

Ugly, deformed and grubby: the common law and human rights¹.

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The English common law springs from the font of the rich man's insecurities. It is a vast watercourse that powers his mills, irrigates his fields and defines the moat that keeps him in his castle and the poor man at bay. The common law is concerned with the retaining of property, with the preservation of privilege and above all, the *status quo*. From it springs the principles of larceny, of trespass, of defamation, of confidentiality, of precedent, of deference.

Human rights law issues from a different source – that of moral concern for victims – slaves and prisoners of war, Jews and Gypsies, underclasses and outsiders. For them it provides sustenance – but it generally flows weakly – in drought, hardly at all. At times and in places however it is in spate – *après la deluge* – at Nuremberg; the Hague; Rwanda.

The common law has learned tolerance – it accommodates many tributaries – it has acquired the knack of cohabitation – at sharing its course; thus with equity it was said that the 'two streams of jurisdiction, though they run in the same channel, run side by side, and do not mingle their waters'.³

5 years ago, the Human Rights Act 1998 opened the sluices and introduced Convention rights into our common law system. Since then the waters have undoubtedly mingled and we are now assured that human rights have fully permeated our domestic legal channels. Lord Woolf has suggested that the

¹ This paper derives from an earlier consideration of the topic, which appeared as L. Clements (2002) *Dirty Gypsies – ex turpi causa and Human Rights*. Human Rights. Dec 2002 204-212. London Jordans.

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³ See Polden, P (2002) *Mingling the Waters* in Cambridge Law Journal 61(3) November 2002 p575, at 575 where this famous statement is cited as follows 'W Ashburner *Principles of Equity* 2nd edition (London 1933), p.18. It is probably derived from Lord Westbury's speech in Parl. Debs. 3rd s. vol. 201 col. 1573 (30 May 1870).'

'extremely smooth implementation'⁴ of the Convention into domestic case law stems from the compatibility of the two systems – that the 'values to which the European Convention on Human Rights gives effect are very much the same values that have been recognised by the common law for hundreds of years'.

This perception fills many with concern: that the judiciary are willing victims of a cognitive illusion: that notwithstanding the changed nature of the law – its course, its destination remains unchanged. The fear being that judges still think within the same common law paradigm – still articulate cases in black letter terms – terms that are intrinsically weighted in favour of the rich man.⁵ A fear that many of the distinctly unpleasant values underpinning the common law remain – having merely assumed a new alias – changed their name, but still rule the same.

Gypsies are an interesting subject group with which to test the extent to which the Act has changed traditional common law notions: Gypsies trouble land owners; they are one of the most socially excluded groups within the UK⁶; they are a vilified minority persecuted by the Nazis – a persecution that prompted the drafting of the European Convention on Human Rights. There is evidence that the Human Rights Act 1998 has made very little difference to the hardships they endure – not least the one third that have nowhere legal to live. An ESRC funded study, undertaken by Cardiff Law School, for instance, considered the extent to which the 1998 Act had modified local authority responses to Gypsies⁷. It concluded that little had changed – save that there had been a concerted effort to ensure that eviction policies remained robust. In relation to the chronic 'access to land' problems Gypsies' experience the research suggested that authorities had consciously decided to take no action to make their planning policies more benign – that in this context (in stark

⁴ Lord Woolf LCJ (2003) *On the occasion of the opening of the judicial year at the European Court of Human Rights* 23rd January 2003 accessible at www.dca.gov.uk/judicial/speeches/lcj230103.htm

⁵ 'Although the system might administer justice impartially, justice itself is partial' Bankowski, Z & Mungham, G (1976) *Images of Law* Routledge & Keegan p9.

⁶ Gypsies and Travellers constitute the single largest category of people (numerically) deemed to be 'at very high risk of social exclusion' - *Breaking the Cycle: Taking stock of progress and priorities for the future. A report by the Social Exclusion Unit* Sept 2004, Office of the Deputy Prime Minister, London: para 1.61.

⁷ Economic and Social Research Council funded research – reference R000239238; see L. Clements & R Morris (2004) *'The Millennium blip: local authority responses to the Human Rights Act 1998'* in Halliday S & Schmidt, P. (eds) in *Human Rights Brought Home: Socio-Legal Studies of Human Rights in the National Context*. Oxford: Hart Publishing

contrast to their active review of their eviction procedures) 'not being proactive' was the most attractive local authority option.

If the approach of the statutory agencies has not been revived by the Human Rights Act 1998, then what of the courts? One small (but revealing) example of this problem can be found in the use of a common law principle *ex turpi causa non oritur actio*. It is of interest, since in equity it is mirrored by a similar doctrine encapsulated in the maxim 'he who comes to equity must come with clean hands'. *Ex turpi causa non oritur actio* is generally interpreted in modern text books as meaning 'no cause of action may be founded upon an illegal cause'. However it is commonly (and more accurately) interpreted as proscribing actions arising out of a 'base or shameful causes'. Many a true word is spoken in Latin. *Turpe* translates as 'shapeless, unsightly foul, deformed, ugly, base, nauseous'. Ugliness is in the eyes of the beholder – and a principle that denies access rights to the law, for people whose cause is deemed to be unsightly or ugly or base and to people who come with dirty hands – is of interest to lawyers concerned about the rights of poor and otherwise socially excluded people – people for whom the common law has not traditionally been framed – Gypsies for instance.

