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The Law of Human Rights: Second Edition
by Richard Clayton and Hugh Tomlinson.
Oxford, 2768 pp., £295, March 2009, 978 0 19 926357 8

Human Rights Law and Practice: Third Section
edited by Anthony Lester, David Pannick and Javan Herberg.
Lexis Nexis, 974 pp., £237, April 2009, 978 1 4057 3686 2

Human Rights: Judicial Protection in the United Kingdom
by Jack Beatson, Stephen Grosz, Tom Hickman, Rabinder Singh and Stephanie Palmer.
Sweet and Maxwell, ??pp., £124, September 2008, 978 0 421 90250 3

In January 1999, Colin Middleton hanged himself in prison. He'd been in custody since 1982, when he was convicted – aged 14 – of murdering his 18-month-old niece. While in prison, he had harmed himself seriously, written to the governor about his mental illness, and spoken about suicide to other inmates. On the day before his death he didn't leave his cell, even for meals, and placed a rug over the inspection port. At his inquest the jury tried to add to its verdict the opinion that the prison service had failed in its duty to Middleton, detailing why it had come to this conclusion. When the coroner refused to include the jury's note in his final ruling, Middleton's mother began a campaign to secure a formal public determination that the prison service was responsible for her son's death. The obstacle she faced was the clear wording of the Coroners Act 1988.

The investigation of deaths is the duty of a coroner, who is appointed under that statute (the 1988 act has been replaced by the Coroners and Justice Act 2009, but for these purposes the law remains the same). When there is reasonable cause to suspect that a person has died a violent or unnatural death, or when someone has died suddenly of an unknown cause, or died in prison or in circumstances such as to require an inquest under any other act, then the coroner must hold an inquest as soon as it is practicable. A jury may or may not be summoned, but either way the inquest must decide, first, who the deceased was; and second, how, when and where they came by their death. In the past, inquests used to engage with far wider questions, often digressing into the circumstances of the death, and

juries were not afraid to give their opinion on civil or criminal responsibility when they thought it appropriate. The 1988 law was the culmination of a major effort to tame juries, henceforth allowing them only to 'decide' the obvious. It was a memory of the previous practice that encouraged the jury to try to add its note to the judgment in the case of Colin Middleton.

To defend the status quo as the Home Office did after the Middleton inquest was to reckon without the Human Rights Act, which was passed by Parliament in November 1998 and brought into law nearly two years later. In early 2004 Mrs Middleton finally got what she wanted: the law lords ruled that when the Coroners Act said an inquest must rule on 'how' a person came by their death, the word 'how' in fact meant 'by what means and in what circumstances', and so it was appropriate to go into the details of what had happened and in particular to look at any official dereliction of duty that might be thought to have been causative. No doubt their lordships were much influenced by the statistics on prison deaths: in the years between 1990 and 2003 there were 947 self-inflicted deaths in prison, 177 of them of detainees aged 21 or under. At the time the case was heard more than a third of the deaths – there were very nearly two a week – were of people who had not even been convicted of an offence. One in five of those who killed themselves were women, a proportion far in excess of the female prison population, and two-fifths of the deaths occurred in the first month of custody.

Parliament's effort to narrow the scope of inquests was undone by Article 2 of the European Convention on Human Rights. This 'right to life' provision had been interpreted by the Strasbourg judges as involving not only a prohibition on state killing but also a positive obligation properly to investigate killings that occur in suspicious circumstances within a state's jurisdiction: cases in which the state's negligence or reckless indifference may have been partly or wholly responsible for the death. (This can include killings by third parties as well as suicide: the year before *Middleton*, the law lords extended Article 2 to cover the death of Zahid Mubarek, a 19-year-old Asian prisoner murdered by Robert Stewart, with whom he shared a cell. Stewart was a violent racist – as the authorities knew when they allocated him a cell with his eventual victim.) The authorities had to act in accordance with Article 2, which meant, crucially for the outcome in *Middleton*, that judges could interpret pre-existing law in a way that was compatible with the convention rights if this was, as put in Section 3(1) of the Human Rights Act, 'possible' (not 'reasonably possible' or 'probable' or 'practical', but merely 'possible', which is almost the same as 'not impossible'). This allowed the law lords to play around with the word 'how' in *Middleton* without exposing themselves to allegations of usurping the legislature.

