

**LLM: THE LAW OF HUMAN RIGHTS IN THE UNITED KINGDOM LL468**  
**Academic year 2008/9: Term 2**

**(LL4B6 full course (with LL469))**

**PROFESSOR CONOR GEARTY**

Tuesday 10.00-12.00 in terms 2 and 3. Room E304

I am based at the Centre for the Study of Human Rights & Law Department, Z224. During term, I usually hold office hours from 14.30-16.00 on Tuesdays – please sign up on my door if you want to make an appointment. My email is [c.a.gearty@lse.ac.uk](mailto:c.a.gearty@lse.ac.uk) – I am happy to receive emails from students. My ‘phone – a less reliable instrument for reaching me! - is 7955 6554.

Summer term teaching will be by Professor Collins.

Introduction

1. This course examines the United Kingdom law on human rights. It will locate that law in the context of Britain's historical approach to the subject, which in the past has largely been in terms of the protection of civil liberties. The Human Rights Act 1998 will be considered in this context. The general principles underpinning the measure will be considered and then certain of the key rights contained in it will be analysed in detail.
2. As is well known, the United Kingdom has not had a written document guaranteeing constitutional rights and liberties, but in recent years it has been possible for victims of violations of the European Convention on Human Rights to secure redress in the European Court of Human Rights based at Strasbourg. With the implementation of the Human Rights Act 1998 on 2 October 2000, the United Kingdom has now brought the bulk of the European Convention into UK law so that its rights are capable of being relied upon by litigants in the domestic courts. How much does this Act facilitate the protection of human rights? What is the effect of this Act on public authorities? On the common law? On statutes and delegated legislation? On discrete areas of law such as planning, employment and family law? How can the empowerment of the judiciary implicit in the Human Rights Act be squared with parliament's desire to preserve its own sovereignty?
3. Various broader questions are also suggested in any discussion of human rights law. What are human rights? Do they differ from civil liberties? Are they the same as the demands of criminal justice? Are they solely concerned with respect for human dignity? Whatever they are, are human rights important? If so, why? Where do they come from? What is their content? Are they immutable or endlessly variable? What is the effect of the translation of human rights into domestic human rights law via an international agreement, the European Convention on Human Rights? Is the subject drained of energy by the transition, or is it given a new lease of life? Is civil liberties protection better served by the Human Rights Act than it was before the measure was enacted? These are some of the more general questions that we hope also to tackle in the course of our detailed treatment of the Human Rights Act.

4. There is a wider international dimension that we might also want to touch on in class. The UK is a signatory to more international agreements and conventions than the European Convention on Human Rights. In particular there are many such agreements covering human rights and dignity and economic and social rights. What are these agreements? Why has only the European Convention on Human Rights been incorporated? Should not now our other international obligations also be made part of UK law? If not, why not? Is the language of human rights to be selectively applied, with only certain rights being extended to people and others being denied to them?
5. Note that this course will not deal with the international law of human rights, and ECHR law and EU law will be covered only insofar as each impacts on UK domestic law. The course is primarily about UK domestic law, albeit located in a regional and international legal context.

### Examination

The method of examination will be one two hour written examination (closed book, apart from the use of an unannotated copy of the Human Rights Act (with its schedules) which the examinees will be permitted to take into the examination with them and which they will be permitted to refer to during the examination).

### Principal books and journals

I mainly teach from my own book *Principles of Human Rights Adjudication* (Oxford University Press, Oxford, 2005 Paperback £17.99 ISBN 0 – 19 – 928722-8) though I will also be referring to two of my later books on broadly the same topic: C A Gearty, *Can Human Rights Survive?* (Cambridge University Press, Cambridge, 2006), esp ch 3 and C A Gearty, *Civil Liberties* (Oxford University Press, Oxford, 2007).

Three recent new books directly in point are: Greer *The European Convention on Human Rights* (Cambridge 2006); Fenwick, Phillipson and Masterman, *Judicial Reasoning under the Human Rights Act* (Cambridge 2007); and G Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford, 2007). I will refer to these and other readings (from books and periodicals) as we work through the course syllabus: each book, and especially Fenwick, Phillipson and Masterman, contain much of relevance to this course.

There has been a deluge of other human rights texts and also articles in the course of the past few years. Almost every issue of *Public Law* (PL) and the *European Human Rights Law Review* (EHRLR) contain articles of relevance to this course, and the *Law Quarterly Review* (LQR), the *Cambridge Law Journal* (CLJ), the *Modern Law Review* (MLR) also contain much of value. Students are invited to get into the habit of browsing through these journals, all of which are available in multiple editions in most law libraries.

A fairly full list of the books, articles and journals that will be referred to during the year is included under the reading for each seminar. **THERE IS NO EXPECTATION THAT ALL THESE WORKS WILL BE READ OR STUDIED BY STUDENTS. Specific reading for each seminar appears below on a seminar-by-seminar basis, and further guidance on the required reading will be given at seminars.**

Note that I have a lot of the materials referred to below in my room, and am very happy to lend out to students: just drop by and ask.

### Cases

The case law on the Human Rights Act continues to move at a frenetic pace. Students should learn how to access the material via the internet and/or up-to-date law reports. Access to such data bases will be assumed.

### Teaching

There will be one 2 hour seminar per week for the duration of the Lent and Summer terms. As noted above I will be responsible for the Lent seminars, with Professor Collins leading class discussion during the Summer term. As indicated above, specific guidance (thorough use of the \* symbol) will be given in class as to which reading is particularly important for the following class. Students will be encouraged to do some reading in advance of each seminar so as to facilitate class discussion and therefore to improve the learning opportunity provided by the seminars.

## **Part One: The Origins of UK Human Rights Law**

Seminar One: introductory

Seminar Two: the comparative law perspective.

