

<b>Institution: University of Oxford</b>
<b>Unit of Assessment: 20 - Law</b>
<b>Title of case study:</b> <b>Shaping the political debate regarding the development of a British Bill of Rights</b>
<p><b>1. Summary of the impact</b></p> <p>Research conducted by Dr Liora Lazarus and colleagues at Oxford helped shape public and parliamentary debate on the merits of a domestic Bill of Rights for Britain. Some had argued that if Britain were to replace the Human Rights Act (HRA), which allows rights in the European Convention on Human Rights (ECHR) to be argued before domestic courts, with a British Bill of Rights, the government would gain greater flexibility, e.g. in addressing terrorist threats. The research showed that to be incorrect. This finding informed Reports to the Ministry of Justice, was influential in hearings of the Joint Committee on Human Rights and among human rights professionals, and was later used in Ministry of Justice training materials for judges on the nature of 'proportionality' in human rights adjudication. It has situated one of the most controversial debates in British politics on a more secure evidential foundation, and provided reliable information to governments and others on the way courts can be expected to handle certain human rights cases.</p>
<p><b>2. Underpinning research</b></p> <p>A programme of empirical, theoretical, and doctrinal research on the relationship between human rights and security was undertaken at Oxford, beginning in 2003. The principal investigators for this research were Dr Liora Lazarus (Lecturer in Law at Oxford since 2000), Professor Benjamin Goold (Lecturer in Law at Oxford from 2003 to 2009) and Gabriel Swiney (Research Associate, Oxford, from October 2006 – September 2007).</p> <p>Lazarus produced a first public Report for the Ministry of Justice (MoJ) in 2007. The underpinning research was a comparative analysis of carefully selected cases where courts had to balance security demands against human rights in the UK, Germany, France, Spain, and in the European Court of Human Rights (ECtHR). This analysis was published in a MoJ Report, 'Public Protection, Proportionality, and the Search for Balance' <b>[Section 3: R1]</b>. This report built on a body of prior work by the authors. Firstly, the 2007 MoJ Report was comparative in method and included an analysis of Germany's approach to human rights. The comparative method applied in the report, and the material on Germany's rigorous approach to proportionality and human rights, were set out by Lazarus in her monograph <i>Contrasting Prisoners' Rights</i> (OUP 2004) <b>[R4]</b>. Secondly, the 2007 MoJ report applied a theoretical treatment of the balance between security and human rights which Lazarus developed with Goold in their collection <i>Security and Human Rights</i> <b>[R3]</b>. This argued that the reconciliation of security and human rights was unavoidable in a liberal democracy, and that a rigorous approach to proportionality was the primary means through which to achieve this necessary reconciliation. Thirdly, the 2007 MoJ report drew on Lazarus's own work on the 'proportionality principle' as a transparent judicial methodology, which she developed in her paper, 'Conceptions of Liberty Deprivation' <b>[R5]</b>.</p> <p>The empirical research behind these papers involved a systematic study of all court cases involving a conflict between human rights and security in the UK, Germany, France, Spain and the ECtHR. Data on 192 cases were collected, read, and subjected to qualitative and quantitative analyses. This was, and remains, the most comprehensive European data set on human rights cases on the legal notion of 'proportionality'. The Report first subjected the data to quantitative comparisons between jurisdictions, such as how many cases each decided, how often a 'proportionality' test was applied, and how often governments won in rights-versus-security cases. The second analysis was qualitative, involving a detailed study of decisions in rights-versus-security cases across these jurisdictions. It examined how rights are applied and how courts use the concept of proportionality to adjudicate conflicts between security and a range of rights: against torture, against inhuman and degrading treatment, rights to liberty and security, to a fair trial, to privacy, to family life, and rights to freedom of expression and association. The analyses showed that British courts interpreting the ECHR are considerably <i>less</i> demanding in their application of proportionality than are courts in countries with domestic constitutional bills of rights. The Report</p>

also argued that the ECHR is a minimum set of protections in Europe that binds all member states without exception.

Britain was thus shown to be no more hampered by human rights law when pursuing its security interests than are comparable jurisdictions with domestic bills of rights (see [R1], page ii; and also [Section 5: C4] which refers to this finding). The less flexible and more demanding role of a proportionality test in other jurisdictions was linked to the fact that courts under domestic constitutions are vested with significant authority to review their respective governments and parliaments in the light of constitutional rights. This strongly suggested that a justiciable 'British Bill of Rights' would in fact result in stricter rights protections in British courts [R1, page iii]. One common argument in favour of such a bill was shown to be without secure legal or empirical foundation, and the doctrine of proportionality was itself better explained.

