TRANSFORMING CULTURE?
PRINCIPLE VS INSTRUMENTAL ENGAGEMENT WITH HUMAN RIGHTS

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> This Bill will bring human rights home. People will be able to argue for their rights and claim their remedies under the convention in any court or tribunal in the United Kingdom. Our courts will develop human rights throughout society. A culture of awareness of human rights will develop (Lord Chancellor 1997).
>
> On the 'instrumental' side, rights discourses are used to make political, economic, and social demands which we may expect, typically, to include demands for the 'institutionalization' and 'enforcement' (i.e. the 'realization') of such rights. However, the 'objective' on the instrumental side reminds us that rights claims are the tool, not the end of social and political struggle (Stammers 1999:1006).

Introduction

Until the Human Rights Act (*HRA*) was enacted in 1998, British law did not recognise any concept of 'human rights'. While there were international obligations to adhere to various human rights agreements and there had long been oversight of UK law and practice via the European Court of Human Rights, neither of these external elements had had a significant impact on the domestic legal environment. All this changed in November 1998 when the *HRA* received Royal Assent. Though the measure did not come fully into force until 2 October 2000, the need to assess all proposed laws for human rights compatibility kicked in almost immediately, as did the requirement for the devolved administrations in Scotland, Wales and Northern Ireland to adhere to the *HRA's* terms. All judges in England and Wales were 'trained' in the new law. That training was a remarkable phenomenon itself as it was often by activist lawyers whose knowledge of the subject had grown out of their progressive political perspectives; a contrast to the usual interests before the senior British judiciary. As such the *HRA* challenged dominant practices in legal culture even before it was enacted. The major law firms, the law society and the Bar Council embarked on similar training projects, as did many public authorities including the police and local authorities. Subsequently, civil society organisations developed training and development programs around the principles of the *HRA* to engage other civil society organisations and public authorities. It is unlikely that there has ever been such a huge commitment to education in advance of a single legislative measure in UK history.

While this account reflects the extent of the education that accompanied the introduction of the *HRA*, very little is known about its effect. To what extent did this wave of education influence awareness and application of the *HRA*? Did it change legal culture, and how? Has the introduction of the *HRA* resulted in a broader societal engagement with human rights, outside of legal practice? Are human rights making a difference to organisational culture and practice in other areas? These questions are central to understanding how human rights have been received in British law and culture, yet they have not been addressed in any substantial way by scholarship to date. In view of the criticism of human rights literature being 'overwhelmingly prose-rich and data-poor' (Kaufmann 2005:354), there is clearly a space for original, empirical research into the cultural impact of human rights. Three Centres at the London School of Economics are preparing such a study. The Centre for the Study of Human Rights, the Centre for Civil Society and the Mannheim Centre for Criminology plan to undertake in-depth empirical analysis to examine the

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cultural impact of the introduction of human rights in domestic law, looking at the specific sites of civil society, law and the executive.

This essay has emerged from the initial scoping process for that study and addresses a question that is central to the analytical framework of the research. Extensive consultation on the project revealed a key distinction between approaches to human rights as their own objective (an end in themselves) and approaches which saw human rights as a vehicle through which to achieve other objectives (a means rather than an end). While it is a distinction that emerged most strongly in the approaches of civil society organisations, it was also evident in those working in legal practice and in various aspects of executive function. This idea of principle versus instrumentality has elsewhere been termed the interpretation and implementation of normative principles (Wright and Rwabizambuga 2006:97); or as a dichotomy between cultural transformation versus compliance. The quotation from Stammers at the start of this article suggests a definitive position on this question, yet consultation with civil society organisations and legal practitioners painted a far more ambiguous picture. The purpose of this article is to consider whether there is a significant distinction between the principles of human rights and the way they are used. Through an analysis of the impact of human rights in the areas of civil society, law and the executive, this essay considers what, if any, is the difference between principle and instrumental approaches, or whether the concepts of principled and instrumental approaches simply reflect different facets of cultural engagement with human rights.

Assessing cultural impact is no small feat. In the first instance, the meaning of ‘culture’ could be an essay in itself. While such a discussion is beyond the scope of this article, it underscores the necessity of clarifying the boundaries of the term as it is used here, in comprising the three areas of civil society, law and the executive. Within these areas I consider the operational and organisational cultures of individuals and organisations engaging with human rights. This framework allows an analysis of the principled or theoretical positions through which individuals and organisations understand human rights, and the processes and practices they follow in their engagement.

