АКАДЕМИЯ ГЕНЕРАЛЬНОЙ ПРОКУРАТУРЫ РОССИЙСКОЙ ФЕДЕРАЦИИ
САНКТ-ПЕТЕРБУРГСКИЙ ЮРИДИЧЕСКИЙ ИНСТИТУТ (ФИЛИАЛ)

# ИНОСТРАННЫЙ ЯЗЫК (АНГЛИЙСКИЙ)

## Сборник юридических текстов для подготовки научно-педагогических кадров

Санкт-Петербург
2016

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## ПРЕДИСЛОВИЕ

Сборник юридических текстов предназначен для аспирантов и соискателей, обучающихся по направлениям подготовки 12.00.08 — уголовное право и криминология; уголовно-исполнительное право; 12.00.09 — уголовный процесс; 12.00.11 — судебная власть, прокурорский надзор, организация правоохранительной деятельности.

Целью настоящего издания является ознакомление обучаемых с наиболее актуальными проблемами, обсуждаемыми в настоящее время в научных кругах правоведов англосаксонской системы права на образ-

цах аутентичных англоязычных текстов, взятых из основных видов научной литературы.

В первой части приводятся фрагменты монографий из англоязычной правовой литературы, во вторую часть включены отрывки научных статьей из периодических изданий по юриспруденции — *The Cambridge Law Journal, Oxford Journal of Legal Studies, Statute Law Review*.

Сборник может быть полезен аспирантам и соискателям как в качестве источника информации при написании диссертационного исследования, так и для дальнейшего развития и углубления знаний английского юридического языка с целью подготовки к сдаче кандидатского экзамена.

# PART I

## I.1. Fundamental Principles of Criminal Procedure Law and Forms of Simplified Proceedings in Criminal Matters

*by Vojislav Djurdjić*[1]

### *1. On Simplification of Procedural Forms*

Simplified forms of proceedings in criminal matters have their origin in the need for rationalisation of criminal proceedings which is more and more evident every day by making itself felt in the reforms of criminal procedure laws governments have been undertaking with increasing frequency. In which direction the said rationalisation will move depends on the causes and factors which create the need for it. If the causes of a slow criminal justice system lie in the statute itself, the way out of it should be looked for in its reform. An increase in the number of new cases referred to the courts, which has not been accompanied by a corresponding increase in the number of judges and prosecutors, as well as the existing formalism whose purpose is to provide better protection of defendants are offered as arguments in favour of simplification and acceleration of proceedings. In a joint action of its member states to speed up and simplify the working of the criminal justice system, the Council of Europe has also taken as its starting point a rise in the number of criminal cases handled by courts, in particular those which carry minor penalties, as well as the opinion that delay in resolving crimes brings the justice system into disrepute and affects the proper administration of justice. Frequently, the duration of criminal proceedings is the main criterion for evaluating how successful judicial authorities are in their work and a synonym for the premise on the “slow judiciary”, “slow justice”, too much time which passes from the moment a crime is committed until “its perpetrator has received a fitting punishment”.

How much significance is attached to justice administered without delay is expressed in all the international documents on human rights, under which the right to a trial without undue delay (within a reasonable time) is included in the fundamental human rights. Thus, the Eu-

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[1] Simplified Forms of Procedure in Criminal Matters — Regional Criminal Procedure Legislation and Experiences in Application / Ed. Jovanović I. Stanisavljević M. Belgrad, 2013. — 392 p.

ropean Convention of the Protection of Human Rights and Fundamental Freedoms also establishes in its provisions which govern the right to a fair trial (Article 6, paragraph 1) the right to a trial without undue delay.

Acceleration of proceedings is both legal and political problem, so it is understandable that the Committee of Ministers of the Council of Europe has adopted a recommendation on the simplification of criminal justice, which not only advises /the member States/ to resort to the principle of discretionary prosecution but it also sets out these guidelines on how to remedy delays in the administration of criminal justice in proceedings for minor offences which occur on a massive scale: the so-called summary proceedings should be used; out-of-court settlements should be applied as an alternative to trials; the so-called simplified proceedings should be used; ordinary judicial proceedings should be simplified — Recommendation No. (87) 18.

Pursuant to these recommendations, the acceleration of criminal procedure may move in two directions, either towards of the simplification of the ordinary form of criminal proceedings (by implementing measures for making individual stages and phases of those proceedings more simple and flexible) or towards developing special simplified forms (then, as a rule, individual phases or stages are omitted or some instruments of out-of-court resolution of criminal matters are resorted to — the diversionary method).

The lawmakers move away from the ordinary and opt for special proceedings whenever they aim to achieve expeditiousness in trials for certain criminal offences. Recently, the simplification of procedural forms has turned towards avoiding trying cases at main hearings by moving the centre of adjudication to some earlier stage in the proceedings. It was typical of older forms of simplified procedure that stages which preceded the main hearing were omitted as was the case with our summary criminal proceedings in which there was no investigation.

It has been noted that contemporary legislatures are characterised by frequent reforms based on multiplication of special, simplified forms of criminal procedure. However, the aspiration to simplify procedural forms may not cross the lower limit below which a process does not represent a stable system of guarantees for achieving a due process of law and a proper decision on the merits.

There have been more and more new models of simplified criminal proceedings in comparative law, heterogenous and distinguished from each other by the manner in which they have been structured. Their underpinning idea is that the simplification of procedural forms and adapting them to the subject matter of court proceedings will lead to

faster, more rational and efficient trials. Following the said trend and modelled on the solutions from comparative law, two completely new special criminal procedures were introduced in Serbia by the 2001 Criminal Procedure Code: a) sentencing procedure prior to the main hearing and b) procedure for imposing a sentence and suspended sentence by an investigating judge. Those were radical and bold legislative solutions, based on the idea that procedural efficiency may be achieved by preventing all the proceedings which have begun from reaching the stage of the main hearing by definitely resolving the subject matter of the proceedings at some of the earlier stategs which came before the main hearing. Thus, the Court has been released from the needless and unnecessary burden of bringing each criminal matter to the main hearing. In such a manner, the postulate of the traditional hybrid type of criminal procedure according to which there can be no adjudication without a main hearing has been brought down. Unlike summary proceedings, which are also built upon the idea of simplification of procedural forms from which the stage of investigation has been eliminated, the stage of the main hearing is avoided in these newly established special proceedings, which until recently would have been inconceivable for a trial in the civil law model of criminal procedure. Following modern ideas about possible models of rationalisation of proceedings, Serbian legislators introduced another new form of simplified procedure by the 2009 Law Amending the CPC, namely the agreement on the admission of guilt. Simultaneously, an instrument of negotiated justice was thus adopted, which until recentily would have been unimaginable in the hybrid model of criminal procedure. All those simplified forms of procedure, with the exception of the procedure for imposing a sentence and a suspended sentence by an investigating judge, are provided for in the new Code as well. Basically, previous legislative solutions have been kept, the scope of application of summary proceedings has been extended to include all the offences which carry the punishment of maximum eight years in prison, some provisions have been restructured, while some proceedings have been renamed.

### *2. Fundamental Principles of Procedure in Relation to Simplified Forms of Proceedings*

It is a feature of simplified forms of proceedings that they differ from the ordinary criminal proceedings in their structure which adapts to various reasons for simplification (nature and seriousness of an offence; complexity of the case and quality of evidence; defendant's personality; parties' attitude towards the charges, such as defendant's guilty plea or an agreement between the parties, etc.). Essentially,

structural changes come down to the omission of individual stages or even entire phases (the investigation stage is omitted or the entire preliminary proceedings or even the trial, after which the procedure on legal remedy may also be omitted). Precisely the said “defectiveness” of structure requires that procedural stages and actions be linked with each other and that primary procedural functions be structured on fundamental principles of procedure which are differently applied. Since an explanation of how the fundamental principles of procedure correlate with simplified forms of procedure is necessarily based and dependant on how procedural principles and their function are conceived of and how principles are classified as fundamental and how their essence is defined, firstly, those general notions will be briefly explained.

Considering that in the theory of criminal procedure law there is no generally accepted definition, an opinion can be deemed acceptable according to which the fundamental principles of procedure are conceived of as general legal rules which are made through the synthesis of the rules of procedure from international or national law from which they emerge and focused on certain postulated social values to whose achievement the establishment of criminal procedure should serve. The function of procedural principles is divided between jurisprudence, legal policy, and practice of law. Jurisprudence endeavours to build a system based on theory and reduce a plurality of individual legal rules to a definite number of principles, a need that arises out of the economy of scientific thinking which requires that as many objects as possible are reduced to the same explanatory notion. In respect of the lawmaker, principles are understood as his best choice of procedural institutes in the light of criminal policy, whereas in respect of the authorities in charge of criminal proceedings, they are understood as tools which help them interpret the regulations of criminal procedure law, especially when they include legal standards or legal gaps which need to be filled.

In general, legal principles are distinguished from ordinary legal rules by the normative structure which is the basis for their application — a legal rule is applied either in its entirety or it is not applied at all (it may not be applied partially), whereas principles include a requirement that a social goal is achieved either fully or as much as possible (they are “optimal commandments” — Optimierungsgebote). The said lack of definition of required conduct, due to which the principles are referred to as “optimal commandments”, may lead to a conflict of principles which results in their limited implementation. This characteristic of legal principles in general, and thus of

procedural principles as well, is revealed in particular in the realm of simplification of procedural forms.

In essence, the simplification of procedural forms includes three requirements, whose subject matter is different, but which are focused on the same goal. Namely, those requirements emerge as means of reaching one and the same goal — to establish a simplified form of procedure which corresponds to the reason for simplification. This involves: the abbreviation of proceedings which is achieved by omitting individual stages or entire phases; the acceleration of proceedings by setting or lowering time limits for taking procedural actions or on the duration of coercive measures; and making proceedings less formal (by dispensing with formalities or some guarantees). A departure from the consistent application of certain procedural principles by setting up a regime of exceptions in special criminal proceedings has emerged as a particularly suitable method for achieving the said goal.

A general conclusion could be drawn from the above, namely that the application of certain fundamental principles characteristic of the ordinary form of procedure is limited in simplified forms so that they could be released from the burden of guarantees in accordance with the grounds for simplification and its manner and so that the purpose of introducing each simplified form of procedure could be achieved. It is not possible to lay down in advance a general rule based on which principles will be limited in simplified forms of procedure, but it seems reasonable that the purview of principles which dominate a stage or a phase which is omitted from the structure of a particular simplified form should be restricted. By way of example, the scope of the inquisitorial principle is reduced in those simplified forms from which investigation is omitted, while the purview of the principle of directness and the adversary principle is limited in simplified forms in which there is no main hearing.

Limited application of the fundamental principles of criminal procedure has relativized the optional character of those simplified forms whose initiation or completion depends on the will of the parties. The sentencing procedure prior to the main hearing, now, truth be told, wrongly renamed to the sentencing hearing, commences at the motion of a public prosecutor, while a judgment of conviction is passed if a defendant agrees with the prosecutor's motion for the type and extent of a criminal sanction (Art. 512 and Art. 517, para. 2, item 1 of the 2011 CPC). Apart from this, defendants may prevent an already commenced sentencing procedure without a main hearing from being concluded and turn it into summary proceedings (in order for the main hearing to be held) by filing an objection to a judgment of conviction

which has been passed because a defendant has failed to appear at a hearing (Art. 518, para. 2 and 3 of the 2011 CPC).

Generally speaking, legal principles are not related to each other in a uniform manner and they may be either superior or subordinate to each other, they may exclude each other, they may partially overlap or there may be a lack of mutual contiguity. These correlations also exist between procedural principles, both in the ordinary form of criminal proceedings as well as in the simplified forms and they may be useful when selecting the manner in which procedural principles will be transformed, a process which needs to lead to the integration of structural elements (stages and phases) making up the abbreviated structure of a simplified form of proceedings. What this means is that restricting the application of a fundamental principle will not necessarily result in favouring a particular fundamental principle or definitely imply restrictions on some other principle. Transformation of the fundamental principles of procedure in the process of simplifying procedural forms is only subject to the legitimizing grounds based on which a particular simplified form of procedure is established in the first place, whereas the said correlation between legal principles may be a valuable method for coordinating the fundamental principles of procedure while achieving said goal. In brief, the fundamental principles of criminal procedure must be transformed in such a way as to serve the purpose of the simplification of procedural forms.

### *3. Transfer of Negative Effects of the Manner in Which Fundamental Principles are Structured From the Ordinary Form to Simplified Forms of Proceedings*

Under the influence of various factors, both legal and non-legal, principles are subject to change, their scope and subject matter changes, as well as reasons which justify them and purposes they serve, or one set of principles is exchanged for another — therefore, they are characterised as relative. At the normative level, the changes of fundamental principles are manifested in the course of legislative reforms as either widening or restricting the scope of application of a particular fundamental principle, as their new redefinition in the statute, or even the abolishment of a particular principle.

Each of the said changes in the fundamental principles has an impact, either to a lesser or greater extent, on the manner in which the ordinary form of criminal proceedings is structured, while their effect on the manner in which structural elements of the proceedings are organised and interconnected is particularly prominent when it comes to limiting and setting aside one of the fundamental principles. Abolition of a principle which is applied in the ordinary form

of proceedings and classified as a fundamental principle according to the doctrine, as was done by the 2011 Criminal Procedure Code, has repercussions on the restructuring of the entire ordinary criminal proceedings, in particular if it concerns the principle which is deemed (or used to be deemed) to dominate all the other principles, such as the principle of the establishment of truth. Numerous questions have arisen due to the abolishment of the principle of establishment of truth from criminal proceedings: If truth about a criminal incident is not established in criminal proceedings, how can the rules of substantive criminal law be correctly applied to any given case, which is a generally accepted purpose of criminal proceedings? Since in a country in which the "rule of law" is upheld, no one may be punished unless it has been proven with certainty that he is subject to the State's right to sanction, on which will the State's *ius puniendi* be based once the principle of truth is abolished and the Court is released from the duty to prove all the legally relevant facts? It is a crucial question, from the aspect of both legal theory and policy, but also an ethical and philosophical issue to which Serbian lawmakers have not provided an answer. Ultimately, should the State entrust the parties with the establishment of facts on which the public interest to punish an offender is based or is it a civilisational approach to rely on an autonomous, independent, impartial and competent authority such as the Court?

The fundamental principles of procedure also apply to simplified forms of criminal procedure, unless their application has been restricted or abolished by special statutory provisions governing the given simplified proceedings. The said equally applies to the effect which legislative changes made to the fundamental principles have on the simplified forms of procedure, even when it involves negative effects. To put it differently, negative effects which the reform of a fundamental principle has on the manner in which the ordinary criminal proceedings are structured and used are also transferred to the forms of simplified proceedings in which the given principle is neither limited nor from which it has been excluded. Therefore, we will point out the effects of some fundamental principles redefined by the 2011 procedure code. Accusatory Principle — An erroneous statutory definition of criminal proceedings had forced the lawmakers to omit from the new Code a provision governing the accusatory principle. Since the investigation is, according to the lawmakers' idea, a structural element of criminal proceedings in the narrow sense of the word and since it is initiated by the decision of a public prosecutor issued in the form of an order (Art. 7, para. 1, item 1 of the 2011 CPC), it was not possible to keep the previous statutory definition of the accusatory principle, oth-

erwise standard in codes of procedure, which read as follows, “Criminal proceedings shall be initiated upon the request of an authorised prosecutor.” Instead of looking for a way to eliminate the cause preventing the accusatory principle from being properly and consistently provided for in the law, the lawmakers had resorted to a pragmatic, not in the least inventive intervention — they excluded the definition of the accusatory principle from the code of procedure. However, this does not imply that any future criminal procedure will not be established on the accusatory principle because it follows indirectly from other provisions, for instance those governing the authorised prosecutor, the subject of a judgment, judgments dismissing the charges, substantial violations of the rules of criminal procedure as grounds for contesting judgments, etc. (Art. 5, para. 1, Art. 420, para. 1 and Art. 422, para. 1, item 1, Art. 438, para. 1, item 7 of the 2011 CPC).

The lawmakers would have had an opportunity to see that a statutory definition of the accusatory principle was possible even when the investigation was defined as prosecutorial only if they had familiarised themselves with the experiences of comparative law in which the notion of criminal proceedings was properly defined. The statutory definition of indictment/charges exists as well in the legal systems on which we have traditionally modelled our criminal procedure law, even our legal system as a whole; as well, it also exists in the criminal procedure law of the country whose solutions have frequently been adopted or paraphrased by our lawmakers. There is a statutory definition of charges in the German procedural law, which has been our traditional source of ideas for the development of our legislation, “The opening of court investigation shall be conditional upon preferment of charges” (§ 151 StPO). In the legal system of Croatia, the accusatory principle has been elevated to the level of a constitutional principle (Art. 25, para. 5 of the RC Constitution) and as such, it has been incorporated in their criminal procedure code, “Criminal proceedings shall be conducted on the request of an authorised prosecutor” (Art. 2 of the Croatian CPC). Such a solution can also be found in the Montenegrin criminal procedure law, with the exception that the very definition specifies that the accusatory principle also needs to be applied in the course of criminal proceedings, “Criminal proceedings shall be initiated and conducted pursuant to an indictment issued by an authorised prosecutor” (Art. 18, para. 1 of the Montenegrin CPC). Instead of making use of the experiences from comparative law, the lawmakers stayed consistent with and loyal to their erroneous understanding of criminal procedure even though their persistence razed many definitions of traditional concepts of criminal procedure.

Instead of establishing preliminary proceedings on the accusatory principle, whose definition has been left out from the procedure code, their structure (the stage of investigation, in the first place) involves some prominent elements of the inquisitorial principle: the investigation is initiated ex officio even against an unknown perpetrator, and this also applies to the criminal proceedings in the narrow sense of the word under the wording of the Code eo ipso; defendants are not entitled to appeal an order to conduct investigation; only prosecutors may undertake evidentiary actions in the course of an investigation whose findings may be used as evidence at a main hearing without any statutory preclusions; a public prosecutor decides on defendant's or his counsel's motions to present evidence; the defence is not entitled to question witnesses or expert witnesses during an investigation so that their testimony could be used as further evidence at the main hearing; if an investigation was conducted against an unknown perpetrator, the indictment may be confirmed only based on evidence offered by the public prosecutor, etc.

Principle of Directness — If we look at the history of amendments made to our criminal procedure law, one may get the impression that each new conceptual amendment has broadened some more the scope of departure from the principle of directness (e.g. both new codes of procedure, the one enacted in 2006 and the one enacted in 2011, included amendments which either directly or indirectly assailed the principle of directness).

