

# GRAY'S INN STUDENT LAW JOURNAL



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### *Foreword*

As befits the Inn which has been the pioneer in so many aspects of education, Gray's students have been first in the field with a journal of their own whose contributors are all in house. They have appreciated that learning and teaching are in essence two sides of the same coin, and have parlayed their (doubtless) long hours in library and lecture theatre or (as likely) in front of screen into a series of articles which span many areas of law from charities to contempt from punishment to pornography. There was none that I did not find interesting; and several, relating to my own fields of practice, which I found enlightening. On a rough audit public law outnumbered private law topics, a reflection of the litigation currents of our time.

Given that, despite apocalyptic and misconceived predictions from certain quarters about the imminent demise of the Bar, the pressure on pupillages and tenancies grows ever more intense and any distinctive evidence of intelligence and commitment on the part of an applicant is much to his or her advantage. I trust that the contributors and editors reap the just rewards of their industry.

Many new journals have the life span of a mayfly; and the inaugural edition is also the ultimate one. I prophesy no such fate for this new kid on the legal magazine block; I hope and expect that it will become a welcome fixture.

MICHAEL J BELOFF QC  
Treasurer 2008  
Vice-Chairman, Advocacy & CPD 2010-2011

*Advocacy Training and the Employed Bar*

TRICIA HOWSE C.B.E.

It may surprise some, but many of us who leave Chambers to seek our fortunes at the Employed Bar will never set foot in a Court again. However, we remain Barristers – and proud of our profession and of our Inns. Our employers may have hired us precisely for the skills that we acquired in even a short career in court and, more likely, for the independence of thought and training in the law that marks our profession out from others.

We want to preserve and augment our professional skills. We need professional training – preferably from our Inns - that develops those skills which will advance us in our chosen fields. We need to deploy advocacy skills in contexts that are quite far removed from courtrooms. Yet the ability to absorb, marshal and communicate facts are common to courts, boardrooms and indeed just about anywhere that two or more people meet to make decisions. Our training needs are essentially the same, though the context in which we exercise our skills may be radically different.

Some years ago, Tim Dutton, QC – when merely the Leader of the SE Circuit – devised and promulgated a definition of the wider senses of advocacy which BACFI (the Bar Association for Commerce, Finance and Industry), the GLS (Government Legal Service) and the Employed Bar Committee of the Bar Council have been happy to adopt. It is worth repeating here:

*'The essential skills for a persuasive modern advocate are, in combination:*

- *The ability to persuade orally*
  - *The ability to persuade in written argument*
  - *Cogent legal and factual analysis*
  - *The ability to develop reasoned argument*
  - *Forensic skills with evidence (both written and oral);*
- all of the foregoing undertaken to high ethical standards'.*

It is perhaps remarkable that nowhere is the courtroom mentioned. It does not need to be. These skills are universally applicable. They can be tested and developed without going anywhere near a court. So why do our advocacy training courses insist on a courtroom context for every exercise?

It is not just employed barristers who notice this. At the Family Bar, the Revenue Bar and in several other areas of specialist work it may nowadays be accounted a failure for the advocate if his or her case ends up in court. Why? Because settlement, arbitration and simply persuading the opposition of the strength of your case, so that he throws in the towel, can be so much more successful and cost effective for the client. We all need to know how to argue and present facts in the most flattering light (and indeed to chip away the spin to reveal the true nature of the opposing case, as well).

Dare we say that it might be advantageous for *all* young Barristers, whether self-employed or employed, to practice their skills in a non-court situation? After all, the court is what drew us into the profession. We observe it closely as students and as pupils. But do we observe any other forum where advocacy is practiced? Might we find ourselves, in the future, in such another forum without the faintest idea how to conduct ourselves within it?

BACFI believes that we should equip our new practitioners for any sort of career at the Bar. The entire nature of the legal profession is changing (as it does from time to time: the writer recalls as a pupil in 1972 being convinced by all those around her that we would have a fused profession within five years). Who knows where they will be in five or ten years time? No job is for life. It has been replaced by the portfolio career.

In addition, the paucity of ethics training at universities has been noted. Business and professional ethics (even the Parliamentary kind) are more and more in the spotlight. Our profession and our judiciary are justly renowned for their understanding of and adherence to the very highest ethical standards. Ethics are our unique selling point. Again, we would urge that, as modern Barristers move in so many different public and private arenas, their training needs to reflect and address the varied ethical dilemmas presented. Beyond the

court, there are no wise and experienced judges to ensure that justice is done. Many employed barristers are literally the only (and lonely) guardians of what is right and just as well as lawful in their employing organisations. And the 'lawful' is the easy bit, as we all know.

What we propose is modest. BACFI and the GLS have devised some training materials to augment those in use by the Inns' advocacy trainers. These have been provided to the Advocacy Training Council. The material consists of a) additional ethics questions, and b) a draft alternative of practical scenarios. Middle Temple is already running an ethics and advocacy exercise tailored to the employed Bar on its NPP courses. This has been well received by both employed and self-employed students and tutors. Our own Inn was first in the field a couple of years ago with a Boardroom Scenario devised by Mark Engleman, available on selected courses to NPP students choosing the civil court option.

BACFI would like to see the current ethics questions supplemented by some of our materials; to enable all students to step outside their comfort zones and consider some of the problems faced by barristers working outside chambers. These may also occur in pro bono work, or later in the careers, or in giving the kind of informal advice to friends and colleagues that all Barristers get drawn into. Employed Bar ethics materials, we suggest, should be used by the Inn at the earliest possible stage of a new Barrister's training. They do not require special tutors (though we would welcome more employed Bar AT trainers) – these are universal problems needing a universally ethical approach, even if they arise in unusual circumstances.

Once we are comfortable with the ethics materials, it may be time to revisit other areas of the NPP programme. BACFI suggests that a Tribunal or Arbitration scenario could be provided as alternatives to the current civil and criminal sessions. Some Inns already provide Family sessions. We believe that it is important to encourage all students to learn together – we do not want to see separate sessions for the employed and self-employed. We all have much to gain from the different perspectives that are brought to bear in mixed groups. Effective CPD must prepare us for career changes as well as progression

in our current field. Many new practitioners will not have finally decided what area of law to concentrate on, or whether to stay in chambers or look outside.

Finally, a word about BACFI. The employed bar is infinitely varied and ranges from the hundreds of Barristers in the CPS to the solo company secretary in a commercial organisation, whose functions consist of legal compliance and (where needed) the procurement of external legal advice. BACFI represents what our Master of Education rather neatly called the 'CFI Bar' – those employed in all forms of commerce, the financial world (banks, building societies, insurance, hedge funds) and industry. Our aims include providing - and encouraging others to provide - high quality and appropriate professional training for our members.

We want to work with the Inns, BVC providers and the ATC to improve the value and appropriateness of the professional training they offer to CFI barristers. Employed barristers in large firms get more than adequate training in hard skills, such as the law applicable to the industry concerned. Indeed, it is often the case that the highest levels of some areas of specialist legal knowledge can be found in the industry concerned. Such Barristers will also get excellent training in soft skills such as negotiating, equality and diversity, drafting and so on. But those from smaller firms may get nothing.

Within BACFI we can provide a modest amount of training each year. But we have neither the premises nor the permanent staff to organise seminars, which must service our social and networking needs as well as our professional development. We feel strongly that our Inns, which it is fair to say have paid scant attention to the employed Bar until very recently, are the key to both the quality and value of our members' relationships with their profession.

We believe that the 'soft' skill of advocacy is best acquired and developed in the company of those who practice it daily. Even large Human Resources departments expect a profession such as the Bar to provide its own specialist professional training, and are more than willing to work with providers to ensure maximum 'sustainability'. Joint training of the employed with the self-employed ensures common standards of

competence. It promotes understanding of (and access to) the different careers open to Barristers and mutual respect between practitioners. And crucially for the CFI Bar and self-employed practitioners, joint training maintains and strengthens the links and friendships formed by students with each other and with their Inn.



*The doctrine that the Crown has all the powers of a natural person: sensible pragmatism or dangerous constitutional innovation?*

GEMMA AMRAN

**Abstract**

This essay attempts to identify non-statutory powers and the possible effects the use of these powers have on the governance of Britain and the rights of the individual. The author argues that, although there are some practical benefits to the Government exercising certain non-statutory powers, their ambiguous nature in general may have a dangerous impact on the rule of law. The author contends that such an impact is possible because of the way these powers have been treated by both the Government and the courts. The author recommends that a written constitution would at least assist in preventing abuse of such powers.

**Introduction**

'If it is law, it will be found in our books. If it not to be found there, it is not law'.<sup>1</sup> In *Entick*, Camden CJ vehemently corrected the Home Secretary's reliance upon a non-statutory power to trespass on and seize private property. In his view, positive law had to provide such a power. Over 200 years later, Megarry VC in *Malone v Metropolitan Police Commissioner* stated simply: 'England, it may be said, is not a country where everything is forbidden except what is expressly permitted: it is a country where everything is permitted except what is expressly forbidden'.<sup>2</sup> Presently, Megarry's opinion has dominated the Crown's position when it comes to exercising its powers. It is this opinion which forms the basis of the Ram doctrine.

The first section of this paper identifies the Ram doctrine. It also attempts to define the Crown and its powers akin to those of a natural person. The second section examines the benefits of such a doctrine to the Crown. However, it is submitted that since the doctrine threatens fundamental constitutional principles, potentially dangerous consequences ensue. The third section argues that such a dangerous position has been reached because

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<sup>1</sup>*Entick v Carrington* (1765) 19 State Tr 1029.

<sup>2</sup> [1979] Ch. 344, 357.

of the misinterpretation and mistreatment of the Crown and its powers. Finally, the author suggests a way forward to resolve this constitutional crisis, recommending a written constitution.

### **The Ram doctrine**

The doctrine that the Crown has all the powers of a natural person is known as the 'Ram doctrine'. It is based on a memorandum set out by Sir Granville Ram, who was the First Parliamentary Counsel between 1937 and 1947.<sup>3</sup> The position states that 'a Minister of the Crown...may, as an agent of the Crown, exercise any powers which the Crown has power to exercise, except so far as he is precluded from doing so by statute'.<sup>4</sup>

According to Lester and Weait, the present Government's recognition of the Ram doctrine appeared in a report on Privacy and Data Sharing.<sup>5</sup> It described the doctrine as follows, a department can do anything that a natural person can, provided it is not forbidden from doing so'; the report declared that the doctrine is one source of power for Government departments.<sup>6</sup> It was this recognition, that the Government can do anything in which an ordinary person can do, which prompted Lester and Weait to table parliamentary questions on the Ram doctrine.<sup>7</sup>

In order to fully comprehend the ramifications of the doctrine, it is necessary to define 'the Crown'. The literature demonstrates that defining the Crown proves to be a complex task. Sunkin and Payne note the spectrum of definition.<sup>8</sup> At one extreme, they quote Maitland's view that the Crown 'does nothing but lie in the Tower of London to be gazed

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<sup>3</sup> Anthony Lester and Matthew Weait., 'The use of ministerial powers without parliamentary authority: the Ram doctrine' [2003] PL 415.

<sup>4</sup>The full text of the memorandum can be found at <http://www.publications.parliament.uk/pa/jt200708/jtselect/jtstatin/47/4713.htm>.

<sup>5</sup> The Cabinet Office, 'Privacy and Data Sharing: The way forward for public services', April 2002, <http://www.cabinetoffice.gov.uk/media/cabinetoffice/strategy/assets/piu%20data.pdf>.

<sup>6</sup> Ibid 34 [3.46]. The other two sources are 'specific statutory powers' and 'implied powers'.

<sup>7</sup>*Lester and Weait* (n 3). Harris notes that this doctrine has been acknowledged in other publications by the Treasury as well as by the then Office of Public Service, see B.V. Harris, 'The "third source" of authority for Government action revisited' (2007), L.Q.R 225. He cited examples of publications found in Terence Daintith and Alan Page, *The Executive in the Constitution* (1999), Ch. 2, 34.

<sup>8</sup> Maurice Sunkin and Sebastian Payne, 'The nature of the Crown: An Overview' in Maurice Sunkin and Sebastian Payne (eds), *The Nature of the Crown* (Oxford University Press, 1999) 1-21.

at by sight-seers'.<sup>9</sup> At the other extreme comes Lord Diplock's definition stated in *Town Investments v. Department of the Environment*<sup>10</sup>, that the Crown is "'the government'" and includes "all of the ministers and parliamentary secretaries under whose direction the administrative work of the government is carried on by civil servants".<sup>11</sup> Whilst Cornford acknowledges that the concept of the Crown is 'deeply ambiguous',<sup>12</sup> Wade finds Lord Diplock's definition 'extraordinary'<sup>13</sup> and he states his definition as 'in truth, "The Crown" means the Queen who has "plenty of legal personality, both as a natural person and...as a corporation sole."'"<sup>14</sup>

The legal personality of the Crown seems to be vying between a corporation sole and a corporation aggregate. The view that the Crown is a corporation sole has been shared by the Attorney General, Baroness Scotland QC.<sup>15</sup> However, Lester and Weait argue that to call the Crown a corporation sole is outmoded; that such a concept was appropriate in the medieval ages, but inappropriate for a 'modern system of government based upon parliamentary democracy and the rule of law.'<sup>16</sup> Mclean states that the definition of the Crown as a corporation aggregate originated from the Stuart era where it was used to distinguish between the King's personal and political capacity. Thus, the King, the Lords and the Commons were regarded as entities which acted together. She explains that constructing the Crown as a corporate aggregate was to limit the powers of the King as a natural person.<sup>17</sup> In *Town Investments*, Lord Simon extended Lord Diplock's definition to consider that the Crown is:<sup>18</sup>

...a corporation aggregate headed by the Queen. The departments of state including the ministers at their head (whether or not either the department

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<sup>9</sup> Ibid 1.

<sup>10</sup> [1978] A.C. 359.

<sup>11</sup> Ibid 381.

<sup>12</sup> Tom Cornford, 'Legal Remedies Against the Crown and its Officers Before and After M' in Maurice Sunkin and Sebastian Payne (eds), *The Nature of the Crown* (Oxford University Press, 1999) 233.

<sup>13</sup> H.W.R. Wade, 'The Crown, Ministers and Officials: Legal Status and Liability', in Maurice Sunkin and Sebastian Payne (eds), *The Nature of the Crown* (Oxford University Press, 1999) 23-32, 23.

<sup>14</sup> Ibid, 24.

<sup>15</sup> *Lester and Weait* (n 3) 416.

<sup>16</sup> Ibid (n 3) 420.

<sup>17</sup> Janet Mclean, 'The Crown in Contract and Administrative Law' (2004) 24 O.J.L.S. 129.

<sup>18</sup> *Town Investments* (n 10) 400 (Lord Simon).

or the minister has been incorporated) are then themselves members of the corporation aggregate of the Crown.

In contrast, in *M v Home Office*, Lord Woolf described the Crown as both 'a corporation sole or a corporation aggregate'.<sup>19</sup> Whilst Wade lamented that such a decision in *Town Investments* had the implications of extending immunity of the Crown to its servants, he championed Lord Woolf's clarification that the legal personalities of the Crown and its servants ought to be kept distinct.<sup>20</sup> Finally, given the complex history of the Crown, Hogg and Monahan opine that the Crown 'is both a corporation aggregate and enjoys the powers and liberties of a natural person',<sup>21</sup> which in many respects is similar to the underlying principles of the Ram doctrine.

What matters, as Mclean points out, is not the form of the legal personality of the Crown, but rather the rights and duties attributed to it.<sup>22</sup> Certainly, in the case of legitimising non-statutory powers, it has been the attribution of the Crown to different legal personalities which has enabled it to legitimise such actions, some which are pragmatic and sensible and others which are questionable, as will be discussed below. In evaluating the effectiveness of the doctrine, the author submits that 'the Crown' is referred to in its political capacity, as in Lord Diplock's 'government'.<sup>23</sup>

Once 'the Crown' has been defined as accurately as it can be, the discussion proceeds to identifying the second element of the doctrine; the powers of a natural person. Such powers include the ability to make contracts, to buy and sell land, to transfer money, to employ staff,<sup>24</sup> to set up a foundation or trust to distribute funds<sup>25</sup> and to maintain a

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<sup>19</sup> *M v Home Office* [1993] 3 All E.R. 537, 566.

<sup>20</sup> *Wade* (n 13) 26.

<sup>21</sup> *Mclean* (n 17).

<sup>22</sup> *Ibid.*

<sup>23</sup> Secretary of State for Justice and Lord Chancellor, 'The Governance of Britain', (Cm 7170, 2007) <http://www.official-documents.gov.uk/document/cm71/7170/7170.pdf>. The command paper does not define 'the Crown'. This implies that the modern day interpretation of the Crown is 'the government'.

<sup>24</sup> *CCSU v Minister for the Civil Service* [1985] AC 374.

<sup>25</sup> Wade outlines these examples in H.W.R Wade, 'Procedure and Prerogative in Public Law' (1985) 101 L.Q.R., 180-199, at pages 191-194. Wade argues at p. 192, that the Crown has 'the ordinary power which everyone has to employ servants and to tell them what to do'. With regards to setting up a trust, Wade

database,<sup>26</sup> all without requiring parliamentary authority. Megarry VC in *Malone* held supported these powers of the natural person, as outlined above.<sup>27</sup> It is this principle, as Lester and Weait observed, which equates government action with private action.<sup>28</sup>

Harris defines such powers as the 'residuary freedom' for government to act unless they are explicitly legally prohibited from doing so.<sup>29</sup> Such powers have a variety of names.<sup>30</sup> Harris adopts 'third-source powers' and rejects what the House of Lords in *R. (Hooper) v. Secretary of State for Work and Pensions* as common law powers<sup>31</sup> on two grounds. The first is that it conflates this type of power with the royal prerogative since they both derive from the common law.<sup>32</sup> Secondly, the term 'common law power' itself gives the impression that such power is positive law (that there is authority which expressly or implicitly allows the Crown to interfere with the rights of the individual), where in fact, such power is subordinate to such positive law rights.<sup>33</sup>

It is problematic to apply the term 'third source powers' to non-statutory powers. Whilst the author agrees it is unhelpful to associate such powers with the prerogative (since they are effectively two different types of powers), non-statutory powers are not - in the author's view - the residuary freedom which does not conflict with the legal rights of the individual. As will be examined in the second section, these powers do conflict. Harris' second ground also implies that these powers do not equate government freedom with that of an ordinary individual, that is, these powers have less value than those of an ordinary person, which is not the case. Therefore, the term 'non-statutory powers' seems the most appropriate.

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states that the power to create the Criminal Injuries Compensation Board is akin to that of setting up a trust or foundation.

<sup>26</sup> *R. v Secretary of State for Health, Ex p. C* [2000] H.R.L.R. 400.

<sup>27</sup> *Malone* (n 2) 357.

<sup>28</sup> *Lester and Weait* (n 3) 421. The European Court of Human Rights found that such a decision was in breach of the Convention since laws must be sufficiently clear in order that citizens are aware of the circumstances in which their right under Art 8 may be interfered: *Malone v UK* [1984] E.H.R.R. 14 [67].

<sup>29</sup> B. V. Harris, 'The "third source" of authority for Government action revisited' (2007), L.Q.R. 225. Harris says that third source powers derive from the Crown's residuary freedom 'to do that which does not conflict with what other persons are permitted to do by the authority of positive law', at p. 226.

<sup>30</sup> For example, 'de facto powers', 'common law discretionary powers', 'non-statutory powers', *ibid* 226.

<sup>31</sup> [2005] 1 W.L.R. [43].

<sup>32</sup> *Harris* (n 29) 225.

<sup>33</sup> *Idem*.

It is possibly due to the difficulty in pinpointing the nature and limits of such powers that the courts have opposing views on the treatment of them. When it comes to treating non-statutory powers, Harris refers to two strands of thought.<sup>34</sup> The first is to look for the action in positive law, either expressly or implicitly in statute, or in the prerogative, and if such law does not exist, then the action is unlawful. In *R v Secretary of State for the Home Department, ex p. Northumbria Police Authority*, the Court of Appeal found both in statute and the prerogative that the Secretary of State was allowed to maintain a central store which provided police riot equipment since the Secretary of State was deemed an 'organisation' under s. 41 of the Police Act 1964.<sup>35</sup>

Laws J took a stricter approach in *R. v Somerset County Council, Ex p. Fewings*, where he found that there was no statutory authority which allowed the local authority to ban deer hunting on common land.<sup>36</sup> Laws' principle that actions of local authorities must be justified by positive law was upheld by Bingham M.R. in the Court of Appeal.<sup>37</sup> It is argued that this principle can only apply to local authorities, and unlike central government, local authorities are creatures of statute.<sup>38</sup> Lester and Wait assert that with the Humans Rights Act 1998, the *Fewings* position 'applies to all public authorities, including ministers and civil servants, acting as Crown agents'.<sup>39</sup>

The *Fewings* approach contradicts that of the House of Lords, which appears to be the approach of the Ram doctrine. In *Hooper*, although there was no thorough discussion on the point, it appeared that the majority of the House of Lords were persuaded by the argument that the government has the freedom of paying pensions to widowers even though no such authority was found in statute.<sup>40</sup> Such authority is in line with cases such as *Malone*<sup>41</sup> and *R v. Secretary of State for Health, Ex p. C*.<sup>42</sup>

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<sup>34</sup> *Harris* (n 29).

<sup>35</sup> [1989] Q.B. 815. Nourse LJ traced this power back to the medieval ages.

<sup>36</sup> [1995] 1 All E.R. 513.

<sup>37</sup> *R. v Somerset County Council, Ex p. Fewings* [1995] 1. W.L.R. 1037 at 1042.

<sup>38</sup> *R v. Secretary of State for Health, Ex p. C* [2000] H.R.L.R. . 400, 405 (Lady Justice Hale).

<sup>39</sup> *Lester and Wait* (n 3) 422.

<sup>40</sup> *Hooper* (n 32). Lord Hoffman noted at [47] that there 'was a good deal of force' in the Secretary of State's argument. However, his Lordship refused to make any final conclusions on the point. Lord Nicholls at [6] refused to express a view on the issue 'in absence of fuller argument'. Lord Hope at [81] recognised

It is worthwhile noting that even though such powers are characterised as 'private' rather than 'public' in nature, Lester and Weait argue that such powers of the Crown to convey property, employ staff and to manage daily affairs are in fact 'public' rather than 'private' because these are powers which are shared amongst everyone, be it an individual or the Crown.<sup>43</sup>

This section has identified that it is the Ram doctrine that has provided the Crown with the legal basis to exercise the powers of a natural person. It is certainly difficult to define 'the Crown' and today, the Crown is most often referred to as Lord Diplock's 'government of the day'. This section has provided examples of the powers of an ordinary person and has evaluated how the courts have treated such powers. At present, as highly persuasive as the judgment of Laws J in *Fewings* is, the courts are likely to lean towards the Ram doctrine. This analysis demonstrates that what is at issue is not the personification of the Crown or, to a certain extent, the identification of the powers of an ordinary person. Rather, it is whether the Crown's actions without Parliament's authority contravenes constitutional principles and effectively impinges on the rights and freedoms of its citizens. It is this issue which will be examined in the next section.

### **Sensible pragmatism or dangerous constitutional innovation?**

For the Crown, to be able to exercise the powers of an ordinary person allows it to meet the practical day-to-day needs of government, including those which are rare and unexpected.<sup>44</sup> Brazier expands further on such benefits.<sup>45</sup> First, since such powers are ready to hand, legislation is not required, resulting in no pre-action checks by Parliament. Secondly, since parliamentary scrutiny comes into play after said action, it allows these

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that the Government had a common law power to make payments to widowers. Lord Scott at [95] too recognises the power. Lord Brown at [123] recognises the power but contended that to make extra-statutory payments would be 'an obvious abuse of power', thus common law powers cannot be enacted if they are contrary to Parliament's clearly expressed will. Lord Brown's view is closer to the *Fewings* approach.

<sup>41</sup> *Malone* (n 2).

<sup>42</sup> *Ex p. C* (n 38) 406: Hale L.J applies the Ram doctrine by stating that private individuals are allowed to maintain services similar to the one at issue, therefore the government maintaining one is not unlawful.

<sup>43</sup> *Lester and Weait* (n 3) 419.

<sup>44</sup> *Harris* (n 29) 237.

<sup>45</sup> Rodney Brazier, *Ministers of the Crown* (1997), Oxford University Press, pp. 204 – 205.

powers to be used in times of an emergency. Finally, because they do not need an Order in Council, the ability for the courts to deem Order in Council *ultra vires*, does not appear.<sup>46</sup>

Cohn provides examples of non-statutory action which demonstrate their extensive use and administrative nature. She states that ex-gratia payments allow 'equalising policies without the need to strain through the legislative sieve'.<sup>47</sup> She supports this view with the following examples: payments schemes for the surrender of small calibre pistols, unmarried partners receiving pensions on an ex-gratia basis, public inquiries,<sup>48</sup> subsidy programmes and governmental circulars.<sup>49</sup> Cohn then reviews arrangements which are 'only very loosely based on statute' and stated that in 1999, the then Inland Revenue employed no less than 272 extra-statutory concessions as a governance tool.<sup>50</sup>

To provide a statutory footing for such administrative or management functions would not only prevent the Crown from responding to the effective day-to-day management of government but also impose an unnecessary burden on Parliament.<sup>51</sup> Harris asserts that to place such powers in positive law would amount to the same result as leaving the powers steeped in common law. The statutory authority would no doubt be unspecific and incomplete due to the inability to anticipate all actions of the Crown. Legislation would consequently lack appropriate focus and consideration. Parliament would undoubtedly be failing in its ability to set clear limits to the actions of the Crown.<sup>52</sup>

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<sup>46</sup> Note that Brazier defines these powers as prerogative.

<sup>47</sup> Margit, 'Medieval chains, invisible inks: on non-statutory powers of the executive', (2005) O.J.L.S 97-122, 101.

<sup>48</sup> The Profumo report, the Bingham report on the BCCI collapse, the BSE inquiry and the Scott inquiry into the arms-to-Iraq affair are all creatures of non-statutory powers. There is somewhat a hint of irony about an inquiry created out of a non-statutory power (or what normally is classified as a prerogative power) criticising the deployment of prerogative powers as a means of escaping allegations of illegality. For further detail, please see footnote 16 in *Lester and Weait* (n 3). Note however, the entry into force of the Inquiries Act 2005 and in particular s. 6 which requires Ministers to inform Parliament.

<sup>49</sup> Cohn (n 47) 101.

<sup>50</sup> *Idem*.

<sup>51</sup> *Lester and Weait* (n 3) 417. Baroness Scotland said that to require 'parliamentary authority for every exercise of the common law powers exercisable by the Crown either would impose upon Parliament an impossible burden or produce legislation in terms that simply reproduced the common law'.

<sup>52</sup> *Harris* (n 29) 237.



In conclusion, such pragmatism enacted by non-statutory powers is to be praised as long as the powers stay within their administrative arena. They are able to respond quickly and effectively to the governance of the Crown on a daily basis. Nevertheless, a fine line exists between such 'dominium' or 'property' power<sup>53</sup> being used to carry out management functions and such powers becoming coercive, for example, unlawfully infringing on the rights of others. It is when such a boundary is crossed that Cohn stresses that the employment of such powers 'threatens three basic values of proper administrative practice: participation, clarity and accountability'.<sup>54</sup>

One of the problems of allowing the Crown to exercise the powers of a natural person is that it lacks legal certainty in both the nature of the powers and in their limits. When asked, Baroness Scotland admits that such actions which the Crown takes without parliamentary authority are 'necessarily difficult to categorise',<sup>55</sup> thus no such list is maintained, implying that such powers are unlimited. This is all the more confusing, as Cohn indicates, when non-statutory powers are treated as prerogative ones.<sup>56</sup> Cohn suggests two solutions; the first, is by following the Blackstonian-influenced Wade route of dismissing those non-statutory powers which are not unique to Crown and which produce no legally enforceable effects and then putting the rest on a statutory footing. The second is to conflate non-statutory powers with prerogative powers. However, Cohn criticises each one; the first for the danger of enacting broad statutes (similar to Harris' argument above), the second because it completely undermines Lord Diplock's shining ratio in *BBC v Johns*<sup>57</sup> and it 'adds halos to mundane powers, deflects attention from introduced statute law and encourages stagnation of legislative reform'.<sup>58</sup>

The lack of legal certainty also undermines the fundamental principles of the rule of law. Non-statutory powers result in the inability of the courts to comprehend what the Crown can and cannot do. Therefore, they are unable to determine whether the Crown is

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<sup>53</sup> Lester and Weait refer to this terminology: *Lester and Weait* (n 3) 419.

<sup>54</sup> *Cohn* (n 47) 102.

<sup>55</sup> *Lester and Weait* (n 3) 418.

<sup>56</sup> *Cohn* (n 47) 107.

<sup>57</sup> [1965] 1 Ch 33 at p. 79, that 'it is 350 years and a civil war too late for the Queen's courts to broaden the prerogative'.

<sup>58</sup> *Cohn* (n 47) 105.

complying with the law. Legal certainty also gives citizens a greater understanding of their rights and interests, and awareness of when such a right or interest has been interfered with by actions of the Crown.<sup>59</sup> Thus, the perception of infinite non-statutory powers means - according to Harris - that 'the government has an inherent freedom of its own' instead of being kept on a tight legislative leash.<sup>60</sup>

Following from this lack of legal certainty, one can argue that such powers can inhibit human rights and freedoms. Baroness Scotland acknowledges this in her Answer.<sup>61</sup> However, Harris questions when the Crown can rely on a non-statutory power, which although does not infringe the right of an individual, it may impose constraints on the individual's residual freedom.<sup>62</sup> Further, looking back on the administrative examples illustrated by Cohn, when does an ex-gratia scheme or extra-statutory concession become merely a way to administer affairs and when does it infringe on human freedoms? Could not a subsidy programme deprive commercial interests? Lester and Weait give forthright examples of coercive measures by government achieved through 'extra legal means'.<sup>63</sup>

The exercising of such powers can be dangerous because there is ineffective post-action scrutiny. Brazier argues forcefully that parliamentary checks are limited, since powers are not limited by the terms of Acts of Parliament and ministers do have to consult with Parliament before using non-statutory powers.<sup>64</sup> Lester and Weait state that there are select committees which scrutinise bills and delegation of legislative power, but there is little when it comes to scrutinising the powers which do not originate in statute.<sup>65</sup> Even

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<sup>59</sup> For example, in *R v. Secretary of State for Health, Ex p. C*, although it was held lawful to maintain a database for employers to find out whether a prospective employee was suitable to work, knowledge of such a database in the first place would no doubt have had an impact on the conduct of said employee.

<sup>60</sup> *Harris* (n 29) 239.

<sup>61</sup> *Lester and Weait* (n 3) 416: Baroness Scotland states that 'legislation is needed for example, when the proposed action might substantially interfere with human rights. In such cases a clear, reasonably accessible legal framework is required in order to comply with human rights law'.

<sup>62</sup> Harris uses the example of the government, under non-statutory powers, providing free veterinary services to livestock farmers; in effect they have encroached on interests of private veterinarians, even if legally, they have not deprived them of their services. *Harris* (n 29) 244.

<sup>63</sup> Lester and Weait illustrate: 'Employers are "persuaded" to follow government guidelines on pay, under threats of losing government contracts...', *Lester and Weait* (n 3) 421.

<sup>64</sup> Rodney Brazier, 'Constitutional Reform and the Crown' in Maurice Sunkin and Sebastian Payne (eds), *The Nature of the Crown* (Oxford University Press, 1999) 337-362, 356.

<sup>65</sup> *Lester and Weait* (n 3) 426. 'The Governance of Britain' has also recognised that select committees do not provide enough statutory scrutiny (n 23).

mounting a judicial review against such a non-statutory action may be ineffective for many reasons: expense, time limits, not to mention the possibility that it may simply not be justifiable.

Cohn argues the benefits in giving non-statutory powers a statutory footing. This promotes public discussion, it requires consultation from interest groups, there are guides and annotations which can accompany the Act to give it greater clarity (it is also submitted that when all else fails, even Hansard can be consulted).<sup>66</sup> The Act also prescribes limitations and conditions to safeguard against abuse.<sup>67</sup> Such statutory footing reinforces both pre-action scrutiny and facilitates a greater degree of post-action scrutiny.

Another danger of the 'Ram doctrine' is that the Crown may become a rival law maker to Parliament. By entering into legally enforceable contracts, Mclean argues, law is being 'effectively created between Government and the citizen'<sup>68</sup> because in effect, entering into such a contract has created a legal regime between the two parties, thus 'policy shifts to law'.<sup>69</sup> Mclean asserts that when governments enter into long contracts, they are in fact binding successive governments and 'thereby impose significant legal, political and financial costs of policy change on its successors'.<sup>70</sup> This seems most pertinent in the case of Private Finance Initiatives, usually lasting up to 25 to 30 years, which do inevitably bind successor governments. The current economy, which undermines the operation of such PFIs,<sup>71</sup> is the ramification that Mclean suggests when it imposes such costs on future governments. She is correct when she implies that, in many respects, it is easier to change legislation than it is to override a contract.<sup>72</sup>

Finally, the 'Ram doctrine' is a dangerous constitutional innovation because it equates a public body with a private individual. Lester and Weait refer to Laws J in *Fewings* in

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<sup>66</sup> The author's note.

<sup>67</sup> *Cohn* (n 47) 103.

<sup>68</sup> *Mclean* (n 17).

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.*

<sup>71</sup> The Guardian, 'After Alchemy', 03/02/09, <http://www.guardian.co.uk/commentisfree/2009/feb/03/pfi-labour>

<sup>72</sup> She states: 'A Parliament that wishes to override a contract will be repudiating a legal obligation rather than merely changing policies of a constitutionally entitled to do': *Mclean* (n 17).

providing the correct position with regards to the duties of public bodies and it is appropriate to quote this position in full:<sup>73</sup>

Public bodies and private persons are both subject to the rule of law; nothing could be more elementary. But the principles which govern their relationships with the law are wholly different. For private persons, the rule is that you may do anything you choose which the law does not prohibit. It means that the freedoms of the private citizen are not conditional upon some distinct and affirmative justification for which he must burrow in the law books ... But for public bodies the rule is opposite, and so of another character altogether. It is that any action taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake; at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed it exists for no other purpose. I would say that a public body enjoys no rights properly so called ... [I]n every instance ... where a public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performance of its duties for whose fulfilment it exists. It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility: a responsibility which defines its purpose and justifies its existence. Under our law, this is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them.

Even Hale LJ in *R v. Secretary of State for Health, Ex p. C* admits that although a government department can maintain a list just like an ordinary person: 'The impact of a list such as this maintained by a government department or public authority is that much more powerful because they are generally so much more powerful.'<sup>74</sup>

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<sup>73</sup> *Fewings* (n 36) 524.

<sup>74</sup> *Ex p. C* (n 42) 406.

