# NORTHERN IRELAND LEGAL QUARTERLY

## Special Issue
## On the occasion of the 50th Anniversary of the European Convention on Human Rights

Co-edited by:
Colin Harvey and Stephen Livingstone

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Articles by: The Honourable Lord Reed
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This is a special issue co-edited by Colin Harvey, Professor of Constitutional and Human Rights Law, University of Leeds and Stephen Livingstone, Professor of Human Rights Law, Queen's University of Belfast.

It is hoped that this is the first of a series of dedicated issues on various themes.

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# FOREWORD

***Michael O'Boyle, Section Registrar, European Court of Human Rights, Strasbourg***

The 50th anniversary of the ECHR coincides with the entry into force of the Human Rights Act 1998 incorporating the provisions of the Convention and also the decision of the European Union to embark on the drafting of its own Charter of Fundamental Rights. Both incorporation and the decision of the European Union are a reflection of what has been achieved over the last 50 years. Few would have imagined when the Convention was being drafted in 1950 that it would eventually become part of the law of the United Kingdom to be applied by national courts with reference to the case-law of the Convention institutions. Indeed, at the beginning of the life of the old Court there was so little business that the Belgian judge in the Court – Henri Rolin – wrote an article entitled "Has the European Court got a future?" So what has happened over this period in response to Judge Rolin's despondent interrogation? Four main developments have taken place.

In the first place the ECHR has taken root throughout Europe. Gradually, in the course of the sixties and seventies there was universal acceptance of the concept of a collective guarantee of human rights supervised by the Commission and Court in Strasbourg. States accepted the premise that a consequence of the right to be concerned with the protection of human rights in other countries was that the spotlight would also be shone on their own laws and practices. Following the tumultuous events of 1989, States from central and eastern Europe were required to ratify the ECHR as a condition of entry into the Council of Europe. By the end of the century the number of Contracting parties had grown to forty-one, including Russia and Ukraine. The Convention community thus extends from the Atlantic to the Pacific and embraces some 800 million people.

Secondly, an impressive corpus of international human rights law has developed over the years through the examination of cases by the Commission and Court. Most, if not all, areas of national law must now take account of Strasbourg jurisprudence. It also radiates its influence beyond Europe and has been taken into account by the superior courts of many Commonwealth countries. The judgments of the Court have led to many changes in national law and practice even in countries not directly concerned by the Court's judgment. The importance to the new democracies of the standards reflected in these judgments should not be underestimated. They map the contours of their law reform agenda. The law on fair trial, the right to liberty, freedom of expression and association – shaped for the most part in the context of complaints against the established democracies of western Europe – has become an invaluable source and formulation of democratic standards to be factored into reforms of the codes of civil and criminal law.

The third development concerns the continuous efforts of member States to keep the ECHR in pace with the times. The First, Fourth and Seventh Protocols added a series of new rights to the core freedoms contained in the basic treaty. The Sixth Protocol provided for the abolition of the death penalty in peace time and, in recent years, the Eleventh Protocol created a

single European Court of Human Rights composed of full-time judges in an effort to speed up the examination of human rights complaints. The latest development comes in the form of a Twelfth Protocol providing for a general prohibition of discrimination which opened for signature in Rome on 4 November this year.

Lastly, and side by side with the developments described above, the concept of human rights has established itself as part of the political agenda in most countries. Human rights discourse is now an integral part of *inter alia* European political culture. It has become a central plank in foreign policy. Incorporation of the ECHR and the Draft Charter of Fundamental Rights in the European Union are the most recent examples of this reality. A less understood aspect of this is the development of a notion of reciprocity: that western countries cannot expect to influence human rights protection in other regions if they do not accept the same standards and procedures of supervision themselves.

But the 50th anniversary also coincides with a recognition that the Strasbourg system by growing at such a pace is facing serious difficulties in coming to terms with its increasing case-load (estimated at 15000 by the end of 2000) and achieving the aims of the Eleventh Protocol of dealing with cases within a reasonable time. It was unfortunate that the coming into being of the new Court – confronted with the tasks of developing new procedures and working methods – coincided with a period of unparalleled growth in membership of the Convention system. It is suggested that the situation will worsen dramatically if cases against Russia are brought with the same regularity as against other countries. As things stand the Court's docket is especially overburdened with cases against Turkey, Poland and Italy. Already voices are clamouring for a reform of the reform. These are likely to be most strident at the anniversary celebrations in Rome at the beginning of November. If the Court's capacity to deal with cases does not increase, linked to the necessity for States to provide the Court with budgetary ressources commensurate to the spiralling growth in cases, there is the prospect of serious damage to the integrity and reputation of the institution. Many will claim that the European Union's new dynamism in the field of human rights and the interrogation of whether the Draft Charter should be legally binding and enforceable should not be seen, against this background, as a mere accident of calendar. We may have to wait for the next 50 years to answer Judge Rolin's question.

The excellent and varied collection of essays brought together in this special edition graphically depict the developments which have occurred over the last 50 years.

Lord Reed's reflections provide many insights into the consequences of incorporation and the expansion of the judicial role. He reminds Northern Ireland judges that they have some experience in the interpretation of broadly expressed constitutional provisions under the Government of Ireland Act and highlights specific Convention issues which have arisen in Scotland in the area of criminal law, some of which have already had far-reaching consequences (see the "temporary sheriffs" decision). Northern Ireland judges will undoubtedly take particular note. Three particular insights stand out. Incorporation will inevitably lead to and foster a growth of interest in comparative law. Judges will be confronted with references to case-law not

just from Europe but from the United States, Canada, Australia and South Africa. The internet has already become an indispensable judicial tool whose easy access to the law of other jurisdictions can only accelerate this trend. Secondly, the Convention may be expressed in broad terms but its application in a given case does not involve judges giving "free rein" to their own moral and political principles. They must examine the contents of Convention law and take account of generally prevailing standards in other jurisdictions. The novelty lies in the latter proposition which, in Lord Reed's view, will "increasingly be the task of national courts in the century that lies before us" and does not require judges to jettison wholesale their own traditions. Lastly, he makes the valuable point that Strasbourg case-law may be of limited assistance not only because of the difference in context of particular cases but also because national judges may be called on to decide issues before the national proceedings have terminated – something the Strasbourg Court is loathe to do (see, in particular, the law concerning fair trial). To this I would add the observation that many issues may find little or no relevant case-law at all (see Olivier De Schutters' article on "waiver) or the judge may be confronted with a Convention standard that sets the threshold too low for a national court to be persuaded by (see Harvey and Livingstone's discussion of cases concerning solitary confinement). His conclusion has an appropriate prophetic ring to it and sets the agenda for the future. The public will have to understand that there has been a constitutional change. The courts will have to adopt an international breadth of vision, a preparedness to depart from tradition where necessary and self-confidence in their constitutional role.

Conor Gearty's contribution on democracy and human rights brings a provocative and critical touch to the discussion layered with refreshing "cautionary notes" and "complicating caveats". His article is a must for the theorist who is profoundly concerned at the increasing power of the judges (but haven't we been traditionally concerned with their conservatism?) and the incessant tendency of the Strasbourg Court to trample on the fine lawns of tradition and established dogma. *Bowman* v *United Kingdom* is perceived to be such an aggressive intrusion that he has no hesitation about its wrong-headedness. Plain wrong and that's what happens when foreign judges fail to understand the dividing line between carefully worked out national solutions which they should be reluctant to tamper with and fundamental matters which require a uniform resolution. His discussion brings into sharp focus the rationale for the Court's oft criticised doctrine of margin of appreciation (how will this be applied by national courts?). But when is a judgment "wrong"? True its consequences may be far-reaching and difficult to undo but where has the rule of law vanished to in this sense of outrage? Are we expected to pick and choose which judgments we subscribe to because they are more in harmony with what we believe the Strasbourg Court should be doing? It will come as no surprise to learn that many States are equally convinced for similar reasons that certain key judgments which trespass on national prerogatives are also "wrong" (see *Loizidou* v *Turkey* as the most recent and illustrative example). Strasbourg judgments may be perceived as misguided or political but it should be remembered that the law does not stand still and that the Court is always open to new argument in future cases – just like a national court. But Conor Gearty is certainly right when he asks "where are the cases against Russia concerning Chechnya?" because this raises concerns about the relevance of international adjudication

compared to other international actors when faced with large-scale human rights problems; and when he argues that there has been perhaps too much emphasis placed on the Court at the expense of other Council of Europe human rights activities such as the Committee for the Prevention of Torture, the European Social Charter or the Commissioner for Human Rights.

Jane Liddy – a former member of the European Commission of Human Rights – portrays in her thoroughly researched article the growth and development of Strasbourg case-law over the years by contrasting traditional Article 8 case-law concerning prisoners, immigrants, gypsies and the environment with four issues which have come to the fore in recent times (new forms of family life, intrusive publicity, medical privacy and modern forms of surveillance). Her remarks provide a tantalising glimpse of the "profoundly thought-provoking issues" which will be raised before the national courts and Strasbourg – and certainly before Parliament – concerning the right to respect for private and family life. Should insurance companies be permitted to require genetic testing in order to assess a person's risk of inheriting a serious illness? Should the law permit financial institutions or employers to compel individuals to undergo such testing and to give access to the results? What are the implications of the Strasbourg Court's case-law concerning Article 8 as regards routine video surveillance in public places or in private premises or in the work place? Is there a positive obligation on the State to protect people from the intrusive behaviour of the "paparazzi"? Issues concerning "bioethical tourism", cloning, transgenetic therapy, germ-line therapy – and one might add – genetically modified crops, may well come before the courts for adjudication. One may question whether Convention jurisprudence can really be said to have "developed in an adequately measured pace" to meet such daunting challenges.

Aileen McColgan's timely contribution on the rights of women draws heavily on her book entitled *Women under the law: the false promise of Human Rights*. As the title conveys, her thesis is that a constitutional charter of rights is an ill-conceived instrument for promoting equality in civil society and that the legal strides which have been made by women over the last decades are more thanks to the efforts of the legislature rather than the judiciary. There can be no quarrel with her assertion that rights cannot provide a substitute for political action and can threaten legislative action designed to ameliorate disadvantage. She illustrates her theme with extensive references to United States, Canadian and European jurisprudence in the areas of equality, affirmative action, abortion, rape and other forms of violence against women. In so doing she demonstrates the truth of Lord Reed's prediction about the growth of interest in comparative law.

Incorporation will not solve these problems but a greater judicial sensitivity to the concerns of women must be high in the expectations of womens' groups. The latest Cabinet Office sponsored research concerning the earnings gap between similarly-skilled childless men and women over a lifetime and the statistics concerning the low conviction rate for rape – both set out in her paper – throw down the gauntlet.

Colin Harvey and Stephen Livingstone remind us that human rights "refer to personhood and not citizenship". They address the extensive Convention case-law as regards prisoners, asylum seekers and immigrants – "silenced"

groups which lie beyond "the cosy world of democratic citizenship". They recall that many of the leading cases concerning censorship of prisoners correspondence (*Golder, Silver, Domenichini, Petra*) have led to important changes in the law at home and abroad. However they criticise the failure of the Strasbourg system to find violations of Article 3 of the Convention when confronted with especially harsh prison conditions (*Krocher and Muller, Aerts*). They also touch on an important series of cases concerning the rights of prisoners serving discretionary life sentences to challenge the continued lawfulness of their detention as well as the leading judgments in the field of extradition and expulsion (*Soering, Cruz Varas, Vilvarajah, Chahal*). In all of these areas we may expect to see further developments under the Human Rights Act directly inspired by the leading cases referred to by the authors. There can be little doubt that national courts will in the near future be asked to consider whether prison conditions amount to inhuman and degrading treatment, whether expulsion of integrated aliens or second-generation immigrants is at all permissible, whether the standard of judicial review in extradition and expulsion cases passes muster under Articles 3 and 8 of the Convention and whether the procedures for dealing with asylum-seekers satisfy the requirements of Article 5.

Dr Ursula Kilkelly's article examines the implications of the Human Rights Act for the detention and trial of young people, an important area which has received little attention. She draws particular attention to the *Assenov, Boumar, T & V* and *Hussain* judgments. This is certainly an area which is ripe for controversy and challenge as the *T & V* judgment demonstrates (see also Lord Reed's remarks concerning this case). Does the law give sufficient attention to the principles of reintegrating and rehabilitating rather than punishing young offenders? Do the custodial procedures and arrangements concerning minors satisfy Convention requirements? What is meant by Article 5 § 1 (d) when it speaks of " the detention of a minor. . . for the purpose of educational supervision?" As the author points out, future cases in this area before both the national and the Strasbourg institutions will involve interpreting the relevant standards of the ECHR against the background of the UN Convention on the Rights of the Child. To this we should now add Article 25 (the rights of the child) of the Draft Charter of Fundamental Rights of the European Union.

Olivier De Schutter tackles the thorny question of waiver and rightly concludes that there is no general theory of waiver to be found in Convention jurisprudence although the question has been looked at in several cases. Allied to this is the complex issue whether the positive "right to" presupposes the negative "right not to". The issues he examines are nonetheless central since they will be invoked time and time again in the course of human rights litigation. Can an individual waive his right to a fair trial or to be tried by an independent and impartial tribunal for example or are these rights so fundamental in a democratic society that no account should be taken of a personal decision to waive? Should an individual be permitted to contract out of the right to be treated in a manner fitting for human dignity because of some benefit conferred? (See his discussion of the decisions of the French administrative courts concerning the "dwarf-throwing" cases). While the Court's judgments indicate a certain openness to the waiving of procedural rights, Strasbourg is uneasy with the idea that substantive rights can be waived or bartered away although in certain

decisions the Commission has indicated that a person can ultimately assert his/her religious freedom or freedom of expression – restricted by the terms of employment – through resignation. In the *Vagrancy* case the tone is set: "the right to liberty is too important in a 'democratic society'. . . for a person to lose the benefit of the protection of the Convention for the single reason that he gives himself up to be taken into detention".

The scholarship in the following pages covers a wide range of subjects that go far beyond the interests of the academic community for they speak directly to the concerns of practising lawyers involved in human rights litigation, judges who are called upon to give effect to the provisions of the Human Rights Act 1998, legislators contemplating the implications of incorporation, political theorists fascinated but perhaps sceptical about the democratic legitimacy of national law taking its cue from an international court and non-governmental organisations representing the interests of women, children, immigrants, and prisoners. Converts to the wisdom of incorporation, staunch allies of the ECHR, sceptics and outright detractors will find much fuel for their positions in this issue and much of substance to absorb and contemplate. In my experience it is rare for a single specialised issue of a human rights law review to succeed in providing such a judicious blend of hard law, critical theory and practice. It is clear that the era of self-congratulatory coverage of the ECHR is over and has given way to sharper critical reflection. One could think of no greater birthday present.

# INTERNATIONALISM AND TRADITION

## SOME THOUGHTS ON INCORPORATING HUMAN RIGHTS LAW

## THE MACDERMOTT LECTURE

***The Honourable Lord Reed***[1]

## INTRODUCTION

"The past is a foreign country: they do things differently there." The famous opening sentence of L. P. Hartley's *The Go Between* is one to which the common lawyer can hardly give unqualified assent. The common law proceeds upon the basis that there is a continuous tradition linking the present to the past in seamless unity. Indeed, any common lawyer is likely to find himself more at home in the law of his own country's past than in the law of a foreign country of the present day. This may seem surprising. If one considers the solutions produced to legal problems, then on such matters as divorce, parental rights, consumer contracts, company law, product liability, employment law and so forth – probably most of the common legal problems – a modern European legal system, such as German law, would, I expect, produce solutions closer to modern Scots or English law than would the Scots or English law of, say, the eighteenth century. Similarly, if one considers the social context or the prevailing political or moral values, those to be found in modern Scotland are, I would have thought, closer to those to be found in modern Germany than to those of the Scotland of the eighteenth century. The explanation is, I think, essentially to do with what Lord MacDermott described as legal tradition[2]. In large part, this has to do with ideas and their history – the conceptual framework which lawyers use to define and express problems and their solutions, and which tends to persist, and evolve, over a very long period. It also has something to do with more amorphous aspects of legal culture: a continuity, usually reinforced by enduring institutions, in respect of reasoning, rhetoric and so forth, acquired by the members of a legal community through their education and interaction with each other. A legal system, in other words, is more than an accumulation of solutions to problems: even if two legal systems provided identical solutions to all the most common problems of life, they could nevertheless remain profoundly foreign to each other's practitioners. But it is also important to remember that the differences between Scots Law and German Law reflect in addition differences which exist to some extent between the social context and the values prevailing in Scottish and German society.

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[1] Senator of the College of Justice in Scotland.

[2] *Protection from Power under English Law* (1957), p 41.

In this lecture I want to discuss the giving of direct legal effect to the European Convention on Human Rights, under the devolution legislation[3] and under the Human Rights Act 1998[4]. I want in particular to discuss this development in the light of two traditional concepts of our law – concepts which are so embedded in our thinking as to form part of the framework largely taken for granted by lawyers and non-lawyers alike: namely, Parliamentary sovereignty, and the distinction between national and international law. To put my thesis in a nutshell, it seems to me that the Convention, as incorporated into our law, does not sit altogether happily with our traditional ways of thinking about the constitutional role of the courts and about legal reasoning; and that its successful introduction into our law requires the thinking of lawyers, and also of the man and woman in the street, to change. This seems to me to epitomise a wider point concerning the increasing importance of international law at the domestic level. In the background of the discussion will be the more profound issues which I mentioned at the outset: the persistence of tradition, and its implications for the convergence of different legal systems; and the relationship between the law and prevailing values. I will illustrate what I mean by examples drawn from my own experience of the Convention as a judge in Scotland, where the Convention has been given effect under the Scotland Act since May 1999, and as an *ad hoc* judge of the European Court of Human Rights. I will be discussing issues which merit a more extended treatment than I can give them within the confines of a lecture. So I hope I will be forgiven a degree of tendentiousness.

## PARLIAMENTARY SOVEREIGNTY

I want to begin by going back into the past, to the seventeenth century. That century was a period of constitutional turmoil in these islands: a period of violent struggle over the powers of the monarchy. It ended with the drawing up of the Bill of Rights by the English Parliament, and a Claim of Right by the Scottish Parliament, in terms of which the monarchy of each country was offered to William and Mary. These documents were concerned with rights, but not to any great extent with what would now be called "human" rights: the Bill of Rights in particular was concerned primarily with the rights of Parliament against the Crown, reflecting the circumstances which had brought it into being. At the risk of over-simplification, it might be said that the consequence of the Glorious Revolution was that the divine right of Kings asserted by the Stuarts was transmuted into the absolute right of the King in Parliament. Sovereignty had to be exercised through Parliament; but it remained absolute.

The American Revolution against the British in 1775, on the other hand, was of a fundamentally different character. It was not a contest between competing institutions of government: it was a rebellion by a people against their government. That had two important consequences. First, it meant that the legitimacy of the revolution depended on asserting the rights of individuals against their government; and so it was greatly influenced by

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[3] *ie* the Government of Wales Act 1998 (c38); the Scotland Act 1998 (c46); and the Northern Ireland Act 1998 (c47).

[4] c42.

ideas about natural or human rights. Consider for example the opening words of the American Declaration of Independence. I shall quote Thomas Jefferson's original draft, which is more secular than the version finally adopted:

> "We hold these truths to be sacred and undeniable; that all men are created equal and independent, that from that equal creation they derive rights inherent and inalienable, among which are the preservation of life, and liberty, and the pursuit of happiness."

That is a classic expression of the concept of human rights. The second consequence of the nature of the American Revolution was that its success necessitated the drafting of a constitution to establish new institutions of government for the newly-created nation state: a constitution which defined and therefore limited the powers of those institutions. These two aspects – the theory of human rights, and the necessity of a constitution – came together in the drafting of the United States Constitution, in terms which guaranteed human rights and established a Supreme Court to give effect to them.

The concept of a constitution which guaranteed human rights of which a supreme or constitutional court was the arbiter eventually became widespread throughout the world. But it was not followed in the United Kingdom. Subject to one qualification, the constitutional arrangements established at the end of the seventeenth century and the beginning of the eighteenth century proved stable. The qualification of course concerns Ireland, where the Republic adopted the US model of constitutionalism, and the Province alternated between devolution and direct rule.

So a profound difference developed between the constitutional theory taken for granted in the United Kingdom and its dominions and the constitutional theory accepted in other countries such as the United States. There was an equally profound difference in political philosophy. The dominant British tradition, from David Hume onwards, was one of empiricism and scepticism of moral absolutes. One could, for example, contrast with the writings of Jefferson those of Jeremy Bentham, who described the doctrine of the rights of man as nonsense, and the doctrine of imprescriptible natural rights as nonsense on stilts[5]. These divergent traditions have continued down to our own day, as one can see in the debate in jurisprudence between leading representatives of each tradition such as Herbert Hart and Ronald Dworkin.

The distinctive features of British constitutional culture which I have discussed have profoundly coloured British attitudes towards constitutional guarantees of human rights such as are found in the European Convention. The Diceyan tradition emphasised the importance of constitutional conventions, such as Ministerial accountability to Parliament, rather than paper guarantees. The strength of this approach lies in reminding us that human rights ultimately depend on a constitutional culture rather than on legal documents. On the other hand, the nineteenth century system of Parliamentary government on which the Diceyan model was based seems increasingly remote.

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[5] There were of course exceptions, such as R. C. Collingwood.

So the constitution which developed in the United Kingdom was one based on a Parliament with unlimited legislative powers. There were no rights which were fundamental, in the sense that they enjoyed constitutional protection against infringement by Parliament. The courts interpreted legislation and applied it: they could not assess its legality against some higher norm. Moreover, since the task of law making was the province of Parliament, the judges' role even in the development of the common law was generally a conservative one.

One exception to this approach was the supervisory jurisdiction exercised by the courts over the Parliament of Northern Ireland: something in which Lord MacDermott was centrally involved. As counsel and as a judge, he took part in some of the leading cases where the courts had to adjudicate upon the validity of statutes passed at Stormont[6]. Those cases did not for the most part[7] involve issues of human rights; but an issue of that kind did arise in a matter on which Lord MacDermott had to advise as Attorney-General for Northern Ireland, namely the validity of legislation concerning religious instruction in state schools. His opinion on the matter, which cast doubt on the constitutionality of the legislation in question, was based on his interpretation of a provision prohibiting Stormont from making any law so as to endow any religion. His predecessor in office had interpreted that provision as prohibiting Stormont from endowing the Protestant churches in preference to the Catholic churches, or vice versa, whereas Lord MacDermott interpreted the provision not only as prohibiting Stormont from endowing any particular form of Christian belief, but as prohibiting the endowment of Christianity or any of the other world religions. This breadth of vision caused some controversy at the time. In a fascinating article on this episode[8], a conclusion was drawn which is sometimes put forward also in relation the European Convention, and to which I shall return: that such broadly drafted constitutional provisions are dangerous and undesirable, because they enable important matters of social responsibility to be litigated in the courts, where different interpretations can be placed on the same phrase, instead of having such matters decided in a representative legislature. All I would observe at the moment is that if the highest legislature – Westminster – has decided that the subordinate legislature is to have only a limited power to legislate, then the courts have no alternative but to interpret and enforce those limits if called upon to do so.

## NATIONAL AND INTERNATIONAL LAW

I said earlier that I wanted to consider the European Convention in the light of two traditional legal concepts. The first of those was Parliamentary sovereignty. The second is the distinction between national and international law.

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[6] *Eg In re A Reference under the Government of Ireland Act 1920* [1936] AC 352; *Gallagher* v *Lynn* [1937] AC 863; *Benson* v *Northern Ireland Road Transport Board* [1942] AC 520; *Ulster Transport Authority* v *James Brown & Sons Ltd* [1953] NI 79.

[7] Exceptions are *Benson* and *Brown* (n 6, *ante*).

[8] E. Graham, "Religion and Education – The Constitutional Problem" [1982] 22 *NILQ* 20.

If I may be forgiven for again giving a brief sketch of a complex subject, we tend on the whole to think in terms of a world broadly divided into domestic and foreign realms. Our political and legal institutions reflect that broad division. Indeed, we see it reflected on any map. There is a territorial area known as the United Kingdom, within whose boundaries political power is exercised by H. M. Government, through Parliament. The law of the land is made by that Parliament and enforced by the courts. Through national elections, citizens can hold the Government to account; and, as a result of electoral consent, the Government can legitimately make laws in Parliament and pursue policies for the electorate.

It only requires a moment's thought to realise that this model of the nation-state as the basis of political and legal organisation is incomplete. One thinks, for example, of the increasing tendency of national governments to co-operate so as to address policy issues which cut across national boundaries, such as trade, communications, drugs, terrorism, asylum seekers and environmental pollution. These issues are addressed through collective decision-making at a supra-national level, with its own institutions. This development was acknowledged by the Foreign Secretary in a speech delivered in January this year[9], when he said that the new century was going to be "the internationalist century, driven by the biggest ever expansion of internationalist forces." He identified four guiding principles of foreign policy. One was that "the global interest is increasingly the national interest". Using NATO as an example he said:

> "To achieve (a) gain in security, NATO requires a pooling of sovereignty in the area most sensitive for traditional concepts of national identity. Surely, if it is desirable to pool sovereignty to obtain military security, it must also be sensible to pool sovereignty to create jobs, to protect our environment or to defeat cross-border crime."

Another guiding principle, which is of particular relevance to lawyers, was that "the global community needs universal values". That is true not only in the sense that successful co-operation depends on a shared commitment to objectives, but also in the sense that the standards laid down at an international level will express the values which are in future to prevail within the states in question. These values may not necessarily always be identical to those already prevailing within all of those states.

This developing globalisation has profound implications for international law. Its scope has widened beyond traditional concerns such as the law of war and the law of the sea, as it has become concerned with regulating economic, social, environmental and other matters. It has ceased to be concerned solely with the legal relations between states, as individuals have become recognised as subjects of international law, under for example the charters of the various war crimes tribunals and a variety of human rights treaties, including the European Convention. And the sources of international law have become more diffuse than the traditional treaties and conventions concluded by nation states, as legal recognition has been given to a vast array of standards agreed or observed by international institutions.

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[9] Chatham House, London, 28 January 2000.

One consequence of this development is a growing tendency for domestic legislation to be designed to give effect to international instruments of various kinds. In addition to the entire corpus of European Community law, itself of growing importance[10], other examples could be given from the daily practice of the courts. Such instruments may have their background in a legal tradition with which British lawyers are unfamiliar, but with which they then need to familiarise themselves[11]; and the need for some such instruments to be given a uniform construction has necessitated our courts' having regard to decisions of foreign courts and the writings of foreign jurists[12].

There has also been some blurring of the distinction drawn by the courts between domestic and international law. When I was an undergraduate, it was reasonably clear that a treaty was not part of domestic law unless and until it had been incorporated into the law by legislation[13]. The Scottish judge Lord Ross expressed the point with crystal clarity in a case in 1980 concerned with the European Convention:

> "It was His Majesty's Government in 1950 which was a High Contracting Party to the Convention. . . Under our constitution, it is the Queen in Parliament who legislates and not Her Majesty's Government, and the Court does not require to have regard to acts of Her Majesty's Government when interpreting the law."[14]

In other words, the inability of the Crown, in general, to alter domestic law otherwise than through Parliament – one of the central achievements of the seventeenth century struggle between Parliament and the Monarchy[15] – underpinned the distinction between domestic and international law. The distinction has however become less clear in recent times. Quite apart from the special case of European Community law[16], the courts have shown a greater willingness to have regard to international instruments[17].

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[10] Even in cases with no international element whatsoever, *eg English* v *North Lanarkshire Council* [1999] *EuLR* 701.

[11] An example is the Commercial Agents (Council Directive) Regulations 1992: see *eg Moore* v *Piretta Ltd* [1999] 1 All ER 174; *King* v *T. Tunnock Ltd*, Court of Session, 16 March 2000, unreported.

[12] *Fothergill* v *Monarch Airlines Ltd* [1981] AC 251.

[13] *Eg Salomon* v *Commissioners of Customs and Excise* [1967] 2 QB 116, 143 *per* Diplock LJ; *R* v *Secretary of State for Home Affairs, ex parte Bhajan Singh* [1976] QB 198, 207 *per* Lord Denning MR; Hood Phillips, *Constitutional and Administrative Law* (6th ed.), p 446; Fawcett, *The Application of the European Convention on Human Rights* (1st ed.), p 17. That view was not universal: see eg *Ahmed* v *Inner London Education Authority* [1978] QB 36, 48 *per* Scarman LJ.

[14] *Surjit Kaur* v *Lord Advocate* 1980 SC 319.

[15] *Case of Proclamations* (1611) 12 Co. Rep 74.

[16] See *eg R.* v *Secretary of State for Transport, ex parte Factortame Ltd* (No 2) [1991] 2 AC 603.

[17] See *eg R.* v *Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696, 748 *per* Lord Bridge of Harwich; *R.* v *Secretary of State for the Home Department, ex parte Venables* [1998] AC 407, 499 *per* Lord Browne-Wilkinson; and *Ahmed* v *Secretary of State for the Home Department* [1999] Imm AR 22, 36-37 *per* Lord Woolf MR.

A different but, I think, not unrelated development is the growth of interest in comparative law, and reference to it for guidance as to the development of our own law. In a recent Scottish case in the House of Lords, for example, concerned with liability in negligence for pregnancy and childbirth resulting from a failed vasectomy, reference was made in the judgments to the law of the United States, New Zealand, Canada, Australia, France, Germany and the Netherlands[18]. A textbook[19] was also referred to, belonging to a series whose title, *The Common Law of Europe*, in itself epitomises this tendency. Such books reflect the desire to overcome barriers of communication between legal traditions, and can be related to the movement towards the closer convergence of European legal systems which forms part of the agenda of the European Community[20].

One of the most important manifestations of what one might call "legal globalisation" is human rights law. It is no accident that rights-based thinking became increasingly influential after the Second World War. No-one could argue that Nazi atrocities should be tolerated out of respect for national sovereignty or cultural diversity. The International Tribunal at Nuremberg, in rejecting the defence of obedience to superior orders, affirmed that when international rules which protect basic humanitarian values are in conflict with national laws, the individual has in principle a legal obligation which transcends his obligations under national law. The theory underlying the charter of the Nuremberg Tribunal (and other war crimes tribunals) rejected the concept of the absolute sovereignty of states, and warranted intrusion into their internal affairs on the basis that a legitimate state was one which upheld certain values held in common by the international community[21].

That approach was followed in 1948, when the General Assembly of the United Nations adopted the Universal Declaration of Human Rights. In 1950 the European Convention was signed, repeating many of the provisions of the Universal Declaration and, for the first time, enabling individuals to bring legal proceedings against states, including their own government, through an international process of adjudication. In 1966 the United Kingdom Government accepted the individual right of petition to Strasbourg. Thereafter, the Convention became a significant source of law reform in the United Kingdom. Such reform could only be effected, however, as a result of decisions by the Strasbourg institutions, since British judges were unable to apply the Convention directly. Victims of infringements of the Convention

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[18] *McFarlane* v *Tayside Health Board* [1999] 4 All ER 961. This development can also be related to the greater accessibility of foreign law via the Internet.

[19] *Torts*, ed W. van Gerven *et al.*, 1998.

[20] See *eg* Section B of the Presidency Conclusions of the European Council meeting held in Tampere on 15 and 16 October 1999: http://ue.en.int/new.

[21] The concept of crime against humanity, introduced by the charter of the Nuremberg Tribunal, has been supplemented by the concepts of war crimes (under the 1949 Geneva Convention), genocide (under the Genocide Convention) and torture (under the Torture Convention), as crimes subject to universal jurisdiction. The lessening of respect for national sovereignty inherent in these concepts is illustrated by such recent events as the proceedings against General Pinochet, the indictment of President Milosovic by the Yugoslavian Tribunal and the bombing of Kosovo, and by the moves to establish an International Criminal Court.

were equally unable to obtain domestic redress, where our law violated the Convention, but had to embark on lengthy proceedings in Strasbourg. These considerations formed the background to the Human Rights Act.

The Convention should not however be considered in isolation. The contemporary human rights regime consists of overlapping institutions and conventions – global, regional and national. That is particularly true in Europe, where a strong regional framework for the protection of human rights under the auspices of the Council of Europe is complemented by a European Union committed to the notion of EU citizenship advanced by the Maastricht and Amsterdam Treaties and to respect for the European Convention. In that connection, the decision, taken by the European Council last year, to proceed with the drafting of an EU Charter of Fundamental Rights is potentially of great significance.

It may be worth observing that the development of human rights law, and the willingness of national governments to join together in adopting instruments which limit their own powers for the sake of achieving common objectives, is not simply a reflection of a growth in humanitarianism. International human rights law serves a number of policy objectives. Let me give one illustration. The EC Treaty, as amended by the Maastricht and Amsterdam Treaties, draws a direct connection between the creation of the internal market – an area without internal frontiers – and controls on immigration across the external borders of the Community, particularly in respect of asylum seekers[22]. The European Council has identified[23] that one means of reducing the number of asylum seekers (or at least the number of those with a colourable claim to asylum) and thereby assisting the creation of the internal market, is to ensure respect for human rights in their countries of origin; and that entails the EU states themselves accepting the standards and procedures which they wish other countries to accept.

One consequence of these developments is that they inevitably place limits on the activities of national or devolved legislatures, and expand the function of the courts. Legal instruments such as the Convention and its protocols have the effect of limiting (in practice, if not formally) what can be enacted by national or devolved legislatures, and what actions can be taken by national or devolved administrations. The devolution legislation makes the standards imposed by the Convention binding in domestic law, so far as the devolved legislatures and administrations are concerned, as well as in international law. The Human Rights Act makes those standards binding on all public authorities, subject only to the qualification that the courts cannot quash legislation enacted by Westminster but can only declare its incompatibility with the Convention, in which event one would normally expect the legislation to be amended or repealed. Whether it is desirable for courts to determine the range of issues covered by the Convention, or to enforce international standards in respect of such matters, is a political question; but if it is considered to be in the national interest, as is implicit in the United Kingdom's adherence to the European Convention as well as in the recent legislation, then the courts have to perform the function which has

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[22] See EC Treaty (as amended), arts 61-69.

[23] See *eg* para A.I.1 of the Presidency Conclusions of the Tampere Summit (*ante*, n 20).

been given to them. Criticism ought not to be directed at the courts if at times they have to adjudicate on issues which traditionally would have been left to an elected legislature or administration, even if on occasion the courts override the will of a legislature. That is an unavoidable possibility. It also, I think, has to be recognised that, over time, the conservatism inherent in the judicial role under our traditional system of Parliamentary sovereignty is liable to be affected by the adoption of this new constitutional role with different cultural origins.

There are two more pertinent criticisms which may be made; and they are, I think, related. The first is that which I mentioned earlier in connection with the Northern Irish experience of constitutional restraints on a legislature: that broadly drafted provisions are open to different interpretations, the choice between which is essentially a matter of personal opinion. If that is correct, then a further argument is that judges should be selected in such a way that their personal opinions will reflect generally accepted views on social and moral questions. This argument has been advanced in Scotland since devolution[24].

The second criticism proceeds from what I would regard as a more sophisticated premise: that adjudication on controversial legal questions is not simply a matter of personal opinion, insofar as it is rationally based on traditions and values which are collectively accepted as authoritative. Thus the jurisprudence of Ronald Dworkin, whom I mentioned earlier, bases decision-making under the United States Constitution on general principles which can be identified in the case-law, and developed, as society develops, as a type of collective wisdom. The criticism made of the European Convention, on the other hand, is that although the European nations and their legal systems have cultural and historical connections, they are far from forming a political, social or cultural unity. In these circumstances, the idea of common traditions and values is said to be a fantasy.

I propose to consider these criticisms in the light of the Scottish courts' experience of the Convention since May 1999, and my own personal experiences both in Scotland and in Strasbourg. It may be helpful if I begin by summarising what the Scottish courts' experience has been.

As far as I am aware, there has been only one case in which legislation passed by the Scottish Parliament has been challenged as being incompatible with the European Convention. The challenge, which concerned legislation dealing with the detention in the State Hospital of persons with a personality disorder, was unsuccessful. There has been only one other civil case, as far as I am aware, in which a devolution issue has been raised. In that case the independence of a QC sitting as a temporary judge was challenged unsuccessfully[25].

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[24] *Eg* Lord McCluskey *The Herald,* 27 December 1999. Lord McCluskey's doubts about the Convention are not new: see his Reith Lectures, *Law, Justice and Democracy* (1987).

[25] *Clancy* v *Laird*, 2000 SLT 546. *Anderson* v *The Scottish Ministers* 16 June 2000, Court of Session, unreported. Decisions appear at www.scotcourts.gov.uk.

The criminal courts, on the other hand, have had to deal with a great many cases in which devolution issues have been raised[26]. The principal issues raised relating to the Convention can be summarised as follows:

1. Whether a criminal trial can take place before a temporary sheriff, the point being whether the temporary sheriff possesses sufficient independence to comply with Article 6(1)[27].

2. Whether a criminal trial can take place compatibly with Article 6(1) when the legal aid available to the defence is said to be inadequate[28].

3. Whether there has been excessive delay in bringing cases to trial, contrary to Article 6(1)[29].

4. Whether the Crown can use in evidence a statement which the accused was required to provide to the police under Section 172 of the Road Traffic Act.[30]

5. Whether the Crown can, consistently with Article 6(1), lead evidence of a police interview with a suspect[31], or of an identification parade[32], the suspect not having had access to a solicitor during the interview or identification parade.

6. Whether pre-trial publicity has prevented the holding of a trial which would be compatible with Article 6.[33]

7. Whether hearsay evidence can be admitted.[34]

There have also been cases concerning the impartiality of a judge or a jury;[35] the refusal of bail;[36], contempt of court[37], the specification of criminal charges[38], a visit by a jury to the locus of an offence[39], the disclosure of a prior conviction during the course of a trial[40], and the consequences of a procedural irregularity during the course of appeal proceedings[41].

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[26] There are said to have been approximately 800 as at the date of writing. The same issues have however been raised repeatedly in different cases, until the point at issue has been determined by the Court of Criminal Appeal.

[27] *Starrs* v *Ruxton*, 1999 SCCR 1052.

[28] *Buchanan* v *McLean*, 15 June 2000, High Court of Justiciary, unreported.

[29] *HMA* v *Little*, 1999 SCCR 625; *McNab* v *HMA*, 1999 SCCR 930; *McLean* v *HMA*, 2000 SCCR 112; *Docherty* v *HMA*, 14 January 2000, unreported; *Robb* v *HMA*, 2000 SCCR 354; *Crummock (Scotland) Ltd* v *HMA*, 2000 SLT 677.

[30] *Brown* v *Stott*, 2000 SLT 379.

[31] *HMA* v *Robb*, 1999 SCCR 971; *Paton* v *Ritchie*, 2000 SCCR 151.

[32] *HMA* v *Campbell*, 1999 SCCR 980.

[33] *Montgomery* v *HMA (No 2)*, 16 November 1999, unreported.

[34] *McKenna* v *HMA*, 2000 SCCR 159; *HMA* v *Nulty*, 2000 SLT 528.

[35] *Hoekstra* v *HMA* (No 2), 2000 SCCR 367; *Crummock (Scotland) Ltd*. (*ante* n 29).

[36] *Burn, Petitioner*, 16 March 2000, unreported; also *Selfridge* v *Brown, 2000 SLT 437*.

[37] *HMA* v *Scottish Media Newspapers Ltd.*, 1999 SCCR 599.

[38] *McLean* v *HMA* (*ante* n 33).

[39] *Hoekstra* v *HMA*, (No. 1), 2000 SCCR 263.

[40] *Andrew* v *HMA*, 2000 SLT 402.

[41] *Hoekstra* (*ante* n 39).

A number of observations can be made about these cases. The first is that although very few challenges based on the Conventions have been successful, those that have succeeded have had far-reaching consequences. The decision that temporary sheriffs were not compatible with Article 6, in particular, placed strains on the justice system in Scotland, since they performed 25 per cent of the workload of the Sheriff Court. The implications of the decision concerning Section 172 of the Road Traffic Act – which empowers the police to require the registered keeper of a motor vehicle to provide information as to the identity of its driver on a given occasion – are also potentially far-reaching. The same can be said of the decisions concerning the effect of delay in criminal proceedings, which have resulted in charges not proceeding solely because of delay, even though a fair trial remained possible.

The next observation I would make is that the courts are only gradually coming to appreciate the implications of the Convention as it has been incorporated by the devolution legislation; and the inter-relationship between that legislation and the Human Rights Act remains unclear. One particular problem is that compliance with the Convention is made by the devolution legislation into a question of *vires*. Undue delay in bringing a person to trial, for example, is not something which can be reflected in the sentence imposed, as the European Court of Justice has decided in a case concerned with Article 6[42]: it operates as a bar to further prosecution. That is in fact the only issue on which the devolution legislation seems to me to have so far produced a different result from our common law. Another problem concerns the scope of the *vires* provision, which affects "acts" of the Scottish Executive and of the Lord Advocate. The problem is not simply as to how one defines an "act"[43] – for example, whether it includes an omission – but whether one can, in effect, use the bar on acts which contravene the Convention to prevent a prosecution being conducted on the basis of domestic law – the law of evidence, for example, or the statutory basis of appointment of the judiciary – whenever the domestic law fails in some respect to meet Convention requirements[44]. A third problem is that the Strasbourg case-law is sometimes of limited assistance, not only because the Strasbourg cases may arise in a context which bears little resemblance to the context in which the point arises within our own system, but more fundamentally because the European Court of Human Rights always looks at the position after the national proceedings have been concluded, rather than considering during the course of national proceedings the consequences of a

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[42] Case C-185/95 *Baustahlgewebe* v *Commission*, 17 December 1998.

[43] *HMA* v *Scottish Media Newspapers Ltd* (*ante*. n 37); *HMA* v *Robb* (*ante*. n 31).

[44] The temporary sheriffs case illustrates the point: the court could not strike down the UK legislation under which temporary sheriffs were appointed, or even make a declaration of its incompatibility with the Convention; but it being conceded that the prosecution of accused persons before a temporary sheriff was an "act" of the Lord Advocate, that act could be held to be incompetent. The wide meaning which has been given to the term "act", taken together with the wide scope of Article 6, also has the consequence that many issues of a familiar kind, such as common law pleas in bar of trial, may arguably be devolution issues, and therefore subject to a fairly elaborate procedure.

breach of human rights in domestic law[45]. Partly for that reason, assistance has also been sought in case-law from national courts applying similar concepts, such as the courts of the Republic of Ireland and Canada. The Scottish experience bears out an observation which Lord MacDermott made about the devolution cases in Northern Ireland:

> "In this sphere adjudication has special reason to advance cautiously and from case to case"[46].

The other observation I would make is that the incorporation of the Convention under the devolution legislation has been a spur to thought on the part of lawyers and judges about aspects of our criminal law – generally of statutory origin – which were previously taken for granted but which, on examination, proved not to reflect adequately values underpinning our legal system, such as the independence of the judiciary and the right not to incriminate oneself. In a sense, an innovation of international provenance has rejuvenated our own traditions.

Let me return now to the criticism that broadly drafted provisions, such as one finds in the European Convention, are open to widely differing interpretations, the choice between which is simply a matter of personal opinion. This criticism is not in my opinion borne out either by the Scottish experience or by my own experience in Strasbourg.

One of the principal tasks performed by judges is to interpret documents which give rise to legal rights and obligations. Such documents take many different forms – such as wills, contracts, Ministerial decisions, statutes and international treaties – but in each case the function of the court is to try to ascertain the meaning of the language which has been used. In relation to each type of document, there are legal rules as to how the court should go about its task of interpretation: for example, in relation to international treaties such as the European Convention, the general principles are set out in the Vienna Convention on the Law of Treaties. Essentially, in each case the rules require the court to interpret the document in the light of its context and purpose, and having regard to any established meaning which the language has been given by previous usage. I have already said something about the context and purpose of the Convention: it is an international treaty drawn up in the aftermath of the Second World War, and designed to maintain the values of a democratic society, such as pluralism, tolerance and broadmindedness, the rule of law, access to the courts, freedom of expression and freedom of political debate. Its drafting is much less detailed than one often finds in modern UK statutes: that in part reflects the fact that it is not a product of the Office of Parliamentary Counsel, but more importantly reflects the fact that the Convention attempts to lay down an enduring scheme, in terms which allow for interpretation to evolve as social conditions evolve – as it has evolved, for example, to reflect changing attitudes towards illegitimacy, homosexuality and corporal punishment. This is not a unique feature of the Convention. Even in domestic law, judges are used to interpreting wide language so as to give effect to the purpose of the language

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[45] See *eg Montgomery and Coulter* v *HMA* (*supra*, n 33); *McKenna* v *HMA* (*ante* n 34); *Paton* v *Ritchie* (*ante* n 31).

[46] "The Supreme Court of Northern Ireland – Two Unusual Jurisdictions" (1952-1954) II JSPTL 201, 209.

used. And as I mentioned earlier, judges are increasingly having to interpret other international instruments which are drafted as widely as the European Convention and similarly use the language of values: so as to decide, for example, what is meant by "persecution" in the Geneva Convention on Refugees. In relation to the European Convention also, judges are performing their task of finding the meaning of the language used and applying it to the facts of the case. If the language expresses a moral or political principle, then the judges have to give effect to that principle in accordance with their judgement of what the principle entails[47]; but that is a far cry from judges simply giving free rein to their own moral or political principles. It is also important to remember that the judge is not exploring virgin territory: there is a large body of case-law on the interpretation of the Convention, which can be supplemented by case-law on the interpretation of analogous provisions in national constitutions.

Let me give two illustrations. The question whether a trial before a temporary sheriff violated Article 6[48] turned on the interpretation of the words "an independent and impartial tribunal", and in particular on whether those words included a tribunal whose independence and impartiality in decision-making were in practice respected by the Executive, or required a tribunal whose independence and impartiality were objectively guaranteed, for example through security of tenure. The court preferred the latter interpretation because it was supported by the case-law of the European Court of Human Rights. It was also supported by the case-law of the Supreme Court of Canada. In the cases of *T and V* v *The United Kingdom*[49] (more commonly known, after the child whose murder gave rise to the case, as the *Bulger* case), the European Court of Human Rights had to decide whether Article 6 permitted the Home Secretary, rather than a judicial body, to fix the minimum period of detention, or "tariff", to be served by a person sentenced to be detained during Her Majesty's pleasure. The critical words in Article 6 – "the determination of. . . any criminal charge" – had previously been interpreted as including the determination of sentence; and the question was whether the fixing of the tariff amounted to a sentencing function. The Court held that it did, since the tariff was imposed on convicted offenders for the purpose of punishment, and was therefore a sentence in all but name.

I would like finally to say a word about the more sophisticated criticism, that in giving effect to the moral or political principles expressed in a legal instrument, judges rely on a degree of consensus or shared tradition which is absent at a European level.

As I made clear at the outset of this lecture, I have no doubt that national judges belong to a shared tradition which has an important influence on the way they approach legal problems. Equally, national judges are likely to be influenced by the values of their society and to interpret legal provisions in the light of those values. What, then, of the contention that no common values can emerge from the states represented on the European Court of Human Rights, which form what have been described as a "disparate

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[47] *Cf Matadeen* v *Pointu* [1999] 1 AC 98, 108.
[48] *Ante* n 28
[49] 16 December 1999.

collection of states . . . some former police states"[50]. It is no doubt true that, for some states, the Convention reflects an aspiration: values which these states have espoused, rather than values which already are firmly embedded in prevailing attitudes and practice. What the judges in Strasbourg are aiming to do, however – and those from former police states with as much commitment, as far as my observation goes, as those from states where democracy has been longer established – is to interpret the Convention so as to give effect to the values expressed in that document. They do that in the light of generally prevailing standards, which may sometimes be those to which states have committed themselves, even if they are not yet fully reflected in internal practice. Where on the other hand there are no generally prevailing standards, the judges have taken care to avoid imposing a particular solution, and to respect cultural diversity.