British Gypsies have been bringing complaints concerning their lack of sites to the European Commission and Court of Human Rights for almost 20 years. Over this period the Court has endeavoured to find a way of articulating this injustice in the language of the Convention. In *Buckley v. UK* (1996)⁸ the Court gave the Government the benefit of the doubt – on the basis of its assurances that it was trying to resolve the problem. This approach was not without its critics. Judge Pettiti, one of the dissenting judges, referred to the incremental nature of the injustices suffered by Gypsies. In his opinion, it was particularly problematic for courts to identify in black letter law terms injustices that arose out of a 'deliberate superimposition and accumulation of administrative rules (each of which would be acceptable taken singly)' – the net effect of this practice being that it became 'totally impossible for a Gypsy family to make suitable arrangements for its accommodation, social life and the integration of its children at school'. This situation has been described by Liégeois⁹ as 'an accumulation of handicaps ... the combined effects of [which] transform nomadism into vagrancy'.

⁸ 23 E.H.R.R. 191.

⁹ Gypsies and Travellers, J-P Liégeois (1987) Council of Europe, p111.

Vagrancy is of course a criminal offence.¹⁰ If the state (through the obfuscation or incrementalism) is able to criminalise a way of life, it can subsequently resist any claims of injustice by pleading *ex turpi*. Thus in *R v. Hereford and Worcester County Council, ex parte Smith* (1993)¹¹ the applicant, a Gypsy, whose way of his life had become impossible because of systematic ditching of his traditional roadside stopping places by the local authority, applied for a declaration that this activity was unlawful. Although as a matter of strict highway law his case was unanswerable the Court of Appeal rejected the claim, relying on *ex turpi* – because the applicant's purpose in seeking the declaration was to facilitate his way of life (ie stopping on roadside waste) which was also technically unlawful.

Although this case occurred prior to the implementation of the Human Rights Act 1998 – there are grounds for believing that the concept of *ex turpi* has simply migrated into human rights jurisprudence without – it appears – any critical analysis¹². In 2001 the European Court of Human Rights considered the complaint of *Chapman v. UK* (2001)¹³. The applicant was under threat of eviction from land she owned because she lived there in breach of planning control. It is at least four times more difficult for a Gypsy to obtain planning permission than a non-Gypsy, and as a consequence about 30% of them are homeless (notwithstanding a long standing duty on local authorities to provide adequate accommodation for Gypsies). The court rejected her complaint – relying in no small measure on her illegality. This approach was castigated by Judge Bonello. In his opinion the failure of the law to provide adequate accommodation for the applicant had effectively 'entrapped' her into breaking the law: there was simply no logical reason why a 'a human rights court should look with more sympathy at the far reaching breach of law committed by the powerful, than at that forced on the weak'.

Is it the case, therefore, that the human rights jurisprudence has been so muddled by its confluence with the common law, that to all intents and purposes the Convention has lost its vitality. If actions cannot be founded on base or ugly or deformed causes, who is it that decides what is base or ugly or deformed? Is the government free to define illegality and defend itself by criminalising an oppressed group's way of life? Is the doctrine of deference now so deeply rooted that the courts must unquestioning accept such a designation?

¹⁰ Vagrancy Act 1824.

¹¹ Court of Appeal 7 April 1993 Lexis; a case considered by Beale, A. & Geary, R. *Abolition of an unenforced duty* N.L.J. 1995, 145(6679), 47-48, 61.

¹² See in this respect L. Clements (2002) op cit.

¹³ (2001) 33 E.H.R.R. 399.

Of course questions of this nature exploit, in part, a false dichotomy. All law (human rights or otherwise) depends for its articulation on judges who will almost always have been nurtured by a common law or civil law tradition. Such judges are chosen primarily for their brilliant analytical minds – and not for their powers of social insight or for their wisdom or their judgment (in its broader sense). Judges are drawn to black and white contestations that are amenable to black letter law solutions. The problems of socially excluded people do not come in such convenient packages. As Wexler observed 'the law school model of personal legal problems, of solving them and returning the client to the smooth and orderly world in television advertisements, doesn't apply to poor people'.¹⁴ Judges become exceedingly unsettled if invited to look at events preceding a single discreet episode: to ask, for instance 'why was the Gypsy trespassing?' Judges invariably refuse such invitations; explaining that their craft cannot withstand such turbulent waters – that to venture there would be to stray into political territory: in short they defer and declare the issue non-justiciable.

Quo vadis justice when the government has the ability, by playing with the levers of social control¹⁵, to render a minority's way of life unlawful? What role is there for a legal system that defers in such cases, either explicitly or implicitly by recourse to *ex turpi*?

In the last five years we have not seen a conflict of laws of the order that should have occurred had there been a true confluence of these two legal systems. This absence of turbulence has been misinterpreted by the judiciary as evidence of an underlying compatibility between the two systems – one based on the inviolability human life and the other on the sanctity of property. A true resolution will only occur when the courts cease to think the common law way – cease to use common law doctrines (such as *ex turpi*) to stifle conflict.

¹⁴ Wexler S (1970) *Practising Law for Poor People*; The Yale Law Journal. Vol. 79: 1049, 1970.

¹⁵ Townsend, P (1979) *Poverty in the United Kingdom*: London, Penguin.