### **Core reading:**

In class we will be specifically discussing the basic constitutional human rights instruments in the United States, Canada, New Zealand and South Africa: \*Amendments 1-10, 13, 14 (section 1), 15 and 19 of the United States Constitution; \*the New Zealand Bill of Rights 1990 (on which see *Simpson v. AG* [1994] 3 NZLR 667 commentary at (1995) 111 LQR 209-217); \*the South African Bill of Rights; \*the Canadian Charter of Rights and Freedoms 1982.

Each of these basic documents is available via Google.

We will be considering how the protection of human/civil rights is achieved in each of these documents, considering in each case the content of human/civil rights and the mechanisms of enforcement.

### **Further reading**

The literature on these bills of rights is extensive. There are good chapters in Campbell, Ewing and Tomkins, *Sceptical Essays on Human Rights* (Oxford University Press, 2001) on South Africa (Saras Jagwanth, ch 16), Canada (Judy Fudge, ch 18), the United States (Mark Tushnet, ch 19), New Zealand (James Allan, ch 20) and Australia (Adrienne Stone, ch 21): being somewhat sceptical in tone, these essays are not for faint hearted devotees of human rights!! See also T Macklem, 'Entrenching a bill of rights' (2006) 26 *Oxford Journal of Legal Studies* 107-129 and J Hiebert, 'Parliamentary Bills of Rights: An Alternative Model' (2006)

69 *Modern Law Review* 7 and generally Campbell, *Prescriptive Legal Positivism: Law, Rights and Democracy* UCL Press, 2004. Paperback £25 ISBN 1 84472 022 5

Other writings include: S. Kentridge, 'Parliamentary Supremacy and the Judiciary Under a Bill of Rights: Some Lessons from the Commonwealth' [1997] PL 96; M. Mandel, 'A Brief History of the New Constitutionalism, or "How We Changed Everything so that Everything Remained the Same"' (1998) 32 *Israel Law Rev.* 250. For an interesting US perspective, see M A Glendon, *Rights Talk. The Impoverishment of Political Discourse* (1991). See also Carsten Smith CJ, 'Judicial Review of Parliamentary Legislation: Norway as a European Pioneer' [2000] PL 595; and for recent developments in Eastern Europe J Kurczewski and B Sullivan, 'The Bill of Rights and the Emerging Democracies' (2002) 65 *Law and Contemporary Problems* 251-94.

### **Discussion:**

1. Compare and contrast the various rights protected in the US, New Zealand, Canadian and South African bills of rights. What do the rights protected in these four documents have in common? How do they differ?
2. How are the rights in each of these three bills of rights enforced? What is the role of the courts in each jurisdiction? How does each of these three jurisdictions reconcile the demands of democracy with the need to protect basic human rights? Are they each equally successful?
3. Consider the origin, content and development of the Canadian Charter. In what areas has the Charter had its greatest impact? In what areas have the courts been reluctant to intervene? How does the Charter balance the need to protect human rights with the need to preserve the democratic form of Canadian government? How often has it been used? Should it be repealed?

Seminar Three: 'Bringing rights home': the UK perspective (one seminar)

### **Core reading:**

\*The Human Rights Act 1998

\*Gearty, *Principles*, chs 1 and 2

There is an extravagant amount of recent literature on the pre-1998 Act situation. For background, it may be enough to compare K. D. Ewing and C. A. Gearty, 'Rocky Foundations for Labour's New Rights' [1997] *European Human Rights Law Review* p. 146-152 with both Lord Lester, 'Towards a Constitutional Bill of Rights' [1997] *European Human Rights Law Review* pp. 124-131 and R. Wintemute, 'Lesbian and Gay Britons: The Two Europes and the Bill of Rights Debate' [1997] EHRLR. C A Gearty, 'The United Kingdom' in C A Gearty (ed), *The European Convention on Human Rights and the protection of Civil Liberties: A Comparative Study* (Kluwer, Martinus Nijhoff, The Hague, 1995), ch 1 has an extensive review of the background up to the mid 1990s.

On the **current bill of rights** debate: E Metcalfe, 'Rights and Responsibilities' in [2007] 2 *Justice Journal* s a good summary— I have an electronic copy, contact me if you cannot

access the journal. For the Conservative Party's perspective see Nick Herbert 'Rights without responsibilities – a decade of the Human Rights Act' British Institute of Human Rights 24 November 2008. The Joint Committee on Human Rights has published a report on the case for a bill of rights for Britain, and the Government is actively considering the issue this Spring.

### **Further reading**

In Opposition Labour published *Bringing Rights Home* (December 1997), and then shortly after taking power in 1997 the new Labour Government published its proposals for reform: *Rights Brought Home* (Cm 3782 (1997)). For deeper background, students may also care to consult J. Waldron, 'A Right-based Critique of Constitutional Rights' (1993) 13 OJLS 18 and/or J. Allan, 'Bills of Rights and Judicial power - A Liberal's Quandary' (1996) 16 OJLS 337. J. A. G. Griffith, 'The Political Constitution' (1979) 42 MLR 1 is still well worth reading. Also of interest is Mr Justice Laws, 'Is the High Court the Guardian of Fundamental Constitutional Rights?' [1993] PL 59.

Other general reading of now largely historical interest which, though not essential, may be helpful to you during the year and particularly in this class would include:

Books: M. Zander, *A Bill of Rights for Britain*; M. Hunt, *Using Human Rights Law in English Courts* (1997); Lester et al., *A British Bill of Rights* (IPPR, 2nd ed. with a new foreword by Francesca Klug, 1996); Kinley, *The European Convention on Human Rights* (Dartmouth, 1993), pp. 97-154; Ewing and Gearty, *Freedom under Thatcher*, chapter 8

Articles: Bingham, 'The ECHR: Time to Incorporate' (1993) 109 LQR 390; Griffith, 'The Rights Stuff' (1993) *Socialist Register* 106; Ewing, 'The Bill of Rights Debate: Democracy or Juristocracy in Britain?' in Ewing, Gearty and Hepple (eds.), *Human Rights and Labour Law* (Mansell, 1994); S. Sedley, 'Human Rights: A Twenty-First Century Agenda' [1995] PL 386; J. Laws, 'Law and Democracy' [1995] PL 72; J. Laws, 'The Constitution: Morals and Rights' [1996] PL 622 (followed by a response from Lord Irving of Lairg at 636). J. A. G. Griffith, 'The Common Law and the Constitution' (2001) 117 LQR 42.