Since this decision, in case after case, concerned relatives have been able to pursue the authorities – sometimes the police, often the prison service and occasionally local NHS trusts – to find out what had really happened to a family member. When the Iraq war began, coroners started to find

that the bodies of members of the British forces were being returned to their jurisdiction with controversy raging over the manner of their death. These cases too have now been brought within Article 2's remit. In a court of appeal case on 18 May last year (soon to go before the Supreme Court) the death from heatstroke in an Iraq military camp of Private Jason Smith in August 2003 was held – rightly – to be a matter for investigation by the assistant deputy coroner for Oxfordshire, into whose territory the body had been returned. Smith had had to endure shade temperatures in excess of 50 °C without air conditioning. He had been sick in the days leading up to his death, despite which it appears he was given no adequate support of any sort. The appeal judges did not see why the possible culpability of the state should not be investigated merely because his death had occurred in Basra rather than Britain.

In an earlier decision of the House of Lords, *R (Al-Skeini) v. Secretary of State for Defence*, the death of Baha Mousa at the hands of British troops on a military base in Iraq was also held to fall within Article 2. The killing has given rise to the current inquiry by the retired judge William Gage, whose report is likely to deal in detail with multiple allegations of abuse of detainees by British forces in Iraq. When the ECHR came into force in the 1950s, it was exactly such abuses of detainees in foreign countries that dogged the authorities, particularly in Cyprus. And it was the Colonial Office which, anticipating this, resisted the idea of universal human rights with the greatest vigour in the 1940s. But when New Labour took power in 1997, with its talk of human rights and ethical foreign policy, its future role as a quasi-colonial power was somehow not anticipated.

Equally unanticipated was the long reach of Article 3, with its prohibition of torture and inhuman or degrading treatment or punishment, which has been interpreted by judges in Strasbourg and Britain as including a prohibition on handing people over to be tortured by other states. This has been the subject of near hysterical denunciation, not only by the Conservatives but by many in the Labour establishment: there is one remarkable case in which the judge sets out in detail the then prime minister Tony Blair's privately expressed exasperation at the UK's inability to ship a suspect back to Egypt to be interrogated by the security apparatus of one of his holiday friends, Hosni Mubarak.

This simple guarantee against serious ill-treatment has not inhibited the brutal anti-immigrant and anti-asylum laws of recent years, but it has given some protection to the persecuted, the impoverished and the tortured, who would otherwise have been removed from this country without even a chance to associate their plight with any kind of legal argument. In 2002, the government hit on a ruse to dissuade asylum seekers from luxuriating in what ministers (echoing their tabloid masters) saw as the great hospitality and openness of Britain: Section 55 of the Nationality, Immigration and Asylum Act, passed that year, punished 'late' asylum seekers by denying them financial support while also ensuring that they would not be permitted to work. (These applications were 'late' only because a 'timely'

application was almost certain to fail and it was generally known that the best thing to do was to get to Britain and then apply.) The logical end result of the policy – starvation – was vaguely thought to be unlikely because charities would probably help out, but the intention was to send a message to the immigrant hordes that there would be no more free lunches (literally). In 2004, in *R (Limbuela) v. Secretary of State for the Home Department*, the House of Lords condemned this policy as a breach of Article 3. The judges were able to do this without invalidating the statute because some residual sense of duty had led Labour to include within Section 55 a guarantee that convention rights would not be violated by its terms: this gave the courts space to operate as they desired without subverting the sovereignty of Parliament, something that the promoters of the Human Rights Act had ostentatiously declared not to have been their intention.