The 2011 Code is specific because the application of the said principle has been called into question although provisions which depart from direct presentation of evidence at the main hearing have not been amended. The problem has arisen on account of the fact that the nature of investigation has been changed and as opposed to judicial, the investigation has become essentially prosecutorial, whereas the indirect presentation of evidence at the main hearing has not been adapted to that radical change. Provisions which governed the departure from the principle of direct presentation of evidence at the main hearing were not altered, so evidence gathered by non-judicial authorities has been put on a par with evidence whose presentation was ordered by the Court. The fact that the evidence presented by a public prosecutor, the Court or the police has the same strength as evidence whose obtaining was requested by the Court is evident from the provisions on "inspection of contents of the transcripts of testimonies" under which records of evidence presented during an investigation may be used at the main hearing and may constitute grounds for a judgment, irrespective of which authority presented each particular piece of evidence (Art. 406 of the 2011 CPC). Under the new statutory regulations, evidence pre-

sented by non-judicial authorities in the course of an investigation is not different in any respect from evidence presented by the same authorities during preliminary investigation. (From such perspective, it would be the same and even simpler if evidence gathered by non-judicial authorities in preliminary investigation were validated in the current procedure code instead of doing away with judicial investigation.) The fact that in certain cases an obligation is imposed on public prosecutors to obtain authorisation from a preliminary proceedings judge prior to questioning witnesses and expert witnesses (when they are questioned without a defendant being present there, either if he has not been summoned or it is a case of an investigation against an unknown perpetrator), does not increase the probative force of prosecutor's evidentiary actions nor a statement thus obtained may be validated by a prior judicial decision.

As opposed to the offered conception that both evidence ordered to be obtained by the Court and evidence gathered by non-judicial authorities in the course of an investigation has the same legal force, it is almost generally accepted that the presentation of evidence whose obtaining was ordered by the Court following strict formal rules may provide a factual basis for a judgment even when it is presented at pretrial stages and that its probative strength is superior to that of evidence gathered by non-judicial authorities. (Physical evidence is an exception to this rule as well as evidence obtained through the so-called special evidentiary actions taken pursuant to a judicial decision.) However, this does not imply that the prosecutorial investigation will result in evidence from the investigation being absolutely excluded at the main hearing. Such a rigid concept had been originally advocated in the radical reform of the Italian criminal procedure, when a pure version of the adversarial model was introduced, but it was later abandoned primarily due to the so-called mafia crimes. It occurs more frequently in comparative law that evidence from the prosecutorial investigation may be exceptionally used as a factual basis for rendering a judgment, but only under strict conditions, such as in German criminal procedure.

When the new conception of the probative force of evidence presented by non-judicial authorities during an investigation is linked to the main hearing established on the adversarial principle, it can be inferred that one party, namely the public prosecutor is favoured in our new criminal procedure by way of provisions governing the departure from the principle of directness, which makes such a conception dubious. Whereas a defendant must prove each fact which goes in his favour at the main hearing by way of application of the principle of directness and the adversarial principle, a public prosecutor may indi-

rectly introduce evidence he has presented himself (even evidence presented when the suspect was not present there) into the proceedings by making use of the records of presented evidence and it may constitute grounds for rendering a judgment. Proceedings in which adjudication is based on evidence gathered by non-judicial authorities are far from fair since defendants do not participate in the presentation of evidence and since the equality of arms has not been ensured.

Adversarial Principle — The adversarial principle is not defined by some express legislative norm but it follows from the very manner in which proceedings are structured. It can only exist in those models of criminal proceedings which are structured to a lesser or greater extent as a dispute between equal parties before a court of law. In legislation, adversarial proceedings are usually provided for when physical presence of the parties is guaranteed, when an obligation is imposed on the authorities in charge of the proceedings to duly notify the parties of the time at which procedural actions will be undertaken and about the subject matter of the proceedings, as well as of the rules which provide for giving statements and making motions.

Limitations of the adversarial principle are typical of preliminary proceedings, but they may occur at a main hearing as well. Some departures from the principle of directness are at the same time departures from the adversarial principle. For instance, indirect presentation of evidence at the main hearing obliterates both the directness and adversariness of proceedings to the prejudice of the quality of judicial decisions and it is also judged negatively if viewed from the aspect of the protection of human rights.

In that respect, and from the point of view of advesariness, the biggest question mark hangs over the compatibility with the Constitution and European Convention of those provisions from the latest Serbian code which stipulate equal legal strength of evidence directly presented at the main hearing and circumstantial evidence produced at one of the previous stages in the preliminary proceedings, or even in the course of preliminary investigation. In such cases which involve testimonies of witnesses and expert witnesses or the questioning of an expert advisor, defendants are not afforded an opportunity to put questions at the main hearing as in the case of adversarial hearings and they are thus denied the right to "equality of arms" and put at a disadvantage in the proceedings. Statements given during some of the earlier stages in the proceedings may be used as evidence, which is not inconsistent with Article 6, para. 1 and 3(d) of the European Convention on condition that a defendant is provided with an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness makes his state-

ment or at some later stage in the proceedings. When legal provisions governing evidentiary actions in the course of an investigation are linked to the departures from the principle of directness at the main hearing, they do not satisfy the legal standard on which the principle of fair trial is based and which is known as the concept of "equality of arms".

In this case, the principle of "equality of arms" does not exist for a number of reasons. During an investigation, evidentiary actions are exclusively undertaken by a public prosecutor, whereas a defendant and his defence attorney may only be present when they are undertaken, but neither this right is guaranteed without restrictions (Art. 300 of the 2011 CPC). Not only witnesses for the prosecution, but also witnesses for the defence (this applies to expert witnesses as well), are questioned by the public prosecutor during an investigation because the rules on direct examination, cross-examination and redirect examination which are laid down for the main hearing do not apply to investigation. It is not difficult to infer the direction in which examination will move when a witness is questioned by an opposing party! A defendant and his defence attorney are only entitled to propose to a public prosecutor to put a specific question to a prosecution witness, a defence witness or expert witness for the purpose of clarifying circumstances of the case, which the prosecutor may either reject or rephrase (exceptionally, a public prosecutor may approve that questions be put directly). Defendants are not entitled to cross examine prosecution witnesses in the course of an investigation since those rules apply only to the main hearing. How can we even mention equality of any kind when defendants are not entitled to directly question their witnesses or cross-examine prosecution witnesses during an investigation. Rather, it could be asserted that defendant's and his defence attorney's presence during evidentiary actions undertaken in the course of an investigation is a form of control of public prosecutor's work, but that it is insufficient to ensure "equality of arms". In itself, it does not run contrary to the concept of a fair trial if its purpose was to ensure the bringing of an indictment. However, since witnesses' and expert witnesses' statements given during an investigation may be used at the main hearing without any restrictions, a defendant is not afforded an opportunity to contest them and question witnesses against him under the same conditions or to directly examine his witnesses (it is sufficient that either a witness or an expert witness does not appear at the main hearing, i.e. that they "cannot be reached" or that they refuse to testify without legal grounds, for their statements to become a factual basis of a judgment on the motion of the prosecution and by decision of the Court). Equality of arms is directly defeated in cases when

a public prosecutor questions witnesses or expert witnesses in defendant's or his counsel's absence and then their statements are used at the main hearing as a factual basses for a judgment without examining them by applying the principles of orality, directness, and adversariness. In cases when summonses "are not served on" defence attorneys and defendants "in accordance with the provisions" of the code of procedure and when investigations are conducted against unknown perpetrators, a public prosecutor is authorised to question witnesses or expert witnesses in the absence of the defence attorney and the opposing party, for which he needs to obtain a prior authorisation of a preliminary proceedings judge (Art. 300, para. 6 of the 2011 CPC). Still, it is completely clear that without a special argumentation, any prior authorisation by the Court may not enhance the credibility of evidence given by a witness or an expert witness who are questioned by a public prosecutor in the absence of a defence attorney and a defendant, nor may it have any bearing on the "equality of arms". Grounds for giving judicial authorisation have not been laid down, they are left to the discretion of a judge, so a question arises as to the ratio of such a provision. Given the fact that all the power in the investigation is on the side of a public prosecutor, it cannot be expected from a preliminary proceedings judge to prevent investigation against an unknown perpetrator by not granting his authorisation and as a legislative solution, it is dubious in itself.

Departures from the principle of directness have therefore remained the same as if the judicial investigation had not been substituted by prosecutorial. What this implies is that evidence produced by other government authorities in the course of preliminary investigation or investigation has the same value as that presented by the Court in pursuance of the strict legal form and procedural principles of directness, adversariness, and publicity which dominate the main hearing. Nevertheless, it should not be allowed that evidence whose obtaining is ordered by the Court and evidence obtained by non-judicial authorities may be put on an equal footing with regard to its probative force because in that way proceedings stray from their primary task — the correct application of substantive criminal law to a specific incident, but due to an unequal standing of a defendant with regard to the presentation of evidence, such proceedings may not be called fair.

The adversary principle presupposes that proceedings are structured to a certain extent in an "adversary manner", i.e. as an adversary proceeding, which is why it is the principle which features the most at the main hearing. The lawmakers have developed the said idea exhaustively: at the main hearing, evidence is presented exclusively by the parties, while the Court's role has been rendered completely passive. Evidence

proposed by a prosecutor is presented first, then defence's evidence, and finally evidence whose presentation has been ordered by the Court acting ex officio. The law also lays down the order in which a defendant is interrogated and witnesses, expert witnesses and expert advisors are examined. Examination may be direct, when witnesses and expert witnesses are questioned by the party which proposed them, cross, when they are questioned by the opposing party, and redirect, when they are once again questioned by the party which proposed them as witnesses (Art. 396 and 402 of the 2011 CPC). Based on the above, it appears that conditions have been created for a lawyers' duel between two equal parties. Still, for criminal offences punishable by imprisonment of less than eight years, defendants do not have to have a defence attorney, which means that professional defence lawyers are optional for the majority of criminal offences according to the legal classification and committed criminal offences. In such cases, if a defendant does not hire an attorney, the manner in which evidence is presented and legal relevance of facts is assessed is left to his layman's understanding, and then the equality of parties is nonexistent. In a purely adversarial version of the main hearing, the reasons of fairness require that defendants must have professional defence lawyers in all cases irrespective of the type and seriousness of a criminal offence manifest in the punishment which it carries, but the lawmakers have overseen this requirement blinded by a new shiny model of the main hearing built on a formal equality of parties. In cases when a defendant has a defence attorney, irrespective of the fact if a defence counsel is mandatory or optional, it is also questionable in how many cases a defence will be competent and effective, on which solely depends actual and not formal equality of arms.

## *4. Concluding Remarks*

In the process of simplification of procedural forms, a transformation of fundamental principles of criminal procedure is a very suitable method for coordinating and integrating structural elements of a particular form of simplified proceedings in criminal matters, in accordance with values postulated to represent a basis for simplification and the function which the given form should serve.

The scope of application of each fundamental principle based on which ordinary criminal proceedings are established also includes simplified forms of adjudication of criminal matters if it is not restricted or even abolished during the creation of the given procedural form. For that reason, all the effects, even the negative ones, of redefining, restricting the scope of application, or eliminating a fundamental principle, are transferred to simplified forms of criminal proceedings (elimination of the principle of truth from ordinary criminal pro-

ceedings precludes ascertainment and proving of truth in all the simplified forms of procedure).

The restructuring of fundamental principles of criminal procedure and prescribing guarantees for the right to a defence which are not adapted to the prosecutorial type of investigation and adversarial version of the main hearing raise doubts about whether or not the new criminal procedure governed by the 2011 Code ensures that trials are fair. Legislative solution which question the right to a fair trial are numerous. A defendant is not afforded a possibility to seek judicial relief against a decision of the prosecuting authority to launch an investigation against him which is under an express provision contained in the new code only the first stage in criminal proceedings, understood in the narrow sense of that word, which is in direct contravention of Constitutional guarantees of the right to a fair trial, namely that only the Court may decide "whether or not there existed reasonable suspicion which provided grounds for initiating criminal proceedings". By providing for a possibility of conducting investigation against an unknown perpetrator, defendant's right to participate in criminal proceedings conducted against him has been denied, even though the said right is a constituent element of the principle of a fair trial. It has not been provided that defendants must have a professional defence attorney in cases involving criminal offences processed in summary proceedings, which account for the great majority of criminal offences, and defendants have thus been placed at a disadvantage in adversarial proceedings in relation to public prosecutors when it comes to interpreting the rules of criminal law and presentation of evidence, which is now exclusively in the hands of the parties. The ban prohibiting defendants and defence attorneys from offering and presenting evidence after a specific stage in the proceedings directly encroaches on the right to present a defence and runs contrary to the presumption of innocence because it forces the defence to offer evidence at that stage in the proceedings, instead of placing the burden of proof exclusively on the prosecutor. The prosecution is favoured and the "equality of arms" is defeated as a fundamental factor of the fair trial principle by restricting the principles of directness and adversariness in the code, which was done when the same probative force was given to the statements of witnesses and expert witnesses obtained by the prosecuting authorities in the course of an investigation as if they were obtained during cross-examination. *(pp. 60—71)*

### I.2. Reforming Juvenile Justice: European Perspectives

*by Josine Junger-Tas and Frieder Dünkel*[2]

## *1. Introduction*

Many people, and even professionals in the field, tend to forget that most children in our part of the world grow up without any real problems, in good living conditions and with capable and loving parents. However, the media present us with quite another image of youth: they claim that many young people commit delinquent acts and that juvenile delinquency is for ever rising, constituting a severe threat to ordinary norm conforming citizens.

Now it is true that between 1960 and 1980 there was a steep rise in youth crime, followed by some limited increase till about the 1990s. The increase referred mainly to property crime and to vandalism, in short to "petty" crime, which was very annoying indeed but hardly serious. Among the causes of the change in the behaviour of many youngsters were the explosive economic boom in the 1960s related to rising prosperity, the development of self-service shops, the growing employment of mothers, the increase in mobility of young people (motors and scooters) and a decline of informal social control. These profound social and economic changes gave rise to an eruption in juvenile crime in many European countries and led to a new interest in delinquent youth, which was reflected by growing interventions of the police and the juvenile justice system.

The outcome of all this was — in most western countries — a continuous increase in police-recorded figures on both juvenile delinquency and young adult crime, which is going on to this very day. However, in addition to police figures there are two other measures of crime: victimization surveys and self-report studies. For example, systematic victimization surveys are held in The Netherlands since 1980. So two Dutch criminologists were able to examine crime trends in the country from 1980 to 2004 by comparing 25 years of victimization surveys to police statistics (Wittebrood and Nieuwbeerta 2006). Victimization surveys measure the prevalence and frequency of victimizations. They inquire whether the victimizations have been reported to the police and whether, consequently, the police made the complainants sign a formal complaint form.

The outcomes are interesting because, contrary to the police-recorded rise in crime, the study showed considerable stability in crime victimizations. This was true with respect to violence, while property crime was even falling. The authors explained the discrepancy between the two data

[2] Reforming Juvenile Justice // Ed. by Junger-Tas J., Dünkel F. Springer, 2009. 260 p.

sources by pointing first to the increase of reporting violent incidents to the police from 20 to 25%. Similar increases in reporting behaviour are shown in Germany by Schwind et al. (2001, cited in Chap. 1), showing that a police-recorded increase of violent offending of 128% between 1975 and 1998 reflected a “real” rise in violence of only 24%.

The reason is that behaviour that was long considered as “a fact of life” is increasingly seen as unacceptable and tolerance for this kind of behaviour declined. The same tendency is clear with respect to juvenile delinquency where incidents such as a fight in the school playground may end in court before the juvenile judge. Second, the study showed that the police appeared increasingly prepared to make an official report of the offence: recording practice rose from 60 to 80%. The authors concluded that, although recorded police figures suggest substantial increases in crime over the 25 years, victimization trends show instead ongoing stability of crime incidents experienced by victims.

Similarly, systematic self-report surveys among youth populations also show great stability of delinquency since about the 1990s. Comparing new and old EU member states and using different data sources, Alex Stevens (Chap. 1) finds that juvenile property crime has fallen since 1990 and so has violent crime. Summarizing the different factors that explain the discrepancy between policerecorded crime, and victimization or self-reported surveys, suggests the following:

Increase of citizens reporting criminal incidents to the police

Increase of police willingness to make an official recording of citizens complaints

Increase in the probability of juveniles being caught

Policy pressures on the police to give priority to arresting juvenile offenders

Prosecution of young people for increasingly minor offences

Abolition of the discretionary police power to drop charges in the case of petty offences

The accumulation of these actions and measures means that the police are extremely focussed on young people leading to an inflation of police-recorded youth crime. In reality the level of juvenile delinquency is pretty stable.

This does not mean that young people never commit any acts that we consider as antisocial or illegal: many do but in a recent study among 12—15-year-old children only 4 of a total of 15 delinquent acts had high prevalence: vandalism, shoplifting, group fights and carrying a weapon (mostly a knife) (Junger-Tas et al. 2008). However, the majority restricted this behaviour to one or two petty delinquent acts, such as destroying some property or stealing some object out of a

shop. In fact we do not have to be overly concerned about these children: they will not develop into hardened criminals.

The children we have to worry about form only a tiny minority from the youth population: about 7—8% of the total population of delinquents (Junger-Tas et al. 2008). It is this minority which should end up in court but unfortunately many more are caught in the nets of the juvenile justice system.

This trend should also be seen in the light of the increase in (re)criminalization of petty offending and the rise of a "new punitiveness" (Goldson 2000; Pratt et al. 2005; see also Garland 2001a,b; Roberts and Hough 2002; Tonry 2004) in many European countries. Countries such as England, The Netherlands, France, Belgium, Ireland, and even Scotland have "moved away from the Welfare model of dealing with children and young people who offend to one which relies far more on punishment" (Solomon and Garside 2008). We have witnessed similar developments in several European countries that imply an intensification of juvenile justice policy and interventions through raising the maximum sentences for juvenile detention and by introducing other forms of secure accommodation. The juvenile justice reforms in the Netherlands in 1995 and in some aspects in France in 1996, 2002 and 2007 should be mentioned in this context, as should the reforms in England in 1994 and 1998 (for a summary, see Dünkel 2003a; Kilchling 2002; Cavadino and Dignan 2002, p. 284 ff.; 2006, p. 215 ff.; Junger-Tas and Decker 2006; Bailleau and Cartuyvels 2007). In other countries such as or the Scandinavian countries a juvenile crime policy oriented to welfare and a moderate justice approach is maintained (priority to diversion and "education instead of punishment", see Dünkel 2006). Many countries have implemented elements of "restorative justice" (reparation, mediation, family conferences, see e.g. Belgium and Northern Ireland, Dünkel et al. 2009 and chapter 10 in this volume).

The causes for the observed more repressive or "neo-liberal" approach in some countries are manifold. It is likely that the new "punitive" trend with penal law approaches of retribution and deterrence coming from the USA was not without considerable impact in some European countries, particularly in England and Wales. The "new punitiveness" does not stop in front of the doors of juvenile justice. However, juvenile justice is to a certain degree "immune" against neo-liberal tendencies, since the international human rights standards (see chapters 2 and 3) are preventing a total shift in juvenile justice policy. More repressive penal law orientations have gained importance in some countries that face particular problems with young migrants and/or members of ethnic minorities and problems with integrating

young persons into the labour market, particularly with the growing number of young persons living in segregated and deteriorated city areas. They often have no real perspectives to escape "underclass" life; phenomena which "undermine society's stability and social cohesion and create mechanisms of social exclusion" (see Junger-Tas 2006, p. 522 ff., 524).

