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Human Rights in Policing – The Past, Present and Future

Sarah Poolman, Richard Wilshaw, Jamie Grace

Abstract

This article seeks to demonstrate, largely from practitioners' perspectives, the growing evolution in understanding and implementation of meaningful human rights standards within the policing context. In the early 2000s, 'human rights' were perceived and treated as a rather restrictive framework in UK policing. They are now more readily seen as a set of tools that guide and help the police to balance the views and interests of all parties to the criminal justice process. Human rights values enable police in the UK to better endeavour to do the right thing, 'without fear or favour'.

Keywords:

Evolution in application of HRA to operational policing, balancing of competing rights, duty to protect the most vulnerable, human rights and the policing of protest and public order.

Introduction

This Special Issue has been issued to mark seventy years of the Universal Declaration of Human Rights (UDHR). This declaration laid the foundation for future, binding human rights treaties, including the European Convention on Human Rights (ECHR), made directly legally enforceable in the UK through the Human Rights Act 1998 (HRA). Since the HRA came into force in October 2000, it has acted increasingly as the touchstone for UK policing.

Twenty years on, in the context of the debate over calls for the HRA to be replaced by a British Bill of Rights,[1] and with the backdrop, at the time of writing, of the imminent departure of the UK from the EU (and the Charter of Fundamental Rights promulgated by the latter),[2] it is timely for us to ask: has the HRA achieved its objective, and secured better enforcement of and respect for ECHR rights?

By asking ourselves this question, we are also inevitably determining how well UK policing enforces, upholds and respects the text of the UDHR: many of the ECHR rights we discuss in this piece, in relation to operational policing, are found described in the earlier UDHR. Article 10 ECHR, the right to freedom of expression, has as its parallel article 19 UDHR; while article 11 ECHR, the right to freedom of association, is contained in article 20 UDHR.

To assess the success of the HRA in the policing context, we have plotted its impact on policing over the last twenty years. We consider the challenges and also the learning and opportunities that have presented themselves and that have, we feel, enabled the police to become far more sophisticated and professional in their understanding and application of human rights standards.

Back in 2000, the significant challenge of training approximately 140,000 police officers nationwide on what is a complex piece of legislation was delivered through primarily e-learning approaches, and the distribution of aide-memoires. This equipped officers with little more than a cursory knowledge of the key articles, with limited understanding of the subtleties of the interplay between articles of the ECHR. In hindsight, the subsequent lack of in-depth knowledge and cognisance of competing rights was a significant shortcomingof the approach taken at that time, given that policing rarely enables any single element of the ECHR to be considered in isolation. This complexity can be summarised for the purposes of this article as the following three elements: balance, obligations, and flexibility.

Our professional context

Operational policing almost without exception entails and has always entailed a process of decision-making; the change now is that this is undertaken in a human rights-conscious manner, which is structured around the need to *balance* ECHR rights against one another. This means on the one hand taking into account the right(s) of offenders or suspects that are primarily interfered with by policing activity, tactics or strategies. On the other hand, the police must consider the rights of victims and wider members of the public affected, whom the police seek to safeguard.

Added to this initial consideration is the nuance of any relevant police *positive obligation* to uphold fundamental rights. In other words, the police, like most public bodies, have duties to ensure that fundamental rights are effectively secured for and enjoyed by citizens. This obligation contrasts with a more traditional negative obligation—that is, the obligation to

simply abstain from unnecessarily interfering with human rights through to committing human rights violations.

Another complexity is the principle that the ECHR is not meant to result in a complete consistency in the manner in which policing respects human rights from one European jurisdiction to the next: the European Court of Human Rights allows for some *flexibility* (known as the 'margin of appreciation') from one country to the next on a similar issue.

Such complexities lead to practical and logistical challenge when training vast numbers of police officers and staff; however, in the early 2000s, other obstacles hindered the wholehearted implementation of the HRA. Although many frequently refer to the 'the Police' as an institution, it is primarily a collective of police officers as individuals and as teams of colleagues, some of whom are inevitably resistant to change. Such individual resistance, in conjunction with the limited training that failed to dispel media-driven myths about the ECHR being a 'criminals charter'[3], resulted in limited credibility for a human rights agenda. This, in turn, impacted on police understanding and, consequently, ensured a limited initial impact of ECHR standards on everyday approaches in policing.

