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After *Marper*: Two Readings, Two Responses

Roger Brownsword [*]

Abstract

This editorial responds to the important case of S and Marper v The United Kingdom (2008) in which the European Court of Human Rights held that the law that authorises, in England and Wales, the taking and retention of DNA samples, together with the making and retention of identifying profiles for criminal justice purposes, is disproportionately broad, a conclusion which contradicts two domestic appellate panels.

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[*] Professor of Law at King's College London.

In many quarters, the ruling of the European Court of Human Rights in the case of *S and Marper v The United Kingdom*[1] has been welcomed – indeed even acclaimed – as "a breathtaking tribute" to Orwellian ideals.[2] Stated shortly, in *Marper*, the Grand Chamber ruled that the law in England and Wales that authorises the taking and retention of DNA samples, together with the making and retention of identifying profiles for criminal justice purposes, is disproportionately broad. In the Court's concluding words, "the blanket and indiscriminate nature of the powers…fails to strike a fair balance between the competing public and private interests" (para 125). Yet, when this very issue had been considered by the domestic courts, two appellate panels had been satisfied that English law was human rights compatible. Accordingly, we might ask whether, in these circumstances, it was legitimate for Strasbourg to reject the local judgment as to whether the particular interference with privacy is proportionate.

Regulators can be challenged in many ways, primarily in relation to the legitimacy of their purposes and procedures and the effectiveness of their interventions. In settings of regional governance, there is also the cosmopolitan expectation that regulators should respect fundamental values while, at the same time, affording sufficient room for legitimate local difference. Sometimes, regulators might be held to account purely and simply by reference to the "club rules"; but it might also be claimed that regulators are bound by universal values – irrespective of whether such values are accepted or recognised in club constitutions, conventions, or practices. In this light, is *Marper* to be read as an application of the club rules or as an essay in universal regulatory cosmopolitanism?

There are some indications that the Court's dominant concern was with club compliance. For example, much of the judgment is directed at showing the local law to be a serious outlier relative to that of other members. Accordingly, the local law stands accused of being alone in: permitting "the systematic and indefinite retention of DNA profiles and cellular samples of persons who have been acquitted or in respect of whom criminal proceedings have been discontinued" (para 47); allowing "the systematic and indefinite retention of both profiles and samples of convicted persons" (para 48); and providing for the taking of samples routinely and without restriction to specific circumstances, or to cases of suspected serious criminality (para 46). Accepting the legitimacy of the local objectives, the crucial question was whether the interference with privacy fell within the margin of appreciation – a margin that varies depending upon "the nature of the Convention right in issue, its importance for the individual, the nature of the interference and the object pursued by the interference" (para 102), as well as the extent of consensus amongst members. Put simply, the higher ranking the right and the greater the consensus, the narrower the margin of appreciation; and, conversely, the lower ranking the right and the less the consensus, the greater the margin of appreciation. To the extent that the Court is

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[1] *S and Marper v United Kingdom,* applications nos 30562/04 and 30566/04, Council of Europe: European Court of Human Rights, 4 Dec 2008 (henceforth "*Marper*").

[2] P De Hert, *Citizens' Data and Technology: An Optimistic Perspective* (The Hague: Dutch Data Protection Authority, 2009), at 26.

guided by the rough consensus amongst members, this also implies that *Marper* is principally about disciplining a club member that has stepped too far out of line.

If, by contrast, *Marper* is to be read as a larger essay in universal cosmopolitanism (witness, for example, the Court's references to the UN Convention on the Rights of the Child, 1989), we would expect to see: less emphasis placed upon the local position as an outlier relative to other members; less relevance accorded to consensus; and far more attention paid to the nature of the privacy right and its importance relative to whatever conflicting rights are judged to be in play. In other words, one would expect to see the Court attempting to offer its most compelling rendition of human rights as fundamental, categorically binding, values.

How should government respond to *Marper*? In its recent report on *Surveillance: Citizens and the State*,[3] the House of Lords Constitution Committee has recommended that the government should comply fully and speedily. In particular, it should ensure that "the DNA profiles of people arrested for, or charged with, a recordable offence but not subsequently convicted are not retained…for an unlimited period of time" (para 197). Quite probably, this is an unrealistic expectation when the government will view *Marper* as an unwelcome hindrance to its flagship approach to crime control and security. However, the essential point is that the process of review and response might be inspired by two very different visions.

The first vision, the correlate of club compliance, is one of respecting the house rules – of moving local law back into line. Strasbourg has indicated that some features of local law simply cannot be tolerated – for example, the taking and retaining of *children's* samples and profiles (a point already conceded by the government). For the most part, however, local law can cease being an obvious outlier either by making little or no change (for example, with regard to taking samples from adults) or by moving closer to the nearest member – for example, by positioning the law closer to that in, say, Denmark or France (where, following an *acquittal*, profiles may be retained for up to, respectively, ten and twenty-five years). Given such a response, the House of Lords Constitution Committee surely would lead a chorus of complaint that literal compliance of this kind fails to act in the right spirit. But, if the spirit of *Marper* is simply about club compliance, it matters only for collegiality whether local law moves back to the edge or to the centre of the acceptable bandwidth.

The second vision is that of universal regulatory cosmopolitanism. For universalists, a club compliant response falls a long way short, the deeper question being whether the European Convention on Human Rights stakeholders see themselves as articulating and applying principles of binding universal application, or merely the house rules. The Grand Chamber has acted boldly by imposing its view (a move that arguably accentuates the strains of regulatory legitimacy);[4] but, for *Marper* to represent a breathtaking tribute to Orwellian ideals, that is something else. For that, we want clearer signals from Strasbourg (as from Westminster) of a universal cosmopolitan intent.

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[3] House of Lords Constitution Committee, *Surveillance: Citizens and the State*, Paper 18-I, Feb 2009.

[4] Compare F Bignami, "Constitutional Patriotism and the Right to Privacy: A Comparison of the European Court of Justice and the European Court of Human Rights" in T Murphy (ed), *New Technologies and Human Rights* (Oxford: Oxford University Press, 2009), at 128.