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Challenging the European Arrest Warrant

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Introduction

The Framework Decision on the European Arrest Warrant initiated a radical change to extradition proceedings within the EU, accelerating the process considerably and removing a number of bars to extradition, most notably the bar of dual criminality for 32 specified categories of offences.[1] As a result, the number of extradition requests made to the UK has expanded enormously. According to the Serious Organised Crime Agency; the Crown Office and the Procurator Fiscal Service, surrenders under the European Arrest Warrant rose from 24 in 2004 to 332 in 2007 and 515 in 2008.[2] Earlier this year, it was reported that the Polish authorities make numerous requests for individuals from the UK, making it economical for them to charter a flight every fortnight from Biggin Hill airport to return those warranted individuals.[3]

For this reason, the remaining grounds for challenging the warrant are of considerable significance. Although many attempts have been made to challenge the warrant on procedural grounds, these are beyond the scope of this paper, which instead focuses solely on substantive means of challenging the European Arrest Warrant. After a brief overview of the extradition procedure for the European Arrest Warrant in the UK, it focuses on three grounds for challenging the warrant, namely the passage of time, Article 8 of the European Convention on Human Rights ('ECHR'), and triviality.

I. The European Arrest Warrant in the UK

Part 1 of the UK's Extradition Act 2003 was enacted in discharge of the United Kingdom's duty to transpose into national law the obligations imposed on it by the European Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States (2002/584/JHA). This draws a distinction between category 1 territories, which are the Member States of the EU, and category 2 territories, which are any other territories in the world with which the UK has extradition arrangements. Category 1 territories are dealt with by Part I EA 2003.

The fundamental principle of the European Arrest Warrant is that Member States should trust one another's criminal justice systems to the extent that judicial decisions made in one Member State should be recognised by the judicial authorities of other Member States, ie. it is founded on Member States' confidence in the integrity of each other's legal and judicial systems. Broadly speaking, an arrest warrant issued in one Member State should, therefore, be equally valid as a domestic arrest warrant in another Member State. For this reason, Part I EA 2003 limits the discretion of the court and central authority. Also, the implementation of the European Arrest Warrant may be suspended only in the event of a serious and persistent breach by one of the

[1] 2002/584/JHA of 13 June 2002.
[2] Hansard, House of Commons, Written answers, 9 December 2009.
[3] Editor, "Con Air UK: Flights take Polish criminals home", *Daily Mail*, 20 February 2010.

Member States of the principles set out in Article 6(1) of the Treaty on European Union, determined by the Council pursuant to Article 7(1) of the said Treaty with the consequences set out in Article 7(2) thereof.

Procedure

There are three main stages to the process of extradition from the UK to other territories: arrest, extradition hearing and appeal. An initial hearing is held before a district judge. This will be used to ascertain the identity of the arrested person and to establish whether he/she consents to extradition, together with certain procedural matters such as bail and the setting of the date for the substantive hearing. At the substantive hearing, the court will examine compliance with EA 2003 and consider objections before making a decision as to whether to order their extradition or to discharge him/her. Where the person has been convicted in the requesting state, several additional issues will require judicial determination. It is possible for the decision to be appealed to the High Court and, with permission and provided that there is deemed to be a point of law of general public importance at stake, the Supreme Court. An appeal can be made both by the person subject to an extradition order and by the requesting state.

II. Bars to extradition

At the hearing, the court must decide certain questions and consider certain factors which can act as a bar to extradition. These include:

(a)Whether the alleged offence is an 'extradition offence' (section 10(2)). Under Part I, an extradition offence is one where the alleged conduct has occurred in a category 1 territory; constitutes one of the 32 offences specified by the Framework Decision; and is punishable by at least three years' imprisonment in the requesting state.[4] An extradition offence also includes other offences which are punishable by 12 months' or greater imprisonment in the category 1 territory.[5]

(b)The rule against double jeopardy which prevents the extradition of someone who has already been convicted or acquitted of the same offence or an offence substantially relating to the same facts (section 12).

(c) Whether the arrested person might be prosecuted or prejudiced at trial by virtue of his/her race religion, nationality, gender, sexual orientation or political opinions (section 13).

(d)Whether extradition would be unjust or oppressive because of the passage of time (section 14).

(e)Whether the person is below the age of criminal responsibility in the UK (section 15).

(f) Hostage-taking considerations (section 16).

(g) The consideration of speciality (section 17), which, broadly, is the principle that a person who has been extradited cannot then be prosecuted in the requesting state for offences other than those stated in the warrant or other extradition offences disclosed by the same facts.

(h)Earlier extradition to the UK from another category 1 territory (section 18) or non-category 1 territory (section 19).

(i)Whether the physical or mental condition of the arrested person is such that it would be unjust or oppressive to order extradition (section 25).

[4] Section 64(2). The list of categories of offences is set out in Schedule 2.
[5] Section 64(3).

(j)Finally, however, section 21 requires the District Judge at the extradition hearing to decide whether the person's extradition would be compatible with their rights under ECHR, within the meaning of the Human Rights Act 1998, and, if it would not be, to order the person's discharge.