Yet, before we are too disparaging about the police understanding and application in the early 2000s, it is only fair to point out that, at that stage, the HRA was, in some respects, setting up a 'blank canvas' for policing in the UK. There was little case law that was at that time *familiar or relevant enough* to police commanders on the scope and operation of ECHR rights, which could be deployed easily in professional development terms, or more meaningfully as a framework in operational decision-making contexts. The lack of widespread knowledge of and application of human rights case law meant there was little to assist those on the policing frontline to make tough decisions in often very tight timescales.

This position did not last long. Soon there were a number of tragic incidents where police action or inaction brought section 6 of the HRA firmly into focus. Section 6 states:'It is

unlawful for a public authority to act in a way which is incompatible with a Convention right', where '"An act" includes a failure to act'.

High profile murders, such as that of Victoria Climbié in 2000 and those of Julia and William Pemberton in Hermitage in 2003, brought into sharp focus the positive obligation under article 2 ECHR for public authorities to protect the fundamental right to life. State agencies, including the police, were criticised following these murders for failing to protect the lives of vulnerable people suffering abuse in terms of their actions prior to the death and at the time of death. In both cases, inquiries subsequently found that public agencies were aware that there had been a significant risk of death but did not take sufficient steps to protect the victims.[4]

Such high-profile cases made it clear that the police could potentially be held in violation of the HRA if deemed to have failed to act to protect the right to life.

Yet ensuring that a citizen's article 2 rights are protected is just one example of the complex balancing act the police are continually undertaking. In almost every situation where someone's right to life is threatened by another person, the police officers involved have an operational requirement to consider and balance this threat to life, against the rights of the suspected party (in particular, that individual's article 5 (liberty) and article 8 (privacy) rights).). This perpetual balancing act is the core human rights challenge in operational policing. It is never black and white.

In both spontaneous and planned firearms operations, and in threat to life and public order operations, police commanders have no option but to rely on an incomplete intelligence picture. Commanders must then make reasonable assumptions in order to assess the threat

to a member of the public and decide on a course of policing action that is both proportionate and necessary and in line with any competing rights under the ECHR.

The police force's positive duty to protect the most vulnerable

The high-profile tragedies of the 2000s drove the growing awareness and application of the ECHR within policing, and as a resultembedded improvements in the police service. For example, in-depth training on the HRA is now provided as part of leadership courses. In addition,national human rights-cognisant standards for firearms operations and threat to life situations were produced and operationalised, with a focus on being proactive in the protection of life.

Various tragic cases have also prompted legislative and policy changes to assist the police in fulfilling their positive obligation under article 2 ECHR, and in protecting the lives of vulnerable victims. The introduction of the Child Sex Offender Disclosure Scheme (CSODS), known as 'Sarah's Law', in 2010, and the Domestic Violence Disclosure Scheme (DVDS), known as 'Clare's Law', in 2012, and Domestic Violence Protection Notices/Orders in 2015, have further strengthened the procedural focus on human rights and in particular on the right to life, with a greater emphasis than ever before on the need to be proactive in policing with the purpose of protecting vulnerable victims from harm. These schemes are not without their limitations and there is a genuine concern from pressure groups and academics, for example, that victims of domestic violence who receive a disclosure are often framed as individuals who can, as a result, make 'more informed choices' about their relationships—leading to an accusation in some quarters that Clare's Law is to an extent 'victim blaming'.[5] However, the reality is that a disclosure under either the 'right to ask' (where potential victims approach the police) or the 'right to know' (where the police make proactive disclosures) is intended to assist the victim by providing facts about a partner's past and is rarely, if ever, the only intervention undertaken by police and partners to support victims. Other forms of intervention include the embedded Multi-agency Risk Assessment Conference (MARAC)

framework and commissioned Independent Domestic Violence Advocates (IDVA)services countrywide.

This positive obligation to protect the Article 2 and 3 rights of victims of serious harm was further strengthened by the Supreme Court in the spring of 2018 in the case of the *Commissioner of the Police of the Metropolis vs DSD and another*.[6] This case relates to an appeal by the police against the judgment in the case of *DSD* where victims of John Worboys (the 'Black Cab Rapist') had been awarded damages for the breach of their Article 3 rights. Article 3 states that '[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.' The sexual offences committed by Worboys on his victims amounted to Article 3 violations. The contested issue raised by the Metropolitan police was whether the positive obligation under Article 3 extended beyond systemic failures to operational and investigative ones. The Supreme Court found that there were sufficiently serious investigative failings that the claimants should be afforded a remedy against the Metropolitan Police, in the form of damages, in this particular case. The Supreme Court observed that in the cases concerned there were failures to record information in reports of crimes; failures to promptly interview witnesses; failures to collect CCTV evidence (from a police station no less!); and failures to link complaints from multiples victims to one man. Lord Kerr stated that 'failure in investigations, provided that they are *sufficiently serious,* will give rise to liability on the part of the police'.

