The British Institute of International and Comparative Law:

The Belmarsh case

The profound change in our legal system was recently emphasised by the decision of the House of Lords in the *Belmarsh* case.[1] The House of Lords decided by an 8:1 majority that the indefinite detention of foreigners, but not nationals, on the ground of suspicion that they were involved in terrorism was a breach of the European Convention on Human Rights. In the course of discussing the role of judges under the 1998 Act, and testing governmental action against the requirements of the ECHR, Lord Bingham of Cornhill said (at para 42):

> ". . . I do not accept the full breadth of the Attorney General's submissions. I do not in particular accept the distinction which he drew between democratic institutions and the courts. It is of course true that the judges in this country are not elected and are not answerable to Parliament. It is also of course true . . . that Parliament, the executive, and the courts have different functions. But the function of independent judges charged to interpret and apply the law is universally recognized as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself. The Attorney General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision-making as in some way undemocratic. It is particularly inappropriate in a case such as the present in which Parliament has expressly legislated in section 6 of the 1998 Act to render unlawful any act of a public authority, including a court, incompatible with a Convention right, has required courts (in section 2) to take account

[1] *A v Secretary of State for the Home Department* [2005] 2 WLR 87. Lady Justice Arden reviewed this decision in *Human Rights in the Age of Terrorism,* Third University of Essex and Clifford Chance Lecture, 27 January 2005.

> of relevant Strasbourg jurisprudence, has (in section 3) required courts, so far as possible, to give effect to Convention rights and has conferred a right of appeal on derogation issues. . . . The 1998 Act gives the courts a very specific, wholly democratic, mandate. . . ."

This was the most eloquent and magisterial judicial rebuke to an Attorney-General since Lord Denning in *Gouriet v Union of Post Office Workers* (1977)[2] admonished the Attorney-General to bear in mind the words of Thomas Fuller over 300 years ago: "Be you ever so high, the law is above you."

Due to a challenge to my neutrality as a Law Lord made by the government (represented by the Attorney-General) I did not sit in that case.[3] It was the very first time, as far as I have been able to ascertain, that a *government* has sought and obtained an alteration of the composition of the Appellate Committee of the House of Lords. I feel free, however, to say that the *Belmarsh* decision, and in particular Lord Bingham's opinion, was a vindication of the rule of law, ranking with historic judgments of our courts. Nobody doubts in any way the very real risk of international terrorism. But the *Belmarsh* decision came against

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[2] [1977] QB 729, at 761H-762A.

[3] The challenge contained in a letter from the Treasury Solicitor was based on a sentence in my lecture "Human Rights: The Legacy of Mrs Roosevelt" [2002] *Public Law* at 483-484. I had said: "In my view the suspension of Article 5 ECHR - which prevents arbitrary detention - so that people can be locked up without trial when there is no evidence on which they could be prosecuted is not in present circumstances justified": see [2002] *Public Law* at 483-484. It is a matter of speculation whether the challenge was motivated by my later lecture viz "Guantanamo Bay: The Legal Black Hole", republished in "Democracy Through Law", 2004, Ashgate, 195.

the public fear whipped up by the governments of the United States and the United Kingdom since 11 September 2001 and their determination to bend established international law to their will and to undermine its essential structures.[4] It was a great day for the law - for calm and reasoned judgment, analysis without varnish, and for principled democratic decision making by our highest court.

How it ever came about

One can still marvel that the incorporation of the ECHR ever came about. The United Kingdom was one of the first countries to ratify the ECHR in 1951, and the United Kingdom created a right of petition for individuals to the Strasbourg court as long ago as 1966. But there were powerful domestic political forces ranged against Parliament incorporating the ECHR into our law. In legal circles the enthusiasm for the idea was decidedly mixed. Despite the constitutional role of the Privy Council in having to interpret bills of rights in Caribbean constitutions for more than forty years the Privy Council failed to develop dynamic principles of human rights law. On the whole, the wonderful words of Lord Wilberforce that what is needed is "a generous interpretation avoiding what has been called 'the authority of tabulated legalism,'

[4] Professor Phillipe Sands, *Lawless World: America and the Making and Breaking of Global Rules,* Penguin Books, 2005.

suitable to give individuals the full measure of the rights and freedoms referred to [in the ECHR]" remained unfulfilled.[5] Indeed to this very day the story of Privy Council decisions in Caribbean death sentence cases casts a sombre shadow over the case law of the Privy Council. The jurisprudence of the Privy Council did not help to create a legal culture favourable to the development of human rights law.

