

# THE 'WAR ON TERROR' AND THE UNITED KINGDOM'S CONSTITUTION

Mark Elliott\*

*That its “unwritten” nature makes the United Kingdom’s constitution extremely flexible is a truism if not a cliché. It is, nevertheless, a phenomenon that has never been more clearly evident than in the last ten years. No exaggeration is entailed in the statement that the British constitution has, during that period, undergone a truly dramatic period of change, including the devolution of legislative and administrative power and the reform of judicial and related institutions. However, most important, for present purposes, is the Human Rights Act 1998, which gives effect in national law to certain parts of the European Convention on Human Rights. This is the backdrop against which this paper considers the legal dimensions of the “war on terror” being waged by the British government – most notably its (now-abandoned) policy of indefinitely detaining suspected foreign terrorists without charge or trial. This is a useful context in which to seek to understand the implications of the HRA and to consider a broader discourse about the nature of the modern British constitution and the place of human rights within it.*

## I. INTRODUCTION

That its “unwritten”<sup>[1]</sup> nature makes the United Kingdom’s constitution extremely flexible is a truism if not a cliché. It is, nevertheless, a phenomenon that has never been more clearly evident than in the last ten years. No exaggeration is entailed in the statement that the British constitution has, during that period, undergone a truly dramatic period of change,<sup>[2]</sup> including the devolution of legislative and administrative power<sup>[3]</sup> and the reform of judicial and related institutions.<sup>[4]</sup> However, most important, for present purposes, is the Human Rights Act 1998,<sup>[5]</sup> which gives effect in national law to certain parts of the European Convention on Human Rights. This is the backdrop against which this paper considers the legal dimensions of the “war on terror” being waged by the British government – most notably its (now-abandoned) policy of indefinitely detaining suspected foreign terrorists without charge or trial. This is a useful context in which to seek to understand the implications of the HRA and to consider a broader discourse about the nature of the modern British constitution and the place of human rights within it.

## II. HUMAN RIGHTS AND PARLIAMENTARY SOVEREIGNTY

Orthodox accounts of the British constitution ascribe a central role to the doctrine of parliamentary sovereignty. As Dicey –the Victorian jurist whose work dominated this field for much of the last century and remains influential– put it, parliamentary sovereignty entails that Parliament possesses “the right to make or unmake any law whatever”, so that “no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament”.<sup>[6]</sup> On this view, the limits on Parliament’s capacity to enact legislation are political, not legal; there is no possibility of judicial review of legislation. As a result, no norms exist which are legally immune from parliamentary interference or displacement; nothing, in a legal sense, is sacrosanct. Of course, the United Kingdom is not a despotic state in which fundamental freedoms of speech, association, religion, assembly, and so on are non-existent. However, within the traditional account of the UK constitution, this is so because the legislature –influenced, no doubt, by a combination of practical politics and the normative appeal of basic rights– has not chosen to abrogate such freedoms.<sup>[7]</sup>

To an extent, the notion of parliamentary sovereignty –and the associated absence of human rights as legally– or constitutionally–guaranteed absolutes – is a function of the unwritten nature of the British constitution. In the absence of a constitutional text ascribing power to, and limiting the power of, the legislative branch, parliamentary sovereignty fills the void. Of course, the latter does not ineluctably follow from the absence of the former: it would, after all, be possible for judges to hold that the unwritten constitution contained restrictions on legislative power,<sup>[8]</sup> just as judges elsewhere have discovered implied limits in written constitutions.<sup>[9]</sup> However, limitation of legislative power by reference to (unwritten) constitutional norms is not a step which has (yet) been taken in the UK – in part, no doubt, because judges are acutely aware that the legitimacy of judicial review of legislation would be open to question absent a constitutional text on which to fall back.<sup>[10]</sup> Of course, the existence of such a text does not necessarily render judicial review of legislation –in terms of its existence and scope– uncontroversial,<sup>[11]</sup> but it may, arguably if not unambiguously, provide an imprimatur for constitutional review.

The British HRA provides no such imprimatur. Detailed accounts of the Act can be found elsewhere;<sup>[12]</sup> here, it suffices to outline certain of its key operational provisions, all of which proceed on the basis that human rights protection has to be reconciled with the sovereignty principle. This was made clear by the Government’s White Paper on human rights, which stated that “the courts should not have the power to set aside primary legislation [...] on the ground of incompatibility with the Convention. This

conclusion arises from the importance which the Government attaches to parliamentary sovereignty”.<sup>[13]</sup> The centrepiece of the Act, therefore, is section 3, subsection (1) of which provides that, “So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.” Where this is impossible, section 4 permits certain courts to issue a declaration of incompatibility. However, this “does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given”,<sup>[14]</sup> such that the court must go on to apply the law to the parties to the case, notwithstanding its inconsistency with ECHR norms. The legal consequence of a declaration under section 4 is that it makes possible the use of an expedited procedure, provided for by section 10, for amending incompatible legislation. However, whether any amendment should be made is ultimately a political question: a declaration of incompatibility does not legally require the incompatible law to be changed. Moreover, the HRA is not entrenched:<sup>[15]</sup> Parliament is legally capable of amending or repealing it at will.

This may appear to constitute a relatively weak regime for the protection of fundamental rights. The existence and scope of such rights ultimately remain contingent upon the acquiescence of the political branches; judges remain constitutionally unable to disapply or strike down Acts of Parliament which are irreconcilable with the ECHR.<sup>[16]</sup> However, such an assessment of the status of human rights within the contemporary British constitution would be unduly pessimistic.

The courts have, at least in some cases, shown themselves willing to adopt a bold view of their interpretative powers under section 3.<sup>[17]</sup> The need for declarations of incompatibility has therefore been obviated in a number of cases, which have instead been disposed of by a creative interpretation of the domestic legislation so as to render it compatible with relevant ECHR rights.<sup>[18]</sup> The lengths to which it is desirable and legitimate for courts to go in this regard remains a contentious issue, and has generated a lively literature.<sup>[19]</sup>

The focus of this paper, however, is on a more general set of concerns regarding the status of human rights norms within the UK constitution today. Using the specific example of counter-terrorism measures – a context in which fidelity to human rights finds itself, for obvious reasons, under particular pressure – it will be argued that notwithstanding the theoretical capacity of Parliament to override basic norms, it is increasingly difficult for this to occur in practice. In this sense, it will be contended that recent experience implies the enhanced status and security of fundamental rights in Britain today – albeit that the position in which

the UK now finds itself (and the position which it ascribes to fundamental rights) differs in important respects from that which would obtain under an entrenched constitutional bill of rights.

These issues are elaborated in the remainder of this paper by reference to three (connected) sets of events: first, the UK Parliament's legislative response to the 9/11 attacks in the United States; second, the courts' scrutiny (pursuant to the HRA) of that legislation; and, third, the political and legislative response to the judges' views concerning the compatibility of the legislation with human rights standards.

### **III. DETENTION WITHOUT TRIAL: THE 2001 ACT**

The terrorist attacks in the United States on 11 September 2001 provoked a swift legislative response from the United Kingdom Parliament. The Anti-terrorism, Crime and Security Act 2001<sup>[20]</sup> is a wide-ranging piece of legislation covering matters as diverse as terrorist property, nuclear and aviation security, and police powers. Of specific present concern, however, is Part 4 of the Act, which established a regime for the indefinite detention of terrorist suspects without charge or trial.

