

BALANCING NATIONAL SECURITY AND PUBLIC ORDER WITH HUMAN RIGHTS: A JUDICIAL PERSPECTIVE

Keynote speech for a conference on *Identity, Security, Democracy: Challenges for Public Law* co-organized by the International Society of Public Law and Faculty of Law, University of Hong Kong to celebrate the 50th Anniversary of the Faculty.

1. It is a great honour to be invited to give the keynote speech at an important conference. And this conference is important on at least three grounds. First, the significance of the topic being considered, or should I say each of the three topics being considered, namely identity, security and democracy, all of which are fundamental to most modern civilised societies, and all of which are currently being challenged in different ways. I shall, of course, have something to say about those topics in the course of this keynote speech, so I shall not dwell on them now. The second ground for saying that this conference is important is because of the number and quality of the participants. I shall not dwell on that aspect either, partly because it would be invidious to mention only some names and impossible to mention all names, and partly because telling you all how wonderful you are might appear a bit excessive.
2. Before turning to my main topic, I would, however, like to spend a little time on the third ground for saying why this conference is important. That ground is the reason why this conference is happening, namely to celebrate the fiftieth anniversary of the founding of the Faculty of Law at Hong Kong University. Law faculties are unique among university departments because they perform a fundamental constitutional function. That function consists of two roles which are vital in supporting and furthering the rule of law, namely teaching law to students, including future lawyers, and carrying out academic legal research and writing. Teaching law is of course vital for would-be lawyers. They can be taught abroad, but any jurisdiction should ideally have its own law school. Diversity is generally beneficial, so if some future lawyers are educated abroad that is no bad

thing, but internal and external confidence in the legal system, and therefore in the rule of law, will be reinforced if a jurisdiction has its own law faculty. Indeed, the beneficial effect of both diversity and competition suggest more than one law school is even better. Soundly educated lawyers are increasingly crucial in any civilised society. And, of course, it is very useful as well as very important that some people in other areas of work outside the legal profession and legal academe have a proper understanding of the law.

3. Similarly, having at least one domestic institution with respected academic lawyers who carries out legal research and produces legal books and articles is also very important to the legal self-confidence and reputation of a jurisdiction. Until fifty years or so ago, common law judges, unlike civil law judges, rarely paid much regard to academic writing. This was unwise and short-sighted, because academic lawyers and judges have different and mutually complementary perspectives, which are mutually complementary. In two sentences and therefore in very summary terms, I would suggest that the differences can be summarised as follows. First, academics are more concerned with intellectual coherence and principles, whereas judges tend to concentrate more on justice and practicality. Secondly, academics are free to survey the whole landscape and are better equipped to speculate and ruminate, whereas judges have the benefit of adversarial argument and are disciplined, indeed constrained, by knowing that their judgments will lay down the law. These differences in perspective underline how much judges and academics should each be able to benefit from reading the works of the other.
4. Now, of course, it is not much good, indeed it is possibly worse than useless, to have a law faculty which is not of high quality, but Hong Kong has nothing to fear on that account. Bearing in mind that it has all the advantages of the long and respected traditions of common law and the benefits of being a new independent jurisdiction in an unusual system, Hong Kong also represents a very interesting place in which to teach, learn, write about, practice law. That no doubt

helps explain the quality of HKU's law faculty. In addition to having a strong academic record among its professors, teachers, researchers, and students the law faculty of HKU reflects Hong Kong's internationalist approach and attracts many academic lawyers from outside Hong Kong. That is not only good in itself, but is particularly appropriate in what is an increasingly international world – or, as Marshall McLuhan perceptively put it in as long ago as 1962¹, a global village.

5. Anyone who surveys that world will be struck by how conscious lawyers, and indeed many non-lawyers, have become about the importance of human rights. And that is no more true of anywhere than Hong Kong with its new Basic Law introduced in 1997, and the United Kingdom where human rights were first introduced into domestic law through the Human Rights Act, the HRA, one year later. And the tension between individual human rights and the national interest is one of the most interesting and challenging topics to face decision-makers, including, perhaps especially, judges, in many parts of any country's governmental system.
6. I hope that you will forgive me for concentrating in this talk on the UK judicial experience in this area. I do so partly, of course, because it is the aspect with which I am most familiar, and on which, I hope, I can speak with some authority. Also, because it has had such a relatively recent injection of human rights, UK law is, I believe, an instructive seam to mine on the topic. In any event, the limitation is less parochial than it may appear: because UK domestic judges are relatively late arrivals, we have been particularly keen to look at and learn from the jurisprudence of other countries – and not just other European countries. In any event, there is so much information available that even limiting myself to the UK experience does not enable me to deal with anything in great detail.
7. The UK is rather unusual in that it has no formal coherent and overriding constitution, a characteristic shared in the democratic world only by Israel and