Passage of time

As stated above, section 14 EA 2003 allows an extradition request to be refused if it would be unjust or oppressive not to do so because of the passage of time. The leading authority is the joined cases of *Gomes v Trinidad and Tobago* and *Goodyer v Trinidad and Tobago*.[6] This judgment approved Lord Diplock's approach in *Kakis v Cyprus*, which made clear that there are two limbs to the bar: the passage of time may render extradition unjust or oppressive. This distinction between the two limbs has not always been made so clear in the subsequent case law.[7] 'Unjust', for Lord Diplock, means 'directed primarily to the risk of prejudice to the accused in the conduct of the trial itself'.[8] The evidence used to raise this limb may also support an argument that there would be a violation of Article 6 ECHR if extradition took place, although a different test would apply.[9] It is of not that the Strasbourg Court has never attempted to lay down minimum periods of what constitutes a reasonable time, but has laid down factors to be taken into account. See *Eckle v Federal Rep. of Germany*[10] (the word 'time' covers the whole of the proceedings in issue including the present proceedings. See *St gm ller v Austria*[11] where the court said that the aim of Article 6 (1) is to protect parties against excessive procedural delays. Article 6(1) applies to all parties to court proceedings. The court said that in criminal matters it is designed to avoid a person charged remaining too long in a state of uncertainty about his fate. Article 5 (3) ECHR applies to a person charged or detained and implies special diligence of the prosecution of cases concerning such persons (see *Lffler v Austria*[12]). 'Oppressive', conversely, refers to 'hardship to the accused resulting from changes in his circumstances that have occurred during the period to be taken into consideration'. The evidence used to raise this bar may also support an argument that there would be a violation of Article 8 ECHR if extradition took place, but a different test applies which is discussed later.

Lord Diplock further stated in *Kakis* that a delay caused by the accused fleeing the country could not be unjust, and that for delays not brought about by his actions, the issue was 'the effects of those events which would not have happened before the trial of the accused if it had taken place with ordinary promptitude'.[13] After some uncertainty, *Gomes* clarified that any delay in the commencement of extradition proceedings which was brought about by the accused fleeing the country or evading arrest could not be relied upon as a ground for holding it to be either unjust or oppressive to return him. Only a deliberate decision communicated to the accused by the requesting state not to pursue him, or some other circumstance instilling a similar sense of security, could properly allow an accused to assert that the effects of further

[6] [2009] UKHL 21.
[7] [1978] 1 WLR 779.
[8] At 782.
[9] In theory, challenging the European Arrest Warrant on the basis of Article 6 ECHR should be very difficult given that it is founded upon Member States' mutual trust of one another's criminal justice systems; however, the Irish High Court did allow such an appeal in *Minister for Justice v Stapleton* [2006] IEHC 43.
[10] [1982] 5 EHRR.
[11] [1969] 1 EHRR155.
[12] No. 30546/96, 3 October 2000.
[13] At 783.

delay were not 'of his own choice and making' within the meaning of Lord Diplock's speech in *Kakis*. The concept of injustice requires one to ascertain whether a fair trial is possible. Showing that a fair trial is not possible cannot be easily satisfied even in relation to countries where extradition arrangements were more 'ad hoc'. The presumption should be that justice would be done despite the passage of time and that the burden should be on the accused to establish the contrary. The court will also consider what protections are available in the requesting state to prevent injustice.

One example of delay leading to a situation which was likely to lead to injustice arose in *Kakis*, where a key witness for the defence had moved from Cyrus to London in the intervening time. If the trial had taken place with 'ordinary promptitude', he could have been compelled to give evidence, whereas that was not the case given that he had by that time settled in London, and he was not prepared to return voluntarily to Cyprus to testify.

As regards the second element of section 14, Lord Diplock in *Kakis* cited as circumstances which would make the extradition oppressive the fact that Mr Kakis had uprooted his family and moved to England with the help of the Cyprus Government, who had given him reason to believe that they had no intention to prosecute the alleged offence, and that his family had now been settled in England for three and a quarter years before he learned of the request made for his extradition.

From a survey of recent cases in which section 14 has been pleaded, it is clear that it is extremely difficult to successfully plead passage of time. Delays of nine years in a matter of armed robbery,[14] six years in a murder case,[15] eight years in a case of serious fraud and extortion,[16] and even 25 years in a case of an indecent assault of a child, were all considered insufficient.[17] In each case, the reasoning of the court was primarily that no injustice or oppression was likely to arise as a result of the delay. The threshold for 'oppressive' under section 14 would appear to be higher than that for Article 8; indeed, this point was in fact conceded by defence counsel in one case.[18]

One rare recent instance of an appeal under section 14 succeeding was in *Wenting*.[19] Here, a delay of twenty years was compounded by an array of failings on the part of the French authorities, as well as a number of other unusual circumstances. The appellant was arrested in March 1989 in France on charges of drug trafficking. Having admitted the offences, he remained in custody for over two years while awaiting trial before being released on bail in 1991. He then moved back to live with his mother in Holland, complying with his conditions of bail and remaining in contact with the French authorities. Nevertheless, the French authorities issued an international arrest warrant in 1991. Although he apparently was not told about this, a trial took place in 1992 at which he was convicted in his absence to five years' imprisonment. In 2006, the French authorities issued a European Arrest Warrant.