Under section 21(1) of the ACSA, the Home Secretary -a member of the executive- was empowered to issue a certificate in respect of any person whose presence in the UK he reasonably believed to be a risk to national security, and whom he reasonably suspected of being a terrorist. The combined effect of sections 22 and 23 was that certificated individuals who could not be deported -e.g. because there existed a risk of torture in the destination state rendering deportation contrary to Article 3 ECHR-<sup>[21]</sup> could instead be detained under certain immigration powers (applicable only to foreign nationals). Although it was theoretically possible for such detainees voluntarily to leave the UK, thus leading their "prison" to be described as one having only "three walls", this possibility was in fact largely illusory, continued detention generally being a more attractive option than the prospect of torture. It was possible to appeal against certification to the Special Immigration Appeals Commission,<sup>[22]</sup> a judicial body established by statute<sup>[23]</sup> and able to deal with evidence considered too sensitive<sup>[24]</sup> to be revealed to the appellant or his legal advisors<sup>[25]</sup> (and which would not, therefore, be admissible in criminal proceedings).

SIAC could cancel a certificate if it considered that there were no reasonable grounds justifying the Secretary of State's suspicion that the individual concerned was an international terrorist or his belief that the individual's presence in the UK posed a risk to national security. Here,

however, our concern is with the human rights implications of the detention powers generally, rather than with their exercise in specific cases. Of central relevance to this inquiry is Article 5 ECHR, which provides that “[e]veryone has the right to liberty and security of person” and that “[n]o one shall be deprived of his liberty” except in certain defined circumstances. It is clear that none of those exceptions applied to the persons detained under the 2001 Act. On one level, therefore, the enactment of the detention without trial regime appears to evidence the willingness of the legislature to disregard adherence to human rights standards in the face of a perceived threat to national security – a conclusion that undermines the assertion made above concerning the enhanced status and security of fundamental rights in the UK today. However, there is a different –and, for two reasons, it is submitted, better– interpretation of these events.

First, the regime enacted in the 2001 Act was premised on the fact that Article 3 of the Convention is non-derogable.<sup>[26]</sup> The Act was, in effect, a device designed to deal with the absolute prohibition on breaching individuals’ Article 3 rights not to be tortured or subjected to inhuman or degrading treatment –meaning that such individuals could not be deported to countries where they faced a real risk of such treatment–<sup>[27]</sup> while at the same time addressing the difficulties inherent in prosecuting suspected terrorists, bearing in mind that the evidence against them may be inadmissible in criminal proceedings<sup>[28]</sup> and that, in any event, the disclosure of such evidence may prejudice the state’s intelligence-gathering operation. It is significant in itself that Article 3 was, in this way, accepted as a limiting factor around which any legislative scheme had to be designed.

Secondly, although Parliament was willing to sanction a regime of detention without trial that was plainly inconsistent with Article 5 ECHR, this does not indicate that the Convention was simply ignored in this respect. Rather, the UK invoked<sup>[29]</sup> Article 15, which provides that, “In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided such measures are not inconsistent with its other obligations under international law”. Such derogation is possible in respect of Article 5 (but not Article 3),<sup>[30]</sup> and the UK sought to take advantage of that possibility, the thinking being that Part 4 of the 2001 Act could be justified as a necessary derogation under Article 15.

Clearly, it is difficult to portray the decision to enact the detention without trial provisions as a ringing endorsement of the UK’s full-blooded commitment to respect for human rights, and that is not the argument

which is being advanced here. Rather, it is simply noted that the events described above provide (admittedly anecdotal) evidence that legislators, faced with what they perceived to be a real crisis in the wake of 9/11, were nonetheless prepared to treat the ECHR as a brake on their legislative freedom. Although this may seem a modest conclusion, its significance becomes greater when set in the context of a constitution in which the notion of unlimited legislative power is deeply entrenched through attachment to the doctrine of parliamentary sovereignty, as outlined above.

#### **IV. THE JUDICIAL RESPONSE: THE BELMARSH CASE**

Notwithstanding the government's belief that the 2001 Act was compatible with the ECHR (in the sense of being a justifiable derogation under Article 15), the individuals against whom it was invoked unsurprisingly sought to challenge their detention in the courts. Although there was a successful appeal to SIAC against an individual certification decision,<sup>[31]</sup> it is the legal challenges to the detention regime itself that are of present concern. Since that regime was enshrined in an Act of Parliament, it could not, of course, be struck down. Instead, in the Belmarsh Case,<sup>[32]</sup> the detainees sought a declaration of incompatibility, arguing that the conditions for derogation laid down in Article 15 were not satisfied, such that Article 5 remained an operative Convention right – with which their detention was undoubtedly incompatible. The central question for the courts, therefore, was whether the Article 15 conditions were met. In a landmark ruling, a specially-constituted House of Lords<sup>[33]</sup> held that Article 15 was not satisfied, and that the detention without trial regime was incompatible with Article 5 ECHR,<sup>[34]</sup> as well as Article 14. The reasoning which led the court to this conclusion provides an important insight into the level of scrutiny for compliance with human rights norms that judges are willing to undertake following the entry into force of the HRA, and it will therefore be helpful to examine the decision in some detail.

Their Lordships first had to address the requirement that there be a “war or other public emergency threatening the life of the nation” – and the logically prior question of their own competence to scrutinize such a matter. At first instance, SIAC had reached the view that the evidence advanced by the Secretary of State was capable of justifying the conclusion that such an emergency existed<sup>[35]</sup> – a view that was not upset on appeal to the Court of Appeal.<sup>[36]</sup> In the House of Lords, eight of the nine judges agreed that the view that a public emergency existed was not one they should overturn. Lord Bingham (in the majority) noted that it is the practice of the European Court of Human Rights to extend a ‘margin of appreciation’ to states in Article 15 cases, thereby reducing the intensity of

its review of states' decisions.<sup>[37]</sup> Such judicial "deference" was considered by his Lordship to be normatively desirable in the present context: deciding whether there was a public emergency "involved making a factual prediction of what various people around the world might or might not do, and when (if at all) they might do it, and what the consequences might be if they did".<sup>[38]</sup> This, said Lord Bingham, called for an exercise of judgment which the political branches were better-equipped than the judges to make. Such deference is consistent with the usual approach of British courts to matters of national security:<sup>[39]</sup> traditionally, when the executive claims that a particular course of action is justified because national security is in play, while the courts have insisted upon evidence to establish that national security is indeed in issue,<sup>[40]</sup> they have often<sup>[41]</sup> in fact required little more than evidence that a relevant political actor considered national security to be at stake.<sup>[42]</sup>

It is noteworthy, therefore, that although Lord Bingham was not alone in endorsing a highly deferential approach to the public emergency question,<sup>[43]</sup> some of the judges appeared to take a more robust stance. For instance, while Lord Scott accepted that "the judiciary must in general defer to the executive's assessment of what constitutes a threat to national security or to 'the life of the nation'", he indicated that such deference should not be blindly extended, irrespective of the likely quality of such executive assessments. To this end, he drew attention to the fact that a prominent part of the executive's recent track-record in this area consists of the "faulty intelligence assessments on the basis of which United Kingdom forces were sent to take part, and are still taking part, in the hostilities in Iraq".<sup>[44]</sup> As a result, he had "very great doubt whether the 'public emergency' is one that justifies the description of 'threatening the life of the nation'", although he was, ultimately, willing to give the executive "the benefit of the doubt". Lord Hope, too, was prepared to concede that there was a public emergency but, like Lord Scott, was willing to look critically at the executive's claims. This led him to conclude while a "public emergency" existed, it was "constituted by the threat that [terrorist] attacks will be carried out" in the future; although that was sufficient to amount to a "current state of emergency", it was an emergency "on a different level [...] from that which would undoubtedly ensue if the threats were ever to materialise".<sup>[45]</sup> The practical import of Lord Hope's critical approach to the public emergency question lies in its impact upon his subsequent analysis of the question -to which we shall turn shortly- whether detention without trial was strictly necessary: as his Lordship put it, "One cannot say what the exigencies of the situation require without having clearly in mind what it is that constitutes the emergency".<sup>[46]</sup>

