

Citizen UK 2000 and the European Convention for the Promotion and Protection of Human
Rights and Fundamental Freedoms

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Submitted in accordance with the requirements for the degree of PhD

The University of Leeds

POLIS

March 2008

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Abstract

This thesis sets out to review the extent to which the European Convention for the Promotion and Protection of Human Rights and Fundamental Freedoms¹ has influenced the political and legal order of England and Wales.² Analysis is explored along a number of lines of investigation.

A review of the influence of the ECHR on the constitutional order of the UK is prefaced by analysis of its early influence on the order of the Netherlands, Germany and France.³ Analysis gives rise to two questions:

- Does the ECHR, dependent on the signatory-state with its own constitutional arrangement and legal culture, support a claim that a collective enforcement of human rights⁴ protection can not exist empirically, therefore can not achieve as a transcending philosophy?
- Does the ECHR's apparent affinity with the monist order of the civil-law tradition render it in relation to the UK dualist order an impracticable statement of ideal?

Drafted under the auspices of the Council of Europe, the rights and freedoms of the ECHR are accorded a generic structure, essentially subject to derogation. Whether the ECHR is capable of advancing an effective form of human rights protection, this thesis examines the genesis of the ECHR, including its absence of inquisitorial function. Analysis gives rise to the question:

- What is to be expected of the ECHR: the promotion of a common understanding of HR intimated by the Congress of Europe 1948, or a collective enforcement of protection inherent in an understanding of the *telos* of the ECHR?

Narrowing the focus of analysis to the UK, this thesis examines its response to the concern of terrorism, asylum and various aspects of criminal justice and asks:

- Whether the concept of HR protection has become the last haven of *sui-generis* positivism, and if so, the ECHR a *raison d'être* of the signatory-state?

With regard to the judicial treatment of the rights and freedoms of the individual post the Human Rights Act 1998,⁵ this thesis examines the functioning of Section 3 of the HRA. Analysis raises a number of questions:

¹ Hereafter, ECHR

² Excluding the legal order and legislative autonomy of Scotland. Hereafter, UK

³ Following its ratification by the Netherlands, Germany and France

⁴ Hereafter, HR

⁵ Hereafter, HRA

- Does a division in judicial reasoning exist between, and/or within, the higher and lower courts regarding the application of the HRA/ECHR? If so, on what grounds?
- Can a universal humanity exist in a legal order where rights are treated as a form of residual liberty remaining after legal restraints are subtracted?

Whether post 2000, a decline in autonomous law has resulted in a convergence of the legal and political and the creation of a national responsive law in which the HR concern of the individual is placed below that of the prevailing Government and judiciary, the findings of this thesis are used to test the assertion that:

- The Article 1 ECHR agreement by the UK to secure to everyone within its jurisdiction the rights defined in Section 1, is not matched by a realisation of those rights by everyone within its jurisdiction;
- Subject to the sovereignty of Governments and politics of the national judiciary, the ECHR constitutes an order for the popularisation of the concept of HR protection, as opposed to a system for the collective enforcement of the rights and freedom of the individual.

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Section 1: Citizen UK 2000 and the European Convention for the Promotion and Protection of Human Rights and Fundamental Freedoms: Introduction

Section 1.1: *Research Approaches Employed and Research Methods Defined*

The primary approach employed is legal-positivism. The approach asserts that knowledge derives from the data of legal experience and not from the rationalisation of values. There is sound reason for its maintenance. In accordance with positivism, rights presuppose an order created by law. Applied to the analysis of HR, the approach manages data as rules, which makes it possible to determine the *dicta* of law without excessive analysis of the theories behind it. The approach remains the dominant philosophy of the UK judge, committed to a utilitarian structuring of law.

However, the flaw in positivism is that an understanding of HR development necessitates not only empirical analysis of ‘official action...organised round the enforcement of legal precepts and the maintenance of a legal order,’ but the social environment in which institutions exist.¹ The observation is pertinent in relation to the ECHR. The management of data as an assessment of rules constitutes an out-dated representation of what is an achievement between supranational construct and signatory-state. Positivism may highlight the effect of the ECHR in terms of legal processes, but does not explain the reasoning of the social actor. In the UK, the judiciary remains a source of law developed through ongoing exposition, rather than an *a priori* code.

The flaw in positivistic analysis formed the subject of criticism by Black.² Advancing the approach of Durkheim,³ Black observed that reliance on rules as observed data constituted a bar to recognition that legal practice consisted of social acts. Applied to the ECHR, acknowledgement of social processes serves to move analysis from the tabulation of data to the understanding of political and judicial action. Two approaches adopted in this thesis are knowledge and opinion about law⁴ and post-behaviouralism.

As a supranational construct, the ECHR represents a change in the political and social context in which law exists in European society. Instrumental in the procurement of measurable data, KOL examines the way in which the ECHR contributes to HR protection in signatory-states. Technological development has extended the capacity of the State to control society to the extent that legal analysis can not be separated from consideration of policy. Post-behaviouralism serves

¹ R. Cotterrell *The Sociology of Law* (Butterworth and Co. (Publishers) Ltd., London 1984) 3

² D. Black ‘The Boundaries of Legal Sociology’ (1972) *Y.L.J.* 81, 1086

³ E. Durkheim *Rules of Sociological Method* (Macmillan Press, London 1982) 247

⁴ Hereafter, KOL

to broaden the notion of the legal and political beyond that of institutions, toward acknowledging the behaviour of the minister, legislator and judge.

In accordance with positivism, values as statements of preference fall outside the realm of fact. However, insofar as values are embodied in law as rules, values do underlie the structural arrangement of society. Independent of the principal approach employed in this thesis, a number of secondary approaches from a range of socio-legal and political fields are acknowledged.

Whether a normative order of the kind intimated by the ECHR can be developed, this thesis raises a number of questions best addressed by normative-political theory. Examining the politics of the ECHR theorising is prescriptive, drawing on the arguments of sociology to examine justification for a universal arrangement of HR protection. Focusing on the institutional and procedural arrangement of the ECHR, one use made of the approach is a constitutional analysis to rationalise the functioning of the ECHR, in particular the diversity of its application in specific signatory-states.

A primary research method employed is a comparative case-study analysis of the treatment of the ECHR by the UK, Netherlands, Germany and France. The method of data-collection is quantitative, capable of replication. With regard to data-gathering, the technique employed consists of the use of primary and related secondary sources, including formal legal, political and constitutional documentation; judicial ruling and commentary; and informed political and sociological debate.

Finally, facilitating analysis of the practicality of the ECHR, use of institutional and constitutional analysis make for finding based on cause and consequence. Two methods employed are: (1) formal-legal: the analysis of HR in relation to the ECHR, public law and government organisation; and (2) descriptive-inductive: analysis of procedure, institutions, and impetus for the enforcement of a universal European order of HR protection.

Section 1.2: *Literature Review*

Section 1.2.1: Why Human Rights as a Focus of Study?

The proposition that persons, regardless of culture or ethno-geographic location, possess inviolable rights has continued to challenge the practice of law and politics. With regard to the UK, as legislation has proliferated, the concern of HR has pervaded most areas of legal life. Forming the focus of this thesis, if an achievement of the twentieth-century was to promote HR

protection, then a concern for the twenty-first is to examine the effectiveness of policies advanced, and the exertion of the establishment charged with realising them.⁵

Section 1.2.2: Researching Citizen UK 2000

(1) The Concept of Human Rights

The concept of HR forms the focus of considerable socio-political, philosophical and legal analysis. This is reflected in a vast literature review.⁶ Yet, albeit the language of rights may have become part of ‘a common currency’ of twenty-first century life, conviction with which they are asserted remains devoid of philosophical agreement either as to their character, content or foundation.⁷ Although clarification of the concept by focusing on its philosophical foundation may appear theoretical, it is its definition and role assigned at the national level which dominates its evolution.

Analysing the effect of the ECHR on the rights and freedom of the individual, this thesis examines the influence of the ECHR on national legal and political practice, as can be explained by legal and political theory. Analysis advances the question whether dependent on the constitutional arrangement and culture of the signatory-state, the ECHR does support a claim that a collective enforcement of HR protection can not exist empirically, therefore can not achieve as a transcending philosophy.

For example, whereas the concept of HR is used literally in the international context, in UK law rights are discussed in terms of civil-liberties. Although not interchangeable concepts, this thesis highlights the value accorded them by two schools of thought: civil-libertarianism and positivism.

In accordance with the former, a HR is perceived as an inviolable freedom in which civil-liberties operate. A liberty is subsidiary to a right and may be changed provided that the latter is otherwise protected. The approach embodies the philosophy adopted throughout the work of Steiner and Alston,⁸ Ewing,⁹ and Stone.¹⁰ Focusing on the individual, the approach constitutes an expression of Mills.¹¹ Examining the enforcement of morality by law, Mills distinguished

⁵ G. Power *Realising Human Rights* (St. Martin's Press, New York 2000) Introduction

⁶ Including, J. Bentham *Anarchical Fallacies*, in J. Waldron *Nonsense upon Stilts* (Methuen Publications, London 1987); A. Dicey *Introduction to the Study of the Law of the Constitution* (Macmillan Press, London 1965); R. Dworkin *Taking Rights Seriously* (Duckworth Press, London 1978); D. Forsythe *Human Rights in International Relations* (CUP, Cambridge 2000); H. Hart ‘Are There any Natural Rights?’ [1959] *P.R.* 64, 175; A. Ingram *A Political Theory of Rights* (OUP, New York 1994); J. Mills *On Liberty* in M. Warnock *Utilitarianism* (Fontana Press, London 1962); R. Pound *Introduction to the Philosophy of Law* (YUP, New Haven 1954) and J. Waldron *Theories of Rights* (OUP, Oxford 1984)

⁷ P. Jones ‘Re-examining Human Rights’ (1989) *B.J.P.S.* 19, 69

⁸ J. Steiner and P. Alston *International Human Rights in Context* (OUP, Oxford 2000)

⁹ C. Gearty and K. Ewing *The Struggle for Civil-Liberties* (OUP, Oxford 2000)

¹⁰ R. Stone *Textbook on Civil-Liberties* (OUP, Oxford 2004)

¹¹ J. Mills *The Power Elite* (OUP, New York 1956); and *The Sociological Imagination* (Penguin Group Publishers, Harmondsworth 1970)

between a public and private realm of morality and concluded that the purpose for which power could be exercised over an individual was to prevent harm to others. The opinion is cited by Stone as a starting point to his unsympathetic attitude toward collective rights and his premise that the concern of the individual should not be unduly subordinated to the needs of the group.¹² The approach is characteristic of UK HR activists and legal-practitioners generally, critical of one area of twenty-first century HR concern: criminal justice. In so far as a special position is accorded *droits subjectif*, the value accorded HR stands in contrast to the policy of the prevailing UK Government, and (arguably) Parliament. Analysing Government plans to rebalance the criminal justice system in favour of the community¹³ highlights a second approach to the concept of rights, one grounded in the utilitarianism of Bentham¹⁴ and Dicey:¹⁵ concerned not so much with accrediting value to the rights of the individual, than the ability of the state to determine his relationship with society, its forms and functions. It is this conception which forms the focus of Stone's criticism of the UK's treatment of the terrorist-suspect: that in so far as Parliament can be panicked into reacting with undue regard for liberty by a situation of perceived emergency, it is not so much that it is decided that the rights of the individual must give way to the desire to control terrorists, than whether the effect of such a decision is ever seriously considered.¹⁶

Highlighting how ideology shapes the development of HR, the application of classic-rights theory to HR analysis remains significant. Not merely in questioning the utilitarian management of the UK order of HR protection, but the reality expected of a universal system. Whether such examination provides adequate analysis of the term as it has come to acquire in contemporary political practice¹⁷ however, is questionable.

(2) *The ECHR*

Examining the role of the ECHR, as deduced from formal and related documentation, this thesis questions the ECHR as a construct whose objective is to establish rights of the individual to be secured by signatory-states: an objective going beyond mere negative restraint on Governmental interference. Grounded on the premise that a list of rights is only as good as the mechanism in place for enforcing it,¹⁸ this thesis examines the ECHR's construction, the lack of control machinery for ensuring the uniform-application of its terms, and the intention of its drafters.

¹² Stone (2004), Op. cit at 2

¹³ Home Office (2004) *Cutting Crime, Delivering Justice: A Strategic Plan for Criminal Justice 2004-2008* (TSO, London 2004)

¹⁴ Bentham in J. Waldron (1987), Op. cit. at 53

¹⁵ Dicey (1965), Op. cit at 203

¹⁶ Stone (2004), Op. cit at 10

¹⁷ In particular the supranational construct

¹⁸ B. Dickson *Human Rights and the European Convention on Human Rights* (Sweet & Maxwell, London 1997) 8

With regard to its construction, analysis of the text of the ECHR highlights areas where the individual should be protected. For example, one of the Council of Europe's aims was listed as being a solution to intolerance in relation to the treatment of minorities. However, whereas the ECHR remains devoid of provision regarding the self-determination of minorities, examination of religious hatred discloses a need for clarification of the term 'religious freedom.' Further, the ECHR advocates principles none of which are new to liberalism, except that they are expressed on a universal level. The ECHR declares that everyone has a right against unjustified interference by a public authority however, by means of derogation, the only absolute rights are Articles 3 and 4. A state is not prevented from pursuing legitimate aims by its own means. For instance, albeit the ECHR advocates against extensive internment of the individual, providing that there is objective basis for it and the matter is under judicial control, Article 5 does not prohibit it. Similarly, Article 2 is not breached by the use of force necessary to affect a lawful arrest.¹⁹ There is nothing preventing force being used, only that its use is accountable. The same applies to state-surveillance, wiretapping and DNA collation: such practices are not prevented by Article 8. Articles 9, 10 and 11 share the same structure: the second paragraph sets forth grounds in which a state can restrict the exercise of the right expressed in the first. Highlighting the limitations of HR protection inherent in the text itself, whether the ECHR was/is intended neither to affect state-autonomy as traditionally perceived, nor acknowledge HR in the strong sense, this thesis examines the contention in accordance with theorist Vasak,²⁰ as well as the view that the ECHR was drafted with the aim *inter-alia* of achieving domestic status.²¹

Finally, with regard to the role of the ECHR as deduced from the intention of its drafters, according to Steiner and Alston,²² Robertson and Merrills,²³ one purpose for its creation was to bring the democratic countries of Europe within a common ideological framework. Examining the impetus for the ECHR, this thesis questions whether such conservatism remains its primary objective. Analysis advances examination of the normative role of the ECHR as a guardian of individual HR toward its empirical capability; the practicality of the application of Dworkin's interpretation of rights in the strong sense:²⁴ insofar as the ECHR allows rights to be derogated more accurately leads to their interpretation in Hohfeldian terms as liberties as opposed to claims,²⁵ as well as, the relevance of the reasoning of Mills: insofar as the ECHR shares

¹⁹ *McCann v UK* (1996) 21 EHRR 97

²⁰ K. Vasak 'L'application des HR et de libertes fondamentales par le productions nationales, Article 13 de la ECHR, Droit Communautaire et droit national semaine de Bruges' in 'the European Guarantee of Human Rights: a Political Assessment (5-8 November 1975, 4th International Colloquy, Strasbourg: 1976) 39

²¹ T. Buergenthal 'Human Rights and the European Convention on Human Rights and its National Application' (1970) 18 *A.J.C.L.* 233

²² Steiner and Alston (2000), *Op. cit.* at 572

²³ A. Robertson and G. Merrills *Human Rights in the World*, (Manchester University Press, Manchester 1996) 121

²⁴ That 'when we say that someone has the 'right' to do something... we imply that it would be wrong to interfere with his doing it...' Dworkin (1978), *Op. cit.* at 188

²⁵ W. Hohfeld 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 *Y.L.J.* 16, 710

characteristics with the communitarian critics of liberalism that the individual cannot be thought of as being independent of a community

(3) The Constitutional Order of the UK, Netherlands, Germany and France

Whether the ECHR is capable of advancing an effective form of HR protection, its implementation remains with the signatory-state. However, some forms of constitutional order appear more capable of acknowledging the ECHR than others. Characteristic of the civil-law order of Europe, a monist constitutional arrangement, whereby international and municipal law are considered one interlocutory order, provides for the inclusion of international treaty into national law. As exemplified by the constitutional order of France, where international treaty duly ratified, has an authority superior to that of national law; and the arrangement of Germany, where conferral of the status of *lex specialis derogate leges generales*²⁶ on international treaty renders it the more specific law.

In contrast, the UK dualist system regards international and national law as two separate orders, each with its own code of practice and authority. Whether the ECHR's (arguable) affinity with the civil-law order renders it in relation to the UK an impracticable statement of ideals, this thesis examines the arrangement of the UK in relation to that of the ECHR's more prominent signatories: the Netherlands, Germany and France. Reasons for the choice of signatories are as follows.

According to the World HR Guide²⁷ and the Netherlands Planning Office²⁸ the Netherlands's early response to the ECHR rendered it a signatory-state 98% committed to HR. However, despite being characterised by a written constitution which sets out the rights of the individual, this thesis questions the findings, as well as those of Polakiewicz and Jacob-Fultzer,²⁹ van Dijk and van Hoof,³⁰ as to whether the degree of protection awarded HR is in fact greater than that ordinarily afforded by the legislative process.

With regard to the constitutional arrangement of Germany, its Basic Law of 1949 constitutes a supreme law binding on Government officials. Whereas Article 24 allows Germany to transfer some of its sovereign power to international organisations, Article 25 provides for the integration of public international law into German Federal Law. With regard to the legal order, considerable emphasis is placed on the rights of the individual. The positivist premise separating

²⁶ As treaty constitutes a more specific law, national law should be interpreted, as far as practicable, in accordance with it

²⁷ C. Humana *World Human Rights Guide* (Pan Publications, London 1987) 189

²⁸ Netherlands Planning-Office (1994), Social and Cultural Report, Table 11.28, 44, in M. Curtis *Western European Government and Politics* (Longman Press, New York 1997) 353

²⁹ J. Polakiewicz, and V. Jacob-Fultzer 'The European Convention on Human Rights in Domestic Law' (1991) *H.R.L.J.* 12, 65

³⁰ P. Van Dijk and G. van Hoof *Theory and Practice of the European Convention on Human Rights* (Kluwer Law and Taxation Publishers, Boston 1990) 585

law from politics is discarded, along with the automatic application of legislation: Whereas, Article 1 provides a standard by which to measure the legitimacy of legislative action, Article 19 states that in no case may a basic right be encroached. However, such constitutional status is not without limitation. While individual liberty remains a guarded value, it is nevertheless confined within the framework of the overall political and moral order. Examining the findings of Murphy, Tanenhaus,³¹ and Bernhardt,³² this thesis examines the importance of the conferral of *lex specialis derogate leges generales* on treaty law and questions whether, despite its apparent commitment to the immutable rights of man, the German order remains dependent on the principles of societal obligation.

The same questioning is applied to the arrangement of France. During the 1946 Fourth and 1958 Fifth Republic, France restored its parliamentary system. Two features arose out of the restoration: a declaration of rights, and a power accorded a measure of the judiciary to oversee its application. However, despite the scope of protection accorded the individual, including a number of social and economic rights, its impact remains questionable. The uncertain functioning of the French *etat de droit* and a judicial reluctance to accept behaviour in contravention of established social principle, imposing an arguable restraint on individual and collective behaviour.

(4) *The National Judiciary*

A feature of the ECHR is its creation of a legal order for the protection of HR. However, one limitation is that different legal arrangements and judicial histories ensure that the philosophy of the national legal order is not uniform throughout contemporary Europe. Examining judicial commentary and case-law, this thesis examines the functioning of the ECHR as a supranational construct by means of analysis of the early response of the judiciary of the Netherlands, Germany and France.³³ Narrowing the focus of investigation to the treatment of the ECHR by the UK judiciary, analysis is approached by examining not merely positive law, but principles common to the legal order.

For example, considerable academic and judicial opinion has been expressed regarding the status and impact of the ECHR. However, constituting the first (arguable) challenge of its kind to common-law, the courts' early response to the ECHR was essentially archetypal. Whereas, in *R*

³¹ W. Murphy and J. Tanenhaus *Comparative Constitutional Law* (St Martin's Press, New York 1997) 659

³² R. Bernhardt *Reform of the Control Machinery under the European Convention on Human Rights*, in R. Macdonald *The European System for the Protection of Human Rights* (Nijhoff Publications, Dordrecht, 1995) 26

³³ Evidenced in the rulings of the *Hoge-Raad*: Netherlands Supreme Court; *Bundesgerichtshoff*: German Federal Court of Justice; *Bundesverwaltungsgericht*: German Federal Administrative Court; and *Bundesverfassungsgericht*: German Federal Constitutional Court. The *Conseil d'Etat*: French Supreme Administrative Court; *Cour de Cassation*: French Supreme Civil and Criminal Court; and *Conseil Constitutionnel*: French Constitutional Court

v Chief Immigration Officer, Heathrow Airport, ex-parte Salamat-Bibi,³⁴ Lord Denning considered a fear of involvement in the determination of policy to lay at the core of judicial reluctance toward the application of the ECHR, other objections highlighted by Griffith³⁵ included the advantage inherent in unwritten principles of judicial practice and the creation of the impression that the ECtHR was something of a court of appeal. Although a conjunction between UK and international law was maintained by judicial technique, in which the courts made reference to the ECHR in the event of a lacuna, ambiguity, or uncertain point of law,³⁶ evidence pointed to a reluctance to concede to the *telos* of the ECHR, grounded on a premise that the interpretation of unincorporated treaty was not a matter which fell to the jurisdiction of the court.³⁷

The constitutional status of the ECHR formed the focus of Duffy,³⁸ Griffith³⁹ and Warbrick,⁴⁰ who criticised the *hiatus* between the absence of judicial intervention to challenge municipal decision, and the finding of the ECtHR that the ECHR could only be satisfied by the availability of such review.⁴¹ Examining the constitutional sensibilities of the judiciary, this thesis examines its employment of the negative structure of protection highlighted in the annotated case-law and reports of Bailey⁴² and Allen.⁴³ As well as, a number of strictures on its ability to expand HR protection as perceived by Street⁴⁴ and the effect of such limitations (if any) on its ability to apply the ECHR. Analysis gives rise to a number of questions:

- Can the judiciary realistically adapt to a European HR order when its approach to HR remains primarily positivist and not purposive?
- Can HR be practicably protected in an order in which they are treated as a form of residual liberty remaining after legal restraints are subtracted?
- Can the ECHR have an effect on a judiciary used to dealing with issues raised by applying case-law, distinguishing precedents or interpreting legislation, in what can be described as an inward/backward approach?

Analysing the functioning of the HRA according to Craig,⁴⁵ Philipson,⁴⁶ Edwards,⁴⁷ Stone,⁴⁸ Gearty,⁴⁹ Starmer⁵⁰ and relevant case-law, this thesis examines the impact of Section 3⁵¹ on

³⁴ [1976] 1 WLR 979

³⁵ J. Griffith 'The Political Constitution' (1979) *M.L.R.* 1, 42

³⁶ Exemplified in *Waddington v Miah* [1974] 2 All ER 377; *Raymond v Honey* [1983] 1 AC 1; *Re O* [1991] 2 WLR 475; *R v Hallstrom, ex-parte W* [1986] QB 1090, *QBD*; *Mortensen v Peters* (1906) 14 SLT 227

³⁷ *R v Secretary of State for the Home Department, ex-parte Brind* [1991] 2 WLR 588

³⁸ P. Duffy 'English Law and the European Convention on Human Rights' (1980) *I.C.M.L.Q.* 29, 585

³⁹ J. Griffith *The Politics of the Judiciary* (Fontana Press, London 1997) 230

⁴⁰ C. Warbrick 'The European Convention on Human Rights and English Law' (1993) *E.L.R.* 19, 34

⁴¹ *Soering v UK* (1989) 11 EHRR 439

⁴² S. Bailey, D. Harris and D. Ormerod *Civil-Liberties, Cases and Materials* (Butterworths, London 2001)

⁴³ M. Allen, B. Thompson and T. Walsh *Constitutional and Administrative Law* (Blackstone Press, London 1994)

⁴⁴ Street *in* Bailey (2001), *Op. cit* at 263

⁴⁵ P. Craig 'The Courts, the Human Rights Act and Judicial Review' (2001) *L.Q.R.* 117, 589

established principles of statutory interpretation and judicial review. Analysis indicates the employment of three approaches:

- A reluctance to defer from the intention of Parliament, as indicated from the plain reading of statutory language of Lords Nicholls,⁵² Auld⁵³ and Sedley,⁵⁴ the legalistic approach adopted by Lords Slynn, Clyde, Hope and Hutton,⁵⁵ and the court in *R v Lyons*,⁵⁶ *LB Harrow v Qazi*⁵⁷ and *R v J, A-G Reference (No. 2 of 2001)*;⁵⁸
- A cautious deference to Parliament, as evidenced in the restraint of Lord Hope,⁵⁹ and the subjection of Section 3 by Lord Woolf to a number of cautionary rules;⁶⁰
- The liberal approach to interpretation of Lords Steyn,⁶¹ Nicholls,⁶² Carswell,⁶³ Baroness Hale,⁶⁴ and the court in *R (Hammond) v Home Secretary*,⁶⁵ *Middleton v West Somerset Coroner*,⁶⁶ *Commissioner of Police v Hurst*,⁶⁷ the advancement made by Lord Steyn on the heightened-scrutiny test regarding judicial review with a criterion grounded on the principle of proportionality,⁶⁸ and Lord Bingham's intimation of a need for a positive approach to HR protection.⁶⁹

Whether a division in judicial reasoning exists regarding the application of the ECHR order between and/or within the higher and lower courts, this thesis narrows the focus of analysis to three areas where criticism of the judiciary's handling of HR has consistently risen: terrorism, asylum, and criminal justice. Whether the role of the judiciary can be seen as sustaining relations of power as analysts Simpson⁷⁰ and Douzinas⁷¹ would maintain, this thesis examines a number of examples of judicial deference where the employment of Section 3 has continued to be performed narrowly:

⁴⁶ G. Philipson 'Misreading Section 3' (1998) *L.Q.R.* 199, 183

⁴⁷ R. Edwards 'Judicial Deference under the Human Rights Act' (2002) *M.L.R.* 65, 859

⁴⁸ R. Stone *Textbook on Civil Liberties* (Oxford University Press, Oxford 2004)

⁴⁹ C. Gearty 'Unravelling Osman' (2001) *M.L.R.* 64, 159

⁵⁰ K. Starmer 'Two Years of the Human Rights Act' (2003) *E.H. R.L.R.* 1, 14

⁵¹ That, in so far as possible, legislation be given effect in a way which is compatible with the ECHR

⁵² *Re S (FC)* [2002] UKHL 10

⁵³ *R v Daniel* [2002] EWCA Crim 959

⁵⁴ *R (Wooder)* [2002] EWCA 554

⁵⁵ *R v Lambert* [2001] UKHL 37

⁵⁶ [2002] 4 All ER 1028

⁵⁷ [2003] 3 WLR 792, declared a misinterpretation in *Connors v UK* (2005) 40 EHHR 9

⁵⁸ [2004] 2 WLR 1

⁵⁹ *R v A* [2001] UKHL 25

⁶⁰ *Popular Housing Regeneration Community Association Ltd. v Donoghue* [2001] 4 All ER 604

⁶¹ *R v A* [2002] 2 WLR 1546, reiterating Lord Clyde in *de Freitas v Permanent Secretary of Ministry of Agriculture* [1999] 1 AC 69, retracted by Lord Steyn in *Andrews* [2002] UKHL 59; adopted in relation to the procedural concern in *Cachi v Faluyi* [2001] EWCA Civ 998, and *Goode v Martin* [2001] 1 All ER

⁶² *Ghadian v Godin-Mendoza* [2002] EWCA Civ 1533

⁶³ *A-G Ref (No. 4 of 2002)* [2003] UKHL 56

⁶⁴ *R (Kehoe) v Secretary of State for Work and Pensions UK* [2005] UKHL 48

⁶⁵ [2004] EWHC (Admin) 2753

⁶⁶ [2004] 2 AC 182

⁶⁷ [2005] EWCA Civ 890

⁶⁸ *R v Home Department, ex-parte Daly* [2001] UKHL 26

⁶⁹ *R (Amin) v Home Department* [2003] UKHL 51

⁷⁰ A. Simpson *Human Rights and the End of Empire* (OUP, Oxford 2002)

⁷¹ C. Douzinas *The End of Human Rights* (Hart Publications, Oxford 2002)

- The use of a point of technicality to define an issue as falling beyond the concern of the ECHR regarding sentencing: *R (S) v Home Secretary*;⁷² tariff-setting: *R v Sullivan*;⁷³ status of criminal procedure: *Wareham v Perbeck Council*;⁷⁴ legality of a dispersal authorisation order: *R (Singh) v Chief Constable of West Midlands*;⁷⁵ state regulation of the freedom of protest and movement: *R (Haw) v Home Secretary*⁷⁶ and *R (Laporte) v Chief Constable of Gloucestershire Constabulary*;⁷⁷
- A Diceyan conviction of the common-law's ability to protect HR as evidenced in *R (Pepushi) v Crown Prosecution Service*,⁷⁸ *Myles v Director of Public Prosecutions*⁷⁹ and *R (S and Marper) v Chief Constable of South Yorkshire Police*;⁸⁰
- Deference to the policy decision and/or functioning of the policy-maker in the determination of public emergency and/or action taken to deal with it: *R (Gillan and Quinton) v Metropolitan Police Commissioner*,⁸¹ *R v Nelson Carmona*⁸² *N v Home Secretary*⁸³ and *Ullah v Special Adjudicator and Home Secretary*.⁸⁴

(5) *Classic and Contemporary Analysis of Judicial Reasoning*

Whether classic-legal, or contemporary HR theory is able to explain the relationship between the judiciary and the ECHR, this thesis examines the ECHR firstly in accordance with positivism.

In accordance with Kelsen,⁸⁵ the systematic analysis of law represented an accurate account of UK judicial reasoning. Paralleling the growth of liberalism in the nineteenth-century, positivism declared that morality was irrelevant to the identification of what constituted a valid law, that the secular principle of utility was the sole criteria for the evaluation of a legal measure, and that only the calculation of consequence was important, not the intention behind it. Grounded on empirical tradition, the reasoning of the UK judiciary constitutes a pragmatic subscription to the view that an individual can only be accorded such independence as considered conducive to the collective good. Accordingly, the key to understanding the role of law is to seek to explain not the reason why a judge gives a verdict, but the reason why he has authority to do so.

Applied to the ECHR, the observation is interesting. Following the HRA, a denial of an *a priori* source of natural rights and a rejection of international law transcending the empirical reality of

⁷² [2005] EWHC 1957

⁷³ [2004] EWCA Crim 1762

⁷⁴ [2005] EWHC (Admin) 358

⁷⁵ [2006] EWCA 1118

⁷⁶ [2006] EWCA Civ. 532

⁷⁷ [2005] QB 678; [2004] EWCA Civ 1639; [EWHC] (Admin) 253

⁷⁸ [2004] EWHC 798

⁷⁹ [2004] EWHC 594 (Admin)

⁸⁰ [2004] UKHL 39

⁸¹ [2003] EWHC (Admin) 2545

⁸² [2006] EWCA (Crim) 508

⁸³ [2003] EWCA (Civ) 1369

⁸⁴ [2003] 1 WLR 770

⁸⁵ H. Kelsen 'Pure Theory of Law' (1934) *L.Q.R.* 474

the common-law, has dominated UK HR adjudication.⁸⁶ However, positivism remains a philosophy which divorces too readily the judiciary from the ethical foundations of society. Although it is not unreasonable to classify judicial preference for developing HR axiom on existing common-law principle, and statutory enactment as a classic Diceyan treatment of rights, positivism does not explain the supranational development which is the ECHR. Albeit constitutional analysis may provide insight into the HR arrangement in which the ECHR is to function,⁸⁷ what it can not do is explain the division in reasoning between, and/or within, the UK higher and lower courts regarding the application of the ECHR.

The same criticism is equally valid in relation to theories based on the value of utility. In the words of Richards, not even Mill's attempt to redefine utilitarianism by acknowledging the concept of morality within the utilitarian context prevents the philosophy from rendering the individual a utilitarian aggregate, isolating law from society, and excluding too readily the influence of political and sociological factors on the judicial mind.⁸⁸

With regard to natural law theory, in accordance with Dworkin⁸⁹ since law in the form of moral principle does constitute part of legal argument, the omission by positivists to acknowledge its role is inappropriate. Advocating the concept of HR in the strong sense, the approach challenges the reasoning of the judiciary highlighted by Griffith⁹⁰ as either non-normative conclusions drawn from established rules, or propositions arrived at following pragmatic scrutiny of data. However, despite being described by Hoffman⁹¹ as one of few theories which engage with the reality of what the judiciary attempts to do, natural law theory is not without criticism. Not least, that insofar as HR remain in the UK judicial mind *deontic* concepts derived from the language of rules, there can be no conception of HR without a positive set of laws and institutions to bring them into existence.⁹²

In contrast, the emphasis on what is perceived as a societal need to obtain equilibrium between the interest of the state and the individual expressed throughout the works of social theorists Llewellyn,⁹³ Henkin⁹⁴ and Donnelly,⁹⁵ does acknowledge the significance of social and economic conditions on the development of HR in the twenty-first century supranational state. However, lacking focus on how law, politics and HR interrelate, the problem with social theory

⁸⁶ H. Lauterpacht 'The Subjects of the Law of Nations' (1947) *L.Q.R.* LXIII, 438; (1948) *L.Q.R.* LXIV, 97

⁸⁷ D. Pannick 'Dicey and Civil-Liberties' [1985] *P.L.* 611; A. Smith 'Comment on Dicey and Civil-Liberties' [1985] *P.L.* 608. Wolf-Phillips 'A... Look at the British Constitution' (1984) *P.A.* 37, 4; and J. Polakiewicz 'The European Convention on Human Rights in Domestic Law' (1991) *H.R.L.J.* 12, 65

⁸⁸ I. Richards 'Human Rights and the Moral Foundations of the Substantive Criminal Law' (1979) *G.L.R.* 13

⁸⁹ R. Dworkin *Taking Rights Seriously* (Duckworth Press, London 1978)

⁹⁰ J. Griffith *The Politics of the Judiciary* (Fontana Press, London 1997)

⁹¹ L. Hoffman 'Human Rights and the House of Lords' (1999) *M.L.R.* 62, 159

⁹² K. Klare 'Legal Theory and Democratic Reconstruction' (1991) *B.C.L.R.* 69, 67

⁹³ K. Llewellyn 'A Realistic Jurisprudence' (1930) *C.L.R.* 30, 431; 'The Normative, the Legal and the Law Jobs' (1940) *Y.L.J.* 49, 1355

⁹⁴ L. Henkin. *The Age of Rights* (Columbia University Press, New York 1990) Introduction

⁹⁵ J. Donnelly *Universal Human Rights in Theory and Practice* (Cornell University Press, Ithaca 1989) 88

is its tendency to catalogue the need for HR protection, as opposed to explain. Although examination of the ECHR in accordance with social theory succeeds to develop a social approach to HR analysis, grounded on narrowly defined perceptions of culture, it does not generate the knowledge required to make defensible statement on either the dynamics of HR development in post-modern society, or the functioning of the ECHR's internal order in relation to the signatory-state.

Section 1.3: The Case for a Socio-legal, Political Review

The regional protection of HR forms the subject of a diverse range of text, commentary and debate. Examination of the effectiveness of the ECHR in relation to the UK requires an analysis of social-science, jurisprudence and philosophy. In substance jurists and theorists have provided an overview of regional rights protection; however, focus has remained within the confines of their school of thought. Although each provides analysis relevant to its field of study, the ECHR has failed to be addressed in terms of its overall effectiveness.

Concentrating on the procedure of ECHR rights protection, legal analysis in its definitive form, neglects to focus on the political objective(s) of the ECHR, with the result that in its pre-occupation with its legitimacy, composition and jurisdiction, it fails to acknowledge the effect of changing national and supranational social, economic and political objectives either on the nature of the rights upheld, or the status of the individual. Similarly, political argument is rarely indicative of the consequences of European decision-making on the legal heritage of the signatory-state, the response of the legal-practitioner and judge, and the effect of the anomalies produced within the legal process on the individual's ability to seek redress

With regard to Socio-legal analysis, a general premise that a universal framework be ethnocentrically western, excludes such study from informed HR research. Based on a narrow conceptualisation of culture, the ideals of universalism and cultural-relativism do not generate the empirical evidence required to substantiate finding concerning the advancement of HR development in post-modern society. Such a weakness has led to a contemporary sociological approach. Seeking to develop methods of research that allow for the analysis of social interaction through processes of negotiation, the actor-orientated approach of Human Agency has placed actors at the centre of HR development. The idea that HR protection is an ongoing practice, socially constructed and the result of a negotiated process, does take sociological analysis out of its universal versus cultural-relativist stalemate. However, the rejection of empirical analysis, as well as an ethnographical preoccupation with society as distinct from the political organisation of the twenty-first century state, fails to explain the reality of the supranational ECHR: either in terms of the relationship between universal HR standards and

cultural practice, or the relationship between the ECtHR, individual and signatory-state. Similarly, although jurisprudential and philosophical theory does contribute insight into the objective of HR development, analysis too often concentrates on the task of proving theoretical models at the expense of acknowledging Europe's social, political and economic reality.

To conclude, although each discipline serves to place the development of the ECHR into an authentic framework relevant to its field of analysis, employed in isolation, such analysis lacks the capacity to explain the evolving HR order. Only by the adoption of socio-legal political research, does an overall depiction of the ECHR, its influence on the legal, social and political realities of state-parties, as well as its impact on the individual and his actual enjoyment of HR, form.

Section 2: The ECHR and the Signatory-State

Article 25 of the ECHR introduced the Individual-Petition Procedure.¹ Effective from July 5 1995, it is this right that gives rise to the volume of claims which invoke the ECHR and its operation throughout this thesis measured in accordance with its effect on the signatory-state. The right of Individual-Petition constituted a strengthening of the judicial character of the ECHR and the replacement of Articles 19-56 with a text establishing a European Court of Human Rights.² However, held as a compromise by those who argued for a 2 tier-order, the functioning of the ECtHR invoked a number of concerns regarding its jurisdiction and composition. Not least, that confounded by the difficulties inherent in the ECHR's implementation: at most a process of *ad hoc* report and adverse publicity, the jurisprudence of the ECtHR remained a form of dubious realism.

Following a line of enquiry into the functioning of the ECHR grounded on the limits of critical reason,³ Section 2 of this thesis examines and contrasts, the 'early' influence of the ECHR following its ratification on 3 May 1974 in France; its ratification on the 4 November 1950 in Germany; its ratification in 1954 in the Netherlands; and its lack of formal acknowledgement, prior to the HRA, in the UK. Whether the ECHR can be regarded as an effective form of HR protection, Section 2 examines whether (1) the ECHR's apparent affinity with the monist order of the civil law tradition does render it in relation to the UK dualist order merely an impracticable statement of ideal; (2) whether the constitutional arrangement and legal culture of a signatory-state constitutes only one decisive factor in the functioning of the ECHR order amongst many; and (3), whether the difficulty in the application of the ECHR order results *in fact* from those difficulties inherent in the application of the concept of a universal order of human rights protection generally highlighted by Tridade,⁴ Llewellyn,⁵ Douzinas,⁶ Simpson,⁷ Bernstein,⁸ Bernhardt,⁹ Rosenberg¹⁰ and Vasak.¹¹

¹ See: **Appendix 1**

² Hereafter, ECtHR

³ Applied in R. Gaete *Political Parties and Methods of Court* (Dartmouth, Aldershot 1993)

⁴ A. A. C. Tridade 'The Exhaustion of Local Remedies in International Law' (1978) *Archiv des Völkerrechts* 17, 333

⁵ K. Llewellyn *The Common-Law Tradition* (Little & Brown, Boston 1960)

⁶ C. Douzinas *The End of Human Rights* (Hart Publications, Oxford 2002)

⁷ Simpson (2002). Op. cit at 94

⁸ Bernstein *in* Osborne (1991). Op. cit at 114

⁹ R. Bernhardt Reform of the Control Machinery under the European Convention on Human Rights, *in* R. Macdonald *The European System for the Protection of Human Rights* (Nijhoff Publications, Dordrecht, 1995) 26

¹⁰ M. Rosenberg *Constitutionalism. Identity. Difference and Legitimacy* (Durham Duke University Press, Durham 1994)

¹¹ Vasak (1965). Op. cit at 39

Section 2.1: A Legal Obligation to Incorporate?

The ECHR has elicited attention within international law for several reasons.¹² Certainly, as an authority whereby an individual is permitted to instigate proceedings concluding in international determination, the ECHR constitutes a unique precedent.¹³ However, in the absence of provision for its uniform application, whether the ECHR imposes a legal obligation on the signatory-state to incorporate its provisions into its domestic order has formed the focus of debate.

The contention revolves around the interpretation of the text of the ECHR. Firstly, by reading into Article 1 an intent that its provisions should be secured to everyone within the jurisdiction of the signatory-state by the substitution of the word 'shall' secure for the word 'undertake.'¹⁴ Secondly, by reading into its text an implied duty to afford the ECHR domestic status deduced from Article 13 and the reasoning that a right to a remedy instructs the signatory-state to incorporate the ECHR into its domestic law.¹⁵ The opinion is not without support. Invoking the *Travaux Préparatoires* to advance a theory that the ECHR was drafted with the aim *inter-alia* of achieving domestic status, Golsong¹⁶ argued that the ECHR should be given precedence over domestic law. A theory justified by Buergenthal¹⁷ on the ground that Article 1 was drafted in sufficiently precise terms as to render the remedy referred to in Article 13 effective.

However, the contention that there exists a legal obligation on the signatory-state to incorporate the ECHR into domestic law remains *in fact* easier to refute. According to Vasak,¹⁸ using the same *Travaux Préparatoires*, although an intention to create rights and freedoms can be surmised during the ECHR's drafting, it did not follow that the ECHR was intended to create directly enforceable rights, or on being granted the status of domestic law: the ambit of ECHR protection being that of signatory-states, not Europeans. Certainly, that there exists no legal obligation to incorporate the ECHR into municipal law is indicated in the opinion and case-law of the European Commission and ECtHR. Whereas in *Golder v UK*,¹⁹ the European Commission held that the function of the ECtHR was to safeguard a number of rights of the individual, not to prescribe legal obligations, and in *Swedish Engine-Drivers Case*²⁰ neither Articles 1 nor 13 placed a legal obligation on signatory-states to incorporate the ECHR into their domestic order, in *Handyside v UK* the ECtHR highlighted a memo filed by European

¹² Steiner and Alston (2000), Op. cit at 571

¹³ A. Drzemczewski 'Principal Characteristics of the New European Convention on Human Rights Control Mechanism' (1994) *H.R.L.J.* 15, 82

¹⁴ *Ireland v UK* (1979) ECHR Series A No. 25, 90

¹⁵ A. Verdross 'The Status of the European Convention on Human Rights, in Robertson, the Relationship between the European Convention on Human Rights and Internal Law' (1970) *Colloques Européen* 3, 47

¹⁶ H. Golsong *Effect direct an sique le rang en droit interne. des normes de la ECHR des droits de l' homme at des decisions pries par le organs institution per-celle ci.*,72 in A. Drzemczewski *The European Convention on Human Rights in Domestic Law* (Clarendon Press, Oxford 1983)

¹⁷ Buergenthal (1970), Op. cit at 233

¹⁸ Vasak (1965), Op. cit at 39

¹⁹ (1978) ECHR Series B No. 16, 9

²⁰ (1976) ECHR Series A No. 20, 18

Commission's Vice-President Sperduti stating that, far from required to incorporate the ECHR into their domestic order, signatories were free to choose the means of securing the rights set forth within.²¹

Evident then from the above diversity of opinion, whether a legal obligation to incorporate the ECHR into domestic law does exist, remains an issue open to subjective appreciation. However, in the absence of empirical evidence to the contrary, a requirement that a signatory-state is legally obliged to incorporate its provisions into domestic law can not be concluded either by the text of the ECHR, its preparatory work, or the practice of its parties. Although constructed on tenants of treaty law, the ECHR can not be interpreted in the same way as other multi-lateral treaties of a synallogmatic character. Even where incorporation of the ECHR would conform better to its *telos* than a separation of domestic orders, the ECHR does not constitute a supercession of the signatory-state. Accordingly, the impact of the ECHR rests on the status accorded it by national norm.²² Immune from the principle that domestic law conform to agreed international undertaking, or that a signatory-state will not invoke its municipal law as justification for failure to perform a treaty provision. As a result, the process of incorporation of the ECHR into a signatory-state's domestic order can not be generalised.

Section 2.2: The ECHR and the Constitutional Arrangement of France

Characteristic of the civil-law orders of Europe, numerous ECHR signatory-states accept international obligations as part of their domestic law. Determined by their monist constitutional arrangements, such states hold that an international treaty once ratified, has the force of law and may be applied by domestic courts. Such incorporation is exemplified by the constitutional arrangement of France.

Article 55 of the Constitution of the Fifth-Republic (1958) provides that treaties duly ratified, should have an authority superior to that of national law. Grounded on a unitary order in which national and international law have equivalent subjects and sources, such an arrangement forms part of a constitutional code compatible with the *telos* of the ECHR. Whether such an arrangement is more capable of securing an individual's HR than others however, is subject to debate.

To date, France has employed a total of 15 constitutional instruments, including the Declaration of the Rights of Man and the Citizen 1789.²³ A paradigm of classic liberal philosophy, Articles

²¹ (1976) ECHR Series A No. 24. 22

²² By express incorporation exemplified by Austria; by rendering treaty law a distinct area of practice exemplified by Denmark, Sweden and Norway; by affording the ECHR a status equal to domestic law exemplified by France; or informal acknowledgement formerly exemplified by the UK

²³ Hereafter, the 1789 Declaration

1-17 of the 1789 Declaration catalogues a number of protected freedoms, as well as a principle of residual liberty. Further, whereas Preamble III of the Constitution of the Fourth-Republic (1946) claims to protect such political, economic and social concerns as equality of the sexes and union rights; the Preamble to the Constitution of the Fifth-Republic (1958) claims to acknowledge those fundamental HR principles ordinarily recognised by French law. However, despite proclaiming anew the 1789 Declaration and Preamble III of the Fourth-Republic, the facilitation of a secure rights status did not prevent the clash in philosophy that arose in 1982 regarding the 1946 Preamble's encouragement of nationalisation in contravention of the right of individual ownership under Article 17 of the 1789 Declaration. Despite then, such constitutional acknowledgement, is there evidence to suggest that France's commitment to HR does function beyond the mere proclamation of political ideal? What of the effect of such liberal orthodoxy on the infra-constitutional values not protected by the 1946 Constitution such as those enumerated by the ECHR?

Although France was an original signatory, it did not ratify the ECHR until 3 May 1974. Accompanied by reservations to Articles 5, 6 and 15(1), as well as a declaration of interpretation relating to Articles 10 and 63, the Fifth-Republic recognised the jurisdiction of the ECtHR, signing on the 2 October 1981 the Second Additional-Protocol²⁴ and accepting the right to individual-petition.²⁵ Ratification complemented two new dimensions introduced in 1958: limits on the omni-competence of the legislature in the form of a rationalised Parliamentarianism, and a *Conseil Constitutionnel* with the capability to examine the constitutionality of law and parliamentary order prior to their promulgation.²⁶

Whether the ECHR constituted a realistic development in HR protection, Article 55 of the Fifth-Republic provided that treaties duly ratified would have an authority superior to that of domestic law. Consequently, the self-executing provisions of the ECHR were accorded a superior status to conflicting national law, subject to the *proviso* that reciprocity of application could be established. However, accorded what in practice amounted to only an intermediate position, the rule of precedence proved far more difficult to establish both within the French Administrative and Ordinary Court structures.

²⁴ Acknowledging the ECtHR's authority to inform on questions concerning ECHR interpretation

²⁵ *Décret* No. 81-917, (1981), Journal-Officiel 2783

²⁶ Subjecting economic, social and constitutional decisions of Parliament and Government to judicial review; with jurisdiction to act:

(1) As an election court;

(2) As an advisor to the President on the exercise of emergency provisions;

(3) To rule on the constitutionality of Treaties;

(4) To examine the constitutionality of organic laws and parliamentary orders prior to promulgation;

(5) To police the boundaries of the legislative competence of Parliament and the Executive by ruling Private-Member's Bills out of order;

(6) To rule on the constitutionality of a *loi* by means of a challenge on grounds of a breach of fundamental rights

Indeed, charged with the determination of the legality of administrative acts, the general response of the *Conseil d'Etat* to Article 55 of the Fifth-Republic was that it had no authority to question the legality of legislative action. Grounded on a constitutional principle restricting the court's ability to question the will of the electorate, the same sentiment was evidenced in the *Cour de Cassation's* reluctance to provide remedy or review of legislation in conflict with the ECHR. Despite precedence afforded treaty over domestic law, ratification of the ECHR was met with a reluctance of the French courts to regulate its status, grounded (arguably) on a commitment to the principle of the separation of power and a determination to assert its own judicial independence. For example, in *Recueil Dalloz Sirey*²⁷ the *Conseil d'Etat* and the *Tribunal Administratif* upheld a law of 17 January 1975 contradictory to the ECHR. Examining the impact of the ECHR on domestic law, it was held that the 1975 provision was to be awarded priority in accordance with established precedent of the *Council d'Etat*. In reaching its decision, both Courts accorded significance to the rule of *lex posterior derogate legi priori*²⁸ and held that as the domestic law was enacted after the publication of the ECHR, it was entitled to priority over self-executing treaty.²⁹ The ruling highlighted a disparity between the status accorded the law of the ECHR and the European Economic Community³⁰ expressed by the *Chambre Mixte* of the *Cour de Cassation*. Concerning a violation of Article 95 EC, in *Directeur Général des Douanes v Société Cafes Jacques V and J Weigal And Company 1975* the *Chambre Mixte* of the *Cour de Cassation* held that the EC created an order which, by virtue of Article 55 of the Fifth-Republic, was binding on domestic courts. In contrast, the judiciary continued to express its difficulty in acknowledging the *telos* of Article 55 of the Fifth-Republic as it related to the status of the ECHR. While employing an excessive process of suspending proceedings and requesting ministerial interpretation in *Glaeser Touvier*,³¹ the *Conseil de Cassation* proclaimed its inability to interpret international agreement on the ground that to do so would encroach upon the Government's control of *l'ordre public international*; in *La Siméoni Juridique* the *Cour de Sûreté de l'Etat* refused to consider the relevance of Articles 5, 6 and 13 of the ECHR on the ground that domestic law already granted adequate protection.³²

Highlighting what appeared to be confusion amongst the judiciary surrounding the status of the ECHR, the cases intimate an arguable division in judicial reasoning. A division made more evident in a number of cases where the courts were called on to consider the relevance of Article 9(1) of the ECHR to the refusal of conscientious objectors to take possession of military call-up

²⁷ *Recueil Dalloz Sirey Début* (1980) 38

²⁸ Unless national law stands in unequivocal contravention of treaty law, the latter supersedes

²⁹ Similarly, the *Conseil d'Etat* refused to set aside a decision of the *Conseil National de l'Ordre des Médecins* on the ground that Article 6 was inapplicable: *Recueil des décisions du Conseil d'Etat Début* (1978), 395

³⁰ Hereafter, EC

³¹ 19 Yearbook (1976), 1126. Discussed in *La Semaine Juridique* 1977 iii 18435

³² Further, whereas in the case of *Ouin* 21 Yearbook (1978) 732 the *Cour de Cassation* considered Article 6 without serious regard for the status of treaty law vis-à-vis domestic legislation: in *Respino-Francesco* 18 Yearbook (1975) 422 and 19 Yearbook (1976) 112, the court rejected a claim that the Code of Criminal Procedure was incompatible with Article 5

papers. Finding in all cases that a refusal constituted an offence under Article 133 of the *Code de Service National* 1971, whereas in *Ministère Public v Lemesle* the *Tribunal de Grande Instance de Montpellier* held that the ECHR enjoyed primacy to the text on which the prosecution was founded, and that freedom of opinion forming part of the freedom of belief could not be suppressed on the ground that nothing had been stipulated as to the way in which it should be manifested;³³ in *Lartec v Tribunal de Grande Instance*³⁴ reference was made to the fact that rights specified in Article 9(1) were rightfully restricted by domestic law where limitation was necessary for the protection of public order. Accordingly, the ECHR did not place any obstacle in the way of enforcement of the internal law which scheduled the offence committed by the accused. Article 133 of the *Code de Service National* was applied on the basis that Article 9(2) of the ECHR permitted limitation of Article 9(1).

The *Conseil Constitutionnel*³⁵

Following adoption of the Constitution of the Fifth-Republic, constitutional review introduced the CC: an institution afforded the ability to review the constitutionality of domestic law prior to promulgation, and regulation of Parliamentary Assembly prior to application. Although Article 5 of the French Civil-Code denied the Court *stare decisis*,³⁶ this did not prevent it from developing as an *authoritative communiqué*.³⁷ As illustrated in the impact of its 1970 decision concerning changes to the budgetary provisions of the EC Treaty;³⁸ its influence over the *Cour de Cassation* and *Conseil d'Etat*;³⁹ and development of the right of privacy,⁴⁰ freedom of movement,⁴¹ continuity of Public Services,⁴² and respect for human-beings from the beginning of life.⁴³

Further, conferring a definite status on a number of values whose legal significance remained either unaddressed by constitutional text, or otherwise contested, the CC contributed to the clarification of a number of unwritten rights and freedoms: Specifying the ground on which their restriction could be justified; requiring authority to provide explanation for restriction; and

³³ 20 Yearbook (1977) 744; followed in the decision reported in *Gazette du Policis* (1978), 98, 11

³⁴ 20 Yearbook (1977) 746

³⁵ Hereafter, CC

³⁶ The ability to lay down rules for future courts to follow

³⁷ Highlighted by Drzemczewski (1983), *Op. cit* at 82, the objective of constitutional value is the corollary of the implementation of a constitutionally recognised value. Accordingly, if an objective is recognised as having a status which cannot be altered, by including it within the context of legal provisions that the legislature can alter only in limited ways, it is arguable that the *Conseil Constitutionnel* has restricted the freedom of the legislature more than is (arguably) evident from the written sources of the Constitution

³⁸ CC Decision No. 70-139 DC (1970) and CC Decision No. 71-144 DC (1971)

³⁹ Decision of the CE Ass 20 1985. Establishments Outters, R.F.D.A. 1986, 513 influencing the decisions of the *Cour de Cassation* and the *Conseil d'Etat* (albeit, in the main, both rely on their own judgement) and the *Cour de Cassation* Criminal Division in *Bogdon and Vuckovic* (1985) Cass Crim 25, 329

⁴⁰ CC Decision No. 76-77 DC 12 (1977)

⁴¹ CC Decision No. 72-87 DC 23 (1977)

⁴² CC Decision No. 79-105 DC 25 (1979)

⁴³ CC Decision No. 74-75 DC 15 (1975)

ensuring that any restriction imposed did not constitute a measure disproportionate to the object to be achieved. As exemplified in its determination of the lawfulness of the 1986 Chirac Government's intention to extend the detention of immigrants refused entry to a period of three days. Indicating a willingness to go beyond established judicial review criteria, the CC limited the proposed interference to cases of emergency, and then only on the authorisation of the President of a *Tribunal de Grande*.⁴⁴

Finally, whereas some rights and freedoms are self-executing,⁴⁵ their restriction limited to public necessity and subject to control by the CC, others consist of ideals more easily abridged.⁴⁶ Despite the discretion afforded the relevant authority however, this did not prevent the CC from displaying the occasional activism in ensuring that the former remained proficient in handling the values that it was authorised to implement. For example, an ordinance of 26 August 1944 sought to regulate groups owning newspapers by requiring greater publicity on press ownership and the creation of a Press Commission. Reinterpreting freedom of communication, the CC drew on such concerns as freedom of association and respect for others to develop a right to broadcast, based on freedom of expression and Article 11 of the 1789 Declaration.⁴⁷ In the opinion of the CC, it was up to the legislature to reconcile the exercise of the freedom with such objectives of constitutional value as the legislative development was likely to infringe.

On analysis then, it would appear that the civil-law arrangement of France constituted an order (in theory at least) more than capable of guaranteeing the freedom of the individual. But what of those infra-constitutional values enumerated in the ECHR? Whether the same degree of certainty could be seen in relation to the ECHR is debatable.

For example, despite the CC's ruling in *Immigration-Law Case*⁴⁸ that Article 55 of the Fifth-Republic be accorded unequivocal effect in respect of treaties ratified by France, its general response to conflict arising between national law and the ECHR remained essentially formalistic. Reiterating concern deliberated in *The Abortion-Law Case* over the role of the CC and its impact on French sovereignty, a desire to detach itself from possible political confrontation formed the ground of a decision of 25 July 1991.⁴⁹ Concerning an initiative taken by 81 members of the National-Assembly, the CC was called on to declare Article 4 of the French Abortion Law 1975 incompatible with ECHR Article 2, on the ground that the ECHR's domestic status had been secured in May 1974. Examining whether international treaty could

⁴⁴ Other examples include elevation of the requirement that a criminal offence be stated in a precise manner: CC Decision No. 18-19 DC (1981)

⁴⁵ Association, due-process, home, property and detention, abridged only on grounds of public necessity

⁴⁶ On the difference between 'maximum' control and 'minimum' control denoting the extent to which the CC may intervene to regulate the legislature's dealings with particular constitutional values/principles: see J. Bell 'The Expansion of Judicial Review in France' [1986] *P.L.* 99, 103

⁴⁷ CC Decision No. 84-181 DC (1984)

⁴⁸ CC Decision No. 80-109 DC (1980)

⁴⁹ CC Decision No. 91-293 DC (1991)

form part of the Constitution of the Fifth-Republic, the CC ruled that it was unable to review the constitutionality of a proposed law simply on the ground of an alleged incompatibility. Although treaty was superior in the hierarchy of norms, conflict between it and domestic law did not constitute a constitutional concern, therefore could not be determined by the Court. As a result, the CC refused to incorporate the ECHR into the Article 61 Fifth-Republic criteria for judicial review. In reaching its decision, the position of the CC was made clear: in the event of an incompatibility arising between the operation of France's constitutional order and the ECHR, as an international treaty, the latter was not a concern for the CC.

To summarise, as an example of the civil-law system, the French constitutional order serves to satisfy a high priority of legal certainty characteristic of the revenant of public opinion in France. Article 66 of the Fifth-Republic provides that the *Cour de Cassation* and *Conseil d'Etat* are accredited with the power to safeguard the exercise of the Article 25 ECHR right to individual-petition. With regard to the impact of the arrangement in terms of its ability to facilitate the protection of HR, certainly there are examples of France having been exposed by the ECHR for the inadequacy of such state practice as telephone-tapping⁵⁰ and due process.⁵¹ However, highlighted by such decisions as *Bozeno v France*,⁵² proclamations of HR protection in the classic civil-law tradition may well accord the concept a heightened constitutional status, but not necessarily a greater reality.

The value of a constitutional commitment to HR protection was summarised by Rosenberg.⁵³ By their nature written guarantees of HR are naturally indeterminate in that they become factual only when their guarantee is put into practice. Whether an order of HR protection is written or not, it remains only a subsidiary feature of a constitutional system. Applied to analysis of the civil-law order of France, whether it can survive criticism that its proclamations of HR protection serve only as a statement of *philosophie*, the French performative character of enunciation illustrates that a statement of rights as a forward-looking grammar of action can (and often does) differ in application from both its subjective value and the meaning of its written content.

⁵⁰ *Kruslin v France* (1990) ECHR Series A No. 354

⁵¹ *H v France* (1989) ECHR 24 October 1989 RFDA 1989 203, concerning the length of time taken for the hearing of an administrative case

⁵² (1986) ECHR Series A No. 111, concerning detention and the administration's power to order a foreign national to be returned to the frontier as held in the *Conseil Constitutionnel's* decision in *Entry and Residence of Foreigners (1986) Immigration Law AJD.A [1980] 356 DC of September 1986*, concerning the lawfulness of the 1986 Chirac Government's intention to extend the detention of immigrants refused entry to a period of three days, the CC restricted the interference with the liberty of the individual to cases of emergency only and then upon authorisation by the President of a *Tribunal de Grande*; as well as the lack of reference to Article 8 ECHR (as opposed to Article 9 of the French Civil-Code) and general lack of analysis accorded Article 10 ECHR in recent judicial dealings with the right to privacy: *Cogediprsse et al. v Mme Marchand, Vve Erignac et al.* Cass. Civ., December 20 2000; *SNC Prisma Presse v Smet* Cass. Civ., December 12 2000; and *Ste Hachette Fillipacchi v Smet*, Cass. Civ., December 12 2000. See: H. Delaney and C. Murphy, 'Toward Common Principles Relating to the Protection of Privacy Rights?' 2007 *E.H.R.L.R.* 568

⁵³ M. Rosenberg *Constitutionalism, Identity, Difference and Legitimacy* (Durham Duke University Press, Durham 1994). Certainly the CC highlights the uncertainty generally of the actual functioning of the HR role of a constitutional court

Indeed, since its induction the practice of CC review has found itself the subject of criticism. In accordance with Keeler and Stone, the CC acts as a *contre-pouvoir*⁵⁴ lying outside the control of the executive and legislature with the capability of manipulating policy.⁵⁵ A number of examples are used to highlight the claim, including the CC's outlining boundaries concerning the power of the press: a concern which, lacking formal constitutional authority, came in for at least partial annulment; and its treatment of two examples of established French theory: collective welfare in public order, and the continuity of public services. According to Keeler and Stone, although the CC has claimed that it does not operate a power of decision synonymous to that of Parliament, this does not mean that it does not act in delineating obligation which Parliament is constitutionally bound to pursue. Whether the legal and the political are more connected than legal-practitioners might suggest, the conclusion is drawn that the CC cannot avoid taking an active role in the political process: carving out under the guise of its interpretative function, a framework within which Government and Parliament can operate unhindered.

The observation is not entirely persuasive. While the function of the CC (in theory at least) is to conserve the balance between the organs of Government by policing the exercise of state power in accordance with Articles 34 and 37 of the Fifth-Republic, it is arguable that the Court's legalistic approach actually provides an effective schema for its neutrality.

Further, the CC may play a part in acknowledging formal principles in relation to the operation of Government institutions and the protection of HR, but lacking in power of initiative is limited to only reacting to issues submitted to it.⁵⁶ Hardly then, the partisan politicians that Keeler and Stone would suggest, receiving reference only on point of law, its reasons grounded on the interpretation of constitutional text, it is arguable that the CC does not so much validate *le mythe du Gouvernement des juges*⁵⁷ than merely clarify legality. As illustrated in the 1990 Parliamentary block of a proposal by the President of the CC that French Courts be allowed to refer to the CC HR questions concerning the constitutionality of *loi* following their promulgation; and circumstances surrounding the law of July 1990 regarding racism, where no political party was prepared to refer the matter to the CC prior to its promulgation. Regardless of the role accredited the CC; the system depended on the willingness of party opposition to refer the 1990 law to Parliament

To conclude, although the CC has afforded a greater legalistic input into constitutional debate than formerly seen in earlier Republics, it is an input which has neither significantly altered, nor affected, the French political or philosophical approach toward the ECHR. Illustrated in the

⁵⁴ A centre of power

⁵⁵ J. Keeler and A. Stone. Judicial Political Confrontation in Mitterrand's France, in G. Ross *The Mitterrand Experiment* (CUP, Cambridge 1987)

⁵⁶ Breaches of procedural rules constituting the main concern submitted for scrutiny

⁵⁷ L. Favoureau *Le Mythe du Gouvernement des Judges*, Colloquium-Paper October 1987. (OUP, Oxford 1987) 17

CC's early dealing with the ECHR, questions arising in relation to France's implementation of the ECHR were determined cautiously, rulings (arguably) concerned as much with its own constitutional prerogative as with any serious concern for the infringement of HR. As for the *Conseil d'Etat* and the *Cour de Cassation*, albeit authorised to regulate the application of the ECHR in relation to domestic law,⁵⁸ both continued to maintain a reluctance to affirm the superiority of the former over conflicting domestic law. A reluctance, standing in contrast to its willingness to intervene to set standards for the scrutiny of Parliamentary legislation and the clarification of its own domestic constitutional text.

Despite then, the presumed civil-law affinity between the French constitutional and ECHR order, such a factor may well (arguably) accord the concept of HR protection a greater degree of legal certainty, but not a greater reality.⁵⁹ Rather, a great deal more cautious than its fundamental rights history would suggest, the French order has proved to be *in fact* far less capable in its dealing with the ECHR than for example, the (arguably) more innovative order of the Federal Republic of Germany.

*Section 2.3: The ECHR and the Constitutional Arrangement of the Federal Republic of Germany*⁶⁰

On preliminary analysis, the constitutional arrangement of the FRG would appear an order more than capable of fulfilling its obligations under international law. Firstly, consisting of a written constitution and a Bill of Rights presided over by a constitutional court: the *Bundesverfassungsgericht*, the arrangement confers a definite status on international treaty similar to France. Secondly, the relationship between international law and the German order forms the concern of a number of provisions of the FRG's Basic Law. Whereas Article 24(1) of the Constitution authorises the FRG to assign to international agreement a degree of control over national sovereignty; Article 25 declares that certain rules of international law, forming an integral part of Federal Law, take precedence over ordinary law. With regard to the ECHR, signed on behalf of the FRG on the 4 November 1950,⁶¹ the ECHR was approved in an Act of Ratification 1952 and, in accordance with a law of approbation,⁶² afforded a status akin to Federal Law. A status reinforced by the *Bundesverfassungsgericht*⁶³ and the Federal Administrative Court: the *Bundesverwaltungsgericht*;⁶⁴ But what of the effect of such an arrangement in practice? Exemplified by France, albeit the constitutional order had an impact on

⁵⁸ The Article 25 ECHR right of individual petition

⁵⁹ Highlighted in its recent judicial treatment of Article 8 ECHR, demonstrating in the opinion of Picard, a considerable degree of inconsistency in its treatment of the right to privacy: E. Picard, *The Right to Privacy in French Law*, in B.S. Markesinis (Ed) *Protecting Privacy* (OUP, Oxford 1999) 54

⁶⁰ Hereafter, FRG

⁶¹ In accordance with Article 59(2) Basic Law

⁶² A doctrine whereby treaty norms are transformed into domestic law by the legislature

⁶³ 1 Bverfg (1952) 372

⁶⁴ 3 Bverwg (1955) 48

the effectiveness of the ECHR, a more definite factor was the philosophy of its judiciary: its preoccupation with the mechanics of constitutional procedure, uncertainty over its HR role, and caution in the exercise of judicial review.

As an integral part of Federal law, the status of the ECHR throughout the judicial hierarchy has not met with any significant degree of disapproval. Competent not only to determine infringement of its Bill of Rights but also the ECHR, German courts have taken their role in HR protection seriously and have not been slow to respond to questions raised in relation to it. Whereas, the Civil-Chamber of the Federal Supreme Court: the *Bundesgerichtshoff* has not hesitated to refer to the ECHR in order to reach a finding compatible with its *telos*;⁶⁵ in the opinion of the *Bundesverwaltungsgericht*,⁶⁶ the ECHR, as part of Federal Law, was applicable to all proceedings instituted according to the principles *lex specialis derogate leges generales* and *lex posterior derogate legi priori*.⁶⁷ Yet, whether such judicial determination has served to reinforce the protection offered by the ECHR (certainly in terms of legal certainty) remains questionable.⁶⁸

Firstly, despite the secure status accorded the ECHR, not all of its provisions were applied precipitately by the judiciary. Whereas Article 13 of the ECHR was held by the Federal Court of Justice: the *Bundesgerichtshoff*⁶⁹ not to constitute a directly enforceable right; the *Bundesverfassungsgericht* held that as the ECHR did not have the status of constitutional law, invocation by way of appeal could not be lawfully grounded.⁷⁰ The ECHR did not take precedence over Federal Law arising after the ECHR's promulgation.

Secondly, in the event of there existing within a signatory-state an alternative HR reference, and in so far as nothing in the ECHR can be construed as limiting any right which may be ensured under the law of a signatory-state, it is can be argued that a restricting factor inherent in the existence of a parallel HR order, is the displacement of one order by the operation of the other. The observation is particularly pertinent in the case of Germany, where the existence of a parallel HR order is coupled with a strong praxis of judicial protection of established domestic rights.

Indeed, by means of a process of *Verfassungsbeschwerde*: whereby an individual can lodge a complaint with the *Bunderverfassungsgericht* in respect of an alleged HR violation; the role of the *Bundesverfassungsgericht* can not be undervalued. Whereas, the FRG Constitution omitted

⁶⁵ 69 Bgh (1977) 295

⁶⁶ 3 Bverwg (1955) 48

⁶⁷ As Treaty constitutes the more specific law, national law should be interpreted so far as practicable in accordance with it. Unless national law stands in unequivocal contravention of Treaty, the latter supersedes

⁶⁸ H. Golsong, 'The European Convention for the Protection of Human Rights and Fundamental Freedoms in a German Court' (1957) 33 *B.Y.I.L.* 317

⁶⁹ NJW (1964) 2119

⁷⁰ NJW (1960) 1243

to clarify whether international agreements were subject to judicial review, Article 100 of the Basic Law provided that if, in the course of litigation, doubt existed over the status and/or effect of a rule of international law, the court could obtain the decision of the *Bundesverfassungsgericht*. Invoking the dualist transformation doctrine, whereby review is made not of the treaty but the legislation transforming it, the *Bundesverfassungsgericht* resolved many gaps in its own constitutional order. As a result, in its handling of the rights guaranteed in German law, the Court has (arguably) proved itself unparalleled in the civil-law tradition. But can such practice indicate an equal judicial readiness to meet the FRG's ECHR obligations?

Illustrated by the judicial handling of *Internationale Handelsgesellschaft*,⁷¹ there is a real apprehension that an alternative national order for the protection of rights can weaken the effectiveness of an international system. Reluctant to accept that the superior nature of EC law prevented it from assessing European legislation against its own constitutional guarantee of rights, the *Bundesverfassungsgericht* held that where an adequate standard of protection was not available under EC law, it would not regard itself precluded from applying the protection offered by an alternative order. Further, albeit recognising the progress made in rights promotion by the European Court of Justice, in the case of *Wunsche Handelsgesellschaft*⁷² the *Bundesverfassungsgericht* then went on to alter its position expressed in *Internationale Handelsgesellschaft* by declaring that in the event of an international order failing to afford satisfactory protection, it would accord priority to its own Federal order, even though to do so could result in a breach of EC law.

Although a case concerning the EC, the ruling is telling. Constitutional courts may take international obligations into consideration when authorising decisions, but it is the character of the judiciary which leads it to select the preferred text. Contrary to the *telos* of the direction given in *De Becker v Belgium*⁷³ that contracting-parties are obliged to ensure that their domestic law is compatible with the ECHR, although the opinion of the ECtHR may take precedence to that of the national court, such authority does not have the value of *res-judicata*.

Examining the early response of the German judiciary to the ECHR then, what analysis makes clear is that the impact of the ECHR remains dependant on the co-operation of the national legal order. For example, whereas according to constitutional authority the ECHR can technically be overruled by subsequent legislation, such a consequence can be avoided by the judiciary requiring that the legislature be clear when a national law is intended to depart from the initiative.⁷⁴

⁷¹ 2 CMLR [1974] 549

⁷² 3 CMLR [1987] 225

⁷³ (1962) ECHR Series B No. 48

⁷⁴ *Eurocentral* 9 EG2 (1982) 112

However, although the impact of the ECHR in the hands of the German judiciary (the *Bundesverwaltungsgericht* in particular) has been far from negligible, this is not to suggest that the FRG's legal order has taken the findings of the ECHR order lightly.⁷⁵ Certainly with regard to the findings of the European Commission, lacking the impact of *res-judicata*, and regardless of Germany's formal commitment to the ECHR, its judiciary has not permitted itself to be pressed into an immediate response to its findings. Yet, it remains questionable whether such judicial reluctance did significantly affect the impact of the ECHR, either in relation to amendments made to extradition practices following the European Commission's Report of 14 July 1976,⁷⁶ or Articles 154 and 467 of the German Code of Criminal Procedure following its Report of 11 May 1978.⁷⁷ Similarly, with regard to the impact of the ECtHR, there is evidence that as a result of its rulings, German authorities did take such measures to amend domestic law in order to accommodate the ECHR, as those adjusting the German Court's Costs Act, so as to direct courts to provide persons charged with a criminal offence with the service of an interpreter free of charge;⁷⁸ and the existing Code of Criminal Procedure concerning pre-trial detention.⁷⁹

Albeit the authority of both the ECtHR and the Commission had no executory effect in the sense of being directly enforceable then, it is nevertheless reasonable to argue that they remained persuasive. Where a controversial decision concerned the administrative measure of a public authority, action would be raised by the relevant authority to correct the failing insofar as possible. Where a decision concerned an area of domestic legislation, the Government felt itself obliged to introduce amendment in order to comply with the ECHR.

Certainly, one area of German law which stood out as an innovative means by which national law was brought into alignment with the ECHR was that of the functioning of the principle *Drittwirkung*. Approaching the application of rights similar to that relating to the public law relationship between public authority and the individual based on a third-party effect, an inter-individual application of HR was developed by the *Bundesverfassungsgericht*.⁸⁰ Allowing the ECHR horizontal-effect, the development ensured that provisions of the ECHR were not only binding on the authorities of the signatory-state, but between individuals.

The innovation is interesting. Although there is no evidence that the ECHR was ever intended to possess such third-party effect, the horizontal extension illustrated how the ECHR permitted an innovative judiciary⁸¹ the ability to restrain (to an extent) the activity of an ascendant non-

⁷⁵ T. Tomuschat 'Quo-Vardis Argentoratum? The Success Story of the European Convention on Human Rights' (1992) *H.R.L.J.* 13, 401

⁷⁶ Following *Bruckmann v FRG* (1976) 6 D and R, 57-61

⁷⁷ And *Liebig v FRG* (1978) 17 D and R, 20

⁷⁸ *Koc* ECHR (1976) Series A No. 29; *Luedicke* ECHR (1978) Series A No. 27; and *Belkacom* ECHR (1978) Series A No. 29

⁷⁹ *Wernhoff v FRG* ECHR (1968) Series A No. 7

⁸⁰ Illustrated in the ruling of the *Bundesgerichtshoff* 9 NJW (1958) 384

⁸¹ Minded either to accept the ECHR as a source of internal law, or a directly applicable international norm

governmental institution which, albeit technically fell within the bounds of ordinary law, nevertheless was considered inimical to the interests of German society. Yet, although nothing in the ECHR inhibits signatory-states from allowing for such third-party effect, the development should be acknowledged with caution.

Firstly, the German constitutional order indicates an ordering of constitutional values grounded on the natural law theory that certain liberties of the individual are antecedent to organised society and beyond the reach of Governmental interference. This is reflected in its Basic Law. Articles 1-19 consist of a charter of fundamental rights and an affirmation of 'personhood.' The Basic Law functions as a value-orientated order based on an Article 1 protection of human dignity in which the inviolability of the dignity of man has been used as an independent standard of value by which to measure the legitimacy of state actions, as well as the uses of individual liberty. However, Article 2(1) Basic Law provides that 'everyone shall have the right to the free development of his personality insofar as he does not violate the rights of others, or offend against the constitutional order or the moral code.' Accordingly, and as a paradigm of the judicial approach to HR, HR are exercisable to the extent that that exercise remains within the framework of the political and moral order ordained by the Basic Law. Individual liberty is constrained by the equally important values of political order and social morality, as summarised by the *Bundesverfassungsgericht* in the privacy of communications case: 'the concept of man in the Basic Law is not that of an isolated individual. Rather, the Basic Law has decided in favour of a relationship between individual and community in the sense of a person's dependence on, and commitment to, the community, without infringing upon a person's individual value.'⁸²

Secondly, regardless of the constitutional status afforded the ECHR, the *Bundesverfassungsgericht* held that its values were not to be regarded as being directly applicable in respect of inter-individual relations, but as 'objective criteria only' to be taken into account when provisions of German Private Law were considered.⁸³ Despite then, the innovative use made of the heightened status afforded the ECHR by the *Bundesgerichtshof*, the order remained only part of Germany's *Wertordnung*: value-order. An order which serves to highlight the reality that, whether the achievement of the ECHR lays in its ability to protect rights, as opposed to promote, depends not on the status afforded its provisions in terms of direct and indirect-effect by the national legal order, but on the actual philosophical and political sentiment of the prevailing national judiciary. A reality made even clearer following analysis of the relationship between the ECHR and the constitutional arrangement of the Netherlands.

⁸² W. Murphy and J. Tanenhaus *Comparative Constitutional Law* (St. Martin's Press, New York 1977) 660

⁸³ (1970) A.J.C.L. (18) 305

Section 2.4: The ECHR and the Constitutional Arrangement of the Netherlands

Examining the early impact of the ECHR on domestic law, it was not surprising to Polakiewicz that in the Netherlands, a monistic country with a constitution giving precedence to self-executing treaty provision, the influence of the ECHR was paramount.⁸⁴ The observation is interesting.

The relationship between international law and domestic law is regulated by Articles 60-67 of the Dutch Constitution: the *Grondwet*. Amended in 1953, 1956 and 1983, a heightened status was accorded international law. Whereas, Article 60 prohibited the judiciary from ruling on the constitutionality of treaty law; Articles 65 and 66 instructed it to accord priority to directly applicable international provision. The reform secured the superiority of international treaty over domestic law. Its effect on the legal order evidenced in the general direction to legal-practitioners to incorporate the amended *Grondwet* into their everyday legal practice.⁸⁵

However, such amendments were not without impediment. Whereas, confusion arose over the status of international law, the relationship between directly applicable treaty law and the *Grondwet* remained unclear. Although Article 67 of the *Grondwet* provided that the supremacy of international treaty related not only to directly applicable provision but also authority, read in conjunction with Articles 65 and 66, confusion became evident: did the superior status apply to decisions of judicial agency only, or include such quasi-judicial authority as the European Commission?

Further, Article 63 of the *Grondwet* provided that, should the development of an international order require it, a treaty could deviate from the *Grondwet* following enactment into domestic law by a special two-thirds' majority of both Chambers of the States-General. As such, the *Grondwet* ascribed to its domestic legislature the charge of determining the standing of an international agreement. However, this is not the same as conferring on international treaty the status of constitutional law. As ratification of the ECHR was not enacted by a two-thirds' majority, it is arguable that the ECHR was not technically entitled to a superior status.