¹ See M McLuhan, *The Gutenberg Galaxy: The Making of Typographic Man* (1962) and *Understanding Media* (1964)

New Zealand. The only fundamental rules of the UK constitution, as I see it, are Parliamentary supremacy and the independence of the judiciary, and those firm principles underpin the two main pillars on which most modern civilised countries rest – respectively, democratic government and the rule of law.

8. Mutual respect between Parliament, the legislature, and the judges, the judiciary, is essential and the UK has a history of each of those two branches of government respecting, and steering clear of, the other's territory. But the position is rather more complex when it comes to the third branch of government, the executive, led by government ministers. While UK judges traditionally cannot review Parliamentary decisions, they can review, and where appropriate quash, decisions of the executive. Indeed, along with administering criminal law and resolving civil and family disputes, the judges have no more vital responsibility than holding the executive to account, curbing its excesses, and ensuring that it does not infringe the rights of citizens. The developments in that responsibility over the past fifty years have been remarkable.

9. Let me go back 77 years to the case of *Liversidge v Anderson*². It concerned a Regulation³ which empowered the Home Secretary to detain anyone whom he had "reasonable cause" to believe had "hostile origins or associations". When the case came before the highest court in the land, then the House of Lords, four out of five Law Lords held that it was enough that the Home Secretary stated that he had the requisite reasonable belief, and that the court could not enquire into the matter further, even though they accepted that this was not the natural meaning of the regulation. In his very famous dissenting judgment, Lord Atkin disagreed, observing that he "viewed with apprehension" the fact that his colleagues "when face to face with claims involving the liberty of the subject,

² *Liversidge v Anderson* [1942] AC 206

³ Regulation 18B of the Defence (General) Regulations, 1939

show themselves more executive-minded than the executive”. It is said that Lord Atkin’s judicial colleagues thereafter never had lunch with him⁴.

10. It can fairly be said that *Liversidge* was a wartime decision, but most contemporary heavyweight legal academics sided with majority⁵, and even after the War had ended, this very deferential judicial approach persisted into the 1950s and 1960s⁶. As one writer on the UK constitution put it, “[f]or most of the first six decades of the twentieth century, the judges were dogs that seldom barked or even growled ... and showed no disposition to play any sort of constitutional role”⁷.

11. However, less than thirty years after *Liversidge*, things started to change. In the 1968 *Anisminic* decision⁸, the Law Lords had to consider a statute which set up a claims commission and provided that any decision by the Commission to accept or reject a claim could not be challenged in a court. The Law Lords nonetheless held that they could quash the Commission’s refusal to accept a claim, on the ground that, in making its decision, the Commission had made an error of law which went to its jurisdiction. And in the 1984 GCHQ case⁹, the Law Lords held that the Government could not simply rely on national security as a reason for refusing to let GCHQ workers join a trade union. It was the court whose job it was to decide whether the decision was rational and took into account relevant factors and ignored irrelevant factors.

⁴ I must admit that it is difficult to find any clear authority for the story: there are reliable statements that he was cold-shouldered by his colleagues. It is also fair to say that, in personal or social terms, he was not a particularly popular character as far as I can gather

⁵ The Law Quarterly Review published a number of pieces agreeing with the majority. Sir William Holdsworth thought that the majority were “clearly right” because the issue was not “justiciable” or “within the court’s legal competence”, as it was an “administrative or political issue”. Professor Goodhart agreed, even suggesting that Lord Atkin’s statement about the majority being “more executive-minded than the executive”, might amount to contempt of court, as it suggested that his four colleagues had “consciously or unconsciously, been influenced by their prejudices or political inclinations in reaching their conclusions”.