Lloyd Jones J considered that allowing the extradition would be oppressive, under the second limb of Lord Diplock's test, thereby focusing on the personal

[14] *Sciezka v Poland* [2009] EWHC 2748 (Admin).
[15] *Finch v France* [2009] EWHC 1394 (Admin).
[16] *Secchi v Ireland* [2010] EWHC 521 (Admin).
[17] *Crean v Ireland* [2007] EWHC 814 (Admin).
[18] *Szubryt v Poland* [2009] EWHC 1894 (Admin).
[19] *Wenting v High Court of Valenciennes* [2009] EWHC 3528 (Admin).

circumstances of the individual. In particular, he cited, as relevant factors, the fact that the appellant had been in custody for two years despite admitting the offences, that he did not deliberately flee the jurisdiction, that he was not notified of his trial which occurred in his absence, that he was not informed that he must return to serve his sentence, that the Dutch probation service and his Dutch lawyer advised him that he should wait to be summoned by the French authorities, that he was never made aware of the warrant for his arrest, that over twenty years had elapsed since the commission of the offences, that he had subsequently lived a 'blameless, law-abiding and useful life', that his partner was diagnosed with lung cancer in 2008 and had no close family or support in Holland, and that he had built up two successful businesses which his partner could not maintain because of her condition. Clearly, then, truly exceptional circumstances are required before the court will be persuaded to allow an appeal under section 14.[20]

Challenges based on Article 8

Since EA 2003 came into force at the beginning of 2004, numerous attempts have been made to resist extradition proceedings with reference to the Human Rights Act 1998 ('HRA 1998'). This section focuses on one approach in particular, namely the use of Article 8 ECHR to resist extradition on the grounds of proportionality. Although this approach has attempted to resuscitate the bar of triviality, it has so far has been unsuccessful. It is therefore worth questioning whether HRA 1998 provides the level of protection which the Government claimed it would.

Article 8 ECHR allows for interference where it is proportionate to the legitimate aim of an extradition. It was held in *Launder* that extradition will only be disproportionate under Article 8 in 'exceptional circumstances'.[21] In *Ruiz Jaso v Spain*,[22] Dyson LJ stated that 'although it is wrong to apply exceptionality test, in an extradition case there will have to be striking and unusual facts to lead to the conclusion that it is disproportionate to interfere with an extraditee's article 8 rights.'[23] Most recently, the Supreme Court addressed this issue further in *Norris*, where Lord Philips pointed out that instead of saying that interference with Article 8 rights can only outweigh the importance of extradition in exceptional circumstances it is more accurate and more helpful, to say that the consequences of interference with Article 8 rights must be exceptionally serious before this can outweigh the importance of extradition.[24]

It was further accepted in *Norris* that the court should not just consider the defendant's rights under Article 8, Lord Phillips noting that if '*extradition for an offence of no great gravity were sought in relation to someone who had sole responsibility for an incapacitated family member, this combination of circumstances might well lead a judge to discharge the extraditee*'.[25]

In *Jansons v Latvia*, an appeal was allowed on Article 8 grounds.[26] Here, the appellant attempted to commit suicide the day after the order for his extradition had been made,

[20] Attempts to follow *Wenting* have frequently been unsuccessful, for example *Dare v Principal Court of Santa Cruz de Tenerife* [2010] EWHC 366 (Admin) and *Lynch v High Court in Dublin* [2010] EWHC 109 (Admin).
[21] *Launder v United Kingdom* (1997) 25 EHRR CD 67.
[22] [2007] EWHC 2983.
[23] Para. 57.
[24] *Norris v Government of the United States of America* [2008] UKHL 16, para. 56.
[25] Ibid. paras. 64–5.
[26] [2009] EWHC 1845 (Admin).

and very nearly succeeded. Psychiatric reports stated that he suffered from a depressive illness and post-traumatic stress disorder and that sending him back to Latvia would aggravate those conditions, making it very likely that he would attempt to kill himself again. Written material from the requesting state district court outlined medical and other arrangements which the Latvian prison authorities had in place which would continue the kind of treatment and care the appellant had been receiving in the UK to restrain him from suicide or self-harm. Nevertheless, the Court held that it would be oppressive, under section 25, to order the appellant's return where the evidence established a substantial risk that the appellant would commit suicide if extradited.

With specific reference to Article 8, the Court was satisfied that the test requiring 'striking and unusual facts' was met, and that the risk of suicide, which the doctor described as certainty, outweighed the seriousness of the offences, the need to honour international treaties and the finding that the Latvian authorities would take all reasonable steps to protect the appellant.

