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Helen Fenwick
& Gavin Phillipson

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PREFACE

We have often come across students who have a sound grasp of legal principles and have put in quite a lot of work on constitutional law and yet do not feel confident when faced with the end of year examination. This book is written in response to the pleas of such students for more guidance as to the best means of presenting their knowledge in the exam, and it is hoped that it may alleviate at least some of the stress they experience. It is written at a time when the very far-reaching programme of constitutional reform introduced by the Labour government is largely in place; it affords extensive coverage to this programme and its implications for the UK's radically changing constitution.

The law is stated as at 1 September 2002; however, updates have been made up to January 2003.

Helen Fenwick and Gavin Phillipson
University of Durham
January 2003

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INTRODUCTION

This book is intended to be of help to students studying constitutional and administrative law who feel that they have acquired a body of knowledge but do not feel confident about using it effectively in exams. This book sets out to demonstrate how to apply the knowledge to the question and how to structure the answer. Students, especially first year students, often find the technique of answering problem questions particularly hard to grasp, so this book contains a large number of answers to such questions. This technique is rarely taught in law schools and the student who comes from studying science or maths 'A' levels may find it particularly tricky. Equally, a student who has studied English literature may find it difficult to adapt to the impersonal, logical, concise style which problem answers demand. It is hoped that this book will be particularly useful at exam time but may also prove useful throughout the year. The book provides examples of the kind of questions which are usually asked in end of year examinations, along with suggested solutions. Each chapter deals with one of the main topics covered in constitutional and administrative law or public law courses and contains typical questions on that area. The aim is not to include questions covering every aspect of a course, but to pick out the areas which tend to be examined because they are particularly contentious or topical. Many courses contain a certain amount of material which is not examined, although it is important as providing background knowledge.

Problem and essay questions

Some areas tend to be examined only by essays, some mainly although not invariably by problems, and some by either. The questions chosen reflect this mix, and the introductions at the beginning of each chapter discuss the type of question usually asked. It is important not to choose a topic and then assume that it will appear on the exam paper in a particular form unless it is in an area where, for example, a problem question is never set. If it might appear as an essay or a problem, revision should be geared to either possibility: a very thorough knowledge of the area should be acquired but also an awareness of critical opinion in relation to it.

Length of answers

The answers in this book are about the length of an essay that a good student would expect to write in an exam. Some are somewhat longer and these will also provide useful guidance for students writing assessed essays which

typically are between 2,000 and 3,000 words. In relation to exam questions, there are a number of reasons for including lengthy answers: some students can write long answers—about 1,800 words—under exam conditions; some students who cannot nevertheless write two very good and lengthy essays and two reasonable but shorter ones. Such students tend to do very well, although it must be emphasised that it is always better to aim to spread the time evenly between all four essays. Therefore, some answers indicate what might be done if very thorough coverage of a topic was undertaken.

The Notes

Most essays also provide Notes exploring some areas of the answer in more depth, which should be of value to the student who wants to do more than cover the main points. Some answers provide a number of Notes; it would not be expected that any one student would be able to make all the points they contain, but they demonstrate that it is possible to choose to explore, say, two interesting areas in more depth in an answer once the main points have been covered. It cannot be emphasised enough that the main points have to be covered before interesting but less obvious issues can be explored.

Expressing a point of view

Students sometimes ask, especially in an area such as constitutional law which can be quite topical and politically controversial, whether they should argue for any particular point of view in an essay. It will be noticed that the essays in this book tend to do this. In general, the good student does argue for one side but he always uses sound arguments to support his view. Further, a good student does not ignore the opposing arguments; they are considered and, if possible, their weaknesses are exposed. Of course, it would not be appropriate to do this in a problem question or in some essay questions but, where an invitation to do so is held out, it is a good idea to accept it rather than sit on the fence.

Exam papers

Constitutional and administrative law exam papers normally include one question on each of the main areas. For example, a typical paper might include problem questions on: public order, police powers, judicial review (probably natural justice) and essay questions on: parliamentary sovereignty, conventions, the parliamentary process, the Executive, freedom of

expression, judicial review. Therefore, the questions have to be fairly wide ranging in order to cover a reasonable amount of ground on each topic. Some answers in this book therefore have to cover some of the same material, especially where it is particularly central to the topic in question.

Suggestions for exam technique

Below are some suggestions which might improve exam technique; some failings are pointed out which are very commonly found on exam scripts:

(1) When tackling a problem question, do not write out the facts in the answer. Quite a number of students write out chunks of the facts as they answer the question—perhaps to help themselves to pick out the important issues. It is better to avoid this and merely to refer to the significant facts.

(2) Use an impersonal style in both problem and essay answers. In an essay, you should rarely need to use the word I and, in our view, it should not be used at all in a problem answer. (Of course, examiners may differ in their views on this point.) Instead, you could say: 'it is therefore submitted that' or 'it is arguable that'; avoid saying: 'I believe that' or 'I feel that'.

(3) In answers to problem questions, try to explain at the beginning of each section of your answer what point you are trying to establish. You might say, for example: 'In order to show that liability under s 1 will arise, three tests must be satisfied.' You should then consider all three, come to a conclusion on each, and then come to a final conclusion as to whether or not liability will arise. If you are really unsure whether or not it will arise (which will often be the case—there is not much point in asking a question to which there is one very clear and obvious answer), then consider what you have written in relation to the three tests. Perhaps one of them is clearly satisfied, one is probably satisfied and the other (arising under, for example, s 1(8)) probably is not. You might then say: 'As the facts give little support to an argument that s 1(8) is satisfied, it is concluded that liability is unlikely to be established.'

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CHAPTER 1

THE CHARACTERISTICS OF THE BRITISH CONSTITUTION

Introduction

This chapter concentrates on five particular issues which arise from the distinctive characteristics of the British Constitution: the nature of constitutions in general and the sense in which the UK can be said to have/not to have a constitution; the significance of parliamentary sovereignty; the nature of constitutional conventions; the principles of the rule of law and the separation of powers; and the desirability of a new written constitutional settlement. These areas are sometimes treated in textbooks as discrete areas, but they are clearly interlinked and will therefore be considered here together. The significance of the Labour government's reform package in general terms is considered here, though the significance of the Human Rights Act 1998 is discussed much more fully in Chapters 2 and 9. The sovereignty of Parliament and the impact of EC law on the UK Constitution are fully considered in Chapter 2.

Checklist

Students should be familiar with the following areas:

- the debate about the nature and functions of a constitution; the argument that the UK does not indeed possess one under certain definitions;
- the nature and role of constitutional conventions;
- certain of the most significant conventions: those relating to the exercise of the royal prerogative, to the working of the Cabinet system, to the relationship between the Lords and the Commons and to those regulating proceedings in Parliament;
- the doctrine of parliamentary sovereignty and the modification to the traditional view represented by the impact of EC law;
- the concept of the rule of law;
- the doctrine of the separation of powers;

- the benefits and defects of the uncodified UK Constitution;
- the devolution proposals to Scotland and Wales;
- the operation of the Human Rights Act 1998;
- the significance of ongoing reform of the House of Lords and of the Freedom of Information Act 2000 for the overall balance of powers within the constitution.

Question 1

Would you agree that there is no justification for distinguishing between strict law and convention in the UK Constitution and that, therefore, conventions should be codified in legal form?

Answer plan

This question is often asked in one form or another and is reasonably straightforward. It requires the student to consider why features of the constitution which are not strict law should be maintained. It should not degenerate into a list of the main conventions; rather, conventions should be used as examples. Clearly, it is crucial at the outset to try to distinguish between law and convention.

Essentially, the following matters should be discussed:

- is there a distinction between law and convention? Jennings' view contrasted with Dicey's;
- the relationship between law and conventions;
- the nature of conventions: the difficulty of distinguishing binding usage from non-binding usage;
- what justification is there for maintaining the distinction between law and convention, assuming that it exists?;
- the advantages which might be derived from codifying conventions;
- the detriment which might flow from such codification: loss of flexibility and of discretion in adhering to conventions.

Answer

This question makes the assumption that there is a distinction between strict law and conventions, but the existence of such a distinction has been questioned by commentators such as Jennings. Before considering whether

any such distinction should be maintained, it should first be asked whether it does indeed exist.

Dicey wrote that conventions could be clearly distinguished from laws, in the sense that no court would apply a sanction for their breach (*The Law of the Constitution,* 1971). However, this distinction was attacked as artificial by Sir Ivor Jennings in *The Law and the Constitution,* 1959, on the basis that law and conventions both ultimately rest on 'general acquiescence'. The distinction put forward by Dicey, however, finds some support in case law. In *Madzimbamuto v Lardner-Burke* (1969), the Privy Council held that the convention under which the UK Parliament needed to obtain the consent of the Southern Rhodesia government before legislating for that colony had no effect in limiting the powers of the UK Parliament. Similarly, the Canadian Supreme Court in *Re Amendment to the Constitution of Canada* (1982) held that conventions are not enforced by the courts: the only sanctions for breach of a convention are political ones. Most constitutional writers have accepted this distinction between law and convention and the general view may be summed up by Marshall and Moodie: conventions may be described as 'rules of constitutional behaviour which are considered to be binding by and upon those who operate the Constitution but which are not enforced by the law courts…nor by the presiding officers in the Houses of Parliament' (*Some Problems of the Constitution,* 5th edn, 1971, pp 22–23). Most conventions are based on usage which continues because statesmen would find it politically inconvenient to depart from it. It may then be argued that conventions depend on acquiescence for their very existence, whereas laws do not cease to exist because they are widely disobeyed. The road traffic laws are frequently violated, but no one doubts that they remain valid laws.

It follows that if, for example, the government was defeated on a vote of confidence in the House of Commons but refused to obey the convention that it should therefore resign, the courts would not recognise this breach of convention by declaring that government ministers were not legally entitled to exercise the powers of their office.

However, having postulated a distinction between law and convention, it must be accepted that there are exceptions to it. In particular, it would be going too far to say, as Dicey did, that conventions are never recognised by the courts. For example, in *Liversidge v Anderson* (1942) and *Carltona Ltd v Commissioner of Works* (1943), the courts supported the refusal to review the grounds on which executive discretionary powers had been exercised on the basis that a minister is responsible to Parliament for the exercise of his power. In *Attorney General v Jonathan Cape Ltd* (1976), Lord Widgery CJ considered the doctrine of collective Cabinet responsibility at some length, coming to the conclusion that the maintenance of the doctrine was in the public interest and, therefore, could justify restraint on the disclosure of Cabinet discussions

(although no restraint was granted in the instant case due to the lapse of time since the discussions took place). Equally, it must be remembered that not all legal rules are justiciable.

Assuming that to an extent, the distinction between strict law and convention holds good, why, as De Smith asks (in *Constitutional and Administrative Law,* 8th edn, 1998), maintain a distinction at all? Why not codify conventions of the constitution in legal form—either in a statute or as part of a written constitution? Several Commonwealth constitutions have already undertaken this. Codification would have the advantage of clarifying certain of the most significant constitutional rules. The informality associated with conventions may be disadvantageous in that it may sometimes be very difficult, if not impossible, to ascertain whether a certain usage has crystallised into a conventional rule. Of course, some conventions are formulated in writing, such as the agreement in 1930 that the Governor General of a Dominion should be appointed by the Crown exclusively on the advice of the Dominion government concerned, but those that have gradually evolved will often be uncertain in scope and, unlike laws, their meaning will not be resolved by their interpretation in the courts. For example, the conventional powers of the Queen to require a dissolution of Parliament are uncertain. A refusal or assent by the Queen to a request for the dissolution of Parliament might, in certain circumstances, appear not to have a clear basis, making the task of defending her action against the charge of unconstitutionality difficult. This difficulty could be avoided if the constitutional functions of the monarch, including the circumstances in which he or she could dissolve Parliament, were set out in legal form.

Uncertainty arises not only as to the scope of some conventions, but as to whether or not they have come into being at any particular time, or whether it may be said of a custom that it is merely a non-binding usage. For instance, it is a convention that the Queen must give assent to a Bill, whatever her personal view of it. In 1708, the royal assent was withheld from a Bill which the monarch in question, Queen Anne, disapproved of, whereas in 1829, George IV gave consent to a Bill which he disliked. At some point during those hundred years, the convention in question must have come into being. However, it would be impossible to pinpoint the stage at which this occurred; if, during that time, the question had arisen as to whether withholding the royal consent was unconstitutional, no answer would be available to the monarch in question: in effect, it would not be available until after he or she had acted.

Moreover, it is arguable that conventions should be enshrined in law because otherwise they may be more readily violated. Conventions are binding if those to whom the usage applies consider that they are under an obligation to comply with them. But although in practice, many conventions

do seem to be regarded as binding, lack of certainty as to the scope or existence of some, as already considered, may lead to behaviour which would be regarded in some quarters as unconstitutional. The absence of an enacted constitutional code means that 'unconstitutional' has no definition. Such a code would mean that unconstitutional behaviour could be more readily identified and would be clearly illegal. If the resulting code were made non-justiciable, its value would largely lie in its clarification of conventions, thereby precluding some disputes.[1]

However, codification might achieve a desirable clarity in some areas, but at the expense of the present flexibility. The interpretation given to an Act of Parliament may evolve over time, but there is still a rigidity associated with statutes which is avoided by conventions. Conventions allow the constitution to evolve and keep up to date with changing circumstances without the need for formal repeal or amendment of law. Further, conventions may not always be followed and, although this can be seen as a weakness, as argued above, it can also be seen as a strength that in certain circumstances, rigid adherence to conventions is not required as it would be if they were enshrined in a legal code. Conventions have been able to lose their binding force or undergo a change in content without the need for any formal mechanism being followed. They may disappear gradually if they are no longer observed. If a convention has been established by express agreement, it may be superseded or modified by agreement. For example, decisions taken by the Prime Minister or the Cabinet about the way the Cabinet is to operate may be superseded by new decisions. Such flexibility has been politically convenient in the past and will, presumably, continue to be so.