On European human rights law generally N Krisch, 'The open architecture of European human rights law' (2008) 71 *Modern Law Review* 183-216 is very rewarding

### **Discussion:**

1. Trace the development of the campaign for incorporation of the European Convention on Human Rights into UK law. Why was this campaign successful?
2. What were the dominant arguments for and against incorporation in the years leading up to the enactment of the Human Rights Act? For which "side" if either does the Human Rights Act represent a "victory"?
3. Would a home-grown bill of rights have been preferable to incorporation of the European Convention? Why was one not adopted by the new Labour Government, elected in May 1997?

4. There is now a renewed push for a British bill of rights underway: should such a measure be enacted? If so what form should it take? If it is enacted, what should happen to the Human Rights Act?

## **Part Two: The Human Rights Act: The General Part**

Seminar four: The Human Rights Act: a broad overview (one seminar)

### **Core reading:**

We now come to consider the substance of the Human Rights Act itself. Please read \*the Act itself and also, before the seminar, both \*K. D. Ewing, 'The Human Rights Act 1998' (1999) 62 MLR 79 and \**Parochial Church Council of Aston Cantlow and Wilmcote with Billesley v Wallbank* [2003] UKHL 37, [2003] 3 WLR 283 [no need to read the case in too much detail, just get a sense of the facts and argument]

\*Department of Constitutional Affairs, *Review of Implementation of the Human Rights Act* (July 2006) – should be easily accessible on the web, I have an electronic copy so e-mail me if you can't find it. The same goes for the Human Rights lawyers' Association and the Law Society, *Home to Stay. Celebrating Ten Years of the Human Rights Act* (November 2008, [www.hrla.org.uk](http://www.hrla.org.uk))

### **Further reading**

An excellent review of the Act in its first five years of operation is to be found in the special issue of the *Journal of Law and Society* published in 2005. See also R Clayton, 'The Human Rights Act six years on: where are we now?' [2007] *European Human Rights Law review* 11-26

An increasingly impressive treatment of the Act, already in its fourth edition, is J. Wadham, H. Mountfield, A Edmundson and C Gallagher, *Blackstone's Guide to the Human Rights Act 1998* 4<sup>th</sup> edn (Oxford University Press, London, 2007)

See on the margin of appreciation K Cavanaugh, 'Policing the Margins: Rights Protection and the European Court of Human Rights' [[2006] EHRLR 422

See also: C. A. Gearty, 'Incorporation of the European Convention on Human Rights: Some Guesses about the Future' in F. Butler (ed.), *Human Rights for the New Millennium*. For the parliamentary record, see F. Klug, 'The Human Rights Act 1998, *Pepper v. Hart* and All That' [1999] PL 246; JUSTICE, *The Human Rights Bill. The Debate in Parliament* (2000). Other interesting perspectives include: T. Campbell, 'Human Rights: A Culture of Controversy' (1999) 26 JLS 6; A. 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; M. Loughlin, 'Rights Discourse and Public Law Thought in the United Kingdom' in G. Anderson (ed.), *Rights and democracy: Essays in UK-Canadian Constitutionalism* (Blackstone, London, 1999); M. Hunt, 'The Human Rights Act and Legal Culture: The Judiciary and the Legal Profession' (1999) 26 JLS 86.

The books on the Act are now numerous and include: D Hoffmann and J Rowe, *Human Rights in the UK* (2<sup>nd</sup> edn 2006); D. Cheney, L. Dickson, J. Fitzpatrick and S. Uglow, *Criminal Justice and the Human Rights Act 1998* (Jordans, Bristol, 1999); R. Clayton and H. Tomlinson, *The Law of Human Rights* OUP, Oxford, 2000 (with update supplements); J. Coppel, *The Human Rights Act 1998. Enforcing the European Convention in the Domestic Courts* (John Wiley, Chichester, 1999); S. Grosz, et al, *Human Rights. The 1998 Act and the European Convention* 2<sup>nd</sup> edn (Sweet and Maxwell, London, 2008); The University of Cambridge Centre for Public Law, *The Human Rights Act and the Criminal Justice and Regulatory Process* (Hart Publishing, Oxford, 1999); JUSTICE *Understanding Human Rights Principles* (2000). Also useful on the practical issue of taking a case to Strasbourg is L. Clements, N. Mole, A. Simmons, *European Human Rights: Taking a Case under the Convention* (2nd edn, Sweet and Maxwell, London, 1999). A general review from the Scottish perspective is A Boyle, C Himsworth, A Loux and H MacQueen (eds), *Human Rights and Scots Law* (Oxford, Hart Publishing, 2002).

### **Discussion:**

1. Why was the Human Rights Act introduced in the form that it was?
2. Summarise the terms of the Human Rights Act 1998. What duties and responsibilities does it impose on (A) executive; (B) the legislature; and (C) the courts.
3. Which rights are missing from schedule 1? Why? Does their absence weaken or strengthen the rights dimension to the Act? (cf ss. 8 and 11)
4. What is the position under the Act with respect to derogations and reservations entered to the Convention by the UK government?
5. What is meant by ‘the margin of appreciation’? Where does it fit, if anywhere, in the HRA?
6. Why do positive obligations matter as much as people say they do? What are they?
7. Explain the ideological underpinnings of the Human Rights Act. What are its principle goals? How does the Act seek to achieve these goals? Is the Act internally consistent?
8. Critically appraise the *Parish of Aston and Cantlow* case. Is it rightly decided?
9. Has the Act been a success?