How much work can the word 'possible' in Section 3 be made to do? The issue is not too difficult where Parliament itself has acknowledged the overriding precedence of human rights (as in *Limbuela*) or has left a space for exceptional circumstances to be taken into account (as in the case of *Offen*, where the judges were able to rescue a clearly mentally inadequate man from life imprisonment under one of the draconian 'two strikes and you're out' laws of the late 1990s). But what if all that stands between the law as it appears to be and injustice is the direction to do what is 'possible' (and no more than that) to bring the law into line with the requirements of human rights? Early on in the life of the Human Rights Act, Lord Steyn tried to encourage a strengthening of the provision by insisting that anything was 'possible' as long as the words under scrutiny did not specifically declare the intention to depart from the demands of human rights. 'Black' could be 'white' unless Parliament had expressly determined this to be outside the range of the possible. This hubristic rejection of the thrust of the act would have turned the judges in the UK into activists on the North American model and it was soon seen off by Lord Steyn's colleagues; the then senior law lord, Lord Bingham, indirectly castigated it in the course of one judgment as 'judicial vandalism'.

After a few false starts the courts eventually hit on a fairly effective approach which has now bedded down in the case-law. Judges must avoid seeming to legislate: their verbal tinkering must appear to be an interpretation. As one of the law lords put it in 2002, 'a meaning which departs substantially from a fundamental feature of an Act of Parliament is likely to have crossed the boundary between interpretation and amendment' and this is 'especially so where the departure has important practical repercussions which the court is not equipped to evaluate'. In the words of another law lord, the judges should 'go with the grain of the legislation' and not violate a 'fundamental feature' or its 'underlying thrust'.

Modest though this appears to be it can sometimes carry judges to the linguistic limit. In the celebrated case of *Ghaidan v. Godin-Mendoza* in 2004, the issue was whether the partners of homosexuals were entitled to

succeed to the statutory tenancy possessed by their lover after his death. The relevant Rent Act covered the married and also (after an earlier case) the heterosexual unmarried: 'A person who was living with the original tenant as his or her wife or husband shall be treated as the spouse of the original tenant.' Convinced that gays were being treated so unfairly that it breached their right not to be unjustly discriminated against in the enjoyment of their family life, the law lords solved the Section 3(1) challenge by effectively amending the definition just quoted, to the effect that a gay partner was to be treated 'as if they were' a spouse if the partnership had had the solidity associated with the conventional marital bond. The original thrust of the legislation was not the promotion of marriage (or the amendment to include the unmarried would not have been enacted) but the provision of 'family' (broadly construed) security – and in that context the move to cover gays could be said not only to make sense but to be 'possible'. The law lords refused a similar move in *Bellinger v. Bellinger* in 2003, when they declined to construe the Matrimonial Causes Act 1973 in such a way as to recognise a transsexual as a female for the purposes of marriage. Playing with the words 'male' and 'female' in the act 'would represent a major change in the law, having far-reaching ramifications'; these issues, it was deemed, were 'altogether ill-suited for determination by courts and court procedures'. Rather, they were 'pre-eminently a matter for Parliament'. The following year saw the Gender Recognition Act, so justice was eventually done.

It was this kind of partnership between the courts and Parliament that was heralded as the unique feature of UK human rights legislation when it was first placed before Parliament in 1997. In most countries, human rights laws either do not exist (in which case the legislature is supreme) or exist in such a form that judges are empowered to impose their own view of those rights (as in the US, Ireland, Germany etc). New Labour wanted its commitment to rights to show how liberal and unthreatening the party was, but it had a sufficiently large Old Labour rump to make impossible any full move towards what Keith Ewing has described as a 'juristocracy'. The compromise reached was the declaration of incompatibility in Section 4. This odd remedy is what was applied to Mrs Bellinger, but it was a victory that made her angry. All that a declaration of this sort does is announce to the world that the law under scrutiny is incompatible with the Human Rights Act, but that since the incompatibility is too clear to be messed about with under Section 3 the law is to be allowed to stand. The judges are permitted to express distaste, but in law that means nothing at all. There have been only a few of these cases and when they have come up the government (responsible of course for bringing the act into force) has generally tried to accommodate the law to what the judges have said. In *Bellinger* it was easy because the required legislation was already being planned (though no one knew for sure that it was going to get through).