The doctrine of collective Cabinet responsibility provides an example of the advantage to be derived from the indeterminate nature of conventions. Under the doctrine, ministers are collectively responsible to Parliament for their actions in governing the country and, therefore, should be in accord on any major question. A minister should resign if he is in disagreement with the policy of the Cabinet on any such question. Examples of such resignation include Sir Thomas Dugdale's in 1954 due to his disagreement with the government as to the disposal of an area of land known as Crichel Down (this resignation is not always cited as an example of policy disagreement, but such appears to have been its basis) and Sir Anthony Eden's in 1938 over Chamberlain's policy towards Mussolini. However, there appears to have been some blurring and weakening of the doctrine dating from the mid-1970s. In 1975, the Labour Cabinet was divided on the question of whether the UK should remain in the Common Market. It was agreed that in the period before the referendum on the question, Cabinet ministers should be able to express a view at variance with the official view of the government that the UK should remain a member of the Common Market.[2]

If the convention of collective responsibility were enshrined in a statute, departure from it, as in 1975, might be less readily undertaken even if the provisions of the statute were made non-justiciable. In any event, it would be difficult and probably undesirable to define the convention, as discretion in complying with it may be said to be endemic in it. Political inconvenience would clearly arise and it might be argued that the democratic process would be endangered if ministers could not at times express their views on exceptionally important issues with some freedom. Therefore, it may be argued that no advantage would be gained by enacting such a statute: such crystallisation of the convention would clearly reduce its value. The example of the convention of collective Cabinet responsibility illustrates the general principle that codification would in general inhibit the main purpose of many of the conventions—keeping the constitution in touch with contemporary political needs.

Of course, in particular instances, the enactment of conventions has been called for after they have been violated; the need for flexibility has been outweighed by the need for clarification and certainty. For example, in 1909, the House of Lords ignored the convention that it must defer to the will of the House of Commons. This led to the enactment of the Parliament Act 1911, which defined the relationship between the two Houses and ensured that the House of Lords would defer to the Commons.

In some instances where a convention seems to embody a clear rule, the need for flexibility is certainly less pressing and the argument for codification more compelling. Arguably, certain constitutional functions of the monarch (such as rules governing assent to the dissolution of Parliament and assent to Bills) should be enacted in order to avoid uncertainty as to when the Queen may be acting unconstitutionally.

Thus, it may be concluded that if codification were undertaken, it should be confined to conventions of a sufficiently definite nature which should be codified in order to reduce the potential for disagreement as to their scope.

Notes

1 The argument as to whether conventions once codified should be made directly justiciable could be developed at this point. De Smith makes the point that the courts would be asked to shoulder a possibly intolerable burden if they had to determine questions of extreme political sensitivity. This argument receives support from the experience of new Commonwealth countries which have codified conventions in the texts of their constitutions.

2 A further example could be given to strengthen this argument. Some weakening of the convention appears from the *Westland* affair which, on the face of it, provides an example of its operation: when Michael Heseltine resigned from the

Cabinet in 1986, due to his disagreement with government policy, he specifically stated that he did not do so as a result of his perception of an obligation arising from the convention.

Question 2

A number of commentators have argued that, in the only meaningful sense of the word, the UK has no constitution. Do you agree, and has this remained true following devolution to Scotland and the coming into force of the Human Rights Act 1998?

Answer plan

Students must set out clearly the argument as to why the UK has no proper constitution, offer a view on it, and then relate this directly to the new state of affairs following devolution and the Human Rights Act (HRA) 1998.

Essentially, the following matters should be discussed:

- the requirements of constitutionalism: power-allocation and power separated by law: power only to be exercised by law; laws to be made in accordance with specified procedures; limitations on the content of laws; entrenched rights;
- the overriding requirement that the constitution be above the power of government and, therefore, not susceptible to ordinary change;
- the application of the above to the UK Constitution; partial compliance but no form of higher law save sovereignty itself;
- the basic point that the HRA and the Scotland Act 1998 are both susceptible to normal repeal by Parliament;
- the constitutional limitations placed on Scottish government—the European Convention on Human Rights (ECHR), etc; the prospect of constitutional review of legislation;
- the growth of the convention that Westminster Parliament will not legislate in devolved areas without consent;
- the impact of the HRA at the normative level—the identification and partially protected status of basic rights;
- overall conclusions—a limited step towards constitutionalism.

Answer

The claim that the UK has no constitution was originally put forward by Bryce, but has recently been forcefully expanded and restated by Ridley ((1988) 41 Parlt Aff 340). In essence, it distinguishes a merely descriptive definition of a constitution as that body of rules and arrangements which regulates the government of a country and its relations with its citizens from what is argued to be the more important one; one which Ridley believes has been in use since the American War of Independence and the French Revolution, in which the word has a much more specialised and more normative meaning. Under this approach, he argues, there are four particular characteristics which a constitution must have. This essay will consider these characteristics, but will also discuss some more basic characteristics which, it will be argued, a constitution must possess and which are not expressly mentioned by Ridley. This combined set of characteristics will then be used as a measure against which to judge the existence or non-existence of the UK Constitution. The final part of the essay will examine whether the introduction of devolution and the (at least, partial) incorporation of the ECHR via the HRA changes the conclusions previously reached on the UK Constitution.

It is suggested that there are perhaps two essential characteristics or purposes of constitutions, at least as they are understood within the tradition of liberal democracy to which Ridley refers. The first is that constitutions are necessary in order to control the power of the State; the second is that constitutions ensure that the power of the State derives from a legitimate source. As to the first notion, constitutions may be seen to exercise such control in a number of ways. As Schauer has pointed out (*Playing by the Rules*, 1991, pp 118–20), they are power-allocating: they usually distribute power amongst the different organs of government, according to law. This represents a limitation on State power in two ways: first, and more basically, there is a formal limitation: allocation of power in this way means that power may not be exercised arbitrarily by any part of government which finds it convenient to do so, but only by that organ of government which is authorised, and publicly authorised at that, to do so. This, in the simplest sense, is the idea of limited government, or government under law. Ridley does not expressly identify this as an essential aspect of a constitution, but it is submitted that this notion of power-allocation through law is implicit in his first characteristic of a constitution, that it 'establishes' the system of government.

The second aspect of power-allocation is rather more substantive: allocation should offer a more concrete guarantee against tyranny by separating out different types of powers and assigning them to different and

separate organs of government. This is the doctrine of the separation of powers which, broadly speaking, demands, first, that each part of government should be separate and to an extent independent of the others; secondly, that each organ should be vested with only one main function of government; and, thirdly, that each should be able to check the actions of the others. This characteristic is, to a greater or lesser extent, apparent in every single liberal constitution and must therefore be seen as an essential aspect of such a constitution; again, it is implicit in Ridley's thesis.

A further very simple aspect of a constitution is that power must be exercised only through the making of laws. To appreciate the constraints which this requirement places on the rulers of a State, it must be contrasted with a State in which the ruler has the power simply to imprison, kill or confiscate the property of any citizen at pleasure and without warning. Power exercised through law-making is far more constrained: a law is a rule, of general application, which is reasonably certain in its terms and made known in advance. This represents a basic limitation on government because, since the rules must be announced in advance and made relatively fixed, the government cannot simply act as it pleases; instead, it must be able to point to some law justifying its actions. As a concomitant of this, constitutions must not only provide that power must be exercised through law, they will also state the procedures that must be followed to produce a valid law. This not only helps us identify what the laws are, it ensures that since certain specified procedures must be followed before a law is deemed valid, the government cannot simply declare the law to be what it wishes.

While the above requirements provide a number of formal restraints upon governments, they are rather empty, formal restrictions, since they merely divide power and provide for formalities in relation to its exercise. They say nothing about *outcomes,* about what laws validly produced can say or do. Therefore, liberal constitutions usually limit the power of government in a more substantive way: that is, governments are limited not only as to the *form* by which it must exercise power, but also as to the *substance* of that power. Thus, under many constitutions, there are some laws which the government *cannot make at all;* broadly, those which would infringe what are seen as fundamental human rights. The First Amendment of the US Constitution states simply (*inter alia*): 'Congress shall make no law abridging the freedom of speech or of the press.' This is the notion of entrenched rights—a ring fence around certain basic liberties which the government is not allowed to cross. Most Western countries have constitutions which declare the existence of such liberties and forbid governmental interference with them, except perhaps in cases of grave national emergency.

Implicit in all the above ideas is the notion that constitutions are in some way superior to and beyond government; they state what form the government shall take and what it may and may not do. They are above government in specifying matters which are prior to any government, and they also bind all governments. From this requirement logically flows another: namely, that the constitution should be *entrenched* so that it is not readily alterable by the government of the day. As well as being logically necessary, this requirement is also practically necessary: if the constitution was not in some way entrenched, then any government could simply remove the limitations on its power which the constitution imposed and the basic idea of controlling the power of government would be lost.

We may now turn to the application of these ideas of constitutionalism to the UK. The British Constitution does allocate power amongst the different organs of government. The doctrine of parliamentary sovereignty states that Parliament, and only Parliament, may make laws. Similarly, the judges must give effect to all valid Acts of Parliament and may not question the desirability of their content. In reality, a government with an overall majority will be able to ensure that the vast majority of its Bills will reach the statute books, often with little modification, and may thus be seen to exercise the power formally belonging to Parliament, but this is a matter of political practice, not constitutional law. However, looking a little closer at the idea of allocation of powers in Britain, another more fundamental problem appears: some of the most important powers in the British State are allocated not by law but only convention, that is, a traditional understanding about how things should be done, which is accepted by everybody but which cannot be enforced legally. Thus, in theory, the Queen holds all the prerogative powers of government—to declare war, to make peace, to dissolve Parliament, etc. In practice, of course, these powers are exercised by ministers, either collectively or individually. However, there is no law of the constitution stating that this is the case. The *law* in fact states that all these powers belong to the Queen. The idea that these powers are exercised by her only in a formal way is a constitutional convention only. Furthermore, some of the most important 'checks and balances' in the constitution, required by the notion of separation of powers, exist only by virtue of convention. For example, it is only a convention that a government, if defeated in the House of Commons on a vote of no confidence, must resign: if a government were to refuse to do so, the courts would not declare the subsequent acts of its ministers to be unlawful.

What about controls on how laws may be made and what they may say? Laws may only be made through Acts of Parliament which comply with all specified formalities: resolutions of the Commons alone, for example, are not laws binding on the courts: *Stockdale v Hansard* (1839). Furthermore, the

courts enforce a basic notion of legality: government action impinging on citizens must be justified by reference to some law which empowers the specific act done, as in *Entick v Carrington* (1765). However, the ability of Parliament to enact what laws it pleases means that it can pass—and does increasingly pass—laws which give government very wide discretionary powers, so that it will be difficult for the courts to find that any particular actions are not justified in law. As to the notion of more substantive limitations on government rule in the form of entrenched rights, we may note immediately that there is no comprehensive system of entrenched rights, and orthodox constitutional doctrine tells us that Parliament is competent to legislate on any matter whatever. However, it has recently become apparent that the courts will not apply Acts of Parliament which conflict with rights deriving from European Community law (*Factortame Ltd and Others v Secretary of State for Transport (No 2)* (1991)), so that insofar as rights are protected by EC law, they do have a special status. However, EC law does not at present provide a set of basic civil and political rights, being concerned mainly with matters relating to trade. The major exception is the guarantee of equal treatment for the sexes, though even this is related mainly to employment. The Race Directive, which is about to be implemented by the UK, will extend this to protection against racial discrimination, while the Framework Directive, which will require implementing legislation by the Member States to be rolled out between 2003 and 2006, will add new heads of discrimination—sexual orientation, disability, age and religious belief. However, even when these new directives have been implemented, most of the key civil rights will remain unprotected by EC law (unless they relate to an EC protected right) and thus the normal doctrine of unlimited sovereignty will still presumptively apply to them, although a few judges have recently, and speaking extra-judicially only, suggested that there may be basic rights and freedoms embedded in the common law which the judges would not allow Parliament to remove.[1] Of course, legislation removing basic liberties would be in violation of the UK's obligations under the ECHR but, prior to the passage of the HRA 1998, the illegality here would not have been imposed by the UK Constitution as such, but rather by a particular treaty signed by the UK, which was not then binding in domestic law at all, and from which the UK could in any event resile from in its entirety.

Finally, what of the notion that the constitution must in some way be above or beyond the powers of government? One matter—parliamentary sovereignty itself—appears to be a matter of 'higher law', in that it is generally accepted that Parliament is unable to restrict its continuing sovereignty. This point has been thrown into some doubt as the courts have, in effect, allowed Parliament to restrict its own powers to legislate contrary to EC law. Nevertheless, there is little doubt that this restriction is ultimately

one which Parliament could remove through withdrawal from the EC and probably also through the simple expedient of stating an express intention that a given Act should prevail over EC law. But, on the orthodox view, no other rule in the constitution is immune from change by an ordinary Act of Parliament. Thus, so called constitutional principles are in theory as readily changeable as rules relating to the licensing of public houses. This means that, at least theoretically, Parliament could restrict the franchise, thus undermining even basic democratic principles. Hence, the basic notion, noted above, that the constitution should establish the source of governmental power and, in a democracy, establish that source as the people is only partly fulfilled in the UK. The source of power in the UK is Parliament, not the people. Of course, Parliament has been a democratically elected body since women were given the vote early in the 20th century, but this requirement is contained only in an ordinary Act of Parliament (currently the Representation of the People Act). As such, it is subject to normal repeal by Parliament and, as a matter of law, has no special status. The constitution thus does not even provide for a democratic basis for government, if 'constitution' is taken to mean a form of higher law not subject to the standard process of legislative change.

Thus, the 'no constitution' thesis appears to be fairly readily made out, at least if it is taken to mean that 'the constitution' must consist of a form of 'higher order' law. Alternatively, it has been suggested that the UK has a constitution, but consisting of only one rule: 'What the Queen enacts in Parliament is law.' Ridley, however, arguably goes too far in further claiming that the term 'constitution' does not even have a normative or conventional meaning in the UK. He claims that there are no parts of the system to which any special sanctity attaches, so that no one may confidently claim that a given change to the system of government or to the rights of the citizen is 'unconstitutional'. However, if the government were, for example, to procure the passage of legislation allowing for the dismissal by Prime Ministerial *fiat* of any judge, or if a court refused to enforce a statute on the basis that it was sponsored by a political party to which the judge was opposed, commentators would have no hesitation in using the term 'unconstitutional' to describe such actions, although the first would not contravene domestic law. The real problem is not that such hypothetical, drastic actions could not be labelled 'unconstitutional', at least in this sense, but that such confidence would fade in the more marginal cases such as the recent curtailment of the right to silence (by virtue of the Criminal Justice and Public Order Act 1994). In the UK, this curtailment was discussed mainly in terms of its impact on crime; in most other liberal democracies, it would have been seen as unequivocally and primarily a constitutional issue.