Seminar five: The principles underpinning the ECHR and Human Rights Act (1): the guarantor of representative democracy through the protection of civil liberties: the Strasbourg dimension

## Core reading

\*Gearty, *Principles*, chs 1 and 2 and especially \*ch 3. See also Colm O'Connell, 'Democracy, Rights and the Constitution - New Directions in the Human Rights Era' (2004) 57 *Current Legal Problems* 175.

In class we will discuss \**Matthews v. United Kingdom* (1999) 28 EHRR 361; \**Yazar, Karatas, Aksoy and Hep v Turkey* 9 April 2002 (2003) 36 EHRR 59; \**Steel and Others v. United Kingdom* (1998) 28 EHRR 603 and \**Lingens v Austria* (1986) 8 EHRR 407. Compare *Appleby v United Kingdom* (2003) 37 EHRR 783. We will then consider a hard case where freedom of expression might be thought to clash with the principle of equality that underpins representative democracy: see \**Bowman v. United Kingdom* (1998) 26 EHRR 1 and (in the UK context) \**R (Animal Defenders Int) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15 upholding the ban on political advertising in Communications Act 2003. See further *Steel and another v United Kingdom* European Court of Human Rights 15 February 2005

## Further reading

Articles 9-11, 15-18, Article 3 of the First Protocol. See generally G Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford, 2007); R O'Connell, 'Towards a Stronger Conception of Democracy in the Strasbourg Convention' [2006] EHRLR 281; A. Mowbray, 'The Role of the European Court of Human Rights in the Promotion of Democracy' [1999] PL 703; S Wheatley, 'Minorities under the ECHR and the Construction of a Democratic Society'" [2007] *Public Law* 770 and C A Gearty, 'Democracy and Human Rights in the European Court of Human Rights: A Critical Appraisal' (2000) 51 *Northern Ireland Legal Quarterly* 381-396.

## Discussion:

1. What is the relationship between civil liberties and representative democracy? To what extent is each idea protected within the European Convention on Human Rights?
2. How broadly does the Strasbourg court define democracy? Is it wider than (merely/) representative government? Does its definition take the court into the realm of policy substance?
3. Should limits be placed on our right to engage in political protest? Does the European Convention on Human Rights set those limits at the right place?
4. Is controlling expenditure by political parties at election time necessary to our system of democratic government or subversive of our basic right to political communication? What about political advertising?

Seminar six: The principles underpinning the ECHR and Human Rights Act (1)(cont): the guarantor of representative democracy through the protection of civil liberties: The Human Rights Act 1998



In this class we will consider the operation of the Human Rights Act and how it attempts a reconciliation between human rights and parliamentary sovereignty. We will look in detail at the structure of sections 3, 4 and 6 of the Act, and consider how far judicial creativity is allowed by the legislation. We will also consider the way in which the courts in the UK have used the Human Rights Act to promote and protect political freedom.

### Core reading

\*Gearty, *Principles*, ch 3 (as above). For a general perspective on civil liberties which goes beyond the Human Rights Act see Gearty, *Civil Liberties* (2007)

\**R v Offen* [2001] 1 WLR 253, [2001] 2 All ER 154, [2001] Cr App R 372; \**R v A (no 2)* [2001] UKHL 25, [2002] 1 AC 45, [2001] 2 WLR 1546, [2001] 3 All ER 1 (just try and get the general drift and look in particular at the s 3 discussion); \**In re S (Minors)* [2002] UKHL 10; [2002] 2 WLR 720; *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557.

On rape law generally (relevant to *R v A (No 2)*), see Home Office Research Study *A Gap or a Chasm. Attrition in Reported Rape cases* (2005)

On parliamentary sovereignty see *R (Countryside Alliance) v Attorney General and Others* [2007] UKHL 52. A very good case on section 6(2) (b) is now \**Doherty v Birmingham City Council* [2008] UKHL 57

\**R (ProLife Alliance) v BBC* [2002] EWCA Civ 297, [2002] 3 WLR 1080, [2002] 2 All ER 756; [2003] UKHL 23, [2003] 2 WLR 1403, [2003] 2 All ER 977.

Also important is \**R (Laporte) v Gloucestershire Chief Constable* [2006] UKHL 55

### Further reading

#### THE STRUCTURE OF THE HRA

Note in particular the complex interaction of ss 3, 4, 6, and 19. G Phillipson, 'Deference, discretion and democracy in the Human Rights Act era' (2007) 60 *Current Legal Problems* 40-78; T Allan, 'Parliament's will and the justice of the common law: the Human Rights Act in constitutional perspective' (2006) 59 *Current Legal Problems* 27-50 is strongly opposed to Gearty's approach and therefore might be thought a good antidote to teacher-imposed orthodoxy. See also: T Hickman, 'The courts and politics after the Human Rights Act: a comment' [2008] *Public Law* 84; A Kavanagh, 'The Elusive Divide between Interpretation and Legislation under the Human Rights Act 1998' (2004) 24 *OJLS* 259; A Kavanagh, 'The Role of Parliamentary Intention in Adjudication under the Human Rights Act 1998' (2006) 26 *OJLS* 179; N. Bamforth, 'Parliamentary Sovereignty and the Human Rights Act 1998' [1998] *PL* 572; Lord Lester of Herne Hill QC, 'The Art of the Possible: Interpreting Statutes under the Human Rights Act' in *The Centre for Public Law at the University of Cambridge, The Human Rights Act and the Criminal Justice and Regulatory Process* (Oxford, 1999), 25; G. Marshall, 'Interpreting Interpretation in the Human Rights Bill' [1998] *PL* 167; D. Pannick, 'Principles of Interpretation of Convention Rights under the Human Rights Act and the Discretionary Area of Judgment' [1998] *PL* 545; G. Marshall, 'Two kinds of Compatibility: More about Section 3 of the Human Rights Act 1998' [1999] *PL* 377; F. Bennion, 'What Interpretation is 'possible' under Section 3(1) of the Human Rights Act

1998?’ [2000] PL 77; C A Gearty, ‘Reconciling Parliamentary Sovereignty and Human Rights’ (2002) 118 LQR 248; A Kavanagh, ‘Unlocking the Human Rights Act: the “Radical” Approach to Section 3(1) Revisited’ [2005] *European Human Rights Law Review* 261.