The point can be illustrated by the *T and V* judgments. In relation to the age of criminal responsibility, almost all the judges came from states where the age was much higher than in England and Wales. If they had been asked for their personal opinion, they might well have considered that the age in England and Wales was too low. But that was not how the case was decided. The court asked itself whether the attribution of criminal responsibility to a child of ten constituted inhuman and degrading treatment within the meaning of Article 3. To answer that question, the court examined whether there was a prevailing standard amongst the member states, and held that there was not, given the degree of diversity which existed in practice, and the absence of any consensus in the international instruments which the states had accepted. In relation to trial procedures, on the other hand, the court was able to conclude that the procedures followed in England and Wales had not in that case ensured a fair trial. It might be said that the prevailing view on the court attached greater weight to the welfare and rehabilitation of child offenders, and lesser weight to the open administration of justice, than has been traditional in our domestic law. The court's approach was however based on international standards, such as those contained in the UN Convention on the Rights of the Child, which the United Kingdom (like the other member states) has accepted at the international level, even if they have not yet been fully implemented at the domestic level and may not wholly reflect prevailing attitudes within our society.

If I can put the matter in a nutshell, the function of a judge in Strasbourg did not appear to me to be essentially different from the function of a domestic judge: the court was interpreting a text in accordance with established legal principles and then applying it to the facts as it found them to be. What was different, in the first place, was the constitutional importance of the judicial function: that, because the Government and Parliament accept that the Court's judgments should be given effect in the United Kingdom (even if particular judgments may not always reflect the views of the Government or of Parliament), it followed that the Court was in practice exercising a function of greater constitutional weight than our domestic courts have done. For the reasons I have explained, however, it seems to me that that is also going to become, to an increasing extent, the role of the judiciary within our national legal system. What also was different was that the court was

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[50] Lord Hoffman, "Human Rights and the House of Lords" [1999] 62 MLR 159.

interpreting the relevant provisions not only in the light of the domestic traditions and values of the United Kingdom, but in the light of traditions and values prevailing at an international level. That too will, I think, increasingly be the task of national courts in the century that lies before us. It does not require us to jettison wholesale our own traditions: Scots law has not so far run into fundamental or widespread problems as a result of incorporating the Convention, and I would not expect the law of the other jurisdictions of the United Kingdom to fare differently.

At the same time, our traditions are likely to be influenced by a body of law made primarily by lawyers from outwith the common law tradition, and not only because of differences in terminology and in the drafting of judgments and other legal texts. Although the judges on an international court such as the European Court of Human Rights are distinguished lawyers used to studying legal problems arising in systems other than their own native systems, and have the assistance of a national judge, it nevertheless seems to me that, like any other judges, they are liable to approach a set of circumstances with a mental framework which reflects their legal background, and which can give rise to an educated expectation as to what constitutes an appropriate outcome. The difficulty which some British judges have had in understanding the *Osman* judgment of the European Court of Human Rights perhaps illustrates the point[51].

To sum up, in conclusion: the public will have to understand that there has been a constitutional change, if it is to be accepted; and the courts will have to adopt an international breadth of vision, a preparedness to depart from tradition where necessary,[52] and self-confidence in their constitutional role, if they are to perform successfully their expanding function in a century of internationalism.

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[51] *Osman* v *The United Kingdom* (2000) 29 EHRR 245.

[52] *Cf Reynolds* v *Times Newspapers Ltd* [1999] 4 All ER 609, 631 h-j *per* Lord Steyn.

# DEMOCRACY AND HUMAN RIGHTS IN THE EUROPEAN COURT OF HUMAN RIGHTS: A CRITICAL APPRAISAL

In a recent valuable article, Alistair Mowbray has traced the way in which the European Court of Human Rights has interpreted the European Convention on Human Rights so as to facilitate the promotion of democracy.[1] His inquiry leads him to the conclusion that "in contemporary times the court has generally developed and applied its concept of democracy in a progressive manner which has sought to enhance and safeguard the vitality of the political process operating in Member States".[2] Mowbray's starting point in the building of an empirical basis for this conclusion is *United Communist Party of Turkey* v *Turkey*.[3] In that case, the Court identified "a number of links between Convention rights and duties and the idea of democracy."[4] These were "apparent, first, from the Preamble to the Convention, which establishes a very clear connection between the Convention and democracy by stating that the maintenance and further realisation of human rights and fundamental freedoms are best ensured on the one hand by an effective political democracy and on the other by a common understanding and observance of human rights."[5] The second relevant link lay in the "necessary in a democratic society" proviso to be found to the rights set out in Articles 8, 9, 10 and 11 of the Convention, which in Mowbray's view served in combination to demonstrate that "the framers expressly incorporated the idea of democracy into the text of the Convention and gave it a prominent role in the balancing of individual claims against the needs of the community as a whole."[6]

As his third example of the linkage identified in *United Communist Party*, Mowbray points out that the Court has frequently drawn attention to certain of the Convention provisions, such as the guarantee of free elections[7] and freedom of expression,[8] as underpinning its recognition of "significant interconnections between the aims and substance of the Convention, and democracy within Member States."[9] Finally Mowbray notes that on many occasions the Court has declared "pluralism to be at the heart of its conception of democracy"[10] and has insisted upon such pluralism in its interpretation of Convention rights. To Mowbray these

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[1] "The Role of the European Court of Human Rights in the Promotion of Democracy" [1999] *PL* 703.
[2] *Ibid* p 725. See also Marks, "The European Convention on Human Rights and its 'Democratic Society'" (1995) 66*British Yearbook of International Law* 209.
[3] (1998) 26 EHRR 121.
[4] *Op cit* n 1 at p 703.
[5] *Op cit* n 3 at para 45.
[6] *Op cit* n 1 at p 703.
[7] Article 3 of Protocol No 1.
[8] Article 10.
[9] *Op cit* n 1 at p 704.
[10] *Ibid*, citing *United Communist Party of Turkey* v *Turkey*, *op cit* n 3 at para 43.

various linkages make apparent that "the court equates democracy with societies where there is a vigorous public debate about matters of public policy and constitutional arrangements conducted by the public themselves and through their representatives in the forms of political parties and elected politicians" and that furthermore "[n]ational governments are under Convention duties to safeguard these components of democracy by, *inter alia*, facilitating diversity in the media, respecting protected forms of free expression, permitting the existence of political parties which subscribe to democratic values and holding free elections."[11]

There is much that is true here and much in the Court's record that is to be applauded. The efforts made by the Strasbourg bench to hew out of the open-ended texture of the European Convention a commitment to political participation and to civil liberties have not been negligible. The case-law has regularly sought to locate itself in a series of principles which have distinguished issues of concern to democratic systems and to civil liberties and to prioritise these matters over other human rights considerations; Mowbray is therefore right to give credit where credit is due.[12] It is also entirely understandable why the Court should so consistently have sought to present its engagement with these issues in the language of "democracy" as well as in that of "the rule of law" and "human rights": its members are the interpreters of a particular text whose discourse requires that its judicial interventions should be so phrased. While not undermining the thrust of this jurisprudence, so comprehensively analysed by Mowbray, it is perhaps appropriate in the course of this essay to enter here just a few complicating caveats. Things are not always exactly as they seem; even apparently straightforward assertions can hide more than those making such claims appreciate. This is particularly the case in the juristic world inhabited by the language of "democracy" and "human rights", words as morally pure as they are rife with ambiguity. The caveats to Mowbray's vision that will be considered here are three in number.

## The Court and the Member States

The first relates to the institutional limitations inherent in the judicial role. The Court's impressive dicta on democracy and human rights and its confident assertions about the kind of Europe that it will accept might mislead some into the belief that here is a very powerful European body, with the capacity profoundly to affect European perceptions of democracy, the rule of law and diversity. This may be true in the very long term. It may also be true in the sense that the Strasbourg tribunal probably does have an indirect influence over the development of legal principles in its Member States. It certain impacts sharply on the legal communities of many of the Member States, but then again it would be surprising if it did not. In terms of immediate power, of the capacity to execute its will,

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[11] *Ibid* at pp 705-6 (footnotes omitted).

[12] The article, *op cit* n 1, provides a comprehensive survey of the case-law which will not be repeated here. For earlier reflections on the same topic see Gearty, "The European Court of Human Rights and the Protection of Civil Liberties: An Overview" (1993) 52 *CLJ* 89 at pp 115-25.

however, such rhetoric masks the degree to which the Court is a very weak body indeed. The judicial limb to any constitutional system may be "the least dangerous branch"[13] of government, but this is also because it is the least effective, with no police force to call its own, no capacity directly to implement its decisions and no policy arm to formulate (much less to apply) general rules. What is true of every court is even truer of the European Court which must rely on the executive officers not of its own nation (it doesn't have one) but of those of individual Member States: a double remoteness from the reality of its own rulings.[14] More critically from the perspective of the European Court is the fact that courts are by their nature reactive and ex post facto in their adjudications. They depend on others to initiate disputes and then rely on a whole series of extraneous decisions by independent actors before they can find themselves seised of an issue of principle. This then occurs long after - perhaps years after - the events to which they gave rise. Even if the execution of their judgments were entirely within their control, whatever the courts say in such circumstances will often be simply irrelevant to the contemporary situation in the place from which the case came. The converse truth is that whatever it says will often be too late to impact on the situation to which it is retrospectively (one could almost say hypothetically) giving its attention.

All of this is obvious, banal even: everyone knows that courts are neither legislatures nor executive bodies, so it is pointless to criticise them for not being what they never set out to be in the first place. This is surely almost always a valid point. The difficulty lies in the language. Lawyers are educated to take seriously the dicta of judges. The more high flown such rhetoric (and the deployment of "human rights" in a legal discourse is as high as it gets) the easier it is to forget the institutional limitations that surround the body from which such pleasing language is flowing. But the more these circumscriptions are forgotten, the more tempting it becomes to take at face value judicial assertions of principle, treating them as reflective of a reality far larger and more pervasive than the passing wishes of a few men and women locked in an adversarial dispute in a courtroom. At its most serious, this drift from the larger reality can led to a bizarre dsyfunction, with judicial assertions of principle co-existing comfortably and without embarrassment with the most horrendous evidence that outside the courtroom these principles matter hardly at all. At this point the two worlds, the political and the judicial have drifted so completely apart that they do not even recognise that they each inhabit the same national air-space. We have seen dysfunctions of this nature in the past in authoritarian and totalitarian societies, with apparently morally valuable legal systems functioning side by side with the most awful tyranny. The point might be thought also to have arisen in the Council of Europe in relation to Russia, which became a Member State on 28

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[13] Bickel, *The Least dangerous Branch: The Supreme Court at the Bar of Politics* (1962)

[14] See Parliamentary Assembly, Committee on Legal Affairs and Human Rights, Execution of Judgments of the European Court of Human Rights, Draft Report (AS Jur (2000) 39. 26 June 2000).

February 1996, and where the Convention has been notionally available to be relied upon since ratification on 5 May 1998.

During these years, the Russian army has been engaged in a large-scale military action against Chechnya, conduct which has proved highly controversial and which has provoked intense international condemnation and debate, not least in the Council of Europe itself where the Assembly has condemned the action as a violation of the Convention and of international humanitarian law "as well as [of] Russia's commitments [which] she entered into upon accession to the Council of Europe".[15] The Council's parliamentarians have demanded various responses from the Russian authorities and asked the Committee of Ministers to take measures to help achieve a peaceful settlement.[16] Throughout this period, however, the institutional limitations inherent in the judicial process discussed above have reduced the European Court of Human Rights to silence. The very enormity of the crisis, the vastness of the violations of human rights in issue, have made the problem just too great to be addressed: "victims" were in no position to come forward; legal redress for wrongs done to individuals was low down on the agendas of the aid agencies involved in the region; the mechanisms of Convention enforcement were certain to be ineffective even if they could somehow be successfully wheeled into action. What progress that was made at the Council of Europe was made by other organs and authorities, such as the Commissioner for Human Rights[17], who were able to act on their own initiative, to visit controversial war-zones and force an engagement with reluctant Russia officials.[18]

In contrast, the five cases that have found their way to Strasbourg from Russia during the same period (all unsuccessful) concerned fair procedures under Article 6,[19] the right to liberty in Article 5,[20] the validity of election procedures in Vladivostock[21] and a delay in the payment of a pension.[22] Nothing so far has come from the war region, or dealt with matters arising from the conflict there, and even if this were to happen now, it is not obvious what effect such a late assertion of human rights protection could possibly have. A harsh critic might conclude from the

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15 Recommendation 1444 (27 January 2000) and Resolution 1201 (4 November 1999). See also the Declaration of the President of the Parliamentary Assembly on the executions in Chechnya, 12 March 1999: (1999) 46 *Human Rights Information Bulletin* 44; Parliamentary Assembly, Political Affairs Committee, The Conflict in Chechnya (Doc 8630. 25 January 2000).

16 *Ibid.* See further the reply from the Russian Federation to the Council of Europe's request under Article 52 of the European Convention on Human Rights, Parliamentary Assembly, Doc 8613 (17 January 2000).

17 Mr Alvaro Gil Robles.

18 The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) visited the Chechen Republic at the end of February 2000 but was unable to enter certain districts of Grozny on account of fighting in those areas.

19 *Tumilovich* v *Russia* application 47033/99: inadmissible 22 June 1999; *Lukach* v *Russia* application 48041/99: inadmissible 16 November 1999.

20 *Syrkin* v *Russia* application 44125/98: inadmissible 25 November 1999.

21 *Cherepkov* v *Russia* application 51501/99: inadmissible 25 January 2000.

22 *Taykov* v *Russia* application 48498/99: struck off the lists 28 March 2000.

extreme example of Russia that the Court's commitment to democracy and human rights is just hot air: frequently deployed (but probably unnecessary) in societies whose commitment to human rights and democracy is not in doubt; desperately necessary but never properly deployed in situations where such a commitment is urgently needed. This however would be unfair. The fact that so many cases at the Court in recent years have involved Turkey demonstrably undermines such a cynical assertion, and the results on the ground of the Strasbourg Court's engagement with Turkey may in time provide the definitive case-study on the effectiveness of a charter of human rights imposing itself through litigation in relatively hostile territory.[23] For countries on the edge of democracy, committed in the abstract to representative government and human dignity, but hostile on the ground to the infilitration of such ideas, the Strasbourg Court may indeed play a vital role. Russia is however a warning against the complacency of rights talk in the judicial sphere, of succumbing to the lawyers' disease of believing that what judges say matters so very much.[24]

## The Court and democratic legitimacy

Our second cautionary note with respect to the Court's jurisprudence arises in a situation which is the polar opposite of that in Chechyna but which is far more the norm in the Council of Europe, namely where a Member State enjoys a reasonably effective set of democratic institutions within its domestic constitutional arrangements, designed to resolve disagreement between various elements of its civil society. In this kind of politco-legal culture, a different kind of misguided certainty accompanies the way in which the Strasbourg judges deploy the language of democracy and human rights. We are not now talking about a dedication to "human rights" which has no connection with reality in a Member State, but rather one which imposes itself all too well, thanks to the commitment invariably to be found in such properly functioning Member States to the implementation of such judgments, as a matter of either national or international obligation. It may be obvious, despite which it remains puzzling, that the European Court of Human Rights can trump any national (democratic) dialogue with a conclusive intervention rooted in what the Convention is interpreted by these self-same Strasbourg judges to demand and that such verdicts are then not permitted to be objected to by

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[23] See in particular the Court's action in the *Öcalan* case, requesting as an interim measure under rule 39.1 that Turkey not carry out its death penalty against the applicant until the Strasbourg authorities have had an opportunity to consider his complaints. See generally Altiparmak, "Turkish Cases Relating to Terrorism Before the European Court of Human Rights: Procedural Issues" (2000) 5 *Journal of Civil Liberties* 30.

[24] We have not even mentioned perhaps the greatest human rights violation of them all, resulting from the post-Communist collapse of Russia's once excellent health service: barely one in ten pregnancies result in a normal birth; less than a third of recorded pregnancies produced a live birth in 1999; deaths exceed births on a monthly basis in many large regions; the birth rate has more than halved since 1989; and 30 per cent of all new born Russian babies now die of infections: Goskomstat (the Russian statistical agency), reported in *The Times* 11 July 2000.

any local authority, despite the fact that not only are they external to the democracy over which they rule but that they are also the culmination of a legal rather than a political (and therefore an accountable) discourse. In modern democratic theory, this may be understood and justified as "taking rights seriously"[25] but it does raise serious questions about the limitations inherent in the kind of domestic dialogue which the European Court has in mind when it commits itself to democracy.

It is clear that the rights to property, to fair procedures, to privacy and so on set out in the Convention and its protocols circumscribe the national political discourse in most Member States, to a greater or lesser extent, depending on the integrity of its rule of law and the degree of Convention penetration of its legal culture. We see evidence of this every day in the vast number of infringements of the Convention found by the European Court in the hundreds of cases from the Member States that now come before it every year.[26] The Court does however have both institutional and juristic means available to it to ameliorate the consequences of its (from the democratic perspective) apparently paradoxical actions. At the structural level, the Court has frequently stressed the subsidiary nature of the Convention's regime for the protection of human rights, evident in Article 1's reference to the duties of Member States and Article 13's requirement for effective domestic remedies in relation to human rights breaches.[27] The Court itself (as noted above) does not oversee the implementation of its own decisions: this falls within the jurisdiction of the relevant national authorities, supervised by the Council's Committee of Ministers.[28] So while not exactly in a position to contradict the Strasbourg intrusion into its zone of competence, national governments are able to connect such rulings with their own circumstances in ways of their own choosing, subject not to the controlling oversight of the judges but to the political scrutiny of the foreign ministries of the Council's Member States.[29]

At a juristic level, the textual allowance made for exceptions to rights that are "necessary in a democratic society" has been deployed as a means of permitting local authorities to make the initial assessment of how far the language of rights needs to be required to be diluted in the name of representative democracy. Even articles which do not carry this proviso have been construed by the Court in a way which has opened up the

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[25] The phrase is of course Dworkin's. See his *Taking Rights Seriously* (1977).

[26] A glance at Kempees, *A Systematic Guide to the Case-Law of the European Court of Human Rights 1960-96* (three volumes) (1996 and 1998) will persuade the doubters.

[27] And see *Handyside* v *United Kingdom* (1976) 1 EHRR 737, para 48.

[28] See *Marckx* v *Belgium* (1979) 2 EHRR 330 at para 58: "the Court's judgment is essentially declaratory and leaves to the State the choice of the means to be utilised in its domestic legal system for performance of its obligations under Article 53".

[29] See *Execution of Judgments of the European Court of Human Rights*, *op cit* n 14. This is an underresearched topic, on which see however Tomkins, "Civil Liberties in the Council of Europe: A Critical Survey" in Gearty (ed), *European Civil Liberties and the European Convention on Human Rights. A Comparative Study* (1997), p 1.

potential for the balancing of rights and the public interest.[30] These various chinks in the absolutism of rights-talk have been developed by the Court into a means by which national authorities are accorded a "margin of appreciation" in their application of the Convention.[31] Though the margin of appreciation has many detractors,[32] one of its conceptually attractive side-effects from the democratic perspective has been to free the Court to be deferential to public authorities within the Member States even where the facts before the Court have seemed to suggest a breach of the Convention. Implicit in this approach to the margin of appreciation is an acceptance of the inherency of conflict in relation to the resolution of rights arguments, and a recognition that the Strasbourg Court need not always insist on the last word. However, despite its extensive use and its roots in a kind of politico-legal democratic theory, the Court has not developed the concept of the margin of appreciation in a democratically sensitive way. The degree of Strasbourg oversight of local action has depended more on the nature of the conduct involved - the ambit of the right in issue - than on the democratic legitimacy (or otherwise) of the public authority engaged in the limitation of the right. Thus national courts have been shown as much (or as little) deference as the actions of democratically legitimate public authorities,[33] and when direct acts of the legislature have been particularly protected then it has often been as much because of the field under scrutiny – social and economic interests for example – as it has been on account of the decision-making body's democratic credentials.[34] Where the ambit of the case has been undeniably central to the Convention, the desire to defer to the national legislature has rarely been explicit, with the occasional result of a degree of analytical confusion.[35] This failure distinctly to locate the margin of appreciation in a coherent theory of representative democracy is a missed opportunity. But at least the Court has been alive, even if sometimes only implicitly, to the oddity of its counter-democratic oversight of "human rights" in the name of "democracy" and has deployed various institutional and juristic devices (albeit imperfectly) to ameliorate the consequences of its own power, thereby rendering less unacceptable its otherwise very peculiar engagement with Europe's properly functioning representative democracies.

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[30] For example Article 14. See McHarg, "Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights" (1999) 62 *MLR* 671.

[31] Van Dijk and van Hoof, *Theory and Practice of the European Convention on Human Rights* (3rd ed, 1998), pp 82 - 95 is a good survey of the relevant case-law. See also Jones, "The Devaluation of Human Rights under the European Convention" [1995] *PL* 430.

[32] See Lavender, "The Problem of the Margin of Appreciation" (1997) 2 EHRLR 380.

[33] In an important early case, the Court extended the margin of appreciation to "the domestic legislator . . . and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force": *Handyside* v *United Kingdom, op cit* n 27, para 48.

[34] Cf Marks, *op cit* n 2, pp 218-21.

[35] See for eg *James* v *United Kingdom* (1986) 8 EHRR 123 and *Lithgow* v *United Kingdom* (1986) 8 EHRR 329 on Article 6.1. For an analysis of the impact of the Court's judgments on selected Member States see Gearty, *op cit* n 29.

## The Court and the oversight of democratic systems

Our third and final cautionary note in relation to the European Court's commitment to democracy and human rights flows from what we have just been saying about the Court's relationship with the representative democracies over which it (somewhat ambiguously) presides. When the Court says, as it did in *United Communist Party of Turkey* (quoted by Mowbray), that it "considers one of the principal characteristics of democracy to be the possibility it offers of resolving a country's problems through dialogue, without recourse to violence, even when they are irksome",[36] we are immediately confronted with a paradox even deeper than that discussed above concerning the imposition from the outside of judicially defined human rights on Europe's mature democracies. The European Court of Human Rights is not restricted by the Convention and its protocols to the policing of Member States for compliance with its version of substantive human rights. The language of the Convention also requires of the Court's a degree of oversight in respect of each Member State's democratic system; Strasbourg has a textually-based jurisdiction to assess the "democratic" validity of the law-making process itself. Thus Article 3 of the First Protocol guarantees the holding of "free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature". The civil liberties clauses in the Convention, on thought, conscience, speech, assembly and association[37] can likewise be read, and are read by the Court, as guaranteeing not only substantive human rights as such but also as intended to deliver the kind of political culture in which this right to a free election, and to democracy in general, can be made meaningful. The terms of the Convention itself therefore necessarily involve the Court in checking (when the occasion arises via litigation) that the system under scrutiny is (in the Court's view) truly democratic. This means that in situations judged by the Court to require it, the Court is empowered to interfere with the status quo in a Member State not only on an issue of substantive rights but also where the State is found to have failed the Court's test of what its version of democracy requires. There is irony as well as paradox in this: an unelected judicial body standing outside the democratic dialogue it purports to foster, determining not only what rights should matter but also, *a priori* in the name of democracy, setting out how such a dialogue should be conducted.

There is an important point of democratic principle here. As William Cobbett wrote, "[t]he great right of every man, the right of rights, is the right of having a share in the making of the laws, to which the good of the whole makes it his duty to submit."[38] In an important recent book, Jeremy Waldron has recovered this idea of the "right of rights" and has made it the centrepiece of a powerful chapter on the limitations of judicially imposed versions of what a commitment to rights should entail.[39]

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[36] *Op cit* n 3 at para 57 quoted by Mowbray *op cit* n 1 at p 706.
[37] Articles 9 - 11.
[38] *Advice to Young Men and Women, Advice to a Citizen* (1829) quoted in McFarlane, *The Theory and Practice of Human Rights* (1985), p 142.
[39] *Law and Disagreement* (1999), ch 11.

Waldron's central insight is that even within a discourse that accepts the idea of human rights, the issue of which rights should prevail and in which circumstances is one that will never be fully resolved by argument about rights alone: disagreement is as inherent here as it is elsewhere in every freely-functioning body politic. Thus what is also required in addition to a theory of rights is a "theory of authority" which will serve to "identify some view as the one to prevail on criteria other than those which are the source of the original disagreement".[40] This theory of authority might even trump rights in which one believes: "[a] person who holds a complete political theory – one that includes a theory of authority as well as theories of justice, rights, and policy – may find himself committed to the view that the wrong decision ought to prevail."[41] Much depends of course on what exactly one's theory of authority is: if it is that one is always not only right but entitled because of this alone to have one's view prevail over others, then the conflict between authority and right anticipated in the preceding quote would never arise.

It does however arise for Waldron: "When someone asks, 'Who shall decide what rights we have?', one answer (*my* answer) is: 'The people whose rights are in question have the right to participate on equal terms in that decision.'"[42] But Waldron recognises that this is not the only possible answer: "Instead of empowering the people on the grounds that it is after all their rights that are at stake, we might instead entrust final authority to a scholarly or judicial elite, on the ground that they are more likely to get the matter right."[43] In an influential book the American scholar John Hart Ely developed a framework for legitimate constitutional adjudication rooted in the assumption that what courts were best equipped to do – and what they should therefore without embarrassment do – was to foster the conditions in which a truly democratic discourse (the kind of discourse favoured by Waldron) could take place.[44] This division of authority into procedural guarantees (the preserve of the courts) and substantive outcomes (the responsibility of the – now guaranteed to be properly democratic – legislature) has been hugely appealing but – as Frank Michelman has recently remarked – it fails to address two vital questions: "Why should it not be left to democratic procedures to decide the standards of democracy and their applications? Why should questions of what counts as 'democratic' be decided extra-democratically, vital as they evidently are to important moral and practical concerns of members of the populace?"[45]

To a degree, as we have seen, the European Court of Human Rights has been alive to these conundra. In theory, it is the elite judicial body that tells everyone in Europe which rights should triumph. In practice, the Court frequently defers to judgments about rights emanating from local

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[40] *Ibid* p 245.
[41] *Ibid* p 246
[42] *Ibid* p 244 (italics in original).
[43] *Ibid.*
[44] Ely, *Democracy and Distrust. A Theory of Judicial Review* (1980). See further Sunstein, *The Partial Constitution* (1993).
[45] Michelman, "Human Rights and the Limits of Constitutional Theory" (2000) 13 *Ratio Juris* 63, at p 64.

legislatures and courts in Member States not only (or even necessarily) because they agree with the outcomes on rights in such cases but because the Court has chosen to dilute its own authority with a democratically tactful commitment to subsidiarity – perhaps we might even call it partnership. To adopt Waldron's language, there is a shared theory of authority between national authorities and the European Court of Human Rights. This still leaves the question of how the Court exercises its power in relation to its jurisdiction over the democratic health of the decision-making processes within Member States which as we have seen the terms of the Convention unequivocally repose in it. Viewed in the abstract, we would expect the sharing of authority with Member States over which rights should triumph in situations of conflict to be predicated (explicitly or implictly) on the assumption that the rival source of authority in the state concerned is democratically constituted. Why else defer to local judgment in so important an area as human rights, particularly when such a heavy emphasis is so frequently placed by the Convention (and the Strasbourg case-law) on the importance of democracy? But as we earlier saw in relation to the margin of appreciation, the Court has not developed its caselaw in the direction of such an explicit, democratically-rooted deference to local judgments. Even if it had, Michelmas's nagging questions would have remained: is it any job of the European Court of Human Rights to tell its Member States what "democracy" means or to override local judgments as to what in specific situations is in the best interests of democracy? The point is particularly relevant when considering the Court's role in relation to western Europe's mature representative democracies; if Michelmas's questions are to be answered in a democratically sensitive way, then we would expect the inclination towards judicial restraint to have taken a very firm grip in this area, and for the Court to have effectively opted out, despite the notional power the Convention gives it, reserving its intrusive fire for newer Member States with less solid grips on democratic principle.

In fact the situation is less principled than might have been expected. Article 3 of the First Protocol certainly has been conservatively applied, with the Strasbourg organs showing themselves to be very wary of telling Member States how to organise their democracies.[46] Thus the Commission has held inadmissible an application from a Jersey resident that his non-participation in Westminster elections was a breach of the Protocol[47] and it has also rejected attempts to force the UK to adopt a particular system of voting (PR) in its parliamentary elections.[48] In the first case that came before it on the subject, *Mathieu-Mohin and Clerfayt* v *Belgium*,[49] the Court declared the Article to be of "prime importance in the Convention system"[50] but recognised that in this sphere Member States enjoyed "a

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[46] For a survey of the caselaw under this provision see van Dijk and van Hoof, *Theory and Practice of the European Convention on Human Rights*, *op cit* n 31, at pp. 655-66. Marks, *op cit* n 2, at pp 221-28 is also excellent.

[47] *X* v *United Kingdom* (1982) 28 DR 99

[48] *X* v *United Kingdom* (1977) 7 DR 95. See also *Liberal Party, Mrs R and Mr P* v *United Kingdom* (1981) 21 DR 211.

[49] (1987) 10 EHRR 1.

[50] *Ibid* para 47.

wide margin of appreciation".[51] The Court considered that for the purposes of this Article, any electoral system had to "be assessed in the light of the political evolution of the country concerned" with "features that would be unacceptable in the context of one system" capable of being "justified in the context of another, at least so long as the chosen system provides for conditions which will ensure the 'free expression of the opinion of the people in the choice of the legislature.'"[52] Similar dicta are to be found in *Matthews* v *United Kingdom*, though on the very particular facts of that case (the right of persons in Gibraltar to vote in European elections), the Court did find a breach of the Article.[53]

In contrast to Article 3 of the First Protocol, however, the Strasbourg judges have developed an extensive jurisprudence under Article 10 (and to a lesser extent Article 11) which has enabled them to be vigilant in countering efforts by national authorities to stifle political debate in what they have judged to be illegitimate ways. To a degree of course this can be understood as an entirely different issue from that dealt with in Article 3; overseeing the impact of a State's democratic system on political freedom in particular cases is very different from scrutinising the internal workings of the system itself. In any event, far from applying a wide margin of appreciation, European supervision here has been much closer and more unrelenting than in other areas.[54] In the context of political speech and Article 10, the margin of appreciation has been narrowly construed, with the Strasbourg organs having been vigilant in their protection of the right. In exerting this control the Court has not paid too much attention to which domestic branch of government has been responsible for the alleged infringement.[55] Under this head of review therefore the Court has scrutinised executive acts,[56] a State's criminal code[57] and its judge-made law.[58] Nor has this approach been controversial; indeed there has been widespread support for the case-law which has asserted the principle of political speech over domestic law even where these laws have emanated directly or indirectly from the national

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[51] *Ibid* paras 52 and 54. But *cf* the joint dissenting opinion of Judges Cremona, Bindschedler-Robert, Bernhardt, Spielmann and Valticos (at *ibid.*p 21): "Falling back on the margin of appreciation is no answer in this case, because that margin is subject to effective respect for the rights protected in the Convention."

[52] *Ibid* para 54.

[53] (1999) 28 EHRR 361. See comments on the margin of appreciation at para 63 of the Judgment. And see further *Ahmed* v *United Kingdom* (1998) 29 EHRR 1, at paras 72-6 of the Judgment.

[54] Leading cases include *Lingens* v *Austria* (1987) 8 EHRR 407 and *Castells* v *Spain* (1992) 14 EHRR 445

[55] A different kind of democratic issue is raised if the invasion of speech is the result of a constitutional amendment upon which the people of a State have recently voted: see *Open Door Counselling and Dublin Well Woman* v *Ireland* (1992) 15 EHRR 244, especially the dissenting opinion of Judge Cremona at p 271 and of Judges Pettiti, Russo and Lopes Rocha at pp 275-6.

[56] *Steel and others* v *United Kingdom* (1998) 28 EHRR 603.

[57] As in *Lingens, op cit* n 54; *Castells* v *Spain, op cit* n 54.

[58] *Observer and Guardian* v *United Kingdom* (1991) 14 EHRR 153; *Sunday Times* v *United Kingdom (No. 2)* (1991) 14 EHRR 229.

legislature. When a couple of controversial cases from the United Kingdom in the late 1980s and early 1990s involving political speech and association rights were found to be inadmissible by the Commission, the decisions were much criticised precisely because a more intrusive oversight from Strasbourg on such vital political issues had been expected, notwithstanding that in both cases the legislature had voted to support the relevant executive action (albeit in each case after the event).[59]

What we have from the European Court of Human Rights (and before it the Commission) therefore is a strongly contrasting approach to Strasbourg's power to oversee the democratic health of Member States. On the one hand, the Strasbourg authorities have been very deferential where the particular system of representative democracy chosen by the Member States has been explicitly before it in the form of an application engaging Article 3 of the First Protocol. On the other hand, the Court and Commission have been vigilant, indeed confidently intrusive, so far as the protection of political speech has been concerned, and have been activist even where this has involved assertions of power over domestic criminal codes and national legislation. The distinction between these two kinds of judicial engagement, the one passive, the other invasive, is however to some extent a false one. In particular, a Member State may choose to arrange its constitutional affairs so as to limit certain kinds of political speech, not with the primary intention of suppressing opinion (as in the Article 10 cases discussed above) but in order to facilitate a level of political debate which the State views as vital to the health of its representative democracy. In such circumstances we are confronted with an apparent control on speech which is in fact designed – at a more general, structural level – to achieve the opposite: greater speech, more open political dialogue and a more effective form of democracy. All that we have said about the margin of appreciation and the Court's sensitivity to the sharing of its authority with Member States would suggest a restrained judicial approach, with the Member State being permitted to make its own assessment of what exactly suits its local democratic circumstances and then to act on that assessment. Instead, mislead by a false analogy with the Article 10 cases discussed above, the Court has recently intervened aggressively in just such a situation, in *Bowman v United Kingdom*.[60]

The case involved a challenge to the United Kingdom's electoral laws, under which rigorous controls were placed on the amount of money that could be spent by election candidates during their parliamentary campaigns. As part of this statutory scheme, designed to "safeguard the position of candidates without access to substantial resources,"[61] the legislation also prohibited any expenditure of more than £5 by any third party "with a view to promoting or procuring the election of a candidate".[62] It was under this provision that the applicant – a well-known

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59 *Council of Civil Service Unions and others* v *United Kingdom* (1987) 10 EHRR 269; *Brind* v *United Kingdom* (1994) 18 EHRR CD 76.
60 (1998) 26 EHRR 1.
61 *Ibid* para 18.
62 Representation of the People Act 1983, s 75(1).

campaigner against abortion and executive director of the Society for the Protection of the Unborn Child – was charged. Her alleged offence had been to circulate 25,000 leaflets in a particular constituency identifying how each candidate there was likely to vote on the abortion issue if elected to Parliament. (One and a half million similar such leaflets were distributed nationwide.) The prosecution was unsuccessful, despite which the applicant managed to get to Strasbourg as a "victim" of an alleged infringement of her free speech rights under Article 10. Before the Commission, the Government explained the necessity of the funding controls as a means of ensuring "the right of each individual candidate to stand on equal terms with his or her rivals" which would be rendered "pointless if other persons were allowed to incur expenses on their behalf" the effect of which would be to "put at an advantage those candidates who had wealthy supporters or the support of particular pressure or campaign groups".[63] The controls did not prevent such persons putting their points of view at any other times, and indeed even during the campaign itself as long as the expression in issue did not fall within section 75:[64] "[t]he limitation imposed by section 75 relate[d] only to the promotion of candidates, not to the promotion of causes".[65] Despite these arguments, the Commission favoured the applicant by no fewer than 28 votes to one. Freedom of expression was "one of the essential foundations of a democratic society: exceptions to it must be narrowly interpreted and the necessity for any restrictions convincingly established".[66] Though the State had a "certain margin of appreciation,"[67] it was not wide enough to come to the rescue here: the statutory prohibition was too widely construed; the communication of the applicant's information would not necessarily affect the equality of the electoral playing field for the candidates affected; and the fear that single issue campaigning would distort the result had not been made out. "[I]ndividual freedom of expression, as a key ingredient of a democratic society, must be considered inextricably linked with a free election system and cannot be excluded without convincing justification"[68] – which was absent here.

In its very short judgment, the European Court took broadly the same line, albeit by a narrower majority (14 votes to six). It is true that the Court explicitly recognised that section 75 was "only one of the many detailed checks and balances which made up UK electoral law"[69] and that States were entitled in the exercise of their margin of appreciation "in the period preceding or during an election, to place certain restrictions, of a type which would not usually be acceptable, on freedom of expression, in order to secure the 'free expression of the opinion of the people in the choice of the legislature.' "[70] However the majority nevertheless judged that the UK

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63 *Op cit* n 60, para 42 of the Commission Opinion.
64 *Ibid* para 43.
65 *Ibid* joint partly dissenting opinion of Judges Loizou, Baka and Jambrek in the Court, para 3
66 *Ibid.* para 45 of the Commission Opinion.
67 *Ibid.*
68 *Ibid* para 46.
69 *Ibid* para 41 of the Judgment.
70 *Ibid* para 43.

had in this case overstepped the mark, for various reasons. First, the £5 limit was very low. Second, the restriction during the election period deprived the applicant of her power of communication "during the critical period when [the electors'] minds were focused on their choice of representative" [71] Third, the majority was "not satisfied that, in practice, [the applicant] had access to any other effective channels of communication":[72] in particular while she could herself have stood for election this was not what she wanted to do and she would in all probability have forfeited her £500 deposit.[73] Fourthly, while section 75 operated "for all practical purposes, as a total barrier" to the applicant's publishing of information, "there were no restrictions placed upon the freedom of the press to support or oppose the election of any particular candidate or upon political parties and their supporters to advertise at national or regional level, provided that such advertisements were not intended to promote or prejudice the electioral prospects of any particular candidate in any particular constitutency."[74]

This reasoning can be criticised in a number of ways. Why should the limit of £5 be thought too low if the purpose of the restriction – the promotion of fairness between competing candidates – was truly accepted as legitimate?[75] The whole point of the restriction was that it was during "the critical period": this was not so much a weakness as its central rationale. In a system of representative democracy, it should surely have mattered more than it did to the Court that the applicant was not disabled from herself standing for election, with or without colleagues doing the same in other constituencies, and it should also surely also have mattered that by doing so she would have been able to liberate herself completely from the restriction on her powers of communication that she found so obnoxious. For the Court to mention as relevant that the applicant would almost certainly have lost her deposit might almost be thought an eccentric intervention in a case in which the issue revolved around how vast a sum of money the applicant should be entitled to pour into vicarious election campaigning. When the Court drew attention to the comparative freedom of the press to report as an argument against the restriction before it, it was effectively punishing the United Kingdom for having imposed as narrow a ban as it could consistently with its broader public interest goals. In the language of Strasbourg, it had been too "proportionate" when it would have been safer to have been wildly disproportionate, but it is surely clear what the Court would have said had such an approach being taken. So why mention the freedom of the press in this context at all?

*Bowman* is a depressing decision because of the majority judges' apparent failure to recognise the debilitating effect of disportionate financial resources on the electoral process. True, the Court does pay lip service to the requirements of political equality, but its emphasis on individual

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[71] *Ibid* para 45.
[72] *Ibid* para 46
[73] *Ibid.*
[74] *Ibid* para 47 (footnote omitted).
[75] A point made by Judge Sir John Freeland in his dissent, paras 9-10 (joined by Judge Levits).

freedom of expression showed clearly where its priorities lay. The decision is also depressing at a deeper level, of direct relevance to the themes that have been explored in this essay. In the majority decisions of neither the Commission nor the Court is there any mention made of the kind of national law that is being challenged under Article 10. Yet what was in issue here was a piece of primary legislation, of relatively recent origin,[76] which was specifically designed to provide the conditions for an effective and fair democratic political system for the United Kingdom.[77] As such the legislation should have been doubly protected in Strasbourg: it was an expression of will by the primary democratic body in the State on an issue – the organisation of that State's democracy – to which the Strasbourg organs had traditionally taken a light touch.[78] As Sir John Freeland put it in the course of his dissenting opinion on the point, there was "a clear need for a particularly cautious approach to be adopted in adjudicating internationally on rules prescribed by long-established democratic parliaments on matters so intimately involved with their own composition and operation."[79] Instead like the proverbial bull in the china shop, the majority's subservience to the demands of a very particular kind of commitment to free speech had the consequence of scattering the careful construction that lay in its path, forcing legislators and other public authorities to pick up the pieces left in its wake. The regulation of election funding is one of the most controversial and politically sensitive issues in the United Kingdom, "a perennial topic of debate"[80] in Britain. Now those seeking to legislate in the field have to take into account a new and uncertain dimension, the effect of which will be to predetermine part of the public debate in a highly individualist and partisan way.

## CONCLUSION

Ill-advised though the decision in *Bowman* may be, the simple fact of its having been made requires now that it be implemented. Once an applicant leaps through the Court's own self-denying ordinances to secure

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[76] Though preceding versions of the provision had been on the statute book for very much longer: see for eg Representation of the People Act 1949, s 63.

[77] *Cf* in this regard *Ahmed* v *United Kingdom*, *op cit* n 53 where what was in issue were government regulations restricting the political activities of local government officers in certain posts. In finding no violation of either Article 10 or Article 11, the Court placed great reliance on a report into local government which had recommended the promulgation of such regulations: see paras 57-65. Also relevant to the Court was the fact that the new UK administration had conducted a review of the need for these regulations and had found them to be justified: para 63. The *Bowman* decision is not referred to in any of the judgments in the case.

[78] See the comments of the sole dissenting Commissioner Mr F. Martinez at *ibid* p 14 and (on the Court) the partly dissenting Opinion of Judge Freeland (joined by Judge Levits) and the joint partly dissenting opinion of Judges Loizou, Baka and Jambrek. To another dissentient Judge Valticos should perhaps be left the last word on this point: "There is something slightly ridiculous in seeking to give the British Government lessons in how to hold elections and run a democracy": *ibid* p 22.

[79] *Ibid* para 12

[80] *Ibid* para 4, per Sir John Freeland.

a finding of a violation, the respondent Government is obliged to apply the decision within its jurisdiction, whatever might be its views, or the public's views, as to its merits. Here we have an example of Waldron's theory of authority in action: the decision may be wrong, but that does not mean that it need not be obeyed. In recent years however a degree of unease has emerged over the kinds of decisions that Member States are being asked to implement. As the overseeing body, the Committee of Ministers has been drawn into this emerging debate as has the Parliamentary Assembly of the Council of Europe.[81] The United Kingdom Government's response to *Bowman* has been made part of its more general review of campaign funding law.[82] More controversially an equally recent decision of the Court's, *Osman v United Kingdom*,[83] resulted in a decision not to make certain legal arguments before the domestic courts, a mode of compliance that may well suit Strasbourg but which appears not to have been well received in the national courts.[84] The Court's management of its relations with domestic national authorities is always at risk of being disrupted by judgments perceived domestically as overly intrusive, whether because the margin of appreciation is not applied or because a widely supported piece of primary legislation is called in issue or (as in *Bowman*) both. Of course there will be many occasions where in the individual case the Strasbourg judgment may not be well received locally despite which it remains right, in the sense of facilitating the protection of human dignity or the promotion of local democracy. One of the purposes of this essay is however to show that, despite the absolutist language of human rights, this is neither inevitably nor invariably the case. Strasbourg decisions can on occasion be as wrong as misguided political acts, and just like the latter they can be very difficult to reverse.

A second conclusion that flows from this essay is that a greater sense of proportion is needed when the activities of the Council of Europe are considered by lawyers. For too long, the focus has been almost exclusively upon the Convention on Human Rights and its enforcement organs, the Court and (until 1998) the Commission at Strasbourg. It is natural that human rights lawyers should be attracted to a body which so obviously speaks their language and behaves in such a lawyerly way, hearing argument and delivering judgment between two parties locked in adversarial combat. But in terms of the protection of human rights across Europe, the Court's role is as only one of a number of bodies active in the pursuit of better human rights protection within the framework of the Council of Europe. The Human Rights Commissioner, the Committee of Ministers and the Parliamentary Assembly of the Council with its political and legal affairs and human rights committees all engage in valuable

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[81] See *Execution of Judgmentsof the European Court of Human Rights*, *op cit* n 14.

[82] See *The Funding of Political Parties in the United Kingdom* (Cm 4413, 1999), esp at paras 7.2 and 7.36.

[83] (1998) 29 EHRR 245.

[84] Resolution DH (99) 720, 3 December 1999. See English, "The law lords are already fighting Strasbourg over the Human Rights Act" *The Times* 29 June 2000.

work. So too does the Congress of Local and Regional Authorities of Europe. The Council's Social Charter,[85] its Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment[86] and its Framework Convention for the Protection of National Minorities[87] all contribute greatly to the protection of human rights in Europe. The subject is a complex one, requiring action on all fronts, but particularly on the political, where the feelings of anger and hate that breed the worst of our European human rights violations can be directly tackled. The energy required to secure the protection of human dignity across Europe should not be needlessly channelled into any single activity, least of all one rooted merely in litigation.

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[85] ETS No 35 (18 October 1961), as amended.
[86] ETS No 126 (26 November 1987).
[87] For the state of signatures and ratifications at 29 February 2000 see (2000) 48 *Human Rights Information Bulletin* 38.

# ARTICLE 8: THE PACE OF CHANGE

***Jane Liddy, Former Member of the European Commission of Human Rights*** [1]

> "It is obvious that human progress has depended tremendously on the initiative of the individual; and as individuals, we are each instinctively committed to preserving human freedom. But we are already seeing that control, at least of the production of new individuals by population limitation, is a necessity; and that the only general lesson that is clear to me is that the whole balance of Nature is such an intricate and marvellous matter that, although benefit may well be derived from changing this balance artificially, it should be done as carefully and gently as possible, because the minds of men are not powerful enough to foresee all the consequences of even the simplest change. It may therefore be necessary from time to time to retrace our steps and think afresh; and that may be impossible if the change has been too violent. This, to me, is the best argument for not forcing too quickly any change in the balance between the individual and society."

These are the words of Professor R.V. Jones in his paper "Some threats of technology to Privacy" delivered at a human rights Colloquy in Brussels in 1970.[2]

The purpose of this contribution some thirty years later is to look briefly at four issues under Article 8 of the European Convention on Human Rights (prisoners, immigrants, gypsies and environment) which, whether widely recognised as such or not, have been problematical since the Convention was adopted in 1950. Then four other issues (new forms of family life, medical privacy, surveillance and intrusive publicity) will be approached which, by reason of advances in technology, could well engage the increasing attention of the European Court of Human Rights in the decades to come. It has frequently been stated by the Court that the Convention must be interpreted in the light of present-day conditions. The question is whether this bird's-eye view of selected old and new problems reveals an evenly and appropriately measured pace of development in the interpretation of Article 8. That Article reads:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with

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[1] All comments are personal. At the time of writing (1 June 2000) the author is not employed by any institution. She would like to thank Suzanne Egan of University College Dublin and Professor Stephen Livingstone of The Queen's University of Belfast for their remarks on an earlier draft of this article. Any errors are her own.

[2] *Privacy and Human Rights* (ed. A.H. Robertson,) Manchester University Press 1973.

> the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

## THE "OLD" ISSUES

### (a) Prisoners' Correspondence

In 1974 Professor Francis Jacobs criticised two decisions of inadmissibility taken by the European Commission of Human Rights, the former first-instance filtering and investigatory jurisdiction whose functions are now performed by the new Court. In these cases the Commission found that the refusal of the authorities to allow a child to visit her father in prison or to correspond with him and the refusal of permission to a prisoner to attend his daughter's funeral were justified.[3] Professor Jacobs's concern was that these decisions appear to have been based on reference to the general provisos in Article 8(2) rather than on a full examination of the merits of the particular cases, including an assessment of the reasons given by the authorities for their actions.