Taking into consideration the ratio of *Laws J* and that of *Hale LJ*, the Crown possessing all powers of a natural person is dangerous because the doctrine accords the Crown with powers from a legal personality which it is distinctly different from. The Crown's duty is owed to the public as a whole, whereas a citizen's duty is owed to another citizen. As *Hale L.J* states, the Crown is much more powerful than an ordinary citizen and by according the Crown statutory powers as well as non-statutory ones, the Crown becomes extremely powerful and the potential for abuse is greater.

To conclude, this section has examined in full the benefits and costs of relying on non-statutory powers. There is an unequivocal need for such powers to manage the Crown's administrative affairs, however as it has been highlighted, the danger lies when such administrative powers become coercive and must be constrained by the courts. It is impossible to determine fully the nature and type of non-statutory powers which the Crown relies upon; and by according the Crown all the powers of a natural person (in addition to its statutory and the prerogative powers), the risk of abuse is higher. Uncertainty and several sources of power render the Crown very dangerous indeed.

Since it has been discussed that the doctrine has dangerous constitutional ramifications, one question remains: how has the Crown arrived at this juncture?

### **The misinterpretation and mistreatment of the doctrine**

There are several reasons as to why Britain's constitutional foundations appear less secure than previously imagined. The first is to do with the classification of non-statutory powers. It is dangerous to intertwine prerogative powers with powers of a natural person, because prerogative powers are not those accorded to the private individual. An individual cannot sign a treaty, sign the prerogative of mercy or order the country to go to war. Classifying non-statutory powers as prerogative powers is not only a misconception of the *Ram* doctrine; the boundaries of dominium or property powers are capable of being pushed back further and further so that they become coercive. When such powers are considered prerogative, the scrutiny of them softens since the prerogative 'enjoys

historical sanction and operates under a set of constitutional conventions'.<sup>75</sup> To avoid the consequences of becoming coercive and undergoing 'soft' treatment, such powers must be kept separate from non-statutory powers.

The second reason falls on defining the Crown as a legal person. By defining the Crown as a corporate aggregate, a corporate sole or as a natural person, 'it legitimises diverse and considerable state action'.<sup>76</sup> Harris agrees with avoiding attempts to classify the Crown in such terms because 'the government is so different in nature and magnitude of influence from other legal persons'.<sup>77</sup> Therefore the Ram doctrine is misleading because it fails to define the Crown. The Crown is not a natural person; it cannot be at liberty do anything unless precluded from doing so because its function and size does not equate with that of a natural person. Its freedom of action would no doubt arbitrarily infringe the rights of those it is supposed to serve.

The Crown has arrived at this juncture because the Ram doctrine has been misinterpreted. The context in which the doctrine was created was narrow; it was an opinion of the Ministers of Crown (Transfer of Functions) Bill - later to become an Act in 1946 - in which it addresses what appeared to be administrative needs.<sup>78</sup> Sir Ram does not identify the Crown as a corporate personality; it was this Cabinet that did so in its report on Privacy.

This observation leads to the last criticism of the Crown's interpretation of the memorandum. Sir Ram wrote that a minister may exercise any powers of which the Crown has power to exercise, unless precluded by statute. However, as argued by Lester and Wait, Sir Ram did not state that a government department could exercise any power that an ordinary citizen could do.<sup>79</sup> Yet, to argue that the Crown has misapplied the

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<sup>75</sup> *Cohn* (n 47) 103.

<sup>76</sup> *Ibid* 111.

<sup>77</sup> *Harris* (n 29) 241. Note that Hale LJ stating the Crown is so much more powerful, above in *Ex p. C* (n 38).

<sup>78</sup> *Lester and Wait* (n 3) 417.

<sup>79</sup> *Lester and Wait* (n 3) 420.

doctrine may seem like a futile exercise, as the doctrine that the Crown has all powers of a natural person can be traced back to much earlier than 1945.<sup>80</sup>

Finally, owing to the very nature of the British constitution, the Crown has the authority to exercise all the powers of a natural person. The constitution is a hybrid of statute, the common law and the prerogative; hence there is no 'established constitutional charter'.<sup>81</sup> A written constitution would avoid the current situation; limits to the Crown's exercising of power are/would be recognised and constrained by the courts, greater protection is afforded to private citizens and the rule of law is strengthened, to the pleasure of Dicey. Some may argue that the Human Rights Act 1998 (HRA) may be the panacea. Although the HRA 1998 has provided important constitutional and legal protection to citizens in the United Kingdom, decisions have shown that non-statutory and prerogative powers have slipped through the net,<sup>82</sup> implying that these powers will escape the courts in the future.

### **Conclusion and Recommendations**

This discussion has provided a clear overview of the Ram doctrine and its implications. In order to comprehend this issue, it was necessary to first define the elements of the doctrine and then analyse its positive and negative implications for the governance of Britain. It has been highlighted that although there are clear administrative advantages of having non-statutory powers, these advantages disappear when such powers are ambiguous in nature and in extent. It is the very fact that the Crown is not a natural person which makes exercising such powers all the more dangerous for its citizens. Finally, the reasons underlying the mistreatment and misinterpretation of the doctrine have attempted to explain why it has become a dangerous constitutional innovation.

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<sup>80</sup> Mclean has provided a thorough historical analysis of how the Crown has gained its legal personality: *Mclean* (n 17). Also see Martin Loughlin, 'The State, the Crown and the Law' in Maurice Sunkin and Sebastian Payne (eds), *The Nature of the Crown* (Oxford University Press, 1999) 33-76, for another in-depth historical analysis.

<sup>81</sup> *Lester and Wait* (n 3) 418.

<sup>82</sup> Cohn argues that non-statutory and prerogative powers need not fear the European Convention since courts can treat such powers within the ambit of 'the law': *Cohn* (n 47).

The Crown has recognised the need to move non-statutory powers and prerogative powers on to a statutory footing, with greater scrutiny from Parliament.<sup>83</sup> Nonetheless, it remains to be seen whether this will progress in reality. The HRA 1998 has allowed more scrutiny of such powers and yet as noted above, the Strasbourg Court allows considerable room to manoeuvre when it comes to what is 'prescribed by law'.

A few suggestions can be proposed at this point. Attributing a corporate personality to the Crown denotes that it is on a level playing field with a natural person when this is evidently untrue. It is more logical therefore, to steer clear from such personification and solely scrutinise the nature and the exercise of the Crown's responsibilities. Moreover, it appears that the case for a written constitution continues to gain strength on two grounds. It will provide citizens with the clarity of their freedoms that is so vitally needed and it will provide the courts with regulatory tools to monitor abuse of power. The call for a written constitution is all the more so since Parliament is slow to scrutinise and the Strasbourg Court does not provide as much oversight as is hoped.

This way forward will guarantee the rights and freedoms accorded to citizens in a democratic society, simply because the courts will be able to uphold them. No longer would judges be seen as 'mice squeaking under a chair in the Home Office',<sup>84</sup> but once more as 'lions under the throne of the British constitution'.<sup>85</sup>

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<sup>83</sup> See 'The Governance of Britain' for the discussion on placing the Civil service on a statutory footing (in section one) and proposals to make the executive more accountable (in section two), (n 23).

<sup>84</sup> Stable J writing to Lord Atkin (dissenting) after the decision in *Liversidge v Anderson* [1942] AC 206. See Loveland, I, 'Constitutional Law, Administrative Law and Human Rights: A critical introduction' (2006), Fourth edition, Oxford University Press, 79. Lester and Weait note that Sir Granville Ram's 'work succeeded when the majority of the House of Lords rejected a legal challenge in *Liversidge v Anderson*'. *Lester and Weait* (n 3).

<sup>85</sup> *Loveland* (n 84) 60, see footnote 13.



*Criminalisation of the Possession of Extreme Pornography – Whilst one cannot doubt their intentions, one must doubt their logic*

SOPHIE MITCHELL

‘The prosecution case was that the appellant had deliberately strangled the victim to satisfy his macabre sexual fantasies, visiting websites which related to sex and violence...the day before the deceased's death, he had logged on to the website, “Deathbyasphyxia”’.<sup>1</sup>

Introduced in the wake of the horrific murder of Jane Longhurst, the media pandemonium that followed it, and the ensuing vigorous campaign by her family, in 2005 the Home Office produced a consultation document proposing to criminalise the *possession* of extreme pornography.<sup>2</sup> The resulting legislation, having effect from January 2009, takes the form of the Criminal Justice and Immigration Act 2008, primarily, Section 63(1)<sup>3</sup>. Response saw an array of support and opposition; this article will focus on the concern over disproportion, namely, that, ‘evidence does not point to pornography as a cause of deviant sexual orientation in offenders’,<sup>4</sup> thus the need to legislate cannot be justified against the lack of evidence suggesting a link between the two. Key studies in search of this link will be assessed, in particular, the Itzin Report,<sup>5</sup> the Home Office research of 1990,<sup>6</sup> the Meese Commission,<sup>7</sup> the Williams Committee<sup>8</sup> and the US Commission on Obscenity and Pornography.<sup>9</sup> Intuitive justifications that may have shaped justifications for the Act in absence of evidence will then be explored. Many of the diverse responses to the Act will be drawn upon to form critical arguments throughout; the repercussions of

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<sup>1</sup> *R. v Coutts (Graham James)* [2006] UKHL 39, at 2182 per Lord Rodger of Earlsferry.

<sup>2</sup> Itzin, C., Taket, A., Kelly, L., *The evidence of harm to adults relating to exposure to extreme pornographic material: a rapid evidence assessment (REA)*, (September 2007)

<sup>3</sup> ‘It is an offence for a person to be in the possession of an extreme pornographic image’.

<sup>4</sup> Akendiz, Y. 2005. *Cyber-Rights & Cyber-Liberties: Possession of Extreme Pornography Consultation-Cyber-Rights.Org Response* [online]. [Accessed November 2008]. Available from World Wide Web: <<http://www.cyber-rights.org/>>

<sup>5</sup> Itzin, C., Taket, A., Kelly, L., *The evidence of harm to adults relating to exposure to extreme pornographic material: a rapid evidence assessment (REA)*, (September 2007)

<sup>6</sup> Howitt, D., & Cumberbatch, G., *Pornography: Impacts and Influences*, HMSO, (1990)

<sup>7</sup> Meese, E., *Attorney General's Commission on Pornography*, (July 1986)

<sup>8</sup> The Williams Committee Report, *Obscenity and Film Censorship*, HMSO, (1979)

<sup>9</sup> United States Commission Report, *Obscenity and Pornography*, (1970)

the controversial statute will then be examined. Ultimately, this article seeks to determine whether criminalising the possession of extreme pornography is proportionate to the actual threat of sexual violence.

### **Examining the evidence: Linking possession with sexual violence**

'Research, development and statistics exist to improve policy making, decision taking and practice'.<sup>10</sup> In pursuit of this, the Government produced the Itzin Report, comprising of five meta-analyses conducted under laboratory conditions, including the measure of aggression after exposure to pornography.<sup>11</sup> It revealed the existence of 'some harmful effects from extreme pornography on some who access it',<sup>12</sup> and although there was no suggestion of a causal link between the propositions, the Government used this to justify their desire to protect society.<sup>13</sup>

Evidence that 'the pornographic material used in laboratory studies is likely – for ethical reasons – to be less extreme than that accessed outside'<sup>14</sup> suggests that the findings are an 'under-estimate of the harm effects',<sup>15</sup> illustrating that the Government's decision to legislate and protect society was a reasonably proportionate response in the likelihood of unforeseen harm being caused.

However, concern over the limitations of what research can achieve within the bounds of ethical practice has admittedly led to criticism.<sup>16</sup> 'The central question is whether the findings of laboratory experiments indicate anything about the world outside the

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<sup>10</sup> Itzin, C., Taket, A., Kelly, L., *The evidence of harm to adults relating to exposure to extreme pornographic material: a rapid evidence assessment (REA)*, (September 2007); P. b

<sup>11</sup> Ibid, P. iii

<sup>12</sup> Ibid, P. iii, 'These included increased risk of developing pro-rape attitudes, beliefs and behaviours, and committing sexual offences. Although this was also true of some pornography which did not meet the extreme pornography threshold, it showed that the effects of extreme pornography were more serious'.

<sup>13</sup> The Home Office, *Consultation: On the possession of extreme pornographic material*, (August 2005); P. 2

<sup>14</sup> Itzin, C., Taket, A., Kelly, L., *The evidence of harm to adults relating to exposure to extreme pornographic material: a rapid evidence assessment (REA)*, (September 2007); P. 4.

<sup>15</sup> Ibid, P.4

<sup>16</sup> Ibid, P. 24

laboratory'.<sup>17</sup> Recognised as an 'un-illuminating and unreliable way of investigating complex behaviour',<sup>18</sup> even 'leading pro-censorship feminists have acknowledged, along with the Canadian Supreme Court,<sup>19</sup> none of these types of "evidence" prove that pornography harms women'.<sup>20</sup> Those seeking to rely on the evidence must admit that it has been obtained in an unreliable way, intimating an undeniable contradiction in their reasoning. Furthermore, in accepting that 'correlation does not mean causation',<sup>21</sup> one cannot rule out the idea that violent sexual offenders may be using the material to relive their acts,<sup>22</sup> or to suppress their ideologies so that they do not perform them on real victims. The message to emerge already suggests that the Act has been built on far from stable foundations.

When the Home Office<sup>23</sup> commissioned an evaluation of existing literature on the effects of pornography, it concluded with no convincing evidence for a link between pornography and sex offending.<sup>24</sup> However, the Attorney General's Commission on Pornography purported otherwise. Falling under heavy critique due to the biased status of individuals chosen to investigate,<sup>25</sup> its contradictory submissions, (for example, the Commission admitted that pornography relieves people of the 'impulse to commit crimes' whilst contending that 'pornography causes crime'),<sup>26</sup> it was even condemned by 'the very social scientists on whose research the Report purportedly relied'.<sup>27</sup> The

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<sup>17</sup> Ibid, P.3, Quoting, 'Allen, D'Alessio and Emmers-Sommers (1999) (pp 156-157)'.  
<sup>18</sup> Gourgey, N., 1997. Pornography and Freedom of Speech. *Entertainment Law Review*. [online]. 8 (3) [November 2008], Ent. L.R. 91. Available from Westlaw. Quoting the Williams Committee on Obscenity and Film Censorship, para. 6.14.

<sup>19</sup> *Butler v. The Queen* 1 SCR 452 (1999)  
<sup>20</sup> Strossen, N. 2000. *Defending Pornography: Free Speech, Sex, and the Fight for Women's Rights*. New York and London: New York University Press; P. 250

<sup>21</sup> The Home Office, *Consultation on the Possession of Extreme Pornographic Material: Summary of Responses and Next Steps*, (August 2006); P. 13, Response 34.

<sup>22</sup> Strossen, N. 2000. *Defending Pornography: Free Speech, Sex, and the Fight for Women's Rights*. New York and London: New York University Press; P. 253

<sup>23</sup> Howitt, D., & Cumberbatch, G., *Pornography: Impacts and Influences*, HMSO, (1990)

<sup>24</sup> *HANSARD (Commons)*. 25 February 2002, column 916W

<sup>25</sup> *Cultronix: The Obscene, Disgusting, and Vile Meese Commission Report- Pat Califa, 1986*. 2008. [online]. [Accessed 19<sup>th</sup> November 2008] Available from World Wide Web <<http://eserver.org/cultronix/califa/meese/>> '...social scientists on the Commission included Park Elliott Dietz... He believes that masturbating to deviant images supports and maintains (if not causes) deviance and he has published research on the dangers of detective magazines'.

<sup>26</sup> Strossen, N. 2000. *Defending Pornography: Free Speech, Sex, and the Fight for Women's Rights*. New York and London: New York University Press, P. 163

<sup>27</sup> Ibid, P. 251

evidently futile nature of the only report to defend the Government's actions further suggests they acted in haste and disproportionately.

The Williams Committee<sup>28</sup> rejected the suggestion that the available statistical information lends any support to the idea of such a link,<sup>29</sup> restraining the Government from acting at the time. One could argue that the proposed legislation is in proportion with society today, however, 'the pornographic material accessible now, in particular on the internet, is likely to be more extreme than that available in the 1980s',<sup>30</sup> illustrating the need for new laws to counter new threats. Furthermore, through control by pre-existing legislation,<sup>31</sup> 'closing down sources of supply and distribution obviated the need for a possession offence', however the borderless nature of the internet 'makes this approach more difficult'.<sup>32</sup>

However, the argument quickly turns circular; many see this as an old problem situated in a new medium. Consider the 'sexual brutalities suffered in Eastern Europe in 1945...violent rapists from a culture insulated from any pornography'.<sup>33</sup> Evidence from history alone surely stands stronger than an artificial laboratory experiment attempting to replicate human reaction. In applying this idea, one could criticise the Government for enplacing restrictions now; not only is it a 'distortion of history to believe that there is anything peculiarly modern'<sup>34</sup> about such material, but it is during an increasingly liberated culture of recognition for Human Rights.<sup>35</sup>

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<sup>28</sup> The Williams Committee Report, *Obscenity and Film Censorship*, HMSO, (1979)

<sup>29</sup> Gourgey, N., 1997. Pornography and Freedom of Speech. *Entertainment Law Review*. [online]. 8 (3) [November 2008], Ent. L.R. 91. Available from Westlaw. Quoting from the Williams Committee at para. 80

<sup>30</sup> Itzin, C., Taket, A., Kelly, L., *The evidence of harm to adults relating to exposure to extreme pornographic material: a rapid evidence assessment (REA)*, (September 2007) ; P.4

<sup>31</sup> Namely, the Obscene Publications Act 1959 and 1964, the Customs Consolidation Act 1876 and the Customs and Excise Management Act 1979

<sup>32</sup> The Home Office, *Consultation: On the possession of extreme pornographic material*, (August 2005); P. 1

<sup>33</sup> *Laws on porn won't combat sexual violence*. 2006. [online]. [Accessed November 2008]. Available from World Wide Web: < <http://www.backlash-uk.org.uk/synon.html> > Taken from an article in the Daily Mail, by Synon, M.E., Monday 11<sup>th</sup> September 2006

<sup>34</sup> Akendiz, Y. 2005. *Cyber-Rights & Cyber-Liberties: Possession of Extreme Pornography Consultation-Cyber-Rights.Org Response* [online]. [Accessed November 2008]. Available from World Wide Web: < <http://www.cyber-rights.org/> > Quoting Howitt & Cumberbatch, (p. 95)

<sup>35</sup> Namely, The Human Rights Act 1998, Article 8 'Right to respect for Private and Family life' and Article 10 'Freedom of Expression', furthermore, see Section 13 (1) Freedom of thought, conscience and religion; 'If a court's determination of any question arising under this Act might affect the exercise... of the

The US Commission on Obscenity and Pornography, unable to preserve the 'bedrock principle' of America's 'proud free speech tradition'<sup>36</sup> was rejected by President Richard Nixon, who discarded its 'morally bankrupt conclusions'.<sup>37</sup> Here surfaces the tendency for moral judgement to take precedence over dispassionate analysis of evidence, an attitude ignoring the actual threat of sexual violence, and, arguably, an attitude reflected in our legislature today.

Concern over this is echoed in a debate between the Law Lords. Describing evidence produced by the Itzin Report as one of the Government's 'weakest suits',<sup>38</sup> therefore 'the Minister is in danger of leading his Government into becoming the thought police',<sup>39</sup> Baroness Miller implied that the only concrete evidence produced was based on conscience rather than conclusion. Defensive of the proposition, Lord Hunt appealed to 'plain common sense',<sup>40</sup> inviting the Lords to view exemplar material in an attempt to provoke disgust within the House, again, appealing to emotion to justify decisions rather than concrete evidence. 'When politicians attempt to justify legislation by appealing to 'common sense' you know that they have got no reasoned arguments left'.<sup>41</sup> This substantially devalues the credibility of the Act, for when the evidence it is based upon is subjected to examination, nothing can be drawn from it for support, and subjective opinion is instead thrown out in desperation. This bolsters the argument that criminalising the possession of extreme pornography is out of proportion to the actual threat it seeks to control, and is perhaps more proportionate to the morals the legislature seeks to uphold.

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Convention right to freedom of thought, conscience and religion, it must have *particular regard* to the importance of that right'. (Emphasis added).

<sup>36</sup> Akdeniz, Y., Walker, C., Wall, D., 2000. *The Internet, Law and Society*. Published in Great Britain: Longman; p. 214

<sup>37</sup> *American Presidency Project*. 2008 [online]. [Accessed 18<sup>th</sup> November 2008]. Available from World Wide Web: <<http://www.presidency.ucsb.edu/ws/index.php?pid=2759>> 'Pornography is to freedom of expression what anarchy is to liberty; as free men willingly restrain a measure of their freedom to prevent anarchy, so must we draw the line against pornography to protect freedom of expression'.

<sup>38</sup> *HANSARD (Lords)*. 21 April 2008, Column 1359; per Baroness Miller of Chilthorne Damer

<sup>39</sup> *HANSARD (Lords)*. 21 April 2008, Column 1360; per Baroness Miller of Chilthorne Damer

<sup>40</sup> *HANSARD (Lords)*. 3 March 2008, Column 907; per Lord Hunt of Kings Heath, 'It seems plain common sense that this awful stuff must have a negative, adverse impact on some of the people viewing it.'

<sup>41</sup> Petley, J., 2008. *Legislating in Haste: Index on Censorship*, by Julian Petley. [online]. [Accessed November 2008]. Available from World Wide Web:

< <http://www.indexoncensorship.org/2008/03/11/legislating-in-haste/> >

Their Lordship's debate illustrates two extreme sides encountered throughout this discussion,<sup>42</sup> due to its controversial nature and the inability to rely on factual findings, as revealed in the above analysis. Thus, it will now be considered whether this piece of legislation is merely a passenger to a 'moral crusade'.<sup>43</sup>

### **Balancing the extremes: Intuitive justifications versus concern over disproportionate action**

Given the Government's current predicament over insufficient evidence to draw definite conclusions,<sup>44</sup> the spotlight deviates from the scientific evidence, and instead turns upon a number of the Government's intuitive justifications to show that the legislation is proportionate to the actual threat of harm.

#### ***Setting Moral Parameters***

Firstly, the Government implies that it is difficult for many to comprehend how the sexually explicit torture of female victims can be fulfilling to a person with reasonable moral standards.<sup>45</sup> Wearside Women in Need believe this provides the 'cultural backdrop against which the abuse of women is mainstream and endemic';<sup>46</sup> perpetuating gender inequalities and normalising sexual violence.<sup>47</sup> It is not surprising that many feminist groups believe the Act should go further in suppressing freedom of expression for a favoured moral code.<sup>48</sup>

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<sup>42</sup> McGlynn, C., Rackley, E., 2007. Striking a balance: arguments for the criminal regulation of extreme pornography. *Criminal Law Review*. [online]. 677-690 [Accessed November 2008], Crim. L.R. 681. Available from Westlaw.

<sup>43</sup> *Index on Censorship: Extreme Ignorance*. 2008. [online] [Accessed November 2008] Available from World Wide Web: < <http://www.indexoncensorship.org/2007/06/26/extreme-ignorance/> >

<sup>44</sup> The Home Office, *Consultation: On the possession of extreme pornographic material*, (August 2005); P. 1

<sup>45</sup> *Ibid*, P. 5, at para. 5

<sup>46</sup> McGlynn, C., Rackley, E., 2007. Striking a balance: arguments for the criminal regulation of extreme pornography. *Criminal Law Review*. [online]. 677-690 [Accessed November 2008], Crim. L.R. 682. Available from Westlaw. Quoting from Wearside Women in Need, Response No.303

<sup>47</sup> *Ibid*, Crim. L.R. 682, Quoting Response No. 326 to Government's Consultation Document.

<sup>48</sup> McGlynn, C., Rackley, E., 2007. Striking a balance: arguments for the criminal regulation of extreme pornography. *Criminal Law Review*. [online]. 677-690 [Accessed November 2008], Crim. L.R. 682. Available from Westlaw.

Further, contrary to objections of failure to recognise Human Rights, it has been contended that 'just because something is held to be speech does not mean that it is inherently good and automatically deserves protection'<sup>49</sup>. Extremists question whether pornography should be protected, as 'it does not contribute to any debate on a matter of public importance';<sup>50</sup> it harvests a very relaxed ideology of the traditional notion. Article 10(2) specifically states that this freedom may be subject to restriction prescribed by law, not only 'in the interests of public safety', but for 'the *protection of morals*'.<sup>51</sup> Found within the same line of reasoning used to champion 'freedom of expression', this suggests there is no reason why the Government's first intuitive justification should not weigh equally with the arguments of those who challenge it. Perhaps the Government fears that by failing to set parameters on public morality, there is a perceived danger that allowing possession of violent pornographic material suggests similar abuse is somehow tolerable.

However, there is apprehension that moral standards, fuelled by the Jane Longhurst case, appear to have influenced the decision to legislate. Failing to take account that, 'content which is deemed as extreme...disgusting or harmful by one person may be another's pornography'<sup>52</sup> does not appear committed to human rights, a concern particularly expressed by the BDSM community<sup>53</sup> and the Spanner Trust.<sup>54</sup> Freedom of speech 'must protect speech that we detest, as well as speech that we admire'<sup>55</sup> in order for liberty to be

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<sup>49</sup> Gourgey, N., 1997. Pornography and Freedom of Speech. *Entertainment Law Review*. [online]. 8 (3) [November 2008], Ent. L.R. 90. Available from Westlaw.

<sup>50</sup> Rowbottom, J., 2006. Obscenity laws and the internet: targeting the supply and demand. *Criminal Law Review*. [online] 97-109 [Accessed November 2008], Crim. L.R. 107. Available from Westlaw. Quoting *Wingrove v United Kingdom* (1983) 5 E.H.R.R. 573

<sup>51</sup> The Human Rights Act, Article 10 Freedom of Expression, Subsection (2). (Emphasis added).

<sup>52</sup> Akendiz, Y. 2005. *Cyber-Rights & Cyber-Liberties: Possession of Extreme Pornography Consultation-Cyber-Rights.Org Response* [online]. [Accessed November 2008]. Available from World Wide Web: < <http://www.cyber-rights.org/> >

<sup>53</sup> The Home Office, *Consultation on the Possession of Extreme Pornographic Material: Summary of Responses and Next Steps*, (August 2006); P. 10, Response 14, 15 and 16.

<sup>54</sup> McGlynn, C., Rackley, E., 2007. Striking a balance: arguments for the criminal regulation of extreme pornography. *Criminal Law Review*. [online]. 677-690 [Accessed November 2008], Crim. L.R. 684. Available from Westlaw, 'The Spanner Trust obtained the opinion of Rabinder Singh QC, in which he cautiously concludes that the legislation "gives rise to real concerns" as to its compatibility with the European Convention on Human Rights'.

<sup>55</sup> Gourgey, N., 1997. Pornography and Freedom of Speech. *Entertainment Law Review*. [online]. 8 (3) [November 2008], Ent. L.R. 93. Available from Westlaw.

protected. The American Constitution recognised this fundamental right in *Stanley*;<sup>56</sup> 'The makers of our Constitution...conferred, as against the government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized man'.<sup>57</sup> Mr Justice Marshall delivered that, 'Our constitutional heritage rebels at the thought of giving government the power to control men's minds'.<sup>58</sup> Yet, our Government is 'remarkably upfront' about their role as the 'moral authoritarians...telling people how to behave',<sup>59</sup> admitting that 'this material should have no place in our society'.<sup>60</sup> When Baroness Miller stressed concern over privacy in our bedrooms,<sup>61</sup> it was met by another subjective criticism, an appeal to the argument that 'most people'<sup>62</sup> would disapprove of the material anyway.

This suggests that introducing the legislation is disproportionate, as private morality has proven unsuitable ground for government meddling.<sup>63</sup> In light of insufficient evidence, the effects of Article 10, and given that 'English law reigns in a democratic society, one queries the necessity to muzzle the population'<sup>64</sup> through enacting such a restricted offence in an era rich with increasing diversity.

### ***Protecting Society from Harm***

The Government's second justification, known as the 'harm principle', proposes that the Act will protect society, especially women and children. It may be suggested that a filter

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<sup>56</sup> *Stanley v Georgia* (1969) [394 U.S. 557](#) (US Supreme Court Judgement)

<sup>57</sup> *Enfacto*. 2008. [online]. [Accessed November 2008]. Available from World Wide Web: < <http://www.enfacto.com/case/U.S./394/557/> > Case facts read for *Stanley v Georgia* (1969) [394 U.S. 557](#) (US Supreme Court Judgement) Mr. Justice Marshall at para [565] Quoting *Olmstead v. United States*, [277 U.S. 438](#), 478, 48 S.Ct. 564, 572, 72 L.Ed. 944 (1928) (Brandeis, J. dissenting)

<sup>58</sup> *Stanley v Georgia* (1969) [394 U.S. 557](#) (US Supreme Court Judgement) Mr. Justice Marshall delivered the opinion of the Court: at para [565]

<sup>59</sup> *Index on Censorship: Extreme Ignorance*. 2008 [online] [Accessed November 2008]. Available from World Wide Web: < <http://www.indexoncensorship.org/2007/06/26/extreme-ignorance/> >

<sup>60</sup> The Home Office, *Consultation: On the possession of extreme pornographic material*, (August 2005); P. 1

<sup>61</sup> *HANSARD (Lords)*. 21 April 2008, column 1360, per Baroness Miller of Chilthorne Domer

<sup>62</sup> *HANSARD (Lords)*. 3 March 2008, columns 907-908 per Lord Hunt of Kings Heath

<sup>63</sup> Akendiz, Y. 2005. *Cyber-Rights & Cyber-Liberties: Possession of Extreme Pornography Consultation-Cyber-Rights.Org Response* [online]. [Accessed November 2008]. Available from World Wide Web: < <http://www.cyber-rights.org/> > Quoting the Wolfenden Report (Report on the Departmental Committee on Homosexual Offences and Prostitution, 1957) and the Williams Committee Report- 'Obscenity and Film Censorship', HMSO, 1979).

<sup>64</sup> Ramage, S., 2008. The Little Red School Book and other harmful publications. *Criminal Lawyer*, [online] 186, 1-3 [Accessed November 2008] *Crim. Law*. 1. Available from Westlaw.



system alone to protect children would be adequate; however, it is likely that limitations in filter technology will prevent 'such a hypothetical ideal from ever becoming a reality'.<sup>65</sup>

Aiming to 'break the demand/supply cycle and discourage interest in the material'<sup>66</sup> represents divergence from setting moral standards, instead, focussing 'on the harm caused to women involved in the pornographic industry'<sup>67</sup> who may be victims of a crime, involuntarily subjected to that lifestyle.<sup>68</sup> McGlynn and Rackley emphasise the importance of political context; acknowledging the tragedy in *R. v Coutts*, the Government recognised the problem of sexual violence against women, and that it is *perhaps* exacerbated by availability of extreme pornography.<sup>69</sup> Authority from *Butler*<sup>70</sup> supplements this: 'this requirement does not demand actual proof of harm'.<sup>71</sup> Baroness Howe stressed that 'far too little is known about the long-term wider effects on society of indulging this kind of appetite'.<sup>72</sup> Additionally, the British Psychological Society claim that, whilst people may not use such material to develop such deviancy, 'those already vulnerable...may use such material to increase their vulnerabilities further'.<sup>73</sup> Thus, although conclusive evidence of the link is unavailable, there are implications that violent pornography *could* cause harm to women and children, therefore it may be considered

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<sup>65</sup> Akdeniz, D., Walker, C., Wall, D., 2000. *The Internet, Law and Society*. Published in Great Britain: Pearson Education; p. 227

<sup>66</sup> The Home Office, *Consultation: On the possession of extreme pornographic material*, (August 2005); P. 1

<sup>67</sup> McGlynn, C., Rackley, E., 2007. Striking a balance: arguments for the criminal regulation of extreme pornography. *Criminal Law Review*. [online]. 677-690 [Accessed November 2008], Crim. L.R. 682. Available from Westlaw.

<sup>68</sup> The Home Office, *Consultation: On the possession of extreme pornographic material*, (August 2005); P. 2

<sup>69</sup> McGlynn, C., Rackley, E., 2007. Striking a balance: arguments for the criminal regulation of extreme pornography. *Criminal Law Review*. [online]. 677-690 [Accessed November 2008], Crim. L.R. 679. Available from Westlaw. (Referring to *R. v Coutts (Graham James)* [2006] UKHL 39)

<sup>70</sup> *Butler v. The Queen* 1 SCR 452 (1999)

<sup>71</sup> Strossen, N. 2000. *Defending Pornography: Free Speech, Sex, and the Fight for Women's Rights*. New York and London: New York University Press, P. 249, Quoting from *Butler v. The Queen* 1 SCR 452 (199), p. 505

<sup>72</sup> *HANSARD (Lords)*. 13 October 2004, column 360, per Baroness Howe of Idlicote

<sup>73</sup> *Response from the British Psychological Society*. 2008. [online]. Available from World Wide Web: <<http://www.melonfarmers.co.uk/agcbps.htm> >

reckless for the Government not to protect their Right to Life,<sup>74</sup> a right which surely ranks higher than that of expression in this context.

Nevertheless, the 'dangerous intuitive approach'<sup>75</sup> in *Butler*<sup>76</sup> has been subject to criticism. If one follows the line of reasoning that exposure to sexist, violent materials bears a causal connection with sexual violence, then even if violent pornography could be completely censored, near identical images that 'pervade the mainstream media would remain untouched'.<sup>77</sup> The only difference is the context the images fall within, and it is not possible to determine which contexts, if any, provide a causal link between possession and sexual violence. This was touched upon at the Committee Stage of the Bill's passage through Parliament: 'violent images of a non-sexual nature...might have stimulated them to kill'.<sup>78</sup> If the Government intends to create legislation on the grounds of protection from harm, perhaps they should extend their reasoning into film and television. Moreover, the 'harm principle' must be balanced against the theory that 'viewing such images may actually be cathartic and operate as a "safety valve"'.<sup>79</sup> Since the reasoning the Government deployed behind this justification appears floored, these arguments only strengthen the proposition that they did not respond relatively.

### ***Bringing the Law into line with Child Pornography***

The 'protection from harm' reasoning can be extended further in light of the Government's third justification, that the proposal will compliment arrangements already in place for the possession of child pornography, where 'feeding the market...increases the likelihood of further abuse'.<sup>80</sup> In likening both materials to a 'record of abuse', a

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<sup>74</sup> Human Rights Act 1998, Article 2 Right to Life, Subsection (1): 'Everyone's right to life shall be protected by law'.