Fortunately, the imagination of legal philosophers like Lord Scarman, the sustained campaigning of lawyers like Lord Lester of Herne Hill QC, and above all the single minded determination of a politician, the Lord Chancellor, Lord Irvine of Lairg, secured for the people of the United Kingdom a charter of fundamental rights. Having crossed swords publicly with Lord Irvine of Lairg about his participation in the judicial business of the House of Lords during his period of office as Lord Chancellor (May 1997 to June 2003), I would like to repeat my great admiration for what he accomplished in bringing about the enactment of the 1998 Act.[6]

The task of the House of Lords

[5] *Minister of Home Affairs v Fisher* [1980] AC 319, at 328H.
[6] See: The Case for a Supreme Court (March 2002), republished in *Democracy Through Law,* at 209.

What changed on 2 October 2000 was that a coherent if ageing charter of fundamental rights became part of our unwritten constitution enforceable in our domestic courts. But the ECHR had to be blended into our legal system by dynamic principles of constitutional interpretation. The House of Lords was the principal guardian of the new interpretative process. It had to take charge of laying the foundations of human rights law in the United Kingdom.

I will ignore transitory problems, such as the retrospectivity of the 1998 Act in various contexts, and concentrate on some fundamentals. It is necessary to be selective. I acknowledge that the jurisprudence of the House of Lords in the period 2001-2005 must await a review by a lawyer who was not *parti pris* to some of those decisions. But perhaps, on a preliminary basis, I can draw some threads together. This review may identify some major issues that have apparently been settled and point to some major issues yet to be resolved. But Aharon Barak, President of the Supreme Court of Israel, cautioned: "Like the eagle in the sky that maintains its stability only when it is moving, so too is the law stable only when it is moving".[7] That is pre-eminently true of human rights law.

The Ethos of the ECHR

[7] A Judge on Judging: The Role of a Supreme Court in a democracy, reprinted from *Harvard Law Review* 116, No. 1 November 2002, 29.

Bills of rights vary according to the historic circumstances in which they came into existence. Our bill of rights is the ECHR which was drafted in 1950 under the ægis of the Council of Europe, against the backdrop of the horrors of the Second World War. Allowing for the fact that the ECHR has been amended by protocols, it is still a product of its time. Fifty years later it is an inadequate statement of human rights principles. Despite the emphasis on the inherent dignity of every person in the United Nations Charter (1945), and in the Universal Declaration of Human Rights (1948), this most fundamental of human rights is not spelt out in the ECHR. It contained no free-standing non-discrimination provision and the government of the United Kingdom is still unwilling to ratify a protocol filling this important gap.[8] The guarantee of freedom of expression was not buttressed by a right to information against the government and its agencies. Unlike South Africa in the 1990s we could not start afresh: there was no political support for such an idea. With all its limitations the ECHR is our bill of rights. The House of Lords had to interpret it dynamically as is appropriate (as Cardozo put it) "not for the passing hour but for an expanding future." It was important as a first building block of the new jurisprudence to identify the historical context and ethos of the ECHR. The opportunity to do so came early on (albeit in

[8] Protocol No. 12 dated 11 November 2000.

the Privy Council) in *Brown v Stott*[9]. It involved a devolution appeal under the Scotland Act 1998 which entered into force before the Human Rights Act came into operation elsewhere in the United Kingdom. Scottish legislation requiring an owner of a vehicle to disclose who was driving his or her car at a certain time was held to be a reasonable and proportionate response to a serious social problem. The Privy Council decided that the privilege against self incrimination implied into article 6(1) of the ECHR was not absolute. The judgments of the Privy Council emphasised the twin objectives of the Council of Europe in 1950. First, it aimed to foster effective political democracy, by creating conditions of stability under the rule of law to serve the best interests of the inhabitants of European countries. Secondly, th

> "The Convention is concerned with rights and freedoms which are of real importance in a modern democracy governed by the rule of law. It does not, as is sometimes mistakenly thought, offer relief from 'The heart-ache and the thousand natural shocks That flesh is heir to.'"