The Conservative Party has now said it wants to repeal the Human Rights Act, and replace it with a new bill of

rights that would better reflect the traditional freedoms the people of this island are presumed to care about. The Tory charter would reaffirm the primacy of individual freedom and empower the individual to resist overweening state power. However popular in right-wing circles, such a dramatic reversal would inevitably raise a question which could in time become as intractable as the 'West Lothian question' with which Tam Dalyell harried successive generations of Labour politicians in debates about devolution. If the UK repeals the Human Rights Act, but leaves in place the European system which allows alleged victims of breaches of the convention to take their cases to the Strasbourg court (which in turn has the power to order the United Kingdom to bring UK law into line with Strasbourg's judgments), how much difference will repeal make? The logical thing would be to withdraw from the whole scheme of Strasbourg-based law, thereby ensuring that foreign judges cannot do what the domestic courts will just have been prohibited from doing. But Cameron's policies towards both Strasbourg and the EU as a whole are entirely populist and opportunist, and what will most likely happen under a Tory government will be a return to the pre-Human Rights Act world of the early 1990s. Strasbourg will then be intervening to stop expulsions that may lead to deportees being tortured, will be declaring this or that anti-immigrant law a breach of human rights, will castigate some pro-marriage or anti-gay proposal with which the Tories will have sought to assert their Britishness, or whatever. The Cameron government will display rage at the interference – to the delight of the *Daily Mail* and the Murdoch press – while quietly doing what international law requires of them.

Another question. If a right set out in the European Convention has become embedded in the common law and is therefore part of our indigenous laws, how can repeal make any difference to that right's continued application within Britain? The John Terry case notwithstanding, the right to privacy, for example, is now pretty well established in the British courts, as are the changes to the restrictions on the powers of the police, which may originally have been inspired by the convention but which take effect as modifications of the ancient power of controlling breaches of the peace. The judges now have a new final tier in the form of the Supreme Court, and it's possible that some of its justices will not baulk at an assertion of local judicial power where rights are concerned, and will claim it is quite independent of the alien law which the Cameron government has so patriotically removed. When there was a legal challenge to the ban on hunting with foxes some years ago (*Jackson v. Attorney General*), some of the then law lords were prepared to contemplate striking down acts of parliament, using ancient common law powers to override unconstitutional action which they had claimed to find lurking in the old pre-democratic cases.

If Cameron is right to make repeal of the Human Rights Act an issue – right in the sense that repeal has considerable popular support – then Labour has only itself to blame. The act was as much maligned by

ministers as it was by the opposition and the right-wing press. It seemed to have been passed almost by accident, at a time when the first Blair administration was searching for constitutional changes to make, having promised to follow the Tories' spending plans for its first two years in power. It thus had quickly to find ways to 'sex up' the party's first Queen's Speech in 18 years. Only recently have ministers begun to defend the values that lie behind the act, to expose the lies that have been told about it and to support the real (rather than fantasy tabloid) decisions concerning human rights that have emerged from the courts. Under Gordon Brown, Labour has even shown a tentative interest in extending protection into the realm of social and economic rights: its discussion paper on a bill of rights and responsibilities was widely mocked when it appeared early last year and the idea has been shelved until after the election, but it reflected the mild leftward drift of a government that seemed to be heading towards an election that was already lost. The proposal was for a new bill of rights which would include provisions on social justice, the welfare state, healthcare, children, and even on equality: a social democratic charter in short. Not a bad idea, it might be thought, at a time when socialism is in retreat. NGOs have found human rights rhetoric a convenient way, indeed perhaps the only way, of discussing ethical causes in these bleak times. In such contexts the term is used in a radically different way: as a rallying cry for ethical action, not a term of legal art to be interpreted in court.

Labour's proposed bill attracted ridicule because it was not intended to be enforced in court, but this was one of its strengths. If the idea of human rights is to be moulded into a social democratic programme for a post-socialist age, then it is important that the issue isn't simply turned over to the lawyers before further, more specific laws are passed, and a political commitment made to follow this legislation up. In this respect, the Human Rights Act is both an inspiration and a warning. The judges have stuck, more or less, to the generalised brief they were given without allowing themselves to drift via an expansionist interpretation too close to the territory of the legislature. But there has been a price to pay – an explosion in human-rights-based litigation. This short act, containing 16 rights of a largely civil and political character, has generated nearly 3000 pages of Clayton and Tomlinson, the 889 pages of Lester, Pannick and Herberg and the 813 pages of Beatson, Grosz, Hickman, Singh and Palmer. These books are all squarely aimed at the barristers who express the interests of their clients in terms of human rights in order to achieve a victory that might otherwise be impossible, or to copper-bottom a legal position that might otherwise be dubious.