On freedom of speech see E Barendt, *Freedom of Speech* (2<sup>nd</sup> edn, Oxford, Oxford University Press, 2005) and H Fenwick and G Phillipson, *Media Freedom and the Human Rights Act* (Oxford, Oxford University Press, 2006); D Milo, *Defamation and Freedom of Speech* (Oxford: Oxford University Press, 2008)

#### s.4

Declarations of incompatibility so far include: *R (H) v Mental Health Review Tribunal, North and East London Region and another* [2001] EWCA Civ 415, [2002] QB 1, [2001] 3 WLR 512; *International Transport Roth gmb v Secretary of State for the Home Department* [2002] EWCA Civ 158, [2002] 3 WLR 344; *R (Wilkinson) v Commissioner of Inland Revenue* [2002] EWHC 182 (Admin), upheld [2003] EWCA Civ 814, [2003] 1 WLR 2683, [2003] 3 All ER 719; *R (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46, [2003] 1 AC 837, [2002] 3 WLR 1800, [2002] 4 All ER 1089; *R (D) v Secretary of State for the Home Department* [2002] EWHC 2805 (Admin), [2003] 1 WLR 1315; *R (M) v Secretary of State for Health* [2003] EWHC 1094 (Admin); *Bellinger v Bellinger* [2003] UKHL 21; [2003] 2 AC 467; *R (Morris) v Westminster CC* 7 October 2004 Keith J; *R (MH) v Secretary of State for Health* [2004] EWCA Civ 1690; *A v Secretary of State for the Home Department* [2004] UKHL 56; *Westminster City Council v Morris: R (Badu) v Lambeth Borough Council* [2005] EWCA Civ; *R (Clift) v Secretary of State for the Home Department* [2006] UKHL 54 . Further declarations that have been overturned on appeal, either because no Convention right had been infringed or because the public authority involved was required to act, include: *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 WLR 1389; *Matthews v Ministry of Defence* [2002] EWCA Civ 773, [2002] 1 WLR 2621, (upheld in the Lords: [2002] UKHL 4); *Wilson v Secretary of State for Trade and Industry* [2003] UKHL 40; and *R (Hooper, Withey, Naylor and Martin) v Secretary of State for Work and Pensions* [2003] EWCA Civ 813.

The most recent Declaration is \**R (F and Thompson) v Secretary of State for the Home Department* [2008] EWHC 3170 (QB) – good to look at to get a sense of how these cases unfold.

#### Comparative jurisprudence

Canadian charter s. 1; *Miranda v. United States* 384 US 436 (1966); *Mapp v. Ohio* 367 US 643 (1961); *People v. O'Brien* [1965] IR 142

#### The domestic case law on the protection of civil liberties

*R (Northern Cyprus Tourism Centre) v Transport for London* [2005] EWHC 1698 (Admin) Newman J; *Austin v Metropolitan Police Commissioner* [2005] EWHC 480 (QB); *R (Brehony) v Chief Constable of Greater Manchester Police* [2005] EWHC 640 (Admin); *Quinn v Prosecutor Fiscal (Dumbarton)* High Court of Justiciary (Appeal Court) 16 March 2005; *R (Pearson and another) v Home Secretary* QBD Kennedy and Garland JJ 4 April 2001 (noted at (2001) 151 NLJ 560); *Blum v DPP* [2006] EWHC 3209 (Admin); *R (Wood) v Metropolitan Police Commissioner* [2008] EWHC 1105 (Admin). See now *Hirst v United Kingdom* E Ct HR 30 March 2004 (2004) 38 EHRR 825 and *Hirst v United Kingdom (No 2)* European Court of Human Rights 6 October 2005; (and not forgetting \**R (Laporte) v Gloucestershire Chief Constable* [2006] UKHL 55).

#### Discussion

1. Analyse the meaning of s. 3(1) of the Human Rights Act. In analysing its meaning, should regard be had to ss. 3(2)(b)? If so, what effect does s. 3(2)(b) have on how the interpretive task in s. 3(1) is approached? Consider *re S* in light of this analysis.
2. Analyse the interrelationship between ss. 6(1) and 6(2). Is the meaning of s. 6(2) connected with s. 3(2)(b)? If so, how? In what way do s. 6(2)(a) and 6(2)(b) differ? What is the difference, if any, in s. 6(2)(b) between acting to "give effect to" and acting to "enforce" legislation "which cannot be read or given effect in a way which is compatible with the Convention rights"?
3. Are *Offen and R v A* rightly decided? Give reasons for your answer.
4. Can *Ghaidan v Godin-Mendoza* stand with *in re S*?
5. Compare Laws LJ in *R (ProLife Alliance) v BBC* with the speeches of the law lords in the same case. Which line of reasoning do you find more convincing? Why?
6. Assess the importance of the *Laporte* decision. Is it the landmark case that many claim?

Seminar seven: The principles underpinning the ECHR and Human Rights Act (2): the guarantor of the rule of law through the principle of legality:

### **Core reading**

\*Gearty, *Principles*, ch 4 and also for a later view about the inter-relationship between democracy, human rights and the rule of law \*Gearty, *Can Human Rights Survive?* ch 3.

Articles 5-7, 8-11; \**Halford v. United Kingdom* (1997) 24 EHRR 523

\**R v Offen* (see above)

\**Murray v Big Pictures Limited* [2008] EWCA Civ 446 (see below)

### **Further reading**

See the work of Trevor Allan, in particular *Constitutional Justice. A Liberal Theory of the Rule of Law* (2001): how far does legality extend? (See R Ekins, 'Judicial Supremacy and the Rule of Law' (2003) 119 *Law Quarterly Review* 127.)