The general discussion in *Brown v Stott* is essential to the understanding of many of the decisions of the House of Lords in the period 2001-2005.

Horizontal application of the 1998 Act

In its interstices the 1998 Act contains a vital structural problem upon which there are different points of view. The question is whether the Act only has vertical effect in the sense of applying as between individuals and the state and its agencies, or whether it also has direct horizontal application between private parties. If the Act does not have direct horizontal effect, the question arises whether it nevertheless has indirect horizontal effect, and, if so, what that means. The importance of the point can be concretely illustrated by the potential scope of the guarantee of privacy under article 10 of the ECHR.

The subject has been discussed in two important House of Lords decisions. In *Wainwright v Home Office*[11] the issue arose whether there

[11] [2004] 2 AC 406.

was a cause of action for invasion of privacy by strip searches of prison visitors not authorised by law. The House re-asserted the traditional English doctrine that there is no common law tort of invasion of privacy. The verticality/horizontality issue was raised in argument. But, due to the fact that the 1998 Act was not retrospective the House was not required to decide whether the 1998 Act may have horizontal application. In *Campbell v MGN Limited*[12] a fashion model claimed damages for an alleged violation of her privacy under article 8(1) of the ECHR. The 1998 Act was in force in respect of the claim. By a 3:2 majority (Lord Hope of Craighead, Baroness Hale of Richmond and Lord Carswell) the House held that the newspaper went too far in publishing facts about her private life and allowed the claim. Baroness Hale held that the 1998 Act does not create any new cause of action between private persons.[13] She therefore expressly answered the question of direct horizontality. Lord Carswell agreed with Lady Hale.[14] Lord Hope did not explicitly comment on this point.[15] Lord Nicholls of Birkenhead expressed no view on the horizontality issue.[16] Lord Hoffmann held in clear terms held that the 1998 Act does not have direct horizontal effect.[17]

[12] [2004] 2 AC 457.
[13] Para 132.
[14] Para 161.
[15] Para 86.
[16] Para 17.
[17] Para 49.

In *Campbell*, therefore, three members of the House - two from the majority and one from the minority - held in express terms that there was no direct horizontality. It could perhaps be argued that there was no *ratio decidendi* on this point. In my view that would be unrealistic. There has been a decision by three Law Lords against direct horizontality under the 1998 Act. In any event, in my opinion, the wording of section 6 of the 1998 Act, limited as it is to public authorities conclusively rules out an independent cause of action under the 1998 Act between private parties.

On the assumption that the 1998 Act does not have direct horizontal effect, the question arises whether it has indirect horizontal effect. The point was not squarely addressed in *Campbell*. The *effect* of the majority view in *Campbell* can be read as endorsing indirect horizontal effect. In other words, the values and principles reflected in Convention rights *may* shape the development of the common law. In German and Canadian jurisprudence the view has prevailed that human rights law may have a radiating effect on the general law.[18] It would be surprising if our law did not adopt the same approach. It reflects the reality that ultimately common law, statute law and human rights law coalesce in one legal system.

[18] B. Markesinis QC *"Privacy, Freedom of Expression and the Horizontal Effect of the Human Rights Bill: Lessons from Germany"* (1998) LQR 47; compare also M. Hunt *"The Horizontal Effect of the Human Rights Act"* [1998] PL 423.

The effect of the decision in Campbell

My observations about *Campbell* have been in the context of the structural problem of direct or indirect application of the 1998 Act as between private parties. The actual decision in *Campbell* was, if I may say so, narrowly based and not self evident. A careful reading of all the judgments does, however, demonstrate (as the House subsequently affirmed in *R v S (A Child)* (Identification: Restrictions on Publication)[19] that four legal propositions were settled. First, neither article 8 (Right to respect for private and family life) nor article 10 (Freedom of expression) has *as such* precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. In this way taxonomy has been advanced in a case where the House was sharply divided on the actual disposal of the case.

The press as the watchdog of the public

[19] [2004] 3 WLR 1129, para 17, at 1137E-F.