One recent issue within the debate on reforming the laws on juvenile welfare and justice is the notion of making the parents of young offenders criminally responsible. In England, the so-called parenting order can be imposed on parents who supervise their children insufficiently, making them criminally responsible for their children's criminal perpetrations by means of, for instance, a fine or an obligation to participate in parenting-support-courses (see chapter 5). France witnessed an intensification of parental liability in 2002, which implies that child benefits can be slashed should their child be accommodated in a secured institution. Furthermore, they can be issued a fine should they fail to appear before the youth court despite a court summons (see Kasten 2003, p. 387).

In England, the concept of responsibilisation has become a pivotal category of juvenile justice (see Graham 1998; critically: Cavadino and Dignan 2006; 2007). What is positive in this sense is that the promotion of responsibility is connected to the expansion of victim-offender-reconciliation, mediation and reparation. It is, however, more problematic in the light of the abolition of doli incapax for 10—14-year-olds which poses a considerable reduction of the age of criminal responsibility. The tendencies in English juvenile justice can be deemed as being symptomatic for neo-liberal orientations under the key-terms "responsibility, restitution (reparation), restorative justice" as well as (occasionally openly publicised) "retribution" . The so-called "4 R's" have replaced the "4 D's" of the debates of the 1960s and 1970s (diversion, decriminalization, deinstitutionalization, due process) (see Dünkel 2003a; 2003b). The retributive character can be exemplified by the requirement for the imposition of community interventions to be "tough" and "credible". For example, "community treatment" of the 1960s was replaced by "community punishment" in the 1980s and 1990s. Cavadino and Dignan comprise these currents to the so-called "neo-correctional model" (see Cavadino and Dignan 2006, p. 210; see also Bailleau and Cartuyvels 2007). Moreover, in England and the Netherlands, for example, nuisance behaviour such as annoying or harassing passersby may eventually lead to placement in an institution. 1 Also, in most of these countries more young people are locked up for long periods in institutions that are youth prisons rather than children's homes. If interventions and treatment are admin-

istered at all they are rarely tested on their effectiveness. Recidivism and reconvictions are extremely high, which does question the usefulness of institutionalization.

In the case of the continental European countries, there is nonetheless no evidence of a regression to the classical perceptions of the eighteenth and nineteenth centuries. There is an overall adherence to the prior principle of education or special prevention, even though justice elements have also been reinforced . Therefore, the area of conflict — if not paradox — between education and punishment remains evident. The reform laws that were passed in Austria in 1988 and 2001, in Germany in 1990, in the Netherlands in 1995, in Spain in 2000 and 2006, in Portugal in 2001, in France and Northern Ireland in 2002, as well as in Lithuania in 2000 (see Dünkel and Sakalauskas 2001), the Czech Republic in 2003 (see Válková 2006) or in Serbia in 2006 (see Škulić 2009) are suitable examples (see Dünkel 2003; Dünkel et al. 2009 for a summary). The reforms in Belgium (2007) and Northern Ireland (2002) are of particular interest, since these strengthened restorative elements in juvenile justice, including so-called family conferencing (see Christiaens and Dumortier 2009; O'Mahony and Campbell and chapter 10). It is true that countries in central and Eastern Europe tend to work in the welfare tradition, thereby following the Council of Europe's Recommendations and UN Rules as well as the example of Germany, a country still rooted firmly in the welfare approach. The same case can be made for the Scandinavian countries, although in Denmark and Sweden punitive tendencies are clearly apparent.

In the light of these trends in juvenile justice the authors of this book give with their contribution indications for other ways in meeting both the needs of the individual child as well as the needs of society to solve the problem of juvenile offending. In the final chapter we try to go a little further in proposing a number of concrete changes to juvenile justice practices: these are outlined in the following sections.

### *2. Young People's Rights in Juvenile Justice*

One major weakness in the welfare approach is the position of extreme dependence of the child. On the basis of the principle of treatment, rehabilitation and protection, all "in the interest of the child" it was deemed unnecessary to give children the same procedural rights as adults. The system was very paternalistic: all actors in the system, in particular the juvenile judge, had great power in deciding the child's fate, while parents and children alike were powerless in their hands. This situation has been drastically changed with the introduction of the Justice model at the end of the 1980s. It was considered

that when imposing more accountability for their offences on juveniles, they would be entitled to similar procedural rights as adults.

This has led to a number of UN Standard minimum rules on the Administration of Juvenile justice in 1985 and on institutionalised children in 1990, while the European Prison rules — adopted by the Committee of Ministers in 2006 — are not applying to minors. Therefore in 2008 the Council of Europe adopted the European Rules for Juvenile Offenders subject to Sanctions and Measures which are the most comprehensive human rights instrument for the imposition and execution of community sanctions and all forms of deprivation of liberty in Europe (see Dünkel 2008 and chapter 4).

One of the most important UN documents is the Convention of the Rights of the Child, adopted by the UN General Assembly in 1989 (see chapter 2), which in its articles 37 and 40 specifies the legal grounds of judicial intervention, the procedural rights which have to be observed and the conditions under which a child may be detained. One hundred and ninety-three states have signed the Convention, which means it is binding law and judges have to comply with its rules. It is important to emphasize this aspect since judges may be slow to implement the CRC. For example, in the Netherlands it took quite some years before juvenile judges started to take the UN convention into account in their sentencing decisions.

In this section we wish to draw special attention to article 3 CRC, stating that "the best interest of the child" should be the primary consideration in all proceedings concerning children. This means that in dealing with offending juveniles we should substitute the emphasis on retribution and repression by rehabilitation and restorative justice. An important recommendation by a UN independent expert (cited in chapter 2) refers to the establishment of independent monitoring bodies with the power to make unannounced visits to youth institutions and to investigate complaints about violence. In addition, the CRC committee recommends States to abolish the criminalisation of so-called status offences, such as running away from home, vagrancy or truancy, all rather problem behaviour than offences.

The European Recommendation on "New Ways of Dealing with Juvenile Delinquency and the Role of Juvenile Justice" of 2003 adds special attention towards victims of crime and to prevention. It emphasizes that resources should be particularly addressed to the most serious offenders and that community sanctions should also be developed for this group.

The "European Rules for Juvenile Offenders Subject to Sanctions and Measures of 2008" are extended to include the ages 18—21, an important renovation, which is in line with the 2003 Recommendation (see

there Rule 11). It reflects the extended transition to adulthood in modern societies. The new Recommendation of 2008 (re) emphasizes that the most important objective of sanctions and measures should be education and social integration, independently of whether the child is deprived of his liberty or subject to community sanctions. Rule 4 states that the age of criminal responsibility should not be too low and in this respect is rather weak. But in the commentary it is clearly stated that the relevant age should be at least 14 or 15, which is the age limit fixed by most European countries (see Table 1 3.1) . The rules establish the principle of individualized sanctions and measures, implying some discretionary power of implementing authorities. The rules oppose some countries' practice of using pretrial detention as some form of crisis intervention or to reduce public concern and fixes a maximum term of 6 months before the beginnings of the trial (see Rec. (2003) 20, Rule 16). Rule 20 of the Rec. (2008) 11 demands — as does the CRC — an independent monitoring body, not controlled by the government, which guarantees complaint procedures and effective supervision of the juvenile justice system by regular inspections (for further details see chapter 3).

### *3. The Age of Criminal Responsibility*

It is no secret that countries differ in the age of criminal responsibility. If one considers these ages on a world scale the differences are striking, but if we look a little closer and limit ourselves to Europe the picture is somewhat less diverse: most countries have chosen for the ages 14—16, often leaving open the option of trying very serious offences at a younger age. However, there is no indication of a harmonisation of the age of criminal responsibility in Europe. The minimum age of criminal responsibility in Europe varies between 10 (England), 12 (Netherlands), 13 (France), 14 (Germany, Italy, Austria, Spain and numerous Central and Eastern European countries), 15 (the Scandinavian countries) and even 16 (for specific offences in Russia and other Eastern European countries). After the contemporary reforms in Central and Eastern Europe, the most common age of criminal responsibility is 14 (see Table 1 3.1).

In part, purely educational sanctions of the family and youth courts are applicable at an earlier age, as has most recently and explicitly been the case in France (from the age of 10 upwards) and Greece (from the age of 8). In Switzerland, the law only provides educational measures for 10— to 14-year-olds, whereas youth imprisonment is restricted to juveniles at the age of at least 15.

Further still, some countries employ a graduated scale of criminal responsibility, according to which only more serious and grave offences can be prosecuted from the age of 14, while the general mini-

mum age of criminal responsibility lies at 16 (see Lithuania, Russia, Slovenia).

Whether these notable differences can in fact be correlated to variations in sentencing is not entirely clear. For within a system based exclusively on education, under certain circumstances the possibility of being accommodated in a home or in residential care (particularly in the form of closed or secure centres such as in England or France) as a "last-resort" can be just as intensive and of an equal (or even longer) duration as a sentence to juvenile imprisonment. Furthermore, the legal levels of criminal responsibility do not necessarily give any indication of whether the practice under juvenile justice or welfare is more or less punitive. Practice often differs considerably from the language used in the reform debates (see Doob and Tonry 2004, p. 16 ff.). Accordingly, legal intensifications are sometimes the result of changes in practice, and sometimes they contribute to changes in practice. Despite the dramatization of certain events by the mass media in some countries, there is for instance in Germany a remarkable degree of stability in juvenile justice practice (see Dünkel 2002; 2003b; 2006).

Chapter 4 draws attention to the fact that most countries have several age limits in juvenile justice, which are related to the age of prosecution. For example in countries which maintain some form of the doli incapax presumption, children are prosecuted some years later than the lower age of criminal responsibility, while in others prosecution will effectively take place at that specific age. In some jurisdictions there is a different age limit for status offences, while the Scandinavian countries — which have no juvenile justice system — have a special "intermediate" legislation for those aged 15—21, so as to avoid prosecution of this age group in the criminal court.

In view of the many variations in age limits of criminal responsibility, one wonders whether it would be possible to arrive at a satisfactory age limit which has reasonable validity on the basis of the present level of scientific knowledge and which would be acceptable to many states. In this respect we feel that chapter 3 gives us a number of valid arguments to try to propose such a general lower age limit of at least 14 years of age (see below).

The point of departure is the lack of maturity in decision-making capacities of adolescents — where adolescence is defined as the period between age 11/12—17/18 — compared with that of adults. Decision-making requires effective cognitive abilities, but these may be influenced by psychosocial factors such as susceptibility to peer influence, willingness to take risks, the lack of orientation to the future and impulsive reactions to emotional arousal (see chapter 3).

There now is neuroscientific evidence for continued maturation of the brain during, and even after adolescence. At the same time specific brain functions go together with behavioural and psychosocial shortcomings in adolescent's decision-making, suggesting a clear link. Moreover, these factors are developing and maturing during adolescence until about age 15—17. An empirical fact is that most young people aged 18—20 abandon delinquent behaviour when accepting adult responsibilities.

On the basis of the present scientific evidence a reasonable recommendation would be to determine the age of criminal responsibility at age 14 and the age of criminal majority at age 18—21.

Since the lower age is based on what we now know about the objective lack of capacities in decision-making under the age of 14, the age limit of criminal responsibility should be absolute and independent of the seriousness of the committed offence. For the upper age of 18—21 pleads the fact that it is in accordance with other civil age limits such as the right to vote, to get married, to drive a car or to join the army.

This is in agreement with the European Rules for Juvenile Offenders Subject to Sanctions or Measures (see chapter 3). According to the commentary on Rule 4 "… The majority of countries have fixed the minimum age between 14 and 15 years and this standard should be followed in Europe".

Rule 17 of the European rules is addressing the position of young adults aged 18—21, stating that "….in general they are in a transitional stage of life, which can justify their being dealt with by the juvenile justice agencies and juvenile courts" and pleads for mitigation of sentences and the application of educational sanctions and measures available for juveniles. The application of sanctions and measures of the juvenile laws to young adults reflects the extended transition to adulthood in modern societies and the fact that young adults can be better dealt with by the more constructive and educational sanctions of juvenile justice and welfare.

We fully endorse these rules and we hope that they will be adopted in all European states.

### *4. The Transfer of Minors to the Criminal Court*

Most of us are familiar with the practice of transferring minors to the adult court of criminal justice in the United States. There has been an extreme increase in this practice since the 1980s, reflected in the gradual lowering of the juveniles' ages required to allow transfer as well as in the harshness and length of prison terms imposed on them (see chapter 4). However, since about 2000 there are signs of change. These are expressed

in a decision of the Supreme Court that abolished capital punishment for minors under age 18 at the time of the offence. It is interesting to note that the decision was based on neuroscientific evidence that one cannot hold adolescents to adult standards of criminal responsibility (see chapter 3). Change is also occurring in individual US states: two states rose the age of criminal responsibility from 16 to 18, Florida reduced the number of transfers by two thirds and several states abolished life sentences for juveniles and barred drug offences from transfer. These are hopeful signs and may signal a coming halt to equating juvenile justice with adult criminal justice.

However, there are also European systems which allow such transfers, often in the age group 16—18. Research on this problem between 1998 and 2004 done in two of them — the Netherlands and Belgium — is reported in chapter 5. Two outcomes deserve to be repeated here. The first is that transfer in both countries is very limited, referring to a small group of offenders and showing great stability over the years. The second is that transfer is not limited to serious violent offenders: the majority of committed offences in The Netherlands were property offences — thefts, followed by robberies, and in Belgium thefts, in some exceptional cases with aggravated circumstances. This is all the more serious in the light of the American follow-up studies on reconvictions of transferred juveniles as compared with similar offenders who remained in juvenile institutions (see Chapter 4). Transferred juveniles re-offended more quickly, more frequently and committed more serious and violent offences. Pinning down the differences between proceedings in the juvenile court and in adult court, research showed more opportunities for therapy, education and training in juvenile institutions, more sympathetic and better trained staff, and — last but not least — better perspectives of reintegration into society. Moreover, the long time company of older, serious offenders has a pernicious influence on developing adolescents. B oth what actual scientific knowledge has taught us about adolescent development and what we know about transfer proceedings lead us to one inescapable conclusion: the transfer of juveniles to adult criminal court should be abolished and all youth under the age of legal criminal majority should be judged in the juvenile justice system.

### *5. Parental Responsibility*

Parents have always had some responsibility for their children's behaviour regulated by civil law. But this responsibility was in most cases limited to paying compensation in cases of damages caused by the child.

However, a number of countries want to do more and have taken legislative steps to punish parents according to penal law in cases where their children have committed offences or shown antisocial be-

haviour, such as throwing stones, harassing their neighbours, spraying graffiti or playing truant. Punishing parents have been introduced in England and Wales, Ireland, Scotland, Australia and the USA.

The simplistic idea of punishing parents is based on the premise that juveniles offend because their parents fail to control them and that if you punish parents they will understand that they have to change their behaviour and must better supervise their children.

In chapter 6, the author examines the relationship between parenting and youth offending and places question marks regarding the effectiveness of punishing parents to curb delinquency. It is true that parent malfunctioning has a great influence on the child's behaviour. However, parents do not operate in a vacuum and are themselves subject to the social and economic conditions in which they live. Unemployment, poverty, family conflict, family break-up, teen age parenthood, debts, alcohol- and drug abuse, psychosocial problems and psychiatric disorders are all implied in parent's failings to raise their children properly. In addition, most of these children live in deprived neighbourhoods where there is ample opportunity to offend. In a recent Dutch study we found that having unemployed parents was related to poor school achievement and to truancy, two variables predicting delinquency. Moreover, living in a deprived neighbourhood was directly related to offending (Junger-Tas et al. 2008).

If the state wants to punish such parents a prerequisite would be that the state had taken its duty towards its citizens and had provided all possible support and assistance to overcome the many problems parents are wrestling with. The argument can be made that in many cases the state fails in providing for adequate, prompt and sufficient assistance to problem families. Because of waiting lists, budget cuts, lack of collaboration between social agencies, lack of skilled staff, and insufficient mental health care, much support comes too late, is insufficient and ineffective.

We may conclude that punishing parents does not solve the many problems families of offending children suffer, and may even make things worse. If parents do not exercise more control on their children it is often by feelings of powerlessness rather than by indifference or ill will. Punishing parents for the behaviour of their children is a bad idea: it is counterproductive and should not be adopted in Juvenile justice legislation.

### *6. The Prevention of Juvenile Delinquency*

Preventative measures instead of punishment should be addressed to parents and children. There is a broad consensus among criminologists, sociologists and developmental psychologists about the underlying risk factors of delinquency. These are found in the child, in the family and in the environment where the child is living. Important

factors are, for example, an aggressive temperament, hyperactivity, family conflict, lack of parents' supervision, harsh and inconsistent discipline, poverty, deprived neighbourhood and a deviant peer group. Little attention has been given to the fact that crime is not the only outcome of such risk factors. Other adverse outcomes are poor health, frequent hospital admissions for illness, injuries and accidents, psychosocial and psychiatric problems, and unstable marriages. It should be kept in mind that none of these factors suffices to predict criminality. This illustrates the difficulty of predicting adequately later criminal behaviour, in particular if one defines criminality by criminal convictions for serious and chronic delinquency. An illustration is given in chapter 8, referring to Farrington and West's longitudinal study of 411 lower class London boys (Farrington and West 1990). Of all boys subject to poor parenting, having a criminal parent, coming from a large family, having a low IQ or living in a low-income family, only about one third became juvenile offenders. Moreover, although 70% of this group were defined as "very troublesome" at age 8—10, only 19% turned into repeated offenders and only 6% became so-called persistent offenders (Farrington 1987). The main problem being one of huge over-prediction, one should keep in mind that only a combination of multiple risk factors may lead to criminal behaviour. Moreover, we should not expect too much from prediction: children are malleable, "maturation" will occur, living circumstances may change; all these may result in behaviour change.

This does not mean that prevention of delinquency as well as of other adverse outcomes is not a worthwhile goal. The question is what should be the primary target of our efforts. Most of the prevention programs have been developed in the United States and are addressed to young children and/or their parents. Many of these have been conducted over a long period and were tested on their effectiveness. Unfortunately this is rare in Europe and it is one of the reasons we adopt so many American programmes. A disadvantage is that in most of these programmes the direct environment — the neighbourhood — where the child is living, plays no role. This might have to do with the fact that social support for poor families is less prominent in the USA than it is in Europe.

All the same, similar to prevailing trends in health policies, where prevention is since long a normal course of action, it is important to reflect on how to prevent delinquency rather than react after the fact. In this respect prevention programmes need to be addressed to parents, to their children and to the communities where they live.

First of all, local communities as well as the state have a special responsibility in preventing youth crime by developing policies to im-

prove social housing, provide for sufficient social support services to assist multiple problem families, to guarantee quality schools, adequate vocational training options, and create employment possibilities for young people. In addition, local youth policies should include specialized health services for young people, create sports- and recreation opportunities, and deliver special assistance to young people in trouble.