Finally, immunity of the status of the ECHR from scrutiny by Dutch courts effectively concealed the disparity in opinion expressed by various national authorities at the time of the ECHR's ratification. Despite acknowledging ratification as an exemplary commitment to the promotion of HR, a formal commitment to the ECHR was considered undesirable by a significant proportion of the Dutch Government and States-General. Not merely on the ground that

⁸⁴ Polakiewicz (1991). Op. cit at 65

⁸⁵ D.C. Fokkema, J.M.J. Chorus, E.H. Hondius and E.C.H. Lisser 'Introduction to Dutch Law For Foreign Lawyers' (1980) 28 *A.J.C.L.* 3, 513

domestic law already afforded adequate protection, but that to relinquish control over HR would be to transfer sovereignty to international authority.

Despite such early reservation, the ECHR and its First-Protocol were ratified in 1954;⁸⁶ the right of individual-petition recognised in 1960,⁸⁷ and the *Grondwet* amended in 1983 to accommodate the ECHR's operation. The amendments resulted in a revised constitution. The most significant provisions being Article 93: that treaties and decisions of international organisations, the contents of which were binding on everyone, would have this effect as from the time of publication; and Article 94: that domestic regulation in force in the Netherlands, whose application could not reasonably conform to provisions of treaties or decisions of international organisations, would not be applied.

Yet, regardless of the ECHR's heightened status, the judiciary maintained a reserve toward the order which lasted into the 1990's. Despite its direct applicability, the ECHR was managed as a subsidiary source of law only. When provisions of the ECHR were invoked before the national courts, the opinion was often drawn that no violation of international obligation had occurred. According to van Dijk, judicial reluctance to seriously address the issue of ECHR applicability translated into a number of techniques.⁸⁸ Techniques which allowed the judiciary to circumvent the difficulties caused by the application of the ECHR either by according domestic law an interpretation different from its original meaning, or by inserting a new principle into domestic law derived from the relevant treaty provision. Other techniques identified by van Dijk included:

- Applying a comparable provision of domestic law and according it such a broad scope as to deny the self-executing character of the ECHR provision;
- Giving the ECHR provision such a restricted scope as to render it not applicable to the case in question;
- Giving a broad scope to the restriction allowed for in the ECHR to solve the non-conformity;
- Interpreting the provision of the ECHR and the applicable domestic law in such an 'embracing' way that a conflict between them is avoided.

On analysis, the findings of van Dijk remain unconvincing. According to van Dijk the techniques adopted by the domestic courts was strong evidence of an underlying determination

⁸⁶ Signed 4 November 1950 and 20 March 1952: the *Tractatenblad* 1951 No. 154; 1952 No. 80; and approved 28 July 1954: *Staatsblad van het Koninkrijk der Nederlanden* 1954 No. 335, 942

⁸⁷ A declaration recognising the jurisdiction of the ECtHR lodged with the Council of Europe 5 July 1960

⁸⁸ P. Van Dijk and G. van Hoof (1990), *Op. cit* at 585

to accord the ECHR little influence.⁸⁹ However, not only is it just as easy to argue that, disposed to subjective assessment, it is through exactly the same techniques that the ECHR has successfully functioned, exemplified by the majority of rulings of the *Hoge-Raad*, the application of international law resulted more often than not in the ECHR's favourable treatment.

For example, despite lacking formal constitutional authority to annul, repeal or (otherwise) amend domestic law, in a ruling of the 18 January 1980 the *Hoge-Raad* demonstrated little reserve in extending the scope of Article 959 of the Netherlands Civil Procedure Act in order to eliminate a statutory discrimination between legitimate and illegitimate children. Influenced by the (then on going) ECHR determination of Articles 8 and 14 ECHR in *Marckx v Belgium*,⁹⁰ the Court went on to re-state the Netherlands's commitment to the ECHR as justification for its over-ruling of a decision of the Lower Netherlands District Court prior to its determination by the ECtHR.

Similarly, in a ruling of 1 July 1983⁹¹ the *Hoge-Raad* displayed little reticence in its dealing with the Netherlands Insanity Act. The provisions in question authorised the Public Prosecutor to prevent a person detained on grounds of mental-health from applying to a domestic court for release. Examining an Official-Circular of 16 April 1980⁹² declaring the practice in breach of ECHR Articles 5(1) and 6(1), the *Hoge-Raad* expressed little reservation for its reliance on *Winterwerp v Netherlands*⁹³ to justify a declaration of incompatibility.

Despite then, the judicial techniques identified by van Dijk, throughout the 1970's and 1980's there is evidence of Dutch Courts affording precedence to the ECHR's self-executing provisions over domestic law. The result, exemplified in a ruling of the 10 October 1978⁹⁴ and forerunner to a number of similar cases,⁹⁵ was the conferral in practice of a superior status on directly applicable ECHR law.⁹⁶

In comparison, reasons for the judiciary's early reticence toward the ECHR remain indeterminate. Arguments advanced included fear of a demise in national sovereignty, confusion surrounding the ECHR's legal status and a low percentage of legal reference made concerning the ECHR.⁹⁷ Despite what remains only speculative explanation, there is evidence of a high level

⁸⁹ In *Argus Steamship v Hanno* NJ (1969) No. 10, 33, the *Hoge-Raad* demonstrated its reluctance to hold an established domestic law in violation of ECHR norm by adopting an order of review which repudiated the self-executing character of the relevant treaty provision

⁹⁰ (1979) ECHR Series A No. 31

⁹¹ (1991) HRLJ 12

⁹² (1980) NJCM 5 233

⁹³ (1979) ECHR Series A No. 23

⁹⁴ (1978) NJCM No. 144

⁹⁵ (1978) NJCM No. 595; (1978) NJCM No. 604; (1979) NJCM No. 8; and 10 NYIL (1979) 484

⁹⁶ Adopted by the *Raad van Straat* in *Voerman v Municipality of Riderkerk* (1978) NJCM No. 12

⁹⁷ A. Robertson 'The Relationship Between the ECHR and Internal Law' (1972) *Colloques-European* 3, 12

of early state acceptance of the ECHR's constitutional status. Not merely in the form of a declaration of the *Hoge-Raad* that domestic law would be scrutinised for the purpose of ensuring ECHR compatibility;⁹⁸ but the direction of an Official-Circular 16 April 1980 that pending legislative action the findings of the ECtHR was to be considered as an authority on all aspects of legal practice which the office of Public Prosecutor was obliged to see carried out.⁹⁹ Whether, this intimated that a ruling of the ECtHR could be used as a form of new evidence to re-open a case, was not at the time of the declaration clarified. However, there is little serious doubt that adherence to the direction resulted in the exertion of judicial influence over such reform as that made to the Netherlands Code of Penal Procedure regarding the limitation to detention pending-trial; and amendment to the application of disciplinary proceedings to the Military Criminal Code of Practice.¹⁰⁰

In view of the above, the Netherlands's response to the ECHR may well suggest (in part) 'a disparate reality but, notwithstanding that becoming a party to a treaty is... like adopting a written constitution with judicial supervision, the impact of the ECHR, is to award judges the final say. If a measure can be challenged as an invasion of rights, it is for the judges to rule on whether it is permitted.'¹⁰¹ This, Polakiewicz points out, is to transfer power from one set of institutions to another, and as such, invest the national courts with a role very different from that which they ordinarily have under a system of parliamentary sovereignty. While it remains arguable whether or not the judiciary can and do act politically, what analysis of the Netherlands does highlight is that such a practice does not necessarily derive from a signatory-state's formal constitutional order. Albeit both the national Government and legislature may well hold unquestionable authority, regardless of a signatory-state's constitutional arrangement, a universal HR jurisprudence can only exist, in so far as the national judiciary is prepared to invoke it.

Section 2.5: The ECHR and the Constitutional Arrangement of the UK

Analysis of the civil-law traditions of France, Germany and the Netherlands highlight that the role of municipal courts in promoting the ECHR cannot be underestimated. In the absence of regulation of the relationship between the ECtHR and national order; 'it is before these courts that signatory-states are witnessing the development of a HR dialogue between their jurisdictions.'¹⁰² Whether such dialogue contributes to the development of a universal jurisprudence however, is not without debate.

⁹⁸ 3 Yearbook (1960) 650

⁹⁹ NJCM (1980) No. 5

¹⁰⁰ *Engel (and Others) v Netherlands* (1976) ECHR Series A No. 32

¹⁰¹ Polakiewicz (1991), Op. cit at 65

¹⁰² *Ibid* p. 405

The UK was one of the first signatories to ratify the ECHR and the First-Protocol of 1952. On the 14 January 1966 the UK recognised the right of individual-application and the jurisdiction of the ECrtHR. However, the relationship between the UK and the ECHR has not been straightforward.¹⁰³ Despite displaying a rights capability,¹⁰⁴ without a belief in natural law, the UK did not embrace an ideology of universal rights easily. As a result, up until the HRA, its attitude toward HR promotion remained in a state of flux. Its primary contribution to the ECHR order being its success in persuading the Committee of Ministers that acceptance of the European Commission and ECrtHR should be left to the discretion of the signatory-state.

In so far as such reluctance can be attributed to the UK's constitutional arrangement, characteristic of the civil-law order, municipal law finds justification in the rules of international law by a process of delegation within one normative system.¹⁰⁵ In contrast, the UK differed not only in its absence of a written constitution, but in the form of a judiciary which did not recognise any authority by reference to which an Act of Parliament could be scrutinised other than by common-law, or in accordance with obligations imposed on the UK by means of its membership of the EC. Accordingly, formal assurance against HR abuse was not contained in any basic law but by the maintenance of a policy that the rights of Englishmen remain protected by common-law, subject to common-law and the supremacy of Parliament. As intimated in a submitted Note on the position of the British Government in relation to the ECHR to the European Secretary-General 1966.

Comprising of the forward of proposals for the improvement of the ECHR, the Note stated in part—

'7. There is...agreement that the common standards of the [ECHR] have to be maintained... But...differing...traditions in the way those standards are implemented...have to be respected. The doctrine of the Margin of Appreciation has been developed...to allow for diversity. For the support of the citizens of Council of European countries, for the [ECHR] and its mechanisms to be...hearted, it is important that the Strasbourg institutions give weight to this principle and respect the decisions of local...institutions... which are...best placed to assess issues of this kind.'¹⁰⁶

The report went on to suggest the adoption of a Resolution in the Committee of Ministers that regard be paid to differing legal traditions and that national law be respected: the suggestion drawn *inter-alia* on the belief that signatory-states were best placed to determine social issues in accordance with regional perspectives. Intimating the concern of the UK Government, the

¹⁰³ A Lester 'Fundamental Rights: The UK Isolated?' [1984] *PL* 46; P. J. Duffy 'English Law and The European Convention on Human Rights' (1980) 29 *I.C.L.Q.* 585; C. Warbrick 'The European Convention on Human Rights and English Law' (1993) *E.L.R.* 34; and G. Marston 'The UK's Part in the Preparation of the European Convention on Human Rights' 1993 *I.C.L.Q.* 42

¹⁰⁴ In the form of a Magna Carta 1215, Habeas Corpus Act 1679 and a Bill of Rights 1689; an Act of Settlement 1700, Equal-Pay Act 1970, Sex Discrimination Act 1975 and 1986, Race-Relations Act 1976 and Employment Act 1989

¹⁰⁵ M. Shaw *International Law* (CUP, Cambridge 1997) 1-44

¹⁰⁶ H.R.R. 1997, 41, 260

proposals highlighted two characteristics of the UK's constitutional arrangement. Firstly, in as much as national sovereignty remained the pillar of UK constitutional tradition, a Government could dilute, select or abandon such rights or liberties as it saw fit when greater interests were at stake.¹⁰⁷ Secondly, such measures as the UK Race Relations Act 1976 and Sex Discrimination Act 1986 represented no more than a form of residual liberty: the freedom which remained after legal restraints were deducted.¹⁰⁸

Accordingly, the UK's commitment included no attempt to accord the ECHR order a formal status. Illustrated in the UK's declaration 13 September 1966,¹⁰⁹ one reason offered was that the UK's need to involve itself too seriously with the ECHR was unnecessary.¹¹⁰ For that reason, ratification of the ECHR amounted to no more than the deployment of its functioning to a national judiciary which, charged with a role greater than the interpretation of codified law, less concerned with the place of a decision than the Code itself, felt constrained from playing a role in the ECHR's enforcement because the initiative had not been transformed into domestic law.¹¹¹

Yet, this is not to say that the UK courts did not have regard for the ECHR. Despite the ECHR's lack of internal validity, a conjunction between domestic and international law was maintained by a principle of judicial interpretation to the effect that international law formed part of the law of the land.¹¹² It was through this rule that the courts made reference to the ECHR in the event of a lacuna, ambiguity or controversial point of law in domestic proceedings. Several respects in which the ECHR was held by the judiciary to be of persuasive authority were highlighted by Lord Bingham in his maiden speech to the House of Lords in July 1996:¹¹³

- In the interpretation of legislation the courts were compelled to presume that Parliament intended to legislate so as to give effect to its ECHR's obligations;
- Where the courts were called on to construe a statute enacted to fulfil an ECHR obligation, the judiciary was to assume that the statute was intended to be effective to that end. In applying the common-law, the courts were to make reference to the ECHR to resolve any doubts about the rule in question. Where the courts had an occasion to exercise discretion, they were to act in a way which did not violate the ECHR;

¹⁰⁷ Evident in the Immigration Acts 1968 and 1971; Prevention of Terrorism Acts 1974 and 1984; the Home Secretary's power to extend the tariff on life-imprisonment; the Police and Criminal Evidence Act 1976, Customs and Excise Management Act 1979, and the Criminal Justice and Public Order Act 1994

¹⁰⁸ Allen (1994), Op. cit at 385

¹⁰⁹ (1966). *Implementation of Article 57 ECHR*, Second-Addendum to the Council of Europe, Doc. H 69, 9. See: R. Beddard 'The Status of the European Convention on Human Rights in Domestic Law' 16 *I.L.Q.* 206 at 207

¹¹⁰ The UK provided two opportunities for individuals to challenge public bodies: (1) Habeas Corpus: a procedure which did not involve judgement on the merits of detention; and (2) judicial review: subject to a strict time limit

¹¹¹ Allen (1994), Op. cit at 385

¹¹² Halsbury's Laws of England, 1977, 18, 1403

¹¹³ Reiterating Lord Balcombe in *Derbyshire County Council v Times Newspaper* [1972] 3 WLR 28

- Where the courts were called on to determine the demands of public policy they were to have regard to international obligations as guidance;
- On occasions giving rise to matters concerning EC law, the principles of the ECHR were to be taken into account.

However, despite such direction, reluctance of the judiciary to concede to the *telos* of the ECHR remained. Examining the relationship between the ECHR and the UK's constitutional order, reasons for such reticence becomes apparent.

In *R v Chief Immigration Officer Heathrow Airport, ex-parte Salamat-Bibi*¹¹⁴ Lord Denning considered the ECHR to be drafted in a style so different from UK legislation, and of so wide a statement of principle, as to be incapable of application. Further, despite the UK being a signatory to the ECHR, because the initiative had not been transformed by Parliament into domestic law, there was neither occasion, nor need, for the judiciary to familiarise itself with the details of the jurisprudence of the ECtHR. Lord Denning then went on that it was the issuance to the judiciary an involvement in the determination of policy, a concern properly the premise of the Government, which lay at the heart of judicial reluctance.¹¹⁵

Whether such explanation was rightly founded, analysis reveals that policy arguments can and do form part of the adjudicative process.¹¹⁶ Whether, in making a rule or standard, or being a decision on an open-ended standard, in reaching a decision a judge will balance a variety of interests, including the elaboration of policy goals and the means of achieving them.¹¹⁷ While an ecumenical-schema may be drawn by a democratically elected body, significant inter-relationships between goals can be developed by the judiciary in executing such policies.¹¹⁸ The observation is pertinent in relation to municipal law, but what of its relevance to international law?

Despite the absence of a mandate with which to interpret the ECHR, it is arguable that the ECHR has been formally recognised by the UK Courts when exercising judicial review with the objective of producing an expeditious remedy with *ad-rem* effect, as opposed to *as-personam* consequences of a judgement of the ECtHR.¹¹⁹ Whether the UK courts fulfilled this objective, judicial management of the relationship between the ECHR and domestic law presents an uncertain account.

¹¹⁴ [1976] 1 WLR 979-985

¹¹⁵ An advancement of the unelected into the political arena detrimental to the traditional constitutional divisions of Government Authority: a theme examined by E. Ewing, and C. Gearty in *Freedom under Thatcher, Civil Liberties in Modern Britain* (Clarendon Press, Oxford 1990)

¹¹⁶ Duffy (1980), Op. cit. at 64

¹¹⁷ A contention advanced by J. Bell's interstitial legislator model: J. Bell *Policy Arguments in Tribunal Decisions* (OUP, Oxford 1983) 6

¹¹⁸ *Magor and St. Mellows RDC v Newport Corporation* [1950] 2 AER 1226; *Sparton-Steel Alloys v Martin* [1973] 1 QB 27; *O'Reilly v Mackman* [1983] 2 AC 237; *R v Greater London Council, ex-parte Bromley London Borough Council* [1983] 1 AC 768; and *Re Westminster County Council* [1986] 2 WLR 807

¹¹⁹ A speedy remedy dealing only with the matter directly in hand

*Waddington v Miah*¹²⁰ constituted the first reported case in which the UK Courts relied on the ECHR as an aid to statutory interpretation. Concerning the application of the Immigration Act 1971, the Court of Appeal and House of Lords held Section 34 (Paragraph 1) to be ambiguous. In support of their finding, both Lords Stephenson and Reid claimed to rely on Article 7 of the ECHR and Article 11(2) of the Universal Declaration of Human Rights, and concluded that it was hardly credible that any Government would promote retrospective legislation. The finding derived from two established UK principles: (1) in so far as language permits, Parliament is presumed to legislate in accordance with international obligations; and (2) the prohibition of retrospective criminal legislation. The case is uninspiring. Where a rule of international law was in accordance with established judicial sentiment, then the willingness of the judiciary to apply the rule was straightforward. But what of those ECHR rights which did not invoke the employment of an established principle? Analysis suggests that their ambit depended solely on how much recognition they were given by the Judge.

For example, in *Bird v Secretary of State for Home Affairs*¹²¹ Lord Denning departed from preferred UK practice by stating that he could be inclined to hold an Act of Parliament invalid on the ground that domestic law ought to be interpreted in conformity with international law. The departure was short lived. In *R v Secretary of State for Home Affairs, ex-parte Singh*¹²² Lord Denning was swift to retract his finding. Deliberating the status of the ECHR, Lord Denning stated that the court could only take the ECHR into account when interpreting a statute which affected the rights of the individual, on the ground that it should be assumed that the Crown did not intend domestic law to conflict with international treaty. Declaring that he had gone ‘too far’ in *Bird*, Lord Denning then went on to reconcile his finding with established UK constitutional principle by claiming that although a treaty did not become part of English law until it was transformed, it could nevertheless be considered by the courts when confronted with problems concerning HR.

A similar reasoning was reached in *R v Secretary of State for Home Affairs, ex-parte Phansopkar* and *R v Secretary of State for the Home Department, ex-parte Begum*. Examining justification for interference with respect for family life, Lord Scarman held ‘...we will not deny...to any man... justice or rights in accordance with the *Magna Carta*. This...principle of our law is...reinforced by the [ECHR]...to which it is...the duty of our public authorities in administering the law...and of our courts in...applying the law...to have regard.’¹²³ Reiterating established UK principle, both cases intimated the courts’ regard for the ECHR. Highlighting a

¹²⁰ [1974] 1 WLR 683

¹²¹ [1961] 1 LR 250

¹²² [1975] 3 WLR 225

¹²³ [1975] 3 All ER 497

de-facto preference for applying established constitutional norm,¹²⁴ where application of the ECHR mirrored the relevant *jurisprudence constante* the ECHR possessed persuasive authority; in relation to the resolution of uncertainty in either statutory or common-law, its influence was less certain.

For example, in *R v Lemon and Gay News Ltd*¹²⁵ the Court of Appeal affirmed the conviction of an appellant for publishing a libel. Although the Court did refer to Articles 9 and 10 of the ECHR, it is arguable that it was Lord Diplock's concern that by discarding the subjective test of the accused's intention that libel would constitute a crime of strict liability which proved the determining factor. However, although Lord Diplock did not make convincing reference to the ECHR in the case of *Lemon*, he did consider the initiative in *Gleavers v Deakin and Others*.¹²⁶ Again, concerning the publication of a libel, the Court was called on to examine the appellant's lack of ability to provide evidence before a magistrate at committal proceedings. In reaching his decision Lord Diplock expressed concern over the unsatisfactory state of the UK's law of libel. Examining Article 10(2) of the ECHR Lord Diplock stated that freedom of expression was subject to restrictions, but only insofar as they were necessary for the protection of the public interest. In contrast, the truth of a defamatory statement was not in itself a defence to a charge of defamatory libel under UK criminal law: a restriction on the freedom to impart information which the UK had undertaken to secure to everyone within its jurisdiction. Lord Diplock went on to highlight that no onus lay on the prosecution to assert that the defamatory matter was of a kind necessary to protect the public interest. Even though no public interest could be shown to be affected by imparting to others accurate information regarding the discreditable conduct of the individual in question, the publisher would be convicted unless he could prove that the publication was in fact in the public interest. In accordance with Lord Diplock this was to turn Article 10 of the ECHR on its head: whereas Article 10 required that the freedom remain untrammelled by public authority, under UK criminal law a person's freedom of expression, whenever it involved exposing discreditable conduct, was to be repressed by public authority unless a jury could be convinced *ex-post facto* that the exercise of the freedom was for the public good. Lord Diplock went on to suggest that to avoid the risk of the UK failing to comply with its international obligations, the consent of the Attorney-General should be sought before a prosecution for criminal libel was instituted, and that in deciding whether to grant consent, the Attorney-General should consider whether the prosecution was necessary on grounds specified in Article 10(2). The approach echoed the sentiment of Lord Denning's attempt to depart from established orthodoxy in *Bird*: orthodoxy which, in the event of conflict between the ECHR and

¹²⁴ That the ECHR could be considered on its own merit was rejected in *Salamat-Bibi*. Lords Denning and Roskill disagreed with Lord Scarman in *Pan-American World Airways v Department of Trade* [1976] 1 LR 257 that the ECHR should be considered despite its unincorporated status. An opinion similarly rejected in *Ahmad v Inner London Education Authority* [1978] 1 All ER 574

¹²⁵ [1979] 1 All ER 898

¹²⁶ [1979] 2 All ER 497

statutory provision, dictated that the latter would prevail. The attempt constituted a rebuff of the transformation doctrine, an approach advanced in *Gleavers* and *Bird* to no avail.

Yet, this is not to suggest that the UK judiciary did not on occasion engage in judicial activism. In *Attorney-General v The BBC* Lords Scarman and Frazor expressed little doubt that they were obliged to bear in mind the impact of their decision on international obligations under the ECHR.¹²⁷ The same approach was reiterated by Lord Denning in *Schering-Chemicals Ltd v Falkman Ltd*.¹²⁸ Examining the underling policy of the law of libel, Lord Denning demonstrated little reserve in holding that it should conform as far as possible with any relevant ruling of the ECtHR. Yet, in terms of according effective HR protection, the case remains uninspiring.¹²⁹ Despite the acknowledgment accorded the jurisprudence of the ECtHR, the ruling in *Schering* did little more than affirm the already established UK doctrine of prior-restraint.

The ruling of *Schering* serves (in part) to illustrate the approach adopted generally by the UK courts. Apart from a readiness to rely on the qualifications to many of the rights enshrined in the ECHR,¹³⁰ evidence pointed to a reluctance of the judiciary to set its own agenda of interpretive activism. As exemplified in the ruling of Lord Ackner in *R v Secretary of State for the Home Department, ex-parte Brind*¹³¹ that the judiciary were under no obligation when dealing with an unambiguous provision of statutory law other than to accord it full effect. Affirming the ruling of Lord Diplock in *British Airways Board v Laker Airways Limited*,¹³² according to Lord Ackner, the interpretation of treaties to which the UK was a party, but the terms of which had not been incorporated into domestic law, was not a matter which fell within the interpretative jurisdiction of the Court.¹³³ In the words of Sir Robert Megarry: albeit at times judges did legislate, they did so with molecular, rather than molar-motions, on the basis that no new right in UK law could derive from the mind of a judge.¹³⁴ Examining the role of the UK courts and the constitutional limits placed upon them,¹³⁵ Sir Robert Megarry then went on to proclaim it abundantly clear that due to the unsatisfactory state of its constitutional arrangement, the UK legal order stood little chance of satisfying even the moderate level of HR protection required by the ECHR. Examining the effect of such an unsatisfactory state in relation to two cases, the observation is not unreasonable.

¹²⁷ [1980] 3 WLR 109 at 130

¹²⁸ [1981] 2 WLR 848

¹²⁹ Reference to the ECHR appearing (arguably) to be made when the judiciary was clear that to do so resulted in no significant change

¹³⁰ *UKAPE v ACAS* [1980] 2 WLR 254

¹³¹ [1991] 2 WLR 588

¹³² [1985] AC 58

¹³³ Courts were bound to apply the clear words of a statute even in conflict with established civil-libertarian principles: *Smith v Director of Serious Fraud Office* [1992] 3 All ER 456. In contrast to the treatment of established privilege governed by common-law: *Lam Chi Ming v R* [1991] 3 All ER 172

¹³⁴ *Malone v Metropolitan Police Commissioner* [1979] Ch 311, 620

¹³⁵ With reference to *Klass v FRG* (1978) ECHR Series A No. 28

In 1992, *Derbyshire County Council v Times Newspaper*¹³⁶ appeared to be the first finding in which the ECHR constituted a decisive factor in the outcome of a case. Called on to determine the extent of the common-law test of libel, the Court held that a local authority had no right to sue in defamation where the allegations went to its governing authority. To do so ran the risk of the Authority interfering with the right to freedom of expression guaranteed under Article 10 of the ECHR. Despite attempting to adopt the language of the ECtHR, the Court did not identify the freedom as a right. Balancing the freedom of expression where political authority was under scrutiny and the protection of the reputation of others, the case turned on the issue of proportionality. In reaching its decision, the Court held that since Article 10 stated the right to freedom of expression and the qualifications to it in precise terms, it would be convenient to consider the question by reference to it. Instead of the Court using the ECHR to bolster its findings, the ECHR was used as a starting-point for judicial reasoning. The County Council appealed and the approach was discarded.¹³⁷ In reaching its decision the Court expressed the opinion that it did not need to rely on the ECHR, insofar as the UK's common-law was already consistent with the obligations assumed by the Crown under the Treaty. The statement displayed a confidence in the UK's legal order at odds with the findings of the ECtHR.¹³⁸ Rather than a serious consideration of the *telos* of the ECHR, its case-law, or substance of the applicant's claim, in determining the significance of the freedom of the press and the legitimate discussion of public officials, it is arguable whether the finding can not more accurately be explained as simply the chance result of a balance of interests.

The second case was described by Lord Goff as the balance between the interest of an applicant's request that he appear in Court to pursue litigation, and the public interest that he be kept secure. In *Wynne v Home Secretary*¹³⁹ the Court assumed that its task was to ensure by all practical means that both interests were protected. Support for this assumption was found in the case of *Golder v UK*.¹⁴⁰ In *Golder* the ECtHR upheld a right of access to the courts in order to guarantee the right to a fair-trial. Albeit in reaching its decision, the ECtHR acknowledged a varying standard of the margin of appreciation granted to national courts in dealing with internal law,¹⁴¹ the case highlighted the need for serious regard to be accorded the nature of Article 6 of the ECHR notwithstanding an applicant's legal status. In *Wynne* however, the Court took little account of the nature of the ECHR when it weighed the applicant's interest against public expenditure and the hypothetical concern of preserving the prison authority from the risk of unmeritorious application. In the opinion of the Court, there had to be a realistic limitation on the

¹³⁶ [1992] 1 QB 770

¹³⁷ [1993] 1 All ER 1011

¹³⁸ *Sunday Times v UK* (1979) ECHR Series A No. 3; *Observer and Guardian v UK* (1991) ECHR Series A No. 216; and *Sunday Times (No. 2)* (1991) ECHR Series A No. 217

¹³⁹ [1993] 1 All ER 254

¹⁴⁰ [1975] ECHR Series A No. 18

¹⁴¹ *Handyside v UK* (1981) ECHR Series A No. 24; and *Sunday Times v UK* (1979) ECHR Series A No. 30

ability of the applicant to appear in court to pursue litigation, and decided that the national interest be accorded the greater weight.

Both judgements were discouraging. Whereas, *Derbyshire* illustrated little more than a coincidence of petition with the UK Court taking little account of either the *telos* or case-law of the ECHR, in *Wynne* it was called on to do little more than support a finding at odds in principle with the ECHR. In accordance with the *tenet* of the ECHR, the objective of the order was/is to protect a number of rights and freedoms from arbitrary interference by the signatory-state: the ability of the State to interfere a power ideally subject to the policing of the ECtHR, and at no time to be used to the detriment of the substance of the right. Yet, in *Derbyshire* and *Wynne* the judiciary did exactly that. Whereas in *Derbyshire* the Court merely extrapolated a coincidental outcome of two understandings of the ECHR provision in question; in *Wynne*, while claiming to have achieved ECHR compatibility, it reached a decision which effectively defeated the *telos* of Article 6.

To conclude, although conformity of UK law with the ECHR was alleged at the point of ratification in 1966 when the right of Individual-Petition was accepted, the scepticism which attended its inauguration continued: commitment to the ECHR remaining (arguably) an adherence to domestic legal sovereignty, political autonomy and prerogative of the State. Clearly, the UK differs in its constitutional arrangement from that of its civil-law neighbours in being a dualist common-law order. Whether the ECHR's affinity with the civil-law system renders the ECHR in relation to the UK an impracticable statement of ideals however, is not so straightforward. Though the UK constitutional order certainly proved a factor in colouring the UK's early approach to the ECHR, an equally significant factor proved to be the judiciary's own fixation with the discipline of law and the foundations which endowed it with validity and consistency.

Section 2.6: The ECHR: An Imagining Beyond The There and Then?

The ECHR imposes *per se* no legal obligation on signatory-states to incorporate it into their domestic order. Rather, the initiative constitutes a subsidiary collective guarantee of rights governing relations between individuals and national authorities: A class of *traité-loi* whose implementation is the responsibility of the signatory-state. Analysis of the exercise of that responsibility results in a number of observations.

Firstly, the effectiveness of the ECHR does not result from the process of ECHR incorporation into a signatory-state's domestic order, but from the accomplishment of its minimum-standards

of protection, the functioning of the right of individual-petition and the adherence to the jurisdiction of the ECtHR.¹⁴²

Despite the motives for the development of a universal order of HR protection, the functioning of the ECHR remained autonomous. Decisions of the European Commission, Committee and ECtHR (although persuasive) were not binding. Insofar as a *jurisprudence constante* between the rulings of the ECtHR and the internal practice of the signatory-state existed, the ECHR imposed no greater an obligation on the national legal order than an ability to take decisions of Strasbourg into consideration when reviewing evidence relating to an alleged HR violation. Accordingly, an individual could have recourse before a national court where Strasbourg had established a violation of ECHR law; where the signatory-state inadequately executed the Strasbourg judgment; or where the national authority had refused to compensate the applicant in accordance with Article 50 of the ECHR. Further, the possibility of re-opening domestic forms of redress following a finding by the ECtHR, could not be excluded from amongst the ECHR's (arguable) impact. Nor the ECHR's ability to imply a positive obligation on a signatory-state to give weight to its provisions by encouraging changes in legislation;¹⁴³ or the willingness of some signatory-states to take corrective action while a concern was pending in Strasbourg.¹⁴⁴

With regard to the European Commission, the findings of the initiative did not bind domestic courts. However Sørensen¹⁴⁵ advocated that the Commission's decision on admissibility could be binding where the ECHR possessed the status of internal law. Similarly, there was support for the view that the terms of a friendly-settlement secured under the *aegis* of the Commission could be enforced by an individual in the national courts were a signatory not to abide by the terms of the Settlement.

In contrast, the authority in domestic law of the operative powers of the Committee of Ministers remained uncertain. Although its decisions could be given weight by national courts, they were likely to carry less influence than the judgment of the ECtHR and the Commission. This was probably because the Committee constituted a political body whose decisions remained essentially unreasoned.

On analysis then, the ECHR would appear to have been of (arguable) significance in those signatory-states in which the initiative possessed either the status of domestic law, or was superior to *lex posterior*. Certainly, one development unforeseen by the founders of the ECHR which merits attention was the application of the ECHR to inter-individual relations developed

¹⁴² *Handyside v UK* (1976) ECHR Series A No. 24

¹⁴³ *Marckx v Belgium* (1979) ECHR Series A No 31; *Handyside v UK* (1981) ECHR Series A No. 24 demonstrating the Courts' potential to respond to the way in which rights change in status and form over time

¹⁴⁴ *Leenart v Netherlands* (1980) Rechtspraak Vreemdelingenrecht 113 No. 80, 591

¹⁴⁵ M. Sørensen 'The Enlargement of the European Communities and Protection of Human Rights' (1972) *European Yearbook*, XIX, 3-17

by the *Bundesverfassungsgericht*. However, the same innovation also highlights that the impact of the ECHR on the domestic order of those signatory-states in which it could be used as legal authority cannot be generalised. Its influence varied not only from state to state and from one court to another, but in terms of time. Thus, while the ECHR was treated primarily as a subsidiary source of law by the Netherlands up until 1970, it remained essentially peripheral in relation to the established constitutional order of Germany.¹⁴⁶

For example, despite the ECHR's definitive status in accordance with Article 25 of German Basic law, in its ruling of the 14 January 1960¹⁴⁷ the *Bundesverfassungsgericht* held that invocation by way of constitutional appeal could not be based on the initiative. On a point of legal technicality it could not be said that the provisions of the ECHR took precedence over Federal Law arising after the initiative's promulgation. As for the development of a horizontal-application of the ECHR, in its ruling of 24 July 1968,¹⁴⁸ the same Court declared the ECHR to be no more than 'objective criteria' to be taken into consideration in the event of discrepancy or conflict between the ECHR and domestic law.

Examining the impact of the ECHR on domestic law then, analysis suggests that the form of a signatory-state's constitutional arrangement represents only one factor on the latter's ability to effectively consider the ECHR order. But what of the influence of the ECHR on a signatory-state which had not formally incorporated the initiative into its internal order? Could the ECHR's (arguable) affinity with the civil-law system render it in relation to the UK merely an impracticable statement of ideal?

Although the ECHR was not without impact on UK law,¹⁴⁹ conjecture that the ECHR could produce expeditious remedy with *ad-rem* effect simply did not occur. Unlike the (arguable) treatment of HR in the civil-law order, in the UK fundamental rights and freedoms remained a concern of political argumentation. Administrative or procedural change resulting (arguably) from the maintenance of politically motivated state interest, as opposed to serious concern for the individual.¹⁵⁰

The approach of the UK toward the ECHR formed a subject for discussion in *Manx*.¹⁵¹ According to Judge Hytner both the UK and Manx authorities appeared somewhat unconcerned

¹⁴⁶ Golsong (1957), Op. cit at 317

¹⁴⁷ (1960) NJW

¹⁴⁸ (1970) AJCL 18, 305

¹⁴⁹ Exemplified in the Home Secretary's announcement to Parliament a change in the UK Prison-Rules following *Golder v UK* (1975) 1 EHRR 524 Series A No. 18; its impact on the Contempt of Court Act 1981, following *Sunday Times v UK* (1979) ECHR Series A No. 30, 197; and introduction of the Mental Health (Amendment) Act 1982, following *X v UK* (1981) ECHR Series A No. 46. As well as, the influence of *Handyside v UK* (1976) 1 EHRR 737; *Dudgeon* (1981) 4 EHRR 491; and (inter-state case) *Ireland v UK* (1978) ECHR Series A No. 25

¹⁵⁰ Exemplified in the deliberation of the doctrine of transformation in relation to the functioning of the UK's immigration order during the early 1970's. See: Application 2991/66 4 Yearbook (1968) 788-94; Report of the Commission 13 Yearbook (1972) 730-72; and *Amekrane v UK* Application 6840/74 16 July 1980, 20 D + R. 5-18

¹⁵¹ The Times Newspaper, 6 October 1981 p. 2

about respective breaches of international treaty obligations. The Court regarded this as an unsatisfactory state of affairs. In the opinion of Hytner, were the ECHR to be accorded the status of domestic law, incorporation of the ECHR would clarify its uncertain status and provide the courts with the benefit of the guidance of Strasbourg. Judicial reticence over the manner in which the UK courts might interpret the ECHR would be allayed by the fact that the court would be technically obliged to have serious regard for ECHR jurisprudence. The assertion was not only conjectural, but at the time, questionable. Although UK courts were unable to prevent Parliament from extinguishing rights, when they did find an opportunity at common-law to voice an objection, they still (in the main) continued to assert a modified version of Dicey's¹⁵² utilitarian concept of adjudication: acknowledging the ECHR as a quasi-objective statement of values to be considered only insofar as the public interest was not compromised.

Despite the conjecture of Hytner, a form of pragmatism pervaded the UK legal order which more accurately explains the early findings of its courts.¹⁵³ It is an approach reflected to a degree in the philosophy of Kelsen's pure theory of law.¹⁵⁴ A structured system of legal validity based on rule upon rule in a progression of legal norms forming an established legal order, the most fundamental being a judicial commitment to its own constitutional conservatism¹⁵⁵ and the supremacy of Parliament.¹⁵⁶

To summarise, the ECHR may offer the promotion of a common understanding of HR, but it is the character of the national judiciary which leads to their actual protection. Examining the tenor of judicial thought throughout a number of ECHR signatory-states, it is a reality not restricted to the UK common-law order. As exemplified in the *passé* reasoning of the Netherlands's judiciary resulting (arguably) in the number of judicial techniques identified by van Dijk;¹⁵⁷ the application of HR to German Basic Law in what the *Bundesverfassungsgericht* repeatedly refers to as a militant democracy; and the ECHR's handling by the French judiciary which, more cautious than its HR history would suggest, (arguably) intimates a greater proximity between the legal and the political than popular French debate would suggest.¹⁵⁸

The reality of the role of the national court in the ECHR order was summarised by Tridade.¹⁵⁹ Acknowledging the relevance of the national court, Tridade observed its tendency to look to its

¹⁵² Dicey (1965), Op. cit at 203

¹⁵³ P. Atiyah *Pragmatism and Theory in English Law* (Stevens, London 1987)

¹⁵⁴ Kelsen (1934), Op. cit at 517

¹⁵⁵ In the event of a conflict between a need to manipulate a rule in order to achieve a result compatible with the ECHR and adherence to the rule itself, the judge would strive to uphold the latter, grounded on a belief in a reciprocal contract of co-operation in accordance with which the judge as *neutral-expositor* regarded himself bound to uphold the will of the rule-maker. Criticised by Twining as an 'oversimplification' in *How to do Things with Rules* (Weidenfeld and Nicolson, London 1980) 183

¹⁵⁶ The judiciary would not accommodate an argument that a single measure could reign over all others, least of all one deemed international

¹⁵⁷ Van Dijk (1990), Op. cit at 585

¹⁵⁸ *Recueil Dalloz Sirey Début*, 30 October 1980, 38; *Recueil des décisions du Conseil d'Etat, Début* 27 October 1978, 395. See: J. Keeler and A. Stone in G. Ross *The Mediterranean Experiment* (CUP, Cambridge 1987)

¹⁵⁹ A. A. C. Tridade 'The Exhaustion of Local Remedies in International Law' (1978) *Archiv des Völkerrechts* 17, 333

own domestic authority of last-instance, rather than the jurisprudence of the ECHR's organs when interpreting the ECHR. Tridade went on to state that it was hoped that from the few cases where the higher courts of some states had openly consulted the findings of Strasbourg would develop an awareness amongst municipal judges that would persuade courts to consult not only their own jurisprudence but that of Strasbourg. Certainly, analysis of the impact of Strasbourg on the UK reveals that, insofar as the relationship between municipal law and the ECHR was maintained by a maxim of judicial interpretation, the ECHR constituted merely a supplementary, as opposed to a decisive factor in the outcome of a case.

Finally, regardless of whatever theory or philosophy a nation-state may profess, there can never be a separation between law and politics. Although within developed societies a distinction can be drawn between the formalities of policy and the method of its enforcement, factors operate to conceal the impact of politics on the legal process. Foremost is the psychological element of tradition which Llewellyn terms law habit.¹⁶⁰ A specific legal atmosphere is created and reinforced by a political order which overt interference with is perceived as unconstitutional. Analysis of the international legal scene in the context of the working of the ECHR highlights such a tradition operating throughout the signatory-states: in the uncertainty of the rulings of the French Courts, the constitutional arguments of the UK and German Courts, and the early fudging of the *Hoge-Raad*. The tradition exists irrespective of the monist or dualist nature of the state, or the fact that its legal order can be characterised as being civil or common-law. In the sense that the conformity of state behaviour with its European obligations is promoted not by a vertical-hierarchy of international tribunals but by a process of interaction with and within national courts, the reality is not ideal.

According to the early rhetoric of Strasbourg, the ECHR constituted a resolution of the Governments of Europe which purported to maintain a classic liberal philosophy rooted (arguably) in the notion of the protection of rights accorded individuals by virtue of the ontological fact that they were human, therefore, by definition, universal.¹⁶¹ However, in so far as the ECHR is utilised in different courts, in different ways, such divergence gives rise not merely to difficulty in applying its jurisprudence in domestic law¹⁶² but to an (arguable) *sine qua non*¹⁶³ within the context of the primary purpose that the initiative was (arguably) meant to secure: the promotion of a 'uniform protection of certain fundamental HR among the Member States of the Council of Europe.'¹⁶⁴

¹⁶⁰ K. Llewellyn *The Common-Law Tradition* (Little & Brown, Boston 1960)

¹⁶¹ B. Cullen *Moral Philosophy and Contemporary Problems* (CUP, Cambridge 1992) 165

¹⁶² R. Masterman 'Taking The Strasbourg Jurisprudence Into Account: Developing a Municipal Law of Human Rights' 2007 *I.C.L.Q.* 907

¹⁶³ Warbrick (1989), *Op. cit* at 715-716

¹⁶⁴ As explained by Lord Bingham in *R (On the Application of Greenfield) v Secretary of State for the Home Department* [2006] UKHL 15 at [3] and, according to Lewis, 'reflected in the fact that the fifth recital of the Preamble refers to "collective enforcement"

Further, in accordance with its structure, the ECHR implies the significance of dialectic, as opposed to fixed opinion. It is a living innovation never completed but peripatetic, reflecting the belief that the issue of rights should be changeable according to new contingencies. In reality however, the outcome of dialectics is interpretative, political and in the final analysis, constructed. Although the ECHR may propose solidarity in the form of a universal order, in practice its operation serves to highlight the irreconcilability of the conflicting principles that are HR and the supremacy of the State.

To conclude, according to the ECtHR the ECHR transcended traditional boundaries between international and domestic law by comprising elements of both.¹⁶⁵ The ECHR (arguably) created not only ‘obligations’ on signatory-states, but ‘rights’ which were intended to be enforceable by individuals, establishing in the field of civil-liberties a new legal order designed to substitute for the systems of individual states a common European order. The opinion revolved around the reading into Article 1 of the ECHR intent by its drafters that the rights and freedoms listed therein would be secured to everyone within the jurisdiction of the signatory-state; and an implied duty to afford the ECHR an effective status deduced from the legal basis of Article 13. In practice however, the opinion could/can not be maintained. Evidenced throughout the ECHR’s early functioning, and regardless of constitutional arrangement, in terms of the impact of the initiative on signatory-states, the ECHR remains an inconsistent system. The practical task of applying the ECHR fraught with a number of problems:

- (Evidenced in the UK in particular) the delegation of an undefined discretion as to the scope of the ECHR and its application to specific facts;
- Indeterminacy of clear political and social aim;
- The natural limitation of legal language;
- Conflict between the values of internal consistency within the signatory-state’s domestic legal system and other values, including prevailing national, social and political concerns.

As a result, a signatory-state’s rhetorical commitment to HR protection was not necessarily matched by a realisation of those rights. Whether the ECHR was intended to function in such a way, is inconclusive. What is not, is that insofar as the ambit of the European HR order remained solely that of European states and not individuals, the ECHR would appear to have inherited a classic imagining of a universal political, legal and judicial reality which lay (arguably) well beyond the ‘there and then.’

of certain of the rights stated in the Universal Declaration of Human Rights,’ J. Lewis ‘The European Ceiling on Human Rights’ [2007] *P.L.* 720 at 722

¹⁶⁵ *Ireland v UK (1978)* ECHR Series A No. 2, 90-91

Section 3: The ECHR and the UK Government and Legislature

The procedures of the UK Parliament for dealing with HR remained underdeveloped up until 2000 and little is known about their impact before then. With regard to the Public Record Office, where information is accessible, it reveals little attention being paid to HR, even in relation to legislation which related to decisions of the European Commission and the ECtHR. With regard to researching concern for HR during the passage of legislation through Parliament, where such regard did arise in debate the ‘tenor of the doctrine of parliamentary...supremacy was to play down...responsibility on the part of Parliament to adhere to substantive standards when conducting its business.’¹ Similarly, it is difficult to make a statistical assessment of the UK’s record of HR protection on the ground that figures are inflated by the fact that the UK did not adjudicate breaches of the ECHR in its domestic courts, and that the majority of cases lost concerned the same point of challenge.

However, Section 3 of this thesis commences from the premise that it was not credible to maintain that to ‘incorporate’ the ECHR into domestic law was unnecessary on the ground that its rights were already protected. By the 1990’s questions concerning the attitude of the UK toward HR were raised in relation to such practices as executive detention,² the shoot to kill policy of terrorist-suspects,³ and the ban on broadcasting of political spokesmen of specific political parties.⁴ Further, rights regarding privacy, aliens and minorities could not found a legal claim. The *locus-standi* in respect of challenges meant that groups who sought to vindicate the public interest had no standing to make use of the ECHR. The ECHR concerned the conduct of private persons through the obligations imposed on the State. A party to civil-litigation was as devoid of a plea in support of his claim, as an individual facing a charge could not plead that the law under which he was charged was in contravention. The same applied to public authorities who, having refused to comply with legislative provision, attempted to challenge any administrative sanction applied. Even in respect of challenges arising after the UK’s acceptance of the Right of Individual Petition, the ECHR could not be directly invoked in the UK Courts.

Examining the impact of the ECHR on the UK Government and legislature, Section 3 of this thesis analyses the effect of the order on such areas of HR concern as asylum, terrorism and various aspects of criminal justice. Whether the UK’s treatment of the individual does support a claim that a universal humanity can not exist empirically, Section 3 examines the structure, and then functioning, of the HRA, and asks whether the reality of the ECHR can remain anything other than a *raison-d’etre* of the signatory-state.

¹ D. Feldman ‘The Impact of Human Rights on the UK Legislative Process’ (2004) 15 *S.L.R.* 25, 2, 95

² *Ireland v UK* (1978) 2 EHRR 25

³ *McCann v UK* (1995) 21 EHRR 97

⁴ *R v Home Department, ex-parte Brind* [1991] 1 AC 696

Section 3.1: The Case for the Human Rights Act 1998

In response (in part) to a lack of process for the safeguard of HR in the execution of policy, a number of Private-Member Bills took the concern of HR seriously enough to consider not merely proposals for the introduction of a Bill of Rights, but also incorporation of the ECHR into UK law.⁵ The Bills constituted a campaign to improve the quality of liberty in the UK.⁶ Acknowledging dissatisfaction with the paradox that while in principle the rule of law might protect the liberty of the individual, in practice such liberties were vulnerable to executive, legislature and judicial erosion,⁷ the case for the HRA was made in the HR Bill *Rights Brought Home*.⁸

Highlighting the effect of the ECHR's non-incorporated status in terms of delay in taking a case to Strasbourg, the Paper was of the opinion that the rights guaranteed by the ECHR should be delivered under common-law. Evidence of such need was said to lie in the number of cases in which the European Commission and ECtHR had found there to be an ECHR violation, and the inadequacy of the UK framework within which it could be tested.

According to the Standing Advisory Committee, the observation was not without foundation. The UK had within the ECHR order a significant number of statutory HR violations by no less than 80 domestic laws.⁹ In an attempt to improve the arrangement for legislative scrutiny prior to enactment, the Cabinet Office had issued a number of Circulars in 1987 urging Government departments to consider the effect of ECHR jurisprudence on any proposed measure.¹⁰ No further direction was given beyond the instruction that in the event of uncertainty, the department should solicit *ad hoc* guidance from the Foreign and Commonwealth Office. The effect was nominal. Analysis of subsequent legislation revealed that unresponsiveness to the rights enshrined in the ECHR, on the part of those responsible for policy, remained evident in the treatment of certain individuals. For example, years after a HR deficiency in the functioning of Sections 61 and 62 of the Criminal Justice Act 1967 became apparent, in *Weeks v UK*¹¹ and *Thynne, Wilson and Gunnell v UK*,¹² the discretionary power of the Secretary of State to deny release of detainees serving life-sentences, was held by the ECtHR to constitute a violation of Article 5(4) of the ECHR. Despite the ruling in *X v UK*¹³ that executive discretion be replaced by

⁵ Discussed in M. Zander *A Bill of Rights* (Sweet & Maxwell, London 1997) Chp. 1

⁶ Largely focused on the question whether rights were better protected by Parliament, the elected representative of the people: a republican approach; or a non-representative judiciary: the liberal approach

⁷ Lord Sedley 'Human Rights: A 21st Century Agenda' [1995] *P.L.* 386; Lord Woolf 'Droit-Public – English Style' [1995] *P.L.* 386; Lord Bingham 'The European Convention on Human Rights: Time to Incorporate' (1993) *L.Q.R.* 109; Lord Browne-Wilkinson 'The Infiltration of a Bill of Rights' [1992] *P.L.* 397; and Lord Scarman *English Law – The New Dimension* (Stevens, London 1974)

⁸ Command Paper. *Human Rights: Rights Brought Home: The Human Rights Bill*, (1997-1998) (Cm 3782) (TSO, London)

⁹ HC Standing Committee's Annual-Report (1986-1987) (Col. 298) (TSO, London)

¹⁰ Discussed in A. Bradley 'The Judge Over Your Shoulder' [1987] *P.L.* 485

¹¹ (1987) ECHR Series A No.11

¹² (1990) ECHR Series A No.190

¹³ (1981) 4 EHRR

an independent tribunal, the official response was the retainment of executive discretion in the Criminal Justice Act 1991.

The cases are interesting. The attitude of the UK toward the HR concerns in *X, Weeks* and *Thynne* indicates not only a disinclination to comply with European obligations to impugned legislation,¹⁴ but also the role of Parliament to ensure that legislation did not unduly censure individual rights and freedoms. The observation formed a subject for discussion by Stone.¹⁵ Examining the extent to which Parliament could act as a custodian of HR protection, Stone identified a number of limitations on the extent to which Parliament could/can fulfil this role.

First, is the danger of incremental infringement. Parliament may accept that one type of control is necessary. Its existence in one area may then justify its application to another in a way that may involve a more significant infringement of liberty. Examining comparisons to be made between the ability of the police to access material under the Drug Trafficking Offences Act 1986, the Prevention of Terrorism (Temporary-Provisions) Act 1989, and the Police and Criminal Evidence Act 1984,¹⁶ according to Stone, the ability of the police to obtain access to confidential information provided just such an example:

‘The [PACE] gave the police powers in certain situations to obtain a court order to compel people who hold...confidential information which is relevant evidence in relation to a serious criminal offence to hand it over. Subsequently, similar powers were included in the Drug Trafficking Offences Act 1986 and the Prevention of Terrorism (Temporary-Provisions) Act 1989. In both cases the powers given looked... to be the same as those contained in [PACE]. However, there were differences. In neither case under the later Acts, did the material have to be evidence: it had simply to be likely to be useful to police investigations. Moreover, whereas the procedure under [PACE] involved an *inter-partes* hearing, where the person from whom the information is sought could challenge the application by the police, in relation to both the other powers the hearing was *ex-parte*. Thus, the later powers involved a clear further encroachment on civil-liberties, but one that was probably made easier by the fact that the first step in that direction had already been taken in the 1984 Act.’¹⁷

Secondly, is the fact that Parliament may easily be panicked into reacting without regard for individual liberty by a situation of perceived emergency. Highlighting the swiftness of the passage of the Official-Secrets Act 1911 through Parliament, according to Stone, Parliament played no role as a guardian of civil-liberties either in its justification of Section 2, or its restraint on the freedom of expression for some 80 years.

¹⁴ HC Deb (1991) 186 (Col 360); HC Deb (1991) 193 (Cols 902-904); and HC Deb (1991) 195 (Col 309-310) (TSO, London)

¹⁵ Stone (2004), Op. cit at 9

¹⁶ Hereafter, PACE

¹⁷ Stone (2004), Op. cit at 10

The tendency of Parliament to be panicked into reacting without regard for individual liberty was raised by the civil-rights group Liberty, according to whom both the Immigration Act 1968 and the Prevention of Terrorism Act 1974 were passed by Parliament during periods of national panic, and in whose opinion had there been a Bill of Rights in force at the time, the question as to whether such legislation did breach fundamental rights would at least have been aired in Parliament and/or a domestic court.¹⁸ Certainly in the opinion of Oliver, it was not unreasonable to suggest that in periods of polarised politics and divided opposition, Parliament could well be persuaded to legislate in breach of civil rights, particularly when the Government desired to avoid the accountability that such rights could promote.¹⁹

Finally, prior to the HRA, the concern of the individual was protected by legislative provision from which a liberty could be inferred and rules shaped by common-law. The approach, highlighted by Lord Goff in *Attorney-General v Guardian Newspapers (No.2)*,²⁰ stood in contrast with that of the ECHR which listed in general terms the rights it purported to guarantee. With regard to the role of the UK judiciary, although a power of review proved effective in the protection of common right and reason, other than the extra-judicial attempts of Lords Browne-Wilkinson,²¹ Sedley²² and Bingham²³ to raise the level of rights consciousness within Parliament, grounded on an unwillingness to immerse themselves with issues of policy, the courts (in the main) were not inclined to develop the law in the field of HR protection.²⁴

Forming the focus of the Paper *Rights Brought Home*, the Bill regarded the enablement of UK courts to rule directly on matters of ECHR concern to be the way forward toward effective scrutiny of domestic legislation. Coupled with the belief that time had come to enable individuals to engage their ECHR claims without the delay involved in taking a case to Strasbourg, the aim of the Government was straightforward: to make more accessible the rights which the individual enjoyed under the ECHR. Whether the HRA has done so, is subject to debate.

Section 3.2: The Mechanics of the Human Rights Act 1998

The HRA entered into force on 2nd October 2000. The provisions of the ECHR given effect are listed in Section 1(1) of the HRA and set out in Schedule 1. Rights which are excluded include the Article 13 right to an effective remedy in domestic law, on the ground that the Government

¹⁸ Liberty *A People's Charter* (Liberty, London 1991) 13

¹⁹ D. Oliver *Government in the UK* (OUP, Oxford 1991) 149

²⁰ [1990] 1 AC 109 at 283

²¹ Lord Browne-Wilkinson (1992), *Op. cit* at 397

²² Lord Sedley (1995), *Op. cit* at 386

²³ Lord Bingham (1993), *Op. cit* at 109

²⁴ Evidenced in the ruling of Lord Denning in *R v Secretary Of State for Home Affairs, ex-parte Hosenball* [1977] 1 WLR 766; Lord Donaldson in *Attorney-General v Guardian Newspapers (No.2)* [1990] 1 AC 109; and observations of Sir J. Laws 'Is the High Court the Guardian of Fundamental Constitutional Rights?' [1993] *P.L.* 60

considered enactment of the HRA to be a sufficient measure to meet the obligation in Article 1; and the rights in the 4th 7th and 12th Protocols.²⁵ In accordance with Section 1 of the HRA, ECHR rights have to be read with the permission in Article 16 of the ECHR to allow restrictions on the political activities of aliens; the prohibition in Article 17 on the use of ECHR rights to subvert other rights; and the Article 18 prohibition on the use of permitted restrictions for improper purposes. The way in which the ECHR impacts upon domestic law is through the imposition of two obligations: the first, in respect of statutory interpretation; the second, public authority.

The HRA assigns the practice of national courts examining standards developed by the ECHR on a formal level. Section 2(1) provides that a court or tribunal determining a question which has arisen in connection with the ECHR must take into account any judgment, decision, declaration, or advisory-opinion of the ECHR order. Section 3(1) provides that insofar as it is possible legislation must be given effect in a way which is compatible with the ECHR. However, Section 3(2) continues that this does not affect the validity, continuing operation or enforcement of incompatible primary legislation; or the validity, continuing operation or enforcement of incompatible subordinate legislation, if primary legislation prevents removal of the incompatibility. Section 4(2) empowers the UK court if it is satisfied that a statutory provision is ECHR incompatible to make a declaration of that incompatibility. The ability to do so applies to proceedings in which a court determines whether a provision of subordinate legislation, made in the exercise of a power conferred by primary legislation, is compatible with an ECHR right. If the court is satisfied that the provision is incompatible and that the primary legislation concerned prevents removal of the incompatibility, it may make a declaration of that incompatibility. Section 4(6) provides that a declaration does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given, nor is it binding on the parties to the proceedings in which it is made.

Clearly, the HRA does not incorporate the ECHR into domestic law in the way that the EC Act 1972 incorporates the EC Treaty: Although certain provisions of the ECHR enjoy a defined status, there is no question of the ECHR becoming part of substantive law. The HRA empowers the higher courts to make a declaration of incompatibility but, lacking in coercive effect, does not prevent the operation of the legislation in question. The reality of the practice is exemplified in *R v Mental Health Review Tribunal, ex-parte H*.²⁶ The Court of Appeal held that the statutory requirement in question breached the ECHR right to liberty. Under Section 4, the Court was able to declare the provision incompatible, but was unable to halt the reverse burden of proof practice until Parliament decided to remedy the breach. Accordingly, Section 4 provides little incentive

²⁵ Concerning the treatment of aliens in relation to exile and expulsion

²⁶ [2001] MHLR 48

for an applicant who can lose out to legislation which breaches the ECHR, and where the decision in question does not provide grounds for an appeal.

With regard to the second obligation, Section 6 of the HRA provides that it is unlawful for a public authority to act in a way which is incompatible with the ECHR, unless legislation renders it impossible to do so. The concept of public authority was considered in *Popular Housing Association Limited v Donoghue*.²⁷ The Court of Appeal held that reference in Section 6(3)(b) to any person certain of whose functions are of a public nature did not mean that any person acting on behalf of a public authority constituted a public authority: Section 6(3)(b) would not apply where the nature of an act was private. Further, as the definition of public authority in Section 6(3)(b) was defined in functional terms, public authority was such that it would need to be determined on a case-by-case basis. According to Lord Woolf, the distinction between public and private law developed for the purpose of determining which bodies were subject to judicial review, could offer direction as to the meaning of public function.²⁸ However, the HRA serves a different object from the practice of judicial review.

Section 6 creates 2 categories of public authority: the first, an authority which is public in relation to all its activities; the second, an authority which is public only in relation to a particular function. Whether proceedings can be instituted on the basis of an alleged infringement of an ECHR right, is dealt with by Section 7. In accordance with Section 7(1), an individual who claims that a public authority has or proposes to act in contravention of Section 6 can bring proceedings against the public authority concerned. ECHR case-law indicates that the applicant must have been affected by the alleged infringement. In accordance with Section 8, the court may grant such relief as it considers appropriate. However, damages can only be awarded where a court has power to do so in civil-proceedings and is satisfied that it is necessary, taking into account the availability of alternative remedies. On analysis, the conditions as to damages constitute the least disconcerting limitation of the Act. The objective of the HRA is the protection of the individual *vis-a-vis* the state. What the HRA and ECHR order do not do, is initiate a law concerning the breach of the ECHR as between individuals. The consequence of limiting liability under the HRA is that its provisions have vertical, and not horizontal, effect.

Yet, this is not to suggest that the ECHR is incapable of innovation. Although the ECHR is concerned with rights as between the individual and the state, Bailey argues that there is a possibility of the HRA being interpreted so as to require its application by the court to claims brought against private persons, on the basis that the courts are public authorities under Section

²⁷ [2001] EWCA Civ 585

²⁸ [2001] All ER 621

6.²⁹ The approach was supported by Wade, who suggested that the application of the HRA could technically result in horizontal-effect.³⁰ The possibility was tested in *Douglas v Hello*.³¹ Considering the absence of a right to privacy in UK law, the Court considered applying the ECHR horizontally. The possibility was rejected. Indicating its preference for development of the common-law, the court decided to circumvent the question of horizontal-effect by developing privacy rights in the context of established law on breach of confidence using its power under the HRA. The reasoning behind the decision was clarified in *Venables v News Group Newspapers*.³² According to Dame Butler-Sloss, the obligation to apply the ECHR did not encompass the creation of a free-standing cause of action that could be used by one private person against another. Examining the handling of the HRA in relation to privacy, Stone identified 2 judicial approaches: the first, involving a narrow interpretation of the Section 6 requirement that the court accord credence to the ECHR in relation to the conduct of legal proceedings; the second, a broader interpretation, that although Article 1 ECHR is excluded from the HRA and cannot be used to obtain a remedy, the same result can be achieved by the recognition of new rights and obligations as being in the spirit of the ECHR to the extent of according the HRA horizontal-effect.³³

The approach was considered more fully in *A v UK*.³⁴ In *A v UK*, the ECHR order was called on to examine the UK defence of reasonable chastisement. The applicant applied to the European Commission alleging that the UK had failed to protect him from ill-treatment amounting to *inter-alia* a violation of Article 3 of the ECHR. The Commission referred the case to the ECtHR which ruled that because the law relating to reasonable chastisement did not provide protection against Article 3 treatment, the Government had failed to secure the right of the victim not to be subjected to inhuman and degrading treatment. As a result of the ruling, the Government considered amending the law relating to parental chastisement but, following the finding in *R v H*³⁵ that the directions given to a jury in relation to the defence already met the Government's ECHR obligation, decided that no action was necessary.

Finally, Section 19(1) of the HRA provides that a Minister of the Crown in charge of a Bill in either House of Parliament must, before its Second Reading, make a statement that (in his view) the provisions of the Bill are ECHR compatible, or make a statement that although he is unable to make a statement of compatibility, the Government nevertheless wishes the House to proceed

²⁹ Bailey (2001), Op. cit at 7

³⁰ W. Wade 'Horizons of Horizontality' (2000) 116 *L.Q.R.* 217

³¹ [2000] 2 All ER 289

³² [2001] 1 All ER 908

³³ Stone (2004), Op. cit at 38

³⁴ (1999) 27 EHRR 611; as well as *Z v UK* (2001) ECHR 29392/95

³⁵ [2002] 1 Cr App R 7

with it. No such obligation exists in respect of an amendment introduced during the passage of a Bill.

The reality of Section 19 was examined by Feldman. According to Feldman, the operation of Section 19 was thought to have a definite impact on the UK legislative process in the sense that ‘the need for a minister to make a...statement about compatibility with [the ECHR] concentrated the minister’s mind and those of his...advisers...on the [HR] implications of the Bill.’³⁶ Counter-arguing the popular criticism that Section 19 was an insufficiently rigorous measure, Feldman argued that it was reasonable for a minister when considering the HRA to apply a balance of probability, recognizing that it was for the courts to decide questions of compatibility. Highlighting two occasions on which a minister had made a Section 19(1)(b) statement: the first, in relation to the correction of a Bill which had been thought likely to have resulted in a violation of the ECHR later to become the Local Government Act 1999; and the second, concerning proposed retention of a ban on political advertising in the broadcast media in a Bill later to become the Communications Act 2003, Feldman argued that the employment of Section 19(1)(b) in both cases demonstrated a positive approach to the concern of compatibility taken by ministers in relation to their respective legislative programme. In justification of Section 19, Feldman continued that the HRA envisaged that in some circumstances it would be necessary for Parliament to legislate incompatibly with the ECHR. Accordingly, rather than question whether Parliament’s ability under Section 19 to legislate incompatibly was proper, it was more sensible to question when such a measure could be considered legitimate. In this context, legitimacy had a number of dimensions. Whereas legislation could be democratically legitimate if it reflected popular will as mediated through the electoral Parliamentary process, legislation would be legally legitimate if it met standards of formal legality; and morally legitimate if it complied with the demands of an acceptable system of ethics. For both courts and Parliament, the ECHR formed part of the matrix of standards relevant to assessment, but their roles differed. While it was for the courts to decide whether legislation was compatible with the ECHR, it was up to Parliament to decide whether it was legitimate to legislate in a manner which had a substantial risk of being incompatible. The observations are interesting. Whether Section 19 constitutes quite the constitutional development Feldman claims however, is debatable.

Firstly, although Feldman went on to justify the application of Section 19 by highlighting factors against the alternative of including on the face of a Bill safeguards against ECHR abuse, he did so by advancing an argument for the need for some ‘form of’ safeguard where the right to be protected was not included in the HRA. Secondly, Section 19 only applies to a Bill at the time that the statement is made. There is no provision in relation to subsequent amendment. Thirdly,

³⁶ Feldman (2004), Op. cit at 97

despite Feldman's opinion that, added to 'the incentive that subordinate legislation...is normally invalid....to the extent of any incompatibility with [an ECHR] right...at least in sensitive areas, there is evidence that...scrutiny in departments is no less careful than for Bills,'³⁷ reiterating the (then) Home Secretary's approach to the compatibility of the Terrorism Act 2000 (Proscribed-Organisations) (Amendment) Order 2001,³⁸ there is no equivalent of a Section 19 statement. Fourthly, albeit Parliament is required to pronounce on the face of an Act whether it is compatible with the ECHR, it is not obliged to ensure that it is. Thus, although a Section 19 statement may well indicate that 'it was not Parliament's intention to cut across [an ECHR] right' and is in 'no doubt...based on the best advice that is available,' nevertheless, in terms of impact, remains no more than an expression of ministerial opinion.³⁹

Whether the HRA does constitute more than the deployment of parliamentarianism for the purpose of maintaining a commitment to the supremacy of Parliament then, its functioning (arguably) underlines the importance that is continued to be attached to the belief that a British citizen has the freedom to do as he pleases subject to the conditions set down in statute or common-law. Despite the introduction of obligations in relation to statutory interpretation, public authority and legislative drafting, it remains open to the UK Government to decide how to deal with the findings of the ECHR and refuse to remedy incompatibility should it decide to do so. As highlighted by the Government's response to concerns raised over the omission of the ECHR's 7th Protocol from the HRA. Although White Papers on the HR Bill recognised areas of incompatibility with the ECHR in existing legislation, compelled by criticism regarding the seriousness of the UK's commitment to the ECHR, the Government's response was to state that it would consider any amendment to remove inconsistency, but only when a suitable opportunity arose. This remains the position in relation to decisions of the ECtHR. The ECtHR may highlight incompatibility requiring correction, but remedial action is something which the UK Government can not be compelled to introduce, or Parliament to make. Whether analysis of Governmental concern can dispel the myth advanced by Lord Reid that it was inconceivable that Government or Parliament would enact legislation which ran contrary to the ECHR,⁴⁰ insofar as both remain autonomous to enact incompatible legislation, it is questionable as to what safeguards the HRA has provided, in particular in such areas of increasing HR concern as terrorism, asylum and criminal justice.

³⁷ *Ibid* p. 104

³⁸ HL 66-I, HC 332-I (2000-2001) (TSO, London)

³⁹ *R v A* [2001] 3 All ER 1 at 24

⁴⁰ *Waddington v Miah* [1974] 1 WLR 683

Section 3.3: The Impact of the HRA 1998: Legislative Encroachment on Human Rights and Fundamental Freedoms

There is little doubt that in the twenty-first century virtually all countries making up the EU have voiced commitment to the respect of the individual with numerous countries accepting international obligation. However, insofar as such universality remains dependent on the solidarity of sovereign Governments, the reality of a universal order remains fundamentally Burkean: the provisions of national law and politics of greater persuasion than international undertaking. With such a premise in mind, this thesis examines the impact of the ECHR on the UK Government and legislature by means of the HRA and, insofar as the universal protection of HR can be said to constitute the last haven of *sui-generis* positivism, questions how far the ECHR has survived political association.

Section 3.3.1: Terrorism

Although not an area falling technically within ECHR control, the UK's treatment of terrorism is significant for a number of reasons. An area in which concern has arisen in relation to the rights of the individual and the value of the ECHR order, the treatment of the terrorist-suspect highlights a reality which not only strikes at the universality at the heart of the ECHR,⁴¹ but raises a number of questions, including what can be expected of a universal order of HR protection.

An omission throughout the ECHR is the absence of a precise definition of the class of individual it is meant to protect. In relation to the ability of the HRA to protect the individual against the exercise of executive power, the question of 'laws subjects' is important. According to Douzinas, 'the modern subject reaches [his] humanity by acquiring... rights of citizenship which guarantee [his] admission to the universal human nature by excluding from that status others with no rights. The citizen has rights to the extent that he belongs to the common-will and to the state.'⁴² In the words of Bernstein, 'citizenship is the reality that stands between and mediates the abstract particularity of personal identity and the abstract universality of HR. [Accordingly] when liberal states claim that they abolish privileges and protect universal rights, they mean that privileges are now extended to a group called citizenry.'⁴³ The observation highlights an anomaly at the core of the ECHR's ability to deliver to everyone the rights guaranteed therein. By its early philosophical pronouncements, the ECHR would appear to have

⁴¹ Insofar as the debate about HR and the upholding of human dignity can be claimed to be in reality little more than a process of 're-legitimation' of the principles of sovereignty and non-intervention in the domestic affairs of the signatory-states: N. Lewis *Human Rights, Law and Democracy in an Unfree World* in T. Evans *Human Rights Fifty Years On: A Reappraisal* (MUP, Manchester 1998)

⁴² Douzinas (2002), *Op. cit* at 105

⁴³ Osborne (1991), *Op. cit* at 114

been intended to be universal.⁴⁴ However, analysis of the impact of the ECHR reveals that vulnerable to the exercise of executive power its concept of humanity is a ranked status, not only in terms of one standard for citizens and another for the peoples of non signatory-states, but between such different class of persons as those remaining at liberty and those lawfully detained.⁴⁵

Since the passage of the HRA, (arguably) one of the most controversial examples of executive encroachment on the rights and freedom of the individual has been the treatment of terrorism. Following the terrorist attack in the US of 11 September 2001, the concern of terrorism has attracted considerable debate not only between those in support of the suspension of rights in combating the threat to security and those against it, but also over the role of the ECHR and HRA. Examining UK strategy for dealing with terrorism, this thesis examines the effect of the UK's response to the threat in the form of the Terrorism Act 2000, Anti-Terrorism, Crime and Security Act 2001, the Prevention of Terrorism Act 2005 and the Terrorism Act 2006.

*The Terrorism Act 2000*⁴⁶

*(1) Section 1 (as amended by Section 34 of the Terrorism Act 2006)*⁴⁷

According to Gearty, the law and practice of counter-terrorism was, and is, not concerned solely with narrow questions of criminal activity in pursuit of a range of ideological objectives: 'terrorist related activities are within the remit of the practitioners of counter-terrorism, but so is much besides.'⁴⁸ This was the case even when the main focus of counter-terrorism was the secessionist inspired violence of the Irish Republican Army. Terrorism was defined in Section 20(1) of the Prevention of Terrorism (Temporary Provisions) Act 1989⁴⁹ as the use of violence for political ends and includes any use of violence for the purpose of putting the public, or any section of the public, in fear. Insofar as the breadth of the definition impacted negatively on civil liberties, the definition of terrorism was particularly wide and imprecise. Whereas the terms 'violence' and 'political ends' were undefined, neither the requirement of putting a section of the public in fear was an essential ingredient of Section 20, nor a particular level of violence or intensity of fear specifically required.

⁴⁴ Lewis (2007), Op. cit at 722

⁴⁵ Douzinas (2002), Op. cit at 316

⁴⁶ Hereafter, TA 2000

⁴⁷ Hereafter, TA 2006

⁴⁸ C. Gearty *Civil Liberties* (OUP, Oxford 2007) at 44. See also: the concern raised by S. Huntington 'The Clash of Civilizations' (1993) 72 *F.A* 22, C. Walker 'The Legal Definition of Terrorism in United Kingdom Law and Beyond' [2007] *P.L* 332, and C. Campbell 'War on Terrorism and Vicarious Hegemons' (2005) 54 *I.C.L.Q* 321 that powerful polities have long sought to exercise hegemonic control over the depiction of emergencies; as well as, concerns raised in relation to the manipulative ability of terrorism to bolster claims to the legitimacy of counter-force as examined by O. Fiss 'The War Against Terrorism and the Rule of Law' (2006) *O.J.L.S* 235, and L.K. Donohue *Terrorism and Counter-Terrorist Discourse* in V.V. Ramraj, M. Hor and K. Roach *Global Anti-Terrorism and Policy* (CUP, Cambridge 2005) 16. For an alternative understanding of the role of counter-terrorist legislation See: C. Walker 'Intelligence and Anti-terrorism Laws in the UK' (2006) 44 *C.L.S.C* 387

⁴⁹ Hereafter, PTA (TP) Act

The definition of terrorism in Section 20 of the PTA(TP) Act formed the focus of the Lloyd Enquiry. Although the enquiry concluded that there was a need for a permanent form of counter-terrorism law in the UK, the review considered that terrorism should be re-defined as ‘the use of serious violence against persons or property, or the threat to use such violence, to intimidate or coerce a Government, the public or any section of the public, in order to promote political, social or ideological objectives.’⁵⁰ Other recommendations advanced included the proposal that terrorism be viewed as part of mainstream criminal law;⁵¹ that the special power of arrest on suspicion of terrorism be removed, and that the prohibition on the admissibility of intercept evidence be lifted. ‘Had [such proposals] been adopted, an important start would have been made in the taming of the [arguable] subversive power of counter-terrorism by the harnessing of its...capacity for repression to the criminal law (with all the procedural and evidential disciplines that this would necessarily have entailed).’⁵² The proposal was not accepted. The definition proposed was too broad since it included the use of serious violence for social objectives, and too narrow in that it did not cover forms of damage to property.⁵³

Section 1 of the TA 2000, as amended by Section 34 of the TA 2006, provides:

(1) Terrorism means the use or threat of action where:

- (a) The action falls within sub-section (2);
- (b) The use or threat is designed to influence the Government or an international Governmental organisation, or to intimidate the public or sections of the public; and
- (c) The use or threat is made for the purpose of advancing a political, religious or ideological cause.

(2) Action falls within this sub-section if it:

- (a) Involves serious violence against a person;
- (b) Involves serious damage to property;
- (c) Endangers a person’s life, other than that of the person committing the action;
- (d) Creates a serious risk to the health or safety of the public or a section of the public; or
- (e) Is designed seriously to interfere with or seriously disrupt an electronic system.

The broad Section 1 definition effectively extends the meaning of terrorism to cover actual or threatened conduct involving either serious violence against the person or damage to property where the intention was/is to influence the Government, an international Governmental organisation, the public, or for the purpose to advance a political, religious or ideological cause. Had ‘the definition stopped there, terrorism law would have had only a peripheral relationship

⁵⁰ Lord Lloyd. *Lloyd Inquiry into Legislation against Terrorism*, (Cm. 3420), (TSO, London 1996)

⁵¹ That certain offences be classified as terrorist offences, including ordinary crimes with a terrorism dimension, as well as a number of defined terrorist crimes such as directing a terrorist organisation and preparation of an act of terrorism

⁵² Gearty (2007), Op. cit at 46. See also: concerns raised by H. Fenwick *Civil Liberties and Human Rights* (Third Edition) (Routledge-Cavendish, London 2002) 403; the objections of Mr Simpson MP to the proposed Section 1 TA 2000 definition of terrorism in *HC Debate, 15 March 2000* (Cols. 399 and 394) (TSO, London 2000); and concerns relating to counter-terrorist measures generally expressed by B. Saul *Defining Terrorism in International Law* (OUP, Oxford 2006) Chapter 1. For an alternative view of the definition of terrorism See C. Walker ‘The Legal Definition of Terrorism in United Kingdom Law and Beyond’ [2007] *P.L* 331

⁵³ *Legislation against Terrorism. A Consultation Paper* (Cm 4178) (TSO, London 1998)

with civil liberties, belonging more...to criminal, than public law. But it did not. Action was also to be regarded as terrorist if with the...intention (identified in Section 1(1)), it either endangered a person's life... created a serious risk to the health or safety of the public...or was designed...to interfere with...an electronic system. [Accordingly, and insofar as violence was no longer an essential feature of the definition] terrorism law burst its original banks in the criminal law and overflowed in the direction of direct-action, civil-disobedience, and political protest generally.⁵⁴ The observation is not unreasonable.