As can be imagined, numerous attempts have subsequently been made to plead Article 8 by citing the possibility of suicide. In *Okruch v Poland*, the appellant's acts of self-harm in a prison in Poland was described by the court as a 'minor episode' and the appeal was dismissed.[27] In *Sbar v Italy*, similarly, 'extreme and illogical behaviour' and 'preoccupation with the spirit-world' did not put the appellant at significant risk of self-harm.[28] In both these cases, emphasis was placed upon the satisfactory procedural safeguards in the prison systems of the respective requesting states. In the latter case, Foskett J warned that circumspection was needed in evaluating evidence in such cases, and that any perception that the possibility of suicide was an 'easy way of avoiding extradition' was erroneous.

Numerous other circumstances have been unsuccessfully raised to defeat an extradition ground on grounds of Article 8. Having a baby daughter, [29] having two children and a wife with a fragile mental state,[30] and having concerns over the adequacy of provisions for individuals suffering from HIV in prison[31] were all insufficient to meet the requirements of Article 8.

Triviality of offence

A subset of the cases which make reference to Article 8 have attempted to avoid extradition by claiming that the offence is too trivial to warrant extradition. EA 2003 of course provides no such bar, unlike the Extradition Act 1989, under which it was possible to resist extradition on the grounds that the offence was trivial in nature.[32] The only statutory bar of triviality is the requirement that the offence in question be an 'extradition offence' as explained above. Under Pt 1 of EA2003 one of the requirements of an extradition offence is that it is punishable with at least 12 months' imprisonment in cases in which the requested person is accused of the offence. In cases in which the requested person has been convicted of the offence, a sentence of at least four months' imprisonment must have been imposed. Furthermore, the

[27] [2010] EWHC 1047 (Admin).
[28] [2010] EWHC 1184 (Admin).
[29] *Reid v HM Advocate* [2009] WL 6567.
[30] *Szubryt* above.
[31] *Valts v Latvia* [2010] EWHC 999 (Admin).
[32] Sections 11(3) (a) and 12(2) (a) (i).

European Commission's evaluation report on the 'European Arrest Warrant and surrender procedures' (COM 407)[33] which examined the 2005 statistics, noted that a number of member states had refused to surrender their own nationals and that in a number of countries the designated competent judicial authority is, directly or indirectly, the Ministry of Justice (a political not a judicial authority).

So far, attempts to plead triviality have been met without success.[34] One striking example of an attempt to use Article 8 to resist an apparently trivial matter arose in *Sandru v Romania*.[35] Sandru had stolen and killed ten chickens from a neighbour in Romania; in his absence, he was sentenced to three years' imprisonment. Although Sandru attempted to resist the European Arrest Warrant on the grounds of proportionality, Elias LJ did not accept that the triviality of the offence would even 'begin to bring this case within Article 8', noting that to do so would be to 'risk undermining the principle of mutual respect which underpins Part 1 of the Extradition Act'.[36] In particular, he noted that the 'appropriate sentence is, in part, a function of culture' and that it may be that 'in this case the Romanian courts treat theft of livestock and its subsequent destruction far more seriously than English courts would typically do', in which case 'the answer is to challenge it in Romania'.[37]

However, there has been some suggestion from the judiciary that Article 8 could provide a bar of triviality. Maurice Kay LJ noted, in the case of a Warrant issued for the theft of a mobile phone, that 'one is becoming used to European extradition cases for less serious offences than used to come before the courts for extradition, but in my reasonable experience of cases under the 2003 Act I have never seen one quite as low down the calendar as this.'[38] In the same case, Richards LJ stated that he could 'see no reason why, in striking a balance under Article 8, the relative seriousness of the offence for which extradition is sought should not be taken into account'.[39] In *Norris*, too, Lord Phillips noted that '[t]he nature and seriousness of the alleged offence will be relevant to the strength of the case in favour of extradition' when considering a claim under Article 8.[40]

Could Luxembourg provide a new bar of triviality? The issue of proportionality Remarkably, a German court has recently attempted to imply an overall limit of proportionality into the European Arrest Warrant.[41]Although the Higher Regional Court in Stuttgart did ultimately order the surrender of the individual in its judgment this February, it considered several sources of law which would imply a limit of proportionality into the European Arrest Warrant. Such a judgment raised the possibility that European Union law may imply a bar of triviality in the European Arrest Warrant not only in Germany, but in the UK too.

[33] http://www.statewatch.org/news/2007/jul/eu-com-eaw-report.pdf
[34] *Dirsyte v Lithuania* [2008] EWHC 3331 (Admin).
[35] [2009] EWHC 2879 (Admin).
[36] Para. 14.
[37] Paras. 14–15.
[38] *Zak v Poland* [2008] EWHC 470. The remark was made at an adjourned hearing and is cited in Rosemary Davidson, 'A sledgehammer to crack a nut? Should there be a bar of triviality in European arrest warrant cases?', *Criminal Law Review* 2009, 31.
[39] Para. 23.
[40] *Norris v Government of the United States of America* [2008] UKHL 16, para. 106.
[41] Higher Regional Court Stuttgart, Decision of February 25, 2010—1 Ausl. (24) 1246/09. For a translation and commentary on this case, see Joachim Vogel and J. R. Spencer, 'Proportionality and the European arrest warrant', *Criminal Law Review* 2010, 6, 474–82.