Second, prevention programmes that target children should particularly be addressed to young children. Research has found that early interventions with young children have considerably more effects than later treatment of young delinquents (Tremblay and Craig 1995; Lösel and Beelmann 2005; 2006; Welsh and Farrington 2006; Beelmann and Raabe 2007; Krüger 2009).

In this respect great investments should be made in the education system by introducing early cognitive stimulation programmes to children aged 3—8 and by reducing learning disabilities. Moreover, social competence programmes in the school diminish aggression and behavioural problems in the classroom and improve learning. If young people have a successful school career, they will not develop a criminal career. In addition, they will have better jobs, higher incomes, will less rely on state benefits, have more stable marriages and better (mental) health.

Third, we propose a combined approach, adding prevention policies targeting families who present many risk factors. The justification for intervention may be found in the multitude of risk factors, which, if we do not do anything, will lead to marginalised and unhappy lives of their children at high costs to society. Thus at the same time prevention programmes are administered to young children, their parents should be approached with programmes that promote their caretaking skills and teach them what the community expects of them in terms of preparing their children to fulfill a useful role in society. Parents should be recruited as a matter of course and if there is no reaction, home visits should be made. In addition, the emphasis of parent training should not be placed on what they may have done wrong, but instead on information about how society is organised, how the school system is operating, what qualities children have to possess to be prepared for the labour market, and what parents may and should do to help them. Such parent training programmes should be repeated at the moment their children enter secondary education, preventing truancy and school drop-out. Since it is of great importance that parents attend these programmes, some modest financial incentive may be considered, for example, justified on the basis of parental investment in time and effort.

Should we exclude all compulsory programmes? We would not go as far as that. For example, in cases of child abuse and substance

abuse or serious antisocial behaviour of the child, the court could exercise some pressure on parents to follow a programme such as Triple P, Functional Family Therapy, Child-Parent Interaction Programme, alongside other measures (see in detail Welsh and Farrington 2006; Beelmann and Raabe 2007). The Court could sentence the child to a (conditional) supervision order and propose Parent Training as an alternative to residential care, while following and supporting parents for some extended time.

### *7. Detention of Juvenile Offenders*

In some European countries, juveniles are still locked up in adult prisons. Fortunately most countries have special institutions for juveniles, because young people held in prison have more discipline problems, are more often victim of violence and get less education or treatment because of staff shortage. Although youth institutions vary greatly in size and in form (closed, semiopen and open), they are always superior to prisons for a number of reasons. They are usually smaller in size, they have more staff and they are more oriented to education, treatment and care (see also chapter 6). This being said conditions in youth establishments are not always good. Many of them, particularly in Central and Eastern European countries, still have dormitories or cell sharing which may lead to all forms of violence. Some institutions employ solitary confinement, physical punishment or collective punishment, handcuffing, and restraint by force as measures of discipline. These measures are used in particular where there is not enough well-trained staff. Many mix juveniles on remand with sentenced juveniles as well as with juveniles who are there for their own protection. This is all the more damaging in the light of empirical findings that a (long) stay in an institution together with other delinquent or problematic juveniles is harmful for the development of adolescents (Dishion et al. 1999; Warr 2002; Gifford-Smith et al. 2005; Cho et al. 2005). Informal subcultures are formed and are controlled by the toughest delinquents, causing what is called “deviancy training”. For example, Dutch research (Wartna et al. 2005) showed that 41% of juveniles, who had not had previous contacts with the juvenile justice system before being detained in a youth institution, were reconvicted after being released.

Parents are rarely involved in educative or treatment measures, which is absurd since most youth will return home after their stay in the institution. Finally, hardly anything is done to prepare the young people for their return to the community, nor is there any provision for sufficient aftercare, in order to bridge the difficult re-adaptation to ordinary life.

In addition, in many countries in Europe there is an increase of juveniles who are processed by the juvenile justice system and end up in detention either in pretrial detention or sentenced to custody. For example, in The Netherlands the number of places has increased fourfold between 1995 and 2006, while the number of sentences to custody increased by 82% (van der Heide and Eggen 2007). However, most juveniles are detained in pretrial detention, either as a form of punishment, to alleviate public unrest, or as a crisis intervention. A Dutch study in 2005 showed that 27% of detained juveniles had committed a property offence without violence and that 46% had only committed 1—2 offences before being sent to custody (Wartna et al. 2005). Moreover, recidivism after detention was sky-rocketing (Van der Heiden-Attema and Wartna 2000). Recidivism is highest after unconditional custody or internment: 84% of these juveniles are reconvicted in a period of 7 years with an average of six new contacts with the justice system. Similar results have been obtained in Germany (see Dünkel in Dünkel et al. 2009).

We can only conclude that locking up children to punish and discipline them and prevent them to offend again is vastly overrated. We are expecting too much of custody both in terms of general and special prevention and of rehabilitation. Indeed we have to reconsider seriously the function of detention in preventing crime. It is clear that detention has a punishment function, but it seems to us that this function can also be fulfilled in other ways. In this respect we do propose the following measures to be taken.

In addition to a specific youth psychiatric institution for mentally disturbed young offenders, we would need only a few small secure units for serious violent or persistent offenders. These should receive education, training and treatment either individually or in small groups. There is much to say for using a risk taxation instrument at intake, on the condition that its validity is empirically tested and that it is also measuring the problems and needs of the young person for care and treatment interventions.

The intramural period should be followed as soon as possible by extramural execution of the sanction. A good example of such execution is a European-funded programme called "Work wise". From the start of custody the juvenile is trained in a job according to market requirements, he is then placed outside the establishment for further training, and when released led to employment. Moreover, 6 months aftercare, housing and a social network are provided for by the institution.

Furthermore, parents should be allowed to visit regularly their child and should be involved as much as possible in all treatment measures taken, thus maximizing the home situation when the juvenile is released. In this respect it should be recalled that family bonds remain in tact throughout life and are rarely (completely) broken. Finally, knowing the risks of re-offending when the youth is returning to the community, a period of at least 6 months of aftercare is required, making sure the juvenile is adequately housed, is following training or is employed, and has a regular social network supporting him. These proposals are very much in line with the European Rules for Juveniles Subject to Sanctions or Measures of 2008, which should be used as guidelines for reforming institutions for the rehabilitation of young offenders deprived of their liberty (see also Dünkel 2008a; 2008b and chapter 3).

If some measure is required between custody and ambulatory alternatives one might impose electronic monitoring as long as this is accompanied by a clear rehabilitation trajectory implying training, employment or therapy, under strict supervision by a social worker.

However, in most cases community sanctions are possible and are to be preferred. These include fines, paying damages, all forms of reparation to the victim, diversion, restorative justice, community service; training programmes, such as social skills training, special vocational training, aggression reduction; programmes such as multi-systemic therapy, drugs- or alcohol therapy, psychosocial day treatment. These subjects are dealt with in the following sections.

### *8. Diversion*

Diversion may be defined as an informal measure to avoid prosecution of the juvenile by the juvenile justice system. Diversion can be applied on the level of the police (Netherlands) or on the level of the prosecutor (Germany) in cases of petty crimes. There are two principal reasons for the application of diversion. The first is that the procedure relieves judicial authorities of the burden to have to formally process petty delinquency cases. The second reason is that formal juvenile justice intervention — with the possibility of a criminal record — may be more harmful to the young person than some unofficial measure. This is all the more so since these measures are addressed preferably to the victims of the offense and should have an educational character. Diversionary measures include fines, reparation to the victim by voluntary work or restitution, paying damages, offering apologies, or performing a limited number of hours of community service. Is diversion effective in terms of reducing recidivism? The evidence is mixed but tends to show that in the case of

police diversion most young people do not come again in contact with the police after being diverted. However, on the basis of what we know about juvenile offending, they would probably not have come back even when nothing was done. Moreover, police diversion has had massive net-widening effects, drawing petty antisocial acts into police nets, followed by police intervention and registration. That is why we would plead for abolishing police diversion, (re)establishing a special juvenile police service and giving (back) to the police some degree of discretionary power to decide whether a case should be prosecuted or dismissed, eventually after some reprimand in presence of the parents. Diversion by the prosecutor is different though, since the latter deals with cases submitted to him by the police. The prosecutor has the competence to dismiss cases after consideration of their seriousness. In this situation imposing some diversionary measures instead of referring the case to the juvenile judge is to be encouraged because it will save the young person a stigmatizing criminal record. There are indications that these measures are more effective in reducing recidivism than official prosecution in court (and eventual detention). However, more evaluation research is needed. From German and English research one can at least conclude that young offenders, diverted from formal court proceedings, do not re-offend more frequently than those formally sanctioned. Diversion has a warning function and impresses most juveniles sufficiently. And importantly, it is a cost-saving strategy of the juvenile justice system. Therefore there are good reasons for preferring prosecutorial diversion: given the temporary character of most juvenile delinquency, diversion is less stigmatizing and less harmful to young people and does not place as heavy a burden on their future as does a conviction or — worse — custody.

### *9. Restorative Justice*

This is a quite different concept of justice than the traditional one of the system representing the state in recreating order by punishing the offender. Based on the notion that crime is in most cases a violation of people and relationships restorative justice reduces the role of the state and places the offender, victim — and eventually other interested family or friends — together, in order to set right the wrongs caused by the offender to the victim (see chapter 10), a process that should lead to forgiveness and reconciliation.

The idea of restorative justice is appealing to many and is endorsed by the European Union, the Council of Europe and the UN. But since its definition is rather vague, the practice shows great variation: in the extent to which it is integrated in existing juvenile justice structures; in its degree of legality or formality; in the agencies applying the pro-

gramme (police or local organisations); and in the involvement of victims in the process.

Victim—offender mediation programmes are among the most popular and are adopted in the USA and Canada as well as in Europe. Usually victim and offender meet with a mediator facilitating the process to put right the harm caused.

A less attractive form — at least to these authors — are the Community Reparation Boards, used in the USA and in England and Wales as well as the English Youth Offender Panels, to which non-violent or first time offenders are referred by the court. These bodies then decide what is going to happen to the offender and which action should be taken. In the United Kingdom and in Northern Ireland police-led restorative cautioning programmes are rather similar to the Dutch police diversion, but all these schemes are characterized by low victim involvement, no evidence of the process being an alternative to prosecution, and by considerable net-widening. Moreover, in this model young people cannot have legal representation and the process may in some cases be too coercive.

The best known restorative model is family group conferencing, which Northern Ireland has integrated in its juvenile justice system. For reasons of "accountability, certainty and legitimacy" the model is based in statute. By doing that, the country has solved several problems related to the original model characterized by informality, variable approaches of a more or less coercive character, differential victim involvement and a weak legal position of the offender caused by the lack of legal representation.

Diversionary conferences are ordered by the prosecutor in cases where offenders should normally be referred to the juvenile judge but where the offender had admitted guilt and has consented to the process. The conference coordinator must provide a plan on how to deal with the offender. If the plan is successfully completed the case is dismissed and the juvenile will have no criminal conviction. Conferences can also be ordered by the court. In fact all court cases must be referred to a conference, except a small group of very serious cases. The conference designs an action plan taking into account the offense, the needs of the victim and the needs of the young person, which must be completed in 1 year. According to one study in 2007, victims were involved in 69% of conferences: 40% were personal victims (most of violence), 60% were victim representatives (mainly of theft). Importantly, victims were not motivated by a desire to seek vengeance and showed no signs of hostility towards the offender. Most cases ended with an apology and some form of reparation or work done for the victim. Although offenders were motivated by their desire to

avoid court appearance and felt nervous at the prospect of meeting their victim, they accepted their responsibility, sought forgiveness and were able to put the offense behind them. Most of the action plans contained elements to help offender and victim and 73% had no specific punishment element. In fact victims preferred the conference process instead of going to court: the conference provided for both parties a meaningful event and appeared to be a way of moving forward.

The authors conclude by stating that conferencing in Northern Ireland has been shown to be a successful way to deliver justice that holds the offender accountable for his acts while giving victims a voice in the process, producing high levels of satisfaction for participants.

## *10. Conclusions*

In this chapter we have taken clear positions with respect to juvenile justice reform, based on the present level of research evidence. Summarizing the outcomes presents the following picture. F ull respect of young people's rights in juvenile justice according to the UN Convention of the Rights of the Child and the various Recommendations of the Council of Europe.

Fixing the age of criminal responsibility at 14—15 and the age of criminal majority at 18—21 — in view of present knowledge on brain development, including the option for young adults to be judged according to juvenile justice legislation.

Abolition of the transfer of juveniles under age 18 to adult courts, in view of the harmful effects of harsher sentences and particularly of prison.

No punishment for parents for delinquent acts of their children. Instead, parent collaboration should be sought with all measures addressed to their children.

Considerable investments should be made by authorities in prevention: evidencebased programmes should be addressed to young children, schools, parents and communities.

Custody should be restricted to violent offenders, who should be detained in a few small secure (psychiatric or social therapeutic) units. Parents should be involved in evidence-based treatment, and a period of aftercare (6—12 months) should be compulsory.

Extra-mural execution should be imposed as a matter of course in the form of community sanctions, training and employment.

Diversion at the level of the prosecutor should be encouraged, while police diversion should be abolished.

Restorative justice in statute and integrated in the juvenile justice system offers an interesting perspective, on the condition that the victim is involved and the rights of the offender safeguarded.

However, there are a number of conditions that have to be fulfilled if reform is to be realized.

First, investments are necessary in juvenile justice establishments: more personnel, better working conditions, more higher trained collaborators. This should reflect growing appreciation for those who work with difficult children.

Second, the system would need extra resources in training adequate staff for the many different functions: for applying evidence-based programmes in prevention, within establishments, and in community programmes, for managing and implementing reform, such as the restorative justice model. Moreover, training facilities should have a permanent character in view of personnel mutations.

Third, special training should be given to probation workers, who have to administer programmes, control and guide young people in the community, and a role of great responsibility. This is all the more important since popular support and public opinion depends on the success of these interventions.

Fourth, juvenile justice research in the workings of the system, as well as in evaluation research of innovative programmes, remains all important in order to go on improving the system.

# PART II

## II.1. CODIFYING THE LAW OF CRIMINAL EVIDENCE

*by Ian Dennis*[3]

### *Introduction*

Codification of the criminal law is a subject that has been on the agenda of law reformers for decades. It was a flagship project for the Law Commission for forty years, until the Commission regrettably abandoned it in 2008. There is distinguished judicial support for the enactment of a criminal code for England and Wales, and powerful academic literature elaborating the case for codification.

Nearly all the scholarly and professional attention has been devoted to codification of the substantive criminal law. By this I mean the

[3] Ian D. Codifying the Law of Criminal Evidence / D. Ian // Statute Law Review. 2014. Vol. 35. No. 2. P. 107—119.

general principles of criminal liability and the main criminal offences for which a person can be prosecuted, convicted and punished. But the codification enterprise is potentially much wider than this. When the Law Commission reported on its project in 1989 it envisaged a code in four parts: Part I would contain general principles of liability, Part II specific offences, Part III would deal with evidence and procedure, and Part IV with the disposal of offenders. Similarly,the Government's 2001 White Paper, *Criminal Justice: The Way Ahead,* also envisaged a code with the same four Parts. However, it is Parts I and II that take up the great bulk of the discourse on codification. Part IV has attracted virtually no attention. The reason may well be that for many law reformers the experience of sentencing legislation suggests that codification is a hopeless cause. Sentencing is a highly politicized subject. The legislation is constantly changing in response to sudden shifts in penal policy, and not infrequently the provisions are unclear or incoherent. The legislation is also notoriously complex, with numerous traps for unwary judges and counsel. Many criminal lawyers will remember the praiseworthy attempt in 2000 to consolidate sentencing law. That consolidation lasted a matter of months before it was substantially amended, and the legislative 'minefield' has been growing ever since.

It is now ten years since the passing of this Act. This anniversary offers an appropriate opportunity to revisit the question of codification, in particular codification of the law of criminal evidence. The focus is on criminal evidence partly because it has been somewhat neglected in the debates on codifying the criminal law, and partly because there is a good case for saying that codification of criminal evidence would now be the easiest part of a comprehensive code to achieve. If it could be achieved, it could pave the way for codification of the other parts.

### *The Arguments in Favour of Codification*

It is necessary to begin with a word about definitions. What do we mean by 'codification'? I was a member of the team of academic lawyers, which assisted the Law Commission on their codification project in the 1980s. Our conception of codification, which the Law Commission accepted, was the task of setting out the criminal law in a 'single, coherent, consistent, unified and comprehensive piece of legislation'. We took the view that this was a different exercise from consolidation. Consolidation, broadly speaking, involves bringing together in one statute provisions relating to the same subject matter that are to be found in a variety of other statutes. The provisions will be restated

rather than reformed. Codification may adopt a guiding principle of restatement of existing law, as the draft criminal code did, but the task of making the law coherent and consistent may necessitate a certain amount of reform. Now of course, more could be said about this distinction between codification and consolidation, but that is not necessary for the purpose of this paper. It seems appropriate to proceed on the basis that a code of criminal law should in principle aspire to the qualities I have outlined. We will return later in the paper to consider how far they can be realized in a code of criminal evidence.

Looking back at the codification project, one can see three kinds of arguments used in support of a criminal code. It is not necessary to elaborate these in detail; it is enough for present purposes to set out a fairly brief summary. First, there are the constitutional arguments. These are partly focused on the legality of the criminal law. They claim that the law should be reasonably clear, accessible and known in advance, so that citizens may regulate their conduct accordingly. This claim is founded on the values attached to the liberty and autonomy of citizens in a democratic society, which require fair warning to be given of prohibited conduct. The argument goes accordingly that a code would enable citizens to find the law more easily and to understand it better than if they had to search through the mass of statutory and common law sources that we presently have. A related claim concerns the legitimacy of the criminal law. A code advances legitimacy by ensuring that the criminal law's various and competing aims of social defence, promotion of individual liberty and autonomy, and due process of law, are debated and resolved through the democratic process. Contemporary Parliamentary approval, in other words, enhances the legitimacy of the criminal law. This argument is particularly apposite to common law rules, but can apply also where criminal law is contained in old statutes that have not received Parliamentary consideration for many years.

Secondly, there are arguments of principle for a code. These relate to the moral quality of the law. They claim that the process of codification enables us to maximize the fairness of the criminal law and to ensure that it adheres to the ethical standards that we wish to respect. As Professor Wechsler, the principal draftsman of the American Law Institute's Model Penal Code, put it, a code demonstrates that '…when so much is at stake for the community and the individual, care has been taken to make law as rational and just as law can be'. These claims are now reinforced by the incorporation of the European Convention on Human Rights into English law. A new draft criminal code could and should take account of relevant human rights jurispru-

dence. It would inform the ethical standards which the code should respect, and we would expect it to form part of the law to be restated in the code.

Third, there are arguments relating to efficiency in the administration of criminal justice. These emphasize the need for the criminal law to be accessible, clear, and reasonably certain. Such claims are the same as some of the constitutional arguments, but the rationale is different. We are concerned here with the instrumental benefits of codification for decision making in criminal justice. The argument is in essence that a code will make the jobs of those working in criminal justice easier. Judges, lawyers, magistrates, police officers, and other criminal justice players will all be able to find and use the criminal law more quickly and efficiently. Since many of these people will not be trained lawyers, or may not have much experience of administering and enforcing the criminal law (for example, part-time judges), a code offers the great advantage of a common authoritative starting point, drafted in a clear and consistent style.