<sup>75</sup> Strossen, N. 2000. *Defending Pornography: Free Speech, Sex, and the Fight for Women's Rights*. New York and London: New York University Press, P. 249

<sup>76</sup> *Butler v. The Queen* 1 SCR 452 (199)

<sup>77</sup> Strossen, N. 2000. *Defending Pornography: Free Speech, Sex, and the Fight for Women's Rights*. New York and London: New York University Press, P. 249

<sup>78</sup> Akendiz, Y., 2008. Pornography, Freedom of Speech and the Internet, lecture notes distributed on the topic Cyberlaw: LAW 3030. Leeds University, The Speakman lecture theatre in the Wool Division on 24/31 October, 2008, Quoting Harry Cohen, 16 October 2007: Mr Cohen goes on to express how, 'there are thousands and thousands of horror films that show people being cut up, so why does this legislation concentrate of material of a sexual nature?'

<sup>79</sup> The Home Office, *Consultation on the Possession of Extreme Pornographic Material: Summary of Responses and Next Steps*, (August 2006); P. 13, Response 32

<sup>80</sup> The Home Office, *Consultation: On the possession of extreme pornographic material*, (August 2005); P. 1 and P.9

Child and Woman Abuse Studies Unit argue that it is right to act without concrete evidence when the sexually violent material 'may affect behaviour'.<sup>81</sup>

However, in justifying the possession offence for child porn, 'evidence exists that child abusers commonly use and are influenced by child pornography',<sup>82</sup> and 'no children, by definition, can consent to play a part in pornography, therefore legal protection for them is clearly required'.<sup>83</sup> Conversely, adults frequently consent to make pornography legally, so there is not such a clear cut need for the Government to intervene. Paedophiles in possession of photographs use them as 'tools for "grooming" children into child pornography...a danger that is distinct from the harms relating to the original making of a picture'.<sup>84</sup> Therefore, possession of the material is used for distinctly contemptible motives which are not shared in the offence under Section 63. This highlights the superficial nature of the comparison; it merely acts as an emotive appeal to already sensitive campaigners, strengthening the accusation of disproportion, as it imposes a stigma of paedophilia on someone who may, for example, possess only a realistic depiction<sup>85</sup> of bestiality.

### ***Repercussions of a Controversial Statute***

Concern over proportionality does not end with debate over the decision to legislate – it extends to enforcement. Primarily, words used throughout the consultation period by each corner of authority, such as 'abhorrent',<sup>86</sup> 'vile'<sup>87</sup> and 'awful stuff'<sup>88</sup> appear to reflect those transcribed onto the Act itself. Described as the 'language of the over-heated moral

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<sup>81</sup> The Home Office, *Consultation on the Possession of Extreme Pornographic Material: Summary of Responses and Next Steps*, (August 2006); P. 11, Response 21

<sup>82</sup> *HANSARD (Lords)*. 13 October 2004, Column 362, per Lord Chan

<sup>83</sup> *Please get interfering Government Ministers out of our bedrooms- Carol Sarler*. 2008 [online]. [Accessed November 2008]. Available from World Wide Web: < <http://www.guardian.co.uk/commentisfree/2006/sep/03/comment.politics> >

<sup>84</sup> Akendiz, Y. 2005. *Cyber-Rights & Cyber-Liberties: Possession of Extreme Pornography Consultation-Cyber-Rights.Org Response* [online]. [Accessed November 2008]. Available from World Wide Web: < <http://www.cyber-rights.org/> >

<sup>85</sup> Criminal Justice and Immigration Act 2008, Section 63(6) 'An "extreme image" is an image which... a reasonable person looking at the image would think that any such person or animal was real'

<sup>86</sup> The Home Office, *Consultation: On the possession of extreme pornographic material*, (August 2005); P. 1

<sup>87</sup> *HANSARD (Commons)*, 8 October: Column 60, per Jack Straw

<sup>88</sup> *HANSARD (Lords)*. 3 March 2008, Column 907; per Lord Hunt of Kings Heath

crusader',<sup>89</sup> it is feared that words such as 'disgusting', 'grossly offensive' and 'purpose of sexual arousal' will cause confusion for juries, (especially when concerning a realistic depiction) and inconsistency in application, as the wording relies on subjective opinion, experience and even 'gut reaction'.<sup>90</sup> Thus, enforcement of the statute increases the potential for injustice through the conclusions of narrow minded jurors.

In such an offence, 'clarity is crucial...an ill-defined possession law could potentially discourage individuals from viewing legal material if [they] want to be sure not to commit a criminal offence'<sup>91</sup> or endure the mortifying prosecution. Enforcement could also lead to unnecessary intrusion into Article 8.

Nevertheless, the European Court of Human Rights has accepted that 'even the best-drafted laws will require an element of interpretation and gradual clarification through judicial decision making'.<sup>92</sup> Intricate challenges in wording a statute will always leave areas of vagueness open to jurors; however the guidance of a judge alleviates this and works effectively in similar subjective offences.

Additionally, to assist with a proportional effect in sentencing, 'similar guidelines as set out in *Oliver*<sup>93</sup> will be necessary', which treated simple possession of, creating and making a pseudo child pornography image as less serious than possession, making or creating a real one.<sup>94</sup> However, the complexity of setting these thresholds is exasperated by increasingly advanced digital imaging.

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<sup>89</sup> *Index on Censorship: Extreme Ignorance*. 2008. [online] [Accessed November 2008] Available from World Wide Web: < <http://www.indexoncensorship.org/2007/06/26/extreme-ignorance/> >

<sup>90</sup> *Index on Censorship: Something Must Be Done – 'The Government's latest legislation on 'extreme pornography' is based on ill-informed notions'*, by Julian Petley. 2008. [online] [Accessed November 2008] Available from World Wide Web: < <http://www.indexoncensorship.org/2008/06/10/something-must-be-done/> > Quoting the Labour MP Ian Mikardo in a Parliamentary debate on 3 April 1987

<sup>91</sup> Rowbottom, J., 2006. Obscenity laws and the internet: targeting the supply and demand. *Criminal Law Review*. [online] 97-109 [Accessed November 2008], Crim. L.R. 102. Available from Westlaw.

<sup>92</sup> Rowbottom, J., 2006. Obscenity laws and the internet: targeting the supply and demand. *Criminal Law Review*. [online] 97-109 [Accessed November 2008], Crim. L.R. 107. Available from Westlaw. Citing *SW & CR v United Kingdom* (1995) 21 E.H.R.R 363 at [33]

<sup>93</sup> *R v Oliver and others* [2002] EWCA Crim 2766

<sup>94</sup> Akdeniz, Y., 2008. *Extreme Pornography: Sentencing Issues*. [online] [Accessed November 2008] Available from World Wide Web: < <http://cyberlaw.org.uk/2008/05/07/extreme-pornography-sentencing-issues/> >

Further disproportionate aspects include that Section 69<sup>95</sup> and 70<sup>96</sup> of the Sexual Offences Act 2003 attract a penalty of imprisonment not exceeding two years, whereas the proposed penalty under the Criminal Justice and Immigration Act 2008 for a Section 63(7)(c)<sup>97</sup> or 63(7)(d)<sup>98</sup> offence is imprisonment for two years, a fine, or both. 'Surely intercourse with a living animal or the sexual penetration of a corpse under the 2003 Act are more serious offences than simple possession of a real or appears to be real image'.<sup>99</sup> However, the fact that the Government have incorporated a fine as a form of punishment may have been included to exercise discretion in light of this extreme disproportion.

### Final Thoughts

Having examined the key studies there appears to be only weak evidence suggesting a link between possession and sexual violence, which in every instance appears rebuttable due to the methodologies chosen. One cannot dispense with the appreciation of scientific evidence simply to obtain a result desired by the voting majority.

It is clear that opinion supporting the proposal is coloured by subjective belief, and having delved into the Government's intuitive justifications, it emerges that a favoured moral code lines their reasoning, propped by the experience of one family and their tireless campaign for justice in a tragic, yet isolated, case. The Government appear reasonable in recognising that harm *may* occur should they not act; however, the only relationship the Act bares with child pornography is that subjective words in defining the offence are likely to make it equally difficult to apply.<sup>100</sup> Although, it is perhaps only fair to take an impartial approach with regard to the repercussions, as enforcement has not yet passed.

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<sup>95</sup> The Sexual Offences Act 2003, Section 69 Intercourse with an animal

<sup>96</sup> The Sexual Offences Act 2003, Section 70 Sexual penetration of a corpse

<sup>97</sup> The Criminal Justice and Immigration Act 2008, Section 63(7)(c) 'an act which involves sexual interference with a human corpse'.

<sup>98</sup> The Criminal Justice and Immigration Act 2008, Section 63(7)(d) 'a person performing an act of intercourse or oral sex with an animal'.

<sup>99</sup> Akendiz, Y., 2008. *Extreme Pornography Offence includes disproportionate penalties*. [online] [Accessed November 2008] Available from World Wide Web: <http://cyberlaw.org.uk/2008/05/01/extreme-pornography-offence-includes-disproportionate-penalties/>

<sup>100</sup> Rowbottom, J., 2006. Obscenity laws and the internet: targeting the supply and demand. *Criminal Law Review*. [online] 97-109 [Accessed November 2008], Crim. L.R. 102. Available from Westlaw; due to uncertainty in the meaning of the word 'indecent', the famous newsreader was reported by photograph developers for taking photos of her daughter in the bath.

Nevertheless, acting impulsively to calm media commotion is 'invariably the worst possible basis for legislation, as evidenced by the Dangerous Dogs Act 1991'.<sup>101</sup> Perhaps the Government should have more carefully considered the responses to the consultation for a more proportionate answer. 'Whilst one cannot doubt their intentions, one must doubt their logic'.<sup>102</sup>

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<sup>101</sup> *Index on Censorship: Something Must Be Done – 'The Government's latest legislation on 'extreme pornography' is based on ill-informed notions', by Julian Petley.* 2008. [online] [Accessed November 2008] Available from World Wide Web: < <http://www.indexoncensorship.org/2008/06/10/something-must-be-done/> >

<sup>102</sup> *Laws on porn won't combat sexual violence, by Mary Ellen Synon.* 2008. [online] [Accessed November 2008] Available from World Wide Web: < <http://www.backlash-uk.org.uk/synon.html> > Taken from an article in the Daily Mail on Monday 11<sup>th</sup> September 2006

*The Charities Act 2006: The Present Position and Suggested Reforms*

ERIC LEE VUI LOONG

The Charities Act, 2006, outlines the charitable purposes for which an organisation may be established as a charity. However, political purposes are not included within such purposes because the court 'has no means of judging whether a proposed change in the law will or will not be for the public benefit.'<sup>1</sup> Therefore, an organisation will not be charitable if its purposes are political.

However, political purposes are to be distinguished from political activity, which is defined as: 'any activity by a charity which is aimed at securing, or opposing, any change in the law or in the policy or decisions of central government, local authorities or other public bodies, whether in this country or abroad.'<sup>2</sup> Charities are permitted to undertake political activities only to the extent that it supports its charitable purposes, but it cannot be the 'continuing and sole activity' of the charity. Additionally, a charity may allocate most, or all, of its resources on political activity for a period, so long as this activity does not become the reason for the charity's existence. In any case, charities cannot engage in any form of party political activity.

Prior to the Charity Commission's new guidance in March 2008,<sup>3</sup> political activity could not be a charity's 'dominant' activity, and could only be 'ancillary' to its purposes. Furthermore, there was no clear distinction between campaigning and political activity. Thus, it was found that there were wide variations in charities' understanding of the degree of campaigning that was legally permissible,<sup>4</sup> which has led to unnecessary self-censorship by some groups.<sup>5</sup>

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<sup>1</sup> *Bowman v Secular Society Ltd* [1917] AC 406 at 442, HL, per Lord Parker; *National Anti-Vivisection Society v IRC* [1948] AC 31, [1947] 2 All ER 217, HL

<sup>2</sup> 'CC9 - Speaking Out - Guidance on Campaigning and Political Activity by Charities', March 2008, Charity Commission, <http://www.charitycommission.gov.uk/publications/cc9.asp#3>

<sup>3</sup> *Ibid.*

<sup>4</sup> *Survey of Campaigning Activities and Charity Commission Guidance (CC9)* (London: nfpSynergy, 2006) at <http://www.nfpsynergy.co.uk/freereports/>

<sup>5</sup> *Campaigning and political activities by charities, Board Paper Number (08) OBM 3.*

Nevertheless, the new guidelines distinguish instead between general campaigning activities, which can be pursued where they 'further' charitable purposes, and political activities, which can only be pursued if they 'support' charitable purposes.<sup>6</sup> Although the guidelines do not explicitly define 'furtherance' and 'support', it makes clear that 'campaigning' refers to awareness raising, and making sure existing laws are observed; while 'political activity' is trying to change the law, or a policy of central or local government.<sup>7</sup>

However, Dunn<sup>8</sup> argues that the difference between dominant and ancillary political activity is conceptually clear, even if the precise boundary is not. Conversely, the distinction between 'furthering' a charitable purpose by campaigning, and 'supporting' it by political campaigning is not conceptually clear, and does not have a precise boundary. Indeed, Purkis pointed out that the words were listed in the dictionary as synonymous.<sup>9</sup> As such, there is a need to provide a definition of the words 'furtherance' and 'support' in order to clarify the distinction between the two.

Although the guidance makes clear that charities cannot have a political purpose, it nevertheless acknowledges that 'there are some purposes (such as the promotion of human rights) which are more likely than others to lead trustees to want to engage in campaigning and political activity.'<sup>10</sup> Hence, it may be possible for the Commission to structure a more tailored guidance for those charities whose purposes involve more political activities, by considering whether there might be a greater scope for political activity.<sup>11</sup>

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<sup>6</sup> Charity Commission, *Speaking Out: Guidance on Campaigning and Political Activities by Charities* (March 2008), para D1

<sup>7</sup> *Ibid*, para C4

<sup>8</sup> A Dunn, 'Charities and Restrictions on Political Activities: Developments by the Charity Commission for England and Wales in Determining the Regulatory Barriers', *The International Journal of Not-for-Profit Law*, Volume 11, Issue 1, November 2008

<sup>9</sup> P Jump, 'Disagreements delay political campaigning guidance', *Third Sector Online*, 1 February 2008, <http://www.thirdsector.co.uk/Channels/Communications/Article/781041/Disagreements-delay-political-campaigning-guidance/>

<sup>10</sup> Charity Commission, *Speaking Out: Guidance on Campaigning and Political Activities by Charities* (March 2008), para D3

<sup>11</sup> A Dunn, 'Charities and Restrictions on Political Activities: Developments by the Charity Commission for England and Wales in Determining the Regulatory Barriers', *The International Journal of Not-for-Profit Law*, Volume 11, Issue 1, November 2008



Parallel to this, the new guidance allows a charity to focus most, or all, of its resources on political activity, in support of a charitable purpose for a period, provided it is not a charity's 'continuing and sole' activity.<sup>12</sup> Although this change has been welcomed by several sectors,<sup>13</sup> its intended purpose may be undermined by the fact that medium and smaller charities often fail to fully utilise the legal process, mainly because they lack the appropriate skills or knowledge, or were unaware of the permissible political activities.<sup>14</sup>

For example, on 3rd January 2008, the British Muslim Initiative, which included 16 charities, declared their support for Ken Livingstone as mayor of London, violating the requirement not to support a political party or candidate.<sup>15</sup> Furthermore, a 2006 survey found that up to half of charities surveyed were unaware or unsure about the Charity Commission guidelines.<sup>16</sup> Thus, there is a pressing need for the greater education and capacity building of charity trustees and their organisations on the nature and extent of their role in influencing the policy process.

Besides that, the Communications Act, 2003, (CA 2003) prohibits charities from broadcasting 'political' advertisements, which includes advertisements that aim to 'influence public opinion on a matter of controversy in the UK'.<sup>17</sup> Although its purpose is said to be to protect public debate and the electoral process from distortion by wealthy operators,<sup>18</sup> such a prohibition would prevent many charities from responding to television advertising in the same media as commercial organisations.<sup>19</sup> For example, large corporations would be allowed to broadcast vanity advertising about its green

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<sup>12</sup> Charity Commission, *Speaking Out: Guidance on Campaigning and Political Activities by Charities* (March 2008), para B2, C2, E1, G1, Appendix 1

<sup>13</sup> 'Talking Point: Campaigning', Third Sector, 12 March 2008,

<http://www.thirdsector.co.uk/Channels/Communications/Article/789695/Talking-Point-Campaigning/>

<sup>14</sup> A Dunn, 'Charities and Restrictions on Political Activities: Developments by the Charity Commission for England and Wales in Determining the Regulatory Barriers', *The International Journal of Not-for-Profit Law*, Volume 11, Issue 1, November 2008

<sup>15</sup> R Butt, 'Muslim leaders back Livingstone as mayor', *The Guardian*, 3 January 2008,

<http://www.guardian.co.uk/politics/2008/jan/03/religion.london>

<sup>16</sup> *Survey of Campaigning Activities and Charity Commission Guidance (CC9)* (London: nfpSynergy,2006) at <http://www.nfpsynergy.co.uk/freereports/>

<sup>17</sup> s.321(3)(f), Communications Act 2003

<sup>18</sup> *R (on the application of Animal Defenders International) v Secretary of State for Culture Media and Sport* [2008] UKHL 15 (12 March 2008), per Lord Bingham

<sup>19</sup> *Report of the Advisory Group on Campaigning and the Voluntary Sector* (London: Advisory Group, 2007) at [www.bateswells.co.uk/Files/News/CampaigningReport.doc](http://www.bateswells.co.uk/Files/News/CampaigningReport.doc) p2.

credentials, but green campaigners are banned from rebutting their claims using the same method.<sup>20</sup>

However, other jurisdictions, such as Italy and New Zealand, have proved that a system which allows social advocacy advertising, but prevents political party advertising, is very much possible. The common criteria between Italian law<sup>21</sup> and New Zealand law<sup>22</sup> for permitting such advertising, is that the advertiser must be clearly identified, and that the opinions expressed must be clearly distinguishable from factual information. As such, it is submitted that adopting such measures in the UK would reduce the unnecessary restrictions on the ability of charities to campaign effectively.

All in all, the Charity Commission's 2008 guidelines mark a welcomed departure from the original cautionary approach, by removing the 'dominant/ancillary' rule, whilst defining 'campaigning' and 'political activity', and by conditionally allowing charities to focus all their resources on political activities for a period. Nevertheless, the present position is not entirely satisfactory, in that there remains a need to clearly define the words 'furtherance' and 'support'. Additionally, tailored guidance is required for those charities whose purposes involve more political activities, while charity trustees and their organisations should be provided with greater education. Furthermore, the ban on social advocacy advertising in the broadcast media should be removed. In any event, the law itself remains unchanged in that charities cannot have a political purpose, and given that the Charities Act of 2006 has recently come into force in 2008, any new legislative changes in the immediate future seem unlikely.

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<sup>20</sup> Ibid.

<sup>21</sup> Art.46, Code of Marketing Communication Self-Regulation Italy, <http://www.iap.it/en/codice.htm>

<sup>22</sup> Rule 11, Advisory Standards Authority Code of Ethics, New Zealand, [http://www.asa.co.nz/advocacy\\_principles.php](http://www.asa.co.nz/advocacy_principles.php)

*Presumed likely to re-offend? A review of the UKBA's detention of foreign national prisoners*

ALEX TINSLEY

**Abstract**

This article will first review the basic legal framework of immigration detention and explain where risk-assessment bites in the process. It will then outline the systems in place for assessing foreign national prisoners at the transition from prison to immigration detention, and at subsequent reviews of detention. It will refer to the Harm Matrix, a categorisation device so far undisclosed by the UK Border Agency, and underline the lack of transparency in the other risk-assessment system in operation. It will then review the case of *R (Abdi) v SSHD* and the use of an 'undisclosed' before the current system was in place. It will suggest that in the light of this episode, there is ample reason to question how fair the current system is. It will argue in conclusion that the UKBA, essentially now a security agency, seems to avoid the full scrutiny of the courts in order to achieve the government's political objectives.

**Introduction**

When an offender is sentenced to custody, the factual justification for depriving him of his liberty is proved beyond reasonable doubt, to the satisfaction of a criminal tribunal of fact. That is the norm, and one would expect no less. The picture in immigration detention is slightly different. If the same individual, now time-served, is to be deported, he can be detained pending his removal. But now the factual judgment is that of an administrative decision-maker, subject to the supervision of the administrative court and the asylum and immigration tribunal.

One of the factual judgments that must be made is the prisoner's likelihood of re-offending if released. This article will, after reviewing the legal framework for immigration detention, detail the systems in place for making that assessment. It will suggest that as things stand, the courts capable of reviewing detention are deprived of valuable evidence going to the likelihood of re-offending. Therefore, the factual basis for

the decision – the decision to deprive someone of their liberty – is proved only to a relaxed standard. This is, at least, an awkward systemic problem.

Or it is strategic. The UK Border Agency (UKBA) has its objectives, after all. It is tasked with protecting the public, and ministers answerable to media pressure demand results. This has in the past led the agency to avoid the scrutiny of the courts. By reference to the infamous ‘undisclosed’ detention policy discovered in 2008, this article will suggest that the UKBA is currently driven by political imperatives and that it has a positive incentive to limit judicial inquiry into its decisions. The real worry, it will be argued, is that the institutional practices detailed below herald an acceptance within the agency that where foreign criminals are concerned, policy imperative outweighs due process.

### **Immigration Detention: Legal Framework**

Under the Immigration Act 1971, a person who is not a British citizen is liable to deportation if the Secretary of State for the Home Department (SSHD) deems his deportation ‘conducive to the public good’. The Crown Court also has the power to recommend deportation upon conviction for an imprisonable offence<sup>1</sup>. The SSHD must exercise this power where a ‘foreign criminal’ is sentenced to a period of imprisonment of at least twelve months.<sup>2</sup> However it may still be – and is – invoked even where this statutory obligation is not engaged.

Once a decision is made to deport, or where a recommendation to deport is made by a court, there arises a power to detain pending removal or departure.<sup>3</sup> That power to detain is subject to the substantive principles in *R v Governor of Durham Prison, ex parte Hardial Singh*<sup>4</sup>. Under *Hardial Singh* principles, detention under the 1971 Act is limited to the period reasonably necessary for carrying out deportation. That period is elastic. It varies according to a number of factors such as the likelihood of removal happening, the efforts being made by the SSHD to remove the detainee, the risk of absconding if

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<sup>1</sup> Section 3(5) and (6)

<sup>2</sup> s 32(5)

<sup>3</sup> Sch. 3 paragraph 2 (1), (1A) and (2)

<sup>4</sup> [1984] 1 WLR 704

released, and, predictably, the risk of re-offending. The focus of this article will be on this last element.

The rationale underlying the 'risk of re-offending' element was succinctly put by Simon Brown LJ (as he then was) in *R (I) v SSHD*<sup>5</sup>. In paragraph 29 he said:

If, say, one could predict with a high degree of certainty that, upon release, the detainee would commit murder or mayhem, that to my mind would justify allowing the Secretary of State a substantially longer period of time within which to arrange the detainee's removal abroad.

So at the initial decision and thereafter, the likelihood of re-offending will in part determine whether or not a foreign national is to be deprived of his liberty.

This 'one' who is supposed to predict the possibility of a time-served prisoner re-offending is an officer of the Criminal Casework Directorate (CCD), who will make the decision to detain. That caseworker is also supposed to review detention on a monthly basis to check that the criteria for detention are still satisfied.<sup>6</sup> These decisions are not just made on a liberal application of *Hardial Singh* principles. The law is translated into policy instructions which the CCD is supposed to follow. Those instructions, and their application, will be the focus of this article. As will be seen below, the current system is convoluted, lacks transparency, and is arguably designed to limit the extent to which the court can interfere.

### **Unchallengeable risk-assessment**

#### ***The systems***

The current policy is contained in Chapter 55 of the Enforcement Instructions and Guidance ('Chapter 55'). In keeping with the common law, there is a (notional) presumption in favour of release. The policy reads:

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<sup>5</sup> [2002] EWCA Civ 888

<sup>6</sup> Pending the outcome of *R (SK) (Zimbabwe) v SSHD*, currently awaiting judgment in the Supreme Court, it is not clear whether in law these reviews constitute fresh decisions to detain or merely passive non-interferences with the original decision. In any event, the whole process is executive and subject to the policy instructions.

...the starting point in [the case of foreign national prisoners] remains that the person should be released on temporary admission or release unless the circumstances of the case require the use of detention. However, the nature of these cases means that special attention must be paid to their individual circumstances. In any case in which the criteria for considering deportation action (the 'deportation criteria') are met, *the risk of re-offending* and the particular risk of absconding should be weighed against the presumption in favour of temporary admission or temporary release (emphasis added).<sup>7</sup>

The policy also specifies that in the case of violent, sexual, drug-related and other serious offences, 'particularly substantial weight should be given to the risk of re-offending'. 'In practice', it continues, 'release is likely to be appropriate only in exceptional cases'.

That is all very well. In the case of a serious, persistent offender, it will not require a great feat of hypothesis to conclude re-offending is likely. Indeed, many obvious correlations apply and a good educated guess is usually possible: drug users, for instance, often return to acquisitive crime.<sup>8</sup> Particularly relevant to immigration is the correlation with unemployment,<sup>9</sup> since persons subject to immigration control are usually prohibited from working. But the risk of re-offending necessarily involves some delicate evaluation of an individual at a psychological level as well as by reference to their criminal antecedents. The offender may seek, and respond to, drug rehabilitation, anger management or psychiatric treatment in prison. Custody itself may have a salutary effect on him.

These factors are monitored by the Probation Service while an offender is in prison under the Offender Assessment System (OASys). OASys assessment is continual, and where a prisoner nears the early release date, to be released on license, it will be used to provide the Probation Service with guidance on the level of supervision to require as a condition

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<sup>7</sup> Enforcement Instructions and Guidance (EIG) Para. 55.3

<sup>8</sup> For a full discussion of the evidence on this point see *Reducing Drug Use, Reducing Reoffending* (full report) UK Drug Policy Commission, March 2008, or '*Reducing re-offending by ex-prisoners*', *Summary of the Social Exclusion Unit Report*, Cabinet Office July 2002. Interestingly, even this correlation is more complex than is widely assumed.

<sup>9</sup> Morgan, P *Remand Decisions and Offending on Bail* Home Office Research Studies (1998), p.184

of the license. Chapter 55, and a parallel Probation Service circular,<sup>10</sup> establish a process whereby the CCD contacts the Probation Service to obtain a pro-forma OASys report for the purposes of the decision to detain.<sup>11</sup> The process is then supposed to be repeated whenever CCD review detention, or if the detainee applies to be released on bail for the purposes of preparing a bail summary to oppose release.

However, an OASys report will only be available where the sentence was twelve months or more. In other cases where the SSHD has decided to deport, it will not be available. In those cases, Chapter 55 requires CCD to make their own assessment, based on 'the nature of the original offence, any other offences committed, record of behaviour in prison and Immigration Removal Centre(s) and general record of compliance'.<sup>12</sup> The emphasis is on the offence, however, and in particular where the offence is 'violent, sexual or drug-related' a high risk will be assumed. This, it is thought, is where the 'Harm Matrix' applies.

The Harm Matrix is an assessment system which allows case-by-case classification of offenders as Category A, B or C (corresponding to high-, medium- and low-risk). Category A contains murder, rape, people and drug trafficking, violent crime and child abuse; category B contains illegal working and identity fraud; and category C covers minor immigration offences and anti-social behaviour. Little is known of the matrix, since it is not disclosed, as will be seen in the discussion below. However, it is clear that it allows staff to calculate the risk to the public posed by a given offender. For instance, if a detainee is bailed or released from detention, staff at the National Asylum Support Service use it to assess the suitability of the accommodation they provide.<sup>13</sup> Or, if a released detainee absconds, the Harm Matrix calculus will govern the extent of

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<sup>10</sup> Probation Circular 32/2007

<sup>11</sup> The circular provides a form specially for the purpose, which includes specific questions to be answered with the help of OASys records. This is different from a comprehensive OASys report which the Probation Service would use when making arrangements for the release of an offender back into the community.

<sup>12</sup> EIG Paragraph 55.3.2.8

<sup>13</sup> UK Asylum Process Guidance: Section 4 Bail Accommodation,

enforcement action that should be taken in response.<sup>14</sup> It also serves at management level to allocate resources and prioritise the deportation of high-risk offenders.<sup>15</sup>

### *The lack of transparency*

Neither of these systems is of much assistance to the courts. Although OASys reports are supposed to be available to applicants (whether for bail or judicial review), none of the documents issued to detainees contain any reference to them,<sup>16</sup> and their existence is not widely known. Further, they do not feature in Subject Access Request files obtained under the Freedom of Information Act (FOI). As for Harm Matrix assessment, practitioners simply do not know how it works. Indeed, the functions described above are known only because various policy documents refer to it. The details remain under wraps, and FOI requests for full disclosure have so far been resisted. Even on the strength of the three headline categories, there is cause for concern. When they were disclosed at the National Asylum Stakeholder Forum in 2009, stakeholders noted that 'violent crime', for instance, was worryingly vague, capable of catching minor assaults as much as manslaughter.<sup>17</sup>

In an obvious case this will not make much difference. Detention can lawfully extend well beyond 30 months if the offending history clearly justifies it. Equally, the court may ignore the CCD's assessment if they find it unreasonable. For instance, in *R (Polanco) v SSHD*<sup>18</sup>, the judge said in paragraph 22:

I do not accept the Secretary of State's assessment of the likelihood of the claimant's re-offending ... the claimant was released from his prison sentence on licence, at a date which does not appear to have been delayed by any doubts about the danger he posed to the community. There is no suggestion that he committed any further offence whilst he was at liberty.

It was difficult to see why it was thought that he was fit to be in the

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<sup>14</sup> Enforcement Instructions and Guidance, chapter 19

<sup>15</sup> Home Office: 'Control of Immigration: Quarterly Statistical Summary, January – March 2009', United Kingdom

<sup>16</sup> Reasons for detention letters, monthly progress reports, and bail summaries

<sup>17</sup> Minutes of the National Asylum Stakeholder Forum, Meeting 13, 22 September 2009.

<sup>18</sup> [2009] EWHC 826 (Admin)



community relatively soon after commission of the offences, but is now regarded as unfit to be in the community because of the risk of his committing further offences.

However, such instances are rare; indeed, Polanco was released from prison in early 2006, before the detention regime tightened. Today, he would undoubtedly be detained at the end of his custodial sentence, and would therefore not be able to rely on the fact of his earlier release from prison to counter the SSHD's assertion. What is more likely now is simply that judicial inquiry will be insufficiently informed. In an arguable case, the absence of a complete risk-assessment leaves the court without a valuable piece of evidence. This is not good for justice.

First, LSC funding for immigration detention cases is scant and many applicants represent themselves at judicial reviews and bail hearings. They may not be in a position to address their offending history as they would if they were represented, even if their case is arguable. Even if they are represented, there will probably take place a rather unsophisticated clash of template submissions: the SSHD asserting there is an unacceptable risk of harm to the public, and the detainee flatly denying it. That was the case in *R (Mamki) v SSHD*<sup>19</sup>, in which the judge noted counsel's lament that there was no up to date assessment available, but ultimately based his decision on the offending history alone.<sup>20</sup> Given that these factual judgments will ultimately decide whether an individual is deprived of his liberty, it is submitted that this relaxed approach is unsatisfactory. One might say the system is flawed, characteristically for a bureaucratic public agency. But this particular agency's track record invites a less sympathetic conclusion.

#### **A track record of secrecy**

In April 2006, the media revealed that 1,023 foreign national prisoners (FNPs) had been released from prison and that their whereabouts were unknown. In fact, they could have

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<sup>19</sup> [2007] EWHC 3115 Admin

<sup>20</sup> *ibid.* at para. 20

been detained further and deported. Cue public uproar<sup>21</sup> and ministerial pledge-making.<sup>22</sup> There followed a two-year period in which the agency<sup>23</sup> operated an 'undisclosed policy' of presumptively detaining virtually every FNP, a policy subsequently found unlawful.

Throughout the period of April 2006 to June 2008, the UKBA's published policy for the detention of FNPs was set out in Chapter 38 of the Operations Enforcement Manual (Chapter 38). On the face of it, it too provided that there was a presumption in favour of release, and that where possible alternatives to detention should be employed. This could be displaced on the circumstances of the case. However, in the series of cases culminating in *R (Abdi and others) v SSHD*,<sup>24</sup> it was revealed that in fact the UKBA had been operating an undisclosed or 'secret' policy which did not match its published instructions.

The policy actually in operation had, since April 2006, been predicated on a presumption in favour of detention. It had been known since *R (Sedrati) v SSHD*<sup>25</sup> that the detention pending deportation power did not create any such presumption, and yet it was being applied. One internal email from June 2006, disclosed in the course of the *Abdi* litigation, indicated that 'CCD are pretty much just detaining all FNPs without proper consideration/review process'.<sup>26</sup> Another from September 2006 read '[i]n recent months ... we have been detaining *all* criminal cases where it is decided to pursue deportation'.<sup>27</sup>

The published policy was eventually revised to match the internal policy, and openly stated the presumption in favour of detention. Applying *Sedrati*, Davis J duly found that policy unlawful. It was therefore quickly revised, and became the current Chapter 55. The episode is revealing, in that it demonstrates the extent to which the agency was prepared

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<sup>21</sup> See, for instance, '1,000 foreign prisoners escape deportation after release' *The Independent*, 25 April 2006

<sup>22</sup> The Home Secretary, at the time, was Charles Clarke

<sup>23</sup> The UKBA did not exist until 2007. The agency responsible for the earlier portion of this period was the Immigration and Nationality Directorate, which was subsumed into the UKBA. Reference is made to the UKBA in the following paragraphs to avoid confusion.

<sup>24</sup> [2008] EWHC 3166 Admin

<sup>25</sup> [2001] EWHC 410 Admin

<sup>26</sup> *ibid.* at 43.3

<sup>27</sup> *ibid.* at 43.8

to avoid the censure of the courts in order to meet political objectives. It also casts a shadow over the current system.

### **Good politics, bad practice**

Indeed, the political motive for detaining FNPs, and keeping them detained, is no less pervasive now than it was in 2006. And it is quite possible that the availability of OASys reports is kept quiet deliberately (there used to be an obligation to disclose the assessment to an applicant's representatives, but the Probation Circular has withdrawn it). The Harm Matrix, as has been seen, is certainly withheld purposefully. So whatever case-by-case assessment is going on, it is kept in-house and scope for judicial scrutiny is minimised. This is consistent with the government's repeal of the provision for automatic bail hearings,<sup>28</sup> which again shows an unwillingness to multiply the opportunities for detainees to be set free.

None of this is surprising, of course. The 'dangerous foreigner'<sup>29</sup> has been the totem of the last decade's safety politics which has seen a gross conflation of migration and security. The Security Council has repeatedly stressed the asylum system should not be allowed to be abused by possible terrorists.<sup>30</sup> Here, the legislature defined the 'serious criminal' exception to the Refugee Convention<sup>31</sup> as catching anyone sentenced to two years' imprisonment,<sup>32</sup> a risk definition altogether harsher than ever intended by the Convention.<sup>33</sup> So the UKBA, in its ordinary immigration and deportation functions, has become a frontline arm of state security; so it has an incentive to obfuscate its systems and not disclose its policies.