However, delimiting cultural terrain is only half the problem. Equally important is the question of what is meant by impact. Linking ‘cultural’ with terms like ‘impact’, ‘effect’ or ‘transformation’ signals some of the processes that are of interest in this project. Yet these terms also carry particular meanings which can be vastly contrasting, depending on one’s standpoint. For example, in his treatise on the impact of human rights on the armed forces, Rowe argues that conscripts should have more human rights protection than volunteers because they are not making a choice to serve in the military (Rowe 2006). Leaving aside the merits or otherwise of applying the universal principles of human rights in such a relativist manner, what is interesting is the attempt to assess the impact of human rights on the military in the first place. Rowe’s project required parallel lines of inquiry such as how existing organisational cultures have been challenged by the human rights framework; and whether citizens and non-citizens are treated equally under domestic human rights law. Through a review of literature on different approaches to human rights, this essay aims to draw some conclusions about what is meant by a study of cultural impact in terms of human rights in civil society, law and the executive.

While the *HRA* is a British law, the literature discussed here include international perspectives. Beyond the utility of a theoretical context for analysis, the international literature is useful for its comparative dimension. As Newburn & Sparks argue, comparative policy analysis helps us engage with the ‘complex mix of structural, subjective and simply serendipitous influences’ that are central to the development of policy, and so

to any reliable account of that process (Newburn and Sparks 2004:6). In that way international perspectives provide an important framework for a serious, sustained analysis of domestic policy.

Finally, it is necessary to explain the use of the *HRA* as a key point of reference in the following discussion. Initially, the focus on specific legislation was motivated by the need to set a timeframe and delineate processes that could be subjected to empirical research and analysis. A wholescale study of the cultural impact of human rights could go back as far as the Universal Declaration of Human Rights in 1948, which is well beyond the scope of the present research. Moreover, the representativeness, benefit and application of such research would be difficult to establish. The *HRA* is significant because it embodies the domestic incorporation of international human rights law. Studying a process of cultural engagement through the enactment of specific legislation enables some broad generalisations about shifts and trends in how human rights are being engaged with, while also paving the way for deeper insights into culture and practice through the study of particular sites effected by that law.

Civil Society

As the LSE's Centre for Civil Society observes, 'the concept of civil society is contested historically and in contemporary debates' (Centre for Civil Society 2004). The present research adopts the following definition provided by that Centre.

> Civil society refers to the arena of uncoerced collective action around shared interests, purposes and values. In theory, its institutional forms are distinct from those of the state, family and market, though in practice, the boundaries between state, civil society, family and market are often complex, blurred and negotiated. Civil society commonly embraces a diversity of spaces, actors and institutional forms, varying in their degree of formality, autonomy and power. Civil societies are often populated by organisations such as registered charities, development non-governmental organisations, community groups, women's organisations, faith-based organisations, professional associations, trades unions, self-help groups, social movements, business associations, coalitions and advocacy groups (Centre for Civil Society 2004).

The terrain of civil society is particularly important for any analysis of cultural transformation regarding human rights in Britain. That terrain includes civil society organisations and other networks engaged in lobbying for or against the *HRA*; civil society and non-government organisations who have been mobilised to work within the human rights framework in the UK, including those who did not previously; and British-based organisations working overseas who have shifted towards a human rights framework in their international work.

The distinction between conceptions of human rights as objectives or as instruments to achieve other objectives is most evident across civil society. The question raised by such a distinction is whether these are contrasting approaches or whether they are simply different expressions of cultural engagement with human rights. In this section I explore these issues as they emerged during initial consultation for the present research project and in the civil society literature. In subsequent sections I consider how civil society has been constructed within the framework of the *HRA*, and how civil society organisations have responded to that construction.

The best way to understand the principle-versus-instrument dichotomy is to examine the approaches of various actors in civil society. Organisations like Human Rights Watch and Amnesty International work towards the realisation of human rights *per se*, as evidenced by their by-lines of 'defending human rights worldwide' and 'working to protect human rights' respectively. Each organisation monitors and advocates for the protection and promotion of human rights in the countries in which they work, reporting and criticising abuses of those rights when they occur.