Taken together, these arguments continue to present a compelling case for a criminal code. However, it is the case that the arguments were largely directed, as noted above, to a code setting out the substantive criminal law of liability. Now it may be, as the Law Commission commented when it abandoned the project in 2008, that for various reasons, it would be more difficult to achieve codification of the substantive law now than in 1989. One can concede this point without weakening the force of the case in principle for codification. We turn, therefore, to consider how far the arguments in favour of a code apply to a code dealing with the law of criminal evidence. In answering this question, it is helpful to begin by thinking about the audience for such a code, and the function of the code. We need to ask who the code is for, and what is it for?

The answers to these questions begin with the proposition that a code of criminal evidence, like a code of criminal procedure, will be concerned with the process of enforcing the criminal law. Most of it is likely to be dealing with the law that governs the process of adducing and using evidence at contested trials. In other words, it will be setting out rules dealing with the adjudication of criminal liability. Fairly obviously, the main users of rules of adjudication will be the courts and the lawyers for the prosecution and the defence. If that is right, the main arguments in play will be concerned with matters of principle and efficiency. Given that the first element of the overriding objective of dealing with cases justly is delivering accurate outcomes (convicting the guilty and acquitting the innocent),

we would be asking whether a code of criminal evidence would enable the process of adjudication to proceed more fairly and efficiently in this function. From this perspective, the strength of the arguments in favour of codification will depend on the comparison we make with the current state of the law of criminal evidence, and I will return to this shortly.

It should be said though that a focus on arguments of principle and efficiency does not mean that constitutional arguments have no purchase in this context. If citizens have a right to due notice of prohibited conduct, it ought to follow that they should also have due notice of their rights if they are caught up in the criminal process. The point of due notice is to enable citizens to regulate their conduct and plan their lives; this seems equally applicable whether we are talking about a citizen in their home or on the street, or in a police station or in a criminal court. Accordingly, we might reasonably expect a code of criminal evidence to set out clearly a person's rights in the criminal process. Let us take as examples the presumption of innocence and the privilege against selfincrimination; these are matters that concern not only police, lawyers and courts in the enforcement of the criminal law, but also express fundamental rights of all citizens. Indeed, in many countries, these rights have constitutional status.

In summary, we can conclude that all three kinds of argument are applicable to the case for codifying the law of criminal evidence. The strength of the arguments depends, as just stated, on a comparison between the current state of the law and what we could expect a code to offer. The current law of criminal evidence is contained in a mixed mass of sources: common law, statutes, rules of court, Codes of Practice and Guidelines issued by the Attorney General and the Director of Public Prosecutions. It is not suggested that all of these are candidates for inclusion in primary legislation. To that extent, the idea of codification as aspiring to a single comprehensive statute will require some modification. We will come back later to the relationship between primary legislation and what we might call 'soft law'; for the moment the focus is on the existing statutes and the common law.

For many years, the law of criminal evidence was very largely common law. It was founded principally on the rulings of trial judges from the 17th century onwards; consistent judicial practice resulted in those rulings hardening into rules of law. Parliament began to intervene in the 19th century on a piecemeal basis, its main concern being the old common law rules of competency of witnesses. Even with these occasional statutory interventions, it was still possible to say as recently as 30 years ago that codifying the law of evidence would be mainly a task of trying to turn a mass of common law into statutory form. However, the law of

criminal evidence has been transformed in the last 30 years. The process began with the reforms made by the Police and Criminal Evidence Act 1984 (PACE), and continued with the Criminal Justice Act 1988, the Criminal Justice and Public Order Act 1994, the Youth Justice and Criminal Evidence Act 1999, the Criminal Justice Act 2003, and the Coroners and Justice Act 2009. Collectively, these Acts have turned a subject that was largely common law into one that is primarily statute-based.

Would it be unduly difficult to consolidate all the relevant provisions from those Acts in one new statute? The answer surely is 'No'. The provisions deal with discrete topics, and the drafting styles do not differ significantly. There are therefore no major issues of overlap or inconsistency. The task would not seem to call for any substantial redrafting, assuming that the underlying policies and principles of the legislation are to remain the same. This consolidation would almost certainly account for more than half the law of criminal evidence. The remaining statutory provisions dealing with general principles of evidence are not extensive. They date mostly from the 19th century, and, while the statutory language needs updating, the principles themselves are reasonably well settled. When we turn to the common law much the same could be said. Take for example the general rules governing the questioning of witnesses. There are a couple of uncertainties about the scope of the finality rule and its exceptions, but broadly speaking, the rules are clear and well settled. They would not be unduly difficult to restate in statutory form. Another example is the common law rules of legal professional privilege. Again, these should not present major problems for the codifier; the basic rule of privilege is already contained in Section 10 of PACE. We should note though that expert evidence is one area where the common law is widely felt to be unsatisfactory. The Law Commission recently produced a full report on the subject, arguing that the law fails adequately to ensure the reliability of expert evidence. The report presents a well-argued case for reform, recommending that the criteria for admissibility should be made more stringent. A policy decision would be required as to this recommendation, but it may be the only really significant one for the purpose of codification. If this is right, we can say that on this basis codification of the law of criminal evidence is not only desirable in principle but looks to be a feasible objective in practice. We can turn therefore to the arguments against codification.

### *The Arguments against codification*

The Law Commission's 1989 report reviewed a number of arguments and difficulties that commentators had raised against codification of the criminal law. The Commission did not find any of them persuasive. Again, it is unnecessary to rehearse them all again now,

since they are set out in full in the report. As the Commission said a number of them seemed to demonstrate several misconceptions about the nature and interpretation of an English criminal code. For example, it is not the case, as one commentator complained, that practitioners would have to learn to interpret a code like continental lawyers. A new technique would not be required. A code would be a normal English statute, interpreted according to established principles of statutory construction. English lawyers have become well used to dealing with lengthy new statutes and with mini-codes in relation to various matters of criminal law, and they have not encountered any special difficulty.

Similarly, it is not the case that codification would reduce the role of the courts in determining matters of criminal process. The courts will still need to interpret the codified law and apply it to differing circumstances. The experience of the new regimes for hearsay and bad character evidence in the Criminal Justice Act 2003 shows that there will still be plenty of work for the courts to do in implementing a code of criminal evidence.

There are three other potential issues with a code of criminal evidence that need to be addressed. The first is the objection that a code would have the effect of making the law immutable, and freezing it at a particular stage of its development. There would be a risk of ossification of the law and perpetuation of error. In its report, the Commission thought there was some force in this view, and we should concede that there could be a risk that the proper development of the law might be inhibited. However, in my view, the risk is largely theoretical. This is for two reasons. First, as I have already suggested, the code, like any other statute, will require interpretation from time to time, and I see no reason why the courts should not continue to use their familiar techniques to adapt and apply the statutory language as appropriate to the case in hand. After all, one can fairly expect the courts to regard the code as a new starting point, not as the end of the road. Secondly, I anticipate that there would be a standing body to monitor the application of the code and, if necessary, to recommend amendments of its provisions. There are already a number of bodies in existence that could undertake this task: the Law Commission is one; the Criminal Justice Council and the Criminal Procedure Rules Committee are others. There is no reason why the code could not be updated as and when required using the expertise of these bodies.

The second issue concerns the content of the code. At this point, we return to the question of whether it would be desirable or even possible for a code of criminal evidence to be a single comprehensive statute. This is an important question and it requires a nuanced answer. One of the problems facing a codifier is how far one can or

should take statutory provisions out of a thematic context. For example, if we are drafting a code of substantive criminal offences, should we try to take all the road traffic offences out of the Road Traffic Act and re-enact them in the code? Similarly, should we include all the licensing offences from the Licensing Act? What about offences concerned with health and safety, or food safety, or environmental protection, and so on? The code team took the view that there were severe practical difficulties in trying to codify offences that formed part of a complex scheme of statutory regulation of a particular activity. Such schemes often have multiple elements involving special statutory agencies, jurisdictional provisions, special duties and powers, and particular procedural and evidential rules, all in addition to the specific offences. Some of this statutory context might have to go with the offences to make them intelligible, but to take all the context would unbalance the code and make it impossibly large. Equally, it would not make much sense to split the regulatory scheme between the code and the thematic statute. This would not suit the convenience of those concerned with the implementation and enforcement of the regulatory schemes. Accordingly, we advised the Law Commission that users of the code would be better served by leaving such regulatory schemes intact in their own mini-codes. In my view, this was the right advice, and we can apply the reasoning to rules of evidence as well as to substantive offences. So, for example, if a statute creates a regulatory offence and then provides for a reverse burden of proof in relation to a special defence to that offence, that evidential rule should remain in its statutory context.

What this suggests is that a code of criminal evidence should aim to state the *general* rules of the law. These are evidential rules, which apply across offences in the same way as general principles of criminal liability, such as the rules of complicity or defences. Evidential rules that apply only in respect of particular offences should not normally be included. As I have just argued, the principle of user-convenience will usually indicate that evidential rules specific to a particular offence, such as a reverse burden of proof or a curtailment of the privilege against self-incrimination, should remain in their existing statutory contexts.

A further exclusion from a code concerns what was referred to earlier as 'soft law'. We may include under this heading forms of delegated legislation such as rules of court and codes of practice issued under statutory authority. It seems to me that the style and detail of much of this material means that it is not appropriate for a code of primary legislation. The PACE codes of practice, for example, with their combination of rules, instructions, notes of guidance and explan-

atory material, would look very odd in a statute, even in a schedule. They could be left as they are, although that would not rule out publishing them as an annex to the code. A similar strategy could be adopted for the criminal procedure rules, which have a number of rules dealing with evidential matters. We may expect to see the practice continue of incorporating practice directions into the criminal procedure rules. That leaves a certain amount of other material such as guidelines issued by the Attorney General or the Director of Public Prosecutions, and judicial Protocols, such as the Protocol on Disclosure. There is a good case for rationalizing and consolidating such material, as Lord Justice Gross recognized in his recent review of the law on disclosure. In the evidential context witness anonymity orders provide an example of a topic where multiple sets of guidelines could usefully be amalgamated.

The third issue that presents potential difficulty for the codifier is restatement of the common law. The code team's experience with the draft criminal code was instructive. One problem with the common law of general principles of criminal liability is that the common law sometimes presents a fuzzy target where the law is obscure or inconsistent. The law may also be a moving target as well, depending on how often it has to be refined or explained to meet the exigencies of the latest case. In this sense, a statutory draft of the common law will always be playing catch-up. A further problem is that the common law may well be viewed by some as defective in terms of policy or principle. These commentators may want the law to be reformed not restated.

The result of these different problems is that the draft the code team produced ofcommon law rules on general principles of liability tended to attract two kinds of criticism. One group of critics, led by no less a figure than Glanville Williams, complained that we had failed to capture the proper common law rules, particularly in relation to causation. In their view, by failing to state the rules accurately, the team had inadvertently reformed them for the worse. On the other hand, some critics complained that in so far as the team had succeeded in stating the common law rules accurately, it had merely succeeded in perpetuating bad law that ought to be reformed. With a hindsight, this was undoubtedly one of the obstacles to taking forward the 1989 draft code. However, the extent of the restatement difficulty depends on how far one regards the common law in question as unclear and/or controversial. It has to be said that there was a substantial amount of obscurity and controversy surrounding the several areas of the common law on general principles of liability. It is debatable whether the position has got better or worse since 1989. The courts have done

some important work on criminal defences, and in clarifying the meaning of recklessness, for example, but the law on intoxication has proved very difficult to state in an intelligible statutory form, and the thought of trying to codify the current law on joint enterprise is the stuff of nightmares.

Would the common law of criminal evidence present a comparable degree of difficulty? I think the answer to this must be 'No'. If we take the law on expert evidence as an illustration, the rules of admissibility and the duties of an expert witness are reasonably clear. There is certainly controversy whether the common law applies a sufficiently searching test of reliability to expert evidence, especially where the evidence involves a new scientific technique or theory. As noted above, a policy decision is required as to whether the Law Commission's proposal for a new statutory test of sufficient reliability should be enacted. If it is not presumably the common law could be restated, warts and all, and the courts would then be left to do the best they could with it. This brings us to the last part of the paper. Having outlined what would *not* be included in a code of criminal evidence, I will now discuss what should be included.

## *Conclusion*

This brings the paper to its conclusion. We have considered how the arguments relating to codification of the criminal law might apply to the law of criminal evidence and noted how codification of evidence law has taken place in other common law jurisdictions. In the course of the paper, I have discussed the contents of an English code, suggesting that the code need not be an unduly lengthy or complex statute. It remains to develop three final points about the preparation and enactment of an English Evidence Act. First of all, who is going to prepare it? The obvious body to do this is the Law

Commission. The exercise would fall squarely within the scope of their statutory duties. They have a track record of valuable work on evidence issues, and potentially they have the resources to do it with the aid of consultants and an in-house Parliamentary draftsman. It is to be hoped that the commission and the government might see the drafting of an evidence code as the first step to reviving the project for codifying the criminal law as a whole.

Secondly, however, there might be fears about the length and organization of an evidence code. At this stage, we can revisit some points made earlier in the paper. It was suggested that most of the evidence code would consist of a consolidation of existing provisions in modern statutes. It is difficult to be precise about the total number of these sections, since there would be debate as to exactly which provi-

sions should go into the code. My best guess is that the total would be in the region of 130—140. There are maybe some additional 30 sections in other Acts, which would be candidates for inclusion. How many sections would be needed for restatement of the common law requires another guess. On the basis of the Australian and New Zealand treatments of the relevant topics, I would hazard an estimate of between 60 and 80. If these figures are anywhere near being accurate, we would be looking therefore at an act of up to 250 sections. That sounds a lot, but more than half of it would essentially involve cutting and pasting from other statutes. It is worth adding that it would be considerably shorter than the Criminal Justice Act 2003, which ran into 339 sections.

The organization of the code would again be a matter for debate. How to divide up the law of evidence for purposes of exposition has always been a tricky issue. No two textbooks follow exactly the same order of topics. There is a broad distinction, reflected in the Australian and New Zealand Acts, between rules of admissibility and rules of proof and trial process, although even then these organizing categories have a degree of overlap, for example in relation to when, how and with what effect evidence can be adduced about a witness's previous statements. Other organizing categories are possible. For example, privileges and immunities could form a coherent group of provisions. Other possibilities might arise according to how widely the code's remit extends. If the code were to include all police powers to obtain evidence from an accused person, the relevant provisions would presumably constitute a distinct part of the code. An argument in favour of inclusion is that such powers clearly engage human rights under the ECHR, and, if the powers are exceeded, there may be an issue whether evidence obtained in consequence should be excluded as a matter of law or discretion. However, it might be objected that such powers are more conveniently treated along with other police investigative powers, such as stop and search, arrest, entry on to premises, and so on, as they currently are in PACE.

Thirdly, there is the question of enactment. The code could not be taken through the parliament under the procedure for consolidation bills. It would have to be a government measure, and this is why it would be essential to obtain the government support for its preparation. How hard would it be to obtain the government support? I am not in a position to answer that question. What I would say is that there was a Home Office commitment a few years ago to the principle of codification of the criminal law. That may not mean very much 13 years on, but nothing significant has happened in the inter-

im to justify withdrawing the commitment. Moreover, an evidence code ought not to be as politically sensitive as a code of substantive criminal law. This was undoubtedly a problem with the 1989 code, which contained a substantial amount of controversial law reform. An evidence code should really not generate a comparable difficulty. Most of it would be consolidation of existing legislation, and the restatement of common law would be mostly of settled principles of interest largely to lawyers. So, there really should not be very much to cause alarm in Whitehall and Westminster.

***Abstract***

This paper revisits the case for codification of the criminal law of England and Wales. It proposes that the Law Commission's codification project should be revived and should begin with codifying the law of criminal evidence. The arguments in favour of codification are strong and the arguments against are weak. The paper suggests that codification of the law of criminal evidence would not be an unduly difficult exercise. Most of the law is contained in a collection of modern statutes, the provisions of which could be simply consolidated. The remaining law is a mix of older legislation and common law that would require restating in a consistent modern style. There are relatively few issues requiring important decisions of policy. The experience of Australia and New Zealand shows that the drafting of an evidence code is a feasible undertaking and need not result in an excessively lengthy Act. (pp. *107–119)*

## II.2. TYPES OF OFFICIAL AND SERVICE OFFENCES

*by Liudmila Aleksandrovna Spector*[4]

The title of chapter 31 of the Criminal Code of the Russian Federation 'Offences against justice' in the acting criminal legislation is identical with the one in the Criminal Code of the Russian Soviet Federated Socialist Republic of 1960, which proves the succession of such legislative object (the term 'justice' was already used in the pre-revolutionary Criminal Code).

The concept of 'justice', in the context of criminal law, has two interpretations. In the narrow sense, it implies hearing, criminal, and civil proceedings as well as administrative offence proceedings or proceedings at arbitration courts. At the same time, it should be noted that the Constitutional Court of the Russian Federation is not included into the

[4] Spector L. A. Types of Official and Service Offences / L. A. Spector // Statute Law Review. 2015. Vol. 36. No. 3. P. 228—232.

judicial system as it does not administer justice but, instead, considers the issues of validity and constitutionality of Russian legislative norms and rules. In the broad sense, justice involves three stages.

1. Pre-trial proceedings—this stage appeared with the adoption of the acting Criminal Procedure Law. According to the Criminal Code of the Russian Soviet Federated Socialist Republic, the pre-trial procedure implied preliminary investigation and inquiry.

In this case, it is vital to define the beginning and the end of pre-trial proceedings: from the moment of the submission of a crime report (reported offence) and till the moment of a judge's passing a decree on the institution of proceedings, while preliminary investigation or inquiry begins upon the initiation of a criminal case. Articles 294—298 of the Criminal Code refer to the old term (preliminary investigation), therefore, by implication of the law, a person's actions that could be characterized as crimes provided by the articles indicated shall be not considered as criminal prior to the institution of a criminal case. It is a failure of the legislator, and, thus, it is necessary to change the term 'preliminary investigation' for 'pre-trial proceedings'.

2. Trial begins upon the adoption of a decree on trial proceedings and finishes with the entry of judgment into legal force.

3. Enforcement of judgment—takes place after the entry of the verdict into legal force.

Crimes related to the abuse of power or official misconduct can be committed at any of the stages stated above, so that the whole process of criminal justice administration can default.

Taking into account the aforesaid, we believe it is vital to clarify some contentious issues in the context of service (official) crimes classification.

Article 285 represents a general provision in relation to Articles 299, 300, 301, 303, and 305 of the Criminal Code. Article 302 is a special norm related to Article 286 of the Criminal Code.

The criterion, which this service offence group is distinguished by, is based on the special status of the perpetrator, namely: persons engaged into pre-trial proceedings and persons conducting the trial (judge or judges, in case the proceedings involve more than one person).