The value of a convention right is crucially affected by the circumstances of each case. In *R v Home Secretary, Ex p Simms,*[20] in the context of freedom of expression, I explained:

> "The value of free speech in a particular case must be measured in specifics. Not all types of speech have an equal value. For example, no prisoner would ever be permitted to have interviews with a journalist to publish pornographic material or to give vent to so-called hate speech. Given the purpose of a sentence of imprisonment, a prisoner can also not claim to join in a debate on the economy or on political issues by way of interviews with journalists. In these respects the prisoner's right to free speech is outweighed by deprivation of liberty by the sentence of a court, and the need for discipline and control in prisons. But the free speech at stake in the present case [to grant interviews to journalists] is qualitatively of a very different order. The prisoners are in prison because they are presumed to have been properly convicted. They wish to challenge the safety of their convictions. In principle it is not easy to conceive of a more important function which free speech might fulfil."

The House has several times emphasised the critical role of the media in a democracy. In *Reynolds v Times Newspapers Limited*[21] Lord Nicholls of Birkenhead observed in regard to defamation:

> "It is through the mass media that most people today obtain their information on political matters. Without freedom of expression by the media, freedom of expression would be a hollow concept. The interest of a democratic society in ensuring a free press weighs heavily in the balance in deciding whether any curtailment of this

[20] [2000] 2 AC 115, para at 127A-C.
[21] [2001] 2 AC 127 at 200.

> freedom bears a reasonable relationship to the purpose of the curtailment."

The decision of the majority in *Reynolds*, and in particular the qualified privilege check list approved by a majority of Law Lords for editors, have been trenchantly criticised by the New Zealand Court of Appeal in *Lange v Atkinson and Australian Consolidated NZ Limited*.[22] It held that the *Reynolds* decision altered the law of qualified privilege in a way which added to the uncertainty and chilling effect of the existing law of defamation. The court also stated that the decision in *Reynolds* conflated the distinct concepts of occasion of privilege and abuse of privilege by allowing factors relevant to abuse of privilege to determine whether the occasion was one of privilege. In my view it may be necessary for the House to re-examine *Reynolds*. But in the meantime, the House has in other contexts strongly protected the role of the press. In *R (Rusbridger) v Attorney-General*[23] the Guardian Newspaper published a series of articles advocating the abolition of the monarchy thereby risking (in its view) prosecution under section 3 of the Treason Act 1848. In robust terms the House rejected the idea that section 3 of the 1848 Act could survive scrutiny under the Human Rights Act. In *Re S (A Child*)

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[22] 2000 4 LRC 596.
[23] [2004] 1 AC 357, [para 40, at 372 B-D.]

(Identification: Restrictions on Publication,)[24] the House declined to grant an injunction restraining the publication by newspapers of the identity of a defendant in a murder trial which had been intended to protect the privacy of her son who was not involved in the criminal proceedings. The House observed that "The glare of contemporaneous publicity ensures that trials are properly conducted. It is a valuable check on the criminal process."[25]

The impact on criminal law

The right to a fair trial occupies a central place in the scheme of the ECHR. It accounts for many of the challenges under the 1998 Act. While opinions may differ on the disposal of some cases, the jurisprudence of the House reveals a concentration on matters of real substance, a balanced approach taking into account the triangulation of interests of the accused, the victim and the community, as well as a desire to ensure a just and even-handed disposal of cases. In *R v Spear,*[26] where the House held that the court martial system was Convention compliant, the House emphasised a realistic and non-technical approach to the

[24] [2004] 3 WLR 1129.
[25] Para 30, at 1141G.
[26] [2003] 1 AC 734.

protections in place. In *Attorney-General's Reference (No. 2 of 2001)*[27] there was a difference of opinion between English and Scottish Law Lords in regard to the consequence of a breach of the guarantee that a trial must take place within a reasonable time. By a majority of 7:2 the House held that it would be appropriate to stay or dismiss the proceedings only if either a fair hearing was no longer possible or it would, for any compelling reason, be unfair to try the defendant. Where a lesser remedy would be just and proportionate the drastic measure of a stay or dismissal need not be adopted. In *R(S) v Chief Constable of the South Yorkshire Police*[28] the principal question was whether the retention of fingerprints and samples of individuals, who were subsequently acquitted, was inconsistent with the right to respect for private life under article 8. The House held that if article 8(1) was engaged any interference was fully justified under article 8(2) by the advantage to be gained from an extended database to investigate serious crime. The decisions of the House have been sensitive to the particular context in cases involving the burden of proof as demonstrated by *Sheldrake v Director of Public Prosecutions*[29] (where a transfer of legal burden was upheld in regard to drunken driving) and *Attorney-General's Reference (No. 4 of 2002)*[30] (where a transfer of legal burden in case of participation in a proscribed