### 3. References to the research

[R1] L. Lazarus, B.J. Goold and G. Swiney, *Public Protection, Proportionality and the Search for Balance* (Ministry of Justice Research Series 10/07 2007)

[R2] L. Lazarus, B.J. Goold, R. Desai, and Q. Rasheed, *The Relationship between Rights and Responsibilities* (Ministry of Justice Research Series 18/09 December 2009)

[R3] L. Lazarus and B.J. Goold (eds), *Security and Human Rights* (Hart, Oxford 2007): introduction, chapters 3 (Goold), and 14 (Lazarus)

[R4] L. Lazarus, *Contrasting Prisoners' Rights* (Oxford University Press, Oxford 2004)

[R5] L. Lazarus, 'Conceptions of Liberty Deprivation', (2006) 69 *Modern Law Review* 738

[R6] B.J. Goold, *CCTV and Policing* (Oxford University Press 2004) (on analysis of rights to privacy)

The MoJ Reports were independent research projects subject to expert review and funded by grants awarded after an open-call competitive and peer-reviewed process. Lazarus's research was funded by a £40,000 grant to support research in the area of 'Human Rights and Public Safety', funded by the Research Unit of the MoJ (then Department of Constitutional Affairs). The object of these grants was to provide robust independent research and analysis to 'improve policy making, decision taking and practice by the MoJ'. The published research was subject to the review of a 'small advisory group of three MoJ policy officials and analysts and two external experts' (see [C5]).

R. Desai and Q. Rasheed (named as authors in [R2]) were at the time law students at Oxford University, working as research assistants on this project.

### 4. Details of the impact

The body of research detailed above had considerable impact by making available to the MoJ, to human rights professionals, and to lawyers, a body of empirical data and of theoretical and doctrinal legal argument that undermined a common assumption in the debate about a domestic Bill of Rights, and that clarified the legal notion of 'proportionality'. The research was embodied in a MoJ Report, to which members of the Joint Committee on Human Rights drew attention, and witnesses to the inquiry (including the responsible Minister) cited and relied upon. As a later spin-off, its explanation of the doctrine of proportionality was included in Ministry of Justice training materials for judges, and was relied on in a leading practitioner's work on human rights (see [C6]).

The 2007 Lazarus/Goold Report [R1] began an ongoing programme of collaborative research between Lazarus and Goold for the MoJ which continued until 2010, when the authors published their second and final Report [R2]. During these years, the government published its Green Paper on *Rights and Responsibilities* (Cm 7577). This was published after a lengthy political debate in

which the Lazarus/Goold Report was quoted by the Minister of Justice in a public lecture [C1], and by human rights specialists testifying before Parliament's Joint Committee on Human Rights [C3]. In the Green Paper, the Government restated its commitment to the HRA, and said that any British Bill of Rights and Responsibilities would have to work as a complement to it. As it stated in the Executive Summary: 'The Government is proud to have introduced the Human Rights Act and it will not resile from it. Any new Bill of Rights and Responsibilities might subsume the Human Rights Act, or might preserve it as a separate Act.' The Green Paper went on to suggest that any proposed British Bill of Rights and Responsibilities should not include legally enforceable rights: 'The Government does not consider a general model of directly legally enforceable [rights or] responsibilities to be the most appropriate for a future Bill of Rights and Responsibilities.' This was elaborated in some detail in the body of the paper, especially with respect to the rights of those accused of crime to liberty, and to the right to a fair trial (e.g. page 32, paragraph 3.15).

The policy of the Green Paper reflected the Minister of Justice's position as set out in his Mackenzie Stuart Lecture at Cambridge University on 25 October 2007 [C1]. There, the then Justice Secretary had argued that 'any Bill of Rights could not have a reduced set of rights or more heavily qualified rights than currently set out in the ECHR without placing the UK in breach of its international obligations'. As evidence for this proposition he relied heavily upon and quoted the 2007 Lazarus/Goold study [R1]: 'Studies show that Article 3 is applied similarly not just in Strasbourg but also in the domestic courts of UK, Germany, Spain and France to name but a few. Any argument that the repeal of the Human Rights Act will mean that the consequences of Article 3 disappear is as disingenuous as it is flawed' [C1].

The 2007 Lazarus/Goold Report [R1] had argued that the right not to be subjected to torture was an absolute right that bound the UK and all the other jurisdictions in the study, and had shown that repealing the HRA would in fact make little difference to the way in which these individuals would be treated. The mention of the binding nature of Article 3 (right against torture) by the Minister of Justice in a public speech [C1] is not only testimony to the influence of the Report [R1], it was also highly significant in the context of the public debate on human rights and security. Many politicians, and the tabloid press, are critical of human rights law on the basis that it protects criminals and terrorist suspects who would otherwise be deported to countries associated with torture. This criticism featured heavily in 2013 debates over the deportation to Jordan of Abu Qatada.

