Criminal Record Disclosure and the Right to Privacy

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Comparative law; Criminal records; Disclosure; Public protection; Rehabilitation; Right to respect for private and family life

When and to whom should a person's criminal record be disclosed? What information contained in criminal records should be disclosable? This article considers the British disclosure rules in the context of the judgment of the European Court of Human Rights in MM v United Kingdom*, and also in the framework of the principles underlying the Rehabilitation of Offenders Act 1974. It argues that, despite recent changes, the UK system still fails to strike the right balance between public protection, the individual's right to privacy, and the criminal justice system's interests in rehabilitation and social reintegration.*

Introduction

When and to whom should a person's criminal record be disclosed? What information contained in criminal records should be disclosable? European countries lack a common approach but, broadly speaking, there seem to be two models. While continental European countries tend to disclose only recent convictions, UK and common law countries are inclined to disclose all convictions, cautions and police records. This results in a very wide and complex disclosure system, which raises a number of questions of principle relating to criminal justice. For example, why, when some old convictions can be "spent" under the Rehabilitation and Offenders Act 1974, is the person still obliged to disclose them when applying for a wide range of employment positions? Why are cautions disclosable when they are not convictions? (since 1995 they have been recorded on the Police National Computer and people may accept cautions without knowing they will be

* This research has been supported by the Spanish Ministry of Economy (Research Project, DER 2012-32150 on Community Supervision). It has been carried out during a Visiting Fellowship at All Souls College, for which I am most thankful. To understand the UK system would have been impossible without the interviews to Jackie Sinclair from Nacro; Ashley Adams DBS Unit Manager from Thames Valley Police, Michele Whiteley, PNC Liaison Officer; Christopher Stacey Director (Services) of Unlock; and emails from Ian Readhead (senior officer of Association of Chief Police Officers Criminal Records Office (ACRO). For help at several stages I thank Chris Baldwin, Andrew Burrows, James B. Jacobs, Ian Loader, Carol Sanger, Terry Thomas, and Dirk van Zyl Smit. Andrew Henley has helped me all along with the editing. Finally, Andrew Ashworth has sacrificed his own time to discuss the paper over and over and I can only express my gratitude and admiration. This paper was presented to Nottingham School of Law (November, 2013) and I wish to thank Paul Roberts for his help. Also to All Souls Visiting Fellows Colloquium (December, 2013), and All Souls Criminology Seminar (March, 2014) from which the resulting lively discussions I benefited greatly.

also disclosed in a CBC, criminal background check).[1] Why should police arrests be disclosed, when this transmits information that is yet untested and unproven, raising suspicion even though no court hearing may have taken place?

The general assumption underlying the disclosure of criminal records is that it is effective in protecting potential employers and the wider public. However, there is widespread concern that excessive disclosures hinder the societal interest in reintegration, contradict the criminal justice foundations of the Rehabilitation of Offenders Act, and breach the rights of people who have already served their sentence. This article explores the interface between the disclosure of criminal records and the "right to privacy" recognised in art.8 of the European Convention on Human Rights (ECHR). I begin by providing a brief description of practices of disclosure of criminal record information, introducing a comparison between the UK and other European countries. I then comment on the European Court of Human Rights (ECtHR) case of *MM v United Kingdom* (2012). Finally, I elaborate on some principles that the ECtHR has provided for balancing the claims to public protection with the respect for the private life of its citizens.

Disclosure of criminal records

Exactly what should and should not be disclosed, and to whom? I will first briefly describe the disclosure system in the United Kingdom, and then contrast it with the system in continental Europe.

Disclosure of criminal records in the United Kingdom

The system of disclosure of criminal records in the UK is very complex. It is not regulated by a single law, but has developed through several policy reports, legislative provisions, guidelines and judgments.[2] The system has six main elements:

i) there is a *general presumption* that an employer may ask for a criminal record certificate before employing somebody;

ii) the two *types of criminal record certificates* regulated in Pt 5 of the Police Act 1997 are "standard" and "enhanced";[3]

[1] Regarding the problems of providing advice of the consequences of a caution see P. Hynes and M. Elkins "Suggestions for reform to the police cautioning procedure" [2013] Crim. L.R. 966, 970: "Even where legal advice is available, it is not always practical or possible for the lawyer to provide a complete and accurate answer to the question: 'If I accept the caution, will it affect my future' (…) particularly as the question touches on other specialist areas of law such as employment and immigration".

[2] For a general history see A. Grier and T. Thomas, "The Employment Of Ex-Offenders And The UK'S New Criminal Record Bureau" (2001) 9 *European Journal on Criminal Policy and Research* 459; T. Thomas, *Criminal Records* (New York: Palgrave Macmillan, 2007); C. Baldwin, "Necessary Intrusion or Criminalising the Innocent? An Exploration of Modern Criminal Vetting" (2012) 76 *Journal of Criminal Law*:140; J.B. Jacobs and D. Blitsa, "US, EU and UK employment vetting as strategy for preventing convicted sex offenders from gaining access to children" (2012) 20(3) *European Journal of Crime, Criminal Law and Criminal Justice* 265; T. Thomas and B. Hebenton, "Dilemmas and consequences of prior criminal record: A criminological perspective from England and Wales" (2013) 26(2) *Criminal Justice Studies* 228.

[3] According to the Disclosure and Barring Service (DBS) *https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/315179/DBS_guide_to_eligibility_v4.pdf* [Accessed July 17, 2014] the organisation that has since 2012 replaced the Criminal Record Bureau, for Standard checks the position must be included in the Rehabilitation and Offenders Act (ROA)1974 Exception Order (1975). For Enhanced Checks the position must be included in both the ROA exceptions and in Part V of the 1997 Police Act. There is still a third category within the DBS which is Enhanced checks with children's and/or adults barred list check(s) to be carried out in case of "regulated activity". These types of Criminal Background Checks are available only for *registered employers*. If the employer is not eligible to register and wants to ask for a criminal record check, in the UK he would probably have two options. The first is to ask the solicitant to apply for a *Basic Criminal Record Check* to Disclosure Scotland which shows only

iii) a standard criminal record check will *automatically disclose* convictions and cautions held on the Police National Computer (PNC);

iv) an enhanced criminal record check will mandatorily reveal convictions and cautions and additionally "*police records*" (for example, arrests, allegations with no further charges, dropped charges, penalty notices for disorder, and acquittals). This latter information is *discretionarily disclosed* under the decision of the chief police officer after carrying out a 'relevance test' to assess which information contained in the police records should be disclosed;[4]

v) in the UK nowadays convictions and police records *are stored on the PNC "until the person is 100 years old"* and may be consequently disclosed[5]; the only way to remove them from the PNC is by an exceptional procedure if it is beyond doubt that no offence has been committed or the sampling was found to be unlawful.