Although the Worboys case relates to offending between 2003 and 2008, it does make clear to the police now and in the future that they could be liable if 'egregious' failings in investigations result in further victims coming to serious harm. Judgements like this that provide greater clarity on public authority obligations will inevitably put an extra demand on the police and quite rightly encourage us to be more proactive around protecting the absolute rights within the HRA. Police forces, as a result of other serious case reviews and learning, have and continue to invest more resources in specialist units trained to deal with sexual offending and vulnerable victims, as well as greater investment in units to detect

online sexual offending. In the current climate, there is daily emphasis on mitigating threat and risk, and in doing so, we seek to protect victims from serious harm. Although there are pressures on police resources, those serious crimes will always be prioritised and so, the impact of these judgments and the resourcing challenge is far more likely to impact on our response to offences at the lower end of the criminal spectrum.

Encouragingly for police commanders, the balancing of competing rights when there is a credible threat to life or serious offence is a relatively straightforward. Quite rightly, the fundamental right to life takes precedence and will often easily justify the interference in the limited or qualified rights of any suspected parties, such as the right to freedom of expression or the right to privacy. This 'weighing up' becomes more challenging when we move into the public order arena, the policing of events and protests, where there is no precise threat to life and where the rights of opposing and wider groups are of equal status within the HRA. This is where both shifts in relevant case law, and the concerted effort by the police to improve and evaluate their proper understanding of the ECHR, has enabled a seismic change in the professionalism of the policing response to protest and public order.

Human rights and the policing of public order and protest

Back in 2001, the only reference made to the HRA in a personal safety manual issued to all officers involved in public order policing operations was in relation to the use of force and of searches. The decision-making/ briefing model to be followed by commanders responsible for public order operations was, at the time, known as IIMARC (Intention, Intelligence, Method, Administration, Risk and Communications) and, with the advent of the HRA coming into force, an 'H' for 'human rights' was simply added at the end to create the IIMARCH tool. Many documents and operation orders at this time concluded with the line 'This document is ECHR compliant' without any further analysis or reference to human rights within the policy or operational order itself. We might now consider this approach to be a sign of the complacency or lack of understanding of the ECHR, or perhaps both. Looking back, with

2019 eyes, and with the benefit of established HRA training and an embedded decision-making model (the National Decision Making model, or NDM) in which the HRA is integral, it is hard to believe that the then-established model, IIMARCH, was so fundamentally flawed: with both Risk and Human Rights identified for consideration after the Method was to be identified (i.e. the tactics and resourcing) and suggesting, in effect, that the policing approach concerning a public protest had already been decided.

Whilst progress was made through the 2000s, the policing of public order changed fundamentally as a result of the 2009 G20 Protests in London. The policing of these protests received widespread media coverage in relation to the unlawful death of Ian Tomlinson, the use of the tactic of 'kettling' and theuse of excessive force by the police. By November of the same year, Her Majesty's Inspectorate of Constabulary (HMIC) had published their guide on *Adapting to Protest – Nurturing the British Model of Policing*, in which HMIC acknowledged the complex and forever-changing legal picture in relation to public order policing but also noted that:

> 'Of particular concern is the low level of understanding of the human rights obligations of the police under the Human Rights Act 1998. It is hard to overestimate the importance for officers to understand the law when each individual police officer is legally accountable for exercising their police powers, most particularly the use of force.'[7]

Amongst the recommendations, HMIC stated that the starting point for the planning of public order operations by police commanders was the presumption, out of respect for the ECHR rights to both freedom of expression (article 10) and freedom of association (article 11), in favour of *peaceful* protests in public places. As a result, in response to *Adapting to Protest*, the national public order command training programme was completely and rapidly rewritten, with the key change being the inclusion of dedicated lessons on 'Human Rights and the Use of Force'. These lessons focussed on the qualified rights of articles 9 (freedom of religion),

10, and 11 ECHR and the 'Ten Key Principles Governing the Use of Force by the Police' published by HMIC.[8] With the rollout of this new command training to both new and existing commanders at tactical and strategic levels (i.e. across the levels of the relevant police Bronze, Silver and Gold Commanders), there is no doubt that this led to a substantial improvement in commanders' knowledge of the combined 'Right to Protest'.