Meanwhile, only one judge, Lord Hoffmann, considered that there was no “public emergency threatening the life of the nation”. While he accepted that there was a real possibility of terrorist attacks on the UK, the key question was “whether such a threat is a threat to the life of the nation”.<sup>[47]</sup> His Lordship considered that the “nation”, in Article 15, is to be regarded as “a social organism”, the “life” of which is not “coterminous with the lives of its people”.<sup>[48]</sup> Hence, said Lord Hoffmann, “Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community”<sup>[49]</sup> (a conclusion that seemed to assume particular resilience in the case of the UK).<sup>[50]</sup> Instead, he said, “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>[51]</sup> Although the foregoing account may be taken to indicate that Lord Hoffmann’s dissent was informed simply by his view of the text of Article 15, that does not represent the whole picture. Central to his reasoning was the view that it is appropriate for a court to evaluate for itself the nature and scale of the threat to public safety posed by international terrorism. Absent from his speech is the language (and spirit) of “deference” which, as we have seen, affected (to varying degrees) the other judges’ views on this point: far from deferring to the executive, Lord Hoffmann said of the public emergency question that “we, as a United Kingdom court, have to decide the matter for ourselves”.<sup>[52]</sup> This view represents a radical break with tradition, going beyond the approach of the other judges and, as we shall see shortly, contrasting sharply with views expressed by Lord Hoffmann himself only three years earlier.

The eight judges who were prepared to accept the existence of a public emergency (or at least to accept that others were entitled to have formed such a view) then had to consider whether the detention without trial regime was a “strictly necessary” response. Although, as explained above,<sup>[53]</sup> British courts have traditionally insisted upon some evidence to justify executive claims that national security is at stake (albeit that they have tended to be very easily satisfied in this respect), judicial scrutiny has generally all but evaporated in relation to the question whether national security justifies some course of action. For example, whether national security concerns could justify, in the context of a deportation decision, departing from the fundamental requirement of natural justice that an individual should be informed of the case against him<sup>[54]</sup> was held to be a question exclusively for the executive: such information did not need to be released, according to Lord Denning MR, “[s]ave to the extent that the Home Secretary thinks safe”.<sup>[55]</sup> Similarly, it was held at the highest judicial level that whether national security could justify

changes to the employment conditions of public servants in what would otherwise have been a procedurally unfair manner was “par excellence a non-justiciable question” raising matters “upon which [the executive], and not the courts of justice, must have the last word”.<sup>[56]</sup> This doctrine of judicial deference -if not abdication- in the face of such national security questions was recently perpetuated by the House of Lords in the *Rehman* case, a challenge to the Home Secretary’s determination that an individual should be deported on national security grounds.<sup>[57]</sup> In a decision which heavily circumscribed the judiciary’s role in scrutinising such decisions, Lord Steyn observed that it is “self-evidently right that national courts must give great weight to the views of the executive on matters of national security”.<sup>[58]</sup> Meanwhile, Lord Hoffmann considered that “whether something is ‘in the interests’ of national security is not a question of law’: rather, it is ‘a matter of judgment and policy’ which is not ‘for judicial decision’”.<sup>[59]</sup> He added that the events of 9/11 underlined the need for judicial deference in this sphere, bearing in mind considerations of institutional competence (the executive, noted his Lordship, “has access to special information and expertise in these matters”) and democracy (since the potentially serious consequences of national security decisions demanded a “legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process”).<sup>[60]</sup>

Why these putative inhibitions upon the judicial process were not considered insuperable in *Belmarsh* is a matter Lord Hoffmann (surprisingly) did not address in that case.<sup>[61]</sup> That point aside, however, the real significance of *Belmarsh* lies in the approach of the other seven judges in the majority<sup>[62]</sup> to the “justification question” – viz whether national security justified detention without trial (or, to put it in Article 15 terms, whether the derogation from Article 5 was ‘strictly required by the exigencies of the situation’). Rather than characterising this as a matter lying in the exclusive domain of the executive, the majority<sup>[63]</sup> subjected the government’s justifications for detention without trial to close scrutiny, and found them wanting. Three aspects of their Lordships’ reasoning should be noted.

First, and perhaps most significantly, the detention regime, as we have seen, applied only to foreign nationals and not to British citizens posing an equivalent threat; all of the majority judges who addressed the justification question agreed that this was fatal to the scheme’s necessity for Article 15 purposes. For example, Baroness Hale observed that, “The conclusion has to be that it is not necessary to lock up the nationals. Other ways must have been found to contain the threat which they present. And if it is not necessary to lock up the nationals it cannot be necessary to lock up the

foreigners. It is not strictly required by the exigencies of the situation”.<sup>[64]</sup> Secondly, as we have already seen, the suspected terrorists were detained in what has been called a “prison with three walls”. Although (for reasons explained above) exploiting this was generally an unattractive option for the detainees, one of them was able to go to France – and did so. Again, this raised serious doubts as to the necessity of the detention regime: as Baroness Hale put it, “What sense does it make to consider a person such a threat to the life of the nation that he must be locked up without trial, but allow him to leave, as has happened, for France where he was released almost immediately”?<sup>[65]</sup> Thirdly, some of the judges noted that the government had not established the inadequacy of other measures –e.g., electronic tagging, limiting access to the internet and other means of communication, and so on– which would have been less restrictive of the suspects’ liberty.<sup>[66]</sup> This also cast doubt on whether wholesale deprivation of liberty was strictly necessary. The purported derogation was therefore quashed, and a declaration issued to the effect that section 23 of the ACSA was incompatible with Article 5 ECHR.<sup>[67]</sup>

This decision evidences heightened judicial willingness to scrutinise –the national security context notwithstanding– whether there has been a breach of rights. The significance of this is considerable, given received wisdom in British public law and the debate which the enactment of the HRA stimulated. Orthodoxy long held that courts in the UK could not, with propriety, set aside administrative decisions<sup>[68]</sup> on substantive (as opposed to procedural) grounds save where they were aberrant or totally “unreasonable”<sup>[69]</sup> – a doctrine of judicial self-restraint which, as explained above, bit with particular force when national security was at stake. The extent to which the HRA frees British courts from these shackles by encouraging the use of the more intensive “proportionality” test favoured by the European Court of Human Rights has been the subject of considerable controversy, with courts and commentators expressing diverse views as to how much “deference” should be attached to the policy views of the executive and legislature by courts charged with determining whether a given measure breaches an ECHR right.<sup>[70]</sup>

Although one case cannot be expected to lay this debate to rest, *Belmarsh* is highly significant in this regard for two reasons. First, short shrift is given to the stock argument that judges should defer to political decision-makers on “democratic grounds”. Lord Bingham considered that the HRA itself “gives the courts a very specific, wholly democratic, mandate”<sup>[71]</sup> to scrutinise measures impacting upon human rights, and endorsed one commentator’s view that the Act charges the courts with the task of “delineating the boundaries of a rights-based democracy”.<sup>[72]</sup> Secondly, *Belmarsh* addresses the vexed notion of