Firstly, despite the Government's clear statement that it had no intention of suggesting that matters that can properly be dealt with under normal public order powers should in future be dealt with under counter-terrorist legislation,⁵⁵ in accordance with amendments made to the definition of terrorism introduced in the TA 2006, Section 1 effectively allows a number of groups and associations to be re-defined potentially as terrorist. Danger to property, violence or a serious risk to safety that can be described as ideologically, politically or religiously motivated may arise in the context of many forms of public protest, including anti-war, environmental and industrial disputes.⁵⁶

Secondly, direct action by such groups as environmental activists and anti-war protestors may be viewed as forms of expression and as having the same role as political speech. Accordingly, to label such forms of action 'terrorist' as Section 1 does, is not only to devalue the term, but to take a stance toward the treatment of public protest which is (arguably) more characteristic of totalitarianism than a democracy.⁵⁷

Thirdly, although Section 1 does not itself create new terrorism-related offences, it nevertheless leads to the questionable criminalization of the acts and omissions of a far wider range of persons, some of whom do not *in fact* technically fall within the definition of terrorist.⁵⁸ Certainly, the definition of terrorism provides the foundation for a very wide range of broad special offences in the TA, and for those subsequently introduced under the Anti-Terrorism Crime and Security Act 2001 and the TA 2006,⁵⁹ as well as, the application of special terrorism

⁵⁴ Gearty (2007), Op. cit at 47. See also: C. Walker *A Guide to the Anti-Terrorism Legislation* (Blackstone Press, London 2002), J.J. Rowe QC, 'The Terrorism Act 2000' (2001) *Crim. L.R* 527, and P. Wilkinson, *Implementations of the Attacks of 9/11 for the Future of Terrorism* in M. Buckley (ed) *Global Responses to Terrorism: 9/11, Afghanistan and Beyond* (Routledge, New York 2003)

⁵⁵ *Legislation against Terrorism: A Consultation Paper* (Cm 4178) (TSO, London 1998) at Paragraph 3.18

⁵⁶ Lord Carlile of Berriew QC proposed in March 2007 that the definition of terrorism should be more narrowly focused to what most citizens would regard as terrorist purposes. That action or threats of action should be regarded as terrorism only if designed to intimidate the Government, rather than influence the Government. In December 2007, Lord Carlile remained disappointed that the proposal was not included in the Consultation Papers concerning changes in counter-terrorist legislation: *Possible Measures for Inclusion in a Further Counter-Terrorism Bill*, and *Options for Pre-charge Detention in Terrorist Cases*, published by the Government 25 July 2007. Lord Carlile of Berriew QC, *Report on Proposed Measures for Inclusion in a Counter-Terrorism Bill* (Cm. 7262) (TSO, London 2007). See also: R. Stone *Civil Liberties and Human Rights* (OUP, Oxford 2004) 101

⁵⁷ H. Fenwick *Civil Liberties and Human Rights* (Routledge-Cavendish, London 2007) 1374

⁵⁸ Insofar as the definition has allowed the application of those special terrorist offences of the TA 2000 (as amended by the TA 2006) of directing terrorist organisations, preparatory and possession offences, the incitement, encouragement and glorification of terrorism, and failure to report a suspected act of terrorism, to what could have been defined prior to Section 1 of the TA 2000 as non-criminal actions

⁵⁹ See: C. Walker (2007), Op. cit at 331

sanctions under the Prevention of Terrorism Act 2005 not dependent on charging a person with a specific offence and without actual proof of an offence.⁶⁰

Reiterating the concern expressed by Fenwick,⁶¹ the consequences of the functioning of such a broad and imprecise definition of terrorism in terms of its effect on HR and civil liberties, including the underlying philosophy behind it, was summarised by Gearty:

‘The risk to civil liberties, lies not in empowering law enforcement agencies to deal with the kind of violent action that is planned by those who would engage in such...activity for political ends. The threat lies...in the way in which the underlying perspective of those involved in counter-terrorism leads to their dealing with terrorist suspects in a way that is entirely different from the manner in which they treat their ‘ordinary’ criminal antagonists. There is a further risk as well...of counter-terrorist action having a negative effect on political freedom which extends well beyond the actions...of those whom the public would recognize as terrorist according to... ordinary...understanding of the term. This ‘chill’ factor affects not only the freedom of those political activists who are brought within the definition of terrorism by the breadth of the term... but also the rights of those on the margins of such groups who find their freedoms curtailed by an over-energetic reading of the law.’⁶²

(2) Section 3 (as amended by Section 21 of the TA 2006)

The proscription of organisations has long been part of counter-terrorism law in respect of Northern Ireland. The TA 2000 extended the reach of the power of proscription beyond the affairs of Northern Ireland into the area of domestic and international terrorism. As a response to the terrorist attacks of 11 September 2001, twenty-one organisations⁶³ were classified as proscribed organisations for the purpose of Section 3 of the TA 2000,⁶⁴ a further four added to the list in 2002,⁶⁵ fifteen added in 2005,⁶⁶ and two added in 2006.⁶⁷ Section 3(1) of the TA 2000 provides that ‘for the purpose of this Act, an organisation is proscribed if it is listed in Schedule 2, or it operates under the same name as an organisation listed in that Schedule.’ The power to proscribe (or de-proscribe) is exercised by the Secretary of State under Section 3(3) where he ‘believes’ that an organisation is ‘concerned’ in terrorism.⁶⁸ Such a belief is not required to be reasonable, or grounded on objective evidence. An organisation does not have to be involved in acts of terrorism or in the preparation of such acts, it is enough that it is either believed to promote or encourage terrorism, or is ‘otherwise’ concerned in terrorism.

⁶⁰ Fenwick (2007), Op. cit at 1374

⁶¹ *Ibid* p. 1374-1376

⁶² Gearty (2007), Op. cit at 46-47

⁶³ Which includes all emanations, manifestations and representations of the Irish Republican Army, whatever their relationship to each other, as part of the inferred intention of Parliament derived from the language of the TA 2000: *R v Z [2005] UKHL 35*

⁶⁴ Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order 2001, SI 2001/1261

⁶⁵ Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order 2002, SI 2002/ 2724

⁶⁶ Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order 2005, SI 2005/ 2892

⁶⁷ Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order 2006, SI 2006/ 2016

⁶⁸ Section 3(4) TA 2000

Proscription is a strong and far-reaching power. Apart from its impact on such rights and freedoms as speech, assembly and association which can be abrogated entirely, the proscription of an organisation can lead to the criminalisation of a number of activities associated with it, including membership of a proscribed organisation, support for its causes, and the wearing of any symbol of allegiance to a proscribed group, the penalty for which (including a maximum sentence of 10 years imprisonment) is harsh. However, it is the reality highlighted by Gearty which raises the greatest concern regarding the practice of proscription, that ‘if the price of keeping [civil liberties] is vigilance, then one of the things that it is necessary to be vigilant about is the preservation of a well-based sense of indignation at how wrong it is to turn people into criminals merely because of the fact of their association with others.’⁶⁹ The observation is not unreasonable.

The power of proscription functions more widely than the ambit of Section 1 of the TA 2000. Organisations which do not themselves fall within the definition, but which are in anyway concerned in terrorism, can be proscribed. Under Section 3(5) an organisation is defined as being ‘concerned in terrorism’ if it (a) commits to or participates in any acts of terrorism; (b) prepares for terrorism; (c) promotes or encourages terrorism; or (d), is ‘otherwise’ concerned with terrorism, which following amendment by Section 21 of the TA 2006, includes the glorification of acts of terrorism whether in the past, the present, or in any general form of praise, celebration or cognate expression. Coupled with the breadth of Section 1, Section 3 permits the proscription of organisations that would not normally be proscribed in practice, ‘including organisations which are fighting against undemocratic and oppressive regimes and, in particular, those which have engaged in lawful armed conflict in the exercise of the internationally recognised right to self-determination of peoples (where the UK is bound in international law to recognise the right and to refrain from offering material support to states engaged in the suppression of the exercise of the right by military, or other coercive means).’⁷⁰ Certainly, in accordance with the way that Section 3 has been judicially applied in respect of Section 1 of the TA 2000, Governments that constitute a dictatorship, a military junta, or a usurping power, are included within the protective structure of the Act.⁷¹

Secondly, the practice of proscription results *in fact* in a considerable extension of the definition of terrorism, insofar as persons who do not themselves fall within the ambit of Section 1 can be classified as terrorist-suspects, or suspects concerned with terrorist activity. Accordingly, by making it possible to proscribe a wider range of persons, the TA 2000 potentially curtails a number of proscription-related activities which prior to the TA 2000 would not have been

⁶⁹ Gearty (2007), Op. cit at 157. See also: Fenwick (2007), Op. cit at 1384

⁷⁰ *R (On the Application of the Kurdistan Workers’ Party and Others) v Secretary of State for the Home Department* [2002] EWHC Admin 644, Paragraph 47

⁷¹ *R v F* [2007] EWCA Crim 243

considered related to terrorism. For example, Section 12(1) provides that it is an offence to solicit support other than money, or property, for a proscribed organisation. Under Section 12(2) it is an offence for a person to arrange, manage, or assist in arranging or managing a meeting which he knows is (a) to support a proscribed organisation; (b) to further the activities of a proscribed organisation; or (c) to be addressed by a person who belongs or professes to belong to a proscribed organisation. Section 12(4) defines a meeting as one which is held either in public or private at which three or more persons are present. Although where the accused is able to put forward evidence sufficient to raise a doubt as to whether he had no cause to believe that any address would be in support of such an organisation, the court must assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not; because Section 12(4) is so narrowly drawn a person who assisted in arranging a public meeting, even if consisting of only three people, not knowing that the member of the proscribed organisation would speak in support of the organisation, would commit an offence. The fact that the provisions of the TA 2000 can, and effectively do, allow for the criminalization of a person, whose conduct may not necessarily be blameworthy, is particularly pertinent in relation to Section 11 of the TA 2000.

Section 11(1) provides, that it is an offence to belong to a proscribed organisation ‘punishable’ by a maximum penalty of ten years imprisonment, no *mens rea* required. Section 11(2) provides that it is an offence for a person charged with an offence under Section 11(1) to prove that the organisation was not proscribed on the last (or any) occasion on which he became a member or began to profess to be a member, and that he has not taken part in the activities of the organisation at any time while it was proscribed. The effect is to impose a reverse burden of proof on the defendant once the prosecution has discharged its burden in showing that he was a member of a proscribed organisation, even if he was unaware that it had been proscribed.⁷² The burden is placed on him to prove that the organisation was not proscribed when he was a member. Whether the placing of such a burden on a defendant who had/has arguably not been engaged in any blameworthy conduct constituted an infringement of the presumption of innocence in breach of Article 6(2) of the ECHR, formed the focus of *Attorney-General’s Reference (No 4 of 2000)*.⁷³

In *Attorney-General’s Reference (No 4 of 2000)*,⁷⁴ the defendant was indicted on two counts under Section 11. It was accepted that Section 11(2) imposed an evidential burden on the

⁷² However, highlighted by Fenwick (2007), Op. cit at 1390, the UK judiciary has engaged in reading down under Section 3 of the HRA legal burdens to evidential ones in order to create Convention compliance with Article 6. See also: V. Tadros and S. Tierney ‘The Presumption of Innocence and the Human Rights Act’ (2004) *M.L.R.* 402; I. Dennis ‘Reverse Onuses and the Presumption of Innocence: In Search of Principle’ (2005) *C.L.R.* 901; and A. Ashworth ‘Four Threats to the Presumption of Innocence’ (2006) 10 *I.J.E.P.* 241

⁷³ [2004] UKHL 43

⁷⁴ [2004] EWHC (Admin) 273

defendant, but that in the instant case there was no case to answer. The Attorney-General referred the case to the Court of Appeal which held that the ingredients of the offence were set out in Section 11(1) and that Section 11(2) imposed a legal burden, rather than an evidential one, compatible with Article 6(2) and Article 10 of the ECHR. The case reached the House of Lords.⁷⁵ The Court held that the ingredients of Section 11(1) were contained within that section and did not require participation in the activities of the organisation while proscribed; therefore Section 11(2) did not add to the ingredients of Section 11(1). The Court of Appeal's decision on that point was correct. Parliament had intended that Section 11(2) imposed a legal burden on the defendant, as was clear from Section 118 which listed a number of sections which imposed an evidential burden. However,⁷⁶ insofar as a person who had not engaged in any blameworthy conduct could come within Section 11(1) and the presumption of innocence infringed by requiring him to disprove involvement in the organisation at the time in question, the application of Section 11(1) would constitute *in fact* an unfair conviction. Bearing in mind the difficulties that a defendant would have in proving the matters contained in Section 11(2), and the serious consequences for the defendant in failing to do so (the possible imposition of a maximum penalty of ten years imprisonment) the imposition of a legal burden on the defendant did not constitute either a proportionate or justifiable response to the threat of terrorism. Although national security considerations would always carry significant weight, they did not absolve states from their duty to ensure that basic standards of fairness were observed. If Section 11(2) was held to impose a legal burden if the defendant failed to prove the matters specified in Section 11(2), the court would have no choice but to convict him. As Section 11(2) infringed the presumption of innocence, it was appropriate that Section 11(2) be read down using the interpretative power under Section 3 of the HRA, so as to impose an evidential burden instead of a legal one.

Finally, Section 5 of the TA 2000 makes provision for the functioning of the Proscribed Organisations' Appeals Commission⁷⁷ as a forum in which proceedings under Section 7 of the HRA against the Secretary of State in respect of a refusal by him to exercise his power of de-proscription, are brought and determined. The framework allows for legal representation and obliges the relevant authorities to implement the Commission's rulings. However, despite POAC involvement, the reality of the proscription process remains that a person is first criminalised, and then the case against him only inquired into should he decide to challenge the proscription order. Accordingly, the functioning of the proscription process has the effect of outlawing even previously lawful activity without recourse to a court or independent tribunal,

⁷⁵ [2004] EWCA Crim 762

⁷⁶ Although it is not a defence to prove that the defendant did not know that the organisation was proscribed, or that it was engaged in activities covered by Sections 1(1) and 1(3): *R v Hundal (Autar Singh; R v Dhaliwal (Kesar Singh)* [2004] 2 Cr App R 19

⁷⁷ Hereafter, POAC

except retrospectively after proscription has occurred. Further, insofar as the power of proscription remains unregulated by the TA and subject only to the Parliamentary Affirmative Resolution Procedure, the process of proscription represents little more than an order whereby a person can become subject to a considerable range of criminal offences, and such fundamental freedoms of speech, assembly and association severely curtailed, by means of an exercise of executive decision.

The reality of the functioning of the proscription process, was encapsulated in the ruling of *R (On the Application of the Kurdistan Worker's Party and Others) v Secretary of State for the Home Department*, *R (On the Application of the People's Mojahedin Organisation of Iran and Others) v Secretary of State for the Home Department*, and *R (On the Application of Ahmed) v Secretary of State for the Home Department*.⁷⁸

In *R (On the Application of the Kurdistan Worker's Party and Others)*, the Kurdistan Worker's Party,⁷⁹ People's Mojahedin Organisation of Iran⁸⁰ and the *Lashkar e Tayyabah*⁸¹ sought judicial review of (1) the decision of the Secretary of State to lay the 2001 proscription order before Parliament; (2) the legality of the 2001 proscription order; (3) the lawfulness of the relevant proscription provisions of the TA Act 2000; and sought declarations to the effect that (1) the inclusion of the organisations in question in the list of proscribed organisations was unlawful; or alternatively (2), that the relevant proscription provisions of the TA 2000 and the consequential criminal sanctions imposed under Sections 11-19 of the TA 2000, were incompatible with Articles 10 and 11 of the ECHR and Article 1 of the First Protocol.

The Court held that Parliament clearly intended that the POAC was the appropriate forum with which claims relating to proscription should be raised for the purpose of Section 7 of the HRA. The argument that an alternative procedure should be exhausted only if it was as extensive in its scrutiny as judicial review was dismissed.⁸² The POAC constituted a specialist tribunal comprising of procedures designed to deal with claims relating to proscription which included exclusion from the prohibition on the disclosure of intercept communications. However, in reaching its decision, the Court highlighted what in practice amounted to, and continues to amount to, a number of flaws in the process of proscription.

With regard to the PMOI, an application for de-proscription was refused by the Secretary of State. An application for permission to apply for judicial review was lodged. The PMOI described itself as a resistance movement committed to the establishment of a secular, pluralist

⁷⁸ [2002] EWHC Admin 644

⁷⁹ Hereafter, PKK

⁸⁰ Hereafter, PMOI

⁸¹ Hereafter, LeT

⁸² *R v IRG ex parte Mead* [1993] 1 All ER 772

and democratic Government, respect for HR, and the internationally recognised norms of state behaviour. Accordingly, its inclusion in a list consisting of organisations committed to the use or threatened use of violence, constituted an interference with its civil right to a good reputation under Article 8 of the ECHR, and a breach of its right to the enjoyment of its ECHR freedoms without discrimination under Article 14.

Whether the claims were or were not *in fact* without foundation, a considerably wide range of organisations meet the broad Section 1 of the TA definition of terrorism. No check or serious scrutiny on the Secretary of State's decision to proscribe is provided in the TA 2000 itself. When Parliament is asked to approve or dis-approve a proscription order, it is required to do so in its entirety. In the instant case Parliament was asked to proscribe all twenty-one organisations listed in the proscription order which included *Al-Qaeda*, or none at all. Thus, despite the PMOI having disarmed in 2003 to become a political organisation dedicated to the reform of Government in Iran, and despite its having significant Parliamentary support across parties at Westminster, as the individual circumstances of the PMOI could not be Parliamentary scrutinised, the PMOI was proscribed along with the terrorist organisation *Al-Qaeda*. Accordingly, and highlighting the concern 'that the UK Government occasionally is inflexible in its attitude to changing situations around the world with reference to proscription,'⁸³ an organisation which posed no specific threat to the UK, insofar as its concern was an oppressive regime abroad, was classified as terrorist as the technical result of inclusion on a list of terrorist organisations. The lack of detailed Parliamentary scrutiny accorded the individual circumstances of an organisation to be proscribed, amounting to what Fenwick termed 'a lack of real' democratic control of the proscription process, was further highlighted in the claims of both the PKK and LeT.

With regard to the PKK, again an application for de-proscription was refused by the Secretary of State. The PKK described itself as a political party committed to the non-violent establishment of a Kurdish identity. The PKK claimed that, although the Secretary of State had notified Parliament that such non-statutory factors as: (1) the nature and scale of the organisation's activities; (2) the threat that the organisation posed to the UK; (3) the threat that the organisation posed to UK nationals overseas; (4) the extent of the organisation's presence in the UK; and (5) the need to support other members of the international community;⁸⁴ would be included in any exercise of the process of proscription, they did not amount to either an adequate or intelligible criteria for the exercise of the wide executive discretion provided under Section 3 of the TA 2000. The claim is not unreasonable. Whereas an organisation that is to be

⁸³ Lord Carlile, *Report on the Operation in 2005 of the Terrorism Act 2000*, Paragraph 43. (TSO, London 2006)

⁸⁴ *Factors in Parliamentary and Health Service Ombudsman Investigations, July 2004-March 2005*, Part 2, (A.26/05) (TSO, London 2005)

proscribed is not made known in advance, the actual decision to proscribe is invariably grounded on classified UK and foreign intelligence available usually only to the Secretary of State. Further, despite the claim of the Secretary of State that the decision to proscribe can be viewed as sufficiently precise and accessible as to be prescribed by law for the purpose of Articles 10 and 11 of the ECHR, given the limited scrutiny accorded to Parliament, the lack of opportunity for an organisation prior to proscription to make representations, and the complete statutory discretion accorded the Secretary of State as to which organisations falling within the definition of terrorism should be proscribed, (highlighted by the LeT) the oversight accorded the proscription process remains in fact no more a safeguard against disproportionate interference with the rights of Articles 10 and 11 of the ECHR, than the decision to proscribe remains no more than the sole exercise of executive discretion. The reality remains, coupled with the predominantly executive nature of the process of proscription, ‘the circumstances relied on for the proscription... [are]...doubtfully able to justify the very serious interferences with the [ECHR] rights of the individual claimants, in particular the ‘chilling’ effect on free speech. The basis for proscription is, in general, too imprecise to satisfy the requirement that the interferences with the rights to freedom of expression and association be both prescribed by law and proportionate.’⁸⁵

(3) Section 44

One controversial legislative development post the HRA is the increase in power conferred on the state in relation to the stop, search, and arrest of terrorist-suspects.⁸⁶ By virtue of Section 44 of the TA 2000, an extended power of stop and search provided for the random search of vehicles and persons on the ground that it appeared expedient to a police officer to carry out a stop in order to prevent an act of terrorism. The first challenge to Section 44 formed the focus of *R (Gillan) v Commissioner of Police for the Metropolis*.⁸⁷ A decision, described by Gearty, as ‘particularly disturbing’ insofar as it serves to highlight the ‘danger’ of counter-terrorism discourse leading to a ‘collapse of [national] tensions in the direction of security and away from civil-liberties.’⁸⁸ The applicant had been subject to a random stop and search on his way to attending a public demonstration. The applicant sought judicial review of the use of the power. Whereas Article 5 of the ECHR was not considered at the hearing (presumably on the ground that the detention was not sufficiently serious to engage it) the Court took the view that the threat of terrorism was sufficient to justify infringement of Articles 8, 9, 10 and 11. Examining Section

⁸⁵ Fenwick (2007), Op. cit at 1405. See also the concerns raised in relation to the value and role of proscription generally: C. Walker *The Prevention of Terrorism in British Law* (MUP, Manchester 1992); H. Fenwick (2002), Op. cit at 409; and Lord Jellicoe, *Review of the Operation of the Prevention of Terrorism (Temporary Provisions) Act 1976* (Cmnd 8803) (TSO, London 1983)

⁸⁶ Other concerns include the breadth of Sections 59 and 87, and the proscription of some further 21 organisations by the TA 2000 (Proscribed-Organisations) (Amendment) Order 2001 *SI 2001 No. 1261*, despite objections against such extension: (Cmd 264) (TSO, London 1987)

⁸⁷ [2003] EWHC 254

⁸⁸ Gearty (2007), Op. cit at 48

44 the court rejected the suggestion that the provision should only be used in relation to threats in relation to specific locations. Although it was decided that the wording of the TA 2000 was such as to make it clear that it was expected to be used in a less decisive way than Section 60 of the Criminal Justice and Public Order Act 1994, the ruling in *R (Gillan)* highlighted a number of HR concerns over the application of Section 44.

Firstly, highlighted by Bowling and Phillips, the TA 2000 extends what is seen by certain sections of the population as a discriminatory state power.⁸⁹ Section 44 empowers a uniformed constable to stop a vehicle or person and search for articles of a kind which could be used in connection with terrorism. A power so broadly defined as to impose little restriction on the kind of search that an officer can carry out.⁹⁰

Secondly, The TA 2000 provides no safeguard against abuse or excessive use of the power other than guidance under Section 2 of PACE as to the requirement of certain information to be given to a person who is stopped, and a requirement that the exercise of the power be recorded.⁹¹ The lack of safeguard formed the focus of Stone and Pettigrew.⁹² Examining the impact of Section 44 on public confidence,⁹³ both analysts concluded that the power could only be justified were it subject to independent monitoring. The negative impact that the power had on public confidence was grounded on a suspicion that generalisation (in terms of race and age) formed by the police as part of their decision to carry out a stop, suggested that certain persons could find themselves subject to unwarranted police attention. Although PACE (Code of Practice A) stated that stereotyped images were not to be relied on as a basis for suspicion, the disparate number of stop and searches amongst certain groups was sufficient, in the opinion of Stone and Pettigrew, to indicate an ethnic bias in the mind of the police.

Thirdly, in accordance with Section 19 of the HRA, the Government attached to the TA 2000 a statement that it considered Section 44 to be compatible with the ECHR, insofar as it did not

⁸⁹ B. Bowling and C. Phillips *Racism, Crime and Justice* (Longman Press, Harlow 2002) Chp. 5. See also: Home Office *Statistics On Race and The Criminal Justice System (2002-2003)* 27 (Home Office, London 2003); and Metropolitan Police Authority *Report of the Scrutiny on MPS Stop and Search Practice* (Metropolitan Police Authority, London 2004) 29, indicating an upward trend in the police stop and search of certain racial sections of the community

⁹⁰ L. Lustgarten 'The Future of Stop and Search' (2002) *C.L.R.* 603

⁹¹ Home Office Statistics on stop and search which does not require reasonable suspicion indicated the increasing frequency in which such power was used. In 2002-2003, 32,500 stops were made under Section 44, compared to 10,000 in 2001-2002: Home Office Statistics, *Arrests for Notifiable Offences and the Operation of Certain Police Powers (2002/03)* HOSB 17/03, Tables PB, PC (Home Office, London)

⁹² V. Stone, and N. Pettigrew 'View of the Public on Stop and Search' (2000) *P.R.S.* 129, 68

⁹³ For examination of public attitudes generally to civil-liberties and terrorism post 2000, See: M. Johnson and C. Gearty, 'Civil-Liberties and the Challenge of Terrorism' in A. Park, J. Curtice, K. Thomson, M. Phillips and M. Johnson (Eds) *British Social Attitudes: The 23rd Report* (Sage, London 2007). Conducted in 2005, findings indicate a decline in societal commitment to civil-liberties in the course of the past 20 years and reasonable willingness to contemplate the restriction of such freedoms as speech and protest where this can be presented as necessary in order to defeat terrorism. According to Gearty, 'the temptation this offers to political leaders is obvious. There have been many examples of pieces of legislation passed in the aftermath of a terrorist atrocity (Examined in Section 3.3 of this thesis) which have contained powers dealing with far more than the terrorist problem that has generated the perceived need for immediate legislative action. If they care about preserving Britain's civil-libertarian culture, politicians of all parties need to be disciplined about their deployment of the counter-terrorism card in public debate.' Gearty (2007). Op. cit 58

involve a degree of interference with personal liberty so as to fall within the scope of Article 5. Although it is arguable that the power does not technically breach Article 5, insofar as a person is obliged under Section 47 to be searched or questioned, the exercise of Section 44 can be said to constitute an encroachment on personal liberty as ordinarily understood by the meaning arbitrary interference. According to Stone, Article 5(1)(c) provides that a deprivation of liberty on reasonable suspicion is legitimate provided that the detention relates to the commission of an offence and is for the purpose of bringing the suspect to court.⁹⁴ Accordingly, any exercise of Section 44 lacking in such intent, could well amount to a sufficient deprivation of liberty as to fall within Article 5.⁹⁵

(4) Section 41

Up until the TA, different legal regimes to counter-act terrorism existed in relation to Northern Ireland and the UK. Whereas the Northern-Ireland (Emergency) Provisions Acts 1973, 1975, 1978, 1987, 1991, 1996 and 1998, introduced a number of emergency powers, the Prevention of Terrorism (Temporary-Provisions) Acts of 1974, 1976, 1984 and 1989,⁹⁶ enacted a number of measures subject to annual review as a response to both terrorist attack and a reasonably perceived threat. Under the Emergency Prevention of Terrorism and Prevention of Terrorism (Temporary-Provision) regimes⁹⁷ a wide power of arrest, including arrest without warrant, was conferred on state officials.⁹⁸ As a response to what the Government considered an increasing threat of international terrorism, the TA 2000 repealed the EPA and PTA regimes. The Act followed the publication of a Consultation Paper which concluded that the threat from terrorist organisations warranted a body of counter-terrorist powers drawn from both regimes as permanent legislation.⁹⁹ Accordingly, on the ground that terrorism was a different order in terms of the methods engaged for inducing terror and the extent of harm it caused, the power of the state to affect a lawful arrest of a person suspected of terrorist involvement was extended.

Section 41(1) of the TA 2000 provides that a constable may arrest without warrant any person whom he reasonably suspects to be a terrorist. For the purpose of the TA 2000, a terrorist is defined in Section 40 as a person who has committed an offence under Sections 11, 12, 15 18,

⁹⁴ Stone (2004), Op. cit at 87

⁹⁵ D. Mead 'Stop and Search and the European Court of Human Rights' (2005) *J. Civ. Lib.* 5 (1). The observation is questionable. Albeit the credibility of the Section 19 statement is open to discussion, there remains (at the time of writing) no significant ECHR case-law which deals directly with the technicality of Section 44. Further, while a claim that an exercise of a Section 44 power involved treatment contrary to Article 3 or a breach of Article 8 is more likely to be considered where an officer can be shown to have acted in a way beyond what is permitted, by analogy with the ruling of the ECtHR in *Lawless v Ireland* (1961) 1 EHRR 1, and *Brogan v UK* (1989) 11 EHRR 117, the use of Section 44 with a view to confirming suspicion is not likely to be found to involve the degree of deprivation of liberty as to engage Article 5

⁹⁶ Hereafter, PTA

⁹⁷ Both the Prevention of Terrorism (Temporary-Provisions) Acts 1974-1989 and Emergency Provisions Acts 1973-1991, formed the focus of the Standing Advisory Commission on HR Annual-Report: (1982-1983) HC (Col. 262); (1983-1984) HC (Col. 175); (1984-1985) HC (Col. 198); (1985-86) HC (Col. 151); and (1990-91) HC (Col. 488). Yet, despite some 15 Reviews between 1974 and 1998 and 4 Parliamentary Debates, the issue of HR did not feature during the drafting of any bill or parliamentary debate

⁹⁸ Hereafter, EPA

⁹⁹ Wilkinson (1998) *Legislation against Terrorism*, (Consultation Paper 4178, 1998), (TSO, London 1998)

54 and 56 to 63 of the TA 2000; or, a person who has been concerned in the commission, preparation or instigation of acts of terrorism. The distinction is significant. Insofar as an arrest is based on reasonable suspicion of a person having committed an offence, the arrest constitutes a standard form of power. However, where reasonable suspicion relates to the commission, preparation or instigation of terrorism, the power is different. ‘Although acts of terrorism will...involve the commission of an offence... the police need have no particular offence in mind; nor...the level of involvement of the person arrested. He need not be a principal accessory, conspirator or attempter. Being ‘concerned in’ [the commission, preparation or instigation of acts of terrorism] is... wider than any of these.’¹⁰⁰ Whereas Sections 40 and 41 confer powers of arrest analogous to Section 14 of the PTA 1989, by virtue of Section 40(1)(b), they extend the power to persons not suspected of a specific crime with the result that an officer, having arrested a suspect, can question the arrestee with a view to obtaining information about terrorist activities, as opposed to acquiring evidence necessary for a charge to be brought against him. Relevant to analysis of Section 44, the lawfulness of the exercise of the power formed the subject of a number of ECHR and UK rulings.

Examining the requirement that an arrest be grounded on relevant consideration, in *Chapman v Director of Public Prosecutions*¹⁰¹ the Court held that an arrest effected by an officer who lacked evidence to prove that he thought that an arrestable offence had been committed, would render the arrest unlawful. In contrast, in *Holgate Mohammed v Duke*,¹⁰² the Court held that where an officer detained an arrestee under the EPA regime in the belief that to do so would induce the arrestee to respond to questioning, such a purpose did not constitute an improper use of power.¹⁰³

In view of the above, the arrest of a terrorist-suspect by an officer for the purpose of general intelligence gathering should be considered *ultra-vires*. Certainly according to the requirements to be applied to determine the lawfulness of a general power in *Kenlin v Gardiner*¹⁰⁴ and *R v Brown*,¹⁰⁵ where an officer does not regard an arrest as a first step in the criminal process, then any arrest will be unlawful. But what of the possibility of an arrestee bringing a successful HRA challenge to Section 41?

Regarding the lawfulness of an arrest made under Section 14 of the EPA 1978, in *Murray v Ministry of Defence*¹⁰⁶ the Court was satisfied that the officer was able to show reasonable suspicion that the arrestee had committed the offence for which he had been arrested, and that questioning which followed was lawful, even though it was not confined to the offence in

¹⁰⁰ Stone (2004), Op. cit at 99

¹⁰¹ [1988] 89 Cr App R 190

¹⁰² [1984] AC 437

¹⁰³ *R v Chalkey and Jeffries* [1998] QB 848

¹⁰⁴ [1967] 2 QB 510

¹⁰⁵ [1976] 64 Crim. App R 231

¹⁰⁶ [1988] 2 All ER 521

question. But how can an arrestee establish what the officer's purpose for the arrest was? In *Brogan v UK*¹⁰⁷ the court held that the fact that an officer did not obtain sufficient evidence to charge the arrestee at the time of arrest did not render it contrary to Article 5(1)(c). The ruling makes it near impossible for an arrestee to bring a HRA challenge to Section 41, made even more pertinent in the light of the statistics of the Home Office Report 2001 which revealed that out of 39 suspects arrested in connection with international terrorism, only 8 were charged with an offence under anti-terrorism legislation.¹⁰⁸ This leads on to highlight another concern in relation to Section 41: the requirement of reasonable suspicion.

The power of arrest under Section 41(1) is conditioned on the presence of a reasonable suspicion that the arrestee is involved in an offence. The significance of the concept was highlighted by Stone: 'the concept of reasonable suspicion is central to the operation of discretionary police powers, and therefore crucial to the freedom of the citizen. It is disappointing that it remains... a...concept which is not properly explained...by definition, or example, in the relevant legislation or codes of practice and is dealt with only to a limited extent by case-law.'¹⁰⁹

The application of the power to arrest on suspicion in accordance with Section 11 of the EPA 1978 formed the subject of *Fox v UK*¹¹⁰ Section 11 provided that an officer could arrest any person whom he suspected of being involved in terrorism and detain for a maximum period of 72 hours without charge. The ECtHR held that the arrest of the suspects on suspicion of involvement in terrorist activities constituted a breach of Article 5. Although, the fact that an arrest was made under a power which required no degree of reasonable suspicion did not make the arrest itself unlawful, the *telos* of Article 5 was such that a requirement of reasonable suspicion (presupposing the existence of facts which would satisfy an objective observer that the person concerned may have committed an offence) was necessary to justify an arrest.¹¹¹

Following the ruling in *Fox*, and a suggestion that a requirement of reasonable suspicion be adopted in the event of an arrest without a warrant,¹¹² the arrest power was abolished under Section 6 of the EPA 1987, leaving the power of arrest to be made either under Section 14 of the PTA 1989, or a specific power conferred by PACE. However, highlighting the significance of the concept of reasonable suspicion, in the sense that it formed the basis of a ground in which detention could occur within Article 5, both the functioning of the concept and the ECtHR ruling in *Fox* formed the focus for further consideration in *O'Hara v Chief Constable of the*

¹⁰⁷ (1989) 11 EHRR 117

¹⁰⁸ Home Office Report: *Statistics on the Operation of Prevention of Terrorism Legislation*, (Issue 16/01, 2001) (TSO, London)

¹⁰⁹ Stone (2004). Op. cit at 73

¹¹⁰ (1990) 13 EHRR 157

¹¹¹ *KF v Germany* (1998) 26 EHRR 390

¹¹² *Review of the Operation of the Northern-Ireland (Emergency-Provisions) Act 1978*, (Cm. 9222, 1984) (TSO, London)

Royal Ulster Constabulary.¹¹³ Section 12(1) of the PTA 1984 provided that conditional on the presence of reasonable suspicion, an officer could arrest without warrant a person whom he had grounds for suspecting was concerned in the commission, preparation or instigation of acts of terrorism. Examining Article 5, the Court distinguished the test of reasonable suspicion to be applied in relation to that of Section 12, from the test applied in *Fox*. In the opinion of the Court, the test which Section 12 laid down related to what was in the mind of an officer when the power of arrest was exercised. Lord Hope stated that he could see no conflict in principle between the approach taken and the judgment of the ECtHR. Whereas in *Fox*, Section 11 of the EPA 1978 constituted a breach of Article 5, in the sense that although the arrest was grounded for the purposes of UK legislation on a bona-fide suspicion, the suspicion of the officer did not presuppose the existence of facts which would satisfy an objective observer that the person concerned may have committed the offence, the requirement in Section 12 that reasonable suspicion had to be in the mind of an officer when carrying out a power of arrest, satisfied the required Article 5 safeguard for protection against arbitrary arrest. The position of the ECtHR in *O'Hara* was as follows:

The reasonableness of the suspicion on which an arrest must be based, forms part of the safeguard against arbitrary arrest laid down in Article 5(1)(c):

'This requires the existence of facts...which would satisfy an objective observer that the person concerned may have committed the offence, though what may be regarded as reasonable will depend on all the circumstances.'¹¹⁴

However,

'...the standard imposed by Article 5(1)(c) does not presuppose that the police have sufficient evidence to bring charges at the time of the arrest. The object of questioning during detention is to further the criminal investigation by way of confirming or dispelling the concrete suspicion grounding the arrest. Thus, facts which raise a suspicion need not be of the same level as those necessary to justify a conviction, or even the bringing of a charge.'¹¹⁵

The ruling indicates what should form the basis for the exercise of an arrest under the HRA in accordance with Article 5. Yet, exemplified by consideration of the concept in *Cumming v Chief Constable of Northumbria Police*¹¹⁶ which held that arresting one of a group of persons likely to have committed an offence could constitute reasonable suspicion for arresting all, fails to acknowledge the difficulties of applying the concept. Apart from the problem whether a

¹¹³ [1997] 1 All ER 129

¹¹⁴ [1997] 1 All ER 129 at 344

¹¹⁵ [1997] 1 All ER 129 at 344

¹¹⁶ [2003] EWCA Civ 1844

definition of reasonable suspicion can ever be provided, in the sense that the term must be both sufficiently flexible to allow an officer to operate effectively, yet sufficiently rigid to ensure the protection of rights, it appears unrealistic to formulate standard grounds of reasonable suspicion as long as it remains impossible to guarantee its separation from state prejudice, opinion and belief.¹¹⁷ Regardless of the ruling of the ECtHR in *Guzzardi v Italy*¹¹⁸ that the power of arrest could not be used to justify a policy of general prevention directed against an individual or a category of individuals, there is no guarantee that an officer in deciding whether there is a reasonable suspicion will adhere to the concept without bias toward a particular section of the population.

According to Stone,¹¹⁹ justification for Section 41 depended on the balance between the scope of the power and the problem against which it was directed. Examining Section 1 of the TA 2000, the definition of terrorism differs from that previously defined. Restricted to acts connected with the affairs of Northern Ireland and international terrorism, Section 20 of the PTA 1989 and Section 58 of the EPA 1996 defined terrorism as the use of violence for political ends. In contrast, albeit by the inclusion of a requirement of serious violence the TA 2000 did give the definition of terrorism a narrower scope, by the inclusion of religious and ideological causes, Section 1 significantly extended it. The extension gives rise to two concerns.

Firstly, in terms of compatibility with Article 5, is the practical difficulty with the Government's position that:

‘An arrest power without an explicit link to a specific offence is compatible with Article 5 (1)(c), citing the decision in *Brogan* where, in the circumstances of the case, (where the applicants were suspected of being members of a proscribed-organisation), the [ECtHR] held that their arrest under Section 12 of the PTA 1982, was not in breach of Article 5. However, it has been pointed out that the Court noted in *Brogan* that the definition of acts of terrorism was... in keeping with the idea of ‘offence’ and that after arrest the applicants were asked about specific offences; the definition of terrorism is now broader than a person arrested might not of course in another case be questioned so specifically. It is accordingly doubtful that there is compliance here.’¹²⁰

Secondly, insofar as the TA can be used to suppress political protest for the purpose of securing a political end, the theoretical capability of Section 1, coupled with the extended proscription of some 39 organisations to assist in the suppression of action, lays (arguably) far beyond the concern of preventing terrorism. Examining the functioning of UK anti-terrorist powers,

¹¹⁷ Bailey (2001), Op. cit at 192

¹¹⁸ (1980) 3 EHRR 333

¹¹⁹ Stone (2004), Op. cit at 73

¹²⁰ Bailey (2001), Op. cit at 587

Dickson¹²¹ claimed that beneath every state restriction of the rights of the individual lay a political motivation: the pacification of the perceived demands of the electorate by a Government determined to preserve its own authority. Applied to the TA 2000, whether it can be said that the concern of terrorism is being exploited for its symbolic significance, is indeterminate; What is not, is the little balance given the TA at both the Governmental and Parliamentary level between its operational efficiency as an anti-terrorist necessity, and the need to protect an increasing class of individual from state erosion of established freedoms and HR.¹²²

The Anti-Terrorism Crime and Security Act 2001

On 15th October 2001 the Home Secretary announced the introduction of the Anti-Terrorist Crime and Security Bill 2001. Introducing a series of measures to attack the operative capability of suspected-terrorists, the purpose and functioning of the initiative gave rise to particular concern. After the removal of a number of controversial provisions, in December 2001, the Bill was hastened through Parliament as the Anti-Terrorism Crime and Security Act 2001.¹²³ However, constituting an advancement of the coercive and investigatory powers of the State introduced in the TA 2000, the Regulation of Investigatory Powers Act 2000, and the Criminal Justice and Police Act 2001, two factors which gave rise to controversy was the increase in power to exchange confidential information, and the detention without-trial of international suspects.

(1) Detention Without-Trial of International Suspects

The rationale behind the introduction of the ATCSA was intimated by the House of Commons.¹²⁴ According to state intelligence there were persons with international terrorist connections whose presence in the UK was contrary to the interests of national security but against whom there was insufficient evidence to bring prosecution. Although non-nationals could be deported on the ground of securing the public good,¹²⁵ such action would not be possible if a person faced treatment contrary to Article 3 of the ECHR.¹²⁶ The response of the UK was the extension of state power over the control of non-nationals, including the ability to detain without charge on the basis of a perceived link with terrorism.¹²⁷

¹²¹ B. Dickson 'Northern Ireland's Emergency Legislation' [1992] *P.L.* 592

¹²² In (arguable) contrast to the Parliamentary 'prevention' of the enactment of a law against the 'glorifying' as opposed to the 'encouragement' of terrorism in the Terrorism Act 2006, which would have effectively prohibited in advance considerable areas of political discussion concerning past acts of political violence

¹²³ Hereafter, ATCSA

¹²⁴ HC Deb (2001) (Col. 924) (TSO, London)

¹²⁵ *Rehman v Home Department* [2001] 3 WLR 877

¹²⁶ *Chahal v UK* (1996) 23 EHRR 413

¹²⁷ Sections 21-27 ATCSA

Section 21 of the ATCSA provides that where the Secretary of State reasonably suspects that a person is involved with terrorism, and whose presence in the UK he reasonably believes is a risk to national security, he may issue a certificate indicating that that person is suspected of being an international terrorist. Such a person can then be the subject of immigration or deportation proceedings in accordance with Section 22, even though deportation would be unlawful; or detained in accordance with either the ATCSA,¹²⁸ or the Immigration Act 1973.¹²⁹ The only means of challenge to the issue of a certificate is by appeal to the Special Immigration Appeals Commission¹³⁰ with a further right of appeal on point of law to the Court of Appeal.

Eight months into its operation, the legality of the ATCSA's detention provisions came up for challenge before the SIAC. Concerning a Section 23 internment of 12 non-national suspected-terrorists, the applicants claimed that detention without trial in accordance with Section 23 constituted a breach of Articles 5 and 14 of the ECHR. In order to allow for such detainment, the UK had made use of Article 15 and Section 14 of the HRA to derogate from Article 5(1). The effect was to detain non-nationals regarded as a threat to national security, but unable to be removed from the UK without trial, charge, or proven suspicion of criminal conduct, in high-security conditions. The SIAC declared Section 23 incompatible. The declaration formed a subject for consideration in *A (and Others) v the Home Secretary*.¹³¹ Adopting a different approach to the question of legality, the Court disagreed with the decision of the SIAC. Following the reasoning of the House of Lords in *Rehman*¹³² that any threat to security was best assessed by the Home Secretary, whether the state had justification to derogate was a judgment for the Government to make. As for the applicants' claim that Section 23 constituted a breach of Article 14, as non-nationals had only the right not to be removed contrary to Article 3, application of Section 23 was not discriminatory. Both the reasoning of the Court, as well as the functioning and purpose of Section 23, remains questionable.

Analysing the functioning of Section 23 in terms of compatibility with Article 14 of the ECHR, the distinction made by the Court between the right of a national to remain within the UK and the lawful right of the non-national not to be removed contrary to Article 3, was wrong. Highlighted by Waldham¹³³ justification for detention under Section 23 was that the individual had such a suspected connection with terrorism as to render him a threat to national security but, because of his nationality, was unable to be lawfully removed from the UK. Yet, the way that Section 23 operated was to render the legal circumstance as to why such a person could not be lawfully removed from the UK irrelevant to the purpose of detention.

¹²⁸ Schedule 2, Paragraph 16

¹²⁹ Schedule 3, Paragraph 2

¹³⁰ Hereafter, SIAC

¹³¹ [2002] EWCA Civ 1502

¹³² [2001] 3 WLR 877

¹³³ J. Waldham 'Why Lawyers Should Be Ashamed of the Latest Ruling on Internment' (2002) 152 *N.L.J.* 1633

The functioning of Section 23 formed the focus of criticism by the Privy-Council Review Committee Report 2003-2004,¹³⁴ the Carlisle-Review 2003¹³⁵ and a number of Parliamentary Committees¹³⁶ who went so far as to find the *de facto* internment of a class of persons contrary to ECHR standards. Characteristically, the criticism was summarily dismissed by the Home Secretary, who maintained that the power of detention remained necessary in the interest of security. Yet, insofar as UK and non-nationals are subject to different treatment, *prima facie* discrimination does exist. Whereas a UK national would have to be subjected to trial on a charge of one of the offences arising under the TA 2000 before detainment could be executed, such a requirement does not apply to the non-national. Providing that Sections 21-23 of the ATCSA can be defined as the determination of a criminal charge, the functioning of Section 23 represents a discriminatory removal from non-nationals a number of due-process safeguards, including the presumption of innocence.

The functioning of Sections 23 of the ATCSA formed the focus of *A (and Others) v Secretary of State for the Home Department*.¹³⁷ A ruling, according to Gearty, ‘rightly celebrated as a high point in the story of the judicial protection of unpopular and uninfluential minorities’ by its use made of Section 4 of the HRA.¹³⁸ In a majority decision, the court held that Section 23 of the ATCSA was incompatible with the UK’s ECHR obligations. On the ground that it was neither proportionate, nor compatible with Article 14 of the ECHR, insofar as it discriminated against the appellants in their enjoyment of the right to liberty on the basis of their national origin.

In reaching its decision, the court examined justification for the derogation from Article 5(1), and criticised the Government’s use of Article 15 and Section 14 of the HRA. In the opinion of Lord Hoffman, Section 23 amounted to an interference with the established liberty: freedom from arbitrary detention antithetical to the traditions of the people of the UK. According to Lord Hoffman, the UK had an unbroken history of living in accordance with values which showed a recognisable continuity. Although the Government had a duty to protect the lives of its citizens, it could not destroy ‘existing’ constitutional freedoms. Accordingly, whether Section 23 was justified on the ground that there existed a public emergency threatening the life of the nation within the meaning of Article 15, the public interest had to be carefully balanced with the right to liberty. In the words of Lord Hope, the right to liberty was a right, not a privilege, to be enjoyed without discrimination in accordance with Article 14 of the ECHR. Although the executive and the legislature were accorded a margin of discretion in matters relating to national security, it remained an essential safeguard that minorities, however unpopular, had the same

¹³⁴ HC (2003-2004) (Col. 100) (TSO, London)

¹³⁵ Lord Carlisle (2004) *Anti-Terrorism, Crime and Security Act 2001, Part IV, Section 28, Review 2003*, in Ewing (2004), Op. cit at 838

¹³⁶ M. Zander ‘The Anti-Terrorism Bill: What Happened?’ (2001) 151 *N.L.J.* 1880

¹³⁷ [2004] UKHL 56

¹³⁸ Gearty (2007), Op. cit at 117

rights as the majority. Due to the gravity of the interference on the right to liberty and the lack of evidence to support its discriminatory application, the indefinite detention of foreign nationals without trial was held not to be strictly required to deal with the emergency in question, insofar as the same threat from British nationals whom the Government were unable or unwilling to prosecute, was being met by other measures which did not require them to be detained indefinitely without trial. The court allowed the appeal.

Finally, the TA 2000 includes a number of offences such as the direction of terrorist organisations and the provocation of terrorism in another country punishable by maximum life-sentence. However, highlighted by the Home Affairs Select Committee, if a person 'cannot be charged with offences which are defined as widely as these, then there can be little justification for certifying them under Section 21 and removing their liberty.'¹³⁹

With regard to the purpose of Section 23, both the role of Parliament and the use made of the ECHR order during the introduction of the ATCSA, formed the focus of criticism. Not least, that insofar as the concern of terrorism could be seen to highlight the limitation of Parliamentary control over the legislative activity of the Government, the question in relation to the introduction of the ATCSA was not so much whether it was decided that the rights of the individual should give way to the need to prevent terrorism, than whether the issue of HR was considered at all. According to Stone,¹⁴⁰ it is for this reason that it is impossible to take Parliament seriously as a HR guardian other than at the most general level. It is also for this reason, difficult to take seriously the direction of the HRA that Parliament pay attention to the ECHR when legislating, when the will of the Government is so visibly retained. In this sense, it is questionable whether a distinction can be drawn between the promotion of HR and their effective protection at the parliamentary level. In accordance with Section 19 of the HRA, the ATCSA was declared compatible with the ECHR. According to Fenwick,¹⁴¹ the impression created was that the ATCS Bill had undergone a process of Parliamentary assurance that the Bill had met ECHR standards when it had not. Fenwick then went on to suggest that the underlying values of the ATCS Bill were not subjected to parliamentary scrutiny, partly as a result of the appearance afforded them by Section 19, and partly by the open-ended nature of the ECHR and a doctrine of appreciation rendering it susceptible to a minimal interpretation which (in the case of the ATCS Act) masked its own erosion. The observation is not unreasonable.

In *Handyside v UK*¹⁴² the ECtHR stated that the role of the ECHR was subsidiary to that of the national order and that since the signatory-state was better placed to determine the balance

¹³⁹ HC (2001-2002) (Col. 351) Paragraph 26 (TSO, London)

¹⁴⁰ Stone (2004), Op. cit at 10

¹⁴¹ H. Fenwick 'The Anti-Terrorist Crime and Security Act' (2002) 65 *M.L.R.* 5, 728

¹⁴² (1976) 1 EHRR 737

between individual rights and societal interests, it would operate a restrained view of any balance struck. According to Fenwick, ‘in order to render the Section 19 statement compatible, ECHR requirements were minimised by placing...emphasis on the new powers of interference. Having adopted minimal-interpretations of those requirements the Government [then] went on to make the Section 19 statement on...a better than even chance of achieving compatibility. Thus, it is likely that compatibility was not in fact achieved in respect of the [ATCS] Bill before it reached the [House of Lords] but this was not discerned by...the [House of Commons] who afforded the Section 19 statement more weight than it deserved.’¹⁴³ Labelling the House of Commons reaction to the ATCS Bill a ‘classic’ response to measures adopted in the face of an emergency, Fenwick highlighted the statement of Lord Stoddart that it was a matter of concern that a Bill containing 126 clauses should have been sent to the House of Lords without most of them having been properly considered. The statement strikes a blow to Diceyan conviction of the efficacy of Parliament as a guardian of established HR and liberties. Whether the House of Lords might have been more open to HR consideration, neither the scrutiny afforded, nor the UK’s constitutional arrangement were such as to prevent the overriding will of the Government from introducing (arguably) the most controversial anti-terrorist measures post the HRA.

Secondly, whereas the ECtHR has never found that a claim for derogation is unjustified on the ground that a state of emergency does not exist, in determining whether the derogation applies only to the extent strictly required by the exigency of the situation; its jurisprudence suggests a reliance on the discretion of the signatory-state. Following the terrorist-attack on the UK in July 2005, the focus shifts from not whether a state of public emergency within the meaning of Article 15 of the ECHR can be justified, but whether in terms of proportionality, the derogation applies only to the extent required by the exigencies of the situation. Although the nature of terrorist activity in terms of scope and effect may well justify Sections 21-23 of the ATCSA, in terms of proportionality whether the detention provisions can be said to apply to the extent strictly required by the exigencies of the situation, is less credible.¹⁴⁴

The enactment of the detention provisions was justified by the Government as a necessary response to terrorism and the need to address the lack of provision to deal with persons whose presence as suspected-terrorists in the UK was contrary to the interests of national security, but whose deportation would place the UK in breach of its obligations under Articles 2 and 3 of the ECHR.¹⁴⁵ In practice however, the ATCSA extends far beyond affecting only those persons it was purportedly aimed at. Section 21(1) provides that where the Secretary of State reasonably believes that a person’s presence in the UK constitutes a risk to national security and reasonably

¹⁴³ Fenwick (2002). Op. cit at 730

¹⁴⁴ E. Ewing ‘The Futility of the Human Rights Act’ [2004] *P.L.* 829

¹⁴⁵ HC Debate (2000-2001) (Col. 924) (TSO, London)

suspects that he is a terrorist, he may issue a certificate in respect of that person indicating that they are for the purpose of the ATCSA a suspected international terrorist. In accordance with Section 21(2) a suspected international terrorist is defined as a person who is, or has been, concerned in the commission, preparation or instigation of acts of international terrorism; is a member of an international terrorist group; or has links with an international terrorist group. Section 21(5) accords the definition of terrorism the same controversial definition as that in Section 1 of the TA 2000. A definition whose breadth catches within its scope such unrelated persons as political, environmental, and industrial protestors.

That the ATCSA goes further than required by the exigencies of the situation, to the extent that the power of detention could just as equally have been introduced for the purpose of subjecting persons already subject to immigration restrictions to further control, was highlighted by Fenwick:

‘Under Section 23(1) persons falling within Section 21 can be subject to detention in respect of immigration controls [under the Immigration Act 1971 and Immigration and Asylum Act 1999] despite the fact that the action specified in Subsection (2) cannot result in their removal from the UK...by (a) a point of law which...relates to an international agreement, or (b) a practical consideration. No...explanation of these terms is offered. Provision under (a) presumably relates to Article 3 [ECHR] and other equivalent provisions, while the practical consideration could relate *inter-alia* to the fact that there appears to be no safe country which will take the person, or to the fact that Britain does not have an extradition agreement with the country from which the person came. Such persons can then be detained under the existing provisions of the 1971 Act allowing for detention of persons liable to examination or removal and detention pending deportation.’¹⁴⁶

Prima-facie then, there appears to be 4 categories of person who could find themselves subject to the ATCSA’s detention provisions, albeit all except the first fall beyond the ATCSA’s intended scope:

- (2) Persons falling within Section 21 who are at risk of Article 3 treatment in their own country, and where there appears to be little prospect that they could be deported to a safe third-country;
- (3) Persons falling within Section 21 who are at risk of Article 3 treatment in their own country, but who could be deported to a safe third-country;
- (4) Persons falling within Section 21 who are unlikely to be at risk of Article 3 treatment in their own country;
- (5) Persons falling within category (1) above, willing to take the risk of Article 3 treatment in another country, rather than be subjected to indefinite detention.

¹⁴⁶ Fenwick (2002), Op. cit at 735

Sections 21-23 of the ATCSA confer on the state the power to lawfully detain without-trial a significant category of non-nationals, including those already subject to immigration control. The decision to detain by certification is left to the discretion of the Secretary of State. Although a challenge may be brought in the SIA Commission, an absence of qualifying clause renders the process of certification immune from independent assessment, including scrutiny by trial. Giving rise to the application of due-process on a racially discriminatory basis, prior to certification there is no requirement that the Home Secretary should ascertain either the willingness of a detainee to leave the UK, or whether there is a risk that the detainee could be subjected to Article 3 treatment if removed. Nor is it necessary for the Home Secretary to receive legal direction regarding the possibility of bringing a detainee to trial rather than relying on the detention provisions, or ensure that a safe country is found. Insofar as the ATCSA allows the Government to detain persons whether they would willingly be returned to another country or not, the application of Sections 21-23 gives rise to the reservation that the detention amounts to a breach of Article 3, by placing detainees in a position of being possibly subject to the risk of inhuman or degrading treatment.

Finally, following certification that the detainee is, in the opinion of the Home Secretary, an international terrorist, the Act makes provision for a number of safeguards including the designation of power to the SIAC to hear challenges to the ATCSA. Apart from the criticism that the provisions only protect the detainee following a decision of the Home Secretary to detain, the extent of their effectiveness is debatable. For example, regarding the subjection of Sections 21-23 to review by means of a sunset-clause, albeit in accordance with Section 29(7) of the ATCSA Sections 21-23 ceased to have effect on the 10 November 2006, the reality of the clause in terms of its effect on the individual is exemplified by the treatment of the detainees in *A (and Others)*.¹⁴⁷ Despite the statutory rhetoric, in the words of Clayton ‘detention without-trial is in effect internment... reminiscent of the use of immigration powers during the Gulf war when some 176 Iraqi, Jordanian, Lebanese and Yemeni nationals were served with deportation notices and detained... However, neither in this situation nor in the Gulf war was there a declaration of war and so the...legal powers and mechanisms connected with war cannot be invoked. In the current situation the war is said not to be against a nation but against terrorism, war against an abstract noun seems a dangerous basis for the removal of HR.’¹⁴⁸

With regard to the SIAC, albeit it was likely that Strasbourg would view the SIAC procedure as providing a form of control proportionate to the demands of the situation, the functioning of the SIAC, in terms of both the compatibility of its procedure with the ECHR and the protection it affords the individual, is not without criticism.

¹⁴⁷ [2002] EWCA Civ 1502

¹⁴⁸ G. Clayton *Immigration and Asylum Law* (OUP, Oxford 2004) 495

Firstly, if certification and detention under Sections 21-23 can be regarded as constituting a criminal charge (as opposed to a preventive measure) the procedure of the SIAC can be said to breach the requirements of Article 6 in two respects:

- (1) In respect of the detention process prior to the SIAC's involvement and the due-process requirements of Article 6, by the continuance of what is technically an unfair trial;
- (2) By the operation of such procedural factors as a lack of provision that the detainee be informed of the charge against him, the denial of a right to defend himself or choose his own legal counsel, and the delivery of evidence against him in closed session.

Secondly, although the SIAC is able to examine appeals, application for bail, and challenges to derogation from Article 5, the impact of its appraisal is limited. Under Section 25 of the ATCSA a detainee can appeal to the SIAC which has the power to cancel the certificate if it finds that there were either no grounds for reasonable belief that the detainee's presence in the UK constituted a risk to security, or reasonable suspicion that the detainee could be considered a terrorist, but can not prevent the re-issue of a certificate on any ground. Although it is arguable that such a re-issuance may be justified where there are grounds to suggest that the detainee represents a threat to the security of the nation, where the detainee is an asylum-seeker, then detention begins to fall beyond the purpose for which Sections 21-23 were purportedly intended.

In accordance with criticism levied, not merely against the functioning of the ATCSA and its impact on HR, but the actual purpose for its introduction, the most disconcerting concern regarding the UK's anti-terrorism regime is the little value shown the democratic values underlying the ECHR by a Government (and arguably legislature) prepared to utilise the order in order to afford Sections 21-23 a misleading appearance of HR compliance. Insofar as indefinite detention without-trial has become the basis of an increasing order of state internment, it is unarguable that such measures 'should be subjected to the most rigorous tests for proportionality, [that] an immediate and...serious [terrorist] threat should be evident... [and that]... measures adopted...go no further than necessary to meet it.'¹⁴⁹

(2) The Exchange of Confidential Information

Section 17 of the ATCSA authorises Government departments, the police, courts, tribunals, and any person certain of whose functions are of a public nature to obtain and exchange confidential information acquired for one purpose to be used for another. By virtue of Section 17(2) the power extends to some 66 statutory powers authorising disclosure of information for the purpose

¹⁴⁹ Fenwick (2002), Op. cit at 725

of any actual, initiated or pending criminal investigation, whether in the UK or elsewhere, and determination of whether investigation should be initiated, or brought to an end.

The power of obtaining and exchanging confidential information under Section 17 formed the focus of criticism by the Privy-Council Review Committee 2003-2004. Voicing concern over a lack of independent oversight against state abuse, the Committee went on to question the use of the power for purposes other than terrorism. Highlighting that, whereas only 21% of disclosures made by Customs and Excise related to terrorism, only 4% of Section 19 ATCSA Inland Revenue disclosures were so related,¹⁵⁰ the Committee criticised the potential of Section 17 to go far beyond the need to deal with suspected-terrorists. Unlimited to the concern of terrorism, or serious crime from which a connection to terrorist activity can be construed, Section 17 allows for the exchange of confidential information even before determination of whether an investigation should be initiated: thus, even before suspicion has arisen, or grounds to believe that the information exchanged relates to a security risk.

The Government justified its introduction of Section 17 on the ground that as terrorists were invariably concerned in crime, such a measure would render the detection of terrorists more practicable.¹⁵¹ The justification is interesting. If an anti-terrorist measure with no connection with terrorism can be justified, then any measure introduced under the guise of securing the national good could become common place. The Government's response to criticism regarding the breadth of Section 17 was to claim that an individual could make use of the HRA. However, 'to suggest that a person wrongly treated by the [ATCSA] can successfully rely on Article 8 as a safeguard is disingenuous insofar as there are both procedural and substantive problems in doing so.'¹⁵² In the sense that there is no way that an individual can be informed of a Section 17 disclosure, the obvious argument against the practicality of an individual relying on the HRA, is that an Article 8 claim could only be brought up at trial were the individual is solely reliant on the court's approach toward its Section 3 HRA interpretative obligation, the effect of which, even if successful, would not provide him with relief.

The Anti-Terrorism Bill 2005

The Anti-Terrorism Bill 2005¹⁵³ proposed (arguably) the boldest state interference with established fundamental rights and freedoms post the ATCSA, the most controversial being the proposed extension of the period of detention of terrorist-suspects from 14 to 90 days; and the deportation of Islamic extremists.

¹⁵⁰ The Newton Committee Report (2003-2004) HC Deb 100 Paragraph 157 (TSO, London)

¹⁵¹ HL Deb (2000-2001) (Col. 949) (TSO, London)

¹⁵² Ewing (2004). Op. cit at 761

¹⁵³ Hereafter, AT Bill 2005

(1) Extended Detention of Terrorist-Suspects

The AT Bill 2005 proposed to extend the period which suspected-terrorists could be detained without charge from 14 to 90 days. The proposal gave rise to an unprecedented degree of Parliamentary, cross-party, judicial, academic and public criticism, all of which voiced serious concern over the HR effect and legality of the proposal.

The Government's justification for the extension of the 14 day period of detention without charge was four-fold. Firstly, the right of the UK citizen to be afforded protection from terrorism outweighed any concern for the rights and freedom of the terrorist-suspect. Secondly, the 90 day period was necessary as the most effective way of dealing with terrorism. Given the nature of terrorism, the extra time proposed was necessary in order to identify and investigate suspects and their contacts, decrypt data, and conduct what was often lengthy inquiry across different countries and jurisdictions. Thirdly, given such a compelling case for the extension of the period of detention by security forces, there was a real risk that the UK electorate would be disturbed were the Government to ignore their recommendations and opt for a lesser period which would place the interest of the suspect above that of the state. Fourthly, the proposed 90 day extension period was not out of step with other Western nations. The justification was not entirely convincing.

Firstly, although the potential of terrorists to cause major disruption and damage to a nation cannot be underestimated, part of the function of Government is to put such risks into context. To seek extension of the period of detention of terrorist-suspects from 14 to 90 days, is to return to the pertinence of arguments lodged against Sections 21-23 of the ATCSA that powers of detention must be subject to judicial approval and that allegations that people are dangerous must be proved before a criminal court.

Secondly, comparative examination of Germany, France and Italy renders the claim that the proposed 90 day extension period was not out of step with other western nations debatable. Whereas in the UK, once the period of detention expires, investigation of the suspect ceases, in Germany, France and Italy officials are at liberty to continue questioning beyond the expiry of the initial period. The reason for this ability is that characteristic of a number of European states the detention of suspects is placed directly into the hands of an investigatory magistrate. Thus, whereas in Germany, a person suspected of terrorist involvement is required to appear before a judge within 48 hours of his arrest and once remanded in custody his detention subject to judicial review every six months; and in France, a suspect can be held for a period of 48 hours which can only be extended by a further two periods of 24 hour duration on the authorisation of a

magistrate; in Italy, under a decree passed in July 2005, a terrorist suspect can only be detained for a maximum 24 hours before being brought before a magistrate.

Regardless of the Government's justification, Parliamentary criticism of the 90 day proposal remained. Whereas, in the opinion of Attorney-General Lord Goldsmith, justification for extended detention could not be made, others felt sufficiently incited by the Government's single-minded determination to pursue the extension to forward a number of constitutional reminders. Albeit acknowledging that previous investigation into terrorism had on occasion collapsed due to lack of effective investigation, Lord Carlile called for more judicial oversight of the detention process. Questioning 'whether what [was] proposed in the [2005] Bill would be proof to challenge under the [HRA] given the length of extended detention envisaged,' according to Lord Carlile, 'a more searching system [was] required to reflect the seriousness of the state holding someone in high-security custody without charge for as long as three months.'¹⁵⁴ The same call was reiterated by Liberal-Democrat Home-Affairs spokesperson Mark Oaten who pointed out that even where other countries did hold suspects for significant periods, there was always one common safeguard in operation: participation by an independent judiciary.¹⁵⁵

On the ground that extension of the existing detention period was disproportionate to the threat, counter-productive and an incitement to terrorism, the proposed 90 day provision was defeated in the House of Commons on the 9 November 2005 by some 322 votes to 291. Commenting on the Government's defeat, a number of public opponents of the pre-charge 90 day extension plan claimed that, in spite of the effort of the Government to turn the concern into an issue of party tribalism, the finding of the House of Commons re-instated a general trust in the functioning of Parliament. Certainly, following Liberty's criticism of the AT Bill 2005, the defeat of the 90 day provision was considered heartening in the sense that it was not the courts that had defeated the proposal but Parliament. Yet, whether Parliamentary rejection was a result of regard for the protection of the rights and freedoms of the individual, or an attempt to detach itself from the controversy surrounding the Government and its policy, the degree of suspicion raised over the attempt by the Government to enforce its 90 days provision, can not but give rise to questions regarding the motivation behind the relatively unprecedented degree of protest. Certainly, with regard to the manner in which the Government attempted to force the AT Bill 2005 onto the statute book, lacking in even cursory debate on its wider HR implications, the AT Bill 2005 was left open to the allegation of gesture politics in what has increasingly become in the general opinion of the media, the Government's tradition of knee-jerk legislation.

¹⁵⁴ The Independent Newspaper, 13 October 2005 p. 1

¹⁵⁵ *Ibid.*, p. 1

With regard to the parliamentary response to the AT Bill 2005, albeit (arguably) motivated by what appeared a very open concern with its wider HR implications, the degree of protest raised is just as easily explained as not so much concern with the 90 day internment of terrorist-suspects, than a dissatisfaction with the Government's impatience with the Parliamentary process, disregard for the rule of law, and attempt to stretch its power at Parliament's own very real constitutional and public expense.

(2) The Deportation of Islamic Extremists

Examining the findings of the Foreign Office Report published on 13th October 2005, the Shadow Home Secretary stated that if the Government wanted to look abroad for viable counter-terrorist solutions, it could do no better than follow the example of its international neighbours and set about the deportation of Muslim extremists.¹⁵⁶ The suggestion is interesting.

On 7th September 2005, the Home Secretary called for the production of a dossier examining the relevance of the role of the ECHR in relation to UK counter-terrorism measures, in particular the practice of deporting terrorist-suspects. Consisting of a memorandum of understanding on the treatment of terrorist-suspects generally, and a number of justifications for their deportation to countries with poor HR records, the dossier was published as the Home Secretary headed to Strasbourg on 7 September 2005 to argue his case at the European Parliament. According to the Home Secretary, it was inconceivable that any desire to deport non-nationals would be met with hostility by any EU authority where an assurance from the country to which the detainee was to be deported that the detainee would not be subjected to Article 3 treatment was in place. However, because the threat to UK security was such that it was necessary to consider the continuing relevance of the ECHR, were a policy of deporting suspects to countries with poor HR records to be found to be incompatible, then the UK would have no option than to seek derogation from the ECHR, including Article 5.

In comparison with its ECHR neighbours, the approach of the UK toward the concern of deportation, coupled with the not dissimilar (though certainly more harshly orated) Italian approach to the concern of individual rights, is interesting.

In France, except for persons granted political asylum, any non-national (including those with long-term residence permits) who pose a threat to public order or national security can be automatically subject to deportation. In Germany, since January 2005, the Government can lawfully deport a person for hate-preaching as well as engage a number of powers to restrict the political activities of non-nationals. However, where an expulsion of such a person would

¹⁵⁶ *Ibid*, p. 1

constitute a violation of ECHR law, such persons can be alternatively dealt with by appropriate supervision orders. Similarly, whereas in Norway non-nationals can not lawfully be deported to a country where they could be subjected to Article 3 treatment, neither in Spain, where persons can be detained up to 40 days pending deportation if they have participated in any activity deemed prejudicial to the state, and proceedings officially halted if the person then claims asylum, nor Sweden, where persons for reasons of national security can be subjected to lawful expulsion, is a person lawfully subjected to deportation to any country where he could run the risk of being subject to a death penalty.

In contrast, in Italy, a person suspected of promoting terrorism can, as from July 2005, be deported on the order of a Police-Chief, as opposed to a court of law. The deportee can appeal against the deportation order but only from the country to which he has been deported. Grounded on a strong national sentiment that works against the *telos* of the ECHR, the legislative reform allows for the swift deportation of suspects, as well as an extended period of detention during which police can question without charge. The July 2005 change in the law was a result of a campaign by Italy's far right Northern League Party to deal with Islamic fundamentalists. Constituting in the words of the Italian Government a crackdown on terror-suspects, and analogous to the sentiment of the UK Government expressed throughout 2005, the measures serve to highlight the vulnerability of the universalism that lies at the core of the ECHR order to the overriding secular concerns of the signatory-state.

To summarise, following on the criticism directed at the ATCSA, the AT Bill 2005 constituted perhaps one of the most controversial counter-terrorist proposal to date. As well as extended detention without trial and the deportation of Islamic extremists, other proposals included orders, curfews, electronic-tagging and restrictions on contact with named individuals. Reflecting the style of the incumbent Government, the Home Secretary admitted counter-terrorism was a sensitive area but remained assured that any HR concern would be overcome. However, exacerbated by the Government's controversial handling of the AT Bill 2005, such confidence did not prevent it from becoming on the 9th November 2005, the first Labour Government defeat as a result of backbench rebellion since Callaghan's Administration March 1979.

The Prevention of Terrorism Act 2005

(1) The Control Order Regime

The Prevention of Terrorism Act 2005¹⁵⁷ received Royal Assent on the 11 March 2005. 'An Act to provide for the making against individuals involved in terrorism-related activity of orders

¹⁵⁷ Hereafter, PTA 2005

imposing obligations on them for purposes connected with preventing or restricting their further involvement in such activity,¹⁵⁸ the PTA 2005 constituted a replacement of the repealed Part 4 of the ATCSA; an arguable political reaction to the ruling against indefinite detention of non-nationals only in *A v Secretary of State for the Home Department*¹⁵⁹ and the legal and political criticism raised generally in relation to the extended detention of terrorist-suspects proposed in the AT Bill 2005. The PTA 2005 introduced two forms of control capable of imposing obligations on any individual suspected of involvement in terrorism-related activity, irrespective of nationality, or terrorist-cause:¹⁶⁰

1. The derogating control order: made by the High Court or Court of Session on application from the Secretary of State; amounting at its extreme to a breach of Article 5 of the ECHR and requiring derogation under Article 15;
2. The non-derogating control order: involving the implication of restraints and obligations deemed not to constitute a possible breach of Article 5,¹⁶¹ following an application by the Secretary of State to the High Court or Court of Session for permission to make such an order where he: (1) has reasonable grounds for suspecting that the individual is, or has been, involved in terrorism-related activity; and (2) considers that it is necessary, for purposes connected with protecting members of the public from a risk of terrorism, to make an order imposing obligations on that individual.

Highlighted by Fenwick¹⁶² and Gearty,¹⁶³ and raised in the rulings of Judge Sullivan in *Secretary of State for the Home Department v JJ and 5 Ors*¹⁶⁴ and *Secretary of State for the Home Department v MB*,¹⁶⁵ Judge Ouseley in *Secretary of State for the Home Department v AF*,¹⁶⁶ Judge Beatson in *Secretary of State for the Home Department v Mahmood Abu Rideh and J (Interested Party)*,¹⁶⁷ and the Court of Appeal in *Secretary of State for the Home Department v JJ and 5 Ors*,¹⁶⁸ the control order regime can be criticised on a number of grounds.

1. That the restrictions imposed on an individual suspected of terrorism-related activity under a non-derogating control order when taken together can, and on occasion do, amount in fact to a deprivation of liberty under Article 5;¹⁶⁹
2. For the weak and unfair standard of judicial review of the lawfulness of the Secretary of State's decision to make an order constituting an arguable breach of the right to a fair trial in Article 6;¹⁷⁰
3. For constituting an arguable departure from the normal criminal law in its provision for the imposition of restraints on persons on the basis of a suspicion that would not necessarily/normally form the basis of a criminal charge;¹⁷¹ and an arguable breach of the fair trial requirements of Article 6;¹⁷²

¹⁵⁸ Long Title, Chapter 2, PTA 2005

¹⁵⁹ [2004] UKHL 56

¹⁶⁰ Sections 1-9 PTA 2005

¹⁶¹ Including prohibitions of, or restrictions on, the possession or use of certain articles, services or facilities; control on paid professional activities; restrictions on residence, association, travel and movement; obligations to allow entry, search and seizure powers to be deployed by specified persons; electronic-tagging and reporting restrictions

¹⁶² Fenwick (2007), Op. cit at 1439-1462

¹⁶³ Gearty (2007), Op. cit at 119-121

¹⁶⁴ [2006] EWHC 1623

¹⁶⁵ [2006] EWHC 1000 (Admin)

¹⁶⁶ [2007] EWHC 651 (Admin)

¹⁶⁷ [2007] EWHC 804 (Admin)

¹⁶⁸ [2006] EWCA Civ 1141

¹⁶⁹ *AF* [2007] EWHC 651 (Admin)

¹⁷⁰ Held by Judge Sullivan in *MB* [2006] EWHC 1000 (Admin); overruled by the Court of Appeal in *Secretary of State for the Home Department v MB* [2006] EWCA Civ 1140

4. For giving rise to the concern of a 'drift towards a...bureaucratic kind of authoritarianism, with individuals lost to public view by non-derogating control orders maintained in perpetuity as much by repressive momentum, combined with over-cautious risk-assessment, as by any genuine and continuing societal need';¹⁷³

5. For constituting a return to the exclusion order under which a number of Irish persons were expelled from Britain on suspicion of terrorism without proper due-process, criticised by the (then) Shadow Home Secretary, Tony Blair.¹⁷⁴

On analysis, the criticisms are not unreasonable.

With regard to the first criticism, that the restrictions imposed on an individual suspected of terrorism-related activity under a non-derogating control order when taken together can, and on occasion do, amount in fact to a deprivation of liberty under Article 5, was highlighted in the *Secretary of State for the Home Department v AF*,¹⁷⁵ the *Secretary of State for the Home Department v JJ, KK, GG, HH, NN and LL*,¹⁷⁶ and *Secretary of State for the Home Department v JJ (5 Others)*.¹⁷⁷

In *AF*, the Court was called on to consider the application of a non-derogating control order made against an individual who had been arrested along with a number of Libyan nationals who had already been deported on grounds of national security. The controlee was released without charge and served with a control order later replaced with one that prevented him from leaving his home for more than ten hours a day; imposed electronic tagging; restricted him to a certain geographical area when out of his home; and required the prior identification and approval of all unauthorised visitors during the curfew hours. The court held that the degree of restrictions placed on the controlee was such as to amount in fact to an Article 5 deprivation of liberty. In reaching his decision, Judge Ouseley acknowledged that, although the decision of the Secretary of State in the instant case was well balanced, freedom from arbitrary detention by the authorities was of fundamental importance. The distinction between a deprivation of liberty and a restriction on movement was one of degree and intensity. In determining whether a case fell on one side of the line or the other, the court had to start with an examination of the actual situation of the individual controlee in question and take into account a range of criteria such as the type, duration, effect and manner of enforcement of the restrictions imposed.¹⁷⁸ Accordingly, the cumulative effect of the control order had to be fully examined.

¹⁷¹ Gearty (2007), op. cit at 120

¹⁷² Fenwick (2007), op. cit at 1340

¹⁷³ *Ibid.* p. 119

¹⁷⁴ Home Office *Legislation against Terrorism. A Consultation Paper* (Cm. 4178) (TSO, London 1998)

¹⁷⁵ [2007] EWHC 651 (Admin)

¹⁷⁶ [2006] EWHC 1623 (Admin)

¹⁷⁷ [2006] EWCA Civ 1141

¹⁷⁸ *Secretary of State for the Home Department v E* [2007] EWHC 233 (Admin)

The relevance of the cumulative effects of the restrictions imposed was made clear in *Secretary of State for the Home Department v JJ, KK, GG, HH, NN and LL*.¹⁷⁹ In *JJ*, Judge Sullivan had little hesitation in ruling that the restrictions in question imposed on the controlees constituted the ‘antithesis of liberty’ amounting to a deprivation contrary to Article 5; that the restrictions and obligations imposed constituted derogating control orders which the Secretary of State had no power to make, and which having been made without having sought and obtained derogation under Article 15, constituted a clear breach of Article 5. In reaching his decision, Judge Sullivan stated firstly, that a basic distinction was to be drawn between mere restrictions on liberty of movement and the deprivation of liberty and that the former, governed by Article 2 of Protocol 4, did not amount to a breach of Article 5. This, according to Judge Sullivan, was clearly spelt out in a number of ECtHR rulings, including that of *Guzzardi v Italy*.¹⁸⁰ Secondly, the distinction was one merely of degree or intensity of restrictions, not of nature or substance. Thirdly, the court must start with the concrete situation of the controlee(s) in question and take account of a range of criteria such as the type, duration, effect and manner of implementation of the measure(s) in question. Fourthly, account must be taken of the cumulative effect of the various restrictions.¹⁸¹

The Secretary of State appealed. In *Secretary of State for the Home Department v JJ (5 Others)*¹⁸² the Court of Appeal had little hesitation in finding that Judge Sullivan had been right to have held that the purported non-derogating control orders in question constituted derogating control orders which the Secretary of State had no jurisdiction to make, insofar as the cumulative effect of the restrictions imposed were so severe as to amount in fact to an Article 5 deprivation of liberty; and that, although it was questionable whether the provisions of Section 3(10) and Section 3(12) of the PTA 2005 were designed to deal with a challenge to a control order on the ground that it was *ultra vires*, Judge Sullivan had acted well within his jurisdiction when he decided to quash the orders, rather than modify their restrictions.

In reaching its decision, the Court of Appeal held that the approach adopted by Judge Sullivan was correct. In considering the question of what constituted a deprivation of liberty, the extent to which the obligations in the control orders enabled the controlees to live a normal life had to be examined. The starting-point had to be the concrete situation of each controlee. Examining the effect of the orders, Judge Sullivan had taken as a starting-point the actual impact of restricting the controlees to their homes for some eighteen hours a day, as well as a range of other factors which were thought to interfere with the controlees’ ‘everyday lives,’ including the impact of the particular physical restraints that were imposed on the controlees when allowed to

¹⁷⁹ [2006] EWHC 1623 (Admin)

¹⁸⁰ (1981) 3 EHRR 333

¹⁸¹ [2006] EWCA Civ 1141 Paragraph 35

¹⁸² [2006] EWCA Civ 1141

leave their homes and the extent to which their cumulative effect prevented the controlees from pursuing a ‘life of choice.’ In the opinion of the court, the controlees’ concrete situation was the antithesis of liberty and more akin to detainment in open prison. For the eighteen hours in which the conrolees were to remain in their homes, their homes were subject to random searches in the manner of a prison. Moreover, unlike in open prisons, the controlees had no access to an appeal mechanism by which they could challenge any refusal of consent under the obligations contained in the control order.¹⁸³

With regard to consideration of the purpose for which the control orders had been imposed, according to the court, on an accurate understanding of *Davis v Secretary of State for the Home Department*¹⁸⁴ it could not be accepted that any doubt should be resolved in favour of the Secretary of State. In *Davis*, the restrictions in question had been imposed both for the purpose of protecting the public and the individual’s own interests, and each purpose had to be considered when assessing the cumulative impact of the restrictions. If the purpose was similar to purposes for which states ordinarily imposed detention in prison, then this would be an indication towards the restriction constituting a deprivation of liberty. Accordingly, and in accordance with the ruling in *Guzzardi v Italy*,¹⁸⁵ the more likely that the restriction was imposed in the interests of the individual, the less likely would the courts regard them as a deprivation of liberty. As there was no indication in *JJ* that the control orders had been imposed in the interests of the controlees, the control orders were quashed, but a stay imposed pending appeal. The Secretary of State appealed.