The German judgment considered three possible sources of a proportionality bar, namely, whether the extradition would be proportionate under German constitutional law,[42] which requires the that '[t]he severity of penalties must not be disproportionate to the criminal offence', and finally whether allowing the extradition would breach Article 49(3) of the Charter of Fundamental Rights of the European Union, and whether there might be a fundamental principle of proportionality between offences and penalties in European law.

The Council's Working Party on cooperation in criminal matters carried out its fourth evaluation visits process and issued a report on the '*principle of proportionality'* because some member states have issued EAWs "for what is perceived as very minor offences". These include:
'…detention of 0.45 grams of cannabis; detention of 1.5 grams of marijuana; detention of 0.15 grams of heroin; detention of 3 ecstasy tablets; theft of two car tyres; driving a car under the influence of alcohol, where the limit was not significantly exceeded (0.81 mg/l); and theft of a piglet.'[43]

This raises the question, for the UK practitioner, of the Charter's status in UK law at present. This is currently uncertain. The UK Government negotiated a Protocol designed to limit the application of the Charter,[44] Tony Blair insisting that '[i]t is absolutely clear that we have an opt-out from both the charter and judicial and home affairs.'[45] However, the consensus amongst academics and practitioners at present appears to be that the Protocol does not have this effect and the Charter may well therefore be justiciable in England and Wales.[46]

Nevertheless, even if the Protocol were as effective as the Government originally claimed, it is still possible to argue that there is a fundamental principle of proportionality between offences and penalties in European law.[47] The German court stressed that the right under Article 49(3) simply expressed a more deep-rooted principle of proportionality which 'forms part of the constitutional traditions common to the Member States and is a general principle of the Union's law'. This is consistent with the preamble to the Charter, which states that the Charter 'reaffirms' pre-existing rights. The preamble explains that the Charter should therefore be interpreted with 'due regard to the explanations' prepared by the Praesidium. These clarify that Article 49(3) does not create new rights, but merely 'states the general principle of proportionality between penalties and criminal offences which is enshrined in the

[42] Ibid. 479.
[43] See: EU doc no: 10975/07. See http://www.statewatch.org/news/2007/jul/eu-eaw-evaluation.pdf.
[44] Protocol (No. 30) on the Application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom, Lisbon Treaty.
[45] Hansard, House of Commons, 25 June 2007, column 37.
[46] Paul Craig, 'An Overview of the Lisbon Treaty' and Marie Demetriou and Hugh Mercer, 'EU Charter and Luxembourg (ECJ) v The European Convention and Strasbourg (ECtHR)', unpublished papers given at *The Lisbon Treaty Conference: Assessing the Impact for UK Law and Policy*, London, 15 June 2010.
[47] The identification of fundamental principles of EU law is not, in itself, unusual. See, for instance, *International Transport Workers' Federation v Viking Line ABP* [2008] 1 CMLR 51, and *Alassini v Telecom Italia SpA*, Joined Cases C–317–320/08, para. 61.

common constitutional traditions of the Member States and in the case law of the Court of Justice of the Communities.'[48]

For this reason, even if the Protocol did prevent the Charter from applying to the UK, it is quite possible that the UK might be bound by a fundamental principle of proportionality. It has already been established by the ECJ that EA 2003 must be interpreted so far as possible in light of the wording and purpose of the Framework Decision.[49] This decision has been confirmed by the House of Lords in *Dabas v High Court of Justice, Madrid*.[50] Given that the Framework Decision itself must be interpreted in light of fundamental principles of EU law, it would now appear possible for a requested person to raise the defence of proportionality as a fundamental right at an extradition hearing in the UK, provided that it could be shown how such a right already subsisted in the existing laws of the EU Member States.

Conclusion

Challenging the European Arrest Warrant is by no means straightforward. It has become clear that Article 8 does not provide a bar of triviality, although there have been indications that, in extreme circumstances, the triviality of an offence might be considered alongside other matters under the heading of Article 8. In general, however, both Article 8 and the passage of time have demandingly high thresholds which are met only in exceptional cases. One of the new avenues may now be open to anyone seeking to challenge a European Arrest Warrant is the Charter and fundamental principles of European Union law. It would be a striking irony indeed if the most successful procedural protection did not come from any specific legislation brought in by the EU, but from European law itself.

The author acknowledges the assistance of **James Olsen** in the preparation of this paper.

From oil spill to electric cars: international environmental crime to carbon saving?

Sally Ramage

The Americans have drawn up plans since 2009, revealing that in two years' time, 30 factories in the United States are scheduled to produce 20 percent of the world's advanced vehicle batteries each year. The plan makes no mention however, of how much environmental pollution this will create nor of how much of the world's energy supplies will this save. The United States 2009 Recovery Act sets out a provision of funds for funding the establishment of 20,000 vehicle charging locations, up from 500 that exist today, according to the report. The investments are expected to lower the cost of batteries, and improve their functionality. A network a network of charging stations is soon to be built. This compares with the present two factories in the United

[48] 'Note from the Praesidium: Text of the explanations relating to the complete text of the Charter', Charter 4473/00 Convent 49, 11 October 2000.
[49] *Criminal proceedings against Pupino* [2006] QB 83.
[50] [2007] 2 AC 31.