Other civil society organisations are engaged in developing human-rights based approaches to their work in various areas. The British Institute of Human Rights has pointed to 'the failure of a wider culture of respect for human rights to take root' and has attributed this in part to the 'narrow legal' definition of public authorities in *HRA* as well as failure of cultural take-up of human rights (British Institute of Human Rights 2007:2). As a response to this critique, the Institute describes its work as 'supporting people to use human rights principles and standards to improve their own lives and *as a tool* for organisations to develop more effective public policy and practice' (British Institute of Human Rights 2008, emphasis added). That approach is demonstrated in the Institute's work with the National Health Service to use human rights-based approaches to improve health and social care. Another example is the Institute's work with the National Council on Voluntary Organisations to 'explore with charities, voluntary organisations and community groups how key human rights standards, such as the Human Rights Act, and frameworks, such as economic social and cultural rights, can inform their campaigning work' (National Council of Voluntary Organisations 2007).

In these alternative constructions of human rights it is clear that some organisations approach human rights as the sole objective of their work while others perceive them as tools to achieve additional objectives. These alternative approaches emerged as a stark difference during initial consultation for the present research, leading to the question of whether principled approaches to human rights differed from instrumental approaches. As will become clear shortly, that distinction also exists in the literature. The key question this raises is whether these are in fact divergent approaches? Are the varying objectives of human rights organisations speaking to contrasting conceptions of human rights? Do they suggest contradictory forms of practice by those working towards the realisation of human rights?

Alternatively, are these distinctions forged in language only; a product of the terminology of particular organisational cultures, but not actually reflective of a broader, substantive difference? In an increasingly corporatized landscape, does the terminology of 'human-rights based approaches' sit comfortably alongside other terms like 'learning events' or the concept of performance indicators? Are these simply different styles and strategies for expressing a similar enterprise, namely the realisation of human rights?

A third alternative paints an even more complicated picture involving elements of both options. The realisation of human rights as an end in themselves may well be a different endeavour to using human rights-based approaches to address social exclusion or poverty. However, it may also be that the former depends upon a broad understanding and support for human rights within society; a support which both shores up and goes beyond the political will of state structures. If that is the case, then instrumental approaches to human rights may simply be another way to bring about a cultural transformation - widespread public affirmation of human rights – thereby laying the groundwork for the former. These major research questions underpin the proposed study of how human rights have been received in British law and culture. Answering them is beyond the scope of the

present discussion, which simply seeks to consider them through the context of existing research on the practice of human rights.

A key refrain throughout the literature on civil society is the notion that civil society is essential to a functioning democracy. In his reflection on the origins of academic inquiry into civil society, Keane sets out the relationship between civil society and democracy in the following way:

> … the process of democratization cannot be synonymous with the extension of total state power into the non-state sphere of civil society. Conversely … democratization cannot be defined as the abolition of the state and the building of spontaneous agreement among citizens living within civil society. The unending project of democracy … must steer a course between these two unworkable extremes. Democracy is an always difficult, permanently extended process of apportioning and publicly monitoring the exercise of power within politics marked by the institutionally distinct - but always mediated - realms of civil society and state institutions (Keane 1998:9; see also Powell 2007).

This is an idealised account of the centrality of civil society to the democratic state. Other scholars point to the multiple ways in which civil society is conceptualised and operates. For example, Daly & Howell note the well-established literature on 'normative interpretations' of civil society, based on 'ideas of what civil society *should* be like', which has been 'credited with giving civil society its "rhetorical power"' (Daly and Howell 2008:14). However, they argue, 'it is also important to note that there is no single normative vision of civil society, but rather a number of competing interpretations' (*ibid*).

Creating the space for, and giving expression to civil and political rights is often held up as one of the most important aspects of civil society. Yet research has pointed to a decline in societal commitment to civil liberties since the 1980s (Johnson and Gearty 2007). As Gearty argues, 'the general public is both generally less convinced about civil liberties than they were 25 to 30 years ago and reasonably willing these days to contemplate the giving up of freedom where this can be represented as necessary in order to defeat terrorism' (Gearty 2007:57). While Gearty's thesis points to a widespread shift in the popular support for civil liberties, the specific context he considers here is the contemporary attention on terrorism. Some of the most interesting analyses of civil society have emerged within current discourses on security. A growing body of literature has explored attacks by the state on civil society under the guise of countering terrorism. Howell et al suggest that there have been widespread restrictions on civil society in Russia (and other former Soviet states), China and some African countries in the name of preventing terrorism (Howell et al. 2007). In the UK, the so-called 'war on terror' is said to have compounded the resistance of social services to providing support for minority communities (Blake et al. 2008); and there has been widespread criticism of disproportionate surveillance and over-policing in particular communities, namely those with a high proportion of Muslim members (British Muslim Human Rights Centre 2007; Gearty 2007; Pierce 2008). These shifts have compounded other factors that have been narrowing the space for civil society, such as the liberal market economy and globalisation (Daly and Howell 2008).