⁶ See for instance *Robinson v Minister of Town and Country Planning* [1947] 1 KB 702

⁷ Anthony King, *The British Constitution* (2012), p 115

⁸ *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147

⁹ *Council of Civil Service Unions v Minister for the Civil Service*

12. The test of rationality was laid down by Lord Greene in the famous *Wednesbury* case in 1947¹⁰, and is still being applied today. But over the past seventy years it has changed beyond all recognition¹¹. I have no doubt that Lord Greene would be truly astonished at how much more easily judges are persuaded today that a decision was irrational than in his time, and I think he would be even more astonished that today's judges would be relying on his *Wednesbury* judgment to justify their quashing of government decisions.
13. This change of judicial approach was no doubt partly attributable to the difference between the restrained and conventional post-war period and the more questioning and exuberant period that followed. Also, during the 1950s, society started to become much more complex and regulated, and the peace-time powers of the executive carried on growing, and judges consequently became more conscious of the importance of their constitutional function to protect citizens against the increasingly mighty state. So, it should be no surprise that the volume of judicial review cases increased very substantially indeed – from around 185 in 1969 to around 4,600 in 1999¹².
14. A year later, in 2000, the HRA came into force, and this has further extended the responsibilities of judges to protect citizens against executive interference in their lives. The HRA has created new rights, such as the right to privacy, the right to family life, the right not to be discriminated against; and it has expanded some previously existing common law rights, eg the right not to be improperly detained, and the right of access to the courts. More generally, it has injected more fundamental and structured thinking about the role of the courts in reviewing executive decisions and actions and protecting citizens¹³.

¹⁰ In *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223

¹¹ Lord Greene's definition of unreasonable was very restrictive, namely "so absurd that no sensible person could ever dream that it lay within the powers of the authority". However, today, as Lord Mance put it in the Kennedy case [2015] AC 455, para 51, "[t]he common law no longer insists on the uniform application of the rigid test of irrationality" and "[t]he nature of judicial review in every case depends on the context".

¹² <https://docs.google.com/spreadsheets/d/1Kcm2Buf8ykb9otUleY5gQCW1DKaaYSpWoNzabR7AmAs/edit#gid=14>

¹³ see per Lord Reed in *Pham v Secretary of State for the Home Department* [2015] 1 WLR 1591

15. Let me give two important examples. First, when carrying out a traditional judicial review, judges had a purely reviewing function; secondly, judges also considered that there were certain areas of executive responsibility into which a common law judge should not enter. Such restrictions do not normally apply when human rights are involved. As Lord Sumption has expressed it¹⁴, any arguable allegation that a person's Convention rights have been infringed is “necessarily justiciable” and “the court’s assessment of an executive decision in a human rights case involves a “review of the proportionality of the decision ... which is not only formal and procedural but to some extent substantive”.
16. Rather than simply deciding whether a decision was rational and took into account legally relevant factors, when considering whether a decision disproportionately interferes with a Convention right, the Court has to apply four-stage approach¹⁵, usefully analysed by Lord Reed¹⁶, namely (i) Is the objective sufficiently important to justify limiting a fundamental right? (ii) Are the measures which have been designed to meet it rationally connected to it? (iii) Are they no more than are necessary to accomplish it? (iv) Do they strike a fair balance between the rights of the individual and the interests of the community? While these are judgments which, as I have mentioned, the judiciary, not the executive, have to make, Lord Reed has also rightly said that, although the court has to form its own view, judges should always bear in mind that “the making of government and legislative policy cannot be turned into a judicial process”¹⁷.
17. This observation is particularly apt when it comes to judicial involvement in the areas of national security and public order. After all, the executive has no more fundamental and vital functions than protecting citizens from foreign attack and interference and from domestic unrest and violence: historically speaking, they were the only real duties of government, and practically speaking, if we suffer foreign attack or civil unrest, all the other areas of state action are fatally

¹⁴ *R (Lord Carlile of Berriew QC) v Secretary of State for the Home Department* [2015] AC 945, para 29

¹⁵ *R (Aguilar Quila) v Secretary of State for the Home Department (AIRE Centre intervening)* [2012] 1 AC 621 as applied in a number of cases – including per Lord Hale in *Lord Carlile* at paras 98-108

¹⁶ *Bank Mellat v Her Majesty's Treasury (No. 2)* [2014] AC 700, paras 72-76

¹⁷ *Ibid*, para 93

undermined. Further, national security is an area where the judiciary has no particular experience or expertise on which to draw (public order, by contrast, is an area, which at least in some parts is relatively familiar territory to the judiciary).