“relative institutional competence”. This idea was invoked by the judges (admittedly with varying degrees of enthusiasm) to justify judicial deference to executive assessments of whether there was a public emergency for Article 15 purposes. However, it cut much less ice in relation to the justification question: here, the majority rightly thought themselves perfectly able to identify the flaws in the legislative scheme by recognising that the “prison with three walls” argument and the non-detention of British terrorist suspects seriously undermined the government’s contention that detention of certain foreign nationals was ‘strictly required’. The significance of this lies in the willingness of the majority to adopt a nuanced approach, whereby judicial deference to the executive or legislature is not set at a uniform level for a given case, but instead varies from issue to issue, depending on (inter alia) the institutional ability of the court to evaluate the justifications advanced by the political branch. This approach – urged by certain commentators in the human rights<sup>[73]</sup> and analogous<sup>[74]</sup> fields – is to be welcomed. It represents a more sophisticated view of deference, a maturing of the jurisprudence as the HRA becomes an established feature of the constitutional landscape, and an appropriate degree of robustness of judicial oversight.<sup>[75]</sup>

## V. AFTER BELMARSH

The response to the Belmarsh Case is as intriguing as the decision itself, and sheds further light on the status of human rights today in the UK. In this section, we sketch the legislative response to Belmarsh, and then consider what broader lessons may be drawn from this part of the story.

Legislators responded promptly to the House of Lords’ ruling by repealing the detention without trial regime and replacing it with the Prevention of Terrorism Act 2005.<sup>[76]</sup> The passage of that legislation through Parliament was extraordinary. Time was of the essence because, under section 29 of the ACSA, the detention without trial provisions could remain in force only if renewed annually by an order approved by resolution of both legislative chambers: if the detainees were not to be released unconditionally – a step which, according to the government, would have had dire consequences for national security – then new legislation had to be in place before the old provisions lapsed on 14 March 2005.<sup>[77]</sup> Against this background, a Bill was introduced into the House of Commons on 22 February and approved six days later; however, it met with fierce opposition in the House of Lords.<sup>[78]</sup> Peers were alarmed by the proposal to allow the Home Secretary to subject terrorist suspects (irrespective of nationality) to ‘control orders’ having a potentially far-reaching impact upon their liberty. Of particular concern were the

standard of proof applying to decisions to impose control orders, the extent to which -and the stage at which- the judiciary should be involved in the making or reviewing of such decisions, and the duration for which the legislation should remain in force. A stand-off ensued between the House of Lords and the government-dominated House of Commons, the former's amendments repeatedly being undone by the latter.[79] Eventually, following an all-night sitting, a compromise was found, and the legislation entered into force on 11 March, just in time to allow control orders to be imposed on those who had been detained under the 2001 Act.

The new Act allows the Home Secretary to make a control order against an individual if he "has reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activity" and "considers that it is necessary, for purposes connected with protecting members of the public from a risk of terrorism, to make a control order imposing obligations on that individual".[80] The Home Secretary must[81] obtain the permission of the court[82] before making such an order (except in urgent cases,[83] which must instead be considered by a court within seven days of the making of the order).[84] It is also possible for individuals to appeal against decisions taken by the Home Secretary to renew or modify a control order, and against his refusal to revoke or modify such an order.[85]

Following the enactment of the PTA, the derogation from Article 5 ECHR mentioned above was rescinded,[86] since it was anticipated by the government that, for the time being, control orders would not restrict the liberty (or other rights) of individuals to an extent that is incompatible with the Convention. However, it is clear that the power conferred by the Act to impose control orders is wide enough to include restrictions on liberty -e.g., house arrest-[87] that would be inconsistent with Article 5. If the government wishes to permit the imposition of such control orders, a fresh derogation will need to be entered; moreover, the Act specifically provides that control orders which, pursuant to such a derogation, impose restrictions on the individual that are incompatible with Article 5 may only be imposed by a court. Such an order may remain in force only if the court is (inter alia) "satisfied, on the balance of probabilities, that the controlled person is an individual who is or has been involved in terrorism-related activity" and "considers that the imposition of obligations on the controlled person is necessary for purposes connected with protecting members of the public from a risk of terrorism".[88] All proceedings under the PTA take place under special court rules which provide, inter alia, for sensitive "closed material" to be withheld from the individual concerned and his legal representatives, and for his interests to be represented, where necessary, by a security-cleared "special advocate".[89]

It is clear enough that the aim of the PTA was to permit a high level of control and monitoring of suspected terrorists without falling foul of the ECHR. No attempt has yet been made to derogate from the ECHR so as to permit the deprivation of liberty – a step which would no doubt be challenged on Article 15 grounds. For the time-being, the government is restricting itself to the making of non-derogating control orders – that is, control orders that must be compatible with the ECHR – but is finding that Article 5 prevents it from going as far as it would like in terms of restricting the movement, conduct and so on of suspects. In two recent cases, control orders were quashed by the courts because they were held to impose such onerous conditions as to amount to a deprivation of liberty under Article 5.<sup>[90]</sup>

For present purposes, however, the very fact that the 2001 provisions were repealed and replaced with the PTA control order regime is, in itself, significant. As explained above, British courts are not constitutionally able to strike down Acts of Parliament that are incompatible with the ECHR, so – as Lord Scott put it in *Belmarsh* – the “import of [a declaration of incompatibility under the HRA] is political not legal”.<sup>[91]</sup> As a matter of domestic law, legislators are free to ignore the courts’ finding that existing legislation is incompatible with human rights standards, but it is clear that politicians did not actually feel able to do so, and that the *Belmarsh* judgment played an important part in bringing moral – if not legal<sup>[92]</sup> – pressure to bear on the political branches. Following *Belmarsh*, the then Home Secretary said that he “accept[ed] the Law Lords’ declaration of incompatibility” and their “judgment that new legislative measures must apply equally to nationals as well as to non-nationals”,<sup>[93]</sup> and later stated that the new bill was “designed to meet the Law Lords’ criticism that the previous legislation was both disproportionate and discriminatory”.<sup>[94]</sup> What this episode suggests is that, notwithstanding the absence of a strike-down power, the HRA is to some extent capable of curbing the worst excesses of majoritarianism even where the rights of an acutely unpopular minority – such as suspected terrorists – are at stake.<sup>[95]</sup> The very fact that courts now have jurisdiction to pronounce on the compatibility of legislation with human rights norms brings new – and, it seems, considerable – pressure to bear on the political branches,<sup>[96]</sup> making it more difficult for legislation that is incompatible with fundamental rights to be kept on the statute book.<sup>[97]</sup>

But this brings us to our final point – that, as a matter of domestic law, it is not impossible for such legislation to be enacted or kept in force. The HRA notwithstanding, the UK has not (yet) turned its back on traditional doctrine. The sovereignty of Parliament remains the established

orthodoxy; and so it seems that respect for human rights -and for the courts' human rights jurisdiction itself- endures only so long as politics and politicians permit. Of course, this is not to say that Parliament therefore enjoys a completely free hand, and can readily abrogate basic freedoms. Ultimately, however, the limitations which are liable to prevent or deter such legislative excesses are not straightforwardly legal; rather, they consist in such factors as public opinion and the (considerable) pressure that can be brought to bear by a vigilant media.<sup>[98]</sup> Yet, if the political will can be mustered, there is no domestic legal prohibition on the enactment (or maintenance in force) of legislation which is flatly inconsistent with the fundamental rights;<sup>[99]</sup> nor is there anything, as a matter of domestic law, to prevent Parliament from amending or repealing the HRA itself. Indeed, such possibilities have been explicitly countenanced recently by politicians. It is reported that the Prime Minister, Tony Blair, considered limiting the courts' human rights jurisdiction following an embarrassing defeat in an asylum case.<sup>[100]</sup> More recently, and most notably, Blair suggested, in the wake of the terrorist attacks in London on 7 July 2005, that he would consider seeking the amendment of the HRA if it proved to be an inhibition to the effective prosecution of the war on terror.<sup>[101]</sup> Such comments serve as an important reminder that, under the UK's present constitutional arrangements, even in their recently-modified form, the jurisdiction of British courts to review executive and legislative action for compatibility with human rights norms ultimately remains vulnerable to majority rule.