[27] [2004] 2 AC 72.
[28] [2004] 1 WLR 2196.
[29] [2005] 1 AC 264.
[30] *Ibid.*

organisation was read down). It was always predictable that there would be murkier areas of statute law and common law which would not be consistent with the fair trial guarantee under article 6. *R v A (No. 2)*[31] involved a statute which rendered inadmissible evidence of previous sexual relations between an accused and a victim in a rape case in circumstances where a fair trial could realistically be compromised. The House unanimously interpreted the statute under section 3(1) of the 1998 Act so as avoid such a result. *R v Mushtaq*[32] concerned *inter alia* the common law rule about how a judge may direct a jury in cases where statements might have been obtained by oppression. The House held that a judge misdirected a jury when he said that, if they were sure that the confession of the defendant was true, they might rely on it, even if it was, or might have been made as a result of oppression or other improper circumstances. Taking into account that the judge and the jury together constitute the tribunal but ultimately the jury is the primary decision-maker on questions of fact, the House held that such a direction, however phrased, would always be inconsistent with the fair trial guarantee under article 6.

The meaning of public authority

[31] [2002] 1 AC 45.
[32] [2005] UKHL 25.

Section 6 is pivotal to the correct operation of the 1998 Act. It provides for two types of "public authority": "pure" public authorities, which must act compatibly in all they do, and authorities "certain of whose functions are functions of a public nature" which must act compatibly only when they exercise public functions. In a balanced and impressive review the Joint Committee on Human Rights has demonstrated how at present the system is failing to confer the comprehensive protection envisaged by Parliament.[33] The report states that there are two principal reasons for this state of affairs. First there is extensive private and voluntary sector involvement in delivering public services. That was, however, an established phenomenon when the 1998 Act was passed, and the very reason why the obligation under section 6 was placed on certain authorities when discharging public functions. Secondly, the report argues with justification that the decisions of lower courts gave too restrictive an interpretation to the concept authorities carrying out of a public function, relying on a largely "institutional" rather than "functional" approach to the question.[34] The report states that the same criticism cannot be levelled at the House of Lords decision *Aston Cantlow and Wilmcote and Billesley Parochial Church Council v*

[33] Joint Committee on Human Rights, House of Lords and House of Commons, The Meaning of Public Authority under the Human Rights Act, Seventh Report of the Session 2003-2004.

[34] The Joint Committee referred to the following decisions: *Poplar Housing v Donoghue,* [2000] QB 48; *R (Heather) v Leonard Cheshire Foundation* [2002] 2 All ER 936; compare also *Hampshire CC v Beer* [2004] 1 WLR 233; *R (West) v Lloyds* [2004] EWCA Civ 506.

Wallbank.[35] No doubt because it was not necessary in the case before the House, the House did not expressly correct the analysis in the lower courts.

The result is unsatisfactory. There is no clear answer to the question whether a contracted out body providing services may be a public authority under section 6. It is one of the most important questions that remains to be addressed by the House. The House may have to start afresh. In the meantime, if I may say so, I would wish to pay tribute to the important work of the Joint Committee on Human Rights.

The principle of proportionality

The correct application of the principle of proportionality under the scheme of the ECHR is of crucial importance. There was always a risk that the traditional *Wednesbury* ground of review *(Associated Provincial Picture Houses Limited v Wednesbury Corporation)*[36] or the adaptation of that test in terms of heightened scrutiny as formulated in *R v Ministry of Defence, Ex p Smith*[37] would continue to dictate the outcome of human rights cases. That is exactly what happened in practice. In *R (Daly) v*

[35] [2004] 1 AC 546.
[36] [1948] 1 KB 223.
[37] [1996] QB 517, 554E-G.

Home Secretary this tendency was corrected. [38] The House emphasised three concrete differences:

> "First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test developed in *R v Ministry of Defence, Ex P Smith* [1996] QB 517, 554 is not necessarily appropriate to the protection of human rights. It will be recalled that in *Smith* the Court of Appeal reluctantly felt compelled to reject a limitation on homosexuals in the army. . . . The European Court of Human Rights came to the opposite conclusion: *Smith and Grady v United Kingdom* (1999) 29 EHRR 493. . . . In other words, the intensity of the review, in similar cases, is guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and the question whether the interference was really proportionate to the legitimate aim being pursued."