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<sup>28</sup> Under s 44 of the Immigration and Asylum Act 1999, repealed in 2003 before it ever came into force.

<sup>29</sup> The expression is that of Kostakopoulou, D 'How to Do Things with Security post-9/11', *Oxford Journal of Legal Studies*, 1 June 2008

<sup>30</sup> See, for example, resolutions 1269 and 1373

<sup>31</sup> The 1951 Convention relating to the Status of Refugees

<sup>32</sup> Nationality, Immigration and Asylum Act 2002, s 72. The provision has now been read down, but it took five years. In the meantime, UKBA caseworkers will have been busy cancelling or denying refugee status for anyone sentenced to two years' imprisonment, ostensibly in defence of national security.

<sup>33</sup> 'a risk definition...the Convention': this was a theme of a lecture by Prof Goodwin-Gill 'Refugees, Security and the Right to Protection', 27 November 2009, Birkbeck School of Law

Any lack of procedural transparency or fairness usually incites much consternation. For instance, where the SSHD imposes control orders, the decision immediately attracts the attentions of human rights lawyers, the Special Immigration Appeals Commission, and the media alike. The rights of controlees are jealously guarded, as the courts are anxious to ensure public safety politics encroach as little as possible on the rights of individuals. However, as has been seen, the internal workings of state agencies are not susceptible to such close scrutiny.

Not only is institutional functioning hard to scrutinise and challenge, it will also surely be harder to correct as time passes. Even Thucydides and Machiavelli – advocates *par excellence* of the theory that the state of emergency justified the suspension of ordinary laws and civility in order to safeguard the state – always believed that these should be restored once the emergency subsides. Civil liberties advocates already express a concern that the legislative tendencies of the last decade have influenced the culture within executive branches. It is – in theory – possible to roll back s44 or the photography provision, but a lot more difficult to reform the culture these powers have instilled, so the argument goes.<sup>34</sup> In immigration, the onus has been on curbing asylum and increasing enforced removals, with a robust attitude towards the rights of migrants (perhaps best exemplified by the use of destitution to deter migration).<sup>35</sup> The worry is that this objective now drives the agency to avoid the scrutiny of the courts, and that such tactics will become institutionally ingrained.

### Conclusion

The operations of the UKBA, and Chapter 55 in particular, do not lend themselves to easy analysis. One recent challenge denounced the latter as an ‘extraordinarily

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<sup>34</sup> Michael Mansfield, for instance, has recently adopted the phrase ‘institutional denial’ to describe the police’s response to the death of Ian Tomlinson at the G20 protests last year. It will be recalled that one of the explanations offered was that protestors sometimes dress up as policemen, and that one such impostor might have been responsible for pushing Mr Tomlinson to the ground shortly before his death from a cardiac arrest. His suggestion is that such responses are the result of a lack of accountability resulting from the police being positioned above the law.

<sup>35</sup> See *R (Limbuela and others) v Secretary of State for the Home Department* [2005] UKHL 66

convoluted document<sup>36</sup> incapable of having the force of law. This author agrees. And yet it determines the fate of many foreign nationals who – lest one forget – have served their time and in the eyes of the criminal law have been punished for their offences. The risk-assessment attached to decisions under Chapter 55 is even less transparent. This could, and should, be improved. If a factual judgment is made, the basis for making the assessment should be disclosed. If the CCD is making these assessments conscientiously, there can be no good reason not to. The less transparent the process, the more one is forced to assume it is faulty.

This criticism is specific, and not intended to deprecate the whole agency. All immigration appeals, however frivolous, are considered, and probably much to the frustration of well-meaning case-workers conscious of the public expense involved. Further, the Home Office has, like all other agencies, undergone a massive disclosure exercise under the current government, which has made freedom of information part of the furniture. However, even freedom of information allows exceptions, not least the protection of the public, and that is the UKBA's *raison d'être*. We should avoid the distasteful situation in which the foreign detainee, by virtue of his legal 'otherness', is considered exceptional. Policy imperative must not compromise procedural transparency, even if the individual in question has waived the right to be in the country.

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<sup>36</sup> *R (Abdi) v SSHD (no 2)* [2009] EWHC 1324 Admin, para 10

*The Application of margin of appreciation doctrine in freedom of expression  
and public morality cases limits free speech/expression in the UK*

HASSNAIN NAQVI

**Abstract**

Rousseau's famous dictum is 'Man was born free, but everywhere he is in chains'. With this notion in mind when we look at any legal system, we notice that laws are prescribed to govern the ways people express themselves. In relation to the EU article 10 of the ECHR, paragraph 1 gives the right to freedom of expression. However, just as this freedom carries with it great responsibility, paragraph 2 imposes restrictions upon this right. In light of paragraph 2, when applied to any given case by Member States of the EU, it can be seen that they are afforded a discretion to impose or limit freedom of expression; this discretion afforded to the courts has come to be known as the Doctrine of Margin of Appreciation. With the application of the Margin of Appreciation there has been inconsistency, an imbalance which requires reform.

This essay will examine the development of the Doctrine of Margin of Appreciation, and the rationale behind it, and will examine legal principles and case law in light of the hypothesis: the application of the Margin of Appreciation doctrine in freedom of expression and public morality cases limits free speech and expression in the UK.

**Introduction**

'Margin of appreciation' refers to the power of a Contracting State in assessing factual circumstances, and in applying the provisions envisaged in International Human Rights instruments.<sup>1</sup> Margin of appreciation is based on the notion that every society is entitled to certain latitude in balancing individual rights and national interests, as well as in resolving conflicts that emerge as a result of diverse moral convictions.<sup>2</sup> Human Rights

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<sup>1</sup> YUTAKA ARAI-TAKAHASHI, THE MARGIN OF APPRECIATION DOCTRINE AND THE PRINCIPLE OF PROPORTIONALITY IN THE JURISPRUDENCE OF THE ECHR 2 (2002); see also Thomas A. O'Donnell, The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights, 4 HUMAN RIGHTS QUARTERLY 474, 475 (1982)

<sup>2</sup> Eyal Benvenisti, Margin of Appreciation, Consensus, and Universal Standards, 31 INTERNATIONAL LAW AND POLITICS 843 (1999).

convention gives the right to freedom of expression, but since this freedom carries with it responsibility, it is subject to regulation.

In this regard, the doctrine is parallel to the interpretation or discretion of the judge, in line with certain constraints prescribed by legislation, precedent or custom, which could decide a case within a range of possible solutions. In other words, judges are entitled to exercise discretion to make fair decisions in a specific case, without being locked into a formula that might not be applicable to every scenario. Since the courts are given a margin of appreciation, one can evaluate that at the disposal of the discretion, freedom of expression may in practice be limited.

However, as two members of the Court have suggested,<sup>3</sup> the limits of the Margin of Appreciation are incapable of abstract definition. The Margin of Appreciation is thus 'context dependent', so that its limits can be drawn only within specific cases.<sup>4</sup>

Within the discourse of Human Rights law there is a tension between those who argue for a universal set of human rights as standard rules for all, and those who believe that human rights are relative.<sup>5</sup> The laws provided by International Human Rights instruments have to balance these two competing ideals of Human Rights law. There must therefore be a compromise struck between setting a common standard for human rights protection, and recognising differences between Contracting States of diverse cultural, economic and social conditions.<sup>6</sup> It is from this balancing exercise that the Margin of Appreciation stems.

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<sup>3</sup> Judge Bernhardt – *Thoughts on the Interpretation of Human-Rights Treaties, Protecting Human Rights: The European Dimension* (1988) eds. Matscher and Petzold, p. 65-86; Judge Macdonald – *The Margin of Appreciation*, in MacDonal, Matscher and Petzold (eds.), p. 83-85.

<sup>4</sup> N. Lavender – *The Problem of the Margin of Appreciation*, *European Human Rights Law Review*, no.4/1997, p. 382.

<sup>5</sup> Kavanaugh, K.A., "Policing the margins: rights protection and the European Court of Human Rights" (2006) *EHRLR* 422

<sup>6</sup> Kavanaugh, *supra*

Letsas<sup>7</sup> describes the substantive concept of the Doctrine of Margin of Appreciation as addressing the relation between fundamental freedoms and collective goals, under an ideal theory of political morality.

He argues that the margin of appreciation is usually linked to two propositions: firstly, that states are justified in taking measures, prescribed by law, to advance collective goals; and secondly, that though such measures may interfere with the fundamental freedoms of the individual, such interference may not amount to a violation of his rights. In Letsas's opinion, it is the second of these propositions which is crucial in relation to the Margin of Appreciation as it enables the doctrine to be linked to a theory which describes whether and when interference with fundamental freedoms is impermissible.<sup>8</sup> Thus, by allowing a margin of appreciation, the European Court of Human Rights (ECHR) gives states a certain discretion to 'do things their own way' from time to time.<sup>9</sup>

### **Article 10, Freedom of Expression**

Article 10 ECHR provides:

- (1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.
- (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information

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<sup>7</sup> Letsas, G., "Two concepts of the margin of appreciation" (2006) *OJLS* 705

<sup>8</sup> Letsas, *supra*

<sup>9</sup> Sweeney, J.A., "Margins of appreciation: cultural relativity and the European Court of Human Rights in the post-Cold War era" (2005) *ICLQ* 459



received in confidence, or for maintaining the authority and impartiality of the judiciary.

Freedom of expression was originally part of the English common law. It has been said that there is no incompatibility between the degrees of protection afforded to freedom of expression under the common law with the protection under Article 10. Lord Goff has opined:

'I can see no inconsistency between English law on this subject and Art 10 [ECHR]. This is scarcely surprising, since we may pride ourselves on the fact that freedom of speech has existed in this country perhaps as long as, if not longer than, it has existed in any other country in the world. The only difference is that, whereas Art 10 of the Convention, in accordance with its avowed purpose, proceeds to state a fundamental right and then to qualify it, we in this country (where everybody is free to do anything, subject only to the provisions of the law) proceed rather on an assumption of free speech, and turn to our law to discover the established exceptions to it.'<sup>10</sup>

In English law freedom of expression issues may arise particularly in cases such as: defamation proceedings, where a person seeks damages for false statements made which damage their reputation; where protection of confidential information through an action for 'breach of confidence' is in issue; where intellectual property rights such as copyright and trade marks are sought to be protected; and, in the criminal law, where offences such as public order offences may have been committed, for example, by political demonstrators.<sup>11</sup>

The text of Article 10, paragraph 2, makes it very clear that there is no absolute right to freedom of expression. Instead, the freedom may be restricted when the conditions contained in (2) are fulfilled. Thus, the nature and scope of freedom of expression is established in paragraph 1, and the exclusive conditions under when that freedom can be restricted are set out in paragraph 2. The approach to be taken when dealing with freedom of expression cases is therefore to ask: is an act of speech, written or in some other form

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<sup>10</sup> *Attorney General v Guardian Newspapers and others (No 2)* [1988] 3 All ER 545 at 659

<sup>11</sup> Davis, H., *Human Rights Law: Directions*, (2007), Oxford University Press, pg 333

of expression, in issue? If yes, is it a type of expression that is protected under the terms of the first paragraph of Article 10? If yes, it must be asked whether the speech been restricted; which is usually caused by a court or a state agency, such as the police. If so, then has the state shown that the restriction is justified in terms of Article 10(2); that is, that it was imposed by law, aimed to achieve one of the purposes listed in paragraph 2, and was necessary to a democratic society in being a proportionate means of meeting a pressing social need?<sup>12</sup>

The protection to be offered under Article 10 extends to a limited obligation to take positive steps, as well as providing a remedy where a breach has occurred. The case of *Ozgur Gundem v Turkey*<sup>13</sup> included allegations by the editors and owners of a newspaper that it had been forced to cease publication because of orchestrated and violent acts of harassment done against it and that the allegations had been inadequately investigated and responded to by the authorities. The ECHR found a breach of Article 10 stating: 'the effective exercise of [freedom of expression] does not depend merely on the state's duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals.'<sup>14</sup> Yet the state is not required to expend disproportionate amounts of resources to this endeavour, as a positive obligation should not be 'interpreted in such a way as to impose an impossible or disproportionate burden on the authorities.'<sup>15</sup>

'Freedom of expression' is a wide concept covering all types of 'expression', rather than just 'free speech'. For example, expressive acts such as playing music, dancing or wearing particular clothes may all fall within 'expression'. The right also concerns freedom to receive information. The ECHR has held that the right to receive information prevents the government from restricting the flow of information that others are prepared to give, but cannot compel the disclosure of information. In *Leander v Sweden*<sup>16</sup> the applicant wished to see his security vetting which found him to be a security risk. It was

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<sup>12</sup> Davis supra pg 334

<sup>13</sup> (2001) 31 EHRR 49

<sup>14</sup> At 43

<sup>15</sup> ibid

<sup>16</sup> (1987) 9 EHRR 433

held that the refusal to disclose the information did not amount to a breach of Art 10 as it does not impose an obligation to impart information.

Particularly important areas of the operation of Art 10 are: freedom of the media, political speech, artistic expression and commercial expression. In terms of media freedom, this has repeatedly been emphasised as important by the ECHR. The principles derived from cases such as *Lingens v Austria*<sup>17</sup> and *Fressoz and Roire v France*<sup>18</sup> include that: safeguarding the freedom of the media is of particular importance for the maintenance of freedom of expression, the media has the 'task' of imparting information and ideas of public interest, the public has a right to receive such information and ideas, the media has a vital 'watchdog' role to play in a democracy, and it is incumbent on the media to impart information and ideas on political issues. Nevertheless, the press must not overstep the boundaries set, for example, in the protection of state interests.<sup>19</sup> The freedom of the media is also subject to the concept of 'responsible journalism'.<sup>20</sup>

Political speech also attracts a high level of protection. This has a broad definition, referring not just to party political matters, but also to matters of general public interest. In *Barthold v Germany*<sup>21</sup> a vet gave an interview criticising the lack of emergency vet services in Hamburg, though he did provide this service. He was charged with breaching professional rules relating to advertising and publicity. The ECHR held that there had been a violation of Art 10. The German court had focused on the publicity the vet had received, without recognising that the primary purpose of the interview was to address an important issue of concern.

Despite the fact that there is no explicit protection for 'artistic' speech in Art 10, the Court has made clear that the protection afforded does extend to artistic works. However, there appears to be only a low level of protection offered to purely artistic works.<sup>22</sup>

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<sup>17</sup> (1986) 8 EHRR 407

<sup>18</sup> (2001) 31 EHRR 2

<sup>19</sup> Davis supra pg 339

<sup>20</sup> *Reynolds v Times Newspapers* [1999] 4 All ER 609

<sup>21</sup> (1985) 7 ERR 383

<sup>22</sup> Davis supra pg 355

Similarly, commercial speech, such as advertising also holds a lower level of protection under Art 10.

### **The Application of Margin of Appreciation to Freedom of Expression**

In *Observer and Guardian*<sup>23</sup> it was noted that ‘Freedom of expression, as enshrined in Article 10, is subject to a number of exceptions, which, however, must narrowly be interpreted and the necessity for any restrictions must be convincingly established.’<sup>24</sup> Furthermore, in *Sunday Times*<sup>25</sup> the ECHR recognised the principle that ‘the right to freedom of expression is the rule and its limitations are the exceptions’ and that the right is not to be balanced with competing principles but ‘is merely subject to certain limitations, which must be narrowly construed.’<sup>26</sup>

The Court has summarised its role as the scrutiniser of national laws relating to Art 10 in the following way:

‘The Court’s task, in exercising its supervisory jurisdiction, is not to take the place of the competent national courts but rather to review under Article 10 the decisions they delivered in the exercise of the power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is look at the interference complained of in the light of the case as a whole and determine whether it was “proportionate to the legitimate aim pursued” and whether the reasons adduced by the national authorities to justify it are “relevant and sufficient”.’<sup>27</sup>

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<sup>23</sup> *Observer and Guardian v The United Kingdom* App No 13585/88 (Nov 26 1991)

<sup>24</sup> At 59

<sup>25</sup> *The Sunday Times v United Kingdom* App No 6538/74 (Apr 26 1979)

<sup>26</sup> At 65

<sup>27</sup> *Association Ekin v France* (2002) 35 EHRR 35, at 56

The first definitively important decision on the application of the Margin of Appreciation to Art 10 was *Handyside v United Kingdom*.<sup>28</sup> The facts of the case were that Handyside, a UK publisher, wanted to publish an English translation of *The Little Red Schoolbook*, a reference book aimed at schoolchildren. About ten per cent of the book dealt with sexual matters, including sections on masturbation, intercourse, contraceptives, homosexuality, pornography and venereal disease. The advice offered was unorthodox and suggested that the children 'experiment, learn for yourself, don't fear disapproval.'<sup>29</sup>

The book was published in several EU countries; however, the UK government acted under the Obscene Publications Acts 1959 and 1964, seizing all copies of the book in the UK. Handyside was convicted and fined and all the books were ordered to be destroyed. It was argued that the book would tend to corrupt and deprave a significant portion of children who read it and was not in the public good.

Handyside then applied to the ECHR, alleging a violation of Art 10. It was held that no breach had occurred. It was said that:

'In particular, it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them...it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of "necessity" in this context.

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<sup>28</sup> (1976) 1 EHRR 737

<sup>29</sup> See commentary in Steiner, H.J., Alston, P., Goodman, R., *International Human Rights in Context: Law, Politics, Morals*, 3<sup>rd</sup> Edition (2007), Oxford University Press, pg 965

‘Consequently, Article 10(2) leaves to the Contracting States a Margin of Appreciation. This margin is given both to the domestic legislator (“prescribed by law”) and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force.’<sup>30</sup>

However, the Court also emphasised the importance of protection of freedom of expression:

‘Freedom of expression constitutes one of the essential foundations of a [democratic] society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10, it is applicable not only to information or ideas that are favourably received or regarded as inoffensive, but also to those that offend shock or disturb the state or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society.’<sup>31</sup>

In the particular circumstances of the case, the UK authorities had a Margin of Appreciation to determine the effect on morals of the likely readers of the book, despite other States having taken a contrary view.

In *Muller v Switzerland*<sup>32</sup> a group of artists were prosecuted for obscenity offences after displaying pictures, some of which depicted sodomy, fellatio, bestiality, and erect penises in a free and public exhibition. The ECHR acknowledged that freedom of expression includes artistic expression even where its manifestation offends shocks or disturbs. However, the seizure of the paintings was not a violation of Art 10. The Court stated that it could not confine itself to considering the decision in isolation but that it must look at the case as a whole, including the paintings involved and the context in which they were exhibited.<sup>33</sup> In the circumstances of the case the authorities had acted within their margin of appreciation.

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<sup>30</sup> Davis supra pg 339 Para 48

<sup>31</sup> *Reynolds v Times Newspapers* [1999] 4 All ER 609

<sup>32</sup> (1988) 13 EHRR 212

<sup>33</sup> Bakircioglu supra

Similarly, in *S and G v United Kingdom*<sup>34</sup> an artist and gallery owner had displayed sculptures in a gallery which included heads to which earrings made from freeze-dried human foetuses had been attached. They were prosecuted for outraging public decency. The Commission of Human Rights found that the application based on Art 10 was manifestly ill-founded, as the prosecution was a proportionate way of achieving the purpose of protection of morals, for which the UK had a wide margin of appreciation.

Works which are merely pornographic enjoy little protection under the Convention. This means that little assistance is provided to artists whose work is vulnerable to State claims that it is indecent or pornographic but who are seeking, through artistic production, to challenge conventional conceptions of art or conventional moralities.<sup>35</sup> However, where works of art have overt political and social themes they will enjoy a higher degree of protection offered to political speech by the operation of a narrow margin of appreciation.

In *R v Perrin*<sup>36</sup> P was convicted of publishing obscene images on the internet. The Court of Appeal held that the conviction was compatible with Article 10, in particular: the margin of appreciation and the relatively low level of protection for non-political speech left States room to make choices balancing internet freedom with other interests, such as the protection of children; there was little if any public interest in the publication of merely pornographic images.

Nathwani notes that there are some exceptions in content-based restrictions on freedom of speech. For example, the dissemination of ideas promoting racism or Nazi ideology, and incitement to hatred and racial discrimination will not give rise to protection under Art 10.<sup>37</sup> Macovei suggests that this is the only content-based restriction of the freedom of expression under the Convention;<sup>38</sup> however, the ECHR has recognised a limitation serving the purpose of protecting the religious feelings of religious believers.

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<sup>34</sup> (1991) App 17364/91 (2 Sept 1991)

<sup>35</sup> Davis *supra* pg 355

<sup>36</sup> [2002] EWCA Crim 747

<sup>37</sup> Nathwani, N., "Religious cartoons and human rights – a critical legal analysis of the case law of the European Court of Human Rights on the protection of religious feelings and its implications in the Danish affair concerning cartoons of the Prophet Muhammad" (2008) *EHRLR* 488

<sup>38</sup> Macovei, M., *Freedom of Expression*, (2001) pg 7

In *Gay News Ltd v United Kingdom* (appeal from *R v Lemon*)<sup>39</sup> the applicants were the publisher and editor of a journal for homosexuals who had been found guilty of the common law offence of blasphemous libel in connection with the publication of a certain poem, with an accompanying picture depicting acts of sodomy and fellatio with the body of Christ after His death. They argued that the conviction amounted to an unjustified interference with their freedom of expression. The complaints were held to be inadmissible because the claim was manifestly ill-founded. The ECHR observed that the offence of blasphemy did not as such raise any doubts as to its necessity for the protection of rights of others, including protection of religious feelings, in a democratic society. Thus, the States are given a wide margin of appreciation to determine what is blasphemous or obscene.

In *Wingrove v United Kingdom*<sup>40</sup> a short film of 18 minutes entitled *Visions of Ecstasy*, containing no dialogue but only music and moving images, was in issue. The film depicted a young female character dressed as a nun in various scenes with erotic content, one scene involving her and the recumbent body of the crucified Christ engaged in a sexual act. According to the applicant the film was inspired by the life of St Teresa of Avila who experienced ecstatic visions of Christ, though no attempt to explain this background was made in the film, apart from a reference in the credits. The British Board of Film Classification refused to grant a distribution certificate to the film on the ground that it was blasphemous. The applicant complained that his freedom of expression had been violated. The Court agreed with the authorities that the refusal to grant a distribution certificate was intended to provide protection against a seriously offensive attack on matters regarded as sacred by Christians and did not accept that there had been a violation of the freedom of expression.<sup>41</sup>

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<sup>39</sup> (1983) 5 EHRR 123

<sup>40</sup> (1997) 24 EHRR 1

<sup>41</sup> See Nathwani *supra*



However, it appears that it is only usually the religious beliefs of the majority which are afforded protection. In *R v Chief Metropolitan Stipendiary Magistrate Ex p Choudhury*<sup>42</sup> it was held that no private prosecutions against the author Salman Rushdie and his publisher regarding the publication of his novel *The Satanic Verses* could be brought, as it was held that 'the law as it stands does not extend to religions other than [Church of England] Christianity.'<sup>43</sup> As Nathwani notes, the protection of religious feelings of believers as a permissible limitation on freedom of expression, together with the standard margin of appreciation applied by the Court to Art 10 limitations, favours majority religions over minority religions and atheism. This is because States are permitted to prescribe by law proportionate limitations on freedom of expression, but are not required to do so under the margin of appreciation and are therefore likely to give more weight to the majority view.<sup>44</sup>

It may be seen from the above that in the areas of morality and artistic expression, the UK authorities are afforded a very wide margin of appreciation. This means that freedom of expression can be limited by the Doctrine in this area to a very significant extent. Despite the ECHR's assertion that freedom of expression exists even where the expression shocks or offends others, this does not seem to be played out by the case law. Indeed, in cases of morality and artistic expression, the state appears to have free reign to restrict expression to whatever extent it wishes, with the simple assertion that the content is, in the view of the majority, obscene.

Commercial expression cases follow similar lines, with a wide margin of appreciation being offered.<sup>45</sup> In *R (British American Tobacco) v Secretary of State for Health*<sup>46</sup> the ban on tobacco advertising in the UK was upheld. It was found that it satisfied the need for proportionality where restrictions on Human Rights are concerned, as measured against the wide margin of appreciation left to the national authorities by the ECHR.

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<sup>42</sup> [1991] 1 QB 429

<sup>43</sup> See Gofur, A., "Blasphemy reconsidered" (2008) *Ent LR* 54

<sup>44</sup> Nathwani *supra*

<sup>45</sup> Randall, M.H., "Commercial speech under the European Convention on Human Rights: subordinate or equal?" (2006) *HRL Rev* 53

<sup>46</sup> [2004] EWHC 2493

However, in other areas of concern within Art 10, namely political speech and media freedom, a very narrow margin of appreciation is given to States, offering much more significant protection to the right of freedom of expression.

As Bakircioglu<sup>47</sup> notes, 'Since political speech constitutes one of the fundamental requirements of democratic societies, the Court hardly grants margin of appreciation to States.' In *Lingens v Austria*<sup>48</sup> the applicant published two articles criticising the former Austrian Chancellor. The ECHR stated:

'Freedom of the press... affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders... The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and must consequently display a greater degree of tolerance. No doubt, Article 10 para 2 enables the reputation of others to be protected, and this protection extends to politicians too, even when they are not acting in their private capacity; but in such cases the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues.'<sup>49</sup>

This has been followed in the UK courts. In *Derbyshire County Council v Times Newspapers*<sup>50</sup> the House of Lords denied a local authority the right to sue to protect its reputation, in respect of allegations of waste and inefficiency.

Furthermore, the wide definition of political speech means that the narrow margin of appreciation offers protection to a good deal of issues. For example, in *Steel and Others v*

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<sup>47</sup> supra

<sup>48</sup> (1986) 8 EHRR 407

<sup>49</sup> At 42

<sup>50</sup> [1993] AC 534

*United Kingdom*<sup>51</sup> demonstrators were detained for breach of the peace. The first applicant had attempted to disrupt a grouse shoot, the second the construction of a motorway; the third, fourth and fifth applicants had all handed out leaflets and held up banners at an arms fair. The ECHR found that Article 10 applied to all five applicants. It found that, following the approach of a much narrower margin of appreciation in relation to political speech, only applicants three, four and five had had their Article 10 rights breached.

However, even political speech may be restricted in certain circumstances. For example, in relation to hate speech, racism and incitement to violence, freedom of expression is restricted. Although Article 10 does not require the suppression of hate speech, the ECHR has held in *Jersild v Denmark*<sup>52</sup> that the expression of vicious racist sentiments would not be protected by Article 10 as they were likely to go beyond merely disturbing, shocking or offensive. It stated: 'There can be no doubt that the [remarks made by racists during a television programme] were more than insulting to members of the targeted group and did not enjoy the protection of Article 10.'<sup>53</sup> However, on the facts of the case, in which the journalist conducting the interview was convicted, although the Court found the aim of the Government to protect its minorities against racial discrimination by convicting the youths involved legitimate, it did not find the penalties imposed on the journalist necessary in a democratic society for the protection of the rights of others.<sup>54</sup> Thus the authorities had overstepped their margin of appreciation.

In *Norwood v DPP*<sup>55</sup> the defendant was convicted of a public order offence aggravated by an anti-religious motive after having displayed posters advocating 'Islam out of Britain'. The Administrative Court held that the prosecution was compatible with Article 10.

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<sup>51</sup> (1999) 28 EHRR 603

<sup>52</sup> (1995) 19 EHRR 1

<sup>53</sup> At 35

<sup>54</sup> Bakircioglu supra

<sup>55</sup> [2003] EWHC 1564

Similarly, in *Hammond v DPP*<sup>56</sup> the conviction of a religious campaigner who had campaigned against gay rights was also held to be compatible with Article 10.

Where national security is involved, freedom of expression in the context of political speech may also be limited. In *Observer and The Guardian v United Kingdom*<sup>57</sup> a retired member of the security services had published his memoirs. An injunction was sought to prevent the press from discussing the book or publishing excerpts. The injunction was held to be compatible with Article 10, though once the book was published in the United States it was disproportionate and therefore a breach of Article 10.

Bans on political advertising have also been found to be compatible with Article 10. In *R (on the application of Animal Defenders International) v Secretary of State for Culture, Media and Sport*<sup>58</sup> the House of Lords held that a ban on political advertising was compatible with Art 10. Despite the fact that a similar case on Swiss law had come before the ECHR and a breach was found, the claim by the animal rights group failed because it was held that a level playing field in relation to political debate was sufficient to bring the ban into the realms of necessity in a democratic society.<sup>59</sup>

Following these cases it may be seen that the margin of appreciation in relation to political speech is very narrow, with only a few limitations being permitted, either where the democratic nature of society itself is in issue (advertising), where national security threats exist and where the speech is 'hate speech' going beyond the merely shocking or insulting.

### Conclusion

The legitimacy of the Margin of Appreciation has been subject to controversy since its emergence; it has been questioned whether the Doctrine can be regarded as a principle or

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<sup>56</sup> [2004] EWHC 69

<sup>57</sup> *supra*

<sup>58</sup> [2008] UKHL 15

<sup>59</sup> See Lewis, T., and Cumper, P., "Balancing freedom of political expression against equality of political opportunity: the courts and the UK's broadcasting ban on political advertising" (2009) *PL* 89

merely a practical tool for the Convention bodies to evade their supervisory functions.<sup>60</sup> While some critics advocate the abolition of the doctrine,<sup>61</sup> most are concerned about its inconsistent application by Strasbourg organs.

No consistent approach to the Doctrine of Margin of Appreciation has yet emerged in the case law, either in the ECHR or the national courts. Even within the structure of Art 10, varying levels of the Margin of Appreciation are to be found. Although the doctrine allows for a flexible and context specific approach to freedom of expression, the lack of consistency leaves it open to criticism. As Bakircioglu has noted, 'deference to local values and "cultural relativism" runs counter to the notion of the universality of human rights.'<sup>62</sup> He goes on to quote Lord Lester as saying:

'The concept of the "margin of appreciation" has become as slippery and elusive as an eel. Again and again the Court now appears to use the margin of appreciation as a substitute for coherent legal analysis of the issues at stake... The danger of continuing to use the standardless doctrine of the margin of appreciation is that... it will become the source of a pernicious "variable geometry" of human rights, eroding the "acquis" of existing jurisprudence and giving undue deference to local conditions, traditions and practices.'<sup>63</sup>

As demonstrated in the research, where no European standard has been set, for example in relation to morals and 'art', Contracting States are given a very wide margin of appreciation and appear to be able to limit freedom of expression to a very large degree.

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<sup>60</sup> Paul Mahoney, *Marvellous Richness of Diversity or Invidious Cultural Relativism*, 19 HUMAN RIGHTS LAW JOURNAL 1 (1998)

<sup>61</sup> The opponents of this doctrine claim that the usage of this doctrine undermines the very basis of human rights, since it deprives the individual of enjoying his/her rights to which he/she is entitled. Moreover, it has been used by the Strasbourg organs as a justification for their "lax review." The unsystematic and vague nature of the doctrine was also found to be running counter to the effective implementation of Convention rights, which should be interpreted in a clear and precise manner. *also Yuval Shany, Toward a General Margin of Appreciation Doctrine in International Law?*, 16 EUROPEAN JOURNAL OF INTERNATIONAL LAW 907 (2005).

<sup>62</sup> At 35

<sup>63</sup> Lord Lester of Herne Hill, QC, *The European Convention on Human Rights in the New Architecture of Europe: General Report*, in *Proceedings of the 8<sup>th</sup> International Colloquy on the European Convention on Human Rights* 227 (1995)

This may be contrasted with areas such as political speech, which is tied in with European standards of democracy, where states are given the narrowest margin of appreciation and can only limit freedom of expression in the most extreme of circumstances.

In order to provide a certainty within the law, as well as more harmonised Human Rights laws and more meaningful rights of freedom of expression, the ECHR should not shy away from offering firmer and more concrete guidance to States on how far their margin of appreciation stretches, and setting European wide standards, such as those relating to political speech, in other areas.

Through the series of case law examined, it can be determined that the courts have in fact been giving a varying degree or margin to decide each case; it can be proven that the Doctrine of Margin of Appreciation when applied to case law has an inconsistent nature, which in effect limits the right of free expression.

However, it should not be forgotten that the right to freedom of expression will always need to be balanced with other competing rights and this will mean that where expression will cause damage to others, for example by offending morals, a legitimate limitation on the right should exist. A clearer European standard in these areas will enable limitation to be harmonised throughout the EU.

Although this suggested harmonisation may not be welcomed by all, considering the diverse nature of the Contracting States, the pursuit of universal Human Rights requires that at least some progress is made towards this aim.

*An 'Extensive Review' of the Collateral Fact Doctrine*

LUKAS LIM

**Introduction**

Until relatively recently, the collateral fact doctrine had arguably been the orthodox view taken by the courts as to how far they should go in reviewing tribunals and other inferior bodies. The effect of *Anisminic Ltd v Foreign Compensation Commission*,<sup>1</sup> as interpreted in *Re Racal Communications Ltd*,<sup>2</sup> *O'Reilly v Mackman*<sup>3</sup> and especially *R v Lord President of the Privy Council, ex parte Page*,<sup>4</sup> however, has resulted in the demise of the doctrine in favour of the doctrine of extensive review. It is submitted that, although the policy implications of opting for the collateral fact doctrine are quite unsatisfactory, the extensive review approach has problems of its own as well.

**The Collateral Fact Doctrine**

The collateral fact doctrine holds that there are certain preliminary questions which must be decided before it can proceed to the merits of a question it is asked to decide. The preliminary question would either concern a matter central or collateral to the case at hand. Lord Diplock enunciated the principle in *Anisminic*:<sup>5</sup> a wrong question asked as to the kind of case (a collateral fact) into which the tribunal was meant to inquire would go to jurisdiction, but one concerning the situation (a central fact) that the tribunal had to determine would, at most, be an error within jurisdiction.

Questions regarding collateral facts determined the scope and limit of a tribunal's jurisdiction and therefore had to be decided by a higher body (the courts). It would be absurd to allow the tribunal to determine its own jurisdiction. Matters central to the issue at hand, however, would be left to the discretion of the tribunal.

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<sup>1</sup> [1960] 2 AC 147.

<sup>2</sup> Reported as *Re a Company* [1981] AC 374.

<sup>3</sup> [1983] 2 AC 237.

<sup>4</sup> [1993] AC 682.

<sup>5</sup> [1960] 2 AC 147.

### The Demise of the Doctrine

When the House of Lords delivered their judgment in the *Anisminic*<sup>6</sup> case, it looked as though they had pronounced the death sentence on the collateral fact doctrine. The concept of jurisdictional error had been stretched to the breaking point, and while Lord Reid insisted that there remained a distinction between errors of law which went to jurisdiction and errors of law which did not, this was difficult to reconcile with the general line of his judgment.