Subsequently the Commission developed the principle that it is an essential part of both private and family life and the rehabilitation of prisoners that their contact with the outside world be maintained as far as practicable, in order to facilitate their reintegration into society on release, and this is effected by providing visiting facilities and by allowing correspondence. It also recognised that there can be a heavy administrative and security burden in providing visiting facilities in prison and that some general limitations were reasonable.[4] Nonetheless, Convention case-law does not appear to have developed any minimum level of frequency of visits as a norm to be aimed at. It may be that the early Commission decisions had a certain inhibiting effect on other possible applicants: they were taken within what was – at the time Professor Jacobs wrote – a Council of Europe of just eighteen Member States, only thirteen of which had accepted the then optional right of individual complaint.

Neither can it be said that the Court's early jurisprudence on the question of censorship of detainees' correspondence was encouraging. In the Vagrancy Cases in 1971[5] the Court without further explanation said that "even in the case of persons detained for vagrancy, th[e] authorities had sufficient reason to believe that it was 'necessary' to impose restrictions for the prevention of disorder or crime, the protection of health or morals, and the protection of the rights or freedoms of others." In this case, one of the letters not forwarded by the director of the detention centre was addressed to the Minister for Justice.

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[3] Appln 2306/74 *X* v *Austria*, Dec. 19.7.1966, CD.21; Appln 4623/70, *X* v *UK*, Dec. 19.7.1971, C.D.39; see Francis Jacobs, *The European Convention on Human Rights* (1975) Cavendish Press, Oxford.

[4] Appln 9054/80, *X* v *UK*, Dec 8 10 1982, DR 30,113.

[5] *De Wilde,Ooms and Versyp* v *Belgium*, Judgment of 18 June 1971, Series A No. 12.

Happily, jurisprudence on censorship has developed somewhat since then. Thus, the Court has held that under Convention law prison authorities may open a letter from a lawyer only when they have reasonable cause to believe that it contains an illicit enclosure; even then it should be opened in the presence of the prisoner and the reading of correspondence will only be justified in exceptional circumstances.[6] More generally, it is not enough that national law provides a domestic legal basis for the action in order to meet the Convention requirement that an interference be "in accordance with the law". While it may be impossible to attain absolute certainty in the framing of a law, and the likely outcome of any search for certainty would be rigidity, the quality of the law must be such as to reduce the risk of arbitrariness. In *Domenichini* v *Italy*[7] the Court said that the law in question gave the authorities too much latitude:

> "In particular, it goes no further than identifying the category of persons whose correspondence may be censored and the competent court, without saying anything about the length of the measure or the reasons that may warrant it. . . Italian law does not indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities, so that Mr. Domenichini did not enjoy the minimum degree of protection to which citizens are entitled under the rule of law in a democratic society. . .".

This dictum may have relevance for many States. For example, in Ireland Rule 63 of the Prison Rules 1947 gives the Governor discretion to stop a letter to or from a prisoner "if the contents are objectionable". A recent complaint on the issue was declared inadmissible by the Commission for non-exhaustion of domestic remedies.[8]

In sum, there is no reason to be complacent that in the Europe of 41, convicts who have been punished with deprivation of their liberty or other detainees who live a life of closed routine, often in deplorable conditions, can rely on a reasonable or even minimum degree of written contact and visits with and from the outside world as of right under national law rather than as a privilege that might be withdrawn arbitrarily. This "old" problem is one which the new Court may have reason to address in more depth in the coming decades.

## (b) Immigrants

In 1974 Professor Jacobs was able to comment that there were two types of situation that had most frequently raised issues under Article 8 to that date. One was the case where some action by the authorities, such as expelling a person from a country or refusing to admit somebody, may result in separation of husband and wife or of parents and children. (The other, which it is not proposed to address in this article, concerned questions of custody of or access to children.) At that time the case-law of the Commission rejecting as manifestly ill-founded such expulsion or family reunification cases

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[6] *Campbell* v *United Kingdom*, Judgment of 25 March 1992, Series A No. 233.
[7] Judgment of 15 November 1996, Reports of Judgments and Decisions, 1996-V.
[8] *Holland* v *Ireland*, Appln 24827/94, Dec. 14.4 1998, DR 93, 15.

indicated the need to establish that there was not merely a family relationship but also family "life". The Commission placed a significant onus on the applicant to satisfy it in this respect by reference to a criterion of particularly close links such as financial dependence.[9] But even if there was family life, there would be no interference with the right to respect for family life if the unit could be preserved by establishing the family's residence in the country to which the member of the family is to be expelled or from which he seeks admission.[10]

Case-law has developed these principles somewhat in the years that followed. If sufficiently *de facto* family life can be shown to exist, the Court treats a deportation measure as an "interference by a public authority" and examines whether the deportation satisfies the conditions in paragraph 2 of Article 8. A deportation that has been ordered because of a history of delinquency or criminality can be taken as being aimed at the prevention of disorder, but when regard is had to all the circumstances of family ties and the age of the individual at the time of the offences, it may still be that deportation is a disproportionate response to that aim and hence not "necessary in a democratic society". In such circumstances there may be a violation of Article 8 if there is a failure to achieve a proper balance between the individual's interest in maintaining a family life and the public's interest in the prevention of disorder.[11]

What of the case where the measure complained of is a refusal by a State to give residence rights to a family member of a settled immigrant? In such cases the Court may still regard the matter as involving an allegation of failure on the part of the respondent State to comply with a positive obligation under Article 8(1) to "respect" family life. The boundaries between a State's positive and negative obligations under Article 8 do not lend themselves to precise definition, the Court has said, but in both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and the community as a whole; in both contexts the State enjoys a certain margin of appreciation. The extent of a State's obligation to admit to its territory relatives of settled immigrants will vary according to the particular circumstances of the persons involved and the general interest; and in the latter respect the Court accepts that a State has the right to control the entry of non-nationals into its territory and that Article 8 does not impose on it a general obligation to respect the immigrants' choice of the country of their matrimonial residence and to authorise family reunion on its territory.[12]

At a time of long-publicised concern about what Judge Martens, in a dissenting opinion[13], called "situations where political pressure – such as the

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[9] Appln 5269/71, Dec. 8.2.1972, C.D.39.

[10] Appln 2535/65, dec. 16.7.1965, C.D.17.

[11] *Moustaquim* v *Belgium*, Judgment of 18 February 1991, Series A No 193; *Boughanemi* v *France*, Judgment of 24 April 1996, Reports of Judgments and Decisions 1996-II.

[12] *Gul* v *Switzerland*, Judgment of 19 February 1996, Reports of Judgments and Decisions 1996-I; *Ahmut* v *Netherlands*, Judgment of 28 February 1996, Reports of Judgments and Decisions 1996-VI.

[13] *Gul* v *Switzerland*, above.

growing dislike of immigrants in most member States – may inspire State authorities to harsh decisions", it is at least reassuring to note that the principles elaborated in Convention jurisprudence provide some tools with which the Court may check abuses or incidents of official inertia in immigration matters where such violate the right to respect for family life. These tools were needed when the Convention was signed in 1950, they are needed today in different contexts from those of the past and they will be needed in the coming decades in situations not yet imagined.

It might be noted, however, that jurisprudence has not developed in a way that would explicitly call for legislative and/or procedural safeguards against the risk of arbitrariness in decision-making at national level, unlike the case-law discussed above in relation to prisoners and below in relation to gypsies and environmental matters.

## (c) Roma, gypsies and travellers

Although the minority lifestyle and culture of roma, gypsies and travellers has been a feature of life in member States since before the signature of the Convention, sensitivity to their rights is a rather recent phenomenon, except within relatively small circles. Indeed it is noteworthy that the Court in the above-mentioned *Vagrancy* cases of 1971[14] made no attempt to distinguish between members of such minority groups and the vagrants referred to in Article 5(1)(e) of the Convention when it accepted for its purposes Belgium's definition ("Vagrants are persons who have no fixed abode, no means of subsistence and no regular trade or profession").

There were certain dicta in Commission decisions of inadmissibility to the effect that a minority group is, in principle, entitled to claim the right to respect for the particular lifestyle it may lead as "private life", "family life" or "home".[15] However it was not until 1994 that the Commission declared admissible an application from a gypsy alleging that she was prevented from living with her family in caravans on her own land and from following the traditional lifestyle of a gypsy, contrary to Article 8. In the event the Court found no violation of Article 8 in this, the *Buckley* case.[16] Nonetheless the judgment holds out hope for other gypsies and for roma or travellers whose plight might be considered worse. In the first place, the Court accepted that even though there was no planning permission to park the caravan on the site in question, the facts showed that Mrs Buckley had established a real "home" there which attracted the guarantees of Article 8. Secondly, in examining whether the measures taken to compel Mrs Buckley to remove the caravans were justified as "necessary in a democratic society", the Court said that the decision-making process leading to measures of interference must be fair and such as to afford due respect to the interests safeguarded to the individual by Article 8. Applying this test, the Court was satisfied by the State's offer of alternative (albeit less satisfactory) accommodation, the relatively minor sanctions for failing to remove the caravan, and what it considered to be

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[14] Note 5 above.
[15] *Eg* Applns 9278/81, and 9415/81, *G* v *Norway*, Dec. 3.10.1983, DR 35,30.
[16] *Buckley* v U*nited Kingdom.* Judgment of 25 September 1996, Reports of Judgments and Decisions 1996-IV.

relevant and sufficient reasons offered by the planning authorities in the domestic proceedings.

In his dissenting opinion Judge Pettiti said that Europe has a special responsibility towards gypsies:

> "During the Second World War, States concealed the genocide suffered by gypsies. After the Second World War this direct or indirect concealment continued (even with regard to compensation). Throughout Europe, and in Member States of the Council of Europe, the Gypsy minority have been subject to discrimination, and rejection and exclusion measures have been taken against them. . . . In Eastern Europe the return to democracy has not helped them. Can the European Convention provide a remedy for this situation?"

Time will give the answer to Judge Pettiti's question, but for the present it suffices to note that not all – and perhaps not even many – of the 41 member States of the Council of Europe can be taken to provide the procedural guarantees against being forced unjustifiably to "move on" that satisfied the Court in the *Buckley* case. At the time of writing the Court is facing the task of ruling on many serious complaints in an Inter-State Case[17], including an issue of respect for the homes and private and family lives of the Turkish Cypriot gypsy community.

## (d) Environmental Issues

Concerns about risk to health by reason of radiation and concerns about noise and smell levels in the environment were just as valid in 1950 when the Convention was signed as they are today. Recently expressed protests against genetically modified crops bring a reminder of challenges in the 1960s to the fluoridation of water supplies (for example, when the Irish Supreme Court found that the ingestion of water fluoridated to the extent proposed was harmless and so could not injure bodily integrity[18]). In 1985 the Court said that the concept of "private life" covers the physical and moral integrity of the person.[19] Notwithstanding this background the most important jurisprudence on environmental risks only began to take shape in the 1990s.

In 1990, within the context of an Article 13[20] issue, the Court said that Article 8 was a material provision in relation to the quality of the applicant's private life and the scope for enjoying the amenities of his home that had been adversely affected by the noise generated by aircraft using Heathrow Airport.[21]

Four years later the Court was faced more directly with the issue in the form of a complaint about a plant for the treatment of liquid and solid waste twelve metres away from the applicant's home in Spain. There was

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[17] *Cyprus* v *Turkey*, Appln 25781/94, Comm. Rep. 4 June 1999.
[18] *Ryan* v *Attorney General* [1965] IR 294.
[19] *X and Y* v *Netherlands*, Judgment of 26 March 1985, Series A No. 91.
[20] Guaranteeing the right to an effective remedy.
[21] *Powell and Rayner* v *United Kingdom*, Judgment of 21 February 1990, Series A No. 172.

independent expert evidence to the effect that hydrogen sulphide emissions from the plant exceeded the permitted limit and could endanger the health of those living nearby. Moreover, there was a domestic court finding that the nuisances in issue impaired the quality of life of those living in the plant's vicinity. In finding a violation of Article 8 the Court said that severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely. The Court found that the measures taken by the State "did not succeed in striking a fair balance between the interest of the town's economic well-being – that of having a waste-treatment plant – and the applicant's effective enjoyment of the right to respect for her home and her private and family life".[22]

In this, the *Lopez Ostra* case, the applicant was in the relatively well-armed situation of having scientific expertise and a domestic court statement supporting her case to a degree. Article 8 may also be relevant in relation to the possibility of gaining access to scientific information that would enable an individual to assess the risks he runs by remaining in his home. In *Guerra* v *Italy*[23] the applicants were able to point to some information about an explosion at a factory years beforehand which led to the hospitalisation of 150 people and also to an expert report on the direction in which emissions from the factory were channelled. However a major factor for the Court was that pursuant to Directive 82/501/EEC (the "Seveso" Directive) Italian law had classified the factory, which produced fertilisers and caprolactum, as "high risk". The Court concluded that Article 8 was applicable because of the direct effect of the toxic emissions on the applicants' right to respect for their private and family life. Referring to the long wait endured by the applicants for essential information that would have enabled them to assess the risks they and their families might run if they continued to live in a town particularly exposed to danger in the event of an accident at the factory, the Court found that Spain did not fulfil its positive obligation to secure the applicants' right to respect for private and family life. The omission of a reference to the right to respect for the "home" may indicate that the technical evidence in this case was not so compelling as in the *Lopez Ostra* case but nonetheless sufficed for a more nuanced finding of violation of Article 8.

The issues of radiation from nuclear plants or by reason of nuclear tests have been approached very cautiously by both the Commission and the Court. In *Taura* v *France*[24] the Commission, by a majority, rejected an application by residents of Tahiti and Mangareva concerning France's decision to resume nuclear testing in 1995 and 1996 in the vicinity of their islands. The Commission said that in order for an applicant to claim to be a victim of a violation of the Convention owing to a future violation of, *inter alia*, Article 8 he must produce "reasonable and convincing evidence of the likelihood that a violation affecting him personally will occur . . . ". Subsequently, in an Article 6[25] case, *Balmer-Schafroth* v *Switzerland*[26], the Court by 12 votes

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[22] *Lopez Ostra* v *Spain*, Judgment of 9 December 1994, Series A No. 303.
[23] Judgment of 19 February 1998, Reports of Judgments and Decisions 1998-I.
[24] Appln 28204/95, Dec 4.12.1995, DR 83,112.
[25] Guaranteeing the right to a fair trial.

to 8 likewise put a high onus on an applicant to show a direct link between the operating conditions of a nuclear power station and their domestic law right to protection of their physical integrity such that they should have access to a court. It found that the applicants had failed to show that the operation of the nuclear power station "exposed them personally to a danger that was not only serious but also specific and, above all imminent". The minority commented that in 1997 Western Europe continued to be affected by the fallout from the Chernobyl accident and they said that a finding that Article 6 had been infringed was all the more necessary because European comparative law shows that the national systems of States such as Belgium, France, Italy, Spain and Germany possess a whole array of review machinery for dealing with disputes of this type. To that comment it might be added that if national courts are not required to take seisin of such domestic law disputes except where there is "imminent" danger it is difficult to be confident that later review at Strasbourg level can be effective.

However in 1998, in another judgment of non-violation, *McGinley and Egan* v *United Kingdom*[27], the Court allowed some prospect that Article 8 might, in different circumstances, have a role to play in regard to suspected radiation hazards. In 1958 the United Kingdom had carried out a number of atmospheric tests of nuclear weapons at Christmas Island in the Pacific Ocean. The applicants, who were army and naval servicemen, were on duty in the vicinity. Years later they suspected that their health problems were related to exposure to radiation but they were unable to establish the link for the purpose of obtaining relevant pension payments. The Court found that there was a positive obligation under Article 8: where a Government engages in hazardous activities, such as those in issue in the case, which might have hidden adverse consequences on the health of those involved in the activities, respect for private and family life requires that an effective and accessible procedure be established which enables such persons to seek all relevant and appropriate information. In the event the Court found by five votes to four that there was an adequate procedure open to the applicants in the United Kingdom to seek relevant radiation records. The case seems to leave open for future consideration whether the obligation to provide a procedure enabling access to relevant information carries a concomitant obligation on Governments engaging in such hazardous activities to create and keep medical and/or other monitoring records of individuals at particular risk.

In its decision of inadmissibility in the French nuclear test case (*Taura*) the Commission said that it did not consider it within its remit to rule on the scientific validity of the various reports to which the parties referred, especially as there was controversy surrounding a number of points amongst experts. The extent of the Court's ability to assess such important issues in the future may depend on the extent to which it is willing to follow the logic of the above-mentioned *Guerra* v *Italy*[28] and *McGinley and Egan* v *UK*[29] cases by identifying an obligation on the part of States to keep and

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[26] Judgment of 26 August 1997, Reports of Judgments and Decisions 1997-IV. This jurisprudence was confirmed by the new Court in *Athanassaglou* v *Switzerland*, Judgment of 6 April 2000.

[27] Judgment of 9 June 1998, Reports of Judgments and Decisions, 1998-III.

[28] Note 23 above.

[29] Note 27 above.

make available to the public records such as independent environmental studies on the impact of new scientific methods. Much has been written about the influence of human rights law on the jurisprudence of the European Court of Justice in Luxembourg: it would be fitting if the initiatives taken by the European Union in environmental matters were to find an echo, via the Strasbourg Court, in the application of Article 8 within the 41 member States of the Council of Europe.

## GENERAL COMMENT ON THE "OLD" ISSUES

It may be seen from the above how far the Court has moved from what may have been the expectation of many of the original States Party when they ratified the Convention. Such States may have assumed that they were answerable only for an "interference by a public authority" with private and family life, home and correspondence and that, given a domestic legal basis for an official action, their main task in defending a case in Strasbourg would be to demonstrate the necessity for the measure in the interests of one of the aims listed in paragraph 2 of Article 8. In fact, the cases declared admissible by the Commission enabled jurisprudence to develop in such a way as to make it clear that there can be a violation of Article 8 by reason of a failure of States to take positive action to "respect", within the meaning of Article 8(1), private and family life, the home and correspondence, because of the absence of a legal regime with sufficient procedural safeguards for the individual.[30] Such safeguarding procedures would mean that the national authorities, rather than an international judicial body, would be the first to test the evidence and the competing arguments in relation to the particular situation of a given individual and hence the justification for the measure as perceived at national level. This principle of there being a procedure under national law whereby the authorities most familiar with national conditions are enabled to balance in a disciplined fashion the individual interest and the general interests is found also within the autonomous concept of the phrase "in accordance with the law" in Article 8(2). However, there is little sign as yet of its finding a place in cases concerning immigration and expulsion, where the Court carries a heavy onus in its task of supervising whether the search for balance that is inherent in Convention rights has been attained in a given case.

## THE "NEW" ISSUES

### (e) New forms of "family life": the impact of science and technology

There are many old forms of family life or relationship which, even if atypical in any given context, nonetheless are well-known phenomena in the sense that they are based on a biological link and the oldest habits of human conduct.

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[30] Relatively early indicators of this approach were identifiable in *Airey* v *Ireland*, Judgment of 9 October 1979, Series A No. 32 and in *W* v *United Kingdom*, Judgment of 8 July 1987, Series A No. 121, concerning, respectively, the absence of a civil legal aid scheme to facilitate legal separation proceedings in Ireland and, in the United Kingdom, procedures governing access to children taken into care.

Thus the Convention expression "family life" in the case of a married couple normally implies cohabitation.[31] Even where there is no cohabitation, family life embraces the tie between a parent and his or her child, regardless of whether or not the latter is "legitimate" and even if the mother is married to another ; although that tie may be broken by subsequent events this can happen only in exceptional circumstances.[32] Stronger evidence of *de facto* family "life" can be crucial in more distant blood relationships – such as with grandparents, siblings and uncles or aunts.[33]

With regard to children, until 1997 the Court had only been called upon to consider family ties existing between biological parents and their offspring. In that year it gave judgment in a case where the application of two aspects of recent technology and medical science coincided in an unusual combination of facts. X was a female-to-male transsexual who had lived with Y, a biological woman, to all appearances as her male partner since 1979. A child Z was born to Y as a result of artificial insemination by anonymous donor. X had been involved throughout the process of the seeking and granting to Y of AID treatment in the United Kingdom and since the birth he had acted in a father-role to Z in every respect. In these circumstances the Court was satisfied that the *de facto* family unit was such that Article 8 was applicable. However there was no violation of the right to respect that family life by reason of a refusal to register X as Z's father on the birth certificate.[34] In its reasoning the Court noted that there was no consensus among the member States of the Council of Europe on the question of whether the best interests of a child conceived by AID are best served by preserving the anonymity of the donor of the sperm or whether the child should have the right to know the donor's identity. It said that "the community as a whole has an interest in maintaining a coherent system of family law which places the best interests of the child at the forefront. . . ".

The Commission had earlier been called upon to examine whether there was "family life" between a man who donated his sperm in order to enable a woman in a lesbian relationship to become pregnant through artificial insemination and the child subsequently born: the particular facts proved insufficient for the Commission to accept that there was an adequately close tie between father/sperm-donor and child to fall within the scope of Article 8 and thus attract its guarantees.[35]

These cases prompt the question as to how long it will be before the Court has occasion to give judgment on a claim that the right to respect for private and family life includes the right to conceive a child by artificial insemination by donor (anonymous or otherwise) or to have a child born by a

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[31] *Abdulaziz, Cabales and Balkandi* v *United Kingdom*, Judgment of 28 May 1985, Series A No.94.

[32] *Boughanemi* Case note 11 above; *Keegan* v *Ireland*, Judgment of 26 May 1994, Series A No.294; *Kroon* v *Netherlands*, Judgment of 27 October 1994, Series A No.297.

[33] See further the author's article "The Concept of Family Life under the ECHR" in (1998) *EHRLR* 15.

[34] *X, Y and Z* v *United Kingdom*, Judgment of 22 April 1997, Reports of Judgments and Decisions 1997-II.

[35] Appln 16994/90, *M* v *Netherlands*, Dec 8.2.1993, DR 74,120.

surrogate mother. There are certain indications, in line with the Court's dicta in the *X, Y and Z* v *United Kingdom* case[36] concerning the child's possible interest in knowing its parentage (and thus, by implication, the circumstances of its conception), that a cautious approach will be taken in Strasbourg. Thus, in a complaint under Article 8 that a single woman was unable to adopt a child, the Commission referred to the fact that under Article 12[37] the right to found a family implied the existence of a couple and it rejected the application.[38] Also, within the context of Article 11[39], the Commission had regard to the fact that French law criminalised incitement to abandon a child when it rejected a complaint about the refusal to register an association the aim of which was to promote the interests of surrogate mothers.[40]

It seems to be only a matter of time before the Court will also be faced with even more profoundly thought-provoking issues. It may be that experiments on the cloning of humans are not permitted within Council of Europe member States and that they are not imminent elsewhere. However, at a time when it has been reported that the cloning of a primate – the rhesus macaque monkey – has moved a step closer[41], one can envisage the possibility that a non-European research institute could be funded by a wealthy donor with a view to such experiments. As a result of what has been called "bioethical tourism"[42] it may be that issues will arise about the recognition of sex-change operations or the parentage of a surrogate birth child as a result of events crossing different jurisdictions with different control thresholds even within Council of Europe member States. The issue of abortion arose indirectly in a complaint about the right to information about the location of clinics outside a given jurisdiction[43]; issues could likewise introduce themselves indirectly with regard to the possible cloning of, for example, a mortally injured child or with regard to transgenetic therapy or germ line therapy. (Lord Winston, Chairman of the House of Lords Science and Technology Committee is reported[44] as believing that the use of germ line therapy is inevitable. The writer understands[45] germ line therapy as meaning the correction of a genetic defect in the germ or reproductive cells of a patient so that the offspring of the patient also inherits the corrected gene – thus future generations would be research subjects without their consent.)

Considerations such as the foregoing underline the importance of the above-mentioned dicta in the *X and Y* v *Netherlands* case[46] and in the *X, Y and Z* v

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36 Note 34 above.
37 Guaranteeing the right to marry.
38 Appln 31924/96, *Di Lazarro* v *Italy*, Dec. 10.7.1997, DR 90,134.
39 Guaranteeing freedom of assembly and association.
40 Appln 14223/88, *Lavisse* v *France*, Dec.5.6.1991, DR 70,218.
41 *Science Magazine*, Vol.287, No.5451, pp 317-319.
42 Deirdre Madden "Reproductive Rights and Assisted Conception" in *Human Rights: an Agenda for the 21st Century* (ed. Hegarty/Leonard,) Cavendish Publishing Ltd 1999.
43 *Open Door and Dublin Well Woman* v *Ireland*, Judgment of 29 October 1992, Series A No.246.
44 *Daily Telegraph* 27 January 2000.
45 From David Smith, "Life and Morality: Contemporary Medical-Moral Issues" (1996) Gill and MacMillan Ltd, pp 139-141.
46 Note 19 above.

*United Kingdom* case[47] as well as of Article 7 of the United Nations Convention on the Rights of the Child ("The child shall. . . have. . . as far as possible, the right to know. . . his or her parents"). They also underline the significance of the case of *Gaskin* v *United Kingdom*[48] where the Court found to the effect that the records contained in a file compiled for and by a local authority about the past and formative years of an applicant undoubtedly did relate to his "private and family life" in such a way that the question of his access thereto fell within the ambit of Article 8. These new forms of relationships and genetic history and identity, emanating from recent and potential scientific developments, pose weighty questions about respect for the physical and moral integrity of the person that may fall for step-by-step resolution in the years and decades to come.

## (f) Medical Privacy

If one side of the coin of private and family life is the interest of an individual in knowing about his genetic inheritance, the other side of the coin is his interest in keeping secret his medical history or genetic makeup. The principles of existing case-law probably have been elaborated largely on the premise that an individual can keep secret his real or likely disposition, tastes, addictions, health and family background except such as revealed in ordinary social interaction or to the extent necessary on the occasions when he crosses the path of officialdom deliberately, culpably or inadvertently. The year 2000 sees the time of the Human Genome Project which seeks to decode the genetic strand to uncover humans' chemical structure and find its shortcomings: it has been reported[49] in this context that project researchers have budgeted approximately 5 per cent of their funds to investigate any legal and ethical complications that may arise from their findings. The concept of medical privacy is not new in itself but the backdrop to future case-law is new now that individuals have reason to believe that the whole of their genetic makeup may be decoded and accessible.

In 1970 Jaques Velu in his contribution to the Brussels Colloquy on Privacy referred to Commission decisions of inadmissibility concerning compulsory medical examinations of accused persons and the investigation of a person's social background by the department responsible for protecting young persons. He stated:

> "The problem of the infringement of the right to respect for private life is much more complex when it comes to using methods which really do amount to an assault on an individual's privacy – projection tests which reveal ideas or feelings which he cannot or does not wish to express, sincerity tests used to assess his moral level and above all narco-diagnosis, which consists in administering sodium barbiturate tablets and taking advantage of the weakening of consciousness thus produced in order to carry out various neurological, psychological or psychiatric examinations."

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[47] Note 34 above.
[48] Judgment of 7 July 1989, Series A No.160.
[49] *Sunday Tribune* 28 May 2000.

On the whole, Convention case-law since then has not thrown up major issues in the areas identified by M. Velu but this is not to say that problems of the nature that he described do not exist at national level.

The Commission has found that a compulsory medical intervention, even if it is of minor importance, must be considered as an interference with the right to respect for private life. However the public has a prevailing interest that the courts should have the power to make use of harmless scientifically-proved methods of obtaining evidence for the purpose of determining paternity relationships.[50] The Commission also rejected a complaint about the obtaining of medical evidence in a case where there was concern as to the applicant's mental competence to handle his affairs.[51] Likewise, the Commission considered that a requirement to undergo methods of tuberculosis screening was justified to protect both public health and the applicant's health and was not disproportionate to that aim.[52] The Court, for its part, found no violation of Article 8 by reason of the forcible administration of food and neuroleptics in a situation where it was argued that, according to the psychiatric principles generally accepted at the time, medical necessity justified the treatment in issue and where the patient was regarded as entirely incapable of taking decisions for himself.[53]

The individual's interest in not being compelled to disclose her private medical history unnecessarily was an implicit factor in the Court's reasoning when it agreed with the Commission that, as a result of the frequent necessity for a French transsexual to disclose information concerning her private life to third parties, she suffered distress which was too serious to be justified on the ground of respect of the rights of others.[54] The question of confidentiality of medical information arose more directly in the case of *M.S.* v *Sweden*.[55] The applicant, who had made a claim for compensation for industrial injury from the Social Insurance Office, complained about the communication of her medical records from a women's clinic at the request of that Office. The records contained information about an abortion. The Court found no violation on the facts but said that domestic law must afford appropriate safeguards to prevent any such communication or disclosure of personal health data as may be inconsistent with the guarantees of Article 8. On the other hand there was such a violation in another 1997 case, where a Finnish court had named the applicant, Z, as being an HIV carrier. The domestic proceedings primarily concerned the applicant's husband who, following complaints of rape, was ultimately convicted of various counts of attempted manslaughter by reason of having deliberately subjected a number of individuals to a risk of HIV infection. The Court found that the publication of the applicant's own name and HIV infection was not supported by cogent reasons and gave rise to a violation of her right to respect for private and family life.[56] The reasoning in both of these cases started from the principle

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[50] Appln 8278/78, *X* v *Austria*, Dec.13.12.1979, DR 18,154.
[51] Appln 8509/79, *X* v *FRG*, Dec.5.5.1981, DR 24,131.
[52] Appln 10435/83, *Acmanne* v *Belgium*, Dec.10.12.1984, DR 40,251.
[53] *Herczegfalvy* v *Austria*, Judgment of 24 September 1992, Series A No.244.
[54] *B* v *France*, Judgment of 25 March 1992, Series A No.232.
[55] Judgment of 27 August 1997, Reports of Judgments and Decisions 1997-IV.
[56] *Z* v *Finland*, Judgment of 25 February 1997, Reports of Judgments and Decisions 1997-I.

that confidentiality is necessary to preserve confidence in the medical profession. In the *Z* case the Court went on to say:

> "Without such protection [of personal medical data], those in need of medical assistance may be deterred from revealing such information of a personal and intimate nature as may be necessary in order to receive appropriate medical treatment and, even, from seeking such assistance, thereby endangering their own health and, in the case of transmissible diseases, that of the community."

Against the background of such Convention case-law, the Court's attentions may be focused in future years on new issues arising out of increasing use of DNA tests. How far would the reasoning in the *Z* case be applicable in the event of a complaint that national law permits insurance companies to seek genetic testing to assess a person's risk of inheriting serious illness and/or that the law permits financial institutions or employers to compel individuals to undergo such testing and to give access to the results? Does the right to physical and moral integrity include the right to respect the wish of an individual leading an ordinary working, insured and mortgage-prone life to remain personally ignorant – and, by implication, to keep others ignorant – of future health risks, in much the same way as a pregnant woman may not wish to know in advance whether her child is brain-damaged? What countervailing interests could justify the imposition of such knowledge or its disclosure to third parties? Absent official concern about health risks to the community[57], the most obvious interest in the balance is an economic one: that of insurance companies to weight insurance premiums in a manner most financially advantageous; and that of employers to assess the risks to the efficiency of their enterprises. At a time when the market economy has an extraordinarily pervasive effect on the culture of many member States, it is not easy to be sanguine about the future balancing of the public interest in the economic well-being of the country with the individual's right to respect for private life.

The position may be simpler within the context of family relations (such as voluntary pre-marriage medical tests) and within the context of the investigation of crime and the obtaining of evidence to that end. Existing Convention case-law on the gathering and storing of data relating to the private life of an individual may provide some guidance as to the safeguards against arbitrariness that would help justify any such interference.[58]

## (g) Surveillance measures

Secret surveillance of telephone conversations by or with the assistance of the security forces is a long established phenomenon. Because of the lack of public scrutiny and the risk of misuse of power it has been established that domestic law must provide some protection to the individual against arbitrary interference with Article 8 rights. Thus, domestic law must be sufficiently clear in its terms to give citizens an adequate indication as to the

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[57] As in the case of tuberculosis screening : see note 52 above.

[58] *Leander* v *Sweden*, Judgment of 26 March 1987, Series A No. 116; *Amann* v *Switzerland*, Judgment of 16 February 2000.

circumstances in and conditions on which public authorities are empowered to resort to any such secret measures.[59] Calls made from business premises as well as from the home may be covered by the notions of "private life" and "correspondence". It seems to follow from the *Halford* case[60] that at least in the absence of any warning given that office calls would be liable to interception a Government employee or office-holder may have a reasonable expectation of privacy so that the guarantees of Article 8 would apply.

This jurisprudence seems sufficiently highly developed to cope with complaints concerning other methods of surveillance by State authorities, whether by means of old technology in new circumstances (such as the use of listening devices in a prisoner's confessional or against the wall of a suspect's home) or in relation to new technology (such as Internet or E-mail communications).

What seems to be a new phenomenon is the extent to which private individuals can gain access through legitimate commercial outlets to sophisticated surveillance equipment for the purpose of spying on other private individuals. The paper presented by Professor Jones at the 1970 Brussels Colloquy[61] gives, with the benefit of his experience as Director of Scientific Intelligence in the Ministry of Defence, descriptions of the "major weapon[s] of espionage and security services, of the private enquiry agent and of industrial espionage" at a time when "the cost is so high that only a small proportion of individuals could be kept under surveillance all the time". Thirty years later it is necessary to be aware of measures that may be taken relatively cheaply by such small actors on the stage as parents wishing to monitor the conduct of a baby-sitter in their absence.

With regard to the use of surveillance techniques by private employers, the non-governmental organisation Liberty argued in their third party intervention in the *Halford* case that, even if the State was not the employer, Article 8 imposes a positive obligation to protect employees against surveillance. (In the above-mentioned case of *X and Y* v *Netherlands*[62] the Court had said that the positive obligations under Article 8 "may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.") However, this step was not necessary for the Court's reasoning in the *Halford* case leading to a finding of violation, and the Court refrained from taking it.

The issue of surveillance by private parties, if not already pending before the Court, may present itself before long, in the light of the spiralling usage in the workplace of closed circuit television (over 700 per cent increase in two years in Ireland, according to reports[63]). Commission case-law on video and photographic surveillance is not particularly helpful. In *Appln 18670/91* v

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[59] *Klass* v *FRG*, Judgment of 6 September 1978, Series A No.28; *Malone* v *United Kingdom*, Judgment of 2 August 1984, Series A No.82; *Huvig* v *France*, Judgment of 24 April 1990, Series A No.176; *A* v *France*, Judgment of 23 November 1993, Series A No.277.

[60] Judgment of 25 June 1997, Reports of Judgments and Decisions 1997-III.

[61] Note 2 above.

[62] Note 19 above.

[63] *Irish Independent* 18 February 2000.

*Ireland*[64] the applicant objected to the taking by a private investigator of photographs from outside the boundary of her home but showing her inside it closing a window. The case was rejected for non-exhaustion of domestic remedies. More recently, in a case against Belgium[65], a complaint was made that there was no legislative provision governing forms of visual surveillance that did not involve the recording of data. The Commission decided that there was no appearance of an interference with private life. Its reasoning was that the photographic systems in question were likely to be used in public places or in premises lawfully occupied by the users of such systems in order to monitor those premises for security purposes. Moreover, all that could be observed was, essentially, public behaviour: the data was identical to that which somebody could have obtained by being on the spot in person.

In the light of this case-law and where there is an absence of national laws adequately regulating such matters, there seems ample scope for the development of Convention jurisprudence concerning unwarned audio or visual surveillance not only on streets and other public places but also in privately owned or controlled premises. Clothing stores, for example, could have an interest in monitoring the conduct of possible shop-lifters in changing rooms or of staff in taking unauthorised cigarette breaks. The test seems to be the Court's willingness to apply, in an appropriate case, the principle that Article 8 can require the taking of measures to secure respect for private life in the sphere of relations between private individuals.

## (h) Intrusive publicity

The Commission has been prepared to take steps in the direction of such a positive obligation to regulate relations between private individuals in the areas of intrusive publicity and harassment. The question of intrusive publicity has new relevance at the turn of the century by reason of the ease and speed with which allegations or facts about an individual's private life can now be communicated world-wide and by reason of possible new and more intrusive development and/or application of information technology. When these developments in the means of transmitting information are associated with the apparently new phenomenon of surveillance technology being widely and affordably available in commercial outlets, the scope for turning the details of an individual's intimate life into a saleable commodity and against his will seems to be unprecedented.

In the relatively innocent days of the 1970 Brussels Colloquy on privacy, M. Velu was in a position to say:

> "The point of balance between the requirements of Article 8 and those of Article 10[66] would seem to lie in the notion of public interest, which, of course, must be distinguished from public curiosity. In principle the press is not entitled to interfere in the private lives of individuals . . . But in certain exceptional circumstances the making known through the

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[64] Dec.1.12.1993, apparently unreported.
[65] Applns.32200/96 and 32201/96, *Herberq* v *Belgium*, Dec. 14.1.1998, DR 92,92.
[66] Guaranteeing, with qualifications, the right to freedom of expression including freedom to receive and impart information and ideas without interference by public authority and regardless of frontiers.

> press, film or television of facts which normally form part of private life may be justified because required in the public interest, especially if that person is a public figure."

The two major decisions (both of inadmissibility) in this difficult area emanated from the Commission in the 1990s and do in fact concern well-known persons but the Commission did not pronounce on whether these were "public figures" and the extent, if any, of "public interest" in the material. These decisions had been preceded by a decision of inadmissibility – for non-exhaustion of domestic remedies – in a case where the Commission nonetheless accepted that the State was under an obligation to secure the applicant's Article 8 rights by providing adequate protection to her against deliberate persecution in the form of harassment by a former partner.[67]

In one of these two cases[68] complaints were made about the failure of the United Kingdom to prohibit the publication and dissemination of information relating to the private life of the first applicant (for example, references to the state of his marriage) and about the taking with a telephoto lens of photographs (which were subsequently published) of the second applicant while she was in the private grounds of a clinic where she was obtaining treatment. The Commission said that it would not exclude that the absence of an actionable remedy in relation to the publications could show a lack of respect for their private lives. In the event the Commission concluded that the remedy of breach of confidence (against the newspapers and their sources) was available to the applicants and that that they had not demonstrated that it was insufficient or ineffective to the circumstances of their cases.

That case concerned intrusive publicity regardless of whether the material published was true or false. In the other case[69] the applicant, in contrast, wished to take proceedings in malicious falsehood (but under domestic law could not in the absence of evidence that the publication was calculated to cause him financial loss) or in libel (but there was no legal aid for such and in any event he was advised not to sue in libel due to his pre-existing infamous reputation as a moors murderer). There was evidence that the material had been fabricated and that its publication had led to a significant deterioration in the applicant's mental condition. The Commission said that in limited circumstances the Convention will impose a positive obligation on a High Contracting Party to protect the right to respect for private life. However, it considered that the right to privacy was protected by these two remedies and that the fact that the applicant in the particular circumstances of his case could not succeed in establishing either cause of action did not cast doubt on their effectiveness.

The same line of thinking was brought to bear in a case[70] introduced by a company whose object was the sale to its customers of information which it

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[67] Appln 20357/92, *Whiteside* v *UK*, Dec.7.3.1994, DR 76,80.
[68] Applns 2881/95 and 2882/95, *Earl and Countess Spencer* v *UK*, Dec.16.1.1998, DR 92,56.
[69] Applns 27436/95 and 28406/95, *Ian Stewart-Brady* v *UK*, Dec.2.7.1997, DR 90,45.
[70] Appln 32849/96, *Grupo Interpres S.A.* v *Spain*, Dec.7.4.1997, DR 89,150.

sought to obtain from court registries. The Commission, in rejecting the complaint, said that where the exercise of the right to freedom of expression may interfere with the rights of others, and in particular the rights protected by Article 8, the scope of the right of access to the information in question is limited by the wording of Article 10(2).

However, for its part the new Court seems to be some distance away from envisaging a right to protection against intrusive publicity, if one is to judge by the priority it gave to freedom of press issues over the application of defamation remedies in the recent case of *Tromso* v *Norway*.[71] The Court found that, in the particular circumstances, a newspaper was not required to carry out its own research into the accuracy of the facts reported and that the undoubted interest of the defamed crew-members of a seal-hunting vessel in protecting their reputation was not sufficient to outweigh the vital public interest in ensuring an informed public debate over a matter of local and national as well as international interest (methods of killing seals). The forcefulness of the dissenting opinions in this case is reminiscent of an earlier Article 10 case where, notwithstanding invocation of the necessity for the protection of the reputation or rights of others (members of a different race), a violation was found, prompting some members of that minority to protest that, while they appreciated that some judges attached particular importance to freedom of expression ("the more so as their countries had largely been deprived of it in quite recent times"), they could not accept that this freedom should extend to encouraging racial hatred and contempt.[72]

Against this background, it seems that, while there are the beginnings of stepping stones in the Commission's case-law for the tools to cope with the failure by persons engaged in the exercise of freedom of expression to keep in mind their "duties and responsibilities" referred to in Article 10(2), there is not a strong body of Article 8 jurisprudence to which legislatures can refer when addressing the threats to privacy posed by new and evolving technology, including the transnational implications of the Internet.

## GENERAL COMMENT ON THE "NEW" ISSUES

New and potential scientific and technological developments, whatever their benefits, pose grave risks that some individuals in future years and decades may become involuntary research subjects; that information as to the likely development of their lives may be thrust on them against their will with consequent pressure on their lifestyle; that their intimate words and actions may be secretly monitored by private entities or individuals; and that material thus gathered may be made available globally almost instantaneously. The structure of Article 8 as it has been interpreted contains the means to condemn *ex post facto* a State's failure to provide an appropriate legal regime that would regulate potential invasions of one individual's private or family life by other individuals or entities, not forming part of the apparatus of government and pursuing essentially private interests. However, it may be that the person whose privacy or family life has been intruded upon will not become aware of a cause for complaint until

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[71] Judgment of 20 May 1999.

[72] See the Dissenting Opinion of Judges Golcuklu, Russo and Valticos in *Jersild* v *Denmark*, Judgment of 23 September 1994, Series A No.298.

years after the event, if ever. The pace of change in Article 8 jurisprudence may be indirectly determined or driven by applications brought by these other, "intruding", individuals or entities invoking freedom of expression or of association or property rights or, indeed, their own self-development as an aspect of private or family life. The case-law that would facilitate national legislatures to identify clearly their responsibilities under Article 8 to regulate the conduct of private individuals in certain areas may take longer. In the meantime there may be an important role for third party interventions before the Court by organisations representing neither the interests of a given applicant nor the interest that a Government may have in defending its own country's chosen legislative regime.[73]

## CONCLUSION

The foregoing consideration of four "old" aspects and four "new" aspects of Article 8 could lead some to consider that Convention jurisprudence has from the outset been developing in an adequately measured pace to meet the challenges of the future at any given stage. It could lead others to wonder whether the degree of protection of, for example, prisoners' rights might not be more visible at the end of the twentieth century if priority categories of issues affecting particularly vulnerable individuals could be identified sufficiently early in the consideration of a case.

In his essay "Reflections on the Eve of the Twenty-First Century"[74] Alexandr Solzhenitsyn commented:

> "Today, self-limitation appears to us as something wholly unacceptable, constraining, even repulsive, because we have over the centuries grown unaccustomed to what, for our ancestors, had been a habit born of necessity. They lived with far greater constraints, and had far fewer opportunities. The paramount importance of self-restraint has only in this century arisen in its pressing entirety before mankind."

It is clear that many of the "new" issues arising out of medical, technological and other scientific developments raise fundamental ethical questions, as was recognised by the Court in the case of *X, Y and Z* v *United Kingdom*[75]. In this respect, it is heartening to note that, while the clause "for the protection of morals" in paragraph 2 of Articles 8 and 10 has often been regarded as relating to sexual mores, some judges appear to have advocated a broader approach towards the interpretation of the word "morals" as a permissible aim for an interference with such rights, so that it may include, where appropriate, allowance for the imperatives of the historical context of a given country[76]. The contrast between the speed of change in the last

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[73] See the Concurring Opinion of Judge Pettiti in *X, Y and Z* v *United Kingdom*, note 34 above.

[74] "At Century's End" ed. Gardels N.P.; publ. 1997 Wolfhound Press Dublin; 1995 ALTI San Diego.

[75] Note 34 above.

[76] *Lehideux and Isorni* v *France*, Judgment of 23 September 1998, Reports of Judgments and Decisions 1998-VII; see dissenting Judgment of Judges Foighel and Loizou and Sir John Freeland with regard to a law concerned with offences of collaboration with the enemy.

decades in the culture of some geographical areas within the jurisdiction of the Council of Europe and the continuing relatively traditional form of lifestyle in other such geographical areas is likely to be mirrored on a wider scale in future decades. If the Court is seen to be adopting a restrained approach towards the interpretation of Article 8 in coming years this may be more a reflection of what Professor Jones, quoted at the beginning of this article, saw as a need to think afresh from time to time rather than an indication of any diminution in the standards of protection of human rights consequent upon the recent accession of many new member States to the Council of Europe.

# WOMEN AND THE HUMAN RIGHTS ACT*

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On 2 October 2000 the Human Rights Act (HRA), which incorporates elements of the European Convention on Human Rights into UK law, became fully implemented throughout the UK. The Act's explicit aim is to 'bring home' to UK subjects the rights guaranteed by the Convention by permitting their enforcement at the national, as well as the international, level. This, in turn, entails a transfer of some power from the legislature to the judiciary. British judges will be empowered to interpret existing legislation in accordance with the incorporated rights, to strike down secondary legislation inconsistent with those rights and to issue 'declarations of incompatibility' in respect of primary legislation. The legislature will not be obliged to remedy primary legislation in the face of a declaration of incompatibility, but it has accepted by all concerned that failure to take remedial action is likely to be very rare.[1]

There is a general presumption on the part of those of a liberal bent that 'rights' are, in general, a 'good thing'. The aim of this article is to challenge that presumption by examining the impact of entrenched rights (as distinct from 'normal' statutory rights such as those to be found in the Sex Discrimination (Northern Ireland) Order 1976) upon women. Given space constraints, no detailed analysis of the provisions of the HRA or of the European Convention on Human Rights will be attempted.

'Entrenched' or 'constitutional' rights are generally characterised by a level of abstraction not common to statutory rights. This abstraction, which renders them of general application, also means that this application turns upon their interpretation by the judiciary. It will be argued that judges have not, by and large, served women's interests. This has, in part, resulted from sexist assumptions embedded within the common law and translated therefrom into judicial notions of fairness and reasonableness. But other dangers inherent in entrenched rights are not unique to women, being connected with factors such as their relative disadvantage and vulnerability in the 'private' sphere.

Entrenched rights have the potential to curb the excesses of government. But they may also serve to combat progressive forces. In 1997, Ireland's Supreme Court struck down legislation which required employers to make reasonable accommodation for disabled workers on the grounds that it violated employers' constitutionally protected property rights. And the

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* As will be evident from the references throughout, this paper draws heavily on my recently published *Women Under the Law: the False Promise of Human Rights* (Addison, Wesley, Longman, 2000).

1 See Rights Brought Home: the Human Rights Bill (1997, CM 3782) (available on the world wide web at – http://www.official-documents.co.uk/document/hoffice/rights/rights.htm), para 2.10, statements by the Home Secretary Jack Straw 16 Feb 1998 (HC Debs, col. 772) and 21 October 1998 (col. 1301), and by Lord Borrie, HL Debs 3 November 1997, col.1275.

history of the US Supreme Court in thwarting remedial social legislation is well known.[2] The power given to the judiciary by the HRA does not, in theory, permit that body to override the Parliamentary will. But the interpretative obligations placed upon judges by the Act, together with the likely political impact of any declarations of incompatibility, serve radically to increase in practical terms the power of the judiciary *vis-à-vis* that of Parliament.

In order to consider some of the possible implications for women of the HRA, it is useful to consider the experience of entrenched rights in other jurisdictions as well as some of the jurisprudence relating to the ECnHR (which jurisprudence must – section 2 – be taken into account in the application of the HRA). The experience in Canada and the US is particularly instructive, not least because of the broadly liberal nature of the rights there entrenched (South Africa's post-Apartheid Constitution, by contrast, also embraces social and economic rights), but also because they stand at opposite ends of the spectrum in terms of date of entrenchment[3] and, accordingly, in their approaches to issues of discrimination and equality.