It should be noted that a person executing judgments shall not be the subject of the crimes in question. However, if the official receiver does not execute the judgment for money, his/her actions shall be classified, as part of the topic given, according to Article 285 of the Criminal Code (power abuse), since the legislator has not provided a

special rule for such subjects (the same concerns Article 286 of the Criminal Code).

It is clear that all the offenses considered are committed at pre-trial proceedings and trial stages.

In Article 299 of the Criminal Code, the title and disposition coincide. For comparison, let us recollect that the same norm of the Criminal Code of the Russian Soviet Federated Socialist Republic of 1960 stressed the subject of crime as follows: criminal prosecution of the innocent by public prosecutor, interrogation officer, and inquiry officer. Today the situation is quite different.

A judge cannot be the subject of crime provided by Article 299 or 301 of the Criminal Code (illegal detention, custodial placement, or custodial detention). He/she shall be, instead, liable to proceedings for such actions in accordance with Article 305 of the Criminal Code [passing of designedly unjust (wrongful) sentence, decision, or other judicial act.

It should also be noted that in Article 299 of the Criminal Code a legislator does not apply the criminal procedure notion of 'criminal prosecution' (indictment). This particular case eliminates the possibility for specifying, for instance, what kind of investigation action the investigator carries out could prove his/her involvement in illegal criminal prosecution. Logically, and objectively, the investigator shall be believed to commit a crime (Article 299) if he/she takes a decision on indictment. However, the Criminal Procedure Law envisages the familiarization of the suspect with this decision, therefore there are only two ways to solve the problem in focus:

1. the crime shall be completed on the issuance of the decree mentioned above and
2. the crime shall be completed on the submission of the decree for consideration.

We believe the second approach would follow the logic of the criminal procedure legislation, as after familiarization of the suspect with the charges, he/she acquires the status of the accused, which increases the chances for his/her facing negative consequences.

Such vagueness in the statement that complicates the process of the law enforcement can be eliminated by making the amendments to Article 299 of the Criminal Code as follows: 'Decree on indictment of the person, known to be innocent'.

According to the Criminal Code of the Russian Soviet Federative Socialist Republicof 1960, the definition given included one more aggravating circumstance — 'artificial document production'. At the present day, no such circumstance is provided, since the acting crimi-

nal law foresees criminal liabilities for tampering with evidence in the Article 303 of the Criminal Code.

Besides, it should be noted that if a decision on indictment entailing detention is made, such type of crime committed by the investigator shall be categorized by the total number of crimes committed — Articles 301 and Article 299 of the Criminal Code, as Article 299 does not cover such kind of detention. In the event, the actions of the investigator stated above are accompanied with the submission of 'falsified' evidence, the nature of the crime committed shall be also determined with reference to Article 303 of the Criminal Code.

Moreover, it should be noted that Article 300 of the Criminal Code (illegal exemption from criminal liability) is based on a new law — there used to be no such law in criminal legislation earlier. It clearly defines the subject of crime, in fact: public prosecutor, interrogating officer, investigator, or inquiry officer. Additionally, Article 300 of the Criminal Code names persons who may be liberated from criminal responsibility: these are, in particular, suspects or accused of a crime.

Unlawful exemption from criminal liability results in concealing the actus reus. Therefore, we believe it is necessary to change the composition of Article 300 and include two aspects: with the first aspect 'misprision of crime by public prosecutor, investigator or inquiry officer' and the second aspect 'illegal liberation from criminal responsibility'.

Such an approach is based on the fact that the both cases result in the infringement of the interests of justice.

According to the Criminal Code of the Russian Soviet Federative Socialist Republic of 1960, the law warranting the responsibility for illegal detention, confinement under guard or detention in custody (Article 178 of the Criminal Code) included two criminal acts: illegal detention and illegal confinement under guard.

The law envisaging the responsibility for illegal detention in custody was introduced only in 1996 with the adoption of the current Criminal Code. It names a wide range of subjects of crime (governor of temporary holding facility, investigator, etc.).

The Criminal Procedure Code of the Russian Federation provides grounds for detention—pursuant to Article 91. Consequently, the 'illegal detention' shall be deemed as a case when, in particular, there are no procedural grounds for detention; detention procedure is violated, for instance, no protocols are drawn up, protocol time is not reported; public prosecutor is not informed within 12 hours, in case of non-compliance with the detention period.

Article 302 of the Criminal Code is another legislative norm in the system of special service crimes that requires attention (compulsion of evidence).

The conditions for bringing to responsibility under this article include the institution of a criminal case and conducting of investigatory actions basing on testimonies provided. If there is no criminal case, subsequently, the abuse of office takes place.

This legislative norm provides a clear description of affected persons (suspect, accused, witness, or expert). And crimes or forced actions are to be committed in the ways stipulated by law, namely extortion, threats (the norm does not describe types of threats, therefore all kinds of threats taking place cause punishment), and other illegal actions.

Since amendments were introduced to criminal law in 2003, the subject of crime may be represented by other individuals who committed the actions stated above with the acquiescence of the investigation officer (e.g. operatives). This is an exception to the rule, laid down in Article 34 of the Criminal Code of the Russian Federation, when a third person may become the subject of crime. It is also necessary to note that Article 286 of the Criminal Code does not expand the range of such subjects.

In this regard, we suggest expanding the point 4 of Article 34 of the Criminal Code adding the following specification: 'except for divisible (complex) crimes'. In this case, this will eliminate contradictions between Article 286 and Article 302 of theCriminal Code.

One of the last components of the service offence system is represented by Article 303 of the Criminal Code ('Falsification of evidence').

Here, the legislator offers a clear division by the types of cases (civil and criminal cases). We believe it to be a right approach, given the type of procedure.

The subject of offence, provided by the part 1 of Article 303 of the Criminal Code — plaintiff, defendant, the third persons involved into the case, defensor, and according to part 2—interrogating officer, investigator, inquiry officer, public prosecutor, prolocutor, or defense counselor.

Article 305 of the Criminal Code stipulates criminal liability for intentional passing unjust verdicts, decisions, or other kinds of judicial acts. The content of the article does not give a clear vision of whether triers of fact or jurors can be the subjects of crime.

We believe two approaches can be applied to settle this issue:

1. Jurors should be held responsible under Article 305 of the Criminal Code if they are involved into collusion and

2. Jurors shall be not perceived as the subject of crime stipulated by Article 305 of the Criminal Code, since the final decision is eventually taken by the court.

We believe jurors (triers of fact) should be the subject of the crime given.

Unjust verdict implies the conviction of the innocent or the acquittance of the guilty. At the same time, it is not clear how actions of the judge who makes findings of guilt but applies unsatisfactory sanctions (for instance, he/she passes a decree on suspended sentence as punishment for a murder) should be categorized. It is a vital issue though the legislator appears to be not intent upon solving it in the near future.

**_Abstract_**

This article studies special kinds of service offences in the system of crimes against public justice; offers for consideration disputable points of the proper interpretation of disposition of constituent elements of such crimes and their classification; explains and describes the concept of the term 'justice' in the narrow and broad senses; and clarifies the controversial issues in the context of official and service crimes classification. (pp. *228—232)*

## II.3. WHOLE-LIFE SENTENCES IN THE UK: VOLTE-FACE AT THE EUROPEAN COURT OF HUMAN RIGHTS?

*by Naomi Hart*[5]

CASE AND COMMENT

The ECtHR has for the second time in three years engaged with the British Government's handling of whole-life prison terms. In *Hutchinson v United Kingdom* (Application no. 57592/08), Judgment of 3 February 2015, not yet reported, the Fourth Section accepted the authoritativeness of an English court's decision on the meaning of English law relating to the Home Secretary's discretion to reduce a whole-life sentence. It also yielded to national judges on whether this sentence review mechanism complies with the proscription on inhuman and degrading treatment in Article 3 of the ECHR.

Arthur Hutchinson was convicted in 1984 of aggravated burglary, rape, and three counts of murder. In December 1994, the Secretary of

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[5] Hart N. Whole-life Sentences in the UK: Volte-face at the European Court of Human Rights? / N. Hart // The Cambridge Law Journal. 2015. Vol. 74. No. 2. P. 205—208.

State for the Home Department informed Hutchinson that he had, at the Lord Chief Justice's recommendation, imposed a whole-life term of imprisonment. In 2008, a judicial review of the sentence under the Criminal Justice Act 2003 and a subsequent appeal found no reason to reduce this sentence. In November 2008, Hutchinson lodged a claim with the ECtHR, alleging an Article 3 violation.

The ECtHR was invited to consider the English legislative regime for reviewing whole-life sentences. Section 30(1) of the Crime (Sentences) Act 1997 provides that "The Secretary of State may at any time release a life prisoner on licence if he is satisfied that exceptional circumstances exist which justify the prisoner's release on compassionate grounds". Chapter 12 of the *Indeterminate Sentence Manual* ("the Manual"), issued by the Home Secretary in 2010, limits compassionate release on medical grounds to prisoners with a terminal illness likely to cause their death very shortly.

Two prior cases concerning whole-life sentences under this regime provide crucial background to *Hutchinson*. In *Vinter and Others v United Kingdom* (Application nos. 66069/09, 130/10, and 3896/10) (2012) 55 EHRR 34, handed down in July 2013, the ECtHR's Grand Chamber affirmed (at [107]—[122]) that whole-life sentences, while not inherently inimical to Article 3, are unlawful if they are "irreducible" in law or fact. National mechanisms for reviewing sentences must provide a realistic prospect of release based on a shifting balance between legitimate penological purposes — retribution, deterrence, public protection, and rehabilitation — over the course of a prisoner's sentence. Although the ECtHR will not prescribe the form of such a review mechanism, the general principle is that "[a] whole life prisoner is entitled to know, at the outset of his sentence, what he must do to be considered for release". The Grand Chamber proceeded to find (at [125]—[130]) that the UK's regime for reviewing whole-life sentences violated Article 3, because the Manual's restrictive and apparently exhaustive grounds for sentence reduction did not accommodate other legitimate penological grounds for a commutation. It was unclear how the Home Secretary would exercise his or her discretion to reduce a life sentence outside of the bases in the Manual.

The second decision was of a specially constituted Court of Appeal in *Attorney General's Reference (No. 69 of 2013)* [2014] EWCA Crim 188; [2014] 1 W.L.R. 3964 (*McLoughlin*, after one of the appellants). This February 2014 judgment affirmed that whole-life sentences are compatible with Article 3 provided that a review mechanism exists when a sentence is imposed (at [14]—[22]). The Court found that the Grand Chamber in *Vinter* had misconstrued the UK's review

mechanism. It held (at [31]—[36]) that the Home Secretary's power to review a whole-life sentence under s. 30 of the Crime (Sentences) Act arises whenever exceptional circumstances exist. The Manual provides guidelines on certain grounds for sentence relief but cannot fetter the Home Secretary's discretion, which (by virtue of s. 6 of the Human Rights Act 1998) he or she is bound to exercise in conformity with Article 3. The Court of Appeal found that the term "exceptional circumstances" was a "term with wide meaning" that could be developed through the common law (at [31], [36]).

In *Hutchinson*, the Fourth Section interpreted *Vinter* as establishing that "if section 30 . . . impos[es] a duty on the Secretary of State to exercise his power of release if it could be shown that the prisoner's continued detention was no longer justified on penological grounds, ... this would, in principle, be consistent with the requirements of Article 3" (at [22]). While *Vinter* had found that the UK's regime did not permit the review demanded by Article 3, the subsequent Court of Appeal decision provided an "unequivocal statement" that, under British law, the Home Secretary must consider all exceptional circumstances that could warrant a sentence reduction. The ECtHR considered itself bound to recognize the Court of Appeal's interpretation of national law as definitive (at [24]–[25]). For that reason, it accepted that the UK's system of reviewing whole-life sentences complied with Article 3.

It is well established in the ECtHR's jurisprudence that domestic courts bear primary responsibility for interpreting national law. The Court of Appeal's explanation in *McLoughlin* that the Manual did not exhaustively enumerate the grounds on which the Home Secretary may reduce a whole-life sentence — a discretion that must be exercised based on any exceptional circumstances and compatibly with Article 3 — is a structural feature of British law on which the Fourth Section in *Hutchinson* rightly deferred to English judges. There are, however, two grounds for questioning the result in *Hutchinson*.

The first relates to chronology. Both *Vinter* and *McLoughlin* established that a review mechanism must be available and visible to a prisoner at the time a whole-life sentence is imposed. For Hutchinson, that was in December 1994. The *McLoughlin* ruling on the relationship between the Manual and s. 30 of the Crime (Sentences) Act was handed down in 2014 and related to a whole-life sentence imposed in 2013. As Judge Kalaydjieva pointed out in her dissenting opinion, it was not clear whether the Court of Appeal's finding was "an *ex tunc* or an *ex nunc*" exposition on the exercise of the Home Secretary's discretion. She could not "see the bearing of this progressive development of the law on [Hutchinson's] situation" when he submitted his complaint to the EC-

tHR in 2008. Moreover, before the enactment of the Human Rights Act 1998, there was no legislative imperative for the Home Secretary to exercise his or her discretion compatibly with Article 3. To the contrary, a policy announced by the then Home Secretary in December 1994 (cited in *McLoughlin* at [7]) indicated that he would exercise his discretion under the predecessor to s. 30 of the Crime (Sentences) Act based only on "considerations of retribution and deterrence". *R. v Home Secretary ex p. Hindley* [1998] Q.B. 751 found that this policy had unlawfully fettered the Home Secretary's discretion, and was redeemed only in 1997 when the Home Secretary introduced additional considerations including a prisoner's rehabilitation (at 770). Even adopting the Court of Appeal's view in *McLoughlin* of English law as it now stands, it is arguable that no adequate review mechanism existed when Hutchinson's whole-life sentence was imposed — essential to Article 3 compliance.

The second concern is over the ECtHR's uncritical acceptance that the UK's regime provides whole-life prisoners with a realistic and discernible prospect of release. In *Vinter*, the Grand Chamber found not only that the Manual unlawfully restricted the grounds for sentence relief, but also that the general scope of exceptional circumstances cognisable by the Home Secretary was unclear. While *McLoughlin* addressed the first issue by explaining that the Manual could inform but not condition the Home Secretary's discretion, it paid short shrift to the broader lack of clarity, claiming simply that "the term 'exceptional circumstances' is of itself sufficiently certain" (at [31]). It is for this reason that critics consider the *McLoughlin* approach unsatisfactory (see e.g. Bild [2015] C.L.J. 1, at 3). Previous case law suggests that an enquiry into this aspect of English law may have altered the *Hutchinson* outcome. In *Trabelsi v Belgium* (Application no. 140/10), Judgment of 4 September 2014, not yet reported, the Fifth Section considered whether the Belgian government's extradition of an accused criminal to the US violated Article 3. In the US, a whole-life sentence could be reduced by a presidential pardon, as well as through various legislative channels which demanded consideration of a prisoner's assistance in another criminal investigation and more general "extraordinary and compelling reasons" including factors of retribution, deterrence, the protection of society, and a defendant's access to rehabilitative services (18 US Code §3553(a)). Even with these factors enumerated, the Fifth Section found that the review mechanisms failed to provide "objective, pre-established criteria of which the prisoner had precise cognisance" (at [137]). Although the British Home Secretary, unlike the American authorities in *Trabelsi*, is obligated to act compatibly with Article 3, the fact that the circumstances under which he or she will discretionarily reduce a life

sentence under legislation — let alone under the prerogative of mercy, not addressed in Hutchinson — are undefined casts doubt on whether Hutchinson's whole-life sentence is reconcilable with Article 3. *(pp. 205 – 208).*

## II.4. ANALOGICAL REASONING IN THE COMMON LAW

*by Grant Lamond*[6]

### *Introduction*

The use of analogies is a standard feature of reasoning in the common law: judgments, opinions and textbooks rely on them in discussing the state of thelaw in every area. Yet, their precise role is a matter of considerable dispute among legal theorists. Some theorists regard them as the cornerstone of common law reasoning, whereas others regard them as mere window-dressing, without normative force. Others again argue that analogies owe their normative force, and their identification, to some independent element, such as principles or their rationale.

In this article, I will argue that there is some merit in most of these views. This is because there is not one type of analogical reasoning in the common law, but several different types. Some of the disagreements about analogical reasoning stem from the fact that these differences are not very clearly marked in the common law itself, nor in theoretical discussions of the common law. Many of the pieces of the puzzle of analogies are, I think, already available in the theoretical literature. The key to understanding analogies lies in how we put these pieces together, rather than in their wholesale replacement. I will distinguish three types of analogies: classificatory analogies, close analogies and distant analogies.

Classificatory analogies are those used in the process of characterizing the facts of a case for legal purposes. This is often because a particular categorization would bring the facts under an existing legal rule and settle the result of the case. When the characterization is unclear, decided cases with similar facts are called in aid to help settle the question. Close analogies, in contrast, are used in helping to resolve a novel legal issue raised by the facts of the case. Where there is no clear law on that issue, the way that this type of issue has been dealt with in other branches of the same legal doctrine is brought to bear. The problem is not how to characterize the facts, but how to resolve the novel issue raised by those facts. Distant analogies are relied upon

for the same reason as close analogies. They differ from close analogies in being more doctrinally distant from the issue to be resolved. Consequently, while close analogies are regarded as very

[6] Lamond G. Analogical Reasoning in the Common Law / G. Lamond // Oxford Journal of Legal Studies. 2014. Vol. 34. No. 3. P. 567—588.

strong reasons for reaching a particular result, distant analogies merely support or provide a reason in favour of doing so. But it is not just the role of these different types of analogies that distinguishes them. Their justifications also differ. The use of classificatory analogies rests on rule of law concerns for consistency in the application of the law, while the use of close analogies is derived from the collateral force of precedent. Distant analogies, on the other hand, derive what rational force they have from a concern with general doctrinal coherence in the law, and their value is consequently far more variable than close analogies. Understanding these different types of analogies helps to explain the disputes over the normative force of analogical reasoning and helps to explain the widely divergent views of its significance.

Of course, to identify three basic types of analogical reasoning is not to claim that every instance of analogical reasoning can be fitted easily into one of these categories, nor that the distinction between close and distant analogies is always clear-cut. Rather it is to say that the typology is sound and covers enough instances for it to help advance our understanding both of analogical reasoning itself and the theoretical disputes about its nature. One underlying theme in this article is that even if common law reasoning is best understood as a form of reasoning with rules, it is not *simply* reasoning with rules. The different types of analogy rely in part not only on legal doctrine having a structure which is (at the least) rule-like, but they also depend upon legal doctrines having rationales that make sense of their existence and content. Both dimensions of legal doctrine are necessary to understand the operation of analogical reasoning in the common law. In the course of this analysis, I also hope to shed a little light on two other issues: the nature of legal concepts and the nature of the doctrine of precedent. The use of classificatory analogies not only involves the use of cases to determine the characterization of novel facts, but it also indicates that decided cases are integral to the constitution of legal concepts. The existence of close analogies, meanwhile, helps to make sense of some of the disputes over specifying the *ratio* of a precedent. Because my focus is on the common law, I will limit myself to the use of cases as the source of analogies. Statutes are sometimes also used as

a source of analogy, but their use is more limited and complex than the use of cases, and there is much more variation within the Common Law tradition over their use.