Over the next twenty years, the combination of *Pearlman v Keepers and Governors of Harrow School*<sup>7</sup> and *Re Racal*<sup>8</sup> did much to confirm that the demise of the collateral fact doctrine was imminent, although the *South East Asia Fire Bricks*<sup>9</sup> case gave it a lifeline to grasp at. In 1993, however, the case of *Page*<sup>10</sup> appeared to hammer the final nail in the coffin. In his judgment, Lord Browne-Wilkinson stated that the decision in *Anisminic*<sup>11</sup> rendered obsolete the distinction between errors of law on the face of the record and other errors of law, by extending the *ultra vires* doctrine.

Thus, all errors of law are now jurisdictional, leaving no room for the collateral fact doctrine. This would apply to all tribunals and inferior bodies, with the caveat that visitors and inferior courts of law would be excluded.

### The Doctrine of Limited Review

Paul Craig argues<sup>12</sup> that the courts sometimes preferred limited review, even prior to *Anisminic*,<sup>13</sup> (as put forward by D.M. Gordon<sup>14</sup>) in cases like *R v Bolton*<sup>15</sup> and *Brittain v*

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<sup>6</sup> *Ibid.*

<sup>7</sup> [1979] QB 56.

<sup>8</sup> [1981] AC 374.

<sup>9</sup> [1981] AC 363 (decided 10 days before *Re Racal*).

<sup>10</sup> [1993] AC 682.

<sup>11</sup> [1960] 2 AC 147.

<sup>12</sup> P Craig, *Administrative Law* (6<sup>th</sup> edn Sweet & Maxwell, London 2008) 452.

<sup>13</sup> [1960] 2 AC 147.



*Kinnaird*.<sup>16</sup> It was held in these cases that so long as the tribunal decided the question assigned to it by the law, then that was sufficient. The tribunal could make a mistake in its determination, but as long as the charge laid before the tribunal was in the correct form, no review of its decision could be made by the courts.

### **The Insufficiency of Limited Review and the Collateral Fact Doctrine**

D.M. Gordon<sup>17</sup> saw many flaws in the collateral fact doctrine. First, he insisted when an Act of Parliament gave the tribunal power to act upon certain given facts, it was always within the power of the tribunal (subject to appeal), to decide. Its relative decision and opinions were to be final and free from review. Secondly, it was artificial to divide the question at hand into a subdivision of 'collateral' and 'central', for no justification could be found as to why the courts called a fact collateral in one case but not in another.

Gordon's purported solution, however, does not solve the problem. The limited review doctrine affords the tribunal ample discretion to decide all the elements of the charge according to its own views. A rent tribunal, for example, would be able to decide what a 'furnished tenancy' means in any way it pleased. A 'furnished tenancy' would be, as Craig put it, 'an empty vessel into which anything could be poured'.<sup>18</sup> Such a degree of discretion on the part of the tribunals should surely be unacceptable on policy grounds.

Nonetheless, the problems pointed out regarding the collateral fact doctrine are warranted. Craig notes that it is impossible to draw the line between 'collateral' (the type) and 'central' (the situation), because the definition of 'type' is inevitably comprised of the descriptions within the statute of the 'situation' which the tribunal has to determine.<sup>19</sup> The distinction is simply illusory, with no predictability being possible as to how a case

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<sup>14</sup> 'The Relation of Facts to Jurisdiction' (1929) 45 LQR 458; 'Observance of Law as a Condition of Jurisdiction' (1931) 47 LQR 386, 557; 'Conditional or Contingent Jurisdiction of Tribunals' (1959-1963) 1 U.B.C.L.Rev. 185; 'Jurisdictional Fact: An Answer' (1966) 82 LQR 515; 'What did the *Anisminic* Case Decide?' (1971) 34 MLR 1

<sup>15</sup> (1841) 1 QB 66.

<sup>16</sup> (1819) 1 Br. & B 432.

<sup>17</sup> DM Gordon (n 13)

<sup>18</sup> *Administrative Law* 443.

<sup>19</sup> *Ibid.* 441.

will be categorised before the court pronounces on the matter. Lord Denning recognised this when he articulated in *Pearlman*<sup>20</sup> that the distinction between errors made within and without jurisdiction was too fine. He felt that it left too much room for arbitrary judicial manipulation and recommended discarding it altogether.

### **A Review of Extensive Review**

Following *Page*,<sup>21</sup> the distinction has indeed been discarded in favour of extensive review where all errors of law are jurisdictional. Craig, however, is not convinced of this doctrine either. He says that there is no reason why the courts should be the final arbiters of all matters of law, as opposed to tribunals and other inferior bodies.<sup>22</sup> The real question should be: which is best suited to answer the question at hand? Quite often, it is the tribunal that is in the best position to decide on both matters of fact and law. They are often more specialised and often accumulate expertise in particular areas of the law which is substantially greater than the more generalist High Court, for example, with the social security appeal tribunal in *Chief Adjudication Officer v Foster*.<sup>23</sup>

Another problem with the extensive review doctrine is that it collapses the distinction between appeal and review. The court substitutes its view for that of the decision maker, stripping the administrative body of its autonomy and discretion. A tribunal only has the power to make the right decision. Gordon stressed that this goes too far; jurisdiction must involve the power to make a wrong as well as a correct decision. Craig also argues that the reason collateral fact doctrine lasted as long as it did rests in the fact that it was a compromise between having control on one hand and allowing discretion on the other.<sup>24</sup> The extensive review doctrine does not appear to take this into account.

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<sup>20</sup> [1979] QB 56, 69-70.

<sup>21</sup> [1993] AC 682.

<sup>22</sup> *Administrative Law* 466.

<sup>23</sup> [1993] AC 754, 767; where Lord Bridge acknowledged the 'great expertise of the Social Security Commissioners in the 'somewhat esoteric area' of social security law.

<sup>24</sup> *Administrative Law* 465.

### Craig, Hare and the Doctrine of *Ultra Vires*

In a previous edition of his book,<sup>25</sup> Craig initially proposed that a 'correctness test' should be used in determining jurisdiction. The court should be able to take into account issues such as the rationale for the tribunal's existence and its expertise. This pragmatic approach with judicial intervention based on 'correctness' may seem attractive, but it violates the juridical basis of judicial review. A court, after all, derives its legitimacy in reviewing tribunals and other inferior bodies on the basis of the *ultra vires* doctrine and not whatever the courts feel is right. Sir John Laws, however, argues that once the distinction between jurisdictional and non-jurisdictional errors is discarded (as in extensive review), there is no longer any need or purpose for the *ultra vires* doctrine since the courts are in reality simply intervening to correct errors of law.<sup>26</sup>

Ivan Hare<sup>27</sup> on the other hand, suggested an entirely different solution: putting the constitutional basis of review for error of law under separation of powers doctrine. Once the foundation of review is removed from the *ultra vires* principle, the courts are liberated and no longer have to perform the mental gymnastics of referring the court's intention to the intention of Parliament.

### Conclusion

It is submitted that both Craig and Hare's solutions cannot be adopted, because the *ultra vires* doctrine must always be the foundation of judicial review as long as Parliament remains (at least formally) supreme. Nonetheless, the *ultra vires* doctrine only grants the courts powers of review and not appeal. The expansion of review of error of law has given the courts powers of appeal, and the only way around this is to call 'review' a synonym for 'appeal'. Lord Slynn seemed to say as much in *Bate v Chief Adjudication Officer*.<sup>28</sup>

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<sup>25</sup> *Administrative Law* (5<sup>th</sup> edn Sweet & Maxwell, London 2003)

<sup>26</sup> M Supperstone and J Goudie (eds), 'Illegality: The Problem of Jurisdiction', *Judicial Review* (Butterworths, London 1992) Ch. 4.

<sup>27</sup> CF Forsyth and I Hare (eds), *The Golden Metwand and the Crooked Cord* (OUP, Oxford 1998).

<sup>28</sup> [1996] 1 WLR 814

This, however, cannot be acceptable. The courts have ironically expanded their own jurisdiction, acting *ultra vires* of their powers. The artificiality of the *ultra vires* doctrine can only be stretched so far. But, as has been seen, trying to draw the line through means like collateral facts has not proved successful either.

It is thus submitted that Craig's second possible solution should be considered seriously; a 'rational basis approach' in which it is possible for control to be achieved without the court automatically substituting judgment for that of the tribunal, while still fettering the tribunal's powers.<sup>29</sup>

He cites the American case of *Chevron USA Inc v NRDC*,<sup>30</sup> where a court would substitute judgment only where Congress gave a specific meaning to a statute and the agency misconstrued it. If the point was not dealt with directly by Congress, then it was left to the discretion of the tribunal, with the courts stepping out of the way. To an extent, this approach was taken in *R v Monopolies and Mergers Commission, ex parte South Yorkshire Transport*,<sup>31</sup> in which it was held that only where the term, as defined by the reviewing court is still inherently imprecise that a rational basis would be applied to test the agency's interpretation: if it was not so abhorrent as to be irrational, it would be accepted. The difference here is that Craig's approach removes the unnecessary requirement of the reviewing court defining a term in the first place.

The solution is not perfect. Some questions may be asked as to how one decides what is and is not a clear statutory meaning and the possibility for uncertainty is present. It is submitted that a possible answer to this is to have a set of objective rules as to what a clear statutory meaning is, perhaps something akin to the doctrine of irrationality, cited by Lord Diplock in the *GCHQ* case,<sup>32</sup> but with a very high threshold to ensure that judicial review does not become judicial appeal, unless the decision is such that the courts have little choice.

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<sup>29</sup> *Administrative Law* 467-73.

<sup>30</sup> 467 US 837 (1984).

<sup>31</sup> [1993] 1 WLR 23.

<sup>32</sup> *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374

*How Has the UK's Approach to Terrorism Since 2001 Impacted on Fair Trial Rights? In Comparing the United Kingdom with Another Jurisdiction, Discuss Whether the Judicial Response Has Been Satisfactory*

MATTHEW O'GRADY

**Abstract**

At no time since the Second World War has individual liberty faced greater strain than since the attacks on the World Trade Centre in 2001. The right to a fair trial has borne the substantial measure of this strain and this is the principal reason for the paper's focus. Responsibility for this outcome lies directly in the United Kingdom's and United States' approaches to terrorism: the crime control criminal justice model and the siege model of democracy respectively. Their most prominent incursions are the creation of indefinite detention facilities and the adjustment of the law of evidence. These incursions, and judicial deference to national security arguments, are the main points for comparison between the UK and the USA and explains why they are the focus of the analysis. For 'due process' aims to be realised fundamental change must be made to these models and the judicial attitude to review.

**Introduction**

It will be submitted that the United Kingdom and the United States have critically hindered themselves in their responses to terrorism by using techniques which undermine the right to a fair trial. This paper will be approached from a due process perspective, discussed by Sanders and Young (2007: Chapter 1). In line with revisionist thought, which "insists on formal ... processes in which the case against the accused is tested before a public and impartial tribunal" and which sees the criminal justice system's aim as the protection of the factually innocent from wrongful conviction, it will be submitted that *impacts* shall refer to those effects which produce results contrary to due process (Sanders and Young 2007:21 and Packer 1968: 165). The paper will require an initial discussion of the UK's and USA's approaches to terrorism and the sources of due process' requirements for a fair trial. It will follow by analysing the breaches of these rights, how courts have responded and how their respective approaches to terrorism are responsible for these outcomes. It will be contended that the judicial responses have failed to serve

the requirements of due process, particularly in the USA, and that rights to a fair trial will continue to be undermined where deference is demonstrated to executive determinations on national security. It will be argued that these approaches, instead of realising their aims, promote insecurity and terrorism. The paper will conclude that the UK's treatment of terrorism through the vision of crime control and the USA's siege mode approach have woefully handicapped them in protecting their citizens, because their methods will never reduce terrorism and cannot give legitimacy to the outcomes they produce.

### **The UK and USA Approaches to Terrorism**

The Diplock Review (1972: Chapter 2) recommended sweeping adjustments to the UK's approach to terrorism, concluding that safeguards of extra-judicial processes "can never ... be as complete as the safeguards which are provided by a public trial". Walker (2006: 1) concluded that the Review heralded the abandonment of the militaristic approach of the early twentieth century in preference to procedures which favoured the criminal justice system. He is accurate, but his conclusion is weakened by his failure to analyse the different conceptual models of the criminal justice system. The UK's criminal justice system operates according to Packer's (1968) crime control model. Crime control limits the adversarial nature of the criminal justice system to the initial meeting of suspect and police. Crime control's advocates prioritise the conviction of the guilty and argue that without repressive and invasive techniques guilty outcomes will not be secured. David Miliband's (2009) recent acknowledgement of the *War on Terror's* critical failures has weakened arguments that the UK has conducted itself according to a criminal justice model. However, a substantive analysis of the UK's approach, particularly when compared to the USA's, leads to a conclusion which affirms the UK's criminal justice approach.

There is a direct contrast to the UK's approach to terrorism in the model adopted by the USA. The USA has chosen to treat the threat of terrorism through the goggles of the *War on Terror*; a siege model of democracy, which suggests the nation's survival is at stake (Kostakopoulou 2008: 3). Kostakopoulou (2008: 3) is perceptive in his analysis that under a siege mode governments use the pervasive nature of fear to apply the unique

procedures invoked at times of national emergency to areas where national security is not an issue. It will be submitted that the siege mode cannot serve the needs of justice when due process' requirements for a fair trial are borne in mind. It would be inaccurate to maintain an argument that this approach is unique to the last decade. The manifestation of the siege mode approach in the policies of George Bush is consistent with the neo-conservative model which concentrates response to threats on the Pentagon.<sup>1</sup>

### **The Sources of Fair Trial Rights**

The UK's criminal justice approach to terrorism entitles suspects to the fair trial rights afforded by the common law, the *Human Rights Act 1998* and the *European Convention on Human Rights (ECHR)*. It is submitted that the *War on Terror* is principally a non-international armed conflict<sup>2</sup> and therefore the domestic law of the USA ought to apply to detained terrorist suspects. However, to extrapolate the paper along this line would fail to appreciate the reality of the USA response to terrorism. Although this conclusion is the paper's principal weakness, it is argued that because the USA has used a military procedure to conduct its response to terror, the sources of fair trial rights are those available to combatants in war. This is a line of reasoning supported extra-judicially by Lord Steyn (2004) and is consistent with the USA decision to grant detained individuals rights afforded in war by abandoning the term "enemy combatant".<sup>3</sup> Combatants in war are protected by the *Geneva Conventions of 1948*, such as the right to receive a hearing before an independent and impartial court, detention prior to that hearing "in no circumstance" being longer than three months and the right to know the evidence and case against them.<sup>4</sup>

It is apparent that there are points of comparison between the fair trial rights available to terrorist suspects in the UK's criminal justice model and those in the USA's siege mode.

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<sup>1</sup> In 1986 Ronald Reagan approved rendition of terrorist suspects and formalised it as the US policy to respond to terrorism with *National Security Decision Directive 107*, Satterthwaite (2008: 538).

<sup>2</sup> A non-international armed conflict involves hostilities between government armed forces and organised armed groups, International Committee of the Red Cross (2005).

<sup>3</sup> <http://www.justice.gov/opa/pr/2009/March/09-ag-232.html> (accessed 16.03.2009).

<sup>4</sup> *Third Geneva Convention Arts.84 and 103*.

This paper will proceed to analyse the law along the main lines of comparison: detention without charge and the law of evidence.

### **Detention without Charge**

Detention without charge is the most invasive manifestation of crime control's desire to suppress criminal activity and of the siege mode's reactive blanket targeting of those perceived to be the "enemy" (Bush 2005, on the *radical Islamist enemy*). Its effects have the most acute impacts on fair trial rights, yet the judicial responses in the UK and USA have failed to adequately respond in protecting rights at the same rate as the political establishment has sought to curtail them.

The UK's detention of suspected terrorists in Belmarsh prison was justifiably described as "grossly antithetical to established constitutional rights"<sup>5</sup> and mirrors Lord Steyn's (2004: 11) extra-judicial criticism of the USA's creation of a legal Alsatia in Guantanamo Bay.<sup>6</sup> He observed:

As a lawyer brought up to admire the ideals of American democracy and justice, I would have to say that I regard this as a monstrous failure of justice.

This forms a useful foundation from which to analyse the law. The UK Home Secretary was authorised<sup>7</sup> to indefinitely detain suspected terrorists who could not be deported because of the UK's obligations not to deport to states where a person risked being tortured.<sup>8</sup> Similarly, President Bush created a regime of indefinite detention at Guantanamo Bay for terrorist suspects detained in Afghanistan and elsewhere.<sup>9</sup> Since that

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<sup>5</sup> *A v Home Secretary* [2004] EWCA 1124, 224 per Laws LJ.

<sup>6</sup> Alsatias were used by Warbrick (2004: 15) to describe jurisdictions where the government was insulated against accountability.

<sup>7</sup> *Anti-Terrorism, Crime and Security Act 2001 s.23 (c.24)*, London: OPSI.

<sup>8</sup> *Chahal v United Kingdom* (1997) 23 EHRR 413.

<sup>9</sup> Military Order – *Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism*, 13.09.2001



time approximately 800 people have been detained at Guantanamo Bay,<sup>10</sup> of which the American Civil Liberties Union (2008: 33) claim at least 23 were under the age of 18. This latter figure must be viewed critically. A comprehensive analysis requires note of the submissions made by the Department of Defense (2008: 12) who contend that instead eight children have been detained at Guantanamo Bay. Regardless of the figure, what can be drawn from these contrasting statistics is the USA government's readiness to detain the most vulnerable individuals absent of fair trial rights. The UK government's introduction of control orders is further evidence of crime control's influence on anti-terrorism legislation which is more concerned with repression of criminal activity, as a means of deterring crime, rather than policy which could actually have long-term effects in countering terrorism.<sup>11</sup> Detention in Belmarsh and Guantanamo Bay is arguably a product of crime control and the siege mode. These models create the need to punish and repress individuals defined as a threat, so that others are discouraged from similar activity, and so that the *enemy* cannot participate in the conflict.

According to the House of Lord's judgment in *A v Home Secretary*<sup>12</sup>, rejecting Belmarsh detention is the most forthright rejection of detention without charge of any jurisdiction; however, it must be measured by the limitations of the majority opinion. The majority did not choose to reject indefinite detention without charge, because such a measure in itself could never be compatible with the UK's liberal democratic traditions. Instead, the majority were of the view that detention without charge was discriminatory, because the power was exercisable against foreign nationals only, and consequentially irrational and self-evidently disproportionate, because less invasive means were being used against British terrorist suspects. Although these observations are surely correct, they fail to give accord to the *critical mass* of what was at stake in the case; not whether detention without charge could be maintained if a different legislative foundation was created, but whether it could be justified at all. In his majestic dissent Lord Hoffmann observed:

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<sup>10</sup> *Executive Order – Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities*, 22.01.2009.

<sup>11</sup> Control orders are executive orders imposing obligations on terrorist suspects for purposes connected with preventing or restricting their further involvement in such activity, *Prevention of Terrorism Act 2005* (c.2), London: OPSI.

<sup>12</sup> [2005] 3 All ER 169.

I said that the power of detention is at present confined to foreigners and I would not like to give the impression that all that was necessary was to extend the power to United Kingdom citizens as well. In my opinion, such a power in any form is not compatible with our constitution. The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these.<sup>13</sup>

Lord Hoffmann's dissent forms a useful basis for criticising the majority's, and indeed the more general judicial, deference to executive determinations on national security. This deference was evident in the subsequent review of control orders in the House of Lords judgments in *Home Secretary v JJ*<sup>14</sup> and *Home Secretary v E*,<sup>15</sup> where it was held respectively that although an eighteen hour curfew amounted to a deprivation of liberty, twelve or fourteen hours did not. It is respectfully submitted that Sullivan J's judgment that the absence of review is "capriciously unfair" captures the essence of judicial deference's failure to realise due process' requirements for a fair trial.<sup>16</sup> Advocates of the due process model must necessarily contend that only this interpretation of deference's effect is consistent with the primacy which must be afforded to fair trials.

The failure of courts to examine the executive's determinations on national security allows the government to conjure a shield behind which its constitutionally incompatible activities can avoid scrutiny and perpetuate the erosion of fair trial rights. It is submitted that only where this review occurs, as Lord Hoffmann and Sullivan J were prepared to carry out, will the courts be capable of adequately upholding due process' fair trial requirements.

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<sup>13</sup> *Ibid* at 220.

<sup>14</sup> [2007] UKHL 45.

<sup>15</sup> [2007] UKHL 47.

<sup>16</sup> *Home Secretary v MB* [2006] EWHC 1000.

There is a distinct contrast between the House of Lord's and the U.S. Supreme Court's responses to incursions made against fair trials, not in any particular formal approach to review, but on the substantive preservation of due process' requirements for a fair trial themselves. The Supreme Court in *Hamdi v Rumsfeld*<sup>17</sup> allowed a habeas corpus petition by a USA citizen detained at Guantanamo Bay. Justice O'Connor's plurality opinion has formed the principal judgment of the case.<sup>18</sup> Justice O'Connor constructed a haphazard system of review which Moeckli (2005: 9) justifiably criticised as obscure, which runs counter to fair trial rights and is at odds with international humanitarian law. Justice O'Connor accepted the use of hearsay evidence irrespective of its source, a reversal of the evidential burden in favour of the government, and that detention per se is acceptable provided it is not abusive – all measures sought by the siege model in restricting *enemy* activity.<sup>19</sup> Her judgment has subsequently been used as authority for the creation of Combatant Status Review Tribunals, which have been highly criticised as inconsistent with the USA's fair trial obligations (Moeckli 2005: 9). Therefore, far from substantively realising due process' requirements for a fair trial by curtailing detention without charge, as done by the House of Lords, the Supreme Court's plurality has further perpetuated the attrition of fair trial rights in its jurisdiction. The justification used is identical to Lord Bingham's reasoning behind a need for "demarcation of functions",<sup>20</sup> or rather deference, to executive determinations on national security and exposes the judgment to the same criticism as above, which can also be levelled at him.

It is argued that the values of crime control and of the siege mode of democracy are directly responsible for the anti-terrorism legislation which has undermined the right to a fair trial in the form of detention without charge and goes some way to accounting for the creation of the shield of judicial deference behind which executives can shelter. Just as the USA's siege mode blinkers counter-terror strategy to simple notions of an enemy based on religion, which cannot rationally be hoped to be successful in reducing terrorism, the UK's crime control approach reduces terror prevention to the most basic

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<sup>17</sup> 124 S.Ct. 2650.

<sup>18</sup> A plurality opinion is a case in which no single judgment received the support of a majority. The decision is decided according to the opinion which received support of less than half, but more than any other (*Marks v United States* 430 US 188).

<sup>19</sup> *Supra* n.16, 2649.

<sup>20</sup> *Supra* n.11, 190

value of suppression, where the police and executive are granted the powers that *they* think fit, not the minimum powers which are *objectively* necessary or proportionate. The detention powers which deny fair trials serve as a focus around which young minorities become radicalised (Rimmington 2009). This most significantly counter-productive effect increases the threat of terrorism and is the most powerful argument for fundamental change. It is submitted that, far from handicapping the UK and USA in their desire to reduce terror, realising due process counters arguments that the UK and USA have double standards in applying the Rule of Law. It is contended that dispelling this perception increases the likelihood of international intelligence sharing with Islamic states and of minority communities being more willing to confront radicalism in society, which will ultimately reduce the harm created by terrorist activity, and will enhance security.

### **Torture and Hearsay Evidence**

It will be submitted that, while detention without charge has compromised access to trials fair or otherwise, the contorting of the law of evidence in accord with the values of crime control and the siege mode has diluted the fairness of those hearings which do take place. It will be argued that the common impacts on the fairness of trials in the UK and USA are, firstly, the admission of torture evidence and secondly, reform of the rule against hearsay evidence. Torture evidence is material used in proceedings which has been obtained by a public official, or person acting in an official capacity, through the use of “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes of obtaining from him ... information or a confession”.<sup>21</sup> This practice is prohibited in the UK by *ECHR Art.3* and in the USA by the Constitution’s Eighth Amendment. The rule against hearsay evidence has been authoritatively defined by Cross (2007: 588) who observed that:

A statement other than one made by a person while giving oral evidence in the proceedings [is] inadmissible as evidence of any fact stated.<sup>22</sup>

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<sup>21</sup> *UN Convention Against Torture, Inhuman or Degrading Treatment or Punishment Art.1.*

<sup>22</sup> Approved in *R v Kearley* [1992] 2 AC 228.

Packer (1968: 231-2 in Sanders and Young 2007: 21) argued that where due process is concerned with upholding moral standards, because law by example is the most effective way of encouraging law-behaving activity, crime control permits the admission of evidence, regardless of its provenance, because of a flawed argument that it will have *some* probative value against a suspect and would therefore be of *some* use in securing a guilty outcome. Similarly, it is argued that the siege model's use of a state of national emergency caters for the admission of evidence which undermines fair trials, because of a belief amongst those who advocate it that these extraordinary methods are justified if they secure the nation.

The use of torture evidence has been facilitated in the UK and USA in similar contexts over the last decade. The UK's Special Immigration Appeals Commission (SIAC), which hears appeals against the Home Secretary's certification of an individual as an international terrorist, purported capability to hear secret intelligence material provided by foreign states which may have been obtained in that state through torture.<sup>23</sup> In a similar way, the *Military Commissions Act 2006 (MCA) §948r(c)* purports to allow military commissions in Guantanamo Bay to hear evidence obtained through coercion in its review of terrorist suspects' combatant statuses. Although the Act expressly forbids the use of material obtained through torture,<sup>24</sup> it is submitted that in practice this statement is of little worth, because the Act permits military judges to admit evidence "in which the degree of coercion is disputed"<sup>25</sup> and that it is therefore possible for US military authorities to adduce evidence obtained through reprehensible means (Stewart 2007: 3). It is clear that an argument by crime control's advocates that the material's admission can be justified in law because of a necessity to prevent crime is unequivocally untenable. The *ECHR Art.3* privilege against torture is one of the few Articles to be unfettered and does not permit the state party to make any derogation regardless of the magnitude of the circumstances or threat it faces. Similarly, arguments by proponents of siege mode's validity, that in times of war the state is permitted to use extraordinary means to prevent threats, cannot be justified in law. The Eighth Amendment to the U.S. Constitution is unfettered and

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<sup>23</sup> *SIAC (Procedure) Rules 2003 Rule 44(3)*.

<sup>24</sup> *MCA §948r(b)*.

<sup>25</sup> *Ibid*, §948r(c).

furthermore, *Article 74(4)(f) of the Third Geneva Convention*, which provides rules for the treatment of prisoners in such exceptional circumstances, states that:

No moral or physical coercion may be exerted on a prisoner of war in order to induce him to admit himself guilty of the act of which he is accused.

The International Committee of the Red Cross has argued that this rule is of such significance that it has now been established in customary international law so that such conduct is unlawful in non-international armed conflicts (Henckaerts and Doswold-Beck 2005: 67 in Stewart 2007: 3). It is submitted that the legislative measures introduced in the UK and USA to allow the admission of evidence in breach of the rule against hearsay, also reflect crime control's and the siege model's perpetual desire to counter and repress threats, as a means of providing security against crime and national emergency. Just as the Home Secretary and SIAC can make determinations of an individual's status using evidence extracted through torture, so too can they use other less emotively sensitive hearsay. The same is applicable to USA military commissions and Combatant Status Review Tribunals, which are not bound by the rules ordinary courts must adhere to, but may instead hear *any* evidence which is "relevant and helpful".<sup>26</sup> Crime control's and the siege model's shaping of how the UK and USA approach terrorism, which have permitted the use of torture and hearsay evidence, have profoundly undermined the right to a fair trial. In the USA this has been magnified by the Supreme Court's failure to protect fair trial rights, in stark contrast to the robust rejection of torture evidence by the House of Lords, and has instead contributed to the erosion of due process.

The unanimous judgment in *A v Home Secretary (No.2)*<sup>27</sup> is a high-water mark in judicial protection of substantive elements of due process' requirements for a fair trial. In allowing the appellants' appeals against SIAC's use of evidence obtained through torture, which British authorities had no involvement in, Lord Bingham presented a comprehensive rationale undermining crime control's values by realising due process'

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<sup>26</sup> *Order Establishing Combatant Status Review Tribunal para.(g)(9)*, 07.07.2004.

<sup>27</sup> [2006] 2 AC 221.

aspirations. His Lordship drew golden threads of due process reasoning in comprehensively unravelling crime control's claim to the solutions to terrorism. Forster (2006: 3) indicates that, firstly, he argued that the common law regarded torture and its fruits with such abhorrence that it alone compelled its exclusion as unreliable, unfair and offensive to ordinary standards of human dignity. Secondly, he judged that it would be contrary to the Rule of Law for UK courts to be able to exercise jurisdiction and try a foreign torturer for an act of torture committed abroad whilst simultaneously receiving evidence obtained by such torture.<sup>28</sup> It is regrettable, from a due process perspective, that a similar desire to robustly counter the siege model's incursions into the law of evidence has been tellingly absent from the U.S. Supreme Court's judgments. In the leading case of *Hamdi v Rumsfeld*, outlined above, far from even discouraging the use of *unreliable evidence*, torture or otherwise, Justice O'Connor's plurality is influenced by the siege model's values and produces an opinion which undermines due process by subrogating ordinary fair trial rights. She observed:

The exigencies of circumstance may demand that ... enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time on ongoing military conflict. Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government. Likewise, the Constitution would not be offended by a presumption in favour of the Government's evidence.<sup>29</sup>

It is submitted that this *tailoring*, coupled with the unjustifiable failure to make any reference to torture evidence, is perverse to even the siege model and departs so far from established precedent that it is an anomaly in US law. It is strongly argued that in order to give effect to due process' requirements for a fair trial the Supreme Court should deconstruct the shield of judicial deference which has developed into a judicial dagger,

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<sup>28</sup> *Ibid*, 263.

<sup>29</sup> *Supra* n.16, 2648-9.

striking at fair trials by creating systems which depart from due process, by returning to the forthright rejection of coercion evidence as a “denial of due process”.<sup>30</sup>

Although crime control's and the siege model's teleological purposes differ, arguably their effects are similar in that they diminish the *fairness* of trials by manipulating the law of evidence. The admission of torture evidence into proceedings critically undermines the moral condemnation which can be attached to their outcome. Claims by the siege model's advocates, that admitting torture evidence makes the nation more secure, must be firmly rejected because they cannot be supported on a rationale basis. Kostakopoulou (2008:7) is correct that due process is a “precondition for security”. It is contended that due process insures against the fallibility of human intelligence, provides for the collection of the most reliable information possible and does not expose the nation to the vulnerabilities of societies that alienate those people who may be the principal threat, but are simultaneously essential to countering the radicalisation that terrorism thrives off. There is no empirical evidence which supports coercion evidence's reliability, or the idea that it can provide a basis for repressing crime or providing national security. Arguably the siege model's blindness to these factors results in the USA being dependant on intelligence material which has the lowest reliability possible, places its military personnel captured by an enemy abroad at even greater peril, strains old alliances which have long been founded on mutual respect for the Rule of Law, and has left the government impotent to argue otherwise as it has abandoned the power of its example.<sup>31</sup> On any view, the admission of torture and hearsay evidence magnifies its security vulnerabilities.

Similarly, the prolific use of hearsay by the UK and USA cannot be hoped to be successful in meeting due process' need for reliable proceedings and consequentially removes the moral censure of their findings. Even from a crime control or siege model perspective, the admission of hearsay can be questioned, as the European Court of Human Rights recognised when rejecting the use of extensive hearsay in proceedings against terrorist suspects.<sup>32</sup> The risks of manufacture of evidence, of error in transmission, of

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<sup>30</sup> *Ward v Texas* 316 US 547 (1942), 555, per Byrnes J.

<sup>31</sup> Bill Clinton on power of America's example, “People the world over have always been more impressed by the power of our example than by the example of our power”, 27.08.2008.

<sup>32</sup> *Hulki Gunes v Turkey* Application 28490/95.



hearsay not being the best evidence available and of a difficulty in assessing the weight to be attached to the evidence, means that there can be no certainty that those brought before commissions and tribunals are those individuals that the state needs to repress or secure itself against. If this is not done then crime control's and the siege model's aspirations are not realised. It has been the House of Lords, in contrast to the Supreme Court, which has checked Executive approaches to terrorism as being inconsistent with fundamental due process requirements for a fair trial. The explanation offered for this difference is the effects that crime control and the siege model have on national courts. It is submitted that claims of maintaining national security are less susceptible to review in a siege model because deference to Executive determinations is more profound, whereas national security arguments based on a crime control foundation can be penetrated by the House of Lords because they are based on ordinary notions of criminal justice. Crime control's influence can be countered because such changes to the law of evidence are at odds with the fundamental ideals that we have for the criminal justice system: fairness, equality and due process.

### **Conclusion**

Crime control and the siege model have conditioned the political establishment to legislate in ways which respond to perceptions of crime and insecurity by *repressing* fair trials rather than encouraging any effective ways of reducing terror or legitimising proceedings against suspects. They are significant factors accounting for judicial deference. Suggestions that UK and USA responses are ineffective, which is arguably an accurate analysis, have resulted in a debate on reform.

President Obama has argued that for terrorism to be defeated America must regain its influence in the world by restoring its values and by returning to foreign and domestic policy which opens dialogue.<sup>33</sup> Restoring fair trial is essential to this and the measure of its significance is shown by President Obama announcing the closure of the Guantanamo Bay detention facility. His vision is the most tangible realisation of due process yet to emerge in the debate. Dershowitz (2002) has opposed steps which limit the tools

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<sup>33</sup> [http://www.whitehouse.gov/agenda/homeland\\_security/](http://www.whitehouse.gov/agenda/homeland_security/) (accessed 04.03.2009)

available to the military and law enforcement. He has proposed the creation of torture warrants coupled with prolonged detention because of his belief that the magnitude of the threat faced by terrorism necessitates such measures.<sup>34</sup> His arguments, however, are somewhat fragile by failing to appreciate their potentially counter-productive effects: the undermining of human dignity and due process. Although it might be favourable for significant invasions of individual autonomy, such as indefinite detention and extraction of evidence under torture, to be placed on a judicial footing, the proposals cannot be justified because the reliability of the material which results from them would be wholly unsound and the risk of subjecting innocents to inhuman treatment would be great. It is due process in fair trials which can deliver the reliability which is essential to crime prevention and homeland security.

Dershowitz is correct that there needs to be greater judicial involvement and that must mean that those indefinitely detained in Guantanamo Bay must be tried in US civilian courts; a measure President Obama is yet to implement. Arguments opposing this action as exposing the US to greater security threats, lack a perception of the significant advantages of civilian courts noted by Vagts (2003:2). US District Court judges, who have standing equivalent to High Court judges, have a reputation for independence and impartiality and this, coupled with unrestricted access to counsel and the right to call evidence, would result in full blameworthiness being attached to a conviction and justify the invasion of autonomy that a sentence would result in. This must be done alongside reforms that: remove the bar to intercept evidence, allow post-charge questioning in terror cases and deliver more resources to the criminal justice system.<sup>35</sup> Only when there are alternatives to secret intelligence gathering and unexplained detention, will proceedings in UK and USA civilian courts be a legitimate alternative for policy makers.