No attempt will be made, within the constraints of this article, to survey the impact of entrenched rights across the whole spectrum of women's lives in order to determine whether, on balance, entrenchment is beneficial or otherwise to them. No survey could capture the variety of possible approaches to entrenchment, of specific rights entrenched and qualifications thereto, much less the wealth of differences between women and the diverse aspects of their lives on which entrenched rights may impact. Whether, for example, the operation of Canada's Charter is, taken in the round, beneficial or detrimental to a particular woman will turn on her marital and parental status; sexual orientation; participation or otherwise in paid work and, in the case of participation, position within the public or private sector and within a female or male-dominated or gender-balanced occupational or industrial sector. It will also turn on her membership or non-membership of a trade union; her experience or otherwise of domestic violence, sexual assault or other criminal behaviour; her participation or non-participation in criminal activity and her financial position.[4] The aim of this paper is, rather, to suggest that entrenchment may not be as unmixed a blessing as those on the left tend to believe, and to point to some issues which may prove particularly problematic from a feminist perspective. In order to make this point, the impact of entrenched rights upon women as reproducers, as producers and as victims of violence will be considered.

## Constitutional rights and reproductive freedom

It is clear from the experience elsewhere that women have gained some benefits from entrenched rights. A frequently cited (though not universally accepted) example is the decision in *Roe* v *Wade* (1973)[5], in which the US Supreme Court ruled that women's access to abortion was protected by the

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[2] See further A.McColgan, *Women Under the Law*, Chapter 2.

[3] In the US, broadly the late 18th century, with those provisions of most concern to us having been embraced largely in the late 19th Century: in Canada, 1982.

[4] See McColgan, note 2 above, Chapters 4-9.

[5] 410 US 113.

constitution. Similarly, in *Morgentaler* (1988)[6], Canada's Supreme Court ruled that the Charter of Rights was breached by legislation which severely restricted access to abortion. But Germany's *Bundesverfassungsgericht* (Supreme Constitutional Court) has twice struck down restrictive abortion legislation on the grounds that, by failing to criminalise the procedure, it provided inadequate protection to the foetus which was required by the constitutionally protected right to life. And in Ireland the High Court's reading of the constitution resulted, in 1992, in an order requiring the return of a 14 year old girl from England and prohibiting further travel by her for the duration of her pregnancy. Sexually assaulted over a period of years by an adult man, she had travelled to England with her parents in order to have an abortion. Despite the Constitution's recognition of the 'equal right to life of the mother' and medical evidence of a risk of suicide and the probability of devastating injury to the girl's mental health if she were forced to carry the pregnancy to term, it was not until the matter reached the Supreme Court that the order was lifted and the girl permitted to travel abroad in order to secure an abortion a month later than would otherwise have been the case.[7]

The decision of Canada's Supreme Court in *Morgentaler* resulted in the repeal of the offending legislation which has not, to date, been replaced. This repeal was greeted by one commentator at the time as "perhaps the only unqualified good result to come from the Supreme Court of Canada yet".[8] But the impact in the US of *Roe* v *Wade* is more difficult to assess. In 1985 the *New Republic* suggested that the decision was the "worst thing that ever happened to American liberalism. Almost overnight it politicized millions of people and helped create a mass movement of social conservatives that has grown into one of the most potent forces in our democracy".[9] One *amicus curiae* in the *Roe* v *Wade* proceedings warned that "one of the most dangerous things that could happen now is that women could sit back and think that they had won". But the anti-abortion industry which developed in the US after 1973 was not matched by the activities of pro-choicers. And, while the decision struck down all state abortion legislation then in force, it was followed (and continues to be followed) by a tidal wave of restrictive statutes only some of which have been successfully challenged on constitutional grounds[10].

The political power of the anti-abortion lobby in the US is such that legislative assaults on access to abortion are easy vote winners. Although a majority of Americans still support abortion, politicians can point-score by supporting very restrictive legislation in the knowledge that it will be struck

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[6] [1988] 1 SCR 30.

[7] *Attorney General* v *X and others* [1992] IRLM 401, [1992] 1 IR 1. The Irish and German examples are, with those of the US and Canada, further discussed in McColgan, note 2 above, Chapter 4.

[8] M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Wall & Thompson Inc, 1989) p 287.

[9] 25 February 1985, cited by L. Epstein and J. Kobylka, *The Supreme Court and Legal Change: Abortion and the Death Penalty* (1992: University of North Carolina Press, Chapel Hill), p 207.

[10] See McColgan, note 7 above.

down on constitutional grounds.[11] At the same time the Supreme Court, stacked under Presidents Reagan and Bush with political conservatives, has continued to dilute the constitutional protection afforded by *Roe* v *Wade*.[12] This unholy alliance was remarked upon by Justice Blackmun, who wrote the majority decision in that case but, by the 1980s, had found himself in a minority. In *Webster* v *Reproductive Health Services* (1989), in which the Supreme Court upheld legislation which prohibited any but life-saving abortions being carried out in "any physical asset owned, leased, or controlled by [the] state or any agency or political subdivisions thereof", Blackmun protested that the majority "implicitly invites every state legislature to enact more and more restrictive abortion regulations in order to provoke more and more test cases, in the hope that sometime down the line the Court will return the law of procreative freedom to the severe limitations that generally prevailed in this country before January 22, 1973 [the date of the decision in *Roe* v *Wade*]".[13]

Abortion continues to be a extraordinarily significant election issue in the US[14] and has, at times, played a major role in judicial appointments.[15] This was most evident in the Senate Hearings concerning Clarence Thomas prior to his Supreme Court appointment. But President Bush, who was determined to have *Roe* v *Wade* overturned, did his utmost to appoint only those opposed to abortion at all levels of the judiciary. Such appointees being perhaps more inclined than others towards social conservatism, the repercussions of Bush's anti-abortion policy have been felt across the spectrum of judicial decision-making.[16]

The final point which arises in connection with abortion is one of more general application. The US Supreme Court has consistently refused to rule that the right of access to abortion (even in its 1970s heyday) is more than a negative freedom. Abortions are available under Medicaid (which provides 'medically necessary' health care for the lowest-income Americans) only where the woman's life (or, according to the political composition of the government, her health) is at stake.[17] Justice Brennan protested in his dissent in *Maher* v *Roe*, in which a majority of the Supreme Court upheld the exclusion of abortions from Medicaid, that funding childbirth, while refusing to fund abortions, "clearly operates so as to coerce indigent pregnant women

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[11] *Chicago Tribune* 2 February 1995 "support for a bill that restricts abortion will protect [politicians] from likely attacks from abortion opponents in upcoming elections". Even liberal politicians could, according to the *Tribune*, use their support for a restrictive law "to defend themselves against opposition from the Right". See also Epstein and Kobylka, note 9 above, pp 219-20, citing E. Rubin, *Abortion, Politics and the Courts:* Roe v Wade *and its Aftermath* (New York: Greenwood Press, 1987) p 131.

[12] McColgan, note 7 above.

[13] 492 US 490.

[14] McColgan, note 7 above.

[15] See R. Dworkin, *Freedom's Law*, (Cambridge, Mass: Harvard University Press, 1996), p 147.

[16] See, for example, the discussion of affirmative action below and in McColgan, note 2 above, Chapter 7.

[17] The 'Hyde amendment' to the Public Health Service Act, upheld by the Supreme Court in *Maher* v *Roe* 432 US 464 (1977) and in *Harris* v *McRae*, 448 US 297 (1980), and varying in its severity from time to time.

to bear children they would not otherwise choose to have, and just as clearly, this coercion can only operate on the poor, who are uniquely the victims of this form of financial pressure."[18] But despite continuing dissent, the Supreme Court has continued to uphold the 'right to choose' as a purely negative freedom[19] which does not entitle women to abortions carried out in publicly-funded facilities or by publicly-funded personnel, or to information about, or referrals for, abortion through family planning programmes funded by the state. [20]

The issue of funded abortions illustrates a more general point about entrenched rights. Generally enforceable only against the state, such rights are intended "to restrain government, to protect the negative freedoms of citizens – freedom from the long arm of the state"[21]. This point will be pursued further below.

## Constitutional rights and workplace equality

Abortion is generally regarded as an area in which entrenched rights have operated to the benefit of women. We have seen, above, that this is not wholly accurate. The likely impact of the Human Rights Act in this context is considered below. But another area in which women would perhaps generally be regarded as likely to benefit from entrenched rights concerns workplace discrimination. There is abundant evidence (but insufficient space here to discuss it) that women suffer from discrimination in the workplace. The latest Cabinet Office sponsored research suggests an earning gap of between £143,000 and £241,000 between similarly skilled *childless* women and men over a lifetime[22], childbearing costing women up to an additional £285 000 in earnings where they comply with the normal patterns of return for low-skilled women (£285,000), mid-skilled women (£140,000) or highly skilled women (£19,000). As the research notes, highly skilled women who retain their position in the workforce do so at very significant expense in terms of childcare costs.

The impact on workplace equality of entrenched rights has differed significantly between the US and Canada. A fundamental preliminary point concerns the application of entrenched rights generally. Whereas much of the threat to women's reproductive autonomy emanates from the state itself, with the effect that it may be constrained by vertically effective entrenched rights, most of the threat to women's workplace equality issues from the market. To the extent that women are legally prohibited from entering certain occupations, and so forth, entrenched rights can provide a basis for challenge.[23] But their role in actions against private sector employers is less

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[18] *Griffin* v *Illinois* 351 US 12, 23 (1956).
[19] *Harris, Webster and Rust* v *Sullivan* 500 US 173 (1991).
[20] *Ibid*.
[21] P. Russell, "The political purposes of the Charter: have they been fulfilled? An agnostic's report"; in P. Bryden *et al* (eds), *Protecting Rights and Freedoms: Essays on the Charter's Place in Canada's Political, Legal and Intellectual Life* (Toronto: University of Toronto Press, 1994), p 40.
[22] The size of the gap depends on whether the woman and her comparator are low-skilled (£197,000 or 37% of lifetime earnings), high-skilled (£143 000 or 12%) or mid-skilled (£241,000 or 37%).
[23] As in the US, see McColgan, note 2 above, Chapter 6.

certain. Canada's Supreme Court has adopted a very narrow approach, applying the Charter only to the activities of 'government' narrowly defined[24] and to other bodies only in relation to 'inherently governmental actions' delegated to them. It has also, and to roars of condemnation, refused to apply the Charter to the common law.[25] Thus, in *RWDSU* v *Dolphin Delivery Ltd*, that Court held that an injunction against secondary action, which was issued at common law, was not vulnerable to Charter review. The approach taken by the US courts has been more generous, constitutional protections generally being regarded as applicable to actions 'under color of law' (actions permitted, whether or not required, by law[26]) and to the common law.[27]

Canada's Charter has been applied to declare unlawful a provision restricting the size of pay increases to be awarded under legislation designed to tackle the gender-wage gap.[28] It has also been applied to prevent the repeal of a legislative provision designed to enable otherwise excluded women to benefit from such legislation. [29] These decisions are consistent with that of the Supreme Court in *Eldridge* v *British Columbia*[30] to the effect that: "once the state does provide a benefit, it [must] do so in a non-discriminatory manner".[31] But, although a number of Supreme Court justices have suggested that "a government could properly be subjected to a challenge under section15 . . . for failing to act at all"[32], such hints have yet to be followed in practice.

In *Eldridge* La Forest J, for the Court, left open the possibility that section 15 of the Charter might "oblige the state to take positive actions to ameliorate the symptoms of systemic or general inequality".[33] But in *Ferrel* v *Ontario* (1997), in which Ontario's Divisional Court rejected a Charter challenge to the repeal of proactive anti-discrimination legislation, Dilks J took the view

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[24] See *McKinney* v *University of Guelph* [1990] 3 SCR 229; *Stoffman* v *Vancouver General Hospital* [1990] 3 SCR 483.

[25] *RWDSU* v *Dolphin Delivery Ltd* [1986] 2 SCR 573, [1986] 2 SCR 573

[26] *American Federation of Labor* v *Swing* (1941) 312 US 321 (1941); *Shelley* v *Kraemer* 334 US 1 (1947); *Lugar* v *Edmondson Oil Co* 457 US 922; *Jackson* v *Metropolitan Edison Co* 419 US 345 (1974); *Lebron* v *National Railroad Passenger Corporation* (Case no. 93-1525, 1995).

[27] *Swing* , *ibid*.

[28] *Manitoba Council of Health Care Unions* v *Bethesda Hospital* (1992) 88 DLR (4th) 60.

[29] *Re Service Employees International Union, Local 204 et al. and Attorney General of Ontario, SEIU, Local 204* v *Ontario (Attorney General)*, 151 DLR 4th 273, Ontario Court (General Division). The government subsequently announced its decision not to appeal – *Toronto Sun* 8 October 1997.

[30] [1997] 3 SCR 624.

[31] *Eldridge*, *ibid*, para 73, *per* La Forest J citing *Tétreault-Gadoury* v *Canada* [1991] 2 SCR 22; *Haig* v *Canada* [1993] 2 SCR 995; *Native Women's Assn. of Canada* v *Canada* [1994] 3 SCR 627 and *Miron* v *Trudel* [1995] 2 SCR 418.

[32] Lamer CJ for the majority in *Vriend* [1998] 1 SCR 493 noted that this possibility had been left open by Heureux-Dubé J for the majority in *Haig*; by Dickson CJ in *Reference re PSERA (Alberta)* [1987] 1 SCR 995 and by La Forest J for the Court in *Eldridge*.

[33] Morden ACJO in *Ferrel* v *Ontario (Attorney General)* 1998 CRDJ 79; 1998 CRDJ LEXIS 141 (Ont CA) for the Court.

that: "The application of the Charter must be confined to government action as opposed to inaction . . . The overwhelming weight of authority negates the existence of any duty under the Charter to legislate".[34]

Ontario's Court of Appeal rejected the subsequent appeal, Morden ACJO for the Court citing, *inter alia*, Dickson J (later Chief Justice) in *Hunter* v *Southam Inc*: "[the Charter] is intended to constrain governmental action inconsistent with those rights and freedoms; it is not in itself an authorization for governmental action"[35] and La Forest J (now Chief Justice), in *McKinney* v *University of Guelph*: "This Court has repeatedly drawn attention to the fact that the Charter is essentially an instrument for checking the powers of government over the individual"[36]. Morden ACJO also pointed out that "[h]istorically, Bills of Rights . . . have been directed at government. . . While subjecting private activities directly to review under the Charter is not the same thing as interpreting section 15(1) as imposing a duty on legislatures to enact legislation to govern private activities [similar considerations apply]. . . Legislatures have flexibility and a wide range of choices. Courts, acting under the Charter, have no guidance in making their determinations of what the Charter requires of legislatures".

The limitations on the application of the Charter otherwise than to "government" very narrowly defined have served to neuter the potentially radical impact of the Supreme Court's approach to 'discrimination' under that Charter. Whereas, as we shall see further below, the US Supreme Court have adopted a very formal, conservative approach to the equality provisions (such as they are) of the US Constitution, Canada's Supreme Court embraced a substantive model of equality from the start. In *Law Society of British Columbia* v *Andrews*[37], discrimination was defined to include its indirect as well as its direct form[38] and the Court ruled that "every difference in treatment between individuals under the law will not necessarily result in inequality and . . . identical treatment may frequently produce serious inequality". In this and in subsequent cases that Court ruled that a demonstration of discrimination under section 15 requires an examination of "the larger context [in order] that a court can determine whether differential treatment results in inequality or whether, contrariwise, it would be identical treatment which would in the particular context result in inequality or foster disadvantage. A finding that there is discrimination will, in most but in perhaps not all cases, necessarily entail a search for disadvantage that exists

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[34] Ont Gen Div 9 July 1997, citing Iacobucci J in *Symes* v *Canada* [1993] 4 SCR 695 and *Board of Education of Kiryas Joel Village School* v *Grunet* (1994) 124 US 2481. See also the unanimous decision in *R* v *S (S)* [1992] 2 SCR 254, in which the Court ruled that the non-exercise of discretion by the Attorney-General (there to establish alternative programmes for young offenders) could not be reviewed under s.15 of the Charter.

[35] [1984] 2 SCR 145, p 156.

[36] Note 24 above, pp 261-263.

[37] [1989] 1 SCR 143.

[38] Justice Wilson going so far as to state that: "s 15 is designed to protect those groups who suffer social, political and legal disadvantage in our society". See also *Eaton* v *Brant County Board* [1997] 1 SCR 241 and *Eldridge*, note 30 above.

apart from and independent of the particular legal classification being challenged".[39]

The approach taken by Canada's Supreme Court has permitted it to find that unequal restrictions on the employment of male and female prison officers in, respectively, female and male prisons, did not amount to discrimination under section 15. In *Conway* v *Canada (Attorney General)*[40], male prisoners challenged their subjection to surveillance and 'frisk' searches by women guards on the grounds that male guards were not permitted to perform these functions in relation to women prisoners. La Forest J declared, for the unanimous Court, that "the historical trend of violence perpetrated by men against women is not matched by a comparable trend pursuant to which men are the victims and women the aggressors. . . the effect of cross-gender searching is different and more threatening for women than for men. The different treatment to which the appellant objects thus may not be discrimination at all". In the US, by contrast, the non-discrimination guarantee is regarded as requiring that male prison guards perform the full range of duties in female prisons with the effect that male-on-female sexual violence is commonplace throughout the prison system.[41]

The US Constitutional jurisprudence relating to discrimination has been very different. Part of this difference results from the distinct Constitutional provisions. Section 15 of Canada's Charter provides that: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability". By contrast, discrimination is regulated by the Equal Protection Clause of the 14th Amendment to the US Constitution which provides that "nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws".[42] This provision was not applied to sex discrimination until the mid-twentieth century. When it was, the Supreme Court ruled that such discrimination could be justified if it was reasonably necessary in pursuit of a permissible and important aim.[43] This is the 'intermediate standard' of scrutiny, race discrimination being subject to 'strict scrutiny' (it will be unconstitutional unless 'necessary' or 'narrowly tailored' to promote a 'compelling interest' of government) and other forms of discrimination to the 'relaxed' standard of review (most classifications are acceptable if they are not totally irrational or utterly arbitrary).

The US Supreme Court has refused to categorise pregnancy-related discrimination as sex discrimination. But perhaps the most significant

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[39] *Turpin* [1989] 1 SCR 1296. *Cf Thibaudeau* v *Canada* [1995] 2 SCR 627; *Miron*, note 31 above and *Egan* v *Canada* [1995] 2 SCR 513. Most recently see *Law* v *Canada* [1999] 1 SCR 497 and *Lovelace* v *Ontario* 20 July 2000, available at http://www.lexum.umontreal.ca/csc-scc/en/rec/html/lovelace.en.html.

[40] [1993] 2 SCR 872.

[41] The Human Rights Watch *Global Report on Women's Human Rights* (New York: Human Rights Watch, 1995), Chapter 3.

[42] Applied by analogy to federal action through the due process clause of the 5th Amendment.

[43] S15 is subject to s1's provision permitting such "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

limitation on the Equal Protection Clause lies in its non-application, as interpreted, to unintentional indirect discrimination.[44] An intention to discriminate requires, not merely that the body imposing the rule knew of its disparate impact, but also that the decision maker "selected or reaffirmed a particular course of conduct at least in part "because of", not merely "in spite of", its adverse effects upon an identifiable group."[45] Even if an intention to discriminate was one of the reasons behind the imposition of a disparately-impacting practice, the 14th Amendment will be violated only if the rule would not have been imposed even in the absence of this motive.[46] Finally a number of Supreme Court decisions require that, when evaluating the evidence to ascertain whether discriminatory intent has been established, each be considered separately and discriminatory intent be found only if this can be done on the basis of one or more factors *viewed in isolation*.[47] The application of the Equal Protection Clause to direct discrimination alone "means if men don't need it, women don't get it".[48]

The equality provisions of the US Constitution fall well short, in their application, from those of Canada's Charter of Rights. This is evident above but even more so in the context of 'affirmative action'. The relationship recognised by Canada's Supreme Court between 'discrimination' and 'disadvantage' has been mentioned above. Further, section 15(2) of the Charter provides that section 15(1) does not apply to "any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of . . . sex".

Section 15(2) has not been applied by the Supreme Court. But in 1987, prior to its implementation, the Supreme Court gave its stamp of approval to affirmative action in *Action Travail des Femmes* v *CNR* (1987), in which it upheld an order of Canada's Human Rights Commission that at least 25 per cent of appointees to traditionally male, blue-collar jobs be women until the proportion of women in that sector of the workforce reached a minimum of 13 per cent (this being the average level of participation of women in such jobs nationwide).[49] The Supreme Court accepted that 'systematic discrimination' (defined as "discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination") had occurred and that the programme ordered was "essential to combat [its] effects". According to that Court, the Commission had to be given generous scope to remedy such systemic discrimination: "to render future discrimination pointless, to destroy discriminatory stereotyping and to create the required 'critical mass' of target group participation in the workforce, it

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44 *Washington* v *Davies*, 426 US 229 (1976).
45 *Massachussetts Personel Administrator* v *Feeney* 442 US 256 (1979).
46 *Village of Arlington Heights* v *Metropolitan Housing Development Corp* 429 US 252 (1977).
47 *City of Mobile* v *Bolden* 446 US 55 (1980). *Cf. Rogers* v *Lodge* 458 US 613 (1982).
48 Catherine MacKinnon, cited in K. Mahoney, Charter Equality: The First Twelve Years, paper presented to the Warwick Legal Research Institute *Rights and Democracy in Canada and the UK* Conference, 17 May 1997, p 13.
49 [1987] 1 SCR 1114.

is essential to combat the effects of past systemic discrimination. . . specific hiring goals. . . are a rational attempt to impose a systemic remedy on a systemic problem".[50]

More recently, in *Lovelace* v *Ontario*, the Supreme Court ruled (*per* Iacobucci J) that section 15(2) could best be understood as "confirming the substantive equality approach of s 15(1)", although he did not "foreclose possibility that s 15(2) may be independently applicable to a case in the future . . . claimants arguing equality claims in the future should first be directed to s 15(1) since that subsection can embrace ameliorative programs of the kind that are contemplated by s 15(2)."

The approach taken by the US Supreme Court to affirmative action has been significantly different and the Equal Protection Clause, having failed significantly to reduce the disadvantage suffered by women and ethnic minorites in the workplace, threatens to undo legislative attempts to combat systemic discrimination by positive means. In *Regents of the University of California* v *Bakke* (1978)[51], the Supreme Court struck down a quota-based admissions programme operated by the university's medical faculty in an attempt to ensure the admission of ethnic minority candidates into medical training (as Justice Brennan pointed out in his dissent, minority applicants were disadvantaged by segregated schooling).[52] The minority judges took the view that strict scrutiny of race discrimination was inappropriate when applied to remedial action. The majority disagreed.

*Bakke* left open some forms of affirmative action. Justice Powell, who joined the bare majority, accepted that remedial action could pass muster under the strict scrutiny test (this being a race case) where it was directed at past discrimination by the particular body, and that universities could have a compelling interest in taking steps to secure a diverse student group, although he demanded 'narrow tailoring' of means to this end and drew the line at rigid quotas to achieve this purpose. The approach of the Supreme Court to affirmative action has wavered over time but what can be said with certainty is that the US Constitution has stood as an impediment to attempts radically to tackle systemic disadvantage. In recent years the approach of that Court appears to have hardened, *Adarand Constructors* v *Pena* (1995) being regarded by many as having delivered a mortal wound to the future of affirmative action programmes.[53]

## Violence and Entrenched rights

One of the most problematic aspects of entrenched rights, from a feminist perspective, concerns their application in the criminal context. Women are, although perhaps less likely to be victim to violent crime than men, disproportionately likely to be the victim rather than the perpetrator of such crime. Constitutional safeguards of the rights of suspects and defendants

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[50] *Ibid*, p 1145 *per* Dickson LCJ.
[51] 438 US 265 (1978).
[52] Prohibited by the Supreme Court in *Brown* v *Board of Education* 347 US 483 (1954).
[53] Case no. 93-1841, 1995. For discussion of the repercussions of this decision and of the general trend of Supreme Court decisions on the affirmative action issue see McColgan, note 2 above, Chapter 7.

therefore have particular implications for women who are more likely to suffer their constraints then to benefit from them. This is not to argue that such safeguards should not be applauded, rather simply to point out a gender issue related to them. Where this gender issue becomes particularly significant is where those safeguards are applied in a manner which is intrinsically hostile to the interests of women, that is, in the area of sexual offences.

Sexual and other violence against women, generally carried out by men known to them, is endemic. In 1998 the British Medical Association estimated that one in four women in the UK has been the victim of domestic violence.[54] In London in 1982, Women Against Rape found that one woman in every six had been raped, and that a further one in five had suffered an attempt.[55] One in seven married women had been raped by their husbands. The number of reported rapes has been increasing (8,500 in 1999 by comparison with 1,850 in 1985).[56] The *Observer* reported on 30 July 2000 that the conviction rate had "fallen to a record low", citing Home Office statistics to the effect that only 634 (7.5 per cent) of the rapes reported to the police in 1999 resulted in convictions. This is not to say that 7.5 per cent of women raped see their attackers convicted. Of the 50 000 women who report rapes to the Rape Crisis Federation each year, only 7 per cent contact the police.

The attrition rate for rape, both at the trial stage and before, is very high. In particular, women find it next to impossible to have their intimates convicted and women whose lifestyles and sexual behaviour do not fit the stereotype of chaste Victorian wife or virgin are especially disadvantaged. The courtroom significance of factors personal to the rape complainant feed back into the pre-court proceedings and, no doubt, explain in part the high 'no-criming' and other non-prosecution decisions in rape complaints where the alleged offender is identified (around 70 per cent in 1999).[57]

Recognition of the impact on the conviction rate of evidence about women's sexual behaviour has resulted in legislative attempts to curtail the introduction of such evidence in many jurisdictions. In both Canada and the US, the constitutionally entrenched rights of defendants have resulted in the striking down of some such provisions. In *Seaboyer*[58], for example, Canada's Supreme Court ruled that the 'rape shield' provisions of the Criminal Code breached the accused's right to a fair trial. In doing so, and despite her repeated assertions that the sexual conduct of complainants was relevant neither to their credibility nor, in general terms, to the likelihood of their consent, a number of the situations in which Madam Justice McLachlin, for the majority, regarded sexual history evidence as potentially relevant

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[54] *Guardian*, 7 July 1998.
[55] R. Hall, *Ask Any Woman: London Inquiry into Rape and Sexual Assault* (Bristol, Falling Down Press, 1985).
[56] *Observer* 30 July 2000
[57] *Ibid*.
[58] [1991] 2 SCR 577.

relied in part upon these very "outmoded and illegitimate notions" concerning credibility and consent.[59]

Canada's Charter was put to further use by the defendant in *Osolin* in which the Supreme Court ruled that the defendant's right to a fair trial required that he be permitted to cross-examine the complainant on mental health records which had previously been admitted into evidence on the issue of her competence to testify.[60] In *O'Connor*, the same Court ruled that the complainant had no privacy interest in counselling and medical records already disclosed to the prosecution and that relevance to the defence "must be presumed where the records are in the Crown's possession."[61] Subsequently in *Carosella* (1996) the Court stayed proceedings against a man charged with sexual assault.[62]

Notes taken of an interview between the complainant and a counsellor at a sexual assault clinic had been destroyed in line with the policy of the clinic. The stay was granted on the basis that the destruction of the notes "had seriously prejudiced the accused by depriving him of the opportunity to cross-examine the complainant as to her previous statements relating to the allegations she made" and that, accordingly, his "Charter right to make full answer and defence had been breached". The sexual assault centre was not an agency bound by the Charter and it was under no obligation to make, much less to retain, records of its interviews with sexual assault complainants. Further, as was pointed out at the time of the original stay of prosecution, the effect of the order was to "requir[e] those counselling the victims of sexual abuse to become evidence gatherers – investigators – for the defence. . . Services and relationships that were established to. . . assist survivors of sexual abuse in healing, are being subverted as they are drawn increasingly into the litigation process".[63] The logic of *Carosella* applies in equal measure to a diary allegedly kept but subsequently destroyed or mislaid by the complainant. Canada's defence lawyers are now subpoenaing journals, as well as "counseling notes, employment and academic records, medical files and more".[64]

Seventeen months after the decision in *O'Connor*, Canada's Parliament established a statutory procedure for disclosure of personal records, whether those records are in the hands of the prosecution or not.[65] In *Mills* (1997), Alberta's Court of Queen's Bench struck down the legislative restrictions on disclosure on the grounds that they were inconsistent with the Supreme Court's decision in *O'Connor.*[66] The Supreme Court ultimately overruled

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[59] For further discussion of this see McColgan, note 2 above, Chapter 9 and "The relevance of sexual history evidence" (1996) 16 *Oxford Journal of Legal Studies* 275.

[60] [1993] 4 SCR 595.

[61] [1995] 4 SCR 411.

[62] [1997] 1 SCR 80.

[63] J. Gilmour, "Counselling records: disclosure in sexual assault cases", in J. Cameron (ed), *The Charter's Impact on the Criminal Justice System* (Scarborough, Ontario: Carswell, 1996), 239, pp 256-7.

[64] *Chatelaine*, October 1997.

[65] Unless the complainant has expressly waived privacy in records in prosecution hands.

[66] (1997) CRR Lexis 97, Alberta QB. See also *Lee*, (1997) CRR Lexis 100, Ontario.

that decision and confirmed the constitutionality of the legislative restrictions.[67] Nevertheless, the overall effect of Charter jurisprudence in this area has been to the significant detriment of those who suffer sexual assault.

It is not here suggested that the right to a fair trial can justifiably be infringed. But the question which arises concerns the courts' conception of what a 'fair trial' demands. In *Mills*, McLachlin and Iacobucci JJ, for the majority, evinced an understanding of the section 7 right to a fair trial which took into account the complainant's interests in privacy and (given the relationship between privacy of therapeutic records and the complainant's 'mental integrity', her) security of the person:

> "under section 7 rights must be defined so that they do not conflict with each other. The rights of full answer and defence, and privacy, must be defined in light of each other, and both must be defined in light of the equality provisions of section 15 . . . the first question to ask is how to define full answer and defence, privacy, and equality in this context, and not how they may be justifiably limited."

The Court went on to decide that the legislative provisions adequately safeguarded the accused's section 7 rights by permitting disclosure of information which directly bore on the right to make full answer and defence. But in *Seaboyer* and in *O'Connor*, this approach had been taken only by the minority. The decisions in these cases and in *Carosella* cast doubts on the ability of the courts to revisit common law notions of fairness *taking into account* the constitutionally protected rights of the complainant. When it comes to the 'balance' between the 'right to a fair trial' and the complainant's interests in privacy, security of the person or the equal protection of the law, the accused's 'right to a fair trial', understood decontextualised from the rights of the complainant, can operate to trump any other considerations. Thus, only evidential or procedural restrictions which do not infringe upon the defendant's fair trial rights as those rights are understood *under the common law* are upheld.[68]

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[67] [1999] 3 SCR 668.

[68] *R* v *L (DO)* [1993] 4 SCR 419; *Levogiannis* [1993] 4 SCR 475. See also *Canadian Broadcasting Company* v *Attorney General for New Brunswick* [1996] 3 SCR 480. *Cf* , on similar facts, the US decisions in *Coy* v *Iowa* (1988) 487 US 1012. See also (on sexual history evidence), *Shaw* v *United States* 892 F Supp. 1265, *Hoke* v *Thompson* 589 F Supp. 206, *US* v *Fuller* 589 F. Supp. 206, *United States* v *Kasto*, 584 F.2d 271, *Doe* v *United States*, 666 F 2d 48, *Darrow* v *Alabama* 451 So 2d 394 (1984), *People* v *Khan* 80 Mich. App. 605; 264 NW 2d 360; *Massachussets* v *Elder* 389 Mass 743 (1983), *Hubbard* v *State* 271 Ark 937 (1973); *Commonwealth* v *Black* 337 Pa Sup Cut 548 (1985), *Louisiana* v *Small* CA 2nd Cir, Lou 693 So 2d 180 (1997) and *Giles* v *Maryland* (1967) 386 US 66 (1967). No Supreme Court decision has yet been reached as to the constitutionality of absolute privilege accorded to the private records of complainants, but that Court, too, has generally assessed the constitutionality of statutory privileges by weighing the rights of the accused *as perceived by the judges* against the public interests served by the privilege: *Pennsylvania* v *Ritchie*, 480 US 39 (1987); *United States* v *Nixon*, 418 US 683 (1974); *Davis* v *Alaska*, 415 US 308 (1974) and *Washington* v *Texas*, 388 US 14 (1967). See further Hogan M, "The constitutionality of an absolute privilege for rape crisis counseling" (1989), 30 *Boston College Law Review* 411,

The procedural aspects of sexual assault trials have been focused upon here. But the damage wrought by entrenched rights has not been confined to this area. In *Hess and Nguyen*[69], Canada's Supreme Court ruled that statutory rape provisions which denied a defence to those who claimed mistake in relation to the age of an under-fourteen year old girl breached the Charter (Madam Justice McLachlin dissenting, in part, on the ground that: "all that a person need do to avoid the risk of [conviction] . . . is to refrain from having sex with girls of less than adult age unless he knows for certain that they are over fourteen.") And in *Daviault* [70] the Court recognised intoxication as a defence to crimes including sexual assault.[71] Alcohol plays a significant role in sexual assaults as it does more generally in crimes against women, and many men who assault women seek to explain and excuse their actions by reference to intoxication, as they also seek to excuse and explain their actions by reference to the behaviour of the women, and, indeed, of the children they attack.[72]

Women as victims of violence have not generally been well served by constitutionally entrenched rights. These rights do not bind women's abusers. But they can limit the ability of the state to intervene on behalf of the victims of violence by safeguarding the interests of the accused with scant regard to those of the accuser. 'Rights' enable defendants to attack every legislative provision designed to ameliorate the position of the victims of gender-related crimes such as rape. And even where they involve challenges to apparently sex-neutral rules concerning the mental elements of crime (as, for example, in *Daviault*, in which the accused successfully argued that the inference of *mens rea* from drunken state violated his rights), they also appear peculiarly popular in cases involving male-on-female violence.

I have pointed out elsewhere, in relation to English criminal cases, that there is remarkably little to distinguish the nature of violence in cases in which men plead automatism (whether sane or insane) from those in which 'normal' sane and conscious men do violence to women (in D Nicholson and L Bibbings (eds), *Feminist Perspectives on Criminal Law* (forthcoming). Many of the authorities on automatism involve assaults by men on female intimates, the assaults conforming to the typical pattern of male violence against women. This being the case, the opening up of the scope for challenge to the rules applying to these and similar defences poses significant risks for women.

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pp 470-74; White W, "Evidentiary privileges and the defendant's constitutional right to introduce evidence" (1989) 80 *Journal of Criminal Law and Criminology* 377, at pp 423-25.

69 [1990] 2 SCR 906.

70 [1994] 3 SCR 63.

71 See also the four-strong dissent in *Stone* [1999] 2 SCR 290 in which the accused challenged the refusal of the trial judge to leave to the jury a plea of non-insane automatism brought on, it seems, by his wife's insulting words. He had stabbed her 47 times with a six-inch hunting knife before disposing of her body, arranging his affairs and fleeing to Mexico.

72 See D. Scully and J. Marolla, "Convicted rapists' vocabulary of motive: excuses and justifications", *Social Problems* (1984) vol. 31(5), p 530; D. Scully, *Understanding Sexual Violence: a Study of Convicted Rapists* (Boston, Unwin Hyman, 1990).

*Daviault* just happened to involve a sexual assault as did *C*, *Bjordal*, and *Jensen*[73], in which the defendants based appeals on *Daviault*; and *Brenton*, in which the Supreme Court of the Northwest Territories ruled that federal legislation which sought to reverse the decision in that case violated the Charter.[74] In *Simpson*, and in *Thomas*, men who had killed cohabitees appealed on the strength of *Daviault*.[75] So, too, did the defendant in *Tom* who had raped and killed a prostitute.[76] Of the 18 reported '*Daviault*' cases (all of which involved male defendants), five concerned sexual assaults by men on women, three the deaths of the defendants' (female) cohabitees, one of a prostitute and one a serious assault on the defendant's mother.[77] In one case the homicide victim was male as was an assault victim[78], the other cases involving driving offences (three[79]), forced entry (one[80]) and two cases in which the identity of the victim was unclear from the report[81]. Further, in 1997 it was reported that the first post-*Carosella* case in which a stay was requested as a result of the unavailability of evidence involved a sexual assault.[82] In the same year it was pointed out that women were continuing to plead guilty to the manslaughter of their abusive partners despite the decision of the Supreme Court in *Lavallee* which eased the path to acquittal in these cases, by recognising that the reasonableness of defensive force had to be assessed taking into account factors specific to battered women.[83]

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[73] Respectively, Ontario CA 40 WCB 2d 419; British Columbia CA 33 WCB 2d 182, Ontario CA 30 WCB 2d 479. See also *Stanford* Ontario Court (Provincial Division) 27 WCB 2d 248, in which *Daviault* was raised at first instance.

[74] 44 WCB 2d 48. A similar decision was reached by Ontario's Supreme Court in *Dunn* 1999 CRDJ 441, which involved very severe male-on-male violence.

[75] Respectively, British Columbia CA 42 WCB 2d 235, Supreme Court of Canada [1998] 3 SCR 535. See also *Tipewan* Saskatchewan QB 1998 Sask. D. Crim. LEXIS 284, in which the defence was put forward at trial stage.

[76] British Columbia CA 39 WCB 2d 457. See also *Royer* [1996] 2 SCR 169 in which the defendant unsuccessfully tried to rely on *Daviault* on appeal from a conviction of murdering a 14 year old girl. According to the *Toronto Star* 13 October 1995, 'Royer . . . boiled a pot of water and threw it on the [girl and her] mother. . .as they lay in bed reading. He then took a kitchen knife and stabbed them.'

[77] *Levy*, Nova Scotia CA 29 WCB 2d 461.

[78] Respectively, *Misquadis* Ontario Court (Provincial Division) 27 WCB 2d 4 and *Frechette* British Columbia CA 1999 41 WCB 2d 91.

[79] *DeVingt* 43 WCB 2d 448, *Morey*, Ontario Court (General Division) 39 WCB 2d 225 and *Byers*, Saskatchewan Provincial Court 29 WCB 2d 136.

[80] *O'Flaherty*, Ontario Court (Provincial Division) 26 WCB 2d 582.

[81] *McShane* Ontario Court (Provincial Division) 30 WCB 2d 10 - criminal harassment and *Wickstrom* British Columbia CA 28 WCB 2d 384 (attempted murder).

[82] *The Lawyers Weekly* 11 April 1997 (Canada), discussing *R* v *Mitchell*. The application was rejected and the rejection upheld by British Columbia's Court of Appeal, the decision of which is available at: http://www.courts.gov.bc.ca/CA/1998/ca-crimlaw.htm

[83] *The Lawyers Weekly* 4 April 1997, reporting the results of a federal government review conducted by Ontario Provincial Court Judge Lynn Ratushny: "In its examination of more than 50 cases, the Self-Defence Review discovered that some women who had viable self-defence or provocation claims felt severely pressured to plead guilty to manslaughter–rather than risk a conviction of second–degree murder, with its mandatory sentence of life imprisonment without eligibility for

Again, no suggestion is made that fair trials should be jeopardised. But 'fairness' is an issue determined by the very courts whose creature – common law – ill-serves the interests of woman, particularly women as victims of sexual violence. 'Fairness', it seems, often operates as a one-way street and attempts made to place the [usually female] victims of sexual assault in a similar position to that of the victims of unisex violence are thwarted by the tendency of entrenched rights to privilege traditional judicial perceptions of relevance over those which are the result of conscious attempts to eradicate discrimination from the law.

Women in Canada have seen a succession of cases rendering the prosecution and conviction of alleged rapists ever more difficult and providing a defence of intoxication, to men accused, *inter alia*, of rape and domestic assault. And in the US, while constitutional guarantees have not enabled women to challenge the inadequacies of the law relating to rape (its historical non-application to husbands, requirements for 'utmost resistance', and so forth), they have permitted defendants to have women's sexual history evidence admitted in court in the face of legislative prohibitions on this practice, and to gain access to counselling and other records even where those records have been accorded absolute privilege by statute. One of the primary reasons for imbalance is the traditional view of the criminal defendant as a vulnerable individual pitted against the might of the state. While this view is frequently accurate, it does not capture the private violence to which women (and children) are subjected. The extent of this violence is only now being realised, and the entrenchment of rights can serve to ossify legal rules in line with perceptions of fairness embedded in the common law.[84]

## THE HUMAN RIGHTS ACT

The above survey is intended only to raise questions about the application of entrenched rights in general, and their application to women in particular. The main points which have arisen concern the approach taken (by the entrenched provisions and the judges applying them) to 'discrimination' and/or 'equality'; the tendency of entrenched rights to apply exclusively in respect of 'government', and to 'protect the negative freedoms of citizens', rather than to "alter power relations, redistribute wealth, or promote social welfare";[85] and the relationship between constitutional judicial powers and the values and attitudes of the common law.

As far as the first is concerned, the approach to discrimination determines issues such as the constitutional approach to questions such as the legality of indirect discrimination and of affirmative action (not to mention the test for

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parole for 10 years". This pressure was particularly acute for the mothers of young children

[84] Lord Lester remarked in the House of Lords Committee stages of the Youth Justice and Criminal Evidence Bill, 1 February 1999, col. 1394, that "I love my colleagues from the criminal Bar, but I am bound to say that I find them somewhat conservative when it comes to doing anything to change the traditional elements of evidence and procedure in criminal trials".

[85] Russell, note 21 above, pp 40-1: "The Supreme Court's interpretation of the Charter has minimized its impact on social and economic relations", (citing *Dolphin Delivery Ltd*, *Reference re Public Service* [1987] 1 SCR 313 and *Irwin Toy* [1989] 1 SCR 927) - see further McColgan, note 2 above, Chapter 6.

justification of discrimination). The second point highlighted gives rise to difficulties in securing access to meaningful, usable rights as distinct from those which exist only in theory, and leads to problems in relation to attempts by the state to ameliorate the effects of private actions, such as entrenched employment-related discrimination. Even where legislatures (not being obliged to) act to improve the position of disadvantaged groups (whether by affording women pregnancy rights, embracing affirmative action or restricting the use of sexual history evidence in rape trials), entrenched rights can be relied upon to challenge those improvements.

The third issue raised is particularly problematic in the criminal law context. One US commentator, writing specifically about the implications of the Constitution for the admissibility of sexual history evidence, remarked that: "[t]he best method to determine whether admission [of any particular evidence] is required by the Constitution is to apply the jurisdiction's standard rules of evidence to the proffered . . . evidence. Because standard rules of evidence are premised on general principles developed over many years, exclusions of evidence under those rules are almost always constitutionally justified".[86] But these rules may themselves be tainted by discrimination and prejudice (such as, for example, the traditional mistrust of sexual assault complainants), in which case constitutionally protected rights serve merely to perpetuate the discrimination suffered by the traditionally disadvantaged. This is considered further below, when we consider the likely implications for women of incorporation. First we address the more general points concerning the interpretation of 'discrimination' and the issues of state action/ positive obligations under the ECnHR and the HRA.

## Discrimination

Turning to the Human Rights Act itself, the approach incorporated from the European Convention to 'discrimination' is less than satisfactory. It need hardly be reiterated here that the Convention contains no free-standing prohibition on discrimination, Article 14 providing only that: "[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status". Article 14 does not require the violation of another right under the Convention in order to come into operation[87] but "there can be no room for [the] application [of Article 14] unless the facts at issue fall within the ambit of one or more" substantive Articles.[88]

The next point to make about Article 14 is that its concept of discrimination is not as sophisticated as that embraced by EC law. Whereas indirect discrimination is well developed as a matter of EC law, alleged violations of

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[86] D. Haxton, "Rape shield statutes" (1985), *Wisconsin Law Review* 1219, pp 1271-72, cited by L'Heureux-Dubé J in *Seaboyer*, note 58 above.

[87] *Abdulaziz, Cabales, and Balkandali* A 94 (1985), p 35. This was recognised also by the Commission in *X* v *Federal Republic of Germany* DR 18 (1980) 216.

[88] *Abdulaziz, ibid*; *Rasmussen* (1984) A 87, p 12.

Article 14 generally involve direct and overt discrimination[89]. In the *Belgian Linguistics* case the ECtHR suggested that Article 14's prohibition extended to the 'effects' as well as the 'aims' of legislation – that is, to indirect as well as direct discrimination.[90] But Harris *et al* suggest that "the burden upon the applicant to establish that it exists is severe" and, as we shall see below, the justification of such discrimination is relatively easy.[91]

Direct, as well as indirect, discrimination can be justified under Article 14. This is inevitable given the wide and inexhaustive grounds covered by Article 14, but it has reduced the protective potential of that provision in the context of sex discrimination. In the *Belgian Linguistics Case* the ECtHR ruled that Article 14 is violated by discrimination having "no objective and reasonable justification", discrimination in pursuit of a "legitimate aim" being justified unless it was "clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realized".[92] Under EC law, by contrast, the burden is on the alleged discriminator to justify indirect sex discrimination as "correspond[ing] to a real need, appropriate with a view to achieving the objectives pursued and necessary to that end"[93]. Finally, Article 14 permits the 'remedy' of discrimination by levelling-down. So, for example, when in *Abdulaziz* Britain's immigration rules were found to violate Articles 14 and 8 (by providing less favourable treatment to the spouses and fiancé(e)s of

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[89] Although, as D. Harris *et al* point out (*Law of the European Convention on Human Rights* (London: Butterworths ,1995), pp 476-477) "the "badge" of differentiation relied on in the legislation or decision . . . may be challenged by the applicant as not being the "real" reason for distinguishing him from others". Having said this, the Court generally gives "short shrift [to] . . . claims attributing covert and discreditable motives to governments" (*Ibid*, pp 477, citing *Abdulaziz*, note 88 above, and *Handyside* v *UK* (1976) A 24).

[90] (1968) A 6, 1 EHRR 252.

[91] Note 90 above. *Abdulaziz* (note 88 above), for example, involved a challenge to an immigration rule which required that fiancés had previously met in order that the non-patrial be permitted access to the UK. The rule disproportionately disadvantaged those from the Indian sub-continent where arranged marriages were particularly common. In deciding that the rule was not discriminatory, however, the Court ignored its impact and examined only its aim (the prevention of bogus marriages). See Harris, pp 477-8. Harris also discusses *X* v *Ireland* (1978) A 25, in which the Court did not examine why no Loyalists were interned beyond the Government's statement that their activities were directed differently.

[92] Note 90 above. In the *Belgian Police* and *Swedish Engine Drivers* cases (respectively, (1975) 1 EHRR 578 and (1975) 1 EHRR 617) the Court took an even more restricted approach to Article 14, asking only whether the treatment at issue had a justified aim in view or whether the authorities pursued "other and ill-intentioned designs. According to van Dijk and van Hoof (*Theory and Practice of the European Convention on Human Rights* (2nd, ed) (The Netherlands: Kluwer, 1990), pp 545-6): "Article 14 has been deprived of much of its meaning, since only those inequalities for which no objective and reasonable justification can be found are considered to conflict with it".

[93] *Bilka-Kaufhaus*, *Bilka-Kaufhaus GmbH* v *Weber von Hartz* (case C-170/84) [1986] ECR 1607. See also the tendency, discussed by van Dijk and van Hoof, *ibid*, pp 545-6, to overlook the discriminatory nature of rules in considering the justifiability of their aims.

patrial women than patrial men), Britain responded by withdrawing the more favourable treatment from the latter.[94]

Section 2 of the Human Rights Act 1998 provides that, in determining a question which has arisen in connection with a Convention right, courts and tribunals 'must take into account' the jurisprudence of the ECtHR and the ECmHR. This does not require that the domestic courts follow such jurisprudence – they could, of course, adopt a more generous approach than the Convention organs to the protection of Convention rights where no conflicting right is at issue. But the domestic courts are certainly not required to apply the EC approach to discrimination to Human Rights Act litigation. And, even in the unlikely event that they were minded so to do[95], they might well be deterred by the fact that, although a disgruntled plaintiff can challenge domestic interpretation before the ECtHR, the respondent is unlikely to be able so to do. The State appears before the ECtHR only as respondent, the jurisdiction of that court being limited to breaches by Contracting Parties to the Convention (all of which are States). And even where the Human Rights Act is called into play in cases not involving the state (of which see more below), the respondent who wished to challenge an allegedly over-wide interpretation of the Convention rights could not do so unless s/he could point to another Convention right allegedly violated by this interpretation.