Declining civil liberties have been observed in ancillary aspects of civil society also. A particular area of concern amongst scholars has been attacks on the academic freedom of researchers. These freedoms have been limited specifically by the introduction of anti-terrorism laws in numerous countries that criminalise the collection of information that *could* be used in the commission of a terrorist attack, regardless of its intended or actual

use (Daruwala and Boyd-Caine 2007; Small 2008 unpublished). In condemning the detention without charge of academics under these laws in Germany, Sennett and Sassen argue that researchers are being persecuted because of 'nameless fears, vague forebodings, and irrational responses' inspired by the international agenda of anti-terrorism (Sennett and Sassen 2007). In the UK, a Masters student at Nottingham University was detained for 6 days without charge after downloading an Al-Qaeda document for his dissertation on international relations (Glendinning 2008). While widely condemned by activists and advocates, his detention was well within the powers of police contained in recent legislation aimed at curbing terrorism. Despite the prevalence of such encroachments on civil liberties, there is very little analysis of whether and how the *HRA* has had an enabling effect upon the space accorded to civil society in general; nor on how civil society has engaged with the principles and objectives of that legislation. In one of the few examples of empirical analysis, Morris has argued that, in response to the hegemony of legal approaches to human rights within the domestic sphere, civil society has successfully positioned itself as an integral player in the development of the law in this area (Morris 2008 forthcoming). She cites examples of civil society organisations who have used their first-hand contact with vulnerable groups such as refugees and asylum seekers to establish expert status in the courts. Morris concludes,

> the role of the courts in will formation could be a vital final stage in the process of civil repair, bringing public opinion more closely into line with a rights based conception of public interest. ... such a linkage could open up the route to a more cosmopolitan citizenry, by endorsing a more expansive conception of human rights (Morris 2008 forthcoming).

Yet one of the interesting positions adopted by civil society organisations seeking to engage with the *HRA* has been their increasing attempt to push engagement with human rights beyond the boundaries of the law. Stammers argues that such attempts are central to the project of ensuring space for civil society *per se*, as much as a strategy for engagement with human rights.

> There is an enormous literature on the international bill of rights and regional human rights instruments dealing with issues such as standard setting, monitoring and reporting, enforcement, and interventions. In short, this is a literature overwhelmingly concerned with the establishment, implementation, and enforcement of human rights as international public law. Without wanting to dismiss the importance of such work, it clearly has some particular limitations from the point of view of recognizing the role of social movements in the construction of human rights. ... Yet it is precisely in their nonlegal form that the link with social movements is most evidently apparent (Stammers 1999:991).

Organisations like the British Institute of Human Rights and the National Council of Voluntary Organisations have suggested that the traditional legal approach has excluded from participation in human rights aspects of civil society less well-versed in legal principle, even if they have the interest and capability to further the realisation of human rights. Similarly, the traditional focus on civil and political rights has been challenged by the increasing assertion of economic and social rights as equally worthy of attention and advocacy by human rights defenders. Although enshrined together in the original declaration of human rights (the Universal Declaration of Human Rights, 1948), economic, social and cultural rights took second place to civil and political rights throughout most of the 20th century (Amnesty International 2008). Less than ten years ago it was argued that 'neo-liberal constructions of power still typically focus exclusively on political power,

economic power being seen as freedom of action in a free market. Bizarrely, economic inequality is not seen as a problem of power at all' (Stammers 1999:999).

The assertion of economic and social rights has also been a key factor in the engagement of many development organisations with human rights principles. As Salm notes,

> relief and development organizations were founded as third sector organizations, to fill roles not taken on by government or business, and to serve as an independent check on government and corporate policies, pressuring for funds and policies to benefit the world's poorest people (Salm 1999:96).

Yet, development-based organisations have had to face the question of why, despite their decades of work, humanitarian problems like poverty are getting worse. Their increasing engagement with human rights principles has represented an attempt to find a new framework in the face of criticisms that development theory masked great divisions within societies, and further that the world development objective was unattainable and undesirable (Eade and Pearce 2000).

It is the engagement of development-based organisations with human rights that provides the first site through which to consider whether the dichotomy between principle and instrumental approaches to human rights is merely semantic. Writing as both scholars and practitioners in the field, Offenheiser & Holcombe proffer the following accounts of what the shift towards human rights has meant for development organisations.