However, if there is to be greater judicial involvement in the reformed systems of approaching terrorism, it must be conditioned on reform of judicial attitudes. The notion of deference must be re-examined so that determinations on national security are

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<sup>34</sup> <http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2002/01/22/ED5329.DTL> (accessed 04.03.09).

<sup>35</sup> Liberty, Charge or Release campaign (<http://www.liberty-human-rights.org.uk/issues/2-terrorism/extension-of-pre-charge-detention/index.shtml> accessed 04.03.2009).

reviewable. Although Cole (2008: 49) contends that deference in military matters is advantageous, these advantages hide the intrinsic and instrumental worth of fair trials. The next test for the House of Lords will be how willing it is to restore fair trial rights by rejecting twenty-eight days detention, and the Executive's unending attempts to extend this time, to forty-two and even ninety days.<sup>36</sup> On the other hand, the Supreme Court has more progress to make and must start by exercising its comprehensive power of judicial review against measures which are not compatible with fair trials. This should begin with the non-discussed phenomenon of extraordinary rendition, which Grey (2006) authoritatively analysed, and indefinite detention of persons in theatres overseas. To do this *and* substantively uphold due process the courts must abandon deference. These measures alone may do more than anything else to restore due process and the power of the UK's and USA's examples.

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<sup>36</sup> *Terrorism Act 2006 s.23 (c.11)*, London: OPSI.

*The Achilles: A Return to Orthodoxy or a New Departure?*

JOHN LEE

The case of *Transfield Shipping Inc v Mercator Shipping Inc* ('*The Achilles*')<sup>1</sup> raised before the House of Lords a fundamental issue of contractual damages: how and on what basis are we to determine the remoteness (and hence the recoverability) of losses arising from a breach of contract? Although the appeal was allowed unanimously, there were contrasting, if not disparate, reasons for the decision. The opinions can be divided into two broad camps, a divide which goes to the core of this essay: namely, the 'Orthodox' approach taken by Lord Rodger and Baroness Hale, and the 'Alternative' approach taken by Lord Hoffmann, Lord Hope and Lord Walker.<sup>2</sup> It is argued that the Orthodox approach reaffirms the dominant prevailing understanding of the rule of remoteness as essentially consisting of bare foreseeability<sup>3</sup> and probability, to be found in the leading House of Lords authority, *Czarnikow (C) Ltd v Koufos* ('*The Heron II*').<sup>4</sup> The majority's Alternative approach, on the other hand, departs from that contemporaneous understanding of remoteness and depends upon a more purposive construction of the contract itself and the surrounding norms and circumstances of the agreement.

This conclusion of a new departure, however, must be qualified. There have been a number of cases since *The Heron II* which reveal a sentiment akin to the Alternative approach, culminating in *South Australia Asset Management Corporation v York Montague Ltd*.<sup>5</sup> However, it remains true that the enunciation of a general principle

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<sup>1</sup> [2008] UKHL 48; 3 WLR 345

<sup>2</sup> Admittedly, the language of Lord Walker's approach is different from that of Lords Hoffman and Hope. However, for the purposes of this essay, i.e. of evaluating the judgment in the context of the prevailing understanding remoteness of contractual damages, it is submitted that it falls on the "Alternative" side of the line. In fact, it will be argued below that there is very little difference in substance between the two "Alternative" approaches.

<sup>3</sup> There is much debate in the cases, especially in *Czarnikow (C) Ltd v Koufos* ("The Heron II") [1969] 1 AC 350, concerning whether the term "foreseeability" is appropriate in the context of remoteness of contractual damages, since it is used in tort to connote a lesser degree of likelihood than is appropriate in the law of contract. This essay is not concerned with this issue at all, and will use "foreseeability" throughout to signify foreseeability *with the prerequisite level of likelihood as appropriate for the law of contract*, whatever that level may be.

<sup>4</sup> [1969] 1 AC 350

<sup>5</sup> *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd (sub nom South Australia Asset Management Corporation v York Montague Ltd)* [1997] AC 191

applicable to all contracts by the highest authority in *The Achilleas* is a radical departure from the prevailing orthodoxy.

One final twist in the tale is that, ironically, this 'new departure' from the contemporaneous orthodoxy is, at the same time, a return to the *old* orthodox understanding of remoteness of the latter half of the nineteenth century<sup>6</sup> based on the assumption of responsibility, evident in the seminal case of *Hadley v Baxendale*<sup>7</sup> itself. Thus, *The Achilleas* is best seen as both a departure from the prevailing orthodoxy and a return to the old orthodoxy.

### **The Facts and the Issues**

The facts of *The Achilleas* have been well rehearsed elsewhere. As far as material for our present purposes is concerned, the issue is the extent of the liability of the appellant charterers in respect of their late redelivery of the vessel in breach of contract. The owners claimed that they were entitled to recover the whole loss resulting from a lost future fixture. The charterers admitted liability only for the difference between the charter rate and the market rate for the period of overrun only. Since it was generally agreed that the loss of a subsequent fixture was a 'not unlikely' result of late redelivery, the case, as Lord Hoffmann remarks, raised a fundamental point of principle in the law of contractual damages.<sup>8</sup> Is the essence of remoteness merely about foreseeability and probability, given the knowledge (actual or imputed) of the parties? Or is there some other concept upon which remoteness is based, quite possibly an assumption of responsibility for the losses by the contracting parties, foreseeability being merely subservient to that and being a *prima facie* approximation in most cases?

### **The Orthodox Approach**

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<sup>6</sup> See below, fn. 35

<sup>7</sup> (1854) 9 Exch 341

<sup>8</sup> *The Achilleas* [2008] UKHL 48; 3 WLR 345 at [9]

After an examination of a long line of authorities starting from the seminal case of *Hadley v Baxendale*, with particular attention paid to the House of Lords decision in *The Heron II*, Lord Rodger took the law of remoteness to be a function entirely of the *degree of probability* with which the parties could *foresee* such losses. He says:

‘In any event, amidst a cascade of different expressions, it is important not to lose sight of the basic point that, in the absence of special knowledge, a party entering into a contract can only be supposed to contemplate the losses which are *likely to result* from the breach in question’ (emphasis added).<sup>9</sup>

Baroness Hale explicitly rejected the Alternative understanding, thereby affirming the Orthodox view, on the grounds that ‘[q]uestions of assumption of risk depends upon a wider range of factors and value judgments’ which may well bring about uncertainty and injustice in future cases.<sup>10</sup> As for Lord Rodger, however, it is not clear whether he decides this case on the general principle that foreseeability is *always* the decisive test, or whether he is declining to rule on the point of general principle and deciding the case merely on the fact that the test was satisfactory *in this case*.<sup>11</sup> However, this is of little importance since there is clearly a majority in favour of the Alternative approach.

The minority, however, found that the loss from the lost fixture was *not* something which the parties would have regarded as arising ‘naturally’ and ‘in the ordinary course of things’<sup>12</sup> in the context of a late redelivery of a vessel under a time-charter. Lord Rodger said that at the time of contracting, ‘this loss *could not have been reasonably foreseen as being likely to arise* out of the delay in question. It was, accordingly, too remote to give rise to a claim for damages for breach of contract’ (emphasis added).<sup>13</sup> This seemed rather difficult since the arbitrators found, quite uncontroversially, that missing a date for

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<sup>9</sup> *Ibid* at [52]

<sup>10</sup> *Ibid* at [93]

<sup>11</sup> This is largely due to his puzzling remark at the end of his speech (at [63]) where he states that he has not found it necessary to explore the issues concerning assumption of responsibility, but is “nevertheless...*otherwise* in substantial agreement with” the reasons given by Lord Hoffmann and Lord Walker (emphasis added). However, considering that the whole of Lord Hoffmann’s reasoning was based on that principle, it is difficult to know with which *other* reasoning he is in agreement. Furthermore, Lord Walker, as shall be argued later, engages in a very similar process of reasoning as Lord Hoffmann.

<sup>12</sup> In the language of Alderson B in *Hadley v Baxendale* (1854) 9 Exch 341

<sup>13</sup> [2008] UKHL 48; 3 WLR 345 at [60]

a subsequent fixture and the consequent losses were readily foreseeable as 'not unlikely' results of late redelivery. The solution was to latch onto the finding by Rix LJ in the Court of Appeal that, 'it required extremely volatile market conditions to create the situation which occurred here'<sup>14</sup> and therefore conclude that the losses were unusual and could not be foreseen with the requisite degree of probability. This seems to be a questionable distinction given that everyone in the shipping industry understands that the market is often volatile, the rate sometimes fluctuating quite rapidly.<sup>15</sup>

### The Alternative Approach

The majority, however, were rather less inclined to make such a tenuous distinction of type or kind to find the loss in question unforeseeable. Furthermore, as a matter of principle, they did not accept that remoteness is merely a question of foreseeability and probability. This was explicitly raised by Lord Walker by way of an example concerning defective lightning rod.<sup>16</sup> He recognised that if a building burns down after being struck by lightning because of a defective lightening rod, that damage cannot be too remote just because only one in a hundred buildings have been struck by lightning. It seems that the foreseeability test as a self-standing, underlying core of the principle of remoteness does (not??) and should not apply in this case.

His solution is that one must also 'take into account the nature and object of the contract'.<sup>17</sup> Indeed, 'what is most important is the common expectation, objectively assessed, on the basis of which the parties are entering into their contract.' Remoteness of certain types of losses are not merely a function of its probability of occurring, but essentially a function of what the parties would have thought of as the basic *purpose* of the transaction, to be ascertained objectively by the courts taking into account all the surrounding circumstances and norms of particular commercial contexts. It seems that what is required is a *teleological* enquiry by the courts into the contract and construing it

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<sup>14</sup> [2007] 2 Lloyd's Rep 555, p. 577 at [120]

<sup>15</sup> One is forced to make a *qualitative* distinction along what seems palpably to be *quantitative* lines (i.e. the *extent* of the volatility). This issue will be addressed later.

<sup>16</sup> *Ibid* at [78]

<sup>17</sup> *Ibid* at [78]

purposely using all the information available. With this in mind, the liability for the lightning conductor manufacturer is perfectly explicable. The *whole* purpose of the transaction is that the buyer should be protected by a properly functioning rod against the very unusual occurrence of his house being struck down by lightning. Using Lord Walker's language, that was the essential *nature* and *object* of the contract and there is little doubt that that was the common expectation upon which the parties were contracting. To hold the manufacturers not liable would defeat the whole purpose or object of the contract.

Lord Hoffmann (and Lord Hope concurring) is in substantial agreement with the approach taken by Lord Walker, endorsing various academic literature<sup>18</sup> which propose the view that 'the extent of a party's liability for damages is founded upon the interpretation of the particular contract, not upon the interpretation of any particular language in the contract, but (as in the case of an implied term) upon the interpretation of the contract as a whole, construed in its commercial setting.'<sup>19</sup> However, Lord Hoffmann takes the ostensibly further step of basing liability on whether the party could *reasonably have been taken to have assumed responsibility* for such a loss. This he sees as following from the fundamental principle of the law of contract: that contracts, and hence obligations under it, are undertaken voluntarily.<sup>20</sup>

Although Lord Walker does not explicitly use the language of assumption of responsibility, it is submitted that, in substance, going from Lord Walker's position to Lord Hoffmann's is *not* a significant step. Lord Walker sees remoteness as being concerned with 'what the contracting parties must be taken to have had in mind'.<sup>21</sup> But that phrase by itself seems rather incomplete: one naturally asks 'as what', or 'for what

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<sup>18</sup> Kramer, "An Agreement-Centred Approach to Remoteness and Contract Damages" in Cohen and McKendrick (eds.), *Comparative Remedies for Breach of Contract* (2005), pp. 249-286; Tettenborn, "Hadley v Baxendale Foreseeability: a Principle Beyond its Sell-by Date" (2007) 23 *Journal of Contract Law* 120 - 147; Robertson, "The Basis of the Remoteness Rule in Contract" (2008) 28 *Legal Studies* 172 - 196

<sup>19</sup> *The Achilles* [2008] UKHL 48; 3 WLR 345 at [11]

<sup>20</sup> *Ibid* at [12]: "It seems to be logical to found liability for damages upon the intention of the parties (objectively ascertained) because all contractual liability is voluntarily undertaken. It must be in principle wrong to hold someone liable for risks for which people entering into such a contract in their particular market, would not reasonably be considered to have undertaken"

<sup>21</sup> *Ibid* at [78]



purpose', must the parties have had the loss in mind. It seems that it must be something like 'what the parties must have had in mind *as recoverable losses*'. By getting to this position, we have already asked all the relevant normative questions concerning the purpose and object of the contract, taking into account what benefits and burdens the parties had in mind, and the norms of practice and understanding in certain specialised markets, which would allow one to establish what the parties would have assumed responsibility for, objectively. It is therefore appropriate to categorise the opinions of Lord Hoffmann, Lord Hope and Lord Walker under the umbrella heading of the Alternative approach.

This approach also explains a case analogous to the present one, in which one would regard as too remote certain losses which are readily foreseeable and probable. A high-flying businessman tells the taxi driver that if he does not catch a certain flight, he will lose a £1 million deal. The taxi driver, unaware of the fine details of the law of contract, undertakes to drive the man to the airport promptly. In breach of contract, he arrives late and the deal is lost. Under the Orthodox approach, it is difficult to escape the conclusion that the loss of the deal is not too remote and the taxi driver should be liable for that loss.

Under the Alternative approach, an average cab driver would not be liable, since he would *never* have thought that he was taking on the risk of that loss. But this presumption could be rebutted if the driver had said 'Ok. But I'll have to charge you \$200,000'. By raising his price to such a magnitude, he can be taken to have assumed responsibility for the consequential loss. Indeed, as Lord Hoffman notes, '[t]he view which the parties take of the responsibilities and risks they are undertaking will determine the other terms of the contract and in particular the price paid. Anyone asked to assume a large and unpredictable risk will require some premium in exchange.'<sup>22</sup>

There is another respect in which the Alternative approach provides a more coherent account of remoteness. Once we have the rule that only those losses which are reasonably foreseeable as 'not unlikely' are recoverable, as a self-standing rule in its own right, not based on any other rationale, there is a problem in that whether a loss is recoverable or

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<sup>22</sup> *Ibid* at [13]

not depends purely on a nominal categorisation of the 'type' of the loss in question; crucially, there is no independent criterion by which one can judge whether such distinctions are apt.

The current case is an illustration of this point. Why should the extent of the volatility of the market rate give rise to such a distinction of 'type' rather than, say, the nationality of the charterers of the follow on fixture? This cannot be answered by the Orthodox approach because its conception of remoteness based on an ungrounded, neutral and self-standing notion of foreseeability is incomplete and incoherent. Under the Alternative approach, however, whether certain characteristics or features are relevant to the question of remoteness or not depends on the intention of the parties. It is reasonable to regard the nationality of the subsequent charterers as wholly irrelevant in deciding which losses we can reasonably assume the charterers to have undertaken, whereas 'extreme' volatile market conditions *may* well be relevant.

In conclusion, the core of the Alternative approach is the rejection of the foreseeability rule as the complete and definite guide in all cases concerning remoteness of damages. Instead, it shows that liability for breach is founded upon the intention of the parties deduced objectively from the construction of the whole transaction, taking into account all relevant factors in its commercial setting. The foreseeability rule is useful when, and only insofar as, it provides a good approximate guide to that intention.

### **A New Departure?**

How do the two approaches reflect the prevailing understanding of remoteness of damages in previous authorities? Simply put, the previous leading authority of *The Heron II* was a rejection of the Alternative approach in favour the Orthodox approach, and to that extent, the majority decision in *The Achilleas* can be seen as a 'new departure'.

As noted above, Lord Rodger takes his approach to be the correct interpretation of the original statement of principle in *Hadley v Baxendale*, supported by *The Heron II*. It will be useful to quote the full passage by Alderson B in that case. He said:

‘[T]he damages which the other party [i.e. party not in breach] ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.’<sup>23</sup>

The crucial question is this: what does it mean for losses to arise ‘naturally’ or ‘according to the usual course of things’? It has already been noted that Lord Rodger, following an extended discussion in *The Heron II*, takes it as a function entirely of the *degree of probability* with which the parties could foresee such losses.

This, it is submitted, is a reasonable conclusion to draw from *The Heron II* where their Lordships were overwhelmingly preoccupied with ascertaining the requisite degree of probability of loss if it were to be recoverable. Lord Reid rejected expressions such as ‘a serious possibility’, ‘a real danger’ and ‘on the cards’ as being too wide.<sup>24</sup> Their Lordships unanimously rejected the expression ‘on the cards’ but Lord Morris, Lord Pearce and Lord Upjohn approved<sup>25</sup> the other two rejected by Lord Reid. This was no surprise since much of the discussion is concerned with whether the judgment of Asquith LJ in *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd*<sup>26</sup> represented a departure from the traditional rule in *Hadley v Baxendale*, and the difference between the foreseeability requirements in tort and contract. Whatever the appropriate expression may be, the overriding focus was on the fine tuning of the degree of foreseeability, rather than considering whether there was something else underlying our idea of losses flowing ‘naturally’ and ‘in the ordinary course of things’.

Indeed, there is a very telling passage found in Lord Hodson’s speech which clearly points to the Orthodox approach. He says that ‘[t]he word “probable” in *Hadley v*

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<sup>23</sup> (1854) 9 Exch 341, pp. 354-355

<sup>24</sup> [1969] 1 AC 350, p. 390

<sup>25</sup> *Ibid* pp. 400, 415 and 425

<sup>26</sup> [1949] 2 KB 528

*Baxendale* covers both parts of the rule'.<sup>27</sup> This interpretation, that losses arising 'naturally' are also governed by probability, leads inevitably to the conclusion that the whole rule of remoteness is essentially concerned with foreseeability and probability.

Furthermore, Lord Upjohn expressly states that mere knowledge and foresight is enough, rejecting the view that liability must be made a term of the contract.<sup>28</sup> Although making liability an implied term is going further than ascertaining objectively whether the party in question can be reasonably taken to have assumed the risk of such liability, one is essentially engaged in the same practice in both cases: both<sup>29</sup> involve looking *outside* the words of the agreement and into the factual matrix of the agreement, to make a normative judgment as to the intention of the parties (objectively). Therefore, Lord Upjohn's *dictum* is a powerfully implicit rejection of the Alternative approach and the affirmation of the primacy of the foreseeability.

Lord Walker, in his judgment in the present case, rather charitably attributes to various passages<sup>30</sup> in *The Heron II* the sentiment of unease with the notion that remoteness is only a function of foreseeability. It is submitted that all but one of the passages is unconvincing, the one passage being Lord Pearce's discussion of the court ceiling collapsing after defective repairs.

Lord Reid, when he says that the loss should be 'sufficiently likely to result from the breach of contract *to make it proper* to hold that the loss flowed naturally from the breach or that loss of that kind should have been within his contemplation', in this context, seems to have in mind simply that the loss must have been sufficiently probable to be recoverable. Lord Morris, in the relevant passage, quotes a revealing passage from the judgment of Bovil CJ in *British Columbia Saw Mill Co v Nettleship*,<sup>31</sup> which states that the loss 'must be something which could have been foreseen and reasonably expected,

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<sup>27</sup> [1969] 1 AC 350, p. 409

<sup>28</sup> *Ibid* p. 422

<sup>29</sup> Now even more clearly so after *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 W.L.R. 896

<sup>30</sup> Lord Reid's speech at p. 385; Lord Morris's speech at pp. 398–399; Lord Pearce's speech at pp. 416–417 (with the example of the court ceiling collapsing during a sitting); and Lord Upjohn's speech at pp. 424–425

<sup>31</sup> (1868), LR 3 CP 499, 505

and to which he has *assented expressly or impliedly* by entering into the contract' (emphasis added). However, instead of commenting on this remarkable and explicit acceptance of the principle of assumption of responsibility by the parties, he goes on to examine a series of quotes from *The Monarch Steamship*<sup>32</sup> which all, in effect, say that the loss must be a 'likely' or 'probable' result of the breach, and finally concludes that the loss in question was clearly 'likely' or 'liable' to result, and hence recoverable. As for the passage by Lord Upjohn, he is simply examining the appropriateness of various adjectives to describe the prerequisite likelihood required for the loss to be recoverable. As mentioned above, Lord Upjohn had already stated that mere reasonable inference of the loss from the knowledge of the circumstances is enough, expressly overruling the contrary opinion in *Nettleship*.

It is accepted that Lord Pearce's judgment shows clearly the kind of concerns Lord Walker himself had in mind in the present case.<sup>33</sup> He is the least bothered about defining the precise degree of foreseeability required and states simply that '[t]he facts of the present case lead to the view that the loss of market arose naturally, that is, according to the usual course of things [from the breach].'<sup>34</sup> However, even though this concern was raised, none of the other Lordships were even-minded enough to acknowledge it. This deliberate omission, together with the general focus of the judgments and especially Lord Upjohn's *dictum*, leads one to the conclusion that the principle concerning the remoteness of contractual damages as stated in *The Heron II* is fundamentally based in foreseeability and probability. In this regard, the majority approach in the present case is a clear departure from the prevailing orthodoxy enunciated by the House of Lords in *The Heron II*.

However, the conclusion that the present case is a 'new departure' must be qualified. There have been cases subsequent to *The Heron II* which also reveal a departure from the Orthodox approach taken in that case. In *Satef-Huttenes Albertus SpA v Paloma Tercera*

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<sup>32</sup> *Monarch Steamship* [1949] AC 196

<sup>33</sup> The lightning rod example in at [78]

<sup>34</sup> [1969] 1 AC 350, p. 417

*Shipping Co SA ('The Pegase')*<sup>35</sup> Robert Goff J stated that, in determining one's liability, the emphasis is on what a reasonable person would have considered to be the extent of his *responsibility*. Furthermore, the Court of Appeal in *Mulvenna v Royal Bank of Scotland plc*<sup>36</sup> struck out a claim for damages against a bank for the loss of profits which the claimant said he would have made if the bank had complied with its agreement to provide him with the necessary funds. Even on the assumption that the bankers could have foreseen that the claimant would suffer a loss of profit, the damages were, nevertheless, too remote.

Most importantly of all, the 'assumption of responsibility' approach was *explicitly* applied in the House of Lords in the case of *South Australia Asset Management Corporation v York Montague Ltd.*<sup>37</sup> This case raised the question of whether a valuer, who had negligently advised his client bank that a certain property was worth more than the actual market value, should be liable not only for the difference between the valuation and the market price at the time, but also for the further loss due to a fall in the property market. The House decided that he should not be liable for that kind of loss:

'The scope of the duty, in the sense of the consequences for which the valuer is responsible, is that which the law regards as best giving effect to the express obligations assumed by the valuer: neither cutting them down so that the lender obtains less than he was reasonably entitled to expect, nor extending them so as to impose on the valuer a liability greater than he could reasonably have thought he was undertaking.'<sup>38</sup>

In the present case, however, Lord Hoffmann held that this principle was to apply equally to consequences arising out of an express contractual duty (to redeliver the ship on time) as well as an implied contractual duty (to take reasonable care in valuation). It is submitted that this is an entirely logical step, since there is no material difference as a matter of principle between losses arising out of an express on one hand and an implied

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<sup>35</sup> [1981] 1 Lloyd's Rep 175, p. 183

<sup>36</sup> [2003] EWCA Civ 1112

<sup>37</sup> [1997] AC 191

<sup>38</sup> *Ibid* p. 212

duty on the other, as far as remoteness of damage is concerned. However, it is doubtful whether *South Australia Asset Management* was really a case of an implied term or duty in tort. Therefore, in any event, insofar as it elevates the Alternative approach to a *general* principle of remoteness in all contracts, *The Achilles* is worthy of special recognition as a departure point.

### **Return to Orthodoxy?**

What about a return to orthodoxy then? A departure from the modern understanding of remoteness has in fact led us back to the prevailing orthodoxy of the latter half of the 19th Century, soon after the seminal case of *Hadley v Baxendale* was decided. A series of cases<sup>39</sup> took precisely the agent-centred, purpose-based, assumption of risk approach to remoteness propounded by the majority in the present case. As an illustration, Willes J said:

‘the mere fact of knowledge cannot increase the liability. The knowledge must be *brought home* to the party sought to be charged, under such circumstances that he must know that the person he contracts with reasonably believes that he *accepts the contract with the special conditions attached to it*’ (emphasis added).<sup>40</sup>

Coming back full circle to the starting point of the rule of remoteness, it is submitted that the above approach taken by Willes J in the 19th Century and the Alternative approach taken by the majority in the present case, can be teased out by a careful examination of the judgment in *Hadley v Baxendale*.

The Orthodox view first of all designates the losses arising ‘naturally’ or ‘according to the usual course of things’ as losses recoverable under normal circumstances (first-limb), and the losses that may be regarded as having been ‘in the contemplation of the parties... as the probable result of the breach’ as recoverable under knowledge of special

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<sup>39</sup> *British Columbia and Vancouver's Island Spar, Lumber, and Saw-Mill Co v Nettleship* (1868) LR 3 CP 499; *Horne v Midland Railway* (1872) LR 7 CP 583; *Portman v Middleton* (1858) 4 CB (NS) 322; *Elbinger Aktiengesellschaft v Armstrong* (1874) LR 9 QB 473

<sup>40</sup> *Nettleship* (1868) LR 3 CP 499, p. 509. See also the Bovin CJ at p. 514, quoted above.

circumstances (second-limb).<sup>41</sup> Then, it proceeds to interpret 'probable' as being applicable in *both* cases.<sup>42</sup> This seems a very odd construction – why make a distinction of two limbs if they are to be assimilated to one and the same thing (in all cases, a 'not unlikely result')? It is submitted that this way of interpreting the passage is unwarranted, and an alternative construction is proposed.

First, it is obvious, on the face of it, that Alderson B was making an explicit *distinction* between losses that arise 'naturally, i.e., according to the usual course of things' and those that may be regarded having been in the mind of the parties 'as the probable result of the breach of it'.<sup>43</sup> By putting the two losses in the alternative formulations, he cannot have regarded these two as identical concepts, or have picked out the exact same set of losses in all cases. It follows then that he must have had some criteria other than bare probability in determining whether a loss was to be properly regarded as arising 'naturally' or 'according to the usual course of things'.

We have already seen the arguments from the basic contractual principle of voluntary undertaking, which points towards the assumption of responsibility as the best answer.<sup>44</sup> But this concept was not foreign to Alderson B, as is shown by his discussion with regards to the second-limb of the rule. His rationale for making the contract breaker liable for the foreseeable (probable) losses arising out of special circumstances if they were known to him, but not if they were unknown, is that:

'had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case, and of this advantage it would be very unjust to deprive them.'<sup>45</sup>

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<sup>41</sup> *The Heron II* [1969] 1 AC 350, p. 409 as per Lord Hodson: "The phrases beginning 'either' and 'or' are commonly said to divide the rule laid down by the Court into two parts, the one arising 'according to the usual course of things' and the other relating to special circumstances in which the contract was made"

<sup>42</sup> *Ibid*

<sup>43</sup> We shall return shortly to the issue of whether it is correct to regard the first as being applicable in normal circumstances and the second in special circumstances.

<sup>44</sup> [2008] UKHL 48; 3 WLR 345 at [12], as per Lord Hoffmann

<sup>45</sup> (1854) 9 Exch 341, p. 355



When special circumstances are known between the parties, the party potentially in breach can be taken to have obtained a risk-premium in light of the knowledge of the increased risk (thereby implicitly accepting the risk of the special loss) and therefore the courts should apply the foreseeability test, *because that is how the courts should assume the parties to have allocated the risks*. This seems to echo exactly Lord Hoffman's observation: 'Anyone asked to assume a large and unpredictable risk will require some premium in exchange'. The converse is that where the special circumstances are *unknown*, the loss should lie where it falls (with the innocent party) since the court cannot expect the parties to have allocated the risk of the loss from the special circumstances. It is again but a short step to say the contract-breaker had not assumed responsibility for the special risk, because he had no knowledge of it, nor the opportunity to bargain for a higher price in return.

It may be argued that this is only concerned with the so-called 'second-limb' and therefore it does not automatically follow that the same reasoning should be extended to the 'first-limb'.<sup>46</sup> It is submitted that such a distinction is artificial and again unwarranted, both conceptually and from the reading of the passage itself.

Although Alderson B makes a clear distinction between the two types of losses, he regards both types of losses as being equally applicable both in the presence *and* absence of knowledge of special circumstances. He readily talks of 'natural' consequences in the context of knowledge of special circumstances and of losses arising 'in the great multitude of cases' (that is, probable) in the context of the absence of such knowledge.<sup>47</sup>

What this goes to show is that the difference between usual and 'special' circumstances is merely the set of information input from which one judges whether the loss in question was either a 'natural' or 'probable' consequence of the breach. In other words, there is no fundamental distinction between usual and 'special' *circumstances*, but there is one between 'natural' and 'probable' *losses*, both of which are applicable in all circumstances. This new interpretation, therefore, turns the Orthodox understanding on its

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<sup>46</sup> *Ibid* at [93], as per Baroness Hale

<sup>47</sup> (1854) 9 Exch 341, p. 355

head: assimilating the 'natural' and 'probable' measure of losses, and making a fundamental distinction of species between usual and 'special' circumstances.

This means that whatever the information set, we are always processing it in the same way; that is, to find out what the 'natural' or 'probable' consequences of the breach from such states of knowledge are. If the assumption of risk approach is inherent in that process (in considering, it is submitted, the 'natural' consequence), then it would be inconsistent to say that that approach is appropriate for some information sets (knowledge of special circumstances) but not for others (with no such knowledge).

Finally, there is a passage which immediately follows the more well-known one, which clearly indicates that the rule just enunciated *is* sensitive to the intention of the parties as to their relative rights and obligations in case of breach. The passage is worth quoting in full:

'It is said, that other cases such as breaches of contract in the non-payment of money, or in the not making a good title to land, are to be treated as exceptions from this, and as governed by a conventional rule. But as, in such cases, both parties must be supposed to be cognisant of that well-known rule, these cases may, we think, be more properly classed under the rule above enunciated as to cases under known special circumstances, because there both parties may reasonably be presumed to contemplate the estimation of the amount of damages according to the conventional rule.'<sup>48</sup>

This shows that there was another way in which the parties' intentions could be accommodated under the general rule. In the present case, the 'conventional rule' governing the losses arising out of a late redelivery under a time-charter was that damages were limited to the difference between the charter-rate and the market rate for the period of overrun. The above passage says that this common knowledge may be processed as one of the input information from which one determines the appropriate level of damages.

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<sup>48</sup> (1854) 9 Exch 341, p. 355

Some of the interpretations suggested above may well bring problems of their own. However, they need not be valid to their full extent to support the thesis that the majority approach in *The Achilleas* is supported by the passages in *Hadley v Baxendale*. It is enough to show that Alderson B saw that bare probability was not the one and only definitive and determinative rule of remoteness in contractual damages, and that he alluded to ideas of assumption of risk as underlying his rule. It is submitted that evidence of that is clear, and to that extent, *The Achilleas* is also a genuine return to old orthodoxy.

*The Impact of Article 10 of the European Convention of Human Rights on  
Contempt of Court in the UK*

GERWYN WISE

**Abstract**

The focus of this article is on contempt of court and the impact of Article 10 on the approach undertaken by national judges. There is a clear conflict between Article 10, promoting the distribution of ideas and thought, and the administration of justice, primarily focused on preserving orderly court proceedings. The national courts have tended to favour the protection of the administration of justice, imposing strict rules of contempt, over the right to disseminate a free flow of ideas infringing on the Court's jurisdiction. However, it has been noted by the national judges that they must avoid protecting 'justice as a cloistered virtue'. Indeed, Lord Atkin stated that it must be 'allowed to suffer the scrutiny and the respectful even though outspoken comments of ordinary men'.<sup>1</sup> It is this fundamental conflict that makes contempt of court particularly interesting, as the national judges have been forced to readjust their traditionally sympathetic approach to infringements of justice. However, Article 10 of the European Convention of Human Rights appears to have been followed to an unacceptable level, particularly in relation to sensational 'media-driven narratives, going well beyond the reporting of facts'.<sup>2</sup>

***Sunday Times and the Domestic Judicial approach***

As has already been stated, the national judges have historically favoured the protection of the administration of justice over freedom of expression in applying the law of contempt of court. However, this archaic approach has received significant criticism; Rosen has commented that 'its scope is notoriously uncertain, producing far-reaching insecurity amongst journalists and muzzling the majority of them with caution'.<sup>3</sup> However, the Courts were far from convinced by expression arguments, the law having focused on 'accused persons who ought not to be put in jeopardy by publications for

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<sup>1</sup> *Ambard v Attorney General of Trinidad and Tobago* [1936] A.C. 322, 336 (PC)

<sup>2</sup> H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (OUP, Oxford 2006) 44

<sup>3</sup> M. Rosen, *The Sunday Times Thalidomide Case: Contempt of Court and the Freedom of the Press* (Writers and Scholars Educational Trust, London 1979) 1

which those responsible cannot be brought to book'.<sup>4</sup> This focus on protection of the court process over the promotion of expression was demonstrated in *Attorney General v Times Newspapers*<sup>5</sup>. The case concerned an article the *Sunday Times* planned to publish in relation to the ongoing Thalidomide litigation, where drug company Distillers was alleged to have caused severe deformities to developing foetus due to its manufactured drug for pregnant mothers. The allegations were resisted and the parties to litigation entered into further negotiations. The *Sunday Times*, having already published critical articles, proposed to publish further articles, with the permission of the Attorney General. However, he decided to apply for an injunction to prevent publication, to which the Divisional Court granted by refusing to entertain ideas of free expression, stating English judicial authority did 'not require the Court to balance competing interests'.<sup>6</sup> The Divisional Court refused to consider rights of publication, through an application of the law prior to the *Sunday Times* case, preferring to focus on the protection of the administration of justice. Indeed, the House of Lords overturned an appeal, granted by Lord Denning in the Court of Appeal, preferring to reassert the principles enunciated in the Divisional Court.