vi) *old (spent) convictions and cautions may be disclosed*. The Rehabilitation of Offenders Act (ROA 1974) was designed to help rehabilitate persons with convictions, by allowing them after the passage of some time not to disclose this information. However, on the one hand not all convictions get spent[6]; on the other, the ROA was soon followed by the ROA 1974 (Exceptions) Order 1975 which allows employers to ask the "excepted question" (i.e. do you have a criminal conviction/caution *even if spent?*), in the case of a Standard or Enhanced criminal record check. This means that even if "spent", criminal convictions/cautions may have to be disclosed.

These two types of checks (mentioned in ii) were required in all occupations that had the slightest contact with children, but were also additionally extended to a plethora of other employments.[7] The exemptions list is extraordinarily large and as Hughes L.J. acknowledges:

> "It currently includes amongst the exceedingly long list of those who must answer questions relating to spent convictions persons

information of unspent convictions and cautions. The other might be to ask the solicitant to bring a 'police certificate for personal use' (which discloses convictions and police intelligence). As far as I understand s.56 of the Data Protection Act 1998 tries to avoid these practices but it is still not implemented.

[4] See *Statutory Disclosure Guidance* (Home Office, July 2012), *https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/118017/statutory-disclosure-guidance.pdf* [Accessed July 17, 2014]

[5] This change in policy followed the *Bichard Report* (2004). This report came as a result of what was considered to be a failure of the police to disclose information about Ian Huntley. He had no conviction record, but apparently the police had some information that they did not share. After the Bichard Enquiry Report the police were allowed to store convictions, cautions and police records "until necessary" (which has been interpreted as the "100 years old rule"). However old convictions and cautions were "stepped down", that is, not disclosed after a certain time. *Chief Constable of Humberside Police v Information Commissioner* [2009] EWCA Civ 1079; [2010] 1 W.L.R. 1136 at [3] confirmed that the policy of "stepping down" was not accurate according to Pt V of the Police Act 1977. From then on the police interpreted that there would be no "stepping down" and that they could disclose all convictions and cautions contained in the PNC.

[6] Convictions would not get spent if they exceed 30 months' imprisonment. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 reduced the periods of time taken for convictions and cautions to be considered "spent". However according to the (reformed) ROA, a prison sentence of four years or more will never be considered spent. This reform came into force on March 9, 2014.

See *http://www.legislation.gov.uk/ukpga/2012/10/part/3/chapter/8/enacted* [Accessed July 17, 2014].

[7] A.R. Mears. "Rehabilitation of offenders-does the 1974 Act help them?" (2008) 55(2) *Probation Journal* 161.

> as diverse as those who wish to hold a National Lottery licence, or to be a doctor's receptionist, dental nurse, steward at a football ground, or traffic officer …"[8]

In practice the Enhanced Criminal Record Check is the one that most employers apply for, probably because it is not simple to find out the positions for which a Standard rather than an Enhanced Criminal Record Check is required. In the Government response to its own review of the ROA 1974 it confirmed "that the number of Enhanced Disclosures currently outnumbers Standard Disclosures by 10 to one".[9] And, according to Mason, there were 4.3 million Enhanced Criminal Record Checks carried out in 2009.[10] It is important to emphasise that although many people think that this type of check is only carried out when working with children or vulnerable adults this is not the case, and the disclosure of spent convictions and police records extends for example to veterinary care, any employment concerned with health services, traffic wardens, a person living in the same household as a person whose suitability is being assessed for a position working with children, private hire vehicles and taxis and employment in the private security industry. [11]

Disclosure of criminal records in (continental) Europe[12]

There is no general presumption in continental Europe that an employer may conduct a criminal background check.[13] In fact the reverse is true: criminal record information is considered confidential, and unless there is a specific law authorizing an employer to carry out a CBC it is generally assumed that they may not ask for this kind of information.[14]

In continental Europe when a CBC for employment purposes is allowed it generally means two things: a) that the employer can enquire directly to the National Conviction Register (NCR); or b) that the employer may ask the individual subject for a criminal record certificate (CRC) in what is known as "enforced subject access".[15] Direct access of employers to the NCR is only permitted exceptionally in the case of some public administration positions. Accordingly, when an employer

[8] *Chief Constable of Humberside Police v Information Commissioner* [2009] EWCA Civ 1079; [2010] 1 W.L.R. 1136 at [112].

[9] Home Office, *Breaking The Circle*, ROA Review, April 2003.

[10] S. Mason (2011) *A Common Sense Approach*. Phase 1. p.30. Independent Advisor for Criminality Information Management.

[11] See *https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/311451/DBS_guide_to_eligibility_v4.pdf* [Accessed July 17, 2013)

[12] My explanations are based on the information I have been able to gather because each European country naturally has its own regulations. I hope to portray general principles, yet there might be exceptions. See also M. Boone, "Judicial rehabilitation in the Netherlands: Balancing between safety and privacy" (2011) 3(1) *European Journal of Probation* 63; M. Herzog-Evans, "Judicial rehabilitation in France: Helping with the desisting process and acknowledging achieved desistance" (2011) 3(1) *European Journal of Probation* 4; C. Morgenstern, "Judicial rehabilitation in Germany-The use of criminal records and the removal of recorded convictions" (2011) 3(1) *European Journal of Probation* 20; N. Padfield, "Judicial Rehabilitation? A view from England" (2011) 3(1) *European Journal of Probation* 36.

[13] E. Larrauri and J.B. Jacobs, "A Spanish Window on European Law and Policy on Employment Discrimination Based on Criminal Record", in T. Daems, D. van Zyl Smit and S. Snacken (eds) European Penology? (Hart, Oxford, 2013).