> Instead of focusing on creating an inventory of public goods or services for distribution and then seeking to fill any deficit via foreign aid, the rights-based approach seeks to identify the key systemic obstacles that keep people from accessing opportunity and improving their own lives. From the very outset, the focus is on structural barriers that impede communities from exercising rights, building capacities, and having the capacity to choose (Offenheiser and Holcombe 2003:271).

> A rights-based approach to development bridges theoretical gaps between political, civil, social, and economic rights by understanding how they are interconnected in practice. During the past half-century, specialized civil society organizations like Amnesty International and Human Rights Watch have effectively spotlighted violations of political and civil rights, using the 'stick' of adverse publicity to halt violations, case by case. Civil society has yet to focus on the 'carrots' needed to build social, cultural, and institutional capacity and to create a positive environment that makes honouring rights our new norm. To take a preventive rather than a corrective approach to violations of political and civil rights, development organizations also need to focus on building the economics and social rights that enable people to effectively exercise and defend their citizenship (Offenheiser and Holcombe 2003:286).

One of the questions raised by Offenheiser and Holcombe's account is how much coordination is taking place between and across civil society to its own end? Keane shows how concepts of democracy and governance have been increasingly elided with notions of human rights, particularly in the contexts of non-government organisations working in the area of development. He posits,

> the emerging consensus that civil society is a realm of freedom correctly highlights its basic value as a condition of democracy: where there is no civil society there cannot be citizens with capacities to choose their identified entitlements and duties within a political-legal framework. Yet conservative critics of contemporary civil society have objected - powerfully, in preaching prose - that actually existing civil societies tend to destroy the civility upon which their character as a *civil* society depends (Keane 1998:114).

Yet, in their analysis of civil society under the contemporary anti-terrorism agenda, Howell et al argue there has been very little coordinated response to what amounts to sustained attacks on the space for and organisation of civil society in many countries (Howell et al. 2007). This position was confirmed during consultation with civil society organisations for this research. Some argued that organisations traditionally focused on human rights had directed their attention primarily on state actors and had shown little interest in forging networks with other civil society organisations such as trade unions or those engaged in development work. Yet in the international literature on civil society and development, some organisations have been motivated to engage with human rights because of increasing harassment or endangerment to their staff. Organisations like Oxfam have come to recognise these as attacks on civil society more broadly, and have responded by supporting their civil society colleagues engaging with both state and non-state actors. As such, human rights have become both the theoretical framework through which to conceptualise such attacks on civil society, and a practical strategy for strengthening civil society in response to them (Offenheiser and Holcombe 2003). Meanwhile, others have argued that translating human rights into development objectives can provide a mutually reinforcing approach to the objectives of both human rights and development:

> it may be pertinent to explore potential synergies between the existing in-depth country diagnostic tools for governance and corruption, and integration of relevant and measurable human rights dimensions through these surveys of enterprises, citizens, and public officials (Kaufmann 2005:383).

Here then are a number of examples of human rights operating as both principle, for example in providing the basis on which to defend the legitimacy of a civil society organisation's presence in a developing country; and as instrument, in providing the means through which to collaborate with other civil society organisations, and so to strengthen their position. The linking of human rights and development at the highest levels of international co-operation, such as through the establishment of the UN Millennium Development Goals, has served to re-enforce the notion of human rights-based approaches to other issues. The practical implications of this are no more evident than in the statement by former Secretary-General of the United Nations, Kofi Annan, that 'it is my aspiration that health will finally be seen not as a blessing to be wished for, but as a human right to be fought for' (as cited in British Institute of Human Rights 2007).

This analysis of civil society has sought to explore how principle and instrumental approaches to human rights have been perceived as competing frameworks, and to raise some questions about whether this is so. Underpinning those questions is an interest in cultural engagement and transformation. In the next section I consider these aspects in relation to the law, through the question of how legal culture has shaped and been shaped by human rights since their introduction in domestic law.

Law and Legal Culture

As already stated, there was an unprecedented level of education of lawyers and the judiciary around the enactment of the *HRA*. Much of the literature on law and human rights in the UK focuses on the development of case law and interpretation (see for example Human Rights Law Review; Human Rights Quarterly; English and Havers 2000; Padfield 2002; Cooper and Jowell 2003; Gearty 2004; Richardson 2005; Poole and Shah 2008 forthcoming). Yet the effect of such comprehensive education on legal culture and practice has been little discussed. That is a significant gap in the existing research and an area of much-needed empirical evidence which would both enhance knowledge about the implications of the *HRA* and about the effect of legal education more generally.