#### **THE ECHR**

*Khan v United Kingdom* (2000) 31 EHRR 1016

#### **THE HRA**

The impact of the Act on the common law, The requirement of 'prescribed by/in accordance with' law: horizontality: The Rt Hon Sir Richard Buxton, 'The Human Rights Act and

Private Law' (2000) 116 L.Q.R. 48; H. W. R. Wade, 'Horizons of Horizontality' (2000) 116 L.Q.R. 217; *Douglas v. Hello! Ltd* [2001] 2 All ER 289; *Douglas v Hello! Ltd* [2003] EWHC 786 (Ch); *Venables and Thompson v. News Group Newspapers* [2001] 1 All ER 908. The latest as well as the most notorious case is *Mosley v News Group Newspapers* [2008] EWHC 1777 (QB). However (as indicated above) \**Murray v Big Pictures Limited* [2008] EWCA Civ 446 is the best case here, a good snap-shot of where we are now on this. See further *Jones v University of Warwick* [2003] EWCA Civ 151; *Martin v McGuinness* Lord Bonyon (Outer House) (2 April 2003); *Wainwright v United Kingdom* European Court of Human Rights 16 September 2006); *Jones v University of Warwick* [2003] EWCA Civ 151, [2003] 1 WLR 954, [2003] 3 All ER 760; *Ash v McKeivitt* [2006] EWCA Civ 1714. (Two recent essays which may be helpful are G Phillipson, 'Clarity postponed: horizontal effect after *Campbell*' in Fenwick, Phillipson and Masterman (eds) *Judicial reasoning under the UK Human Rights Act* ch 6 and R Mulheron, 'A Potential Framework for Privacy? A Reply to *Hallo!*' (2006) 69 *Modern Law Review* 7.)

## Discussion

1. How far does the idea of legality extend? Compare the views of Allan and Gearty (above); whose perspective do you prefer and why?
2. Consider the case of *Halford v United Kingdom*. Does this decision show up both the strengths and the weaknesses of the Convention's approach to legality?
3. What is meant by 'horizontality'? How far do you think the Human Rights Act reaches into litigation between private parties?
4. Is there a new action against private parties for breach of human rights? If not, why not? Has the 'piggy-backing' of human rights substance on the old forms of common law action now become an unnecessary legal fiction?
5. Is it possible to reconcile democracy and human rights in the way for which Gearty argues in *Can Human Rights Survive?* Ch 3?

Seminars eight and nine: The principles underpinning the ECHR and Human Rights Act (3): respect for human dignity

## Core reading

\*Gearty, *Principles*, ch 5; McCrudden, On Human Dignity (Oxford Legal Studies Research Paper 10/2006: available via the Web/google)

\**Pretty v United Kingdom* (2002) 35 EHRR 1 (see further *R (Purdy) v DPP* [2008] EWHC 2565 (Admin)) and from a different angle \**Dickson v United Kingdom* E Ct HR 44362/04 *Times* 21 December 2007;

\* *R v Secretary of State for the Home Department ex parte Limbuela* [2005] UKHL 66 following upon *R (Q, D, J, M, F and B) v Secretary of State for the Home Department* [2003] EWHC 195 (Admin); [2003] EWCA Civ 364, [2003] 3 WLR 365, [2003] 2 All ER 905 (see further on the blanket ban on seeking access to the labour market being in breach of article 8: *R (Tekle) v Secretary of State for the Home Department* [2008]

EWHC 3064 (Admin). On another aspect of dignity see \**R (P and Q) v Secretary of State for the Home Department* [2001] EWCA Civ 1151, [2001] 1 WLR 2002.

### Further reading

Dworkin, *Life's Dominion. An Argument about Abortion and Euthanasia* (Harper Collins, 1993); D. Feldman, "Human Dignity as a Legal Value" [1999] PL 682 and [2000] PL 61; D. Feldman, "Privacy-related Rights and their Social Value" in P. Birks (ed.), *Privacy and Loyalty* (Clarendon Press, Oxford, 1997), at pp 15-50; JUSTICE, *Developing Key Privacy Rights. The Impact of the Human Rights Act 1998* (2000).

### THE ECHR

Articles 2-4, 8, 12, 14, Article One of the First Protocol. The case-law is voluminous: see *inter alia*: *Brecknell and others v United Kingdom* E Ct HR 27 November 2007; *Finucane v United Kingdom* (2003) 37 EHRR 656; *A v. United Kingdom* (1998) 27 EHRR 611; *Goodwin v United Kingdom* (2002) 35 EHRR 447; *Smith and Grady v. United Kingdom* (1999) 29 EHRR 493; *Lustig-Prean and Beckett v. United Kingdom* (1999) 29 EHRR 548; *Keenan v United Kingdom* (2001) 33 EHRR 913; *Air Canada v. United Kingdom* (1995) 20 EHRR 150; *Former King of Greece and others v Greece* (2000) 33 EHRR 516; *Former King of Greece v Greece (no 2)*, European Court of Human Rights, 28 November 2002; *J A Pye (Oxford) Ltd v United Kingdom* European Court of Human Rights 15 November 2005 – Grand Chamber 31 August 2007;

### HRA

*Re S (A Child)* [2004] UKHL 47; [2004] 4 All ER 683: balancing rights; *R (Burke) v GMC* [2004] EWHC 1879 (Admin) 30 July 2004 – on the right to life and arts 2, 3 and 8; *Ghaidan v Mendoza* [2004] UKHL 30, [2004] 3 All ER 416 (art 8 with 14);

See on extra-jurisdictionality: *MT (Algeria) v Secretary of State for the Home Department* [2007] EWCA Civ 808; *(Ullah) v Special Adjudicator: Thi Lien Do v Secretary of State for the Home Department* [2004] UKHL 26, [2004] 3 All ER 785 ; *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26; *A and others v Secretary of State for the Home Department and others (No 2)* [2005] UKHL 71; *R (Al-Jedda) v Secretary of State for Defence* [2008] UKHL 58. R Wilde, 'Legal "Black Hole"? Extra-territorial State Action and International Treaty Law and Civil and Political Rights' (2005) 26 *Michigan Journal of International Law* 739.