## State Action/ positive obligations

We saw, above, that entrenched rights generally restrain rather than require state action, and are generally enforceable only against the State. Certainly, only States can appear as respondents before the ECtHR. But some of the Convention rights are defined in more positive terms (Article 2 stating that '[e]veryone's right to life shall be protected by law'; Article 8 that '[e]veryone has the right to respect for his [sic] private and family life, his [sic] home and his [sic] correspondence'). Certainly, the Convention organs have required positive action by Contracting Parties (in *Airey*[96], the provision of practical access by way of financial assistance to particular litigants, in *National Union of Belgian Police*, an obligation to hear, though not necessarily to consult with, unions[97]). And in *X* v *Federal Republic of Germany* (1980) [98] the Commission accepted that Contracting States which chose to act in areas covered by the Convention guarantees were obliged to do so without discrimination.[99]

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[94] See P. Gardner and C. Wickremasinghe, England and Wales and the European Convention, in B. Dickson (ed) *Human Rights and the European Convention* (London: Sweet & Maxwell, 1997), p 83.

[95] See A.McColgan, *Equal Pay: Just Wages for Women* (OUP, 1997) Chapters 3-5 and *Discrimination: Text, Cases and Materials* (Hart, 2000, forthcoming), *passim*, for critical discussion of the judicial approach to discrimination law.

[96] (1981) A 41, 13 EHRR 622.

[97] (1975) A 19. See also *Swedish Engine Drivers' Union* (1976) A 20, *Marckx* (1979) A 31, 2 EHRR 330, *B* v *France* (1994) A 232-C, 16 EHRR 1. Some measure of positive obligation was accepted also in *Abdulaziz*, note 87 above, *Rees* (1986) A 106, 9 EHRR 56 and *Cossey* (1990) A 184, 13 EHRR 622.

[98] Note 87 above.

[99] See the Canadian approach discussed above.

The positive obligations recognised under the Convention extend also to the provision of some measure of protection against interference by private persons with Convention rights. In *Young, James and Webster* v *UK*[100], the ECtHR accepted that Article 11 (freedom of association) required protection from interference by private parties.[101] In *X and Y* v *Netherlands*[102] a similar conclusion was reached in respect of Article 8 and in *A* v *UK* the Court ruled that Article 3 (the right not to be subjected to degrading and inhuman treatment) was breached by a failure on the part of the state to protect from inhuman and degrading treatment at the hands of a private individual.[103]

As for the HRA itself, section 6 renders it unlawful for a 'public authority' to act incompatibly with a Convention right (unless bound so to do by primary legislation) and section 7 permits legal actions to be brought under the Act against public authorities (and public authorities alone). But the approach taken by the HRA is wide in two significant respects. First, courts are defined as 'public authorities' and are, therefore, bound to act compatibly with Convention rights unless bound by primary legislation to do otherwise. This has profound implications for the development of the common law, while section 3(1) imposes an express obligation upon the courts "[s]o far as it is possible to do so", to "read and give[] effect to" primary and subordinate legislation "in a way which is compatible with" the Convention rights incorporated.[104] Secondly, section 6(6) of the HRA expressly defines the 'acts' of public authorities which must not be incompatible with Convention rights to include omissions, although the omissions thus covered do not extend to a failure to legislate.

## Implications of incorporation

### *Reproductive freedom*

Turning to the possible implications of implementation on some of the substantive areas considered above, a number of points can be raised. The incorporation of Article 2 will provide scope for challenge to the existing abortion regime. The ECtHR has yet to determine finally whether 'the right to life' extends to the foetus.[105] The Commission has considered a number of cases involving abortion, upholding restrictive abortion legislation in *Brüggeman and Scheuten* v *Federal Republic of Germany* (1977)[106] and rejecting (on the facts) a challenge to Great Britain's Abortion Act 1967 in

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100 Appl. 7601/ 76 (1977) *Yearbook* XX 520.

101 See also *Belgian Police* case, note 93 above; and *Plattform "Ärzte für das Leben"* v *Austria* 13 EHRR 204 on freedom of assembly.

102 (1985) A 91.

103 23 September 1998, available on the ECHR homepage: http://www.dhcour.coe.fr/.

104 See Schedule 1 for those included and McColgan, note 2 above, Chapter 10 for discussion of the omissions. For the controversy concerning the extent of the Human Rights Act's 'horizontal' application see R. Buxton, The Human Rights Act and Private Law (2000) 116 *Law Quarterly Review* 48, H Wade, Horizons of Horizontality (2000) 116 *LQR* 217, M. Hunt, The Horizontal Effect of the Human Rights Act [1998] *Public Law* 423.

105 See *Open Door and Dublin Well Woman* v *Ireland* (1993) 15 EHRR 244.

106 (1976) *Yearbook* XIX 382, (1978) 10 DR 100.

*Paton* v *United Kingdom* (1980)[107] while refusing to state definitively, as yet, whether the right to life protected under Article 2 extends to the foetus.[108] A wide margin of appreciation is accorded to the Contracting States in this matter. But while the possibility remains that Article 2 extends to the foetus, incorporation may well spark a spate of attempts by putative fathers to prevent terminations. The British courts have tended to take a robust approach in these circumstances[109]. Armed with a possible right to life of the foetus, this stance might change. While the current Government has made it clear, in the House of Commons on October 21 1998, that abortion is one of the areas in which it might well chose not to act on a declaration of incompatibility, restrictive judicial interpretations of the Abortion Act may follow incorporation. Further, any 'right to life' of the foetus may well tip the balance, post-viability, in cases where a woman's views on the appropriate method of childbirth differ from those of her doctors.

In theory, if not always in practice, English common law upholds the right of pregnant women to bodily autonomy.[110] There have been a number of cases in which women have been subjected to actual or threatened caesareans by court order[111] and there is significant potential for abuse of the requirement that a patient must be 'competent' in order to veto medical opinion.[112]

In *Re MB* (1997) the Court of Appeal ruled that a "competent woman . . . may . . . choose not to have medical intervention, even though the consequence may be the death or serious handicap of the child she bears, or her own death" and that "the interests of the unborn child should not be taken into account by the courts". And in *Re S* the same Court ruled that: "The court does not have the jurisdiction to declare that [forced] medical intervention is lawful to protect the interests of the unborn child even at the point of birth." But the decisions, which alone stand between pregnant women's right to determine what is in the best interests of themselves and their prospective progeny, and rule by *diktat* of a profession which is frequently arrogant, blinkered and inclined to regard pregnant women as intellectually sub-normal[113], turned on the absence of any right to life on the part of the foetus. To the extent that any such right were to be recognised, it could well be the case that these decisions would be reversed and forcible caesareans permitted by law.

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[107] Appl. 8416/79 (1980) 19 DR 244.

[108] See also *H* v *Norway* (1990), unreported, cited in *Re MB* [1997] 2 FCR 541, 38 BMLR 175, 1997 *Fam Law* 542, discussed in McColgan, note 2 above, Chapter 5.

[109] *Paton* v *Trustees of BPAS and Anor* [1978] 2 All ER 987; *Kelly* v *Kelly* [1997] SLT 896, [1997] SCLR 749. See also *C* v *S* [1988] QB 135.

[110] *Re F* [1988] 2 All ER 193, [1988] Fam 122, [1988] 2 WLR 1288, *Re MB*, note 108 above; *Re S* [1998] 3 All ER 673, [1998] Fam Law 526, discussed in McColgan, note 108 above.

[111] *Re MB*, note 108 above; *Re S* [1993] Fam 123, [1992] 3 WLR 806, [1992] 4 All ER 671, [1993] 1 FLR 26; *Re S* (1998), *ibid*; *Rochdale Healthcare (NHS) Trust* v *C* and *Norfolk and Norwich HealthCare (NHS) Trust* v *W* [1996] 2 FLR 613, [1997] Fam Law 17 and *Tameside and Glossop Acute Services Trust* v *CH* [1996] 1 FLR 762. See further McColgan, note 108 above.

[112] *Re L*, unreported, *Rochdale* v *C* and *Norfolk* v *W*; all discussed in McColgan, *ibid*.

[113] See McColgan, *ibid*.

### *Women at work*

Turning next to the position of women in the employment sphere, incorporation may have some gap-filling interpretative potential[114] and may provide some scope for challenge to procedural aspects of litigation (unavailability of legal aid in employment tribunals, delays associated with equal pay claims). But the former is likely to be severely constrained by the Convention jurisprudence in employment-related cases. The Convention organs have been very reluctant to apply its protections in the employment sphere. In *Ahmad* v *UK*, for example, the ECmHR dismissed, as manifestly unfounded, an Article 9 (freedom of religion) complaint by a Moslem teacher who was refused time off to attend Mosque on a Friday afternoon. According to the Commission, no interference had been established with his protected right given that he "remained free to resign if and when he found that his teaching obligations conflicted with his religious duties". A similar decision was reached in *Stedman* v *UK*, a claim brought by a woman sacked for refusing, on religious grounds, to agree to have her contractual terms varied to require Sunday working. The Commission reasoned that she had been dismissed for "failing to agree to work certain hours rather than her religious belief as such and was free to resign and did in effect resign from her employment".[115]

Workers have, on occasion, succeeded in establishing employment-related violations of their ECnHR rights. In *Vogt* v *Germany*[116], a teacher successfully challenged her dismissal on grounds of her active membership of the German Communist Party. But in employment cases, it is fair to say that actionable interference with Convention rights is difficult to establish and easy to justify.[117] As to the potential of the HRA for challenge to the non-availability of legal aid in employment tribunals, any such claim is unlikely to succeed. The ECtHR did recognise, in *Airey* v *Ireland*, that the non-availability of legal aid to a woman seeking a judicial separation order in a case involving allegations of physical and mental cruelty breached Article

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[114] Protection of lesbians by the Sex Discrimination Act, for example, contrary to the pre-*Smith and Grady, Lustig-Prean and Beckett* approach (these are at 29 EHRR 548 and 493 respectively), endorsed by the ECJ in *Grant* v *South-West Trains* [1998] ECR I-3739; development of protection against multiple discrimination (for example, by requiring interpretation of the SDA's indirect discrimination provisions to recognise disparate impact on particular groups of women defined by race or religion).

[115] Respectively, 4 EHRR 126 and 23 EHRR CD. See also *X* v *Denmark* (1976) 5 D&R 157. These and other authorities are discussed in J. Bowers and J. Lewis, "Whistleblowing: freedom of expression in the workplace" 1 EHRLR 637 (1995) and K.D. Ewing, "The Human Rights Act 1998 and labour law" (1998) 27 *Industrial Law Journal* 275.

[116] 21 EHRR 205. *Cf Kosiek* v *Germany* 9 EHRR 328, *Glasenapp* v *Germany* 9 EHRR 25.

[117] See, for example, *X* v *UK* 45 D & R 41, *Morissens* v *Belgium* 56 D & R 127, *Ahmed* v *UK* [2000] EHRR 29 and *B* v *UK* 16 D & R 101, discussed by Bowers and Lewis, note 116 above, and by McColgan, "Freedom of expression and the Human Rights Act 1998: workers ungagged?", in K. Ewing (ed) *The Human Rights Act and Labour Law* (London: Institute of Employment Rights, 2000) forthcoming.

6.[118] According to the Court, the Article: "is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective". But the case was an extreme one, the state itself standing between the plaintiff and her protected right (there to family life free of an abusive partner), and the ECtHR stressed that the right to effective access under Article 6(1) could have been satisfied by simplification of the proceedings such as to render a lawyer unnecessary, rather than by provision of legal aid.[119] In *X* v *UK*[120] (a challenge to the non-availability of legal aid before industrial tribunals) the Commission ruled that "only in exceptional circumstances, namely where the withholding of legal aid would make the assertion of a civil claim practically impossible, or where it would lead to an obvious unfairness of the proceedings, can such a right be invoked by Article 6(1)".

Of more significance from the perspective of this article is the potential of incorporation to operate against the interests of women in the workplace. The point here concerns the nature of entrenched rights primarily as a shield against government action, a device whereby the state can be reined in. It is true, and it has been pointed out above, that some measure of positive protection is required by the ECnHR jurisprudence. But as we have seen, the measure of this protection is severely constrained in the employment field.

To the extent that women are relatively disadvantaged, redress relies, by and large, on intervention by the state rather than arguments from entrenched rights. Such intervention is itself vulnerable to the entrenched rights of others. So, for example, in the US, affirmative action has been the subject of much constitutional challenge. And in Canada, the Charter has been used as a weapon by which men have challenged the provision of sex-specific maternity rights to women.[121]

It is to be expected that the implementation of the HRA will be followed by various challenges to maternity provision. It is unlikely that such actions will succeed in the final analysis, although they may well ensnarl the lower courts for a period of time. Of more significance perhaps is the potential of the HRA to counter any movements which might otherwise be made towards structural challenges to workplace discrimination against women (equally, against ethnic minority workers, the disabled, and other disadvantaged groups). Voices are currently raised in support of the imposition on employers of various monitoring duties, and of the enforcement of such duties by mechanisms including contract compliance.[122] These voices are unlikely to be heeded in the short term. But, at the European level at least, there appears to be some recognition of the need for a more radical approach to discrimination than the individualistic model currently employed in the

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[118] Note 96 above. Art 6 specifically provides a right to legal aid in criminal cases.

[119] See *Munro* v *UK* Appl. 10594/83, (1987) 52 D R 158.

[120] Appl. 9444/81 6 EHRR 136.

[121] See, for example, *Schachter* v *Canada* (1988, eventually in the Supreme Court at [1992] 2 SCR 679) and *Schafer* v *Canada* (1988) 18 FTR 199, Ontario Court of Appeal, 8 August 1997), discussed by McColgan, note 2, Chapters 7 and 10.

[122] See, for example, B. Hepple, M. Coussey and T. Choudhury, *Equality; A New Framework* (Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation) (Cambridge: University of Cambridge, Centre for Public Law and the Judge Institute of Management Studies, 2000).

UK.[123] To the extent that any such shift could be categorised as a move to 'affirmative action', 'positive' or 'reverse' discrimination, the resistance will come waving copies of the HRA.

The other issue which might arise concerns the role of collective bargaining reducing the gender-pay gap. Freedom of association is a protected Convention right (Article 11). But the jurisprudence is less than impressive, perhaps the most significant decision on freedom of association being *Young, James and Webster* v *UK*[124], which sealed the death warrant for the British closed shop. The ECtHR has accepted that freedom of association extends beyond the bare right to be a member of a trade union.[125] But, while the Convention Organs have been ready to interpret Article 11 to restrict the rights and freedoms of trade unions[126], the Court has yet to uphold a single application alleging breach of trade union rights under Article 11.

The new recognition provisions mean that domestic law is almost certainly compliant with Article 11, if indeed it was not before.[127] And the hostility displayed by the domestic judiciary towards trade unions make it inconceivable that their interpretation of Article 11 would be more generous than that of the Convention organs.[128] It is entirely possible, however, that judicial application of Articles 6, 10 and 11, and of the right to property enshrined in the First Protocol to the Convention (and incorporated by the HRA) will result in the shackling of the CAC's discretion in the recognition proceedings, the judicial protection of employer freedom to campaign against recognition votes and to restrict trade union access to workplaces, and so forth.[129]

### *Women as victims of violence*

We have seen that entrenched rights impact both on procedure (the admissibility of evidence, and so forth) and on the substance of the criminal law. The potential of entrenched rights to improve the quality of justice afforded to criminal defendants is, of course, a benefit. But, to the extent that

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[123] Note the movement of the ECJ from *Kalanke* v *Freie Hansestadt Bremen* (Case 450/93) [1996] All ER (EC) 66 to *Marschall* v *Land Nordrhein-Westfalen* (Case C-409/95) [1997] All ER (EC) 865 and *Badeck & Ors* v *Landesanwalt beim Staatsgerichtshof des Landes Hessen* Case C-158/97 [2000] All ER (EC) 289; the amendment of old Article 119 of the Treaty expressly to permit positive action and the express acceptance by the new race discrimination directive (Council Directive 2000/43/EC) and the draft equal treatment general framework directive (available at http://europa.eu.int/eur-lex/en/com/reg/en_register_ 052005.html).

[124] (1982) EHRR 38.

[125] *Belgian Police*, note 92 above. *Cf* the House of Lords in *Associated Newspapers* v *Wilson*, *Associated British Ports* v *Palmer* [1995] IRLR 258, discussed below.

[126] See also *X* v *Belgium Yearbook IV* (1970) p 708, for example, *Cheall* v *UK Yearbook* XIV (1971) p 198, Appl. 4125/69 and *Sigurjonnson* v *Iceland* (1993) 16 EHRR 462.

[127] The ECtHR decision in *Wilson & NUJ*, *Palmer*, *Wyeth & RMT* and *Doolan &Ors* (Appls. 30668/96, 30671/96 and 30678/96), (the ECmHR admissibility decision in which is available at: http://www.dhcour.coe.fr/hudoc/default/asp?Language=en&Advanced=1), is awaited.

[128] See McColgan, note 2 above, Chapter 10.

[129] This is further discussed by McColgan, *ibid*.

the judiciary is permitted to pass judgement upon the substance of the criminal law or upon statutory procedural rules, entrenchment serves to insulate the common law from democratic reform. That common law has proved itself hostile to the needs and interests of women.

Article 6 of the ECtHR requires a "fair and public hearing within a reasonable time by an independent and impartial tribunal established by law" in the determination of criminal charges as well as enshrining the presumption of innocence and affording, *inter alia*, the accused the right "to defend himself in person or through legal assistance" to "to examine or have examined witnesses against him". It is distinctly possible that Article 6 will be wielded by the domestic judiciary to challenge the long-overdue provisions of the Youth Justice and Criminal Evidence Act 1999 which attempt to restrict the use of complainants' sexual history evidence in rape trials as well as to prevent the accused from cross-examining the complainant himself in these cases. The 1999 provisions were necessitated, in part, by judicial reluctance to apply the restrictions on sexual history evidence previously established by the Sexual Offences (Amendment) Act 1976.

The 1976 Act restricted the admission of sexual history evidence to cases in which it would have been permitted at common law *and*, on application by the accused, the judge decided it would be unfair to him to exclude it. The operation of the 1976 Act has been discussed elsewhere,[130] it being sufficient to note that the judiciary interpreted the Act so as to make admissible what would not have been at common law and to exclude only that evidence which was alleged to be relevant to the complainant's credibility on the bare assumption that unchaste women lie about sex. There is an abundance of evidence that juries do not convict men of raping women who are *seen* to be sexually 'available' (that is, who have any history of sexual activity outside marriage).[131] Thus, the promiscuous admission of sexual history evidence in rape trials contributed to the high acquittal rates therein and, at least as significantly, deterred many women from prosecuting.

Judges having proven themselves unworthy of the discretion vested in them by the 1976 Act, the 1999 Act's approach replaces the open-ended question of unfairness with a provision that sexual history evidence may only be adduced, or a question asked thereon, if it *both* falls within one of a closed number of exceptions to the general prohibition *and* the judge is satisfied that its exclusion "might have the result of rendering unsafe" a conclusion of jury or court. The reaction of the judicial element of the House of Lords to this reform points to the wisdom of having refrained from handing over to them the power to strike down primary legislation, as distinct from simply declaring it incompatible with the ECnHR.

Their Lordships were adamantly of the view that the existing safeguards (both in terms of cross-examination by rape defendants and admission of

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[130] A. McColgan, Common law and the relevance of sexual history evidence (1996) 16 *Oxford Journal of Legal Studies* 275.

[131] For lawyers' awareness and exploitation of this, see remarks by Lord Lester during the Committee stage of the Bill, 8 February 1999 col. 61, citing research carried out by Jennifer Temkin.

sexual history evidence) were perfectly adequate.[132] The real gaps between the judges and the legislators on this issue were that the former were convinced (a) that cross-examination by the defendant was problematic only if 'improperly' conducted, and that judicial control of the substance was adequate[133] and (b) that sexual history evidence was properly admitted as going to the issue of consent[134]; whereas the latter took the view (a) that the prospect of cross-examination by a rapist would deter many rape victims from reporting[135] and (b) that a woman's sexual behaviour on other occasions would very rarely be relevant to the question whether she consented to the defendant[136].

It being clear from the House of Lords' debates that the 1999 provisions are regarded by the judiciary as excluding 'relevant' evidence, it is presumably a matter of time before they are declared incompatible with the incorporated provisions of the ECnHR. Given the government's firm view supported, *inter alia*, by prominent human rights lawyer Lord Lester, that the provisions

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[132] See, for example, Lord Bingham LCJ in the House of Lords debate on the Second Reading of the Bill, 15 December 1998, cols. 1269 ff; Lord Ackner at cols. 1276 ff, at Committee stage 8 February 1999 cols.42ff and the Report stage HL Debs 8 March 1999 cols 12ff. Referring to the Lord Chief Justice's report of judicial "outrage and disbelief" at allegations that the 1976 provisions were being improperly applied Lord Williams of Mostyn remarked (8th February 1999, col.58) "The proposition that six men falsely accused of terrorist offences in Birmingham had been wrongly accused was met year upon year by the judiciary . . . with outrage and disbelief. Indeed that was not the only occasion when our system determined that outrage and disbelief were not necessarily the safest guides to the most just outcome".

[133] Lord Bingham, *ibid* and at the Committee stage, HL Debs 1 February 1999, cols. 1400 ff; Lord Ackner, *ibid* and at Committee stage HL Debs 8 February 1999 cols.19ff.

[134] Lord Bingham, *ibid*; Lork Ackner *ibid*.

[135] Lord Williams of Mostyn HL Debs, 15 December 1998, cols. 1302 ff, 1st February cols. 1404 ff and Committee stage 8 February 1999, cols. 58ff; Baroness Kennedy, 15th December 1998, cols.1401 ff

[136] Lord Williams of Mostyn, Report stage, HL Debs 8 March 1999 col. 33: "I assert again. . . that the fact that a woman has consented to sexual activity on an earlier occasion, with perhaps another man in different circumstances, is not relevant to whether she consented to sexual relations with the defendant on a particular occasion. That is a matter that one either accepts or does not accept. . . I shall not resile from that proposition". See also Lord Lester , Report stage, 8 March 1999 col. 22 "It seems to me that in most cases evidence of previous sexual promiscuity is irrelevant, or should be irrelevant, and is inadmissible or should be inadmissible in relation to the issue of consent as distinct from honest belief in consent. . . Lord Ackner, and. . . Lord Thomas of Gresford. . . believe there is a wider category of cases in which evidence of the complainant's previous sexual history is relevant, ought to be able to be admitted, and is not greatly prejudicial to the dignity and other rights of the complainant. So there is a disagreement in principle. With respect, it does not do to cite existing case-law on that subject if the disagreement is within the attitudes displayed in that case-law on the one hand and what the Government seek to do . . . on the other, which is indeed to change the unsatisfactory status quo".

are entirely consistent with the Convention, it is to be hoped that any such declaration will not result in amendment to the legislation.[137]

It has been mentioned throughout that the perpetrators of violence against women are not themselves bound by the provisions of the ECnHR as incorporated into domestic law by the HRA. Nor is it likely that incorporation will assist the lot of those women who kill their abusive partners. Elsewhere, most notably in Canada, the self-defensive nature of some such killings has begun to be recognised by the courts, although there is evidence that women are pressurised into accepting manslaughter pleas for fear of failing in a self-defence claim.[138] Here, the use of self-defence by battered women killers is virtually unknown, not least perhaps because of the unavailability of a partial defence of excessive use of force in self-defence as a back-up plea.[139] But if the courts were minded to look afresh at the traditional models of self-defence in order to apply the core principles of that defence to the circumstances in which women kill out of fear for their own lives or the lives of their children, it is at least possible that the HRA would deter them from so doing. In *McCann, Farrell and Savage* v *UK* (1996), the ECtHR ruled that Article 2 of the ECnHR permits the use of "no more force than absolutely necessary"[140] in self-defence, a test considerably more rigorous than that which currently prevails in domestic law.[141]

The only way in which incorporation might benefit battered women, together with the victims of rape, lies in Article 8's "right to respect for . . . private and family life". It has been accepted that this provision requires "the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves" and that "respect for private life" in turn includes access to legal redress in the case of sexual assault and domestic violence. This approach was taken by the Court in *X and Y* v *Netherlands*, discussed above.[142] Equally, in the wake of *A* v *UK* (1998)[143], it could be argued that the failure of the legal system adequately to protect women from violence at the hands of their partners breaches Article 3. But the obstacle in *X and Y* was legal and absolute, and the violation in *A* v *UK* lay in the law, rather than in practice.

The difficulties experienced by rape complainants are, in large part, inherent in the private nature of the crime, the widespread distrust of women who complain of it and the prevailing view that 'consent' in the context of sexual intercourse is a 'fuzzy' concept. It is hard to imagine that any positive obligations imposed on the state by the ECnHR extend to ensuring the conviction of the guilty, as distinct from the possibility of criminal prosecution.

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137 HL Debs 1 February 1999, cols. 1395 ff. For further discussion of this see McColgan, note 108 above.
138 See note 83 above.
139 See further McColgan, "In defence of battered women who kill" (1993) 13 *Oxford Journal of Legal Studies* 508.
140 (1996) A 324, 21 EHRR 97.
141 See McColgan, note 139 above.
142 *X & Y* v *Netherlands*, note 102 above.
143 Note 103 above.

## CONCLUSION

The aim of this article has been to point out some of the pitfalls associated with entrenched rights in general and, in particular, with the Human Rights Act 1998. I have chosen to focus on women, and then only in particular spheres, but a number of conclusions can be extrapolated more generally. The first point concerns the relative importance of rights and the wider political context in which they operate. Entrenched rights – in particular the type of rights adopted by the UK – are limited in their scope and their impact. They cannot provide a substitute for political action and they can threaten legislative action designed to ameliorate disadvantage.

The dangers posed by constitutional rights are particularly acute where, as here, the rights leave much to be desired. The ECnHR was adopted in the aftermath of the second world war by a Europe preoccupied with the more extreme end of human rights abuses. The Convention was regarded as a first step rather than an ultimate statement of rights. In particular, it is silent as to 'social' rights such as rights to work, housing, social security, protection of health, minimum working conditions, fair remuneration, and free collective bargaining[144]. And while it could be argued that any rights are better than none at all, the HRA's failure to balance the Convention rights with those secured by the European Social Charter creates the danger that the latter will be further marginalised. Further, concerns associated with the shift in power from legislature to judiciary have been mentioned throughout.

Rights do not exist in a vacuum, but have to be balanced against other rights. The question which must be asked is whether the legislature or the judiciary has shown itself best suited to perform the necessary balancing act. In the UK, in those areas which have formed the substantive subject matter of this article, the best that can be said of the judiciary is that its attitude has been highly questionable. The legal strides which have been made by women over the last decades are, by and large, thanks to the efforts of the legislature rather than the judiciary.

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[144] All of which are contained in Council of Europe's Social Charter, which must be distinguished from that adopted by the European Community and subsequently incorporated into the Social Chapter appended to the Treaty of European Union by the Maastricht Treaty, and subsequently into the TEU itself by the Amsterdam Treaty..

# PROTECTING THE MARGINALISED: THE ROLE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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## 1. INTRODUCTION

The European Court of Human Rights has played a significant role in the protection of human rights in Europe. Over the years it has demonstrated a willingness to develop the Convention in a way intended to make rights both practical and effective. While it has not always succeeded in this task, and has shown caution in some areas, it has made an important contribution by developing a rich human rights jurisprudence. The Court's dynamic approach has helped to give the Convention the public profile that it now has across Europe. Those struggling to protect human rights are more likely to make use of the Convention if it is seen to work. In the United Kingdom (UK) the rise of "Strasbourg-style" judicial reasoning may be one practical impact of the Human Rights Act 1998. As is consistently stated, judicial decision-making in the human rights sphere is not an end in itself. The ultimate objective is more effective human rights protection for those individuals and groups which require it. The aim of this article is to explore the contribution which the Court has made in protecting the rights of immigrants, asylum seekers and prisoners.

The Court has, as noted, made a contribution to the creation of a rich human rights jurisprudence. Doctrinal development does not necessarily make a difference in practice, but the crafting of this case law has had an impact and is of importance. As we argue in this article the Court's work is not without problems. It has tended to opt for a cautious and incremental approach to the development of the Convention. On some rights it has failed to provide a coherent justification of its own jurisprudence. The Court is an institutional actor operating in a European political and legal context. It does not function in a political vacuum. The judges are evidently conscious of this wider political context. While there are sound reasons why judges should be alert to this, we argue that this must not shade into excessive empathy for the difficulties faced by states. The European Court of Human Rights should function with its own paradigmatic understanding of the judicial role tied to the core values of the Convention system. There is a strong justification for a robust approach to the rights of the groups discussed in this article. If the Court is concerned with strengthening democracy and human rights protection, then it should take a clear stand with reference to those groups silenced within the democratic process. We suggest that the plight of immigrants, asylum seekers and prisoners in Europe demands a coherent and assertive response. The Court can assist in the struggle to protect these marginalised groups and bring their voices more fully within the public sphere of member states of the Council of Europe.

## 2. HUMAN RIGHTS AND JUDICIAL ACTIVISM: THE LAW AND POLITICS OF INTERPRETATION

It is often suggested that human rights law demands a purposive approach to interpretation. This is because it is difficult to conceive of, for example, the rights contained in a human rights treaty as purely contractual. When states sign and ratify a human rights treaty they are granting rights to individuals and not purely reaching an inter-state agreement. The customary international law rules of treaty interpretation are reflected in the Vienna Convention on the Law of Treaties 1969.[1] There reference can be found to a mixture of interpretative methods, including the contextual and purposive. In practice the European Court of Human Rights has focused on the object and purpose of the Convention and applied a dynamic approach to its provisions.[2] On occasion it is suggested that the Convention has a special constitutional status and this argument reinforces the legitimacy of the evolutive approach adopted. This approach to interpretation leaves room for a tension to emerge later if, for example, a monitoring body or court adopts an interpretation of the instrument which departs radically from the one state parties thought they had signed up to. The success of an international instrument can, however, be dependent on whether an institution is created which has an interest in its dynamic interpretation. One of the reasons why the European Convention has been so successful is precisely because institutions were created to give authoritative meaning to the rights it contains. While cautious in some areas, the Court has not been afraid of pushing at the boundaries of Convention rights in others. This is if we assume that there are boundaries contained within the abstract language of the Convention. It might be more accurate to argue that the Court has shaped its own boundaries, and there are very few natural limits to some Convention rights. What this alerts us to is the role of judicial activism in shaping the development of European human rights law. All the old and familiar controversies are raised by this, surrounding the legitimacy of the judicial role. In human rights law the context for this discussion is changing. If in the past there was a tendency to rely excessively on judicial activism this is no longer the case today. One clear example of this is the recent rise in interest in national institutions for the protection of human rights.[3] At least one of the reasons for their establishment is scepticism about the role of national courts.[4] There is in addition more sophisticated thinking about how human rights might be mainstreamed in domestic contexts. This re-focuses attention on the fact that it is to the national level that we must still look for effective human rights protection. In making use of a purposive approach the European Court of Human Rights is ultimately fulfilling its task of facilitating national level protection. The problems surrounding this arise most starkly in the deployment of the margin of appreciation doctrine. This

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[1] Articles 31-33.

[2] See, for example, *Golder* v *UK* (1979-1980) 22 EHRR 524.

[3] See Principles relating to the status of National Institutions (Paris Principles), UNGA Res 48/134, 20 December 1993; S. Spencer and I. Bynoe *A Human Rights Commission: The Options for Britain and Northern Ireland* (1998).

[4] A. Gallagher "Making human rights treaty obligations a reality: Working with new actors and partners" in P. Alston and J. Crawford (eds) *The Future of UN Human Rights Treaty Monitoring* (2000) pp 201-227.

can be portrayed as either a welcome openness to national diversity or as timid capitulation to cultural relativism.[5] Mahoney states:

> "As in any system of international enforcement of human rights, some interpretational tool is needed to draw the line between what is properly a matter for each community to decide at local level and what is so fundamental that it entails the same requirement for all countries whatever the variations in traditions and culture. In the European system that function is served by the doctrine of the margin of appreciation".[6]

As he also notes, the doctrine has attracted severe criticism from those who believe it encourages excessive deference to local traditions and practices. Mahoney, nevertheless, defends it as a legitimate principle of interpretation. Why? He does so because he believes that the Convention is grounded in a particular version of political philosophy.[7] The political theory is that "political democracy is the best system of government for ensuring respect of fundamental freedoms and human rights".[8] What is noteworthy in this argument is the view of the Court as a participant in a transnational dialogue about the regulation of social, economic, political and cultural life. This role demands limits and restraint as well as activism. Restraint may, of course, be motivated by policy factors just as much as any principled basis in notions of political democracy. Whatever the motivation, activism may be particularly suited to protecting the rights of those individuals and groups systematically neglected by the democratic process. This clearly applies to the groups examined in this article. Political democracy has not always demonstrated sufficient concern and respect for all individuals and groups. The dynamic approach of the Court can assist in making political democracy work.

The arguments over the margin of appreciation doctrine reveal other problems. The main one is a tendency to overestimate the judicial role in the protection of human rights, to the detriment of all the other mechanisms that currently exist. There is a tendancy to place the judges on a pedestal and then bemoan the fact that they do not reach the desired results. While judges of the European Court should not abdicate responsibility, respectful deference to national level decision-making need not be as problematic as is sometimes suggested. The human rights movement should be careful about placing excessive faith in the judiciary. The reason for introducing these thoughts here is that too often minorities are used unreflectively simply as convenient vehicles to justify judicial activism. While this is understandable we believe that it is important to ground this approach more effectively. Our argument is that the dynamic approach to the protection of rights can be reconciled with a commitment to political democracy. In this way an

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[5] See P. Mahoney "Marvellous Richness of Diversity or Invidious Cultural Relativism?" (1998) 19 HRLJ 1. See also P. Mahoney "Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin" (1990) 11 HRLJ 57.

[6] Mahoney (1998) *ibid*. p 1.

[7] *Ibid*. p 3.

[8] *Ibid*. p 3.

assertive approach by the European Court of Human Rights can enrich and not necessarily undermine political democracy.

There is one final point to note here. Judgments of the Court are influential beyond Europe. Several significant judgments of the Court have attracted attention in other international fora. The Court's jurisprudence has an impact beyond the European context. Slaughter has suggested the term "transjudicial communication" to refer to the fact that courts are in dialogue with one another.[9] There is a transnational judicial conversation about the meaning of human rights which the Court has made a significant contribution towards. The Court thus has a impact at the national level, but also a less tangible international influence on the development of a transnational dialogue on human rights. This transnational communication is not confined to courts, but that is the specific subject of this article.

While we can argue about the legitimacy of its role, from a results-driven perspective the jurisprudence of the Court has a wide-ranging impact on rights protection. What we have sought to do here is argue that the Court, through a dynamic approach, can make a vital contribution to enriching political democracy, in particular, by ensuring that those groups silenced within democratic life are accorded due concern and respect.

## 3. PRISONERS

Few are more silenced, at least as regards official political discourse, than prisoners. They are a classic "discrete and insular minority",[10] who in some member states are denied even the right to vote when in prison. However the European Court of Human Rights has recognised that although prisoners are generally out of sight they should not be out of mind. Starting with the decision in the *Golder* case in 1975 the Court has rejected the idea that there are any "inherent limitations" on the rights of an individual simply because they are detained in a prison.[11] Instead it has been prepared to review claims emanating from prisons as to the extent to which aspects of prison regimes infringe the rights of those detained within them. As a result the Court and Commission have delivered a significant range of rulings on matters such as prisoners' correspondence, disciplinary procedures, decision-making with respect to release and the conditions within which prisoners are held. Many of these have wrought significant change in national practices in respect of imprisonment, notably in the UK from which a substantial proportion of cases have originated.

Engaging with prisons though poses some significant dilemmas for a human rights tribunal. Taken literally it is difficult to see how any prison regime can conform with notions of respect for private and family life, freedom of expression and even the prohibition on inhuman and degrading treatment. Even the most humane regime of imprisonment involves removing people from regular contact with their family, depriving them almost entirely of privacy, curtailing their freedom of movement and denying them the

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[9] A. M. Slaughter "A Typology of Transjudicial Communication" (1994) 29 *University of Richmond Law Review* 100.

[10] The words of Stone J in *United States* v *Carolene Products* (1938) 304 US 144, 152-3 n. 4.

[11] *Golder* v *United Kingdom* (1975) 1 EHRR 524.

possibility of voluntarily associating with others. Yet the European Convention on Human Rights was clearly not intended to prohibit imprisonment in Council of Europe member states. Article 5(1)(a) provides for the "lawful detention of a person after conviction by a competent court" as one of the permitted deprivations of the right to liberty, and those who drafted the Convention clearly envisaged that imprisonment would be available as a penalty for those convicted of criminal offences. Indeed with the progressive elimination of the use of the death penalty which is facilitated by Protocol 6 and encouraged by the Committee of Ministers, imprisonment has been recognised as the *only* penalty which is permitted (perhaps even required under some interpretations of recent Article 13 jurisprudence) for serious criminal offences. Indeed the evidence in most Council of Europe states in the last decade is that the use of imprisonment is substantially on the increase.[12]

The Strasbourg institutions thus face a tension. On the one hand they recognise that the notions of individual rights contained in the Convention extend to all persons who find themselves within a Convention member state. On the other hand those same states clearly take the view that the operation of a prison system is consistent with their being parties to international human rights provisions such as the ECHR. The jurisprudence on prisons issues very much reflects this tension. In some areas it has been highly interventionist, calling into question long established practices of prison management, in others it has been characterised by a reluctance to intervene and rather brusque dismissals of an applicant's claims. If an overall theme can be discerned it is perhaps that the Court and Commission have been more willing to uphold lawyer's values of fair procedures (especially in respect of access to court and a fair hearing) than intervene on matters of substance. This perhaps reflects a deeper view that while issues of sentencing and the management of prisons lie primarily within the discretion of the state the Court will be prepared to intervene if prisons become islands of lawlessness, spaces where capricious brutality is allowed to flourish and where few other forms of external scrutiny or redress exist.

## Areas of Intervention: Communications, Discipline and Violence in Prisons

The *Golder* case itself concerned restrictions on prisoners' correspondence and it is perhaps in this area that the Strasbourg case has shown itself most willing to intervene. In *Golder* English prison practices which prohibited a prisoner from contacting his solicitor before any complaint had first been resolved internally within the prison were held to contravene both the Article 6 right of access to the courts and the Article 8 right of privacy in correspondence. The Court stressed especially the importance of allowing a prisoner unrestrained access to a lawyer in order that they might vindicate the rights which they retained despite their imprisonment. This was a theme the Court returned to in its 1992 decision in *Campbell* v *United Kingdom*, when it found a breach of Article 8 where a Scottish prisoner's letters to his

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[12] See V. Ruggerio, M. Ryan and J. Sims (eds.) *Western European Penal Systems* (1995).

lawyer were regularly read by the prison authorities.[13] Again stressing the importance of ensuring that prisoners are able to have unhindered access to the courts an 8 to 1 majority in Strasbourg indicated that only in exceptional circumstances, for example where the authorities have reason to believe the privilege is being abused, could prisoners' letters be read or stopped.[14] These decisions have had a significant impact on prison regulations within the United Kingdom[15] and the Court has also given rulings on the impermissibility of restrictions on correspondence with lawyers in respect of a number of other member states.[16]

The willingness to intervene in respect of correspondence has not been limited to correspondence with lawyers. Although the practice of censoring a prisoner's correspondence has been recognised as not being a breach of the Convention *per se*[17] the Court has been prepared to require some regulation of it. In the *Silver* case the Court held that English Prison Rules allowing the authorities to stop letters, including those to relatives and MPs, which they found "objectionable", did not meet the standard of ensuring that restrictions on correspondence were "prescribed by law".[18] A similar view was reached in the *Diana* case where, although Italian law left the decision to read correspondence to a judge, it again provided little guidance on when letters might be read or stopped.[19] The Court went on in *Silver* to indicate that some of the specific grounds for stopping letters actually operated by the prison authorities, for example that they used foul language or were critical of the authorities, could not be justified as "necessary in a democratic society". Once again the result has been significant changes in the way prisoners' correspondence is treated in the United Kingdom. The grounds of censorship have been significantly narrowed and a Standing Order in which they are contained has been published, enabling prisoners to have a better idea of what may or may not be subject to restriction.

Internal prison discipline systems are another area where the Strasbourg system has had an impact. The landmark case here was the Court's 1983 judgment in *Campbell and Fell* v *United Kingdom*.[20] There the Court concluded that although United Kingdom law categorised proceedings before a prison Board of Visitors as "disciplinary" in character they could be viewed as "criminal" for the purposes of Article 6 of the Convention, primarily because of the severity of the penalty imposed. Under then prevailing rules the Board had the authority to impose unlimited loss of remission and did in fact impose a penalty of 570 days loss of remission on

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13 (1993) 15 EHRR 137.

14 Similar principles govern the extent to which prison authorities may listen to oral or telephone conversations with lawyers; see *S* v *Switzerland* (1992) 14 EHRR 670.

15 See S. Livingstone and T. Owen *Prison Law* (2nd ed, 1999) pp 213-9. Most recently the Court extended this protection to correspondence with a trustee in bankruptcy, *Foxley* v *United Kingdom*, unreported 20 June 2000.

16 See, for example, *Domenichini* v *Italy* [1997] EHRLR 192, *Petra* v *Romania*, unreported 23 September 1998.

17 See *Boyle and Rice* v *United Kingdom* (1988) 10 EHRR 425.

18 *Silver* v *United Kingdom* (1981) 3 EHRR 475.

19 *Diana* v *Italy*, unreported 15 November 1996.

20 (1984) 7 EHRR 165.

one of the prisoners concerned. To the Strasbourg court a penalty of such severity, effectively meaning that a prisoner would spend over a year and a half longer in prison, was such that it should only be imposed after proceedings which respected the fair trial guarantees appropriate to criminal proceedings. The most immediate impact of the *Campbell* ruling was that prisoners were entitled to legal representation in at least some internal prison disciplinary proceedings, a constraint which began a series of moves to first reduce the penalties available to Boards of Visitors in the English prison system and then finally to remove their disciplinary powers altogether.[21] However, by basing the issue of whether prison disciplinary proceedings become "criminal" on the length of penalty awarded rather than the fact that an internal disciplinary tribunal can extend someone's deprivation of liberty at all, the Court left uncertain the extent to which states may retain internal disciplinary proceedings at all. In many Council of Europe member states Prison Directors or Governors will hear disciplinary charges brought against prisoners by prison staff and are able to order penalties if they find the prisoner guilty. Clearly such proceedings cannot comply with the Article 6(1) requirement of a hearing before an independent and impartial tribunal but the Convention will only be breached if the applicant can establish that the proceedings relate to "criminal charges" or the determination of "civil rights and obligations". The Commission, in its admissibility decision in *Pelle* v *France*,[22] concluded that a penalty of 18 days loss of remission did not suffice to trigger the "criminal charge" requirement, but it remains unclear whether 42 days, the current maximum in Northern Ireland, would be treated similarly. An early challenge under the Human Rights Act is likely. If successful it might require the state to introduce a fully independent element into all prison disciplinary proceedings. However one wonders whether this would be entirely desirable since it might be accompanied by a rise again in the potential penalties a tribunal could hand out, coupled with greater formality and delay. As Conor Gearty has pointed out elsewhere it is not always clear that compliance with the formal requirements of the Convention will bring an actual improvement in people's rights.[23]

Prisoners have also benefited from the Court's progressive strengthening of the Article 3 protection against inhuman and degrading treatment, especially where this relates to violence by agents of the state. Although cases such as *Tomasi*, *Ribitsch*, *Aydin*, *Assenov* and *Selmouni* have occurred in a police detention context, their principles are equally applicable to the detention of people in prisons.[24] These include the idea that any use of force against a detainee which is not rendered strictly necessary by their conduct is a breach of Article 3, that the burden is on the state with regard to someone who went

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[21] For a summary of these developments see S. Livingstone "The Impact of Judicial Review on Prisons" in B. Hadfield (ed) *Judicial Review: A Thematic Approach (*1995) pp 167-86. At the time of writing Boards retain a disciplinary role in Northern Ireland, though this is currently under review.

[22] (1986) 50 D & R 263.

[23] See C. Gearty "Terrorism and Human Rights; A Case Study in Impending Legal Realities" (1999) 19 *Legal Studies* 367, on the "levelling down" of standards to comply with the Human Rights Act.

[24] *Tomasi* v *France* Series A No 241-A (1992), *Ribitsch* v *Austria* (1995) 21 EHRR 573, *Aydin* v *Turkey* (1997) 25 EHRR 251, *Assenov* v *Bulgaria* unreported 28 October 1998, *Selmouni* v *France*, unreported 28 July 1999

into custody uninjured but subsequently demonstrates marks or injuries that he has not suffered at the hands of the state, that severe mistreatment of detainees can amount to torture and that the state is under an obligation to conduct an effective investigation of all claims of mistreatment in custody. In the *Tekin* case the Court applied these principles in finding a breach of Article 3 where there was evidence that a prisoner had been beaten during his detention.[25] Prisoners may also benefit from the Court's development of the idea that the state has a positive obligation to protect people from death or severe ill-treatment. It has recently admitted the case of *Keenan* v *United Kingdom*, which raises questions as to whether the state may breach Article 2 in respect of a young prisoner who commits suicide.[26]

The recent decision of the Grand Chamber in *Labita* v *Italy*, however, may suggest that prisoners will face greater evidential difficulties in securing a finding that they were subject to treatment contrary to Article 3.[27] Here the applicant claimed that he was subject to regular beatings during his time in prison on remand. He prayed in aid of this claim medical evidence as to broken teeth and knee injuries as well as reports from the judge responsible for overseeing the prison that there was extensive mistreatment and staff lawlessness during the period in question. Eight of the Court felt this was sufficient to justify a finding of a breach of Article 3, especially as the Court unanimously found a breach in respect of inadequate domestic investigation of these complaints and hence that the applicant was hindered in uncovering any more concrete evidence about the incidents. However a narrow majority of 9 of the Court's members felt the applicant had not produced enough specific evidence relating to his specific treatment and in particular noted his failure to complain even to a doctor for over a year. This decision seems somewhat at variance with *Tomasi* and suggests that, at least in respect of longer periods of imprisonment, the burden of proof remains on the applicant even in relation to proving that treatment of sufficient severity to engage Article 3 has occurred.