The House of Lords clearly worked from the premise of the fair trial having priority; Lord Reid stated: 'there has long been, and there still is in this country, a strong and generally held feeling that trial by newspaper is wrong and should be prevented.'<sup>7</sup> Indeed, Lord Cross of Chelsea confirmed the superior position of the administration of justice over speech protection, stating that an 'absolute rule' was required 'in order to prevent a gradual slide towards trial by newspaper or television'.<sup>8</sup> However, Lord Reid ensured the weak position of the press under domestic law, restating the basic principle that 'prejudgment of a case or of specific issues in it is objectionable'.<sup>9</sup> The approach taken by the Law Lords was of complete contrast to that of the Court of Appeal, Lord Denning having stated that the court must remember to consider 'the interest of the public in

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<sup>4</sup> *Freedom of Expression and the Law: a Report by Justice*, Chairman of the Committee, Lord Deedes (Justice, London 1990) 10

<sup>5</sup> *Attorney General v Times Newspapers* [1974] A.C. 273 (HL)

<sup>6</sup> *Attorney General v Times Newspapers* [1972] 3 W.L.R. 855, 865 (QBD)

<sup>7</sup> *Attorney General v Times Newspapers* (n 5) 300

<sup>8</sup> *Attorney General v Times Newspapers* (n 5) 330

<sup>9</sup> *Attorney General v Times Newspapers* (n 5) 300

matters of national concern and the freedom of the press to make fair comment on such matters.<sup>10</sup> In fact, Lord Denning afforded the freedom of expression significant authority, outlining that one may only be in contempt where there was a 'real and substantial danger of prejudice to a trial or settlement'.<sup>11</sup> The Court's contrast in approach effectively demonstrated the uncertain and inconsistent approach of the judiciary to freedom of expression, particularly in the sphere of contempt of court. Thus, critics attacked the 'inconsistencies, abstractions and unanswered questions', with Rosen having claimed that the decision was devastating to an English media that already had 'one hand tied behind its back'.<sup>12</sup> Indeed, one would have to agree with Niekerk's analysis of Lord Denning as proceeding to 'knock a massive aperture into the law as it had previously been understood', affording freedom of expression significant recognition.<sup>13</sup> Some, like Lord Devlin, refused to accept such criticism, suggesting that 'it is difficult to see how the free area can be more generously defined' in relation to the press, if 'trial by newspaper or television is to be outlawed'.<sup>14</sup> Although the decision was not universally dismissed, it did seem to be based on broad policy considerations, taking an extreme approach to the level of protection that ought to be afforded to Distiller's right to a fair trial. Indeed, the European Court of Human Rights accepted that the judgement seemed 'dangerously wide as to prohibit comment on the basis that it would lead generally to trial by newspaper', imposing a new approach on the most senior judiciary in England and Wales.<sup>15</sup>

### **European Court of Human Rights and *Sunday Times***

Following the decision in the House of Lords, to which there was significant criticism, the editor of the *Sunday Times* applied to the European Court of Human Rights to assess whether the domestic law of contempt complied with Article 10 of the Convention. In an immediate statement of intent, the majority of the European Court stated that the law of

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<sup>10</sup> *Attorney General v Times Newspapers* [1973] Q.B. 710, 739 (CA)

<sup>11</sup> *Attorney General v Times Newspapers* (n 5) 731

<sup>12</sup> M. Rosen (n 3) 76

<sup>13</sup> B.V. Niekerk, 'The Premises of a Democratic System of Free Speech concerning the Administration of Justice: A Comparative Overview' (1981) 6 J. Legal. Prof. 87, 118

<sup>14</sup> Lord Devlin, in *The Thalidomide Children and the Law: a Report by the 'Sunday Times'* (Deutsch, London 1973) 155

<sup>15</sup> N. Lowe and others, *The Law of Contempt* (3<sup>rd</sup> edn Butterworths, London 1996) 226

contempt of court 'was an interference by public authority in the exercise of the applicants' freedom of expression.'<sup>16</sup> Indeed, when moving on to consider the vital question of whether the law of contempt was a justified infringement under article 10(2), the Court stated that there was not a 'choice between two conflicting principles, but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted.'<sup>17</sup> Thus, one is able to state that the Strasbourg Court clearly gave 'precedence to freedom of expression and press freedom over other goals'.<sup>18</sup> Indeed, the majority claimed 'the courts cannot operate in a vacuum' and that 'whilst they are a forum for the settlement of disputes, this does not mean that there can be no prior discussion of disputes elsewhere.'<sup>19</sup> Therefore, it is clear, having considered the domestic approach taken in the Court of Appeal and the critical reaction to the House of Lords decision, that the European Court was more in favour of a greater recognition of freedom of speech in contempt of court proceedings. Rosen reflected on the Strasbourg decision, noting 'never was the relationship between free press and free trial so fully argued, nor could the facts which emerged have more favoured open expression.'<sup>20</sup> On the basis of the above analysis, one may conclude that the European Court clearly declared the domestic approach of the Law Lords as inconsistent with Article 10 and the European Convention, thus suggesting that the national judges ought to alter their approach to contempt of court.

The clear distinction in the decision of the majority in Strasbourg, thereby placing the national court under an obligation to alter the law so as to comply with the convention, has been questioned both judicially and academically. Indeed in a joint dissenting opinion in *Sunday Times*, the minority judges stated the domestic Law Lords considered whether 'in order to guarantee the due administration of justice, it was necessary to restrain publication of the contested article.'<sup>21</sup> The apparent consideration of free speech in the Law Lords' decision was demonstrated in Lord Cross's judgement that the 'law of contempt constitutes an interference with the freedom of speech' and that 'we should be

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<sup>16</sup> *Sunday Times v United Kingdom* (1979-80) 2 E.H.R.R. 245, 45

<sup>17</sup> *Sunday Times v United Kingdom* (n 16) 65

<sup>18</sup> E. Barendt, *Freedom of Speech* (Oxford University Press, Oxford 2005) 325

<sup>19</sup> *Sunday Times v United Kingdom* (n 16) 65

<sup>20</sup> M. Rosen (n 3) 4

<sup>21</sup> *Sunday Times v United Kingdom* (n 16) Para 5 Dissenting Opinion

careful to see that the rules of contempt do not inhibit freedom of speech more than is reasonably necessary.<sup>22</sup> Indeed, Mann, supporting the observation of the minority judges, argued that the House of Lords 'spoke in terms which were entirely consistent with the tenets of the convention', even though they were under no obligation to apply it.<sup>23</sup> Although one is able to appreciate the above opinions, particularly those of the Strasbourg minority, the House of Lords adopted a 'very restrictive absolute rule' which would, in Judge Zekia's opinion, 'not provide the press with a reasonably safe guide for their publications'.<sup>24</sup> Therefore, it would seem that the decision of the majority in Strasbourg was a bold shift from the law as enforced by the Law Lords, though one would have to appreciate Lowe's observation that the decision was 'sufficiently open-ended to allow a difference of view'.<sup>25</sup>

### **The Contempt of Court Act 1981**

The Lord Chancellor, Lord Hailsham, stated during the passage of the Contempt of Court Act 1981 that its main purpose was to 'harmonise the law of England and Wales with the majority judgment of the Strasbourg Court in the *Sunday Times* case'.<sup>26</sup> However, one must question the impact of the European judgment as section 1 of the Act incorporated a 'strict liability' test for claims of contempt, disregarding the interferers 'intent to do so'.<sup>27</sup> Section 1 is qualified under s2(2), where it is stated that 'strict liability applies only to a publication which creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced'.<sup>28</sup> Our initial focus shall be on how the national judges applied section 2(2) following the *Sunday Times* case, noting Lloyd LJ's observation that the provisions affected 'a permanent shift in the balance of public interest away from protection of the administration of justice and in favour of freedom of speech'.<sup>29</sup> Indeed, this was confirmed by Lord Hailsham, the architect of the Contempt of

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<sup>22</sup> *Attorney General v Times Newspapers* (n 5) 322

<sup>23</sup> F.A. Mann, 'Contempt of Court in the House of Lords' (1979) 95 LQR 348, 349

<sup>24</sup> *Sunday Times v United Kingdom* (n 16) Judge Zekia para 26

<sup>25</sup> N. Lowe and others (n 15) 337

<sup>26</sup> Hansard HL, Vol 419, Col 660 (9 December 1980)

<sup>27</sup> Contempt of Court Act 1981 s 1

<sup>28</sup> Contempt of Court Act 1981 s 2(2)

<sup>29</sup> *Attorney General v Newspaper Publishing Plc*[1988] Ch 333, 382 (CA)



Court Bill, when claiming 'this is a liberalising Bill'.<sup>30</sup> However, this positive shift in basic application of expression principles was questionably undermined by Lord Hailsham's 'vital points', specifically his assertion that 'by far the most important is to safeguard the rights of man charged with a serious crime to have a fair trial'.<sup>31</sup> The approach of the Lord Chancellor, far from ensuring that the Bill incorporated the supremacy of free expression asserted in *Sunday Times*, appeared inconsistent and reminiscent of the approach prior to 1981. Indeed, Lord Wigoder noted that 'already there are signs that in this Bill the balance has been tilted unnecessarily against the press'.<sup>32</sup> Furthermore, following the passing of the Act, some within the judiciary have appeared to apply the law prior to *Sunday Times*, stating that it is 'not to be expected that decisions of this House on questions of this sort will invariably be consistent with those of the European Court'.<sup>33</sup> Therefore, following the indecisiveness in Strasbourg and clear inconsistency in the reasoning behind the amending Contempt of Court Act, Article 10's impact depended largely on the application of section 2(2) in the 1981 Act.

### **Judicial Application of Section 2(2) prior to the Human Rights Act**

It was in *Attorney-General v English*<sup>34</sup> that the House of Lords was provided with the first opportunity to consider the threshold of the 'substantial risk of serious prejudice' test under s2(2). The case concerned an article published in a newspaper supporting a pro-life candidate in a by-election. The candidate was severely handicapped and her entire campaign was based on the sanctity of life and an opposition to the growing practice of allowing handicapped babies to die in hospitals. In reference to the candidate, the editor commented that 'today the chances of such a baby surviving are very small' and that 'someone would surely recommend letting her die of starvation'.<sup>35</sup> The article appeared on the third day of the trial of a paediatrician who was alleged to have allowed a handicapped baby to die of starvation. Though the article did not directly refer to the paediatrician, the Divisional Court claimed the article breached section 2(2), the

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<sup>30</sup> Hansard HL, Vol 419, Col 659 (9 December 1980)

<sup>31</sup> Hansard HL, Vol 419, Col 661 (9 December 1980)

<sup>32</sup> Hansard HL, Vol 419, Col 670 (9 December 1980)

<sup>33</sup> *Attorney General v BBC* [1981] A.C. 303, 352 (HL)

<sup>34</sup> *Attorney General v English* [1983] 1 A.C. 116 (HL)

<sup>35</sup> *Attorney General v English* (n 34) 122

reasoning of which was subsequently upheld in the House of Lords. Lord Diplock stated that, in terms reminiscent of the law prior to 1981, 'trial by newspaper, or as it should be more compendiously expressed today, trial by media, is not to be permitted in this country.'<sup>36</sup> Furthermore, in complete contrast to the decision in *Sunday Times* and intention of Parliament, Lord Diplock interpreted the 'two words (substantial and serious) to be intended to exclude a risk that is only remote.'<sup>37</sup> The decision, far from appearing to incorporate an appreciation for the freedom of the press to publish, restricted valid interferences with the administration of justice. Indeed, Zellich argued that Lord Diplock was 'robbing section 2(2) of all meaning' and that he had 'seriously misinterpreted the subsection and confirmed the traditional breadth of the contempt law which Parliament had been at pains to curb.'<sup>38</sup> The clear attempt by the House of Lords to restrict the impact of Article 10, through the Contempt of Court Act, was further demonstrated in *MGN Pension Trustees Ltd*,<sup>39</sup> where the Court reasserted Lord Diplock's 'remote' test, dismissing claims that substantial meant 'weighty'.<sup>40</sup> Thus, immediately following the passing of the 1981 Act, the domestic law continued to violate the principles outlined by the European Court, whilst specifically dismissing any emphasis on Article 10. Indeed, one would have to agree with Miller's conclusions following *English* that 'the substantial risk element of the statutory test now has effectively the same meaning as the common law test as interpreted by Lord Reid in the *Sunday Times* case.'<sup>41</sup>

In applying section 2(2), which one must agree is 'vague and may be interpreted either expansively or narrowly',<sup>42</sup> the Court took an inconsistent approach to freedom of expression, demonstrated by the Court of Appeal in *Attorney-General v Independent Television News Ltd and Others*.<sup>43</sup> The case concerned newspaper and television reports on the murder of a special constable, in which one of the suspects was identified as a former member of the IRA. In subsequent contempt of court proceedings, Lord Justice

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<sup>36</sup> *Attorney General v English* (n 34) 141

<sup>37</sup> *Attorney General v English* (n 34) 142

<sup>38</sup> G. Zellich, 'Free Trial and Free Press' (1982) PL 343, 344

<sup>39</sup> *MGN Pension Trustees Ltd v Bank of America National Trust and Savings Association and Credit Suisse* [1995] E.M.L.R. 99 (Ch D)

<sup>40</sup> *MGN Pension Trustees Ltd* (n 113) 107

<sup>41</sup> C.J. Miller, *Contempt of Court* (3<sup>rd</sup> edn OUP, Oxford 2000) 232

<sup>42</sup> D. Feldman, *Civil Liberties and Human Rights in England and Wales* (2<sup>nd</sup> edn OUP, Oxford 2002) 57

<sup>43</sup> *Attorney-General v Independent Television News Ltd and Others* [1995] 2 All E.R. 370 (QBD)

Legatt initially stated that ‘the approach that the court should adopt in these matters is most helpfully explained by Lord Diplock.’<sup>44</sup> However, the Court of Appeal, in a clear break with the opinion that the ‘Act has done little to change the law of contempt’,<sup>45</sup> placed emphasis on the fact that the offence occurred many months before the criminal trial. Indeed, Lord Justice Legatt relied on observations in the *Botham case*<sup>46</sup> that “‘proximity to trial is clearly a factor of great importance’ noting ‘many wickets will have fallen’ by the time the case was heard ten months later.<sup>47</sup> Therefore, the court in *ITN* took a particularly wide approach to the consideration of contempt, preferring a more practical approach over Lord Diplock’s restrictive test. Indeed, Lord Justice Legatt acknowledged the ‘overriding importance’ of the ‘lapse of time between broadcast or publication and trial’.<sup>48</sup> Therefore, one would have to question Surin’s observation that the Act was ‘intended to maintain the basic stance of the ultimate supremacy of the due administration of justice over freedom of speech’, particularly as Lord Justice Legatt found in favour of the media.<sup>49</sup> However, the decision failed to fully comply with the principles proposed in Strasbourg, particularly as the media organisations were branded as ‘extremely fortunate’.<sup>50</sup> Indeed, Buxton J stated that he reached the conclusion, favouring the media, without a ‘great deal of confidence’.<sup>51</sup> Therefore, the impact of the 1981 Act, as a measure enforcing the principles imposed by Strasbourg, was questionable; one can appreciate Young’s observation that it ‘may not be a repressive measure, but let no-one be misled by the Lord Chancellor into believing it to be a liberal measure.’<sup>52</sup> Furthermore, prior to incorporation of the convention into domestic law under the Human Rights Act, freedom of expression as employed in the *Sunday Times* case was largely dismissed in relation to section 2(2) of the Contempt of Court Act 1981.

### Section 5 of the 1981 Act

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<sup>44</sup> *Attorney-General v Independent Television News Ltd and Others* (n 43) 375

<sup>45</sup> J. Young, ‘The Contempt of Court Act 1981’ (1981) 8(2) *British Journal of Law and Society* 243, 252

<sup>46</sup> *Attorney General v News Group Newspapers Ltd* [1987] Q.B. 1 (CA)

<sup>47</sup> *Attorney General v News Group Newspapers Ltd* (n 46) 16

<sup>48</sup> *Attorney-General v Independent Television News Ltd and Others* (n 43) 382

<sup>49</sup> *N. Lowe and others* (n 15) 105

<sup>50</sup> *Attorney-General v Independent Television News Ltd and Others* (n 43) 383

<sup>51</sup> *Attorney-General v Independent Television News Ltd and Others* (n 43) 386

<sup>52</sup> J. Young (n 45) 252

Before moving on to consider the effect of the Human Rights Act on the law of contempt, one must consider section 5 of the Contempt of Court Act, which arguably provides protection for the freedom of speech. Section 5 states:<sup>53</sup>

‘A publication made or as part of a discussion in good faith of public affairs or other matters of general public interest is not to be treated as contempt of court under the strict liability rule if the risk of impediment or prejudice to particular legal proceedings is merely incidental to the discussion.’

If the Attorney General is able to demonstrate that the s2(2) requirements are fulfilled, he must then seek to establish that s5 does not apply. Marshall, particularly encouraged its inclusion, stated that if a ‘broad interpretation’ were given to it by the courts, section 5 would ‘go some way to acknowledging the claims of free expression’.<sup>54</sup> Indeed, the Attorney General argued that compliance with the convention, following the *Sunday Times* saga, was made ‘doubly sure’ by what is now section 5.<sup>55</sup> Thus section 5 was a clear attempt by Parliament to allow the courts the opportunity to balance the requirements of free speech and the administration of justice, as was advised by the European Court. Jaconelli interpreted section 5 in a similar fashion, arguing that it ‘helps to ensure that restrictions on speech imposed by the substantive offences that they qualify are proportionate’ and consistent with the jurisprudence of the European Court.<sup>56</sup>

The leading case in respect of section 5 is that of *English*, discussed earlier. Lord Diplock emphasised the strong position of s5, not as an ‘exception to s2(2)’, but as ‘stand[ing] on an equal footing with it’.<sup>57</sup> In an approach parallel to that taken by the European Court, Lord Diplock noted that the article contributed ‘to the wider controversy as to the

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<sup>53</sup> Contempt of Court Act 1981 s 5

<sup>54</sup> G. Marshall, ‘Press Freedom and Free Speech Theory’ (1992) Spr P.L. 40, 58

<sup>55</sup> Hansard HC, Vol 1000, Col 300, (4 March 1981)

<sup>56</sup> J. Jaconelli, *Open Justice: A Critique of the Public Trial* (OUP, Oxford 2002) 46

<sup>57</sup> *Attorney General v English* (n 34) 141

justification of mercy killing'.<sup>58</sup> Indeed, he afforded Article 10 a significant presence through section 5, even stating that a restrictive approach 'would have stifled all discussion in the press upon the wider controversy of mercy killing'.<sup>59</sup> However, critics were not so optimistic, with Barendt claiming that section 5 only protected discussions of public affairs where they were 'incidental', and it 'would not have helped the *Sunday Times* in the thalidomide case'.<sup>60</sup> Barendt's analysis must be valued, principally due to Lord Diplock's own admission that the expression in *English* was 'in nearly all respects the antithesis' of the *Sunday Times* article, where there was no mention of the paediatrician.<sup>61</sup> Furthermore, Lord Diplock's observation appears somewhat ironic, particularly as the Contempt of Court Act was introduced to meet the criticisms of the European Court in *Sunday Times*. However, the apparent limitations were arguably undermined in *Attorney-General v Times Newspapers*<sup>62</sup> where a number of tabloids discussed Fagin, a man who had broken into Buckingham Palace. Lady Falkender, commenting in the *Mail on Sunday*, alluded to the possible homosexual relationship between a member of the Queens bodyguard and the alleged intruder. Though it was felt that the article would affect the jury's assessment of Fagin's honesty, the Court of Appeal held that section 5 protected the newspaper article. In a liberal balancing of the competing public interests, akin to that taken in *Strasbourg*, Lord Lane stated 'the appalling state of the safeguards designed to protect her majesty together with the proclivities of her personal officer were matters which were of the greatest public concern.'<sup>63</sup> Indeed, on first analysis the case demonstrated 'a liberal interpretation of s5 which is to be welcomed', thus emphasising the impact of the decision in *Sunday Times* on the domestic law of contempt.<sup>64</sup> However, an article by *Sunday Times*, alleging that Fagin had stabbed his step-son, was found not to fall within section 5. Therefore, the impact of section 5 was severely limited in scope, particularly due to the requirement that the risk of prejudice must be incidental to the discussion.<sup>65</sup> Thus, one might reasonably state that, following

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<sup>58</sup> *Attorney General v English* (n 34) 143

<sup>59</sup> *Attorney General v English* (n 34) 144

<sup>60</sup> E. Barendt (n 18) 330

<sup>61</sup> *Attorney General v English* (n 34) 143

<sup>62</sup> *Attorney General v Times Newspapers Ltd* (1983) *The Times* 12 February (QBD)

<sup>63</sup> *Attorney General v Times Newspapers Ltd* (n 62) Lord Lane

<sup>64</sup> *N. Lowe and others* (n 15) 116

<sup>65</sup> *C.J. Miller* (n 41) 113

the above analysis, the high standards imposed by the European Court in *Sunday Times*, under Article 10, were not initially appreciated by the English judges.

As noted, section 5 was not received as positively as Parliament intended, particularly demonstrated in *Attorney-General v TVS Television*.<sup>66</sup> The case concerned a television programme exposing Reading landlords who were obtaining money by deception, coinciding with the trial of a landlord for charges of conspiring to defraud the DHSS. In deciding that s5 would not be available as a defence to the broadcasters, the Court took a significantly restrictive approach to the meaning of 'merely incidental'. One would have to agree with the critique that s5 is fatally flawed, particularly as the media attempt to demonstrate that their article, already judged as creating serious prejudice, is merely incidental even though it relates largely to the case.<sup>67</sup> Indeed, Stone argued that section 5 'gives no special recognition to freedom of expression or the importance of the press in a democracy', thus suggesting that the national court's approach frustrated the intention of Parliament.<sup>68</sup> Indeed, in applying section 2(2) and the fundamentally flawed section 5, the court did not appear overly concerned with the decision taken by Strasbourg in *Sunday Times*. However, the passing of the Human Rights Act 1998 placed the national courts in a particularly difficult position, forcing our esteemed judiciary to finally apply the principles of the convention that Parliament signed up to.

### **Contempt of Court and the impending Human Rights Act**

As one will recall, the threshold of section 2(2) in the Contempt of Court Act was somewhat unclear following the decision in the *ITN* case. Some argued that the impact of the Human Rights Act was 'unlikely to be dramatic', specifically due to the supposed prior impact of *Sunday Times* on the domestic law.<sup>69</sup> Indeed, Lord Justice Sedley, speaking extra-judicially, stated that the United Kingdom was 'not embarking on an

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<sup>66</sup> *Attorney General v TVS Television* (1989) *The Times*, July 7 (Div)

<sup>67</sup> H. Fenwick and G. Phillipson (n 2) 282

<sup>68</sup> R. Stone, *Textbook on Civil Liberties and Human Rights* (6<sup>th</sup>edn OUP, Oxford 2006) 347

<sup>69</sup> A. Nicol and others, *Media law and Human Rights* (Blackstone, London 2001) 137

unchartered sea'.<sup>70</sup> Therefore, one could reasonably have suggested that incorporation of Article 10 would not have a significant impact on a law already altered to comply with the Convention. However, Fenwick and Phillipson disagreed, claiming there were a number of cases decided immediately prior to the inception of the Human Rights Act that 'marked the turning point in approach'.<sup>71</sup> The influence of the impending incorporation of the Convention was arguably demonstrated in the *Gillian Taylforth case*,<sup>72</sup> which concerned newspaper reports commenting on a defendant's previous criminal record prior to trial. In a clear break with the restrictive application of s2(2) undertaken by Lord Diplock in *English*, Lord Justice Schiemann stated that the 'substantial risk' must result not only in the proceedings being 'impeded or prejudiced, but seriously so'.<sup>73</sup> Indeed, had the facts of the case been presented to Lord Diplock in *English*, there would undoubtedly have been a different finding of contempt of court. Furthermore, the decision, in allowing admittedly prejudicial material to be published, represented a 'critical turning point' in the approach of the courts to Article 10.<sup>74</sup> The liberal approach in applying section 2(2), more akin to the principles enunciated in Strasbourg, was further demonstrated in *Attorney-General v Unger*<sup>75</sup>, where the Court of Appeal found that the publication of a defendant's admission of guilt was not contempt of court. In a similar approach to that adopted in *ITN*, Lord Justice Simon-Brown confirmed the 'crucial matter' as being the 'residual impact of the publication on a notional juror at the time of the trial'.<sup>76</sup> Indeed, relying on the so-called 'fade factor', the Court found the delay of nine months significant, particularly as 'many stories are told nowadays and the memory of them rapidly fades'.<sup>77</sup> However, one might question the apparent shift towards an application of the *Sunday Times* principles by the national judges, particularly as the court reasserted the 'imperative that newspaper articles do not imperil the fairness of any such trial'.<sup>78</sup>

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<sup>70</sup> Sir S. Sedley, 'The Rocks or the Open Sea? Where is the Human Rights Act Heading?' in L.J. Clements and P. Thomas (ed), *The Human Rights Act: a Success Story?* (Blackwell Publishers, Malden MA 2005) 22

<sup>71</sup> H. Fenwick and G. Phillipson (n 2) 269

<sup>72</sup> *Attorney General v MGN* [1997] 1 All E.R. 456 (Div)

<sup>73</sup> *Attorney General v MGN* (n 72) 460

<sup>74</sup> A.T.H. Smith, 'Contempt, Free Press and Fair Trial: a 'Permanent Shift'' (1997) 56(3) C.L.J. 467, 468

<sup>75</sup> *Attorney General v Unger* [1998] E.M.L.R. 280 (Div)

<sup>76</sup> *Attorney General v Unger* (n 75) 291

<sup>77</sup> *Attorney General v Unger* (n 75) 292

<sup>78</sup> *Attorney General v Unger* (n 75) 289

Indeed, Lord Justice Simon-Brown issued a 'warning'<sup>79</sup>, stating that his judgement 'shines as an amber light, not a green one'.<sup>80</sup> Therefore, one may remain doubtful as to the national judiciary's enforcement of Convention principles, particularly Article 10, in relation to contempt of court proceedings.

Nevertheless, some continue to suggest that the Human Rights Act and Article 10 undoubtedly influenced the judiciary, apparently evidenced in *Attorney-General v Guardian Newspapers*.<sup>81</sup> The case concerned the trial of an artist who stole body parts, for which *The Observer* published an article suggesting that the defendant had no artistic purposes. In contrast to the 'fade factor', evident in *Unger*, the newspaper article contemporaneously published accusations that Kelly was a necrophilic character', with similar characteristics to 'addictive murderers'.<sup>82</sup> In a clear advancement in judicial analysis, Lord Justice Sedley stated, though the Human Rights Act was not in force, the history of the Contempt of Court Act made it 'not only legitimate but necessary' to construe contempt in conformity with the European Convention.<sup>83</sup> Indeed, in allowing the publication to escape strict liability, Lord Justice Sedley relied strongly on the 'likelihood' test outlined in *Worm v Austria*.<sup>84</sup> *Worm* concerned a clash between Article 6 and Article 10 in relation to a publication that specifically imparted guilt on the defendant in criminal proceedings. In the course of their judgement, the European Court stated 'the necessity for any restriction on freedom of expression must be convincingly established'.<sup>85</sup> Thus, Lord Justice Sedley was able to conclude, 'not without anxiety', that the jurors 'would have heard the judge's direction about ignoring both the media and personal animus and have done their best to follow it.'<sup>86</sup> Indeed, Lord Justice Sedley placed significant importance on his previous statement, principally relevant in regard to the law of contempt, that it would be 'unreal and potentially unjust to continue to develop English public law' without reference to Article 10 and the decisions in Strasbourg.<sup>87</sup>

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<sup>79</sup> *Attorney General v Unger* (n 75) 292

<sup>80</sup> *Attorney General v Unger* (n 75) 293

<sup>81</sup> *Attorney General v Guardian Newspapers* [1999] E.M.L.R. 904 (QBD)

<sup>82</sup> *Attorney General v Guardian Newspapers* (n 81) 909

<sup>83</sup> *Attorney General v Guardian Newspapers* (n 81) 922

<sup>84</sup> *Worm v Austria* (1998) 25 E.H.R.R. 454

<sup>85</sup> *Worm v Austria* (n 84) 47

<sup>86</sup> *Attorney General v Guardian Newspapers* (n 81) 926

<sup>87</sup> *R v Secretary of State for Home Department, Ex Parte McQuillan* [1995] 4 All E.R. 400



Therefore, one may conclude at this stage by stating that the threat of the Human Rights Act and the possibility of direct application of the Convention principles in their domestic courts, finally forced the national judges to apply the law consistently with that proposed decades earlier in *Sunday Times*.

### **Has the European Court forced the Domestic Judiciary too far in protecting Article 10?**

Following the decision in *Guardian Newspapers*, one must question whether the court has gone too far in its promotion of Article 10, with Fenwick claiming the modification from protection of justice to a promotion of free press 'shifts the responsibility for the effect of prejudicial material from the media to judges and jurors'.<sup>88</sup> Indeed, one would have to agree with the observation that the decision in the Court of Appeal represented a 'stealthy raising' of the standard required to satisfy the strict liability test. Fenwick even questioned whether s2(2) was 'effective in protecting fair trials to the extent demanded by Article 6' of the convention, particularly due to the Court's post-1998 willingness to find in favour of the press in contempt proceedings.<sup>89</sup> Though, the European Court emphasised the importance of expression in *Worm*, it also warned that it 'was the public prosecutor's role and not that of the applicant, to establish Mr Androsch's guilt.'<sup>90</sup> Although juries do not require complete protection from the media, journalists must be aware of the 'limits of permissible comment' and avoid prejudicing 'the chances of a person receiving a fair trial'.<sup>91</sup> Therefore, one might question whether the national courts, in an attempt to prepare for the incorporation of Article 10 and ensure that domestic law adhered to the principles upheld in Strasbourg, may have over-compensated in their protection of the press and inadvertently developed a law of contempt in violation of Article 6. Thus, one might declare that, although the interpretation of s2(2) of the 1981 Act may have finally reached the level required under Article 10 in *Sunday Times*, the national Court's unwillingness to develop when required resulted in its inability to effectively reflect the law as developed in other aspects of the convention.

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<sup>88</sup> H. Fenwick and G. Phillipson (n 2) 265

<sup>89</sup> H. Fenwick, 'Free Speech and Fair Trials' (2006) 47(Spr) S.L.Rev 5, 6

<sup>90</sup> *Worm v Austria* (n 84) 55

<sup>91</sup> *Worm v Austria* (n 84) 5

As has been noted, the domestic courts, particularly since the incorporation of the convention under the Human Rights Act, have favoured a protection for the press under Article 10. This expansive and wide favouring of the press was particularly evident in the judgment of Lord Philips in *R v Hamza*<sup>92</sup>, where the appellant was appealing against his conviction on the grounds of excessive publicity. In a further split with previous judicial standards, Lord Philips stated that the fact 'adverse publicity may have risked prejudicing a fair trial is no reason for not proceeding with the trial if the judge concludes that, with his assistance, it will be possible to have a fair trial.'<sup>93</sup> Indeed, in a clear expansion of the approach taken by Lord Justice Sedley in *Guardian Newspapers*, the Court of Appeal claimed there was 'no reason to believe that the jury were not able to consider and resolve issues objectively and impartially'.<sup>94</sup> It would appear that, following Lord Philips' admission that the Court would not question the press unless there was an 'extreme'<sup>95</sup> violation, the judiciary will not oppose the media unless there is 'absolutely no prospect of a fair trial being held'.<sup>96</sup> Furthermore, one must question whether it is advisable that so much focus and pressure should be placed on the judiciary to prevent press violations affecting ongoing legal proceedings. As Qureshi noted, the idea that a judge presented with a case involving thousands of witnesses 'will suddenly on day one of the trial halt proceedings because of judicial reporting is wholly unrealistic'.<sup>97</sup> Indeed, the unrelenting presence of the media during legal proceedings was further evident in *Attorney General v MGN*<sup>98</sup>, where a newspaper article insinuated that there were racial undertones to an attack, an issue the judge had ruled as unrelated. Though it was held that there was a contempt of court, the judgement represents one of only a few post-HRA decisions against the press. Indeed, the standard of contempt, far from the restrictive approach taken to expression by Diplock in *English*, has risen in coordination with the 'culmination of a series of media pieces' that emerges on 'almost a daily basis'.<sup>99</sup> It appears that the

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<sup>92</sup> *R v Abu Hamza* [2007] Q.B. 659 (CA)

<sup>93</sup> *R v Abu Hamza* (n 92) 93

<sup>94</sup> *R v Abu Hamza* (n 92) 106

<sup>95</sup> *R v Abu Hamza* (n 92) 78

<sup>96</sup> D. Bloy and S. Hadwin, *Law and the Media* (Sweet and Maxwell, London 2007) 98

<sup>97</sup> T. Qureshi, 'Adverse Publicity' (2007) 157(7280) NLJ 969, 969

<sup>98</sup> *Attorney General v MGN Ltd* [2002] EWHC 907 (QBD)

<sup>99</sup> *Attorney General v Express Newspapers* [2004] EWHC 2859, [2005] E.M.L.R. 13, 279

judiciary, far from ensuring that the Contempt of Court Act is enforced, have increased the s2(2) threshold to a limit that has allowed the press an almost unregulated level of coverage. As Phillipson and Fenwick commented, the modern courts attempted to circumvent the restrictive approach taken to applying the principles in *Sunday Times*, though they have 'continued to raise the bar without fully acknowledging that they were doing so.'<sup>100</sup>

### Conclusion

To conclude on our analysis of Article 10 and the impact it has had on the process of a free trial, one must state that its influence has unquestionably increased. Indeed, one would have to agree with Smartt's opinion that 'contempt rules are breached everyday' by the media, though action is 'rarely taken' by the Attorney General.<sup>101</sup> Indeed, this was particularly demonstrated during the Soham trials, where there was a constant barrage of intrusion and the defendants were subjected to 'trial by media'. We must be concerned by the lack of contempt proceedings initiated by the Attorney General in relation to that media coverage, particularly compared to the decision in *BBC and Hat Trick Productions*<sup>102</sup>. In the *BBC* case, the Court condemned the 'strikingly prejudicial' observations of a single program of a trial months away, finding a violation under section 2(2).<sup>103</sup> Indeed, one would have to state that the level of intrusion was 'not even in the same league' as occurred in Soham, emphasising the advancement of the media's influence throughout society.<sup>104</sup> Indeed, the Contempt of Court Act, originally attempting to incorporate Article 10, appears to have raised considerable questions on the validity of the domestic law under Article 6. Surely it is wrong that the national courts, having applied the 1981 provisions restrictively until the incorporation of Article 10, are now imposing standards completely out of line with the purpose of the Convention? The fact that media coverage has now been afforded too much respect, regularly causing public

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<sup>100</sup> H. Fenwick and G. Phillipson (n 2) 279

<sup>101</sup> U. Smartt, 'Who Still Observes the Law of Contempt?' (2007) 171(5) J.P. 76, 76

<sup>102</sup> Attorney General v BBC and Hat Trick Productions [1997] E.M.L.R. 76 (Div)

<sup>103</sup> Attorney General v BBC and Hat Trick Productions (n 102) 82

<sup>104</sup> D. Bloy and S. Hadwin (n 96) 102

interest trials to collapse, must adhere the reader to accept that 'maybe it is time to abolish the Contempt of Court Act 1981?'<sup>105</sup>

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<sup>105</sup> U. Smartt (n 101) 83

*Has the Human Rights Act 1998, as a constitutional statute, meant the end of the road for constitutional rights at common law?*

GAVIN MCLEOD

**Introduction**

December 2004 was marked in legal news by *A and Others v Secretary of State for the Home Department*,<sup>1</sup> being arguably the most significant constitutional case in a generation. The question for the Appellate Committee of the House of Lords was essentially this: could a minister of the British Crown, acting under the authority delegated to him by Parliament,<sup>2</sup> cause a foreign national to be detained without charge or trial, potentially indefinitely?<sup>3</sup>

The initial answer was affirmative, since such is the natural consequence of a parliamentary system of government where the legislature's authorisation is the supreme form of law. The response was however substantially qualified.<sup>4</sup> Such a thing could not be done compatibly with Article 5 of the European Convention on Human Rights.<sup>5</sup> It was totally inconsistent with the right of the individual under that Article to freedom from arbitrary detention without charge or trial. Article 5, in turn, was not some obtuse or foreign concept. It was fully part of national law. The legal basis was the Human Rights Act 1998, and particularly section 1 thereof, which provides that Article 5 (amongst other Articles guaranteeing other freedoms) is to have '*effect*'<sup>6</sup> domestically. Moreover, section 2(1) provides that a court having regard to questions posed under the Act has to give

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<sup>1</sup> *A and Others v Secretary of State for the Home Department*, [2005] 2 AC 68, HL

<sup>2</sup> Namely under the Anti-Terrorism, Crime and Security Act 2001, s23

<sup>3</sup> Or at least for the duration of time that Parliament delegated the power; under ATCSA, s29, the exercise of the power was to be reviewed by 10<sup>th</sup> November 2006, but could then have been renewed.