The importance of these findings has been acknowledged. According to the Legal Adviser to the Joint Committee on Human Rights and a Visiting Professor at Oxford, 'The Lazarus/Goold Report on how the principle of proportionality operated in other Council of Europe member states made a very significant contribution to ensuring that the debate on this contentious subject was evidence-based. The Report was drawn to the attention of the members of the Committee and referred to in the Committee's briefing material, as well as being referred to by witnesses to the inquiry, including the responsible Minister himself. Other common misperceptions continued to dog the political debate about whether there should be a UK Bill of Rights, but this research authoritatively laid to rest the misperception that, in countries with national Bills of Rights, laws and policies designed to counter terrorism are subject to less intrusive scrutiny by the courts than is the case in the UK under the Human Rights Act' [C2].

The MoJ found Lazarus and Goold's research for the first report helpful, and commissioned them to undertake a second research project, which resulted in their 2009 Report on *The Relationship between Rights and Responsibilities* [R2]. This complemented their earlier research by studying the potential risks associated with any attempt to incorporate 'responsibilities' into the existing constitutional framework. The research explained the importance of ensuring that justiciable legal rights do not become some kind of contingent reward for performing nebulous responsibilities. The 2009 Report was commissioned by the MoJ to 'contribute to the debate on the relationship between rights and responsibilities initiated by the Green Paper' on *Rights and Responsibilities* [R2, page 1]. It provided independent academic endorsement to the position laid out in the Green Paper that 'contingency' had to be avoided, and was explicit that it was reinforcing this message [R2, page 1].

The influence of Lazarus and Goold's work also reached beyond the MoJ. It was absorbed and relied upon by respected human rights experts in the wider community, including the Commissioner at the Equality and Human Rights Commission between 2006 and 2009, who in oral evidence to the Joint Committee on Human Rights hearings regarding a UK Bill of Rights in 2008, replied to a question as follows:

'The technical answer to your question is found in this research, which I commend to all members of the Committee, if you have not already read it. It is by the Ministry of Justice and Oxford University, called 'Public protection, proportionality and the search for balance'. It is a comparative study of jurisdictions where the Convention is incorporated and there is an additional Bill of Rights. In every case, in a nutshell, it was found that actually, in jurisdictions that had additional Bills of Rights, as well as incorporating the Convention, the courts tended to, if you like, let the government off the hook far less frequently: they were far more diligent and rigorous in their application of the fundamental rights that were in their Bills of Rights and they took a more strenuous approach to the proportionality principle which is in play in security versus individual freedom cases...So I think this idea that having your own Bill of Rights somehow means that you get Strasbourg off your back is not based on any evidence or research' [C3].

In 2009, Klug reiterated the point in a popular political journal: 'Cameron has advanced the case that a British Bill of Rights would somehow allow British governments to ignore European Court of Human Rights rulings it does not agree with – a proposition that has been demolished by research from Oxford University, which demonstrated that, if anything, the reverse applies' [C4, p.421-2].

A final wave of impact of the research [R1, R2] came through its use by those who were training judges, and by those arguing before those judges. The MoJ training materials on the idea of 'proportionality' in human rights decisions included selections from the Lazarus/Goold research because they articulated a working definition of that idea that was found to be clear and accessible to judges new to human rights reasoning. And in what is described as 'the leading practitioner text on the law of human rights' Lazarus and Goold are referred to and followed on these complex issues [C6, p. 353].

In government, in Parliament, in the human rights community, and in the world of legal practice, the research of Liora Lazarus and her Oxford colleagues has contributed to a better informed understanding of tensions between human rights and security, and of the legal doctrine of proportionality that is often called on to resolve them.

## 5. Sources to corroborate the impact

[C1] Jack Straw, Stuart Mackenzie Lecture on 25<sup>th</sup> October 2007, see page 9, footnote 6 of transcript. [http://www.cels.law.cam.ac.uk/events/Straw\\_HR\\_Lecture\\_text.pdf](http://www.cels.law.cam.ac.uk/events/Straw_HR_Lecture_text.pdf)

[C2] Letter from the Legal Adviser to the Joint Committee on Human Rights (held on file).

[C3] Joint Committee on Human Rights 'A Bill of Rights for the UK?' Twenty-ninth Report of Session 2007-08 Volume II HL Paper 165-II HC 150-II, 10 August 2008.

[C4] Francesca Klug, 'Solidity or Wind? What's on the Menu in the Bill of Rights Debate?' *The Political Quarterly*, Vol. 80, No. 3, July – September 2009, 420-426

[C5] Letter from Head of Research for the Ministry of Justice at the time and now at the Constitution and Access to Analytical Services (held on file) confirms the review process for the Reports.

[C6] Richard Clayton QC and Hugh Tomlinson QC, *The Law of Human Rights*, 2<sup>nd</sup> ed (Oxford University Press 2009).