[14] E. Larrauri "Legal Protections Against Criminal Background Checks" (2014) 14(1) *Punishment and Society*.

[15] N. Louks, O. Lyner and T. Sullivan. "The employment of people with criminal records in the European Union" (1998) 6(2) *European Journal on Criminal Policy and Research* 195.

wants a "proof of a clean record", the subject will have to apply directly to the NCR and show the subsequent outcome to the employer.

In continental Europe the disclosure of criminal record information seems to follow two "bright line policies": old convictions are not disclosed and police records not relating to convictions are not disclosed. Thus, first, in most European countries all convictions become "spent", "cancelled", "erased", "sealed", "expunged" by the mere passage of a certain period of time. This process is generally automatic[16] and covers all convictions. However there are some exceptions of convictions that do not get spent like, for example, life sentences in Germany or the most serious crimes in France.[17] Yet nowhere do the rules seem as restrictive as in the UK where, according to the (reformed) ROA, any conviction resulting in a prison sentence of four years or more will never be considered spent.[18]

What "spent", "cancelled", "sealed", "expunged" convictions have in common is that criminal record information does not get disclosed outside the criminal justice system. There is a "criminal justice" rationale for this: if governments decide to promote the rehabilitation and reintegration of ex-offenders by "expunging" their convictions long after people have served their sentences,[19] it seems paradoxical to undermine the purpose of expungement laws by providing for the disclosure of these convictions in relation to a large list of occupations. As Morgenstern graphically points out, "What the government gives with one hand [it] can not take with the other".[20]

The second "bright policy line" in continental Europe is that criminal record disclosure for employment purposes is usually limited to convictions. Information regarding (unspent) convictions gets disclosed automatically when the person applies for a criminal record certificate or in the (exceptional) cases that the employer is allowed to ask for such information directly from the NCR. The

[16] In some countries (Belgium, France) the person can also apply to have their record sealed before the expungement period has elapsed. See Herzog-Evans, "Judicial rehabilitation in France: Helping with the desisting process and acknowledging achieved desistance" (2011) 3(1) *European Journal of Probation* 4; Morgenstern, "Judicial rehabilitation in Germany-The use of criminal records and the removal of recorded convictions" (2011) 3(1) *European Journal of Probation* 205. In Italy there are no "expungement periods", and only a judge can declare a conviction non-disclosable in the court's discretion when passing the sentence. A. Di Nicola, and B. Vettori, "National Criminal Records and Organised Crime in Italy" in C. Stefanou and H. Xanthaki (eds) *Financial Crime in the EU. Criminal Records as Effective Tools or Missed Opportunities* (The Netherlands: Kluwer Law International, 2005).

[17] See Herzog-Evans, "Judicial rehabilitation in France: Helping with the desisting process and acknowledging achieved desistance" (2011) 3(1) *European Journal of Probation* 4; Morgenstern. "Judicial rehabilitation in Germany-The use of criminal records and the removal of recorded convictions" (2011) 3(1) *European Journal of Probation* 20.

[18] Convictions would not get spent if they exceed 30 months' imprisonment. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 reduced the periods of time taken for convictions and cautions to be considered "spent". However according to the (reformed) ROA, a prison sentence of four years or more will never be considered spent. This reform came into force on March 9, 2014.

See *http://www.legislation.gov.uk/ukpga/2012/10/part/3/chapter/8/enacted* [Accessed July 17, 2014].

[19] Expungement laws do not usually factually erase but "seal". "Sealed" information might be disclosed to judges but not outside the criminal justice system. Because of the long periods these laws require it is said that "Expungement at this point does not so much facilitate as recognize rehabilitation". J.B. Jacobs *The Eternal Criminal Record* (Harvard University Press, 2014 forthcoming). Expungment laws are not without critics in the United States. For some authors it is like recognising a "right to lie", and they advocate instead for introducing "certificates of rehabilitation". See further discussion in C.M. Love, "Starting over with a clean slate: In praise of a forgotten section of the model penal code" (2002) 30(5) *Fordham Urban Law Journal* 1705; L.R. Silva, "Clean Slate: Expanding Expungements And Pardons For Non-Violent Federal Offenders" (2010) 79 *University Of Cincinnati Law Review* 155; J. Radice, "Administering justice: Removing statutory barriers to reentry" (2012) 83(3) *University of Colorado Law Review* 715.

[20] C. Morgenstern in blog COST *http://www.offendersupervision.eu/blog-post/reflections-on-the-liverpool-conference* [Accessed July 17, 2014); see also L.D. Wayne, "The Data-Broker Threat: Proposing Federal Legislation to Protect Post-Expungment Privacy" (2012) 102(1) *Journal Of Criminal Law & Criminology* 253.

information contained in the NCRs covers only convictions and it does not contain arrests. Police records of arrests or allegations with no charges are not disclosed, although there are some minor exceptions in Belgium and Holland which relate only to jobs involving children.[21]

The reasons why other police records are not disclosed to employers or the general public probably relate to the major emphasis on privacy and reintegration in most European jurisdictions. Additionally there is a perceived difference between what professionals need to know to facilitate the goal of crime prevention as opposed to a generalized public "right to know" about criminal history.[22] A third reason not to disclose police records might be related to the presumption of innocence which could inhibit the disclosure of arrests to the wider public.[23] Regarding cautions or penalty notices for disorder, the police in the majority of States in continental Europe do have the power to impose similar measures but these are deemed to be "administrative sanctions". These (regulatory) sanctions are not stored on the conviction register and they do not get disclosed,[24] probably because they are not imposed with all the safeguards associated with a conviction, they are related to minor events, and do not embody the "public censure" element associated with convictions.[25]

In summary, the main differences between the UK's system as distinct from the continental disclosure system is its breadth. When this wide disclosure system began to develop in the UK Grier and Thomas stated: "whether or not the new policy will withstand an appeal to the European Convention on Human Rights as being a 'necessary and proportionate' measure to reduce crime in the workplace remains to be seen."[26] In December 2012 the ECtHR held in the case *MM v UK*, that this disclosure system was not "necessary and proportionate".