Of course, this is so only if the orthodox doctrine of parliamentary sovereignty, described above, continues to hold sway. It is worth noting, by way of conclusion, that that traditional view finds itself increasingly open to question today, both academically and curially. British membership of the European Union is part of the reason for this, bearing in mind the doctrine of the primacy of EU law,<sup>[102]</sup> but so too is the UK's status as a party to international treaties like the ECHR. In light of the resulting international obligations to accord respect to basic rights, the view that Parliament enjoys legally unbridled power as a matter of domestic law can appear unreal or notional. As a result of these (and other) considerations, commentators have for some time questioned whether the doctrine of parliamentary sovereignty remains pertinent today; more generally, they have asked whether the ascription of unrestricted power to a legislative body is consonant with the UK's status as a modern liberal democracy.<sup>[103]</sup> That such questions can be asked, and the veracity of the doctrine doubted, is possible because the concept of parliamentary sovereignty is itself an uncertain one. Although representing the received view of the British constitution, the nature and scope of the doctrine of parliamentary sovereignty has always been open to some doubt. Since the

legislative authority of the UK Parliament does not derive from a constitutional text, it has been argued that the sovereignty of Parliament is primarily a “political fact” which emerged due to the willingness of the courts to recognise and enforce Acts of Parliament.<sup>[104]</sup> In result, parliamentary sovereignty is effectively a function of the relationship between the judiciary and the legislature – a product of the courts’ willingness to recognise Parliament’s enactments as the law. On this view, it follows that the supremacy of Parliament is, in some sense, contingent on the ongoing acquiescence of the judiciary.

The extent to which it would be legitimate for courts to withdraw their recognition of parliamentary enactments as valid laws – by, for example, refusing to enforce legislation which offends basic principles of constitutionalism – is a controversial issue. It divides commentators,<sup>[105]</sup> and this is not the place to rehearse that debate. However, it is worth noting that fidelity to the traditional view that Parliament’s authority is unlimited, and that the judiciary is impotent to curtail even fundamental infractions of the rule of law and constitutional standards, finds itself under greater pressure today than ever before. It is particularly noteworthy that this pressure now emanates not only from the law journals but from the law reports too, with some senior judges openly questioning the traditional view.

The most significant example of this phenomenon is supplied by the recent decision of the House of Lords in *Jackson*.<sup>[106]</sup> Although the question whether Parliament is fully sovereign in the traditional sense did not directly fall for determination in that case, it is highly significant that three of the judges who nevertheless chose to address it reached conclusions markedly at odds with orthodoxy. Lord Steyn thought that, as a matter of “logic: and “[s]trict legalism”, Parliament could enact ‘oppressive and wholly undemocratic legislation’, for instance “abolish[ing] judicial review of flagrant abuse of [executive] power”<sup>[107]</sup> (or, presumably, indefinitely detaining suspected terrorists without charge or trial). Yet his Lordship ultimately doubted the correctness of the traditional analysis which ascribes unlimited power to the legislative branch. It was premised on a “pure and absolute” conception of parliamentary sovereignty which, he said, was “out of place” in modern Britain. He went on to argue that the supremacy of Parliament depends on judicial recognition of it: the judges, he claimed, “created this principle”, and could equally be the authors of its demise. If Parliament were to assert an extravagant power by, for example, seeking to remove judicial review, the courts “may have to consider whether this is a constitutional fundamental which even a sovereign Parliament [...] cannot abolish”.<sup>[108]</sup> Lord Hope expressed similarly striking views, opining that

“parliamentary sovereignty is no longer, if it ever was, absolute”<sup>[109]</sup> and Baroness Hale thought it possible that the courts may reject an attempt by Parliament to “subvert the rule of law by removing governmental action affecting the rights of the individual from all judicial scrutiny”.<sup>[110]</sup>

The significance of these remarks should not be underestimated. Although certain academics<sup>[111]</sup> and -extra-curially- judges<sup>[112]</sup> have for some time openly questioned whether it is sensible or meaningful to ascribe unfettered power to a legislative body in a modern, liberal democracy, it is noteworthy that such sentiments are now finding expression in the UK’s highest court. This at least raises the possibility that the security of fundamental rights in the UK may, in time, be ultimately vouchsafed not by the political process, but by judicial vindication of hitherto unarticulated restrictions on legislative power contained within the UK’s constitutional order.

## **VI. CONCLUSIONS**

The “war on terror” provides a useful context in which to evaluate the extent to which human rights enjoy legal security in the UK today, following the changes to the British constitution -most notably the enactment of the HRA- mentioned at the beginning of this paper. In this context, one might expect to find fidelity to human rights standards under greatest pressure, given the potential gravity and scale of the threat posed by terrorism, and judicial review at its most deferential, bearing in mind both the fact that national security is at stake and the traditional approach of British courts to that subject area.

The main contention of this paper is that a picture emerges from events post-9/11, in particular from the enactment and fate of the detention without trial regime, which suggests that human rights norms are more deeply embedded -and therefore harder to displace- than might at first be assumed. Although the HRA does not legally place interference with fundamental rights beyond the capacity of the legislature, it is tolerably clear that the Act has instituted important changes in the broader environment within which adjudication occurs, legislation is enacted and politics conducted. While, therefore, the implications of a declaration of incompatibility under the HRA remain political, not legal, those implications should not be underestimated. Given the right political conditions, it is clear that a powerful judicial condemnation of rights-infringing legislation will bring considerable -sometimes irresistible- pressure to bear on legislators to amend or repeal the relevant provisions. In this way, the HRA affords the opportunity for healthy tension between the judicial and legislative branches. As the Lord Chief Justice of England

and Wales recently put it, “the Human Rights Act has unquestionably circumscribed both the legislative and the executive action that would otherwise have been the response to the outbreak of global terrorism that we have seen over the last decade”.<sup>[113]</sup>

It is not, however, difficult to envisage particular sets of circumstances - the immediate aftermath of a terrorist attack being an obvious example- in which the public and political mood is such that it would be quite possible for legislators to resist any pressure emanating from a judicial declaration of incompatibility. In this sense, therefore, the status of human rights in the UK today is ultimately vouchsafed by -and so contingent upon- politics rather than law, a position intimately bound up with the notion of parliamentary sovereignty. While that view of the constitution holds sway, everything -including respect for fundamental rights- exists in the shadow of the will of the majority (in Parliament). The fact that that view is itself now being questioned at the highest judicial level is perhaps the most graphic illustration of the extent to which the tectonic plates of the UK constitution are moving. This sense that the ground is shifting -that old orthodoxies are finding themselves under increasing pressure, amid uncertainty about what may fill the resulting vacuum- was reflected by Laws LJ in the *Roth* case. He argued that “[i]n its present state of evolution, the British system may be said to stand at an intermediate stage between parliamentary supremacy and constitutional supremacy”.<sup>[114]</sup> As this statement acknowledges, it is too soon to consign the notion of parliamentary sovereignty to history, but it seems clear that constitutional thinkers -judges as well as commentators- are increasingly willing to countenance the emergence of constitutional restrictions on the legislative authority of the UK Parliament.