States which manufacture advanced vehicle batteries, and which now produce less than 2 percent of the world's supply.

U.S. factories will be able to produce electric batteries and component parts to support up to 500,000 electric-drive vehicles annually by 2015, creating tens of thousands of jobs, according to a new Energy Department report. This hitherto unrevealed but anticipated growth of the US battery industry was released in the Energy Report.The US department of Energy has invested $12 billion in advanced vehicle technologies, almost half of it focused on electrifying the transportation sector.

However, almost anything compares favourably with the BP oil spill in America at present. The BP oil spill can be classed as criminally negligent and therefore an international environmental crime, having a harmful impact on the economics and security of the US and neighbouring states. Were the oil spill to have occurred in Europe, it would be governed by Directive 2008/ 98/ EC (which lays down a list of environmental offences by all Member States if committed intentionally or with serious negligence) and the1998 United Nations Aarhus Convention, in force since October, 2001. The Convention establishes a number of rights of the public with regard to the environment.

The United States thought that when 270,000 barrels of oil (or 11 million gallons) was spilt by the Exxon Valdez, polluting 1,300 miles of Alaskan shoreline, it was their worst disaster. Due to the Exxon Valdez oil spill, it was found that the loss included 250,000 seabirds, 2,800 otters, 300 harbour seals, 250 bald eagles, 22 killer whales, and billions of salmon and herring eggs lost. Exxon paid $100 million in federal settlement and $900 million in civil settlements. (See the appeal case *In Re: the Exxon Valdez, Sea Hawk Seafoods, Inc v Exxon Corporation and Exxon Shipping Company*, No. 05-35468, 16 April, 2007)).

Now the BP oil spill is nearly a million times the size of the 1989 oil spill. Furthermore, in the natural course of oil manufacturing, a barren landscape results, as multi million tons of plant life and top soil are lost to the process and millions of gallons of water are diverted from rivers to produce crude oil which consumes millions of litres of gas to make is a viable product.

The1973 US Endangered Species Act protects certain plants and animals that are already struggling to survive and in 2004 there were 326 species of plants and 306 species of animals on the US endangered list.

Human Rights: confronting myths and misunderstandings

Andrew Fagan
Edward Elgar Publishers, 2009
ISBN978-1-84844-161-3
Book review by Sally Ramage

Dr. Andrew Fagan is a Deputy Director of the Human Rights Centre, Essex University. He has taught in four separate academic disciplines: philosophy, law, government and social anthropology, at the University of London and Essex University. His human rights teaching focuses upon the philosophical, political and

cultural dimensions of human rights' principles and practice. His interests lie in the philosophical foundations of human rights law, the relationship between cultural diversity and human rights, and that between religion and a respect for human rights principles. He is also the author of *The State of Human Rights Atlas* (University of California Press, 2010) and he has written many journal articles and chapters in scholarly editions. He is editor of *Making Sense of Dying & Death* (Rodopi, 2004) and co-editor of *Human Rights and Capitalism: a Multidisciplinary Perspective on Globalisation* (Edward Elgar, 2006). He teaches medical ethics to medical professionals and has a long-standing interest in the development of human rights in the central Asian region and some republics of the former Soviet Union.

This book of 165 pages is a very challenging one. Its seven chapters are terse and straightforward. There is no dawdling in this work. The chapters are titled: 'the basis and scope of human rights'; 'human rights and law's domain'; 'universalism and 'the other''; 'globalisation, human rights and the modern nation-state'; 'democracy and human rights'; 'global economic inequalities and human rights'; and 'accentuating the positive'. Chapter 1 addresses the 'established tendency to confuse social privileges with human rights'. Chapter 2 explores human rights as a distinct moral landscape. Chapter 3 discusses the alleged myth of human rights as a universally valid moral doctrine. Chapter 4 is concerned with human rights and nation-states. Chapter 5 looks at the relationship of human rights and democracy. Chapter 6 explores a misunderstanding between rights and duties and chapter 7 draws together these ideas and hypotheses and concludes positively as to the future of human rights tomorrow.

What is the concept of 'human rights? The author argues that it is not a 'fully comprehensive morality for human life'. He says that the 'social privileges' of goods are not human rights. Human rights are not some things that we deserve; they are not privileges. Human rights protect and promote (but do not ensure) the *conditions* for a certain quality of life for all. Fagan illustrates this idea with the ECtHR class action case brought in 2008 by 200 prisoners against the UK government because they were heroin addicts who, on being imprisoned for offences, were deprived in prison of the heroin-substitute 'methadone'. Although they were successful in their human rights case, Fagan asserts that this case contrasts with the original reasons for the ECHR, ie. the holocaust. The rationale takes on the following hue:-
(I)All humans may claim human rights.
(ii) However, which aspects of human life are human rights?
(iii) Which actions of human life are human rights?
Human rights are prerequisites for human agencies and so they are the *mechanism* through which are secured those interests which constitute us. This is contrary to the view of human rights which sociologist Brian Turner takes - of 'protecting human beings from one another' (See Turner. Bryan (2002) 'Outline of a theory of human rights', 2(93), *Sociology*, 489-512).