## Areas of Restraint: Prison Conditions, Informal Discipline and Family Life

With rising prison populations throughout Europe many of those detained in Council of Europe states find themselves in overcrowded and unhealthy conditions, with little to occupy their time. The European Committee on the Prevention of Torture (ECPT), which draws upon but is not bound by the Court's definition of Article 3, has denounced the conditions in even several western European member states as amounting to inhuman and degrading treatment.[28] It has only in the past few years turned its attention to the prisons of eastern Europe, where United Nations bodies have already expressed concern about prison environments which are life threatening. However the European Commission and Court of Human Rights have largely proved deaf to any claims that Article 3 has been breached in respect

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[25] *Tekin* v *Turkey*, unreported 9 June 1998.
[26] [1998] EHRLR 648.
[27] Unreported, 16 April 2000.
[28] See generally R. Morgan and M. Evans *Protecting Prisoners: The Standards of the European Committee for the Prevention of Torture in Context* (1999).

of prison conditions. The nadir was arguably reached in *Aerts* v *Belgium* where a majority of the Court found no breach of Article 3 even though the ECPT had already condemned the conditions in the prison in question as inhuman and degrading.[29] The Court starts from the premise that Article 3 is not meant to prohibit the normal deprivations that result from imprisonment. Since most European prisons have always been overcrowded and unhealthy places the prisoner immediately faces an uphill struggle in demonstrating that the conditions in which they are held amount even to degrading treatment. Commission decisions have indicated that the threshold is fairly high, indicating that three weeks in a cockroach infested cell, for example, did not meet it.[30] One occasion where the Commission did find conditions amounting to a breach of Article 3 was in the *Greek* case, where some prisoners were held two to a cell in a very small basement cell for up to nine months, without any recreation and virtually no light.[31] It may not be entirely coincidental that this finding was made in a case concerning political detainees rather than convicted criminals. The Commission also found that the requisite level of severity to trigger Article 3 was reached in relation to the "dirty protests" in Northern Ireland's jails in the late 1970s. However in the McFeeley case it did not go on to find a breach, arguing that the nature of these conditions were largely the responsibility of the prisoners themselves.[32]

Where complaints have related to specific rather than general conditions, such as solitary confinement, they have fared little better. As Kaufmann has observed: "where measures are imposed for security, disciplinary or protective purposes, the Commission has shown a remarkable tolerance, irrespective of the effects of their stringency and the effects on the health of the victim".[33] In *Krocher and Muller* v *Switzerland* the applicants were detained for several months in cells 8.4 metres square under constant observation via CCTV and in permanently lit cells.[34] For the first month of this isolation they were denied access to lawyers and families, exercise was limited to 20 minutes a day for the first three months and for six months they were denied access to a TV, radio or newspapers. In concluding that such conditions did not amount to a breach of Article 3 the Commission was clearly influenced by a lack of medical evidence that these conditions amounted to severe suffering and by the fact that the regime was progressively improved.

Some cases raising issues of poor medical treatment in prison have resulted in a finding of a breach of Article 3[35] but the overall impression is that the European Court of Human Rights is reluctant to become too engaged with the issue of prison conditions. In this they may be wary of the fate which befell U.S. Courts, whose extensive involvement with prisons issues in the 1970s and 1980s spawned protracted litigation and a political backlash in the

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[29] Unreported, 30 July 1998. The majority focused on the individual applicant and found insufficient medical evidence of his deterioration during his time in custody.
[30] Reed v United Kingdom (1983) 5 EHRR 114.
[31] [1969] Yearbook 1.
[32] McFeeley v United Kingdom (1981) 3 EHRR 161.
[33] P. Kaufmann "Prisoners" in K. Starmer European Human Rights Law (1999) pp 453-91 at p 457.
[34] (1982) 34 D & R 24.
[35] For example Hurtado v Spain (1994) Series A No 280-A.

1990s, though not without much good having been done in the opinion of many.[36] They may also feel that with the creation of the ECPT that the Council of Europe already has an effective mechanism for closely scrutinising detailed issues of prison conditions, even if it does not take a judicial form.

Moving to the issue of informal discipline, such as the use of intra prison transfer, denial of home leave or administrative segregation, there is again little indication of a willingness of the Court or Commission to intervene. Although these measures can often have a significant impact on the quality of a prisoner's life (for example if they are moved further away from where their family live or to a prison where an educational course they were involved in is not available) the Commission has dismissed most applications as not disclosing the engagement of a Convention right. A similar view has been taken of many efforts to raise family life claims, for example in relation to restrictions on the number of visits a prisoner can receive or their initial location. The issue of whether prisoners might be entitled to conjugal visits has also been canvassed without success before the Commission. However some European states now permit this and the Court may yet move to a position where the existence of a "European consensus" on the issue might outweigh the claims of member states to be entitled to a "margin of appreciation" as to how they preserve a prisoner's right to family life.

## Release from Prison

The Strasbourg Court has shown a reluctance to become engaged with issues of sentencing and has generally rejected any claims that sentences are so disproportionate as to amount to an infringement of Article 3.[37] However it has displayed a willingness to review procedures at the other end, when a prisoner's release date is not determined automatically by the sentence they received. Again cases from the United Kingdom have been well to the fore in this story, beginning with the Court's decision in *Weeks*[38] that prisoners originally sentenced to a discretionary life sentence but who had subsequently been released could not be recalled to prison without the opportunity of having some form of judicial hearing. Three years later, in the case of *Thynne, Wilson and Gunnell* v *United Kingdom*, the Court went further to hold that the lack of an opportunity for discretionary lifers to challenge their continued detention before a court was also a breach of Article 5(4) of the Convention.[39] More recently the Court has continued this trend in respect of young prisoners sentenced to Her Majesty's Pleasure sentences for murders committed while they were under 18. In the *Hussain* case the Court took the view that the continued detention of such prisoners should be subject to regular review and that they should have an opportunity

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[36] See S. Sturm "The Legacy and Future of Corrections Litigation" (1994) 138 *U of Pennsylvania LR* 639.

[37] See *Kotalla* v *Netherlands* (1979) 14 D & R 238, *B, H, and L* v *Austria* (1989) 64 D & R 264. The nearest it has perhaps got to reviewing a sentence was in *Hussain* v *United Kingdom* (1996) 22 EHRR 1, where it indicated that if the United Kingdom was proposing a power to detain juveniles convicted of murder for life with no possibility of review, then that could be a breach of Article 3.

[38] *Weeks* v *United Kingdom* (1988) 10 EHRR 293.

[39] (1990) 13 EHRR 666.

to petition the courts if they felt that the original reasons for their justification no longer held good.[40] This view was further endorsed in *T and V* v *United Kingdom* where the Court also ruled that the Home Secretary's power to fix an initial tariff of how long a juvenile would spend in jail amounted to a sentencing exercise which, according to Article 6(1), could only be carried out by an independent and impartial tribunal.[41]

In each of these decisions one can see a discomfort, which also appears in the Court's mental health jurisprudence, with the idea that politicians or administrators can decide on deprivations of liberty, beyond the control of judicial authorities. The Convention scheme, especially the structure of Article 5, quite clearly reflects an objective of a separation of powers where questions relating to the removal of a person's liberty belong to the judicial rather than the administrative sphere. They also reflect a European consensus which has witnessed a move away from the use of indeterminate sentences in the direction either of sentences being initially fixed by the courts or with a significant level of judicial oversight of their execution.[42] Once again the Strasbourg court decisions have had a significant impact on prison law and practice in the United Kingdom, leading to legislative reform in relation to both discretionary lifers and young prisoners, which have substantially reduced the discretionary power of the Home Secretary in relation to both.

However discretionary lifers and HMP prisoners make up less than 20% of the more than 3000 lifers currently imprisoned in the United Kingdom. The rest are "mandatory" lifers who receive an automatic life sentence on conviction for murder. Life, though, rarely means life and most of these prisoners are released after spending an average of 12-14 years in prison. Before their release, however, they may experience significant periods of uncertainty and a sense of injustice when their applications for release are refused, especially if they discover that others with comparable records are being released. There is considerable concern that politicians, deprived of the use of the death penalty to communicate to the public their attitudes to crime, now use decisions about when to release lifers as a substitute. Overall the system has been widely criticised as arbitrary and capricious.[43] Domestic courts in the United Kingdom have offered some redress, especially with regard to injecting transparency requirements into the initial tariff setting exercise[44], but have hitherto lacked the capacity to challenge the central fact of administrative discretion.

The Strasbourg court had the opportunity to take this step when it was faced with the *Wynne* case in 1994.[45] However, despite the fact that even Home Office practice essentially treated mandatory and discretionary lifers in the same way (both had an initial tariff set by the Home Secretary, with a

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[40] (1996) 22 EHRR 1.
[41] Unreported 16 December 1999.
[42] See D. Van Zyl Smit "Is Life Imprisonment Unconstitutional?: The German Experience" [1992] *Public Law* 263.
[43] See, for example, Justice *Sentenced to Life* (1996).
[44] Notably in *R* v *Secretary of State, ex parte Doody* [1994] 1 AC 531 and *R* v *Secretary of State, ex parte Pierson* [1997] 3 ALL ER 577.
[45] *Wynne* v *United Kingdom* (1994) 19 EHRR 353.

reference to the Parole Board on its expiry to determine whether the prisoner still posed a significant risk if released) the Court accepted the government's arguments that the two sentences were conceptually different. The *Wynne* court endorsed the view that a prisoner sentenced to life essentially forfeits her liberty to the state, hence that the whole of her sentence is determined at the initial moment of conviction, rather than by subsequent decisions on tariff or risk. Any decisions to release a prisoner before the end of their life are thus effectively the exercise of a prerogative of mercy. As a result the United Kingdom's lifer release system, which vests significant discretionary power in the hands of the Home Secretary, was held to comply with Article 5. The decision seems difficult to reconcile with cases such as *Thynne* or *T and V* and provokes some concern as to whether the Court in the end drew back from imposing too great a burden on the state in the exercise of powers central to traditional state functions. This is a concern which also finds resonance in the immigration and asylum context, which we consider next.

## 4. IMMIGRANTS AND ASYLUM SEEKERS

The obvious point to be made about human rights is that they refer to personhood and not citizenship. They are *human* rights after all. In other words, human rights are not confined to those possessing the citizenship of a particular state. In simple and attractive logic you possess rights because of your status as a human being only. This is the normative basis upon which much human rights law has been constructed. This ideal is not matched by empirical reality. As we know, status often determines entitlement. The treatment that you can expect to receive is determined, to a significant extent, by who you are. Membership and status within political communities has the major impact on the nature of a person's life. Although the abstract, naked and disengaged person of human rights discourse is nowhere to be found (we are all of course situated selves) the ideal remains a powerful one.[46] And it is this ideal which forms the normative basis for the defence of immigrants, asylum seekers and refugees. It has become increasingly important in the last decade, as European states have adopted uniformly repressive approaches to immigration and asylum. In practice, the protection of immigrants and asylum seekers is frequently cited as the reason why human rights matter. This is fair, but as the analysis above made clear this cannot become an excuse for unreflective approaches to this area.

In law states have the right to admit and exclude non-citizens. This is a basic element of state sovereignty. The fact shapes the approach of national and international courts and tribunals to immigration and asylum law. Despite all the arguments about postnationalism, most states still view the regulation of migration as a core function of government. This right of states is now, however, subject to rules of law which grant rights to the individual and not the state. The rise of human rights law has led to some questioning of the traditional view of sovereignty. It has evidently had an impact. Although the right to seek asylum, to be found in Article 14 of the Universal Declaration of Human Rights 1948, has not been translated into a binding international Convention, there are other human rights guarantees which

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[46] See C. Harvey "Dissident Voices: Refugees, Human Rights and Asylum in Europe" (2000) 9 *Social & Legal Studies* 367.

constrain the state in this area. Article 1 of the European Convention reflects the human rights ideal:

> "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention".

The rights apply to *everyone* within the jurisdiction of the state. While states retain the right to admit persons they must do this within the context of guaranteed Convention rights. On this physical presence is enough to be protected by the Convention. This is not true of all rights. For example, the right to free movement applies to everyone lawfully within the state,[47] and separate provision is made for nationals and aliens on the prohibition of expulsion.[48] It is difficult to make a general statement about the precise role of the Court in this context. This is because of the incrementalism noted previously. It will steadily explore the boundaries of Convention rights while demonstrating a consciousness of limits. In expulsion cases this is evident in the willingness to embrace the protection of asylum seekers (even though no direct reference to this group can be found in the Convention) while at the same time displaying an awareness of national asylum systems. The Court has demonstrated that the Convention system should not become a surrogate for national level decision-making on asylum. There are, however, clear gaps in refugee law which are covered in the European Convention; thus it can offer protection not guaranteed in existing refugee law. It would therefore seem to be a relevant tool in the service of refugee protection. Goodwin-Gill has, however, noted that although it would seem to have potential, the reality is that there is a substantial distance between Article 3 and refugee protection.[49] The Court has repeatedly taken a cautious approach in this area, even though willing to expound general principles which at least in theory apply to refugees.

The cases examined here are simply illustrative examples of the approach the Court has taken to the areas of immigration and asylum. The general context must be kept in view. In the last decade many member states of the Council of Europe have embarked upon policies of restriction against asylum seekers in particular.[50] It is within the context of this more exclusionary approach that the assessment of the Court must be based.

## Detention

A point of departure for any examination of detention is that those who seek asylum are not criminals. Asylum is a valid way to seek to enter a state such as Ireland or the UK. Detention is part of the general trend of restriction and deterrence in the member states of the Council of Europe and the detention of asylum seekers is a widespread practice in Europe generally.[51] The plight

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[47] Article 2(1), Fourth Protocol.

[48] The expulsion of nationals is prohibited (Article 3 Protocol 4). The collective expulsion of aliens is prohibited (Article 4 Protocol 4) and there are procedural safeguards relating to the expulsion of aliens (Article 1 Protocol 6).

[49] G. Goodwin-Gill *The Refugee in International Law* (2nd ed, 1996) p 316.

[50] See C. Harvey *Seeking Asylum in the UK: Problems and Prospects* (2000) ch. 3.

[51] See generally J. Hughes and F. Liebaut (eds) *Detention of Asylum Seekers in Europe: Analysis and Perspectives* (1998).

of detained asylum seekers has attracted the attention of the ECPT, as well as the European Commission and Court of Human Rights. It is a problematic aspect of national asylum policy which has clear human rights implications. In *Amuur* v *France* the applicants were detained at the international zone in the airport and at a hotel nearby.[52] Their entry into France was refused and they were eventually deported to Syria. They were detained for 20 days prior to deportation. In that period they had access to legal advice for 15 days and the detention was not reviewed by the national court for 17 days. The applicants argued that their rights under Article 5(1) had been violated. In assessing whether there was a deprivation of liberty the Court acknowledged that there was a difference between being held in a detention centre and in the international zone. It noted that such confinement would be acceptable if accompanied by appropriate safeguards and if carried out for the purpose of preventing unlawful immigration.[53] This had, however, to comply with the 1951 Convention relating to the Status of Refugee.[54] In particular:

> "States' legitimate concern to foil the increasingly frequent attempts to get round immigration restrictions must not deprive asylum seekers of the protection afforded by these Conventions."[55]

The reference to "these Conventions" is noteworthy because this refers to the 1951 Convention also. The Court took into account the fact that the applicants were asylum seekers and had not committed a criminal offence. On review by the courts it stated:

> "Although by the force of circumstances the decision to order holding must necessarily be taken by the administrative or police authorities, its prolongation requires speedy review by the courts, the traditional guardians of personal liberties. Above all, such confinement must not deprive the asylum seeker of the right to gain effective access to the procedure for determining refugee status."[56]

There are two points to note about this. First, the Court clearly attached importance to speedy review, and second, it also moved beyond that to include the right to effective access to a refugee status determination procedure. The fact that the applicants were deported to Syria without having a decision taken on their claims to refugee status was a factor in the conclusion reached by the Court.[57] This is further evidenced in the judgment by reference to the delay in access to legal and social assistance.[58] When contact with a lawyer was established the national court made an interim order which described the deprivation of liberty as arbitrary.[59] This was only after the applicants had been deported.

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[52] (1996) 22 EHRR 533.
[53] Para. 43.
[54] *Ibid*.
[55] *Ibid*.
[56] *Ibid*.
[57] Para 44.
[58] Para 45.
[59] *Ibid*.

One argument advanced by the government, that found favour with the Commission, was that the applicants were free to leave the international zone at any time. Although closed on the French side it was open to the outside world. The Court rejected this argument:

> "The mere fact that it is possible for asylum seekers to leave voluntarily the country where they wish to take refuge cannot exclude a restriction on liberty, the right to leave any country, including one's own, being guaranteed, moreover, by Protocol No. 4 to the Convention. Furthermore, this possibility becomes theoretical if no other country offering protection comparable to the protection they expect to find in the country where they are seeking asylum is inclined or prepared to take them in."[60]

The Court held that Article 5(1) was applicable as holding in the international zone was equivalent to a deprivation of liberty.[61]

As is well known, the Court looks not simply to the existence of national law but to its quality. It must be compatible with the Court's autonomously defined concept of the rule of law. This concept includes the requirement of sufficient accessibility and precision. The Court stressed again the particular importance of this in the case of a "foreign asylum seeker":[62]

> "These characteristics are of fundamental importance with regard to asylum seekers at airports, particularly in view of the need to reconcile the protection of fundamental rights with the requirements of States' immigration policies."[63]

The applicants argued that they had been in a legal vacuum because, according to the applicable French law, they were not in France while being held in the international zone. The Court rejected the argument that the international zone had extraterritorial status. The only document which dealt specifically with the holding of aliens at the material time was an unpublished circular issued in 1990. The Court held that there was not adequate legal protection in French domestic law against arbitrary interferences with the Convention.[64] At the material time domestic laws did not provide for review by the courts of holding in the international zone:

> "They did not provide for legal, humanitarian and social assistance, nor did they lay down procedures and time-limits for access to such assistance so that asylum seekers like the applicants could take the necessary steps."[65]

*Amuur* is an important judgment and its implications must be understood. There are several points of interest. The Court attached particular significance to the plight of asylum seekers. It took their particular problems into account, both in its assessment of the applicability of Article 5(1), and

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[60] Para 48.
[61] Para 49.
[62] Para 50.
[63] *Ibid.*
[64] Para 53.
[65] *Ibid.*

its substantive judgment on compatibility. This is reflected in its focus on the right to effective access to a determination process. The right is a vital aspect of refugee protection and one which the Court recognised as significant. The Court acknowledged how states might try to avoid their Convention obligations by creating lawless spaces. It was alive to the problem and addressed it in this judgment.

## Human Rights Law and *Non-Refoulement*

The most important guarantee for the asylum seeker is that she will not be returned to an unsafe state.[66] This is reflected in the fundamental status of the norm of *non-refoulement*.[67] The Court has developed Article 3 to include a prohibition on return in extradition and expulsion cases, where there is a sufficiently serious risk of ill-treatment in the state of origin. The judgment of the Court in *Soering* v *UK* (an extradition case) was significant because of the way it was prepared to stretch traditional notions of international responsibility.[68] In *Cruz Varas* v *Sweden* the Court extended this to expulsion.[69] In practice a number of Article 3 expulsion cases are settled before a final judgment of the Court. This demonstrates that the Convention can have a practical impact regardless of whether the case ever reaches the final stages of the process.

Once the Court had extended Article 3 it was aware of the problems that could result from an overly expansive approach. The issues were raised and addressed in *Vilvarajah* v *UK*.[70] The five applicants in the case had all been refused asylum in the UK and were returned to Sri Lanka. They successfully appealed against their refusal of leave to enter from Sri Lanka (an appeal on the merits was only available once they had left the UK). The applicants argued that the refusal of asylum by the UK constituted a violation of Articles 3 and 13 of the Convention. In these cases the Court has to determine whether at the material time substantial grounds had been shown for believing that there was a real risk of treatment contrary to Article 3 upon return. As the applicants had been returned, the Court focused on what the foreseeable consequences were at the material time. The Court noted the general improvement in the human rights situation in the relevant parts of Sri Lanka. The initiation of a repatriation scheme by the UNHCR was taken as a strong indication of improvement. In addition, the Court did not believe that the personal situation of the applicant "was any worse than the generality of other members of the Tamil community or other young male Tamils who are returning to their country".[71] It was noted that there was a possibility that they might be detained and ill-treated:

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66 Most cases have revolved around expulsion, but there have been admission cases where the Convention has been used: see *East African Asians* v *UK* (1981) 3 EHRR 76; *Lalljee* v *UK* (1986) 8 EHRR 45; *Abdulaziz, Cabales and Balkandali* v *UK* (1985) 7 EHRR 471.

67 See H. Lambert "Protection against *refoulement* in Europe: Human Rights Law comes to the Rescue" (1999) 48 ICLQ 515.

68 (1989) 11 EHRR 439.

69 (1992) 14 EHRR 1. For consideration of the applicability of the principle to a safe third country case see *T.I.* v *UK*, Decision of 3 March 2000.

70 (1992) 14 EHRR 1.

71 Para 111.

> "A mere possibility of ill-treatment, however, in such circumstances, is not in itself sufficient to give rise to a breach of Article 3."[72]

Although the second, third and fourth applicants claimed to have suffered ill-treatment when returned, the Court stated that "there were no special distinguishing features in their cases that could or ought to have enabled the Secretary of State to foresee that they would be treated in this way".[73] The Court also lent weight to the experience of the UK in dealing with asylum cases from Sri Lanka.[74] The Court held that there had not been a violation of Article 3.

The applicants also argued that they had no effective remedy in the UK. Judicial review in this context, did not, they argued, constitute an effective remedy.[75] While the Court acknowledged the limitations of judicial review, it held that there was in judicial review proceedings an effective measure of control in asylum cases. This generous assessment of judicial review can be contrasted with the dissent of Judge Walsh, joined by Judge Russo. He noted that this case could be distinguished from *Soering* because the facts were in dispute. As he stated, judicial review did not function to resolve issues of disputed facts, and in English law its purpose was principally to control procedures, but not offer a remedy on the merits of the case. It is evident that the Court is prepared to pay due regard to national asylum systems. Three aspects of this case stand out. First, the Court advanced a highly personalised approach to the Article 3 claim, based on factors which distinguished them from the general population. Second, the Court took into account the experience of the UK authorities in these types of asylum cases. And finally, it adopted a very generous interpretation of the effectiveness of judicial review. While there have been clear advances in judicial review, it still remains a weak remedy for the asylum seeker.

Some applicants have been successful before the Court. In *Chahal* v *UK* the applicant won his case.[76] He was a Sikh political activist who had been detained in the UK pending his deportation to India for national security reasons. His claim to asylum was rejected. He successfully argued that his return would violate Article 3, and that the denial of the opportunity to have the lawfulness of his detention challenged in a national court violated Article 5(4). Key to his success on Article 5(4) were the restrictions imposed on national courts by the security aspects of the case and the inadequacy of the existing procedures. The national court was effectively unable to review the decision to keep him in detention for security reasons. The advisory panel that did exist was inadequate for a variety of reasons, including that he had no access to legal representation. As noted, the case is exceptional. The applicant was a high profile political activist who had been detained for six years. The inadequacy of the UK's arrangements in these cases was well known and particularly serious. While the facts were exceptional, it still

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[72] Para 111.
[73] *Ibid*.
[74] Para 114.
[75] The Court in *Soering* v *UK* had held that judicial review was an effective remedy.
[76] (1996) 23 EHRR 413.

demonstrates that the Convention system can be used productively by applicants.

Another example of the exceptional use of Article 3 is *D* v *UK*.[77] The applicant had been convicted for drug trafficking offences while seeking to enter the UK. After his release he was sent to an immigration detention centre to await deportation to St Kitts. However, while in prison the applicant was diagnosed as HIV positive and as suffering from AIDS. The applicant argued successfully that his return would violate Article 3. At the time of the proposed removal the applicant was seriously ill, he had no close relatives in St Kitts and would have no financial resources available to him. The withdrawal of the medical services in the UK would hasten his death and equivalent services were not available in St Kitts. The Court took account of the fact that he had come to rely on the medical services available in the United Kingdom:

> "Although it cannot be said that the conditions which would confront him in the receiving country are themselves a breach of the standards of Article 3, his removal would expose him to a real risk of dying under most distressing conditions and would thus amount to inhuman treatment."[78]

The Court noted that these were exceptional circumstances.[79] In order to reinforce this point it stated:

> "Against this background the Court emphasises that aliens who have served their prison sentences and are subject to expulsion cannot in principle claim any entitlement to remain on the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance provided by the expelling State during their stay in prison. However, in the very exceptional circumstances of this case and given the compelling humanitarian considerations at stake, it must be concluded that the implementation of the decision to remove the applicant would be a violation of Article 3."[80]

As with *Chahal* v *UK* this was clearly an exceptional case. These cases illustrate in practice a certain dynamism in approach but also a strong element of caution. On Article 3 there is an awareness of boundaries and limits to this right. Although the Court is prepared to extend its reach, it does so incrementally.

## Migrants, Criminality and the Right to Private and Family Life

Just as the state retains the right to admit persons onto its territory, it also has the right to expel or remove a non-national. This right of the state is now subject to an extensive range of human rights guarantees.

The Article 3 jurisprudence has the advantage of coherence. It is now well established who is protected by it in the immigration and asylum areas. This

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[77] (1997) 24 EHRR 423.
[78] Para 53.
[79] Para 53.
[80] Para 54.

may be because the issue of balance is not a factor in this jurisprudence. This is not the case with Article 8.[81] The case law on this provision lacks coherence and the reasoning is highly casuistic. In immigration and asylum cases the issue is mainly whether deportation is "necessary in a democratic society". The Court has struggled to provide a coherent approach to the balancing exercise that is required. While this may result in justice in the individual case, it does not assist in the task of facilitating effective national level protection. This is problematic at a time of general restriction against third country nationals in Europe.

The Article 8 cases can be particularly troubling because the applicants tend to have established themselves in the state for some time.[82] The use of deportation as a response to criminality by integrated immigrants, after they have been subjected to punishment through national criminal law, is problematic. It is a legal and policy option, however, which many states in Europe wish to retain. A few cases will illustrate the points made here. In *Moustaquim* v *Belgium* the applicant had lived in Belgium from the age of one and after the commission of several offences was deported after having served his sentence.[83] His deportation was later suspended. All his close relatives lived in Belgium and he had resided there for about twenty years. The applicant argued that his deportation violated his right to private and family life under Article 8(1). These cases typically hinge on an assessment of whether deportation is "necessary in a democratic society". In this instance the Court held that the means employed were disproportionate to the legitimate aims sought. Materials factors included the long period between the commission of the offences and the deportation order, the strength of his family ties and the fact that he had returned to Morocco only twice. This case can be contrasted with *Boughanemi* v *France* where the Court held that there was no violation of Article 8.[84] The applicant had lived in France for twenty years and was deported in 1988, following his conviction for several criminal offences. He returned illegally and had a child with a French woman, but was deported again in October 1994. His close family all resided legally in France. He claimed that the deportation violated his rights under Article 8. Although the facts were similar to *Moustaquim* v *Belgium* and other cases[85] the Court felt confident that this case could be distinguished. Two factors appear to have counted heavily against the applicant. First, he had retained his Tunisian nationality, and second, his offences were judged to be particularly serious. Judge Martens, in his dissent, stressed the problems with the way the Court chose to address this issue. The Court started, he stated, from the premise that the Convention did not protect integrated aliens from expulsion. This focused attention on the applicant's right to family life. He noted two problems with this approach.

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[81] See H. Lambert "The European Court of Human Rights and the Right of Refugees and Other Persons in Need of Protection to Family Reunion" (1999) 11 IJRL 427; H. Storey "The Right to Family Life and Immigration Case Law at Strasbourg" (1990) 39 ICLQ 329. See also C. Warbrick "The Structure of Article 8" [1998] EHRLR 32.

[82] See, for example, *Baghli* v *France*, Judgment of 30 November 1999.

[83] (1991) 13 EHRR 802.

[84] (1996) 22 EHRR 228.

[85] See *Beldjoudi* v *France* (1992) 14 EHRR 801 and *Nasri* v *France* (1996) 21 EHRR 458.

First, not every integrated alien would necessarily have a family life, and second, it led to a lack of legal certainty. He described the approach as a lottery which was an embarrassment to the Court. He made a number of suggestions, including that the expulsion of an integrated alien should constitute a violation of Article 3. In addition, he argued that the Court should accept that expulsion of an integrated alien, as a rule, constituted a lack of respect for private life, but would exceptionally be justified in cases of conviction for very serious crimes. He cited serious crimes against the state, political or religious terrorism and holding a leading position in a drug trafficking organisation. This position, if accepted, would result in greater legal certainty and would shift the emphasis much more securely on to the rights of the individual. The majority of the Court has not been persuaded, however, to alter its position.

There are clearly complex issues involved in the deportation cases decided under Article 8 and other cases could be mentioned here. The Court must balance public order considerations against the fact that the individual will suffer considerably during and after the deportation process. In situations where an individual has been living in a state for twenty years or more, and where her close family resides legally, this makes matters worse. The difficulty at present is that it is not clear on what precise basis the balancing exercise is being conducted. The seriousness of the offence plays a part, as does the individual's links with the receiving state. It is not clear that the principles which underpin the Court's reasoning in these cases is sound. There is room for more to be done to protect the rights of immigrants in these cases. This is particularly if the primary focus of the jurisprudence is to ensure effective protection at the national level.

## 5. CONCLUSION

Asylum seekers, immigrants and prisoners have sometimes been seen as beyond the reach of civil rights law. In both theory and practice they can fall outside the cosy world of democratic citizenship. Asylum seekers and immigrants are not citizens and prisoners have, historically, been treated as forfeiting their civil status by the fact of imprisonment. The European Court has been prepared to bring both groups within its regime of rights protection. In doing so it has rejected the idea that the treatment of any group in society is beyond the scope of the law and has curbed the most brutal forms of disregard of these groups. However there remains the feeling that it has proceeded cautiously. In the Article 3 conditions jurisprudence relating to prisoners, or the Article 8 family jurisprudence on immigrants, there is a sense of the Strasbourg institutions not wanting to go too far, perhaps because these areas involve core state functions. The Court, in particular, has stressed the importance of national level protection. Indeed the Court's jurisprudence in these areas has had an important impact at the national level. In relation to prisoners we note that many of the cases have resulted in significant change at the national level. On immigration and asylum the jurisprudence has clearly impacted on the development of the concept of *non-refoulement* within the member states of the Council of Europe. It has also resulted in changes in national practice in this area too. There is a mixture of doctrinal advancement and judicial caution. On asylum, for example, the Court has no intention of becoming a surrogate for the failures of national asylum systems. We argue that a more assertive approach can be

taken, and fully justified, within the Court's own self-understanding of its role. These are groups which tend to be marginalised and excluded in democratic polities. The Court could assist in attacking this process by developing a coherent and robust approach to the defence of human rights in these areas. In this article we have attempted to show what the Court has achieved and where improvements might be made. We will see how the Court progresses in the next fifty years.

# THE HUMAN RIGHTS ACT 1998: IMPLICATIONS FOR THE DETENTION AND TRIAL OF YOUNG PEOPLE

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## INTRODUCTION

In contrast with other human rights treaties, the European Convention on Human Rights provides little protection for children and young people in conflict with the law. For example, Article 14 paragraph 4 of the International Covenant on Civil and Political Rights 1966 provides that the procedures faced by such juveniles shall take account of their age and the desirability of promoting their rehabilitation.[1] Article 10 of the Covenant stipulates that accused minors shall be separated from adults during pre-trial detention and brought as speedily as possible for adjudication.[2] These principles are echoed and elaborated upon in the UN Convention on the Rights of the Child 1989.[3] In particular, Article 37 of this Convention requires the use of detention for the shortest possible period of time and as a measure of last resort, and Article 40 encourages the development of alternative measures for dealing with children without resorting to judicial proceedings and provides that children, who cannot be diverted from the criminal process, must be treated with dignity and respect for human rights.[4] Moreover, young persons in trouble with the law must be treated in a manner consistent with their age and the desirability of reintegrating them into society.[5]

In line with its absence of children's rights generally, the European Convention on Human Rights contains no principles or provisions of this kind. Importantly, however, two of the Convention's rare references to children can be found in Article 5, which safeguards the right to liberty and Article 6, which guarantees the right to a public hearing before an independent and impartial tribunal. These references are not overtly positive however and they both can be said to limit rather than extend the protection which the Convention offers in this area. Paragraph 1(d) of Article 5 permits the detention of minors for the purpose of educational supervision, and Article 6 paragraph 1 provides that the public may be excluded from all or part of a trial where the interests of juveniles so require. Neither provision contains any expression of the manner in which young people in conflict with the law should be treated either before trial or following conviction. While this absence of specific provision for children is unfortunate, nevertheless young people are equally entitled to the more general protection offered by these and other European Convention provisions. This is supported strongly by Article 1 of the Convention, which guarantees its

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1 UNTS vol 999, p 171.
2 Article 10 (2)(b), *ibid*.
3 UN Doc A/44/25.
4 Article 40 (3)(b), *ibid*.
5 Article 40 (1).

rights to 'everyone', as well as Article 14, which forbids discrimination in the enjoyment of Convention rights on various grounds, including the unenumerated ground of age. It is clear, therefore, that children and young people in conflict with the law must enjoy the right to liberty, as well as the safeguards which flow from it, including the right to have the legality of their detention reviewed regularly. Juveniles must also be guaranteed a fair trial before an independent and impartial tribunal, with all of the attendant rights which Article 6 conveys. In addition, other Convention provisions, which provide important protection for the rights of all minors, take on added importance for young people in detention. They include the right to respect for private and family life under Article 8, the right to have their life protected by law under Article 2, the freedom from inhuman and degrading treatment under Article 3, and the right to education under Article 2 of the First Protocol.

The Human Rights Act 1998 brings these and many other substantive provisions of the European Convention on Human Rights into domestic law. By the end of 2000 individuals who wish to do so will be able to rely on these provisions in domestic courts across the United Kingdom and to challenge public authorities acting in breach of Convention obligations. This article aims to introduce the relevant case law of the European Commission and Court of Human Rights on issues of juvenile justice and detention relevant to the United Kingdom, but Northern Ireland in particular. The undeveloped nature of Strasbourg case law in this area means that conclusions cannot be drawn with absolute certainty. It also means, however, that this is an area particularly ripe for challenge under the Human Rights Act. The article's course will follow the route of the young offender from arrest and questioning through to trial and conviction, and it will conclude by looking at some of the issues around detention. [6]

## Questioning Child Suspects

The first likely stage at which children in conflict with the law will require protection is during questioning. In this regard, it is relevant that Article 5 paragraph 1 (c) of the Convention permits arrest or detention in order to bring a person before the competent legal authority on suspicion of having committed an offence. The fact that minors are not criminally responsible before a certain age does not preclude their interrogation where they are suspected of involvement in activities which would be punishable if they were criminally responsible.[7] The Commission has held this to be justifiable with regard to the proper administration of justice and the protection of the rights of others. However, it has also established that the interrogation of children should be carried out in a manner respecting their age and susceptibility. Given that the police constitute a 'public authority' for the purposes of section 6 of the Human Rights Act 1998, the failure to take appropriate steps to take into account the age and vulnerability of young suspects during questioning would undoubtedly be subject to challenge in the domestic courts. What steps are appropriate in this context would clearly be for such courts to decide although the European Court's increasing

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[6] See generally Kilkelly, *The Child and the ECHR*, (1999).
[7] No 8819/79 *Sargin* v *Germany*, Dec 19.3.81, DR 24, p 158, 4 EHRR 276.

references to UN Convention standards would make this approach an obvious one for the United Kingdom courts too.

Article 5 paragraph 2 of the European Convention requires that everyone arrested shall be informed promptly, in a language which he understands, of the reasons for the arrest and any charge against him. Normally, this requires that the arrested person be told the essential legal and factual grounds for his arrest in "simple, non-technical language that he can understand", so as to enable a challenge to its lawfulness to be made if appropriate.[8] According to the Commission, the application of this provision in children's cases requires that their special needs and status are taken into account.[9] In order to be effective, therefore, it is arguable that the application of Article 5 paragraph 2 to child suspects requires either that the police use language which children and young people understand, and/or that an appropriate adult, who understands the situation, be present to explain the charge to the child. The fact that this explanation should enable a challenge to the legality of arrest to be initiated suggests also that a legal representative should be present at this stage.[10]

## Detention on Remand

It is not incompatible with the Convention to detain the accused – whether an adult or a young person – pending trial and this is envisaged by Article 5. Significantly, however, the Criminal Justice (Northern Ireland) (Children) Order 1998 envisages remand as a measure of last resort only.

Article 5 paragraph 3 of the Convention guarantees those detained on reasonable suspicion of having committed an offence the right to be brought promptly before a judge and the right to trial within a reasonable time or release pending trial. In the case of a juvenile on remand, however, the obligation to bring the accused to trial is greater than in the case of an adult.[11] Considering a case against Bulgaria in 1998, the Court noted that in the light of the relevant domestic law, which provides that minors should be remanded only in exceptional circumstances,

> "it was more than usually important that the authorities displayed special diligence in ensuring that the applicant was brought to trial within a reasonable time."[12]

On the facts of the case, the applicant had been detained on remand for approximately two years, during one of which virtually no action was taken in connection with the investigation: no new evidence was collected and Mr Assenov was questioned only once. According to the Court, therefore, bearing in mind the importance of the right to liberty and the possibility, for example, of copying the relevant documents rather than sending the original

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[8] Eur Court HR *Fox,Campbell and Hartley* v *UK*, judgment of 30 Aug 1990, Series A no 182, 13 EHRR 157, para 40.

[9] No 21528/93 *Bohuslav and Lausman* v *Austria*, Dec 12.10.94, unreported, where the applicants failed to exhaust domestic remedies.

[10] See further below.

[11] Eur Court HR *Assenov* v *Bulgaria*, judgment of 28 Oct 1998, Reports 1998, VIII, no 96.

[12] *Ibid*, para 157.

file to the authority concerned on each occasion, the applicant's many appeals for release should not have been allowed to have the effect of suspending the investigation and thus delaying his trial.[13] The consequence of failing to show the appropriate diligence in bringing the minor to trial in this case gave rise to the Court's finding that he had been denied the right to a trial within a reasonable time.

There is a clear parallel with the Northern Ireland situation here as, similar to the Bulgarian legislation, Article 12 of the 1998 Order also reflects the need to refrain from remanding juveniles where possible.[14] That the Convention obliges states to expedite criminal proceedings involving children and young people is a natural deduction therefore and it is arguable that this burden is even greater where the accused is particularly young and/or where s/he has been remanded to a secure unit or detained alongside committed juveniles. Yet, notwithstanding the obligation on the authorities to display exceptional diligence in minor's cases, it is unclear to what extent the test under Article 5 paragraph 3 differs from that applied in adult cases.[15] Similarly, in the absence of further case law on the subject it is difficult to determine whether the length of time during which detention on remand is compatible with the Convention is shorter in juveniles' than in adults' cases. At the very least, it would appear that when assessing whether a minor has been brought to trial within a reasonable time, the court should attach weight to the age of the applicant, in addition to other relevant factors, such as the complexity of the case, the use of unnecessary or cumbersome procedures and the conduct of applicant.

## Right to a Fair Trial

Once brought to trial it is clear that the young accused must enjoy all the same safeguards as adults under Article 6. This requires therefore that s/he enjoy a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. In addition, where the interests of juveniles or the protection of the private life of the parties requires, Article 6 allows the exclusion of the press and public from all or part of a trial. Under Article 6 paragraph 2 everyone has the right to be presumed innocent until proven guilty and paragraph 3 of the fair trial provision sets out more specific and detailed rights. They include, for example, a person's right to have adequate time and facilities for the preparation of his defence (sub paragraph b); the right to a defence lawyer of one's own choosing, including free legal aid where necessary (sub paragraph c) and the right to examine and cross-examine witnesses (sub paragraph d). The difficulty involved in striking a balance between ensuring that the fundamental right to a fair and impartial trial is protected, and treating young accused in an appropriate

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[13] *Ibid*.

[14] Article 12 provides that where a court remands or commits a young person for trial it shall release him/her on bail unless, *inter alia*, his/her detention is necessary to protect the public and/or the charge relates to a violent or sexual crime.

[15] In such cases, the Court has tolerated detention on remand for lengthy periods where the criminal investigation and/or the legal proceedings are complex in nature. See, for example, Eur Court HR *W* v *Switzerland*, judgment of 26 Jan 1993, Series A no 254-A, 17 EHRR 60 and compare it with Eur Court HR *Scott* v *Spain*, judgment of 18 Dec 1996, Reports 1996-VI no 27.

manner so as to facilitate their reintegration into society, is clear from the *Nortier* case.[16] This involved a challenge to the Dutch judicial system and in particular the fact that the judge appointed to each juvenile's case took all the relevant decisions both before and during his/her trial. The young offender in this case therefore claimed that this raised questions about the impartiality of the tribunal considering the criminal charge against him, contrary to Article 6. His challenge failed on the basis that the Court refrained from examining the general issue of whether the Dutch system was compatible with the Convention and confined itself to the claim of bias in this individual case, which it rejected. Despite the narrow focus of the Court's deliberations, however, numerous members of the Commission and Court in their separate and dissenting opinions referred both to the need to avoid diluting the fundamental guarantees in Article 6, as well as the importance of affording juvenile offenders special protection in line with the standards of the UN Convention on the Rights of the Child.[17] For example, Mr Justice Morenilla, in his concurring opinion, referred expressly to the UN Convention and attached considerable importance to the need to afford juvenile offenders special protection identified in its Preamble and Article 40.[18] His judgment also attempts to place the complaint in the context of the need to set up

> "juvenile courts under specific procedural rules to apply penal or protective measures aiming at the correction or re-education of the minor rather than the punishment of criminal acts for which he is not fully responsible."[19]

The principles underlying this and other similarly minded opinions were developed by the Court in the cases of *T* and *V* v *UK* in 1999, where it articulated, for the first time, what constitutes a fair trial for children.[20] These cases concerned whether it was compatible with Article 6 of the Convention to try two 11 year old boys for murder in an adult court with all the attendant publicity. In the circumstances, the Court concluded that it was not and what was fundamental was that:

> "a child charged with an offence is dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings."[21]

This is a strongly worded principle that requires that the ability of children to understand and participate in their own criminal proceedings be facilitated by the authorities. Moreover, the application of this principle is not confined to children charged with murder or serious crime, to which it admittedly has

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16 Eur Court HR *Nortier* v *the Netherlands*, judgment of 24 Aug 1993, Series A no 267, 17 EHRR 273.

17 See the dissenting opinion of Commissioner Mr Geus, joined by Mr Weitzel and Mr Marxer in No *13924/88 Nortier* v *the Netherlands*, Comm Rep, 9.7.92, Series A no 267. See also the concurring opinion of Mr Trechsel, *ibid*.

18 *Nortier* judgment, *op cit*. See also the opinion of Mr Justice Walsh.

19 *Ibid*.

20 Eur Court HR *T* v *UK* and *V* v *UK*, judgments of 16 Dec 1999.

21 *T* judgment, *ibid* at 84.

most relevance, but it has a more important, general application to the way in which the criminal justice system deals with child offenders.

In the light of the specific circumstances of *T* and *V*, the Court went on to note that where a child is charged with a grave offence which attracts high levels of media and public interest, it is necessary to conduct the hearing in a way that reduces his/her feelings of intimidation and inhibition as far as possible. According to the facts, the trial of *T* and *V* took place over three weeks in public in the Crown Court, although special measures were taken in view of their young age and to promote their understanding of the proceedings: for example, the hearing times were shortened and the procedures were explained to the children in advance. Nevertheless, the Court observed that the formality and ritual of the Crown Court must, at times, have seemed incomprehensible to a child of eleven. There was also evidence that certain modifications to the courtroom – such as the raised dock which was designed to enable them to see what was going on – had the effect of increasing their sense of discomfort during the trial and their sense of exposure to the scrutiny of the press and the public. Moreover, considerable psychiatric evidence showed that the boys suffered from post-traumatic stress disorder which made it difficult if not impossible for them to instruct their lawyers and follow the trial. In such circumstances, the Court held that it was insufficient for the purposes of Article 6 that the applicants were represented by skilled and experienced lawyers because it was highly unlikely that they would have felt sufficiently uninhibited, in the tense courtroom and in the glare of public scrutiny, to have consulted with them during the trial. Indeed, given their immaturity and disturbed emotional state, it considered it unlikely that they were capable of cooperating with their lawyers even outside the courtroom in order to give them information for their defence. In essence, then, the Court concluded that neither applicant was able to participate effectively in the criminal proceedings against them and they were, as a consequence, denied a fair hearing.

The Lord Chief Justice of Northern Ireland issued a Practice Direction on the trial of children and young persons in the Crown Court in June 2000.[22] The document contains some positive elements, including its overriding principle that the "trial process should not itself expose the young defendant to avoidable intimidation, humiliation or distress". Its recommendations that young defendants should be brought into the court out of hours in order to familiarise them with the surroundings, that the court should explain the course of proceedings to the young defendant in terms s/he can understand and that the court should be prepared to make an order restricting reporting of the trial are welcome. However, it remains to be seen whether the Practice Direction will in itself be sufficient to implement the *T* and *V* judgments in full. It is contentious, for example, that the steps to be taken to comply with the Practice Direction in any given case fall within the discretion of each individual trial judge.[23] Moreover, it also remains to be

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[22] Lord Chief Justice of Northern Ireland, Practice Direction: Trial of Children and Young Persons in the Crown Court, 15 June 2000. The Lord Chief Justice of England and Wales issued a Practice Direction on Crown Court: Trial of Children and Young Persons on 16 February 2000.

[23] See Gillespie, "Practice direction on child defendants and the case of T v United Kingdom" (March 3 2000) NLJ 320.

determined whether Article 6 of the ECHR will require that young people be tried in the youth court system regardless of the nature of their crime or the age of co-defendants.[24]

## Detention

Article 5 provides that no one shall be deprived of his liberty save in the circumstances set out in the first paragraph of that provision. These include: following conviction by a court; in order to bring some-one before a legal authority on suspicion that they have committed an offence; for the purpose of providing a minor with educational supervision; on the grounds of psychiatric illness and with a view to deportation. This list is exhaustive and, moreover, the deprivation of liberty will only be consistent with the Convention where it falls within the scope of one of the sub-paragraphs in Article 5 and is otherwise lawful insofar as it pursues one or more of the aims set out in that provision. According to the Court, the fundamental importance of the right to liberty requires that the express exceptions contained in Article 5 paragraph 1 must be narrowly interpreted.[25] There are thus limited circumstances in which a minor can be detained lawfully under Article 5, in particular, following conviction under Article 5 paragraph 1(a); on remand under Article 5 paragraph 1(c) and for the purpose of educational supervision under Article 5 paragraph 1(d).[26] The detention of a minor for any other purpose is not permitted therefore and in principle, it is clear that detaining a young person who is at risk, such as placing a child in secure accommodation, falls outside the scope of Article 5.

## Challenging the Legality of Detention

Although the protection minors enjoy under Article 5 of the European Convention is inadequate when compared with that which the UN Convention offers in this area,[27] the provision nevertheless contains important safeguards. In particular, Article 5 paragraph 4 guarantees everyone deprived of his/her liberty the right to take proceedings to have the lawfulness of that detention determined speedily by a court, which is empowered to order release if the detention is not lawful.[28] This holds particular relevance for minors for the following reason. According to the case law, the detained person must have the opportunity to question whether his/her detention is consistent with the applicable domestic law, with the Convention, and free from arbitrariness.[29] This means, first, that in order to comply with Article 5 paragraph 4 the body considering the challenge to the lawfulness of the detention, whether on remand or following conviction, must consider its compatibility with domestic law. For example, a juvenile

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[24] Under Article 28 of the NI Order, a child jointly charged with an adult can be tried in a court other than a youth court.

[25] Eur Court HR *Bouamar* v *Belgium*, judgment of 29 Feb 1988, Series A No 129, 11 EHRR 1.

[26] Clearly, there is nothing to prevent the State detaining a minor who has a psychiatric illness under Article 5 para 1 (e) or with a view to deportation under Article 5 para 1 (f).

[27] See above.

[28] See further Kilkelly, *op cit*, pp 46-52.

[29] Eur Court HR *Van Droogenbroeck* v *Belgium*, judgment of 1982, Series A no 50.

may seek to question whether his/her detention on remand is consistent with the Criminal Justice (Children) (Northern Ireland) Order 1998, particularly its principle to detain or remand as a measure of last resort. In addition, the detainee must be able to challenge any detention alleged to be arbitrary, and in this context, the European Court normally considers simply whether the detention is consistent with its purpose. In some cases, however, it introduces considerations of proportionality and thus the domestic courts, responding to a challenge under Article 5 paragraph 4 may choose to consider, for example, the basis for remanding or committing the juvenile. Thus, it may examine the legality of the detention in the light of the legislation's commitment to restricting custodial sentences to those whose offences are serious or so persistent that only a custodial sentence would be justified. The extent to which practice corresponds to what is prescribed or directed by the legislation may thus be the focus of challenge under the Human Rights Act 1998.