In many situations, as in *Belmarsh* itself, the HRA will continue to act as a safety valve, allowing courts to pronounce on the human rights implications of legislation - and, in turn, shaping if not directing the response of legislators. But this will not inevitably be so, particularly if politicians ever succumb to the temptation to amend the HRA, removing or curtailing the courts’ jurisdiction thereunder. Indeed, we have already seen that this has been countenanced in the specific context of the war on terror. Should such a situation arise, judges will be called on to choose between fidelity to legislative intention and enforcement of deeper constitutional norms. Of course, even in states with written constitutions, the assertion by the judiciary of powers of constitutional review can prove controversial; British courts are no doubt mindful of the fact that this would be doubly so in the absence of a written constitution. Intriguingly, however, there are now at least tentative signs that some judges, at least, are prepared to contemplate the assertion of such powers.

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\* Senior Lecturer in Law and Assistant Director, Centre for Public Law, University of Cambridge. This article draws on, and in some places reproduces parts of, papers first published by Oxford University Press in the *International Journal of Constitutional Law*: M.C. ELLIOTT, "Detention without Trial and the 'War on Terror'", *International Journal of Constitutional Law*, 2006, No 4, pp. 553-566; M.C. ELLIOTT, "The UK Parliament: Bicameralism, Sovereignty and the Unwritten Constitution", *International Journal of Constitutional Law*, 2007, No 5, pp. 1-10. I am grateful to Simon Atrill, David Feldman, Brigid Hadfield, Ian Loveland, Amanda Perreau-Saussine and Iain Steele for their comments drafts of those papers. I am also indebted to Rory Brown, Angus Johnston and James Nickel for their advice and comments on this paper. I remain responsible, however, for the opinions expressed and for any errors.

[1] The British constitution is "unwritten" in the sense that no constitutional text with special legal status exists. The sort of rules which would, in many countries, be part of the Constitution, are instead found in a variety of other sources, such as legislation, judicial decisions and constitutional conventions (established practices).

[2] See, eg, V. BOGDANOR, "Our New Constitution", *Law Quarterly Review*, 2004, pp. 242-262.

[3] Scotland Act 1998; Northern Ireland Act 1998; Government of Wales Acts 1998-2006.

[4] Constitutional Reform Act 2005.

[5] Hereinafter 'HRA'.

[6] A.V. DICEY, *An Introduction to the Study of the Law of the Constitution*, 10th ed, London, Macmillan, 1959, p. 10.

[7] See, e.g., A.V. DICEY, *Law of the Constitution*, supra note 6, p. 271; Court of Appeal for England and Wales, *Wheeler v. Leicester City Council*, 13 Dec. 1984, 1985 AC 1054, p. 1065, per Browne-Wilkinson LJ.

[8] See, e.g., J. LAWS, "Law and Democracy", *Public Law*, 1995, pp. 72-93; H. WOOLF, "Droit Public - English Style", *Public Law*, 1995, pp. 57-71.

[9] See, e.g., the decision of the High Court of Australia, *Australian Capital Television Pty Ltd v. Commonwealth*, 1992, 177 CLR 106, holding that the Australian Constitution contains implied an right of freedom of political communication which limits legislative power.

[10] That is not to say that such objections are necessarily insuperable. For discussion, see, J. LAWS, *Law and Democracy*, supra note 8; J. LAWS, "The Constitution: Morals and Rights", *Public Law*, 1996, pp. 622-635.

[11] As experience in the United States, in the wake of *United States Supreme Court, Marbury v. Madison*, 24 Feb. 1803, 5 US 137, demonstrates.

[12] See, e.g., S. GROSZ, J. BEATSON AND P. DUFFY, *Human rights: the 1998 Act and the European Convention*, London, Sweet & Maxwell, 2000.

[13] Cm 3782, *Rights Brought Home: The Human Rights Bill*, London, 1997, p. 10.

[14] HRA, Section 4(6)(a).

[15] In orthodox constitutional theory, it is impossible for legislation to be entrenched. Cf *Administrative Court, Thoburn v. Sunderland City Council*, 18 Feb. 2002, EWHC 195, 2003 QB 151.

[16] British judges are, however, able to disapply primary legislation which is incompatible with the law of the European Communities (see House of Lords, *Regina v. Secretary of State for Transport, ex parte Factortame Ltd* (No 2), [1991] 1 AC 603). This means that where national legislation purports to implement or derogate from EC law, it may be disapplied to the extent of any inconsistency with EC fundamental rights norms (see, e.g., E.C.J., Case 260/89, *Elliniki Radiophonia Tileorassi AE and Panellinia Omospondia Syllogon Prossopikou v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others*, 1991, ECR-I, 2925). The fundamental rights recognised by the EC legal order are drawn from a variety of sources, including the ECHR: see E.C.J., Case 44/79, *Hauer v. Land Rheinland-Pfalz*, 1979, ECR, 3727, § 15.

[17] See, e.g., House of Lords, *Ghaidan v. Godin-Mendoza*, 21 June 2004, UKHL 30, 2 AC 557.

[18] Only 14 declarations of incompatibility (excluding those overturned on appeal) have been made thus far under the Act. See *Declarations of incompatibility made under section 4 of the Human Rights Act 1998*, London, Department for Constitutional Affairs, 2006, <http://www.dca.gov.uk/peoples-rights/human-rights/pdf/decl-incompat-tabl.pdf>

[19] See, inter alios, A. KAVANAGH, “The Role of Parliamentary Intention in Adjudication under the Human Rights Act 1998”, *Oxford Journal of Legal Studies*, 2006, pp. 179-206; A. KAVANAGH, “Statutory Interpretation and Human Rights after Anderson: A More Contextual Approach”, *Public Law*, 2004, pp. 537-545; D. NICOL, “Statutory Interpretation and Human Rights after Anderson”, *Public Law*, 2004, pp. 274-282; G. MARSHALL, “The Lynchpin of Parliamentary Intention: Lost, Stolen, or Startled?”, *Public Law*, 2003, pp. 236-248; T. ALLAN, “Parliament’s Will and the Justice of the Common Law: The Human Rights Act in Constitutional Perspective”, *Current Legal Problems*, 2006, pp. 27-50.

[20] Hereinafter ‘ACSA’.

[21] E.C.H.R., *Chahal v. UK*, 15 Nov. 1996, 23 EHRR 413.

[22] Hereinafter ‘SIAC’.

[23] Special Immigration Appeals Commission Act 1997.

[24] E.g., because its disclosure may reveal sources, placing them, and future intelligence-gathering, in jeopardy.

[25] Instead, security-cleared ‘special advocates’ could argue on behalf of appellants in relation to such ‘closed evidence’.

[26] European Convention of Human Rights, Article 15 § 2.

[27] See *supra*, note 21.

[28] Current UK law generally renders intercept evidence inadmissible in court proceedings (see *Regulation of Investigatory Powers Act 2000*), a position recently endorsed by a government review (see <http://security.homeoffice.gov.uk/ripa/interception/use-interception/use-interception-review/>). The ban on the use of such evidence has been strongly criticised. See, e.g., *Privy Counsellor Review Committee, Anti-terrorism, Crime and Security Act 2001 Review: Report*, London, The Stationary Office, 2003, pp. 57-58.

[29] See SI 2001/3644, *The Human Rights Act 1998 (Designated Derogation) Order 2001*.

[30] European Convention on Human Rights, Article 15 § 2.