### Discussion

1. Is human dignity a fatuous, question-begging idea?
2. How far does the Strasbourg court extend the right to life and the right not to be subjected to torture or to inhumane or degrading punishment? Do these articles as interpreted by that Court go far enough?
3. 'As far as the Human Rights Act is concerned, respect for human dignity amounts to little more than a branch of what used to be called "natural justice"'. Discuss.
4. Does where a person comes from matter to how much dignity we should accord them?

5. The reliance placed upon the Convention by legal (as opposed to natural) persons exposes its alleged ethical core as entirely bogus.' Do you agree?

### Seminar ten: Making Sense of the Human Rights Act: Three Aspirations

#### **Core reading**

There is more to the Human Rights Act than the application of principle. Many of the cases under the Act involve other issues not directly connected with principle but upon which the outcome of cases depends. It is with these issues that this couple of seminars is mainly concerned. The reading here is \*Gearty, chs 6-8, making note (without necessarily reading in the original) the cases referred to therein, and the asterixed cases set out below - these will be discussed in class.

#### **Further reading**

##### *Theme One: Institutional competence:*

Doing what the courts are good at – and not more. Baroness Brenda Hale, ‘Law Lords at the Margin: Whop Defines Convention Rights’ Justice Tom Sargant Annual Lecture 2008 (15 October 2008) is excellent on this and many other ideas as well.

R A Edwards, ‘Judicial Deference under the Human Rights Act’ (2002) 65 MLR 859. See generally M Hunt, ‘Sovereignty’s Blight: Why Contemporary Public Law Needs the Concept of “Due Deference”’ in Leyland, P. and Bamforth, N. (eds.), *Public Law in a Multi-Layered Constitution* (Oxford: Hart Publishing, 2003); J Jowell, ‘Judicial Deference: Servility, Civility or Institutional Capacity?’ [2003] *Public Law* 592; F Klug, ‘Judicial Deference under the Human Rights Act’ [2003] *European Human Rights Law Review* 125.

T Allen, *Property and the Human Rights Act 1998* (Oxford, Hart Publishing, 2005); M Emberland, *The Human Rights of Companies* (Oxford, Oxford University Press, 2006)

##### *Cases:*

Strasbourg (1): the role of the margin of appreciation: *Handyside v United Kingdom* (1976) 1 EHRR 737; *Allgemeine Gold- und Silberschmiedanstalt v United Kingdom* (1986) 9 EHRR 1; *Hertel v Switzerland* (1998) 28 EHRR 534

Strasbourg (2): how far do positive obligations extend? *Lopez Ostra v Spain* (1994) 20 EHRR 277; *Guerra v Italy* (1998) 26 EHRR 357; \**Hatton v United Kingdom* (2001) 34 EHRR 1 [Grand Chamber revised judgment is at \*(2003) 37 EHRR 611]

The UK cases: *R (Pretty) v DPP* [2001] UKHL 61, [2002] 1 AC 800, [2001] 3 WLR 1598, [2002] 1 All ER 1, [2002] 2 Cr App R 1; *In re S (FC)* [2002] UKHL 10; [2002] 2 All ER 192; *Lee v Leeds City Council* [2002] EWCA Civ 06; *Napier v Scottish Ministers* Outer House, Court of Session, 26 June 2001 (Lord MacFadyen); \**Bellinger v Bellinger* [2003] UKHL 21; *International Transport Roth gmb v Secretary of State for the Home Department*

[2002] EWCA Civ 158; on property: *R(Federation of Tour Operators) v HM Revenue and Customs and HM Treasury* [2008] EWCA Civ 752.

An interesting and tricky issue of balancing resources against principle arose in *\*R (Wells) v Parole Board; R (Walker) v Secretary of State for the Home Department* [2007] EWHC 1835 (QB)

The role of the courts and parliament in the context of criminal procedures is well captured in the furore over anonymous witnesses which broke (it seemed quite suddenly) in 2008: *\*R v Davies* [2008] UKHL 36 and the subsequent Criminal Evidence (Witness Anonymity) Act 2008.

...and the knotty question of national security: *Secretary of State for the Home Department v JJ and others* [2007] UKHL 45; *Secretary of State for the Home Department v MB and AF* [2007] UKHL 46; *Secretary of State for the Home Department v E* [2007] UKHL 47 with the follow up case of *Secretary of State for the Home Department v AF, AM, AN; AE v Secretary of State for the Home Department* [2008] EWCA Civ 1148 (Sedley LJ dissenting)

..... and what about the Olympics, do they justify eroding rights? *Sole v Secretary of State for Trade and Industry and the London Development Agency* [2007] EWHC 1527 (Admin).

### **Discussion:**

1. Trace the origins of the margin of appreciation in the case-law of the European Court of Human Rights. Does it translate easily or at all into UK law?
2. Why was the *Hatton* decision so controversial? The Grand Chamber changed the Court's mind in this case; was it right to do so?
3. When should judges engage creatively with the Human Rights Act and when should they not do so? How can we tell on a case-by-case basis which is the right approach?
4. Critically analyse the judgment of Laws LJ in *International Transport Roth gmb*. Is there a distinction between judicial restraint and judicial deference of the type for which Gearty argues?
5. How much should the courts assert themselves in the field of national security?
6. Is *R (Wells) v Parole Board; R (Walker) v Secretary of State for the Home Department* rightly decided?
7. Should courts or parliament decide when anonymous witnesses should be allowed in court? What is the human rights point in such cases?