To begin with, it is important to state the meaning of 'legal culture' as it is being used here. The question of whether to include systems that revolve around the law, such as the criminal justice system, is open to debate. These are systems which derive from legislation and legal practice but also intersect with other actors (not the least of which is the executive, discussed below). In the interests of brevity I have taken a fairly narrow view in defining legal culture to include legislation, legal practice (by both the judiciary and advocates) and legal education.

While the effect of the *HRA* on legal culture has received very little attention, there is a body of work on legal culture in general and particularly prior to the introduction of the *HRA*. One major critique advanced has pointed to the generally conservative tenor of legal practice. As Clements notes, 'domestic law has signally failed to "suit itself" to the radical changes that have occurred in the latter part of this century' (Clements 1999:74). That established critique has been developed in assessments of the relationship between international human rights law and domestic statute. Thomas points out that in both the USA and the UK, human rights have traditionally been held at arms length by governments who have perceived them as foreign values, and who have resisted as undemocratic their implementation domestically (Thomas 2008; see also Metcalfe 2007 and Clements 1999). Many scholars of British human rights have pointed to the resistance of politicians on both sides of the political spectrum who have perceived the introduction of human rights as a threat to executive discretion and the independence of the state (see for example Gearty 2006; Gearty 2007; Klug 2007). The British judiciary has been criticised in equal measure for a generally conservative response to human rights in domestic law. Judges in the European Court of Human Rights have been praised for using principles of the law as a 'living instrument' to be 'practical and effective' as additional instruments for interpreting the European Convention of Human Rights, including for issues not envisaged by the Convention's drafters (Mowbray 2005). By contrast in the UK, the *HRA* has been met by judges who have 'not liked these laws', and who 'have found in the language of human rights a ready way of articulating their distaste' (Gearty 2006:97).

Yet conservative reactions by politicians and the judiciary have not determined the reception of domestic human rights law in legal culture more broadly. Indeed, some have argued that human rights law has the potential to expand the boundaries of what has been traditionally accepted as legal culture. For example, in a paper on how to use the recent human rights law in Victoria (Australia), Tobin argues that the opportunities to use human rights law are twofold: for 'litigation - the development of a case plan to assist the individual interests of a particular client; and advocacy - the development of submissions to agitate for law reform or provide a response to a proposed law reform or initiative of the Government which entails broader issues of justice' (Tobin 2008:4). In the UK, Gearty has noted that human rights have worked 'both as law and as a stimulus to a political rethink'

(Gearty 2006:97); while Morris has argued that parliament is an 'increasingly imperfect vehicle for participatory rights, and that the process of litigation can itself provide an opportunity for participation by means of argument before the court on the nature and scope of rights' (Morris 2008 forthcoming). In each of these examples the law has been envisaged as a way of engaging with democratic principles and human rights *beyond* the strictures of legislative debate and interpretation.

These perspectives suggest that the role and utility of the law extends from the detail of legislation and caselaw to fulfilling a broader social purpose in producing cultural change. For example, Gearty's critique of the conservatism of the judiciary leads him to conclude that democracy is best served by the introduction of thorough, competent law in parliament rather than an over-reliance on judicial policy-making via the development of caselaw (Gearty 2006). His argument goes to the heart of attempts to realise civil and political rights. This provides an important link to the function of civil society, as discussed earlier. It also suggests that approaches to human rights as principle or instrument might be contingent on their context rather than being deliberate and opposing strategies.

This brief analysis of legal culture shows that not only does law provide the institutional framework in which civil and political rights are enshrined; it can also play an institutional role in supporting and sustaining (on the one hand) or stifling and restraining (on the other) the extent to which human rights take hold in society. The idea that legal culture provides meaning both through the creation of law and through its practice is a second example of how the theoretical distinction between the principles and instrumentality of human rights are far more convergent in practice.

The Executive

As the third site of cultural impact in this research, the executive is perhaps the hardest aspect to define. One of the revealing points in consultation for the present research was how the term 'executive' was used and understood differently across academics and those working in human rights policy or advocacy. Some participants took an all-of-government approach, using the term 'executive' to refer to the government and the bureaucracy collectively. Others saw the executive solely as the administrative arm of government and in that sense used it to refer to the bureaucracy alone. For the purpose of this research, the technical distinction between the government as embodied in political processes - such as the Cabinet - and the bureaucracy which supports the political function is immaterial. On the contrary, the project seeks to engage with the full range of these aspects of executive function. As Keith suggests,

> understanding the tension between the bureaucracy and the political imperative consequently illuminates both the value of the former and its limits; the proper sense of the political as a notion of 'ethics in public' and its limits when translated into the public arena of the tabloid press. Through this situated tension we might then also begin to understand the sort of knowledge that might be performatively helpful in constituting a public rather than one in which artefacts of academic production sit as ornaments in a 'public sociology' (Keith 2007:328).