The case of *MM v United Kingdom*

On April 24, 2000 the applicant was arrested by the police in Northern Ireland for child abduction. On October 10, 2000 the NI Director of Public Prosecutions indicated that a caution,[27] a warning issued by the police, should be administered. On March 6, 2003 in reply to a query from the applicant, the police advised her that the caution would remain on her record for five years and so would be held

[21] Boone "Judicial rehabilitation in the Netherlands: Balancing between safety and privacy" (2011) 3(1) *European Journal of Probation* 63

[22] See J.B. Jacobs and E. Larrauri, "Are criminal convictions a public matter? The US and Spain" (2012) 14(1) *Punishment and Society* 3. See also L. Meachum, "Private Rap Sheet Or Public Record? Reconciling The Disclosure of Non Conviction Information Under Washington's Public Disclosure And Criminal Records Privacy Acts" (2004) 79 *Washington Law Review* 693. The author highlights the conflict in the United States between privacy rights (Washington Criminal Records Privacy Act) and the Washington Public Disclosure Act which states, "The people insist on remaining informed so that they maintain control over the instruments that they have created".

[23] See for a discussion J.B. Jacobs, "The Jurisprudence of Police Intelligence Files and Police Records" (2010) 22(1) N.L.S.I.R. 135; L. Campbell, "Criminal Labels, the European Convention on Human Rights and the Presumption of Innocence" (2013) 76(4) M.L.R. 681; E. Larrauri, "Criminal Record Disclosure and the Presumption of Innocence" (2014, forthcoming).

[24] *Ozturk v Germany* (A/73) (1984) 6 E.H.R.R. 409.

[25] A. Von Hirsch, *Censure and Sanctions* (Oxford: Clarendon Press, 1993).

[26] Grier and Thomas, "The Employment Of Ex-Offenders And The UK'S New Criminal Record Bureau" (2001) 9 *European Journal on Criminal Policy and Research* 465.

[27] A caution is not a sentence, but it implies an admission of guilt. See further *http://www.justice.gov.uk/downloads /oocd/adult-simple-caution-guidance-oocd.pdf* [Accessed July 17, 2014] (para. 6, 9 and 11). For a discussion of police cautioning see A. Ashworth, *Sentencing and Criminal Justice* (Cambridge, Cambridge University Press, 1992 (5th edn, 2010)), p.19; A. Ashworth and M. Redmayne, *The Criminal Process* (Oxford: OUP, 2010), p.170; and P. Hynes and M. Elkins, "Suggestions for Reform to the Police Cautioning Procedure" [2013] Crim. L.R. 966.

until November 17, 2005. On September 14, 2006 the applicant was offered employment by the company "Westcare" as a Health Care Family Support Worker subject to vetting procedures. She was asked to disclose details of prior convictions and cautions which she did. On October 31, 2006 Westcare withdrew their offer of employment. The applicant then wrote to the Criminal Record Office who replied that there had been a change of policy[28] and that although a caution would previously have been "weeded"[29] after a period of five years, this weeding policy had changed: "The current policy is that all convictions and cautions, where the injured party is a child, are kept on the record system for life" (at para.13 of the ECtHR judgment).

The applicant's solicitor subsequently informed her that there did not appear to be any action which she could take to remove her caution from the police records. In February 2007 the applicant was interviewed, subject to vetting, for a position as a Family Support Worker. "She was asked to disclose details of prior convictions and cautions. She accordingly disclosed details of the incident of April 2000 and her subsequent caution on the form provided, and consented to a criminal record check" (at para.11). On March 2007 the applicant was informed that her application was unsuccessful although no reasons were provided.

The ECtHR found that her right to privacy (art.8 of the ECHR)[30] had been violated. In summary the Court explained: the collection and storage of cautions is not ruled by statutory provision in the UK, but rather through adherence to policy documents. The relevant document in this case is the Association of Chief Police Officers (ACPO) Guidelines[31] which establishes that the *recording and retention* of caution data is automatic and

> " … that there is a *presumption in favour of retention … until the data subject is deemed to have reached one hundred years of age,* regardless of the type or classification of data or grade of the intelligence concerned … While deletion requests can be made, they should only be granted in exceptional circumstances … the examples given … do not suggest a possibility of deletion being ordered in any case where … the data are accurate." (para.202, emphasis added).

Regarding the disclosure of this information

> "Pursuant to the legislation now in place, [32] caution data contained in central records, including where applicable information on spent cautions, must be disclosed in the context of a standard or enhanced criminal record check. *No distinction is made based on the seriousness or the circumstances of the offence, the time which has elapsed since the offence was committed and*

[28] See fn.5.

[29] The equivalent to "removed".

[30] Article 8 of the European Convention of Human Rights provides: "1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as in in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others".

[31] The ACPO (Association of Police Officers) Retention Guidelines for Nominal Records on the Police National Computer came into effect on March 31, 2006. The second edition was published by the ACPO in 2010 and it sets out the framework for the retention of police information (para.36-45).

[32] The ACPO Guidelines make reference to a "stepping down" (or non-disclosure) policy of convictions and cautions in order to limit access to data. See fn.5.

> *whether the caution is spent*. In short, there appears to be no scope for the exercise of any discretion in the disclosure exercise. (para.204, emphasis added)."

According to the ECtHR, the UK system lacks a clear legislative framework for the collection and storage of data and there are limited arrangements in place in respect of mandatory disclosures. No distinction is made on the basis of the nature of offence, the disposal of the case, the time elapsed or relevance of the data to the employment in question.

> "The cumulative effect of these shortcomings is that the Court is not satisfied … The retention and disclosure of the applicant's caution data accordingly cannot be regarded as being in accordance with the law. There has therefore been a violation of Article 8 of the Convention in the present case." (para. 207).

While the ECtHR considered there to be deficiencies in both storage and disclosure of convictions and cautions, I will focus my analysis on those aspects of this judgment which relate specifically to disclosure.