18. The 9/11 attack on the World Trade Centre occurred eleven months after the 1998 Act came into force. Some people may think it unfortunate, that, at about the time that the UK security services and armed forces were having to deal with a new phase of international terrorism and foreign military action, the UK judiciary was being given significant new powers to uphold and enforce human rights. And the same point may be made about the Hong Kong judiciary and the Basic Law. I prefer to see it as a sign of a civilised and decent society that, even when we are under threat at home and the armed forces are putting their lives at risk abroad, we affirm and uphold fundamental freedoms. As the former President of the Israeli Supreme Court, Aharon Barak famously said, “judges in modern democracies ... should protect [society] both from terrorism and from [any inappropriate] means that the state wants to use to fight terrorism”¹⁸, and “preserving the rule of law and recognition of an individual's liberty constitutes an important component in its understanding of security”¹⁹.

19. The very fact that the powers of the executive so far as the maintenance and promotion of national security and public order are so fundamental and vital renders it all the more important that they are not misused or abused. Furthermore, it is worth recalling that the executive is ultimately run by government ministers, and in most countries government ministers are only able to serve either if they have been democratically elected or if they have been appointed by a democratically elected appointor (a President or Prime Minister). This means that they are sometimes inclined to play along with short term popular concerns. It is in such cases that the judiciary play such an important part. Indeed, I suspect that sometimes government ministers may make decisions

¹⁸ A Barak, *The Role of a Supreme Court in a Democracy, and the Fight Against Terrorism*, 58 U Miami L Rev 125 (2003), p 132

¹⁹ *Committee Against Torture in Israel v Israel* 53(4) PD 817, 845, para 39,

almost in the expectation them to be overturned by judges. Making decisions which are right but unpopular is often much easier for judges, who have the plain unblinking duty to uphold the law and who enjoy security of tenure, than it is for ministers, who constantly face all manner of different political pressures, as well as the risk of losing office.

20. No sensible person would disagree with the notion that it should require a very powerful reason for a judge to deny citizens their fundamental rights or to prevent them from complaining of an unjustified interference with their fundamental rights, properly determined by the courts. Equally, no sensible person would disagree with the notion that a judge should not normally be making decisions as to policy matters, especially those involving intelligence or military issues. Where sensible people may often disagree is how best to reconcile these two notions when they come into conflict, or tension, in practice.
21. There are two principal approaches which UK judges adopt to deal with such tension under the common law. The first approach is to accept that, while the court has jurisdiction to rule that a particular decision is unlawful because it interferes with an individual's rights, great weight will often be given to the view of the executive decision-maker. The second approach for dealing with the tension is, as I have mentioned, to impose a self-denying ordinance, and conclude that the issue is simply one on which it will not accept jurisdiction. The first approach applies to human rights claims, but to a more limited extent than to common law claims; the second approach at least largely does not apply to human rights claims.
22. The House of Lords decision in *A v Home Secretary* in 2004²⁰ is almost totemic in human rights circles, at least in the UK, as it conclusively demonstrated that the courts are prepared to overturn ministerial decisions even in a case where they are contained in a ministerial order approved by parliament, and even when they are aimed at fighting terrorism at a time of high national alert. In that case,

²⁰ *A & Ors v. Secretary of State for the Home Department* [2005] 2 AC 68

the fact that the legislation²¹ provided that foreign suspected terrorists could be imprisoned, whereas UK national suspected terrorists could not, was held by all but one of nine Law Lords to be represented unjustified, and therefore unlawful, discrimination against the former. In his leading judgment, Lord Bingham relied in part on “the fundamental importance of the right to personal freedom”²² which was engaged in that case, and justified the House of Lords effectively quashing the order.

23. The decision highlights more than any other how the rule of law and respect for individual rights has moved on since 1941. In *Liversidge*, you will recall, the Home Secretary’s decision to imprison a suspect when there was no reason to do so, and even when the regulation concerned appeared to require reasons, was held to be lawful. In the *A* case, even though the Home Secretary had apparently good reasons for his decision to imprison foreign suspects, his decision was quashed because it was unfairly discriminatory. And let me add that discrimination was not simply a technical reason: if he didn’t want to imprison UK national suspected terrorists, it obviously called into question the value or point of incarcerating suspected terrorists generally. The development of domestic administrative law by the judges in the second half of the 20th century, coupled with the coming into force of the HRA in 2000, had very substantially and very beneficially stiffened the judicial resolve and the judicial armoury in relation to the performance one of its fundamental duties, namely the protection of individuals against unlawful or arbitrary decisions and actions of the executive branch of the government. (And, in case that sounds one-sided, let me parenthetically add that judges have an equal duty to uphold and enforce lawful decisions and actions of the executive).