### *Theme Two: Proportionate intrusion:*

'Don't mend it if it is not broken; beware the Bull in the China shop.' The Human Rights Act does not belong everywhere, even in places where it might seem to belong, particularly if the underlying 'human rights' issue is already being carefully catered for.

### Cases

*R v Shayler* [2001] EWCA Crim 1977, [2001] 1 WLR 2206 (CA); [2002] UKHL 11, [2003] 1 AC 247, [2002] 2 WLR 754, [2002] 2 All ER 477; *R (S and Marper) v Chief Constable of South Yorkshire* [2002] EWHC 478 (Admin); [2002] EWCA Civ 1275, [2002] 1 WLR 3223, [2003] 1 All ER 148; [2004] UKHL 39, [2004] 4 All ER 193 but see now *\*S and Marper v United Kingdom* E Ct HR 4 December 2008; *\*Harrow London Borough Council v Qazi (FC)* [2003] UKHL 43, [2003] 3 WLR 792, [2003] 4 All ER 461 – see further *Price v Leeds City Council* [2005] EWCA Civ 289 following *Qazi* rather than *Connors v UK* in Strasbourg. This issue of which forum to follow, Strasbourg or local, is gradually becoming important: *\*R (RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63.

(There is a good summary of the *Qazi* line of cases at J Lewis, ‘The European Ceiling and Human Rights’ [2007] *Public Law* 720.)

The impact of the Act on judicial review: *\*R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 AC 532; *\*Huang v Secretary of State for the Home Department*; *Kashmiri v Secretary of State for the Home Department* [2007] UKHL 11

The retrospectivity crisis – now thankfully in the history books and for note only  
*R v Kansal (No 2)* [2001] UKHL 62, [2002] 2 AC 69, [2001] 3 WLR 1562, [2002] 1 All ER 257 *R v Lambert* [2001] UKHL 37, [2002] 2 AC 545, [2001] 3 WLR 206, [2001] 3 All ER 577, [2001] 2 Cr App R 511; *Wilson v First County Trust Ltd (No 2)* [2001] EWCA Civ 633, [2002] QB 74, [2001] 3 WLR 42, [2001] 3 All ER 229; *Wilson v Secretary of State for Trade and Industry* [2003] UKHL 40, [2003] 3 WLR 568, [2003] 4 All ER 97; *Wainwright v Home Office* (cited above)

### Discussion:

1. What were the factors that led the courts to resist human rights challenges to legislation in *Shayler* and *Marper*? Are there any general conclusions that can be drawn from these cases about when the courts should engage with the Human Rights Act and when they should not? Is the Strasbourg decision in *S and Marper* correct?
2. Describe exactly the effect of the Human Rights Act on judicial review of administrative action.

*Theme three: Analytical coherence:*

*Strasbourg cases:*

Expanding article 6(1): compare the *Osman v United Kingdom* and *Z v United Kingdom*, fully discussed with references in Gearty, ‘Unravelling Osman’ (2001) 64 MLR 159 and ‘Osman Unravels’ (2002) 65 MLR; T Hickman, ‘The “uncertain shadow”: Throwing Light on the Right to a Court under Article 6(1) of the ECHR’ [2004] PL 122.

Keeping up-to-date: *Goodwin v United Kingdom* (2002) 35 EHRR 447, on which see *Bellinger v Bellinger* (cited above)

*Domestic cases:*



The procedural/substantive bar in article 6(1): *Matthews v Ministry of Defence* [2003] UKHL 4; [2003] 1 AC 116; [2003] 2 WLR 435; [2003] 1 All ER 689;

The public/private divide: Compare D Oliver, 'Functions of a Public Nature under the Human Rights Act' [2004] PL 329 and M Sunkin, 'Pushing Forward the Frontiers of Human Rights Protection; the Meaning of Public Authority under the Human Rights Act' [2004] PL 643. See also H Quane, 'The Strasbourg jurisprudence and the meaning of a "public authority" under the Human Rights Act' [2006] *Public Law* 106.

Cases include *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595, [2002] QB 48, [2001] 3 WLR 183, [2001] 4 All ER 604; *R (Heather, Ward and Callin) v The Leonard Cheshire Foundation and the Attorney General* [2001] EWHC Admin 429; [2002] EWCA Civ 366, [2002] 2 All ER 936 [on which see C Donnelly, 'Leonard Cheshire again and beyond: Private contractors, contract and section 6(3)(b) of the Human Rights Act' [2005] *Public Law* 785]; *R (Dr Julian West) v Lloyds of London* [2004] EWCA Civ 506, [2004] 3 All ER 251; *R (Bishop) v Bromley LBC* [2006] EWHC 2148 (Admin); *R (Weaver) v London and Quadrant Housing Trust* [2008] EWHC 1377: see Craig, 'Contracting out, the Human Rights Act and the Scope of Judicial review' (2002) 118 LQR 551; Palmer, 'Should Public Health be a Private Concern? Developing a Public Service Paradigm in English Law' (2002) 22 OJLS 663; M McDermont, 'The Elusive Nature of the "Public Function": *Poplar Housing and Regeneration Community Association Ltd v Donoghue*' (2003) 66 *Modern Law Review* 113.

In class, time permitting, we will discuss: \**YL v Birmingham City Council and Others* [2007] UKHL 27 – see J Landau, 'Functional public authorities after *YL*' [2007] *Public Law* 630

### **Discussion:**

1. Does the procedural/substantive distinction developed under article 6(1) of the ECHR have any coherence? What is the purpose of the distinction?
2. Does keeping up with modern developments (as in *Goodwin*) come at too high a price for the integrity of the law?
3. Critically appraise the decision of the House of Lords in *YL v Birmingham City Council*

### **Part Three: Applying the Human Rights Act**

Professor Collins: to follow

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