[31] *Special Immigration Appeals Commission, M v. Secretary of State for the Home Department*, 8 Mar. 2004, unreported (upheld by the Court of

Appeal, *M v. Secretary of State for the Home Department*, 18 Mar. 2004, EWCA Civ 324, 2 All ER 863.

[32] So-called after the prison in which the claimants were detained. See *House of Lords, A v. Secretary of State for the Home Department, X v. Secretary of State for the Home Department*, 16 Dec. 2004, UKHL 56, 2005 2 AC 68.

[33] The House of Lords, in its judicial capacity, is the court of final appeal for all civil and non-Scottish criminal matters in the UK, although the recently-enacted (but as yet unactivated) Constitutional Reform Act 2005 provides for the transfer of its judicial functions to a new Supreme Court.

[34] In addition, the administrative order required under the HRA scheme to effect derogation was quashed. The House of Lords went further than the first instance decision (*Special Immigration Appeals Commission, A v. Secretary of State for the Home Department, X v. Secretary of State for the Home Department*, 30 July 2002, HRLR 45), which found incompatibility on Article 14 grounds only, and reversed the Court of Appeal (*Court of Appeal, A v. Secretary of State for the Home Department, X v. Secretary of State for the Home Department*, 25 Oct. 2002, EWCA Civ 1502, 2004 QB 335), which found no incompatibility at all.

[35] *Supra*, note 34.

[36] *Supra*, note 34.

[37] See, e.g., E.C.H.R., *Lawless v. Ireland (No 3)*, 1 Jul. 1961, 1 EHRR 15; E.C.H.R., *Ireland v. UK*, 18 Jan. 1978, 2 EHRR 25; E.C.H.R., *Brannigan and McBride v. UK*, 26 May 1993, 17 EHRR 539.

[38] *Supra*, note 32, § 9.

[39] See, e.g., K. EWING, "The Futility of the Human Rights Act", *Public Law*, 2004, pp. 829-852.

[40] See, e.g., Privy Council, *The Zamora*, 7 Apr. 1916, 2 AC 77, pp. 106-107.

[41] See, e.g., House of Lords, *Council of Civil Service Unions v. Minister for the Civil Service*, 22 Nov. 1984, 1985 AC 374.

[42] For further comment on the approach to the "public emergency" question in *Belmarsh*, see T.R. HICKMAN, "Between Human Rights and the Rule of Law: Indefinite Detention and the Derogation Model of Constitutionalism", *Modern Law Review*, 2005, pp. 655-668.

[43] E.g. Baroness Hale, *supra* note 32, § 226, did 'not feel qualified' to disagree with SIAC's conclusion on this point.

[44] *Supra*, note 32, § 154. These intelligence failings (on which see HC898, *Review of Intelligence on Weapons of Mass Destruction*, London, 2004) remain a highly contentious political matter in the UK (and elsewhere: see, e.g., *Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction, Report to the President of the United States* Washington DC, 2005).

[45] *Supra*, note 32, § 119.

[46] *Ibid.*, § 116.

[47] *Ibid.*, § 95.

[48] *Ibid.*, § 91.

[49] *Ibid.*, § 96.

[50] *Ibid.*, § 95; "There may be some nations too fragile or fissiparous to withstand a serious act of violence. But that is not the case in the United Kingdom".

[51] *Ibid.*, § 97.

[52] *Ibid.*, § 92.

[53] At text to notes 40 and 41.

[54] See, e.g., House of Lords, *Regina v. Secretary of State for the Home Department, ex parte Doody*, *Regina v. Secretary of State for the Home Department, ex parte Pegg*, *Regina v. Secretary of State for the Home Department, ex parte Pierson*, *Regina v. Secretary of State for the Home Department, ex parte Smart*, 24 Jun. 1993, 1994 1 AC 531, p. 560, per Lord Mustill.

[55] Court of Appeal, *Regina v. Secretary of State for Home Affairs, ex parte Hosenball*, 29 Mar. 1977, 1 WLR 766, p. 782 (emphasis added).

[56] House of Lords, *Council of Civil Service Unions v. Minister for the Civil Service*, 22 Nov. 1984, 1985 AC 374, p. 412, per Lord Diplock.

[57] House of Lords, *Secretary of State for the Home Department v. Rehman*, 11 Oct. 2001, UKHL 47, 2003 1 AC 153.

[58] *Ibid.*, § 31.

[59] *Ibid.*, § 50.

[60] *Ibid.*, § 62.

[61] Although of course the language of Article 15 (which was relevant in *Belmarsh* but not *Rehman*) does appear to call for particularly rigorous scrutiny.

[62] Only Lord Walker declared himself satisfied as to the strict necessity of the detention without trial regime.

[63] With the exception of Lord Hoffmann, who did not need to address the “justification question”.

[64] *Supra*, note 32, § 231.

[65] *Ibid.*, § 230.

[66] See, e.g., Lord Bingham (*ibid.*, § 35); Lord Scott (*ibid.*, § 155).

[67] The declaration further stated that section 23 was incompatible with Article 14 ECHR, which provides that the “enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground”, including “national origin”. Such a declaration had been granted at first instance, but SIAC’s decision on this point (*supra*, note 34) was overturned by the Court of Appeal (*supra*, note 34), which held that section 23 was an immigration measure and that differential treatment on grounds of nationality was therefore objectively justified. The majority in the House of Lords disagreed, holding that section 23 was essentially a security measure, and that, in such a context, differential treatment on grounds of nationality could not be objectively justified.

[68] Outside the special context of matters relating to EU law, judicial review of legislation was simply not in issue prior to the conferral upon the courts, via section 4 HRA, of jurisdiction to issue declarations of incompatibility.

[69] See, classically, Court of Appeal, *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation*, 10 Nov. 1947, 1948 1 KB 223.

[70] The case law and literature are already immense. For recent contributions, see Court of Appeal, *International Transport Roth GmbH v. Secretary of State for the Home Department*, 22 Feb. 2002, EWCA Civ 158, 2003 QB 728; House of Lords, *Regina (on the application of ProLife Alliance) v. British Broadcasting Corporation*, *Regina (on the application of Quintavalle) v. British Broadcasting Corporation*, 15 May 2003, 2003 UKHL 23, 2004 1 AC 185; J. JOWELL, “Judicial Deference: Servility, Civility or Institutional Capacity?”, *Public Law*, 2003, pp. 592-601; M. HUNT, “Sovereignty’s Blight: Why Contemporary Public Law needs the Concept of ‘Due Deference’” in N. BAMFORTH AND P. LEYLAND, *Public Law in a Multi-Layered Constitution*, Oxford, Hart Publishing, 2003, pp. 337-370; J.

RIVERS, "Proportionality and Variable Intensity of Review", *Cambridge Law Journal*, 2006, pp. 174-207.

[71] *Supra*, note 32, § 42.

[72] J. JOWELL, "Judicial Deference", *supra* note 70, p. 597.

[73] E.g. M. HUNT, "Sovereignty's Blight", *supra* note 70.

[74] E.g. B. HARRIS, "Judicial Review, Justiciability and the Prerogative of Mercy", *Cambridge Law Journal*, 2003, pp. 631-660.

[75] It must, however, be recalled that this case arose in the specific context of Article 15, the language of which, as noted above, seems to call for especially rigorous scrutiny.

[76] Hereinafter 'PTA'.

[77] See Statutory Instrument 2004/751, *Anti-Terrorism, Crime and Security Act 2001 (Continuance in force of sections 21 to 23) Order 2004*.

[78] In its legislative, rather than judicial, capacity.

[79] The approval of both Houses (as well as the assent of the Monarch) is generally required in order for a Bill to become an Act of Parliament.