24. The *A* decision does not only provide a good and high-profile example of the courts standing up for the rule of law in general and fundamental rights in particular. It also provides a good example of the first type of approach, namely

²¹ Human Rights Act 1998 (Designated Derogation) Order 2001 (SI 2001/3644)

²² *A & Ors* [2005] 2 AC 68, para 36

great weight being given to the view of the decision-maker. Although they found the ministerial order to be defective on discriminatory grounds as I have described, the House of Lords (again with one exception) was not persuaded by the bolder submission that they should also hold that the order was defective on the alternative ground that it was based on the Home Secretary's view that, notwithstanding its interference with personal liberty, it was justified on the ground that, immediately after 9/11, there was a national state of "emergency". The decision not to interfere with that decision was justified by Lord Bingham, "not without misgiving"²³, partly because "great weight should be given to the judgment of the Home Secretary, his colleagues and Parliament on this question, because they were called on to exercise a pre-eminently political judgment".

25. I think that the way in which Lord Bingham expressed himself makes it clear that the identity of the decision-maker, as well as the nature and circumstances of the decision, is relevant to the weight to be given by the court to the decision-maker's decision. Here, not only was the decision made by a very senior cabinet minister, but it had been effectively approved by the democratically elected legislature. And, of course, the decision itself concerned with making of a political judgment, namely whether a national state of emergency existed, and, if it did, what steps should be taken to deal with it. By contrast, if the minister had expressed a view as to what, as a matter of principle, constituted a national emergency, the courts would have been readier to engage with his decision, and may very well have quashed it for an additional reason, if they had concluded that his definition was too lax. Deciding whether a national emergency exists is not an obvious function for a judge (although I should emphasise that it is a function any judge will carry out if and when it is required of him or her), whereas deciding on the meaning of a particular expression in a particular context is part of most judges' staple diet.

²³ *Ibid*, para 26

26. The *Bank Mellat* case²⁴ in 2014 is another example of a case where a court was prepared to hold that a measure designed to fight terrorism was unjustifiably discriminatory. By a bare majority of 4-3, the Supreme Court held that an order shutting out an Iranian bank, Bank Mellat, from the London market on the ground that it might be supporting terrorism involved making “an arbitrary and irrational distinction” because “the problem is not specific to Bank Mellat but an inherent risk of banking” so that “the risk posed by Bank Mellat’s access to those markets is no different from that posed by the access which comparable banks continued to enjoy”²⁵. It is at least strongly arguable that the case could have been decided that way without reference to human rights, as it is expressed as a classic judicial review irrationality decision; yet I strongly doubt that before the judges were invigorated by the HRA, a court in the UK would have been confident enough to have reached such a decision.

27. Moving forward a decade, the 2014 *Lord Carlile* decision²⁶ is an example of a case where decisive weight was given by the court, albeit reluctantly, to the ministerial view. The Home Secretary refused to permit an Iranian lady enter the UK to have discussions with parliamentarians about democracy in Iran on the ground that this might upset the Iranian authorities, which could “endanger the safety of individuals for whom our government has some responsibility, or could harm this country's economic or international political interests”²⁷. While there were reasons to doubt whether this concern was genuine, there had been no cross-examination of the civil servants who had given the evidence, and so it had to be accepted by the Court²⁸.

28. The Court had little difficulty in holding that the second and third questions of the structured approach (whether there was a rational connection between the measure and its aim, and whether the measure was no more than necessary to accomplish the aim). Greater difficulty was caused by the first and fourth

²⁴ Footnote 28

²⁵ *Bank Mellat*, footnote 28, para 27, per Lord Sumption

²⁶ *Lord Carlile*, footnote 24

²⁷ *Ibid*, para 58

²⁸ *Ibid*, paras 71, 97 and 114

questions, namely whether the objective was sufficiently important, and whether a fair balance had been struck. These are the questions which, as I have already explained²⁹, it has been held that the court has to decide for itself. By a majority of four to one the Supreme Court concluded that the government had satisfactorily answered those questions.