Principles of disclosure of convictions and cautions

The following principles for disclosure of convictions and cautions for employment prospects may be derived from the ECtHR judgment:

Convictions and cautions are part of the person's private life and fall within the protection of art.8 of the ECHR

According to the Court, disclosing public data like convictions interferes with private life. The Court relies on two arguments. First, European legislation considers that convictions are "personal protected data" ("sensitive personal data")[33] and are thus entitled to the protection of personal data laws regarding collection, storage and disclosure of information. Personal data are protected by the right to privacy even if they refer to personal aspects developed in public life.[34] Secondly, the Court states that the right to private life is not limited to issues of personal secrets or intimacy but extends also to "the right to establish and develop relationships with other human beings".[35] Disclosing convictions would therefore affect the liberty

[33] See art.6 of Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108) — "Special categories of data: Personal data revealing racial origin, political opinions or religious or other beliefs, as well as personal data concerning health or sexual life, may not be processed automatically unless domestic law provides appropriate safeguards. *The same shall apply to personal data relating to criminal convictions*." (emphasis added). See also Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] O.J. L 281/31.

[34] For a discussion if the right to privacy can also accommodate the right to protect personal data see P. De Hert and S. Gutwirth. "Privacy, Data Protection and Law Enforcement. Opacity of the Individual and Transparency of Power", in E. Claes, A. Duff, S. Gutwirth (eds), *Privacy and the Criminal Law* (Intersentia, Antwerpen-Oxford, 2006). Both authors comment on art.8 of the Charter of Fundamental Rights of the European Union which focuses explicitly on the protection of personal data. However this article does not deal with the problems that could arise with the disclosure of criminal records and makes no mention of disclosure or removal.

[35] R.C.A. White and C. Ovey, *Jacobs, White and Ovey: The European Convention On Human Rights* 5th edn (Oxford, OUP, 2010), p.358; D.J., Harris, M. O'Boyle, and C. Warbrick, *Law of the European Convention on Human Rights* 2nd edn (Oxford, Oxford University Press, 2009), p.364. See for example *Rotaru v Romania* (2000) E.C.H.R. 2000-V.366, information about political activities is protected by the right to private life; *Luordo v Italy* (32190/96) (2003) 41 E.H.R.R. 547, automatic entry on a bankruptcy register raises an issue on private life; *Sidabras v Lithuania*

of the person to develop relations and work with other people, specifically (the Court concurs on this with Lord Hope)[36] when this information is available for disclosure "long after the event when everyone other than the person concerned is likely to have forgotten about it" (para.102).

It is not difficult to agree with the Court, although two points are worth highlighting for future discussion: on the one hand, we could further reflect on whether the protection of the right to privacy against disclosure requires a long passage of time after the judgment, or in other words, if the disclosure of an "unspent" conviction by the government might also raise an issue under art.8 of the ECHR.[37] On the other hand it might be controversial to consider convictions as confidential information entitled to the protection of the right to respect for privacy.[38] In order to avoid disclosure of old convictions perhaps we should look instead for another "right" like, for example, "a right to change" grounded ultimately in the autonomy of the person. [39]

Mandatory disclosure of all convictions is disproportionate

The Court is against mandatory disclosure of all convictions and approvingly quotes Lord Hope [40] that: "It should no longer be assumed that the presumption was for disclosure unless there was a good reason for not doing so" (para.107).

As we have seen in the UK the Disclosure and Barring Service (DBS) automatically discloses all convictions and cautions held in the Police National Computer. The ECtHR argues against automatic disclosure of all convictions contained in the PNC, which does not allow the exercise of any discretion to balance public protection and privacy.[41] According to the ECtHR disclosure of criminal history information should be restricted in accordance with some criteria. These criteria should be, as the Court explains (para.206), based on the "nature of the offence, the disposal in the case, the time which has elapsed since the offence took place or the relevance of the data to the employment sought".

The judgment could be read as a criticism of the automatic disclosure of convictions and as suggesting a discretionary "case by case" system in order to establish a proportionate disclosure scheme.[42] However, it is arguable that the issue is not the discretionary versus the automatic nature of disclosures, which is the most common system in (continental) Europe, but rather the *breadth* of the

(55480/00 and 59330/00) (2004) 42 E.H.H.R. 104, a far reaching ban on taking up private sector employment affects "private life"; and *Turek v Slovakia* (57986/00) (2006) 44 E.H.R.R. 861, registration as former collaborator of former State Security Agency is an interference with the right to respect private life.

[36] *R (on the application of L) v Commissioner of Police of the Metropolis* [2009] UKSC 3; [2010] 1 A.C. 410

[37] T. Thomas and D. Thompson, "Making Offenders Visible" (2010) 49(4)*The Howard Journal* 340. The general discussion should be to which extent a deprivation of freedom for example entails also a deprivation of privacy. See L. Lazarus, "Conceptions of Liberty Deprivation" (2006) 69 M.L.R. 738; L. Zedner, "Punishment and the Plurality of Privacy Interests", in Claes, Duff, Gutwirth (eds) *Privacy and the Criminal Law* (2006).

[38] For a further discussion see J.B. Jacobs and E. Larrauri, "Are criminal convictions a public matter? The US and Spain" (2012) 14(1) *Punishment and Society* 3; M. Tunick, "Privacy and Punishment" (2013) 39(4) *Social Theory and Practice*.

[39] Or "the right to be forgotten" recently developed in the context of personal data protection by the Court of Justice of the European Union. *Google Spain SL & Google Inc v Agencia Española de Protección de Datos (AEPD) & Mario Costeja González* (C-131/12) May 13, 2014, ECJ).

[40] *R. (on the application of L) v Commissioner of Police of the Metropolis* [2009] UKSC 3; [2010] 1 A.C. 410.

[41] See also *R (on the application of T) v Secretary of State for the Home Department* [2014] UKSC 35; [2014] 3 W.L.R. 96 " … The nature of T's and JB's attack on the regime is obvious. It is that it operated indiscriminately … If the type of request was as specified, there had to be a disclosure of everything in the kitchen sink" at [41].

[42] K. Hughes, "Proportionality Not Presumption" (2010) 69(1) The *Cambridge Law Journal* 4.

disclosure. A discretionary system, such as the UK's system of Enhanced Criminal Record Certificates, still leaves too much leeway for interpretation.[43] The best way to implement the criteria suggested by the Court might be not to disclose spent convictions (as a rule). This conclusion is a consequence of the fact that many of the criteria that the ECtHR suggests taking into account have already been considered by the ROA, precisely when classifying a conviction as "spent".