In so far as this project promises some form of public sociology, it seeks to conduct an empirical analysis of the difference that has been made to political process overall, since the enactment of the *HRA*.

However there was a third meaning to executive which emerged from our early consultations and which raised a much more important question about methodology in defining the terrain. The executive was taken by some to refer to those agencies or organisations engaged in public services. That meaning derived, in part, from the definition of public authorities contained in the *HRA*.

> In this section "public authority" includes (a) a court or tribunal, and (b) any person certain of whose functions are functions of a public nature, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament (Human Rights Act *1998:s 6(3)*).

While the legislation defined public authorities in order to ensure that the law could be applied to more than government agencies, its effect has been to elide government and non-government operations where they overlap in the provision of services. As such, there has been a fairly widespread shift amongst people working within the framework of the *HRA*, in the relationship between public services, the executive and civil society. So much so that some have argued for a new terminology of 'public interest companies' which are charged with delivering public services in the public interest and constitute a third way within the public sector (Prabhakar 2004).

The idea that civil society is embodied in the delivery of services has been strongly criticised for narrowing of its traditional terrain. Critics have asserted that the government's shift towards emphasising civil society organisations engaged in service delivery is because they produce measurable outcomes and are more politically palatable than aspects of civil society that provide the space for the realisation of civil and political rights, particularly where that space is filled by criticisms of the government. This is a trend that has been observed internationally. For example in Australia, reforms under the former (conservative) government stipulated that federal funding was not to be spent on civil society organisations whose activities included advocacy (Australian Council of Social Services (ACOSS) 2003).

The way civil society has been constructed under the *HRA* will be an important question in the broader project. Noteworthy here is how these different perceptions of 'the executive' revealed the necessity of defining the executive in each context where it is used. For the present purpose, the executive includes public administration and public authorities as set out under the *HRA* (for example schools, hospitals, prisons and the civil service); organisations engaged in profit-making enterprises but also termed public authorities under the *HRA* because of their role in service delivery (for example care homes); and politics at the macro level (the government and Cabinet). At the same time, the notion of a definitive distinction between government and non-government is an attempt to impose a structure for the purpose of clarity in writing and comprehension. The weakness of such an approach soon becomes evident from the highly connected nature of the issues (and hence the analysis) across government and non-government spheres.

In the discussion of legal culture above, one of the criticisms made of the judiciary was that their inherent conservatism had the potential to undermine the exercise of democracy, which was better preserved in the province of effective parliamentary process. The question of political versus judicial judgment has particular resonance in human rights discourse. In her analysis of the implications of Human Rights Committee caselaw on the Good Friday Agreement (GFA), Joseph discusses the case of two political prisoners who were subjected to ongoing detention despite the release provisions of the GFA (*O'Neill and Quinn v Ireland*) (Joseph 2007). While they qualified for release under the conditions

of the GFA, the Court found that the Justice Minister 'nevertheless had an "absolute discretion" on whether to release any prisoner under the GFA' (Joseph 2007:569). Joseph argues,

> The O'Neill and Quinn case throws up a perplexing question: to what extent, if ever, should human rights be sacrificed for the purposes of political necessity? The decision served a utilitarian purpose by permitting the singling out the authors for non-release, perhaps unfairly, to ensure ongoing public support for a process that appears to have brought peace to a long-standing bloody conflict. Whilst human rights are not inherently utilitarian, utilitarianism is certainly an occasional factor in determining whether a human right has been permissibly limited in order to facilitate a broad public interest such as public order or national security. Nevertheless, acceptance of 'political necessities' as a legitimate reason for the limited application of human rights sets a dangerous precedent which has the capacity to sacrifice the rights of unpopular minorities to satisfy the whimsical political preferences of the majority (Joseph 2007:574).

Joseph's analysis points to the complexities of the principle-versus-instrumentality dichotomy, and how it has played out in legal debate. However she also shows the complexity in assuming a preference for either political or judicial judgement when it comes to the realisation of human rights. For instance, the idea that human rights and security are diametrically opposed has been widely rejected by advocates and scholars alike (see for example Daruwala and Boyd-Caine 2007; Gearty 2007; Howell et al. 2007; Mercer 2008). Yet Joseph shows that the tensions that underlie such dichotomies are as much structural as substantive, pertaining to decision-makers as much as to decisions made.