In *Secretary of State for the Home Department v JJ (and Others)*,¹⁸⁶ Lords Hoffman and Carswell dissenting, it was held that: (1) neither Judge Sullivan, nor the Court of Appeal, had erred in their legal reasoning. The cumulative effect of the restrictions and obligations of the control orders in question had resulted in the controlees living in solitary confinement for an indefinite detention. Although the area open to them during their six non-curfew hours was not objectionable, insofar as their lives remained wholly regulated by the Home Office *Guzzardi v Italy*¹⁸⁷ and *Engel v Netherlands*¹⁸⁸ applied. (2) As the Secretary of State was not accorded the power to make the control orders in questions, the control orders in question were a nullity. Defects could not be cured by amending specific restrictions and obligations. (3) That it was clear, according to Lord Hoffman, from the unqualified nature of the right to liberty and its place in the scheme of the other qualified ECHR rights, that it dealt with literal physical restraint. In order to preserve the distinction between the unqualified right to liberty and the qualified rights

¹⁸³ *Guzzardi v Italy* (1981) 3 EHRR 333

¹⁸⁴ [2004] EWHC 3113 (Admin)

¹⁸⁵ (1980) EHRR 333

¹⁸⁶ [2007] UKHL 45

¹⁸⁷ (1981) 3 EHRR 333

¹⁸⁸ (1980) 1 EHRR 647

of freedom of movement, communication, association and so forth, it was essential not to give an over expansive interpretation to the concept of deprivation of liberty. *A v Secretary of State for the Home Department*¹⁸⁹ was considered. The controlees' situations could not be compared with that of persons in prison. Even if it was accepted that the control order violated the controlees' right to liberty, there was no conceptual reason why the court could not modify the order so as to make it lawful, and the judge's failure to accept that he had such power had been an improper exercise of his discretion.

The approach adopted by both Judge Sullivan, and the Court of Appeal in *JJ*, was followed in *Secretary of State for the Home Department v E*.¹⁹⁰ In 2005 a control order was imposed on the controlee which confined him to his residence between 7pm and 7am; prohibited any unauthorised visitors to the residence, or any pre-arranged meeting outside of it; and prohibited him from possessing any form of mobile communication, including mobile telephones and internet access. The court held that although the Secretary of State did have reasonable grounds for suspecting that the controlee had been involved in terrorism-related activity, the cumulative effect of the restrictions and obligations imposed in the control order constituted a breach of Article 5. In reaching its decision, the Court adopted the approach of Judge Sullivan and the Court of Appeal in *JJ (5 Others)*, and held that since the PTA 2005 did not empower the Secretary of State to make a control order which would in effect amount to an Article 5 deprivation of liberty, the court was well within its jurisdiction to quash the control order under the power accorded it by Section 3(12)(a) of the PTA 2005.

Both the approach of the Court in *E* toward the relevance of the cumulative effect of control orders, and the engagement of Section 3(12)(a) of the PTA 2005, formed the focus of *Secretary of State for the Home Department v Mahmood Abu Rideh and J*.¹⁹¹ The controlee appealed against the conferral of a non-derogating control order and applied for a supervisory hearing under Section 3 of the PTA 2005. In 2001 the controlee was detained under the ATCSA, during which time his pre-existing mental health problems worsened. In 2005 the controlee was released and made subject to a non-derogating control order, the terms of which confined him to his home for some twelve hours a day; instructed him to report to the relevant monitoring authority some four times a day, as well as when he left and returned to his home; placed a number of restrictions on visitors to his home, pre-arranged meetings with persons outside of his home, and on his use of communications equipment; and subjected his home to random searches by the police. A new order was imposed which revoked the former requirement to seek authorisation for any pre-arranged meetings outside of his home, but which required that prior

¹⁸⁹ [2004] UKHL 56

¹⁹⁰ [2007] EWHC 33 (Admin)

¹⁹¹ [2007] EWHC 804 (Admin)

authority was sought and granted for any employment for which he received payment. The court held that the cumulative effect of the restrictions imposed by the control order had deprived the controlee of his Article 5 right to liberty, and the order was quashed. In reaching his decision, Judge Beatson held that the relevant Strasbourg jurisprudence clearly highlighted the requirement that a distinction had to be drawn between mere restrictions on the freedom of movement, and an actual deprivation of liberty. Accordingly, the cumulative effects of the restrictions imposed, as well as consideration of the controlee's pre-existing mental health problems, were relevant factors in considering whether the control order had crossed that boundary and deprived the particular controlee in question of his liberty.

With regard to the court's exercise of the power accorded it by Section 3(12)(a) of the PTA 2005, in passing the PTA it was clear that Parliament had intended that the Secretary of State should not have power to make a control order which had the effect of depriving a controlee of his liberty in breach of Article 5. As the cumulative effect of the control order in question had done exactly this, and as the Secretary of State had no power to make the order, then following the finding of the Court of Appeal in *JJ (5 others)*, it was well within the power accorded the court under Section 3(12)(a) to quash the order.

With regard to the second criticism, Section 3(1) of the PTA 2005 provides that unless a non-derogating control order is considered urgent, the Secretary of State must not make an order against an individual except where, having decided that there are grounds to make such an order, he has applied to the court for permission to make the order and has been granted that permission. Where the Secretary of State makes a non-derogating control order without the permission of the court, he must immediately, within seven days, refer the order to the court, and the function of the court on the reference is to consider whether the decision of the Secretary of State to make the order he did was obviously flawed.¹⁹² Section 3(2) of the PTA 2005 provides that where the Secretary of State makes an application for permission to make a non-derogating control order, the application must set out the order for which he seeks permission, and the function of the court is to consider whether the decision that there are grounds to make that order is obviously flawed; the court may give that permission unless it determines that the decision is obviously flawed; and if it gives permission, the court must give directions for a hearing in relation to the order as soon as reasonably practicable after it is made. In accordance with Section 2(6) of the PTA 2005, the Secretary of State may renew a non-derogating control order, (with or without modifications), for a period of 12 months if he considers that it is necessary, for purposes connected with protecting members of the public from a risk of terrorism, for an order imposing obligations on the controlled person to continue in force, and considers that the

¹⁹² Sections 3(3) and 3(4) of the PTA 2005

obligations to be imposed by the renewed order are necessary for purposes connected with preventing or restricting involvement by that person in terrorism-related activity. Further, it is ‘immaterial’ for the purposes of determining what obligations may be imposed by a control order made by the Secretary of State, whether the involvement in terrorism-related activity to be prevented or restricted by the obligations is connected with matters to which the Secretary of State’s grounds for suspicion relate.¹⁹³

According to Gearty, ‘this curious formulation of the PTA 2005 [was/is] the result of much Parliamentary energy having been expended on the question of who exactly should be making these orders: the answer for the sponsors of the measure remains the minister, while for its critics it is in practice the courts. But this concession to Parliamentary opponents of the proposal exacted a high price in the very light standard of review that the court can then bring to the question of whether to grant or refuse permission.’¹⁹⁴ Coupled with a number of HR concerns regarding the actual functioning of the control order regime, the observation is not unreasonable.

Firstly, the function of the court is to consider whether the Secretary of State’s decision that there are grounds to make the control order in question is obviously flawed. However, since the court can only refuse permission when the decision is found to be obviously flawed, it is unlikely at that stage that permission will be withheld. Section 3(6) provides that on a reference under Section 3(3)(a) if the court determines that the decision of the Secretary of State to make a non-derogating control order against the controlled person was obviously flawed, it must quash the order; if it determines that that decision was not obviously flawed but that a decision of the Secretary of State to impose a particular obligation by that order was obviously flawed, it must quash that obligation and (subject to that) confirm the order and give directions for a hearing in relation to the confirmed order; and in any other case, must confirm the order and give directions for a hearing in relation to the confirmed order. Highlighted by Fenwick, the use of the term ‘obviously flawed’ makes it unlikely that a control order would be refused at the permission stage.¹⁹⁵

Secondly, in accordance with Section 3(5), the court may consider an application for permission under Section 3(1)(a) and a reference under Section 3(3)(a): (1) in the absence of the individual in question; (2) without his having been notified of the application or reference; and (3) without his having been given an opportunity (if he was aware of the application or reference) of making any representations to the court. Any opportunity of the controlee to engage with the process comes after, rather than before, the actual control order is made.

¹⁹³ Section 2(9) PTA 2005

¹⁹⁴ Gearty (2007), *Op. cit* at 119

¹⁹⁵ Fenwick (2007), *Op. cit* at 1445

Finally, once a control order is confirmed, the court must then give directions for a hearing in relation to the order as soon as reasonably practicable after it is made, at which, and in accordance with Section 3(10), the function of the court is to determine whether the Secretary of State's decision that the requirements of Section 2(1)(a) and (b) were satisfied for the making of the order; and whether his decisions on the imposition of each of the obligations imposed by the order, was flawed. In accordance with Section 3(11), testing for such defects is to be made by reference to the principles applicable on an application for judicial review. Namely, following a special procedure involving the (arguable) protection accorded the use of closed material and the use of a special advocate, determination of whether the decision in relation to the making of the control order was flawed, and whether the decision to impose the obligations in question was flawed. Highlighting in particular the (arguable) weak and unfair standard of judicial review of the lawfulness of the Secretary of State's decision to make an order, whether the procedures in Section 3 of the PTA 2005, were/are in fact incompatible with the Article 6 right to a fair trial, formed the focus of *Secretary of State for the Home Department v MB*.¹⁹⁶

In *MB*, the Secretary of State had obtained permission on a without notice application to make a non-derogating control order to restrict the ability of an individual suspected of terrorist involvement from travelling outside of the UK. In accordance with Section 3 of the PTA 2005, the court was required to follow a special procedure which involved the use of closed material and a Special Advocate. At a full hearing Judge Sullivan considered the closed material and held that the control order remain in force. He further held that the procedure under the PTA 2005, whereby the court merely reviewed the lawfulness of the Secretary of State's decision to make the order on the basis of the material available to him at that earlier stage, was unfair, and made a declaration of incompatibility with regard to the law under which the order was made under Section 4(2) of the HRA. According to Judge Sullivan, 'to say that the [PTA 2005] does not give the [controlee] in this case...a fair hearing...would be an understatement. The procedure under the [PTA 2005], whereby the court merely reviews the lawfulness of the Secretary of State's decision to make the order upon the basis of the material available to him at that earlier stage, [is] conspicuously unfair. The thin veneer of legality which is sought to be applied by Section 3 of the [PTA 2005] cannot disguise the reality...that the controlee's rights under the [ECHR] are being determined not by an independent act in compliance with Article 6(1) of the [ECHR], but by executive decision-making, untrammelled by any prospect of effective judicial supervision.'¹⁹⁷

With regard to the third criticism, according to Gearty 'the control order regime [constitutes] a major departure from the normal criminal law in that it provides for the imposition of quite

¹⁹⁶ [2006] EWHC 1000 (Admin)

¹⁹⁷ [2006] EWHC 1000 (Admin) at Paragraph 103

severe restraints on persons on the basis of a suspicion that would not necessarily form the basis of a criminal charge and after a process that, like the ASBO regime that preceded it, lacks many of the vital safeguards associated with the criminal trial.¹⁹⁸ Despite the summary given in the Explanatory Notes to the PTA 2005 that the purpose of the Act was to provide only for the making of what are defined as preventative orders designed to restrict or prevent the further involvement by individuals suspected of being involved in terrorism-related activity in such activity;¹⁹⁹ or the finding of the Court of Appeal in *Secretary of State for the Home Department v MB*,²⁰⁰ and *Re MB*,²⁰¹ that proceedings under Section 3 of the PTA 2005 did not technically constitute criminal proceedings, insofar as they did not involve determination of a criminal charge, the observation is not in fact unreasonable.

In *MB*,²⁰² the Court of Appeal held that Judge Sullivan had erred in holding that the provisions for review by the court of the making of a non-derogating control order by the Secretary of State did not comply with the requirements of Article 6(2) of the ECHR. Section 3(10) of the PTA 2005 could not be read so as to restrict the court to a consideration of whether, when the Secretary of State made the initial decision, he had reasonable grounds for doing so. A purposive approach to Section 3(10) had to enable the court to consider whether the continuing decision to keep the order in place was flawed, therefore Section 3(10) had to be read as requiring the court to consider whether the decisions were flawed at the time of the court's determination. Section 3(10), when read alongside Section 11(2) of the PTA 2005, did not restrict the court to a standard of review that fell short of that required to satisfy Article 6. Proceedings under Section 3 of the PTA 2005 did not involve determination of a criminal charge. Section 3(10) did not require the court to apply a low standard of proof. The court had only to determine whether there existed reasonable grounds for suspicion, not whether a fact had been established according to a specified standard of proof. The procedures in question represented a determination of civil rights and obligations. Accordingly, the question to be determined was whether the procedure for determining whether reasonable grounds for suspicion did exist in fact satisfied the fair trial requirements of Article 6. As both relevant Strasbourg authority and UK law acknowledged that it was often necessary in the interests of justice to make use of closed material, and the PTA 2005 made provision for the engagement of a special advocate, alongside a number of well established rules of court, the Secretary of State's appeal should be allowed, and the validity of the non-derogating control order reconsidered.

¹⁹⁸ Gearty (2007), Op .cit at 120

¹⁹⁹ Explanatory Notes to PTA 2005, Chapter 2, Summary No. 3

²⁰⁰ [2006] EWCA Civ 1140

²⁰¹ [2007] UKHL 46

²⁰² [2006] EWCA Civ 1140

In conjoined appeals, the appellants M and F in *Re MB*²⁰³ appealed against the decisions in *MB*²⁰⁴ and *AF*²⁰⁵ that the procedures contained in Section 3 of the PTA 2005 were not incompatible with Article 6. Examining whether the procedures provided for by Section 3 of the PTA and Part 76 of the CPR were compatible with Article 6, the Court held that (1) non-derogating control order proceedings did not involve the determination of criminal charge insofar as there was no assertion of criminal conduct, only a foundation of suspicion, and no identification of a specific criminal offence; (2) that the control order regime was itself preventative, as opposed to punitive or retributive; and (3) that the actual restrictions and obligations imposed, had to be no more restrictive than was necessary to achieve the control order's preventative purpose.²⁰⁶ However, in reaching its decision, the Court acknowledged that in any given case in which a controlee was at risk of being subjected to an order containing restrictions which, either in terms of severity or in terms of their cumulative effect, could amount to a deprivation of liberty within the meaning of Article 5, the application of the civil limb of Article 6 did entitle him to such procedural protections as was commensurate with the gravity of the potential consequences.²⁰⁷ And, whilst the court could not be confident that Strasbourg would always hold that every control order hearing in which the special advocate procedure provided for in the PTA 2005 would satisfy Article 6 it should, with strenuous effort, be possible to accord the controlee in question an ECHR satisfactory measure of procedural justice.

According to the orthodox view apparent from both *MB*²⁰⁸ and *Re MB*²⁰⁹ then, in the context of control order proceedings, the use of sanctions almost and practicably indistinguishable in their impact from criminal sanctions outside the criminal process, does not constitute the equivalent of a criminal charge. However, for a number of reasons, it is arguable that the proceedings could and should be viewed as criminal, rather than civil.

Firstly, breach of an obligation imposed by a control order without reasonable excuse, will be a criminal offence punishable following conviction on indictment, with a prison sentence of up to five years or a fine, or both; or following summary conviction, to a prison sentence of up to twelve months (or six months in Scotland or Northern Ireland), or a fine, or both.²¹⁰

Secondly, although in *Benham v UK*²¹¹ the ECtHR held that although Regulation 41 of the Community Charge (Administration and Enforcement) Regulations did not in accordance with domestic law create a criminal offence, nevertheless it should be accounted criminal for the

²⁰³ [2007] UKHL 46

²⁰⁴ [2006] EWCA 1140

²⁰⁵ [2007] EWHC 651 (Admin)

²⁰⁶ *A v Secretary of State for the Home Department* [2002] EWCA Civ 1502

²⁰⁷ *Engel v Netherlands* (1979) 1 EHRR 647

²⁰⁸ [2006] EWCA 1140

²⁰⁹ [2007] UKHL 46

²¹⁰ Explanatory Notes to PTA 2005, Chapter 2, Summary No. 6

²¹¹ (1996) 22 EHRR 293

purpose of Article 6, insofar as (1) the proceedings against the applicant were brought by the public authorities; (2) the proceedings clearly involved some punitive elements which the bringing of them implied fault on the part of the applicant; and (3) the relevant penalty applied was severe.

Thirdly, although it was recognised by Fenwick that if control order proceedings were to be viewed as the determination of a criminal charge, then this would be to effectively undermine the ability of the Home Secretary to employ the control order scheme since the safeguards under Article 6(2) and (3) would be applicable, nevertheless Article 6(1) and (2) does not require proof beyond reasonable doubt, insofar as a wide margin of appreciation has been conceded to national courts in respect of the burden of proof. Accordingly, although ‘as a matter of domestic law proceedings viewed as criminal in character would require proof beyond reasonable doubt...these would be proceedings deemed criminal due to the autonomous [ECHR] meaning of the ‘criminal charge,’ therefore the domestic requirements of criminal proceedings would not necessarily apply.’²¹²

Fourthly, and as in the case of Part 4 of the ATCSA, the non-derogating control order regime functions on a low standard of proof, namely that of reasonable suspicion. Accordingly, no criminal or civil action is necessary to subject a controlee to the restrictions and/or obligations contained in the control order. Highlighted by Fenwick, ‘the subjection of [controlees] to control orders broadens the definition of terrorism...since it places a number of persons in the position of being terrorist suspects and makes them subject to a range of sanctions...despite the fact that they may not...fall within the Section 1 TA 2000 definition since they have not themselves taken part in terrorist activity, and that only a very low level of proof is needed that they are in any way associated with terrorism.... The 2005 measures thus remain controversial in human rights terms, since...they rely on interfering proactively with the liberty of suspects before any offences have been committed, or where it appears difficult to prove that they have been committed.’²¹³ Such observations lead on to highlight the reality of the functioning of the control order regime, amounting *in fact* to the fourth and fifth criticisms.

In accordance with Sections 1(9) and Sections 1(3) of the PTA 2005, the suspicion of terrorism does not need to be of specific acts, and the restrictions and/or obligations permitted in a control order can be any that the Home Secretary considers necessary for purposes connected with preventing or restricting involvement of the controlee in any form of suspected terrorist activity. Further, the suspicion of terrorist activity which can justify the Home Secretary’s subjection of the control order to indefinite renewal, in accordance with Section 2(6) of the PTA 2005, does

²¹² Fenwick (2007), *op. cit* at 1342

²¹³ *Ibid.*, p. 1439

not have to be the same as that which underpinned the original decision. Section 2(9) of the PTA 2005 provides: that it is ‘immaterial for the purposes of determining what obligations may be imposed by a control order made by the Secretary of State, whether the involvement in terrorism-related activity to be prevented or restricted by the obligations is connected with matters to which the Secretary of State’s ground for suspicion relate.’ Albeit, Section 7(1) and Section 10 of the PTA 2005 provide specifically for matters relating to review, criticism raised generally regarding the actual HR impact of what Gearty terms an essentially executive governed process of control,²¹⁴ serves to highlight not merely the logic of the dismissal of the effectiveness of the Section 19 HRA statement of ECHR compatibility by Lord Hope in *R v A*,²¹⁵ but a number of very real flaws in the functioning of the control order regime. The precise nature of those flaws, and the courts response to them, was summarised by Fenwick.²¹⁶

Despite the fact that the PTA 2005 had been declared ECHR compatible, the rulings in *JJ and 5 Ors*,²¹⁷ *JJ and 5 Ors*,²¹⁸ and *Mahmood Abu Rideh and J*,²¹⁹ and *E*²²⁰ highlighted the need of the court to impose on the control order regime a Convention compliance which it clearly failed to achieve when the PTA 2005 passed through Parliament. While the exercise of a clear engaged judicial HR role, its purposive handling of both Parliamentary intent and relevant Strasbourg jurisprudence, as well as the degree of serious consideration accorded the cumulative effect of the restrictions imposed by the control order in question, characterised the rulings in *JJ and 5 Ors*,²²¹ *JJ and 5 Ors*,²²² and *Mahmood Abu Rideh and J*,²²³ and *E*,²²⁴ in *MB*²²⁵ the Court effectively improved (to an extent) the procedure for reviewing the making of a non-derogating control order by its application of the right to a fair trial under Article 6. As a result of the ruling, the procedure adopted in control proceedings must now (1) adhere to Article 6; (2) the court itself must consider whether there were reasonable grounds for suspicion; and (3) such exercise must differ from that of deciding whether a fact had been established according to a specified standard of proof. A decision, according to Fenwick, which ‘has built in a greater [albeit moderate] safeguard against unfair proceedings and miscarriages of justice than was present under the [PTA 2005] as interpreted without reference to Section 3 [of the HRA].’²²⁶

²¹⁴ Gearty (2007), Op. cit at 119

²¹⁵ [2001] UKHL 25. ‘These statements may serve a purpose in Parliament. They may also be seen as part of the Parliamentary history, indicating that it was not Parliament’s intention to cut across a Convention right...No doubt they are based on the best advice that is available. But they [remain] no more than expressions of opinion by the minister,’ [2001] UKHL 25 Paragraph 69. See: Stone (2004), Op. cit at 42

²¹⁶ Fenwick (2007), Op. cit at 1460-1462

²¹⁷ [2006] EWHC 1623

²¹⁸ [2006] EWCA Civ 1141

²¹⁹ [2007] EWHC 804 (Admin)

²²⁰ [2007] EWHC 33 (Admin)

²²¹ [2006] EWHC 1623

²²² [2006] EWCA Civ 1141

²²³ [2007] EWHC 804 (Admin)

²²⁴ [2007] EWHC 33 (Admin)

²²⁵ [2006] EWCA 1140

²²⁶ Fenwick (2007), Op. cit at 1461

Yet, problems remain. One being that the court merely has to consider whether reasonable suspicion could be arrived at on the basis of the relevant material, meaning that control orders can be imposed on a standard of proof well below that of the civil standard. A low standard indeed considering the actual punitive effect of the restrictions and obligations of the control order imposed on the controlee. However, it is in relation to the rulings concerning the related issue of ‘torture evidence’ that the functioning of the control order gives rise to arguably the greatest HR concern.

Judicial supervision of control orders is conducted by applying established judicial review principles to the control order regime. Following the decision in *MB*,²²⁷ in order to satisfy the requirements of Article 6, the court must consider whether there was reasonable grounds for suspicion as the basis for imposing the order. This means that the court has to inquire into the evidence relied on by the Secretary of State which would appear to indicate that if the controlee raises the possibility that the material relied on was in fact obtained by torture, the court should inquire into the matter. However, as relevant House of Lords ruling decided, if the court is left in doubt as to whether the evidence was obtained by torture, it can nevertheless receive the evidence in question and take account of it in finding that reasonable suspicion was arrived at.²²⁸ Accordingly, the evidence on which the decision to impose a control order is based could well include evidence obtained by torture, so long as the inquiries that the court is able to make, are unlikely to demonstrate to that standard of proof that the evidence was so obtained.

Further, insofar as inhuman and degrading treatment is not specifically covered by any House of Lords ruling, it would appear that evidence obtained by these methods could be well be accepted. Although Section 76(2)(a) of PACE demands that the procedure should prove beyond reasonable doubt that the evidence was not obtained by the use of treatment in breach of Article 3, Section 76(2)(a) does not apply to the control order regime, insofar as its proceedings do not constitute the determination of a criminal charge. Accordingly, where evidence may have been obtained by inhuman or degrading treatment as opposed to torture, and there is doubt as to the method that was used, the evidence can be accepted, with the result that in relation to methods of obtaining evidence, persons subject to control orders are placed in what Fenwick terms a ‘doubly invidious position’ in terms of due process. Not only does the evidence in question only have to be sufficient to found a reasonable suspicion, it can also be rightly obtained by methods which in relation to a criminal trial would have rendered it inadmissible.²²⁹

To summarise, the PTA 2005 represents a change from the reactive response to the threat of terrorism and the essentially incremental and nuanced development of counter-terrorist measures

²²⁷ [2006] EWCA Civ 1140

²²⁸ *A (and Others) v Secretary of State for the Home Department (No. 2)* [2005] UKHL 71

²²⁹ Fenwick (2007). Op. cit at 1462

evidenced in the TA 2000, toward an increasingly proactive model of legislative development first seen in the ATCSA. Whether the control order regime as a whole, and despite the functioning of an increased supervisory judicial role, does operate as a deprivation of liberty due to the frequent severity of the restrictions imposed,²³⁰ insofar as the regime remains in fact an executive process of certification which lays outside of the criminal justice order and the due process safeguards associated with it, in the final analysis as the courts have worked to accord the PTA 2005 Convention-compatibility, the control order regime can not avoid the observation advanced by Gearty, that the real concern of the functioning of the PTA 2005, lays not with its ability to address the threat of terrorism, but the ‘real danger of a drift towards a...bureaucratic kind of authoritarianism, with individuals lost to public view by [the functioning of an essentially executive order] of non-derogating control, capable of being maintained in perpetuity, as much by repressive momentum, combined with over-cautious risk-assessment, as by any genuine and continuing societal need.’²³¹ A return, in effect, to the underlying *telos* of the functioning of the Exclusion Order:²³² a process strongly criticised by Tony Blair, during his office as Shadow Home Secretary.²³³

*The Terrorism Act 2006*²³⁴

The TA 2006 provides an extensive range of counter-terrorist offences which adds to the offences under the TA 2000 and builds on a range of preparatory offences introduced in the ATCSA. The TA 2006 introduced in particular, two broadly defined offences of preparation of terrorist acts and terrorist training (Sections 5-8), and the encouragement of terrorism (Sections 1-4).

(1) Preparation of Terrorist Acts and Terrorist Training

Sections 5, 6 and 8 introduce a range of offences relating to the preparation of terrorist acts. Section 5 provides that a person commits an offence if, with the intention of committing acts of terrorism or assisting another to commit such acts, he engages in any conduct in preparation for giving effect to that intention. Although the offence requires intention, the *actus reus* is considerably broad. It is irrelevant whether the intention and preparation(s) relate to one or more particular terrorist acts, acts of a particular description or terrorist acts generally. A person found guilty of an offence shall be liable on conviction on indictment to life imprisonment. Section 6 provides that a person commits an offence if he provides instruction or training in any skills in

²³⁰ The Joint Committee on Human Rights *Counter-terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2007, Eighth Report of Session 2006-07*, HL Paper 60, HC 365, (TSO, London, 2007)

²³¹ Gearty (2007), Op. cit at 119

²³² Under which a number of Irish nationals were expelled from Britain on suspicion of terrorism without proper due-process

²³³ Home Office *Legislation against Terrorism: A Consultation Paper* (Cm. 4178) (TSO, London 1998)

²³⁴ Hereafter, TA 2006

connection with the Commission, or preparation of acts of terrorism, or to assist in the commission or preparation by others of such acts or offences.²³⁵ The offence advances the Section 54 TA 2000 offence of weapons training, punishable by a maximum penalty of ten years imprisonment. Section 8 provides that a person commits an offence if he attends at any place, whether in the UK or elsewhere, used for terrorist training. The requirements of Section 8 are satisfied in relation to a person if, he knows or believes that instruction or training is being provided at a place of which he attends for purposes connected with terrorist or Convention offences, or throughout the period of attending at such a place he could not reasonably have failed to understand that instruction or training was being provided there for such purposes. In accordance with section 8(3), it is immaterial for the purposes of Section 8 whether the person concerned receives the instruction or training himself and whether the instruction or training is provided for purposes connected with one or more specific acts of terrorism or Convention offences, or acts of terrorism or Convention offences generally. A person found guilty of such an offence is liable on conviction on indictment to a term of imprisonment not exceeding ten years or to a fine, or both; and on summary conviction in England and Wales to a term of imprisonment not exceeding twelve months, or to a fine not exceeding the statutory maximum, or both.

Sections 9 to 11 of the TA 2006 introduce a new range of offences involving radioactive devices and materials and nuclear facilities and sites.²³⁶ Section 9 provides that a person commits an offence if he makes or has in his possession radioactive material with the intention of using that device or material in the course of or in connection with an act of terrorism, or making it available to be so used. It is irrelevant whether the act to which such an intention relates to a particular terrorist act, an act of a particular description or for acts of terrorism generally. A person found guilty of such an offence shall be liable on conviction on indictment to life imprisonment. Section 10 provides that a person commits an offence if he uses a radioactive device or material in the course of, or in connection with, the commission of an act of terrorism or for the purposes of terrorism. A person commits an offence if in the course of or in connection with the commission of an act of terrorism or for the purposes of terrorism, he uses or damages a nuclear facility in a manner which causes a release of radioactive material, or creates or increases a risk that such material will be released. A person found guilty of such an offence shall be liable on conviction on indictment to life imprisonment. Section 11 provides that a person commits an offence if, in the course of or in connection with, the commission of an act of terrorism or for the purposes of terrorism, he makes a demand for the supply of a radioactive

²³⁵ In accordance with Section 6(3), skills include the making, handling or use of a noxious substance or substances of such description; the use of any method or technique for the purposes of terrorism; the design or adaptation of any method or technique for the purpose of terrorism or in connection with the commission or preparation of an act of terrorism, or any ECHR offence

²³⁶ As well as, a Section 12 offence of trespassing on a nuclear site

device or material, for a nuclear facility to be made available, or for access to such a facility to be given, and supports the demand with a threat that action will be taken if the demand is not met, in such circumstances that it is reasonable to assume that there is a real risk that the threat will be carried out. A person found guilty of such an offence shall be liable on conviction on indictment to imprisonment for life.

As well as the introduction of new offences, the TA 2006 expands the existing provisions of the TA 2000 in relation to penalties. Section 57 of the TA 2000 provides that a person commits an offence if he possesses an article in circumstances which give rise to a reasonable suspicion that his possession is for a purpose connected with the preparation, instigation or commission of an act of terrorism. In accordance with Section 13 of the TA 2006, a person guilty of an offence is now liable on conviction on indictment to fifteen years imprisonment. Section 2 of the Nuclear Material (Offences) Act 1983²³⁷ provides a number of offences relating to nuclear material involving preparatory acts and threats. Section 14 of the TA 2006 provides that a person guilty of an offence under Section 2 of the NM(O) Act 1983 shall be liable on conviction on indictment to imprisonment for life. Similarly, Section 53 of the Regulatory of Investigatory Powers Act 2000²³⁸ introduced the offence of contravening notice relating to encrypted information. Section 15 of the TA 2006 increases the maximum penalty for contravening notice to encrypted information in the case of national security to a term of five years imprisonment, and in any other case to two years.

The TA 2006 introduces and advances an extensive range of counter-terrorist measures of a preparatory nature aimed at strategists who plan or assist in the planning of terrorist activities but do not themselves participate in their execution. The provisions of the TA 2006 effectively allow for state intervention in relation to the criminalisation of both perceived potential terrorists and their supporters. Certainly, insofar as the TA 2006 advances a counter-terrorist process whereby sanctions follow the conviction of crime, rather than administrative decision, such intention is not without support.²³⁹ Whereas, the Joint Committee on Human Rights was swift to state that prevention outweighed any form of ‘after the event’ pursuit, according to Walker not only is it inevitable that law should be used instrumentally in counter-terrorist strategy, but right that it should, insofar as states have a duty to protect life.²⁴⁰ However, ‘whilst good intelligence and early intervention are important, it should be recalled that in a liberal democracy at least, the ultimate test of success or failure of activities against terrorism is the maintenance of public support while at the same time respecting the fundamental values on which legitimacy and

²³⁷ Hereafter, NM(O) Act 1983

²³⁸ Hereafter, RIP Act 2000

²³⁹ Lord Carlile *Report on the Operation in 2005 of the Terrorism Act 2000* May 2006 (TSO, London 2006)

²⁴⁰ Walker (2007). *Op. cit* at 335

consensus cohere such as respect for individual rights.²⁴¹ The observation is particularly relevant in relation to two controversial offences under the TA 2000 and TA 2006 regime: (1) the advancement of Section 18 of the Prevention of Terrorism (Temporary Provisions) Act 1989²⁴² by Section 19 of the TA 2000 and the imposition on persons an obligation to report to a police constable any information of a terrorist nature; and, (2) the introduction of a Section 1 TA 2006 offence of encouraging terrorism.

A Positive Obligation to Report Information

Section 18 of the PT(TP) Act made it an offence to fail to report information to a police constable which might be of material assistance in preventing an act of terrorism, or in assisting someone else to carry out such an act. Despite criticisms raised by Lord Lloyd as to the practical value of the provision and recommendation that it should not be included in any permanent legislation, such an offence was included in Section 19 of the TA 2000.²⁴³ Section 19 provides that a person commits an offence where he does not disclose to a police constable as soon as reasonably practicable his belief or suspicion, as well as the information on which it is based including that which comes to his attention in the course of a trade, profession, business or employment, that another person has committed an offence under Sections 15-18 of the TA 2000.²⁴⁴ Section 38B, inserted by Section 117 of the ATCSA, creates an even broader provision. Section 38B makes it an offence, subject to a defence of reasonable excuse, for any person to fail to disclose to a police constable any information which he knows or believes might be of material assistance in preventing an act of terrorism or securing the application or conviction of a person involved in such an act. As well as Section 38B, the ATCSA also inserted Section 21A into the TA 2000. In accordance with Section 21A, a stricter duty to disclose information is applied instead of, rather than in addition to, that of Section 19. Section 21A provides that if a person believes, suspects, or has reasonable grounds for believing or suspecting that another person has committed an offence under Sections 15-18, and the basis for that belief or suspicion came to him in the course of a business in the regulated sector, he will commit an offence if he does not disclose such information to a constable as soon as reasonably practicable. Raising similar criticisms to that advanced against the offence of directing terrorism,²⁴⁵ as a result of the functioning of Sections 19, 21A and 38B, a considerably wide range of people, including ordinary citizens, banks and businesses, who are not part of any proscribed group or organisation

²⁴¹ *Ibid* p. 336. See also: K. Nielsen 'The Moral Justifiability of Terrorism (State and Otherwise)' (2003) *O.H.L.J* 427; and Campbell (2005). *Op. cit* at 353

²⁴² Hereafter, PT(TP) Act

²⁴³ Lord Lloyd (2006), *Op. cit* at paragraph 12.7

²⁴⁴ Section 15 provides that a person commits an offence where he invites another person to provide money or other property, or receives or provides money or other property, which he knows or reasonably suspects will be used for the purpose of funding terrorism. Similar provisions are made in relation to the use and possession of such money and property in Section 16, in relation to funding arrangements in Section 17, and money laundering in Section 18

²⁴⁵ See: C. Walker and K. Reid 'The Offence of Directing Terrorist Organisations' (1993) *Crim. L. R* 669

covered by Section 1 of the TA 2000, are potentially criminalised for failing to disclose relevant information. Similar to the functioning of Section 58 of the TA 2000, which advances the Section 16B of the Prevention of Terrorism Act 1989 offence of collecting, recording or possessing information which might be considered useful to terrorism, and the functioning of Section 56 of the TA 2000,²⁴⁶ the most controversial effect of such counter-terrorist changes is both their potential to effectively subject any journalist or accountant who has records of information relating to funding activities of terrorist groups, either at home or abroad, to a maximum penalty of ten years imprisonment; and their very real ability to subject 'ordinary citizens',²⁴⁷ who function well beyond the activities of those whom can be classified as terrorist in accordance with the ordinary meaning of the term, to a maximum penalty of five years imprisonment.²⁴⁸

Secondly, examining both the broad scope of the functioning of Section 1 of the TA 2000 and the extended range of offences as a result of the TA 2006, highlighted by Gearty,²⁴⁹ Walker²⁵⁰ and Fenwick,²⁵¹ the definition of terrorism should not depart far from what are accepted legitimate boundaries of criminal law and process. Examining the current 'incrementally extended' range of offences, according to Fenwick, violent terrorist acts infringe a number of criminal law provisions without the need for recourse to the special terrorist offences. Accordingly, 'it might be asked looking over the vast list of provisions, whether special terrorist offences have realistically any 'real' value.'²⁵² Whether the TA 2000 as amended and advanced by the TA 2006 can be said to be more of 'symbolic' than 'actual' impact, according to Walker 'where the [TA 2000 generally] may be condemned as lax...is not so much in the terms of its core elements of method, purpose and target [but rather] in the circumstances of how these components are applied.... To cater for this aspect, there should be emphasis upon not only the types of seriously threatening and destabilising offences being perpetrated, but also the nature of the perpetrators, for it is that context which renders less capable normal criminal justice processes and thereby justifies special laws.'²⁵³ Walker then goes on to state that, one example when special terrorist laws might be justifiable, is where action occurs in the context of a secretive and organised group where it is the collective paramilitary nature of the association which makes its actions so particularly threatening to society and difficult to detection and control by the police. According to Walker, it is this additional element of context which provides an answer to questions as to when special laws should be triggered by terrorism. 'A

²⁴⁶ Where the offence of directing at any level a terrorist organisation is not confined to proscribed groups, and lacks any requirement of knowledge regarding the nature of the information or any requirement that the person intending to use it is intending to do so for purposes connected with terrorism

²⁴⁷ Including the commercial sector

²⁴⁸ Fenwick (2007), Op. cit at 1413

²⁴⁹ Gearty (2007), Op. cit at 47

²⁵⁰ Walker (2007), Op. cit at 337

²⁵¹ Fenwick (2007), Op. cit at 1407

²⁵² *Ibid* p. 1407

²⁵³ Walker (2007), Op. cit at 346

response may....be justifiable when terrorism is emanating from a collective of people with capabilities to act on an organised, co-ordinated and sustained basis and to engage in sophisticated plans and operations...By contrast [lone individuals]...lack the capacity to create a threat...of a kind which necessitates special laws. Even organisations which seek political change and use violence to achieve it, but do not have the sophistication, size or threat of the likes of Irish paramilitary groups, should be tackled through normal laws rather than special laws.’²⁵⁴ Applied to analysis of the advancement of the range of preparatory offences, the observation is interesting.

Examining the roles of politicians and judges in relation to the concern of human rights, terrorism and risk-assessment, Feldman questioned the claim advanced by the incumbent Government that the threat of terrorism made it essential to discard what was claimed to have been at some time in the second half of the twentieth-century a liberal consensus toward the treatment of offenders and terrorist suspects, and its decision to accord national security a higher priority than liberty.²⁵⁵ Examining both political and legal justification for a more repressive approach to anti-terrorism law, Feldman could find no evidence of (1) a feasible 1960s-1970s consensus among liberals on matters of social policy, law and order that focused on either offender’s or suspected terrorist’s rights,²⁵⁶ or, (2) a more serious threat of terrorist activities than that which existed during the 1960’s and 1970’s from a number of prominent Irish terrorist organisations. Accordingly, as the current risk of terrorism is (arguably) exaggerated, there remains no definite long-term perspective to provide a sense of proportion. The observation is interesting, Although as Feldman highlighted, ‘it is true that one person’s right to life may conflict with another person’s right to liberty, in the sense that it may be necessary to interference with liberty to protect life,’²⁵⁷ the shift away from freedom toward security which underlays the TA 2000 and TA 2006 regime can not but give rise to the question whether preparatory offences which impose both a positive duty and the risk of criminalisation on persons who remain technically what Fenwick terms ‘ordinary’ citizens, are proportionately, if not reasonably, related to the aim of protecting life and security.²⁵⁸

Finally, demonstrating little concern with the (arguable) rights and liberties of the ‘ordinary’ citizen, Section 19 and Section 38B of the TA 2000 and Sections 21A and 21B provide that it is a defence for a person charged with an offence under the relevant Section, to prove that he had a reasonable excuse for not making the disclosure in question. Certainly, highlighted by Fenwick under Sections 19 and 38B, this could effectively allow a journalist to raise a number of ECHR

²⁵⁴ *Ibid* p. 347

²⁵⁵ D. Feldman ‘Human Rights, Terrorism and Risk: The Roles of Politicians and Judges’ [2006] *P.L* 364

²⁵⁶ As well as, equality, discrimination and the understanding of the social causes of criminality

²⁵⁷ Feldman (2006). *Op. cit* at 371. See also: Walker (2007). *Op. cit* at 346

²⁵⁸ Fenwick (2007). *Op. cit* at 1413

Article 10 points under the HRA, and the defence of reasonable excuse under Sections 19 and 38B accorded a wide interpretation in order to protect investigative journalism.²⁵⁹ Section 21A and Sections 19 and 38B all have to be interpreted compatibility with Article 6(2). However, although Section 118 eases the burden of proof on defendants in accordance with the presumption of innocence under Article 6(2), it does not cover Sections 19, 38B or 21A. Accordingly, and highlighting a legal flaw in the functioning of the TA 2000 and TA 2006 regime,²⁶⁰ the ruling in *Sheldrake v Director of Public Prosecutions; Attorney General's Reference (No 4 of 2002)*²⁶¹ becomes relevant. Firstly, insofar as requiring a journalist to prove reasonable excuse stands Article 10 'on its head,' since freedom of expression is not viewed as a defence under Article 10 the justification for the interference operates in a sense as a defence negating the potential breach. Secondly, insofar as such a defence can, and should, be read down so as to impose on the defendant an evidential burden only. Certainly, given the burden that is being placed on groups of citizens, including those working in the financial sector, by these offences, it is arguable that requiring a defendant to prove a defence of reasonable excuse, could be viewed as requiring him to disprove a substantial element of the offence, so as to engage the principle from *Attorney-General's Reference*.²⁶²

(2) *The Encouragement of Terrorism*

The breadth of the Section 1 TA 2000 definition of terrorism, as amended by Section 34 of the TA 2006, 'compounds the perceived latitude of several new offences in the TA 2006, the most contentious relating to the indirect incitement (including glorification) of terrorism under Section 1(2) of the TA 2006.'²⁶³

Section 1 of the TA 2006 provides that it is an offence to indirectly encourage acts of terrorism which includes the glorification of such acts. Constituting a considerably broad offence, encouragement applies to a statement that is likely to be understood by some or all members of the public to whom it is published, as a direct or indirect encouragement or other inducement to the commission, preparation or instigation of acts of terrorism, or Convention offences. In accordance with Section 1(2), a person commits an offence if he (a) publishes a statement to which Section 1 of the TA 2006 applies or causes another to publish such a statement; and (b) at the time he publishes it or causes it to be published, he (i) intends members of the public to be directly or indirectly engaged or otherwise induced by the statement to commit, prepare or instigate acts of terrorism or Convention offences; or (ii) is reckless as to whether members of

²⁵⁹ *Ibid* p. 1414

²⁶⁰ As well as, the relevance of the judiciary in protecting individual rights

²⁶¹ [2005] 1 All ER 237

²⁶² Fenwick (2007), *Op. cit* at 1414

²⁶³ Walker (2007), *Op. cit* at 331. See also: A. Jones, R. Bowes and H.D. Lodge *The Terrorism Act 2006* (OUP, Oxford 2006). and D. Barnum 'Indirect Incitement and Freedom of Speech in Anglo-American law' (2006) *E.H.R.L.R* 258

the public will be directly or indirectly encouraged or otherwise induced by the statement to commit, prepare or instigate such acts or offences. Section 1(3) provides that for the purposes of Section 1 of the TA 2006, the statements that are likely to be understood by members of the public as indirectly encouraging the commission or preparation of acts of terrorism or Convention offences include every statement, which (a) glorifies the commission or preparation (whether in the past or the future, or generally) of such acts or offences; and (b) is a statement from which those members of the public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by them in existing circumstances. Section 1(7) provides that a person guilty of an offence under Section 1 of the TA 2006 shall be liable (a) on conviction on indictment to imprisonment for a term not exceeding seven years or to a fine, or to both; (b) on summary conviction in England and Wales to imprisonment for a term not exceeding twelve months or to a fine not exceeding the statutory maximum, or to both; (c) on summary conviction in Scotland or Northern Ireland to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or to both.

The offence of indirect encouragement of acts of terrorism which includes the ‘glorification’ of such acts, constitutes a considerably broad offence, insofar as it is neither confined to glorifying acts of terrorist violence which amount to serious criminal offences, nor necessitates the requirement of incitement.²⁶⁴ The breadth of the offence of encouraging terrorism, as originally drafted, formed the focus of the Joint Committee on Human Rights Third Report (2005-2006).²⁶⁵ Following the HR implications of the terrorist attacks and attempted attacks in London on 7 and 21 July 2005, the Report considered the HR implications of various counter-terrorism measures which had been taken by the Government in the wake of those attacks. Recognising that reconciling the requirements of security and public safety with HR standards was likely to be a dominant theme in Parliament’s work, the Committee conducted an inquiry into counter-terrorism policy and human rights. The findings in relation to the (then) proposed offence of indirect encouragement of terrorism, were as follows.

According to the Joint Committee, any criminalisation of the publication of statements engaged directly the right to freedom of expression in Article 10 of the ECHR. However, whereas restrictions on direct incitement to violence are clearly compatible with Article 10, restrictions on indirect incitement to commit violent terrorist offences would only be capable in principle of

²⁶⁴ Contrary to Section 59 of the TA 2000 for example, which provides that a person commits an offence if: (a) he incites another person to commit an act of terrorism wholly or partly outside of the UK; and (b), the act would if committed in England and Wales constitute one of a number of offences listed in Section 59(1)(2) which includes (i) murder; (ii) wounding with intent, an offence under Section 18 of the Offences Against the Persons Act 1861; (iii) Poisoning under Sections 23 or 24; (iv) use of explosions under Section 28 and 29; and (v) endangering life by damaging property under Section 1(2) of the Criminal Damage Act 1971. Section 59(3) of the TA 2000 provides that a person guilty of an offence under Section 59 shall be liable to any penalty to which he would be liable on conviction of the offence listed in Section 59(2) which corresponds to the act which he incites

²⁶⁵ Joint Committee on Human Rights, *Counter-terrorism Policy and Human Rights: Terrorism Bill and Related Matters*, Third Report of Session (2005-2006), HL Paper 75-1, HC 561-1 (TSO, London 2005)

being Convention compatible provided that they were necessary, defined with sufficient precision to satisfy the requirements of legal certainty, and proportionate to the legitimate aims of national security, public safety, the prevention of crime and the protection of the rights of others. According to the Joint Committee, the main issue to be considered was whether the proposed new offence of encouraging terrorism was both necessary and sufficiently precisely defined as to satisfy the requirements of legal certainty and proportionality.²⁶⁶

With regard to the requirement of necessity, the Joint Committee examined the Home Secretary's claim that there existed a gap in the existing law which made it difficult to prosecute incitement to terrorism of a general nature, as opposed to incitement of a specific terrorist act. In its analysis of the claim, the Joint Committee acknowledged that: (1) incitement to violence, including terrorist violence, was already a criminal offence in UK law; (2) that incitement to commit an act of terrorism overseas was a criminal offence by virtue of Section 59 of the TA 2000; (3) Solicitation to murder was an offence under Section 4 of the Offences Against the Person Act 1861; (4) Incitement to racial hatred was a crime under the Public Order 1986; and that in the light of such a wide range of criminal offences already available, whether a new offence of encouragement was actually necessary. Acknowledging that recent prosecutions such as that in *R v El-Faisal*²⁶⁷ clearly illustrated the particular width of the offence of soliciting to murder and the scope of behaviour sufficient to constitute the offence as identified in *R v Most*,²⁶⁸ the Joint Committee concluded that, although there were a number of uncertainties about the scope of such existing offences, thus clarification of the law in principle was justifiable, in view of the breadth of the offence of solicitation to murder and of common law incitement, the strict necessity for a new offence of encouragement remained questionable.²⁶⁹

With regard to the requirement of legal certainty, the Home Office did acknowledge that the description of the offence of encouragement of terrorism could be regarded as insufficiently imprecise as to engage the requirement of Article 7 of the ECHR that the criminal law should be as sufficiently precise and accessible as to enable an individual to know in advance whether his conduct was/is criminal. However, concluded that the description of the offence was Article 7 compatible because the constituent parts of the offence were clearly laid in a publicly accessible piece of primary legislation, and the consequences of action falling within the offence were clearly formulated in the clause. The Joint Committee was not without reservation.

Firstly, the 'glorification of terrorism' was included in the offence of encouragement of terrorism. Glorification was defined in the Bill to include any form of praise or celebration.

²⁶⁶ *Ibid* p. 16, Paragraph 20

²⁶⁷ [2004] EWCA Crim 456

²⁶⁸ [1881] 7QBD 244

²⁶⁹ Joint Committee on Human Rights, *Counter-terrorism Policy and Human Rights: Terrorism Bill and Related Matters*, Third Report of Session (2005-2006), HL Paper 75-1, HC 561-1, Paragraphs 21- 25 (TSO, London 2005)

According to the Joint Committee, the legal certainty concern was that terms such as glorification, praise and celebration were too vague to form part of a criminal offence which could be committed by speaking. Although the Home Secretary drew a distinction between encouraging and glorifying on the one hand and explaining or understanding on the other,²⁷⁰ in the opinion of the Joint Committee the difficulty with the distinction was that it was not self-executing. Whereas, the content of any comment in question would have to be carefully analysed, including the context in which it was spoken, there would still be enormous scope for disagreement between reasonable people as to whether a particular comment was merely an explanation or an expression of understanding, or amounted to encouragement, praise or glorification.²⁷¹

Secondly, highlighted by the Joint Committee, a second source of legal uncertainty regarding the scope of the new offence of encouragement was the functioning of the breadth of the definition of terrorism itself. The offence relies on the definition in Section 1 of the TA 2000 and concerns the use or threat of terrorism designed to influence a Government or to intimidate the public or sections of the public for the purposes of advancing a political, religious or ideological cause any where in the world. Although the Government accepted that the effect of the clause was to criminalise expressions of support for the use of violence as a means of political change, it defended its scope on the ground that there was nowhere in the world today where resort to violence, including violence against property, could be justified as a means of bringing about change. According to the Joint Committee, the argument was not convincing. Throughout history there were plenty of examples, and certainly present day resistance movements, whose aims and acts have been justified and supported by individuals who, although would not be considered terrorists, would now be liable to prosecution under the terms of the offence of encouraging terrorism. Accordingly, the new offence would (and does) make it a criminal offence to vocalise support for any 'serious' form of opposition to regimes viewed by the speaker and others in the international community as tyrannous and illegitimate.²⁷²

Thirdly, according to the Joint Committee, the final sources of uncertainty about the scope of the offence of encouragement of terrorism stemmed from the lack of any requirement in its definition that there be an intention to incite the commission of a terrorist offence and that the statement must cause a danger of a terrorist offence actually being committed.²⁷³ According to the scope of the offence, the state of mind which had to be proved by the prosecution was the

²⁷⁰ The last two would not be caught by the new offence because they did not amount to encouraging, glorifying, praising or celebrating

²⁷¹ Joint Committee on Human Rights, *Counter-terrorism Policy and Human Rights: Terrorism Bill and Related Matters*, Third Report of Session (2005-2006). HL Paper 75-1, HC 561-1, Paragraphs 26-28 (TSO, London 2005)

²⁷² *Ibid* p. 19, Paragraph 29

²⁷³ Joint Committee on Human Rights, *Counter-terrorism Policy and Human Rights: Terrorism Bill and Related Matters*. Third Report of Session (2005-2006). HL Paper 75-1, HC 561-1, Paragraphs 30-33 (TSO, London 2005)

knowledge or belief that members of the public were likely to understand the statement as a direct or indirect encouragement or other inducement to acts of terrorism, or having reasonable grounds for such belief: a requirement which fell particularly short of a specific intention to incite the commission of a terrorist offence. Although the Joint Committee agreed with the Home Secretary that a good reason for not restricting himself to a requirement of intent was that to have done so would have been to have made it more difficult to secure convictions, it nevertheless argued that insofar as it would have provided a necessary safeguard against the offence being of too broad an application, there was good reason for its inclusion. As a general rule, every crime requires a mental element, the nature of which depends on the definition of the crime. The mental element required to constitute serious crime is an intention to bring about the elements of the crime in question or recklessness. Recklessness arises in this context where the act in question involves an obvious and serious risk of causing injury or damage and either the defendant fails to give any thought to the possibility of there being such a risk, or having recognised that there is some risk involved, he nonetheless goes on to take it.

Following this description of one test of subjective recklessness, the Joint Committee then went on to examine an amendment proposed by the Government that the state of mind to be proved by the prosecution be that the person publishing a statement, or causing it to be published by another, intended the statement to be understood by members of the public as a direct or indirect encouragement or other inducement or was reckless as to whether or not it was likely to be so understood. In the opinion of the Joint Committee however, such a formulation constituted not a subjective, but an objective test, with the result that insofar as people could be able to say that they did not realise what the effect of their actions would be, it would be ‘incredibly difficult to prosecute people who genuinely were encouraging other people indirectly to commit terrorist acts.’²⁷⁴ Accordingly, it was necessary for the offence either to have been restricted to intention or, if it was to be extended beyond intention, only to the recklessness of knowing or being aware of but indifferent to the likelihood that the statement would be understood as an encouragement.²⁷⁵

Finally, with regard to the concern of proportionality, there is nothing in the definition of the offence of encouragement which would require the prosecution to prove that the statement in question gave rise to any danger that an act of terrorism might be thereby committed. Such an absence gives rise to two concerns.

Firstly, highlighted by the Joint Committee, it is essential that in relation to such an offence as the encouragement of terrorism, that there be a public interest defence to protect the right to

²⁷⁴ Hazel Blears MP, as quoted by the Joint Committee on Human Rights, *Counter-terrorism Policy and Human Rights: Terrorism Bill and Related Matters*, Third Report of Session (2005-2006), HL Paper 75-1, HC 561-1, Paragraph 32 (TSO, London 2005)

²⁷⁵ A subjective test of recklessness rather than objective

freedom of expression against unnecessary interference. Certainly, most of the offences which impinge on freedom of expression in the TA 2000, including Sections 19(3), 38B(4), 35(5)(b) and 58(3), include a reasonable excuse defence the availability of which constitutes a significant factor in determining whether a criminal restriction of freedom of expression is proportionate. According to the Joint Committee, in light of the concerns about the impact of the resultant uncertainty on freedom of expression, either a reasonable excuse or public interest defence should have been included in the offence in order to render it less likely that it could, and would, be found to be Article 10 incompatible.²⁷⁶ Coupled with an amendment to introduce a requirement of intent or objective recklessness, the offence of the encouragement of terrorism was, in the opinion of the Joint Committee, not sufficiently legally certain to satisfy the requirement of Article 10 that interference with freedom of expression be prescribed by law because of (i), the vagueness of the glorification requirement; (ii), the breadth of the definition of terrorism; and (iii), the lack of any requirement of intent to incite terrorism or the likelihood of such an offence being caused, as an ingredient of the offence.

Finally, giving rise to what is, without doubt, a highly controversial concern regarding the consequence of the over-breadth of the offence of encouragement; it is arguable whether the new offence could prove in practice to be sufficiently discriminatory in its application as to give rise to questions under Articles 10 and 14. According to Fenwick, certain statements made by the Muslim population could well be regarded as ‘glorification’ if addressed to a Muslim audience, but not if addressed to a non-Muslim audience due to the requirement under Section 1(3)(b) that the audience could reasonably be expected to infer that what was/is being glorified, is conduct that should be emulated by them in existing circumstances.²⁷⁷ Fenwick then went on to illustrate the point with a controversial example of two public statements of opinion consisting of similar content and sentiment relating to the motivation of Palestinian ‘terrorists,’ and seriously questions the possibility that a person, because of his faith and ethnicity could, and would, be more likely subject to arrest for the encouragement, including the ‘glorification,’ of terrorism.

To conclude, the extension of existing anti-terrorism powers and the creation of new ones (some in circumstances unconnected with terrorism) characterise the UK’s post HRA counter-terrorist regime. Insofar as prevailing policy impinges on the rights and freedoms of the individual, in abandoning the democratic ideal in the name of extending the reach of investigatory techniques, and the power of the state to deal with such underlying political problems as asylum, the disregard shown by the counter-terrorist regime not only toward HR generally, but also established processes of democratic legality, would appear, in the opinion of Simpson, to have

²⁷⁶ Joint Committee on Human Rights, *Counter-terrorism Policy and Human Rights: Terrorism Bill and Related Matters*. Third Report of Session (2005-2006), HL Paper 75-1, HC 561-1, Paragraphs 34-37 (TSO, London 2005)

²⁷⁷ Fenwick (2007). *Op. cit* at 1421

rendered the ECHR not so much a HR instrument, than more an (arguable) ‘charter for repression.’²⁷⁸

Whether the Parliamentary event of 9 November 2005 was a response to an erosion of established liberties, or a Government’s affront to the supremacy of Parliament and the rule of law, the defeat raises questions as to the practicality of the universalism at the core of the ECHR. Examination of UK counter-terrorism policy highlights a series of anomalies which advance the argument that the ECHR constitutes *in fact* only a tool in the promotion of rights, as opposed to any form of protection. As a construct of political engineering, the ECHR specifies a series of mostly negative rights designed to prevent State interference with its citizen’s private domain. However, the ECHR’s circumvention of rights by means of exemption and derogation, can not avoid the observation that its pretence at universalism conceals a case of cultural-relativism where rights remain the preserve of the signatory-state. Regardless of a State’s rhetorical commitment to the ECHR then, there is no assurance that that commitment will accord certainty against breaches of its provisions. In practice, the State is capable of extinguishing such of the initiative’s rights and freedoms as deemed necessary for the furtherance of its own concerns. A capability, following in the vein of the UK’s handling of terrorism, no where more visibly seen than in the closely related treatment of asylum.

Section 3.3.2: *Asylum*

The origin of UK immigration law rests on the internationally acknowledged right of a nation to exclude non-nationals on whatever terms it sees fit. Arising from a process of defining that right and giving substance to it, immigration has been concerned with regulating the circumstances of those to whom entry will be granted, not with the protection of their rights. In the context of asylum, any process committed to the protection of HR constitutes a modern phenomenon in terms of UK law, requiring reassessment of concepts of control and sovereignty. In this sense, it is argued that the HRA marks a new era in HR protection. Certain rights can be relied on as the ground for legal argument, offering greater equality of arms between the individual and the State. However, post the HRA, the relationship between HR and asylum has remained awkward. As a matter of legal definition, the order has continued to move toward ‘greater procedural

²⁷⁸ Simpson (2002), *Op. cit* at 94. The argument is grounded on a premise that the ECHR order has effectively allowed domestic terrorist legislation to function relatively unhindered by allowing signatory-states a wide margin of appreciation. The possibility of anti-terrorist legislation being used as an (arguable) tool for repression formed the focus of the *Lloyd Inquiry into Legislation against Terrorism*. (Cm. 3420) (TSO, London 1996). According to the *Lloyd Enquiry*, the subject of terrorism should be viewed as part of mainstream criminal law, which should include the re-classification of ordinary crimes with a terrorist dimension, and the development of a set of clearly defined terrorist offences, subject to the same HR safeguards regarding due process (no detention without trial, and no arrest without reasonable suspicion) and evidence, as characterises the criminal law. Other recommendations included the suggestion that the special power of arrest on suspicion of terrorism, an activity not in itself an offence, be abolished, along with its potential for use as a tool for repression. See also: the concerns of T. Kapitan, the Terrorism of Terrorism in J.P. Serba (Ed) *Terrorism and International Justice* (OUP, New York 2003); C. Gearty ‘Terrorism and Morality’ (2003) *E.H.L.R* 377; L.K. Donohue (2005), *Op. cit* at 15; Fiss (2006) *Op. cit* at 235; and D. Claridge ‘State Terrorism? Applying a Definitional Model’ (1996) 8 *T.P.J.* 47. See also: D. Feldman ‘Human Rights, Terrorism and Risk: the Roles of Politicians and Judges’ [2006] *P.L* 364

integration of asylum claims but not greater harmonization: the intention...of...integration [being] not to recognise the...continuum between asylum and migration but to facilitate the removal of failed asylum-seekers.²⁷⁹

Examining the impact of the ECHR on the executive and legislature, this thesis analyses the effect of the order on a number of asylum aspects. Whether ‘by reason of their...contact with the vital forces of their countries, state authorities are...in a better position than the international judge to give opinion on the...content of [asylum] requirements,²⁸⁰ Section 3 of this thesis examines the delivery of ECHR protection in accordance with the HRA.

Human Rights and UK Asylum Policy

Although Article 14 of the Universal Declaration of HR 1948 recognises the right to seek asylum, it also recognises that as a matter between States, the right involved in a claim for asylum is the right of the State to grant asylum, not the right of the asylum-claimant to receive it.²⁸¹ However, Article 33(10) of the Geneva Convention Relating to the Status of Refugees 1951 provides that no contracting-state shall *refouler* a non-national to the frontier of a territory where his life or freedom would be threatened. Thus, although a State does not have an obligation to grant asylum, ‘...it does have an obligation not to return someone on its soil to persecution.’²⁸²

With regard to the protection accorded by the Geneva Convention, in order for a claim to be brought, a claimant has to satisfy the requirement of Article 1(A) that owing to a well founded fear of persecution in his country of nationality, he is unable to avail himself of the protection of that country; or who not having a nationality and being outside the country of his former residence, is unable to return to it. However, although the obligation in Article 33(10) applies to claimants in the process of seeking asylum, the obligation is limited to claimants within the territory of the relevant contracting-state. Coupled with the absence of an obligation to grant asylum, the limitation facilitates a State’s ability to develop the reach of its asylum policy, with the result that the success of the Geneva Convention’s individual-application process remains a matter for the contracting-state.

Up until 1993, the UK’s immigration order excluded any significant regard for asylum.²⁸³ However, from 1993 onwards, a process of application referring to the principle of *non-refoulement* was acknowledged in the Asylum and Immigration Appeals Act 1993;²⁸⁴ modified

²⁷⁹ Clayton (2004). Op. cit at 345

²⁸⁰ *Handyside v UK* (1979) 1 EHRR 737

²⁸¹ *T v Home Department* [1996] 2 All ER 865

²⁸² Clayton (2004). Op. cit at 346

²⁸³ A disregard not out of step with the rest of its ECHR neighbours: P. Alston *The European Union and Human Rights* (OUP, Oxford 1999)

²⁸⁴ Hereafter, AIA Act

by the Asylum and Immigration Act 1996,²⁸⁵ the Immigration and Asylum Act 1999²⁸⁶ and the Anti-Terrorist, Crime and Security Act 2001;²⁸⁷ and amended by the Nationality, Immigration and Asylum Act 2002,²⁸⁸ and Asylum and Immigration (Treatment of Claimants) Act 2004.²⁸⁹ However, forming the focus of debate, such provision continued to remain the subject of criticism: not least for what has become a merging of the treatment of terrorism and asylum or an affront to *non-refoulement*, but (arguable) disregard for the rights and freedoms of the individual.

Writing in 1986, Bevan identified a number of themes underlying UK immigration policy: lack of planning; consideration of Commonwealth and international law; bipartisan politics; use of language; and concern for civil-liberties, race relations, and integration.²⁹⁰ Attach to the list a preoccupation with public fear over the social and economic security of the State, and the impact of these themes lead to a post 2000 regime of controversial policy and purpose.

Indeed, throughout the 1990's concern over abuse of the immigration system attracted considerable public attention. The Government responded by introducing legislation aimed at controlling asylum. The first was the AIA Act, which introduced a measure to deal with dishonest claims known as the short-procedure. Satisfying the Government's concern to be seen to be dealing with unmeritorious claims, the theme underlined similar provisions of the AI Act, including the creation of an offence of obtaining leave to remain by deception, the subjection of applications to restricted rights of appeal, and a policy of removal of the claimant to a country designated by the executive as likely to pose no risk of subjecting him to persecution.

Similar provisions followed in the IA Act, the NIA Act and the AI(TC) Act. Section 2 of the AI Act introduced an executive power to remove claimants before their appeal was heard if they had travelled through a country regarded as safe. Other measures continued to focus on counter-acting obtaining asylum by deception by creating a Section 5 offence to deal with persons who engineered entry into the UK for profit, and the imposition of a Section 8 practice of withholding welfare-benefit from claimants.

Despite reservation expressed over the statutory erosion of the right to seek asylum,²⁹¹ the IA Act continued the trend.²⁹² Repealing provisions of the AI Act, the IA Act introduced a number of procedures to discourage illegal-entry and deal swiftly with claimants while their claims were being considered, including a greater use of detention centres. However, whereas a lack of

²⁸⁵ Hereafter, AI Act

²⁸⁶ Hereafter, IA Act

²⁸⁷ Hereafter, ATCS Act

²⁸⁸ Hereafter, NIA Act

²⁸⁹ Hereafter, AI(TC) Act

²⁹⁰ V. Bevan *Development of British Immigration Law* (Croom Helm, Beckenham 1986) 22

²⁹¹ The right to engage the process of seeking asylum, not to a right to receive asylum

²⁹² D. Stevens 'The Immigration and Asylum Act 1996' (1998) *M.L.R.* 61, 2, 201

judicial supervision of the detention process and a right to bail had the effect of according claimants even lesser treatment than that accorded persons detained under a criminal offence, the denial of welfare provision cast doubt over the Act's compliance with the principle of *non-refoulement* by making life so practicably impossible for the claimant, that the better choice was to return and risk persecution.

Regardless of criticism, the IA Act was followed by the Nationality, Immigration and Asylum Bill 2001. Justified as a response to the need to relieve the 72,430 asylum applications per year, the Bill was defined as an initiative to end the practice of individuals making an unfounded application and then residing in the UK while the process of appeal occurred.²⁹³ The proposals included amendment to the British Nationality Act 1981 and the requirement of citizenship; a narrowing of the grounds of Appeal to points of law only; and the placing on claimants a number of restrictions to justice, including a questionable burden of proof. Other risks to established freedoms included the creation of greater security measures relating to the detention, release and removal of individuals, the development of Accommodation Centres, and such proposals as extended powers of search and entry without warrant, and the confiscation of citizenship. Indicating little regard for the individual claimant, the changes were incorporated into the UK system by means of the NIA Act; an act which, according to McKee, arguably 'went so far beyond denying the asylum-claimant any form of HR interest, as to deny him any status at all.'²⁹⁴

Aimed at sorting out the shambolic asylum order created by the NIA Act, the Government responded with the introduction of the AI(TC) Act. Whether its amendments rendered it anything near an anti-shambles act however, was open to question. For example, Section 2 of the AI(TC) Act attempted to address the concern of claimants entering the UK without a lawful travel document by rendering it a criminal offence to enter the UK without a valid immigration document. However, due to circumstances in which a claimant is forced to flee, and by the common practice of an agent who demands that any documentation be returned to him on entry to the UK, the ability of the claimant to satisfy the requirement of Section 2 remained practically impossible.

Similarly, with regard to the process of asylum, Section 26 altered the previous 2-tier system to a 1-tier with the introduction of the Asylum and Immigration Tribunal. However, retaining a right to judicial review of the Tribunal's decision on a ground of error of law only, the provision made no alteration to the former ground which was similarly restricted. Rather, exacerbated by the

²⁹³ HC (Cm. 5387, 2002) (TSO, London)

²⁹⁴ R. McKee 'Fitting the Bill? A Survey Of The Main Proposals In The [NIA] Bill' (2003) 16 *J.A.N.L.* 3. 181

absence of legal-aid to fund appeals,²⁹⁵ and the readiness of legal-practitioners to consider instituting appeals, far from simplifying the system of appeal, the amendments only succeeded in rendering the process even more uncertain. Whereas, Section 27 provided that the only recourse for an unfounded HR claim was an out of country appeal once the claimant has been removed from the UK, in accordance with Section 28 where a claimant arrived with entry clearance from a British diplomatic post abroad and the immigration official at the port of entry cancelled the visa, there would no longer be an in country right of appeal.

In terms of HR protection then, the AI(TC) Act is disappointing, insofar as its provisions have little positive impact on the treatment of the asylum-claimant. For example, in accordance with Section 8, failure by a claimant to produce a valid travel document either at the port of entry or within 3 days without reasonable explanation, will damage the claimant's credibility. Examining the wording of Section 8, it is not unreasonable to suggest that its operation would appear to overstep the constitutional boundary between the role of legislation and the judiciary, by prescribing the way in which the issue of credibility should be dealt.

Finally, on 7th February 2005, the Government published its 5 year plan.²⁹⁶ Envisaging a reduction in the number of asylum-claimants entering the UK, the proposals concentrated on speeding up the removal of failed claimants. Building on the control and surveillance policy of the NIA Act and the AI(TC) Act, claimants awarded the status of refugees would be given limited leave for 5 years provided conditions in their own country did not improve. With regard to control on the entry of claimants to the UK, all future applicants for naturalisation would undergo assessment on their command of the English language, knowledge of life within the UK, and ability to integrate with the community. In respect of satisfying the interests of security, extending restrictions on requirements of entry clearance, all visa applications would be fingerprinted by 2008 and information in travel documents checked against UK data-bases designed to prevent entry of claimants who could pose a risk to security. With regard to asylum-claimants having secured lawful entry into the UK, whereas after entry controls would include an increased enforcement of provisions against illegal working, the practice of those having settled sponsoring family members would no longer be permitted, until the claimant had been settled in the UK for not less than 5 years, or granted full British citizenship.

It was during this climate of control and surveillance that the HRA was introduced, and an asylum claim theoretically capable of forming the basis of legal argument. Whether such has translated into practice however, is best assessed by examining the impact of the ECHR order in

²⁹⁵ Which up until 3rd April 2005, franchised firms were able to obtain through the Legal-Services Commission

²⁹⁶ *Controlling our Borders: Making Migration Work for Britain (2004-2005)* (Cmd. 6472) (TSO, London)

areas where HR claims have arisen most: the removal and detention of claimants, and their treatment throughout the asylum process.

The ECHR and the UK Asylum Order

(1) Removal of Asylum-Claimants

Article 1 of the ECHR provides that a signatory-state is obliged to ensure that the rights and freedoms of the ECHR must be secured to everyone within its jurisdiction. An asylum-claimant can make a HR claim against treatment arising from the asylum process; there is no requirement of lawful presence. Although Article 1 was not included in the HRA, the statute contains no provision excluding persons on grounds of status. Section 7 provides that its provisions are open to anyone who would be a victim for the purposes of Article 34 of the ECHR. Section 6 of the HRA makes it unlawful for a public authority to act in a way which is incompatible with the ECHR, including a failure to act. What then is the position of a claimant against whom direction for removal has been issued, who attempts to rely on the ECHR?

Although since 1993 there is a statutory process of asylum application, when an application is refused there is no right of appeal against the refusal as such, only against the associated immigration decision. An appeal against a decision on the basis that the decision infringes a HR is made not using the HRA, but the NIA Act. Under Section 84(1)(c) a claimant may lodge an appeal against a decision to remove him with the relevant adjudicator, on the ground that removal is unlawful under Section 6 of the HRA. However, the ability to remove an asylum-claimant remains a power exercised within a statutory regime governed foremost by the Immigration Act 1971, as amended by the IA Act and the NIA Act.

There are 2 powers of removal: that of immigration-officers to remove claimants having been refused leave to enter, or having been found to be illegal entrants; and that of the State to remove those having overstayed their leave, obtained leave by deception, or breached a condition of leave. The relationship between HR protection and the exercise of both powers is interesting.

Schedule 2, Paragraph 8(1) of the Immigration Act 1971 provides that where a claimant is refused leave to enter he may be removed on the direction of an immigration-officer. Section 92 of the NIA Act affords such claimant a right of an in country appeal where he holds either a valid entry clearance or work permit, is an EEC national, or has made an appeal grounded on HR. Further, whereas Section 77 of the NIA Act provides that a person who has claimed asylum shall not be removed until their claim has been determined, Section 78 provides that a claimant who is entitled to pursue a right of an in country appeal, shall not be removed while that appeal is pending. Both provisions are subject to exceptions. By virtue of Section 11 of the IA Act, the

Secretary of State may order the removal of a claimant to an EU member-state under a standing-arrangement.

Secondly, Section 12 deals with the removal of claimants to countries other than those covered by Section 11 which as EU members, or listed in the Asylum (Designated Safe Third Countries) Order 2000, are unlikely to subject the claimant to ill-treatment. In the majority of cases the claimant will not be entitled to remain in the UK while his claim is decided. One exception is that removal under Sections 11 or 12 can not take place where the claimant has lodged an appeal on the basis that the decision to remove is unlawful under the HRA. However, whereas by virtue of Section 93 of the NIA Act, the Secretary of State has the power to certify that an appeal against removal based on HR is unfounded, in which case the claimant will lose his right of in country appeal and be removed from the UK; by virtue of Section 94(7), the Secretary of State has the power to remove the claimant's right to an in country appeal where it is proposed that he be removed to a country where there is no reason to believe that his ECHR rights will be breached. Highlighted by Clayton, the use of the words in Section 94(7) 'no reason to believe' is telling: Suggesting 'a different standard of protection from that in the [Geneva Convention]...at its lowest, it would enable the Secretary of State to make a decision simply without assembling all the evidence,'²⁹⁷ while at its highest, constitute an affront to the rationale of asylum itself, including the obligation of *non-refoulement*.

However, the wording of Section 94(7) is not the only concern to be raised against the NIA Act. Section 94(3) provides that if the Secretary of State is satisfied that a claimant is entitled to reside in a state listed in Section 94(4) he shall certify the claim. Whereas the use of the word 'shall' creates a duty on the Secretary of State to certify, thus limits the scope for judicial review of the exercise of discretion, there is a presumption that this duty will be exercised unless the Secretary of State is satisfied that there are reasons to the contrary. The burden of proof is on the claimant to show that the claim is not unfounded.

Secondly, analogous to the issue of a Home Office certificate under the ATCSA limiting the SIAC from considering an appeal where a claimant's removal is imminent, the ability of the Secretary of State to certify a claim as unfounded, coupled with a practice of identifying certain countries as safe, brings into practice a dependence on generalized statements which rests awkwardly with the requirement to prove that the particular claimant is at risk.

Thirdly, with regard to the functioning of Sections 93 and 94 of the NIA Act, whereas under the IA Act the removal of a claimant could not be ordered while a HR appeal was pending, following Section 78 of the NIA Act, such a direction can now be given. Added to the fact that

²⁹⁷ Clayton (2004), Op. cit at 407

the issue of certification is *prima facie* unchallengeable, inclusion of a country on the list of safe countries unquestionable, and the ability of the Secretary of State to certify extended so as to include part of a state safe in relation to specific groups of claimants, the NIA Act serves to illustrate the reality of any attempt to afford universal HR credible protection in an area dominated by national politics. Although the NIA Act acknowledges a right of appeal on HR grounds, it continues to maintain the State's unchallengeable position in the asylum process. In this sense, any practicable effect of the HRA remains subjugated by the politically perceived need of the time: to control asylum. A subjugation evidenced in the removal under Section 10 of the IA Act of a full right of in country appeal formerly accorded a number of offences previously characterised as grounds for deportation under the Immigration Act 1971. What then is the real effect of the HRA on the concern of removal?

The Value of Article 3

One frequent argument in relation to removal of the asylum-claimant is that it could constitute a violation of Article 3 of the ECHR. On first appearance, it would appear that Article 3 would respect the fundamental value that no one should be subjected to torture, inhuman or degrading treatment or punishment. The Article is an absolute right in that it cannot be breached, even in the event of a state of emergency²⁹⁸ and irrespective of the claimant's conduct.²⁹⁹ In relation to the politically charged area of asylum however, the absolute nature of Article 3 is not quite so straightforward.

Firstly, not all forms of harmful treatment invoke the protection of Article 3. With regard to torture, the term attaches meaning only to deliberate treatment causing serious suffering; with regard to inhuman treatment, treatment must reach a minimum-level of severity of physical or psychological harm; and with regard to degrading treatment, the debasement must obtain a level of seriousness relative on the circumstances.

Secondly, the ECHR governs the conduct of signatory-states in relation to what is acknowledged by the ECtHR as a margin of appreciation: the right of a signatory-state to control the entry, residence, expulsion and removal of non-nationals. In accordance with Article 3, the signatory-state is obliged to safeguard asylum-claimants in respect of whom there are grounds for believing that there is a risk of their being subjected to torture, inhuman or degrading treatment, if removed from the state. A signatory-state will be found to be in breach of Article 3 if it seeks to remove a claimant to a country where there is such a risk, or where removal itself constitutes treatment contrary to Article 3. If the substance of a claim is made out, then asylum status will be granted and Article 3 adds nothing to the claimant's protection. Where a claim fails and there

²⁹⁸ *Ireland v UK* (1978) 2 EHRR 25

²⁹⁹ *Chahal v UK* (1997) 23 EHRR 29

is a need for an inquiry into whether the claimant's removal from the signatory-state will constitute a breach of Article 3, Article 3 then becomes relevant.³⁰⁰ However, in practice, direction for an asylum-claimant's removal can be given by the Secretary of State without any independent intervention. The effect of the HRA is that such power can be mitigated by a right of appeal, or judicial review which can suspend a removal. Post 2000, an Adjudicator is obliged to consider the effect of removal on the claimant and restrained from affecting a removal where its execution could subject the claimant to the risk of an ECHR violation.³⁰¹ One of the features of the UK's constitutional order is that the judiciary remain independent from the executive. However, insofar as the argument to support a premise that Article 3 should remain no more than a consideration to be balanced against the greater public interest is evidenced throughout UK case-law, the judiciary has continued to exert its own influence over the absolute nature of Article 3. Whereas in *Ullah v Special Adjudicator* and *D v Home Department*³⁰² the Court reasoned that the ECHR could not have been intended by its signatories to curtail the international right of a state to remove non-nationals from its own territory; in *N v Home Department*³⁰³ the reasoning in *Ullah* and *D* was accorded the status of established principle. Serving as an indication that the HRA does not necessarily generate delivery of HR protection, the judiciary in all three cases held that the initiative could not be treated as having been intended to constrain a state's right to deal with its own national concerns.

Indeed, examining the UK judiciary's handling of the absolute nature of Article 3 post 2000 is interesting. The popular understanding of the ECHR as a 'living instrument' implicit in the ECHR order would appear to indicate reasoning not averse to a lowering of the threshold of seriousness required to invoke Article 3.³⁰⁴ In contrast, in a climate domineered by concern over the effects of asylum and economic migration, the reasoning of the UK Judiciary has differed significantly. Highlighting a disparity in the application of Article 3, in *Hilal v UK* the ECtHR was called on to examine the UK's approach toward the relevance of a medical report in support of an asylum-claimant's allegation of his having been subjected to Article 3 treatment.³⁰⁵ Because the report had not been presented at the claimant's initial interview, it was refused admissibility as evidence, on the ground that its late submission went to a lack of credibility. The ECtHR held that, although the UK authority had expressed doubts as to the authority of the report, they nevertheless had failed to provide evidence to substantiate them. The approach constituted a departure from the relevance attached to the concern of credibility from that applied by the UK Court, where doubt alone was held to constitute lawful reason for refusal.