How far has any of this changed in the UK following devolution and the advent of the HRA? The first point to make is that neither change has, in terms, created any 'higher' system of law. Both the Scotland Act and the HRA specifically affirm that they do not affect Parliament's continued ability to reverse the changes they make, either wholly or in part. Thus, the HRA makes no attempt to entrench itself, and further provides quite specifically that if the courts find a piece of legislation passed either before or after the HRA to be incompatible with one or more of the Convention rights, this will not affect the validity or continuing effect of that legislation (ss 3(2) and 4(6)). The White Paper on incorporation of the ECHR (Cm 3782) states quite clearly that the HRA is not intended to detract from the sovereignty of Parliament in any way. Similarly, the White Paper on Scottish devolution (Cm 3658) proclaims that 'The United Kingdom is and will remain sovereign in all matters', and this basic statement of principle is clearly enacted in the legislation. Section 28(7) of the Scotland Act states that the grant of legislative powers to the Scottish Parliament 'does not affect the power of the United Kingdom Parliament to make law for Scotland'. Westminster may, therefore, still legislate in the devolved areas and may also repeal or modify the Scotland Act itself by ordinary legislation.

These two pieces of legislation introduce substantive, rights-based limitations on governmental power (the HRA) and devolution of that power to a specified region (the Scotland Act). These are matters which in most countries would be part of 'higher' constitutional law, subject to change only through extraordinary procedures themselves specified in the constitution. Instead, the opposite is provided for: following devolution and since the introduction of the HRA, Parliament is still, as a matter of law, able to invade basic rights or the legislative autonomy of Scotland as easily and readily as it may regulate food labelling or the rate of income tax.

Thus, on one level, the 'no constitution' attack retains its basic force. But, on another level, its applicability to the UK has become more problematic. To take Scotland first, its Parliament and thus its government for most matters will be limited by what will be in effect a written constitution, made up of the Scotland Act itself, the ECHR and EC law. This is because the Scotland Act provides that Acts of the Scottish Parliament or Executive which are outside the powers devolved to it by the Act or which infringe Convention rights or EC law will be *ultra vires* (s 29), and further that the courts will have what can only be described as a power of constitutional review, being empowered to strike down legislation of the Scottish Parliament or actions of its Executive on those grounds. Of course, in the areas which are not devolved, the Scots will continue to be governed by the unrestrained and unconstitutionalised Westminster government and Parliament. However, the day to day experience of the Scottish people will

be to live under a government which, in most areas, will be constrained by a written constitution which will protect basic rights, specify the electoral system and set the basic shape of government. Those entrenched matters will be above and beyond the reach of the Scottish government and Parliament (since neither may alter the Scotland Act itself). Of course, the Westminster Parliament will still have the theoretical right to legislate in the devolved areas and even to abolish the devolved institutions entirely, but no one seriously expects either to occur: the system would be unworkable if Westminster interfered in the devolved matters, while the outright abolition of devolution will become virtually a political impossibility. The Conservative party, which bitterly opposed the Labour plans for devolution from the run up to the 1992 election onwards, has bowed to reality and promised that it will not attempt to reverse devolution. Thus, the day to day experience of the Scottish people will be to live under a written constitution for the first time.[2]

Moreover, it is clear that the term 'unconstitutional' will start to have a very clear and definite meaning, certainly in relation to the government of Scotland, but also in relation to Westminster. In relation to the former, it will mean 'legislation or administrative decisions which violate the legal constraints on the government of Scotland'—there will be no doubt as to that. Legislation on rights-related matters will therefore fall to be discussed, and eventually adjudicated upon, in constitutional terms. As to Westminster, it may readily be anticipated that as devolution and the new Scottish government become firmly entrenched, a convention will grow up to the effect that the Westminster Parliament will not legislate in the devolved areas without the consent of the Scottish Parliament, just as such a convention developed during the period of the Stormont government of Northern Ireland between 1920 and 1972. Indeed, in a memorandum of understanding drawn up between the UK government and the devolved administrations, it is stated that 'the UK government will normally proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature', implying that a convention to this effect was established with the setting up of the devolved legislatures. So far, Westminster has not in fact legislated in the devolved areas without the consent of the Scottish Executive. Of course, legislation intruding into the areas of Scottish competency could not be *legally* condemned by the constitution, but the *terminology* of constitutionalism will enter into the competency of Westminster. Furthermore, this constitutional convention will not suffer from the indeterminacy of other more vague conventions, such as the principle of individual and collective responsibility of government to Parliament, an indeterminacy that allows such principles to

be manipulated by the government of the day and undercuts the confidence of any attempts to label a given act as clearly 'unconstitutional'. This is because the Scotland Act lays down in considerable detail the reserved powers of Westminster and thus the powers devolved. Devolution will thus become constitutionalised: in a very concrete way as far as Scotland and its government are concerned; in a conventional but nevertheless real way for the Westminster Parliament.

Much the same may be said of the HRA. We have noted that it is not in any formal way entrenched; nevertheless, for the first time, the rights of the UK citizenry have been authoritatively identified and stated to be fundamental. Executive actions are unlawful if they infringe such rights, unless primary legislation inescapably mandates or authorises the infringement (s 6). *Daly* (2001) confirms that this will require courts to assess for themselves whether Executive decisions have infringed Convention rights, affording a far higher level of protection for those rights than was available under judicial review. For the first time, statutory construction will fully and unequivocally recognise the importance of basic rights—courts have to read both past and future legislation into conformity with the Convention rights if possible (s 3(1)). Cases such as *A* (2001) indicate the radical force of this provision, and how far it subordinates normal canons of statutory interpretation to the overriding imperative to uphold Convention rights if possible, though other cases indicate a less activist approach. Ministers now have to make a statement when introducing legislation into Parliament that it does not infringe Convention rights, or that they believe it does, but they wish to proceed in any event (s 19). Statements of the latter kind would amount to a declaration that the UK intended quite deliberately to violate its Treaty obligations and breach international law; this requirement will inevitably act as a powerful deterrent against the introduction of such legislation. Open infringements of the Convention will therefore become almost inconceivable, and inadvertent infringements will be avoided by the need to scrutinise the Bill prior to making the statement to Parliament mentioned above. Meanwhile, ambiguously worded legislation which may infringe rights can be dealt with via the interpretative obligation of the courts noted above. Together, and depending upon how rigorously the courts enforce the interpretative injunction in s 3(1) of the HRA (as indicated above, the cases to date indicate that it is being taken very seriously, though the outcomes vary), this could add up to quite a strong guarantee that legislation will no longer, in practice, infringe basic rights. All this could of course theoretically be removed, simply by repeal of the HRA. However, as with the Scottish Act, this will be highly unlikely, so that as with devolution of powers, basic rights will become to an extent constitutionalised.

In conclusion, therefore, while no form of higher basic norms has, as a matter of law, been created, the effect of the canvassed reforms may in practice be indistinguishable. The basic ability of Parliament to remove so called 'constitutional' guarantees will still remain, at least as a matter of strict law. However, Ridley's suggestion that the concept of 'constitutionalism' at the normative, conventional level cannot be deployed in the UK will lose much of its force, as certain notions of devolved power and of basic rights attain an authoritatively declared basis and—as is likely—become fenced round by strong inhibitory conventions. In that sense, these reforms will inject a modest dose of normative constitutionalism into UK government and society while leaving us formally still in search of a constitution.

Notes

1 Students could expand on this, pointing out that recent articles indicate that members of the judiciary, including a very senior member, no longer accept this viewpoint. Lord Woolf ([1995] PL 57) has opined that the courts would not apply an Act of Parliament which purported to remove the power of judicial review from the courts on the basis that this would represent an intolerable attack upon the rule of law, on which the constitution is based. Similarly, Sir John Laws has argued ([1995] PL 72) that not Parliament but the constitution is supreme, and that the 'higher order law' which the constitution represents would inhibit Parliament from successfully assailing fundamental human rights, democratic institutions and the rule of law. He acknowledges that 'constitutional theory has perhaps occupied too modest a place here in Britain', but urges that 'though our constitution is unwritten, it can and must be articulated'.

2 Students could add here that there is some doubt as to whether Scottish judges would uphold Westminster's claimed legislative omnicompetence. In the case of *MacCormack v Lord Advocate* (1953), the judge suggested that the notion of parliamentary sovereignty was a 'distinctively English principle, which has no counterpart in Scottish constitutional law'. Furthermore, the *Scottish Claim of Right,* the foundation of the Scottish Constitutional Convention which laid the basic principles for devolution, affirmed the 'sovereign right of the Scottish people to determine [their] form of government'—a clear rejection of the notion that sovereignty over Scotland lies with Westminster. It is possible, therefore, that Scottish judges in the future will make findings at least to the effect that devolution, bolstered as it was with emphatic democratic endorsement by the Referendum of 1997, is an entrenched principle which may not be unilaterally removed or modified by the Westminster Parliament.

Question 3

Would you agree that the notions of the separation of powers and the rule of law are entirely overshadowed in the UK Constitution by the doctrine of parliamentary sovereignty? Take account of the impact of the Human Rights Act 1998 in your answer.

Answer plan

This question is very commonly asked. Clearly, the assumption that parliamentary sovereignty is the dominant feature of the constitution should be tested. The question of how far the doctrine has been affected by the UK's membership of the EC should be touched on, but cannot be considered in detail if the other two main issues are to receive adequate coverage. Obviously, it amounts to a very important issue in itself (which is considered in Chapter 2), but it would not be appropriate to examine it in detail here. In considering the doctrine of the separation of powers, comparisons can usefully be made with other jurisdictions, such as the USA. Mention of specific aspects of the Human Rights Act (HRA) 1998, specific European Convention on Human Rights (ECHR) Articles and relevant case law is essential in dealing with the final part of the question.

Essentially, the following matters should be discussed:

- the concept of the rule of law as put forward by Dicey;
- the extent to which the rule of law finds expression in the constitution;
- the doctrine of the separation of powers as propounded by Montesquieu; instances in which the doctrine is breached or observed;
- the impact of the HRA on both of the above;
- the meaning of the doctrine of parliamentary sovereignty;
- the weakening of the doctrine which has taken place due to Britain's membership of the EC.

Answer

The question presupposes that parliamentary sovereignty is the main basis of the UK Constitution and that the two other doctrines mentioned do not represent a constraint on it. It will be argued that both these assumptions are overstated, although it will be accepted that parliamentary sovereignty is the most significant feature of the UK Constitution. It will be argued that while

the HRA has strengthened aspects of both the rule of law and the separation of powers, its enactment has not affected the basic subordination of both to parliamentary sovereignty.

Before determining whether the rule of law can be said to be irrelevant in the British Constitution, it must be decided what is meant by the concept because the interpretation adopted will clearly affect the issue of relevance to be addressed. The concept of the rule of law as influenced by Dicey (*The Law of the Constitution*, 1971) appears to encompass the following notions: first, that powers exercised by government must be founded on lawful authority as opposed to being arbitrary; secondly, that citizens should be equal before the law; and, thirdly, that the law should be clear. Can it be said that these notions find expression in the UK Constitution?

Historically, constitutional lawyers in this country have prided themselves on their adherence to the rule of law, as upheld by judges in a number of famous cases. One of these is *Entick v Carrington* (1765), in which agents of the King, acting under a warrant issued by the Secretary of State, broke into the house of Entick, alleged to be the author of seditious writings, and removed certain of his papers. It was found that because the action was justified by no specific legal authority, it was a common trespass, for which the Secretary of State was liable in damages. If government is under the law, in the sense that any actions it takes must be authorised by law, then since the courts are empowered to make the authoritative determination of what the law is, this must mean that the government is in a sense under (and therefore obliged to obey) orders of the courts, expressed in the form of injunctions. The normal sanction for failure to obey an order of the court is a finding of contempt of court. Perhaps surprisingly, it was only in the case of *Re M* (1993) that it was settled that ministers of the Crown were obliged to obey court orders and risked a finding of contempt if they did not. The notion, expressed in both the above cases, that exercises of governmental power, particularly those which impact upon the liberty of the citizen, must have a basis in law, has now found a powerful reinforcement through the incorporation of the ECHR into UK law through the HRA 1998. The Convention rights are now binding on all public authorities, including courts, which act unlawfully if they act incompatibly with them (s 6(1)). Under s 3(1) of the HRA, 'So far as it is possible to do so, all legislation must be construed compatibly with the Convention rights', though if any primary legislation cannot be so construed, it remains valid and of full effect—the courts are given no strike down power. Certain Convention rights permit interferences with them in limited circumstances: Art 2 (right to life); Art 5 (personal liberty); Art 8 (privacy); Art 9 (freedom of religion); Art 10 (freedom of expression); and Art 11 (freedom of assembly and association). In order for such interferences to be lawful under the ECHR, the government must first show that the interference was

'prescribed by' or 'in accordance with' the law, that is, that it had a basis in existing domestic law. In other words, an identifiable legal basis authorising the interference must be shown: mere Executive discretion cannot suffice. It was on this basis that the UK was held to be in violation of Art 8 of the ECHR in the case of *Malone v UK* (1985).

It could be said that arbitrary power, although apparently contrary to the rule of law as expounded by Dicey, is exercised by ministers in the sense that legislation is often enacted conferring on them a broad discretion to act as appears appropriate in any particular circumstance. Section 10 of the Broadcasting Act 1990 provides an example of a very widely drafted discretion: the Home Secretary can order the Independent Television Commission to 'refrain from broadcasting any matter or classes of matter'. Once a discretion of this width is granted to a minister, might it be said that he can act in a manner which is unregulated by the law? Clearly, in a narrow sense, the minister is acting within the law because the discretionary power is lawfully granted. However, such an answer begs the question at issue. To some extent, it may be said that the minister is indeed able to exercise arbitrary power in the sense that any specific action has no specific legal authority; the only check on such actions is represented by the availability of judicial review. Where the exercise of the power in question would impact on a right protected by the ECHR, as in the example given above (Art 10) then, under s 3(1) of the HRA, the courts will be obliged to construe the power granted narrowly, so that it no longer authorises interference with Convention rights, if that is possible, and to strike down actions which do infringe Convention rights (s 6(1)) unless the statute in question clearly mandates or authorises such infringement (s 6(2)). This will considerably reduce the broad discretion which is *prima facie* granted by such statutes. But where no Convention right is arguably engaged by the exercise of statutory authority, such powers, however broad, will not be affected by the HRA. However, the courts are prepared to invalidate a minister's actions, according to the House of Lords in *Padfield v Minister of Agriculture* (1968), where he purports to act within a broadly drafted power, on the ground that the actions do not promote the policy and objects of the statute conferring the power. Although the check thus represented by judicial review on a minister's actions may suggest that the rule of law is recognised by the constitution, it might be equally plausible to suggest that such a check springs from the doctrine of parliamentary sovereignty, in that it is designed to ensure that powers exercised by ministers and other bodies do not rise above those of Parliament itself. Certain constitutional writers, such as Wade, have criticised the notion that such a well settled feature of the constitution as the granting of wide powers to ministers can be said to infringe the rule of law.[1]

What of the notion that the law applies equally to all citizens, which implies that no one is above the law? The notion could be attacked by citing numerous exceptions to it. Members of Parliament enjoy complete civil and criminal immunity in respect of words spoken during 'proceedings in Parliament' by virtue of the Bill of Rights 1688, while judges also enjoy various legal privileges. Diplomatic and consular immunities arise under the Diplomatic Privileges Act 1964 and the Consular Relations Act 1968, and these have been left undisturbed by s 16 of the State Immunity Act 1978. However, it might be suggested that these examples of exemptions granted and recognised by law support the argument that the rule of law exists in the British Constitution, as they imply that there is a need to create exceptions to a general principle which would otherwise apply to all the groups mentioned.