But the House made clear that this did not involve a shift to merits review: the role of judges and administrators remained distinct. Looking at the matter more broadly, it is possible that the principle of proportionality may be applied in appropriate contexts beyond the four corners of the 1998 Act. The ECHR is not an exhaustive statement of human rights principles. The proportionality principle was already applied by the Court of Appeal in *Leech*[39] before the 1998 Act came into

[38] *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, para 27, at 547D-H.
[39] *R v Secretary of State for the Home Department, Ex p Leech* [1994] QB 198.

force, and this decision was subsequently approved by the House in *Simms*.[40]

The interpretative obligation

In practice, a central problem was a correct understanding of the remedial structure of the Human Rights Act represented by the interpretative power under section 3(1) and the power to make a declaration of incompatibility under section 4. Inherent in the language of section 3(1), and in particular the words "so far as it is possible to do so", is a limit beyond which the courts may not use the interpretative power. Examples of this limit are *R (Anderson) v Secretary of State for the Home Department*[41] and *Bellinger v Bellinger*[42] In *Anderson* it was impossible under section 3(1) for the House to devise a scheme to replace the Secretary of State's former power to decide on the tariff to be served by mandatory life sentence prisoners and in *Bellinger* redefining gender was held to be beyond the power of the courts under section 3(1). Both may be regarded as obvious examples falling in the forbidden territory. On the other hand, the actual decision in *R v A (No. 2),*[43] correctly understood, made clear the strength of the interpretative obligation under

[40] [2000] 2 AC 115.
[41] [2003] 1 AC 837.
[42] [2003] 2 AC 467.
[43] [2002] 1 AC 45.

section 3(1). It was the so-called "rape shield" case. The House unanimously read words into section 41 of the Youth Justice and Criminal Evidence Act 1999 so as to make that section compliant with an accused's right to a fair trial under article 6. The House did so even though the statutory language was categorical and unambiguous. Unfortunately, the significance of this decision was in practice frequently misunderstood. This was the result of confusion caused by differently worded dicta in judgments in *R v A* and a persistent preoccupation with purely linguistic considerations in statutes under consideration. The result was uncertainty. By the decision in *Ghaidan v Godin-Mendoza*[44] the House by, a majority of 4:1 may have succeeded in restoring the correct balance. The House emphasised that interpretation under section 3(1) is the prime remedial remedy and that resort to a declaration of incompatibility under section 4 must always be an exceptional course. In *Ghaidan* the House held that section 3(1) of the 1998 Act was modelled on the analogy of the obligation under the EEC Treaty on national courts, so far as possible, to interpret national legislation in the light of the wording and purpose of Directives. This was held to be a significant signpost to the meaning of section 3(1). In *Ghaidan* the House eschewed linguistic arguments in favour of a broader approach. It affirmed a strong rebuttable presumption in favour of an interpretation consistent with

[44] [2004] 2 AC 557.

Convention rights. Having said that, it may be optimistic to assume that the problem is entirely solved: for those brought up under the old dispensation engrained habits of thinking may tend to linger on. The continued vigilance of the House of Lords in this area will remain essential.

Deference or discretionary area of judgment

The concept of the margin of appreciation applicable to the relationship between the ECtHR and national authorities is fairly well understood. But there has been a debate about the critical problem of the deference to be observed by our courts, notably in cases involving national security issues. In important articles and judgments on the subject Lord Hoffmann has argued for a new perspective based on separation of powers and constitutional principles. In the *Secretary of State for the Home Department v Rehman,*[45] a case involving national security issues, Lord Hoffmann gave as his first reason for the judiciary deferring to the executive the special expertise available to the executive in these matters. This can be called the point of relative institutional competence. It is uncontroversial. Secondly, Lord Hoffmann observed that such decisions must be made by persons whom the public have

[45] [2003] 1 AC 153.