³⁰⁰ *R (Mbanjabahizi) v Immigration Appeal Tribunal* [2004] QBD Admin

³⁰¹ *Bataya v Home Department* (2003) EWCA Civ. 1489

³⁰² [2003] 1 WLR 770

³⁰³ [2003] EWCA Civ 1369

³⁰⁴ *Selmouni v France* (1999) 29 EHRR 403

³⁰⁵ (2001) 33 EHRR 2

Another way in which the UK departed from ECtHR reasoning in relation to the application of Article 3 was exemplified in its response to the ruling in *D v UK*.³⁰⁶ Called on to examine the likely subjection of a claimant to the risk of inadequate medical treatment in the country to which he was to be removed, the ECtHR held that removal of a claimant in an advanced state of AIDS in receipt of terminal-care to a country where treatment was not available, constituted a breach of Article 3. In contrast, and grounded on the reasoning in *Ullah* and *D*, in *N v Secretary of State for the Home Department*³⁰⁷ the Court of Appeal advanced a distinction regarding the application of Article 3 between the type of treatment which was likely to occur in the country to which a claimant was to be removed, and that which would result from a lack of medical facility in the receiving country. The Court held that the ECHR was not intended to interfere with a state's ability to make whatever immigration order it saw fit, therefore any impact which the ECHR would have, would be limited to only that form of treatment which could be termed positive, and even then, in exceptional circumstances. The effect of the ruling is obvious: 'There is no doubt that [*D*] was an extreme case. However in distinguishing it as [it] did...the Court of Appeal [seemed to move] away from the established [ECtHR] doctrine in *Soering v UK* that it is the expulsion which is the breach. The ECtHR in *Soering* expressly disavowed any claim to judge the [HR] standards in the receiving country. In these cases the [UK] Court parted company with the ECHR and in *R (Bagdanavicius)* ...held that it was necessary, by way of a standard, to consider the application as if the ECHR was in force in the receiving country.'³⁰⁸

The Value of Article 8

The second common ECHR basis of challenge in respect of asylum is Article 8. Paragraph 1, provides that everyone should have a right to respect for his private and/or family life, home and correspondence.³⁰⁹ The functioning of Article 8 invokes the imposition of a positive obligation on the signatory-state to exercise respect for the personal life of the asylum-claimant,³¹⁰ as well as, what is referred to in *ECO Dhaka v Shmin Box*,³¹¹ as a negative obligation to refrain from interfering.

Applied to removal, even where an application for asylum has failed, a claimant may raise the right to remain grounded on Article 8.³¹² In practical terms, where the claimant has built up a personal life in the UK prior to determination of his claim, consideration should be given not only to his long term ability to remain, but to the circumstances surrounding the stage that his application has reached. Certainly, where children have been born to the claimant during his

³⁰⁶ (1997) 24 EHRR 423

³⁰⁷ [2003] EWCA Civ 1369

³⁰⁸ Clayton (2004), Op. cit at 79

³⁰⁹ Hereafter, personal life

³¹⁰ *Marckx v Belgium* (1972) 2 EHRR 330

³¹¹ [2002] UKIAT 02212

³¹² *Kacaj v Home Department* [2001] INLR 354

residency, this will affect his claim *per se*. In such a case, a claim will be based on both a fear of persecution either in the country of origin or prior residence in accordance with the Geneva Convention, and a ground that removal could result in a breach of Article 8. Ideally, it is a rare instance in which removal of a claimant after his having been resident in a signatory-state for a significant period of time,³¹³ or dependent on a family already lawfully resident in the signatory-state³¹⁴ will not constitute interference with his personal life. However, unlike the absolute nature of Article 3, the right under Article 8 is qualified in that it can be interfered with in accordance with law and as necessary to protect a greater state interest.

According to Blake,³¹⁵ examining the broadness of the qualification, despite the argument that immigration control is not of itself an end capable of justifying an interfering measure, but a medium through which other legitimate aims may be pursued,³¹⁶ respect for Article 8 does not prevent the signatory-state from developing lawful provision which conflicts with a claimant's personal life.³¹⁷ As a matter of international principle, a state has the right to regulate its own immigration concerns. Accordingly, and acknowledged in the ruling of the Court in *Abdulaziz, Cabales and Balkandali*,³¹⁸ the ECHR order accorded signatories a wide margin of appreciation in the way in which control was implemented. Highlighted by Rogers 'the repercussions of [the reasoning in *Abdulaziz*] was that [signatory-states] would...be afforded a margin of appreciation at the point when it was to be determined whether an obligation existed in the case of a positive obligation; whereas in the context of a negative obligation, it would only play a role at the stage of determining whether a breach of the obligation was justified.'³¹⁹ Applied to the concern of removal, protection arises only from the claimant's ability to satisfy a burden of proof that his removal will constitute an unjustified interference insofar as there is an insurmountable obstacle,³²⁰ or some other reason why a removal would render it impossible for him to establish his personal life elsewhere.

Following *Abdulaziz*, determination of a claim concerning Article 8 was carried out by the weighing on a case-by-case basis the effect of the interference on the right in question. The balance was achieved by determination of whether the removal of a resident non-national with personal ties corresponded to a pressing social need and was proportionate to the legitimate aim to be pursued.³²¹ The approach formed the focus of *Boughanemi v France*.³²² Called on to examine application of Article 8 to the expulsion of a long term resident non-national following

³¹³ *Moustaquim v Belgium* (1991) 13 EHRR 802

³¹⁴ *Nasri v France* (1995) 21 EHRR 458

³¹⁵ N. Blake, *Immigration, Asylum and Human Rights* (OUP, Oxford 2003) 170

³¹⁶ *R (Backwood) v Home Department* [2003] EWHC 78

³¹⁷ *R (Samaroo) v Home Department* [2001] UKHRR 1150

³¹⁸ (1985) 7 EHRR 471

³¹⁹ N. Rogers, 'Immigration and the European Convention on Human Rights' 2004 *E.H.R.L.R.* 1, 59

³²⁰ *Sorabjee v UK* (1995) No. 23938/93, October 23 1995

³²¹ *Berrehab v Netherlands* (1989) 11 EHRR 322

³²² (1996) 22 EHRR 228

the commission of a criminal offence, the court considered that a more certain handling of Article 8 was to invoke the position that the right to a personal life was a right to be unconditionally acknowledged, unless the interference in question was one specified in Paragraph 2. Applied to the facts in *Boughanemi*, the approach led the Court to regard the removal of an integrated non-national as an Article 8 breach, which could only be justified where the non-national had been found guilty of a serious criminal offence.

Hailed as a landmark in HR protection, the reasoning in *Boughanemi* constituted what was regarded as a move toward satisfying the *telos* of the ECHR as advocated in *Boldjoudi v France*: a fact-specific consideration of the harm to be inflicted by removal of the claimant, as opposed to an examination of the underlying purpose of the intervening measure.³²³ The approach received support in both *Boujlita v France*³²⁴ and *Bouchelkia v France*,³²⁵ as well as acknowledgement in the ECtHR's clarification in *Ciliz v Netherlands* of the object of the ECHR to protect foremost the rights of the individual. Representing in the opinion of Rogers, redress of the imbalance between the weight accorded a state interest and the concern of the individual,³²⁶ the ruling in *Ciliz* constituted a relieving of the burden placed on the claimant to prove insurmountable obstacles, toward greater emphasis on the obligation on the signatory-state to justify its interference.

For example, called on to examine the effect of an expulsion of a claimant following his proven involvement in the commission of a criminal offence, in *Boultif v Switzerland*³²⁷ the ECHR order admitted to its tendency to accord limited consideration to what could constitute an insurmountable obstacle, and in reaching a decision whether the claimant's family could be expected to follow him to the country where he was to be expelled, laid down a list of factors to be considered:

- The nature and seriousness of the offence in question;
- The time elapsed since the offence was committed, and the conduct of the claimant during that time;
- Effect of an expulsion on the claimant's family;
- Factors which could render the claimant's private life unworkable.³²⁸

In terms of the impact of Article 8 on the rights of the non-national then, the approach of the ECtHR from *Boughanemi* onwards, coupled with a broad interpretation of personal life,

³²³ (1992) 14 EHRR 801

³²⁴ (1997) 30 EHRR 419

³²⁵ (1998) 25 EHRR 686

³²⁶ Rogers (2004). Op. cit at 62

³²⁷ (2001) 33 EHRR 50

³²⁸ *Yildiz v Austria* [2003] 2 FCR 182

suggests a move by the ECrtHR away from the dominance of the interest of the signatory-state toward greater emphasis on the claimant.³²⁹ In contrast, the impact of the ECHR on the UK courts has proved far less certain in terms of the protection accorded the non-national. Whereas, the nature of Article 8 is such that the burden of proof alters when different factions of the provision are raised; insofar as emphasis is laid on the principle of proportionality, the standard of proof is different to that which common-law lawyers are ordinarily familiar.³³⁰

How to apply Article 8 to the long term non-national resident formed the focus of *Nhundu and Chlwera*.³³¹ In accordance with the Immigration Appeal Tribunal, in order to satisfy the *telos* of Article 8, a step-by-step assessment of whether the interference constituted a violation of the claimant's personal life should be adopted which included asking:

- (1) Whether the relationship to which the claim related constituted a personal relationship;
- (2) Whether the act/omission constituted an interference with the claimant's personal life;
- (3) Whether the interference was justified as a legitimate attempt to pursue a purpose necessary in a democratic society;
- (4) Whether the interference was proportionate to the legitimate aim pursued.

The approach stood in contrast with the reasoning of *R v Home Department, ex-parte Mahmood*.³³² Called on to determine whether the Secretary of State's refusal of an application for judicial review of a decision to remove a claimant constituted a violation of Article 8, the Court held that where a personal life was established, removal would not constitute an unjustifiable interference where the claimant could continue that life in the country to which he was to be removed. In reaching its decision, the Court declined to consider either the question of legitimate aim, or the application of the principle of proportionality, but went on to lay down a number of principles which a court ought to adopt when determining conflict between a proposed removal and Article 8:

- (1) When examining the relevance of ECHR guidance, the decision-maker would be advised to uphold the rule of international law that a state maintains a right to control the movement of non-nationals;
- (2) Article 8 does not impose an obligation to respect the choice of residence of a claimant;

³²⁹ *Moustaquim v Belgium* (1991) 13 EHRR 802

³³⁰ Whereas the evidential Burden falls on the claimant to establish that interference with his interest constitutes a breach of Article 8, it falls on the state to show that the interference was justified

³³¹ (01/TH 000613) ILU (4), 14, 227

³³² [2001] 1 WLR 840

- (3) Removal of a family member where others are lawfully resident, will not infringe Article 8 where there are no insurmountable obstacles to the family residing together in the country to which they are to be removed;
- (4) Knowledge on the part of the claimant's spouse, at the time of marriage, that the claimant's right of residence was precarious, automatically works against a finding that removal violates Article 8;
- (5) Whether an interference with Article 8 is lawful will depend on all the facts of the case, as well as the circumstances prevailing in the country whose action is impugned.

The ruling in *Mahmood* constituted a classic Diceyan example of common-law reasoning. Grounded on what appeared to be its understanding of the ECtHR's ruling in *Abdulaziz* of the need for the claimant to show that there were reasons why he should not be expected to establish his personal life other than in the UK, the Court reasoned that the concerns of legitimate aim and proportionality were issues best left to the state. The reasoning was based on acknowledgement of the margin of appreciation accorded to signatories in the exercise of a positive obligation. Following the argument that by admitting into its order such a principle, the ECHR needed not to be applied uniformly, but varied in its application according to needs and conditions,³³³ in the opinion of the Court, the right of a signatory-state to control its own immigration concerns proved the exception to the protection ordinarily afforded by Article 8.³³⁴

Both the approach of *Mahmood*, and its reasoning, was followed in *Baljit-Singh*.³³⁵ According to *Baljit-Singh*, unless there were exceptional reasons as to why the claimant should not be removed, removal on facts similar to *Mahmood* was lawful. The reasoning of the Court was not without criticism.

Apart from a lack of concern with the construction of the principle of proportionality by the ECtHR, the logic of *Mahmood* disregarded the formulation of the principle expressed by the ECtHR and advanced by the Privy-Council in *de Freitas v Ministry of Agriculture*.³³⁶ Called on to determine whether the immigration measure in question constituted an Article 8 violation, *de Freitas* advocated a 3-point approach which the relevant authority should adopt in the determination of an Article 8 claim:

- (1) Whether the legitimate aim in question was sufficiently important as to justify limiting the claimant's right or freedom in question;
- (2) Whether the interfering measure was designed to meet the legitimate aim in question;

³³³ *R v Director of Public Prosecutions, ex-parte Kelbine* [1999] 4 All ER 80

³³⁴ *Samaroo v Secretary of State for the Home Department* [2001] UK HRR 1150

³³⁵ [2002] UKIAT 00660, ILU, (5) 8

³³⁶ [1999] 1 AC 69

- (3) Whether the means used to impair the right or freedom was no more than necessary to accomplish the legitimate object.

The 3-point approach held particular appeal for Clayton.³³⁷ Firstly, whereas the first point applied to removal would satisfy the question as to whether the interfering measure complained of was necessary in a democratic society, the second and third points would prove more than effective in determining the question of proportionality.

Secondly, in accordance with the *telos* of the ECHR, it is arguable that while examining the application of Article 8, the UK should render its treatment consistent with the fact specific handling of the concern of proportionality characteristic of ECtHR jurisprudence, as opposed to the mere assessment of the rational connection between the legitimate aim to be achieved in the limitation of an individual's right, and the measure taken to achieve it.

Thirdly, in *Baljit-Singh*, the reasoning of the court was based on the premise that the non-national and his family would be removed unless there were exceptional reasons. Although in both cases the ruling was influenced by the fact that the claimant was fully capable of making an entry clearance application as a spouse in the country to which he was to be removed, such logic is problematic: 'The fact that there is...alternative course of action for the person to be removed is not of itself decisive of the question of whether removing him is proportionate to the aim to be pursued. [Rather] it is [merely] a factor to be taken into account...'³³⁸

Regardless of international commitment then, the treatment of non-nationals remains primarily a matter of state concern. Accordingly, decisions regarding removal can be explained not only by what is at stake for the claimant, but what is at stake for the signatory-state in the maintenance of immigration policy. The HRA is appraised as the means by which a failed asylum-claimant may be able to remain within his state of refuge on the basis of preserving his HR. On analysis however, this is more often than not because of the risk of the state committing a breach of Article 3. Enshrining one of the fundamental values of liberal democratic society, Article 3 is strictly enforced by the ECtHR which prohibits interference in absolute terms irrespective of the existence of a state of emergency or the claimant's conduct. Although it is arguable that once a finding that a removal would invoke Article 3, then this is ordinarily conclusive of the issue, in contrast, the effect of Article 8 is far less certain. The approach adopted by the UK continues (in the main) to have little regard for the *telos* of the ECHR³³⁹ In the case of a removal, it is arguable that the individual is removed not only as a means of facilitating the public good, but also for

³³⁷ Clayton (2004). Op. cit. at 378

³³⁸ *Ibid.* p. 94

³³⁹ *Cetin v Home Department* [2002] UKIAT 06272

being one of a group in relation to whom there is a statutory provision which serves to procure a particular policy aim.³⁴⁰

(2) Detention

Power to detain asylum-claimants to be removed, or seeking entry to the UK, is contained in Schedules 2 and 3 of the Immigration Act 1971, and Section 62 of the NIA Act. Detention is used where there is a reasonable belief that a claimant will fail to keep the terms of his temporary admission or release; where time is necessary to confirm the basis of a claim; or where it is necessary to effect a lawful removal or deportation. Prior to 2000, detention was used as a last resort for enforcing a refusal of leave to enter, Government policy preferring to grant temporary admission subject to conditions or release. In March 2000 however, a change was introduced in relation to asylum. Where it was thought that an application could be dealt with quickly then a claimant could be detained at a Reception Centre for a period of 7 days with a view to resolving his status. The change represented one of a number of alterations reflecting the Government's seeming determination to increase its control over asylum. Accordingly, detention formerly governed by the Immigration Act 1971, was extended by means of specific provision for the use of detention centres.

With regard to the second category of detention, the power to detain an asylum-claimant is a general administrative power exercisable by Chief Immigration-officers and the Secretary of State. Auxiliary to immigration control, the power to detain in accordance with Schedule 2 of the Immigration Act 1971 is accorded Chief Immigration-officers over immigrants on entry to the UK pending their subjection to examination, and/or their removal. Prior to the NIA Act, the Secretary of State was responsible for all in country decisions to grant or vary leave to remain, deport, or detain pending deportation. However post 2000, the power was extended. By virtue of Section 62(1)-(7) of the NIA Act, the Secretary of State is accorded the power to either grant the claimant leave to enter, or to order his detention pending examination or the decision to remove. Examining the effect of the increase in executive power is instructive.

Extending the power of detention,³⁴¹ the NIA Act granted the Secretary of State power to detain where he had grounds to suspect that he might make a decision to refuse leave to enter, or a direction to remove. In the opinion of Clayton, this was 'strange indeed: raising the Kafkaesque spectre of detention ending at the point where the Secretary of State decides not to make a decision, or of a person being detained when the Secretary of State suspects that he is about to grant leave to enter... The use of the word 'suspect' is also peculiar, suggesting a kind of

³⁴⁰ *Vandi v Home Department* [2002] UKIAT 05755

³⁴¹ By broadening the grounds for removal and abolishing former restrictions on the power to detain pending removal in relation to claimants in respect of whom direction for removal had already been given

introspective self-policing by the Secretary of State.³⁴² Albeit, the intention of the drafting seems to have been to make the power to detain as wide as possible without invoking these extremes, in accordance with the drafting of the NIA Act, the possibility for invocation of such extremes remain.

Further, examining the *tenor* of the NIA Act, it is arguable that the detention of a claimant is analogous to the treatment of criminal detention, except the asylum order permits detention of claimants who are neither charged, nor suspected of any criminal offence. Such treatment raises questions about the lack of policy criteria for the respect of the rights of the claimant. Throughout the asylum order the power to detain is discretionary. Any restraint on that discretion in the form of guidelines does not have the force of statutory authority. As a result, although failure to have regard to guidelines may give rise to a challenge in administrative law, a lack of statutory control over the exercise of discretion facilitates an unquestionable domination of the asylum order by the State.

Such lack of control was analysed by Weber.³⁴³ Examining the practicality of Immigration Directorate Instructions to Immigration-officers on the subject of detention, Weber highlighted the tendency for replacement of consideration of the merits of a case with routine decision-making and the development of local trends to expedite claims. Grounded on an implied direction to Officers not to examine the need of the claimant, but the swiftest way to deal with his claim, the application of detention policy highlighted a contradiction at the core of the asylum order. In accordance with instructions, Immigration-officers were directed to consider not only the length of detention that a claimant would be subjected to, but his likelihood of removal. Such considerations were to go to the Officer's decision whether to detain the individual in question. Technically, the Immigration-officer was charged with the task of forming a personal judgment as to the substance of a claim: whether the claimant was likely to be removed from the UK, and if so, whether sooner rather than later.

The amendments (arguably) reflected the post 2000 objective of the Government to increase its hold on asylum. However, highlighting the state's ability to devise almost unlimited stratagem to deal with a claimant, one controversial exercise of the power of detention was its application to the most technically complex form of asylum-claimant: the family unit.

Despite the fact that by its nature the family unit gives rise to its own considerations, a policy change indicating greater pre-occupation with public hostility toward asylum-claimants and their perceived impact on housing, health-care and employment, underlined the Government's move

³⁴² Clayton (2004), Op. cit at 440

³⁴³ L. Weber *Deciding to Detain* (Cambridge Institute of Technology, Cambridge 2000)

to increase the detention of asylum families.³⁴⁴ The result was an increased demand on authorities to make readier use of detention, an alteration to criteria concerning the handling of the family unit, and the putting into effect a will to bring the treatment of the family into line with that of the individual claimant.

The policy stood in contrast not only with the *telos* of the ECHR, but the use of detention prior to 2000 as a last resort to be exercised as near to the family's removal as possible. Examining the Government's rejection of opposition against amendment to the NIA Bill, which would have prohibited the detention of young persons for more than 10 days, the impact of the UK's reservation to Article 22 of the United Nations Convention on the Rights of the Child³⁴⁵ formed the subject of criticism by Blake.³⁴⁶

Article 22 of the UNCRC provides that state-parties shall take appropriate measures to ensure that a child seeking refugee status shall receive protection and assistance in accordance with any international HR instrument to which the signatory-state is party. The implications of the UK's reservation can be highlighted as follows:

- To exclude the principle that decisions concerning children should be taken in their best interest, as required by the Children Act 1989, and the UNCRC;
- To assert the primacy of executive discretion in the implementation of a system of asylum control.

Examining the underlying policy considerations, Blake concluded that it was inconceivable that any relevant authority could contemplate even short term detention of the child asylum-claimant for the sake of administrative convenience. Yet, the new policy of child detention constituted an interference with Article 8, and a disregard of the guidance given in the Operational Enforcement Manual which recognised a right to a family life and advised that detention should only be used where it was necessary to achieve one of the legitimate aims set out in Article 8. Accordingly, 'the October 2001 policy change toward more detention of families [raised doubt] as to whether detention [was] being used only where strictly necessary, particularly given that the...change was not based on evidence, but a minister's recognition.'³⁴⁷ This, according to Clayton, seemed dangerously to elevate executive discretion over all other counter-veiling factors. However, the elevation of executive discretion constitutes only one reason amongst many for concern.

³⁴⁴ Letter from the Home Office to Immigration Services Detention Policy Unit, 18th June 2002, *quoted in* E. Cole 'The Detention of Asylum-Seeking Families in the UK' (2003) *I.A.N.L.(17)*, 2, 96-113

³⁴⁵ Hereafter, UNCRC

³⁴⁶ Blake (2003), *Op. cit* at 170

³⁴⁷ Clayton (2004), *Op. cit* at 447

Firstly, it is arguable that the risk of absconding is being used as justification for the detention of families, and young persons without detailed or meaningful assessment of the risk. Standing in violation of the ECHR requirement that detention be used only where necessary to achieve one of the aims set out in Article 8, throughout the asylum process a claimant can just as easily be detained because the facilities for detention are available, as opposed to the result of a full enquiry in accordance with the principles of necessity, proportionality, and appropriateness of detainment.³⁴⁸

Secondly, in April 2004, amendment to the funding arrangements for asylum was introduced with the purpose of reducing costs. Forming the focus of general criticism, reduction in the amount of financial assistance available for legal work has resulted in the withdrawal of previously well established legal-practitioners from the field of immigration practice leaving a dearth in expertise, with obvious consequences for the claimant.

Thirdly, in accordance with powers afforded under the Immigration Act 1971, IA Act, NI Act and NIA Act, asylum authorities are empowered with the ability to detain an asylum-claimant who seeks asylum in the UK. No judicial review of the decision to detain is required. Whether such lack of independent oversight constitutes a bar to the ability of the detainee to effectively challenge any state decision, this thesis examines the position of an asylum-claimant who questions the lawfulness of his detention in terms of its justification and/or its duration, as well as his apparent inability to seek independent review, and the effect of the HRA on the UK's ECHR commitment to extend to everyone within its jurisdiction the protection of those fundamental rights and freedoms set down in Section 1 of the ECHR.

A decision to detain an asylum-claimant is not a decision as to a refusal, or a grant of leave of entry. Accordingly, a decision to detain is not appealable under Section 82 of the NIA Act. However, this is not to suggest that detention is never subject to review. Although detention is not subject to statutory control, a number of principles governing the lawfulness of detention in terms of duration and the exercise of discretion to detain, have developed at common-law.³⁴⁹ However, albeit such safeguards do exist, their effectiveness remains a matter of debate. For example, whereas the process of judicial review remains relevant in relation to the exercise of state authority, the use of *habeas corpus* to challenge the lawfulness of asylum detention is limited. Section 140(1) of the IA Act permits detention where there is a reasonable suspicion that direction for removal of the asylum-claimant may be given. Unless there is no reasonable suspicion, or detention is excessively long, the question turns from whether the detention was

³⁴⁸ Cole (2003), Op. cit at 100

³⁴⁹ For example, whereas the lawfulness of detention can be challenged by way of *habeas corpus*, in accordance with Schedule 2 of the Immigration Act 1971 (regarding asylum), and Section 54 of the IA Act (regarding deportation), the asylum-claimant has a right to apply for bail. In accordance with common-law presumption, the Burden of proof to show that bail should not be granted, rests firmly on the asylum authority

unlawful, to whether the jurisdiction to detain was exercised appropriately. Similarly, difficulties in the claimant's ability to apply for bail (from his obtaining suitable legal representation from a depleting pool of specialist legal-practitioners, to his satisfying conditions of bail, recognisance or sureties) renders the process as likely to effectively address the lawfulness of detention, as the operation of *habeas corpus* is likely to give rise to full and frank analysis of the effect of a decision on the rights and freedoms of the asylum-claimant.

The Value of Articles 5 and 6

The ECHR evinces a concern against the arbitrary use of state detention mirrored in Article 9 of the United Nation's Declaration of Human Rights, and Article 9 of the International Covenant on Civil and Political Rights. Article 5 of the ECHR deals with the right to personal liberty and security, commencing with the presumption that everyone has such a right, except where the state exercises the authorised purpose of interfering either to prevent unauthorized entry, or to execute detention of a person against whom lawful action is being taken with a view to their removal. Article 5 subjects such interference to the requirement that it be in accordance with a procedure prescribed by law; and annexes to it a number of due-process rights: including the right to be informed of the reason for detention; to a hearing within a reasonable time; and the right to initiate legal-proceedings to challenge the lawfulness of any decision to detain.

Although not intended to subjugate the principle that a state has power to control the entry of non-nationals, unlike the qualified rights of the ECHR, whose sanctioned purposes for interference is expressed in terms of prevailing national policy, the purposes for interference sanctioned by Article 5 are more specifically defined by the ECHR order. Thus, concerning a challenge by an applicant to a deportation order grounded on national security, in *Chahal v UK*³⁵⁰ the lack of judicial involvement in the deportation process constituted a breach of Article 6. Under the Immigration Act 1971 there was no impartial right of appeal against a deportation order. Although the deportee was availed with an opportunity to make representation, the process involved only the inclusion of the opinion of an advisory panel of three advisors appointed by the Home Office. Although, following *Chahal*, the procedure was amended by the Special Immigration Appeals Commission Act 1997, what remains of interest in *Chahal* is the approach of the ECtHR.

Examining the ECHR requirement of impartial judicial authority, the ECtHR maintains that Article 5(4) requires that everyone deprived of liberty is entitled to an impartial and speedy review of the lawfulness of deprivation. According to the ECtHR, the principle of lawfulness inherent in Article 5 requires that deportation proceedings be carried out with all due diligence to

³⁵⁰ (1997) 23 EHRR 413

protect the applicant against arbitrariness. Accordingly, the approach of the ECtHR is to accord Article 5 a narrow interpretation, in which regard for what may constitute the public interest is not necessarily conclusive. The approach stands in contrast to the reluctance of the court in *R v Home Department, ex-parte Hosenball* to look behind the Home Secretary's assertion that in the event of 'conflict...between the interests of security...and the freedom of the individual...the balance between [the] two is not for a court of law...[but] the Home Secretary.'³⁵¹

Further, regarding the definition of lawfulness accorded by the ECtHR, whereas detention must be carried out in accordance with a substantive process of law,³⁵² the quality of that process must be compatible with the rule of law³⁵³ and satisfy the general principle against arbitrariness.³⁵⁴ Thus, concerning a question of procedural fairness, in *Conka v Belgium* the ECtHR held that where the purpose for detention given to a detainee is misleading, unclear or imprecise, then insofar as the purpose contravenes the principle against arbitrariness, detention constitutes an indirect breach of Article 5. The facts of *Conka* are interesting. A notice requesting claimants to attend police stations for the purpose of up-dating details regarding their applications for asylum was issued by the Belgium police. When the claimants attended they found themselves served with orders for removal, detained and then removed. Criticised by the ECtHR as state-engineered fraud, the notice issued was held to constitute action leading to detainment by deception. The facts of *Conka* echoed the findings of Weber's 2000 analysis of the UK asylum order.³⁵⁵ Examining a number of cases where claimants were called to attend an interview to hear the result of their asylum decision, the statements of some of the immigration-officers involved revealed a discomfort with the lack of information given to the interviewees at the time, some of whom were not even aware of the purpose of the interview.

To summarise, since the 1990's a development in the process of asylum is the increase in the use of detention. Although the basis for detainment has not significantly changed since the Immigration Act 1971, both the IA Act and NIA Act have resulted in an advance in the use made of the detention centre. The development stands in contrast with the *telos* of the ECHR order, in particular the concern that detention be carried out with full consideration of its effect on liberty. In contrast to the practice of judicial review, the ECHR order (arguably) places a 'requirement' on the signatory-state to uphold the fundamental rights and freedoms of everyone within its jurisdiction. The responsibility for ensuring compliance is on public authority. Accordingly, Section 6 of the HRA provides that a public authority which behaves in a way which is incompatible with the ECHR acts unlawfully, unless required to do so by primary

³⁵¹ [1977] 3 All ER 452 at 461

³⁵² *Conka v Belgium* (2002) 34 EHRR 54

³⁵³ *Amuur v France* (1996) 22 EHRR 533

³⁵⁴ *Dougaz v Greece* (2002) 34 EHRR 61

³⁵⁵ Weber (2000), Op. cit at 472

legislation. As the decision to detain an asylum-claimant is an administrative decision, it is subject to challenge under Section 6. However, the impact of the HRA on the legislature remains limited. With the exception of the House of Lords acting in its judicial capacity, Section 6(3) excludes from the definition of public authority both Houses of Parliament, as well as those persons exercising functions in connection with proceedings in Parliament. Accordingly, neither the enactment of legislation, nor proceedings for contempt falls within the scope of the HRA. A parliamentary department can not be subjected to a challenge on HR grounds merely because by its failure to act it creates a *lacuna* in UK law. Parliament may be obliged to consider whether its legislation is compatible with the ECHR, but is not obliged to comply with its provisions. Insofar as this aspect of parliamentary sovereignty is retained, what impact has the enactment of the HRA in terms of protecting the asylum-claimant?

Highlighted by Lord Mustill in *T v Home Department*,³⁵⁶ the right of a claimant to seek asylum in UK law is a matter of executive discretion. Post 2000, a new category of detention was introduced based on the power of the Secretary of State under Section 4 of the IA Act to provide for the detention of claimants temporarily admitted, released from detention, or released on bail under the Immigration Acts. Designed to deal with claimants temporarily admitted, the ‘Oaklington regime’ consisted of the detainment of claimants whose applications were considered capable of being decided swiftly at a detention centre, a fear of absconding not required as a pre-condition for detention.

On September 7th 2001, this form of detention was challenged in *R (Saadi) v Home Department*.³⁵⁷ Concerning detention pending examination of 4 Iraqi Kurds (one who on entering the UK had claimed asylum upon arrival) the challenge in *Saadi* was based on 2 grounds. Firstly, that detention of all 4 claimants was unlawful in accordance with the Immigration Act 1971; and secondly, that detention offended against Article 5 of the ECHR. On the first ground the Judge Collins held that the power to detain all 4 claimants fell lawfully within Schedule 2 of the Immigration Act 1971, which permitted the immigration authority to detain pending examination. Provided that detention was exercised in accordance with law, it was for the Home Department to decide on the circumstances in which it should be used. With regard to the second ground, the question for the Court was whether detention of the claimants for the purpose of enabling a speedy decision came within the wording of Article 5(1)(f). Article 5 (1)(f) permits restriction of the right to liberty in the event of a lawful detention to prevent a claimant from effecting an unauthorised-entry, or against whom action is being taken with a view to removal. The Administrative Court held that the detention regime in the circumstances relating to Saadi constituted a breach of Article 5. The finding was summarised by Judge

³⁵⁶ [1996] 2 All ER 865 at 868

³⁵⁷ [2002] EWHC Admin 670; [2001] 4 All ER 961

Collins: ‘the detention in question can not be justified...that it can speed up the process of determination of applications generally...and assist other applicants. It is plain that detention can not be justified on the basis that it might deter others from seeking to enter by making false claims for asylum. Once it is accepted that an applicant has made a proper application for asylum and there is no risk that he will abscond...it is impossible to see how it could reasonably be that he needs to be detained to prevent his affecting an unauthorised entry.’³⁵⁸

The Home Secretary appealed. The Court held that the power of the state to detain under the circumstances was lawful under domestic law. Article 5 could not have been intended to override the international principle that a state had the right to control the right of entry of non-nationals. The interpretation of Judge Collins would be to place an obligation on the Secretary of State to grant temporary admission whenever an asylum claim was made, absent the likelihood of the asylum-claimant absconding. In reaching its decision the Court highlighted the finding in *Chahal* that Article 5(1)(f) did not require that detention be necessary to prevent either absconding or the commission of an offence. All that was required was that proceedings should be executed with due diligence. Accordingly, detention under the Oaklington regime was proportionate in achieving the objective(s) legitimised by Article 5(1)(f), regardless of whether the decision was justified under domestic law.

The lawfulness of the claimant’s detention formed the focus for consideration by the House of Lords. Advancing from the premise that the detention of all 4 claimants pending examination accorded with Schedule 2 of the Immigration Act 1971, the question for the Court was whether a policy of using detention for the purpose of effecting a speedy process fell within the wording of Article 5(1)(f).

Examining the objective(s) of the Oaklington regime, the Court held that the purpose for detention was neither arbitrary, nor disproportionate. The objective of using the process of detention to effect a speedy decision on the claimant’s right of entry in the instant case, and to the benefit of others awaiting determination, fell within the scope of Article 5. In reaching its decision, the Court rejected the argument that in order to satisfy Article 5 detention could only be used for the purpose of preventing an unauthorised entry. Adopting the finding in *Chahal* that it was lawful to detain an individual in respect of whom action was being taken with a view to their removal, deportation, or extradition, regardless of whether such detainment was necessary to prevent his committing an offence or absconding, the Court held that all that was required was that it be carried out with due diligence.

³⁵⁸ [2001] 4 All ER 961 at 977

The reasoning of the House of Lords differed from that of Judge Collins. Satisfying both the Home Office and Executive, the House of Lords applied literally the reasoning that every right of entry of a non-national was unauthorised, until rendered authorised. Constituting the first HR case following the introduction of the HRA to examine asylum detention, the reasoning of the House of Lords in terms of rights protection was discouraging. Grounded on the concern of sovereignty, the lawfulness of detention was determined without significant regard for the *telos* of the ECHR. Although the detention in question engaged Article 5, it nevertheless had a legitimate objective under Article 5(1)(f), and the procedures used were not disproportionate to the achievement of that objective.

(3) The Treatment of the Asylum-Claimant

The Value of Article 3

Regardless of the HRA, insofar as policy continues to outweigh any serious regard for the asylum-claimant, the exclusion of parliamentary process from Section 6 of the HRA, renders the effectiveness of the ECHR a matter of political will. However, this is not to suggest that the ECHR is without significance. In accordance with Section 3, the UK judiciary is accorded the power to determine what exactly a legislative provision requires. Forming the subject of debate between the Home Office and the UK judiciary, objection voiced over the constitutional role of the judiciary under the HRA is revealing.

Questioning whether there was such a thing as public policy in the UK asylum order, the Home Secretary declared that he was tired with the situation where the Government initiated a response to a concern of national interest, Parliament debated it, legislation developed it, and the judiciary then undermined it. The statement referred to the rulings in *R (J) v Secretary of State for the Home Department*³⁵⁹ and *R (Q and Others) v Secretary of State for the Home Department*³⁶⁰ Rulings, in the opinion of the Home Office, which constituted little more than a challenge to Parliament.

Justified as an attempt to introduce rigour into the UK asylum order, on January 8 2003, the Government put into effect the Section 55 of the NIA Act requirement that in order to qualify for financial assistance, a claim for asylum had to be made as soon as reasonably practicable following the claimant's arrival in the UK. The words reasonably practicable were defined by the Government to mean upon immediate arrival at a port of entry and before any award of temporary admission. Less than one year after the introduction of Section 55, in *R (J)* and *R (Q)*, its lawfulness was called into question. The Court concluded that the prohibition of support

³⁵⁹ [2003] CO/151/2003

³⁶⁰ [2003] EWHC 2507

where a claim was not made as reasonably as practicable, was unlawful. The reason for the finding was stated in *R (Q)*. In the opinion of the court, the application of Section 55 had led to the claimants suffering flawed decisions, in the sense that their reasons for not claiming asylum as soon as reasonably practicable required at least enquiry into the particular pressures on them, including what they had been officially told about the process of claiming asylum. Judge Collins went on that although he was aware that his ruling in the instant case would weaken the anticipated effect of Government policy, nevertheless Parliament could not have intended that claimants should be faced with the choice of either returning to persecution or face destitution.

The Home Secretary appealed. Despite the argument that the functioning of Section 55 constituted a response to increasing public concern in which the Government had to take tough decisions in the short term for the long term benefit of society, the appeal was dismissed. Lords Phillips, Sedley and Clarke ruled that not only was the procedure to work out whether a claimant had just arrived in the UK impracticable, the absence of a right to challenge the decision was unjust. Since the late application of two of the claimants was not deemed to have received fair consideration, the Home Secretary's appeal against the decision of the High Court was dismissed.

On January 7 2003, a number of HR organisations issued a joint statement on the effect of Section 55. The statement expressed concern with the effect of the deprivation of in country asylum-claimants of the right to support, and criticised the punitive philosophy of the Government. In the opinion of the Joint Statement, the effect of Section 55 was to render certain claimants destitute, regardless of whether they reasonably believed that they did not need to apply for asylum immediately on arrival.

The punitive philosophy of Section 55(1) formed the focus of *Home Department v Limbuel, Tesema and Adam*.³⁶¹ The Secretary of State appealed against a decision granting relief by way of judicial review to 3 asylum-claimants contrary to a Home Office decision not to provide support. As a response to the refusal, it was argued that there was nothing in the opinion of the Secretary of State's decision to prevent his taking action under Section 55(5) of the NIA Act, which provided that nothing in Section 55(1) prevented the exercise of a power in order to avoid a potential ECHR breach. In all 3 cases, the Appeal was dismissed. The Court held that, whereas in two of the cases the refusal to assist a claimant who had failed to find alternative means of support constituted a breach of Article 3, in the third case, in order to qualify for Section 55(5) support, the claimant had to produce evidence of a level of suffering verging on the threshold of severity laid out in *Pretty v UK*.³⁶² While declaring that there was no error of law in 2 of the

³⁶¹ [2004] EWCA Civ. 540

³⁶² (2002) 35 EHRR 1

decisions in which the Court (applying the criteria in *Pretty*) had concluded that without support the claimants would become subject to treatment sufficient to engage Article 3, the Court held that overshadowing the facts of the case was the reality that there were some other 666 claimants who, as a result of Section 55, were likely to be subjected to treatment which would take them across the severity threshold. Accordingly, the underlying policy of Section 55 was unlawful. There was no reason to interfere with the decision of the Administrative Court that the Secretary of State should have provided the claimants with support in order to avoid a breach of his ECHR obligation.

The Home Secretary was dissatisfied. In *R v Home Department, ex-parte Adam, Limbuela and Tesema*³⁶³ Lord Bingham summarised the Home Secretary's appeal as revolving around the question in what circumstances did the State become obliged to provide support where it was not satisfied that a claim was made as soon as was reasonably practicable. In reaching its decision, the Court examined the policy behind Section 55(5). According to Lord Bingham, the provision constituted a response to what the Government perceived to be an increase in asylum claims detrimental to the well-being of the State. Grounded on the premise that while some claimants were genuine refugees the overwhelming majority were economic migrants, in the opinion of Lord Bingham, the object of Section 55 was to discourage unmeritorious claims by encouraging firmer dealing with asylum-claimants. Section 55(1) revoked the former ability of the Home Secretary to provide support for claimants and their dependents who, in accordance with Section 59 of the IA Act, he was not satisfied had made a claim as soon as was reasonably practicable.

However, in the words of Lord Bingham, the legislation did not end there. The prohibition in Section 55(1) is qualified by Section 55(5). Although Paragraphs Section 55(5)(B) and (c) were not pertinent in the present case, they nevertheless indicated Parliament's recognition that the prohibition in Section 55(1) could lead to a breach of a claimant's ECHR rights which, in accordance with Section 6 of the HRA, the Secretary of State was obliged to acknowledge. Accordingly, it was unlawful that the treatment of the late asylum-claimant could merit what could only be described as 'mountainish inhumanity.' Upholding the finding of the Court of Appeal, the Court stated that it was not developing a duty to house the homeless, but upholding a duty to prevent destitution caused by public policy.

To summarise, insofar as a signatory's dedication to the ECHR constitutes a guard against the excessive use of state power, the UK judiciary's criticism of the underlying policy of Section 55 in *R v Home Department ex-parte Adam, Limbuela and Tesema* served to ensure that not even the actions of the Home Secretary fell beyond lawful scrutiny. Whether such scrutiny can be defined as effective protection of the rights and freedoms of the asylum-claimant however, either

³⁶³ [2005] UKHL 66

in terms of the development of judicial principle, or the effect of any pronouncement on the Government, remains questionable. Regardless of criticism, the withholding of state support continued to be justified by an executive which, in contravention of its attempt to produce seamless provision for the dealing with unmeritorious claims, followed its appeasement of French Ministers to close the *Sangatte* Refugee Camp by granting exceptional leave to remain to some 1,200 refugees, removing the Asylum Claimant's Employment Concession, and declaring an intent to abandon altogether its ECHR obligations, if measures proved necessary to stem the tide of claimants entering the UK.

Although asylum decisions will invariably be taken by a state authority, therefore open to challenge under Section 7 of the HRA, the facility for a non-national to challenge a decision on HR grounds remains an executive structured programme of state control. Yet, the risks of executive involvement, including its impact on established constitutional arrangements, as voiced by the ECtHR in *Procola v Luxembourg*³⁶⁴ and *Mc Gonnell v UK*,³⁶⁵ as well as the House of Lords in *Davidson v Scottish Ministers*,³⁶⁶ remains only one of many concerns to the non-national.

For example, Part I of the NIA Act, which amends the British Nationality Act 1981, demonstrates the exclusive power of the State to determine who its nationals are. Rather than birth and parentage, the Government has concentrated on the determination of nationality by means of assessment of the suitability of the claimant for UK citizenship grounded on his participation and value to the State. Coupled with an asylum policy reflecting little concern with the *telos* of the ECHR, the international principle of *non-refoulement* or the UN Convention on the Rights of the Child, such amendment brings home the reality advanced by Arendt,³⁶⁷ Douzinas³⁶⁸ and (arguably) Burke,³⁶⁹ of the practicalities of the application of a universal standard of HR protection. Although the ECHR has served to highlight the concern of the asylum individual,³⁷⁰ the UK's treatment of asylum serves to show how HR do *in fact* attend the

³⁶⁴ (1995) 22 EHRR 193

³⁶⁵ (2000) 30 EHRR 289

³⁶⁶ [2004] UKHL 34

³⁶⁷ Insofar as asylum highlights the fallacy of the concept of 'humanity' assuming the HR role formerly accorded to the concept of 'nature' (that the 'right' of the individual to belong to a universal humanity is guaranteed by 'humanity' itself) the concept of a universal HR order can remain only at best 'symbolic.' H. Arendt, *The Origins of Totalitarianism* (Harvest Publications, San Diego 1979) 298

³⁶⁸ That 'the modern subject reaches [his] humanity by acquiring political rights which guarantee [his admission] to the universal human nature, by excluding from that status all those who do not have such rights.' Douzinas (2007) Op. cit at 142

³⁶⁹ The lack of rights as a result of the loss of community and of the legal protections associated with it, demonstrates the reality of a universal order of the communitarians, who insist that only national law can create and protect rights

³⁷⁰ Although highlighted by P. Alston (1999), Op. cit at Appendix. even this remained subject to debate. For example, 'in 1997, the EU launched an initiative entitled [*Leading by Example: a Human Rights Agenda for the European Union for the Year 2000*]. A committee... was asked to draw up a set of European [HR] policies to mark the 50th Anniversary of the Universal Declaration... At a meeting of the advisory group, in October 1997... a researcher presented [a] draft of the report he had been asked to prepare on the work of European "supervisory bodies." The rapporteur proposed to look into the [ECHR], the European Convention against Torture, and the reports of the European Commission against Racism and Intolerance, and summarise problems identified by the respective organs. At that point, the European Commission representatives strongly objected to the inclusion of a report of this kind... Publication of the final report was accompanied by controversy... European Governments moved before publication to downgrade proposals that the EU should set up a special department headed by a new Commissioner to co-ordinate [HR] work

principle of nationality and, despite its generality, excludes from the Community of its own subjects all those who do not belong to the nation-state.³⁷¹

Despite the Government's endeavour to bring rights home by means of the HRA then, analysis of its impact on the asylum-claimant continues to give rise to a number of concerns. Not least:

- The increasing power of the Executive to act without judicial oversight;
- The difficulty of a detainee to challenge asylum decisions, including the reduction in April 2004 of public funding for legal work resulting in a dearth of specialised legal expertise;
- The increasing linkage in policy and law between asylum and terrorism.

Yet, such concerns do not stop there. Beyond the treatment of the non-national, and underlying recent legislative developments in criminal justice, lays arguably the most controversial executive use made to date of the concepts of community, security and national interest.³⁷²

Namely, justification of the ability of the state to exert even further control over possibly the most vulnerable individuals in the field of criminal justice: children and young persons lawfully detained.

Section 3.3.3: Treatment of the Child and Young Person

(1) The ASBO

Forming part of the Government's law and order strategy, the Anti-Social Behaviour Order,³⁷³ introduced in Section 1 of the Crime and Disorder Act 1998,³⁷⁴ has provided police and local authorities with unprecedented control over anti-social behaviour. The statistical reality of the ASBO formed the subject of a Paper by Professor Scraton.³⁷⁵ Examining the 'automatic imposition' of the ASBO, resulting between April 1999 and March 2004 in a 98.3% rate of issue, according to Scraton such data could not but give rise to concern over the effect of a measure whose political imperative appeared to be the fast-track of the majority of those subject to it into custody. On analysis, such concern is not unreasonable.

throughout Europe. References to the inhuman and degrading treatment of detainees and details of deaths of asylum-seekers in police custody in the initial report were deleted from the final version. But the report did conclude...that Europe's "strong rhetoric" on [HR] was not matched by the reality.' (Douzinas 2004, Op. cit at 125-126)

³⁷¹ Simpson (2002), Op. cit at 94

³⁷² D. Garland *The Culture of Control* (OUP, Oxford 2000)

³⁷³ Hereafter, ASBO

³⁷⁴ Hereafter, CD Act

³⁷⁵ Scraton *Regulating Anti-Social Behaviour: A Critical Perspective*, Presented to the IASD Annual Conference, Cavan 5th November 2004

According to Ashworth and Redmayne, one sign of Government ambivalence about HR in their application to criminal justice is the ASBO. Both the ECHR and ECtHR³⁷⁶ adopt the approach that, where proceedings are in substance criminal because of what is at stake...they should be treated as criminal for the purpose of the safeguards that the [ECHR] applies to those charged with criminal offences...The whole point of the ASBO was 'to circumvent this...Thus, the Government promoted the measure as a way of avoiding the 'problem' of the criminal process: an application is made to a court under civil procedure, and if they find evidence of anti-social behaviour they may make an order imposing conditions on the defendant.'³⁷⁷ According to Ashworth and Redmayne, the development highlights a recent tendency affecting the criminal process: 'Not too long ago it was a mark of enlightenment to suggest that some forms of misconduct should be taken out of the criminal law and dealt with only through civil processes. Now it seems, that the route is being exploited as a means of avoiding the protections of criminal procedure, while ensuring that, by means of making breach of the civil order an offence of strict liability with a high maximum penalty, severe sanctions are available.'³⁷⁸

Certainly, as a policy leading to the marginalisation, and arguable prevention of re-integration of the stigmatised child later into main stream society, objection to the long term effect of the ASBO, including its compatibility with the ECHR, has continued throughout its functioning. Yet its use, as well as such related practice as the vilification of juveniles subject to it in the national press, has remained constant. The Government's response, a denial of the possibility that the regime could lead to the excluded child finding itself enticed onto the ladder of criminality. According to Professor Williamson,³⁷⁹ such a response was not surprising. Analysing the political climate surrounding the ASBO, according to Williamson, the initiative represented no more than an example of the tyranny of policy momentum to full damaging effect: the detainment (at the time of Williamson's writing) of some 3,000 under 17 year olds. The opinion re-iterated the criticism of the Government's method of Government by the former Deputy Political Secretary and former Head of Policy, whose experience in Government led them to believe that the ASBO represented merely a knee-jerk reaction of little substance other than the media inspired determination to satisfy public interest.³⁸⁰ Whether on the ground of securing the greater good the ASBO regime can be justified, both the quantity and quality of criticism is disconcerting.

³⁷⁶ *Engel v Netherlands* (1979) 1 EHRR 647

³⁷⁷ A. Ashworth and M. Redmayne *The Criminal Process* (OUP, Oxford 2005) 14

³⁷⁸ *Ibid.*, p. 14

³⁷⁹ Williamson *Social Justice, Children, Crime and the Community*, Report of October 2005 (Howard League for Penal Reform, London 2005)

³⁸⁰ *The Independent Newspaper* 2 September 2005 p. 17

Following the significance afforded the United Nation's Convention on the Rights of the Child 1989³⁸¹ and the European Charter in *Costello Roberts v UK*,³⁸² it can be argued that the UK is obliged to demonstrate greater willingness to respect the rights and freedoms of the child. Examining the UK's response to problems arising from the functioning of the ASBO however, the argument is debatable.³⁸³

Article 3 of the UNCRC provides that in dealings concerning the welfare of a child undertaken by a public body, the best interest of the child should remain a primary consideration. The *telos* of Article 3 is developed further in Article 24 of the European Charter which provides that in all actions relating to children, whether taken by a public authority or a private institution, the child's best interest will remain the primary consideration.

The significance of the UNCRC, ECHR and European Charter formed the focus of *K v Advocate General*.³⁸⁴ Concerned with the delay between the charging of a child offender and his being brought before a court, the Privy Council held that the reasonable time limit requirement should be read in the light of the UNCRC and the *Beijing Rules*,³⁸⁵ insofar as the HRA placed an obligation on the Court to have regard to the rulings of the ECtHR and relevant international provision. Accordingly, the obligation required that criminal proceedings be carried out with due expediency and in accordance with the ECHR. Reason for the finding was adopted from *R (Howard League) v the Secretary of State*.³⁸⁶ Examining the relevance of Article 3 of the UNCRC and Article 24 of the European Charter, the Court in *Howard League* held that although neither provision was legally binding, both could be consulted insofar as they elucidated the content of HR recognised throughout Europe. Accordingly, where a child's (arguable) rights were engaged in a decision, then the decision-maker was obliged to have regard to the best interest of the child.

The application of the welfare principle formed the subject of *R (A) v Leeds Magistrates and City Council*.³⁸⁷ Concerning the imposition of an ASBO, the Court held that if it was contended that the best interest of a child required that an ASBO should not be issued, or if so, in terms different from those proposed by the Local Authority, it was for the child to provide both an explanation of his case and any relevant evidence. In the opinion of the Court, the phrase the best interest of the child was not a 'magic talisman' which if not pronounced would invalidate the order made. Albeit a court was obliged to consider the interest of the child when deciding

³⁸¹ Hereafter, UNCRC

³⁸² (1999) 27 EHRR 611

³⁸³ Certainly in the opinion of Ashworth and Redmayne, 'in this country, the spirit underlying the UNCRC does not pervade Government pronouncements on youth justice.' Ashworth and Redmayne (2007), Op. cit at 377

³⁸⁴ [2004] 1 AC 104

³⁸⁵ United Nations Committee on the Rights of the Child 1985

³⁸⁶ [2003] 1 FLR 484

³⁸⁷ [2004] EWHC 443 (Admin)

whether to make an ASBO, the imposition of an order could never be precluded. The ruling represented a classic Diceyan handling of the tension between the policy of a politically charged Government initiative and its effect on the individual. Certainly, throughout its deliberation of the ASBO regime, it is arguable that the promotion of the rights of the individual, in accordance with the *telos* of the ECHR, has remained no more visibly foremost in the judicial mind, than considerations of policy.

For example, in *Wareham v Purbeck District Council*³⁸⁸ the Court was called on to determine the lawfulness of an ASBO application against a 19 year-old, and whether failure by the authority to consult the youth prior to application rendered the proceedings contrary to Articles 6 and 8 of the ECHR. The Court held that it did not. Where an authority was contemplating whether to apply for an ASBO, it was not under a legal duty to consult the individual concerned. The decision was justified on the ground that what occurred prior to court proceedings was no more than a decision to make an application, and that when an application was made, the subject was given adequate opportunity to be heard. The decision of an Authority not to invite the subject to be heard prior to a decision to apply for an order could be distinguished from those circumstances in which a decision not to consult would give rise to invocation of the ECHR.³⁸⁹ In reaching its decision, the Court examined the policy objective of the ASBO regime and found it to fall within the ECHR exception of a measure intended to protect public safety.

Similarly, in *R (T) v Manchester Crown Court*³⁹⁰ the policy of the ASBO regime formed a determining factor in the deliberation of the concern in question. The case concerned a refusal to permit an appeal against the terms of an ASBO which had been originally consented to at the time of its imposition by the 14 year-old subject to it. The Court held that the denial was unlawful. Consent to an ASBO, or its terms, did not debar any future exercise of a right to forward an appeal. In reaching its decision, the Court held that consent could not constitute the ‘trump-card’ on which an ASBO depended. Although the Court recognised that it would be to the detriment of the subject, were consent to the terms of an ASBO at the time of issue to debar a future appeal, greater was its concern over the frustration that an alternative finding would have on the ASBO’s policy objective: to protect the public good.

The reasoning behind the rulings of *Wareham* and *R (T)* was not out of character with that generally of the UK court. Whatever could have been expected of the HRA, the effect of the regime on the individual remained (not uncommonly) the lesser interest to be weighed against that of the state. Whereas, the Court was only too aware that to have placed a legal duty to consult on an authority seeking to make an ASBO application would have been to place too

³⁸⁸ [2005] EWHC 358 (Admin)

³⁸⁹ *Venema v Netherlands* (2003) 1 FLR 552

³⁹⁰ [2005] EWHC 1396 (Admin)

onerous a burden upon it; by treating the issue of consent as a factor in relation to the matters required to be proved and the value judgment that a Court must exercise in deciding whether an order was necessary, the ruling re-enforced the most controversial concern regarding the ASBO regime, the power of the State.

Finally, that the Court will not go so far as to acknowledge a right of the individual to challenge an ASBO is evident in the ruling of *W v Director of Public Prosecutions*.³⁹¹ The case concerned the validity of an ASBO imposed on a 14 year-old which prohibited him from committing any criminal offence, and the possibility of such an invalidity being used as a defence in related proceedings. Although an ASBO can prohibit behaviour that would amount to the commission of a criminal offence, the Court held that the width of the prohibition was not only too wide, but unnecessary for the purpose of protecting society. Distinguishing the order from one relating to the commission of a specific offence,³⁹² the court grounded its finding on the principle of legal certainty.³⁹³ But in doing so, limited the scope of any challenge to circumstances where an ASBO was in violation of established principles of UK justice, on the ground that to allow an alleged invalidity to be raised as a defence would be to open the floodgates.

To summarise, along with prevailing Home Office policy regarding the treatment of terrorism and asylum, insofar as ‘it appears that the Government has been able to by-pass the protections for criminal charges and to open up a way of dealing with crimes...that avoids the [ECHR] safeguards,’³⁹⁴ the ASBO constitutes a particular challenge to the *telos* of the ECHR.³⁹⁵ The Government’s determination to be tough on juvenile crime, whatever the long term cost, and the judiciary’s approach toward the ASBO grounded on a belief that the initiative, as a civil remedy,³⁹⁶ is both ECHR and common-law compliant,³⁹⁷ renders the success of any challenge uncertain.

(2) Detention of the Child and Young Offender

Contrary to Home Office policy, in *R (Howard League) v the Secretary of State*³⁹⁸ the court held that the protection accorded the child under the Children Act 1989³⁹⁹ did apply to those held in custody. If (in the opinion of the Court) there were Young Offender Institutions which were not living up to the standards which the CA 1989 (were it to apply) would require, and children were

³⁹¹ [2005] EWCA Civ 1333

³⁹² *R v P* [2004] 2 Cr App R (S) 63

³⁹³ *R v Chief Constable of Avon and Somerset* [2001] 1 WLR 340

³⁹⁴ Of liberty and due-process: Ashworth and Redmayne (2005), Op. cit at 14

³⁹⁵ As would any application of it as a way of imposing political conformity on pain of criminal sanction. A possibility, following *R (Singh) v Chief Constable of West Midlands Police* [2006] EWCA 1118, regarding the application of a dispersal order introduced in the Anti-Social Behaviour Act 2003, not wholly unreasonable: Gearty (2007). Op. cit at 112

³⁹⁶ *R (McCann) v Manchester Crown Court* [2003] 1 AC 787

³⁹⁷ *R (M) v Secretary of State for Constitutional Affairs* [2004] 1 WLR 2298

³⁹⁸ [2003] 1 FLR 484

³⁹⁹ Hereafter, CA 1989

being subjected to the unacceptable treatment depicted by the Report of the Chief-Inspector (as raised), then it could only be a matter of time before an action was brought under the HRA by a child detained in a Young Offender Institution. The case highlighted 3 concerns:

- (1) The exclusion of children and young persons held in detention, from mainstream child protection;
- (2) The conditions of detention, and necessity for Government and Local Authority to safeguard the welfare of the child and young person;
- (3) The influence (if any) of the ECHR on prevailing policy.

The policy that children and young persons be detained without protection against HR violation, formed the subject of the Carlile Report 2006.

In 2006, Lord Carlile led an Inquiry into the treatment of children and young persons held under State punitive control.⁴⁰⁰ The rationale for the investigation was that international recognition of the need to protect the welfare of juveniles should apply to all children and young persons whether at liberty, or not. According to the Howard League, children and young persons in custody were entitled to protection before, during and after detainment, in accordance with any treaty to which the UK was a signatory, as well as the *telos* of the UNCRC, European Charter and (arguably) the ECHR. Examining the functioning of 3 types of institutions: the Young Offender, Secure Training Centre, and Local Authority Secure Children's Home; the Inquiry concentrated on the impact of a number of methods of physical control, including restraint, solitary confinement, and strip-search. The findings are discouraging.

Examining the treatment of children and young persons in custody, according to the Carlile Report, throughout January 2004 to September 2005, the use of physical restraint was used some 5,133 times. Out of that number, some 7,020 children were restrained while detained in Secure Training Centres and 3,359 in 8 Special Local Authority Units. Apart from the fact that the practice often proved counter-productive, injury requiring medical treatment was not uncommon: some 296 cases having been recorded between April 2000 and February 2002. Greater statistics were uncovered in relation to the institutionalised practice of strip-search and the unmonitored practice of segregation which led, in its commonest form, to a child being held in a bare-cell without counselling, supervision, or access to the assistance of an advocate for up to 20 days or more.

Highlighting an atmosphere antipathetic to young persons prevalent throughout all 3 institutions, the contention of the Inquiry was that the lawful treatment of the child constituted a morally

⁴⁰⁰ Lord Carlile (2006), *The Carlile Report* (The Howard League for Penal Reform, London 2006)

impoverished regime of systematic neglect and misuse. Questioning where, in an era where the Respect Agenda had become a *tenet* of public policy, was the respect due from state authority to the most vulnerable of young persons in society, the Report forwarded a number of suggestions, including the proposal that the Police and Crown Prosecution Service be more willing to prosecute numbers of staff in all *prima facie* cases of abuse.

According to the above findings, the Carlile Report delivered a disturbing analysis of a closed world of juvenile secure estate, which in other circumstances, would have more than likely rendered those responsible subject to criminal investigation. Yet, its findings were not new to legal-practitioners, HR organisations, and trusts dedicated to the protection of the welfare of offenders generally. One such organisation was the Prison Reform Trust which, critical of placing children behind bars, highlighted what it regarded as the continuing failure of the Government to address the conditions of detainment faced by offenders aged between 18 and 21 years.⁴⁰¹ According to the Trust, such lack of official regard was not merely immoral, but unwise. Young offenders were a key issue for concern not simply because they reputedly carried out most of what the Home Secretary termed bulk crime, but because of the recidivism rates which revealed that out of the number of 18 to 21 year olds detained, an approximate three-quarter would be re-convicted and detained within 2 years of release. The Report then went on to highlight the cost of such disregard on society generally, intimating how the deprivation experienced by the young offender during his detention often contributed to the resentment expressed at his re-offending. Echoing sentiments similar to that of the Carlile Report, the Trust highlighted the need for understanding in the Government's handling of the issue. Far less convincing however, was the significance in terms of impact it attached to the effect of the perceived 'increasing judicial acknowledgment' of the rights of the child, as opposed to the young offender.

For example, following formal investigation into the Feltham Young Offender Institute, and inspection of the Olney Young Offender Institute in July 2001, the (then) Chief-Inspector of Prisons reported that the practices exercised in both, amounted to a dangerous order of excessive control and neglect.⁴⁰² Similar criticism in respect of the damaging effect of solitary confinement was raised in *R (BP) v Home Department*,⁴⁰³ but what of its impact?

In *R (BP)* the Court held that although the practice of segregation in the juvenile order did not constitute a breach of Articles 3 or 8 of the ECHR, the detainment of a 17 year-old with a history of self-harm did constitute contravention of the Young Offender Institute Rules 2000. In reaching its decision, the Court made reference to *Howard League* which imposed on persons

⁴⁰¹ Report of the Prison Reform Trust (2003) *Re-Forming Children's Services* (The Prison Reform Trust, London 2003)

⁴⁰² Home Office, *Report into Olney Young Offender Institute* Olney 9-13 July 2001 (Home Office, London 2001)

⁴⁰³ [2003] EWHC 196, 3 Admin

entrusted with the care of a child or young person, an obligation to have regard for their best interests (as recognised by the ECtHR, encapsulated in the UNRC and European Charter) and the need to take steps to protect them against any treatment of the kind capable of invoking the ECHR. Beyond promoting the immediate plight of the juvenile offender, the impact of *Howard League* on Government policy, remained minimal.

For example, post the HRA the criminal justice order saw reform primarily in the range of sentences applicable to the young offender, and the introduction of the Parenting Order, Reparation Order, Action-Plan Order and Detention and Training Order. Further, whereas in the case of the 12 year-old offender where the criteria of Section 1 of the Criminal Justice Act 1991 is made out, a Youth Court can now order his detention in a Young Offender Institute and any time spent in custody is no longer taken into account when determining a date for release, amendment to the jurisdiction of the Youth Court is extended so as to allow it to impose custodial sentences of up to 24 months in length. Similar developments include the replacement of the former system of cautioning an offender with the new regime contained in Sections 65 and 66 of the CD Act; and an increase in the power of Magistrates to impose custodial sentences on a wider range of offender, including children aged between 12 and 16 years charged with medium-level offences who, by virtue of Section 130 of the Criminal Justice and Police Act 2001, can now be subject to imprisonment while on remand.

Whether, such developments can be said to represent the determination of a Government to pacify foremost public concern and remove juvenile offenders from society, regardless of the long term consequences, whereas in accordance with the Government's short term solution the number of child offenders subject to custody continues to increase, the perceived long term effects of detaining children continues to be challenged on grounds of humanity.⁴⁰⁴ A reality only too readily recognised by the Howard League, and the Prison Reform Trust, as well as the Children's Society, the National Association for Youth Justice, and the Children's Alliance for England, whose research (post the HRA) into the reality of the Government's treatment of the young, makes it all the more harder to purport that the obligation placed on the judiciary to follow the reasoning of the ECtHR and explore more widely the international acknowledgment of the rights of the child, has had any real effect.

Section 3.3.4: Treatment of the Adult Offender Lawfully Detained

Tension between the concern of the State and the interest of the non-national, child and young offender, indicates a reality that in the event of HR impinging on the procurement of political goals, executive indifference will give way to disregard. Analysis of the treatment of the adult

⁴⁰⁴ Report of the Howard League for Penal Reform *Out For Good: The Resettlement Needs of Young Men in Prison* 31 May 2006 (The Howard League, London 2006)

offender lawfully detained, provides similar example, except for its ability to highlight not the capability of the state (as in the case of the non-national) to deny the individual any form of HR where there is no legal duty to do so, but to interfere, and even remove, formerly established freedoms of the UK national.

(1) Prisoner Correspondence

The consolidated Prison Rules 1964 consisted of a multi-tiered hierarchy of regulations. Throughout the 1970's and 1980's, the Rules invoked a number of findings against the UK Government by both the European Commission and ECtHR. The findings concerned the interference of the State in a prisoner's ability to correspond: a restriction which had no parallel in any other ECHR signatory-state.

Under the Prison Rules, the Secretary of State could issue instructions to censor prisoner correspondence. Compatibility of the power with the ECHR formed the subject of *Golder v UK*.⁴⁰⁵ The court was called on to determine whether refusal to permit a prisoner contact with a solicitor with a view to initiating defamation proceedings, constituted a breach of Articles 6 and 8. The court held that it could. Although, a prisoner's ability to access justice was not absolute, justification for refusal was without foundation. The PR was amended by the Prison (Amendment) Rules 1972. The effect was to accord the prisoner ability to correspond with a legal advisor, but only in respect of proceedings to which he was already party. In the opinion of the ECtHR, the amendment was inadequate. In order for the UK to meet its ECHR obligation, prisoners were to be accorded the ability to correspond, regardless of whether it related to existing action or not. Again, the provision was amended. The Prison (Amendment) Rules 1976 provided that a prisoner could correspond for the purpose of obtaining advice concerning action by which he could become a party to civil proceedings, but then went on to qualify the concession by the requirement of ministerial discretion.⁴⁰⁶ The ability of a prisoner to seek legal advice formed again the focus of *Silver v UK*.⁴⁰⁷ In accordance with Statutory Order 17, a prison authority could prevent a prisoner from seeking advice with a view to instigating proceedings where an issue raised internally was considered not to warrant legal advice. The prisoner alleged that the Order constituted a breach of the ECHR. Examining Article 6, the European Commission and ECtHR held that it did. Although a right of access was not an absolute right, ministerial control under Statutory Order 17 was discriminatory and excessive. With regard to Article 8, the Government justified censorship on the ground that it fell within Article 8(2): as a restriction necessary for the prevention of disorder. The prisoner challenged the justification, and

⁴⁰⁵ (1971) ECHR Series A No. 18

⁴⁰⁶ The qualification constituted a regard for the ECHR made more pertinent by the Home Secretary's refusal to accord Government time to debate the amendment: HC Deb (1976) 909 (Cols. 611-612) (TSO, London)

⁴⁰⁷ (1980) ECHR Series B No. 15

argued that whereas the requirement that a restriction be in accordance with law should be objectively determined, the control accorded the minister was insufficiently defined as to render it unaccountable.⁴⁰⁸ The European Commission and ECtHR agreed. Whereas the requirement that grievances be settled internally before a prisoner could seek advice was unnecessary for the prevention of disorder, the discretion accorded the Secretary of State was excessive. the Prison Rule unaccountable, and the interference unnecessary.

The Government responded with the introduction of a number of Statutory Orders and the Prison (Amendment) Rules 1983. Amendment allowed for less control of prisoner correspondence, but continued to restrict access to legal advice. As a result, the European Commission continued to receive some further 30 UK applications.⁴⁰⁹

The operation of the Prison Rules on a prisoner's ability to correspond provides an example of the UK's attitude toward the *telos* of the ECHR as it was allowed to impact on one aspect of prison life prior to the HRA. An attitude best described as a blatant disregard of the Resolution of the Council of Europe and Committee of Ministers Standard Minimum Rules for the Treatment of Prisoners.

In accordance with the Preamble to the Standard Minimum Rules, the Committee of Ministers directed that Governments be guided by the principles set out in its text, which included the application of Articles 6 and 8. In response to the adverse Strasbourg reaction to the UK's treatment of prisoners, the utilisation of the Rules formed the subject of parliamentary debate.⁴¹⁰ The question asked was whether in fulfilling its ECHR obligations, the UK had ensured that ECHR standards had been met. Despite concern raised over the issue of prisoner correspondence and access to legal advice, the Secretary of State declared that they had. Four years later however, while refusing to review a departmental circular, the same Department announced its decision to abandon altogether the Standard Minimum Rules⁴¹¹ The declaration was unusual. The treatment of persons lawfully detained was one area of HR concern where it could be presumed that the HRA would have impact, insofar as it could afford the individual facility to question conditions of detention. Instead, indicating only marginal improvement in the accountability of executive action, the ability of a prisoner to correspond has continued to highlight in one particular area of HR concern, the actual success of the HRA in bringing respect for the ECHR rights and freedoms of the individual home.

⁴⁰⁸ A concern raised in HL Deb (1977) 387 (Col. 2078) (TSO, London)

⁴⁰⁹ Including that of *Campbell v UK* (1984) ECHR Series A No. 80. As Rule 49(2) had denied the prisoner adequate facility to prepare for a defence and the ability to secure assistance of his own choosing, both the European Commission and ECtHR declared its functioning a breach of Articles 6(3)(b) and 6(3)(c)

⁴¹⁰ HC Deb (1980) 987 (Col. 57); HC Deb (1980) 992 (Col. 335) (TSO, London)

⁴¹¹ 1984 HC Deb (1984) 58 (Col. 311) (TSO, London)

For example, in *R (Daly) v Home Department*⁴¹² the House of Lords disagreed with the Court of Appeal's refusal of an application for judicial review of Home Office policy set out in the Prison Rule Security Manual, on the basis that the power granted authorities to search any cell for correspondence suspected of being a risk to prison security constituted an interference with the prisoner's ability to correspond. The finding was based on 2 grounds: that the rule infringed the common-law principle of legal professional privilege; and that the executive decision constituted an Article 8 interference. In reaching its decision, the Court highlighted not merely the precise relevance of the HRA, but also the distinction to be drawn between the reasoning of the ECtHR and the common-law, as well as, the review criterion to be adopted when considering a question of ECHR compliance.

The ruling in *Daly* was reached by an application of common-law principle derived from common-law authority and an orthodox approach to judicial review. Distinguishing the approach between the ECtHR and the UK, the court went on to confirm its HRA obligation, and added that it be carried out in accordance with an approach laid down by Lord Steyn. Examining the common-law approach toward the standard of judicial review based on the *Wednesbury* criteria of reasonableness,⁴¹³ and the ECHR standard grounded on proportionality,⁴¹⁴ according to Lord Steyn, the test to be used was whether the measure was necessary in a democratic society and proportionate to the legitimate aim to be pursued.⁴¹⁵ Although the ruling may have introduced the concept of proportionality to the review of executive action however, both the constitutional limitation of the HRA, and the role of the national court was made clear. Although, by means of the HRA, the court had been accorded a greater role to ensure that the interests of the individual were not abused by executive power, it nevertheless remained bound to defer to the executive. Accordingly, the power of the court remained one of review, not decision. The purpose of the HRA was to accord the judiciary ability to give formal notice of any impediment to the relevant executive department so that it could initiate legislative action.

⁴¹² [2001] UKHL 26

⁴¹³ *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223

⁴¹⁴ *de Freitas v Permanent Secretary of Agriculture* (1999) 1 AC 69

⁴¹⁵ The traditional approach to reasonableness within judicial review based on *Wednesbury* is limited in scope. The question to be asked under the *Wednesbury* test is whether any authority in the place of the decision-maker could reasonably have come to the same conclusion. It is a test of rationality, with limited concern with the actual content of the decision, or whether it operates fairly on the person whom it affects. According to Lord Steyn, a more rigorous review is needed which takes into particular account both the proportionality of the decision in question, and whether a restriction is *in fact* necessary in a democratic society: (1) A review to assess the actual balance which the decision-maker has struck, not merely whether it is within the range of rational or reasonable decisions; (2) attention to be directed to the relative weight accorded interests and considerations; and (3) application of the principle that the more substantial the interference with HR, the more the court should require justification for interference with them

(2) *Extended Licences*

A provision allowing for the release of detainees on-licence to the three-quarter point, except those serving less than 12 months, was introduced by the Criminal Justice Act 1991.⁴¹⁶ Section 44 empowered the Court to extend the licence period to the end of the sentence. In accordance with the Crime and Disorder Act 1988, the licence period could be extended beyond that of the sentence: thus a person on-licence could be recalled to prison during the licence period. Both provisions formed the subject of amendment in the Powers of Criminal Courts (Sentencing) Act 2000:⁴¹⁷ Section 85 concerning offences committed after 30 September 1998, and Section 86 committed before 30 September 1998; as well as a focus of concern in *R v BR*.⁴¹⁸

Concerning the functioning of the Powers of the CC(S) Act, the prisoner questioned whether an extended licence constituted a criminal penalty and whether Section 86 applied to an offence committed prior to the introduction of the extended licence in the CJ Act. Despite its retrospectivity, the Court held that the extended licence did not constitute a criminal penalty in the sense referred to in Article 7 of the ECHR, but a preventative measure, therefore could be used in relation to an offence prior to its statutory introduction.

The finding is debatable. The impact of the extended licence remains a form of suspended sentence of imprisonment. A reality made even more apparent in relation to the practice of recall of prisoners on-licence. Called on to examine a recall of a prisoner on-licence, in *R (West) v Parole Board*⁴¹⁹ the Court held that the practice was not a concern which amounted to determination of a criminal charge. Although, Lord Hale disagreed on the ground that the eight months and two week period of detention served by the detainee in question could only be regarded as criminal, the Court remained unmoved. Both cases are interesting. Not least because the distinction between punishable and preventative penalties, effectively served to justify measures which, in terms of retrospectivity, were ECHR incompatible.

(3) *Release of the Prisoner On-Licence*

A further area of criminal procedure which clearly questions the impact of the ECHR order on persons lawfully detained was/is highlighted in *R (Uttley) v Home Department*.⁴²⁰ The House of Lords was called on to determine the impact of Article 7 on changes to the system of early release of prisoners on-licence. The prisoner had been convicted in 1995 of criminal offences committed prior to 1983 and sentenced to 12 years imprisonment. In accordance with provisions

⁴¹⁶ Hereafter, CJ Act

⁴¹⁷ Hereafter, CC(S) Act

⁴¹⁸ [2003] EWCA Crim 2199

⁴¹⁹ [2002] EWCA Civ 1641

⁴²⁰ [2004] UKHL 38

at the time that the offences had been committed, had the prisoner been sentenced in 1983 he could have obtained remission of the last third of his sentence, been eligible for parole after one-third, and been on-licence until the expiry of two-thirds of the sentence. However, in accordance with changes to the procedure introduced by the CJ Act, the prisoner was released after serving two-thirds of his sentence in 2003, but released on-licence which continued until he had secured three quarters of his sentence. The Court of Appeal ruled that Section 33 of the CJ Act which had made the prisoner's release subject to licence, constituted a breach of Article 7. In reaching its decision, the Court held that a licence amounted to punishment; insofar as it contained the risk of re-call to custody and a number of restrictions on the prisoner's freedom. In its understanding of the CJ Act, the Court reasoned that there was an implicit acceptance that its provisions constituted a punitive measure insofar as its transitional provisions provided that the licence period would end at the two-thirds point of the sentence. The Secretary of State appealed, submitting that the applicable penalty should be interpreted as the maximum penalty prescribed by law for the offence in question and that the penalty applicable in *Utley* had remained unchanged. The House of Lords found for the Home Secretary. In reaching its decision, the Court examined the requirement in Article 7, that no heavier penalty be imposed than the one that was applicable at the time when the offence was committed, and interpreted it to mean the maximum penalty prescribed by law for the offence in question at the time when it was committed, and not the penalty that would probably have been imposed at the time. As the maximum penalty for the offence had not altered as a result of the CJ Act, the Court did not have to make comparison between the sentence which the prisoner had received and the penalty he could have received.

The finding is not without criticism. In ruling against the Court of Appeal's decision the House of Lords appeared to go against the *telos* of Article 7. In making the prohibition one against increasing the maximum penalty applicable, the Court ignored the relevance of the penalty imposed.

A similar deliberation underlined the decision in *R (Wright) v Home Department*,⁴²¹ where the Court was called on to examine a refusal to permit the applicant compensation in relation to a period of questionable detainment. The applicant had been a prisoner serving a sentence of life-imprisonment for murder. He had been detained in prison for a period including that between June 1993 and his release on-licence in November 1999. The Home Secretary had refused to release him from custody despite a decision by the Parole Board that he be recommended for release. The applicant questioned the refusal on 3 grounds:

⁴²¹ [2004] EWHC 3084 (Admin)

- (1) As the Home Secretary had no longer been entitled to fix the tariff in the case of a mandatory life-sentence, the period complained of could not be lawfully justified;
- (2) The decision was retrospective for the purpose of Article 7;
- (3) The fact that the period complained of had been prior to the introduction of the HRA was unimportant, as there was a free-standing right to compensation for unlawful detention implicit in Article 5(5) of the ECHR.

The application was dismissed. The Court ruled that Article 5(5) was such that it was dependent on actual contravention of Article 5, and since there had been no breach, no compensation was payable.

To summarise, the relevance of the ECHR in relation to prisoners, has involved a number of cases finding their way to the House of Lords and the ECtHR. Whether the quantity of questions raised can support an argument that the executive has sought to retain control over the detained individual, the quality of questions raised do indicate a void in its awareness of the impact of policy on formerly perceived fundamental freedoms. Two such examples include questions concerning determination of the minimum period to be served to meet the requirements of punishment of those receiving mandatory life-sentences for murder; and the role of the Home Secretary.

(4) Tariff Setting and the Role of the Home Secretary

Following a gradual transfer of control of the tariff element of the life-sentence to the trial judge, and the decision of release to the Parole Board, the final element of the life-sentence to be transferred to the judiciary is the setting of tariffs for those receiving a mandatory life-sentence for murder committed on, or after, 4th April 2005. In accordance with the Criminal Justice Act 2003,⁴²² mandatory life-sentencers detained under tariffs fixed by the Home Secretary prior to 2003, are able to apply to the High Court to have their tariff re-fixed by a judge without oral hearing. Whether the statutory language of the CJ Act 2003 ‘without oral hearing’ constituted a contravention of Article 6 of the ECHR formed the focus of *R (Hammond) v Home Secretary*.⁴²³ The Court held that it could. In order to satisfy Article 6, some circumstances would necessitate the admittance of oral evidence characteristic of a public hearing before a court. In reaching its decision, the Court deliberated 2 points of law: whether, in order to satisfy Article 6, determination of a tariff required an oral hearing at first instance, and whether statutory provision could be interpreted so as to accord it an implied condition.

⁴²² Hereafter, CJ Act 2003

⁴²³ [2005] 2 PLR 218

With regard to the first point, the Court ruled that the requirement of fairness inherent in the fair-trial provision of Article 6 required that a prisoner applying to the High Court to have a tariff re-fixed was entitled to an oral hearing at first instance. With regard to the second, in accordance with the HRA the language of the CJ Act 2003 could be stretched so as to accord it ECHR compatibility. The Home Secretary disagreed. Although it could sometimes be necessary for a judge to hear oral evidence in order to secure a fair-trial for the purpose of Article 6, since the CJ Act 2003 allowed for a process of appeal, any hearing ordinarily satisfied the requirement, albeit not at first instance. The House of Lords was unconvinced.⁴²⁴ In order to satisfy Article 6, the ability of a prisoner to avail himself of an oral hearing was required at first instance. Accordingly, the Court was right to read into the provision an entitlement of the prisoner to an oral proceeding in accordance with the requirements of the ECHR. The objections raised by the Home Secretary were dismissed.