29. However, as Lord Reed said in the *Bank Mellat case*³⁰, while the court must subject any executive decision or action said to infringe fundamental rights to an “intense review”, “the intensity [of review] – that is to say, the degree of weight or respect given to the assessment of the primary decision-maker – depends on the context”. As one of the majority, I followed that approach in *Lord Carlile* saying that the court must also bear in mind that the executive is the body charged with making the decision, and therefore “the court ... must give the decision appropriate weight, and that weight may be decisive”, adding that “[t]here is a spectrum of types of decision, ranging from those based on factors on which judges have the evidence, the experience, the knowledge, and the institutional legitimacy to be able to form their own view with confidence, to those based on factors in respect of which judges cannot claim any such competence, and where only exceptional circumstances would justify judicial interference”³¹.

30. As I went on to say³², it seemed “self-evident that a decision based on the possibility of an adverse reaction of a foreign government, and consequential risk of damage to the United Kingdom's diplomatic and economic interests, and to the well-being of United Kingdom citizens and employees abroad, is very much at that end of the spectrum where a court should be extremely diffident about differing from a ministerial decision.” The fact that the Supreme Court seriously entertained a challenge to the decision in *Lord Carlile*, and that one member of the court actually dissented, demonstrates the change in judicial responsibilities since the passing of the HRA.

²⁹ See para 17 above

³⁰ *Bank Mellat* footnote 28, paras 69-70

³¹ *Lord Carlile*, footnote 24, para 68

³² *Ibid*, para 70

31. Another indicator of the change that has been occurring over the past sixty-five years or so in the UK is to be found in language. Judges used commonly to say that the courts should be “deferential” when it came to interfering with ministerial and other executive decisions. In a couple of important articles around ten years ago, the notion of judicial deference, with its overtones of servility, was challenged as outdated³³. This was taken up by the Law Lords led by Lord Bingham in the 2007 *Huang* case when they said that, when judges were considering the lawfulness of a ministerial decision, they were not expected to defer to the minister but to “perform the ordinary judicial task of weighing up the competing considerations on each side and according appropriate weight to the judgment of a person with responsibility for a given subject matter and access to special sources of knowledge and advice”³⁴. The Law Lords went on to say that the Court of Appeal³⁵ had “adopted a review approach incorrectly based on deference to the Secretary of State's view of proportionality”³⁶.

32. As I mentioned earlier, there are also doctrines which have been developed by common law judges on the basis that there are areas of executive action where they should fear to tread. An example arose in last year's *Rahmatullah* case³⁷, which concerned claims brought by a number of individuals who contended that they had been wrongly detained and mistreated by UK troops in Afghanistan or Iraq. They brought their claims against the government both in tort and under the HRA. The Supreme Court decided that the army's decision to detain non-UK citizens abroad was a Crown act of state, because it was “authorised by the United Kingdom's detention policy or required by the United Kingdom's agreements with the United States [which] were both inherently governmental in character and authorised by the Crown in the conduct of the United Kingdom's international relations”³⁸. In the eyes of the common law, Lord Sumption said

³³ TSR Allan, *Human Rights and Judicial Review: a Critique of 'Due Deference'* [2006] CLJ 671, and J Jowell, *Judicial Deference: Servility, Civility or Institutional Capacity?* [2003] PL 592

³⁴ *Huang v Secretary of State for the Home Department* [2007] 2 AC 167, para 16

³⁵ [2006] QB 1

³⁶ [2007] 2 AC 167 para 21

³⁷ *Rahmatullah v Ministry of Defence (No 2)* [2017] 2 WLR 287

³⁸ *Ibid*, para 75, per Lord Sumption (with whom others agreed on this point)

that it was “a principle of consistency”, as the nature of the acts to which the doctrine applies are “the paradigm functions of the state”. However, the Court also said that the common law would not allow Crown act of state to apply where the acts complained of are torture or even maltreatment. And importantly for present purposes³⁹, it was held in that case that the doctrine of Crown act of state could not be relied on as a defence to a claim based on the HRA.

33. However, even human rights have their limits. The Strasbourg court has held that article 2 of the Human Rights Convention (right to life) carries with it an obligation on a state “to initiate an effective public investigation by an independent official body into any death” which may have been attributable to a failure by that state “not to take life without justification”.⁴⁰ In the 2008 *Gentle* case⁴¹, the House of Lords had to consider a claim by the mother of a soldier killed in Iraq for an inquiry into the legality of the 2003/4 invasion of Iraq war. Lord Bingham rejected this for a number of reasons⁴², including that it cannot have been “envisaged that [the Convention] could provide a suitable framework or machinery for resolving questions about the resort to war”.