elected, and whom they can remove. Conveniently this can be described as the argument based on the restraint inherent in the lack of democratic legitimacy of judges. In Lord Hoffmann's analysis this was a legal principle: it introduces limits on the jurisdiction of the court. In *R (ProLife Alliance) v British Broadcasting Corporation*[46] Lord Hoffmann developed his earlier analysis further. He observed that when a court rules that a decision on policy and allocation of resources properly belong to the executive it is deciding a matter of law. In other words, it is not a matter of discretion. It is a legal rule. Greatly as I admire Lord Hoffmann's judgments, I cannot accept his views on this point. In a public lecture given three weeks before judgments were delivered in the *Belmarsh* case I explained why I disagreed with Lord Hoffmann on this point. Given that my lecture has now been published, I will not cover the same ground again.[47] But my theme can be encapsulated by the observation of Simon Brown LJ that "The court's role under the Human Rights Act is as the guardian of human rights. It cannot abdicate this responsibility."[48] It is, however, necessary to examine whether in the judgments in *Belmarsh* there is support for the legal principle put forward by Lord Hoffmann or whether deference must be treated as a matter of the exercise of a wise discretion by a court.

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[46] [2004] 1 AC 185.
[47] [2005] Public Law 346.
[48] *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728, at para 78.

Lord Hoffmann was the only member of the majority of the House to hold there had been no emergency threatening the life of the nation and that the appeals should be upheld on this ground.[49] He did not revert to his views as expressed in *Rehman* and *ProLife Alliance.* Lord Walker of Gestingthorpe dissented. He mentioned Lord Hoffmann's dicta in *Rehman* and *ProLife Alliance* only in passing.[50] It is to the other 7 opinions that I must turn to consider whether there is support for Lord Hoffmann's earlier legal analysis. The leading opinion was that of Lord Bingham. Six members of the House agreed with Lord Bingham's opinion. Lord Bingham referred to *Rehman* in the context of the need for the courts to defer to the executive on matters of national security. Nobody questions that proposition. But Lord Bingham does not anywhere in his opinion endorse the proposition that national security introduces legal limits to the court's jurisdiction under the 1998 Act. Such a concept would have been inconsistent with his reminder to the Attorney-General that the 1998 Act gives the courts "a very specific, wholly *democratic* mandate."[51] It would also have been inconsistent with his endorsement of Professor Jowell's statement that "The courts are charged by Parliament with delineating the boundaries of a rights-based

[49] Paras 96-97.
[50] Para 192.
[51] Para 42.

democracy."[52] This was a reference to an article in which Professor Jowell explained in detail why Lord Hoffmann's analysis in *Rehman* and in *ProLife Alliance* cannot be accepted. Lord Bingham accepted the submission of Liberty that the question is one of "relative institutional competence", a concept deriving from Professor Jowell's writings.[53] In my view Lord Bingham's opinion demonstrates that in respect of cases falling within the jurisdiction of the courts under the Human Rights Act it would be wrong for the courts to create jurisdictional barriers to certain classes of cases. In an important opinion Lord Hope of Craighead, also with the agreement of the majority, observed:[54]

> "[T]he margin of discretionary judgment that the courts will accord to the executive and Parliament where this right [to liberty] is in issue is narrower than will be appropriate in other contexts. We are not dealing here with matters of social or economic policy, where opinions may reasonably differ in a democratic society and where choices on behalf of the country as a whole are properly left to government and to the legislature. We are dealing with actions taken on behalf of society as a whole which affect the rights and freedoms of the individual. This is where the courts may legitimately intervene, to ensure that the actions taken are proportionate. It is an essential safeguard, if individual rights and freedoms are to be protected in a democratic society which respects the principle that minorities, however unpopular, have the same rights as the majority."

This analysis is inconsistent with the second rationale of Lord Hoffmann's analysis in *Rehman* (the lack of democratic legitimacy of

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[52] "*Judicial Deference: servility, civility or institutional capacity"* [2003] PL 592, at 597.
[53] Para 29. For Professor Jowell's relevant writings see footnote 52 below.
[54] Para 108.

judges in national security cases under the 1998 Act). This autopsy on the opinions in *Belmarsh* has been a trifle wearisome but essential to an understanding of the point at which we have arrived.