## ***Legal Reasoning***

It is common enough to speak about 'analogical reasoning', 'reasoning by analogy' or the 'logic of analogies' as part of legal reasoning. But what is legal reasoning? At a basic level, legal reasoning deals with the steps and the inferences made by lawyers in reaching a conclusion over the state of the law on some issue. For instance, the fact that there is a binding precedent that applies to a case requires that a court either follow the decision (ie reach the same outcome as the precedent) or distinguish it. Other types of considerations are raised because they count in favour or against a particular conclusion. The types of considerations that can be pressed in legal argument are very varied. A contrast is often drawn between *legal* considerations and non-legal considerations, though there are at least two different contrasts that can be marked by these terms. In one sense, a legal consideration is any consideration that is regarded as legally permissible or relevant, ie that it would not be inappropriate to take into account in reaching a decision. At present, the common law treats some considerations, such as the truth of religious views, or the desirability of party-political outcomes, as legally inadmissible, iюeю as not in principle available to weigh in its considerations. But it is generally very permissive about the types of considerations that can be raised. Within those considerations regarded as admissible, however, there are some that are regarded as distinctively *legal* considerations, such as precedent, *dicta* and legal principles, as opposed to non-legal considerations such as moral values, practical constraints or consequential effects.

Legal reasoning is concerned with the ways in which different considerations

contribute to the determination of the law. Like any sort of reasoning, it can be studied as a psychological phenomenon and as a normative practice. Psychological studies focus on how people in fact come to conclusions in some area: what things influence their thinking, and what factors play a key role. From a psychological perspective, fallacies and biases are just as much a part of human reasoning as 'rational' constraints, and there is a great deal to be learnt about human reasoning from such empirical research. Approaching reasoning as a normative practice, on the other hand, is concerned with understanding what constitute good canons of reasoning in a particular branch of human endeavour, ie how reasoning is supposed to be carried out when it is done well. Of course, the psychological and normative approaches complement each other and are, to a degree, mutually dependent. Neither approach can be pursued in isolation from the other, though each has its own emphasis. What constitutes a 'fallacy' or a 'bias' depends upon what constitutes sound reasoning. And what constitutes sound reasoning in a field depends in part

on what practitioners in the field do and what they judge appropriate to do. This is not to say that the standards of reasoning in a particular field are selfvalidating, as if agreement among participants over what constitutes a sensible approach is sufficient to make that approach cogent. Those who believe in astrology may follow certain standards of reasoning in coming to their predictions about a person's future, but that does not, on its own, make those standards rationally plausible. So a normative approach to reasoning also seeks to vindicate the standards used in a particular area, and may be led to criticize and question some (or even all) of the standards currently endorsed. The focus in this article is on the normative approach to legal reasoning, ie on what is treated as sound reasoning by common lawyers.

Legal reasoning in the common law is often characterized as a form of reasoning with rules. Some accounts regard reasoning by analogy as analysable in terms of rules, whereas others regard it as a process that does not rely on rules, for good or ill. The approach in this article is more complex, as will become apparent in the sections below. The common law certainly has a rule-like character: the concepts, doctrines and areas form a structure which can be analysed in terms of their elements and their application. But the common law is more provisional and partial than statutory rules. It is more open to being developed in cases, due to the processes of

distinguishing and analogy, and it often provides only a general sketch of the structure of an area. In addition, the common law regards the rationale for a doctrine as integral to its content. I will write below of legal doctrines being partly constituted by 'legal rules', but I mean by this the looser and more relaxed standards that are characteristic of the common law. The role of such rules differs from one form of analogical reasoning to another. This is another reason, then, why it is important to distinguish the different types of analogies.

Some theorists have written of there being 'logic' of analogical reasoning. I will not adopt this terminology, since it implies a degree of precision and structure that is not generally found in the common law. It can also be misleading. Logic, in its strict sense, concerns the relations of entailment between the premises and conclusions of an argument. Reasoning, in contrast, is concerned with what there are reasons to believe or do. Reasoning *involves* the use of logic, but logic is only one aspect of reasoning. What the language of 'logic' does highlight, however, is that analogical reasoning has distinctive forms, ie that it involves a pattern or process that can be explained, and not simply an intuitive recognition of the relevance of other cases.

## *Conclusion*

The key to understanding analogical reasoning in the common law lies in recognizing its different forms. With these forms in place, it is easier to appreciate the diversity of views that have been expressed about the nature of analogical reasoning. Close analogies, for example, are a cornerstone of common law reasoning, since close analogies complement and expand a narrow conception of the nature of precedent. The difference between a binding ratio and a close analogy can be very small. In many cases, it will matter little to a later court whether a precedent is strictly binding or 'merely' a close analogy: either way it should be followed unless it is distinguishable.

When it comes to distant analogies, it is easier to see the force in skeptical views of analogical reasoning. There are of course situations where maintaining coherence between or across different doctrines is a significant concern, but there are many other situations where the lack of synchronization will matter little, if at all. What matters far more is the cogency of the reasoning in the analogical case, ie whether it presents a good case for dealing with an issue in a certain way. If it does, then naturally it should be adopted. So distant analogies can provide valuable assistance in resolving an issue. But they are apt to being given a weight in reaching a decision that exceeds their value. This points to the desirability of giving distant analogies a more modest role than they currently enjoy in common law reasoning. Even so, they are more than mere window-dressing, since inter-doctrinal coherence does matter in many situations.

All forms of analogical reasoning draw on the fact that legal doctrines are not simply a body of standards with a particular structure, but a body of standards with an intelligible rationale that are nested within wider bodies of law. The operation of analogical reasoning relies both on the structure and the rationale of legal doctrines. Its importance lies in the way that it serves the courts' adjudicative functions: it enables courts to develop the law in ways that are both faithful to existing legal doctrine and sensitive to the novel context in which the law is to be applied.

## *Abstract*

Analogical reasoning is a pervasive feature of the common law, yet its structure and rational force is much disputed by legal theorists, some of whom are sceptical that it has any rational force at all. This article argues that part of the explanation for these disagreements lies in there being not one form of analogical reasoning in the common law, but three: classificatory analogies, close analogies and distant analogies. These three differ in their functions and rationale. Classifi-

catory analogies involve the use of decided cases to help characterize novel fact situations, and are justified by the rule of law ideal of minimizing the dependence of judicial decisions on the individual views of decision-makers. Close analogies are used to help resolve unsettled issues by reliance on decisions from other branches of the same legal doctrine. They complement the doctrine of precedent, and rest on similar considerations. Distant analogies are also used to help resolve unsettled issues, but by reference to decisions from other legal doctrines. They are the most susceptible to sceptical critique: although they can serve to maintain coherence in the law, they deserve a more modest role in legal reasoning than they are often given.

**Keywords**: analogical reasoning, common law, legal reasoning, precedent, legal Philosophy.

## II. 5. THE HUMAN RIGHTS ACT 1998 — FUTURE PROSPECTS

*by Ronagh J.A. McQuigg*[7]

### *Introduction*

The Human Rights Act 1998 is undoubtedly one of the most contentious pieces of legislation on the UK statute books. Although many regard the Act as providing essential protection for the rights of individuals, it is also viewed in certain quarters as 'a rogues' charter'. Indeed, there have been strong calls for the repeal of the Act, and for its replacement with what is commonly referred to as a 'UK Bill of Rights'. The debate surrounding this issue culminated in the establishment of a Commission on a Bill of Rights, which issued its final report in December 2012. Little progress has since been made on the issue of a Bill of rights. One notable occurrence however was the introduction of the Human Rights Act 1998 (Repeal and Substitution) Bill, a Private Member's Bill which was eventually withdrawn in March 2013. This article seeks to analyse the current situation regarding the Bill of rights debate in the United Kingdom and the future prospects for the Human Rights Act. Overall, it will be questioned whether the enactment of a UK Bill of Rights would constitute an improvement on the current position under the Human Rights Act.

### *The Political Context*

[7] McQuigg R. The Human Rights Act 1998 — Future Prospects / R. mcQuigg // Statute Law Review. 2014. Vol. 35. No. 2. P. 120—132.

The result of the general election of 2010—a Coalition government consisting of the Conservative and Liberal Democrat Parties—gave rise to a particularly problematic situation as regards the question of the future of the Human Rights Act. The Conservative Party manifesto had contained a pledge to ‘replace the Human Rights Act with a UK Bill of Rights’. The Liberal Democrats however had stated in their manifesto that they would ‘ensure that everyone has the same protections under the law by protecting the Human Rights Act’. After some delay, a compromise position was adopted, whereby a commission was established in March 2011 with the mandate *inter alia* of investigating ‘the creation of a UK Bill of Rights that incorporates and builds on (the United Kingdom’s) obligations under the European Convention on Human Rights, ensures that these rights continue to be enshrined in UK law, and protects and extends…liberties.’ It is notable that, even from the outset, this process suffered from a remarkable amount of incoherency. Essentially, the primary reason for addressing the question of a UK Bill of Rights at that juncture was the Conservative Party’s belief that the Human

Rights Act should be replaced. However, the Commission’s mandate was to investigate the creation of a UK Bill of Rights to incorporate and build upon the United Kingdom’s obligations under the European Convention and ensure that these rights remain part of UK law. According to this mandate, proposing a weaker instrument than the Human Rights Act was not an option. Therefore, there was never any possibility that the Commission’s deliberations could produce a solution to the perceived problem.

### *The Report of the Commission on a Bill of Rights*

During the course of its deliberations, the Committee produced two consultation papers. On each occasion, approximately a quarter of respondents supported a UK Bill of Rights; just under half opposed such a Bill; with the remainder being neither clearly for or against. The majority of those who opposed a UK Bill of Rights did so on the basis that the UK already has a Bill of rights, in the form of the Human Rights Act. Many of the respondents who shared this view were of the opinion that the Act is working well and that it is ‘an effective and sophisticated piece of legislation’. In particular, there was ‘considerable suspicion among many respondents that the call for a UK Bill of Rights from some political parties and politicians (was) motivated by a desire to reduce existing human rights protection’. In Scotland, Wales and Northern Ireland, calls for a UK Bill of Rights were ‘generally perceived to be emanating from England only and there was

little if any criticism of the European Court of Human Rights or of the Convention.'

The Commission presented its final report on 18 December 2012. In its report the Commission stated that there was 'no doubt that the arguments that have been put to us against a UK Bill of Rights are substantial.' Nevertheless, despite the relatively low levels of support for a Bill of Rights, seven of the Commission's nine members were of the view that there was a strong argument in favour of a Bill of Rights to incorporate and build upon the United Kingdom's obligations under the European Convention. The primary reason for the support of the majority of the Commission for a Bill of Rights was a perceived 'lack of public understanding and "ownership" of the Human Rights Act'. For the members of the Commission who supported a UK Bill of Rights, it would therefore be 'desirable in principle if such a Bill was written in language which reflected the distinctive history and heritage of the countries within the United Kingdom', as the 'key argument' in favour of a Bill of Rights was 'the need to create greater public ownership of a UK Bill of Rights than currently attaches to the Human Rights Act'.

### *Would a UK Bill of Rights improve on the Human Rights Act?*

Two members of the Commission—Baroness Kennedy of The Shaws and Philippe Sands—were however of the view that the time was not ripe for the conclusion to be reached that a new UK Bill of Rights should be enacted. Their primary reason for disagreeing with the approach of the majority was the fact that the majority had failed to identify any actual shortcomings in the Human Rights Act or in its application by the judiciary. Essentially the problem which the majority of the Commission perceived to exist was not with the Act itself, but with the way in which it is viewed by certain sections of the public. Indeed, from a legal perspective, the Act is working in an effective manner. As Harvey comments, the Human Rights Act 'has been carefully and steadily absorbed into the legal system of the UK and a strong case can be made for its retention and the security of its place in the constitutional order.'

It is true that the Human Rights Act has not reached 'the iconic status of the American or South African bills of rights'. However, to hope that the Act would attain such a status was perhaps too lofty an aspiration. The Constitution of the United States was drawn up in the wake of the American Declaration of Independence, which declared the separation of the 13 colonies from Great Britain. Given this context, it is unsurprising that the US Constitution, and the rights con-

tained therein, carry great symbolic importance. Likewise, the Bill of rights found in the South African Constitution was drawn up following the end of apartheid. Given the history of the widespread human rights abuses which occurred in South Africa, it is again unsurprising that the South African Bill of rights now holds an iconic status. The Human Rights Act was enacted in a very different context to either of these examples. It seems that it is rather more difficult for Bills of rights drawn up in less turbulent circumstances to catch the imagination of the public. The New Zealand Bill of Rights Act of 1990 is a case in point. This Act was passed, not because of the occurrence of any prominent human rights abuses, but rather due to the impetus produced largely by the then Prime Minister, Geoffrey Palmer. The New Zealand Act is similar in many ways to the United Kingdom's Human Rights Act. In particular, section 6 of the New Zealand statute places an obligation on the courts to interpret legislation consistently with a set of rights, within certain limits, in a manner similar to that of section 3 of the Human Rights Act. There was no cross-party political support for the New Zealand Act, and the attitudes of the general public were apathetic at best. It cannot be said that the Bill of Rights Act has ever reached iconic status in New Zealand however, 24 years after its inception, the Act is still in existence and proposals were in fact made to strengthen its provisions. Human rights instruments do not need to be iconic documents in order to survive and to be effective in protecting rights.

In addition, given the constitutional context of the United Kingdom, it is unsurprising that the Human Rights Act has not gained an iconic status. The United Kingdom's constitutional structure is based on a liberal ideology. The attitude to rights which was traditionally adopted was that of negative liberties ensuring individual freedoms. Bills of rights do not fit well with such an approach, and indeed the Human Rights Act represented a substantial departure from such an ideology. Interestingly, New Zealand has a very similar constitutional context to that of the United Kingdom and, as discussed above, its Bill of rights has not attained an iconic status either. Australia, another common law jurisdiction which again shares a similar constitutional heritage, does not have a Bill of rights at the federal level. Essentially, to expect that a human rights instrument will achieve symbolic status in a country with a constitutional history such as that of the United Kingdom is perhaps to be overly optimistic.

Another reason why the Human Rights Act has not achieved iconic status may be due to its own operative mechanisms. The American and South African Bills of rights both accord the respective judiciaries

the power to strike down legislation which is incompatible with the rights contained therein. It is not suggested that the Human Rights Act should be amended to allow the UK judges to do likewise. Indeed, affording the judiciary such a power would be seen as anathema to many in the political sphere, and as contrary to the doctrine of parliamentary sovereignty which is the bedrock of the constitutional order of the United Kingdom. However, the fact that the US and South African judiciaries have the power to strike down legislation which is incompatible with human rights standards gives the respective Bills of rights something of a dramatic flourish, which is significantly more likely to catch the imagination of the public than is the declaration of incompatibility mechanism found in section 4 of the Human Rights Act. Of course, that is not to denigrate this mechanism in any way. Indeed, the respondents to the Commission's consultations were widely of the view that section 4 of the Human Rights Act is operating in a successful manner, and the majority of the Commission was of the opinion that a similar mechanism should be utilized in a UK Bill of Rights. However, the very fact that this mechanism had to be created in order to address the difficulty of how to reconcile a human rights instrument with the constitutional context of the United Kingdom adds weight to the proposition that it may be immensely difficult for the Human Rights Act (or indeed any UK Bill of Rights) to achieve a status equivalent to that of the US or South African Bills of rights.

However, the fact that the Human Rights Act has not achieved iconic status does not mean that it has insufficient support. It seems that levels of opposition to the Human Rights Act have in fact been significantly overestimated. According to the findings of the Commission's consultations, it appears that any 'ownership' issue is limited to certain parts of England, and does not therefore create a difficulty in the majority of the United Kingdom. In a separate paper produced by the two members of the Commission who did not support a UK Bill of Rights, it is stated that the consultations demonstrated in fact that there was 'overwhelming support to retain the system established by the Human Rights Act'. Indeed 96 per cent of participants were of the view that the Human Rights Act should be retained. This paper proceeded to state that,

> it is abundantly clear that there is no 'ownership' issue in Northern Ireland, Wales and Scotland (or, it would appear, across large parts of England), where the existing arrangements under the Human Rights Act and the European Convention on Human Rights are not merely tolerated but strongly supported.

It seems that rather than attempting to create a new UK Bill of Rights with all the attendant difficulties, a better and more straightforward solution would be to carry out education campaigns regarding the Human Rights Act in the parts of England where an 'ownership' problem is deemed to exist. This would constitute a more logical approach than that of attempting to produce a UK Bill of Rights when there is clear opposition to such a measure among some sections of the population, particularly in the devolved nations. If the key argument for a UK Bill of Rights is a lack of 'ownership' of the Human Rights Act, the fact that only 25 per cent of the respondents to the Commission's consultations were in favour of a Bill of Rights does not lead one to believe that a Bill of Rights would engender any greater sense of 'ownership' than has the Human Rights Act. The Commission itself stated in its report that there was a strong strand in response to our consultations that even if there were, and are, problems or perceived problems with the Human Rights Act, or its adjudication by the courts, these have largely been caused by a lack of public education, and could be addressed accordingly. For example, the British Institute of Human Rights commented in its response to the consultation that,

rather than reinventing the wheel with a Bill of Rights, we believe the Commission should focus on recommending the need for an appropriate and accessible programme for public education on human rights and the (Human Rights Act) to show that the law works and is working well.

In addition, as regards the elements of the public among whom an 'ownership' problem is deemed to exist, it is arguable that negative attitudes may be linked to the concept of 'human rights', as opposed to the Human Rights Act specifically. A proportion of members of the public may well be of the opinion that 'human rights' create advantages for the 'undeserving' in society, such as terrorist suspects. However, it is likely that a large percentage of the general public do not actually have a high level of substantive knowledge of the Human Rights Act itself, such as precisely what rights are contained therein. According to the Bill of Rights Commission's report, the primary purpose of a UK Bill of Rights would essentially be to change the wording of the rights currently contained in the Human Rights Act to make them more reflective of 'the distinctive history and heritage of the countries within the United Kingdom.' However, if it is the case that the majority of the public are unaware of precisely what their rights are, let alone how these rights are currently expressed, how will changing the wording have any effect whatsoever? Conversely, if the

public *are* aware of the content of their rights under the Human Rights Act, the assumption that 'cosmetic' changes to the wording of these rights will somehow create a greater degree of public 'ownership' of the rights in question verges on constituting an insult to the intelligence of the general public. Of course, other problematic questions also arise, such as how does one distil 'the distinctive history and heritage' of the United Kingdom, for the purposes of a UK Bill of Rights, from the different heritages of the various nations within the United Kingdom? Even if this task is accomplished, how does one then go about drafting a Bill of Rights that is reflective of this 'distinctive history and heritage'?