Can it equally be said that the doctrine of the separation of powers is of some relevance to the UK Constitution, even though it is possible to find instances where it is clear that the doctrine is not being applied? The doctrine, mainly developed by Montesquieu and his followers, encompasses the notion that the three main organs of government are the legislature, the Executive and the judiciary, and that only one class of function should be in the hands of each body. For example, the judiciary should apply, not create, law. Thus, a system of checks and balances between each branch of government will be provided. It is not hard to find examples of the violation of this doctrine. Judges can create law, in the sense that they can declare and develop the common law. Declaring the common law clearly means creating it, as the common law often has to meet fresh situations which have never previously been addressed. In *Shaw v DPP* (1962), for example, the House of Lords declared that the common law included a doctrine known as conspiracy to corrupt public morals, although no precedents were cited demonstrating that it had ever existed except as a variant of the power exercised by Star Chamber judges to punish offences against conventional morality.

Ministers, who are members of the Executive, sit as members of the House of Commons which is the legislative body. The Lord Chancellor is a minister as well as head of the judiciary and a Law Lord, and is also a member of the House of Lords in its legislative capacity. However, the case of *McGonnell v UK* (2000), in which the Bailiff of Guernsey, an office-holder with mixed functions similar to the Lord Chancellor's, was found to have violated Art 6 of the ECHR when he sat in judgment in a case involving legislation in the passage of which he had been involved as Speaker of the legislative body, perhaps indicates that the Lord Chancellor's days as a judge are now numbered. More importantly, it is well accepted by constitutional observers that the Executive can

effectively determine the legislative output of Parliament, theoretically a separate body. As Calvert puts it, with perhaps a little exaggeration, 'before the formally dramatic part of the legislative process even begins, almost all the terms of almost all (government) Bills are settled' (*British Constitutional Law,* 1985).

It seems clear, then, that the separation of powers, if interpreted as connoting a rigid compartmentalising of the functions of government, hardly exists in the British Constitution, and indeed it appears that government could hardly be carried on if it were. However, if the doctrine is not interpreted literally, it may be argued that some aspects of government do reflect a recognition of its existence. Under the House of Commons Disqualification Act 1975, civil servants must resign their posts if they wish to stand for election to the House of Commons, as must professional full time judges. Further, the number of government ministers permitted to sit in the House of Commons is limited to 95. Moreover, the growing significance of judicial review does not suggest that the separation of powers is irrelevant. Judicial review is generally recognised as an important and necessary check on the exercise of official power. Here again, the HRA will clearly have an impact: s 6(1), which makes it unlawful for a public authority to act in violation of a Convention right, represents a significant shift in power from the Executive to the judiciary. This is not, as some on the right have complained, a shift in power from *Parliament* to the judiciary because, under the HRA, there is no power given to judges to strike down primary legislation. However, there is a shift from the *Executive* to the judiciary, because for the first time, the courts will be able to strike down actions not because they are outside the powers used to justify the actions or did not follow a fair procedure, but on the substantive basis that they violated human rights. The freedom of action of the Executive—the area of discretion it enjoys—is, as a corollary, substantially curtailed. Again, however, this shift in power will occur only in relation to areas of law which touch on Convention rights.

The HRA has already had a more specific impact in terms of the separation of functions between the Executive and the judiciary. An example of what Stevens refers to as 'the casual British attitude to the separation of powers' ((1999) OJLS 366) was the power of the Home Secretary to set sentences to be served by juvenile killers. Under the Crime (Sentences) Act 1997, the Home Secretary set a 'tariff'—that part of a sentence designed to satisfy the demands of retribution and punishment—and upon its expiry, the prisoner became eligible for release by the Parole Board, and would be released unless it was thought that he still constituted a danger to society. In effect, therefore, a sentencing function was being

performed by a party politician and powerful member of the Cabinet. A challenge to the Secretary's power to set such tariffs was launched before the European Court of Human Rights, in reliance upon Art 6(1) of the ECHR, which provides: 'In the determination of his civil rights and obligations, or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.' In *T v UK; V v UK* (2000) the Court found that the Secretary, as a party politician, could not be considered an Independent' tribunal. The UK was obliged to implement that judgment as a matter of international law: it could now be made by the UK courts under the HRA. Indeed, the Scottish decision in *Starrs v Ruxton* (2000), finding that the scheme for appointing temporary sheriffs was unlawful under Art 6(1) because it failed to guarantee their impartiality and independence from the Executive, indicates the bolstering effect which that Convention right may now have on the independence of the judiciary, a vital aspect of the separation of powers. However, it must be recalled that a statute (say) clearly granting a judicial function to a politician (as with the Home Secretary, above) or setting up a scheme for appointing judges that similarly violated Art 6(1) could not be struck down by the UK courts (ss 3(2) and 4(6) of the HRA).

Overall, it must be acknowledged that the separation of powers in Britain is less clearly apparent than under some systems. In America, for example, the President and his Cabinet cannot be members of Congress, and the President may veto legislation but may not dissolve Congress. The courts can declare legislation enacted by Congress invalid on the ground that it is unconstitutional. In contrast, it is clear that the UK judiciary will refuse to hold legislation enacted by Parliament to be invalid (as a matter of English as opposed to Community law), as demonstrated in *Pickin v British Railways Board* (1974), although it did show itself willing in *R* (1991) to ignore a word used in an Act of Parliament. Furthermore, Parliament is free to enact legislation nullifying a decision taken in the House of Lords, as it did in the War Damage Act 1965 which followed the decision in *Burmah Oil Co v Lord Advocate* (1965).[2] Article 7 of the ECHR, now binding on all public authorities save Parliament under s 6(1) of the HRA, states: 'No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed.' This Article reinforces the protection against non-retroactivity in criminal law but, since it is incorporated through the HRA, could simply be overridden by Parliament and therefore makes no formal difference to the separation of powers.

The reluctance of the judiciary to depart from the will of Parliament flows from the doctrine of parliamentary sovereignty which—it should be acknowledged—is the most prominent feature of the UK Constitution in a way which marks it out from other constitutions. Parliament can legislate on any subject and therefore could pass laws severely curtailing civil liberties without facing the possibility that such legislation might be declared unconstitutional. The HRA 1998 specifically declares that the incompatibility of any legislation with the incorporated Convention rights will not render that legislation void or deprive it of effect (ss 3(2) and 4(6)). Parliament's full powers to invade civil rights are thus maintained, at least as a matter of law. This lack of legal restraint has both a positive and a negative aspect. It means that while Parliament can legislate on any subject, it cannot bind successive Parliaments. If it could, then obviously each successive Parliament would not be free to legislate on any matter. This aspect of sovereignty means that where there is inconsistency between a previous and a subsequent Act, the latter impliedly repeals the former to the extent of its inconsistency. Authority for this proposition derives from *Ellen Street Estates Ltd v Minister of Health* (1934).

However, it may be argued that parliamentary sovereignty has been weakened by Britain's membership of the EC. After the ruling of the European Court of Justice in *Factortame v Secretary of State for Transport (No 2)* (1991), the House of Lords accepted that where Community law was clear, it must prevail over domestic law subsequent or previous, though it did not deal with the (still hypothetical) instance in which Parliament in a statute expressly instructed the courts to apply domestic law in preference to EC law. It re-affirmed this position in *Secretary of State for Employment ex p EOC* (1994). Theoretically, Parliament could repeal s 2(4) of the European Communities Act 1972, which gives primacy to community law; in practice, it would almost certainly refrain from doing so. Equally, while theoretically able to repeal the Canada Act 1982, in practice it would not do so, not least because the Canadians would refuse to recognise any validity in such a measure.

It may be concluded that despite some diminution in the constitutional force of parliamentary sovereignty, it is still the dominant feature of the constitution, and therefore to an extent undermines the doctrine of the rule of law and of the separation of powers, although it is submitted that it does not render them wholly irrelevant. The HRA has strengthened both these doctrines to a significant degree, but of course remains itself subject to the doctrine of parliamentary sovereignty.

Notes

1 Students could note that the HRA may paradoxically be said to undermine the rule of law by adding further uncertainty to the law. The Act requires all legislation to be read and given effect in such a way as to be compatible with the Convention rights 'so as is possible'. Potentially, therefore, all legislation which touches on ECHR issues is now open to re-interpretation; a considerable period of uncertainty will thus ensue.
2 Further support for this argument could be given, such as this statement from Sir Robert Megarry VC in *Manuel v Attorney General* (1983): 'Once an instrument is recognised as being an Act of Parliament, no English court can refuse to obey it or question its validity.'

Question 4

'The legal limitation of parliamentary sovereignty by means of a written constitution has now become essential due to the failure of traditional checks on government power and the refusal of the Labour government to give real teeth to its reforms in this area.'

Discuss.

Answer plan

This is a particularly topical question and is therefore likely to be quite popular with examiners. It is, however, quite demanding. It assumes that 'traditional checks' have failed; that it is desirable to limit parliamentary sovereignty; that the Labour reforms—basically the Human Rights Act (HRA) 1998—will not address this problem; and that a written constitution would be likely to provide such limitation. All these assumptions should be tested. As the question raises a large number of issues, care must be taken in planning in order to ensure that they all receive adequate coverage. It would be quite easy to devote most of the essay to the problem of entrenchment, for example. Note that there is some overlap between this area and the discussion in Chapter 9 concerning the adoption of a UK Bill of Rights. However, adoption of a Bill of Rights could take place without a new constitutional settlement and, indeed, whether it should do so is one of the main issues in the Bill of Rights debate.

The following issues should be addressed:

- Lord Hailsham's notion of an 'elective dictatorship';
- the role of the House of Lords in providing a check on the power of the Commons; the impact of reform so far and prospects for further reform;

- the role of the media in informing the public as to government actions;
- the impact of membership of the EC and the role of the European Convention on Human Rights (ECHR);
- the impact of the HRA and the Freedom of Information Act 2000;
- the benefits which might flow from a written constitution;
- the difficulties of entrenching a new constitutional settlement: s 2(4) of the European Communities Act 1972 as a model.

Answer

Within the UK, there is no written constitution which has a higher status than the rest of the law. The body of rules relating to the structure, functions and powers of the organs of State, their relationship to one another and to the private citizen is to be derived from common law, statute and constitutional conventions. Therefore, the constitution does not impose limits on what may be done by ordinary legislation in the way that many constitutions do. The legislative competence of the UK Parliament is unlimited save (perhaps) in the field of EC law. No Parliament may bind its successors or be bound by its predecessors, and the courts cannot question the validity of an Act of Parliament. Therefore, no formal mechanism exists ensuring that the rights of minorities and individual citizens are not infringed by Parliament. Instead, there has been an informal acceptance that such rights will be respected—that the legally unlimited power of Parliament will not be used to the full. This informal acceptance is reflected in the structure of the HRA. While it allows citizens to enforce their Convention rights against government and other public bodies, it expressly preserves the right of Parliament to pass legislation infringing the Convention rights and makes no attempt to entrench itself. Its enactment does not, therefore, fully answer the doubts which have been expressed as to the wisdom of placing reliance on such informal restraints. Similarly, the Freedom of Information Act 2000 which, for the first time, gives a basic right of access to government information, is a statute, like any other, subject to ordinary repeal. While devolution has given Scotland, Wales and Northern Ireland local administrations which are limited, *inter alia,* by the guarantees in the ECHR, Westminster retains full powers to legislate in the devolved areas, and to repeal the devolution legislation itself.

In 1976, Lord Hailsham put forward the view that the current constitutional arrangements amounted to an elective dictatorship for which the only remedy was a written constitution. This view has since been endorsed many times from the other end of the political spectrum. It

arises due to a perception that the House of Commons has become subordinate to the government which controls it through the party machine. Lord Hailsham wrote that legislation of major importance was passed with wholly inadequate debate and that Parliament was being reduced to little more than a rubber stamp. He also considered that although absolute power was conferred on Parliament, those powers were concentrated in an executive government formed out of one party which, due to the electoral system, might not fairly represent the popular will.

When the government in power has a large majority, as at present, this problem is likely to be exacerbated as suggested by the use, in 1988, of a three line whip against a Conservative back bencher's Private Members' Bill (Richard Shepherd's Bill in 1988, intended to reform s 2 of the Official Secrets Act 1911) and the guillotining of parliamentary debate on the Official Secrets Bill 1989. The recent passage of quite draconian anti-terrorism legislation—the Anti-Terrorism, Crime and Security Act 2001—in response to the September 11th attacks—further provides a startling example of how Parliament may readily renounce its scrutinising and checking function: the legislation, which ran into over 100 clauses, was passed through the Commons in only 16 hours, even though it clearly contained numerous provisions which had little or no relation to the threat from international terrorism. The House of Lords made a number of improvements to the Bill, but its harshest provisions, including the powers to detain without trial certain terrorist suspects, a provision which required the UK to derogate from Art 5 of the ECHR, were left basically intact.

Furthermore, the secrecy which cloaks the actions of ministers hampers the Opposition in scrutinising their actions. The corollary of government secrecy is misinformation: the case of *Ponting* (1985) testified to its extent. At the time of writing, the Freedom of Information Act, while passed by Parliament in 2000, has not yet been brought into force in respect of its main provisions and will not be fully in force until 2005. Moreover, while for the first time it gives UK citizens a basic legal right to government information and backs this up with impressive and independent enforcement mechanisms, it has been widely criticised for its numerous, very wide exemptions and the inclusion of a ministerial veto over the release of certain classes of information on public interest grounds. At present, in any event, the Act, which will still amount to a significant assault on unaccountable government, remains in abeyance.