## Indeterminate Sentences and Article 5

It is not the task of the European Court to pass judgment on whether the length of a particular sentence is compatible with Article 5 and consequently, it confines its consideration of whether an indeterminate sentence, such as the sentence of detention on Her Majesty's pleasure frequently imposed on young people, is compatible with the Convention to the question of whether the right to have the legality of such detention reviewed has been respected.

The Court has established that the imposition of an indeterminate sentence on a young person can only be justified by reasons based on the offender's perceived dangerousness to society.[30] In the light of the fact that this must involve taking into account any developments in the young offender as s/he grows older, and characteristics, which are susceptible to change with the passage of time, it is clear that new issues of lawfulness may arise in the course of such detention. Consequently, a young person must be entitled to take proceedings to have these issues decided by a court at reasonable intervals. Indeed, according to the Court, failure to have regard to the changes which inevitably occur as a young person matures would mean that they "would be treated as having forfeited their liberty for the rest of their lives", a situation which might raise an issue under Article 3.[31]

When it imposes an indeterminate sentence on a convicted young offender the national court also imposes a fixed sentence for the purposes of punishment, known as a tariff. Although the supervision required by Article 5 paragraph 4 is incorporated into that decision[32] this is not the case in respect of any ensuing period of detention in which new issues affecting the lawfulness of the detention may arise.[33] Thus, in *Hussain* v *UK*, the Court found that once the tariff expires Article 5 paragraph 4 requires that a young

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[30] Eur Court HR *Hussain* v *UK*, judgment of 21 Feb 1996, Reports 1996-I, no 4, p 252, 22 EHRR 1, para 52-54.

[31] *Singh* judgment, para 62.

[32] Eur Court HR *De Wilde, Ooms and Versyp* v *Belgium*, judgment of 18 June 1971, Series A no. 12, 1 EHRR 373, para 76.

[33] Eur Court HR *Weeks* v *United Kingdom*, judgment of 2 March 1987, Series A No 114, 10 EHRR 293 para 56.

offender detained during Her Majesty's pleasure be able periodically to challenge the continuing legality of his detention. This is necessary, according to the Court, because the only justification for the detention could be dangerousness – a characteristic which is subject to change.[34] The Court has not yet considered what the position is under Article 5 paragraph 4 before the tariff has expired – pertinent perhaps where the offender is very young and the tariff set is high. It did establish in the *T* and *V* cases, however, that where the tariff element of the offenders' sentences has been quashed,[35] any failure to set a new tariff will set at nought their entitlement to access a court to have the lawfulness of the detention reviewed causing a violation of Article 5 paragraph 4.[36]

## Procedural Safeguards implicit in Article 5 paragraph 4

In addition to the fundamental guarantee of *habeas corpus*, Article 5 paragraph 4 has also been found to include implicit procedural safeguards, which are particularly pertinent to young people. In the *Bouamar* case, the Court found that the treatment of the minor, who appeared in person but unrepresented before the court reviewing the lawfulness of his detention, was inadequate for the purposes of Article 5 paragraph 4, in light of his young age at the time.[37] According to the Court, it is essential that the minor should have the effective assistance of a lawyer, in addition to having the opportunity to be heard in person.[38] Although flexible and informal proceedings, such as in a juvenile court, may be entirely consistent with the Convention, Article 5 paragraph 4 makes it essential that minors challenging the lawfulness of their detention must not only be present at the proceedings, but they must also enjoy the effective assistance of a lawyer. The same principle could be said to apply to any review of the young offender's detention, particularly where it concerns the nature of the detention or sentence – such as whether it is to be served in a closed or open institution. In all such cases, therefore, it is important that the child not only be present, but be supported by independent representation in order to safeguard from arbitrary detention.

## Detention for the Purpose of Educational Supervision

Article 5 paragraph 1(d) makes an express exception to the right to liberty, where the minor's detention is for the purpose of educational supervision. This is one of the few child-specific provisions in the entire Convention, and it reflects the important need to divert juvenile offenders and suspects from the criminal process. Notwithstanding that it provides for the minor's detention rather than his/her liberty, the provision has been interpreted in a

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[34] *Hussain* judgment, *op cit*, para 54.

[35] The House of Lords quashed the tariff element of the offenders' sentences in 1998. See *R.* v *Secretary of State for the Home Department, ex parte V and T* [1998] AC 407.

[36] *T* judgment, *op cit*, para 120.

[37] *Bouamar* judgment, *op cit*.

[38] No *15006/89 Abbott* v *UK*, Dec 10.12.90, unreported. The settlement reached in this case involved making legal representation available to minors who as wards of court were neither party to, nor represented in, the proceedings concerning their detention.

dynamic manner by the Court, which has found that, in certain circumstances, it may place a strict positive obligation on States to put in place appropriate facilities, which ensure the education and reformation of juveniles in conflict with the law.

*Bouamar v Belgium* concerned a 16 year old boy who was detained on remand on nine successive occasions, for a total of 119 days within the period of one year.[39] The placements had been made by a juvenile court pursuant to legislation which promoted the diversion of young offenders from the criminal process. The relevant provision of that law permitted the detention of a juvenile in a remand prison for up to 15 days, when it was 'materially impossible' to place him in a reformatory immediately.[40] The Court made a number of initial points before going on to consider whether the boy's detention was compatible with Article 5 paragraph 1(d). In particular, it established that the provision does not preclude the use of an interim measure as a preliminary to an educational placement. Nor does it require that this placement be immediate. However, in order to be consistent with Article 5, any interim measure of imprisonment must be speedily followed by actual application of an educational regime. The 'material impossibility' in this case was that Belgium did not have an appropriate institution in which to place the juvenile. As a result, it fell to the Court to examine whether the detention on remand fulfilled the requirements of Article 5 paragraph 1(d) as regards its purpose of educational supervision. In short, the Court held that it did not, and found on the facts that:

> "the detention of a young man in a remand prison in conditions of virtual isolation and without the assistance of staff with educational training cannot be regarded as furthering the educational aim."[41]

Moreover, the Court went on to find that taken together, the nine placement orders were incompatible with Article 5 paragraph 1(d) as their "fruitless repetition had the effect of making them less and less lawful especially as proceedings were never instituted against the boy".[42]

*Bouamar* clearly establishes that Article 5 paragraph 1(d) is to be interpreted narrowly to mean that where a State has chosen a system of educational supervision as its policy on juvenile delinquency, it is obliged to put in place appropriate institutional facilities which meet the demands of security and the educational objectives of the domestic law. Moreover, if the fulfilment of this obligation should necessitate the building or provision of appropriate reformatories then this action should be undertaken by the State, regardless of the cost. It is unfortunate that the Court failed to offer more specific guidance as to how the educational objective so clearly reflected in Article 5 paragraph 1(d) should be achieved. However, it did advise that the placement must occur in a setting designed and with sufficient resources for the purpose.

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[39] *Bouamar* judgment, *op cit*.

[40] Here, the material impossibility had arisen because there were no closed reformatories with educational facilities in his region and his difficult behaviour meant that available open reformatories were unwilling to accept him.

[41] *Bouamar* judgment, *op cit*, para 52.

[42] *Ibid*, para 53.

It is apparent from *Bouamar* then that where the purpose of detaining juveniles, as set out in legislation or elsewhere, is to address their behaviour and needs as well as to protect themselves and society from their criminal behaviour, then they must be placed in institutions which pursue this objective. Placing young people in institutions which resemble prisons, and which do no more than contain and restrain the young people they accommodate, is a practice which is likely therefore to be subject to challenge under the Human Rights Act.

## Detention on Other Grounds

Article 5 paragraph 1(d) contains a second specific ground on which a minor can be detained, that is, for the purpose of bringing him before a competent legal authority. The Court has not yet had the opportunity to clarify the meaning of this ambiguous provision and the only clear situation to which the Commission has found it applicable is the detention of a young delinquent in order to study his behaviour.[43] In this case, the Commission had to consider whether the detention of a 15 year old boy who was held for eight months 'under observation', which was ordered by the judge investigating him for a variety of offences, was unlawful under Article 5. Given that the applicant was a minor for the purpose of the provision and agreeing that he was deprived of his liberty being detained and forbidden to leave, the Commission had little difficulty finding Article 5 to be applicable. It went on to find that the detention fell within the meaning of Article 5 paragraph 1 (d) because its purpose was to bring the minor before the competent legal authority. However, it did not find that the detention of the boy in these circumstances violated the provision. Even though the Commission expressed concern about the duration of the detention, this fact alone did not cast doubt either on the purpose of the detention or its conformity with Article 5. Instead, in reaching its conclusion, the Commission was guided by the fact that the decision to detain the youth had been taken by a juvenile court (a competent legal authority) and had been prompted by the ineffectiveness of earlier measures and the need to gain a better understanding of the boy's personality. These elements are important insofar as they confirm the lawfulness of the detention within the domestic system, as well as its purpose under Article 5 paragraph 1(d).

The practice of detaining a minor in order to supervise or assess his behaviour will be consistent with Article 5 paragraph 1(d), therefore, as long as it is carried out by lawful order and is considered to be proportionate in the circumstances. It is also possible that, given the provision's drafting history, the detention of a young person who is a danger to society in order to secure her/his protection may fall within its scope, although the limited case law in this area makes this very uncertain. Moreover, the Commission's concern about the length of the detention flags this as a potential problem. Finally, while it is not a decisive factor in its compatibility with Article 5 paragraph 1, the fact that the provision applies to the detention will require that the right to have the lawfulness of the detention reviewed at regular intervals be secured.

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[43] No 8500/79 *X* v *Switzerland*, Dec 14.12.79, DR 18, p 238.

## Respect for Private and Family Life

It is clear that the rights to respect for private and family life and correspondence, safeguarded by Article 8 of the European Convention, do not cease once the child or young person is placed in detention. Restrictions on these rights may be Convention compatible however once they fulfil the requirements of Article 8 paragraph 2 by being in accordance with the law and proportionate to the requirements of preventing disorder and maintaining security in detention centres for example. Under the Human Rights Act 1998 it will fall to the domestic courts to assess whether limits placed on the exercise of such rights are compatible with the Convention. With regard to the child's right to privacy in detention, for example, it will be possible to invoke Article 8 when claiming individual breaches of the provision caused by the reading of mail, placing restrictions on the right to communicate with family members and advisors and failing to allow young people privacy during visits and telephone conversations. On a general note, it is important that freedom of correspondence for prisoners is protected to a high degree under the European Convention and interferences are thus difficult to justify under Article 8.[44] While there may be circumstances in which such interferences with young offenders' private lives may be necessary in order to prevent disorder or to protect the secure environment of the detention centre there must always be a proper balance achieved between both interests. Moreover, according to the *de minimis* rule, the measure used must be no greater than is strictly necessary in the circumstances.

There is similar potential for invoking the right to respect for family life under Article 8 in circumstances where the authorities fail to accommodate visits to offenders, particularly in secure units, by their parents, siblings, other family members and friends. Again, any interference with a juvenile's family life falls to be justified under Article 8 paragraph 2, but notably there is no ground for imposing such restrictions as a punishment measure. The Court's emphasis on the effective protection of rights means that where there is a practical obstacle to maintaining contact between young people and their family (such as a long distance separating them) then the State may be required to surmount this to ensure that family life is respected.[45] Thus, where the location of a detention centre makes it difficult for parents to visit their children regularly or for long periods, the State may be required under the Convention to take practical measures to facilitate such contact, such as making elongated or overnight visits possible. It is important to remember too, that family life exists not only between parents and their children but also between siblings and other close family members.[46]

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[44] For the Court's case law on this topic generally see Eur Court HR *Golder* v *UK*, judgment of 21 Feb 1975, Series A no 13, 1 EHRR 524, *Silver* v *UK*, judgment of 25 March 1983, Series A no 61, 5 EHRR 347 and *Campbell* v *UK*, judgment of 25 March 1992, Series A no 233-A, 15 EHRR 137.

[45] Eur Court HR *Olsson* v *Sweden*, judgment of 24 March 1988, Series A no 130, 11 EHRR 259.

[46] *Ibid.*

## Death in Custody: Article 2

Article 2 of the European Convention provides that everyone's right to life shall be protected by law. Despite its somewhat restrictive wording the Court has established that the authorities are under an obligation to protect individuals in their custody.[47] Moreover, the Commission has found that the existence of this obligation is not affected by the fact that the death or injury occurs as a result of the prisoner's attempts, successful or otherwise, to commit suicide, although this may have consequences for the scope of the State's obligation under Article 2.[48] At the same time, it has held that it would run counter to respect for other Convention rights – such as the right to respect for private and family life – to impose a regime designed to make attempts at self-harm impossible. The case of *Keenan v UK* concerned the question of whether the prison authorities were responsible for the suicide of the applicant's 28 year old son in prison where he was serving a short sentence for assault. The man had a history of depression and other psychiatric illness and had received on-going treatment of which the prison authorities were aware. The question of whether the authorities were, ultimately, responsible for his death depended, said the Commission, on two factors: the extent of the knowledge of the prison authorities and the reasonableness of the steps taken. On both counts, however, the Commission failed to find that the prison authorities had acted in an unreasonable manner, finding that their decision to place him in a segregation block was supported by medical evidence that he was fit to receive such punishment; that the level of social deprivation or hardship there was not such as could foreseeably have caused a suicide attempt and that the decision not to place him under a suicide watch was justifiable. Taking all the circumstances into account, then, the Commission concluded by 15 votes to 5 that there had been no violation of Article 2. However, the dissenting opinion of Mr Rozakis, joined by Mrs Liddy and Mr Geus, was written in strong language. Their conclusion – that despite knowing about the suicidal tendencies of the prisoner and having in their hands reasonable means to avert the fatal incident, the authorities opted for a policy towards him which contributed to rather than avoided his taking of his life – does not appear harsh on the facts of the case.

In any event, however, it is clear that the authorities are under a significant positive obligation under Article 2 of the Convention to do all that can reasonably be expected of them to avoid risk to the life of anyone in their custody. The extent of this burden will depend on the circumstances of the case and will be heightened where a risk of self-harm is believed to exist.

## Conditions of Detention: Article 3

Article 3 of the Convention prohibits torture, inhuman and degrading treatment or punishment. Once ill-treatment is held to fall within the scope of this provision, it cannot be justified in any circumstances. With regard to young people it is clear that extremely long periods of detention, especially without an opportunity to have their sentence reviewed, may raise an issue of

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[47] Eur Court HR *Salman* v *Turkey*, judgment of 27 June 2000.
[48] No 22729/95 *Keenan* v *UK*, Comm Rep of 6 Sept 1999, para 79.

inhuman and degrading punishment.[49] Other matters too, such as those relating to the nature of a child's detention, may be incompatible with Article 3. The use of physical punishment, restraints, or solitary confinement or isolation, for example may be problematic in this regard. Admittedly, only ill-treatment which reaches a particular level of severity will fall foul of Article 3.[50] However, this test is relative insofar as it depends on all the circumstances of the case, including the age and state of health of the victim. The use of physical restraint on a young person, whose bone structure may not yet have formed fully, will thus be more harmful than on an adult, and may indeed be severe enough to fall within the meaning of inhuman and degrading punishment under Article 3. Similarly, the fact that the effect of solitary confinement on an adult may not be severe enough to bring it within the scope of the provision does not mean that the same conclusion should be reached in the case of a minor, who may find isolation from his/her peers a much greater psychological hardship to endure.[51] Bearing in mind the Commission's view that a person deprived of liberty is vulnerable to the extent that responsibility for his/her welfare has been relinquished to the authorities,[52] it is arguable that the use of harsh measures and techniques to deal with disorder in detention centres may be open to challenge under the Human Rights Act 1998.

## Education in Detention: Article 2 First Protocol

Despite the negative wording (no one shall be denied . . .) of Article 2 of the First Protocol it is well established that the provision does contain a right to education which must be secured to all children.[53] Thus, although the obligation on the State under the provision stops short of requiring states to introduce education of a particular kind or type, such as through a particular language, it does encompass equal access to existing systems of education. This would appear to have direct relevance to the situation of children in detention or juvenile justice centres, and notwithstanding the demands of the secure setting, young people in such institutions must obtain a basic level of educational training, from which they are entitled to draw benefit.[54]

In relation to education in the wider sense, there is also scope for arguing that a young person has a right to access adequate rehabilitation services while in detention. In *Bouamar*, for example, the Court noted that detention in conditions of virtual isolation and without assistance of staff with

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[49] See *Weeks* judgment *op cit* and *Singh* judgment, *op cit*, para 66. See also the arguments made in the *T* and *V* judgments, *op cit*.

[50] Eur Court HR *Tyrer* v *UK*, judgment of 25 April 1978, Series A no 26, 2 EHRR 1.

[51] See also *Keenan*, Comm Rep, *op cit*, where the Commission held by 11 votes to 9 that the conditions of detention in which the applicant's son was held were not severe enough to breach Article 3. The view of the significant minority was that the authorities, in total disregard of his particular needs, had applied measures against him, which were unfit for his health conditions and contributed to his suffering and to his anxiety.

[52] *Ibid*, at para 79.

[53] Eur Court HR *Costello-Roberts* v *UK*, judgment of 25 March 1993, Series A No 247-C, 19 EHRR 112, at para 27.

[54] Eur Court HR *Belgian Linguistics Case*, judgment of 23 July 1968, Series A no 6, 1 EHRR 242, at para 4.

educational training cannot be regarded as furthering the educational aim. There would appear to be potential, therefore, for invoking this approach in a challenge to poor conditions of detention for young people or in conditions where their wider educational needs are not being addressed adequately.

## CONCLUSION

While the implications of the Human Rights Act 1998 for juvenile justice in Northern Ireland may be daunting, it is important to remember that the Convention does more than proscribe certain treatment of children in conflict with the law. It also contains considerable examples of good practice, many of which have been highlighted here, which must be taken on board to ensure compatibility with the Convention under the Human Rights Act 1998. Admittedly, there are many areas concerning young people which have not yet been considered by the European Court and for which there is no Convention precedent. In their consideration of such matters under the Human Rights Act the courts would do well to reflect on the extent to which the European Court has been influenced in this area by the UN Convention on the Rights of the Child 1989. The child-specific standards in this Convention include the principles of reintegrating and rehabilitating, rather than punishing young offenders, and treating them in an appropriate manner. In the absence of more specific rules, the application of this important, albeit general guidance would ensure that the Human Rights Act 1998 has a positive impact on the way in which young people face detention and trial in Northern Ireland and the United Kingdom as a whole.

# WAIVER OF RIGHTS AND STATE PATERNALISM UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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## I. INTRODUCTION

The extension of the scope of applicability of the European Convention on Human Rights to the relationships between private parties, inaugurated in the 1981 landmark judgment in the *Young, James and Webster* case,[1] situates the conflict between the logic of fundamental rights and the logic of the market at the centre of the difficulties raised by the application of this instrument. The question of the waiver of rights, that is, of whether the individual bearer of rights may dispose of his fundamental right as he pleases, becomes of decisive importance in this context. The logic of the market is, indeed, favourable to admitting such a waiver. Such an authorization – which, one could say, seems to follow from a conception of the individual right as the private property of the right-holder – appears at first glance to enlarge the range of choices open to the individual, and thus, the utility of the right-holder: to the economist, (insofar as the individual has the choice whether or not to waive his right, and thus, whilst having the *liberty* not to exercise the right or not to seek its vindication, is not under an *obligation* to do so), the individual is better off in a context where the waiver of rights is authorized than in a context where such a waiver is prohibited. On the other hand, in the logic of fundamental rights, the possibility of waiver may appear instead as a threat. Such a possibility amounts to the commodification of the right, which becomes a negotiable good, the value of which is made dependant on the laws of offer and demand.

In this article, I intend to discuss the status recognized to the waiver of rights in the case law of the European Court of Human Rights, which, I believe, remains a doctrine in a confused state – a practice devoid of a theory. Much of the confusion, however, may be attributed to the failure to distinguish

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[1] Eur. Ct. H.R., *Young, James and Webster* v *United Kingdom* Case, Judgment of 13 August 1981, Series A No. 44, § 49: " Although the proximate cause of the events giving rise to this case was [an agreement between an employer and trade unions], it was the domestic law in force at the relevant time that made lawful the treatment of which the applicants complained. The responsibility of the respondent State for any resultant breach of the Convention is thus engaged on this basis". See generally, *inter alia*, A. Clapham, "The 'Drittwirkung' of the Convention", in: R. St. McDonald, F. Matscher & H. Petzold, *The European System for the Protection of Human Rights* (Martinus Nijhoff, Dordrecht–Boston-London, 1993) p 163; A. Clapham, *Human Rights in the Private Sphere* (Oxford, Clarendon Press, 1993); A. Drzemczewski, "The European Human Rights Convention and Relations Between Private Parties", Neth. I.L.R., 1979, p 163.

clearly between two questions.[2] Although both of these questions may be said to relate to the conflict between the respective logics of the market and of fundamental rights, the conflict develops, in each case, in quite distinct fashion. These two questions may be summarized as such:

(a) The first question is whether a Contracting State may avoid being found in violation of the Convention by invoking the fact that the individual applicant, although she now asserts that her rights under the Convention have been violated, had in fact consented to the treatment complained of. In such a circumstance, the question put before the European Court of Human Rights is that of the existence, *vel non*, of a *privilege*[3] to waive a right guaranteed by the Convention. The State relies on the existence of such a privilege to escape his international responsibility for the situation complained of.

(b) The second question is whether a Contracting State may be held responsible, not only for having violated the rights set forth in the Convention, but also for having violated what the individual applicant asserts is her right not to have imposed upon her the benefit of a right which she resents as burdening her, and which she would prefer to barter away or simply to sacrifice. The *right* to waiver is asserted, here, not by the respondent State, but by the individual applicant; instead of it being diminished, the international obligation of the State under the Convention is duplicated: not only is the State obliged to respect each right stipulated in the Convention, it also must respect the right of the individual right-holder not to have the guarantee of the right imposed upon her.

A coherent theory of waiver under the Convention must begin with such a distinction, between these two hypotheses where the question of waiver arises[4] – either as invoked by the State (a), or as asserted by the individual (b). For example, a statement by the European Commission on Human Rights that a protest strategy by prisoners involving "self-inflicted

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[2] It does not seem to me that Ph. Frumer completely avoids the confusion, in an otherwise excellent thesis to which I am much indebted: *La renonciation aux droits et libertés dans le système de la Convention européenne des droits de l'homme*, thèse de doctorat, Université libre de Bruxelles, 1999.

[3] The distinction between these two hypotheses and the terminology used to describe it are inspired by my reading of W. N. Hohfeld, " Some Fundamental Legal Conceptions as Applied in Judicial Reasoning", 23 *Yale L. J.* 16 (1913).

[4] Perhaps one could identify a third function of waiver in the system of the European Human Rights Convention, which seems irreducible to the two main functions described here, but is of marginal importance: the waiver by the right-holder may serve as a means to estimate the adequacy of the reparation by the State authorities of the consequences of a measure found to be in violation of the Convention, thus dispensing the European Court of Human Rights from granting a just satisfaction to the aggrieved individual. See the *Neumeister* v *Austria* Case, Judgment of 7 May 1974 on just satisfaction (previously Art. 50 ECHR), following the judgment of 27 June 1968 on the existence of a violation, § 40: "In his request of 26 May 1972 for pardon, he indicated that remission of the remainder of his sentence would be the best possible form of reparation, given that the wrong suffered was by its nature incapable of being wiped out; so sure was he of this that he stated that he would be prepared to waive, if he were accorded a pardon, all his claims for compensation against the Republic of Austria . . . . The opinion he expressed of his own accord at that time retains its value; it confirms the just character of the measure taken in Austria in favour of the applicant".

debasement and humiliation to an almost sub-human degree" cannot engage the responsibility of the respondent Government, which situates us under the *privilege* to a waiver (a)[5], may not be interpreted to imply that there can be found under article 3 of the Convention a *right* to engage in self-destructive practices which, if they were inflicted by State authorities, would amount to an inhuman or degrading treatment (b). Nor can the oft-quoted statement by the European Court of Human Rights that

> "neither the letter nor the spirit of this provision (article 6 § 1 of the Convention) prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to have his case heard in public (. . .). However, a waiver must be made in an unequivocal manner and must not run counter to any important public interest"[6],

be taken to mean that, under article 6, § 1, of the Convention, there exists a *right* to have one's case heard behind closed doors. In both these examples, the State invokes the existence of a *privilege* with the applicant to waive his right under the Convention, to diminish or simply escape its international responsibility: these examples do not even raise the question of whether or not the Convention grants a *right* to waiver to those to whom it grants fundamental rights.

In the following sections, I shall examine, first, the nature of the privilege to waive the rights set forth in the Convention, as invoked by the respondent State (II), and secondly, whether the Convention, when it confers a right to the person under the jurisdiction of the State party to the Convention, at the same time recognizes the right of that person to waive the right conferred upon her, not in the large but also too vague sense of not using it, but in the precise sense of exchanging it against an advantage to which the right-holder attaches more value than to the preservation of her fundamental right itself (III). It may be useful to announce, from the outset, the conclusions which I have been led to: although a *privilege* to waive the rights stated in the

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[5] According to the *McFeeley* decision, the protest by the prisoners "cannot derive any legitimacy or justification from the Convention and cannot be attributed to any positive action on behalf of the respondent Government. Thus the Commission is of the view that the undoubtedly harsh conditions of detention, which developed from the applicants' decision not to wear prison uniform or use the toilet and washing facilities provided and other self-imposed deprivations associated with their protest, cannot engage the responsibility of the respondent Government"(Eur. Comm. HR, *Mc Feeley* v *United Kingdom*, Appl. N° 8317/78, *YB ECHR*, vol. 23, 1980, 256, 322).

[6] *Hakansson and Sturesson* v *Sweden* case, Eur Ct HR, Series A No 171–A (1990), § 66 (for a commentary, J.–Fr. Flauss, "De la renonciation à la publicité des débats dans le cadre de la Convention européenne des droits de l'homme", Les Petites Affiches, 1991, n°130, p. 20). See more recently, for a reaffirmation of the validity of this case-law, the *Voisine* v *France* case, Eur Ct HR (8 February 2000), § 32 . In the *Le Compte, Van Leuven and De Meyere* Case, the Court had already noted in its 23 June 1981 judgment, after concluding that Article 6 of the Convention was in principle applicable in the circumstances of the case: "Admittedly, neither the letter nor the spirit of Article 6 par. 1 (art. 6–1) would have prevented them from waiving this right of their own free will, whether expressly or tacitly . . . ; conducting disciplinary proceedings of this kind in private does not contravene the Convention, provided that the person concerned consents."(§ 59).

Convention may be said to exist, there may be found in this instrument no *right* to waiver, at least absent exceptional circumstances which I shall examine in more detail below. As a result, although the Convention does not guarantee against the commodification of the rights it lists, it leaves the Contracting States free to take measures against the risks such a commodification may entail. This, however, as we will soon discover, is a much too crude characterization of a situation eminently complex in fact.

## II. Waiver as a privilege

As must be already apparent to the reader from the examples above, a State Party to the Convention may in principle escape its international responsibility by invoking the fact that the individual applicant has waived the right afforded to him by this instrument. The principle may be read as implicit in the requirement of Article 34 of the Convention that the individual applicant must be a "victim" of the violation complained of. More precisely, it may be deduced from the rule according to which, if the direct victim of the violation is capable of filing the application in his own name, no other person – even when that other person, organization or parent, has a legal interest in obtaining from the European Court of Human Rights a judgment finding that a violation has occurred – may substitute himself to the victim, whose wish not to file a complaint with the Court must be respected, at least in the absence of pressure or duress on the victim not to act against the State.[7] The procedural argument, however, is not totally convincing. For, to the doctrine just stated, it may well be responded that, once an application has indeed been lodged with the organs in charge of the Convention, these organs may continue to examine the case, even when the individual applicant expresses his wish that an end be put to that examination.[8] This latter practice, codified to some extent in the rules relating to friendly settlement under the Convention[9], suggests the existence of a "public order" dimension to the Convention: indeed, it may be interpreted as witnessing to the fact that, in the system of the Convention, the rights and freedoms set forth are not a purely private matter, left at the disposal of the right-holders to whom they are recognized[10].

Nevertheless, it may be argued, both from the fact that a victim of a violation of the Convention may not be forced to act against the State responsible for

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[7] See, *eg*, for an application of the rule leading the Court to deny the status of "victim" to shareholders of a company which, although in the process of liquidation, nevertheless had not ceased to exist as a legal person, the *Agrotexim and others* v *Greece* Case, Judgment of 24 October 1995, esp. § 68 where the Court notes that the company was at the time of the violation "represented by its two liquidators, who had legal capacity to defend its rights and therefore to apply to the Convention institutions, if they considered it appropriate".

[8] See, *eg*, Eur. Ct. H.R., *Tyrer* v *United Kingdom* Case, Judgment of 25 April 1978, Series A No. 26, §§ 24–27.

[9] On this, O. De Schutter, "Le règlement amiable dans la Convention européenne des droits de l'homme: entre théorie de la fonction de juger et théorie de la négociation", in: *Les droits de l'homme au seuil du troisième millénaire* (Brussels, Bruylant, 2000) 225.

[10] F. Sudre, "Existe-t-il un ordre public européen?", in: P. Tavernier (ed.), *Quelle Europe pour les droits de l'homme? La Cour de Strasbourg et la réalisation d'une 'union plus étroite'* (Brussels, Bruylant, 1996) 39.

the violation and from the case-law of the European Court of Human Rights, that the existence of a privilege to waiver may not *as a matter of principle* be excluded, thus making it possible for the respondent State to invoke the fact of the waiver to request from the Court a statement of non-violation. Moreover, the existence of a *privilege* to waiver, thus understood, is not limited to the cases where the individual applicant has, in fact, a *right* to waiver, as for example when he invokes his right to respect for private life to request closed proceedings in his case. However, the principle, that a privilege to waiver exists and must be taken account of in the evaluation of the international responsibility of the State, is limited in three important ways. In the following paragraphs, I consider with the other two the second limitation (that a privilege to waiver would be nonexistent with respect to some rights recognized under the Convention because of their fundamental character), notwithstanding my scepticism.

## Waiver and Individual Autonomy

It should first be noted that the respondent State may not invoke the privilege to waiver simply because the individual, by choosing to act otherwise, could have escaped the situation which led to the violation complained of before the European Court of Human Rights. If such a reasoning were to be followed in all circumstances, the result would be to shrink the autonomy of the individual, that is, the possibility left to the individual, not only to be protected against the violations of his rights guaranteed to him by the Convention, but also to seek his self-fulfilment in the exercise of his freedom to act even when he is not exercising a fundamental right.[11] In the *Dupuis* Case, which may serve as a perfect counter-example, the applicant, although opposed to military service, had not requested the status of conscientious objector, and had moreover waived the exemption from military service when such an exemption was granted to him. Thereafter, when charged for desertion, the applicant complained that the military courts lacked the independence and impartiality required by Article 6 of the Convention. However, the European Commission of Human Rights reasoned that "by adopting this attitude, the applicant made a choice which implied that his case would be referred to the military courts . . . . Bearing in mind the applicant's attitude, he cannot complain of a situation which he himself contributed to bringing about and cannot therefore claim to be a victim of a violation of Article 6 due to the allegedly objectively partial nature of the military courts in examining the case ".[12] However relevant the argument may be in the specific circumstances of that case, there is, of course, a limit to its logic. For it always is the case that, by making a different choice – by choosing a different route of action – the alleged victim of a violation of the European Convention on Human Rights could have avoided the violation he then complains of : the criminal, prosecuted under a procedure incompatible

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[11] As noted by Jed Rubenfeld, "the very order of things in a free society may on certain occasions render intolerable a law that violates no express constitutional guarantee" (J. Rubenfeld, "The Right to Privacy", 102 *Harv. L. Rev.* 737 (1989)). The notion of autonomy to which I am referring here is analogous to the one put forward by J. Raz, *The Morality of Freedom*, Clarendon Press, Oxford, 1986.

[12] Eur. Comm. H.R., Appl. No 12717/87, *O. Dupuis* v *Belgium*, Decision of 8 September 1988, *D.R.* 57, p. 196, 208.

with the requirements of the Convention, could have refrained from committing the crime; the woman, discriminated against because of the laws of marriage, could have chosen to remain single; a myriad of other examples may be easily imagined.

## Waiver and the Nature of Rights Waived

It is sometimes argued that there exists a second limit to the invocation by the State of the privilege to waiver, in that the privilege may not be invoked when certain guarantees of the Convention are deemed to be of such fundamental value that the State Party to the Convention must grant them, even in circumstances where the individual applicant has knowingly acted in a fashion which could be interpreted as constituting a waiver of his rights under the Convention. The typical expression of this limit is to be found in the judgment of 18 June 1971 delivered by the Court in the *"Vagrancy" Cases*. The three applicants, homeless people who had been detained under the provisions of Belgian law, complained of a violation of Article 5 of the Convention, because of the lack of judicial control on the detention they had been subjected to. However, the Belgian Government argued that the three applicants, in two cases explicitly, had requested their admittance into places where they would be sheltered : thus, according to the Government, the applicants would not have been "deprived of liberty" in the meaning of Article 5. The Court remained unpersuaded :

> "Temporary distress or misery may drive a person to give himself up to the police to be detained. . . . Insofar as the wishes of the applicants were taken into account, they cannot in any event remove or disguise the mandatory, as opposed to contractual, character of the decisions complained of . . . . Finally and above all, *the right to liberty is too important in a 'democratic society' within the meaning of the Convention for a person to lose the benefit of the protection of the Convention for the single reason that he gives himself up to be taken into detention*. Detention might violate Article 5 even although the person concerned might have agreed to it. When the matter is one which concerns *ordre public* within the Council of Europe, a scrupulous supervision by the organs of the Convention of all measures capable of violating the rights and freedoms which it guarantees is necessary in every case (. . .) [T]he fact that the applicants 'reported voluntarily' [does not] in any way relieve the Court of its duty to see whether there has been a violation of the Convention".[13]

The passage quoted, however, is not irreproachable. The reference to the "temporary distress or misery" of the applicants, and especially the opposition drawn between measures which are "mandatory" and others which are "contractual", seem to contradict the identification of the right to liberty as belonging to the "public order", that is, as non-tradable. Furthermore, the references to the "public order" of the Convention have been proliferating since 1971, and the expression put to far too many

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[13] *De Wilde, Ooms* and *Versyp* Cases ("Vagrancy" Cases ), 18 June 1971, Series A No12, § 65.

different uses, for it still to retain a truly useful meaning. Although the notion of "public order" appears in the case-law of the Commission[14] or the Court[15] to justify these organs in setting aside the procedural restrictions to their power to find a violation of the Convention, the notion is hardly helpful when the question is not one of the jurisdiction of these organs, but whether a violation has indeed occurred or not, notwithstanding the consent of the individual to the situation adversely affecting him. In such a use of the expression, moreover, the presentation of the Convention as "an instrument of European public order" seems to argue *against* the establishment of a hierarchy of rights within the Convention, as this character is recognized to the instrument as a whole.[16] Thus, one must be careful not to attach too much weight to statements by the organs of the European Convention on Human Rights which suggest that the rights recognized by that instrument may be hierarchized, some being more fundamental, or instituted, rather than for the sole benefit of the individual, for the benefit of the whole of society, and thus not waivable by the right-holder.[17] These statements serve an essentially rhetorical function: although the waiver invoked by the State will be scrutinized more closely when the right is fundamental and instituted in the public interest, the waiver of a right thus characterized is not prohibited; and the waiver of the other rights is not permissible under any circumstance.

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[14] See esp Eur. Comm. H.R., Appl. No788/60, *Austria* v *Italy* ("Pfunders" Case), YB ECHR, vol. 4, 1961, p. 117, 138: ". . . the purpose of the High Contracting Parties in concluding the Convention was not to concede to each other reciprocal rights and obligations in pursuance of their individual national interests but to realise the aims and ideals of the Council of Europe, . . . and to establish a common public order of the free democracies of Europe with the object of safeguarding their common heritage of political traditions, ideals, freedom and the rule of law".

[15] See, *eg*, the *Loizidou* v *Turkey* (preliminary objections) Case, Judgment of 23 March 1995, Series A No 310, § 93 (referring to "the special character of the Convention as an instrument of European public order (ordre public) for the protection of individual human beings").

[16] It is worth emphasizing, for example, that although the right to have access to a court is traditionally considered as a right too fundamental to lend itself to being waived, both the European Commission and the European Court of Human Rights have agreed that a compulsory arbitration clause may bind the individual concerned and lead the courts to deny their jurisdiction, at least, that is, if the clause has been previously freely consented to. See, *inter alia*, Eur. Comm. H.R., Appl. No. 1197/61, *X* v *Fed. Rep. of Germany*, decision of 5 March 1962, YB ECHR, vol. 5, p 88; Eur. Comm. H.R., Appl. No. 10881/84, *R* v *Switzerland*, decision of 4 March 1987, D.R., vol. 51, p 83; Eur. Comm. H.R., Appl. No. 18926/91 and 19777/92, *Spandre and Fabri* v *Belgium*, decision of 30 August 1993, *D.R.*, p 179; Eur. Ct. H.R., *Deweer* v *Belgium* Case, Judgment of 27 February 1980, Series A No. 35, § 49.

[17] See, *eg*, Eur. Comm. H.R., Appl. No. 10802/84, *H. Pfeifer and M. Plankl* v *Austria*, Rep. of the Commission adopted on 11 October 1990, § 39: ". . . even supposing that the rights in question can be waived by a defendant, the circumstances surrounding the applicant's decision deprived it of any validity from the point of view of the Convention"; Eur. Comm. H.R., Appl. No. 17358/90, *M. B.* v *Austria*, Rep. of the Commission adopted on 8 September 1994: "Although the Court in *Pfeifer and Plankl* indicated that it was not necessarily permissible to waive all Convention rights, the Commission finds nothing in the judgment in that case which precludes the operation of a waiver in the circumstances of the present case"; Eur. Ct. H.R., *Albert and Le Compte* v *Belgium* Case, Judgment of 10 February 1983, Series A No. 58, § 35.

The appearance of a notion of "public order" in the case law of the Convention asks for a last commentary. It is clearly established in the case-law of the European Court of Human Rights that the national courts are not obliged to apply the Convention *ex officio:* in the *Ahmet Sadik* Case, the Court confirmed its previous case-law, against a powerful dissenting opinion of Judge S.K. Martens, to the effect that "Even if the [national] courts were able, or even obliged, to examine the case of their own motion under the Convention, this cannot have dispensed the applicant from relying on the Convention in those courts or from advancing arguments to the same or like effect before them, thus drawing their attention to the problem he intended to submit subsequently, if need be, to the institutions responsible for European supervision".[18] This doctrine would be irreconcilable with the view that, as an instrument of the European public order, the Convention must be applied by the national courts, whether the individual victim has consented to the situation imposed upon him or not : instead, the *Van Oosterwijck-Ahmet Sadik* line of cases concerning the local remedies rule – according to which an individual must have invoked the Convention before the national courts, at least in substance, for his application to the international judge to be admissible – strongly argues against a prohibition of waiver under the Convention, that is, it recognizes that the respondent State may invoke the abdication of the individual to escape its international responsibility. It seems therefore that the "public order" character of the Convention mentioned in the "*Vagrancy*" *Cases* not only may not serve to arrange the rights and liberties of the Convention in a hierarchical order; it also cannot be interpreted as meaning that the privilege to waiver is not recognized under the Convention, in the sense that it could not be invoked by the State, in any circumstance, to diminish its international responsibility.

## Waiver and Procedural Guarantees

Whichever the recognition of the waiver as privilege in the system of the Convention, it cannot be doubted that the validity of the waiver, as invoked by the respondent State before the European Court of Human Rights, is to be decided solely on the basis of the Convention itself, and not on the basis of the criteria set forth by the national legislation of the State party. In the *Bulut* case, although it appeared clearly that the applicant's lawyer had not used the opportunity given to him to challenge the presence of a judge as a member of a criminal court after he was informed that the judge had taken part in the questioning of two witnesses during the preliminary investigation, the European Court of Human Rights considered – after having explicitly refused to question the finding of the national courts that the waiver was valid under Austrian law – that: "Regardless of whether a waiver was made or not, the Court has still to decide, *from the standpoint of the Convention*, whether the participation of [a judge] in the trial after taking part in the questioning of witnesses at the pre-trial stage could cast doubt on the impartiality of the trial court"[19]. However, a few paragraphs later, the Court

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[18] *Ahmet Sadik* v *Greece* Case, Judgment of 15 November 1996, § 33. See previously the *Van Oosterwijck* v *Belgium* Case, Judgment of 6 November 1980 (Series A No. 40), and the *Cardot* v *France* Case, Judgment of 19 March 1991 (Series A No. 200).

[19] *Bulut* v *Austria* case, 22 Feb. 1996, § 30.

appears to afford more weight to the waiver invoked by the respondent Government, when it considered that "it is not open to the applicant to complain that he had legitimate reasons to doubt the impartiality of the court which tried him, when he *had* [under national law] *the right to challenge its composition but refrained from doing so* "[20]. The two statements are contradictory only under a superficial reading: in fact, all the first statement means is that the validity of the waiver may not depend ultimately on the internal law of the State party to the Convention, but must be considered from the point of view of the Convention alone, although the guarantees surrounding the waiver under internal law at times appear as a condition of the validity of the waiver from the point of view of the Convention itself [21]; one could say, somewhat abusively insofar as the term "waiver" does not appear in the text of that instrument, that the notion receives, in the Convention, an autonomous meaning, that is, it has a definition which is not fully dependant of the categories and conditions of national law.

Thus, unsurprisingly, the "waiver" of his rights by the individual applicant which the State may invoke must respect a number of conditions progressively laid down in the case law of the European Court of Human Rights.[22] It must be free, unequivocal – although it may be express or tacit –, sufficiently well informed, and "must not run counter to an important public interest". These conditions deserve a more elaborate commentary.

When it insists on the individual's "own free will", the European Court of Human Rights seems to require more than the obvious, that the consent of the individual to waive his right may not be coerced or obtained under conditions amounting to duress. Or, if one prefers: the Court seems to be attached to a realistic understanding of what coercion or duress may mean, especially in bargaining processes.[23] In the *Deweer* case, which led to a

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[20] *Bulut* case, § 34.

[21] Eur. Ct. H.R., *Pfeifer and Plankl* v *Austria* Case, Judgment of 25 February 1992, Series A No. 227, § 38 : the Court notes that the Government concedes that "there is no provision of Austrian law which allows for a defendant expressly to waive his right to be tried by a court whose composition is in accordance with the law, nor consequently is there any provision which defined the procedure to be followed for this purpose".

[22] Eur. Commiss. H.R., Appl. No. 10802/84, *Heinrich Pfeifer and Margit Plankl* v *Austria*, Rep. of the Commiss. adopted on 11 October 1990 : "In order to be effective for Convention purposes, a waiver of procedural rights requires minimum guarantees commensurate to its importance" (§ 74).

[23] It may be of interest to compare what follows with the criteria used by the Court to distinguish – in its own words – between "bearing Christian witness" and "improper proselytism": "The former corresponds to true evangelism, which a report drawn up in 1956 under the auspices of the World Council of Churches describes as an essential mission and a responsibility of every Christian and every Church. The latter represents a corruption or deformation of it. It may, according to the same report, take the form of activities offering material or social advantages with a view to gaining new members for a Church or exerting improper pressure on people in distress or in need; it may even entail the use of violence or brainwashing; more generally, it is not compatible with respect for the freedom of thought, conscience and religion of others" (*Kokkinakis* v *Greece* Case, 25 May 1993, Series A No260–A, § 48). It is noticeable that, in the distinction drawn, the offer of "material or social advantages" is equated with the exertion of "improper pressure".

judgment of 27 February 1980, the applicant had been found to have violated an economic regulation, and his business was threatened with being provisionally closed. While he was facing trial, the applicant was offered a friendly settlement by the authority in charge of prosecuting the offence: indeed, the applicant was notified that his business would be authorized to remain open and the prosecution terminated after the payment of a sum of 10,000 BF. Mr Deweer promptly made the payment, and thus not only avoided the trial, but also did not have to close his business pending judgment on the offence which, according to the prosecutor, he was guilty of. At the same time, by effectuating this payment, he was in fact waiving his right to a court, which the European Court of Human Rights has read into article 6, § 1, of the Convention, as an element of the right to a fair trial. The Court expressed itself as follows on that issue:

> " In the Contracting States' domestic legal systems a waiver of this kind is frequently encountered both in civil matters, notably in the shape of arbitration clauses in contracts, and in criminal matters in the shape, *inter alia*, of fines paid by way of composition. The waiver, which has undeniable advantages for the individual concerned as well as for the administration of justice, does not in principle offend against the Convention . . . . Nevertheless, in a democratic society too great an importance attaches to the 'right to a court' . . . for its benefit to be forfeited solely by reason of the fact that an individual is a party to a settlement reached in the course of a procedure ancillary to court proceedings. In an area concerning the public order (ordre public) of the member States of the Council of Europe, any measure or decision alleged to be in breach of Article 6 calls for particularly careful review"[24].

More interesting is, however, the interpretation that the *Deweer* Court gives to the requirement of an "absence of constraint" in the situation complained of. Reminded that the applicant faced the threat of a trial, which, according to the Belgian legislation applicable to the case, could lead to him being fined up to 30,000,000 BF, the Court considered that the "constraint" resided precisely in the imbalance – the "flagrant disproportion" – between the alternatives facing the applicant. According to the respondent Government, the waiver of the right to a court should be accepted, as the sum proposed as friendly settlement was particularly minor compared to the fines which could have been judicially imposed on Deweer. To this, the Court answers: "The 'relative moderation' of the sum demanded in fact tells against the Government's argument since it added to the pressure brought to bear by the closure order. The moderation rendered the pressure so compelling that it is not surprising that Mr Deweer yielded"[25]. This answer is paradoxical only in appearance. Indeed, the particular suspiciousness of the Court towards the proposal of settlements, implying the waiver of the right to a court, which appear *too advantageous* to the person concerned, simply results from the assimilation of the sum offered against the waiver to a tax imposed on the exercise of a right: the higher the sum gained by the person agreeing to

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[24] *Deweer* v *Belgium*, Judgment of 27 February 1980, Series A No 35, § 49.
[25] *Deweer* case, § 51.

waive the right[26], the heavier the tax – in both cases, there is a coercion at work, and the means through which such coercion is imposed is, in the reasoning of the Court, indifferent.

Not only must the consent be free, however; it must also be informed.[27] Especially in the course of legal proceedings, the validity of the waiver may depend on the presence of a lawyer, capable of informing the aggrieved individual of its possible consequences.[28] In fact, legal representation not only guarantees that the consent will be informed; it also constitutes a check against pressure being exercised on the layperson. In the *Pfeifer and Plankl* case, the Commission reasoned thus, rejecting the argument of the Austrian Government that the applicant, by agreeing to the composition of the court before which he appeared, had waived his right to invoke its lack of objective impartiality on that basis:

> ". . . the presiding judge incited the applicant to waive his right to a remedy which would otherwise have been available to him. It may be left open whether in this context undue pressure was exerted on the first applicant or whether he was led into error about the legal situation. It suffices to note that the applicant was put into a difficult psychological situation when he was called to appear before the presiding judge *without the assistance of his legal defence counsel*, and required to give a reply immediately. In order to preserve his rights, he would have had to tell the presiding judge that he did not agree with him that the disqualification was merely a formal matter and did not justify a fear of substantive bias. It may well be that a waiver declared by the applicant *in the presence of his lawyer* before a judge who was not himself disqualified would have to be regarded as binding also for the

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[26] Of course, this sum is not that of the transactory fee. The sum gained by the person agreeing to waive his right is equivalent to the sum that person risks being fined if the case goes to court (in the *Deweer* case, up to 30,000,000.– BF), minus the amount of the transactory fee (in that case, 10,000.– BF): the difference between these two amounts is, in the comparison suggested, the level at which the tax is imposed for the exercise of the fundamental right at stake. This problem is logically similar to the problem of the "unconstitutional conditions" which a State may want to impose on those to whom it offers an advantage to which they have no right. Consider, for example, a grant that a State decides to offer to artists who agree not to attack the monarchy. It can be said that the artist accepting the grant has waived his right to freedom of expression. But the higher the amount of the governmental grant, the more important the pressure is exercised on the artist to waive his right. See, for a classical treatment of the question, R.L. Hale, "Unconstitutional Conditions and Constitutional Rights", 35 *Colum. L. Rev* 321 (1935).