Given that the consultation carried out by the Commission found that there is in fact very considerable opposition to a UK Bill of Rights, the obvious question that
arises is why then did the majority of the Commission support such a Bill of Rights? In their separate paper, Baroness Kennedy and Philippe Sands commented that,

in the course of our deliberations it became evident that a number of (Commission members) would like the United Kingdom to withdraw from the
European Convention….(T)he unambiguous expression of such views offered openly in the course of our deliberations has made it clear to us that for some
of our colleagues a UK Bill of Rights is a means towards withdrawal from the
European Convention.

Two of the other Commission members, Lord Faulks and Jonathan Fisher produced a separate paper entitled 'Unfinished Business' in which they stated that, 'there are strong arguments that the cause of human rights, both in the United Kingdom and internationally, would be better served by withdrawal from the Convention and the enactment of a domestic Bill of Rights'. There is undoubtedly a section of the Conservative Party which believes strongly that the United Kingdom should leave the Convention, due to decisions of the European Court on issues such as prisoners' voting rights. Under Article 65 of the European Convention, the United Kingdom could denounce its adherence to the Convention after giving six months notice of its intention to do so. However, it is debatable whether such a development would ever constitute a politically viable option. Given the high levels of support for the Human Rights Act which the Bill of Rights Commission found in its consultations, it is very doubtful whether such a move would prove to be popular among the public. Also, it is likely

that leaving the Convention would make the United Kingdom the subject of potentially damaging criticism on an international level, and open to allegations of insufficient respect for human rights standards.

### *The Human Rights Act 1998 (Repeal and Substitution) Bill*

In 2012 Fenwick remarked that, 'The appetite of a number of senior Conservatives for repeal of the (Human Rights Act) and diminution of Strasbourg influence appears undiminished, even enhanced, in the context of the Coalition.'21 This fact is clearly illustrated by the introduction of the Human Rights Act 1998 (Repeal and Substitution) Bill by Charlie Elphicke, the Conservative Member of Parliament for Dover and Deal. The Bill was also supported by 11 other Conservative MPs. Although the Bill was later withdrawn, an examination of its contents is nevertheless instructive as the Bill demonstrates the level of opposition among certain sections of the Conservative Party to the Human Rights Act.

Section 16 of the Bill stated that, 'The Human Rights Act 1998 is repealed', while under section 17, no provision of the European Convention, judgment of the European Court, opinion or decision of the European Commission of Human Rights or decision of the Committee of Ministers taken under the Convention would be regarded as binding on any person or on any public authority. As regards what would be put in the place of the Human Rights Act, the Bill set out a catalogue of rights (referred to in the Bill as 'UK rights') and also a very limited number of responsibilities. The operative mechanisms of the Bill contained strong similarities to those of the Human Rights Act, which reflects the finding of the Bill of Rights Commission that the mechanisms contained in the Act are working effectively.

Section 2(1) of the Bill stated that when determining a question which has arisen in connection with a UK right, a court 'may take account of ' judgments of the courts in Australia, Canada, New Zealand, the United States of America or any country having a common law-based judicial system; the European Court of Human Rights; or a court in any other jurisdiction which may be relevant to the UK right under consideration. This provision contained similarities to section 2(1) of the Human Rights Act, which states that the courts 'must take into account' the judgments of the European Court. However, under the Bill, although the UK judiciary would be permitted to take account of the judgments of the courts listed, there would be no actual obligation to do so. Also, and most obviously, the proposed section 2(1) potentially covered the jurisprudence of all courts outside of the United

Kingdom, with no especial position being afforded to the jurisprudence of the European Court.

Section 2(2) of the Bill stated that,

> A court or tribunal determining a question which has arisen in connection with a UK right shall take into account all the facts and circumstances of the case, including the conduct of the person seeking to assert the UK right (including his adherence to the responsibilities set out in Article 23 of Schedule 1) and whether it is fair, equitable and in the interests of justice for such UK right to be applied in relation to the question at hand.

This provision sought to link the entitlement to rights to the exercise of responsibilities, and envisages situations in which courts may decide that a right should not be applied, essentially due to the conduct of the person seeking to rely on the right. It is however doubtful whether such a provision would ever receive sufficient support to be enacted, given that the majority of respondents to the consultations carried out by the Bill of Rights Commission indicated that they were of the view that rights should not be linked to the exercise of responsibilities. It is also doubtful whether the courts would apply a somewhat vaguely drafted provision such as this in a manner as to prevent individuals from relying on rights, as such an approach would be contrary to internationally accepted human rights principles. No guidance was given on how the courts should take into account the conduct of the person seeking to assert the right, and it is difficult to imagine that there would be a great many cases in which the courts would hold that it would be unfair to apply a right. From a purely pragmatic perspective therefore, it is unlikely that such a provision would make any great difference to the outcomes of cases. Nevertheless, from a theoretical perspective, linking the entitlement to rights with conduct in this manner strikes at the very heart of the foundations of human rights in a deeply troubling manner.

As in the Human Rights Act, section 3 of the Bill related to the interpretation of legislation by the courts. Section 3(1) stated that, 'When reading and giving effect to legislation in light of the UK rights, the words and sentences of legislation must be construed in accordance with their ordinary and natural meaning.' Section 3(2) provided that, 'Where the meaning of legislation arrived at in accordance with subsection (1) is ambiguous, it may be presumed that a possible meaning that is compatible with the UK rights was intended, unless the contrary intention appears.' The Bill therefore

adopted a much more restrictive approach as to the interpretation of statutes in accordance with rights than does section 3(1) of the Human Rights Act, which states that, 'So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.' A fairly liberal approach has been taken by the courts to section 3(1), with the seminal case on interpretation being that of *Ghaidan* v. *Godin-Mendoza.* However, under section 3(1) of the Bill, legislative provisions would have to be construed in accordance with their ordinary meaning, with the question of a possible rights-consistent interpretation only arising if there is ambiguity. Indeed, this is the approach that the UK courts currently take towards the provisions of international treaties that are not incorporated into domestic law. It seems somewhat odd that so-called 'UK rights' would not be afforded a higher status under the Bill. Section 4 of the Bill contained a declaration of incompatibility mechanism, which is very similar to that found in section 4 of the Human Rights Act. It is however likely that this mechanism would be used much more frequently by the courts under the Bill than is currently the case under the Human Rights Act, due to the extremely limited circumstances in which section 3(2) could be used. If a declaration of incompatibility is issued, it is up to Parliament to decide whether the legislation in question should be amended to make it compatible with rights, as opposed to the courts simply applying a rights-consistent interpretation using the interpretative obligation. Therefore, the Bill would decrease the role of the courts, relative to Parliament, as regards human rights issues. Section 7(1) of the Bill stated that, 'It is unlawful for a public authority to act in a way which could not reasonably be regarded, in all the facts and circumstances of the case, as compatible with the UK rights.' This provision would raise the threshold for a finding of unlawfulness from that which is currently applied by the courts under section 6(1) of the Human Rights Act, which states that, 'It is unlawful for a public authority to act in a way which is incompatible with a Convention right.' Indeed the reference to reasonableness brings to mind the *Wednesbury* standard which is applied in judicial review cases which do not involve the Human Rights Act. Section 8 of the Bill provided a right of action for breach of the duty on public authorities which is broadly similar to that contained in section 7 of the Human Rights Act. Section 9(1) of the Bill stated that,

In relation to any act of a public authority which the court finds is unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate, unless the act

was reasonable with regard to all the circumstances, including a reasonable understanding of primary or subordinate legislation applying to the public authority concerned.

The equivalent provision of the Human Rights Act is found in section 8(1), which states,

In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.

It is notable that the caveat placed on section 9(1) of the Bill appears to be superfluous. Section 9(1) would only come into operation if a court has already found that a public authority has acted in a way which could not reasonably be regarded as compatible with the UK rights, and that the public authority in question was not caused to act in such a manner by provisions of primary or subordinate legislation.24 It would seem peculiar if the court then decided that the actions of the public authority were in fact reasonable for the purposes of section 9(1).

Section 11 of the Bill contained a power for Ministers of the Crown to take remedial action in respect of legislation declared under section 4 to be incompatible with UK rights. This mechanism is broadly similar to that found in section 10 of the Human Rights Act. Sections 13 and 14 of the Bill contained particular provisions relating to freedom of expression and freedom of thought, conscience and religion which are almost identical to those found in sections 12 and 13 of the Human Rights Act. Section 15 of the Bill would place an obligation on a Minister of the Crown who is introducing legislation to make either a statement that the provisions of the legislation are compatible with the UK rights, or a statement that the government nevertheless wishes to proceed with the legislation in the event of incompatibility. This procedure is identical to that of the making of statements of compatibility with the Convention rights under section 19 of the Human Rights Act.

The rights and responsibilities themselves were found in Schedule 1 to the Bill. The rights listed were heavily based on those found in the European Convention, and indeed the wording used was for the large part identical to that of the Convention rights. The differences between the rights in the Bill and the Convention rights tended to be related to issues which have been discussed by the media in the United Kingdom in recent times. For example, two provisos were added to

the right to free elections, whereby this right 'shall not entitle a person to vote in an election if that person is in detention under the sentence of a court handed down for a criminal offence', and 'shall not entitle a person to vote in an election if they are not a British citizen.' Article 18 of the Schedule would afford British citizens a right to challenge extradition. However under Article 22(2), 'No person who is not a British citizen may rely on any Article in this Schedule to delay, hinder or avoid deportation or other removal from the United Kingdom.' Article 22(3) stated that,

A public authority may take such action in relation to a person as it believes to be appropriate in the interests of national security or public safety if it reasonably
believes that there is a clear and present danger to national security or public
safety presented by that person; but such action shall not include deprivation of life...or torture or inhuman or degrading treatment or punishment (though, for the avoidance of doubt, such action may include extradition or other removal from the United Kingdom).

Article 16(1) provided that,

In a dwelling, a person…has the right to use force against someone for the purpose of defending himself or others from violence or a sexual crime or for protecting property from crime, where he believes the person he uses force against is in or entering the dwelling as a trespasser; but the force used must not be grossly disproportionate in the circumstances that he believes exist.

However, Article 16(2) stated that, 'This Article applies in England and Wales only.' It certainly seems that affording a right to persons in only particular parts of the United Kingdom would be problematic, given the fact that human rights are based upon the principle of universality!

A short list of responsibilities was found in Article 23. The duties encompassed were obeying the law; rendering civil or military service when this is required for the country's defence; supporting, nurturing and protecting one's children; respecting and upholding basic public order; seeking to support oneself without recourse to a public authority; and rendering help to other persons who are in need of assistance, where reasonable and to the best of one's ability. Overall, very little attention was given to the concept of responsibilities in the Bill. Alt-

hough it is a much repeated argument that rights should 'go hand in hand' with responsibilities, linking the two concepts is in practice problematic. One of the reasons for this difficulty is that the very essence of human rights is that rights are afforded to individuals simply by virtue of the fact that they are human beings. The virtuosity or otherwise of their conduct is irrelevant. Attempting therefore to link the entitlement of an individual to human rights to the exercise of responsibilities is, at the most basic level, incompatible with the principles which form the very foundation of the human rights discourse. Thus when those seeking to connect rights with responsibilities actually attempt to draft a legislative instrument in this vein, it seems that the product tends to be simply a bill of rights with very few meaningful references to the concept of responsibilities. For example, a Charter of Rights and Responsibilities Act was passed in the Australian state of Victoria in 2006. However, although the term 'responsibilities' is included in the title of the legislation, there is very little reference to the concept of 'responsibilities' in the Charter's substantive provisions.

The Human Rights Act 1998 (Repeal and Substitution) Bill was withdrawn following the second reading debate in March 2013. Nevertheless, the very fact that such a detailed Private Member's Bill was introduced is evidence in itself of the deep dissatisfaction within certain sections of the Conservative Party regarding the incorporation of the Convention rights into domestic law by the Human Rights Act. Although there are great similarities between the Bill and the existing Human Rights Act, there are nevertheless aspects of the Bill which are deeply problematic, such as the inclusion of provisions which are in direct conflict with cases of the European Court, such the decisions in *Chahal* and *Hirst*. In the Parliamentary debate on the Bill, Elphicke commented that it was drafted 'in such a way as to leave it open to the Executive to decide whether they wished to remain party to the Convention or to withdraw from it altogether.' However, the enactment of provisions which directly conflict with jurisprudence of the European Court would in fact make the United Kingdom's continued membership of the European Convention untenable.

### *Future Prospects*

The question of a UK Bill of Rights remains in a state of uncertainty. Although there is a strong element of the Conservative Party which would wish to repeal the Human Rights Act, the hands of the Conservatives are tied by the fact that they are in a Coalition government

with a party which has the stated aim of protecting the Act. Although the Bill of Rights Commission's report was in favour of a UK Bill of Rights, this recommendation was made on the understanding that such an instrument would incorporate the United Kingdom's existing obligations under the European Convention, and that it would provide no less protection than is contained in the current Human Rights Act. During debate on the Human Rights Act 1998 (Repeal and Substitution) Bill, the Minister for Policing and Justice stated that, 'the Government remain committed to the European Convention on Human Rights and to ensuring that those rights continue to be enshrined in UK law.' Therefore a UK Bill of Rights which contains *less* than the current level of protection is not an option.

Equally it seems that a Bill of Rights containing *more* than the current level of protection is not an option either. Given the current levels of Conservative opposition to the Act as it stands, it is very unlikely that sufficient support would be found for adding to or strengthening the existing catalogue of rights. In addition, from a purely pragmatic perspective, it is difficult to imagine firm conclusions being reached as to what any additional rights should actually be. As Klug comments, the Human Rights Act already includes 'all the standard rights present in bills of rights the world over.' There was certainly no agreement among the respondents to the Commission's consultations who gave their views on this issue. Indeed, the Bill of Rights Commission itself was unable to reach agreement on the possible content of a UK Bill of Rights. In their separate paper, Baroness Kennedy and Philippe Sands commented that,

> We find it difficult to imagine how agreement could be reached on the idea of a UK Bill of Rights, even in principle, when views are so polarised as to what such an instrument might contain. In our view, it would be preferable for form to follow substance, and for any move as to whether there should be a new UK Bill of Rights…to await a time when there is a reasonable degree of consensus as to what such a Bill might contain.

It is difficult to disagree with this statement. There seems to be little point in deciding

that there should be a UK Bill of Rights and then attempting to find rights, additional

to those found in the European Convention, which garner a sufficient degree of public support to merit inclusion, essentially with the sole purpose of justifying the creation of a Bill of Rights.

Even the comments of the members of the Commission who supported a UK Bill of Rights give the impression that they thought it unlikely that any moves would be made on the issue in the near future. All of the Commission's members recognized that, 'To come to pass successfully a UK Bill of Rights would have to respect the different political and legal traditions within all of the countries of the United Kingdom, and to command public confidence beyond party politics and ideology.' Given the current lack of support for a UK Bill of Rights particularly within the devolved nations, as demonstrated by the results of the Commission's consultations, it seems extremely unlikely that such a consensus could in reality be attained in the near future, if at all. All of the members of the Commission were of the view that any future debate on the issue must be sensitive to issues of devolution. In particular, it would be essential to await the outcome of the independence referendum in Scotland before making any final decisions on the creation of a UK Bill of Rights. The Minister for Policing and Justice later commented in the course of Parliamentary debates that 'it is difficult to fault the logic of that conclusion, which provides a persuasive reason as to why now is not the time to embark on wholesale changes to the human rights framework.'

### *Conclusion*

In conclusion therefore, it is highly probable that the Human Rights Act will continue in its present form, at least for the foreseeable future. It has been stated by the Bill of Rights Commission, and accepted by the Government, that steps should not be taken as regards any UK Bill of Rights until after the referendum on Scottish independence. Even beyond the referendum, it is doubtful whether a UK Bill of Rights will come to fruition. According to the Commission's report, the key argument for the creation of a UK Bill of Rights is a perceived lack of public 'ownership' of the Human Rights Act. However, the Commission's consultations found that there is in fact no widespread problem of this nature, and that any such 'ownership' issue is restricted to certain parts of England. It seems that the implementation of education campaigns on the Human Rights Act in the areas in question would constitute a more logical approach than attempting to enact a UK Bill of Rights Act, particularly when the Commission found that there is substantial opposition to such a measure. Even if there were an 'ownership' problem, it is unlikely that the

type of Bill of Rights suggested by the Commission, based primarily on changing the wording of the Convention rights, would ameliorate the situation.

Nevertheless, despite the fact that the Government's official position is that it remains committed to the rights contained in the European Convention and to ensuring that those rights remain enshrined in UK law, there are sections of the Conservative Party which are strongly opposed to the continued incorporation of the Convention rights. The strength of this opposition may be seen in the introduction of the Human Rights Act 1998 (Repeal and Substitution) Bill. However, the key point is that the cause of the rules which are perceived as problematic is not the Human Rights Act, but rather the case law of the European Court, which would be binding on the United Kingdom regardless of the existence of the Act. If the objection is to the decisions of the Court in cases such as *Chahal* and *Hirst*, the replacement of the Human Rights Act with a UK Bill of Rights will never provide a solution.

***Abstract***

It is now over 15 years since the Human Rights Act was enacted in November 1998. Although in legal terms it is difficult to argue with the proposition that the Act is working in an effective manner, in political terms the Act remains one of the most highly debated pieces of legislation on the UK statute books. In recent years, there have been numerous calls for the repeal of the Act, and for its replacement with a 'UK Bill of Rights'. Such calls led to the establishment of a Commission on a Bill of Rights, which issued its final report in December 2012. Little progress has since been made on the issue. One notable occurrence however was the introduction of the Human Rights Act 1998 (Repeal and Substitution) Bill, a Private Member's Bill which was eventually withdrawn in March 2013. This article seeks to assess the current situation regarding the Bill of rights debate, and ultimately the question of the future prospects of the Human Rights Act, an issue of immense legal significance. Overall, it will be questioned whether the enactment of a UK Bill of Rights would constitute an improvement on the current position under the Human Rights Act.

## ЛИТЕРАТУРА

1. Ian D. Codifying the Law of Criminal Evidence / D. Ian // Statute Law Review. — 2014. — Vol. 35. — No. 2. — P. 107—119.

2. Hart N. Whole-life Sentences in the UK: Volte-face at the European Court of Human Rights? / N. Hart // The Cambridge Law Journal. — 2015. — Vol. 74. — No. 2. — P. 205—208.

3. Lamond G. Analogical Reasoning in the Common Law / G. Lamond // Oxford Journal of Legal Studies. — 2014. — Vol. 34. — No. 3. — P. 567—588.

4. McQuigg R. The Human Rights Act 1998 — Future Prospects / R. McQuigg // Statute Law Review. — 2014. — Vol. 35. — No. 2. — P. 120—132.

5. Simplified Forms of Procedure in Criminal Matters – Regional Criminal Procedure Legislation and Experiences in Application / Ed. Jovanović I., Stanisavljević M. — Belgrad, 2013. — 392 p.

6. Spector L. A. Types of Official and Service Offences / L. A. Spector // Statute Law Review. — 2015. — Vol. 36. — No. 3. —P. 228—232.

7. Reforming Juvenile Justice // Ed. by Junger-Tas J., Dünkel F. — Springer, 2009. — 260 p.

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