Cautions are private information

The Court notes that cautions are not public information but relate to things that have "occurred in private" (para.188) and "that happen behind closed doors" (para.102, quoting Lord Hope[44]), implying that there might be a difference between disclosing convictions and cautions. The Court draws attention to the Council of Europe Recommendation No.R (87) 15 regulating the use of personal data in the police sector on September 17, 1987 (Principle 5.3), which emphasizes that *communication of police data* to third parties is *exceptionally permissible*, when it "is necessary so as to prevent a serious and *imminent danger*". (emphasis added). This wording does not promote transmission of criminal record information for the "prevention of crime", but permits it only exceptionally where there is an imminent danger (which precisely authorizes the transmission of police information to private parties).

After the ECtHR judgment one could argue that cautions should not be disclosed (as is now the common practice in Standard and Enhanced Checks). A caution is not a conviction and whilst it may reflect the actual commission of a crime (manifested by the person's admission), the person's admission should not be considered equivalent to a court finding of guilt precisely because cautions are imposed in private by a police officer, with no involvement of a court, nor a public hearing, and without following the full criminal justice safeguards.[45] This does not mean that the administration of cautions is ilegitimate[46] but it does make a strong case for providing different disclosure rules to cautions as opposed to convictions. Consequently, one could defend the position that disclosure should extend only to convictions precisely because "convictions are imposed by the accountable judicial bodies in public, rather than simply administered by police officers in private".[47]

On the other hand the considerations of the Court relating to cautions should apply even more clearly to other police information that "may even disclose something that could not be described as criminal behaviour at all" (at para.102,

[43] " … the bald statistics show that, of the three applicants to suffer damaging soft disclosure under the new R (L) test, two found their judicial review applications dismissed entirely and the third, C, was returned to the discretion of a chief officer of police who wanted to disclose". Baldwin, "Necessary Intrusion or Criminalising the Innocent? An Exploration of Modern Criminal Vetting" (2012) 76 *Journal of Criminal Law* 163.

[44] *R. (on the application of L) v Commissioner of Police of the Metropolis* [2009] UKSC 3; [2010] 1 A.C. 410.

[45] True, convictions from plea bargains also lack procedural safeguards and this is why they are so intensely criticized. However at the very least, one could point to the involvement of the courts in their administration. See A. Sanders, R. Young and M. Burton, *Criminal Justice* 4th edn (Oxford: OUP, 2010.

[46] See for a discussion A. Ashworth and M. Redmayne, *The Criminal Process* (Oxford, OUP, 2010), p.171.; P.l Hynes and M.Elkins, "Suggestions for Reform to the Police Cautioning Procedure" [2013] Crim. L.R. 966.

[47] M. Zalnieriute, "Blanket criminal record data disclosure system incompatible with privacy rights" [2013] *International Data Privacy Law* 1.

quoting Lord Hope).[48] Arrests, allegations with no further action, or dropped charges contain information that might relate to innocent people and might be too uncertain to be disclosed.[49] Unfortunately, for the affected person the disclosure of police information, albeit untested and unproven, might produce the same effects as a conviction,[50] representing as Lord Neuberger stated "something close to a killer blow to the hopes of a person who aspires to any post".[51]

Changes in disclosure policies affect one's expectations of privacy

Noting that the applicant's consent to the caution was based on her understanding that it would be deleted from her record after five years, the Court expressed "concern about the change in policy, which occurred several years after the applicant had accepted the caution and which was to have significant effects on her employment prospects" (para.205).

These changes in policy affect one's expectation of privacy because, according to the case law concerning the art.8 right to privacy, in order to authorise interference into private life this interference needs to be in "accordance with the law". The Court also adds that the law needs to be "accessible" and "foreseeable". Leaving aside whether the law regulating disclosure of criminal records is accessible, it is difficult to believe that these changes in policy do not affect the "foreseeable" element.[52] Therefore changing policies regarding the disclosure of criminal record information not only makes it impossible for a person to regulate their conduct but also affects one's expectations of privacy.

Second, one could debate, as the Court hints (para.205), whether such changes in policy affect also h*er right to a fair trial* (art.6.1 ECHR) which she waived once she was assured that the cautions would be removed from her criminal record five years later. The waiver of her right of access to court requires an informed consent,[53] yet one is surely left to wonder if informed consent will ever be possible given that disclosure policies may change after the consent to the caution has been given.

Finally, a caution might not be considered a penalty[54] but it is debatable as to whether or not its disclosure should be subject to the *prohibition of retrospective application* (art.7.1 ECHR). There seems to be only two alternatives: either we subject the administration and disclosure of cautions to the prohibition of retrospective penalties or consent can never be fully informed[55] if policies regarding its administration might change[56], and therefore there is a breach of her right to a fair and public hearing.

[48] *R (on the application of L) v Commissioner of Police of the Metropolis* [2009] UKSC 3; [2010] 1 A.C. 410; see also *R. (on the application of P) v Chief Constable of Thames Valley Police* [2014] EWHC 1436 (Admin).

[49] Interestingly acquittals are also disclosed in the UK but not in the EU. See Baldwin, "Necessary Intrusion or Criminalising the Innocent? An Exploration of Modern Criminal Vetting" (2012) 76 The *Journal of Criminal Law* 163.

[50] See *R. (on the application of Stratton) v Chief Constable of Thames Valley* [2013] EWHC 1561 (Admin) at [48].

[51] *R. (on the application of L) v Commissioner of Police of the Metropolis* [2009] UKSC 3; [2010] 1 A.C. 410 at [75].

[52] A rule is foreseeable "If it is formulated with sufficient precision to enable any individual -if need be with appropriate advice- to regulate his conduct". *Rotaru v Romania* (2000) E.C.H.R. 2000-V at [55].

[53] See B. Emmerson, A. Ashworth and A. Macdonald, *Human Rights and Criminal Justice*, 3rd edn (London, Sweet & Maxwell, 2012), p.434.

[54] See Emmerson, Ashworth and Macdonald, *Human Rights and Criminal Justice* (2012), p.871–876.

[55] Regarding the problems of providing complete advice of the consequences of a caution see fn.1.

[56] *Chief Constable of Humberside Police v Information Commissioner* [2009] EWCA Civ 1079; [2010] 1 W.L.R. 1136 at [48].