However, whether intentional or not, this heavy focus on articles 9, 10 and 11 in isolation from the rest of the articles of the ECHR did potentially elevate the importance of these 'protest rights' to an almost-absolute status. What the training used at the time, we feel, failed to cover was Article 17 ECHR, and its 'Prohibition of Abuse of Rights':

> ‘Nothing in the convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set out in the Convention.’

Had there been a healthier focus on article 17 ECHR, and the linked concept of the need to balance the rights of protestors with a positive obligation to protect the equally-important rights of members of the public and of communities, commanders might have had a clearer view of what could/should be regarded as lawful and ‘peaceful protest’. Direct action by demonstrators aimed at preventing the lawful activities of members of the public or of businesses could have been viewed as an act aimed at the destruction of rights and freedoms of others and would have been an approach that assisted commanders in more thoroughly balancing the rights of all interested parties. The correct (albeit complex) and current position has been best summarised, in our view, by Mr Justice Males in a case concerning injunctions brought against demonstrators interfering with the destruction of trees in Sheffield by a contractor employed by the local authority. Mr Justice Males in *Sheffield City Council v Alice Fairhill and others* (2017)[9] noted, at paragraph 88, that:

> ‘the lawfulness of a protest may change with time. In some circumstances it will be impossible to justify a restriction on freedom of expression or freedom of peaceful

assembly which is of limited duration, even if it involves conduct which is tortious or which amounts to a criminal offence, and even if the conduct in question affects adversely the rights of others or – as in this case – prevents others from going about their lawful business. That is something which public authorities and others may have to put up with in view of the importance of these rights in a democratic society. However, a protest which starts as a legitimate exercise of Article 10 or 11 rights may become unlawful if it continues for a more extended period. The more serious the tortious or criminal conduct in question and the greater the impact on the rights of others, the shorter the period is likely to be before the initially legitimate protest becomes unlawful. Similarly, there is a distinction between a protest which is aimed at requiring a public authority, particularly an authority which is democratically accountable, to think again about a controversial decision and a protest which seeks to prevent such an authority from implementing a lawful decision reached and maintained after extensive debate.'

An earlier focus by the police on article 17 would have helped to add the necessary nuance to the 'presumption in favour of peaceful protests'. Instead, this presumption—particularly following the ruling of the unlawful death of Ian Tomlinson—resulted in a climate in which, for some time thereafter, the police continued to 'facilitate' problematic and impactful protests. The fact that the police placed too much focus on the rights to assemble and express views in a public arena has led to criticism from groups in the wider community that protests were 'allowed' which they perceived to be interfering with their own rights. Police commanders all too often have not challenged this position of 'facilitation' and perhaps did not feel easily empowered to do so, until the fairly recent case of *R (DB) v Police Service of Northern Ireland* (2017),[10] in which the wider community challenged the policing of marches in Belfast and demanded that their article 8 rights (privacy, right to a home) were recognised and protected. Article 8 was engaged because the homes of individuals on the parade route were damaged. Lord Kerr stated in his precis of the case that:

> 'the police wrongly believed that they were obliged by Article 11 of the European Convention on Human Rights and Fundamental Freedoms to facilitate protests, even if they are technically illegal. To the contrary. . . They had an inescapable duty to prevent where possible what were plainly illegal parades and to protect those whose rights under Article 8 of the convention were being infringed.'

The *DB* case of 2017 has served as a catalyst for police forces to recognise and fulfil their positive obligations to protect the rights of others/ the wider community and not just to protect the rights of protestors. Police forces have begun to rely more on article 17 ECHR and to undertake a more nuanced balancing of rights, which sometimes justifies greater interference with the rights of the protestors. What has emerged is a distinct move away from the 2009 position of simply 'facilitating peaceful protest';the police must show no 'fear or favour' and now carefully balance the rights of not only the protest and counter-protest groups, but also those of the general public affected.