Other checks on governmental power are perceived as relatively weak. The House of Lords has had some successes, notably the incorporation into the Police and Criminal Evidence Act 1984 of a provision with great potential to safeguard the liberty of the citizen (s 78) and its recent,

repeated rejections of the Labour government's attempts to curtail the right to trial by jury. Lord Carrington said, in 1975 in relation to the Trade Union and Labour Relations (Amendment) Bill: '…there should be a second House…to enforce a delay in which there can be reassessments by government, by parties and by the people of this country of the rights or wrongs of an issue.' However, the Lords are not generally so bold; when they oppose a Bill sent up by the Commons, they tend to propose amendments at the Committee stage rather than vote against the second reading. The Lords will rarely insist on their amendments to a government Bill although, of course, they may do so when the government lacks an effective majority to ensure their rejection in the Commons. Under the Salisbury Convention, the Lords will not reject measures which were contained in the government's manifesto. O Hood Phillips also argues (*Constitutional and Administrative Law,* 7th edn, 1987, p 148) that there is almost a convention that the Lords will not return a government Bill to the Commons for reconsideration more than once. That this is indeed not a firm convention, but merely a general description of practice, has been vividly illustrated by events surrounding the European Elections Bill 1998, in which the Lords five times restored an amendment rejected by the Commons, eventually causing the Bill to be lost. Ultimately, the government can threaten to pass a Bill under the 1911 and 1949 Parliament Acts procedure if the Lords appear minded to oppose it, giving the Lords only a year's power of delay over most legislation, though the scarcity of its use illustrates the generally very self-restrained approach of the Lords. There is general agreement that the removal of most of the hereditary peers from the House in 1999 has given the House a greater sense of its own legitimacy, which has manifested itself in a more assertive stance vis à vis the government-dominated Commons. Nevertheless, as indicated above, the House ultimately gave way on most of the crucial issues relating to the protection of liberty raised by the Anti-Terrorism Bill 2001.

The Wakeham proposals for reform of the House of Lords have now been referred to a Joint Committee of both Houses for consideration, after the government's White Paper—which proposed a largely nominated House, with most of the safeguards for ensuring its independence proposed by Wakeham removed—was roundly rejected in 2002 by MPs and peers alike in a rare victory for parliamentary power over central government. It now appears likely that a reformed House will have a substantial elected element—probably at least 50%—and around 20% independent peers, preserving the House's traditional strengths in (partial) independence from party control and expertise. While such a reform would undoubtedly greatly increase the *de facto* power of the

House—by giving it the confidence to use its formal, legal powers far more fully than it does at present—there appears to be no support for giving the House greater legal powers over legislation than it currently possesses. Unlike nearly every second chamber in liberal democracies abroad, the House will have no special powers over legislation altering the constitution, while the Salisbury Convention will probably remain in place.

Traditionally, the operation of a free and diverse press has offered a further check to government power but, without a Freedom of Information Act, the press is mainly dependent on a system of official and unofficial leaks, though there is evidence of increasing usage of the government's Code of Practice on Access to Information, policed by the Parliamentary Commissioner, whose recommendations on release of information are generally, though not invariably, complied with. When this lack is coupled, as it is at present, with the concentration of the press in a few hands, the quality of diversity is weakened, and when certain of the most powerful owners of the press are generally sympathetic to the government a loss of independence may follow. There is a danger that certain organs of the press will merely peddle the same government 'leaks' or press handouts dressed up in different forms to suit different markets.[1]

Although it may be true that traditional checks on government power are ineffective, it is arguable that newer ones will have an increasing impact. The EC, which will have a growing influence,[2] has already had an impact on parliamentary sovereignty, curbing government power in areas such as sex discrimination. Section 2(4) of the European Communities Act 1972 provides, in effect, that UK Acts of Parliament shall be construed and have effect subject to directly applicable Community law. In this respect, it is clear from judgments of the European Court of Justice (see *Costa v ENEL* (1964)) that Community law should prevail over national law, a principle broadly accepted by the UK courts in *Factortame Ltd and Others v Secretary of State for Transport (No 2)* (1991).

The rulings of the European Court of Human Rights have, to an extent, acted as a substitute for a domestic Bill of Rights and have led to better protection of human rights in such areas as prisoners' rights (*Golder* (1975)), freedom of expression (*Sunday Times* case (1979)) and privacy (*Malone* (1985)). While one problem was the ability of the UK government to minimise the impact of an adverse judgment by responding in a minimalist fashion to defeat or by avoiding implementation of a ruling by entering a formal derogation (*Brogan, Coyle, McFadden and Tracey v UK* (1988)), the main problem has been that the process of invoking the ECHR has been extremely cumbersome, lengthy and expensive. This has now been addressed through the enactment of the HRA 1998. Litigants are now able

to assert their Convention rights against any public authority in any UK court or tribunal. The HRA makes it unlawful for a public authority to perform an act that is incompatible with the Convention rights, unless legislation unambiguously mandates or authorises such actions (s 6). All legislation will have to be read 'so far as…possible' to be compatible with the Convention rights (s 3). There is no doubt that this Act therefore represents a very real and substantial limitation upon Executive action. The decision in *Brind* (1991), in which the House of Lords refused to impose a presumption that statutes granting wide ministerial discretion give no power to infringe Convention rights, has been unequivocally reversed. Moreover, ministers now have to make a statement when introducing legislation into Parliament that it does not infringe Convention rights or that it does, but they wish to proceed in any event (s 19). A statement that it did amount to an infringement would amount to a declaration that the UK was quite deliberately violating its Treaty obligations and breaching international law; this will therefore act as a powerful deterrent against the introduction of such legislation. It is likely, therefore, that clear statutory infringements of the ECHR will become rare if not extinct phenomena, whilst the courts can deal with ambiguous statutory infringements by the robust interpretative approach specified in s 3. Cases such as *A* (2001) and *Offen* (2001) indicate the potency of that provision, though other decisions are more cautious and it is safe to say that no definitive interpretation of s 3 has been judicially agreed upon. Nevertheless, the HRA clearly provides for a strong and concrete restraint upon Executive action and, in practice, will probably ensure that legislation infringing basic rights becomes a thing of the past, though the recent derogation from Art 5 of the ECHR following the September 11th attacks in 2001, in order to allow for the detention without trial of certain suspected international terrorists, indicates that the UK is very far from developing a strong culture of respect for the ECHR. Repeal of the HRA itself, of course, remains a legal possibility, but is likely to be regarded as politically very costly, though the stance of the Conservative party remains one of hostile neutrality at present. It should be stressed again that Parliament's formal legal powers are not in any way restricted by the Act.

It may therefore be argued that there is a need for a further check on parliamentary power. A written constitution might meet that need, at least theoretically, because it would allow the judiciary to act as a more effective check on Parliament through the ability to strike down legislation as unconstitutional. (At present, the judiciary will refuse to invalidate legislation which has been enacted by Parliament (*Pickin v British Railways Board* (1974)).) In particular, if a Bill of Rights were entrenched within the constitution, basic civil rights might be more surely guaranteed to UK

citizens. Adoption of a written constitution might address other problems identified by Lord Hailsham, including over-centralisation and unfairness in the electoral system.

However, it has sometimes been doubted whether entrenchment of a written constitution is possible in our system. Entrenchment could be attempted by means of a provision that the constitution could be repealed or amended only by means of a referendum, or perhaps by a two-thirds majority of Parliament. If a later Parliament purported to repeal part of the constitution without a referendum, would the judges refuse to give effect to such legislation on the grounds that it was unconstitutional? Under the traditional doctrine of implied repeal, as exemplified in *Ellen Street Estates v Minister of Health* (1934), judges would give effect to the later legislation. However, it might be possible to create artificially a discontinuity of power which would have the effect of modifying parliamentary sovereignty permanently, after which adoption of a written constitution might be possible. O Hood Phillips considered that this could occur if Parliament extinguished itself, transferring its powers to a new Constituent Assembly. Dicey took the view that it would be untenable to espouse 'the strange dogma sometimes put forward that a sovereign power, such as the Parliament of the UK, can never, by its own act, divest itself of authority' (*An Introduction to the Study of the Law of the Constitution,* 10th edn, 1959, p 68). On this view, the judges would accept the new constitutional settlement; possibly, as Wade suggests, the Judges' Oath should also be amended in order to make it clear that their allegiance had changed.

Moreover, as already mentioned, the judges have accepted a variant of the rules of implied repeal flowing from s 2(4) of the European Communities Act 1972. It appears to follow from *Macarthy's v Smith* (1981) and from *Factortame* that Parliament has succeeded in partially entrenching s 2(1) of the European Communities Act by means of s 2(4), due to the imposition of a requirement of form (express words) on future legislation designed to override Community law. This development lends more force to the argument that entrenchment of a written constitution is possible.

In conclusion, it may be argued that while many of the traditional means of curbing government power no longer seem to be effective, the HRA is likely to constitute a new and powerful guarantee against oppressive government; when and if it is joined by the Freedom of Information Act, a very substantial movement towards more open and limited government will be apparent. The objections to the unentrenched UK Constitution will of course remain, though they may become less practically evident. They can only be fully addressed by a new constitutional settlement.

Notes

1 It could also be pointed out here that the freedom of the media is, in any event, hampered by the laws of libel, contempt, official secrets, and particularly recently by the action for breach of confidence. The possibility of prior restraint via the use of an interim injunction to preserve confidentiality, combined with the extension of the law of contempt in *Attorney General v Newspaper Publishing plc* (1987), supporting such an injunction, arguably represents the most worrying curb on media freedom since *Attorney General v Times Newspapers* (1974).

2 Further developments in the influence of EC law could be considered at this point. The House of Lords in *Litster v Forth Dry Docks Ltd* (1989) determined that even where EC law is not directly effective, priority for EC law should be ensured by means of national law. The House of Lords was prepared to construe the domestic legislation contrary to its *prima facie* meaning, because it had been introduced expressly to implement the directive in question.

CHAPTER 2

PARLIAMENTARY SOVEREIGNTY, HUMAN RIGHTS AND THE EUROPEAN UNION

Introduction

Textbooks on constitutional law often deal with parliamentary sovereignty and European Community law in separate chapters. However, exam questions on sovereignty will now often have explicit EC dimensions, and will, in any event, almost invariably require explanation of the impact of EC law on the traditional doctrine. Therefore, this chapter deals with the traditional view of parliamentary sovereignty and the impact of EC law together. In this edition, we have decided to drop the question on the institutions of the EU, their relationship with each other and the issue of the 'democratic deficit', since such issues will nearly always be dealt with on a separate EC course, now that EC law has become a seventh core subject. We have substituted for that question one on the Human Rights Act 1998 and sovereignty, a very topical subject. Thus, four main issues are covered in this chapter: the nature of parliamentary sovereignty and possible legal limitations on it; the impact of Community law on the traditional doctrine of parliamentary sovereignty; the means by which Community law can take effect in the UK (direct and indirect effect); and the impact of the HRA on sovereignty. Questions on sovereignty and on the applicability of EC law in the UK may be of the problem or essay type, though essays are probably more common.

Checklist

Students should be familiar with the following areas (note that if the course does not cover EC institutions, etc, then the last two categories need not be covered):

- the traditional doctrine of parliamentary sovereignty: the doctrine of implied repeal; possible authority for departure from the doctrine: *AG for New South Wales v Trethowan* (1932);

- the main academic arguments surrounding the possible limitations on Parliament, including possible self-limitation;
- the effect of ss 2(1), 2(4) and 3(1) of the European Communities Act 1972;
- the primacy of Community law: *Costa v ENEL* (1964);
- the direct and indirect effect of Community law; the *Francovich* principle;
- the purposive approach to domestic legislation supposed to implement indirectly effective Community law;
- the partial entrenchment of s 2(1) of the European Communities Act: *Macarthy's v Smith* (1981); the *Factortame* litigation; *Secretary of State for Employment ex p EOC* (1994);
- the implications of the above for protection of a Bill of Rights;
- the extent of protection for the HRA—whether the normal doctrine of implied repeal will fully apply; recent case law under the Act.

Note in relation to the *Factortame* litigation: *Factortame* (1990) refers to the first decision of the HL, cited in the Tables as [1990] 2 AC 85; *Factortame* (1990) (ECJ) refers to the decision of the ECJ on interim relief, cited in the Tables as [1990] 3 CMLR 1, ECJ; *Factortame (No 2)* (1991) refers to the second decision of the HL, cited in the Tables as [1991] 1 AC 603; *Factortame (No 3)* (1992) refers to the decision of the ECJ on the substantive issue, cited in the Tables as [1992] QB 680.

Question 5

Consider the validity of the following statement: '…once an instrument is recognised as being an Act of Parliament, no English court can refuse to obey it or question its validity' (*per* Sir Robert Megarry VC in *Manuel v AG* (1983)).

Answer plan

This is a fairly demanding question as it concerns two quite complex aspects of sovereignty: the ability of the courts to consider the validity of a statute and the effect of accession to the European Community.

The following matters should be considered (two aspects of the doctrine of parliamentary sovereignty arising from the statement):

- the validity of an Act of Parliament; the refusal of the courts to consider proceedings in Parliament; the 'enrolled Bill' rule; the position under the Human Rights Act (HRA) 1998;
- compliance with statutory provisions; the relevance of the rule that no Parliament can bind its successors; the effect of the European

Communities Act 1972 and the doctrine of the primacy of EC law—*Factortame* litigation;
- modification of the statement made by Sir Robert Megarry in order to take the primacy of EC law into account.

Answer

There are two aspects to this question: first, that the judges will not ask whether what appears to be an Act of Parliament is valid, in the sense that it has been passed in accordance with lawful procedure; secondly, that the judges will not refuse to obey it. Of course, it might be argued that the first aspect is embodied in the second; in other words, the lack of validity of a statute might merely be one ground among others which could be put forward as a reason for disapplying the provision in question. Nevertheless, the issues are distinguishable in that a negative answer to the first question will preclude the second, although a positive answer will still leave the second question open. In one instance, a court is confining itself to asking the narrow question: what is an Act of Parliament? In the other, a court may be accepting that there are circumstances in which an Act of Parliament accepted as valid will yet not be applied. The two aspects of this question will therefore be considered separately. It will be argued in relation to the first that the courts will in general decline jurisdiction to examine the authenticity of purported Acts of Parliament. In relation to the second, it will be argued that the traditional concept of parliamentary sovereignty as expressed in the statement must be modified due to the UK's membership of the European Community.