Even within the realm of governmental decision-making (political rather than judicial), the executive does not function as a singular element. The complexities of the issues and the variety of actors engaged in debates about law and policy are often as complicated within the various arms of the executive as they are between the executive and other stakeholders. In considering the reception of human rights within the executive, there are a number of key actors involved. The most obvious representatives of government are ministers and state departments. However there are also statutory authorities like the Equality and Human Rights Commission, who has responsibility for ensuring that the various aspects of the legislation are given effect. While not a government department, it is accountable for public funds and would sit uneasily in the category of civil society. Finally, a myriad of parliamentary committees have had either passing or continuous oversight of the *HRA* and its implementation. While the parliamentary Committee on Human Rights is the most widely known, reports from a number of other parliamentary committees or office-bearers have engaged directly with the *HRA* and its implementation (Joint Session between Home Affairs Select Committee and Constitutional Affairs Committee 2006; House of Lords et al. 2008; Lord Carlile of Berriew QC 2008). Thus the executive comprises many actors who represent neither a formal nor singular governmental viewpoint.

If we take government to be a constitutive component of the executive, we can look more closely at the implementation of the *HRA*. Governments the world over have been widely criticised for failing to give effect to their human rights commitments in the contemporary climate of anti-terrorism. Such criticisms have been heard as loudly in the UK as elsewhere (Klug 2002; Gearty 2006; Gearty 2007b). In his analysis of the minutiae of Whitehall's preparations for the introduction of the *HRA*, Croft illustrates how government

was still seeking to defend the existing ground of executive discretion and maintain the status quo wherever possible in terms of policy, even as it spoke of the *HRA* as being about widespread cultural change (Croft 2001). In Scotland, Coope et al noted that 'the biggest challenge in relation to compatibility with the introduction of the Act has faced the Scottish Executive and its practices' (Coope et al. 2001:1.18).

In England, the Home Office developed a 'Compact on Relations between the Government and the Voluntary and Community Sector' the same year the *HRA* was introduced (Home Office 1998). In Roberts' study of the future of independence for the voluntary sector within the Compact framework, he argues that while the Compact was based on principles of partnership, the executive were only capable of engaging with the voluntary sector within the context of free market principles. As a result, participants in his research expressed 'significant reservations about the extent of the Compact's protection of the unique characteristics of voluntary organisations' (Roberts 2007:33). For Roberts, this points to the more fundamental problem of what happens 'if the values of voluntary organisations and government do not coincide' (Roberts 2007:34).

Yet the implementation of policy is rarely a seamless process and changing organisational culture is always difficult. Thus Kendall has credited the 'Compact' between government and civil society, which was central in policies to embed human rights in British society, an idea 'completely without precedent, representing an unparalleled step in the positioning of the third sector in public policy' (Kendall 2000:2). He argues that civil society had increasingly moved into the domain of public policy, and deliberately so under new Labour. Kendall considered this as significant in the history that had led to the notion (and structure) of 'public authorities' under the *HRA* which blurred the distinction between government departments and civil society organisations providing social services. Kendall's analysis opens the prospect of further interrogation of the standpoints of both the executive and civil society itself, on the dual roles of delivering services and creating space for civic participation.

What emerges from this initial analysis of the executive is how, despite the hope of cultural transformation heralded by the Lord Chancellor (opening quotation), engaging with human rights has been as chequered within the executive as without. The bigger study hopes to conduct more detailed analysis into what changes have been brought about in executive function since the *HRA*; and how they have intersected with those in legal culture and civil society.

Conclusion

This analysis reveals the complicated perceptions of and relationships to human rights, both within organisational cultures and across practice in civil society, law and the executive. In this essay I have explored - but not sought to resolve - various tensions arising from different perceptions of the executive, and of the relationship between civil society and service delivery. My central interest has been in the perception of competing approaches to human rights embodied by a conception of human rights principles as objectives in their own right, as distinct from a conception of human rights as tools to achieve other objectives. Here again, my interest has not been to resolve disagreement about which approach is preferable. Rather, I have raised whether these are truly contrasting approaches, or whether they reflect different styles or stages of engagement with the same fundamental project, that is engagement with human rights. Above all, my aim has been to set the stage for a fuller consideration of cultural transformation following

the *HRA*, in the context of debates about its impact in the areas of civil society, law and the executive.

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