34. It is also worth mentioning the 2013 *Smith v MoD* case⁴³, which raised understandable controversy. The issue was whether the families of some soldiers who had died in Iraq could sue the Government in negligence and for violating article 2 of the Convention on the ground that they had negligently failed to provide the soldiers with the necessary protective equipment. Lord Hope, speaking for the majority, rejected the government’s application to strike out the claims, although he accepted that there were cases where the government could invoke the doctrine of combat immunity, which he said was “not limited to acts or omissions in the course of an actual engagement with the enemy”, but “extends to all active operations against the enemy”⁴⁴.

³⁹ *Rahmatullah v The Ministry of Defence* [2014] EWHC 3846 (QB), para 6

⁴⁰ *R(Middleton) v West Somerset Coroner* [2004] 2 AC 182, paras 2 and 3

⁴¹ *R (Gentle) v The Prime Minister* [2008] 1 AC 1356,

⁴² *Ibid*, para 8

⁴³ *Smith v Ministry of Defence*

⁴⁴ *Ibid*, para 94, citing Dixon J in *Shaw Savill & Albion Co Ltd v Commonwealth* (1940) 66 CLR 344, 362.

35. However, he considered that there was a real prospect of showing that the failures occurred “when men are being trained, whether pre-deployment or in theatre, or decisions are being made about the fitting of equipment to tanks or other fighting vehicles” and “there is time to think things through, to plan and to exercise judgment”⁴⁵. By contrast, Lord Mance gave a powerful dissenting judgment, suggesting that the majority decision would be “likely to lead to the judicialisation of war”⁴⁶. I suspect that the issue of the extent of combat immunity is not yet finalised. *Smith v MoD* was not only a 4-3 decision; it was also an interlocutory decision. The MoD will probably live to fight another day, but I am not necessarily convinced that they will win.

36. The problems the courts face when national security and preserving law and order clash with individual rights are not limited to substantive issues. They also arise in relation to procedural issues. There is no fundamental right which is closer to the judicial heart than the right of access to the courts, which of course includes the right to a fair trial. Yet, what is meant to happen when an individual is prosecuted or sued, and evidence which is essential to the prosecution or another party, which could include the defendant, is much too sensitive to be revealed? (And that could of course occur in a civil case where the individual is the claimant.) If the government wants, or even more, if the government needs, to rely on such evidence, there is an obvious problem. It cannot show the evidence to the defendant, not least as he will normally be, or at least will be perceived to be a suspected enemy of the government. So it would obviously be unfair if the Judge saw the evidence and decided the case against the defendant, without the defendant seeing it.

37. In the UK, by a mixture of judge-made law, decisions of the Strasbourg court of human rights, and parliamentary statute, we have arrived at a *modus vivendi*, which is undoubtedly less than perfect, but it is, at least in my view, inevitable that there has to be a degree of compromise. First, where the government claims

⁴⁵ *Ibid*, para 95

⁴⁶ *Ibid*, para 150

certain documents, though relevant to the proceedings, are protected from disclosure and use in court by so-called public interest immunity, a judge will decide whether they should be so protected. There was much political debate as to whether the final decision should be that of a judge, but it seems obvious that it should be: (i) the government cannot be the ultimate judge in its own cause, and (ii) it is judges who decide what evidence can and cannot be produced in trials. Where a document relevant to the proceedings has immunity, the common law will not accept any bending of the fair trial rule, so (unless, I suppose the defendant waives his right) under the common law a defendant can object to the trial proceeding once a significantly relevant document is held to be immune from production.

38. In the *Al Rawi* case⁴⁷, a claimant was suing the UK government for its alleged responsibility for his mistreatment at Guantanamo Bay, and the government could not defend without relying on documents which it was not prepared to let the claimant see for security reasons. By a majority of six to three, the Supreme Court held that the common law was not prepared to permit a hearing where the claimant could not see and challenge all the evidence which the government wanted to rely on. The effect of this was that the government had to settle the claim by paying a large sum to the claimant.