In determining whether the courts will question the validity of a statute, it is unhelpful to ask whether it has been recognised as such, because to say so begs the question as to what the recognition of an Act of Parliament involves. An Act of Parliament is an expression of the sovereign will of Parliament; if, however, Parliament is not constituted as Parliament, or does not function as Parliament within the meaning of the law, it would seem to follow that it cannot express its sovereign will in the form of an Act of Parliament. However, the courts have declined opportunities to declare an Act a nullity where it has been asserted that something which appears to be an Act of Parliament and which bears the customary words of enactment is not authentic. In *Edinburgh and Dalkeith Railway Co v Wauchope* (1842), the court was asked to find that the legislation in question, a Private Act, had been improperly passed and was therefore invalid, in that Standing Orders had not been complied with. Lord Campbell said, *obiter,* that if, according to the Parliament Roll, an Act has passed both Houses of Parliament and has received the royal assent, a court can neither inquire into the manner in

which it was introduced into Parliament nor into what passed in Parliament during its progress through the various parliamentary stages. This rule, now known as 'the enrolled Bill rule', was relied upon in *Pickin v British Railways Board* (1974): Mr Pickin had sought to challenge a Private Act of 1836 on the basis that Parliament had been misled by fraud. The House of Lords held that he was not entitled to examine proceedings in Parliament to show that the Act had been passed due to fraud. That action therefore failed.

Perhaps, after *Pickin's* case, the possibility still remains that a court might be prepared to take note of an assertion that a Bill had not obtained a majority at the final reading in the House of Commons. However, even if a court were prepared to look at the notes of the official shorthand writers, it would be likely to ask leave of the House to conduct such an inspection because the House has asserted the privilege not to have its internal proceedings investigated.[1] Generally speaking, then, the courts will decline jurisdiction to declare an apparently authentic Act of Parliament a nullity.[2]

If a court were asked to disapply a statute not because something in its background was alleged to render it invalid but due to other factors, it would, according to the traditional doctrine of parliamentary sovereignty, decline to do so except where the other factor consisted of incompatibility between the statute before it and a subsequent statute. This doctrine includes the notion that Parliament cannot bind its successors because the latest expression of Parliament's will must prevail.

In *Ellen Street Estates Ltd v Minister of Health* (1934), it was argued that the Acquisition of Land (Assessment of Compensation) Act 1919 prescribed a certain manner for authorising the acquisition of land. It provided in s 7 that other statutes 'shall have effect subject to this Act'. If s 7 applied to subsequent enactments, provisions of the Housing Act 1925 which were inconsistent with the 1919 Act would have no effect. However, Maughan LJ held, *obiter,* that Parliament cannot bind itself as to the form of future enactments. Thus, the courts will not give effect to a statute which is in conflict with a later statute, on the basis that the earlier statute has been impliedly repealed to the extent of its inconsistency. However, in *AG for New South Wales v Trethowan* (1932), the Privy Council upheld the requirement of a referendum before a Bill to abolish the Upper House was presented for the royal assent. Although, as De Smith argues, this decision may be of limited application as involving a non-sovereign legislature, it does suggest that a class of legislation exists for which it may be appropriate to delineate the manner and form of any subsequent amendment or repeal.

Section 1 of the Northern Ireland Act 1998 provides that Northern Ireland will not cease to be part of Her Majesty's dominions without the consent of the majority of the people of Northern Ireland voting in a poll. If a future Act of Parliament purported to revoke this guarantee without first conducting a

poll in Northern Ireland, how would a court react to it? According to the traditional view of parliamentary sovereignty as expressed by O Hood Phillips, the later statute would impliedly repeal the former, but if so, it may be argued that Parliament must have misunderstood its powers in creating s 1 of the 1998 Act. It is at least arguable that the courts would hold the later statute to be invalid, which occurred in the South African case of *Harris v Minister of the Interior* (1951) (this view is put forward by Jowell and Oliver, *The Changing Constitution,* 1989).[3]

However, although there may be instances as suggested in which the traditional doctrine of implied repeal might not be applied, can it be assumed that apart from those considered, the courts will obey a statute which constitutes the latest expression of Parliament's will? The doctrine of parliamentary sovereignty as explained by Dicey means that Parliament has the right to make, unmake or amend any of its Acts and that such power is not open to challenge by any outside body. Since 1688, the doctrine of the supremacy of Parliament has developed to the stage when, in *Pickin v British Railways Board* (1974), it appeared clearly settled that the notion of finding an Act of Parliament invalid could be said to be obsolete. This notion might be qualified today on the ground that if a word in an Act of Parliament is incapable of bearing a sensible meaning, it appears that the courts may be prepared to disregard it. The House of Lords so held in *R* (1991) on the basis that the word 'unlawful' in the Sexual Offences Act 1956 must be mere surplusage. The HRA contains no clause purporting to protect the Act from future repeal, in this respect following the pattern of the legislation creating the devolved institutions. But it also emphatically re-affirms the traditional doctrine of sovereignty by allowing the courts only to make declarations of incompatibility if they find statutes incompatible with the rights guaranteed by the ECHR. Section 4(6) of the Act states that such declarations have no effect on the Validity, continuing operation or enforcement' of the legislative provisions in respect of which they are made. However, s 3(1) of the Act, in which the courts are instructed to construe all legislation compatibly with the Convention rights 'if possible', is such a strong adjuration that it arguably enables courts to blur the line between 'interpretation' of an Act of Parliament and rewriting it, presenting at least a practical challenge to Parliament's ability to enforce its will through legislation. The case of *A* (2001), in which words were read into a statute in such a way as to alter radically its *prima facie* meaning, is a vivid illustration of this, though it must be conceded that other cases, in particular *Re W and B* (2002), indicate a more cautious approach.

Most importantly, a further qualification to the rule deriving from *Pickin* must be introduced due to the UK's membership of the European Union. Community Treaties and Community law capable of having direct effect in the UK were given such effect by the European Communities Act 1972 which,

by s 2(1), incorporated all existing Community law into UK law. No express declaration of the supremacy of Community law is contained in the Act; the words intended to achieve this are contained in s 2(4) of the 1972 Act, which reads as follows: '…any enactment passed or to be passed…shall be construed and have effect subject to the foregoing provisions of this section.' The words 'subject to' appear to suggest that the courts must allow Community law to prevail over a subsequent Act of Parliament. '[T]he foregoing' are those provisions referred to in s 2(1) giving the force of law to 'the enforceable Community rights' there defined.

The problem arises in respect of statutes passed after 1 January 1972. According to the traditional doctrine of parliamentary sovereignty, the later Act should prevail as representing the latest expression of Parliament's will, but the Community doctrine of the primacy of EC law and s 2(4) would require Community law to prevail. In this respect, it has become clear from the Treaty as interpreted by the European Court of Justice (see *Costa v EN EL* (1964) and *Amministmzione delle Finanze dello Stato v Simmenthal SpA* (1978)) that it is an implied Community principle that Community law should prevail over national law.

In *Secretary of State for Transport ex p Factortame Ltd and Others* (1990), the UK courts had to consider the question of direct conflict between domestic and European Community law. The applicants, who were unable to comply with the conditions imposed on them under the Merchant Shipping (Registration of Fishing Vessels) Regulations 1988 made under the Merchant Shipping Act 1988, sought a ruling by way of judicial review that the Regulations contravened the provisions of the EEC Treaty by depriving them of Community law rights. A ruling on the substantive questions of Community law was requested from the European Court of Justice and pending that ruling, an order was made by way of interim relief, setting aside the relevant part of the 1988 Regulations.

This order was set aside by the Court of Appeal; Bingham LJ remarked, however, that where the law of the Community is clear:

> …whether as a result of a ruling given on an Art 177 [now 234] reference or as a result of previous jurisprudence or on a straightforward interpretation of Community instruments, the duty of the national court is to give effect to it in all circumstances…

To that extent, a UK statute is not as inviolable as it once was. The House of Lords upheld the ruling on the ground that no court had power to make an order conferring rights upon the applicants which were directly contrary to UK legislation. The result of these two rulings was clearly in accord with the traditional doctrine of parliamentary sovereignty as far as English law was

concerned. However, their Lordships also accepted that Community law might impose other requirements which would be overriding. The Lords referred to the European Court of Justice for a preliminary ruling on the question of whether Community law required that a national court should grant the interim relief sought.

The European Court of Justice held (*Secretary of State for Transport ex p Factortame Ltd* (1990) (ECJ))[4] that the force of Community law would be impaired if, when a judgment of the Court on Community law rights was pending, a national court was unable to grant interim relief which would ensure the full efficacy of the eventual judgment. Therefore, when the only obstacle to granting such relief was a rule of national law, that rule must be disapplied. In view of this judgment (*ex p Factortame Ltd (No 2)* (1991)), the House of Lords granted the relief sought by the vessel owners. The position taken by the House of Lords was re-affirmed in *Secretary of State for Employment ex p EOC* (1994).

It follows from this decision that if it is clear that a statute is inconsistent with EC law, the domestic court would have to disapply it, in other words, refuse to give it effect. It is therefore clear that the statement made by Sir Robert Megarry should be modified to read 'once an instrument is recognised as an Act of Parliament *and is compatible with any enforceable Community law,* no English court can refuse to obey it or question its validity'.

Notes

1 De Smith, it could be noted, suggests that there are other circumstances in which a court might treat a purported statute as nugatory; a Bill to prolong the life of a Parliament beyond five years might be passed in the Commons but not in the Lords (such a Bill is explicitly excluded from the 1911 Parliament Act procedure) and receive the royal assent. It would state that it had been passed in accordance with the Parliament Acts; if so, a court might treat it as a nullity as 'bad on its face'; its defective nature would be apparent without needing to inquire into proceedings in Parliament.

2 It could be pointed out here that challenges to the validity of an Act or part of an Act may be mounted on other grounds. In *Cheney v Conn* (1968), a taxpayer appealed against an assessment of income tax made under the Finance Act 1964 on the basis that Parliament had acted unlawfully in making the statute; he argued that it was contrary to international law, as part of the money would be used for the construction of nuclear weapons. In response, it was held that the statute could not be unlawful because 'what the statute…provides is the law and the highest form of law that is known to this country'. Thus, the courts will not accept that Parliament had no power to make the statute in question.

3 Students could note that this point also receives some support from Slade LJ in *Manuel v AC* itself, although he did not finally resolve the issue. The question of

whether the courts can determine the validity of a statute can ultimately only be resolved by the courts; the statement made by Megarry VC fails to take that factor into account and is, therefore, too simplistic.

4 It could be explained here that this ruling was based on the Court's judgment in *Amministrazione delie Finanze dello Stato v Simmenthal SpA* (1978), in which it had held that conflict between provisions of national law and directly applicable Community law must be resolved by rendering the national law inapplicable, and that any national provision or practice withholding from a national court the jurisdiction to apply Community law even temporarily was incompatible with the requirements of Community law.

Question 6

Would you agree that, under our current constitutional arrangements, a Bill of Rights could not be protected from repeal and that the Human Rights Act 1998 makes no attempt to so protect itself?

Answer plan

In answering this question, it should be borne in mind that a number of different forms of protection could be suggested for the Bill of Rights short of entrenchment.

Essentially, the following matters should be considered:

- the doctrine of parliamentary sovereignty;
- the danger of erosion of the Human Rights Act (HRA) 1998 and of any Bill of Rights due to implied repeal by subsequent enactments;
- the attempt to prevent inadvertent implied repeal through ministerial statements of compatibility;
- the construction of subsequent enactments so as to avoid conflict with the HRA under s 3; a comparison with the approach of the courts to protecting EC legislation from repeal under s 2(4) of the European Communities Act 1972; an assessment of case law so far on s 3;
- the consequences of this approach—the partial protection of the Convention rights;
- the preclusion by the HRA of the possibility of the judiciary using the more radical approach taken in *Secretary of State for Transport ex p Factortame Ltd and Others (No 2)* (1991) to protect the Convention;
- the possibility of entrenchment by means of a new constitutional settlement.

Answer

The adoption of a Bill of Rights intended to exist for all time is incompatible with the doctrine of parliamentary sovereignty: under that doctrine, a purported Bill of Rights would in fact have the same status as other enactments in that it would be vulnerable to express and (probably) implied repeal. This, indeed, was the stance taken by the White Paper (Cm 3782) on incorporation of the European Convention on Human Rights (ECHR); the HRA makes no attempt to entrench the Convention into UK law, and indeed explicitly states that incompatibility between Convention rights and either future or past UK legislation will not affect the validity or continuing effect of that legislation. Under the doctrine of sovereignty, no Parliament may bind its successors or be bound by its predecessors, and the courts cannot question the validity of an Act of Parliament (see *Pickin v British Railways Board* (1974)). It follows that Parliament can repeal or amend any statute and that where a later statute is incompatible with a former, it repeals the former to the extent of its incompatibility. Thus, the adoption of a Bill of Rights appears to include the unconstitutional notion of limiting the legislative competence of successive Parliaments.

Express repeal of all or part of the Bill of Rights might be undertaken by a subsequent Parliament out of sympathy with its aims, while implied repeal—which might at times be unintentional—could gradually and insidiously erode it. For example, a Bill which, in future, sought to *entrench* the provisions of the ECHR would contain a clause protecting the right to privacy—Art 8. If a subsequent enactment dealt with an aspect of privacy (such as the use of newly developed surveillance devices) in terms that clearly allowed for violations of the rights guaranteed by Art 8, this Act would prevail. The Bill of Rights might eventually become almost worthless—in fact, worse than worthless, because it could be used by government to cloak erosions of freedom while at the same time raising expectations it could not fulfil. This danger cannot be ruled out in relation to the HRA.

However, arguably, certain forms of protection for enactments, even amounting to a weak form of entrenchment, already exist in our constitution and are utilised by the HRA. (The word 'protection' is used as being wider than 'entrenchment'.) It is possible that a convention of respect for the Bill of Rights would grow up; this may well be the case with the HRA 1998. It is a constitutional truism that Parliament never uses its power to the full; for example, it is inconceivable at present that Parliament would limit suffrage to those with incomes over a certain level. Similarly, the Bill of Rights, although enacted as an ordinary Act of Parliament, might acquire such prestige that although its express repeal remained theoretically possible, it

would never be undertaken. This may represent the best protection for the HRA. However, this cannot be taken for granted: the recent derogation from Art 5 of the ECHR following the September 11th attacks in 2001 in order to allow for the detention without trial of certain suspected international terrorists indicates that the UK is very far from developing a strong culture of respect for the ECHR, though, provided that the derogation is found to be lawful by domestic courts and the European Court of Human Rights (ECtHR), there will, technically speaking, have been no violation of the ECHR. Even outright repeal of the HRA cannot be ruled out: the present government would not presumably undertake such a course, given that the Act was its own initiative, but the stance of the Conservative party remains one of hostile neutrality at present. Moreover, even if Parliament does prove reluctant to engage in express repeal, implied repeal would still remain a possibility.