With regard to the role of the Home Secretary, in jurisprudential terms release on parole was a privilege in the sense that it was for the Home Secretary to determine when a prisoner would be considered for parole. However, just as the ECtHR intimated that the setting of the tariff was a sentencing exercise governed by Article 6, the House of Lords ruled firstly, that the setting of the tariff for a mandatory-lifer was a sentencing exercise and so should be for a court of law; and secondly, that the release of mandatory-lifers should be equated to the provisions for discretionary-lifers and so be a matter for the parole board. Accordingly, the obvious executive response should (arguably) have been to diminish the degree of executive power.⁴²⁵ Instead, the mandatory life-sentence was reinforced by the Criminal Justice Act 2003, along with a policy of imposing higher tariffs than those previously adopted.

The involvement of the Home Secretary in the process of release of the life-sentence prisoner formed the focus of *Clift v Home Department*.⁴²⁶ The release of the life-sentencer is primarily a matter for the Parole Board. However, for prisoners who receive a determinate sentence, discretionary release on parole remains a matter for the Home Secretary who (although in the case of prisoners serving less than 15 years imprisonment has delegated his power to the Parole Board) in relation to those serving 15 years or more, has retained control. Whether the distinction constituted discrimination for the purpose of Article 14 of the ECHR formed the question for the Court. Article 14 prohibits discrimination whenever a circumstance is such as to bring it within the ambit of the ECHR. Insofar as the Home Secretary's involvement in the process subjected prisoners serving 15 years or more to a more demanding process, the Court held that their treatment did constitute discrimination for the purpose of Article 14 but, due to

⁴²⁴ [2005] UKHL 59

⁴²⁵ And the issue of legislative guidance as to the actual level of the tariff left to the judiciary

⁴²⁶ [2004] 3 All ER 338

the nature of the offence, was justified. Giving rise to a number of questions regarding the content of the ECHR, insofar as its exceptions affect the fundamental rights of the prisoner. the ruling highlights the classic doubt of the cultural-relativist as to the possibility of the implementation of a universal HR order.⁴²⁷ A difficulty further illustrated in the application of the ECHR to the practice of the penalty of additional-days imprisonment being added to a prisoner's stay.

(5) Penalty of Additional-Days Imprisonment, and the Role of the Special Advocate

In *Ezeh and Connors*⁴²⁸ the court was called on to consider whether the impact of a penalty of additional-days imprisonment being added by a prison disciplinary adjudication to a prisoner's stay, was such as to render it a breach of Article 6. The Court held that it was. The effect of such a decision necessitated adjudication before a judge. An attempt to build on the ruling was made in *Bannatyne v Home Department*.⁴²⁹ The question for the Court was whether in circumstances similar to those of *Ezeh*, the prisoner was entitled to a public trial, as opposed to a hearing in the presence of an independent adjudicator in closed prison. The Court held that it was not. Article 6 was subject to the requirements of public order which included the practical difficulties of organising such adjudication. Accordingly, the provision of an independent adjudicator was sufficient to comply with the requirement that the hearing be fair.

The balance between the interest of the prisoner lawfully detained and the practice of an established procedure justified on a ground of public necessity formed the focus of *R (Roberts) v Parole Board*.⁴³⁰ Concerning application of the ECHR to the life-sentencer, the Court was called on to determine the lawfulness of the use of special advocates to deal with sensitive information. The facts were as follows. The prisoner was convicted of murder in 1996 and his punitive term of imprisonment set at 30 years. At the time of the hearing the prisoner was in the post-tariff stage of detention, but was returned to closed prison following allegations of his involvement in drug dealing. The information regarding his alleged involvement was forwarded to the Parole Board. Both the prisoner and his solicitor were denied access to the information which was passed on to a special advocate. Following an unsuccessful challenge of the practice, the prisoner appealed to the House of Lords. The question for the Court was whether the Parole Board had the power to appoint a special advocate in the absence of clear statutory authority, and whether the procedure satisfied Article 5. In both cases the Court held that it did, but not without reservation. Focusing on the effect of the use of a special advocate on the rights of the prisoner, Lord Bingham questioned the fairness of a process whereby a decision concerning an

⁴²⁷ The practical separation of the HR concern of the individual and the concerns of the state

⁴²⁸ [2004] PLR 95

⁴²⁹ [2004] EWHC 1921

⁴³⁰ [2005] UKHL 45

individual's liberty could be grounded on evidence which remained undisclosed to the prisoner and his legal-representative. Since the power to appoint a special advocate could not be implied into the rules applicable, the power to depart from the requirement of fairness could only be authorised by statutory provision. In the absence of authorisation, and as a fundamentally unfair process, the Special Advocate procedure constituted a breach of Article 5. The finding stood in contrast with the majority, in whose opinion, it was essential to focus not on the concern of the prisoner, but the practicality of the Parole Board having to achieve a decision in the best interest of the State. Although the procedure constituted a violation of Article 5, insofar as it permitted evidence to be kept from the prisoner and his legal-representative, the use of the special advocate was necessary to satisfy the greater need to protect the public.

To summarise, the treatment of prisoners raises a number of concerns regarding the practical effect of the ECHR. Although there is little doubt that since its inception, the ECHR has gone some way in promoting the concern of the prisoner (permitting greater access to courts for example) its effect on the prison experience remains relatively unchanged. The ECHR may be capable of influencing Parliamentary discussion, but incapable of effecting significant change either in terms of executive action, or Parliamentary stance. According to von Hirsch and Ashworth, one of the functions of the State in delivering a just criminal order, should be its ability to respond to harm caused by the individual offender in a way which satisfies the demands of justice, while simultaneously acknowledging him as a 'rational citizen' and adopting a fair, proportionate and consistent process.⁴³¹ However, post the HRA, the Government has responded to an increasing public and media concern over the perpetrators of crime with a number of reforms to alter the order grounded on a perceived consensus throughout Parliament of a need to place greater emphasis on the interest of the Community, the victim of crime, the witness and the informant.⁴³² Whether such a re-balance can be used to support an argument that criminal justice has been rendered a zero-sum game, whereby the interest of the community is achieved at the expense of the offender, certainly it is arguable that criminal justice has fast become, in the words of Ashworth and Redmayne, a greater 'focus for political posturing,'⁴³³ with all the danger of a reduction in the seriousness accorded the HR of the offender, including a right to proportionate punishment commensurate with his actions, which such posturing can arguably suggest.⁴³⁴

For example, in September 2001, the Criminal Justice (Mode of Trial) (No 2) Bill 2001 faced its second defeat in the House of Lords. The main objection raised was its transfer of the offender's

⁴³¹ A. von Hirsch and A. Ashworth *Proportionality in Sentencing* (OUP, Oxford 2005) Chapter 2

⁴³² As declared in the *5 Year-Strategic Plan: Cutting Crime, Delivering Justice: A Strategic Plan for Criminal Justice (2004-2008)* August 2004 (TSO, London)

⁴³³ Ashworth and Redmayne (2007), *Op. cit* at 57

⁴³⁴ D. Downes and R. Morgan, *The Skeletons in the Cupboard: The Politics of Law and Order at the Turn of the Millennium* in M. Maguire, R. Morgan and R. Reiner *The Oxford Handbook of Criminology* (3rd Edition) (OUP, Oxford 2002)

right to elect trial by jury in cases triable either way into the hands of the Magistrates Court and the latter's ability to consider such circumstances as the existence of a previous conviction, or the consequences of a possible conviction, on the well-being of the defendant and his dependents. Apart from opposition raised in the House of Lords, the proposal invoked considerable unrest amongst academics and legal-practitioners generally, including the Bill's earlier supporters. Whereas, according to Zander, the reality of such a restriction could well hinder the offender's ability to defend himself against inaccurate assumption; Lord Bingham declared it an impracticable interference with judicial discretion, unworkable in the sense that were a magistrate obliged to decide at the outset where a case was to be heard, such practice would require him to consider all the facts, including previous conviction.⁴³⁵ However, resulting in a number of equally questionable amendments to evidential provisions regarding previous convictions, misconduct, character and hearsay,⁴³⁶ as well as DNA Collation,⁴³⁷ the double jeopardy rule and measures of re-trial, it is the Criminal Justice Act 2003⁴³⁸ which has continued to provoke criticism of a perceived increasing imbalance between the criminal justice order and the offender.

Applying mainly to offences committed on, or after 4 April 2005, the CJA 2003 introduced a number of changes to the sentencing regime. One development included the conferral on magistrate courts greater powers of custodial sentencing, including an increase in discretionary power to sentence from 12 to 18 months for a single offence, and the introduction of a number of changes to the range of custodial sentences available, including a new category of life-sentencer. In accordance with Part 2, the category of life-sentencer is extended firstly, by the introduction of a life-sentence for those persons who commit 2 designated serious offences, and secondly, by a Section 224 indeterminate sentence of life-imprisonment applicable where the offender is deemed a danger to the Community. A measure, now forming the focus of the Lockyer Review following judicial criticism of its underlying policy in *Wells v Parole Board (2007)* and *Walker v Parole Board (2007)*,⁴³⁹ so ill-conceived from the start, that its implementation in the opinion of Garside, has proved nothing less than 'corrosive of the principles of a just, proportionate, and effective sentencing framework.'⁴⁴⁰

Further, responding to public criticism of the seemingly light sentences dealt out by courts, the CJA 2003 introduced a range of sentences including the Custody Plus,⁴⁴¹ Custody Minus,⁴⁴² and

⁴³⁵ M. Zander (2001), Op. cit at 1880

⁴³⁶ Forming the focus of criticism by the Joint Committee on Human Rights, *Criminal Justice Bill: Further Report (2nd Report of Session 2002-2003)* (HC, London)

⁴³⁷ Forming the focus of criticism by the Joint Committee on Human Rights, *Criminal Justice Bill: Further Report (11th Report of Session 2002-2003)* (HC, London)

⁴³⁸ Hereafter, CJA 2003

⁴³⁹ [2007] EWHC 1835 (QB)

⁴⁴⁰ Director of Criminal Studies, King's College London, reported in the Times Newspaper 8 May 2004 p. 4

⁴⁴¹ Twelve months imprisonment is combined with post release supervision for twenty-six weeks

the Intermittent Sentence.⁴⁴³ Forming an exacerbation of the existing use by Magistrates of the short custodial sentence, the underlying rationale of the plea before venue procedure introduced in the CJA 2003 suggested a policy of reform designed foremost to reduce the number of cases in the Crown Court. On analysis however, the procedure had no such effect. While the incidence of defendant elections for Crown Court did decline, little change in magistrate decisions to send cases to the Crown Court meant that they still continued to send an approximate 10% to 12% of either way cases to the Crown Court for trial, or sentence. In accordance with the findings of the Auld Report 1999, out of all the either way cases tried in the Crown Court which resulted in a conviction, some 44% resulted in the imposition of a non-custodial sentence and a further 12% in a custodial sentence of less than 6 months.⁴⁴⁴ Although the figures did include a minority of defendants who did elect for trial in the Crown Court, despite the introduction of the plea before venue procedure, the Magistrates court remained responsible for sending more offenders to prison than the Crown Court.

Whether such experience constitutes a feasible indication of the risk that the Government is running by increasing magistrate use of the custodial sentence, the excessive use of custodial sentencing does constitute a viable concern. Whereas in 2006 England and Wales topped the Prison League Table for Western Europe, imprisoning some 145 per 100,000 of the population, compared with 88 in France and 97 in Germany, statistics on UK criminal sentencing revealed that in February 2007 the number of prisoners serving indeterminate sentences was 8,700, with an average of 140 prisoners a month being given an indeterminate public protection sentence.⁴⁴⁵

One aspect of the custodial sentence, its increasing use in relation to women for non-violent offences, formed the focus of the Fawcett Society, according to whom, in March 2004 there was some 4,500 of the female population serving time in prison: representing an increase of some 194% during the last 10 years, compared to a 50% increase in the imposition of custodial sentences on men.⁴⁴⁶ Published in the same month, the Government's response to the criticism was the introduction of the Women's Offending Reduction Programme. An attempt to encourage greater diversion in the treatment of women at the pre-court stage, including use of accommodation centres and support services for drug and alcohol abuse. Apart from the cost placed on community providers and the actual availability of such services however, the diversions advanced by the Programme seemed somewhat removed from the concern expressed

⁴⁴² A sentence of less than twelve months custody suspended for six months to two years, combined with supervision in the community

⁴⁴³ A sentence of up to twelve months served intermittently

⁴⁴⁴ The Auld Report. *The Auld Review of the Criminal Courts of England and Wales 2001* (The Lord Chancellor's Department, London)

⁴⁴⁵ Howard League, *Howard League for Penal Reform Symposium on Criminal Sentencing, 10 May 2007* (Howard League for Penal Reform, London)

⁴⁴⁶ The Fawcett Society. *Report of the Fawcett Society's Commission on Women and the Criminal Justice System, 31 March 2004* (The Fawcett Society, London)

by the Corston Review of March 2007, that a continual increase in the number of the female prison population, with no equivalent rise in the number of women committing more offences, could only lead to the reality that a population effectively ignored in penal policy was becoming all the more in need of serious attention.⁴⁴⁷

A second aspect of the increased use of the custodial sentence was/is not merely the increase in the prison population, but its impact on certain persons being sent to prison. Research by the Parliamentary Joint Committee on [HR] into the consequences of imprisoning the mentally-ill in standard facility prisons, concluded that whereas prior to the excessively punitive political climate of 2003, in 2002 there were an approximate 95 suicides committed by such prisoners during incarceration, post 2003 this number rose to 189 by 2005.⁴⁴⁸ The statistics followed 4 months after the publication on 13 January 2005 of the Management of Offenders and Sentencing Bill, whose aim, insofar as it attempted to address the problems of mental health and the likelihood of such prisoners re-offending, remained characteristically the protection of the public.

In view of the above, both policy and political discourse concerning the increasing use of the custodial sentence and the HR of the individual offender post the HRA, represents a continuing ideological shift from the focus on the underlying causes of crime which, according to Livingstone, Owen⁴⁴⁹ and Feldman,⁴⁵⁰ (arguably) characterised the 1960's and 1970's criminal justice order. A shift beginning with reform of the right to silence in the Criminal Justice and Public Order Act 1994 and an attempt to remove the right to elect jury trial, and ending (so far) in such ambivalent regard for the application of HR to the criminal process, as the introduction of the controversial ASBO.⁴⁵¹

Examining possible motivation for the shift, one reason for the seeming nullification of the interest of the individual offender in favour of the concerns of the community, could be its value in securing public confidence in the circuits of political and media exchange. Whether such an incentive can reasonably explain the rationale behind recent changes to the criminal justice order however, certainly the changes which so far have been made, have been at the expense of that category of citizens which, insofar as it remains on the fringe of mainstream society, the incumbent Government would appear increasingly prepared to accord ever diminishing account. Whether or not engineered to reinforce first and foremost the retributive sentiments of society, such a shift toward the emotional response of populist politics has resulted in an arguable

⁴⁴⁷ Report of the Home Office, *The Corston Report: A Review of Women With Particular Vulnerabilities in The Criminal Justice System*, 13 March 2007 (Home Office, London)

⁴⁴⁸ *Parliamentary Joint Committee on Human Rights Sixth Report (2005-2006)* (Hansard, London)

⁴⁴⁹ S. Livingstone and T. Owen *Prison-Law* (OUP, Oxford 1993) Chapters 6 and 10

⁴⁵⁰ D. Feldman *Civil-Liberties and Human Rights in England and Wales* (OUP, Oxford 1993)

⁴⁵¹ Ashworth and Redmayne (2005). *Op. cit* at pp 11-14

descent into a zero-sum relationship between the individual offender and the greater community. As a result, whatever can have been expected of the impact of the HRA, it appears unlikely that there can be any political room for a serious debate of HR in a climate which places control so far above the concerns of the individual offender, that any concern for the invocation of his rights and interests, is regarded as an affront to the community.

Section 3.4: UK Policy and Human Rights, the Last Haven of Sui-Generis Positivism?

The ECHR represents a classic construct of the twenty-first century nation-state: a declaration of popularly perceived universal rights and freedoms which is more uncertain in practice than it is absolute. Insofar as the ECHR's circumvention of its declarations allows its signatories to take measures to suspend the rights and freedoms contained therein, it cannot avoid the argument that its attempt at universalism conceals a case of cultural relativism whereby HR remain the premise of the signatory-state.

The reality of a universal order of HR protection and the reach of liberalism is summarised throughout the work of Simpson,⁴⁵² and Bernstein.⁴⁵³ When liberal states proclaim to protect universal rights they mean that the privileges of such are acknowledged only insofar as they are conducive to political good, and then only in relation to individuals who are accorded the status of citizen. The observation is particularly pertinent in relation to the UK Government's (and arguably Legislature's) treatment of three areas of HR concern: asylum, terrorism and various aspects of criminal justice.

Post the HRA, the objective of UK asylum policy has been politically pursued regardless of cost to the individual, his family and/or dependents.⁴⁵⁴ The object of reform of the asylum order was to reduce the cost and burden of unfounded asylum claims, speed up the removal of economic migrants, and formulate definite measures to counteract the risk of terrorism. Experience of the reform has witnessed the delivery of numerous induction and accommodation programmes, conditional and restricted support services, and a particularly controversial detention and removal process of claimants perceived as a threat to national security. In the House of Commons 15 October 2001, the Home Secretary declared such measures paramount for the protection of the nation from insecurity. A justification which, at the expense of respect for the rights and freedoms of the asylum individual, was used to drive forward the greater empowerment of the Home Secretary to detain and/or remove the claimant and/or his family from the UK; the introduction of a conditional process of state support for the claimant and/or his family: including the imposition of reporting and residence requirements; the introduction of

⁴⁵² Simpson (2002), Op. cit 83

⁴⁵³ Osborne (1991), Op. cit at 119

⁴⁵⁴ S. Chakrabarti 'National Security and Human Rights' in K. Economides (and Others) 'A Symposium on the 2005 Hamlyn Lectures' [2007] P.L 209

a system of deportation and appeal conducted from either the claimant's native country, or the country through which he had travelled to the UK; as well as a number of amendments to the British Nationality Act 1981 to accommodate a policy of conditional nationality.

Further, drafted in conjunction with the UK Department for Constitutional Affairs, one of the measures carried out by the Home Secretary included the abolition of the Immigration Appeal Tribunal and its replacement with a single-tier system.⁴⁵⁵ In accordance with the new order, judicial review of any decision made by the authority was restricted to requests for rulings of the Court of Appeal on points of legal principle only. Although the Tribunal had for a long time constituted an arguable drain on the resources of the Legal Services Commission, its abolition constituted a disturbing development in terms of the impact on the asylum-claimant. In accordance with the single-tier system, judicial review of any decision made by the authority was restricted to requests for rulings of the Court of Appeal on points of legal principle only. The measure constituted an affront to HR on two grounds. Firstly, in relation to the ECHR requirement for a clear and just process of appeal, restriction on judicial review amounted to discrimination against the asylum-claimant. Secondly, the abolition of a mode of appeal in relation to questions of error of law, natural justice, irregularity or jurisdiction, a contravention of the *telos* of both the ECHR and the HRA.⁴⁵⁶

Insofar as such asylum policy has resulted in the greater erosion of the non-national's (arguably) universally acknowledged 'rights' and liberties, it becomes apparent in the language of Osborne,⁴⁵⁷ Bernstein⁴⁵⁸ and Simpson,⁴⁵⁹ that HR do attend the principle of nationality, and despite its generality, excludes from the community of its own subjects all those who do not belong to the nation-state. The ECHR may declare a universality of rights protection on behalf of the universal man, but insofar as the negative freedom which the UK has continued to draw from its provisions is used to close society, the UK's response to asylum serves to illustrate that it is the separation between the national and non-national which has continued to dominate HR thought. Applied to the concern of terrorism, the observation becomes increasingly persuasive.

⁴⁵⁵ Assessed in F. Klug and H. Wildbore 'Breaking New Ground, the Joint Committee on Human Rights and the Role of Parliament in Human Rights Compliance' (2007) *E.H.R.L.R.* 231

⁴⁵⁶ The abolition of the Immigration Appeal Tribunal appeared to be a measure consistent with the UK Prime Minister's declaration on 20 January 2003 regarding the 'unacceptable flood' of asylum-claimants into the UK, to commit the Government to examine measures beyond those in accordance with international law, including the UK's withdrawal from the ECHR. The declaration is interesting. Despite its attempt to tighten the process of asylum and discourage economic migration, the UK Government rendered full diplomatic support to the French authority's decision to close the Sangatte Refugee Camp. As a consequence, the UK received some 1,200 refugees all of whom were granted leave to remain for a period of 4 years, regardless of merit. Almost simultaneously, the Government removed the asylum-seeker's employment concession which, up until the 23 July 2002, allowed claimants to apply for work should their application not be decided by the Home Office within 6 months of their arrival in the UK

⁴⁵⁷ Osborne (1991), *Op. cit* at 114

⁴⁵⁸ Bernstein *in* Osborne (1991), *Op. cit* at 119

⁴⁵⁹ Simpson (2002). *Op. cit* 83

Post the HRA, the Government's response to the threat of terrorism has resulted in a myriad of legislative development, amendment and debate.⁴⁶⁰ Although it is arguable that the ability of a signatory-state to derogate from the ECHR in times of national emergency highlights its appeal as a 'living instrument' to acknowledge HR as constructs, which by their nature alter in form, content and social function, the extent to which the UK has extended the use of exclusion, as well as the defining conditions which enable it to operate, illustrates the same order's questionable ability to prevent a signatory-state from lawfully exceeding its provisions.

Amongst criticism of the impact of the anti-terrorist measures on the rights and freedom of the individual, rests the general charge that underlying the Government's attempt to counter the concern of national security, lays a motive to regain control of asylum by a discriminate placing of the non-national beyond the concern of HR protection. Although such discrimination reflects a change of direction in policy evident throughout ECHR signatories generally,⁴⁶¹ it is the way, as much as the nature, in which the UK has responded to terrorism, which gives rise to a number of concerns including whether, having entered the era identified by Douzinas,⁴⁶² HR can themselves be characterised as a form of legitimisation of state power: an *ersatz* ideology.

Certainly, there can be few less suspicious statutory-initiatives, in terms of their effect on the power of parliamentary scrutiny, than the Civil Contingencies Act 2004⁴⁶³ and the Inquiries Act 2005, which extended the powers of ministers while making them less answerable to Parliament.⁴⁶⁴ Introduced as the CC Bill, initiatives proposed included the expansion of the circumstances in which emergency powers could be used; abolishment of the need to declare a state of emergency as a precondition of use; and the conferral on ministers greater powers to introduce emergency regulations, including a power to prohibit activity not even specified in the Bill. Indicating the Government's 'wearying of the HRA,' one matter of interest was its conferral on the CC Bill the status of secondary legislation on condition that it was convinced that the courts would not challenge the efficiency of the impending Act.⁴⁶⁵

Further, in accordance with the Civil Contingencies Act 2004, following a minister's declaration of a state-of-emergency, property can be seized and/or destroyed without compensation, courts

⁴⁶⁰ Justified on the ground of national security, the new order of counter-terrorism has made provision for the extension of police powers of stop and search (including a *de facto* random practice), arrest and interrogation; the extension of state power to detain indefinitely without trial any individual suspected of terrorist involvement; the empowerment of ministers to seize personal assets and freeze bank accounts, confiscate or destroy property, prohibit movement, assembly and protest within specific areas and at specific times; the creation of a number of offences including breach of order restricting movement, being a member or supporter of a proscribed organisation, or wearing any item signifying such support; as well as the extension of the power of exchange of confidential information between Government departments and any relevant public body

⁴⁶¹ Toward curtailing the movement of the non-national which promises a less secure status for his rights and freedoms, as well as a greater willingness to exclude by reason of the threat posed by terrorism

⁴⁶² Douzinas (2002), Op. cit at 100

⁴⁶³ Hereafter, CC Bill

⁴⁶⁴ Or, such proposals as those of the Legislative and Regulatory Reform Bill 2006, whose original draft would have allowed ministers to effectively make law without reference to Parliament

⁴⁶⁵ Ewing (2004), Op. cit at 839 (fn) 59

or tribunals set-up, and assemblies prohibited or confined to a specific area on suspicion that an emergency might occur. Only after 7-days is Parliament able to consider the situation. If the minister is found to have acted wrongly his action may be subject to assessment by Government investigation in accordance with the Inquiries Act 2005, but as findings are presented directly to ministers (not as they once were to Parliament), a minister maintains the right to set the terms of the inquiry, withhold information, suppress evidence, and either close or terminate the hearing without explanation. Despite *universalist* claims to the contrary then, it would appear that HR remain constructs of political determination, shaped by the need to counteract whatever concern an increasingly multi-cultural state creates. In this context, the influence of the ECHR on the national governing authority remains questionable and effective scrutiny of the impact of executive action on the rights and freedom of the individual increasingly superficial.⁴⁶⁶

Indeed, on July 3rd 2006, Parliament was sufficiently concerned by the effect of the practice of indefinite detainment without trial of terrorist-suspects, and concerted attempts by politicians to stifle criticism, as to call for the establishment of an independent body to report to Parliament on the need for such measures. Adding little to the debate other than its reassertion of the need for a greater time limit to facilitate interrogation, the Government responded to the criticism with the launch in November 2006 of a campaign to recast the HRA: whereby the Courts would be prohibited from overruling executive decision when to do so contradicted the interpretation accorded the ECHR by other signatory-states. Examining the Government's claim that the ECHR stood between the Government and its first duty: national security, it is arguable that far from a fear that the ECHR served as an impediment to public safety, the real motive for wanting to change the HRA was that it gave (in theory at least) greater-credence to the rule of law in safeguarding the rights of the non-national from the will of the state. The intimation that beneath the Government's intention to radicalise the HRA lays an unstable authoritarianism, whereby exaggeration of the threat to national-security could even be used to justify measures which have no relevance to tackling terrorism, is disturbing. Certainly, the use of the Serious Organised-Crime and Police Act 2005⁴⁶⁷ to suppress the relatively formerly 'free' practice of protest at the centre of political power, gives rise to the particular criticism that, insofar as the Government's response to the threat of terror appears to have resulted in the exchange of freedom for security, the SOCPA represents (from an arguable civil-libertarian perspective) little more than an advancement of the technical ability of the State to curb public-protest, either by the use of police power in accordance with the TA 2000 and SOCPA, or the prohibition of specified activity by means of the ASBO.

⁴⁶⁶ Stone (2004), Op. cit at 10

⁴⁶⁷ Hereafter, SOCPA

Yet, according to Gearty, the criminalisation of free-protest constitutes merely a third phase in the history of the freedom of public protest and internal security in the UK.⁴⁶⁸ A move away from the discretionary power of the police to keep order and their reliance on a ‘protean common-law’ as a basis for action, toward the legalisation of the control of public protest by means of statutory control.⁴⁶⁹ As a result, as police discretion has fallen away, the police have come to deploy their power under various statutes in preference to their previous commitment to a one-size-fits-all common-law. Two developments have pushed this process along. The first, ‘the introduction of the [ECHR] into UK law [via the HRA]: the restrictions on protest that this charter permits must as a basic prerequisite be prescribed by law...[in which case] the common-law has been severely cut back by the demand of foreseeability that is entailed by the new European yardstick. The second...the judges themselves, increasingly impatient with police invocations of broad common-law discretionary powers and more inclined to note the plethora of parliamentary laws that now cover the field and to counsel the authorities to rely on these.’⁴⁷⁰

Whether the reality of a move from discretion to law, is the greater placement of civil liberties protection more fully into the democratic process as Gearty suggests, or simply a technical transfer of control from one state limb to another, examining the Government’s treatment of asylum and terrorism, it becomes clear that a universal-concern for the individual cannot prevail against national-politics. Firstly, it is precisely during periods of perceived national emergency when the need for protection is heightened, that the Government is most unwilling to accept any restraint on its power. Secondly, HR and freedoms do attend the principle of nationality, which exclude from protection all those who do not belong to the signatory-state. Observations which do raise the specific concern: is the concept of HR protection becoming the last-haven of *sui-generis* positivism, and if so, a *raison-d’etre* of the signatory-state?

Post the HRA the UK has seen a plethora of controversial criminal justice reform. Certainly one example is the Criminal Justice Act 2003.⁴⁷¹ In accordance with amendments in the Criminal Justice Bill 2003, evidence of bad character was accorded, in Part 10 (Chapter 1) of the CJA, a far wider use and definition. Section 82(A) defines evidence of bad character as behaviour, or a disposition to behave, which in the opinion of a Court, could be viewed with disapproval by a reasonable person. The amendments are objectionable for a number of reasons.

Firstly, Part 10 effectively creates a risk that defendants could be convicted on evidence of past offences for which they had already been tried, or of a disposition toward such conduct. Although, evidence could be put before a jury where the judge was satisfied that there was no

⁴⁶⁸ Gearty (2007), Op. cit at 185-187

⁴⁶⁹ A process having been well underway since the early part of the twentieth-century

⁴⁷⁰ Gearty (2007), Op. cit at 186

⁴⁷¹ Hereafter, CJA

risk of prejudice to the defendant, evidence of bad character can only work against the defendant, insofar as knowledge of previous conviction will prejudice a jury. Secondly, insofar as the CJA introduces the requirement of obtaining leave from the court before the admission of such evidence, the task of determining the relevance of past conduct will now lie with the judge and not the jury: constituting a direct interference with the ability to cross-examine. Thirdly, Part 10 gives rise to the very real risk of replacing the police practice of establishing evidence to link the accused to the crime of which he is accused with reliance on previous conviction, and a reality that the police could well pursue known offenders in the knowledge that their past conduct could lead to a successful conviction.

Similar concerns can be raised in relation to both statutory interference with the rule of double jeopardy, and the practice of drug-testing and treatment. In accordance with Part 9 of the CJA, a Public Prosecutor is accorded the power to apply to the Court to request the quashing of an acquittal and the order for a retrial on grounds of new evidence against the defendant where the interest of justice demands. The provision eliminates the double jeopardy rule in relation to drug offences, offences against the person, and terrorism, with the effect that in the event of their failing to secure a conviction, the police are granted a power of search and seize on the ground that new evidence may be found. Apart from the prosecution being allowed the advantage of knowing details of the defendant's case, the basis of the retrial (grounded on a pre-trial finding that there is new evidence to justify a second hearing) can only lead to the increased likelihood of the retrial starting off on a presumption of guilt as opposed to innocence.

With regard to drug-testing and treatment, in accordance with the CJA a new paragraph 6A of Schedule 1 is inserted into the Bail Act 1976. The paragraph provides that a separate decision that there is no risk of the commission of a further offence by a drug dependant defendant must now constitute part of drug assessment. Unless the ECHR can be constructed as a living-instrument, the requirement will stand in breach of Article 5 which does not allow detention on grounds that it is in the defendant's own good.⁴⁷²

Grounded on the idea of preventative and rehabilitative detention, such examples highlight an increasing concern central to the new punitive order.⁴⁷³ Although the practice of reliance on risk-assessment has been part of the UK sentencing framework for some time, risk-assessment is

⁴⁷² Further measures include the direction to the court, under Paragraph 9A Schedule 1 of the Bail Act 1976, when considering the possibility of the defendant committing a further offence if awarded bail, to give attention to the fact that at the time of commission the defendant was on bail for an earlier imprisonable offence. This sets out what can be described as a low hurdle. As does the extension of the prosecution right to appeal against the granting of bail under the Bail Amendment Act 1993 to all imprisonable offences; and a new Section 14 abolishing the residual power of the court to grant bail, except in cases where there is an appeal pending by way of case stated. Although the alternative method of appeal to the Crown Court is deemed adequate in accordance with Articles 5 and 6, the exclusion of consideration of appeals against bail conditions of curfew, tagging, and conditions to reside away from a specific area, raise valid concerns regarding the effect of such developments *in fact* on civil liberties

⁴⁷³ Ashworth and Redmayne (2005), *Op. cit* at 14

expanding.⁴⁷⁴ A practice, which relies on an assumption that the system can reliably identify potential offenders, made worrying firstly, by the fact that risk-assessment tools are still in a state of evolution, whereby even supposedly objective tests invariably involve subjective assessment at the point of scoring with the result that various health professionals can reach very different scores on the same offender; and secondly, that many traditional elements of mitigation are features which will produce higher scores on the risk assessment tool by the probation officer.

To summarise, broadening of the definition of bad-character, erosion of the double-jeopardy rule and interference with the presumption of innocence, constitutes only part of a policy which, according to Liberal-Democrat spokesman Heath and Marshall-Andrews MP,⁴⁷⁵ demonstrates the increasing (arguable) 'authoritarianism' at the heart of the Government's approach toward the wider concern of HR: a rebalance of the criminal justice order in favour of the state-compliant.

Yet, the Government remained dissatisfied at the pace of change. In July 2006 another review resulted in the drawing up of another Criminal Justice Bill whose central theme constituted an extension of that already seen so far: a rebalance of the criminal justice system in favour of the law-abiding majority. Insofar as proposals affected the individual, the enforcement of licence conditions for offenders in the community, either post release from prison, or serving community orders, remained a priority. The strategy set out plans for the introduction of new powers to ensure that courts operated to a presumption that offenders who breached bail, and/or offended while on bail, would be remanded in custody. Targets for the time by which an offender who breached his licence conditions was returned to custody were also amongst measures of control proposed, as well as a power of probation officers to vary the punishment of an offender already served, should he be found to be in breach of his conditions, without having to approach a court.

A second theme of the 2006 planned reforms was the notion of summary justice to improve the speed and effectiveness of the Magistrates and Crown Court. Proposals included the introduction of a 24-72 hour period of bringing an offender to justice. Undermining some of the most fundamental principles of due-process, according to measures proposed, those pleading guilty would be sentenced by crown-prosecutors and police, at the expense of the former open-judgment of those charged with an offence, impartial judicial-sentencing of those found guilty and acquittal of those found to be innocent. More important than protecting the innocent from being wrongly convicted it seemed, was/is the incumbent Government's determination to pursue

⁴⁷⁴ The CJ Act 2003 takes the sentence for public protection introduced in the CJ Act 1991 and the automatic life-sentence for a second serious offence introduced in the Crime (Sentences) Act 1997 further, by ensuring that those who commit one of a number of serious offences will be subject to a risk assessment to determine whether there is a risk of harm from further offences, with an assumption that there is such a risk if the offender has a previous conviction for a similar offence

⁴⁷⁵ Independent Newspaper 29 June 2006 p. 2

its rebalance of the criminal justice order in favour of the law-abiding majority by the replacement of the independent magistrate, with an unseen agent of the state.

To summarise, the implementation of policy post the HRA, has resulted in a transparent and (arguably) consistent erosion of the HR concern of the individual by a plethora of measures in a law and order agenda to control potential, as well as actual offenders, to coerce drug-users into treatment, ensure that courts hand down severer sentences, control communities, criminalise political protest, and ensure that the state compliant take a privileged place at the heart of the system.⁴⁷⁶ According to Feldman, such policy stands in (arguable) contrast to the law and order philosophy prevalent throughout the 1970's and 1980's during which, in a process highlighted by Douzinas,⁴⁷⁷ prisoners and offenders were (arguably) admitted to what was described by Livingstone and Owen as a 'second class humanity.'⁴⁷⁸ The recognition of the rights of the offender was due to recognition of the value of the individual which led to a demand that state interference required justification: the burden of proof resting on those who would interfere to show that such interference was necessary. The philosophy represented a clear expression of Mills 1859 essay on liberty that the only purpose for which power could be rightfully exercised over an individual against his will was to prevent harm to others.

In contrast, a philosophy of what is politically perceived to be in the best interest of the majority/State has gained overwhelming ground with the incumbent Government. Accordingly, the idea that the individual is impelled to act by social or economic force is no longer feasible. The prevailing political climate is one of rights and responsibilities: the power of the state to interfere with the customary freedom of protest, assembly, speech and expression (indefensible from a civil-libertarian perspective) justified on the basis of reasserting the greater authority of the state. Insofar as the convicted prisoner, the anticipated offender and the anti-social juvenile remain on the fringe of the controlled society, the functioning of the criminal justice order post 2000 gives greater significance to the question regarding the free and subjected subject raised by Douzinas: when does respect for established liberties and HR end? Insofar as the drive of the Government to be tough on crime continues to have a damaging effect on the rights and liberties of the individual, the answer would seem to be when they are raised in relation to the wrong kind of citizen: the 'state non-compliant.'⁴⁷⁹

With regard to the role of Parliament, the extent to which it has been able to act as a guardian of HR post the HRA, has continued to remain inherently hindered. Firstly, by a process of incremental infringement exemplified not merely by the examples given by Stone, regarding

⁴⁷⁶ The latest development being the introduction of Clause 26 of the Criminal Justice and Immigration Bill 2007, which proposes to abolish the Court of Appeal's ability to quash a criminal sanction

⁴⁷⁷ Facilitated (in part) by the heightened awareness of the need for HR protection by the ECHR. Douzinas (2002), Op. cit at 184

⁴⁷⁸ S. Livingstone and T. Owen *Prison-Law* (OUP, Oxford 1993) Chapters 6 and 10

⁴⁷⁹ Douzinas (2002), Op. cit at 185

police access to confidential material in the TA 2000 and the Proceeds of Crime Act 2002, but the ability to control public assembly, speech, and protest in accordance with the SOCPA 2005.⁴⁸⁰ Secondly, by coercion into acceptance of public policy without due regard for individual freedom by situations of perceived emergency, exemplified by the ATCSA and the TA 2005. Although, one example to take issue with Stone's observation that with any Parliamentary attempt to protect civil liberties in relation to controls grounded on national emergency, the problem is not so much that it is democratically decided that the rights of the individual must give way, but that they are ever seriously raised at all, is the Government's defeat in Parliament over the proposed 50 day detention without trial; as the erosion of freedom continues under justification of state necessity, it is becoming all the more difficult to regard Parliament as an effective HR guardian, other than at the most general level.

To conclude, as the nature and volume of UK reform post the HRA strikes at the (arguable) universalism of the ECHR, the Government's treatment of criminal justice, asylum and terrorism, serves to highlight the reality of a universal HR order in which the argument of the cultural-relativist is played out. The primary effect of the HRA, in terms of protecting the rights and freedom of the individual, is the general removal of the need to petition Strasbourg for the deliberation of a potential breach of the ECHR, and the creation of a private law remedy for the award of damages against any public authority which is found to have violated its provisions. A compromise between sustaining state sovereignty and formally acknowledging the ECHR, the charge that UK law is practicably interpreted so as to accord effect to the ECHR, falls essentially to the UK judiciary. The UK courts are charged with applying the right to life, liberty, fair-trial, security, respect for family/private life and effective legal remedy; the prohibition on torture, slavery, forced labour, discrimination, abuse of lawful punishment; and respect for the freedom of thought, conscience, religion, expression, and association, in a way that gives the ECHR, a purposeful reality. Yet, the courts must also heed the prerogative of the Government to govern, and not substitute judicial insight for executive policy.

Despite such limitation however, throughout 2005 and 2006, the Government signalled its dissatisfaction with the role of the judiciary in the asylum, immigration and counter-terrorist order by calling for legislative restraint on its ability to interpret the HRA.⁴⁸¹ The dissatisfaction arose (in part) in relation to a number of court rulings, including that of Judge Sullivan that control orders under the TA 2005 were ECHR incompatible.⁴⁸² Following Judge Sullivan's judicial condemnation of the counter-terrorist measure as a deprivation of liberty, the

⁴⁸⁰ Stone (2004), *Op. cit* at 9

⁴⁸¹ Reported in *The Independent Newspaper* 29 June 2006 p. 14

⁴⁸² Ministers brought in the control orders in 2005 after the House of Lords ruled that the previous policy of detention of terrorist-suspects without trial was incompatible. The new laws gave the Home Secretary the power to impose control orders on all terrorist-suspects whether national or foreign

Government's position was made clear: whereas in any political argument concerning the rights of the individual and national security the latter would prevail; in the event of further judicial alienation of its policies, steps would be considered to ensure that the courts were statutorily restricted altogether, from frustrating any measure introduced to enforce them.

The controversy between what the judiciary has come to consider a political attack by the Government on its long held constitutional role, and what the Government considers to be an undermining of its authority as decision-maker by an ambitious judiciary, seems a long way from any opinion that, insofar as the outspokenness of the judiciary under the HRA could promote the concern of the individual, such could only have a beneficial influence on the Government without the need for constitutional confrontation. The HRA has brought with it something of the unexpected: a (very public) fracturing in the relationship between the Government and the Judiciary, and a risk of the ability of the latter to speak out on issues concerning national security being statutorily restricted altogether. Whether such controversy can seriously be regarded as an indication of the success of the HRA, or merely a catalyst for re-engagement by the latter of the argument that there are implied limits imposed by the common-law on the absolute powers of the Queen in Parliament however, is perhaps best assessed by examination of the actual protection accorded by the judiciary, the ECHR rights and freedoms of the individual.

Section 4: The ECHR, HRA 1998 and the UK Judiciary

Section 4.1: The HRA 1998 and the UK Judiciary

On 2 October 2000 the UK Government claimed to have brought home the ECHR by means of the HRA. Six years later, the same Government declared that the UK required a profound rebalancing of the HR debate. The reason given was the need to limit the abuse by the judiciary of Sections 2 and 3 of the HRA. Criticising the reasoning of the legal establishment, the Prime Minister declared (inaccurately) that the point about the HRA was that it allowed courts to strike down acts of Parliament.¹ Three areas in which a faction of the judiciary appears to have demonstrated concern over the interest of the individual are terrorism, asylum and criminal justice. The *tenor* of criticism has revolved around the effect of policy on fundamental liberties and an assertion that the duty of the judiciary lies not to the Government but to the electorate. Whether such criticism constitutes evidence of the ability of the ECHR to protect the individual, or rather judicial concern over a perceived constitutional threat to its own order, Section 4 of this thesis examines the judicial treatment of the ECHR post the HRA, as intimated in relevant case-law.

The way in which the ECHR impacts on domestic law is through the judicial obligation in respect of statutory interpretation in Section 3 of the HRA and the ability of the court to declare domestic law ECHR incompatible under Section 4. However, the duty of construction does not affect the validity of incompatible legislation if primary legislation prevents the removal of the incompatibility. In this sense the effect of the ECHR remains practicably no greater than it was prior to the HRA.²

Yet, highlighted by Kavanagh,³ Feldman,⁴ Bennion,⁵ Jowell and Oliver,⁶ the role of the judiciary has changed from the time when deviation from the literal approach to interpretation was regarded as a ‘usurpation’ of legislative function.⁷ Certainly, insofar as Parliament’s original intent is no longer the sole deciding factor, Section 3 has shifted the interpretative focus toward the concern of ECHR compatibility.⁸ According to Ewing, such departure from the search for Parliament’s original intent represented an indication of a ‘restructuring’ of the UK’s

¹ Independent Newspaper 29 June 2006 p. 2

² C. Gearty *Civil Liberties* (OUP, Oxford 2007) 26

³ A. Kavanagh ‘The Role of Parliamentary Intention in Adjudication Under the Human Rights Act 1998’ (2006) *O.J.L.S.* 179

⁴ D. Feldman ‘The Human Rights Act and Constitutional Principles’ (1999) *L.S.* 165

⁵ J. Bennion ‘What is Possible Under Section 3(1) of the Human Rights Act 1998’ [2000] *P.L.* 77, 91

⁶ J. Jowell and D. Oliver *The Changing Constitution* (OUP, Oxford 2000) 103

⁷ G. Marshall ‘The Linchpin of Parliamentary Intention: Lost, Stolen or Strained?’ [2003] *P.L.* 236

⁸ In the absence of guidance in Section 2 of the HRA as to the quantification of damages, the court in *R (Bernard) v Enfield London BC* [2002] EWHC Admin 2282 ruled that damages should be calculated on normal tort principles on the ground that it was obliged to reach a decision that did not undermine the *telos* of the ECHR; and in *Andrews v Reading BC* [2004] EWHC 970 (QB), despite the case falling outside of the terms of a statutory scheme for compensation, the court held that the possibility that an absence of compensation could result in a breach of Article 8 constituted a viable concern in accordance with the *telos* of the ECHR

classic constitutional order.⁹ However, by its nature, the HRA is a construct of a dualist order derived from a commitment to the sovereignty of Parliament. Whether such (arguable) adjustment to traditional principles of statutory interpretation¹⁰ can support a claim that the HRA has affected HR protection to the degree suggested by Ewing, is questionable.

Although prior to the HRA, the judiciary could be relied on to question some kinds of freedom threatened by executive action,¹¹ there were limits as to what it would do in shaping HR law.¹² According to Street, two limitations were (1) its reluctance to clash with Government officials; and (2) a determination not to immerse itself in public policy.¹³ Applied to analysis of the ECHR, a narrow construction of the HRA and adherence to established legal thought remain characteristic of the self-restrainer. The idea that the interpretative focus under Section 3 is no longer solely what Parliament originally intended, or what statutory language literally meant, regarded as ‘a defiance of coherent exposition.’¹⁴

However, the ability of the judiciary to look beyond Parliamentary intent has brought about changes in the traditional functioning of statutory interpretation, insofar as a broad view of the ECHR and (an arguable) willingness to move beyond established constitutional agency has come to characterise the finding of the activist.¹⁵ Accordingly, two approaches grounded on two philosophies re-emerge: that of the activist examined in Kremnitzer’s composite constitutionalist view of the role of the judiciary in decision-making advanced by Cohn;¹⁶ and that of what Hoffman terms the self-restrainer,¹⁷ determined to leave any change in the treatment of the individual to the Government.

Judicial Activism versus Self-Restraint

According to Starmer, the functioning of Section 3 resulted in a ‘180 degree shift’ in judicial focus from enforcing public duties to protecting individual rights.¹⁸ Insofar as a number of rulings indicate a heightened HR awareness, the observation is not unreasonable.

For example, prior to the HRA, where a tribunal ordered release of a detainee subject to a condition which was not fulfilled, detention continued and the jurisdiction of the tribunal ended.

⁹ E. Ewing ‘The Human Rights Act and Parliamentary Democracy’ (1999) 62 *M.L.R.* 79

¹⁰ As intimated by Lord Nicholls in *Ghaidon v Mendoza* [2004] 2 AC 557 Paragraph 30, that ‘the question of difficulty is how far, and in what circumstances, Section 3 requires a court to depart from the intention of the enacting Parliament;’ and Lord Woolf in *Popular Housing v Donaghue* [2002] QB 48 Paragraph 72

¹¹ *R v Ministry of Defence ex-parte Smith* [1996] QB 517; *R v Secretary of State, ex-parte Fire Brigades Union* [1995] 1 All ER 888; *Re M* [1994] 1 AC 377

¹² Other than its constitutional limitations: including the ‘unincorporated’ status of the ECHR

¹³ H. Street *Freedom, the Individual and the Law* (Penguin Group Publishers, London 1982) 263

¹⁴ Marshall (2003), Op. cit at 237-8. A continuing desire of a faction of the judiciary to comply foremost with Parliamentary intention expressed in *R (Anderson) v Secretary of State for the Home Department* [2002] 3 WLR 1800

¹⁵ A. Kavanagh ‘The Role of Parliamentary Intention in Adjudication under the Human Rights Act’ (2006) *O.J.L.S.* 26(1), 179

¹⁶ M. Cohn ‘Judicial Activism in the House of Lords: A Composite Constitutionalist Approach’ [2007] *P.L. Spr* 95

¹⁷ *R (On the Application of Pro-Life Alliance) v BBC* [2003] UKHL 23; and Klug, the judicial-deferrer, F. Klug ‘Judicial Deference under the Human Rights Act’ (2003) *E.H.L.R.* 125

¹⁸ K. Starmer ‘Two Years of the Human Rights Act’ (2003) *E.H.R.L.R.* 1, 14

In *R (IH) v Nottinghamshire Healthcare NHS Trust*¹⁹ the Court ruled that in order to render an order ECHR compliant, not only was it to be considered provisional, but subject to an obligation to monitor compliance, or order release. The ruling constituted a contravention of the decision in *Campbell v Secretary of State*²⁰ justified on Section 3, and the fact that the approach proved more consistent with the concern that a detainee was entitled to seek a court order for release.

A similar approach was adopted in *R v the Commissioner of the Metropolis Police, ex-parte U* and *R v Durham Constabulary, ex-parte R*,²¹ *R (Sim) v Parol Board*²² and *R (O) v Harrow Crown Court*.²³ As well as, *R (Wilkinson) v Broadmoor*²⁴ where, in the opinion of the court, it was not merely necessary for it to be active in terms of determining whether the treatment in question was acceptable (as opposed to merely reviewing the reasonableness of the decision taken) but that a purposive approach to statutory construction was an inherent requirement of both Article 6 of the ECHR, and Section 3 of the HRA.

Such case-law represents only a fraction of rulings relating to Articles 5 and 6 which, despite representing an area of law traditionally less bound by statute, would appear to indicate an increasing HR awareness (arguably) not dissimilar to the civil-law order. But what of the influence of the HRA on judicial thought? What of the distinction to be drawn between the reasoning and motive of the activist and self-restrainer/deferrer as (arguably) evidenced between different levels of court, and between procedural and substantive law?

The judicial approach to be followed when applying Section 3 formed the focus of *R v A*.²⁵ Concerning a question regarding a preparatory hearing prior to trial, the House of Lords was presented with the question whether a sexual relationship between the accused and the complainant was of such relevance to the issue of consent, as to render its exclusion under Section 41 of the Youth Justice and Criminal Evidence Act 1999 a breach of Article 6?

In the opinion of Lord Steyn the exclusion of prior sexual history in Section 41 posed an acute problem of proportionality. In order to assess whether Section 41 was ECHR compatible, it was necessary to consider what evidence it excluded. If the impact of Section 41 was to deny the right in a significant range of cases, it could amount to a breach. Counsel for the Secretary of State relied on the principle that in certain contexts the executive retained a discretionary judgment within which policy choices could be made, and which the courts were bound to accord weight. Lord Steyn declared that when a question arose as to whether Parliament had

¹⁹ [2002] MHLR 87

²⁰ [1998] 1 AC 120

²¹ [2002] EWHC 2486 (Admin)

²² [2003] EWCA Civ 1865

²³ [2003] EWHC Admin 868

²⁴ [2002] 1 WLR 4

²⁵ [2001] 3 All ER 1; *R v A (No. 2)* [2002] 1 AC 45

adopted a legislative scheme which made excessive inroad into an established right, the court was qualified to make its own judgment. Lord Steyn then went on to suggest the methodology to be adopted.

Referring to the observations of Lords Lester,²⁶ Wilson,²⁷ and the criteria for determining proportionality in *De Freitas*,²⁸ Lord Steyn highlighted two processes of interpretation: a contextual approach relevant in minimising the *prima facie* breadth of Section 41, and the approach of Section 3 of the HRA. Examining which was the more appropriate, Lord Steyn declared that the obligation under Section 3 applied even where there was no ambiguity in statutory language. Under ordinary methods of interpretation a court could depart from statutory language in order to avoid absurd consequences, however Section 3 went further. In asking what meaning statutory words were capable of yielding, and whether they could be made to yield a sense consistent with Convention rights, it could sometimes be necessary to depart from former methods of interpretation which could include the need to replace a reasonable interpretation of a provision with one which was linguistically strained.²⁹ In Lord Steyn's opinion, Section 3 required the court to subordinate the language of Section 41 to a broader consideration of relevance to be judged by common-sense criteria of time and circumstances. Because it was realistic to proceed on the basis that the legislature would not wish to deny the right of an accused to put forward a defence by advancing probative material, it was possible under Section 3 to read Section 41 as subject to the implied provision that evidence required to ensure a fair trial would not be treated as inadmissible. Constituting in the opinion of Starmer,³⁰ the 'boldest' exposition of interpretative power under Section 3, the approach introduced a new element into statutory interpretation: the ability, when rendering domestic provision ECHR compatible, to render it subject to implied provision. But how bold was/is Lord Steyn's exposition?

According to Cooke, Section 3 would require a very different approach to interpretation from that which the UK courts were accustomed.³¹ An approach in which the judiciary could depart from the traditional goal of statutory interpretation of understanding what Parliament meant by enacting legislation in its particular context, to interpreting the words of the legislation detached from that context.³² Despite Lord Steyn's referral to his approach as a 'reading of' statutory language, the subjection of Section 41 to an implied provision constitutes a departure from the

²⁶ A. Lester 'The Art of the Impossible: Interpreting Statutes under the [HRA]' (1998) *E.H.R.L.R.* 665

²⁷ R. Wilson 'The Making of a Constitution' [1998] *P.L.* 370

²⁸ [1999] 1 AC 69

²⁹ 'Similarly, when justifying a decision to read down Section 11(2) of the TA 2000 in *Attorney-General's Reference No 4 of 2000* [2004] UKHL 43, Lord Bingham declared that although the interpretative result was not the intention of Parliament when enacting the 2000 Act, it was the intention of Parliament when enacting Section 3 of the 1998 Act,' Kavanagh (2006), *Op. cit* at 188

³⁰ Starmer (2003), *Op. cit* at 16

³¹ HL. Deb (1997) 582 (Col. 1272) (Hansard, London)

³² Kavanagh (2006), *Op. cit* at 198

classic judicial approach summarised by Dame Butler-Sloss in *Re K (A Minor)*,³³ or advocated by Lord Hope, Klug³⁴ and Marshall,³⁵ according to whom, a court should defer only to what could literally be considered the will of Parliament, Yet, rather than speak of a potential conflict of intentions, it is arguable that Section 3 can be viewed as creating an additional presumption of statutory interpretation. Certainly Clayton and Tomlinson argue that the proper way to understand Section 3 is to acknowledge ‘that it combines the traditional enacted intention rule with a constitutional presumption in favour of [ECHR] rights’³⁶ According to Kavanagh, presumptions of interpretation have long been used in the common-law to protect fundamental rights. Clayton and Tomlinson’s suggestion therefore, presents adjudication under Section 3 in a way already familiar in interpreting statutes: Although, ‘Section 3 adds new content to the familiar presumption in favour of protecting [HR] because judges must now presume that Parliament does not intend to enact legislation which violates the...[ECHR]; and differs from the old presumption that Parliament did not intend to legislate so as to put the UK in breach of its ECHR obligations because the latter was only held to have application in cases where the statutory provision was ambiguous... the presumed intention model does not provide a different method of adjudication or a different set of principles to inform that adjudication; rather it provides a different way of presenting...that method.’³⁷

According to Kavanagh then, rather than ‘restructuring’ statutory interpretation, the approach adopted by Lord Steyn indicated the development of an additional factor to a process which (post the HRA) could be considered as consisting of three stages: (1) Determination of the meaning of the provision in question using ordinary methods of interpretation, the question being what did Parliament intend when enacting it; (2) Determination of whether the provision constituted a violation of the ECHR, requiring assessment in accordance with the principle of proportionality; And, (3) notwithstanding any *prima facie* conclusion in relation to the second stage, determination of whether the provision could be given effect in a way which was in fact ECHR compatible.³⁸ The observation is not unreasonable.

³³ ‘The duty of the... court is to attempt to find [an ECHR] compatible interpretation. If [such an] interpretation can be found, there is no justification for a declaration of incompatibility... [However] Section 3... [now requires]... a very different approach to interpretation from that to which the UK courts are accustomed. Traditionally, the search has been for the true meaning, now it will be for a possible meaning that would prevent the making of a declaration.’ [2001] 2 All ER 719 at 732

³⁴ Klug (2003), Op. cit at 128-129

³⁵ Marshall (2003), Op. cit at 237-238

³⁶ R. Clayton and H. Tomlinson *The Law of Human Rights* (OUP, Oxford 2000) 167

³⁷ ‘Viewing Section 3 as embodying a presumed intention does not remove the potential conflict of intentions [between that expressed in Section 3 and that expressed in the legislation under scrutiny]. It will still be the case that, when interpreting legislation in light of Section 3, the overriding goal of the interpretative process will be to find a Convention-compatible reading of the legislation. The difference is that under the ‘presumed intention model,’ that interpretation can be *characterised* as being in conformity with, or even deriving from, the will of Parliament [as expressed in Section 3].’ Kavanagh (2006), Op. cit at 188

³⁸ Lord Steyn ‘2000-2005: Laying the Foundations of Human Rights Law in the United Kingdom’ (2005) *E.H.R.L.R.* 349; ‘Incorporation and Devolution-A Few Reflections on the Changing Scene’ (1998) *E.H.R.L.R.* 153

The functioning of Section 3 formed the focus of *R v Lambert*.³⁹ Concerning a prosecution for possession of drugs contrary to the Misuse of Drugs Act 1971, the Court was called on to determine whether the imposition under Sections 5 and 28 of a legal burden of proof on the defendant constituted a breach of Article 6. In reaching its decision, the Court, using ordinary methods of interpretation, considered whether Parliamentary intent in enacting Section 28 was to impose a legal burden of proof, as opposed to an evidential burden. This led to an assessment of whether the provision constituted both a legitimate aim and satisfied the principle of proportionality. On the ground that the provision constituted a disproportionate way of satisfying the legitimate aim, Section 28 was read as imposing an evidential burden only. Examining whether the provision could be given effect in a way which was ECHR compatible, the words ‘prove’ and ‘proves’ in Section 28 were read as meaning ‘giving sufficient evidence’ to raise an issue.

Whether or not, such an approach can be seriously acknowledged as an indication that the role of Parliamentary intention has changed under the HRA,⁴⁰ insofar as ‘in a number of cases which have arisen under Section 3(1) since the HRA has come into force, the judiciary has held that the statutory objective is legitimate, but that the means chosen by Parliament to achieve that objective have amounted to ‘legislative overkill,’⁴¹ [the approach adopted in *Lambert* does show how] Section 3(1) can be used by the judiciary to qualify the effect of Parliament’s enacted intention in previous legislation [so as to effectively allow] the courts to amend legislation and change the choices made by Parliament about how an area of the law will be regulated.’⁴²

The approach was followed in *R v Keogh*,⁴³ *Attorney-General’s Reference Case (No. 4 of 2000)*⁴⁴ and *Sheldrake v Director of Public Prosecutions*.⁴⁵ As well as, *Goode v Martin*⁴⁶ where, on the ground that the application of Civil Procedure Rule 17.4 (2) had no legitimate aim when applied to the facts in question, the court considered it appropriate to adopt the interpretative technique espoused by Lord Steyn in *R v A*. The ruling followed the reasoning of *Cachia v Faluyi*⁴⁷ where, according to Lord Brooke, the ability of the court to extend its interpretative role by means of the HRA was to allow the interests of justice to be pursued in a way not previously open to the court.⁴⁸

³⁹ [2001] UKHL 37

⁴⁰ Although clearly the role of Parliamentary intention is not discarded, insofar as when judges seek to identify the objective of the statute for the purposes of applying the principle of proportionality, they do so using ordinary methods of statutory construction

⁴¹ *R v A (No. 2)* [2002] 1 AC 45; *R v Offen* [2001] 1 WLR 421

⁴² Kavanagh (2006), Op. cit at 192

⁴³ [2007] EWCA Crim 528

⁴⁴ [2004] UKHL 43

⁴⁵ [2003] EWHC 273

⁴⁶ [2001] 1 All ER 620

⁴⁷ [2001] EWCA Civ 998

⁴⁸ Highlighted in R. Cross *Statutory Interpretation* (Butterworths, London 1995) 49, long before the HRA, a judge was accorded the ability to rectify statutory language by means of reading in words which he considered to be necessarily implied by words which were already present in the relevant statutory text, ignore or alter words in order to prevent a provision from being absurd, unreasonable, unworkable or unintelligible. ‘Although judicial rectification of statutory words has occurred before 1998, it is

However, both *Goode* and *Cachia* concerned restrictions resulting from provisions contained in secondary legislation. In the case of primary legislation the courts began to distance themselves from *R v A* and *Lambert*. Whereas, in *International Transport Roth GmbH v Home Secretary*,⁴⁹ the Court held that it was not for a Court to effectively rewrite a statutory scheme so as to leave out the offending burden of proof, or substitute a maximum penalty for a fixed penalty; the reluctance of the Court to interfere with Parliamentary objective was made clear in *Re S (FC)*.⁵⁰ In order to preserve the integrity of statutory law, interpretation which departed from a fundamental feature of an Act of Parliament constituted an unacceptable use of Section 3. Although *Re S (FC)* did not challenge the approach in *R v A* and *Lambert*, the line between interpreting a provision and legislating, was rigidly drawn. A line defined in *R v Daniel*,⁵¹ *R (Wooder) v Feggetter and Mental Health Commission*,⁵² *R (Anderson) v Secretary of State for the Home Department*,⁵³ *Bellinger v Bellinger*,⁵⁴ and *Ghaidan v Mendoza*,⁵⁵ in more definite terms.

Representing a retreat from the approach employed in *R v A*, in *R v Daniel* Lord Auld was anxious to set limits on the extent to which the meaning of statutory language could be altered in the course of attempting to secure ECHR compatibility. Although Lord Auld accepted that a court could read down legislation so as to accord the provision relevant safeguards, he was not prepared to accept the ruling in *Lambert* that words could be read so as to lower the relevant burden of proof to an evidential one. The ground for such reluctance was summarised in *Feggetter*. According to Lord Sedley the imperative of Section 3 was not anything as ‘revolutionary’ as some of his colleagues believed. Once it was established that Parliamentary intent remained at the core of the meaning of a text, Section 3 could only ever constitute a tool of construction ‘subordinate’ to it.

The approach of Lord Sedley is interesting. Examination of relevant case-law suggests that his reasoning represents an example of the first of three (arguable) approaches toward Section 3 employed post the HRA:

- A reluctance to defer from the plain intention of Parliament, as indicated from a plain reading of statutory language evidenced in the reasoning of Lord Nicholls in *Re S (FC)*, Lord Auld in *R v Daniel*, and Lord Sedley in *R (Wooder)*;

certainly the case that the HRA changes the constitutional context within which such an interpretative strategy takes place. A rectification under Section 3 is given a democratic pedigree since it is endorsed by Parliament in the 1998 Act...[And] given the persuasive application of Section 3...to all legislation whenever enacted, it means that a rectification of statutory words may become more common and less exceptional than before.’ Kavanagh (2006), Op. cit at 198

⁴⁹ [2002] 3 WLR 344

⁵⁰ [2002] UKHL 10

⁵¹ [2002] EWCA Crim 959

⁵² [2002] EWCA 554

⁵³ [2003] 1 AC 837

⁵⁴ [2003] 2 AC 467

⁵⁵ [2004] 2 AC 557

- A cautious deference to Parliament, evidenced in the reasoning of Lord Hope in *R v A*, and *Lambert*;
- A strained interpretation of statutory words, exemplified in the reasoning of Lord Steyn in *R v A*, and the application of Section 3 by Lord Brooke in *Cachia and Goode*.

But how accurate is it to view judicial response to Section 3 in terms of separate approaches? How radical, in terms of protecting the individual has Section 3 been? How activist is the judicial activist, and for whose benefit?

In *R (Anderson) v Secretary of State for the Home Department*,⁵⁶ the House of Lords declared the power of the Home Secretary to control the release of mandatory life-prisoners under Section 29 of the Crime (Sentences) Act 1997 incompatible with the Article 6 right to a fair trial. As Parliament intended to give the Home Secretary such power, the possibility of reading out his role would constitute judicial vandalism. The ruling stood in contrast to the declaration of Lord Nicholls in *Ghaidan v Mendoza* that ‘in the ordinary course the interpretation of legislation involves seeking the intention reasonably to be attributed to Parliament in using the language in question. Section 3 may require the court to depart from this legislative intention, that is, depart from the intention of the parliament which enacted the legislation..., [including, the modification under Section 3 of] the meaning, and hence the effect, of primary and secondary legislation.’⁵⁷ According to Marshall, the ruling in *Anderson* constituted clear evidence of continuing judicial preference to hold fast to the ‘linchpin’ of Parliamentary intention, over and above the strong interpretative adjuration to read down statutory text, imply provisions in it, or strain it in pursuit of Convention-compatibility.⁵⁸ However, rather than regard *Anderson* as a retreat from the approach of *R v A* and *Cachia and Goode*, Kavanagh opined that the better way to understand *Anderson* was/is to view the ruling as a statement regarding the limits of judicial rectification in relation to the circumstances of the case.⁵⁹ ‘Although the language in *Anderson* was couched in terms of respect for the will of Parliament, it should not be taken as authority for the proposition that the courts...should never go against the intention of Parliament when interpreting under Section 3.’⁶⁰ But rather, as Lord Nicholls went on to state in *Ghaidan*, that a court should refrain from adopting a meaning which would depart substantially from a fundamental feature of an Act of Parliament.⁶¹

Illustrated in the above rulings then, the effect of Section 3 remains dependent on the approach of the judge who, (in his traditional handling of substantive law) usually takes as his point of departure the premise that as an outsider to the political process he should defer to the will of

⁵⁶ [2003] 1 AC 837

⁵⁷ [2004] 2 AC 557 Paragraphs 30-32

⁵⁸ Marshall (2003), Op. cit at 245

⁵⁹ A. Kavanagh ‘Statutory Interpretation and Human Rights After Anderson: A More Contextual Approach’ [2004] *P.L.* 537

⁶⁰ Kavanagh (2006), Op. cit at 203

⁶¹ [2004] 2 AC 557 Paragraph 33

Parliament. Although the above cases do demonstrate how Section 3 can be used by the judiciary to qualify the effect of Parliamentary intention, when judges do engage in this type of interpretation, they invariably maintain that they are nonetheless enforcing the will of Parliament. Firstly, by claiming to give effect to Parliamentary intention as expressed in Section 3; and secondly, either by claiming that any change to Parliamentary intention is compatible with Parliament's legislative aim underlying the provision in question,⁶² or by reconciling a novel interpretation with the underlying statutory objective.⁶³ Accordingly, it is arguable that any advancement in terms of rights protection has been primarily in relation to the judiciary's handling of procedural law. Whereas, the Courts will not sanction interpretation which results in the alteration of parliamentary objective, including the imposition of rights or responsibilities, in the case of procedural concerns, the approach is less rigid. And yet even then, whether the approach is in fact any less rigid is not without question. One example is the House of Lords placing a block on the transitional effect of the HRA in relation to concerns raised on appeal from trial occurring before the HRA came into force.

Section 7 of the HRA provides that any person who claims that a public authority has acted in a way which is contrary to the ECHR is entitled to bring proceedings against the authority under the HRA, or rely on the ECHR right concerned in any legal proceedings. Yet, although the HRA does apply to the conduct of proceedings brought by, or at the instigation of, a public authority after its entry into force, even though the actual facts giving rise to a claim occurred before that date, Section 22(4) prohibits proceedings arising under Section 7 in respect of an act which occurred before the HRA entered into force. Adopting a purposive approach, one solution could be to hold that because courts are public bodies bound by Section 6 of the HRA, they are obliged to apply the ECHR which includes permitting ECHR points to be raised on appeal. In *R v Lambert*⁶⁴ the House of Lords refused to accept such reasoning. Although the court held that the trial judge's direction to the jury on the defence in question was incompatible with Article 6, the question was whether the defendant could take any benefit from the ruling, albeit his trial and conviction took place before 2 October 2000. According to Lord Steyn, because the appeal court constituted a public body, it was bound not to breach the ECHR, unless statute gave it no other option. The majority of the Court disagreed. The retrospective effect of Section 7 applied only to proceedings concerning a public authority and did not include direction given by a trial judge. 'Legal proceedings' in Section 7(1) was defined in Section 7(6) to cover: (a) proceedings brought by, or at the instigation of a public authority; and (b) an appeal against the decision of the court. Because Section 22(4) of the HRA referred only to the first of these and made no mention of appeal proceedings, it was assumed that appeals were not intended to be covered by

⁶² Lord Nicholls in *Ghaidan*

⁶³ Lord Hutton in *R v A*, and Lords Steyn and Hope in *Lambert*

⁶⁴ [2001] UK HL 37

it. In accordance with a literal interpretation of Sections 7-22 of the HRA, the intention of Parliament was to prohibit the effect of the ECHR in relation to appeals from trials which occurred before the HRA came into force. That a trial may relate to events which may well be unlawful once the HRA has come into force, but which were lawful at the time, was irrelevant. The decision was grounded on both an acknowledgement of the floodgates argument that to have held otherwise would have been to allow for countless convictions being challenged under the HRA, and a legalistic approach far removed from the purposive reasoning of following a route which would have protected the right on the basis that it would be consistent with the *telos* of the ECHR. According to Lord Steyn, the House of Lords was a public authority for the purpose of Section 6 of the HRA, thus obliged to take decisions which were themselves compatible in all respects with the judicial obligations in Sections 3 and 4. Irrespective of the literal reading of Section 22(4), the Court was obliged to interpret Section 28 of the Misuse of Drugs Act 1971 in a way which was compatible with Article 6. In the opinion of Hope, such an argument would render Section 22(4) otiose since all appeals would have to be dealt with under ECHR principles whenever the trial took place, and this could not have been what Parliament intended.

The ruling in *Lambert* was disappointing. The commitment of the court to a narrow legalistic approach resulted in a fetter on the transitional effect of the HRA, insofar as it could have positively related to ECHR concerns raised on appeal from trials occurring prior to the 2nd of October 2000. A fetter more clearly highlighted in *R v Kansal*.⁶⁵ Examining the ruling of *Lambert* the House of Lords held that the case had been wrongly decided and that the HRA did apply to appeals heard after it came into effect in relation to trials before that date. But, because *Lambert* was such a recent ruling it would be inappropriate to depart from it. Grounded on reasoning which placed the doctrine of *stare decisis* and precedent above consideration of the ECHR, the ruling diminished the value of the latter by placing legal certainty above any protection that it could have given the right in question.

With regard to appeals in relation to trial decisions prior to October 2000 then, the impact of the HRA on the essentially Diceyan approach of the UK courts, has done little to address the protection of the rights of the individual. Despite judicial reservation expressed in *R v Rezi*⁶⁶ and *R v Benjafield*,⁶⁷ the principle relating to retrospectivity remains. But this is not to suggest that the courts have not acknowledged its shortcomings. In *Commissioner of Police v Hurst*⁶⁸ the Court of Appeal took time to examine the approach adopted in both *Lambert* and *Kansal* and provided by its own example, how it could be avoided.

⁶⁵ [2002] UK HRR 169

⁶⁶ [2002] UK HL 1

⁶⁷ [2002] UK HL 2

⁶⁸ [2003] EWHC 1721 (QB)

Concerning the issue of retrospectivity in relation to an inquest into a death occurring before October 2000, the court was called on to examine an application for judicial review of a coroner's refusal in November 2002 and June 2003 to resume an inquest into the death of a person whose circumstances suggested a lack of vigilance by the authority responsible for his welfare. In the opinion of the Court, a legalistic reading of the HRA in relation to events occurring prior to October 2000 may well have been an arguable approach for the judiciary to adopt, but this did not mean that Section 3 could never be used in relation to circumstances which existed prior to that date. The issue under consideration in *Hurst* was whether an inquest should be reopened, an event which, in the absence of any countervailing consideration of unfairness to any other individual, could be justified on the ground of satisfying not only the demands of Article 2 of the ECHR, but the requirements of Section 3.

The approach resembled that taken one week earlier by Baroness Hale in *R (Kehoe) v the Secretary of State for Work and Pensions*.⁶⁹ Called on to consider an alleged violation of Article 6, according to Baroness Hale, the Child Support Act 1991 placed the enforcement of child maintenance into the hands of an authority obliged by the HRA to ensure enforcement of any ECHR concern, which required as wide a reading of statutory provision as necessary, including the implication of additional rights. Accordingly, the Child Support Agency was obliged to act with reasonable speed in enforcement proceedings so as to satisfy the implied right of the claimant to an accurate deliberation of the payment of maintenance.

Despite the logic inherent in Baroness Hale's reasoning however, a broad approach has continued to remain the exception rather than the norm. Whereas, in *R (Hurst) v Commissioner of Police of the Metropolis*⁷⁰ the direction of the Court of Appeal that the inquest on a death occurring in May 2000 be reopened was overruled, and the question 'how' the deceased died replaced by the narrower question 'in what' circumstances; in *R v J (Attorney-General's Reference Case No 2 of 2001)*⁷¹ a stay of proceedings, awarded on the ground that the facts in question constituted an Article 6 breach of the requirement of reasonable expedition, was held to only constitute an appropriate remedy where a fair trial was not possible, otherwise matters such as unreasonable delay could be reflected in a reduced sentence in the event of a conviction, or compensation in the event of an acquittal. Consistent with the approach adopted in *Lambert* and *Kansal*, the House of Lords upheld the ruling. The ruling is objectionable for a number of reasons.

Firstly, it is arguable that the *telos* of the ECHR requires the asking of whether the prosecution should have acted differently to achieve a fair trial, as opposed to concentrating solely on

⁶⁹ [2005] UKHL 48

⁷⁰ [2007] 2 WLR 726

⁷¹ [2004] 2 WLR 1

technicality. Secondly, the majority ruling in *R v J* stands in contrast to the nature of the earlier Privy Council decision in *HM Advocate v R*⁷² in which the court held that the prosecution could not proceed when there had been a breach of the reasonable time remedy. In *R v J* the House of Lords was not willing to defer to a recent contrary decision. Reluctance, made (arguably) more interesting by the fact that the difference between *R v J* and the concern over retrospectivity was that the authority overturned was one which favoured defendants. The observation is interesting.

Returning to *R v A*, highlighted by Stone, rather than interpreting Section 41 in a way which would have provided guidelines, Lord Steyn's approach served to put back the question of what was fair for the purpose of Article 6, into the hands of the judge.⁷³ Illustrated in the ruling of *R (Hindawi) v Home Secretary*⁷⁴ and the response of Lords Lester, Bridge, Steyn, Woolf and Rawlinson to proposed changes to the role of the judiciary in the judicial review ouster clause 11 of the Asylum and Immigration (Treatment of Claimants) Act 2004, the courts have not been silent in protecting their role over perceived executive encroachment.⁷⁵ Although in *Andrews*⁷⁶ Lord Steyn retracted his reasoning in *R v A* by accepting that his approach to Section 3 was not appropriate where the suggested interpretation was contrary to the express words of the statutory provision, Stone's observation concerning the rulings of *R v A* and *R v J*, give rise to questions concerning the motive behind the court's approach. Questions, in relation to three areas of HR concern: terrorism, asylum and various aspects of criminal justice, made (arguably) more pertinent post the HRA, by the heightened degree of executive and judicial antagonism over the conflict between Government policy and judicial concepts of independence and the rule of law.

Section 4.2: Various Aspects of Criminal Justice

An approach frequently adopted by the UK courts is the use of a point of technicality to define an issue as falling beyond the concern of the ECHR.⁷⁷ One example, illustrated in *R (BR) (Sentencing: Extended Licences) v Home Secretary*⁷⁸ and *R (Uttely) v Home Secretary*,⁷⁹ is when questions arise as to what is a criminal charge.

One of the developments of the last 20 years has been the ancillary order against persons convicted in criminal courts. In *R (BR)* the court was called on to consider the application of an order in relation to two assaults committed in 1976 and 1982, and whether an extended licence period constituted a criminal penalty for the purposes of Articles 6 and 7. The Court of Appeal

⁷² [2003] 2 WLR 317

⁷³ Stone (2004), Op. cit at 45

⁷⁴ [2004] EWHC Admin 78

⁷⁵ HL. Deb (2003-2004) 658 (Column 1041) (Hansard, London)

⁷⁶ [2002] UK HL 46

⁷⁷ *R (A) v Harrow Crown Court* [2003] EWHC Admin

⁷⁸ [2003] EWCA Crim 2199

⁷⁹ [2003] EWCA Civ 1130

held that the order constituted a preventative as opposed to a punitive power, therefore its use in relation to an offence prior to its introduction was not prohibited by Article 7. In reaching its decision, the Court disregarded the fact that the extended licence constituted a form of suspended sentence with a prospect of a detainee being recalled to prison not just for committing a further offence, but where the Home Secretary decided that the risk of his committing an offence was high.⁸⁰ The ruling stood in contrast with the Article 7 prohibition on retrospectivity, which included the principle that the maximum sentence accorded should be that which was/is applicable at the time of the offence.

In *R (Utley)* the question for the Court was whether a licence period expiry at the three-quarter point of the sentence amounted to an additional penalty if the prisoner was sentenced for an offence occurring before the Criminal Justice Act 1991⁸¹ was introduced. The Court of Appeal held that the licence was a part of the sentence under the CJA when applied to offences committed before its enactment. The Secretary of State appealed. The Minister submitted that the Court's finding that the change to release effected by the CJA would mean that the sentence imposed was greater than it would have been before the Act, was wrong. The applicable penalty meant only the maximum penalty prescribed by law for the offence in question, and that the penalty applicable in *Utley* had not changed under the CJA. The House of Lords agreed.⁸² Its reasoning is questionable, not least because part of the reasoning of the court in reaching its decision was to take note of the Practice Direction pursuant to which judges were supposed to amend the sentence imposed under the CJA, so as to avoid making it more severe under the new provisions.

Contrary then, to any perceived heightened HR culture post the HRA, there would appear to remain (in this area of HR concern at least) a judicial preference to concentrate on established procedures, rather than the normative logic of the ECHR. According to Douzinas⁸³ and Allen⁸⁴ such preference is due to the fact that jurisprudence has continued to acknowledge the concept of HR as *deontic* concepts belonging to the universe of norms. An approach according to Ewing,⁸⁵ exemplified by a judicial deference to the will of Parliament, grounded on a policy of non-engagement to follow the political imperative underpinning the legislative provision in question. Examining the deference argument in relation to the application of the ASBO, the argument is compelling.

⁸⁰ *R (Giles) v Parole Board* [2002] EWCA Civ 951

⁸¹ Hereafter, CJA

⁸² [2004] UKHL 38

⁸³ Douzinas (2002), Op. cit at 5

⁸⁴ Allen (1994), Op. cit at 385

⁸⁵ Ewing (1999), Op. cit at 79

The ASBO, Anonymity Orders, and the ASBO Child

The ASBO represents an example of neo-classical philosophy that individuals take responsibility for their own action, with little concern for its broader implications for civil liberties. On analysis, it is a philosophy which appears to be strictly adhered to by the courts.⁸⁶

Called on to determine the legal status of the ASBO for the purposes of Article 6, in *McCann v Manchester County Council*⁸⁷ the Court held that an ASBO constituted a civil proceeding insofar as proceedings constituted:

1. A two stage process of obtaining an order, and when necessary, initiating proceedings for its breach;
2. The involvement of no technical punishment;
3. Proceedings essentially administrative in nature.