The position remains, as Lord Lester of Herne Hill and David Pannick QC, summarised it, that the doctrine of discretionary area of judgment "concerns not the legal limits of jurisdiction but the wise exercise of judicial discretion having regard to the limits of the courts institutional capacity and the constitutional principle of separation of powers"[55]. To that extent the position should now be clear. That does not, however, mean that the courts will not sometimes have to make exceedingly difficult choices as to when they should defer to the other branches of government and when not.

A creative dialogue

In the Government's paper "Rights Brought Home," which accompanied the Human Rights Bill, it was explained that there should be

[55] *Human Rights Law and Practice,* 2nd ed., para 3.19 note 3. See also, Professor J Jowell QC, *Judicial Deference, Servility, Civility or Institutional Capacity?* 2003 PL 592; Professor Jowell, *Judicial Deference and Human Rights: A Question of Competence* in P Craig and R Rawlings, eds, *Laws and Administration in Europe* (Oxford University Press, 2003); Richard Clayton QC in *Judicial Deference and Democratic dialogue: the legitimacy of judicial intervention under the Human Rights Act 1998* [2004] PL 33 illuminating.

a creative dialogue between our highest courts and the ECtHR.[56] The Lord Chancellor stated that it was important for the English courts to have scope to develop their own human rights law.[57] The duty under section 2(1) "to take account" of the decisions of the ECtHR reflects this carefully crafted position.[58] While the House of Lords has not always adopted the law as stated by the ECtHR - for example, not in all respects about court martials[59] - the view is that the House is under a general duty to apply a clear decision by the Grand Chamber.[60] That is how it should be. The House has paid close attention to the decisions of the ECtHR. But it is a two-way process. The ECtHR has in turn responded to the jurisprudence of the House of Lords. Thus in *Z and Others v United Kingdom*[61] the ECtHR, in the face of the decision of the House in *Barrett v Enfield London Borough Council,*[62] resiled from the earlier decision of the ECtHR in *Osman v United Kingdom* about the duty of care.[63]

The House also made clear from the start its desire to take into account the human rights jurisprudence of other countries, such as Canada, Germany, New Zealand and South Africa. For example, the

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[56] *Rights Brought Home: The Human Rights Bill* (Crim 3782), para 1.15.
[57] Hansard H.L., Col 1270 (19 Jan 1988).
[58] Section 2(1) of the 1998 Act.
[59] *R v Spear and others* [2003] 1 AC 734.
[60] *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 WLR 1389, 1399, para 26.
[61] (2002) 34 EHRR 37.
[62] [2001] 2 AC 350.
[63] (2000) 29 EHRR 245.

House of Lords has sometimes relied strongly on the Charter jurisprudence of the Canadian Supreme Court.[64]

A Supreme Court

Finally, I return to the point where I started. I pose the question whether the United Kingdom has already become a true constitutional state. A distinctive characteristic of such a state is that it has a wholly separate and independent Supreme Court which is the ultimate guardian of the fundamental laws of the community. In point of constitutional principle we have not quite reached that point. It is true that a fundamental defect in our arrangements which entitled the Lord Chancellor, a politician and Cabinet Minister, to sit in our highest court and preside over it has now been abandoned. It now seems strange that it could have been regarded as acceptable by so many senior judges until so very recently. But to this very day some serving Law Lords, from time to time, act as legislators. Since the announcement on 1 June 2003 by the government of its intention to create a Supreme Court, 7 serving Law Lords have spoken in the chamber on diverse subjects, most of them twice or three times, and some of them have voted in divisions. When

[64] *R v A (No. 2)* [2002] 1 AC 45, para 27; *R v Lambert* [2002] 2 AC 545, paras 34,45 and 40; *R v Johnstone* [2003] 1 WLR 1736, para 49; *R (Pretty) v Director of Public Prosecutions* [2002] 1 AC 800, paras 19-23 and para 55.

this longstanding anomaly comes to an end, as it surely must, a new generation of lawyers will be astonished at the resolute defence by superb modern-minded judges of the "privilege" of a Law Lord to act as a legislator. It bewilders those in many countries who hold our highest court in high esteem. While this "privilege" continues to be exercised by Law Lords the Appellate Committee of the House of Lords cannot claim to have in full measure even *de facto* the attributes of a truly independent Supreme Court.[65]

[65] I am indebted to Richard Clayton QC, Diane Procter and Emma Waring, my Judicial Assistant, for help with the preparation of this lecture.