The HRA deals with such a possibility in two ways. The first of these is the provision in s 19 that ministers, when introducing legislation subsequent to the enactment of the HRA, must make a statement as to whether the legislation is or is not compatible with the Convention rights. This is clearly designed to prevent governments from engaging in a stealthy erosion of rights; it should also help to guard against inadvertent erosion by focusing minds in Parliament and government on whether the legislation is indeed Convention compliant. Governments are likely to be extremely reluctant openly to announce that they are introducing incompatible legislation, since this would amount to a declaration of an intent to breach the UK's Treaty obligations. However, governments may rely upon the inherent imprecision of many of the Convention rights and the possible consequential lack of legal certainty as to whether particular provisions are Convention compliant in order to argue that doubtful legislation is, in fact, compatible. Arguably, this occurred in relation to the Regulation of Investigatory Powers Act 2000, the Terrorism Act 2000 and the Anti-Terrorism, Crime and Security Act 2001, all of which contain draconian powers of interference with Convention rights. Such cases of ambiguity may be dealt with by judges under the interpretative rule in s 3 of the HRA, to which we shall turn in a moment. However, the introduction of legislation which would very clearly have the effect of eroding Convention rights will become politically much more difficult. However, there is nothing to stop Parliament repealing s 19 itself.

Legislation which is of doubtful compatibility with the ECHR may be prevented from impliedly repealing the protected rights by virtue of s 3(1). This strongly worded section instructs the courts that in interpreting both previous and future legislation so far as is possible, they must read and give effect to it in such a way as to make it consistent with the Convention rights. This amounts to a form of protection which may be as

strong as judges care to make it although, of course, s 3 could in future be expressly repealed or modified. Just how much protection can be afforded by such an approach can be illustrated by reference to the stance judges have taken in relation to the protection of EC law from implied repeal. The equivalent provision to s 3 of the HRA is s 2(4) of the European Communities Act 1972, which reads as follows: '…any enactment passed or to be passed…shall be construed and have effect subject to the foregoing provisions of this section.' The words 'subject to' appear to suggest that the courts must allow Community law to prevail over a subsequent Act of Parliament.[1] The 'foregoing provisions' are those of s 2(1), importing Community law into national law.

The House of Lords in *Pickstone v Freemans* (1988) found that domestic legislation—the Equal Pay (Amendment) Regulations—made under s 2(2) of the European Communities Act appeared to be inconsistent with Art 141 (ex 119). It held that despite this apparent conflict, a purposive interpretation of the domestic legislation would be adopted; in other words, the plain meaning of the provision in question would be ignored and an interpretation would be foisted upon it which was not in conflict with Art 141. This was done on the basis that Parliament must have intended to fulfil its EC obligations in passing the Amendment Regulations once it had been forced to do so by the European Court of Justice.[2] The House of Lords followed a similar approach in *Litster v Forth Dry Dock Engineering* (1989). These decisions provide authority for the proposition that Parliament cannot by plain words impliedly depart from the provisions of European Communities law (except by repealing part or all of the European Communities Act 1972). Probably, it could do so only by stating expressly that it was so acting. In *Macarthy's Ltd v Smith* (1981), Lord Denning accepted that an express provision that the instrument in question should prevail over inconsistent Community law would be obeyed. Clearly, such a ruling involves a departure from the rule (deriving from the *dicta* of Maughan LJ in *Ellen Street Estates Ltd v Minister of Health* (1934)) that Parliament cannot bind itself as to the form of future enactments. Thus, partial entrenchment of s 2(1) of the 1972 Act has occurred.

There are some signs that this approach is indeed being followed, at least in some of the cases under the HRA. The House of Lords' decision in *A* (2001) concerned the interpretation to be given to s 41 of the Youth Justice and Criminal Evidence Act 1999, which forbade any evidence to be given in a rape trial of the woman's sexual history, including any previous sexual history with the alleged rapist, except in very limited circumstances. This was thought to raise an issue of compatibility with Art 6 of the ECHR which provides, *inter alia,* that: 'In the determination of…any criminal charge against him, everyone is entitled to a fair and

public hearing within a reasonable time by an independent and impartial tribunal established by law.' Lords Steyn and Hutton were prepared to hold that given the very strong wording of s 3(1) and *Pepper v Hart* (1992) statements in Parliament to the effect that declarations of incompatibility (indicating that the attempt to ensure compatibility using s 3(1) had failed) were to be a remedy of last resort, the only way in which Parliament could legislate contrary to a Convention right would be by 'a clear limitation on Convention rights… stated in terms'. This approach led them simply to read into the relevant part of s 41 words which were not there, namely, that evidence was to be admitted where that was necessary to achieve a fair trial. It may be noted that Lord Hope, in contrast, considered that this approach went too far, crossing the line from interpretation to legislating. He considered, in what is certainly the more usual understanding of the word 'interpreting', that the judge's task was limited to identifying specific words which would otherwise lead to incompatibility and then re-interpreting those words, clearly not something which Lords Steyn and Hutton—and for that matter Lord Slynn—undertook. Lord Hope's approach arguably found more support from the House of Lords in *Re W and B* (2002), in which their Lordships emphasised the importance of not stepping over the boundary from statutory interpretation to 'statutory amendment'. It is too early to say what will be the general approach taken to s 3, since the House of Lords has arguably sent out conflicting signals in the above two decisions. Nevertheless, if the approach in *A* is followed in even some areas of rights protection, the result will be that Parliament has, through s 3(1), succeeded in imposing a requirement of express words upon such of its successors that wish to legislate incompatibly with the Convention rights.

It should be noted, however, that the parallel with EC law must be treated with caution. In 1972, the UK was signing up to a legal order in which the supremacy of EC law had already been firmly established by the European Court of Justice (ECJ) (for example, in *Costa v ENEL* (1964)) and was arguably necessary if the purposes of the Community were to be achieved. No such situation applies in relation to the European Convention, and indeed the White Paper expressly disclaims any such comparison (para 2.12). In practice, many judges may not be prepared to go as far to protect the Convention as they have to protect the law of the Community; furthermore, it may well be a number of years before any consistent approach, approved at House of Lords level, emerges. Even if a *Litster*-style approach were to be generally adopted, the courts would at least occasionally be bound to come across provisions which are not capable of a compatible construction. In such a case, the incompatible statute would have to stand: the HRA expressly seeks to preclude judges

from taking the further radical step of disapplying incompatible statutes, the step taken in the EC context in the case of *Secretary of State for Transport ex p Factortame (No 2)* (1991). Depending then upon the approach of the judiciary, the incorporated ECHR may turn out to be at least partly protected from implied repeal, while its express repeal—amounting as it would to an open breach of a Treaty and of international law—has always been most unlikely. The HRA may therefore, contrary to the assertion in the question, be said to endow the Convention rights with at least the *potential* for some protection against future repeal, though the Act appears to rule out expressly the wholesale suspension of implied repeal engineered in the area of EC law.

Although this is not an issue in relation to the HRA, there is, finally, the possibility that a future Bill of Rights could be given substantial procedural protection from repeal. Constitutions throughout the world adopt a number of different forms of entrenchment of codes of rights. The constitution of the USA can be amended only by a proposal which has been agreed by two-thirds of each House of Congress or by a convention summoned by Congress at the request of two-thirds of the States. The proposed amendment must then be ratified by three-quarters of the States' legislatures. The amendment procedure itself—Art V of the Constitution—can be amended only by the same method.

It is generally thought that if a Bill of Rights for the UK were enacted containing a provision that it could not be repealed except in accordance with some such procedure, the courts would not give effect to it. However, De Smith suggests that Parliament could redefine itself so as to preclude itself as ordinarily constituted from legislating on a certain matter. The argument is based on the redefinition of Parliament under the Parliament Acts of 1911 and 1949: if Parliament could make it easier for itself to legislate on certain matters, equally, it could make it harder, thereby entrenching certain legislation. However, this analogy has come under attack from Munro (*Studies in Constitutional Law,* 1987) on the ground that the Parliament Act procedure introduces no limitation on parliamentary sovereignty. The only authorities which would support this proposition come from other constitutions; in *AG for New South Wales v Trethowan* (1932), the Privy Council upheld the requirement of a referendum before a Bill to abolish the Upper House was presented for the royal assent. Although, as De Smith argues, this decision may be of limited application as involving a non-sovereign legislature, it does suggest that a class of legislation exists for which it may be appropriate to delineate the manner and form of any subsequent amendment or repeal. The South African case of *Harris v Minister of the Interior* (1951) is to similar effect. Thus, the point cannot be regarded as settled.

Therefore, a proposal that the Bill of Rights be fully entrenched would be constitutionally controversial and probably impossible without a written constitution. However, is it clear that the Bill of Rights could be entrenched within a written constitution? Dicey considered that it would be untenable to espouse 'the strange dogma, sometimes put forward, that a sovereign power such as the Parliament of the UK can never by its own act divest itself of authority' (*An Introduction to the Study of the Law of the Constitution*, 10th edn, 1959, p 68). On this view, judges would accept the new constitutional settlement; possibly, the Judges' Oath should also be amended so that they owed allegiance to the new settlement as opposed to a subsequent statute.[3]

Notes

1 It had been thought that membership of the Community did not represent any surrender of sovereignty: Lord Gardiner said in 1969: There is, in theory, no constitutional means available to us to make it certain that no future Parliament would enact legislation in conflict with Community law' (HL Deb, Cols 1202–04, 8 May 1969).

2 It could be noted that the Court of Appeal in *Pickstone v Freemans* (1988) went further: it treated Art 141 as having more authority than the Equal Pay (Amendment) Regulations and made a ruling consistent with Art 141.

3 A further possibility could be examined: the appointment of a body charged with the duty to apprise Parliament of the possibility that a particular provision of a Bill might conflict with the Bill of Rights could be joined with any of the forms of protection mentioned above. The body could be comprised of a mixture of judicial and administrative representatives and would act in an advisory capacity to Parliament, Such an institution would by no means ensure that the difficulties mentioned above would not arise, but it might be valuable as a means of alerting the judiciary and others outside Parliament to the possibility that a conflicting provision was to be passed.

Question 7

In March 2001, Parliament passes the Parental Leave Act, s 1 of which provides that men or women are entitled to five months' parental leave on 80% of full pay after the birth of their baby. Section 2 provides that any employer who fails to provide the said parental leave shall be liable in damages which shall be equivalent to the salary which would have been paid. Section 3 provides that no Bill to amend or repeal the Act shall be laid before Parliament, unless the Equal Opportunities Commission (EOC) has approved the changes.

In 2002, a European Community Regulation is passed allowing men and women equal access to parental leave and making provision that an employer who refuses to grant such leave will be liable in damages.

In 2003, a Bill amending s 1 of the Parental Leave Act 2001, with the effect that men are no longer entitled to parental leave, is laid before Parliament without the approval of the EOC, and is enacted as the Parental Leave Amendment Act 2003.

Advise Mr B, who asks for parental leave in 2004 but is refused it by his employer. How would your answer differ if the fictitious Community legislation passed in 2002 was a directive which, in 2003, remained un implemented after the time limit for its implementation had expired?

Answer plan

A problem question is commonly set in this area which will usually involve conflict between two statutes, thereby requiring discussion of the doctrine of implied repeal. It will often also involve conflict between domestic law passed subsequently to directly enforceable European Community law. This question also brings in issues of indirect effect and the *Francovich* principle.

Essentially, the following matters should be considered:

- an explanation of the traditional doctrine of implied repeal;
- a possible authority for departure from the doctrine: *AG for New South Wales v Trethowan* (1932);
- a conclusion as to the lack of redress available to Mr B under domestic law;
- the effect of s 2(4) of the European Communities Act 1972;
- the partial entrenchment of s 2(1) of the European Communities Act: *Macarthy's v Smith* (1981) and *Secretary of State for Transport ex p Factortame (No 2)* (1991);
- the availability of redress for Mr B under Community law;
- the alternative scenario of the unimplemented directive—indirect effect and *Francovich*.

Answer

In addressing this question, Mr B's position under domestic law will be considered first before examining the relevance of the 2002 EC Regulation.

Under the traditional doctrine of parliamentary sovereignty, Parliament is competent to legislate on any matter whatsoever and no court is competent to question the validity of an Act of Parliament. This lack of legal restraint has both a positive and a negative aspect. It means that while Parliament can legislate on any subject, it cannot bind successive Parliaments. If it could, then clearly each successive Parliament would not be free to legislate on any matter. That aspect of sovereignty means that where there is inconsistency between a previous and a subsequent statute, the latter impliedly repeals the former to the extent of its inconsistency. Authority for this proposition derives from *Ellen Street Estates Ltd v Minister of Health* (1934), in which it was argued that the Acquisition of Land (Assessment of Compensation) Act 1919 prescribed a certain manner for authorising the acquisition of land. It provided in s 7 that other statutes 'shall have effect subject to this Act'. If s 7 applied to subsequent enactments, provisions of the Housing Act 1925 which were inconsistent with the 1919 Act would have no effect. However, Maughan LJ held that Parliament cannot bind itself as to the substance or form of future enactments.

If a court was prepared to consider whether Parliament had consulted the EOC, this would breach 'the enrolled Bill rule' expressed in *Edinburgh and Dalkeith Railway Co v Wauchope* (1842). The court was asked to find that the legislation in question, a Private Act, had been improperly passed and was therefore invalid because Standing Orders had not been complied with. Lord Campbell said, *obiter,* that if according to the Parliament Roll, an Act has passed both Houses of Parliament and has received the royal assent, a court can inquire neither into the manner in which it was introduced into Parliament nor into what passed in Parliament during its progress through the various parliamentary stages. This rule was relied upon in *Pickin v British Railways Board* (1974): Mr Pickin had sought to challenge a Private Act of 1836 on the basis that Parliament had been misled by fraud. The House of Lords held that he was not entitled to examine proceedings in Parliament to show that the Act had been passed due to fraud. That action therefore failed.

In the instant case, the 2003 Act expressly repeals s 1 of the 2001 Act and therefore, on the face of it, Mr B can claim no redress. Section 3 of the 2001 Act has not, however, been repealed and it could therefore be argued that the later Act is invalid as, in passing it, Parliament did not follow the correct consultative procedure as laid down in s 3. However, the doctrine of implied repeal set out above and, in particular, the *dicta* of Maughan LJ in *Ellen Street Estates v Minister of Health* would suggest that s 3 of the 2001 Act

is impliedly repealed as inconsistent with the expression of Parliament's will in the 2003 Act.