Of the three books, Clayton and Tomlinson is the best organised from this point of view. Every known case is in there somewhere and the arrangement of its sections allows busy lawyers swotting up the night before to find what they are looking for reasonably quickly: the ten cases on a certain meaning to be

given to 'inhumane treatment' under Article 3, for example, or the 15 dealing with the five relevant aspects of the meaning of 'civil rights' under Article 6. Lester, Pannick and Herberg is grander in its presentation, but the irrepressibility of human rights law means that it feels rather short if you want instant help. Beatson, Grosz et al is in some ways the best of the three in that it is more reflective, more inclined to look behind the law to think things through. But for this reason it may appeal more to academics (and even brave members of the public) than to litigating lawyers. The barristers' method is first to identify the issue (this is often the hard bit), then to run off to the books to find the avalanche of cases that will fill out the written submissions on the issue (this is called 'the common law method' – it's been made much easier by the new variant of it, 'cut and paste'). Then (another hard bit) all of this has to be distilled into a set of principles or precedents which are applied to the facts in a way beneficial to the client – this is often done in court by means of oral submissions. Because British lawyers are simply far too good and because the system is adversarial, all advocates are in perpetual terror of being found out. I know of a case in which a lawyer's entire written argument was destroyed when the other side pointed out that the law it relied on wasn't yet in force.

If the first legitimate worry about a social democratic bill of rights would be an explosion of litigation, the second concerns the danger of legitimating a wrong or a great injustice. The fact that the current generation of judges is largely liberal may yet prove as historically anomalous as the progressive Warren Supreme Court in the United States. In any event, the Human Rights Act has not really been tested in this regard, since Labour has done so little of an even vaguely socialist nature. But the right to property probably did constrain it in relation to the nationalisation of Network Rail (otherwise why pay compensation?) and there can be little doubt that private schools are standing by with batteries of lawyers to argue that even removing their charitable status (much less the schools themselves) will be a breach of the human rights of parents. Intervening to modify the contractual relationship between banks and their 'fat cat' employees may yet run aground on issues of property rights or due process. In short, it has been the absence of socialist legislation that has made the Human Rights Act (and therefore the judges empowered to enforce it) seem so unthreatening to radicals. On only three occasions since it came into force has the government certified a proposed measure to be incompatible with the act, and only one of these, the Communications Bill 2003, concerned a matter close to the party's heart: restrictions on political advertising. (The law turned out in the end not to be at odds with the convention after all.) But if we had a social rights charter enforceable by judges and a government (Labour or Tory) committed to the inegalitarian status quo, who is to say that the 'exigencies of the national interest' or the 'demands of fiscal responsibility' or 'the need to take into account the economic interests of others' (i.e. the rich) would not trump the right to shelter, or to water, or to

work, or to whatever else such a document had insisted on? Even the UN's convention on these issues talks of the progressive realisation of rights and the need to tailor expenditure to an unspecified 'maximum' of 'available resources'. Such caveats are inevitable in any kind of instrument intended to be litigable. Were we to have such a charter, we might find ourselves quite soon trying to convince the poor that their plight was in full compliance with their human rights.

Human rights charters work best when the lawyers are only a small part of them. If the inquest cases brought under the act seem to have been effective this is not because they have functioned as ethical interventions by a far removed branch of government but because the concerns of the judges have found an echo across the prison service itself, particularly within the inspection teams whose statutory obligation it is to oversee the system. In her most recent annual report, the chief inspector of prisons, Anne Owers, noted continuing concerns about prison deaths but acknowledged that 'it is welcome that the rolling three-year average of self-inflicted deaths as a proportion of the prison population' – a 'more reliable indicator' than absolute numbers – 'is lower than at any time during the last two decades.' In the 12 months to August 2008, there were 68 suicides, with women accounting for just three deaths (4 per cent of the deaths as against 5 per cent of the prison population). Courts should not be asked to cure the ills of society. Whether or not the language of human rights is invoked remains for politicians to determine. □