[80] PTA, section 2(i). The expression 'terrorism-related activity' is defined by section 1(9).

[81] Except in relation to control orders made before 14 March 2005 against individuals who, at the time of the making of the order, were certificated individuals under ACSA, section 21.

[82] PTA, section 3(1)(a).

[83] *Ibid.*, section 3(1)(b).

[84] *Ibid.*, section 3(4).

[85] *Ibid.*, section 10.

[86] See Statutory Instrument, 2005/1071, *The Human Rights Act 1998 (Amendment) Order 2005*.

[87] Which is clearly contemplated by section 1(5).

[88] PTA, section 4(7).

[89] See Statutory Instrument, 2005/656, *The Civil Procedure (Amendment No 2) Rules 2005*, inserting a new Part 76 into the *Civil Procedure Rules 1998*. It was argued, ultimately without success, in *Court of Appeal, Secretary of State for the Home Department v. MB*, 1 Aug. 2006, EWCA Civ 1140, 3 WLR 839, that the procedural regime under the 2005 Act was incompatible with Article 6 § 1 ECHR.

[90] *Court of Appeal, Secretary of State for the Home Department v. JJ and others*, 1 Aug. 2006, EWCA Civ 1141, 3 WLR 866; *Queen's Bench Division (Administrative Court), Secretary of State for the Home Department v. E*, 16 Feb. 2007, EWHC 233 (Admin). For an overview of current control orders in force, and the restrictions imposed thereby, see A. CARLILE, *Second Report of the Independent Reviewer pursuant to Section 14(3) of the Prevention of Terrorism Act 2005*, London, Home Office, 2007, pp. 3-5.

[91] *Supra*, note 32, § 142.

[92] While, as a matter of domestic law, a declaration of incompatibility does not compel amendment of the legislation, litigants who obtain such a declaration but no subsequent legislative redress are highly likely to pursue their claim before the European Court of Human Rights. State parties to the ECHR are obliged to abide by the judgments of the Strasbourg Court (Article 46) and to "secure to everyone within their jurisdiction" the Convention rights (Article 1). Thus, while the HRA creates no domestic law obligation to amend legislation, such a declaration anticipates, or at least points towards the possibility of, an international obligation to do so.

[93] C. CLARKE, HC Deb, Hansard, 26 Jan. 2005, col. 306.

[94] C. CLARKE, HC Deb, Hansard, 22 Feb. 2005, col. 151.

[95] Cf D. NICOL, "Law and Politics after the Human Rights Act", Public Law, 2006, pp. 722-751, at p. 741. He characterises the PTA regime as a "drastic, indeed unprecedented, curtailment of liberty, replacing the threat of Belmarsh incarceration for a minority with the threat of house arrest for everybody". Two brief points may be made in response. First, whether or not one approves of the regime laid down by the PTA, it is important to my argument that it was prompted by Belmarsh and its contours shaped by the government's understanding of the ECHR. Secondly, as pointed out above (see note 90 and accompanying text), the ECHR, in particular Article 5, constrains the restrictions which can be imposed through control orders. Even if a derogation were entered under Article 15, so as to enable the making of "derogating control orders" entailing deprivation of liberty contrary to Article 5, whether the derogation conditions in Article 15 were met would be subject to judicial review.

[96] As noted above, supra note 18, 14 declarations of incompatibility (excluding those overturned on appeal) have thus far been made under the HRA. In ten of those cases, the incompatible law has been repealed or amended; the government is considering how to respond to two others; one is subject to a pending appeal; and in the final case, it is envisaged that new legislation will be enacted as part of a wider package of reforms in the relevant area.

[97] D. NICOL, "Law and Politics", supra note 95, p. 745, argues that politicians should not feel thus constrained by judicial declarations of incompatibility; Parliament should consider itself free to "assert its own interpretation of human rights". This follows, in Nicol's view, because of the "contested political values at play in rights adjudication". However, it is worth remembering that, as Nicol acknowledges (ibid., p. 729), the "political sanction" of a declaration of incompatibility "melds into a legal one", given the international law implications if the Strasbourg Court finds a breach of the ECHR (see further supra note 92). It follows that even if Nicol's view concerning the nature of rights is accepted in theory, the reality is that, at least for the time being, the prevailing legal regime -of which the HRA and ECHR are constituent elements- significantly constrains politicians' freedom of action, and involves an important realignment of political and judicial power that is at odds with orthodox, bald accounts of parliamentary sovereignty.

[98] See further A.V. DICEY, Law of the Constitution, supra note 6, Ch. 1, on "external limits" to parliamentary sovereignty.

[99] Although if Parliament wishes legislation to be interpreted incompatibly with fundamental rights, it has to make its intention very clear indeed, bearing in mind the way in which courts have viewed their duty, under section 3 of the HRA, to interpret legislation consistently with the ECHR where possible: see, e.g., House of Lords, Ghaidan v. Godin-Mendoza, 21 June 2004, UKHL 30, 2 AC 557. Making its intention to abrogate fundamental rights sufficiently clear will often (but perhaps not inevitably) be a politically difficult step for Parliament to take.

[100] The Daily Telegraph, 20 Feb. 2003.

[101] T. BLAIR, speaking at the monthly Downing Street press conference, 5 Aug. 2005 (<http://www.pm.gov.uk/output/Page8041.asp>).

[102] On the implications of this doctrine vis-à-vis parliamentary sovereignty, see House of Lords, Regina v. Secretary of State for Transport, ex parte Factortame Ltd (No 2), 11 Oct. 1990, 1991 1 AC 603; Queen's Bench Division

(Administrative Court), *Thoburn v. Sunderland City Council*, 18 Feb. 2002, EWHC 195, 2003 QB 151.

[103] See, e.g., T. ALLAN, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism*, Oxford, Oxford University Press, 1993, and T. ALLAN, *Constitutional Justice: A Liberal Theory of the Rule of Law*, Oxford, Oxford University Press, 2001.

[104] H.W.R. WADE, "The Basis of Legal Sovereignty", *Cambridge Law Journal*, 1955, pp. 172-197, at p. 189.

[105] E.g. compare T. ALLAN, *Constitutional Justice*, supra note 103, Ch. 7, and J. GOLDSWORTHY, *The Sovereignty of Parliament*, Oxford, Oxford University Press, 1999, Ch. 10.

[106] House of Lords, *Regina (on the application of Jackson) v. Attorney General*, 13 Oct. 2005, UKHL 56, 2006 1 AC 262.

[107] *Ibid.*, p. 102. This example was well-chosen: the government attempted to introduce legislation in 2003 preventing judicial review of certain asylum and immigration decisions, but ultimately stepped back from this proposal in light of pressure from politicians and judges. See A. LE SUEUR, "Three Strikes and It's Out? The UK Government's Strategy to Oust Judicial Review from Immigration and Asylum Decision Making", *Public Law*, 2004, pp. 225-233.

[108] *Supra* note 106, § 102.

[109] *Ibid.*, § 104

[110] *Ibid.*, § 159.

[111] See *supra*, note 103.

[112] See *supra*, note 8.

[113] N. PHILLIPS, "Terrorism and Human Rights", University of Hertfordshire Law Lecture, 19 Oct. 2006, available at [www.judiciary.gov.uk/publications\\_media/speeches/2006/sp191006.htm](http://www.judiciary.gov.uk/publications_media/speeches/2006/sp191006.htm)

[114] Court of Appeal, *International Transport Roth GmbH v. Secretary of State for the Home Department*, 22 Feb. 2002, EWCA Civ 158, 2003 QB 728, § 71.