Going on to the bigger picture of human rights and nation-states, Fagan asserts that the United Nations is a 'contradictory organisation', which has aims of universalism but which fails simply because it contains many nation-states, all of which are self-interested, a contradiction in terms. As to democracy and human rights, Fagan states that they are inter-dependent, and the equality ideal is central to the human rights doctrine and that with rights come responsibilities.

This is where the law enters, for, a right may be a moral or legal right and becomes a legal right when it has secured legal recognition in a jurisdiction. The European Convention on Human Rights ('ECHR') was drafted by the Council of Europe, formed in an attempt at unifying Europe and the objective of the ECHR was to protect against large-scale violations such as the holocaust. The fact of the matter, though, is that it was not triggered in Srebrenica, Bosnia (when 8000 Muslim men and boys were slaughtered in 1995, two years after this town of Srebrenica had been declared a United Nations Safe Area) and other genocide eradication of humans, but instead is being used primarily to address isolated weaknesses in legal systems with the commonality of freedom and 'rule of law'. Essentially, the ECHR is concerned with civil and political rights. However Ireland did bring an action against the United Kingdom (See *Ireland v UK*, E Ct HRR A 25 (1978); 2 EHRR 25) concerning the policy of internment and detention that applied in Northern Ireland between 1971 and 1975. The British had used five techniques of torture on Irish suspects, namely 'standing spread-eagled for many hours against a wall'; hooding the suspect during interrogation; subjecting suspects to continuing loud and hissing noise pending their interrogation; depriving the detainees of sleep and food and drink pending interrogations. However, by rule of law, the UK was not found guilty of torture because the UK gave notice of derogation in time of emergency under article 15. This book is a stimulating read and gives much 'food for thought'.

Justice in Genetics

Louise Bernier
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Review by Sally Ramage

Edward Elgar publishers have again excelled by choosing to publish an essential book.
The author of *Justice and Genetics*, Louise Bernier hails from the area of life sciences and is Professor and Head of the Law and Life Sciences Programme at the University of Sherbrooke in Quebec, Canada. Her expertise includes conventional biochemistry, genetics, virology, bioprocesses and medicinal chemistry. At undergraduate level she studied sciences including forestry including mycorrhiza. She also studied asbestos toxicity. At the master's degree level, she studied the conjugation of antibodies and anti-cancerous molecules to target cancer cells that produce tumour-specific antigens. During her doctoral studies she studied changes in blood group antigens that emerge in the oncogenesis of leukemia cells, exploring the potential for natural killer cells to target such modified antigens. Bernier then became a registered patent agent in the pharmaceutical and biotechnology industry. For close to 10 years, she headed the patent department at Boehringer Ingelheim (Canada) Ltd., where she managed a large portfolio of international patent applications in the areas of medicinal chemistry and biological sciences, particularly virology.

Justice in Genetics includes a preface written by Professor Richard Gold. Professor Richard Gold teaches in the area of intellectual property and common law property at McGill University's Faculty of Law. He was the founding director of the Centre for

Intellectual Property Policy. His research centres on understanding the links between innovation, intellectual property and development. He led the International Expert Group on Biotechnology, Innovation and Intellectual Property, a transdisciplinary research team that issued a ground-breaking report on the policies and law of innovation and intellectual property. He has published widely in legal and scientific journals on this topic. Professor Gold leads a cutting-edge initiative to translate academic research in concrete policy for government, industry, universities and NGOs.

Already, patent law is being used as the author expected. 'The completion of the human genome project and the concept of personalized medicine has the potential to result in a gene-patenting craze, where genes that play a role in disease, or are involved in drug reactions, are targeted and become the IP of a single research organization'. Most patent offices now have the requirement for laying claim to a gene, that the gene be in *isolated* form. This prevents any individual or company from trying to stake a claim on a whole organism, or even a human being. Of course this limitation sounds reasonable, but is it fair? To those doing the DNA sequencing it might be, but granting exclusive rights to a single, isolated gene, if it is a disease-related sequence, could hinder future research on that disease for years until the sequence becomes public knowledge, according to a report by Theresa Phillips ('Biotech/biomedical' at http://biotech.about.com/b/2010/04/12/patents-and-the-human-genome.htm).

This is an understandable fear since the human genome project was initiated in 1990 by the US Department of Energy (DOE) and National Institutes of Health (NIH). It also involved hundreds of scientists from different organizations worldwide. The primary goal of this DNA sequencing project was to determine the entire sequence of nucleotide bases (DNA) in humans (the human genome). In addition to DNA sequencing, the project goals included identifying all of the genes in the human genome, developing and improving techniques for 'gene sequencing' and genomic data analysis and sharing the data and technologies with the private sector.