<sup>4</sup> Or at least that of eight of nine of their Lordships who heard the appeal: (Lord Bingham, Lord Nicholls, Lord Hope, Lord Scott, Lord Rodger, Lord Carswell and Baroness Hale). Lord Walker dissented against the majority's findings. The decision of Lord Hoffmann (who concurred with the majority in the result) will be the subject of particular comment.

<sup>5</sup> The European Convention on Human Rights and Fundamental Freedoms 1950 is an international treaty, entered into by most European states (including the United Kingdom) in response to the horrors of Nazism. It establishes obligations upon signatory states to protect such rights of the individual as are laid down in the Articles of the Treaty.

<sup>6</sup> The Human Rights Act 1998, s1 (2) (emphasis added)

consideration to the jurisprudence of the European Court of Human Rights in Strasbourg, which is the principal interpretative tribunal determining the scope of the Convention rights. This jurisprudence is therefore now officially regarded as persuasive case law in UK courts.

As a result of these legislative provisions, Article 5 was enforceable on its own terms as against the Government, and accordingly the majority categorically stated that the actions of the Home Secretary in detaining the individuals breached their human rights. Lord Hoffmann, in doing the same, did not however feel the need to base his judgment on the principles of the Convention particularly. The arguments based on the applicability of Article 5 to the situation were in fact, to him at least, '*technical*,'<sup>7</sup> and almost digressive. He stated that:

‘I would not like anyone to think that we are concerned with some special doctrine of European law. Freedom from arbitrary arrest and detention is a quintessentially British liberty, enjoyed by the inhabitants of this country when most of the population of Europe could be thrown into prison at the whim of their rulers.’<sup>8</sup>

Lord Hoffmann seemingly implied that it was the common law, the peculiar corner-stone of the English legal system, which provided, at least in substance, the answer to the question the case posed. The Human Rights Act, as well as the defined protection of liberty in Article 5 contained therein, was something which merely re-stated the situation which the common law already recognised; it was a different means of reaching the same end. As his judgment went on to hold:

‘The United Kingdom subscribed to the Convention because it set out the rights which British subjects [already] enjoyed under the common law.’<sup>9</sup>

It is noteworthy that Lord Hoffmann's approach in the case was peculiar to him. For the majority, the application of Convention principles was, to a greater or lesser degree,

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<sup>7</sup> *A and Others* (op.cit.) at 130, per Lord Hoffmann (emphasis added)

<sup>8</sup> *Supra*

<sup>9</sup> *Ibid*

centrally important in the rationale of their opinions. Lord Bingham (with whom all others in the majority expressed agreement) made substantial reference to the Convention and the related Strasbourg case law. Lord Hoffmann's judgment was therefore distinctive in the way that it appeared to offer an alternative theoretical basis, being one which implicitly appealed to the common law and not to the European Convention as enacted by the 1998 Act.

It is submitted that Lord Hoffmann's rationale was not however in substance inconsistent with the 1998 Act, mostly because the common law's historic recognition of civil liberty (by which is meant political and bodily liberty)<sup>10</sup> has not been substantially replaced by the new regime the Act provides, but rather cemented by it. In particular, the Act has advanced the protection of rights in circumstances where the common law has demonstrated substantial weaknesses in the efficacy of its own regime of protection. Historically this has been largely the result of the imbalances in the British constitutional system and its dogmatic insistence upon the ideal of Parliament as representing supreme legal authority. The fact that the incorporation of the Convention has not led to a substantial value reassessment by the courts is shown both by continued reliance upon common law doctrine where such is available but also by cautious responses to Strasbourg case law when such is seen as difficult to reconcile with the common law system or otherwise lacking in understanding of it. The metamorphosis caused by the 1998 Act, significant as it is, is therefore one of constitutional importance and not one demonstrating a substantive change in the role of common law civil libertarian values.

### **Common law rights: the traditional understanding**

‘In this country, a person is...entitled to his freedom and is only required to submit to restraints on his freedom if he knows in substance the reason why it is claimed that this restraint should be imposed.’<sup>11</sup>

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<sup>10</sup> This essay will not comment upon broader rights considerations, particularly as regards so called ‘social rights.’ It is submitted that these so called rights (to education, etc) do not reflect the traditional British understanding of the concept, which has historically been one of rights as political freedoms, or as devices which regulate the relationship between state and citizen.

<sup>11</sup> *Christie v Leachinsky* [1947] AC 573, HL, at 588, per Viscount Simon LC

This ruling of the House of Lords led to the conclusion that a failure to substantiate the basis of the arrest by telling the arrestee of the reasons for it amounted to his false imprisonment and provided him with a cause of action. So the cause of human rights and liberty was advanced by the common law courts before the days of the European Convention and the Human Rights Act. The decision shows, in terms of origin, what Lord Hoffmann largely appeared to appeal to as the basis of his decision in *A and Others*.

The common law has provided a significant portion of English law in terms of its governance of the relationship between the individual and the state. *Christie v Leachinsky* is a primary example. The case provided the impetus for the modern law on information upon arrest, as now enacted statutorily.<sup>12</sup> Going back further than this, the courts of the 18<sup>th</sup> and early 19<sup>th</sup> Centuries largely saw themselves as protectors of liberty in a political climate where England, in the wake of its 'Glorious Revolution' of 1688, was eager to be viewed differently from the supposed absolute-monarchical superpowers across the water. It is in this context that *Entick v Carrington* is best understood.<sup>13</sup> The case led to the decision that a minister of the Crown had no authority by virtue of his office alone to intrude upon the household of the plaintiff and still less seize his property. Counsel for the plaintiff argued that:

'A power to issue such a warrant...is contrary to the law of England, [and even though it is said that] such warrants have been granted by Secretaries of State ever since the [English, i.e. Caroline] Revolution; if they have, it is high time to put an end to them, for if they are held to be legal the liberty of this country is at an end; no power can lawfully break into a man's house and study to search for evidence against him; this would be worse than the Spanish Inquisition; The warrant is to seize all the plaintiff's books and papers without exception, and carry them before Lord Halifax [the minister]; what? has a Secretary of State a right to see all a man's private letters of correspondence? this would be monstrous indeed; and if it were lawful, no man could endure to live in this country.'<sup>14</sup>

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<sup>12</sup> Police and Criminal Evidence Act 1984, s28

<sup>13</sup> *Entick v Carrington* (1765) 2 Wilson KB 273

<sup>14</sup> *Supra*, at 282 (grammar, etc, as originally reported)



The plaintiff won the case, the importance of which has been described as being:

‘In the way it established on behalf of the judges a claim to have a shared responsibility for the assessment of what kinds of abridgements of civil liberties were required in the name of national survival. Many of the advances in civil liberties in 18th Century Britain were made *in the courtroom*.’<sup>15</sup>

So in his assessment of a ‘quintessentially British liberty,’<sup>16</sup> Lord Hoffmann, it could be suggested, was referring back to such famous decisions of the courts as this one. Other cases have followed the spirit of *Entick. Beatty v Gilbanks*<sup>17</sup> established that persons not otherwise acting unlawfully cannot be prevented from associating together simply because that they might do so could lead to disruption caused by rival demonstrators. More recently, *Derbyshire County Council v Times Newspapers Limited*<sup>18</sup> held that it was unsustainable for a political institution elected by popular vote to claim to have any cause of action in defamation, due to the restrictions on political expression such would cause. These cases show that the common law itself has historically taken progressive steps to defend liberty and continues to do so in modern times, establishing principles upon which individuals have been able to assert political or conscientious freedoms as against the state.

The common law has however suffered from weaknesses in its battle since *Entick* with the forces of political power and those forces’ readiness to interfere with the liberties of the individual. The principal weakness has been the common law’s own creation: the supremacy of the legislature. The principle has its origin in the same political circumstances which gave courts the rationale of *Entick*, and has ironically been used by the legislature to silence such rationale through parliamentary enactment when the context has purportedly necessitated it ever since. In terms of the potential the doctrine actually has for the undermining of the kinds of civil liberty which the courts have otherwise protected, one need only look to Lord Reid’s famous definition of it:

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<sup>15</sup> Gearty: ‘Rethinking Civil Liberties in a Counter-Terrorism World’ (2007) *European Human Rights Law Review* 111, at 114 (emphasis added)

<sup>16</sup> See footnote 8

<sup>17</sup> *Beatty v Gilbanks* (1882) 9QBD 308

<sup>18</sup> *Derbyshire County Council v Times Newspapers Limited* [1993] AC 534, HL

'It is often said that it would be unconstitutional for the United Kingdom Parliament to do certain things, meaning that the moral, political and other reasons against doing them are so strong that most people would regard it as highly improper if Parliament did these things. But it is not beyond the power of Parliament to do such things. If Parliament chose to do any of them the courts could not hold the Act of Parliament invalid.'<sup>19</sup>

Parliament has, time and time again, interfered with rights under the common law. Sometimes the motivation has been both understandable and necessary (for example, in the case of emergency powers restricting freedoms of liberty and association in the two World Wars).<sup>20</sup> Regrettably, though, there has been an unfortunate temptation for the courts to abdicate adjudicative responsibility altogether in times such as these, even though such times demand more controls of legality on the exercise of political power than less panicked periods. *Liversidge v Anderson*<sup>21</sup> arguably claims to have pre-eminent place as the representation of this. Since described as a decision that 'at the time, perhaps, [was] *excusably wrong*,'<sup>22</sup> it concerned the definition of 'reasonable cause' for the purpose of the Secretary of State's power to order internment<sup>23</sup> of those suspected of being in allegiance with Nazism during the Second World War. The majority<sup>24</sup> took the view that 'reasonable cause' was capable of being satisfied on the basis of the Home Secretary's subjective assessment, such that his claim to believe there to have been reasonable cause was sufficient. Lord Atkin alone took the view that this was a fallacious argument. His analogy of 'if A has a broken ankle...does not mean and cannot mean if A *thinks* he has a broken ankle'<sup>25</sup> led to his firm view that 'reasonable cause' was an objective concept which needed satisfaction by evidence. His dissenting speech is now seen as one of the most powerful defences of the rule of law:

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<sup>19</sup> *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645, HL, 723, per Lord Reid

<sup>20</sup> For instance, under s1 of the Emergency Powers (Defence) Act 1939

<sup>21</sup> *Liversidge v Anderson* [1942] AC 206, HL

<sup>22</sup> *Inland Revenue Commissioners v Rossminster* [1980] AC 952, HL, 1011, per Lord Diplock (emphasis added)

<sup>23</sup> Defence (General) Regulations 1939, 18B; these Regulations were made pursuant to s1 of the 1939 Act

<sup>24</sup> Viscount Maugham, Lord Romer, Lord Macmillan, Lord Wright

<sup>25</sup> *Liversidge*, (op. cit), at 227, per Lord Atkin (emphasis added)

'I view with apprehension...the attitude of judges who...when face to face with claims involving the liberty of the subject show themselves more executive minded than the executive...In this country, amidst the clash of arms, the laws are not silent...It has always been one of the pillars of freedom, one of the principles of liberty for which...we are now fighting, that the judges...stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law.'<sup>26</sup>

The majority's decision was wrong, it is suggested, not because it accepted the necessity of internment; it was wrong because it effectively held that there was no demonstrable limit on the power of internment *at all*, leaving a vacuum in which the rule of law was distinctly absent. As such, the court's interpretation demonstrated a manifest failure of the common law doctrine, as advocated by Lord Hoffmann, of the 'principle of legality,' which means that:

'Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words...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.'<sup>27</sup>

In the principle of legality, the common law has developed an important rule which serves as a useful mechanism for limiting the extent of interferences with liberty as sanctioned by the political powers through the legislative processes. The principle does not reveal a common law right in itself, but rather ensures that such rights as those which the common law has historically recognised cannot be revoked except by the clearest of authorisation and then only after being subject to the strictest judicial interpretation. It is not a doctrine which has been in any way rendered obsolete by the Human Rights Act. In 2010, one of the first decisions of the new Supreme Court applied the principle of legality

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<sup>26</sup> *Supra*

<sup>27</sup> *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115, HL, 131, per Lord Hoffmann; *Liversidge* concerned delegated, not primary, legislation, but it is submitted that such should make no difference, the principle of legality being equally applicable to both.

and concluded that attempts by the Government to rely upon s1 of the United Nations Act 1946 as a means of imposing orders which froze the financial assets of terrorist suspects were unlawful because the legislation could not be interpreted as expressly authorising such oppressive sanctions.<sup>28</sup> Lord Hope held:

‘The case brings us face to face with the kind of issue that led to Lord Atkin's famously powerful protest [in *Liversidge*]...The consequences of the [freezing] Orders that were made in this case are so drastic and so oppressive that we must be just as alert [as was Lord Atkin] to see that the coercive action that the Treasury have taken really is within the powers that the 1946 Act has given them....We must be just as careful to guard against unrestrained encroachments on personal liberty.’<sup>29</sup>

Here then is some strong evidence in support of the notion that common law principles of liberty, as well as common law rules as to the limiting of state interference with that liberty, remain important judicial considerations in the Human Rights Act age. The principle of legality operated to ensure that explicit statutory authorisation alone is now the only means of lawfully effecting the kind of order with which the case was concerned. This will require as a consequence the policy to be subjected to legislative debate before being enacted.

Statute deprives the principle of legality of utility as a means of protecting civil liberties when the ordinary meaning of enacted legislation is unquestionably clear. Before the Human Rights Act, therefore, it was widely recognised that some modifications in the constitutional order were going to be necessary if the spirit of *Entick* was to have a chance of ever properly testing ‘elective dictatorship’<sup>30</sup> in the face of such clear enactments. Moreover, the dangers of executive, rather than parliamentary, government are prevalent in our own constitution and so this was no imagined problem; Parliament may be supreme, but only in circumstances where membership in the House of Commons

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<sup>28</sup> *A v HM Treasury* [2010] 2 WLR 378, SC

<sup>29</sup> *Supra*, at 387-8, per Lord Hope, Deputy President

<sup>30</sup> Lord Hailsham, ‘*The Dilemma of Democracy*,’ Collins, 1978, 126; the former Lord Chancellor referred to the phenomenon of British politics whereby dubious and largely unchallenged levels of executive power can be indirectly encouraged by the legislative process and the ‘first past the post’ electoral system.

is controlled by the political tactics of the governmental party and where the ability of the House of Lords permanently to resist such tactics has been swept away.<sup>31</sup>

The desirability of such modifications in the constitutional order was neatly analysed by Sedley LJ when rejecting the argument that democracy means that the enacted will of Parliament must, *of necessity*, prevail:

‘A democracy is *more* than a state in which power resides in the hands of the majority...it is [also] a state in which individuals and minorities have an assurance of certain basic protections from the majoritarian interest, and in which independent courts hold the responsibility for interpreting, applying and- importantly- supplementing the law...in the interests of every individual.’<sup>32</sup>

It is the Human Rights Act which has served as the primary modification.

### **The Human Rights Act: old principles, new enforcement**

The Labour Government elected in 1997 had innovative policies, including that of ‘bringing rights home,’ (i.e. from the ‘*European*’ Convention) this having its fulfilment in the Human Rights Act. The Act led to two main consequences. The first is the effect of section 6, which renders unlawful the actions of a public authority when inconsistent with the incorporated Articles (unless such acts are clearly authorised by legislation). Public authorities are hence now required positively to act in a way which is compatible with human rights principles and failure to do so accordingly becomes actionable.

The second consequence is in the shift the Act has caused as regards the constitutional role of the courts in oversight over the other powers of the state. This is pivotal to what the Act truly means for civil libertarian jurisprudence; the legislation provides, in the minds of some commentators, ‘unquestionably the most important formal distribution of

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<sup>31</sup> Parliament Act 1911, as amended

<sup>32</sup> Sedley LJ in ‘*The Making and Remaking of the British Constitution*,’ Blackstone, 1998, at p25 (emphasis added)

political power in Britain since [the Parliament Act] 1911.<sup>33</sup> By virtue of section 3, courts, in interpreting legislation, are required 'so far as it is possible' to ensure that such interpretation is consistent with the incorporated principles of the Convention. The courts have interpreted this power purposively, holding that it gives them the ability to 'read in words' into legislation and thereby to 'modify the meaning, and hence the effect' of what Parliament legislated for.<sup>34</sup> This is novel territory, for the principle of legality never went so far as to enable courts to modify the meaning of *explicit* words, whereas section 3 does. As Lord Phillips has said:

'I do not consider that the principle of legality permits a court to disregard an unambiguous expression of Parliament's intention. To this extent its reach is *less* than that of section 3.'<sup>35</sup>

The power under section 3 can accordingly be used to come to a rights-g geared conclusion in a particular case despite the existence of apparently unhelpful legislation, as indeed in *Ghaidan*<sup>36</sup> itself. But whilst the capability of the courts to counter-act against legislation shown to interfere with rights principles has been undoubtedly strengthened by section 3, the logical basis remains the same as under the principle of legality. The underlying value of the use of the court's jurisdiction over statutory interpretation to try and ensure a use of legislative power as respectful of established human rights as possible is substantially unchanged.

The courts' new found efficacy in the face of oppressive legislation does not end with section 3, however. If a finding of Convention-compliant legislation is impossible, the senior courts can consider the imposition of a 'declaration of incompatibility' under section 4 instead, whereby Parliament is effectively told that what has been enacted is contrary to the human rights of an individual affected and the courts are unable, despite their existing powers, to remedy the situation. Such a declaration was made in *A and*

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<sup>33</sup> Ewing: *The Human Rights Act and Parliamentary Democracy*, (1999) 62 *Modern Law Review* 79, 79

<sup>34</sup> *Ghaidan v Godin Mendoza*, [2004] 2 AC 557, HL, 571, per Lord Nicholls

<sup>35</sup> *A v HM Treasury* (op. cit.) at 423, per Lord Phillips, President (emphasis added)

<sup>36</sup> In *Ghaidan*, gender specific words ('wife or husband') were put into a conditional wording ('as if they were wife or husband') so as to include within their ambit homosexual as well as heterosexual couples-see the Rent Act 1977, Schedule 2.

*Others*. The declaration of incompatibility does not entitle the courts to overturn the legislation or to render it ineffective, as section 4(6) makes clear. In that sense Parliament remains free to 'legislate contrary to fundamental principles of human rights';<sup>37</sup> its sovereignty is preserved. But the declaration is a powerful political device. It provides 'ammunition to those who disapprove of the [incompatible] Act and desire to agitate for its amendment or repeal'<sup>38</sup> and serves as a constitutional warning which invites Parliament to address the legislation and to enact remedial provisions, lest it fatally undermine the authority of the courts given these powers by Parliament in the first place. The political significance of a section 4 declaration is such that, whilst executive and Parliament 'might refuse' judicial invitations to amend legislation, such 'is likely to be far from usual.'<sup>39</sup>

In the case of s23 of the Act of 2001, the declaration of incompatibility issued by the House of Lords in *A and Others* led to the enactment of hurriedly produced remedial legislation, the Prevention of Terrorism Act 2005.<sup>40</sup> This paved the way for the release of the detained individuals from custody, subject to strict oversight in the form of 'control orders.'<sup>41</sup> The key question in the case was of whether the exercise of emergency powers of detention for foreign nationals, further to a power of derogation from Article 5 of the Convention as supplemented by section 23, was compatible with the detainees' rights.<sup>42</sup> This was in circumstances where no equivalent measures had been taken to detain British nationals, from whom (it was accepted by the Government) an equivalent danger existed. The power of derogation was meanwhile exercisable only in times of 'war or other emergency threatening the life of the nation' and then only to the extent 'strictly required

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<sup>37</sup> *Simms*, (op. cit.), at 131, per Lord Hoffmann

<sup>38</sup> *A and Others* (op. cit.), at 145, per Lord Scott

<sup>39</sup> Klug: 'A Bill of Rights: Do we need one or do we already have one?', (2007) *Public Law* 701, 708

<sup>40</sup> This Act made the headlines at the time as being one of the most significant Bills to go through Parliament in recent years in terms of what it revealed regarding relations between Lords and Commons. Both Houses sat through the night as the Lords insisted on amendments which the Commons refused. The ping-pong game led to a dawn light 'endurance test' until the Commons eventually relented.

<sup>41</sup> Control orders restrict the social and communicative activities of the individuals concerned to varying degrees. In some instances, they have been so oppressive as of themselves to amount to breaches of Article 5: see, e.g. *Secretary of State for the Home Department v JJ*, [2008] 1 AC 385, HL

<sup>42</sup> The Home Secretary had enacted the Human Rights Act 1998 (Designed Derogation) Order (SI 2001/3644) into law, thereby removing the protection of Article 5.

by the exigencies of the situation' (per Article 15). The House essentially had to decide if that test had been made out.

Whilst the majority was prepared to accept that there was an 'emergency threatening the life of the nation' in the existence of the terrorist threat (Lord Hoffmann dissenting), the majority was not prepared to accept that the policy established by section 23 was 'strictly required.' To state that it was strictly required was illogical and unfounded when no equivalent plans had been made to detain British nationals in similar circumstances, despite their admitted equivalent danger. This showed the entire rationale to be flawed. The effect of the decision in *A and Others*, in causing the Government to abandon a much maligned anti-terrorist policy<sup>43</sup> despite parliamentary authorisation, leads to the conclusion that the case is 'perhaps the most significant of all decided under the Human Rights Act'<sup>44</sup> and therefore one which pre-eminently demonstrates the practical effect which that piece of legislation has had in asserting the courts' role of oversight over the other organs of the state.

It will be noted that the decision depended upon the concept of the test in Article 15 of the Convention.<sup>45</sup> That test lays down circumstances in which interference with the right to liberty is lawful, based on preconditions of necessity as regards the exercise of emergency powers in the public interest. In effect, Article 15 establishes a particular formula for what is a well rehearsed principle of the rule of law, namely that the exercise of emergency powers can only be legally justified on objective grounds in a manner which is proportionate to the legitimacy of the aim of public safety. In many material respects, the lone dissent of Lord Atkin in *Liversidge* represented this ideal. As regards whether the particular Regulation (18B) contained the power which it purportedly did, he appeared to consider that he owed a judicial obligation to ensure that the emergency

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<sup>43</sup> Criticism of the policy was widespread and intense. Notably it came from a committee of Privy Councillors headed by Lord Newton, which recommended that section 23 be 'replaced as a matter of urgency'; see the Newton Committee Report: *The Anti-Terrorism, Crime and Security Act 2001 Review*, Crown Copyright, at paragraph 203.

<sup>44</sup> Leigh, in Fenwick (ed), *Judicial Reasoning under the Human Rights Act*, Cambridge University Press, 2007, 190

<sup>45</sup> Article 15 has not been incorporated by s1 of the Human Rights Act. Nevertheless, the Attorney General in *A and Others* accepted that it provided the proper test for the question of derogation from Article 5, which had been incorporated by that section.



power could not be used except further to a strictly governed interpretation of its limits in accordance with the principle of legality. The court's approach to 'strictly required' sixty years later was not, it is suggested, fundamentally different from Lord Atkin's approach to 'reasonable cause.' Both used the language of the particular tests under consideration in a way which was geared towards furthering the cause of civil liberty. In *Liversidge*, this was in the interpretation given to the relevant words; in *A and Others*, it was in the subjugation of the test to the principles of logic to see whether, as the test required, there was effectively no other option but to derogate. The desired end remained the same in both instances. It is only the means which changed.

### Conclusion

Lord Hoffmann has made the point that the European Convention is largely the product of the common law and its principles of liberty. The implied consequence is that the Human Rights Act, which incorporates that Convention on a statutory footing, is not much more than a re-statement. In *A and Others*, he indirectly appealed to the old values of the common law to attack the detention policy and make the point that people would be mistaken if they thought the case was concerned with 'some doctrine of European law.'<sup>46</sup> Parallels could easily be drawn between his speech and the submissions of Mr Entick's counsel in 1765, such being the impassioned nature of the language used in both instances. 'The real threat to the life of the nation,' Lord Hoffmann concluded, 'comes not from terrorism but from laws [i.e. section 23] such as these.'<sup>47</sup>

In large part, it has to be recognised that Lord Hoffmann's romanticism is well founded. Many conceptions of rights in English law, from those guaranteeing liberty from arbitrary detention to those ensuring a fair trial, arise ultimately from the common law. Such rights may well have been supplemented by statute, but the common law is often the origin of them. Moreover, the common law has done much through its principles of statutory interpretation (the principle of legality) to nurture, develop and protect such liberties. It is right to say then that there are 'constitutional' rights of individuals which the common

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<sup>46</sup> See footnote 8

<sup>47</sup> *A and Others*, (op. cit.), at 132, per Lord Hoffmann

law recognises 'quite apart from the Human Rights Act,' in the sense that they did not suddenly appear from the Act, but have merely been reinforced by it.<sup>48</sup>

*A and Others v Secretary of State for the Home Department (No 2)*<sup>49</sup> concerned such a constitutional right, namely the right against torture. Counsel laid much emphasis on the common law's rejection of torture, at least since the time of the abolition of the Court of Star Chamber in 1640. Lord Bingham, in response, held that:

'The principles of the common law, standing alone, in my opinion compel the exclusion of third party torture evidence as unreliable, unfair, offensive to ordinary standards of humanity and decency and incompatible with the principles which should animate a tribunal seeking to administer justice.'<sup>50</sup>

As one might expect from Lord Bingham, he supplemented his ruling with discussion of case law from Strasbourg in relation to Article 3 of the Convention (prohibiting, in all circumstances, torture and inhuman and degrading treatment) and notably *Chahal v United Kingdom*.<sup>51</sup> Lord Hoffmann, also with no element of surprise, made substantial reference to the history of the common law in rejecting the argument that evidence obtained by torture was admissible in English courts, even though no British authority had been responsible for procuring the inhuman treatment.

The values of common law rights, and of common law protections of such rights, endure in the Human Rights Act age. The two *A and Others* cases and *A v HM Treasury* are notable representations. The difficulty, as has been seen, is in the historic impotence of the common law where legislation has been directly and carefully crafted to deprive persons of liberty, no matter how illogically or oppressively. The Human Rights Act has now led to the courts taking important steps to address this problem, providing a means for a more rigorous defence of the liberties of the individual whilst maintaining, in theory at least, the principle of legislative supremacy and its associated democratic justification.

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<sup>48</sup> Lord Cooke: 'The Road Ahead for the Common Law,' (2004) *International and Comparative Law Quarterly* 273, 276, paraphrasing Lord Steyn

<sup>49</sup> *A and Others v Secretary of State for the Home Department (No 2)* [2006] 2 AC 221, HL

<sup>50</sup> *Supra*, at 270, per Lord Bingham

<sup>51</sup> *Chahal v United Kingdom* (1996) 23 EHRR 413, European Court of Human Rights

The section 3 interpretative power, as a progression from the principle of legality, has combined with the political influence of a section 4 declaration to intensify the courts' constitutional armoury. It can therefore fairly be said that the Act provides the new constitutional arrangement which was (as Sedley LJ highlighted) needed in order to put a stop on the advancing rise of 'elective dictatorship,' this being something perhaps seen most prominently of late in the quasi-presidential role exercised by Prime Minister Blair when supported by an intense Commons majority.

Rather than the Act meaning the end of common law traditions of rights protection, it actually means, if anything, the better survival of such traditions, primarily by giving them a new found 'sense of democratic legitimacy.'<sup>52</sup> After all, it is ultimately the provisions of an Act of Parliament which have provided the courts with powers to question other Acts of Parliament on rights grounds, and so the exercise of those powers is, in theory at least, as democratic as the action of enacting the legislation as against which those powers are in fact used. With respect, all this shows why the attitudes implicit in the speech of Lord Hoffmann as regards the common law's superior role to play in *A and Others (1)* were perhaps:

'ungenerous, given that it has only been the measure of incorporation that has strengthened the power of the judges in the face of legislation designed to interfere with human rights and fundamental freedoms.'<sup>53</sup>

Lord Hoffmann's 'ungenerous' response possibly arose, in addition to his view that the common law has its own means of protecting liberty regardless of the Convention, because of his known scepticism about the helpfulness of the indirect incorporation of Strasbourg case law by section 2 of the 1998 Act. He has admitted to having doubts 'about the suitability...for this country of having questions on human rights decided by an international tribunal made up of judges by many countries';<sup>54</sup> doubts, presumably, only

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<sup>52</sup> Masterman: 'Taking the Strasbourg Jurisprudence into account: developing a municipal law of human rights under the Human Rights Act,' (2005) *International and Comparative Law Quarterly*, 907, 924

<sup>53</sup> Bailey, Harris & Jones: '*Civil Liberties: Cases, Materials and Commentary*,' Oxford University Press, 6<sup>th</sup> edition 2009, 471

<sup>54</sup> That is, by the Strasbourg Court; Lord Hoffmann: 'The Human Rights Act and the House of Lords,' (1999) 62 *Modern Law Review* 159, 164

exacerbated by the section 2 obligation of domestic courts to consider the decisions of that particular tribunal.

The courts' interpretation of its obligation under section 2 has largely been to state that a clear decision of Strasbourg should be followed in the absence of 'special circumstances'<sup>55</sup> which suggest that it should not be so. Where Strasbourg has not determined the question, the courts consider themselves free to act, subject to a prohibition on interpretation 'which goes way beyond anything which [they] can reasonably foresee that Strasbourg might do.'<sup>56</sup>

This should not be seen as endorsing a Strasbourg 'take over.' For one thing, if, as this essay and Lord Hoffmann would hold, the principles of the Convention largely follow the common law, it is not as though the obligation to consider cases decided under the former necessarily undermines the independence of the latter. Furthermore, the exception of 'special circumstances' which Lord Slynn identified entitles the courts to act of their own initiative when the Strasbourg jurisprudence has shown itself inappropriate to follow. Lord Hoffmann himself has followed the logic of this, reiterating that there is no obligation to follow Strasbourg and particularly so where that court's decision is 'fundamentally at odds with the distribution of powers under the British Constitution.'<sup>57</sup> Domestic courts have thus stopped short of accepting Strasbourg's rationale in circumstances where they consider it plainly wrong or based on misconceived understandings, as notably recently in the case of *R v Marquis and Horncastle*<sup>58</sup> in respect of hearsay evidence in criminal trials. To put it another way, direct reliance upon Strasbourg is normalised where the domestic court would choose, notwithstanding domestic or political reservations, to give the same answer as the European Court, but not otherwise. This means that the independence of common law adjudication is not defeated by section 2, because the judges themselves make it clear that 'it is not part of the

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<sup>55</sup> *R (Alconbury Developments Limited) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295, HL, 313, per Lord Slynn

<sup>56</sup> *R (Gentle) v The Prime Minister* [2008] 1 AC 1356, HL, 1381, per Baroness Hale

<sup>57</sup> *Alconbury*, (op. cit.), at 327, per Lord Hoffmann

<sup>58</sup> *R v Marquis and Horncastle* [2010] 2 WLR 47, SC

function of the Strasbourg Court to tell [them] what the content of [the] substantive common law should be.<sup>59</sup>

That having been said, the principles deriving ultimately from the Convention have served as a catalyst for innovation in the common law's approach to certain rights issues. Developments caused by the enactment of the Human Rights Act include ones by which the Act has positively encouraged the expansion of existing common law principles in a way which is more rights-aware, thereby putting a new gloss on old doctrines. The most obvious example is in the way that the common law's rejection of a cause of action in privacy<sup>60</sup> has now been modified in the light of the incorporation of Article 8 guaranteeing a right to private life, such that, whilst 'privacy' continues to hold no cause of action as such, related torts, notably of confidence, now have to be understood as including an actionable right of the wronged party not to have private information about him misused.<sup>61</sup> So the common law now recognises an indirect right to personal privacy which it did not before the Act came into force. It is hence true that the Act has led to the recognition of new rights principles in addition to the cementing of old ones.

It does nonetheless ultimately remain the case that it is this cementing which is the main effect of the Act from the point of view of common law liberties. Laws LJ, in one of the most important seminal decisions under the Human Rights Act, expressed the same logic that this essay has sought to put forward. The Act reveals new perimeters in constitutional relationships between the organs of the state and provides new and more effective mechanisms of protecting vulnerable liberties, but does not substantially reveal any new conceptual understanding of what the rights being protected actually are. So in acknowledging that the 'common law has come to recognise and endorse the notion of constitutional rights,' Laws LJ accepted that 'these are broadly the rights given expression in the Convention.' But whilst 'their recognition in the common law is autonomous,' he continued, it is the Act which has provided them with the 'democratic

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<sup>59</sup>Lord Hope: 'The Judge's Dilemma,' (2009) *International and Comparative Law Quarterly* 753, 764

<sup>60</sup> *Wainwright v Home Office* [2004] 2 AC 406, HL

<sup>61</sup> *Campbell v MGN Newspapers* [2004] 2 AC 457, HL

underpinning'<sup>62</sup> which they needed in the face of the 'elective dictatorship' world. Such an underpinning will do much to ensure that the spirit of *Entick v Carrington* endures. It will do much to make sure, in the words of Lord Cooke, that in 'a liberal democracy there *must* be a bottom line of minority rights...which *cannot* be crossed *without a legal revolution*.'<sup>63</sup> Ensuring these things does not in any way mean the end of the road for common law rights principles. If anything, whilst new foundations are certainly being laid, these are being cast in familiar moulds.

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<sup>62</sup> *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728, CA, 759, per Laws LJ

<sup>63</sup> Lord Cooke, (op. cit.), 278 (emphasis added)