The reason underlying the classification was explained in *McCann*.⁸⁸ Despite being a measure which could lead to imprisonment, the ASBO was not a concern for the purpose of Article 6. An application for an order did not constitute a criminal charge, but a preventative measure, on the ground that its imposition involved no finding of guilt. Accordingly, the restriction on an individual's freedom within a specified area (and the value accorded hearsay evidence based on anonymous or undiscovered sources) was lawful. In reaching its decision, the court thought it necessary to consider the social problems which had led to the introduction of the ASBO, in particular the Government's attempt to protect the interest of the law-abiding majority, and the fact that the initiative not only filled an existing *lacuna*, but satisfied a need to restore public confidence. Accordingly, the HR implications of the ASBO, including the imprisonment of persons subject to it, were not addressed. Although the ruling made clear that even though the ASBO was classified as civil, this did not mean that findings were to be made on a bare balance of probabilities, any suggestion that the civil-standard of proof fell foul of the ECHR, or that the functioning of the ASBO infringed Articles 8 and 11, was accorded little credence. The ASBO was a procedure prescribed by law, necessary for the prevention of disorder.

The reality of the classification was made clear in *Clingham v Kensington and Chelsea London Borough Council*,⁸⁹ and *R (M) v Secretary of State for Constitutional Affairs*.⁹⁰

⁸⁶ A. Ashworth 'Social Control and "Anti-Social Behaviour:" The Subversion of Human Rights' (2004) 120 *L.Q.R.* 263

⁸⁷ [2001] 1 WLR 1084

⁸⁸ [2003] HL AC 787 Paragraphs 16, 42 and 85

⁸⁹ [2003] 1 AC 787

⁹⁰ [2004] EWCA Civ 312

Highlighted by Emmerson and Ashworth,⁹¹ the ECHR and the ECtHR adopt the approach that where proceedings are in substance criminal, regardless of whether domestic law classifies them as civil, they should nevertheless be treated as criminal for the purpose of the safeguards (regarding liberty and due-process) that the ECHR applies to those charged with a criminal offence.⁹² According to Ashworth and Redmayne, ‘the whole point of the ASBO regime is to circumvent this... [And] although the House of Lords [in *Clingham*] held that the standard of proof in the civil proceedings [was/is] so high as to be indistinguishable from the criminal standard, the main thrust of its decision was that the Government had succeeded in its circumvention.’⁹³ The ruling is objectionable. In so far as it appears that the Government has been able to by-pass the protections for criminal charges and open up a way of dealing with crimes that effectively avoids HR safeguards, the courts have allowed the recent tendency affecting the criminal process that is the slippage between criminal and civil procedures to function as ‘a means of avoiding the protections of criminal procedure, while ensuring that, by means of making breach of the civil order an offence of strict liability with a high maximum penalty, severe sanctions are available.’⁹⁴

With regard to *R (M)*, called on to consider a challenge to the interim ASBO scheme, the Court of Appeal held that the without notice procedure introduced by the Magistrates Courts (ASBO) Rules 2002 did not constitute a breach of the ECHR, insofar as the procedure did enable a person subject to it to apply to have the order reviewed. The finding gave rise to criticism from legal-practitioners generally, in whose opinion, if the without notice procedure could not be legally considered to be offensive then it was near impossible to anticipate any successful challenge to the interim ASBO scheme.⁹⁵ Echoing the observation of Ewing, that judicial regard for the rights of the individual offender almost invariably came back to the political imperative that underpinned the legislation in question,⁹⁶ such criticism revolved around suspicion that the prevailing political stand to take stricter law and order measures had created such a neo-classic climate, that the judiciary was compelled to follow. The observation is not untenable. Certainly, that the policy objective of an ASBO remains paramount in the judicial mind is exemplified in *R (Singh) v Chief Constable of West Midlands*.⁹⁷

In *R (Singh)*, the court was called on to review the legality of the issue of a dispersal authorisation order under Section 30 of the Anti-Social Behaviour Act 2003.⁹⁸ The application for review was based on two grounds: (1) that a dispersal order could not be used to prevent

⁹¹ B. Emmerson and A. Ashworth *Human Rights and Criminal Justice* (Sweet and Maxwell, London 2001)

⁹² *Engel v Netherlands* (1979) 1 EHRR 647

⁹³ Ashworth and Redmayne (2005), Op. cit at 13

⁹⁴ *Ibid* p. 14

⁹⁵ Scraton (2004), Op. cit 841

⁹⁶ Ewing (1999), Op. cit 767

⁹⁷ [2005] EWCA 2840 (Admin)

⁹⁸ Hereafter, ASB Act

protestors from exercising their right to freedom of expression. insofar as the ASB Act could not be used for a purpose other than that of the control of anti-social behaviour; and (2) that the order issued was disproportionate, insofar as the police did not consider using alternative measures prior to its imposition. Both arguments were dismissed. With regard to the question of legality, although in the opinion of the Court the provision did lack the inclusion of an express exception to protest, it was not necessary to make use of Section 3. The language of the ASB Act clearly indicated Parliament's intention that the dispersal order could be used to cover any form of public protest which involved a risk of disorder arising. As for the issue of proportionality, although the ability to protest as part of the freedoms guaranteed in Articles 10 and 11 was necessarily effected, insofar as the order fell within the permitted exception of being in accordance with a procedure established by law and proportionate to the aim to be achieved, the scheme provided a lawful basis for interference with it.

In terms of HR protection, the ruling is disappointing. Certainly, the rejection of the applicant's argument that as a matter of principle the dispersal order could not apply to public protest, and that to apply the low-level threshold permitting control under anti-social behaviour legislation would have the potential to effectively destroy protests which could not otherwise be prohibited, appears to stand in contravention to a dictum of Lord Hoffman's which seemed directly in point:⁹⁹ 'the principle of legality means that Parliament must...confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.'¹⁰⁰

Giving credence to the concern that 'there [being] no certainty that, in some future period of civil-libertarianism stress [such powers] will not be turned to as a way of imposing political conformity on pain of criminal sanction,' the result was judicial confirmation of the ability of the state to exercise its power in almost any situation where a power is statutorily authorised.¹⁰¹ Apart from standing in contrast to the long established constitutional claim that an individual has liberty to do anything which is not lawfully prohibited, the finding appears to constitute one of a number of responses to low-level disorder, (contrary to the claims of White),¹⁰² indicating a judicial preference to follow the political imperative. A preference exemplified more clearly in the handling of anonymity orders and the treatment of the ASBO child.

⁹⁹ Gearty (2007), Op. cit at 113

¹⁰⁰ *R (Simms) v Secretary of State for the Home Department* [2000] 2 AC 115 at 131

¹⁰¹ Albeit, 'the strong orientation of the orders towards anti-social conduct, backed by Government advice that has accompanied their application, has so far helped to steer the procedure away from any application in the arena of public demonstrations,' Gearty (2007), Op. cit at 111-112

¹⁰² (1999) EHRLR 55

The treatment of anonymity orders in respect of the ASBO subject formed the focus of *R (Stanley) v Metropolitan Police Commissioner and Brent LBC*.¹⁰³ Highlighting an arguable continuance of the political imperative of a neo-classic law and order strategy to shape the courts response toward applications for anonymity orders, the court held that the distribution of pamphlets identifying the subject of an ASBO did not constitute unlawful interference, insofar as disclosure was necessary for the prevention of crime. Although in reaching its decision the court did justify its decision on grounds of proportionality, it did so without consideration of the effects of disclosure on the individual concerned, reiterating verbatim the reasoning adopted in *Mc Kerry v Teesside and Wear Valley Justices*.¹⁰⁴

In *Mc Kerry* the court was called on to consider the continuance of an anonymity order made by a Youth Court pursuant to Section 49 of the Children and Young Person's Act 1933.¹⁰⁵ The Court held that the decision of the Youth Court to lift the order would remain. Reflecting the political imperative of the ASBO regime, the subject of an ASBO could be subjected to vilification in both local and national press as part of the ASBO's overall 'name and shame' programme. Accordingly, where the behaviour complained of had been proved, the ASBO child could be denied anonymity.

The rulings stand in contrast to the exercise of the power of the crown *parens patriae* by the court, where an injunction can be awarded in order to protect a child from publication of details which would reveal his identity.¹⁰⁶ Informational privacy is to some extent safeguarded by a judicial balance between the right of the public to be kept informed of what is going on in court, and the need for the welfare of the child not to be put at risk by identification.¹⁰⁷ However, one difficulty in relation to dealings concerning the interests of the child is that the ECHR does not make specific reference to them. In accordance with its understanding of the ECHR as a living instrument, the ECtHR has addressed the omission by using the international UNCRC to adopt an interpretation of Article 8 of the ECHR so as to accord moderate protection to what has technically become a child's right to a personal-life.¹⁰⁸ The exact position formed the focus of *R (Howard League) v Secretary of State*.¹⁰⁹ Called on to consider the relevance of international treaty following the HRA, the court held that although Article 3 of the UNCRC 1991 and Article 24 of the European Charter could not be legally binding, insofar as they proclaimed, reaffirmed or elucidated the scope of HR recognised by the ECHR, they should be taken into

¹⁰³ [2004] EWHC Admin 2229

¹⁰⁴ [2000] Crim LR 594

¹⁰⁵ Hereafter, CYP

¹⁰⁶ *Re X (A Minor) (Wardship: Injunction)* [1984] 1 WLR 1422

¹⁰⁷ *Re C (Wardship: Medical Treatment) (No 2)* [1999] Fam 39 CA; *Clayton v Clayton* [2006] EWCA Civ 878

¹⁰⁸ *Costello Roberts v UK* (1995) 19 EHRR 112; *A v UK* (1999) 27 EHRR 611

¹⁰⁹ [2003] 1 FLR 484

consideration when applying a measure of domestic law. Accordingly, where what could be regarded as an ECHR right was/is engaged, the welfare of the child should be considered.

The actual impact of the ruling was made clear in *R (A) v Leeds Magistrates Court*.¹¹⁰ Even where it could be argued that the interest of a child was such as to require that an ASBO should not be issued, or that its terms be different from those proposed, it was nevertheless incumbent on the defendant to provide an explanation of his case. Although there could be cases where it was/is inappropriate to impose an ASBO by reason of a child's age, the child's welfare was not a 'talismán' which if not pronounced would invalidate any ASBO made. As an indication of what Ewing¹¹¹ terms the deference given by the judiciary to the prevailing law and order concerns of Parliament, the reduction of the 'best interest' principle to a secondary consideration is disconcerting. However, when such deference becomes all the more serious, is when it can be said to adversely impact on what are best described as popularly perceived existing rights and liberties.

Control of the Freedom of Public Protest

The freedom of the governed majority to assemble and express opinion on the activity of the governing minority is commonly cited as one of the fundamental characteristics of liberal democracy,¹¹² autonomy and self-development.¹¹³ Yet, highlighted by Phillipson and Fenwick, UK courts have 'shown little recognition of the...value of public protest. Instead...the interest of judgments [centred] on orthodox statutory construction...the judiciary have been confined to applying the constraints on public protest in existing law, whether or not those restrictions go beyond those nationally and internationally deemed necessary in democracies, and whether or not they were developed in the context of political protest....To an extent due to the judges' inevitable preoccupation, under a constitution based on negative liberties, with the legal content of the restrictions of public protest.'¹¹⁴ Certainly the extent to which the freedom was exercised prior to the HRA was dependent not merely on the existing law, but the way in which it was enforced. The only certainty in the way it was enforced by the UK courts being variance according to political circumstances.¹¹⁵ In the words of Bailey, Harris and Ormerod 'the more stable the political system, the greater...the toleration of political protest. [As] effectiveness of

¹¹⁰ [2004] EWHC 443 (Admin)

¹¹¹ Ewing (1999), Op. cit at 79

¹¹² 'Rights of peaceful protest and assembly are amongst our fundamental freedoms: they are numbered among the touchstones which distinguish a free society from a totalitarian one.' White Paper *Review of Public Order Law* (Cmnd. 9510) 1985 Paragraph 1.7 (TSO, London)

¹¹³ *Brokdorf* (1985) 69 Bverfge 315

¹¹⁴ G. Phillipson and H. Fenwick 'Public Protest, the Human Rights Act and Judicial Responses to Political Expression' [2000] *P.L.* 627, 630

¹¹⁵ Highlighting the 'fragile nature... of rights which lack a positive definition,' N. Taylor and B. Fitzpatrick 'Trespassers Might Be Prosecuted: The European Convention and Restrictions On The Rights To Assemble' (1998) *E.H.R.L.R.* 293

protest increases, [the more] toleration is reduced [and] the law enforced more rigorously.¹¹⁶ Whether or not the HRA has had any real influence on the judicial approach toward control of the freedom then, the observation is interesting.

‘Until October, 2000, the right to public protest in the UK was protected only in the traditional constitutional manner: citizens could do anything that the law did not forbid. By contrast, under the [ECHR] as received into UK law under the [HRA], they are able to exercise positive rights, circumscribed by specified exceptions, or exceptionally, incompatible domestic legislation.’¹¹⁷ Section 6 of the HRA renders Articles 10 and 11 binding on public authorities. Further, ‘in areas of law concerning political expression [in particular] concerning political speech in the media, the judiciary *have* considered the content and value of the speech in question, rather than confine themselves to the legality of interferences with it. In such cases, courts have either overtly adopted...Strasbourg principles, or have strongly emphasised the high status that freedom of speech holds in the common-law.... Even where media freedom collides with values the judiciary have historically been strongly concerned to uphold... the [HR] dimension has at least been...given some prominence in the judgments.’¹¹⁸ Accordingly, it was not unreasonable to presume that the response of the UK court toward the ability to assemble and peacefully protest post the HRA, would have consisted of a more vocalised determination to protect such freedoms from state encroachment in accordance with Sections 3 and 4. The actual influence of the HRA is illustrated in the approaches adopted in two cases: *DPP v Jones*¹¹⁹ and *Percy v DPP*.¹²⁰

In *Jones*, the defendants were charged with breaching conditions imposed on the freedom to protest in accordance with Section 14A of the Public Order Act 1986.¹²¹ Because some of the conditions imposed were lawful, some unlawful, and severance between the two types could not be made, the defendants were convicted of having taken part in a ‘trespassory assembly.’ The defendants appealed, and their convictions were quashed by the Crown Court, restored by the Divisional Court and quashed by the House of Lords. The main question was whether the peaceful non-obstructive assembly in question fell within the category of legislative purposes for which the highway might lawfully be used by the public. The House of Lords held that it did. Although the facts concerned engagement of Articles 10 and 11, little reference was made to them. The approach is objectionable on three grounds.

¹¹⁶ Bailey, Harris and Ormerod (2001), Op. cit at 389

¹¹⁷ Phillipson and Fenwick (2000), Op. cit at 627

¹¹⁸ *Ibid* p. 631

¹¹⁹ [1999] 2 WLR 625 HL. See: Taylor and Fitzpatrick (1998), Op. cit at 293

¹²⁰ [2001] QBD 21 1201

¹²¹ Hereafter, POA

Firstly, given the (arguable) opportunity to take ‘account of the advent of positive rights to speech and assembly under Articles 10 and 11 with the enactment of the [HRA] and the growing jurisprudence on a common law “right” to freedom of expression,’¹²² determination of the freedom was decided with little regard for anything other than whether use of the highway to conduct a protest was such that could be classed as a use ordinarily associated with it without amounting to a public nuisance.

Secondly, insofar as the lawfulness of a long established freedom which had not been declared unlawful was rendered dependent on the existence of another positively declared right, the ruling constituted an affront to the fundamental principle that an individual had the freedom to do anything he liked provided that that it did not constitute a crime, a tort, or some other act prohibited by law.

Thirdly, regardless of whether ‘it must be doubted whether the exercise of the vague and far-reaching banning powers available under Section 14A will always satisfy the requirements of the ECHR, [insofar as] many assemblies will cause...only a marginal degree of disruption... what the [ECHR] demands...is not knee-jerk derogation from the positive part of the Article 11 right, but a sensitive balancing, which enables that if a ban is imposed, it is indeed necessary in a democratic society, and thus reflects the demands of proportionality. Section 14A of the Public Order Act 1986, in so far as it allows for the prohibition of peaceful, non-obstructive assemblies, could therefore breach the requirements of the [ECHR].’¹²³

The approach adopted in *Jones* formed the focus of Phillipson and Fenwick. Whereas Lord Clyde considered that the law of trespass defined the issue, insofar as English law admitted of no positive legal right to hold a peaceful non-obstructive assembly on the highway, Lord Irvine stated that he found it unnecessary to have regard for the ECHR. Both rulings proceeded on the basis of an orthodox approach to analysis of the common-law authorities. An approach which accorded ‘a higher place to the uncertain value of preserving accepted custom, than to the supposedly fundamental [HR] declared in Article 11.’¹²⁴ Further, according to Phillipson and Fenwick, there was no arguable awareness of the background of the case, insofar as the legislative attack upon the right to peaceful assembly of which Section 14 was the culmination, was resolved by little serious reference to other than the interpretation accorded nineteenth-century case-law on real property. The approach stood in contrast with that of *Simms*¹²⁵ and *Reynolds*¹²⁶ (decided within months of *Jones*) where freedom of expression, both as a

¹²² Phillipson and Fenwick (2000), Op. cit at 627

¹²³ Taylor and Fitzpatrick (1998), Op. cit at 299

¹²⁴ Phillipson and Fenwick (2000), Op. cit at 635

¹²⁵ [1999] 3 All ER 400

¹²⁶ [1999] 4 All ER 609

constitutional right and as embodied in Article 10, was the ‘starting point’ of legal reasoning and the values underlying it identified.

With regard to *Percy*, the court was called on to consider the conviction of a defendant for engaging in behaviour likely to cause harassment, alarm or distress while protesting at a US air-base. Examining the relevance of the ECHR, the Court had held that because Article 10 was qualified and the risk of public disorder unlikely, the focus lay solely on whether the behaviour complained of was necessary in a democratic society. Insofar as the behaviour complained of was disrespectful to one cultural group, the manner in which the appellant had protested constituted behaviour which was restricted by Section 5 of the POA. The defendant appealed. The Court declared Section 5 ECHR incompatible. Although, in reaching its decision, the Court accepted that Article 10 could protect the exercise of a freedom of expression which others could interpret as insulting behaviour, because the Court had confined its examination to only the manner in which the behaviour complained of had given insult, the requirement of proportionality had not been addressed.

The ruling in *Percy* represented a change in judicial approach toward public protest. Firstly, in reaching its decision, the court acknowledged the need to protect the freedom as part of the freedom of expression, and set about a re-classification which effectively created a differentiation in public order law between (1) disorder, obstruction and/or trespass generally, and (2) public protest which created just such an effect.

Secondly, in the opinion of Bonner, Fenwick and Harris, whereas the approach adopted in *Jones* represented the kind of disregard for the *telos* of HR which had ‘bedevilled’ public protest generally in the UK judicial mind, the approach in *Percy* followed a more definite structure ‘exhibiting some of the elements of the approach termed activist.’¹²⁷

- (1) By examining firstly and fully the scope of the ECHR, finding that the protest in question did fall within Article 10(1);
- (2) By finding that Article 10 related to both the content and form of protest, and that the presumption in favour of freedom of expression applied equally to both elements;
- (3) By holding that the relevant test in Article 10(2) was to be applied broadly, despite the often reiterated need to afford it a restricted interpretation.

According to Bonner, Fenwick and Harris then, whereas the ‘starting-point’ for the self-restrainer is to examine the exceptions of Article 10(2) while adopting a minimalist approach to the HRA; an activist approach can encourage the court to go further than ensuring that only the

¹²⁷ D. Bonner, H. Fenwick and S. Harris ‘Judicial Approaches to the Human Rights Act’ (2002) *I.C.L.Q.* 549 at 570

minimum standards laid down in ECHR jurisprudence are maintained, insofar as the ECHR injunction to further realise rights and freedoms contained in the ECHR preamble is also addressed to domestic courts.¹²⁸ In the words of Bonner, Fenwick and Harris, ‘where the common-law is applicable in a protest case, the judiciary would be expected to view themselves as bound to reach an outcome consistent with the [ECHR] under Section 6 of the HRA. Approaches under the HRA to statutory public order law... might allow for either a minimalist, or an activist stance. The courts could view the matter as one of interpretation under Section 3 following *Re W (Children) (Care Order)*, and as a last resort, could issue a declaration of incompatibility under Section 4, or even where statute was applicable, might conduct free-standing enquiry into...compatibility... by using Section 6.’¹²⁹ Although, according to Bonner, Fenwick and Harris, it could not be said that a change in judicial approach toward the freedom to protest would guarantee it in respect of a protestor who chose to behave reprehensibly, the likelihood that the freedom of expression dimension of protest could and would be recognised, was now higher. Whether such recognition has been in fact favourable (or even constant) however, is subject to debate.

For example, the Serious Organised Crime and Police Act 2005¹³⁰ constituted an (arguable) response to the problem of long term political protest which impeded access to Parliament, or disruption of its work. The result was Sections 132-138 which, according to Loveland, went so far beyond merely addressing the concern of protecting Parliamentary workers from low level anti-social behaviour, was commonly suspected of forming a solution to the problem of dealing with the long term demonstration of anti-war protester Haw.¹³¹ The lawfulness of Haw’s prolonged public demonstration at Parliament Square, and the attempt to remove him under the SOCPA, was considered in *R (Haw) v Home Secretary*.¹³²

In accordance with Section 178 of the SOCPA, the Home Secretary is afforded the power to engage any incidental, consequential or transitory measure thought necessary to give the SOCPA full effect. Article 42(2) of the SOCPA (Commencement No. 1, Transitional and Transitory Provisions) Order 2005 provided that reference to demonstrating without authorisation in a designated area, and notice of a demonstration in a designated area, were to take effect as references to demonstrations continuing on or after commencement of the SOCPA. The question in *Haw* was whether the order was *ultra vires*. In accordance with the Court it was. In reaching its decision, the Court applied ordinary rules of statutory construction.

¹²⁸ Following *Percy*, the approach to be used was considered by the House of Lords in *Re W (Children) (Care Order)* and *Re S (Children) (Care Order)* [2002] UKHL 10, where it was suggested that the more ‘secure’ approach was to engage Section 3 of the HRA

¹²⁹ *Ibid* p. 565

¹³⁰ Hereafter, SOCPA

¹³¹ I. Loveland ‘Public Protest in Parliament Square’ (2007) *E.H.R.L.R.* 251

¹³² [2005] EWHC 2061

The intention of the legislature was to be deduced from the words which it employed. No reference was made to the ECHR as to the possibility of the order constituting a violation of either Article 10 or 7. In reaching its decision, the court acknowledged what was described by Loveland as an essentially ‘orthodox...conservative constitutional methodology,’ which wove together two points of principle: (1) that penal statutory provisions should be strictly construed, in the sense that they should be accorded the meaning that interfered least with individual liberty; and (2) that statutory terms should be subjected to a literal construction, unless such led to an absurd result.¹³³ The Home Secretary Appealed. The Court of Appeal held that: (1) the Commencement Order was made *intra vires* in accordance with the will of Parliament; (2) that the SOCPA rightly replaced the outdated Section 14 of the POA; and (3) that the engagement of any interpretation which left existing demonstrations unregulated, was wrong.¹³⁴ For a number of reasons, the approach is open to criticism.

Firstly, in its deliberation of the disapplication of Section 14 of the POA to existing demonstrations prior to the 1 August 2005, it is arguable that insofar as Haw was a sole protester, the former provision, having no relevance to the facts of the case, simply did not apply.

Secondly, ‘using Section 132(6) as a conduit, [the Court] read Section 132(1) not simply in the context of but as subordinate to Section 14 in respect of its temporal scope...But why [as Loveland highlights] does Section 14 control Section 132 rather than vice-versa? One might have thought that on the application of a simple *lex posterior* principle, any inconsistency between the two measures would have to be resolved in favour of the later provision.’¹³⁵

Thirdly, regardless of the obligations placed on the court under Section 3, the ECHR was accorded no great consideration. Whereas, the relevance of Article 10 did not feature in any serious deliberation, the prohibition against retrospectivity embodied in Article 7 was disregarded in what appears to be not merely the creation of *ex-post facto* criminal law, but the removal by retrospective criminalisation of what was a widely democratically respected freedom prior to the SOCPA.

The observations are interesting. However, *Haw* is not the only example of a ruling in which the court appeared to abandon regard for a long established freedom in order to satisfy a perceived need to target an area of political concern. Giving rise to similar concern are the rulings concerning *Laporte*.¹³⁶

¹³³ Loveland (2007), Op. cit at 256

¹³⁴ [2006] EWCA Civ 532

¹³⁵ Loveland (2007), Op. cit at 261

¹³⁶ *R (Laporte) v Chief Constable of Gloucestershire Constabulary* [2004] EWCA Civ 1639

In apprehension of a likely breach of the peace, authorisation was granted pursuant to Section 60 of the Criminal Justice and Public Order Act 1994, to enable police to exercise a statutory power of stop and search. In pursuance of the order, the police stopped and searched a van containing protestors *en route* from London 5 km from a restricted airbase. As a result of a search, items were seized which indicated that the occupants were protestors, and both van and occupants escorted back to London. The action was challenged by way of judicial review. In delivering the judgment of the Administrative Court, Judge May agreed that the court was obliged to conduct a review and concluded that although the officer had been entitled to exercise the power available to him, which included preventing protestors from proceeding nearer to the airbase, the escorted return to London was unlawful on the ground that: (1) there was no immediately apprehended breach of the peace sufficient to justify even a transitory detention; (2) that detention on the escorted vehicle for two and a half hours went beyond anything which could reasonably be said to constitute a transitory detention; and (3) that the length of the detention was disproportionate to any apprehended breach of the peace.¹³⁷ The Chief Constable appealed. In a cross-appeal the protestors questioned the finding of the Administrative Court on three grounds: (1) that it was wrong in its application of a ‘real risk’ test for preventative action short of arrest or detention; (2) that the court was wrong to have applied a test contrary to Section 6 of the HRA; and that (3) the court was wrong to have concluded that the circumstances were such as to have justified the preventative action taken, in view of Section 6 and Articles 10 and 11.

The finding of the Administrative Court was upheld. The decision by the police not to exercise their common-law power of arrest in the absence of a sufficiently imminent threat to the peace, and the decision to prevent the protestors from proceeding to the airbase grounded on apprehension of a breach arising, was reasonable. However, although the exercise of police power was lawful, the manner in which it had been exercised fell beyond that which could be regarded as proportionate. Accordingly, the escorted return to London was unlawful. In reaching its decision, the Court raised a number of concerns in relation to what it regarded as the impact of the ECHR on common-law.

Firstly, although the police action complained of did give rise to an interference with Articles 10 and 11, because the concern of proportionality turned on the facts of the case, the prevention of the protestors from entering the vicinity of the airbase was not unlawful, even though it involved the exercise of what was effectively a blanket-ban. Secondly, although the freedoms to express and impart information, and assemble, were of significance to the functioning of democracy, both Articles 10 and 11 were subject to express qualifications in which police action

¹³⁷ [2004] EWCA Civ 1639 Paragraph 47

did fall. Thirdly, and in contrast to the finding of the Administrative Court, the appeal could not succeed without careful examination of the impact of Article 5. In accordance with the Administrative Court, Article 5 did not encompass a negative obligation not to act in breach of a peace, since a breach was well within the ambit of Article 5(1)(c) which provided that a detention could be lawfully carried out for the purpose of bringing a person before a competent legal authority. Yet, the Court side-stepped Article 5 by holding that it did not apply to the stopping of the vehicle in question. Where reasonable force was used to detain to prevent an immediate apprehended breach, although such could be defined as transitory detention, it did not constitute detention for the purpose of Article 5. With regard to the escorted return to London however, the Court held the detainment of protestors did constitute detention for the purpose of Article 5, and as a disproportionate response, an ECHR violation.

The claimant appealed.¹³⁸ The arguments advanced were summarised by Lord Bingham. Albeit, the interference by the Chief Constable was for a legitimate purpose it was (a) not prescribed by law; and (b) premature, indiscriminate and disproportionate. The House of Lords held that the finding that the interception of the vehicle was necessary to prevent an apprehended breach of the peace was wrong. Such interference constituted indiscriminate action. In reaching its decision, the Court held that the requirement of imminence appropriately identified the common-law power to take preventative action as a power of last resort, catering for situations about to descend into violence. Accordingly, what was imminent had to be judged in the context under consideration. Whereas, both the Divisional Court and Court of Appeal had erred in their understanding of the concept of imminence by linking it to the reasonableness of the preventative action, rather than identifying imminence itself as the threshold for taking preventative action, it was not believed that the circumstances had been such as to indicate that a breach of the peace was imminent.

To summarise then, prior to the HRA the scope of fundamental freedoms consisted of that which was not lawfully prohibited. This negative approach to liberty was theoretically altered following the introduction of the HRA. Certainly, the handling of the immanency threshold in *Laporte* serves to highlight how the role of the court in ensuring that state power which impacts on an individual's fundamental freedom is properly applied, is paramount. Whether the rulings throughout *Laporte* (and arguably *Percy*) suggest that post the HRA, given the mandate to accord greater consideration to the ECHR order, a faction of the courts have demonstrated a consistent willingness to do so, is not without doubt.

Despite any suggestion that the attitude of the judiciary is symptomatic of a young system in which the search for standards is bound to give rise to the occasional inconsistency, the

¹³⁸ [2006] UKHL 55

response of the judiciary to the HRA, has not excluded the courts refusing to acknowledge altogether the relevance of ECHR law.¹³⁹ Whereas in *R (von Brandenburg) v E. London, City Trust and Others*¹⁴⁰ the House of Lords decided to disregard the ECHR altogether, in *R (IH) v Home Secretary*¹⁴¹ the Court refused to examine with reference to the European order, the question as to what constituted a public official for the purpose of the HRA. The rulings are indicative of a judicial approach characterised by a narrow interpretation of the ECHR and a limited acceptance of the HRA grounded on a *Diceyan* conviction in the common-law's ability to protect existing liberties. Combined with a suspicion of foreign jurisdictions, an extreme use of the approach is evident in a number of cases. Whereas in *Myles v Director of Public Prosecutions*¹⁴² the Court held that clear domestic law outweighed any persuasive foreign authority; in *R (Napier) v Home Secretary*¹⁴³ the process of Prison Governors adding extra-days to an existing sentence for disciplinary reasons was held not to constitute a breach of Article 6, albeit so ruled in *Ezeh and Connors v UK*.¹⁴⁴

The rulings are interesting. In accordance with the UK's characteristic handling of the ECHR, the UK courts are engaged in a balancing exercise between the interests of the individual and the State,¹⁴⁵ as opposed to treating the relevant ECHR concern as a right and subjecting any deviation from it to thorough scrutiny; An approach which, exemplified in *Blum v DPP*¹⁴⁶ and *R (Marper) v Chief Constable of South Yorkshire Police*,¹⁴⁷ in the hands of the self-restrainer, can lend itself easily to the concern of the individual being placed below that of the state. For example, in *R (Marper)* the Court was called on to determine Convention compatibility of police retention of DNA from acquitted suspects. The practice was challenged on the ground that it breached Articles 8 and 14. Although it could be argued that the Court could have employed a broad purposive interpretation and placed the Government to provide strict proof as to why acquitted persons should have their DNA retained by the State, in reaching its decision the Court adopted a classic narrow interpretation of the ECHR and held that discrimination for the purpose of Article 14, referred only to gender and religion. As a result, the practice of DNA retention created a distinction between two groups of innocent persons: those who had been investigated and found innocent, and those who had not. The claimant appealed. The Court of Appeal considered the legality of Section 81 of the Criminal Justice and Police Act 2001 and held that the retention of DNA did constitute a breach of Article 8. In reaching its decision, the

¹³⁹ *R (Saadi) v Home Secretary* [2001] 1 WLR 356; *R (H) v Secretary of State for the Home Department* [2003] UKHL 59; *R (K) v Camden and Islington Health Authority* [2001] MHLR 24

¹⁴⁰ [2003] UKHL 58

¹⁴¹ [2003] UKHL 59

¹⁴² [2004] 2 All ER 902; See: *Lawtel v Northern Spirit* [2002] EWCA Civ 327

¹⁴³ [2004] EWHC 936 (Admin)

¹⁴⁴ (2002) 35 EHRR 691; See: *R (Carroll) v Home Secretary* [2002] 1 WLR 548; *Gough v Chief Constable of Derbyshire* [2002] EWCA Civ. 351; and *R v Jones* [2002] UKHL 5

¹⁴⁵ *Sporrong and Lonnroth v Sweden* (1982) EHRR 35

¹⁴⁶ [2006] EWHC 3209 (Admin)

¹⁴⁷ [2002] EWHC Admin 478

Court interpreted the phrase respect for a private life as giving rise to an obligation on the State not to subject an individual to unjustified invasion. The practice of proportionality was to be applied broadly. The case reached the House of Lords.¹⁴⁸

The House of Lords (with the exception of Baroness Hale) took a view which reflected that of the Divisional Court. According to Lord Steyn, it was of paramount importance that the police should be allowed to make use of forensic technology for the purpose of combating crime. The general view of the use of such technological developments by other ECHR signatory-states was that the practice did not offend against the *telos* of the ECHR, nor was it likely that such information would be used for purposes other than that for which the technology was devised. The hypothetical case of a state misusing such information was dismissed, on the ground that any event of misuse could be adequately met by the national courts. Whether the retention of such information satisfied the test of proportionality, Lord Steyn had little doubt that it did. The information was kept for a limited purpose, was of value only when compared with actual comparators removed from a crime scene, and provided a tool in the twenty-first century fight against crime. With regard to the claim that retention of DNA constituted a violation of Article 14 which prohibited discrimination in relation to the application of the ECHR, any discrimination which did arise was not one based on status in the sense which invoked Article 14. Apart from according little credence to the discriminatory use made of the practice, the main concerns behind the reasoning of *Marper* can be summarised as follows.

Firstly, a ‘problem faced by UK courts as they seek to interpret Article 8 is the lack of...a domestic tradition of privacy and Strasbourg jurisprudence that avoids seeking to define the limits of Article 8. [In this sense, the ruling in *Marper* involved] a disappointing analysis of the scope and application of Article 8(1), with little significant attempt to identify the normative foundations of the right.’¹⁴⁹

Secondly, the ECHR constitutes a ‘living instrument’ that should be interpreted in the light of present day conditions, including technological developments.¹⁵⁰ Not only do recent rulings of the ECtHR disclose an increasing willingness to hold that the collation and storage of personal data concerning suspects interferes with Article 8(1), but support for the application of Article 8(1) derives from the recognition in data-protection legislation of the impact on individual privacy of the retention of personal data, indicating, according to Roberts and Taylor, an increasing applicability of a notion of privacy to the retention of data.

¹⁴⁸ [2004] UKHL 39

¹⁴⁹ A. Roberts and N. Taylor ‘Privacy and the DNA Database’ (2005) *E.H.R.L.R.* 373, 376

¹⁵⁰ *Tyrer v UK* (1979) 2 EHRR 1

Thirdly, ‘on a reductionalist view that the...concern of privacy is the control of information, the primary harm occasioned by the taking of a sample comprises not the violation of bodily integrity, but the loss of information into the hands of the state.... What the state then does with the information...merely affects the magnitude of the interference.’¹⁵¹ Insofar as the retention of DNA constitutes in fact an indefinite interference with the subject’s private life, it is arguable that the court’s ‘standpoint that if the retention of DNA...did involve an interference with privacy it was modest or insubstantial...proceeded from a flawed premise.’¹⁵²

Finally, it was a longstanding domestic policy that those who were acquitted were able to insist that the police no longer retain any DNA samples they may have had taken from them. Accordingly, if it was accepted that those who had been acquitted (and who were, perhaps, wrongly prosecuted) should be able to remove these samples from the police, it is not unreasonable to question why the court did not consider it necessary to seriously question whether a fundamental right was engaged. The appellants argued that they had not been convicted, yet were continuing to be subjected to discriminatory inclusion on the relevant database. ‘The House of Lords thought there was nothing to this point...however, under the law at the time, fingerprints could only be taken without consent before charge, if they could help in the investigation of the offence for which the suspect had been arrested.... [Accordingly], to keep them in order to investigate future crime [was/is] to use them for a...different purpose.’¹⁵³ In *Marper*, the court held that a Chief Constable needed not to review every case in which DNA had been taken from an unconvicted suspect. ‘The effect of the decision...grounded on utilitarian considerations, [was a widening of the statutory scheme] to an extent that the words of the statute [did] not appear capable of bearing and beyond the point to which reasonable arguments of proportionality... [could] be sustained.’¹⁵⁴

In view of the above, it is arguable that the decision in *Marper* constituted a clear example of the continuing Diceyan confidence of the court to protect the rights of the individual from state encroachment. Coupled with a pragmatic temperance toward the role of the ECHR however, the reasoning is not exclusive to the issue of personal privacy. Certainly, in *R (Persey) v DEFRA*¹⁵⁵ and *R (Howard) v Secretary of State for Health*,¹⁵⁶ the narrow approach adopted by the Court allowed the Government’s conduct in relation to two particularly sensitive areas of public concern to go effectively unchecked.

¹⁵¹ Roberts and Taylor (2005), Op. cit at 382

¹⁵² *Ibid* p. 385

¹⁵³ Ashworth and Redmayne (2005), Op. cit at 128

¹⁵⁴ Roberts and Taylor (2005), Op. cit at 390

¹⁵⁵ [2002] EWHC Admin 371

¹⁵⁶ [2002] EWHC Admin 396

Yet, regardless of such criticism, the ECHR is not an ideal order. Areas exist in which the individual is not protected. For example, the ECHR maintains that rules relating to criminal evidence are a matter for the national court. Accordingly, the ECtHR has no concern in investigating such issues as collaboration, the competence of witnesses, DNA testing, or evidence of bad character. In this respect, the confidence which legal positivism expresses regarding the common-law's ability to protect civil liberties could well be justified. Certainly, in relation to evidence of bad character, the common-law would appear to provide better protection of the accused's interests than the ECHR.¹⁵⁷

Further, 'being a document that has to be interpreted and applied in a number of jurisdictions, reflecting diverse political ideologies, the [ECHR] can only ever aspire to being a minimum statement of [HR], which in the final analysis, imposes very few positive obligations on states.'¹⁵⁸ The relationship between the ECHR and the State remains one of pluralism not monism.¹⁵⁹ Hardly then, a death-knell to the national legal order, the reality of the ECHR's 'incorporation' by means of the HRA remains far removed from any prognostication that the role of the national court based on new grounds for judicial review imported from Europe, would transform the UK constitution and open up a field of impossibility for the Government to make any decision without being challenged. Rather, any advance made in the acknowledgement of the ECHR by the adoption of a purposive approach characteristic of the judicial activist, has just as frequently been met with a pragmatic temperance. Temperance particularly evident in the approach toward *agent provocateurs* and the discretionary exclusion of evidence improperly obtained.

Agent Provocateurs and the Discretionary Exclusion of Evidence

Section 78 of PACE, in conjunction with a judicial ability to stay proceeding as an abuse of process¹⁶⁰ and a common-law power to exclude evidence where prejudicial effect outweighs probative value,¹⁶¹ has allowed the courts to develop a judicial discretion to exclude evidence improperly obtained from a court of law. Applied to the concern of HR however, one area of

¹⁵⁷ If not some of its ECHR neighbours. For example, whereas in the UK a raising of the accused's bad character before a jury may be held to adversely effect the presumption of innocence unless there are special circumstances for doing so, in some civil orders such as France, there is no prohibition on the evidence of bad character being put before a jury at the commencement of trial

¹⁵⁸ As exemplified in the UK's dealing with the concern of assembly: 'In the absence of supranational legal coercion, it is regrettable that... there has been not even a domestic legislative gesture towards a positive right of assembly. In the absence of a positive right, it is even more disappointing that the prohibition of a peaceful, non-obstructive assembly under Section 14A of the Public Order Act 1986 may, on account of the vagueness of the provision, through the complex semantics of "disruption" and "community" reach the very minimal threshold of the Convention... That... this lack of clarity... allows breaches of the Convention to occur, and that this may not be unintentional.' Taylor and Fitzpatrick (1998), Op. cit at 299

¹⁵⁹ *R v Director of Public Prosecutions, Ex-parte Kebilene* [2000] 2 AC 326, 380-381; *Ofulue and Another v Bossert* January 19 2008 The Times Newspaper February 11, 2008; And exemplified in much of the current Strasbourg public protest jurisprudence 'where states [remain] generally favoured when taking preventative measures to deal with even peaceful protest, by a wide margin of appreciation and the ability to rely on the loose and abstract concept of preventing disorder to justify interferences.' D. Mead 'The Right To Peaceful Protest Under the European Convention on Human Rights – A Content Study of Strasbourg Case-Law' (2007) *E.H.R.L.R.* 359

¹⁶⁰ *Attorney-General's Reference Case No. 3 of 1999* [2001] 1 Cr. App. R 34

¹⁶¹ *Chalkley* [1998] QB 848

police action which continues to give rise to particular concern is where police effectively set up a crime.

In accordance with Article 6, police entrapment is regarded as a breach of an individual's right to a fair trial. However, despite the ECHR's prohibition on law enforcement officers eliciting a crime, only in extreme circumstances will entrapment be regarded as a defence.¹⁶² Unless a defendant was caused by state agents to commit a crime which he otherwise showed no willingness to commit, the commission of that offence does not amount to entrapment.¹⁶³ The distinction is based on the defendant's willingness to participate, as opposed to the lawfulness of the police practice in question.¹⁶⁴ Yet, the issue of discretionary exclusion of unlawfully obtained evidence remains pertinent in so far as it raises questions concerning the unprincipled use of evidence of criminality. The aim of the minimum standards promoted by the ECHR should be to secure a basic level of protection for everyone. However, the omission of Article 13 from the HRA was justified by the Government on the ground that an effective remedy could be crafted from the Act. But what of the remedy applicable in relation to the use of evidence of criminality obtained (arguably) in breach of the ECHR?

The approach of the UK court toward the exclusion of illegally obtained evidence has always been awkward.¹⁶⁵ Grounded on a distinction between the discretionary exclusion of evidence as a means of securing a fair trial, and exclusion as a means of affording fair treatment,¹⁶⁶ whereas in *R v Looseley, Attorney-General's Reference Case (No. 3 of 2000)*,¹⁶⁷ the court had little hesitation in ruling that the appropriate remedy for entrapment was/is a stay of proceedings for abuse of process;¹⁶⁸ Section 78 of PACE only went so far as to impose a discretion on the judge to determine whether the admittance of evidence illegally obtained would have such an adverse effect on the fairness of proceedings, that it should be excluded.¹⁶⁹

According to Ormerod and Birch, Section 78 consisted of three flaws: (1) a lack of clearly acknowledged rationale; (2) ambiguity as to the interests it sought to protect; and (3) too unconstrained a discretion.¹⁷⁰

¹⁶² *R v Elwell and R v Derby* Ref: LTL 18/5/2001 EXTEMPORE (Unreported elsewhere)

¹⁶³ *Attorney-General's Reference Case (No. 3 of 2000)* [2003] UK HRR 333

¹⁶⁴ *Nottingham Chief Constable v Amin* [2000] 1 Crim App R 462

¹⁶⁵ D. Ormerod and D. Birch 'The Evolution of the Discretionary Exclusion of Evidence' (2004) *C.L.R.* 767, 768-772. 'On the numerous occasions on which the issue has been raised, judicial responses have been notable for failing to identify clearly the principles that ought to guide the law.' A. Roberts and D. Ormerod 'The Trouble With Teixeira: Developing A Principled Approach To Entrapment' (2002) *I.J.E.P.* 38

¹⁶⁶ R. Cross, *Cross on Evidence* (6th Edition) (Butterworths, London 1985) 171

¹⁶⁷ [2001] UKHL 53. For analysis of the decision see: A. Ashworth, 'Re-drawing the Boundaries of Entrapment' (2002) *C.L.R.* 161

¹⁶⁸ The appropriate remedy for entrapment being that proceedings should not take place at all: *Teixeira de Castro v Portugal* (1999) 28 EHRR 101

¹⁶⁹ V. Bevan and K. Lidstone (1985) *A Guide to the Police and Criminal Evidence Act*, (1st Edition) (Butterworths, London 1985) 294; and J. Andrews and M. Hirst *Criminal Evidence*, (1st Edition Sweet and Maxwell, London 1987) 321

¹⁷⁰ Ormerod and Birch (2004), *Op. cit* at 778

With regard to the first flaw, although it could have been hoped that the attitude of the courts toward Section 78 would have led to a more rights based approach with the enactment of the HRA, such was not the case. ‘Since the 1990’s, the courts [having] wedded themselves to the reliability principle, Section 78 remains firmly anchored in reliability rather than rights based principle.’¹⁷¹ Accordingly, ‘Evidence obtained illegally is not *ipso facto* inadmissible...The passing of the [HRA does not] alter that position.’¹⁷² Since Section 78 does not oblige the courts to adopt a protective or disciplinary approach, it is understandable that the courts have developed a reliability based approach allowing for focus on the question of guilt, as opposed to moral judgments. However, the trial process is not ‘merely about reliably convicting the guilty...there is an important judicial responsibility to maintain the moral integrity of the trial process. To date, the courts have relinquished the opportunity to use Section 78 to establish...this moral legitimacy.’¹⁷³

With regard to the second flaw, Section 78 remains of such vagueness as to the meaning of fairness and the subject it seeks to protect, as to allow for judicial evasion of a principled rationale.¹⁷⁴ One aspect of this is the courts narrow interpretation of Section 78 as being a fair trial based discretion, as opposed to fair treatment and the development of what is essentially an artificial, if not illogical, fair trial/fair treatment distinction; insofar as ‘whether one is considering the possibility of excluding evidence on account of pre-trial police impropriety, or the possibility of staying proceedings on account of such impropriety, what is at stake is surely the same: should the prosecution be deprived of the facts of the pre-trial impropriety?’¹⁷⁵ Another, according to Grevling, is whether the obligation to have regard to the fairness of the proceedings requires the judiciary to consider the interests of the prosecution, as well as the defendant, and if so, an overstepping of the role of the judge, adding to the dangers inherent in the exercise of exclusionary discretion.¹⁷⁶

Finally, albeit Section 78 allows the court to respond to the needs of the instant case, in order for discretion to justly supplement rules of admissibility, judicial discretion should be clear and transparent in terms of the standard to which the judge must be satisfied before applying his discretion. According to Ashworth, Section 78 lacks these attributes: ‘Enticing the judge into the world of balancing where issues of principles may be presented as facts and where the relative weight of the counter-veiling factors, and the reasons for assigning that weight, are rarely spelt out.’¹⁷⁷ According to Ormerod and Birch, such observation prompted the question

¹⁷¹ *Ibid* p. 779

¹⁷² *Hardy v Hardy* [2003] 1 Cr. App. R 30, Paragraph 18

¹⁷³ Ormerod and Birch (2004), *Op. cit* at 782

¹⁷⁴ Ormerod and Birch (2004), *Op. cit* at 784

¹⁷⁵ A. Choo and S. Nash ‘What’s the Matter with Section 78?’ (1999) *C.L.R.* 929

¹⁷⁶ K. Grevling ‘Fairness and the Exclusion of Evidence under Section 78 of the Police and Criminal Evidence Act 1984’ (1997) 113 *L.Q.R.* 667

¹⁷⁷ Ashworth (2002), *Op. cit* at 161

whether the flaws in Section 78 could be remedied by adopting a more structured format which could identify the purpose of the discretion including the interests to be served, and lead the courts to adopt a more rights based approach to exclusion.¹⁷⁸ Echoing the call for transparency and consistency of the Auld Review of the Criminal Courts of England and Wales,¹⁷⁹ the structured approach was explored by Roberts and Ormerod.¹⁸⁰

Drawing on the Canadian Supreme Court decision in *R v Mack*,¹⁸¹ Roberts and Ormerod proposed a structured scheme to regulate the conduct of entrapment operations and remedies for abuse, including a pre-operation threshold criterion that would secure ECHR compliance. The starting-point consisted of a refining of the test of entrapment laid down in *Mack*¹⁸² by the development of a pre-operation threshold consisting of three different tests related to the type of operation conducted¹⁸³ to define the boundaries of legitimate covert activity prior to an entrapment operation commencing. Having formulated three threshold tests to define the boundaries of covert activity, Roberts and Ormerod then went on to consider the actual functioning of such an operation.

According to Roberts and Ormerod, the fundamental distinction in evaluating police conduct was between facilitation and instigation. In entrapment cases, police behaviour amounted to an offence of incitement under English law subject to proof of *mens rea*. However, the question was whether the police had caused crime, and this could not be answered by asking whether they had incited it.¹⁸⁴ Rather, a better approach would be to compare police behaviour to that of the ‘unexceptional participant’ engaged in the activity in the circumstances, insofar as it should be the actual propriety of police conduct that should be at the forefront of enquiry. Police activity would then constitute illegitimate entrapment either when it failed to satisfy a pre-operation threshold condition, or having satisfied the criteria, went beyond what was unexceptional participation in the context of the operation. With regard to the remedy available, although the applicability of remedies would remain a matter for the court, under a structured approach to entrapment, it would be possible to delineate the two alternatives of a stay of proceedings for abuse of process and exclusion. Whereas the remedy most appropriate in respect of a breach a pre-operation threshold would be a stay of proceedings, unless police

¹⁷⁸ Ormerod and Birch (2004), Op. cit 286

¹⁷⁹ HL Deb. (1984) 455 (Col. 656) (Hansard, London). While advocating for rationalisation of Section 78, Auld maintained that it would be incongruous to stay proceedings for abuse of process in circumstances where an individual item of reliance evidence could not be excluded, and that a rights based discretion would enable courts to exclude evidence which stood in direct breach of Article 6

¹⁸⁰ Roberts and Ormerod (2002), Op. cit at 38

¹⁸¹ (1988) 44 CCC (3d) 513

¹⁸² Where the authorities provide an opportunity for persons to commit an offence without prior reasonable suspicion, or acting *mala fides*; or, having reasonable suspicion, or acting in the course of a *bona fide* inquiry, go so far beyond merely providing an opportunity, as to actually induce the commission of an offence

¹⁸³ Cases of (1) individual offending, (2) test purchases, and (3) sting operations

¹⁸⁴ ‘Incitement is an inchoate crime, and by definition does not require proof of causation of any offence,’ Roberts and Ormerod (2002), Op. cit at 53

conduct was so morally discreditable as to constitute an affront to public conscience,¹⁸⁵ the exclusion of evidence under Section 78 would constitute the appropriate remedy where the police conduct in question would render the reception of the evidence at trial unfair.

Examining the evolution of the UK's doctrine of entrapment and the correct approach to improperly obtained evidence under Section 78, Ormerod, Birch and Roberts highlight convincingly the advantages in transparency and consistency of adopting a structured discretion to the exclusion of evidence. However, added to the defects identified, is the argument by Squires that the legal framework governing entrapment¹⁸⁶ necessitates serious departure from general criminal law approaches to assessing liability, including principles ordinarily stressed as fundamental to the criminal law. According to Squires, 'entrapment doctrine determines liability for criminal acts by reference to the kind of environment inhabited by their perpetrators, a perspective the law ordinarily attempts to exclude.'¹⁸⁷ However, the distinction between a police authority actually causing crime, and merely offering an opportunity to commit crime, is problematic.¹⁸⁸ Consideration of the defendant's background and the context in which a crime was committed is difficult to reconcile with the principles to which the criminal law generally claims to adhere. Such consideration is usually regarded as impermissible in the determination of criminal liability, which focuses upon the defendant's *mens rea* at the moment he commits a criminal offence and not the kind of social world he inhabits. According to Squires, 'if correct...and defendants in entrapment cases are committed or acquitted by reference to their backgrounds, then the courts are, in effect, making determinations of blameworthiness.'¹⁸⁹

Mohoney opines a solution.¹⁹⁰ Examining the law as it once stood in New Zealand, the HRA is based (to an extent) on similar reasoning to the New Zealand Bill of Rights Act 1990. Section 3 of the New Zealand Act 1990 provides a similar structure to Section 6 of the HRA, albeit unlike Section 7 of the HRA, the New Zealand Act does not provide a remedies clause. Yet, such absence did not prevent the judiciary from developing a principle which upheld the *telos* of the New Zealand Bill of Rights. Following the New Zealand Act coming into force, the courts developed the *prima facie* exclusionary rule that a finding of a breach of a specified right led to an automatic presumption that evidence obtained as a result of a breach was to be excluded, unless the prosecution could demonstrate that there were good reasons for it to be admitted.

¹⁸⁵ In which case the remedy to be applied would be a stay of proceedings

¹⁸⁶ Articulated in *Looseley and Attorney-General's Reference Case (No. 3 of 2000)*

¹⁸⁷ D. Squires 'The Problem with Entrapment' (2006) *O.J.L.S.* 26(6) 351

¹⁸⁸ In *Teixeira* the ECtHR held that the right to a fair-trial extended to the rights to fair pre-trial procedures, and found a violation when a court had received and acted upon evidence obtained by entrapment. On the boundaries of 'reasonable suspicion' the court regarded evidence of a person's predisposition to commit the offence as being a relevant factor. Apart from the failure of the ECtHR to clarify the term [highlighted by Roberts and Ormerod (2002), *Op. cit* at 43] evidence of a person's predisposition could well lead to prejudice of those who have previous convictions

¹⁸⁹ Squires (2006), *Op. cit* at 354

¹⁹⁰ R. Mohoney 'Abolition of New Zealand's *Prima Facie* Exclusionary Rule' (2004) *C.L.R.* 787

The development of a presumption of exclusion for breach of specified rights was justified in *Baigent's Case*.¹⁹¹ Although the rule could be criticised for seeming to favour the defendant, it was nevertheless right that it should be granted formal recognition on the ground that courts were bound to protect the rights and freedom of *all* citizens.¹⁹² Applied to the UK, should a judge find that in securing evidence there had been a breach of an ECHR right, but nevertheless allowed that evidence to be used, then he would be at the very least turning a blind eye to that illegal securing and, by a compounding of the ECHR breach, an arguable disregard of the obligation in Section 6 of the HRA. In this sense, the argument against the approach toward the admissibility of illegally obtained evidence appears relatively clear, if by formal acknowledgement of the ECHR, the HRA declares that certain rights and freedoms are fundamental, then the judiciary should ensure that this is given effect. The language of Section 6 of the HRA arguably mandates this, which is why the approach followed in UK case-law is disappointingly unprincipled.

To summarise, the judicial approach toward the admissibility of illegally obtained evidence and the handling of entrapment, serves as yet another example of how (in the main) the UK judiciary has moved cautiously in terms of HR acknowledgment. Whereas, in what had the potential to be a significant ruling in terms of the transitional effect of the HRA, in *Rusbridges Toynebee v Director of Public Prosecutions*¹⁹³ the House of Lords illustrated a limited acknowledgement of Section 3; the reasoning of the court in *R v J*¹⁹⁴ is hard to reconcile with that of *Kansal* and *Lyons*.

Analogous to *Kansal*, the ruling in *R v J* concerned facts already adjudicated in *HM Advocate v R*.¹⁹⁵ Sitting as the Privy Council the House of Lords had held that an unreasonable delay in criminal proceedings constituted a breach of Article 6. Unlike the majority of the House of Lords in *Kansal* and *Lyons* however, in *R v J* the Court refused to consider *HM Advocate* and overturned the authority without justification. Breach of the right to a fair and public hearing within a reasonable time was not sufficient to prevent a prosecution. The rulings of *Kansal* and *Lyons*, and *R v J*, highlight an inconsistency in judicial approach toward both ECHR and UK authority. However, in terms of the ECHR influencing the UK legal order, a number of cases where the appellate courts have firmly rejected arguments based on the ECHR in relation to substantive law, is exemplified in the process of overruling.¹⁹⁶

¹⁹¹ [1994] 3 NZLR 667

¹⁹² Examining the replacement of the *prima facie* rule with a balancing practice which allows account to be taken of various matters, including the seriousness of the offence to which the evidence in question is relevant, according to Mohoney what seemed to have concerned the courts was that the *prima facie* rule gave rise not to a technical problem in its application, or a constitutionally inappropriate exercise of the court's jurisdiction, but to a somewhat mechanical approach. An approach which in other legal contexts would have been termed legal certainty

¹⁹³ [2003] UKHL 38

¹⁹⁴ [2004] 2 WLR 1

¹⁹⁵ [2003] 2 WLR 317

¹⁹⁶ *R (Green) v Police Complaints Authority* [2002] EWCA Civ 389

For example, in *R (Farrakhan) v Home Secretary*¹⁹⁷ the High Court had held that the Home Secretary's prohibition of the US leader of Islam to enter the UK constituted a breach of Article 10. Failure of the Home Secretary to provide adequate reasons for the ban had led to a finding that the decision had not been properly balanced. The Court of Appeal disagreed. Although failure to provide reasons for a decision was questionable, and the risk to community relations (were the US leader to enter the UK) minimal, the Home Secretary was in the best position to decide whether a ban was necessary.

The ruling is not exceptional. In relation to substantive law, the impact of the ECHR remains dependent on the prevalent attitude of the judiciary; that, that attitude (be it activist or self-restraint) differs in relation to what issue the court has under consideration; and that a narrow, linguistic approach emphasising a precise reformation of the statutory words in question, serves to bolster judicial reluctance to encroach upon established legal practice. Constituting a form of tabulated legalism characteristic of the judicial self-restrainer, it is an approach illustrated not merely in *R v Lichniak* and *R v Pyrah*,¹⁹⁸ but in the reasoning adopted (albeit in relation to a concern falling outside of criminal justice) in *Wilson v Secretary of State for Trade and Industry*.¹⁹⁹

In *Wilson* the House of Lords held that the Court of Appeal had been in error to declare the Consumer Credit Act 1974 incompatible with Article 1 of Protocol 1, and Article 6. The case concerned the inability of a pawnbroker to enforce a contract for technical reasons, with the result that the borrower was able to recover the security without repaying the loan. In the opinion of the Court, because the technicality restricted the right to a fair and public review of the case, as well as an adverse interference with the claimant's property rights, the relevant provisions of the Consumer Credit Act 1974 were incompatible. The House of Lords disagreed. Whereas Article 6 was not applicable, the concern was as to the substantive law, rather than to the fairness of the trial process; any interference with the claimant's property rights in accordance with the statute in question was proportionate in the context of the overriding general need to regulate such pawn-broking agreements.

¹⁹⁷ QBD (Admin) 1/10/2001; LTL 30/4/2002 (2002) ACD 5

¹⁹⁸ Over the years, the House of Lords have considered two concerns regarding the legitimacy of the mandatory life-sentence for murder: whether the mandatory nature of the sentence was compatible with the ECHR; and whether it was right that a Government authority should set the term of the tariff, as opposed to an independent tribunal. The concerns formed the subject for determination in *R v Lichniak* and *R v Pyrah* [2002] UKHL 47. In both cases the question for the Court was whether it was proper to serve a mandatory indeterminate sentence on two prisoners convicted of murder, but who had been found by the trial court not to constitute a future danger. In reaching its decision, the House of Lords dismissed the argument that the imposition of such a sentence constituted a breach of the prohibition on degrading treatment under Article 3, and a right to liberty in accordance with Article 5. It was open to Parliament to require a life-sentence for murder and the Home Secretary to set the tariff term accordingly. The fact that the sentences and the tariffs imposed were individualised in relation to the facts of the case, prevented their imposition from constituting an arbitrary ECHR breach

¹⁹⁹ [2003] UKHL 40

The ruling, moved by Government lawyers to overturn the declaration of incompatibility, highlights perhaps the greatest failing of the ECHR order: a lack of control over a signatory-state's compliance. The ECHR may set out minimum standards of protection agreed by signatory-states, but in practice their application is often at best strained, grounded on an underlying fear of the loss of state control over the domestic legal order. Albeit the (above) case-law illustrates an increasing judicial awareness of the concern of HR post the HRA, it remains (arguably) only an awareness of the need to promote, as opposed to protect. As illustrated in the ruling of Lord Nicholls in *Re S and Re W*,²⁰⁰ that Article 13 was not an ECHR right defined in the HRA, so that legislation which failed to provide a remedy for infringement of Article 8 was not for that reason incompatible with the HRA.²⁰¹ A finding objectionable on the ground that the narrow approach adopted not only cut across the developing notion of positive obligations under Article 8, but also ignored the Government's assurance that the non-inclusion of Article 13 was not intended as a limitation, but a recognition that it was already adequately provided for.

Yet, this is not to suggest that the HRA has had no significance in relation to substantive law; or that the judicial response has remained solely one of self-restraint. Certainly, a number of cases outside the criminal sphere highlight a move away from what can be described as the austerity of tabulated legalism, toward a principled approach more in conformity with both the ECHR and HRA.

In *Ghaidan v Godin Mendoza*,²⁰² the House of Lords was called on to determine the entitlement of a same sex partner to succession to a tenancy in relation to Articles 8 and 14. On the death of the tenant, the landlord attempted to obtain possession of the property. The surviving partner claimed that he was entitled to succeed to the statutory tenancy. Following the reasoning adopted in *Fitzpatrick v Sterling Housing Association*,²⁰³ the County Court disagreed. Concerning similar circumstances, the House of Lords had held that a partner of a same sex relationship was to be regarded as a member of the tenant's family within the meaning of Paragraph 2(3) of Schedule 1 of the Rent Act 1977 and entitled to an assured tenancy, but did not constitute a surviving spouse for the purpose of Paragraph 2(2), therefore was not entitled to a statutory tenancy. The partner appealed. Disagreeing with the linguistic approach to the statutory wording of Paragraph 2(2), the Court of Appeal held that a broader interpretation in accordance with the HRA extended the term spouse to include same sex partners. The case reached the House of Lords. The Court held that Article 8 did not impose a positive obligation

²⁰⁰ [2002] UKHL 10

²⁰¹ [2002] UKHL 10 Paragraph 60

²⁰² [2004] UKHL 30

²⁰³ [2001] 1 AC 27

to provide a house, however the different treatment of sexual orientation that characterised the Rent Act 1977, constituted an unjustifiable discrimination contrary to Article 14.

The case is significant. In reaching its decision, the House of Lords adopted an approach to the interpretation of paragraph 2(2) of the Rent Act 1977 which effectively reversed the discrimination. Examining its judicial obligation under the HRA, the Court held that the intent of Parliament was to impose a broad capability on the judiciary to do all that it could to achieve ECHR compatibility; that the capability to declare an incompatibility under Section 4 of the HRA constituted a remedy of last resort; and that far from limited to cases of statutory ambiguity, the obligation under Section 3 applied to cases where statutory interpretation using normal principles would lead to a breach of the *telos* of the ECHR. The Court then went on to discuss the use of interpretative techniques, including the practice of reading into provisions words which technically altered their meaning. According to Lord Nicholls, once it was accepted that Section 3 could require legislation to carry a meaning which departed from the unambiguous meaning the legislation would otherwise bear, it became impossible to suppose that Parliament had intended that the operation of Section 3 should depend critically upon the form of words adopted by the Parliamentary draftsman. That would make the application of Section 3 something of a semantic lottery. Except where compatible interpretation was inconsistent with the nature of the legislation, or where interpretation would inappropriately interfere with public policy, Section 3 could require a court to depart from the legislative intention of the statutory provision in question.

Throughout *Ghaidan*, the House of Lords adopted a broad, purposive approach to the interpretation of the Rent Act 1977 and Section 3 of the HRA. The same form of activism evident in *R v Edwards*,²⁰⁴ where the Court abandoned a legalistic reading of Section 352 of the Insolvency Act 1986 and looked instead to the substantive effect of its application to Sections 357 and 353;²⁰⁵ and the order placed on the Home Secretary to commence an independent enquiry into the death of an offender placed in custody with a prisoner known to be overtly racist in *R (Amin) v Home Secretary*.²⁰⁶ According to the Court, although the UK recognised a common-law duty to prevent prisoners committing suicide while detained,²⁰⁷ the ECHR added a second dimension which included the implication of additional rights to accord practical effect to those set out in the ECHR. Adopting a purposive approach characteristic of the ECtHR, the Court examined its role under Section 3 and held that Article 2 implied a duty on the State to protect life, which included independent investigation into any death concerning state

²⁰⁴ [2005] EWCA Crim 2923

²⁰⁵ With the result that the words 'innocent intention' were accorded a different, and more appropriate, meaning in accordance with the circumstances to which they were applied

²⁰⁶ [2003] UKHL 51

²⁰⁷ *Reeves v Commissioner of Police* [2001] 1 AC 360

involvement.²⁰⁸ The ruling is interesting. The judiciary's consideration of what was *in fact* the implication of additional rights in order to accord the ECHR significance would again appear to indicate an increasing HR awareness post the HRA. Whether such awareness can be seen as willingness to accord greater credence to the substance of a claim, as opposed to legal technicalities however, is perhaps best exemplified in its handling of the issue of privacy.

Section 4.3: Privacy

There has never been a right to privacy in common-law.²⁰⁹ Such absence was examined in *Malone v Commissioner of Police of the Metropolis (No 2)*.²¹⁰ The Court was unable to prevent State telephone-tapping on the ground that the authority in question had committed no wrong. Accordingly, the principle that all persons could do all that which was not prohibited by law was applied to administrative action. Demonstrating a classic Diceyan authority to justify its inability to pronounce on the legality of state action, the fact that the Court could have raised the objection it did in *Entick v Carrington* that the practice produced an illegality, was not addressed.

A similar observation was reiterated in *Kaye v Roberston*.²¹¹ Although the common-law did not recognise an action for invasion of privacy, it remained outside the jurisdiction of the Court to create one. However, due to the nature of the intrusion in question, held it to amount to a malicious falsehood and granted an injunction against the relevant publication. While, in *Marcel v Commissioner of Police of the Metropolis*,²¹² albeit Lord Browne-Wilkinson acknowledged that privacy was a concern which Parliament could not be assumed to have legislated so as to interfere more than was necessary in order to secure public interest and demanded clear statutory language before the executive could impugn a citizen's rights, nevertheless held that there remained in UK law no right to privacy.²¹³

The cases are interesting. On the one hand, the rulings highlighted the disability under which the judiciary, adhering to its perceived role when faced with a unique situation, was placed,²¹⁴ while on the other, intimated the possibility of the activist being creative within the common-law to develop a form of protection akin to the functioning of a right to personal privacy. A possibility mooted by Sir John Laws, who thought that privacy was one of the areas where it should be

²⁰⁸ An approach evident in *R (Middleton) v Coroner for West Somerset* [2004] UKHL 10

²⁰⁹ *R v Brown* [1996] 1 All ER 545; Lord Walker in *OBG Limited v Allan* [2007] 2 WLR 920 at 985

²¹⁰ [1979] 2 All ER 620

²¹¹ [1991] FSR 62

²¹² [1991] 2 WLR 1118

²¹³ Following the approach employed in *R v Home Office, ex-parte Khewaja* [1983] 1 All ER 765; *R v Home Office, ex-parte Bugdaycay* [1976] 1 All ER 458; and *R v Home Office, ex-parte Phansopkar* [1976] QB 606

²¹⁴ In contrast to France, where Article 9 of the French Civil Code provides that everyone has the right to respect for his private life; and the US, which has developed a right to Privacy derived from principles of English law: *Crozon v Director of Missouri Department of Health* 110 US 2841 (1990)

appropriate for the judges to take a hand.²¹⁵ If any (arguable) possibility to take such consideration seriously was given to the judiciary by the HRA, the question is has it done so?

The broad phraseology of Article 8(1) provides that everyone has the right to respect for his private and family life, home and correspondence. A person who infringes that right will be liable in damages unless he can bring himself within the exceptions of Article 8(2). To establish interference, the evidential burden falls on the claimant, while the burden of proof falls on the State to show that interference is justified. The role of the court is to determine whether the interference is proportionate to the aim. A concept which replaces the traditional judicial review test of irrationality which would promote favourable intervention by the courts, as well as the technical reassessment of established common-law principle. Whether such development has characterised the response of the judiciary however, is debatable.

In *Wainwright v Home Office*²¹⁶ the court held that, insofar as UK Courts had refused to consider a principle of privacy, no tort of invasion existed in domestic law. Although in reaching its decision, the court did acknowledge the potential of Article 8 for creating such a right and declared that the provision could be well be appropriate in accordance with Section 6 of the HRA where trespass to the person was not available, the development of such a tort required legislation, not judicial innovation. Yet (aside from a general reluctance of the House of Lords to develop the concept of privacy in relation to personal searches) the ECHR has not been without impact. Following the HRA, the courts have responded cautiously to claimants seeking protection of the right to private life where, without such protection, a claimant could be subjected to a substantial threat of death or injury.²¹⁷ Accordingly, and based on established common-law and equitable principles, there would appear to be evidence of rulings beginning to be shaped by reference to a right of privacy.²¹⁸ A development highlighted by *Stone*,²¹⁹ *Delany*, and *Murphy*²²⁰ in the interface between Article 8 and the right to freedom of expression under Article 10.

Article 10 provides that everyone has the right to freedom of expression, to hold opinion, and to receive and impart information without interference by public authority. Article 10(2) provides that the exercise of such freedom may only be subject to such formalities, conditions, restrictions and penalties as prescribed by law. With regard to privacy, Section 12(4) of the HRA directs that where a court considers whether to grant a remedy, which if granted may

²¹⁵ J. Laws 'Is the High Court the Guardian of Fundamental Constitutional Rights?' [1993] *P.L.* 59, 65

²¹⁶ [2003] UKHL 53, 16

²¹⁷ *Venables v News Group Newspapers* [2001] 1 All ER 908

²¹⁸ G. Phillipson 'Transforming Breach Of Confidence? Towards A Common-Law Right of Privacy under the Human Rights Act' (2003) *M.L.R.* 66, 726; and G. Phillipson and H. Fenwick 'Breach of Confidence as A Privacy Remedy In the Human Rights Act Era' (2000) *M.L.R.* 63, 660

²¹⁹ *Stone* (2004), Op. cit at 445

²²⁰ H. Delany and C. Murphy 'Towards Common Principles Relating To the Protection of Privacy Rights?' (2007) *E.H.R.L.R.* 568

affect the exercise of an Article 10 right, the court must have regard to the democratic imperative of the right of newspapers to freedom of expression.

In *A v B*,²²¹ concerning the continuation of an interim injunction, Lord Woolf considered the limitations of privacy as against the freedom of the press, and held that in the majority of situations where the protection of privacy was justified, relating to events after the HRA came into force, an action for a breach of confidence would provide the necessary protection.²²² This meant that at first instance, it could be readily accepted that it was not necessary to tackle the question of whether there was a separate cause of action based on a new tort involving the infringement of privacy. Indicating (in relation to interim proceedings at least) a strong presumption in favour of publication in relation to public figures, Lord Woolf then went on to state that any interference with the press had to be justified insofar as it would have an effect on its ability to perform its role in society, irrespective of whether a publication was in the public interest. However, the *telos* of the ruling of Lord Woolf ‘represents just one side of the equation and while the [HRA] might have been predicted to give added protection to...freedom of expression, in reality it is the right to privacy which has been the real beneficiary of the legislation....partly evidenced by the...transformation of the traditional remedy for breach of confidence into what can now be described as the tort of “misuse of private information” [and the fact] that it has been [judicially] acknowledged that neither Article 8 nor Article 10 have precedence over the other.’²²³

The interface between Article 8 and Article 10 was raised again in three levels of Court in *Campbell v Mirror Group Newspapers*.²²⁴ The case concerned the publication by the defendant newspaper details of the claimant’s attendance at Narcotics Anonymous. The claimant challenged the publication on grounds that it constituted a breach of her Article 8 right to respect for a private life, a breach of confidence, and a breach of the Data Protection Act 1998. The Newspaper defended its publication as an exercise of its Article 10 right which, in accordance with Section 12(4) of the HRA, the Court was obliged to have regard. The Court examined both interests and ruled in favour of the claimant. The Newspaper appealed. Stressing the importance of the freedom of expression the Court ruled in favour of the defendant. The House of Lords disagreed. Examining the ECHR at length, the court acknowledged that Article 8 protected the claimant’s right to privacy, but that recognition was given in Article 8(2) to the protection of the freedoms of others. Article 8 was balanced against Article 10. The effect of the

²²¹ [2003] QB 193

²²² Freedom of expression has long occupied a significant position in the value system upheld by the UK courts (*R v Secretary of State for the Home Department ex-parte Simms* [1999] 3 WLR 328) acknowledged prior to the coming into force of the HRA of having attained the status of a constitutional right with high attendant normative force (*McCartan Turkington Breen v Times Newspapers Limited* [2001] 2 A.C 277)

²²³ Delany and Murphy (2007), Op. cit at 572

²²⁴ [2002] EWHC QB 499; [2003] 2 WLR 80; [2004] 2 AC 457

disclosure was a factor to be taken into account in assessing the extent of the restriction that was needed to protect an Article 8 right, and was important enough to justify limiting the defendant's Article 10 right asserted on behalf of the public. Demonstrating a willingness to look at the substance of the claim, the court had little hesitation in declaring that whereas public life was a matter for journalists, a person's private life was a matter for the national court. In the opinion of Lord Hoffman, there was no question of Article 10 having precedence over Article 8. Nor was there a presumption in favour of one Article rather than the other. The question was the extent to which it was necessary to qualify the one right in order to protect the underlying value which was protected by the other.²²⁵

The ruling constituted a development in terms of legal practice. The alternative to raising a privacy claim in the court consisted of an order of print media self-regulation governed by the Press Complaints Commission, so inconsistent in its balancing of competing public and private interests, that in practice media lawyers tended not to use it. But what of the real influence of the ruling in *Campbell* on substantive law? Whether a tort of privacy will come to be recognised as actionable either in accordance with the jurisprudence of the ECtHR,²²⁶ or as opined in *Wainwright*, what analysis does suggest is the development (post the HRA) of an increasing judicial awareness of a need to protect privacy born out of the equitable remedy of a breach of confidence, and acknowledgement that neither Articles 8 or 10 have automatic precedence over the other.

For example, in *McKennitt v Ash*²²⁷ the Court held that in order to apply breach of confidence the question to be asked was whether the information was private for the purpose of Article 8, and if so, whether the right of the owner to keep the information private outweighed any exercise of the freedom of the publisher to disclose it. In reaching its decision the Court upheld the principled approach formulated by Lord Steyn in *Re S (a child)*:

1. That following examination of the nature of the information in question, insofar as it impacted on the autonomy and dignity of the claimant, neither Article 8 nor 10 had precedence over the other;
2. That where conflict did arise, primary focus should be placed on the comparative importance of the rights being claimed in the individual case;

²²⁵ [2004] 2 AC 457 at 474

²²⁶ Although the ECtHR has not sought to accord either Article 8 or 10 pre-eminence over the other, despite what Delany and Murphy term 'the theoretical presumption of equality between Articles 8 and 10' [Delaney and Murphy (2007) Op. cit at 570] it is arguable that restrictions have been placed on Article 10 in order to protect a right to privacy under Article 8. Whereas in *Peck v UK* [2004] P.L. 850, the ECtHR held that the broadcast of CCTV footage of the applicant, who was neither a public figure nor participating in any public event, constituted a disproportionate interference with his private life; in *Von Hannover v Germany* (2005) 40 EHRR 1, the ECtHR appeared to almost 'rule out in advance' the possibility of any speech value in the discussion of private facts [H. Fenwick and G. Phillipson *Media Freedom and the Human Rights Act* (OUP, Oxford 2006) 695] when it held that the publication of material relating to the private life of an applicant who was not exercising any official function could not constitute any form of public interest justified in an Article 10 context

²²⁷ [2006] EWCA Civ 1714

3. That the court was obligated to take into account justification for interfering with each right, and in doing so, apply the test of proportionality equally to both interests.²²⁸

How, exactly, such balancing was to be carried out, was examined in *HRH Prince of Wales v Associated Newspapers*.²²⁹ The court was called on to examine the publication of a number of written entries made by HRH in a private diary given to a newspaper by an employee in breach of her contract of employment. HRH sought an order to restrain publication grounded on breach of confidence. In the opinion of the court, the claimant was entitled to a reasonable expectation of privacy, and that disclosure of the entries in question was not necessary in a democratic society. The Newspaper appealed. The Court dismissed the appeal. In reaching a decision, the court examined the approach to be employed between the balance of Articles 8 and 10 and declared that, although the test was one of proportionality, an element to be weighed in the balance was the importance in a democratic society of upholding any duty of confidence which was created between individuals.

The rulings in *Re S*, *McKennitt* and *HRH* are interesting. In applying the principle of proportionality, the court accorded weight to the strength of the privacy interest of the claimant, and in doing so, accorded credence to the argument that public figures remained entitled to a reasonable expectation of privacy from unauthorised public disclosure. Certainly, to the rights evangelists, such rulings can be seen as an indication of the development of a reasoning in keeping with the jurisprudence of the ECtHR, if not an indication of greater willingness to take ‘serious’ stock of ECtHR rulings in which UK law has been found wanting.²³⁰ However, although post the HRA it is arguable that the judiciary has been accorded a greater ability to extend its influence over the concern of HR in domestic law, privacy aside, exemplified by its handling of different ECHR Articles, statutory provisions, and areas of procedural and substantive law, in particular in those areas according to Ewing ‘where HR would appear to matter the most,’²³¹ whether it has consistently chosen to do so, is far less straightforward.

²²⁸ [2005] 1 AC 593 at 603

²²⁹ [2006] EWCA Civ 1776

²³⁰ However, despite movement towards adopting the same form of balancing exercise between Article 8 and Article 10 rights and the use of similar language, there do still remain numerous differences between the ECtHR and the UK’s handling of the specific concern of privacy. Whereas, ‘a gulf still exists in relation to the interpretation placed on the concept of public interest [between] the jurisprudence of the [ECtHR]... and the... [broader interpretation accorded the concept in the UK]... courts;’ ‘While a person bringing a claim before... [UK]... courts... may be deemed to have a reasonable expectation of privacy in a public place in limited circumstances depending on the nature of the claimant’s activities and the manner in which the material was obtained, this issue has been interpreted in a much more expansive way by the [ECtHR], as the decision in *Von Hannover v Germany* [(2005) 40 EHRR 1] illustrates.’ [Delany and Murphy (2007) Op. cit at 582]

²³¹ Ewing (2004). Op. cit at 850

Section 4.4: Terrorism and Asylum

Under Sections 21-23 of the Anti-Terrorism, Crime and Security Act 2001,²³² where the Secretary of State reasonably believes that the presence in the UK of any person reasonably suspected of terrorist involvement constituted a risk to national security, that person could be subjected to indefinite detention. The provision breached Article 5, insofar as the purpose of detention was not to facilitate deportation, extradition or the conclusion of a criminal trial. Accordingly, the UK derogated from Article 5.²³³ The validity of the derogation was challenged in *A (and Others) v Home Department*.²³⁴

In reaching its decision in *A (and Others)*, the Special Immigration Appeals Commission²³⁵ had examined the Government's claim that although the ATCSA 2001 *prima facie* breached the ECHR, such action fell within the flexibility accorded by the ECHR to allow the suspension of some rights in times of public emergency. Because the UK was regarded as a target for terrorist attack, the SIAC agreed with the Government's assessment of the extent of the threat required as a precondition of derogation. On this point, the Court of Appeal agreed. There could lawfully be derogation to the extent required by the exigencies of the situation. With regard to Article 14, the SIAC had upheld the contention that the derogation, insofar as it allowed for the imprisonment of foreign nationals only, was unlawful. The Court of Appeal disagreed. In reaching its decision, the Court noted that there were justifiable grounds for selecting to detain only non-national suspected terrorists. Such detainees did not have a right to remain in the UK, nor were they likely to be detained for longer than the public emergency continued. When dealing with measures concerning public emergency, deferral should be made to the Home Secretary who was in the better position to reach a decision.²³⁶ The ruling was criticised, not least by Waldham.²³⁷ According to Waldham, the reason which led to the detention of suspects under Section 23 was the fact that they could not, in the circumstances, be removed from the UK. Such a reason was irrelevant to the purpose of determining the lawfulness of a process of state detention based on discrimination, a matter which the Court of Appeal in *Ghaidan* had referred to as being of significant 'constitutional' importance.