39. The legislature subsequently stepped in and introduced into such cases a so-called “closed material procedure”, which had existed for some time in relation to terrorism-related claims brought by the government, and which had been approved by the Strasbourg court. It enables the government to rely on immune documents without showing them to the defendant or his advisers. This procedure involves appointing so-called “special advocates” who are security-vetted, and therefore can see the immune documents and represent the defendant’s interests in a closed hearing, which is a private hearing attended by the judge, the government and its legal team and by the special advocates, but from which the defendant and his advisers are excluded. My limited experience

⁴⁷ *Al Rawi v The Security Service* [2012] AC 531

suggests that the special advocates are of high quality and do a good job, which is a tribute to the government, who pay for them and against whose interests they are working. However, there is no doubt but that almost every self-respecting judge must feel deeply uncomfortable about such a procedure, as it breaks two fundamental rules of a fair trial, (i) justice must be carried out in public, and (ii) everything the judge sees and hears must be seen and heard by both parties. The first rule has always been subject to exceptions (eg cases involving children, trade secrets), but the second rule has never been subject to exceptions, and, whatever protection or mitigation you introduce, its infringement carries a significant risk of real substantive injustice.

40. In 2014, the Supreme Court had to decide whether, in the absence of express statutory authority, we could conduct a closed material procedure. By a majority of six to three, we held that we could hold a closed hearing but only in a case where the appeal was in relation to a case where the trial judge had such statutory authority⁴⁸. Like the overwhelming majority of the cases I have mentioned in this talk, that case did not involve unanimous judgments. Indeed, many of those cases involved fairly sharp differences of opinion between highly experienced and respected senior judges. This illustrates how difficult it can be to identify the precise limit of the court's role when it comes to invoking human and common law rights of individuals to curb the freedom of action of the executive in promoting the rule of law and the defence of the country.

41. A more historical perspective underlines this point. Virtually every fundamental belief which most mainstream, moderate people in the UK and in many places elsewhere would take for granted today would have been rejected by most mainstream moderate people in the not-so-distant past. Consider what we regard today as fundamental freedoms, such as the rights to life, to liberty, and to a fair trial, freedoms from torture, from forced labour, and from discrimination, and freedoms of religion, of expression, and of association. The great majority of educated, so-called right-thinking people today would take all these freedoms

⁴⁸ *Bank Mellat v Her Majesty's Treasury (No. 1)* [2014] AC 700

for granted. But you don't have to go back very far in UK history to find a time when every one of these freedoms simply did not exist or, in a few cases, could be said to exist but in an almost unrecognisably restrictive form. Indeed, if we were to go back eight hundred years to the time of Magna Carta, the great majority of English people had virtually none of these freedoms in any recognisable form.

42. In Britain, people freedom of expression and of religion only really started to raise their heads in the 17th century; indeed, it was well into the 19th century before Roman Catholics and Jews began to have the same civil rights as Anglicans. Slavery was alive and well in the 18th century, when the Attorney General and Solicitor General expressed the view that slavery was lawful in England. Fifty years later, this opinion was described by Lord Mansfield as probably having been given after dinner, but it represented conventional legal thinking for many decades after it was given in 1729.

43. Freedom of association only arrived in the UK in 1871 with the recognition of trades unions. Torture was in official use in England until about 1640, with a royal warrant. And when it comes to discrimination, one does not have to go back very far to see how things can change. It is scarcely 150 years since sex between men in England was punishable by death, and less than 50 years ago it was still a crime for which men were regularly prosecuted and imprisoned. A century ago, no woman could vote in UK Parliamentary elections or practise as lawyers, and eighty years ago, many employers required their female employees to give up work when they got married as they would otherwise be keeping a man out of a job.

44. And standards change with place as well as with time. The death penalty is thought by most people in the UK today to be wrong today, but it was only abolished in 1965. No doubt, in the 18th century, it was thought by most people to be somewhat eccentric to oppose the death penalty. And, even today, the death penalty is still part of the law and practice of over twenty countries, including China, India, the USA, Indonesia, Egypt, Pakistan, and Japan. And even part of

the United Kingdom, Northern Ireland, has a significantly different legal position in respect of important social issues such as women's reproductive rights, blasphemy and gay marriage.

45. So, while the human rights we talk and litigate about so much are fundamental to many modern civilised and democratic societies and should be nurtured and treasured, we should not fool ourselves into thinking that they are timeless, let alone absolute. We can look back with disbelief, or at least with surprise or disapproval, at accepted norms and laws 200 years ago, or even 50 years ago. So, particularly in a world that is changing ever more quickly, we may expect the same reaction from right-thinking people in 100, or even 50 years, time, when they look back to our laws and norms. I leave it to you to speculate as to which of our currently accepted views and norms will be viewed as barbaric. The notion that we have reached some sort of Nirvanic state of perfection is no more valid than the eschatological obsessions of those who thought, and in some cases apparently still think, that the end of the world is about to occur.

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Hong Kong, 25th June 2018