Indeed, such changes in policy do not only undermine the guidance function of the law but also its systematic integrity.[57] One could further argue that the reasons why it is worth respecting this doctrine—respect for the rule of law, constancy, generality, reliance interest, institutional responsibility—should hold valid for the policies ruling disclosure of criminal records.

> "If we want to, we *can* enforce laws that the citizenry have not yet gotten used to. But, in doing so, we show contempt for the dignity of ordinary agency and the ability of people to be guided by the law, to internalize it, and to self apply it to their conduct. Upholding dignity in this sense is one of the things that the rule of law requires." [58]

The "new filter rules": are these respectful of the ECtHR?

Following recent judgments[59] the UK government introduced an amendment to the legislation[60] that came into force on May 29, 2013. The new "filtering rules" are designed to allow some convictions not to be disclosed if: a) 11 years have elapsed since the date of conviction or six years in the case of a caution; b) it is the person's only offence; and c) it did not result in a custodial sentence. The government added "Even then, it will only be removed if it does not appear on the list of offences relevant to safeguarding". According to the new filtering rules the list of offences that will always be disclosed include more than 1000 offences.[61]

These new "filtering rules", while offering a slightly more nuanced approach to disclosure, are still very restrictive and do not reflect an adequate balance: for example a short prison sentence will still be always disclosed, two minor offences will always be disclosed, and a large list of offences "relevant to safeguarding" will always be disclosed. The result is that even with the "new filtering rules" the case of *MM*—which, incidentally, relates to a grandmother being cautioned for "child abduction" in the context of a contested custody dispute—would still probably be disclosed. Thus the "new filter rules" fall short of answering the main criticisms of the disclosure system in place in the UK from a human rights perspective, namely that convictions and cautions that are "spent" according to the ROA will still be disclosed and that police records might be disclosed.

Conclusion

The disclosure of criminal record information for employment purposes raises an issue under art.8 of the ECHR. This is because the ECtHR has held that convictions are personal data, and even if they are public data they still can be part of a person's "private life". The right to private life should be seen as protecting a personal

[57] J. Waldron, "Retroactive Law: How Dodgy was Duynhoven?" (2004) 10(4) *Otago Law Review* 631.

[58] J. Waldron, "Stare Decisis And The Rule Of Law: A Layered Approach" (2012) 3:111 Michigan Law Review 1.

[59] *R. (on the application of T v Chief Constable of Greater Manchester Police* [2013] EWCA Civ 25; [2013] 1 W.L.R. 2515 heard in the Supreme Court on December 9–10); *R (on the application of T) v Secretary of State for the Home Department* [2014] UKSC 35; [2014] 3 W.L.R. 96; and *MM v United Kingdom* [2013] April 29, 2013.

[60] On May 29, 2013, the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (Amendment) (England and Wales) Order 2013 came into force. See *http://www.legislation.gov.uk/uksi/2013/1198/contents/made*[Accessed July 21, 2014].

[61] *https://www.gov.uk/government/publications/dbs-list-of-offences-that-will-never-be-filtered-from-a-criminal-record-check* [Accessed July 21, 2014]

(rather than secret) sphere to ensure "the development, without outside interference, of the personality of each individual in his relations with other human beings".[62]

This does not mean that disclosure of criminal history information is impossible, but it does mean that it has to be "in accordance with the law"' (and that the law has to be accessible and foreseeable), and "necessary" in a democratic society. For this to be so a fair balance must be struck between the general aims of public protection, the specific aims of employer selection processes and the individual's right to respect for privacy as well as criminal justice interests in rehabilitation and reintegration. In brief, the disclosure of criminal records has to be proportionate in order to avoid an illegitimate interference with the right to privacy.

In this paper I have suggested that a fair system of disclosure of criminal records to employers should *not disclose old convictions or non-conviction material*. This implies two things: a) that all convictions should be subject to the possibility of being erased ("expunged", "deleted", "cancelled" or "spent")[63], and b) that old convictions cease to be public and should not be disclosed after a certain time. To emphasize the argument once more, if the conviction has become spent (i.e. a long time has elapsed since the sentence has been served), the person has a reasonable expectation of privacy because the government has admitted that this conviction ceases to be relevant for the general public. It is not of much use to shorten the rehabilitation periods foreseen in the ROA, if the person is still obliged to disclose 'spent' convictions in all positions requiring an Enhanced Criminal Record Check.

Moreover a consensus seems to be slowly emerging that after seven years the criminal record has no predictive value[64] and to disclose it results in no increased public protection while damaging the employment prospects of the ex-offender.

> "For most other offenders, and after a ten-year conviction-free period … prior contact is no longer informative for future criminality. In other words, this is the time that statistically, ex-offenders become like non-offenders. Indeed, one perhaps needs to reflect that employers have … more to fear from the non-offending population than from these ex-offenders. In fact, our calculations suggest that *17 out of every thousand* 30-year-olds who had a crime-free period during the previous ten years would be convicted in the next five years. Further, *of those 17 persons, 13 will have previously had no convictions* at all … Whatever else, such calculations should help to *preserve a sense of proportion* in terms of the size of the problem (emphasis added)."[65]

I have also argued that the disclosure of cautions is very problematic because it relates to out-of-court disposals that have been imposed in private by a police officer, with no involvement of a court, nor a public hearing, and without following

[62] D.J. Harris, M. O'Boyle, & C. Warbrick, 2nd edn *Law of the European Convention on Human Rights* (Oxford, Oxford University Press, 1995, 2009), p.364.

[63] "No evidence has been placed before this court or the courts below that demonstrate that it is not possible to identify from among those convicted of serious offences, at any stage in their lives, some at least who pose no significant risk of re-offending" *R. (on the application of F) v Secretary of State for the Home Department* [2010] UKSC 17; [2011] 1 A.C. 331 at [56]. The argument relates to the indefinite notification requirements in the Sex Offenders Register. It is worth considering whether the argument could also be extended in favour of a right to review convictions registers.

[64] A. Blumstein A and K. Nakamura, "Redemption in the presence of widespread criminal background checks" (2009) 47(2) *Criminology* 327; S.D. Bushway, P. Nieuwbeerta and A. Blokland, "The predictive value of criminal background checks: Do age and criminal history affect time to redemption?" (2011) 49(1) *Criminology* 27.