²³² Hereafter, ATCSA 2001

²³³ HRA (Designated Derogation) Order 2001

²³⁴ [2002] EWCA Civ 1502

²³⁵ Hereafter, SIAC

²³⁶ See: the rulings of Lord Slynn and Lord Hoffmann in *Rehman v Home Department* [2001] UKHL 47 who doubted the propriety of the judiciary challenging the judgment of parliament and the executive as to the nature, scale and immediacy of a threat to national security, as well as the measures taken to counter-act it, grounded on a commitment to the constitutional arguments that: (1) democratic accountability remained the basis for legitimacy of policy related decision-making; and (2) that the judiciary remained notably less competent than either parliament or the executive to make risk-assessments relating to national security. However, for an alternative view on the constitutional role of the judiciary vis-à-vis risk-assessments and policy judgements of executive and legislative bodies See: D. Feldman, Human Rights, 'Terrorism and Risk: The Roles of Politicians and Judges' [2006] *P.L.* 364; and A. Barak 'A Judge on Judging: The Role of a Supreme Court in a Democracy' (2002) 116 *H.L.R.* 16 at 150; as well as, the rulings of Lords Hope, Bingham, Scott and Baroness Hale in *R (On the Application of Limbuela) v Secretary of State for the Home Department* [2005] UKHL 66

²³⁷ J. Waldham 'Why Lawyers Should be Ashamed of the Latest Ruling on Internment' (2002) *N.L.J.* 152, No. 7054, 1633

The decision of the court to defer to the view of the Home Secretary was criticised by Ewing.²³⁸ Demonstrating, according to Ewing, a tendency of the UK courts to avoid involvement in areas concerning the rights of individuals coming face-to-face with the state,²³⁹ the ruling in *A* provided a clear example of the primary strategy employed by a court for an exercise of non-engagement: deference to the decision-maker.²⁴⁰ Given the opportunity under the HRA to examine the HR concerns of the individual, the court chose instead to defer to the Home Secretary both the determination of a public emergency, and the action to deal with it. While the HRA may well have allowed for a wider range of questions to be asked before the court, by its refusal to move beyond the deference approach, the fact that the ECHR had been formally acknowledged by the HRA added little in the way of HR protection.²⁴¹ On analysis, the observation is not unreasonable.

In *R (Abbassi) v Secretary of State for Foreign Affairs*²⁴² the court was called on to examine the UK Foreign Secretary's failure to assist a number of UK detainees indefinitely detained without access to legal advice or representation, right to challenge the legality of detention in the US courts, or right to *habeas corpus*. In reaching its decision, the court emphasised what it considered to be two obstacles to intervention: (1) the functioning of the principle of international practice which prohibited the courts from examining the legitimacy of action taken by a foreign sovereign state; and (2) a tradition of constitutional independence which prohibited it to adjudicate on action taken by the executive in the conduct of foreign relations. Accordingly, the claim that the Foreign Secretary was bound by the HRA to intervene on behalf of the claimants was dismissed. It was too political a consideration to suggest that the ECHR could require a signatory-state to take positive action to prevent the effect(s) of any institutionalised violation of HR that took place on territory that lay outside its jurisdiction. The *impasse* was judicially criticised. In the opinion of Lord Steyn,²⁴³ albeit the ruling was constitutionally understandable, the court's refusal to pronounce on the injustice of the detention process constituted a breach in principle of its moral duty to guard against unprincipled executive use of state power.

²³⁸ Ewing (2004), Op. cit at 844

²³⁹ See: the rulings of Laws L.J in *Secretary of State for the Home Department v International Transport Roth GmbH* [2002] EWCA 158, [2003] Q.B 728 and *R (On the Application of Limbuela) v Secretary of State for the Home Department* [2004] EWCA Civ 540, [2004] Q.B 1440

²⁴⁰ A strategy made all the more poignant following the observation of Lord Bingham that in times of emergency, freedom from executive detention was almost the first right to be curtailed, courts of law at their most unreliable as sources of protection, and infringement of personal liberty invariably greater than circumstances required. T. Bingham 'Personal Freedom and the Dilemma of Democracy' (2003) 52 *I.C.L.Q.* 841

²⁴¹ See further: J. Jowell 'Judicial Deference: Servility, Civility or Institutional Capacity?' [2003] *P.L.* 592; R. Clayton, 'Judicial Deference and Democratic Dialogue: The Legitimacy of Judicial Intervention under the Human Rights Act 1998' [2004] *P.L.* 35; and S. Fredman 'From Deference to Democracy: The Role of Equality under the Human Rights Act 1998' (2006) 122 *L.Q.R.* 53

²⁴² [2003] UKHRR 76

²⁴³ J. Steyn 'Guantanamo: A Monstrous Failure of Justice' (2004) 53 *I.C.L.Q.* 1

Despite constitutional objection for judicial intervention, both *A* and *Abbassi* do serve to illustrate a reluctance of the judiciary (post the HRA) to detach itself from a policy of non-engagement grounded on both the nature of the decision-maker and the decision. However, such reluctance is not merely confined to public policy. Exemplified in the courts handling of Section 44 of the Terrorism Act 2000²⁴⁴ in *R (Gillan and Quinton) v Metropolitan Police Commissioner*,²⁴⁵ the same reluctance is evident not only in relation to considerations of policy, but also the actual functioning of it.

Section 44 of the TA 2000, granted the police power of random stop and search over such area as designated by the relevant authority for articles of a kind which could have been used in connection with terrorism. Once an authorisation had been made, the power was exercisable without the requirement that the officer had reasonable suspicion that the person stopped had any terrorist involvement. Examining whether authorisation of the power could be challenged in a court of law, the court held that it could not. The assessment of risk to public safety and the formulation of measures to safeguard national security were concerns solely for the State to decide. The court then went on to examine the way in which the power was applied. Despite questions regarding the way in which the power had been used in the instant case, the court held that falling marginally short of persuasive evidence that the circumstances were such as to justify need, the court was prepared to accept the argument that Section 44 had not been unlawfully executed. With regard to the nature of the decision, although the court was quick to acknowledge the HR impact of Section 44, the assessment of the risk posed by terrorist activity outweighed any consideration of the claimants' Articles 8, 9, 10, or 11 ECHR rights.²⁴⁶

In terms of HR protection the decision of the court was disappointing. Insofar as the concerns of the claimants were concerned, there was no attempt (a) to give an account of the nature of the risk at the event; (b) to give an account of the evidence relied upon to justify the finding that there was a threat relating to the particular event; or (c) to explain why it was necessary to violate the multiple rights of the claimants to avoid that risk.²⁴⁷ The claimants appealed.

The question for the court was what interpretation should be put on Section 44 of the TA 2000, in light of its failure to use the normal reasonable suspicion requirement. Reiterating the Court of Appeal's ruling that in the context of terrorism it was not the role of the court to interfere with either an assessment of risk, or the choice of action taken to counter it,²⁴⁸ the challenge to the authorisation to randomly stop and search was dismissed. According to the court, the requirement of the TA 2000 that an authorisation could be given if it was expedient to do so,

²⁴⁴ Hereafter, TA 2000

²⁴⁵ [2003] EWHC Admin 2545

²⁴⁶ [2003] EWHC Admin 2545 at 62

²⁴⁷ Ewing (2004), Op. cit at 849

²⁴⁸ *R (Gillan) v Metropolitan Police Commissioner* [2004] EWCA Civ 1067 at 33

was clear and lawful. The argument that Section 44 should be construed as requiring necessity was dismissed on the ground that Parliament had chosen to apply a less strict standard of expedience. On the facts of the case, the evidence did not indicate that the renewal of the authorisation was anything other than a *bona fide* use of a power based on an informed evaluation of the risks involved in the area. With regard to the application of the ECHR, whereas Article 5 could not be engaged on the basis that prevention from joining a demonstration by a random power of stop and search could not be equated with custody, any potential breach of Articles 8, 10 or 11 could only be dismissed, insofar as the interference complained of constituted a proportionate response to satisfy the needs of a greater state interest.

Although the ruling of the House of Lords was technically hard to fault, the reasoning of the Divisional Court and Court of Appeal gave rise to two questions: Why did the UK consider itself in need to resort to a course of action which dispensed with the requirement of reasonable suspicion; and why, if there were no reasonable grounds to suspect that a person was involved in terrorism, could this not be considered as a reversal of the burden of proof?

In the opinion of Ewing, insofar as the HRA was delivered on the assumption that it would lead to greater protection of fundamental rights and freedoms, the courts' treatment of national security in *Abbassi* and *Gillan* was/is disappointing. In their preference to exercise caution in their handling of the ECHR in an area of law in which the needs of the individual for protection was/is at its most, the courts appeared to place the concern so far below that of the state as to render incredible any argument that in times of crises it could not offer protection regardless of whether the crises was caused externally or internally. As long as the courts appeared prepared to defer without question to the judgment of the executive,²⁴⁹ and to limit the (arguable) impact of the HRA by applying it so narrowly as to cause the Joint Committee on HR to criticise its failure to ensure that fundamental freedoms were as widely applicable in domestic law as the ECHR required,²⁵⁰ it would require more than the HRA to effectively alter the dominant judicial perception of its own HR role and 'stand up to government when liberty [came] so unfairly face-to-face with security.'²⁵¹

But is this to suggest that, in terms of its impact on substantive law, the HRA has proved futile? Professor Oliver offers a different perspective. According to Oliver, it was not unreasonable to predict that as the jurisprudence of HR developed post the HRA, judicial deference in and between higher and lower courts would decline. Examining the response of the national court post Ewing's 2004 analysis, the argument is compelling.

²⁴⁹ *R v Nelson Carmona* [2006] EWCA Crim 508

²⁵⁰ *The Joint Committee on Human Rights 7th Report*, HL 39, HC 382, (2003-2004) (TSO, London)

²⁵¹ Ewing (2004), Op. cit at 852

In *A (and Others) v Secretary of State for the Home Department*²⁵² the court examined the Government's justification for Sections 21 and 23 of the ATCSA 2001,²⁵³ in particular the inability of the Home Secretary to deport non-nationals where there was a risk of their being subjected to Article 3 treatment in the receiving country, and held that the inability applied to cases of expulsion. Whether there existed a public emergency threatening the life of the nation within the meaning of Article 15, the court examined the meaning of the provision, as well as its own role, and held that national authorities were in principle in a better position than courts to decide on both the presence of a national emergency and the scope of derogation necessary to avert it. In this sense, Article 15 did give authorities a wide margin of appreciation. However, the national court was empowered to rule on whether the authority had gone beyond the extent strictly required by the exigencies of the situation. The court then went on to consider the lawfulness of the derogation in terms of proportionality.

Article 15 requires that any measures taken by a signatory-state in derogation of its ECHR obligations should not go beyond what is strictly required by the exigencies of the situation. Adopting the approach laid down in *de Freitas v Secretary of Ministry of Agriculture, Fisheries, Lands and Housing*,²⁵⁴ in order to determine whether the limitations imposed were arbitrary or excessive, the court asked (1) whether the objective of the ATCSA was sufficiently important to justify limiting Article 5; (2) whether measures designed to meet the objective were rationally connected to it; and (3) whether the means to impair the right was no more than necessary to accomplish the objective.

Focusing primarily on the second and third limb of the criteria, the court then went on to examine its own role in the ECHR regime and held that for the international protection of HR to be effectively carried out, the order required courts to exercise their own judgment.²⁵⁵ Because the ECHR presupposed domestic controls in the form of preventative Parliamentary scrutiny and posterior judicial review, this was why states enjoyed a large margin of appreciation in respect of such derogations as those concerning issues of national security. This, according to the court, was the essence of the principle of subsidiary protection of ECHR rights. The traditional *Wednesbury* approach to judicial review afforded inadequate protection.²⁵⁶ It was now recognised that courts should themselves form a judgment whether an ECHR right had been breached, and that the intensity of review was greater under the proportionality approach.²⁵⁷ As courts were not precluded by any doctrine of deference from scrutinising the

²⁵² [2004] UKHL 56

²⁵³ (1) The inability of the Home Secretary to deport non-nationals where there was a risk of their being subjected to Article 3 treatment in the receiving country, as well as, (2) the lawfulness of its derogation under Article 15, and (3) the effect of the application of the provisions on the non-national, resulting in the different treatment of nationals and non-nationals

²⁵⁴ [1999] 1 AC 69

²⁵⁵ *Handyside v UK* (1976) 1 EHRR 737

²⁵⁶ *Smith and Grady v UK* (1999) 29 EHRR 493

²⁵⁷ *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 AC 532

issues raised (and in the case of the UK specifically charged with the application of ECHR law in accordance with the HRA) the court felt itself under no constitutional restraint to defer from the former judicial conviction of a tension between Articles 14 and 15.

In the opinion of the House of Lords, not only was the argument that the threat to the nation from international terrorism was predominantly from foreign nationals unsupported, what could not be justified was the decision to detain one group of suspected international terrorists defined by nationality and immigration status, and not the other. In accordance with the *telos* of the ECHR, what had to be justified was not the measure in question, but the difference in treatment between one person or group, and another. If the threat presented to the security of the UK by UK nationals suspected of being terrorists could be addressed without infringing their right to personal liberty, it had not been shown that any similar measures could not alternatively address the threat presented by foreign nationals.

As in the ruling of *Secretary of State for the Home Department v JJ*,²⁵⁸ the finding in *A (and Others)* highlighted the importance of the role of the national court in the defence of the rights and liberties of the individual. Whether, it can be said to support a claim that as the jurisprudence of HR has developed post the HRA judicial deference in and between higher and lower courts has declined, with the degree of certainty Oliver proposed, or that the motive of the Court can be rightly claimed to be as a result of greater judicial determination to ensure that the executive functions with greater regard for the rights of the individual however, the ATCSA gave rise to a second dispute, which in *A (and Others) v Home Secretary (No 2)*,²⁵⁹ significantly divided the judiciary.

Under Rule 44(3) of the Special Immigration Appeals Commission (Procedure) Rules 2003, the SIAC was/is able to receive evidence not deemed admissible in a court of law. In *A (and Others) (No 2)* the House of Lords was called on to decide whether such evidence, obtained under torture, could be used to support a claim that the test for certification of the Home Secretary's use of his power of detention had been appropriately made out. In reaching its decision, the Court of Appeal had been divided in its opinion as to what approach should be adopted. In the opinion of Lord Neuberger, by means of the HRA, the court was not only able, but obliged to accord consideration to the opinion of the international community, including the directly enforceable Article 6. To permit the use of evidence obtained under torture was to go against the *telos* of the ECHR and HRA, insofar as the use of such evidence, and an inability of the detainee to cross-examine it, would constitute a clear breach of Article 6. The majority disagreed. Rather than examine the concern in terms of the impact of such evidence on the

²⁵⁸ [2006] EWCA Civ 1141 where examining a challenge to the use of the TA 2005 by the Home Secretary, the Court appeared sufficiently willing to acknowledge the HRA to at least encourage the executive to function within the relevant statutory framework

²⁵⁹ [2005] UKHL 71

individual, the correct approach to be adopted was to acknowledge only its lawful position in accordance with common-law. According to common-law principle, unless information had been wrongly obtained, all information was capable of being submitted as evidence. As the information to be put to use for the purpose of securing national security had not been procured or otherwise wrongly obtained, then it was capable of being submitted as lawful evidence.

The House of Lords disagreed. Not only was the common-law indicative of a constitutional prohibition on the use of the ‘fruits of torture’ generally, its prohibition on the use of evidence obtained under torture was not one which could rest on whether the evidence had been obtained in good faith. The correct approach was to acknowledge the common-law’s regard for evidence obtained by torture as offending against ordinary principles of justice, as reflected in both international and ECHR law. Accordingly, the Court of Appeal was wrong to permit the use of the fruits of torture grounded on an implication from the language of Rule 44(3) of the Special Immigration Appeals Commission (Procedure) Rules 2003. Only by express statutory language could the use of such evidence be admitted.

Following its reproach of the majority ruling of the Court of Appeal, the Court then went on to determine the extent of the prohibition. According to Lords Bingham, Nicholls and Hoffman, where there was a reasonable argument to suggest that evidence could have been obtained under torture, and the SIAC was unable to conclude otherwise, the SIAC was obliged to exclude it. The majority disagreed. If the SIAC was uncertain as to whether evidence had been obtained by torture, it should nevertheless admit it, but in doing so, bear in mind such possibility when evaluating it. The ruling is questionable.

Firstly, the House of Lord’s reproach of the Court of Appeal’s reliance on the implication it drew from the ordinary language of the SIAC (Procedure) Rules 2003 as an intimation of the court’s possible response to any statutory authorisation of the admissibility of evidence obtained under torture, is not entirely encouraging. Use of the fruit of torture, is a disturbing practice which rightly should offend against all understanding of liberal democracy. The admissibility of such evidence stands in direct contravention with the *telos* of the ECHR and certainly most international law.²⁶⁰

Secondly, with regard to the extent to which the prohibition on the admissibility of evidence obtained under torture should be extended, the limitation set by the court on the circumstances in which the absolute prohibition can be invoked, at least for the individual involved, is not without problem. In order to give effect to the prohibition, its functioning will rest on a burden of proof that the evidence was obtained by the use of torture. However, in view of the nature of

²⁶⁰ Including Article 12 of the Declaration on the Protection of All Persons From Torture, and Article 15 of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984

SIAC proceedings, including the appellant's possible ignorance of the evidence against him, and possibly its author, due to the use of closed hearings from which the appellant's legal representatives are excluded, and the subsequent inability to examine the evidence against him, such a burden could prove impossible to discharge.

Finally, with regard to asylum, as a result of the HRA, asylum is subject to HR consideration derived from the ECHR (except Article 13). How such has translated into practice, is best assessed by an examination of the judiciary's actual treatment of the individual in those areas of the asylum process in which claims have risen the most: the removal, detention and treatment of the asylum-claimant.

Article 3 provides that no one shall be subjected to torture, inhuman or degrading treatment, or punishment. The right protected relates specifically to an individual's personal integrity and human dignity. At the same time, the standard for determining whether a state has violated Article 3 is to an extent subjective. The ECHR recognises the need for a margin of appreciation concerning a state's ability to govern entry, residence and expulsion of non-nationals. Nevertheless, signatory-states are obliged to safeguard persons in respect of whom there are grounds for believing that there is a risk of their being subjected to treatment in breach of Article 3 if removed or if their removal is likely to cause suffering. In accordance with the HRA, the judiciary is accorded the power to determine what a legislative provision requires. Forming the subject of political debate, the use of that power is interesting.

On the 20th of February 2003, the Home Secretary claimed that he was discouraged with the situation where Parliament debated issues and the judges overturned them. The statement referred to the rulings of Judge Collins in *R (J) v Home Secretary*²⁶¹ *R (M) v Home Secretary*²⁶² and *R (Q) v Home Secretary*.²⁶³

In *R (J)* and *R (M) v Home Secretary*, the lawfulness of the Government's requirement that a claim be made upon arrival at the port of entry in accordance with Section 55 of the Nationality, Immigration and Asylum Act 2002,²⁶⁴ was called into question. The claimants questioned the following asylum practice:

1. Whether the National Asylum Support Service²⁶⁵ had the power to support asylum-claimants pending a decision on whether Section 55 prohibited support;
2. The meaning of the words as soon as reasonably as practicable;

²⁶¹ CO/151/2003

²⁶² CO/151/2003

²⁶³ [2003] EWCA Civ 364

²⁶⁴ Hereafter, NIA 2002

²⁶⁵ Hereafter, NASS

3. Whether a Section 55 denial of support constituted a breach of Article 3 and 8;
4. Whether there was a duty on the NASS to provide written reasons for its decision(s);
5. Whether Section 55 constituted a breach of the limited right of an Article 6 right of appeal.

The court concluded that the Government's measure of prohibiting support if a claim was not made at port was unlawful and unjust. In accordance with his understanding of the judicial role under the HRA, Judge Collins declared that Section 55 had been enforced too rapidly and that the asylum-claimants in question had suffered flawed decisions due to inadequate consideration of the reasons for their late applications. In the opinion of the court, understanding the reasons for a delayed claim was vital for the functioning of Section 55. Judge Collins then went on to state that although he was aware that his ruling would weaken the anticipated effect of the Government's rules, Parliament could not have intended that genuine refugees would/should be faced with either returning to persecution, or face destitution. The reason for Judge Collins's finding was reiterated in *R (Q)*.

In *R (Q)*, the court examined the compatibility of Section 55 with the ECHR and held that its operation based on inappropriate investigation, and the assumption that a failure to make a claim 'as soon as reasonably practicable' justified a refusal of state support, breached Articles 3, 6 and 8. Although judicial review was available, this could only constitute a remedy where the facts of the case had been properly investigated and full reasons given. The finding was supported by Lord Lester, who identified what he perceived to be an underlying conflict between two UK constitutional principles: (1) the supremacy of Parliament; and (2) the independence of the Judiciary; and (in response to the Government's pledge to cut the power of the UK courts to override Parliament by means of introducing legislation to effectively 'enshrine the sanctity of parliamentary supremacy) characterised the response of the Home Secretary to the ruling(s) of Judges Collins and Sullivan generally as driven by a desire to undermine the independence of the judiciary, rather than an expression of genuine concern with what he perceived to be the greater need of the nation.

The Home Secretary appealed. The appeal was dismissed.²⁶⁶ The Court held that the system operated unfairly, and that the remedy of judicial review could not comply with Article 6, so long as limitations existed in relation to fact finding. Analysing the functioning of Section 55, the Court held that Section 55(5) obliged the Secretary of State to provide support in so far as this was necessary to prevent a breach of Article 3. Although the burden of proof lay on the applicant to establish inhuman treatment, it was for the Minister to act fairly in deciding whether or not the burden had been discharged by providing a fair system.

²⁶⁶ [2003] EWCA Civ 364

The ruling represented one of the most controversial rulings post the HRA. The court's handling of the alleged shortcomings in the asylum order in *R (Q)* was seen as another example of the judiciary's enthusiasm for 'overruling' Parliamentary acts designed to deal with asylum. The controversy continued.

In *R (Limbuela, Tesema and Adam) v Home Secretary*²⁶⁷ the functioning of Section 55 was found to constitute a breach of Article 3. In the opinion of Judge Collins, it was a matter of shame on the part of the Government that it was found in breach of Article 3 which represented a standard below which no Government should fall. The Home Secretary appealed.²⁶⁸ The court held that any act which resulted in an imminent risk of the individual being subjected to conditions in breach of Article 3 meant that the power to provide support under the NIA 2002 became a duty by virtue of the HRA. The court then went on to question whether the state was obliged to take preventative action against an asylum-claimant's circumstances reaching a standard which engaged Article 3. According to the court, the scope of Article 3 ranged from state authorised violence to executive decision. The court examined the shortcomings of Section 55, which included an absence of a statutory right of appeal, and held that the state had a responsibility to take measures which were more than a mere long-stop in individual cases as they arose. If the scale of destitution was such that a system of charitable support was unable to cope, then it was the responsibility of the state to take reasonable measures to ensure that it could. This it was held, was not inconsistent with the wording of Section 55(5)(a) which empowered the Home Secretary, as an exception to the general prohibition on providing state support, to exercise a discretionary power to avoid a breach of Article 3. The courts could not determine on a day to day basis which cases met the Article 3 threshold. In the opinion of the House of Lords, the policy of the Home Secretary had the effect of causing destitution of a kind which fell below the threshold established in *Pretty v The UK*²⁶⁹ for a substantial number of people. The opinion of the court toward the policy behind Section 55 was summed up by Baroness Hale. In denying not only all forms of state relief, but all forms of self-sufficiency to a class of individuals lawfully present in the UK, Section 55 had taken the poor law policy of less eligibility to a new extreme which even the poor law itself could not have contemplated. Although the underlying political reasons for resorting to such treatment could be understood, it remained the responsibility of the state not to subject any individual to suffering which contravened Article 3. Such an end could not justify the means.

To summarise, the concern of asylum remains a matter of political will. The protection accorded the asylum-claimant by judicial intervention against the excessive use of state power,

²⁶⁷ [2004] EWCA Civ 540

²⁶⁸ [2005] UKHL 66

²⁶⁹ (2002) 2 FCR 97

constitutionally limited. Yet, it is arguable that the ability of the judiciary to engage in the issue of asylum by means of the HRA has not been without impact. Certainly, adopting a purposive approach toward the interpretation of Article 3 in *R (Q) and R (Limbuela, Tesema and Adam)* the judiciary were able to highlight a flaw in the Government's asylum policy insofar as it adversely affected the asylum-claimant's fundamental HR. However, whether the judicial motive is consistently one of genuine concern with the rights of the asylum individual is not without question.

For example, in *R (S, D and T) v Home Secretary*,²⁷⁰ Judge Maurice Kay held that the refusing of asylum support to a number of asylum-claimants in accordance with the functioning of Section 55 was unlawful. Judge Maurice Kay examined the claims in relation to Article 3 and held that the fact to be determined in each case was whether the claimants had made their claims for asylum as soon as was reasonably practicable after their arrival. In the case of *S* and *D*, this was the following day to their arrival, however in the case of *T* this was not until six days later. Judge Maurice Kay examined each application at length and held that it was open to the Home Secretary to conclude in the cases of *S* and *T* that the claims for support fell within Section 55, but in the case of *D*, the decision was quashed because the reasons advanced were based on pre-conditions about how asylum-claimants and their agents act. In reaching his decision, Judge Maurice Kay analysed the ruling in *Pretty v UK*²⁷¹ which laid out treatment which constituted a breach of Article 3, and held that the statutory refusal of support, leading to the claimants being reduced to living in such conditions as to cause fear, humiliation and a diminution in human dignity, constituted a breach of Article 3.

The Home Secretary appealed in relation to applicant *T*. A distinction on the facts was drawn between the treatment of *D* and *S*, and that of *T*. In the case of *T*, the applicant had been granted financial accommodation but was not deemed to be in need of immediate medical treatment. The court held that refusal to grant financial support to a claimant who was not in need of emergency treatment did not constitute inhuman or degrading treatment. The ruling demonstrated a division in judicial thought between the lower and higher court. The latter conservative ruling of the Court of Appeal, standing in contrast with both the *telos* of Article 3 and the approach of the lower court. The result of the decision was to draw a distinction between an applicant who was deemed to be in need of immediate medical treatment and an applicant who was not: A disregard of the concern of human dignity inherent in Article 3 leading in practical terms to an actual lowering of the intended European standard of protection.

²⁷⁰ [2003] EWHC 1941

²⁷¹ (2002) 2 FCR 97

According to Clayton, the ruling of *R (S, D and T)* was/is interesting.²⁷² ‘Treatment,’ for the purpose of invoking the protection accorded by Article 3, must satisfy a threshold of severity. Accordingly, what constitutes treatment should arguably be influenced by current understanding,²⁷³ understanding in which the acknowledgement of the ECHR as a ‘living instrument’ would indicate movement toward a lowering of the threshold. In contrast, the position indicated in a number of UK rulings concerning the removal of the failed asylum-claimant in expulsion cases, would appear to suggest the possibility of the threshold in the UK actually moving upwards.

Following a broad interpretation of what constituted ‘treatment,’ for the purpose of Article 3; in *D v UK*²⁷⁴ the Home Secretary was prevented from deporting an asylum-claimant in an advanced stage of AIDS receiving treatment to a country where treatment was not available. In contrast, in *Bensaid v UK*²⁷⁵ the court upheld a decision to remove a claimant suffering from schizophrenia to a country where no treatment was available. In reaching its decision, the court made a distinction between cases in which the treatment giving rise to an arguable Article 3 right would occur in the receiving country, and cases (such as *D*) in which a breach would arise only as the result of a lack of medical facilities in the receiving country. In the opinion of the court, the distinction between an Article 3 breach arising as a result of positive action (as opposed to negative action) was relevant insofar as the ECHR could not have reasonably intended to interfere with the executive right to make immigration decisions. The reasoning represented the development of an idea propounded in *Ullah v Home Secretary*²⁷⁶ and described by Clayton as a ‘new line of case-law’ limiting the state’s liability for breaches of HR by proposing that immigration decisions were, with limited exception, beyond the reach of HR protection.²⁷⁷ A proposition which, according to Clayton, having already been ruled against by the ECtHR in *Abdulaziz, Cabales and Balkandali*,²⁷⁸ served not only to add credence to the argument that all ECHR rights should be subject to serious scrutiny against the interest of the signatory-state, but more specifically, the most fundamental *tenet* of HR reasoning that is the absolute nature of Article 3.

To conclude, the subjection of the asylum-claimant to the risk of Article 3 violation and the treatment of the terrorist-suspect creates one of the most serious threats to the survival of HR laws and values. In the case of the ‘war on terror’ HR ‘language...serves to create a permanent state of emergency with corresponding compromises, suspicions and even perversions of the

²⁷² Clayton (2004), Op. cit at 74

²⁷³ *D v UK* (1997) 24 EHRR 423; and *Tyrer v UK* (1978) 2 EHRR 1

²⁷⁴ (1997) 24 EHRR 423

²⁷⁵ (2001) 33 EHRR 205

²⁷⁶ [2003] 1 WLR 770

²⁷⁷ G. Clayton *Immigration and Asylum Law* (OUP, Oxford 2004) 73

²⁷⁸ (1985) 7 EHRR 471

[HR] framework.... It provides the easiest opportunity for legal derogation from most rights and freedoms and the political and societal appetite to go with it.²⁷⁹ One impact of the deployment of the language of terrorism is that on the 'reasoning' of the judiciary. Although it is without doubt that the above rulings indicate a judicial move toward greater HR awareness post the HRA, there remains 'plenty of evidence of the courts being very slow to challenge [both] ministerial and police assumptions [and their consequences] about what the exigencies of national security now require in this new era of alleged global terrorism.'²⁸⁰ In the final analysis, and despite few cases concerning detention, torture and control orders, the old deference regime of judicial restraint has survived.

²⁷⁹ S. Chakrabarti 'National Security and Human Rights' in K. Economides (and Others) 'A Symposium on the 2005 Hamlyn Lectures' [2007] *P.L.* 209 at 226-227

²⁸⁰ C. Gearty (2007). *Op. cit* at 48

Section 5: Citizen UK 2000 and the European Convention for the Promotion and Protection of Human Rights and Fundamental Freedoms

This thesis Citizen UK 2000 set out to review the ‘effect’ of the ECHR on the constitutional, political and legal order of the UK. Not only by analysing its influence on policy and legislative debate, but by examining the functioning of the order as deduced from statutory provision and case-law in 3 areas of HR concern: terrorism, asylum and criminal justice. Analysis resulted in the following observations.

Section 5.1: The ECHR and the Signatory-State

A review of the functioning of the ECHR in relation to the constitutional order of the UK was prefaced by analysis of its early functioning in France: a signatory-state whose presumed civil-law affinity with the ECHR order and HR history suggested that the ECHR would be accorded the same degree of acknowledgement as the concept of legal certainty; Germany: a signatory-state whose constitutional arrangement and (arguably) innovative judiciary, suggested an order more than capable of fulfilling its ECHR obligations; and the Netherlands: a signatory-state whose political stability, social cohesion and commitment to HR, suggested a heightened adherence to the ECHR. Analysis focused on two questions:

- Whether the ECHR’s apparent affinity with the monist order of the civil-law tradition rendered it in relation to the UK dualist order an impracticable statement of ideal?
- Whether the ECHR, dependent on the signatory-state with its own constitutional arrangement and legal culture, supported a claim that a collective enforcement of HR protection could not exist empirically, therefore could not achieve as a transcending philosophy?

Analysis results in a number of observations.

Firstly, the effectiveness of the ECHR does not depend on the nature of a signatory-state’s constitutional arrangement or process of incorporation of the ECHR into domestic law, but the actual accomplishment of its minimum standards of protection, the functioning of the right of individual petition and adherence to the jurisdiction of the ECtHR.¹ Accordingly, argument that the ECHR’s apparent affinity with the monist order of the civil-law tradition renders it in relation to the UK dualist order an impracticable statement of ideal, can not be supported.² Analysis suggests that the UK’s treatment of the ECHR post the HRA does not significantly

¹ M. Rosenberg *Constitutionalism, Identity, Difference and Legitimacy* (Durham Duke University Press, Durham 1994); and Dickson (1997). Op. cit at 8

² Following analysis of the claims of Polakiewicz and Jacob-Fultzer (1991), Op. cit at 65; van Dijk and van Hoof (1990). Op. cit at 585; Murphy and Tanenhaus (1997), Op. cit at 659; and Bernhardt (1995), Op. cit at 26

differ from the early response toward the initiative of its ECHR neighbours: the legal confusion which surrounded the status of the ECHR, and the division in judicial thought between the activist and self-restrainer regarding its application.

Secondly, regardless of whatever constitutional theory a state may profess, there can never be a separation between law and politics.³ Although within states a distinction can be drawn between the formalities of policy and the method of its enforcement, factors operate to conceal the impact of politics on the legal process. Foremost is the tradition of 'law habit.' A specific legal atmosphere is created and reinforced by a political order which overt interference is perceived as unconstitutional.⁴ Analysis highlights the tradition operating in the uncertainty expressed over the legal status of the ECHR evident throughout the UK, French and German Courts and the early fudging of the Netherlands Supreme Court. The tradition exists irrespective of the monist or dualist nature of the state, or the fact that its legal system can be characterised as civil or common.

Thirdly, by their nature constitutional guarantees of HR are naturally indeterminate in that they become factual only when their guarantee is put into practice.⁵ Applied to analysis of the civil-law order of France for example, the performative character of proclamations of rights illustrates that statement of rights as a forward-looking grammar of action can differ in application from both its subjective value and the meaning of its written content. Accordingly, a constitutional order may accord HR generally greater legal certainty, but not necessarily greater reality.

With regard to the question whether the ECHR, dependent on the signatory-state with its own constitutional arrangement and legal culture, can support a claim that a collective enforcement of HR protection can not exist empirically, analysis of the functioning of the ECHR highlights a number of concerns which question its capability to accord universal HR protection.

Firstly, according to the ECtHR, the ECHR transcended traditional boundaries between international and domestic law by comprising elements of both. Whether that order was designed to substitute for the systems of individual states a common European order however, cannot be supported. The existence of a legal obligation to incorporate the ECHR into domestic law remains an issue open to subjective appreciation. However, in the absence of empirical evidence to the contrary, a requirement that a signatory-state is legally obliged to incorporate its provisions into domestic law can not be concluded either by the text of the ECHR, its preparatory work, or the practice of its parties.

³ J. Keeler and A. Stone, *Judicial Political Confrontation in Mitterrand's France*, in G. Ross *The Mitterrand Experiment* (CUP, Cambridge 1987)

⁴ Llewellyn (1930), *Op. cit* at 431

⁵ Dickson (1997), *Op. cit* at 8

Secondly, although constructed on tenants of traditional treaty law, the ECHR can not be interpreted in the same way as other multi-lateral treaties of a synallogmatic character. The ECHR does not constitute a supercession of the signatory-state. Although an intention to create individual rights and freedoms can be surmised during the ECHR's drafting,⁶ grounded on the argument of Vasak⁷ and relevant ECHR case-law,⁸ it did not follow that the ECHR intended either to create directly enforceable rights, or on being granted the status of domestic law. Accordingly, the impact of the ECHR remains dependent on the co-operation of the signatory-state: the concerns of its prevailing Government and philosophical sentiment of its judiciary. In this sense, the conformity of state behaviour with its European obligations is promoted not by a vertical hierarchy of international tribunals but by a process of interaction with and within national courts.

The reality is not ideal. The most obvious criticism of the universal 'nature' of the ECHR is the relative weakness of its structure as a statement of positive rights. Along with its tendency toward 'paucity in the ECHR jurisprudence in respect of actually defining the content of the rights it protects' identified by Masterman,⁹ according to Ewing and Gearty 'it is well known that the terms of the [ECHR] are extremely vague, with most freedoms enjoying only qualified protection and with much depending on such vague phrases as 'necessary in a democratic society,' 'pressing social need' and 'proportionality.'¹⁰ Constituting the most practical deficiency in the use of the ECHR and its case-law as 'a template for a domestic [HR] jurisprudence,'¹¹ the observation highlights the limitation generally of most HR instruments: that 'their linguistic texture and...evolutive nature necessarily leaves the [national judiciary] with a significant margin of interpretative autonomy.'¹²

Accordingly, the ECHR may offer the promotion of a common understanding of HR, but it is the character of the national judiciary which leads to their actual protection.¹³ As exemplified in the *passé* reasoning of the Netherlands's judiciary (arguably) resulting in the number of judicial techniques identified by van Dijk; the application of HR to German Basic Law in what the *Bundesverfassungsgericht* repeatedly refers to as a militant democracy; and the ECHR's handling by the French judiciary which, more overtly cautious than its HR history would suggest, intimates a greater proximity between the legal and the political than popular French debate would suggest. However, in so far as the ECHR is utilised in different courts, in different

⁶ Verdross (1970), Op. cit at 47; and Buergenthal (1970), Op. cit at 233

⁷ Vasak (1965), Op. cit at 39

⁸ *Handyside v UK* (1976) ECHR Series A No. 24, 22; *Swedish Engine-Drivers Case* (1976) ECHR Series A No. 20, 18; and *Golder v UK* (1978) ECHR Series B No. 16, 9

⁹ Masterman (2007), Op. cit at 915

¹⁰ Ewing and Gearty (1997), Op. cit at 147

¹¹ Masterman (2007), Op. cit at 915

¹² L. Irvine, *Activism and Restraint: Human Rights and The Interpretative Process* in Cambridge Centre for Public Law. *The Human Rights Act and the Criminal Justice and Regulatory Process* (Hart Publications, Oxford 1999) 14

¹³ Tridade (1978), Op. cit at 333

ways, such divergence gives rise not merely to difficulty in applying its jurisprudence in domestic law¹⁴ but to an (arguable) *sine qua non*¹⁵ within the context of the primary purpose that the initiative was arguably meant to secure: the promotion of a 'uniform protection of certain fundamental HR among the Member States of the Council of Europe.'¹⁶

To conclude, according to the early rhetoric of Strasbourg, the ECHR constituted a resolution of the Governments of Europe which purported to maintain a classic liberal philosophy rooted in the notion of the protection of rights accorded individuals solely by virtue of the ontological fact that they were human therefore, by definition, universal.¹⁷ In accordance with its structure, the ECHR implies the significance of dialectic, as opposed to fixed opinion. It is a living innovation never completed but peripatetic, reflecting the belief that the issue of rights should be changeable according to new contingencies. In reality however, the outcome of dialectics is interpretative, political and in the final-analysis, constructed. The ECHR may propose solidarity in the form of a universal order, in practice its operation serves to highlight the irreconcilability of the conflicting principles that are HR and the supremacy of the State.

Although the ECHR may well transcend traditional boundaries between international and domestic law, establishing in the field of HR protection a new legal order, evidenced throughout its early functioning (and regardless of a signatory-state's constitutional arrangement) the ECHR remains an inconsistent system. The practical task of applying the ECHR fraught with a number of inherent problems:

- The delegation of an undefined discretion as to the scope of the ECHR and its application to specific facts;
- Indeterminacy of clear political and social aim;
- The natural limitation of legal language;
- Conflict between the values of internal consistency within the signatory-state's domestic legal system and other values, including prevailing national, social and political concerns.

Whether the ECHR was intended to function in such a way is inconclusive. What is not, is that insofar as the ambit of a European HR order remained solely that of European states and not individuals, the ECHR would appear to have inherited a classic imagining of a universal political, legal and judicial reality, which lay (arguably) well beyond the there and then.

¹⁴ Masterman (2007), Op. cit at 916

¹⁵ Warbrick (1989), Op. cit at 715-716

¹⁶ Lewis (2007), Op. cit at 722

¹⁷ Cullen (1992), Op. cit at 165

Section 5.2: The ECHR and the UK Government and Legislature

Narrowing the focus of analysis to the UK, this thesis examined the response of the Government and Legislature to the concern of asylum, terrorism and various aspects of criminal justice, and asked whether a universal concern for the individual could prevail against national politics. Analysis focused on the observations of Douzinas,¹⁸ Simpson,¹⁹ Osborne,²⁰ and Bernstein:²¹

- That it is during periods of emergency when the need for protection is heightened, that the Government is most unwilling to accept any limit on its power;
- Despite the ECHR's attempt at universal protection grounded on the *tenet* of natural law, rights attend the principle of nationality, which excludes from protection all those who do not belong to the signatory-state.

In order to examine the specific concern:

- Is the concept of HR protection becoming the last haven of *sui-generis* positivism, and if so, the ECHR a *raison d'être* of the signatory-state?

Analysis resulted in the following observations.

The ECHR represents a classic construct of the twenty-first century nation-state: a declaration of popularly perceived universal rights and freedoms which is more uncertain in practice than it is absolute. Insofar as the ECHR's circumvention of its declarations by means of derogation and qualification allows its signatories to take measures to suspend the rights and freedoms contained therein, it cannot avoid the argument that its pretence at universalism conceals a case of cultural relativism, whereby HR remain the premise of the signatory-state.

The reality of a universal order of HR protection and the reach of liberalism is summarised throughout the work of Simpson,²² and Bernstein.²³ When liberal states proclaim to protect universal rights they mean that the privileges of such are acknowledged only insofar as they are conducive to political good, and then only in relation to individuals who are accorded the status of citizen. The observation is particularly pertinent in relation to the UK Government's (and arguably Legislature's) treatment of three areas of HR concern: asylum, terrorism and various aspects of criminal justice.

¹⁸ C. Douzinas *The End of Human Rights* (Hart Publications, Oxford 2002)

¹⁹ Simpson (2002). Op. cit at 83

²⁰ Osborne (1991), Op. cit at 114

²¹ Bernstein *in* Osborne (1991), Op. cit at 119

²² Simpson (2002). Op. cit at 83

²³ Bernstein *in* Osborne (1991), Op. cit at 120

Post the HRA, the objective of UK asylum policy has been politically pursued regardless of cost to the individual, his family and/or dependents.²⁴ Insofar as the asylum order has resulted in a discriminatory erosion of the non-national's universally acknowledged liberties and a policy of conditional nationality, it becomes apparent in the language of Osborne, that HR do attend the principle of nationality, and despite its generality exclude from the community of its own subjects all those who do not belong to the nation-state. Asylum-claimants are subjected to the law and its political distribution of rights but they are not laws subjects. The ECHR may declare a universality of rights protection on behalf of the universal man, but insofar as the negative freedom which the UK has continued to draw from its provisions is used to close society, the UK's response to the concern of asylum serves to illustrate that it is the separation between man and citizen which has continued to dominate HR thought.²⁵ Applied to the concern of terrorism, the observation becomes increasingly persuasive.

The Government's response to the threat of terrorism has resulted in a myriad of legislative development. Although it is arguable that the ability of a signatory-state to derogate from the ECHR in times of emergency highlights its appeal as a 'living instrument' to acknowledge the reality of HR as constructs which alter in form, content and social function, the extent to which the UK has extended the use of exclusion²⁶ questions the same order's ability to prevent a signatory-state from lawfully exceeding its provisions.

Amongst criticism of the corrosive nature of the anti-terrorist measures on the rights and freedom of the individual, lays the charge that in the way in which the UK has responded to terrorism, HR themselves have become an *ersatz* ideology: a legitimisation of state power with no regard for the interest of the universal man, rule of law or political process. Certainly, there can be few less suspicious statutory initiatives than the Civil Contingencies Act 2004 and the Inquiries Act 2005 which extended the powers of ministers while making them less answerable to Parliament. Or, such proposals as those of the Legislative and Regulatory Reform Bill 2006 whose original-draft would have allowed ministers to make law without reference to Parliament

Despite *universalist* claims to the contrary then, it would appear that HR remain primarily constructs of political determination, shaped by the need to counteract whatever concern an increasingly multi-cultural state creates. In this context, the influence of the ECHR on the national governing authority remains questionable, scrutiny of the impact of executive action on the rights and freedoms of the individual increasingly superficial.²⁷ For example, the intimation that beneath the Government's intention to radicalise the counter-terrorism regime lays an

²⁴ Chakrabarti (2007). Op. cit at 209

²⁵ Osborne (1991). Op. cit at 114

²⁶ As well as, the defining conditions which enable it to operate

²⁷ Stone (2004). Op. cit at 10

undertone of authoritarianism, whereby the age-old technique of exaggerating the threat to national security is used to justify measures which have no relevance to tackling terrorism, is disturbing. Certainly, the use of the Serious Organised-Crime and Police Act 2005²⁸ to suppress the relatively formerly ‘free’ practice of protest at the centre of political power, gives rise to the particular criticism that, insofar as the Government’s response to the threat of terror appears to have resulted in the exchange of freedom for security, the SOCPA represents (from an arguable civil-libertarian perspective) little more than an advancement of the technical ability of the State to curb public-protest, either by the use of police power in accordance with the TA 2000 and SOCPA, or the prohibition of specified activity by means of the ASBO.

Yet, according to Gearty, the criminalisation of free-protest constitutes a third phase in the history of the freedom of public protest and internal security in the UK.²⁹ A move away from the discretionary power of the police to keep order and their reliance on a ‘protean common-law’ as a basis for action, toward the legalisation of the control of public protest by means of statutory control.³⁰ As a result, as police discretion has fallen away, the police have come to deploy their power under various statutes in preference to their previous commitment to a one-size-fits-all common-law. Two developments have pushed this process along. The first, ‘the introduction of the [ECHR] into UK law [via the HRA]: the restrictions on protest that this charter permits must as a basic prerequisite be prescribed by law...[in which case] the common-law has been severely cut back by the demand of foreseeability that is entailed by the new European yardstick. The second...the judges themselves, increasingly impatient with police invocations of broad common-law discretionary powers and more inclined to note the plethora of parliamentary laws that now cover the field and to counsel the authorities to rely on these.’³¹

Whether the reality of a move from discretion to law, is the greater placement of civil liberties protection more fully into the democratic process as Gearty suggests, or simply a technical transfer of control from one state limb to another, examining the Government’s treatment of asylum and terrorism, it becomes clear that a universal-concern for the individual cannot prevail against national-politics. Firstly, it is precisely during periods of perceived national emergency when the need for protection is heightened, that the Government is most unwilling to accept any restraint on its power. Secondly, HR and freedoms do attend the principle of nationality, which exclude from protection all those who do not belong to the signatory-state. Observations which do raise the specific concern: is the concept of HR protection becoming the last-haven of *sui-generis* positivism, and if so, a *raison-d’etre* of the signatory-state?

²⁸ Hereafter, SOCPA

²⁹ Gearty (2007). Op. cit at 185-187

³⁰ A process having been well underway since the early part of the twentieth-century

³¹ *Ibid* p. 186

Post the HRA, the UK has seen a plethora of controversial criminal justice reform in which amendment to the rules on evidence of bad character, statutory erosion of the rule of double jeopardy and interference with the presumption of innocence, constitutes part of a policy which, according to Liberal-Democrat spokesman Heath, and Marshall-Andrews MP,³² demonstrates the increasing (arguable) 'authoritarianism' at the heart of the Government's approach toward the wider concern of HR: a rebalance of the criminal justice order in favour of the state-compliant.³³

Grounded on the idea of preventative detention, such examples highlight an increasing concern central to the new punitive order.³⁴ The increased tendency of the criminal process to focus on risk, grounded on an increasing reliance on the assumption that the system can successfully identify potential offenders. Reliance made worrying, firstly by the fact that risk assessment tools are still in a state whereby objective tests invariably involve subjective assessment at the point of scoring, with the result that various health professionals can reach very different scores on the same offender; and secondly, that many traditional elements of mitigation are features which will produce higher scores on the risk assessment toll by the probation officer.

Indeed, the implementation of policy post the HRA, has resulted in a transparent and (arguably) further erosion of the HR concern of the individual in a law and order agenda to control potential, as well as actual offenders, to coerce drug-users into treatment, ensure that courts hand down severer sentences, control communities, criminalise political protest, and ensure that the state-compliant take a privileged place at the heart of the system.³⁵ Certainly, one clear example of Government ambivalence about HR in their application to the criminal process is the introduction of the ASBO. Highlighted by Ashworth and Redmayne, the ECHR and the ECtHR adopt the approach that, where proceedings are in substance criminal, they should be treated as criminal for the purpose of the safeguards that the ECHR applies to those charged with criminal offences. However, 'the whole point of the [ASBO] is to circumvent this [insofar as]...it appears that the Government has been able to by-pass the protections for criminal charges and to open up a way of dealing with crimes...that avoids the safeguards.'³⁶ According to Ashworth and Redmayne, such a development serves to highlight a second post HRA tendency affecting the criminal process. 'Not too long ago it was a mark of enlightenment to suggest that some forms of misconduct should be taken out of the criminal law and dealt with

³² Independent Newspaper 29 June 2006 p. 2

³³ Authoritarianism further demonstrated in the Criminal Justice Bill 2006, and the introduction of powers to ensure that courts operate to the presumption that offenders who breach bail, and/or offend while on bail, will be remanded in custody; targets for the time by which an offender who breaches his licence conditions will be returned to custody; and alteration of the power of probation officers to vary punishment for breach of condition, without having to approach a court

³⁴ Ashworth and Redmayne (2005), Op. cit at 14

³⁵ The latest development being the introduction of Clause 26 of the Criminal Justice and Immigration Bill 2007, which proposes to abolish the Court of Appeal's ability to quash a criminal sanction

³⁶ Ashworth and Redmayne (2005), Op. cit at 13. See also A. Ashworth 'Social Control and "Anti-Social Behaviour:" The Subversion of Human Rights' (2004) 120 *L.Q.R.* 263

only through civil processes. Now it seems that that route is being exploited as a means of avoiding the protections of criminal procedure, while ensuring that, by means of making breach of the civil order an offence of strict liability with a high maximum penalty, severe sanctions are available.³⁷

The observation is interesting. According to Feldman,³⁸ in a change in philosophy, facilitated (in part) by the heightened awareness of the need for HR protection by the ECHR, during the 1970's and 1980's prisoners were (arguably) admitted to what was described by Livingstone and Owen as a second class humanity.³⁹ The recognition of the rights of the offender was due to recognition of the value of the individual which led to a demand that any state interference with the individual required justification: the burden of proof resting on those who would interfere to show that such interference was necessary. The philosophy represented a clear expression of Mills's 1859 essay on liberty that the only purpose for which power could be rightfully exercised over any individual against his will was to prevent harm to others.⁴⁰

In contrast, a neo-classical philosophy of what is politically perceived to be in the best interest of the majority has gained overwhelming ground with the incumbent Government. Accordingly, the idea that the individual is impelled to act by social or economic force beyond his control is no longer feasible. The message from the political climate is one of rights and responsibilities: the power of the state to interfere with the customary freedom of protest, assembly, speech and expression, justified on the basis of reasserting the greater good/authority of the state. Insofar as the convicted prisoner, the anticipated offender and the anti-social juvenile remain on the fringe of the controlled society, the functioning of the criminal justice order gives greater significance to the question regarding the free and subjected subject raised by Douzinas: when does respect for established liberties and HR end?⁴¹ Insofar as the drive of the Government to be tough on crime continues to have a damaging effect on the rights and liberties of the individual, the answer is when they are raised in relation to the 'wrong kind' of citizen: the state non-compliant.

With regard to the role of Parliament, the extent to which it has been able to act as a guardian of HR post the HRA (limited in the way described by Stone) has continued to remain inherently hindered. Although, one example to take issue with Stone's observation that 'with any Parliamentary attempt to protect civil-liberties in relation to controls grounded on national emergency, the problem is not so much that it is democratically decided that the rights of the

³⁷ Ashworth and Redmayne (2005). Op. cit at 14

³⁸ Feldman (1993). Op. cit at 276. Contrary to the claims of K. Ewing and C. Gearty *Freedom Under Thatcher: Civil Liberties in Modern Britain* (Clarendon Press, Oxford 1990)

³⁹ Livingstone and Owen (1993). Op. cit at Chapters 6 and 10

⁴⁰ J. Mills *On Liberty* in M. Warnock *Utilitarianism* (Fontana Press, London 1962)

⁴¹ Douzinas (2002). Op. cit at 185

individual must give way, but that they are ever seriously raised at all,⁴² is the Government's defeat in Parliament over the proposed 50 day detention without trial; as the erosion of freedom continues under justification of state necessity, it is becoming all the more difficult to regard Parliament as an effective HR guardian, other than at the most general level.

To conclude, the Government's treatment of criminal justice, asylum and terrorism, serves to highlight the reality of a universal HR order. As the nature of reform post the HRA strikes at the (arguable) universalism of the ECHR, the argument of the cultural relativist is played out. What the reform also highlights is an age old question of the rule of law versus parliamentary supremacy.

The primary effect of the HRA in terms of the UK individual is the general removal of the need to petition Strasbourg for the deliberation of a potential breach of the ECHR, and the creation of a private law remedy for the award of damages against any public authority which is found to have violated its provisions. Section 3(1) of the HRA provides that in so far as it is practicable to do so UK legislation must be read in a way that is compatible with the ECHR. Section 2(1) of the HRA provides that a court or tribunal determining a question in relation to an ECHR right must take into account any judgment, decision, declaration or advisory opinion of the Strasbourg Court; any Opinion of the [then] Commission; and any Decision of the Committee of Ministers. A compromise between sustaining state sovereignty and formally acknowledging the ECHR, the charge that UK law is interpreted so as to accord effect to the ECHR falls ultimately to the UK judiciary. Yet the courts must also heed the prerogative of the Government to govern and not substitute judicial insight for executive policy and, while courts can quash administrative acts ruled in defiance of the ECHR, they cannot abolish primary law.

Despite such limitation, throughout 2005 and 2006, the Government signalled its dissatisfaction with the role of the judiciary in the asylum, immigration and counter-terrorist order by calling for legislative restraint on its ability to interpret the HRA. The dissatisfaction arose (in part) in response to a number of court rulings on the effect of counter-terrorist reform, including that of Judge Sullivan that control orders under the TA 2005 were ECHR incompatible. Following the ruling, the Prime Minister's spokesman voiced the premier's dissatisfaction, and warned that the Government would, in the event of further judicial alienation of its policies, act to ensure that the courts would not frustrate measures introduced to enforce them.

The controversy between what the judiciary has come to consider a political attack by the Government on its long held constitutional role, and what the Government considers to be an undermining of its authority as decision-maker, seems a long way from any opinion that, insofar

⁴² Stone (2004), *Op. cit* at 9

as the outspokenness of the judiciary could promote the concern of the individual, it could only have a beneficial influence on the Government without the need for constitutional confrontation. Whether such controversy can be regarded as an indication of the success of the HRA, or merely a catalyst for re-engagement of the argument that there are implied limits imposed by the common-law on the absolute powers of the Queen in Parliament, the HRA has brought with it something of the unexpected: a blatant fracturing in the relationship between the Government and the Judiciary, and a very real risk of the ability of the latter to speak out on such concerns as national security being statutorily restricted altogether.

Section 5.3: The ECHR and the UK Judiciary

The introduction of the HRA constituted a new age in UK HR development. HR could be relied on as the basis of legal argument which suggested the potential to give greater equality of arms between the executive and the individual. The way in which the ECHR primarily impacts on domestic law is through Sections 2 and 6 of the HRA, the obligation in respect of statutory interpretation in Section 3 and the ability of the court to declare domestic law ECHR incompatible under Section 4. One of the effects of Section 3 is that case-law *may* have to be revisited: a change to the legal principle of precedent. However, the duty of construction does not affect the validity of incompatible legislation, if legislation prevents the removal of the incompatibility. The HRA requires the courts to interpret legislation compatibly with ECHR rights in so far as it is possible, but carries ‘no orthodox legal consequences’ insofar as it requires governmental or legislative re-engagement to effectuate change.⁴³ In this sense, the effect of the ECHR remains technically no greater than it was prior to the HRA.

Yet, highlighted by Kavanagh,⁴⁴ Feldman,⁴⁵ Bennion,⁴⁶ Jowell and Oliver,⁴⁷ the role of the judiciary has changed from the time when deviation from the literal approach to interpretation was regarded as a ‘usurpation’ of legislative function.⁴⁸ Implicit in the HRA is a departure from the narrow formalistic approach of statutory interpretation characteristic of the UK judiciary, toward greater engagement of a purposive approach ensuring that executive action is subject to scrutiny grounded on a minimum standard of implementation. However, the effectiveness of the ECHR depends solely on the way in which the judiciary responds in fact to the HRA. Certainly, such areas as terrorism, asylum, and various aspects of criminal justice have witnessed judicial activity. But is this to suggest the development of a heightened regard for the fundamental rights and freedoms of the individual?

⁴³ Gearty (2007), Op. cit at 26

⁴⁴ Kavanagh (2006), Op. cit at 179

⁴⁵ Feldman (1999), Op. cit at 165

⁴⁶ Bennion (2000), Op. cit at 91

⁴⁷ Jowell and Oliver (2000), Op. cit at 103

⁴⁸ Marshall (2003), Op. cit at 236

According to Stone, for the most part, the attitude of the kind of approach adopted by the judiciary post the HRA can be characterised as ‘cautious’ rather than ‘bold.’⁴⁹ However, analysis of the judiciary’s treatment of HR indicates an increasing division in judicial thought, not only in relation to the impact of the ECHR on its ability to scrutinise executive action⁵⁰ and the nature of rights themselves,⁵¹ but the protection of the individual who comes under the control of the state. The first is an approach of non-engagement.

According to Ewing,⁵² it is possible to identify a number of strategies of non-engagement: (1) deference to the constitutional decision-maker; (2) deference to the nature of the executive decision in question; and (3) deference to the exercise of executive power lawfully conferred.

With regard to the engagement of (1): deference to the constitutional decision-maker; and (2): deference to the nature of executive decision, such is exemplified (in the main) in the judiciary’s handling of the application of Articles 3, 5, 6 and 8 of the ECHR. In particular, its willingness to defer in times of perceived emergency, not only to executive determination of whether such emergency exists, and its treatment of the individual in the area of deportation, expulsion and executive detention; but in relation to such power accorded the police as the control and regulation of public protest and the power to stop, search and detain. This has taken the form of a refusal to intervene in a decision of the executive on the ground of public policy. In the opinion of the UK court, such exercise of non-engagement is justified on constitutional grounds.⁵³ The ability of the Executive to assess a risk to national security or public safety, and the formulation of measures to safeguard against it, justified on grounds of political legitimacy. Such caution is particularly disturbing in relation to expulsion, in particular where an asylum-claimant could be exposed to treatment in breach of Article 3, and where the development of (arguably) a new line of reasoning limiting the state’s liability for breaches of HR, places this aspect of state control beyond the concern of serious ECHR consideration.⁵⁴

With regard to the third limb of Ewing’s deference theory, such is exemplified in the judiciary’s reluctance to intervene in such aspects of criminal justice as the functioning of the fruit of the poisoned-tree doctrine, admissibility of evidence unlawfully obtained, treatment of the individual subject to the ASBO regime, and exercise of police power of random stop, search,

⁴⁹ Stone (2004), Op. cit at 55

⁵⁰ Exemplified in the disagreement between Lord Steyn’s approach toward the role of the judiciary in HR protection which leans toward a primary/grander role of articulating and protecting fundamental rights and freedoms: Lord Steyn ‘Deference: A Tangled Story’ [2005] *P.L.* 346; and the belief of Lord Hoffman in a separation of powers according a wider margin of discretion to democratic processes: L. H. Hoffman ‘The COMBAR Lecture: Separation of Powers’ (2002) *J.R.* 137

⁵¹ See: C. Gearty ‘Reconciling Parliamentary Democracy and Human Rights’ (2002) 118 *L.Q.R.* 248

⁵² Ewing (2004), Op. cit at 850

⁵³ Highlighted by D. Nicol, ‘Statutory Interpretation and Human Rights After Anderson’ [2004] *P.L.* 274 at 280, and Kavanagh (2004) Op. cit at 537

⁵⁴ Clayton (2004), Op. cit at 462

and detainment. Where, a diluted standard of review is accorded the qualified ECHR Articles 8, 9, 10 and 11.

In the opinion of Ewing, the HRA was sold on the basis that it would lead to the protection of the rights and liberties of the individual. Accordingly, where the courts have been empowered to exert a protective influence against the exercise of sovereign and executive power, they should endeavour to do so.⁵⁵ However, as an instrument for the protection of individual rights, the ECHR (rendered no less certain by the HRA) offers only a ‘weak palliative.’⁵⁶ The findings of Ewing represent (to a degree) a reasonable depiction of one faction of the judiciary’s treatment of the ECHR. Certainly, insofar as there are ‘few cases where the courts have been prepared to stand up to Government where liberty comes face to face with security,’ it would appear that it will take more than the HRA to change the judicial role.⁵⁷ But is this to propose that the HRA constitutes the exercise in futility that Ewing suggests?

Just as there is evidence to support Ewing’s argument, there is evidence to support Oliver’s presumption that as the jurisprudence of HR would develop post the HRA, deference in and between the higher and lower courts would wane. Arguable examples of judicial engagement has included development of the welfare principle in relation to the ASBO child; acknowledgment of the need for a law of privacy (or something like it) grown out of breach of confidence; as well as its response to executive detention of the non-national terrorist-suspect without charge, use of evidence secured by torture, functioning of the rape-shield evidence rules, and the power of the executive to withdraw state-support from an asylum-claimant having failed to have made an asylum application as reasonably as practicable following his arrival in the UK. Grounded on the (arguable) premise that following the HRA ‘the burden of progressive development of ECHR rights protection falls on the judiciary,’⁵⁸ in exercising its margin of interpretative autonomy, two judicial approaches are evident:

- (1) The use of alternative sources of authority in accordance with the *telos* of the ECHR, including comparative law/jurisprudence, not necessarily restricted to circumstances where there is ‘no steer’ from Strasbourg organs.⁵⁹ Exemplified in the protection of personal privacy under common-law breach of confidence, influenced (in part) prior to *Campbell v MGN Ltd*,⁶⁰ by relevant Australian legal text; the influence of US and Australian law on consideration of the rape-shield provisions as part of the proportionality enquiry in *R v A (No. 2)*;⁶¹ and South African and Canadian jurisprudence

⁵⁵ A theory particularly supported throughout the work of R. Stone *Textbook on Civil Liberties* (OUP, Oxford 2004); J. Steiner and P. Alston *International Human Rights in Context* (OUP, Oxford 2000); and G. Clayton *Immigration and Asylum Law* (OUP, Oxford 2004)

⁵⁶ Ewing (2004), Op. cit at 850

⁵⁷ *Ibid* p. 852

⁵⁸ Martens (1998), Op. cit at 14

⁵⁹ Phillipson (2003), Op. cit at 726

⁶⁰ [2004] 2 AC 457

⁶¹ [2002] 1 AC 45

on the courts consideration of the proportionate nature of the restrictions on the presumption of innocence in *R v Lambert*.⁶²

- (2) The development of such common-law concerns as access to a court of law, legal advice and the principle of legal professional privilege accorded a sense of democratic legitimacy by the ECHR.⁶³ Exemplified in *Campbell v MGN Ltd*.⁶⁴

Yet, it is arguable whether such involvement is indicative of a consistent change in judicial willingness to acknowledge the HR concern of the individual. Having been given the ‘ability’ to participate in the development of an effective HR order, a faction of the UK courts have continued to demonstrate an unwillingness to acknowledge ECHR principles on the ground that the common-law already serves to protect the value in question,⁶⁵ or that to apply the logic of a foreign jurisdiction is to encroach on parliamentary sovereignty.⁶⁶ In this sense, examination of the judiciary’s treatment of the individual appears to support the arguments of both Ewing and Oliver in relation to their respective stand taken toward judicial deference. However, what Ewing and Oliver fail to address is the reasoning behind the movement of the judiciary either way. A reasoning which, on analysis, would seem to suggest not merely a difference in treatment of different ECHR Articles in different areas of law, but also a difference in motive.⁶⁷

One possible explanation is that underlying any favourable finding is an interest grounded not so much on protecting the individual against the power of the state, than a determination to protect its own constitutional standing. Certainly, the judiciary has jealously guarded the principle that any dispute about the propriety of executive action should be open to testing by the courts.⁶⁸ Insofar, as HR are acknowledged as a counterbalance to the exercise of executive power, rather than shifting the balance post the HRA in favour of greater consideration being accorded HR, conflict between policy and judicial concepts of independence and the rule of law, would seem to have thrown open greater tension between the judiciary and the executive. In this sense, the ECHR may have envisaged the construction of a legal system befitting a European order of cultural pluralism and ethical awareness, on analysis however, the reality appears somewhat different. Although it was generally argued that ‘incorporation’ of the ECHR would give rise to a new jurisprudence of rights that would mitigate the moral poverty of legal positivism, to overestimate the ECHR’s theoretical capability, is to underestimate the ability of the judiciary from rendering it as lawfully transient as it would desire it to be. Whether or not, the observation that an approach of judicial non-deference can be claimed to be not so much a

⁶² [2002] 2 AC 545

⁶³ Masterman (2007), Op. cit at 930

⁶⁴ [2004] 2 AC 457

⁶⁵ Lord Bingham in *R v Secretary of State for the Home Department, ex-parte Daly* [2001] UKHL 26

⁶⁶ *Re S, Re W, and R (On the Application of Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837

⁶⁷ A. Young ‘A Peculiarly British Protection’ (2005) 68 *M.L.R.* 85; R. Edwards ‘Judicial Deference under the Human Rights Act’ (2002) *M.L.R.* 859

⁶⁸ HL Deb. (2003-2004), (Col. 1041), (TSO, London)

concern with the rights of the individual, as opposed to the preservation of its own role, adopting, the approach of legal realist Llewellyn: that law should be understood in terms of practice rather than rules, analysis of judicial response to the ECHR results in a number of observations.⁶⁹

The UK judicial order is cited as a paragon of political independence. However, the reality of judicial independence is ambiguous. Dispute resolution remains the focus of the judicial task in HR adjudication and identifies the Judge at the centre of legal activity. However, in the case of the ECHR, it is questionable whether dispute resolution is the primary *raison d'être* of the judicial system. Courts of First Instance are ordinarily concerned with the adjudication of relatively settled legal doctrine to the fact situation of cases. According to the judiciary, certainty in the law, achieved by the exposition of rules and established doctrine, remains the court's primary task. Trials are explained as scenarios in which the hegemony of legal ideology is affirmed and legal doctrine prevails. From the viewpoint of legal ideology then, no trial in which legally correct procedures have been followed can be seen as political. Politicisation arises only where proceedings are deliberately manipulated in ways to secure a particular outcome, an act inconsistent with the independence characteristic of judicial reserve.⁷⁰ The task of the lower court judge is the promotion of certainty of law through extrapolations of legal doctrine. In contrast, appellate courts deal with the uncertainty of rules argued on Appeal: its function to enhance the technical quality of legal doctrine, affirm the judiciary's independence, and serve to reinforce the *tenet* that the decision in question has not been performed perfunctory. Yet, insofar as the judiciary are considered to contribute impartially to the Appeal process, they do contribute to the promulgation of beliefs considered to be the foundations of social order. According to Cotterrall, the effect is threefold.⁷¹

Firstly, the maintenance of legal ideology serves to facilitate both state control and doctrinal uniformity. Secondly, the maintenance of legal ideology serves to facilitate the legitimating of the socio-legal order as a whole, reinforcing political and Governmental activity: the preservation of the socially imminent general will in accordance with Parliamentary assertion. Thirdly, judicial pronouncements founded on established legal doctrine commit not so much to resolving disputes, as defining the boundaries within which disputes are possible.

The legitimisation of the socio-legal order through the maintenance of legal ideology formed the subject of analysis by Griffith.⁷² Analysing judicial function, Griffith argued that while the judiciary are without prejudice in the sense of having no policy interest in the outcome of a

⁶⁹ Llewellyn (1930). Op. cit at 431

⁷⁰ Cotterrall (1984). Op. cit at 216

⁷¹ *Ibid* p. 216

⁷² J. Griffith *The Politics of the Judiciary* (Fontana Press, London 1981) 230

case, it can not remain neutral. Judges are required to make personal choices which are presented to them as determinations of where public interest lies. Examining judicial perception of what constituted the public interest, Griffith highlighted the broad interpretation given to the concept, and listed its constituents as including the interests of the State; the preservation of law and order; and the promulgation of political views and values ordinarily associated with conservatism. Whether the primary task of the judiciary can be seen to be sustaining relations of power, judicial behaviour has commonly suggested almost superficial review and an insistence that deliberation remain the concern of Parliament and not the court. Griffith then goes on to ground the judicial function of legitimisation on an unelaborated elite-theory in which the common values of a privileged class are reflected in decision-making, and which by definition are necessarily illiberal. Applied to the functioning of the ECHR however, the analysis is too simplistic. The argument that judges are elite bound does not explain the dichotomy in HR analysis which is the division between judicial activism and self-restraint; or why the judicial view of the public interest may (on occasion) place the judiciary in conflict with the Government.

Rather, the framework of judicial reasoning constitutes (in the main) a utilitarian concept of adjudication that leads to the practical and pragmatic: a legalistic interpretation of the ECHR and its Section 3 HRA obligation.⁷³ As legal doctrine continues to reflect fundamental concepts rooted in a common-law tradition which does not exclude the exceptionalism of English law, the judicial activist seeking to develop national law in accordance with the *telos* of the ECHR as it evolves, is obliged to confine his reasoning to rules of common-law and equitable remedy.⁷⁴

The simplest explanation is that throughout the constitutional order the judiciary maintain a dual position as both the ‘rationaliser’ of legal doctrine, and ‘reinforcer’ of the existing socio-legal order. The judiciary is required to fulfil both tasks. However, albeit explanations of judicial behaviour are deducible from the determination of cases in which the court openly demonstrates its regard for the treatment of certain types of interest, value and claim, such explanations do not always reflect the reasoning advanced by the court.⁷⁵ Applied to analysis of HR, the way in which the ECHR has been treated by the judiciary in relation to asylum, counter-terrorism and various aspects of criminal justice, gives rise to the argument that rather than protecting the rights and freedoms of the individual, the initiative has primarily served to highlight the underlying tension between the Sovereignty of Parliament and the Rule of Law. Rather than found an explanation of judicial behaviour on values which judges as members of an elite are

⁷³ Analysis of judicial behaviour imparts two influences on judicial reasoning: (1) precedent, and (2) the character of legal doctrine and legal ideology, including collective values within the legal culture as to how exactly judicial responsibilities are to be carried out

⁷⁴ An observation maintained throughout the work of M. Allen, B. Thompson and T. Walsh *Constitutional and Administrative Law* (Blackstone Press, London 1994) regarding the role of the ECHR prior to the HRA

⁷⁵ Llewellyn (1930), Op. cit at 431

considered to incorporate into their conception of public interest then, a more feasible reality as Clayton suggests, is that functioning under a political order without either written constitution or mandate, the judiciary strive to protect what it perceives to be the most vital justification of its authority: an image of independence and objectivity.⁷⁶

To conclude, the factor which has made the ECHR a particular tool in the universal promotion of HR, is the development by the ECtHR of a jurisprudence which has expanded the language of the ECHR by the finding and development of implicit rights to ensure that express rights are acknowledged in practice. How far in fact that jurisprudence invades the national judicial mind however, remains dependent not merely on the actual sentiment of the prevailing national judiciary, but on the socio-legal and political environment of the time. The introduction of the HRA constituted a new age in UK HR development. From that date onwards HR could be relied on as the basis of legal argument which suggested the potential to give greater equality of arms between the executive and the individual. However, HR are only effective to the extent that rules of law permit HR argument to be considered by decision-makers.⁷⁷ Whether post the HRA, UK judicial reasoning has remained a utilitarian management of adjudication committed to the imperative of organising legal doctrine either to maintain its own authority, or fulfil legislative goal, exemplified by the treatment of asylum, terrorism and various aspects of criminal justice, HR remain no less an uncertain and difficult alliance: referring to the concern of humanism and the secular discipline of law.⁷⁸

With regard to the influence of the ECHR on the incumbent Government, although the latter introduced the HRA, its pronouncements of policy post the HRA contain little reference to HR issues and, in the field of criminal justice, ‘often seem to make a virtue out of avoiding or minimising HR protections.... If the Government were to...defend this approach, it would probably be on the ground that it [was/is] well aware of the [HR] issues, but that the challenges facing contemporary society... [calls for] exceptional measures [including] more stringent... measures [to fight] terrorism and combat...crime... Apart from the misconception that HR become less important whenever the detection of terrorism and/or the prosecution of crime is the objective, or that the upholding of HR does not in itself form part of the greater public interest, the approach may have been convincing, were it not placed in the context of a society which not only aspires to the rule of law, but which has long proclaimed its adherence to various international treaties on HR, including the ECHR.⁷⁹

⁷⁶ R. Clayton ‘Judicial Deference and Democratic Dialogue’ [2004] *P.L* 33

⁷⁷ Dickson (1997), *Op. cit* at 8

⁷⁸ See: J. Alder, ‘The Sublime and the Beautiful: Incommensurability and Human Rights’ [2006] *P.L* Win. 697 regarding the suitability of judicial determination of HR; and C. Gearty *Can Human Rights Survive?* (CUP, Cambridge 2006) 69-74

⁷⁹ Ashworth and Redmayne (2007), *Op. cit* at 57

In the final analysis:

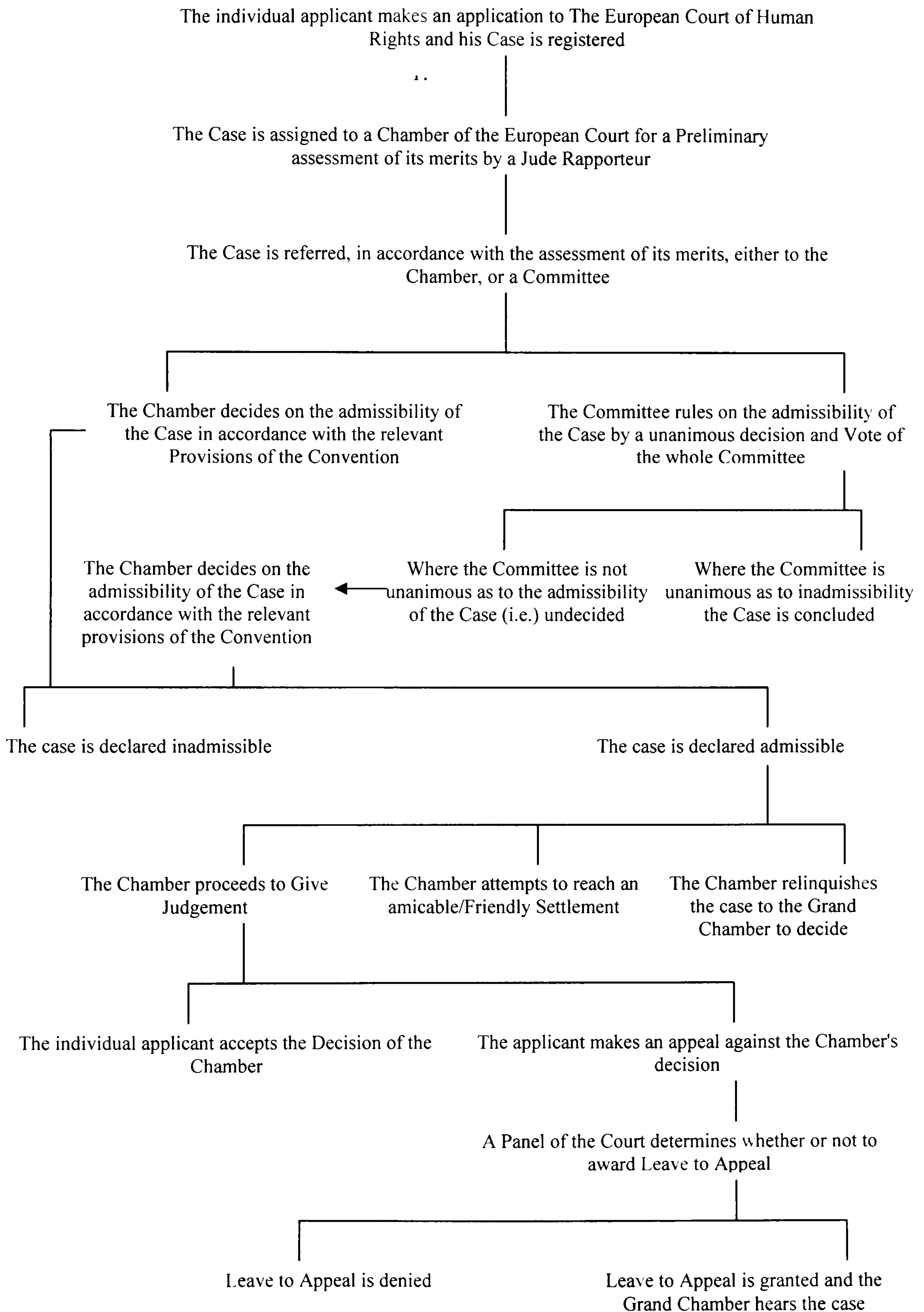
- The Article 1 ECHR agreement by the UK to secure to everyone within its jurisdiction the rights defined in Section 1 is not matched by a realisation of those rights by everyone within its jurisdiction;
- Whether the HRA constitutes ‘simply a mechanism which governs the interpretation of statute law and development of the common-law by reference to the (fluid) standards of an international treaty; or provides the courts with a mandate to develop and expand on those standards found in the [ECHR] in the domestic context,’⁸⁰ there remains no clear judicial consensus;
- A decline in autonomous law has resulted in a convergence of the legal and political and the creation of a national responsive law⁸¹ in which HR concern is frequently placed below that of the prevailing Government, and (arguably) judiciary;
- Subject to the prevailing policy of the national Government, the ECHR constitutes an order for the promotion of the concept of HR protection, as opposed to a consistent system for the actual protection of the rights and freedom of the individual.

⁸⁰ Masterman (2005), Op. cit at 907

⁸¹ In a similar vein to that highlighted by P. Selznick, *Law and Society in Transition: Toward a Responsive Law* (Harper and Row, London 1978)

Appendix I

Operation of the Individual Petition Procedure in Accordance with Article 34, Protocol 11



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