We must be mindful, too, that changing technologies used in policing represent fresh human rights challenges. The use of an algorithmic database and risk-scoring system known as the Gangs Matrix by the Metropolitan Police was deemed unlawful by the Information Commissioner's Office in November 2018. An Enforcement Notice was issued to the effect that the Gangs Matrix was in breach of several data protection principles, which arepart of the framework of UK privacy law and linked to the protection offered by article 8 ECHR and the respect it requires for private and family life. Elizabeth Denham, UK Information Commissioner, observed that:

> 'My investigation revealed serious breaches of data protection laws with the potential to cause damage and distress to the disproportionate number of young, black men on the Matrix. For me it comes back to fairness; how people – both alleged gang members and alleged victims - end up on the matrix, how their personal data is shared, and whether that is done appropriately. What my investigation revealed was

serious breaches of data protection laws with the potential to cause damage and distress to those on the matrix. Ignoring people's fundamental data rights erodes trust and confidence, which risks alienating the communities the Met serves. Building trust with communities to tackle gang crime comes from people knowing that engaging with the police will not have adverse consequences. Knowing that their personal information will not be shared unnecessarily, knowing that their chances of getting housing or a job will not be damaged, and knowing that they have won't be discriminated against, simply because they've included in the Matrix.'[11]

Conclusion

In the twenty years since Royal Assent for the HRA, the police's attitude towards the HRA has evolved dramatically from one of limited understanding to a position where, in our force, the HRA features in every decision made at every level of the organisation, from call handlers through to Gold Commander. There will, of course, be regional and individual variations in the understanding and application of the HRA and, as we are human beings who are asked to do a very difficult job with frequently only seconds to make decisions, mistakes will still be made. However, as the last twenty years have shown us, it is these mistakes and evolution in understanding of the HRA that has enabled the vast progress made. Sometimes the police have been known to falter in their procedural respect for human rights, but increasingly human rights values have taken the centre ground in UK policing. In a substantive sense, UK police officers should now be recognised for the human rights actors that they are. This is not the case in much of the media coverage of UK policing where failures are (sometimes rightly) lambasted and too often dwelt upon. Statements made by Non-Governmental Organisations also tend to focus entirely on the way police forces allegedly breach human rights and rarely recognise the hard graft on human rights issues that the police do every day in this country.

There are many challenges that the police service continue to face in 2019, summarised in the recent Home Affairs Select Committee report 'Policing for the Future'.[12] It is the combination of the reduction in police officers with growing demand that poses a significant challenge for us. However, what our better understanding of the HRA enables us to do is to be more effective at identifying and responding to those incidents where the threat is the greatest and where we need to perform our core role—to protect life. The HRA acts as a moral compass and helps us to steer our way through both fast-time situations where there is a threat to life and slower-time investigative or public order dilemmas, where there is no obvious right or wrong. It is clear that some of this change has been thrust upon the police through tragedy and rightful criticism, but of equal importance in this journey is the willingness and professionalism of those working within the police service to embrace the HRA and seek to apply it so that its original purpose is achieved. This entails better enforcement of ECHR rights for all individuals affected by UK policing and ongoing support of the principles contained in the UDHR. The UDHR may be non-binding in law, but it contains values with which police leadership and policing policy can be framed and developed.

Please note that the views expressed in this article are those of the authors and not of their Police Service.

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[1] For the final, inconclusive report of the Commission on a Bill of Rights that reported in 2012, please see: http://webarchive.nationalarchives.gov.uk/20130206021312/http://www.justice.gov.uk/about/cbr/

[2] The CFREU will be precluded from the body of otherwise 'retained EU law' following Brexit by virtue of Section 5(4) of the European Union Withdrawal Act 2018.

[3] Wagner reference re 'monstering' of rights? See https://ukhumanrightsblog.com/wp-content/uploads/2014/09/the-monstering-of-human-rights-adam-wagner-2014.pdf

[4] See "The Victoria Climbie Inquiry: report of an inquiry by Lord Laming" (2003), available at: https://www.gov.uk/government/publications/the-victoria-climbie-inquiry-report-of-an-inquiry-by-lord-laming; "A domestic homicide review into the deaths of Julia and William Pemberton" (2008), available at: https://aafda.org.uk/wp-content/uploads/2015/07/Pemberton-Homicide-Review-2008.pdf

[5] See M. Duggan & J. Grace, 'Assessing vulnerabilities in the Domestic Violence Disclosure Scheme', (2018) 2 *Child and Family Law Quarterly* 145

[6] Available at: https://www.supremecourt.uk/cases/uksc-2015-0166.html.

[7] https://www.justiceinspectorates.gov.uk/hmicfrs/media/adapting-to-protest-nurturing-the-british-model-of-policing-20091125.pdf p. 14.
[8] Available at: http://library.college.police.uk/docs/APPref/use-of-force-principles.pdf.
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