[65] K. Soothill and F. Brian, "When do Ex-Offenders Become Like Non-Offenders?" (2009) 48(4) *The Howard Journal* 373.

the full criminal justice safeguards. Additionally the disclosure of cautions is dubious because the consent of the person being cautioned is given without their being fully aware that these might be disclosed (and, moreover, without knowing in what future directions the disclosure system might evolve). Finally, disclosure of cautions blurs the important difference of nature and consequences between convictions and punishments on the one hand, and out-of-court disposals on the other hand.[66]

Although the disclosure of criminal record information is based on the presumption that disseminating criminal history information will be effective for crime prevention, no research has so far been able to produce any conclusive results. We do not have a complete understanding of the actual commission of the crime, and in some of the cases that caused particular alarm and triggered changes in policies, the fact that the person was employed had no causal link with the actual offence committed. In the paradigmatic case of the Soham murders for example: Ian Huntley was not employed in the school from where the two girls were killed. His girlfriend was. It is difficult to see what *his* CBC would have prevented. [67] We should remember that disclosure comes at a cost, in terms of rights like privacy and social reintegration. As Lord Neuberger stated, it seems "realistic to assume that, in the majority of cases, it is likely that an adverse Enhanced Criminal Record Check …. will represent something close to a killer blow to the hopes of a person who aspires to any post",[68] because employers might well prefer a "clean slate" even if the offences are minor, old, or irrelevant.

As criminologists have pointed out, contemporary disclosure policies in UK shift the onus to the employer who might become "overcautious" and employ only people with a "clean slate". [69] Therefore the institution of "criminal records" risks excluding people with convictions long after their sentences have been served and perpetuates the stigma attached to previous criminality.[70] Consequently criminal records can act as an "invisible punishment"[71] because they deprive people of social, political, and civic rights.[72]

[66] Also in this second category might be penalty notices for disorder, cannabis warnings and civil preventive orders; but these require separate analysis (E. Larrauri, "Criminal Record Disclosure and the Presumption of Innocence" (2014, forthcoming). See N. Padfield, R. Morgan, and M. Maguire, "Out Of Court, Out Of Sight? Criminal Sanctions And Non-Judicial Decision-Making", in M. Maguire, R. Morgan and R. Reiner (eds) *The Oxford Handbook of Criminology*, 5th edn (Oxford, OUP, 2012), p.962.

[67] It is now possible to check "A person living in the same household as a person whose suitability is being assessed to work in regulated activity with children… and who lives on the same premises where the work would normally take place". *https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/315179/DBS_guide_to_eligibility_v4.pdf* [Accessed July 21, 2014]. So in order to prevent a similar case occurring using a CBC three conditions would need to be met: (1) the partner would need to live in the same household; (2) at the same time his girlfriend was applying for the position; and (3) the girlfriend would have to be intending to conduct the regulated activity at the premises where they both resided.

[68] *R. (on the application of L) v Commissioner of Police of the Metropolis* [2009] UKSC 3; [2010] 1 A.C. 410 at [75].

[69] S. Maruna, "Judicial Rehabilitation and the 'Clean Bill of Health' in Criminal Justice" (2011) 3 *European Journal of Probation* 97.

[70] D.S.Murphy, B. Fuleihan, S.C. Richards and R.S. Jones, "The Electronic 'Scarlet Letter': Criminal Backgrounding and a Perpetual Spoiled Identity" (2011) 50 *Journal of Offender Rehabilitation* 101; A. Myrick, "Facing Your Criminal record: Expungement and the Collateral Problem of Wrongfully Represented Self" (2013) 47(1) *Law & Society Review*:73.

[71] J. Travis, "Invisible punishment: An instrument of social exclusion" in M. Mauer and M. Chesney-Lind (eds) *Invisible Punishment* (New York: The New Press, 2002), pp.15–36; T. Thomas, "The Sex Offender Register. A measure of public protection or a punishment in its own right?" (2008)*http://britsoccrim.org/new/volume8/6Thomas08.pdf* [Accessed July 21, 2014].

[72] N.V. Demleitner, "Preventing internal exile: The need for restrictions on collateral sentencing consequences" (1999) 11(1) *Stanford Law and Policy Review*153; C. Uggen, J. Manza, and M. Thompson, "Citizenship, democracy

The ECtHR decision in *MM* is therefore welcome for three reasons: a) because it declares that there has been a violation of the right to privacy regarding the disclosure of the applicant's caution data; b) because it focuses attention on the European laws on disclosure of criminal records and it may well have implications for the storage and disclosure of criminal data in other European countries;[73] and c) because in balancing the claims to public protection with the respect for the private life of its citizens it can be seen as a contribution to the reinforcement of human rights. What is now required is a careful rethinking of the UK disclosure system.

Postscript

The judgment *R. (on the application of T) v Secretary of State for the Home Department*[74] upheld that the disclosure of a police warning in the case of T, a minor that stole two bicycles when he was 11 year old, and of JB, a woman cautioned for a minor shoplifting offence, was a breach of the right to privacy and "failed to strike a fair balance between their rights and the interests of the community".[75] The implications that this judgment might have for the future system of disclosure of criminal records are still unknown and would probably deserve a further paper. However the problems that arise when disclosing spent convictions and cautions and police records, addressed in this paper, will most likely continue.[76]

and the civic reintegration of criminal offenders" (2006) 605(1) *The Annals of the American Academy of Political and Social Science* 281.

[73] ECtHR judgments are binding to all countries that have signed the ECHR (art.46.1) and the Committee of Ministers will supervise its implementation (art.47). However the precise way in which this is done depends on national legislations.

[74] *R. (on the application of T) v Secretary of State for the Home Department* [2014] UKSC 35; [2014] 3 W.L.R. 96.

[75] *R. (on the application of T) v Secretary of State for the Home Department* [2014] UKSC 35; [2014] 3 W.L.R. 96 at 50.

[76] According to Unlock 85% of the calls made to their Helpline were not protected by the new filter rules. *http://www.unlock.org.uk/supreme-court-rules-that-minor-cautions-and-convictions-shouldnt-be-disclosed-on-criminal-record-checks-and-the-filtering-process-remains/* [Accessed July 21, 2014].