The importance of DNA discovery in the late 1970s is immeasurable. Two DNA sequencing techniques for longer DNA molecules were invented. These were the Sanger method and the Maxam-Gilbert method. The Maxam-Gilbert method is best used to sequence short nucleotide polymers, usually smaller than 50 base-pairs in length. The Sanger method is more commonly used because it has been proven technically easier to apply. In the Sanger method, the DNA strand to be analyzed is used as a template and DNA polymerase is used to generate complimentary strands using primers. Synthesis of the new DNA strand continues until the time when the strand is prematurely truncated. In the automated Sanger reaction, primers are used that are labelled with four different coloured fluorescent tags. The four reaction mixtures are then combined and applied to a single lane of a gel. The colour of each fragment is detected using a laser beam and the information is collected by a computer which generates chromatograms showing peaks for each colour, from which the template DNA sequence can be determined. A patent is a licence granted to an inventor, which gives the inventor the legal right to stop anyone else from making, using or selling the invention without his or her permission. Thus, patents are territorial rights because they give the patent-holder a proprietary right over his invention within a given country and are widely enforced in industrialized countries.

The concern about the human genome patent is that it can stop many from using it because patents carry costs to the licensee. The use of genetics can limit the scope of reproductive freedom, the duty to prevent harm, who we define as the 'least advantaged, for instance. Medical genetics seeks to understand how genetic variation relates to human health and disease and the concern is for theory to keep pace with scientific advances, and be allowed to evolve as the moral landscape changes. The argument is that good health enables people to become educated, work, be productive, earn a salary, pursue personal and familial goals and gain a certain degree of economic security, when possible and normative tools need to be used for the distribution of health.

Very broadly, the two strands of human rights are civil rights and cultural rights. In the EU, the 1977 Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, state that all human rights are indivisible, interdependent, interrelated and of equal importance for human dignity. Guideline 1 states: 'Since the Limburg Principles were adopted in 1986, the economic and social conditions have declined at alarming rates for over 1.6 billion people, while they have advanced also at a dramatic pace for more than a quarter of the world's population. The gap between rich and poor has doubled in the last three decades, with the poorest fifth of the world's population receiving 1.4% of the global income and the richest fifth 85%. The impact of these disparities on the lives of people - especially the poor - is dramatic and renders the enjoyment of economic, social and cultural rights illusory for a significant portion of humanity'. Guideline 5 states: 'As in the case of civil and political rights, the failure by a State Party to comply with a treaty obligation concerning economic, social and cultural rights is, under international law, a violation of that treaty. Building upon the Limburg Principles , the considerations below relate primarily to the International Covenant on Economic, Social and Cultural Rights (hereinafter "the Covenant"). They are equally relevant, however, to the interpretation and application of other norms of international and domestic law in the field of economic, social and cultural rights.'

However tensions remain, especially between the legal and moral discourses on rights and these affect progress in bettering the world's people who are poor in health as well as wealth. When DNA is being researched, not for better health, but to stop people at borders, ie preventing mostly economic migrants, the realisation can make for many poor nations' incitement. For instance, The Prum Treaty is an agreement between Belgium, Germany, Spain, France, Luxembourg, the Netherlands and Austria on the stepping up of cross-border cooperation, particularly in combating terrorism, cross-border crime and illegal immigration. The author appeals to the world with the reasoning that we are a global community with resources, knowledge and technology enough to reduce the majority of existing global health issues and we have a responsibility to act to cease such radical inequalities. The United States federal 2010 Affordable Care Act is an example of this triumph of goodwill to all, starting in one's own country.. For many ordinary mothers, it makes their lives easier. It gives families control over their own care. And it gives them the comfort of knowing that health insurance will be there when they need it most –when they become ill we get sick. As Michelle Obama said in her e-letter to many of us:

'So much of what makes this law great is its emphasis on preventive care -- right now, too many people aren't getting the check-ups or the screenings they need to stay healthy. Twelve percent of kids haven't seen a doctor in the past year. And 59 million adults - and 11 million children - depend on an insurance plan that does not cover basic immunizations.
Health reform is changing that. Under this new law, all new private plans will provide basic preventive services -- things like childhood immunizations and checkups, mammograms, colonoscopies, cervical screenings, and treatment for high blood pressure -- absolutely free of charge. No copay. No deductible. No co-insurance needed… A focus on prevention will help us to combat diabetes, heart disease, and high blood pressure - chronic illnesses that right now lead to seven of ten deaths in the United States and 75 percent of our national health care costs. And it will help us tackle an issue that is dear to my heart - childhood obesity. As some of you know one of my top priorities as First Lady is the "Let's Move!" campaign, where we have made it our goal to put a stop to the challenge of childhood obesity within a generation, so children who are born today grow up at a healthy weight….'.

The rest of the world must follow this example and in the field of human genome, it is not difficult to let goodwill to all men come before financial gain of a few men.

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