[27] One of the interesting conclusions Ph. Frumer is led to in his thesis which I have already cited (above, n. 2), is that positive obligations may be imposed on the State on this basis. The implications, however, remain vague.

[28] On the importance of the representation by a lawyer, Eur. Comm. H.R., Appl. No. 12129/86, *Hans-Dieter Hennings* v *Fed. Rep. of Germany*, Rep. of the Commission adopted on 30 May 1991, § 58. See also the *McGonnell* Case, where the United Kingdom Government argued that the applicant had validly waived the right allegedly violated, as he had been represented by a lawyer before the national courts (Judgment of 8 February 2000, § 42).

> purposes of the Convention law. The Commission considers, however, that having regard to the particular circumstances in which the applicant declared his waiver, it cannot be held to be effective for the purposes of the Convention."[29]

This view was shared by the Court in the judgment adopted in the same case. According to the Court, the presiding judge – who, indeed, was moreover one of the two judges whose disqualification was at stake – "on his own initiative approached Mr Pfeifer in the absence of his lawyer, . . . . He put to him a question that was essentially one of law, whose implications Mr Pfeifer as a layman was not in a position to appreciate completely. A waiver of rights expressed there and then in such circumstances appears questionable, to say the least. The fact that the applicant stated that he did not think it necessary for his lawyer to be present makes no difference. Thus even supposing that the rights in question can be waived by a defendant, the circumstances surrounding the applicant's decision deprived it of any validity from the point of view of the Convention."[30]

Considered as a privilege which, although recognized initially as a prerogative of the individual right-holder, is subsequently invoked by the State defendant before the European Court of Human Rights, the waiver has the status of an exception carved into the rule that the State is answerable for all violations of the Convention which occur under its jurisdiction. Thus, unsurprisingly, the validity of the waiver depends on it being expressed by the individual with sufficient specificity, and the interpretation of the waiver is generally restrictive.

A good example[31] is furnished by the recent *Richard* v *France* judgment of 22 April 1998. The Court was asked to decide whether the consent of the applicant – an AIDS-stricken patient awaiting compensation from the French State – to withdraw from proceedings previously brought before the Commission, after reaching a friendly settlement with the State (in January 1996), excluded him from filing a new application (in October 1996) after it appeared that the proceedings, continued before the French courts even after the applicant agreed to the settlement offered to him, were again suffering unreasonable delay. When the second application was filed, the Government asked the Court "to recognise that the friendly settlement reached with Mr Richard necessarily implied on his part the unequivocal waiver of all

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[29] Eur. Comm. H.R., Appl. No. 10802/84, *H. Pfeifer and M. Plankl* v *Austria*, Rep. of the Comm. Adopted on 11 October 1990, §§ 78–79 (my emphasis).

[30] Eur. Ct. H.R., *Pfeifer and Plankl* v *Austria*, Judgment of 25 February 1992, §§ 78–79.

[31] For another example, see Eur. Ct. H.R., *M.S.* v *Sweden* Case, Judgment of 27 August 1997, § 32. The applicant had requested compensation for what she considered to be an industrial injury; however, the Social Insurance Office had obtained her medical file from a clinic she had visited previously. The Court reject the argument of the Government that, by asking for compensation, M.S. had waived her right to confidentiality with regard to the medical data: ". . .the disclosure depended not only on the fact that the applicant had submitted her compensation claim to the Social Insurance Office but also on a number of factors beyond her control. It *cannot therefore be inferred from her request that she had waived in an unequivocal manner* her right under Article 8 § 1 of the Convention to respect for private life with regard to the medical records at the clinic" (§ 32).

further proceedings against the State on account of the length of the proceedings". The Court refused to follow this suggestion, not only because of the wording of the declaration made by the applicant when he withdrew from the first proceedings,[32] but also because the Court deemed it "highly unlikely that the applicant would have accepted a friendly settlement proposal that allowed the outcome of the proceedings to be delayed with impunity".[33]

Tacit waiver, nevertheless, remains permissible under certain circumstances. That is, although tacit, a waiver may appear sufficiently unequivocal for it to be invoked by the respondent State to escape its international responsibility: the touchstone appears to be the "reasonableness in the circumstances of the case" of what may be required from the applicant to dispel the impression created by his silence.[34] In criminal proceedings, the principle should be combined with the rule according to which the defendant cannot be expected to contribute towards his own conviction: thus, adequate safeguards must ensure that the national authorities do not escape their responsibility in the due conduct of such proceedings by simply asserting that it remains open to the accused to object to the way the trial is conducted, and thus "bring about a normal trial".[35]

It is in the definition of the conditions of validity of the waiver expressed, explicitly or more tacitly, by the individual right-holder, that the European Court of Human Rights defines the exact balance between the two opposite risks involved in the recognition of a privilege to waive one's right. The simple negation of such a privilege, which would deprive of any significance the consent of the individual to the situation he complains of after the fact,

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[32] The applicant had agreed to "waive the right to bring any further proceedings on this account against the French State in the French and international courts"; according to the Court: "The words "on this account" expressly refer to the excessive length complained of in the first application and, consequently, to the domestic proceedings up to the point they had reached when the friendly settlement was agreed; they therefore exclude any subsequent proceedings such as those now in issue before the Court".

[33] The Court continues by reiterating that "under its settled case-law, the waiver of a right guaranteed by the Convention – in so far as such a waiver is permissible – must be established in an unequivocal manner (see, among other authorities, the *Pfeifer and Plankl* v *Austria* judgment of 25 February 1992, Series A no. 227, p 16, § 37) and requires minimum guarantees commensurate to its importance. Those requirements were not fulfilled in the present case". See the *Richard* v *France* (Appl. No 33441/96) Case, Judgment of 22 April 1998, §§ 42, 48–49. See also, decided the same day, the *Pailot* v *France* (Appl. No 32217/96) Case. Thus, the interpretation of the extent of the waiver is made to depend on the plausibility *vel non* of the consent of the aggrieved individual, in the presentation of the respondent Government, to the situation constituting the alleged violation: the less "reasonable" the consent of the individual appears to the Court, the more exacting its control will be on the reality of the alleged waiver.

[34] Eur. Ct. H.R., *McGonnell* v *United Kingdom* Case, Judgment of 8 February 2000, §§ 44–45. Compare for example Eur. Ct. H.R., *Schuler-Zraggen* v *Switzerland*, Judgment of 24 June 1993, Series A No. 263, §§ 56–58, with Eur. Comm. H.R., Appl. No. 16922/90, *Fischer* v *Austria*, Report of the Commission adopted on 9 September 1993, §§ 60–62.

[35] Eur. Comm. H.R., Appl. No. 12129/86, H.–D. *Hennings* v *Fed. Rep. of Germany*, Report of the Commission adopted on 30 May 1991, §§ 49–51.

either would be unworkable given the many situations of life where, if the element of consent were not taken into account, the violation of a right would be assertable, or would lead to an important contraction of the scope of activities protected under the Convention, especially under Articles 8 or 10 of that instrument. At present, these articles have been used in a most extensive fashion[36] precisely because the circumstances surrounding the limitation of these rights, including the circumstance of consent, may be taken into consideration in determining whether these limitations are imposed for reasons which can be deemed relevant and sufficient and are proportionate to the legitimate aim pursued. The more such a contextualism is made impossible, the more absolute, in other words, the guarantees become, and the more their scope of applicability will be restricted. On the other hand, however, the recognition of the privilege to waiver (in our terminology, of the possibility for the respondent State to invoke the consent of the individual to escape its international responsibility) puts the individual at risk, makes him vulnerable to market pressures, the coerciveness of which is not less threatening because the choice is, at least in a formal sense, voluntary.

In the words of R. Hale: "One chooses to enter into any given transaction in order to avoid the threat of something worse – threats which impinges with unequal weight on different members of society. The fact that he exercised a choice does not indicate lack of compulsion. Even a slave makes a choice. The compulsion that drives him to work operates through his own will power. He makes the 'voluntary' muscular movement which the work calls for, in order to escape some threat; and though he exercises will power and makes a choice, still, since he is making it under threat, his servitude is called 'involuntary'"[37]. This view may be extreme, but it nevertheless serves usefully to deconstruct the natural sympathy we have for choice, because of our tendency to contrast it with coercion. Indeed, what Hale teaches is that choice is just another vehicle for coercion, and that, therefore, the question facing us is normative (which kind of freedom do we want?) rather than purely logical (in which situation do we have more choice, assuming, as a matter of course, that we prefer more choice to less choice?). At least when the waiver has its source in a bartering process where the individual gains something in exchange for his giving up of the right (for example, swift judicial proceedings or avoiding the risk of sentencing), the question is whether the individual is better off protected from the coercion exercised by market mechanisms, or rather should be left free, at least formally, to barter away his fundamental rights against some advantage more important to him; and whether the utility of the individual is all that counts, or should preferably be balanced against that of other individuals or the general interest.

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[36] See O. De Schutter, "La vie privée entre droit de la personnalité et liberté", *Rev. trim. dr. h.*, 1999, p. 827.

[37] R.L. Hale, "Bargaining, Duress, and Economic Liberty", 43 *Colum. L. Rev.* 605 (1943).

## III. Waiver as a Right

Quite distinct from the *privilege* to waiver is the *right*, invoked by the individual right-holder, not only to be protected against the violation of his right, but also to be free from the imposition of the benefit of the right against his own free will. Here, the individual seeks the determination from the Court that the right or freedom guaranteed to him by the Convention is, in a sense, duplicated: each primary right is accompanied by the secondary right to trade off the primary right, or, more broadly, by the secondary right "not to" receive the benefits from the primary right, except perhaps as a bargaining chip in the context of a transaction. Procedurally, the difference is significant between this hypothesis and the previous one: whilst the waiver as a *privilege* is invoked by the State, arguing that the individual has consented to the situation he denounces as a violation of his right, the waiver as a *right* is invoked by the individual, arguing against the paternalism of the State which intends to impose the benefit of an unwanted right against the very will of the right-holder. However, although the Convention recognizes a *privilege* to waiver – as we have seen, provided certain conditions are satisfied, the fact that an individual has consented to the situation subsequently complained of is a valid argument by which a respondent State can escape its international responsibility –, there cannot be found in the Convention a *right* to waiver, in the sense just stated. Such a right can be grounded neither in the general principle of liberty, according to which everything not prohibited should be permitted as constituting the exercise of a fundamental right, nor in the deduction, from positive rights (to perform an activity), of negative rights (to abstain from the activity protected). Even when the waiver operates through a contractual mechanism, by which a person disposes of his property or of his labour, this circumstance does not elevate the waiver to the status of a fundamental right protected under the Convention. The only strategy that remains available to those wishing to defend waiver as a fundamental right protected under the Convention is *ad hoc*: in particular circumstances, the waiver of a right X guaranteed by the Convention may take the form of the exercise of a right Y, in which case, of course, the waiver ought to be guaranteed – not, that is, *as waiver*, but because the exercise of right Y can be described, alternatively, as a renunciation to the protection afforded by right X.

### The General Principle of Liberty

It seems, indeed, that there exists no *general right to waiver* in the European Convention on Human Rights. Of course, one could be tempted to identify such a right to waiver in the general principle of liberty, the freedom recognized the individual to do all that he wishes, provided the act causes no damage to anybody else, or remains, in Mill's phrase, "self-regarding". It is true that the existence of a fundamental right to liberty, in such sense, has been asserted at various periods by a number of constitutional courts. Most famously, the affirmation of such a right was the thrust of the doctrine of the United States Supreme Court during the so-called "*Lochner* era" (1905–1937) when, under the guise of giving a substantive content to the Due Process Clause of the Fourteenth Amendment, the Court in fact translated into constitutional law the doctrine limiting the police powers of the State to the enforcement of the maxim *sic utere tuo ut alienum non laedas*, according to which one must not use one's property with the purpose of violating the

rights of others : any public intervention which goes beyond imposing respect of this basic rule of social life would constitute an intolerable, and "paternalistic", interference with individual liberty.[38]

Today, the constitutional doctrine which seems closest to this interpretation of a fundamental right to liberty is that which the German Federal Constitutional Court (*Bundesverfassungsgericht*) bases on article 2 of the Basic Law of 1949, according to which "Everybody has the right to the free development of his personality, as long as he does not violate the rights of others and does not contravene the constitutional order or moral laws"[39]. In the famous *Elfe* case, the Federal Constitutional Court noted that "As long as special areas of life are not protected by a basic right, the individual can refer to Article 2(1) of the Basic Law when public authorities interfere with his freedom".[40] The extent to which such a protection may go is well illustrated by a case concerning a restriction imposed upon the freedom to horse-ride in woods, which was alleged to constitute an unconstitutional interference with the "general freedom to act" (*allgemeine Handlungsfreiheit*) embodied in Article 2(1) of the Basic Law: indeed, in that case, the Court considered that "According to the principles developed by the *Bundesverfassungsgericht*, Article 2(1) of the Basic Law comprehensively guarantees the right to freedom of action . . . . It not only protects a limited area of personality development, but rather protects every form of human activity regardless of the importance of this behaviour for the development of personality"[41]. Such a case-law amounts to requiring that every act by public authorities must be compatible with the principle of proportionality, or else is to be considered an infringement with the right to personal liberty, defined in turn as the right of each individual to act as he chooses unless the act violates the rights of others or infringes public order or good morals.

It is noteworthy that under German Constitutional Law, however expanded this general freedom to act – indeed, this freedom is unlimited in principle –, the public authorities are nevertheless authorized to go against the consent of the individual to a violation of his dignity, even when such consent is freely expressed and properly informed. Indeed, on the basis of Article 1(1) of the Basic Law, which states the inviolability of human dignity, the German Federal Administrative Tribunal considered that the denial of a licence to set up a peep show could be justified insofar as such a representation constituted a violation of human dignity. According to the decision:

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[38] The leading intellectual figure of the doctrinal landscape preceding the *Lochner* era, and thus responsible for preparing it, was Thomas M. Cooley, who considered that it was in the "nature of well-ordered civil society" that "every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community" (Th. M. Cooley, *Treatise on the Constitutional Limitations which rest upon the Legislative Power of the States of the American Union*, Little, Brown, & Co., Boston, 1868, 7th ed. 1883).

[39] Translation from S. Michalowski and L. Woods, *German Constitutional Law. The protection of civil liberties*, Ashgate, Dartmouth, 1999, p 108. The excerpts that follow from the case law of the German Constitutional Court are borrowed, with slight modifications, from the same source.

[40] BverfGE 6, 32 (1957).

[41] BverfGE 80, 153 (1989).

> "This violation of human dignity is not excluded or justified by the fact that the woman performing in a peep show acts voluntarily. Human dignity is an objective, indisposable value, the respect of which the individual cannot waive validly . . . . It is insignificant for the violation of human dignity that the trader has found women who are prepared to perform, for remuneration, in a peep show . . . . The consent of the women concerned can only exclude a violation of human dignity if such a violation is based only on the lack of consent to the relevant actions or omissions of the women concerned. However, this is not the situation here because in the case at issue . . . the human dignity of the women concerned is violated by the exposition typical for these performances. Here, *human dignity, because its significance reaches beyond the individual, must be protected even against the wishes of the woman concerned whose own subjective ideas deviate from the objective value of human dignity* "[42].

The position of German constitutional law, in sum, combines the protection of human dignity as an "objective, indisposable value", with the protection of the right of the individual to do what he chooses unless the public authorities have good reasons to limit the exercise of his liberty and impose such a limitation in full respect to the principle of proportionality. The combination of these two apparently contradictory guarantees results in providing for an exception to the principle of individual liberty, when human dignity is at stake: when such is the case, intervention by the State may be justified by the aim to protect that value, which the liberty of the individual may not lead him to sacrifice, as that value is not to be confused with something of his property or otherwise at his disposal.

The position of the European Court of Human Rights on the question of whether or not there exists in the Convention, as an element of the general liberty of the individual, a right to waive the guarantees afforded by that instrument, can be usefully compared to that just exposed. The similarity resides both in the understanding of individual liberty as a fundamental right, and in the margin of appreciation left to the public authorities in the exercise of their power, nonetheless, to impose the respect for certain values against the wish of the individual to use his liberty by waiving the rights – if this is not too paradoxical a way of putting things – imposed upon him. Although not yet complete, the elevation of the principle of liberty to the status of a fundamental right would represent the final step of a development which has led the European Commission and the European Court of Human Rights to conclude, almost a decade ago, that although it is neither possible nor necessary "to attempt an exhaustive definition of the notion of 'private life'", it would however be "too restrictive to limit the notion to an 'inner circle' in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that

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[42] BverwGE 64, 279 (1981) (my emphasis).

circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings".[43]

Although the European Court of Human Rights has not, as yet[44], gone so far as to read into Article 8 of the Convention a freedom to exercise a professional activity or to pursue a business – although such a right has been linked to the right to the free development of one's personality by the German Courts, an approach which has in turn influenced the European Court of Justice[45] – the scope of activities protected under the right to privacy is nevertheless immense – indeed, it is potentially without limits. But this does not exclude the possibility for the State party to the Convention, while exercising its margin of appreciation, to impose restrictions upon the activities pursued by the individual under the guise of private life. Thus, in its *Laskey, Jaggard and Brown* judgment of 19 February 1997, confronted with the criminalization under English law of sado-masochistic activities performed between consenting adults, the European Court of Human Rights stated that, in its opinion, "one of the roles which the State is unquestionably entitled to undertake is to seek to regulate, through the operation of the criminal law, activities which involve the infliction of physical harm. This is so whether the activities in question occur in the course of sexual conduct or otherwise"[46]. After having found that the prosecution of the applicants was justified for the protection of health within the meaning of Article 8 § 2 of the Convention – indeed, the applicants had not suffered severe injuries from their sexual practices; but, in the opinion of the Court, the national authorities were entitled to decide to act on the basis of the "*potential* for harm inherent in the acts in question"[47] – the Court added: "In view of this

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[43] Eur. Ct H.R., *Niemietz* v *Fed. Rep. of Germany* Case, judgment of 16 December 1992, Series A No 251-B, § 29. The definition of "private life" as "the right to establish and develop relationships with other human beings" was first resorted to by the European Commission of Human Rights, in cases where at stake were the protection of the relationship between the individual applicant and a pet animal (Eur. Comm. H.R., Appl. No 6825/74, *X* v *Iceland*, *D.R.*, 5 (1976), 86) or the right of a woman to choose to interrupt her pregnancy (Eur. Comm. H.R., Appl. No 6959/75, *Brüggeman and Scheuten* v *Fed. Rep. of Germany*, Report of 12 July 1977, *D.R.*, 10 (1977), 100). The phrase was first imported into the case-law of the European Court of Human Rights by Judge S.K. Martens, in a separate opinion joined to a judgment of the Court on the expulsion of non-nationals for public order motives (Eur. Ct H.R., *Beldjoudi* v *France*, 26 March 1992).

[44] See, *eg*, Eur. Ct H.R., *Thlimmenos* v *Greece*, 6 April 2000, nyr.

[45] See, *eg*, Case 4/73, *Nold*, ECR (1974), 491.

[46] Eur. Ct H.R., *Laskey, Jaggard and Brown* v *United Kingdom*, Judgment of 19 February 1997, § 43. Judge Pettiti was of the opinion that § 43 should have been expanded by noting, instead of the phrasing reproduced, that the State is entitled to "regulate and punish practices of sexual abuse that are demeaning even if they do not involve the infliction of bodily harm" (see the concurring opinion of Judge Pettiti, annexed to the judgment). The French reads "régulation et sanction de pratiques d'abus sexuels même si ceux-ci n'entraînent pas de dommages corporels mais des atteintes à la dignité". The reference to human dignity, as a value which is not at the disposal of the individual because of its objective character, although dropped in § 43 of the judgment, is nevertheless implicit in the statement made by the Court in the *obiter dictum* which it adds at the end of the decision (see below).

[47] The emphasis in the excerpt is mine. This also appears to be the position of the Commission as expressed in the Report it submitted in the same case. See Eur.

conclusion the Court . . . does not find it necessary to determine whether the interference with the applicants' right to respect for private life could also be justified on the ground of the protection of morals. *This finding, however, should not be understood as calling into question the prerogative of the State on moral grounds to seek to deter acts of the kind in question*"[48].

It is difficult to see how the last statement quoted could be understood otherwise than as an open recognition by the Court that the consent of the individual to the violation of a right afforded to him by the Convention, however freely expressed and well-informed, does not constitute the exercise of a distinct right under this instrument.[49] The relevancy of such consent is not questioned by the Court; however, the expression of consent simply feeds into the balancing of interests effectuated by the European Court of Human Rights, when it is asked to decide whether the national authorities have offered sufficient reasons for the interference complained of and whether the measures taken are proportionate to the aims pursued, in cases where the State has to justify protective measures imposed on the individual in the name of his own good, when such measures lead to a diminishment of his sphere of personal liberty : his expressed consent to a particular situation or treatment does not give birth to a new right of the individual, which he could invoke against the paternalistic pretences of the State. The deliberate agnosticism of the Court concerning the question whether the sexual activities at stake fall or not within the scope of Article 8 does not diminish the strength of that conclusion: quite the contrary, before reaching its conclusion, the Court reasons as if the activities were protected under Article 8, which implies that the conclusion which it is led to in this case (that the State may prohibit consensual sexual activities with the aim of protecting health or morals) is not to be explained away by the debatable status of sado-masochistic activities among the activities forming a part of "private life", but implies, rather, that *although consented to*, a treatment may nevertheless be prohibited by the State.

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Comm. H.R., Appl. Nos. 21627/93, 21826/93 and 21974/93, *Laskey, Jaggard and Brown* v *United Kingdom*, Report adopted on 26 October 1995, § 60: "The Commission accepts that respect for the health and rights of others may justify a State in prohibiting activities which cause or risk causing death or serious injury or in imposing certain protective measures (*cf* No. 7992/77 Dec 12.7.77, D.R. 14 p 234 concerning the use of motorcycle helmets and 10083/82 Dec 4.7.83 D.R. 33 p 270 concerning aiding and abetting suicide)".

[48] Eur. Ct H.R., *Laskey, Jaggard and Brown* v *United Kingdom*, Judgment of 19 February 1997, § 51.

[49] This appears to be common ground both for the European Court and for the European Commission, including the Members of the Commission which have expressed a dissenting opinion in the *Laskey and others* case. Indeed, the disagreement of Mr Loucaides, joined by six other members of the Commission, with the opinion of the majority, relied at least as heavily on the private character of the activities criminalized than on their consensual character: "If we accept that the interference in question is legitimate we inevitably open the way to Governments to intrude into persons' bedrooms to investigate allegations, for example, that spouses engage in sado-masochistic activities. Strong good reasons are necessary for such a course which in my opinion are lacking".

## From Positive to Negative Rights

In its judgment of 13 August 1981 delivered in the *Young, James and Webster* case, the European Court of Human Rights had expressed the opinion, in a very cautious mode, that it does not follow from the omission in the drafting of Article 11 of the Convention of a formula guaranteeing that "no one may be compelled to belong to an association" – as stated in Article 20 § 2 of the Universal Declaration of Human Rights – "that the negative aspect of a person's freedom of association falls completely outside the ambit of Article 11 and that each and every compulsion to join a particular trade union is compatible with the intention of that provision". Indeed, according to the Court, "to construe Article 11 as permitting every kind of compulsion in the field of trade union membership would strike at the very substance of the freedom it is designed to guarantee".[50] More than a decade later, in the *Sibson* and *Sigurdur A. Sigurjonsson* cases[51], although still refusing to pronounce itself on the question whether the "negative right of association" "is to be considered on an equal footing with the positive right", the Court confirmed that Article 11 encompassed a negative right "not to associate". More recently still, the two aspects of the right of association have been considered to be of equivalent status under Article 11, such an evolution being apparently justified by the close relationship that there exists between the right not to associate with others and the protection of freedom of thought and expression (Articles 9 and 10 of the Convention).[52]

Could it be argued, then, that the waiver of the rights guaranteed by the Convention should be recognized as a fundamental right under that instrument, because constituting the "negative" aspect of guarantees otherwise formulated in "positive" form? Could it be said, for example, that the "right" of an employee to sacrifice his freedom of expression is in fact embodied in Article 10 of the Convention? Could one read this clause as protecting the right "not to hold opinions", thus prohibiting a Contracting State from adopting legislation outlawing restrictions to the free speech of employees, and protecting employees from dismissal because of their exercise of freedom of expression?

Such a reading, it turns out, would be little short of absurd. First, there appears to be no logical link between the two distinct rights which the Court has read into Article 11: the "negative" right not to associate and the "positive" right of association, in fact, are so separate from one another that, in the cases just mentioned concerning freedom of association, the main question facing the Court was the opposition between these rights which,

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[50] Eur. Ct. H.R., *Young, James and Webster* v *United Kingdom* Case, Judgment of 13 August 1981, Series A No. 44, § 52. See esp. A. Drzemczewski and F. Wooldridge, "The Closed Shop Case in Strasbourg", *Int. & Comp. L. Q.*, 1982, p 396; and J. Andrews, "The Closed Shop Case", 6 *E.L.Rev.* 412 (1981).

[51] Eur. Ct. H.R., *Sibson* v *United Kingdom* Case, Judgment of 20 April 1993, Series A No. 258–A; *Sigurdur A. Sigurjonsson* v *Iceland*, Judgment of 30 June 1993, Series A No. 264.

[52] See Eur. Ct. H.R., *Chassagnou and others* v *France* Case, Judgment of 29 April 1999, § 103. On the link between the negative right of association and freedom of thought and expression, see previously the *Sigurdur A. Sigurjonsson* Case, § 37 of the judgment of the Court.

although invoked respectively by the individual applicant (negative right) and by trade unions or the respondent State (positive right), in fact are both rights *of the individual* which appear to conflict with one another – the right of the individual either not to associate against his wishes, or to be effectively represented and defended by associations to which, therefore, certain advantages must be recognized.[53] Secondly, and perhaps more importantly, it can easily be seen that to guarantee "negative" rights "not to" each time a "positive" right "to" is stipulated, would vastly limit the scope of the positive obligations, imposed upon the States Parties to the Convention, to prevent violations of fundamental rights from occurring even when the violation has its immediate source in the "horizontal" relationships between private parties (and, if such a violation nevertheless occurs because the preventive measures have failed, to offer a remedy to the individual victim). Consider again, hypothetically, the (negative) "right" of an employee "not to" be burdened by the benefit of Article 10 of the Convention (perhaps he asserts the existence of a right to consent to a sacrifice of his freedom of expression because he believes he will receive a higher salary if he is authorized to agree to such a clause in his employment contract): if such a right is recognized, under which conditions will it then still be possible to sue the State for refusing to adopt legislation protective of the fundamental rights of employees, that is, for not respecting the positive obligations imposed on it by the Convention ?

No wonder, then, that the deduction of a negative right from a positive right recognized in the Convention has not been attempted by the European Court of Human Rights outside Article 11. In *K v Austria*, the report of the European Commission did state that "the freedom of expression by implication also guarantees a 'negative right' not to be compelled to express oneself, that is, to remain silent".[54] The statement has remained isolated; the question of whether or not a right to remain silent may be read into Article 10 of the Convention has largely become moot, in any case, since the Court subsequently agreed to discover such a right in Article 6.[55] In the *Johnston* case, which concerned the unavailability of divorce under Irish law, the European Court of Human Rights refused to derive a right to divorce from Article 12 of the Convention, which guarantees the right to marry – arguing, ironically if one keeps in mind the reasoning of the *Young, James and Webster* Court, that "the Court cannot, by means of an evolutive interpretation, derive from [the Convention] a right that was not included therein at the outset, . . . [particularly] where the omission was deliberate".[56] And nowhere is there to be found, in the case law, a convincing case for the

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[53] On this, O. De Schutter, *Fonction de juger et droits fondamentaux*, Brussels, Bruylant, pp 1072–1078.

[54] Eur. Comm. H.R., Appl. No. 16002/90, *K.* v *Austria*, § 45.

[55] Eur. Ct. H.R., *Funke* v *France* Case, Judgment of 25 February 1993, Series A No. 256–A, § 44 (recognizing "the right of anyone 'charged with a criminal offence' . . . to remain silent and not to contribute to incriminating himself"). On this comparison, see the excellent commentary on the *Young, James and Webster* Case by R. A. Lawson and H.G. Schermers, *Leading Cases of the European Court of Human Rights*, Ars Aequi Libri, 1997, p 121.

[56] Eur. Ct. H.R., *Johnston* v *Ireland* Case, Judgment of 18 December 1986, Series A No. 112, § 53.

thesis that the protection of the negative aspect of a right should logically follow from the protection of its positive aspect.

## Liberty of Contract

One may be tempted to explore yet another route by which to discover a right to waiver in the European Convention on Human Rights.[57] In a large subset of cases where the question of waiver of rights arises, the alleged waiver occurs in the course of contractual relationships. Either a private party wishes to use his property or to dispose of it, by exchanging it against, among other advantages, the waiver by another of a right guaranteed to him by the Convention – for example, the employer agrees to recruit a person on the condition that she consents to some limitations brought to her right to privacy. Or an individual wishes to dispose of his labour, and beyond that, wishes to sacrifice a particular right granted to him by the Convention, if that sacrifice is required for him to have access to a reasonably well-paid employment. It is in these situations that the conflict appears most vividly between the paternalistic pretence of the State to impose the benefit of certain fundamental rights, and the preference which the individual expresses for a situation where he would be free to give up these guarantees, if not unconditionally and for an indeterminate future, at least in well-specified circumstances and during, for instance, the period of his employment.

Consider the classical case of the short person who expresses the wish to make a living as an object thrown in the infamous "dwarf-throwing" games which the French administrative courts, when the question was submitted to them, considered contrary to the requirements of human dignity.[58] Although the main question faced by the French courts in these cases was framed in typically conceptual terms – it concerned the definition of what was implied in the concept of "dignité humaine" ("human dignity") –,[59] it seems useful to

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[57] For a more complete examination of this aspect, see P. Arend, "Convention européenne des droits de l'homme et liberté contractuelle", *Bull. dr. h..*, Luxembourg, vol. 4, 1995, p 62.

[58] See Conseil d'Etat fr., 27 October 1995 (2 cases), *Commune de Morsang-sur-Orge* et *Ville d'Aix-en-Provence*, concl. P. Frydman, *Rev. fr. dr. admin*., vol. 11(6), Nov – Dec 1995, p. 1204. The first case submitted to the Conseil d'Etat, which concerned Mr. Wackenheim, had led to a decision by the Tribunal administratif de Versailles on 25 February 1992, *Société Fun Productions et Wackenheim c. Commune de Morsang-sur-Orge*. See the commentary by J. Fr. Flauss, "L'interdiction de spectacles dégradants et la Convention européenne des droits de l'homme", *Rev. fr. dr. admin.*, vol. 8(6), Nov – Dec 1992, p. 1026.

[59] The answer of the French courts was, summarily, that the "objectification " implied in the practice of "dwarf-throwing" was violative of human dignity. The Conseil d'Etat reasoned thus: "Considérant que l'attraction du 'lancer de nain' consistant à faire lancer un nain par des spectateurs conduit à utiliser comme un projectile une personne affectée d'un handicap physique et présentée comme telle; que, par son objet même, une telle attraction porte atteinte à la dignité de la personne humaine . . .". This was also the view of the commissaire du gouvernement P. Frydman, in the opinion submitted to the Conseil d'Etat: "En effet, le but du lancer de nains – et ce qui fait tout son intérêt pour le spectateur – n'est évidemment pas de lancer un poids le plus loin possible, mais de lancer avec violence et sans aucun égard pour elle *une personne humaine*, qui se trouve ainsi traitée comme un simple projectile, c'est-à-dire rabaissée au rang d'objet".

insist here on the answer given in one of the cases to the argument of Mr Wackenheim, a dwarf person who had been recruited to perform in such "entertainments". According to Mr Wackenheim, these dwarf-throwing events were a unique opportunity for him to escape unemployment, and, indeed, to make a decent living and seek a social and professional integration that would otherwise remain, were these shows to be prohibited, beyond reach.[60] The answer of the Conseil d'Etat to that presentation sounds rather tautological: the Conseil d'Etat replied simply that "le respect du principe de la liberté du travail et de celui de la liberté du commerce et de l'industrie ne fait pas obstacle à ce que l'autorité investie du pouvoir de police municipale interdise une activité même licite si une telle mesure est seule de nature à prévenir ou faire cesser un trouble à l'ordre public; que tel est le cas en l'espèce, eu égard à la nature de l'attraction en cause". The answer to the argument by the *commissaire du gouvernement* P. Frydman was, however, more developed.

First, he considered that at stake was more than the personal fulfilment of Mr Wackenheim, and the means he had chosen for his professional integration: the violation of human dignity implied in the practice would in fact affect the dwarf community as a whole, the vast majority of the members of which, according to the *commissaire du gouvernement*, are opposed to such a degradation of the image of dwarf persons. In these circumstances, to accept the argument of Wackenheim would be to put the interest of the individual above that of the community of which he is a member ("conduirait . . . à faire prévaloir un avantage procuré à un seul individu sur la nécessité de prévenir l'humiliation d'une communauté entière"). This answer essentially begs the question. Indeed, if there exists a right to waive the right not to be subjected to inhuman or degrading treatments, then it should not be an obstacle to the right to waiver being exercised that its exercise may shock, disappoint, or be condemned by, the group to which the individual belongs. The argument seems useful only if one departs from the premise that there is no such right to waiver: it may then serve to justify the conclusion that the intervention by the municipal authorities, who took the decision to prohibit "dwarf-throwing" events, was not arbitrary or irrational, and to be explained, thus, by inavowable motives.

Secondly – and this branch of the answer to Mr Wackenheim's claim is, in fact, the most interesting – the *commissaire du gouvernement* was of the opinion that the dwarf could not ground his alleged right to waiver on his desire to seek personal and professional fulfillment by seizing a unique opportunity for him to be paid for an employment. Indeed, that Mr Wackenheim received a salary for lending himself to such "shows" was considered to be, if anything, a circumstance *disfavouring* his thesis :

> ". . . la circonstance que la participation de l'intéressé aux spectacles incriminés donne lieu au versement d'un salaire ne nous paraît nullement de nature – nous serions tentés d'ajouter

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[60] The argument, based on Article 8 of the Convention, was put before the European Commission of Human Rights at a later stage; however, the Commission found that the local remedies has not been exhausted by Mr. Wackenheim, and dismissed the application (Eur. Commiss. H.R., Appl. No. 29961/96, *Wackenheim* v *France*, Dec. of 16 October 1996, unpublished).

> le contraire – à infléchir cette conclusion. De par sa nature même, la dignité de la personne humaine doit en effet être placée hors commerce et, sur un plan moral, nous croyons précisément pouvoir déceler, pour notre part, une circonstance aggravante, plutôt qu'atténuante, dans le fait qu'une personne acceptant de se prêter à une attraction à caractère dégradant le fasse à titre de prestation rémunérée dans le cadre d'une exploitation commerciale".

Why this should be so is not perfectly clear. One interpretation is that, when he waives a fundamental right against remuneration, the consent of the individual should be looked at with suspicion, the offer of remuneration exerting on the individual a form of pressure, especially if the individual is in need. The paradox this leads to – the more an exchange of his consent to waiver against something else is advantageous to the individual, the less that consent may be taken as decisive – is familiar to us: we met the same paradox in the *Deweer* case. Another interpretation is that it is more degrading to sell one's "right to dignity" – or, for that matter, to barter off one's fundamental right – against a monetary compensation, than it is to do so for "purer" motives, especially disinterested ones. Perhaps the reason for this condemnation could be found in the taboo it breaches, the "wall of separation" between the market and other spheres of life it creates a gap in.[61]

Whichever the interpretation one should give to the argument that a waiver against monetary compensation is, if anything, less acceptable even than a "gratuitous" waiver, the consequence is that the State, in such a circumstance, is recognized as having the power to deny to an individual a right to waiver which the individual vindicates (in this case, under the guise of the social and professional integration which should be available to a handicapped person), by relying on the background constraints which operate on the individual concerned. This is a disturbing implication. It means that, the less a State does to modify these background constraints, the easier it will be for it to justify a paternalistic attitude by which it denies the individual wishing to barter away his "dignity" a right to do so: it is strange, for instance, that a State not offering any professional opportunities to handicapped persons, should be recognized the power to prohibit these persons the right to take up a job contrary to their dignity, without having to prove that it has invested what it could in developing the professional integration of the handicapped. It should be possible to argue, in contrast to the French courts faced with the "dwarf-throwing" cases, that unless the State can demonstrate that acceptable alternatives are in fact available to those concerned, which do not imply a sacrifice of their dignity, it cannot reproach the individual an activity which is the only one he can perform, if he wishes to escape from the marginal status the circumstances would otherwise confine him to. As argued by Margaret Jane Radin, commenting on the case of a poor and oppressed person accepting a humiliating job: ". . . even if we think of the exchange as coerced, and not usefully characterized as an exercise of liberty, we are still left with the problem that to the desperate person the desperate exchange must have appeared better than her

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[61] On this theme, see esp. M. J. Radin, "Market Inalienability", 100 *Harv. L. Rev.* 1849 (1987).

previous straits, and in banning the exchange we haven't done anything about the straits . . . It seems to add insult to injury to ban desperate exchanges by deeming them coerced by terrible circumstances, without changing the circumstances".[62]

It is true, however, that the case-law of the European Court of Human Rights has never recognized the right to a professional activity as a right protected under the Convention.[63] Although, in the words of the Court, "it is . . . in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world"[64] – which explains that the protection of Article 8 of the Convention extends to professional life – a restriction on the access to employment or to the exercise of a professional activity will only have to be justified by the national authorities if such a restriction may be argued to violate a right independently guaranteed by the Convention, for example, the right to religious manifestation, or the right to freedom of expression.[65] It cannot be excluded that the entry into force of Protocol 12 to the European Convention on Human Rights, which provides for a general prohibition of discrimination independently of the other rights of the Convention, will lead the Court, in the future, to examine more stringently all the restrictions imposed by the Contracting States having ratified the Protocol on access to employment. It would be in line with the current case-law of the Court, however, as expressed most vividly in the *Laskey, Jaggard and Brown* case, if it decided that a State does not violate its obligations under the Convention and the additional Protocol against discrimination, by prohibiting access to employment of an individual when such an employment would imply a sacrifice of his dignity or, expressed in a less restrictive fashion, a too important restriction of his fundamental rights – a limitation which, should the individual not have consented, would undoubtedly amount to a violation.

Nor is freedom of contract protected by the European Court of Human Rights as a fundamental right, implicated, for instance, by Article 1 of Protocol 1 guaranteeing the peaceful enjoyment of possessions. In the *Mellacher* case, the applicants argued that rent control legislation, the effect of which was to diminish, in some cases dramatically, the rent which could be received per square metre, amounted to a deprivation of their possession, or at the very least, deprived them of "a contractual right to receive payment of the agreed rent". Indeed, the contested legislation made it possible for tenants to seek a reduction of the level of the rent to the level legislatively permitted and constituted thus, in the view of the applicants, "a statutory

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[62] M.J. Radin, "Justice and the Market Domain", in J. W. Chapman and J.R. Pennock (eds), *Markets and Justice – Nomos XXXI*, New York Univ. Press, 1989, p. 165, 182.

[63] See, *eg*, Eur. Ct H.R., *Thlimmenos* v *Greece*, 6 April 2000, nyr.

[64] Eur. Ct. H.R., *Niemietz* v *Fed. Rep. of Germany Case*, Judgment of 16 December 1992, Series A, No. 251– B, § 29.

[65] See, *eg*, the cases concerning the loyalty to the Constitution required from public servants in the Federal Republic of Germany : Eur. Ct. H.R., *Glasenapp* v *Fed. Rep. of Germany* Case, Judgment of 28 August 1986, Series A, No. 104; Eur. Ct. H.R., *Kosiek* v *Fed. Rep. of Germany* Case, Judgment of 28 August 1986, Series A, No. 105 ; and, more recently, Eur. Ct. H.R., *Vogt* v *Fed. Rep. of Germany* Case, Judgment of 20 November 1995, Series A, No. 323.

inducement not to comply with the terms of a validly conducted lease and therefore violated the principle of freedom of contract". The Court observed that "in remedial social legislation and in particular in the field of rent control, . . . it must be open to the legislature to take measures affecting the further execution of previously concluded contracts in order to attain the aim of the policy adopted". It concluded: "The fact that the original rents were agreed upon and corresponded to the then prevailing market conditions does not mean that the legislature could not reasonably decide as a matter of policy that they were unacceptable from the point of view of social justice".[66]

The relationship of the *Mellacher* case to the question of the existence *vel non* of a right to waiver in the European Convention on Human Rights should be clear.[67] The Court decides, here, that the protection afforded by the Convention to the property one has does not extend to the right to exchange that property against some other advantage, under the conditions reigning in the market.[68] Perhaps one could reason by analogy: the right one has to freedom of expression or to respect of private life does not extend to the right to obtain, under the mechanisms of the market, a remuneration for the sacrifice of that right, or even for agreeing to that right being limited in some less complete way. Of course, this does not imply that it would be contrary to the Convention to consent to such a restriction; indeed, should such a consent be freely given in valid circumstances, a respondent State could argue that, therefore, it should not be held responsible for the situation that the consent led to. But that simply means that there exists, in the Convention, a *privilege* to waiver; it has nothing to do with a *right* to waive the right to the limitation of which one consented.

## The ad hoc recognition of certain rights to waiver

One final comment is in order. In a limited number of circumstances, it appears that a particular use of a right Y, recognized under the Convention, may be redescribed as constituting – or rather, as implying – a waiver of a right X. We have already met such a circumstance: the right to remain silent, as an aspect of the right not to incriminate oneself during criminal proceedings, although it has its basis in Article 6 of the Convention, may also be said to lead to the recognition, on that limited ground, of a right "not to" express oneself, that is, of a right to waive the right to hold opinions guaranteed in Article 10. Other examples come to mind: the right to waive one's right to have one's case heard in public could be said to follow from the right to privacy of Article 8 of the Convention, when, indeed, the publicity of a case could lead to damaging the reputation of an individual or to matters personal to him being disclosed; more contentiously perhaps: could it not be argued that the right to waive one's right to life (Article 2 of the Convention), that is, to be assisted in the exercise of one's "right to die",

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[66] Eur. Cr. H.R., *Mellacher and others* v *Austria* Case, Judgment of 18 December 1989, Series A No. 169, § 56.

[67] See further J.-Fr. Flauss, "Liberté contractuelle et contrôle des loyers à l'aune de la Convention européenne des droits de l'homme", *Rev. trim. dr. h.*, 1990, p. 387.

[68] See the opinion of the Commission, as expressed in its Report adopted on 11 July 1988, § 208: "In view of the importance of housing as a basic social need it was. . . legitimate to seek to curb excesses of the free play of market forces and aim at a general moderation of the level of housing rents".

can be deduced from the right not to be subjected to inhuman and degrading treatments (Article 3 of the Convention), when the circumstances of continued life become truly unbearable or degrading ?

Although such a strategy to discover a right to waiver in the Convention is valid as far as it goes, it is not without risk. Consider for example the famous *Cruzan* case, in which the United States Supreme Court gave judgment on 25 June 1990. Briefly, the question put to the Court was whether the guardians of Nancy Cruzan, a patient in a persistent vegetative state, could seek judicial sanction for their wish to terminate artificial hydration and nutrition for the patient, and whether the limits imposed by a State law, requiring clear and convincing evidence of the patient's wish to cease hydration and nutrition, should be ignored as violative of a constitutionally recognized right. In an opinion by Chief Justice Rehnquist, the Court framed the question thus: "This is the first case", the opinion stated, "in which we have been squarely presented with the issue whether the United States Constitution grants what is in common parlance referred to as a 'right to die'".[69] But this is not so. At stake in *Cruzan* was not a hypothetical "right to die", but, more modestly, the right to refuse medical treatment.[70] The distinction is not, of course, a pure matter of formulation: a person suffering from depression would have to rely on a "right to die" if she wanted to obtain from the State a form of assistance to perform suicide; she could not rely on a simple right to refuse medical treatment. In his concurring opinion to the *Cruzan* decision, Justice Scalia did adopt the view that the "action-inaction distinction" was "irrelevant" : "Starving oneself to death is no different from putting a gun to one's temple as far as the common-law definition is concerned". Perhaps this is a faithful reading of the common law principles. But the distinction, for the purpose of constitutional law, is nevertheless a valid one, indeed it has an essential function to perform: the right to refuse food constitutes, arguably at least, an aspect of the right to privacy; but this right does not extend to "putting a gun to one's temple".

There are two distinct and correlative risks implied in the reasoning by which a right to waive right X (in the *Cruzan* example, the right to waive the right to life) is grounded in right Y (the right to refuse medical treatment). One error is precisely that committed by the majority opinion in *Cruzan*: it is to deny an implication of right Y because of its consequence – because of the recognition it entails, albeit in a limited way, that its exercise takes the form, in a particular circumstance, of the waiver of right X. The symmetrical error, however, also may be easily committed: once one has agreed that the exercise of right Y can lead to the waiver of right X, it is tempting, but wrong, to conclude that there exists, as a general rule, a waiver to right X. Indeed: had the Supreme Court recognized the right of Nancy Cruzan to refuse nutrition and hydration, it would *not* have followed from its decision that the United States Constitution, from then on, should be read as securing

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[69] *Cruzan* v *Missouri Dept. of Health*, 110 S. Ct. 2841, 2851 (1990).

[70] See Brennan J., dissenting in *Cruzan*, 110 S. Ct. 2841, 2867–2868: "The right to be free from unwanted medical attention is a right to evaluate the potential benefit of treatment and its possible consequences according to one's own values and to make a personal decision whether to subject oneself to the intrusion".

a general "right to die", outside the particular case where such a "right" is a necessary implication of the right to refuse medical treatment.

## IV. CONCLUSION

The difficult questions raised by the waiver of fundamental rights have not been answered. All that was attempted in these pages was a clarification of issues that will have to find their solutions elsewhere. I have been arguing that, although the Convention recognizes a *privilege* to waiver provided a limited number of conditions obtain, there can be found in the Convention itself or in the case-law of the European Court of Human Rights no *right* to waiver. It should come as no surprise that both conclusions are favourable to the State: although the State may escape or diminish its international responsibility by relying on the privilege to waiver (by arguing that, as the applicant has freely consented to the situation he subsequently complains of, his application should fail for that reason), the State is not under an obligation to recognize that, duplicating the rights the Convention grants the individual, there exists a general right to waive these rights – either to sacrifice them without compensation or to trade them against something else.

The position of the State is, indeed, a comfortable one. But before a State may invoke the exercise by the individual having lodged an application against it, it must offer adequate procedural guarantees to that individual, whose choice must not be coerced, must be fully informed, and must be unequivocally expressed. Furthermore, the developments of the right to respect for private life are of such magnitude in the case-law of the Court that, in fact, in an increasing proportion of circumstances where an individual would be tempted to invoke a right to waiver, he will be able to rely, with at least reasonable plausibility, on Article 8 of the Convention. Last, and perhaps most importantly, the position of the State is advantageous only in the procedural sense, and it could turn out that we all, as individuals to whom the Convention secures rights, would be worse off, rather than better off, with a right to waiver than without such a right. It is already a fairly coercive situation where our consent to certain limitations on our rights can be reproached us, and prohibit us from suing the State for not having protected us effectively against the temptations of the market; imagine how much more in danger we would find ourselves if, tomorrow, the European Court of Human Rights were to urge the dismantling of the barriers which – in the fields of employment, trade unionism, family relationships – to this day, still separate the market from our fundamental rights, and protect us against our temptation to choose according to short-term criteria, and as interested rather than altruistic beings.