Is there any authority on which Mr B could rely in order to escape the conclusion that the 2003 Act, although not enacted in accordance with s 3 of the 2001 Act, will nevertheless be followed? If any can be found, he could rely on s 1 of the 2001 Act in order to claim leave or damages from his employer. In *AG for New South Wales v Trethowan* (1932), the Privy Council upheld the statutory requirement of a referendum before two Bills could be presented for the royal assent. Although, as De Smith argues, this decision may be of limited application as involving a non-sovereign legislature (a view in accordance with that of Lord Evershed MR in *Harper v Home Secretary* (1955)), it does suggest that a class of legislation *may* exist for which it may be appropriate to delineate the manner or form of any subsequent amendment or repeal. For example, s 1 of the Northern Ireland Act 1998 provides that Northern Ireland will not cease to be part of Her Majesty's dominions without conducting a poll in Northern Ireland. If a future Act of Parliament purported to revoke this guarantee without first conducting a poll in Northern Ireland, it is at least arguable that the courts would hold the later statute to be invalid, as occurred in the South African case of *Harris v Minister of the Interior* (1951) (this view is put forward by Jo well and Oliver in *The Changing Constitution,* 1994). It also receives some support from Slade LJ in *Manuel v AG* (1983), although he did not finally resolve the issue. In a Canadian case, *Drybones* (1970), the Canadian Supreme Court took the view, *obiter,* that it had the power to render inoperative statutes passed after the Bill of Rights 1960 which were incompatible with it.

However, these decisions are of doubtful persuasive authority when the attempt is made to apply them in the British constitutional context. In *Harris,* for example, the wording of the Speaker's certificate on the face of the instrument in question indicated that the specially prescribed procedure had not been followed; moreover, the ruling did not encompass the legal effect of a self-imposed procedural requirement.[1] It may, therefore, be determined that the weight of authority is against upholding a requirement that Parliament cannot legislate without first complying with a procedural requirement such as that laid down by s 3 of the 2001 Act. Therefore, under the doctrine of implied repeal, the 2003 Act will prevail; under domestic law, Mr B cannot seek redress from his employer. However, in 2002, the EC passed the regulation allowing men or women parental leave. Can Mr B rely on that regulation despite the 2003 Act?

Under s 2(4) of the European Communities Act 1972, 'any enactment passed or to be passed…shall be construed and have effect subject to the foregoing provisions of this section'. The words 'subject to' appear to suggest that the courts must allow Community law to prevail over a subsequent Act

of Parliament. '[T]he foregoing' are those provisions referred to in s 2(1) giving the force of law to 'the enforceable Community rights' there defined. Section 3(1) provides that questions as to the meaning or effect of Community law are to be determined 'in accordance with the principles laid down by any relevant decision of the European Court'. Under Art 249 of the EC Treaty, regulations have direct applicability and are binding on all Member States without requiring implementation or adoption by national law. It is clear from judgments of the European Court of Justice (ECJ) (see *Costa v ENEL* (1964) and *Amministrazione delle Finanze dello State v Simmenthal SpA* (1978)) that Community law should prevail over national law in all circumstances. Thus, on the face of it, Mr B can rely on the 2002 Regulation. It does not matter that he is seeking to rely upon it in an action against a private body, his employer: regulations, unlike directives, have horizontal as well as vertical effect. However, there is clearly a direct conflict between it and the subsequent 2003 Act and, according to the doctrine of implied repeal, the 2003 Act should take precedence over the former instrument. When a conflict has arisen between Community law and a subsequent domestic enactment, the UK courts have where possible adopted what has been termed a 'purposive' approach. In *Pickstone v Freemans* (1988), the House of Lords determined that the plain meaning of the domestic provision in question would be ignored and an interpretation would be placed upon it which avoided a conflict with Art 141 (ex 119) of the EC Treaty. However, there seems to be no means of resolving the conflict between the 2003 Act and the 2002 Regulation in this manner due to their complete incompatibility.[2]

In such a situation, it now seems to be clear, following the decision in *Secretary of State for Transport ex p Factortame Ltd (No 2)* (1991), that the incompatible UK legislation should be set aside, or 'disapplied'. The House of Lords initially determined that as a matter of UK law, no domestic court had power to make an order conferring rights upon the applicants which were directly contrary to UK legislation. However, following a reference to the ECJ, the House of Lords accepted that the Community now imposes the requirement, accepted by Parliament when it passed the 1972 Act, that EC law should override inconsistent domestic legislation, whenever passed. It therefore made an order 'disapplying' the incompatible legislation.[3] In *Secretary of State for Employment ex p EOC* (1994), the House of Lords followed *Factortame* in finding that judicial review was available for the purpose of securing a declaration that UK primary legislation is incompatible with EC law. It was found that certain provisions of the Employment Protection (Consolidation) Act 1978 were indirectly discriminatory and were, therefore, in breach of Art 141 (ex 119) and the Equal Pay and Equal Treatment Directives.

It might appear to follow from *Factortame* and the EOC case that Parliament has effectively succeeded in partially entrenching s 2(1) of the

European Communities Act by means of s 2(4), due to the imposition of a requirement of form (express words) on future legislation designed to override Community law. Thus, as no express words are used in the 2003 Act (such as 'these provisions are intended to take effect notwithstanding any contrary provision of Community law') and assuming that on a straightforward interpretation of its provisions, the meaning of the 2002 Regulation is clear, it would seem that it will prevail over the 2003 Act. If so, it will be the duty of the domestic court to give it effect according to the above decisions.

If the meaning of the 2002 Regulation is not sufficiently clear, a reference might be made to the ECJ under Art 234 in order to determine its effect. If so, it would appear that the Court would clearly rule in favour of the primacy of Community law relying on *Simmenthal SpA* and the ruling of the ECJ on the substantive issue in the *Factortame* litigation: *Secretary of State for Transport ex p Factortame (No 3)* (1992); the only question to be determined would be the correct interpretation of the regulation. This question cannot be finally resolved without examining the provisions of the 2002 Regulation; however, on the face of it, the result would be in favour of the applicant.

It therefore appears that Mr B may rely upon the 2002 Regulation to claim redress from his employer either immediately before the domestic courts or after an Art 234 reference to the ECJ.

In the alternative situation, the 2002 European legislation was not a regulation, but a directive which was not implemented within the time limit laid down. The key difference here is that the ECJ has made clear that directives, unlike regulations, do not have horizontal effect, that is, they do not give individuals enforceable Community law rights against other private bodies, but only against emanations of the State (*Marshall v Southampton and South West Hampshire Area Health Authority* (1986)). Thus, in the instant case, Mr B would be given no directly effective rights against his employer. Both the ECJ and the UK courts have made clear that incompatible national legislation is not overridden by indirectly effective directives: the obligation in such cases is only to *construe* any relevant national legislation so as to conform with the effect of the directive, where this is possible (*Faccini Dori v Recreb* (1994) and *Webb v Emo Cargo* (1993)). The ECJ in *Faccini* made it plain that the earlier decision in *Marleasing* should not be interpreted to mean that national courts had to give effect to indirectly effective directives regardless of the terms of the national legislation, an interpretation which would, as Hartley points out, have created 'horizontal direct effect under another name' (*The Foundations of European Community Law,* 4th edn, 1998, p 213). In this case, plainly, the 2003 Act is not capable of being construed into conformity with the 2002 directive, so the court would doubtless give effect to the later domestic instrument.

However, a further possibility remains for Mr B, namely, an action for damages against the UK government for failure to implement the 2002 directive and the consequent failure to endow him with the rights against his employer to which he was entitled under EC law. The basis for such an action was set out in the case of *Francovich v Italy* (1991). Space precludes detailed examination of *Francovich* liability, but the basic tests which the application must satisfy, as clarified by subsequent case law, are as follows: the directive must have been intended to confer identifiable rights on the individual concerned; the State must have committed a 'sufficiently serious' breach of EC law; and there must be a direct link between this breach and the damage suffered by the applicant. The wording of the Parental Leave Directive is not specified, but if, as seems likely, it clearly stated that it was intended to give employees a right to parental leave for five months, it would satisfy the first test. With respect to the second test, the breach of EC law here is the failure of the UK to implement the directive and the subsequent introduction of clearly incompatible domestic legislation. The ECJ has made it clear that wholesale failure to transpose a directive into domestic law will almost invariably amount to a 'sufficiently serious breach'; the passing of the clearly incompatible Act of 2003 would make such a finding a certainty. Finally, Mr B's loss satisfies the causality test: had the directive been implemented, he would have been given the right to damages against his employer; the failure to do so has directly caused him the loss of his ability to sue for damages, which it seems he would clearly have recovered. Mr B should therefore be able to recover damages against the UK government under the *Francovich* principle.

Notes

1 The views of academic writers on this issue could be considered at this point: Sir Ivor Jennings argues (*Constitutional Laws of the Commonwealth*, 1957) that a requirement to seek the approval of some outside body would constitute a change in the composition of Parliament and so be binding on the legislature. O Hood Phillips (*Constitutional and Administrative Law*, 7th edn, 1987, Chapter 4) attacks this view on the basis that it would lead to an absurdity, as all the elements constituting Parliament would have to be summoned to Westminster to deliberate, vote and hear the royal assent.

2 The House of Lords felt able to adopt this approach because the regulations in question had been adopted with the express intention of giving effect to Community law. In the instant case, this argument could not be used. Thus, *Pickstone* may be of no assistance. In *Garland v British Rail Engineering* (1983), the House of Lords adopted what has been termed a 'rule of construction' approach to s 2(4) in the context of a conflict similar to that in the instant case. Lord Diplock suggested (without resolving the issue) that even where the words of the

domestic law were incompatible with the Community law in question, they should be construed so as to comply with it. This argument could be considered at this point as a means of avoiding a conflict with domestic law which would provide Mr B with the relief he seeks.

3 The UK courts appear to have left open the possibility that a UK court might refuse to give effect to words expressly demonstrating an intention to legislate contrary to EC law.

Question 8

Article 141 of the Treaty of Rome provides: 'Each Member State shall, during the first stage, ensure and, subsequently, maintain the application of the principle that men and women should receive equal pay for equal work.'

In 2004, the UK government takes the view that the principle of equal pay for work of equal value is inappropriate in a free market economy and that, therefore, severe restrictions should be placed upon the ability to bring an equal value claim. The Equal Pay Amendment Bill 2004 is therefore laid before Parliament and duly passed as the Equal Pay Amendment Act 2004. Section 1 of the 2004 Act provides: 'In sub-s (2) of s 1 of the Equal Pay Act 1970 [equality clauses to be implied into contracts of employment], after the words "of equal value to that of a man in the same employment", there shall be inserted the following words: "and the claimant has been in the same employment for a minimum of five years".' Section 2 provides: 'It is hereby declared that in the event of a conflict between any provision of EC law and the provisions of this Act, the provisions of this Act shall prevail.'

(a) Would a UK judge give primacy to UK law if faced with a claimant employed for less than five years who wished to bring an equal value claim against her employer?
(b) Would it make any difference to your answer if Art 141 was not directly effective in UK law?

(Note: you are not asked to decide the likely outcome of the case or to consider the other provisions of the Equal Pay Act 1970.)

Answer plan

A problem question in this area usually concentrates on the issue of conflict between a post-accession domestic instrument and previous directly effective Community law. The first part of this question consists of the type of question which is commonly set; it concerns the most direct conflict possible between Community law and domestic law, and is quite straightforward. It turns on the question of whether or not Community law is subject to the rule of express repeal. The second part concerning the issues raised by the concept of indirect effect is more demanding. However, it raises a very important constitutional issue which is likely to appear more frequently on constitutional law papers in future: the extent to which UK judges can and will implement an indirectly effective instrument through the vehicle of domestic legislation, regardless of the wording of the domestic instrument in question.

Essentially, the following matters should be considered:

(a)

- s 2(1) and (4) of the European Communities Act 1972;
- the traditional doctrine of parliamentary sovereignty;
- the primacy of Community law: *Costa v ENEL* (1964);
- Art 141: direct effect;
- the purposive approach to domestic legislation supposed to implement Community law;
- the probable attitude of the UK courts to s 2 of the 2004 Act: *Macarthy's v Smith* (1981); *Garland v British Rail Engineering Ltd* (1983); *Secretary of State for Transport ex p Factortame (No 2)* (1991).

(b)

- is the doctrine of the primacy of Community law inapplicable to indirectly effective instruments?;
- *Litster* (1989): a domestic court must construe domestic legislation contrary to its *prima facie* meaning so as to implement the directive fully;
- *Marleasing* (1990), as interpreted by *Faccini Dori* (1994): the obligation on domestic courts to construe national law so far as possible as to conform with directives;
- conclusion: UK courts would give effect to s 2 of the 2004 Act.

Answer

(a)

Community Treaties and other Community law capable of having direct effect in the UK were given such effect by s 2(1) of the European Communities Act 1972. Section 2(4) provides that: '…any enactment passed or to be passed…shall be construed and have effect subject to the foregoing provisions of this section.' The words 'subject to' appear to suggest that the courts must allow Community law to prevail over a subsequent Act of Parliament. '[T]he foregoing' are those provisions referred to in s 2(1) giving the force of law to 'the enforceable Community rights' there defined. Section 3(1) provides that questions as to the meaning or effect of Community law are to be determined 'in accordance with the principles laid down by any relevant decision of the European Court'.

However, under the traditional doctrine of parliamentary sovereignty, Parliament is competent to legislate on any matter whatsoever and no court is competent to question the validity of an Act of Parliament. This lack of legal restraint means that while Parliament can legislate on any subject and is free to amend or repeal any previous enactment, it cannot bind successive Parliaments. It follows that where there is inconsistency between a subsequent and a former statute, the later statute impliedly repeals the former to the extent of its inconsistency. Authority for this proposition derives from *Ellen Street Estates Ltd v Minister of Health* (1934) and *Vauxhall Estates Ltd v Liverpool Corp* (1932).

On the other hand, s 2(4) of the 1972 Act and the Community doctrine of the primacy of EC law flowing from the Treaty and from judgments of the European Court of Justice (ECJ) (see *Costa v ENEL* (1964)) require that Community law should prevail over national law. In *Amministrazione delle Finanze dello Stato v Simmenthal SpA* (1978), it was held that conflict between provisions of national law and directly applicable Community law must be resolved by rendering the national law inapplicable, and that any national provision or practice withholding from a national court the jurisdiction to apply Community law even temporarily was incompatible with the requirements of Community law. Furthermore, the ECJ made it clear in *Costa v ENEL* (1964) that Community law would prevail over both subsequent and previous domestic law. Thus, s 2(4) of the 1972 Act appears to import a departure from the traditional doctrine of parliamentary sovereignty, in that a limitation as to the subject matter of future legislation seems to have occurred.

In the instant case, it would seem clear, therefore, that under s 2(4) of the 1972 Act and in accordance with the doctrine of the primacy of Community

law, s 1(2) of the Equal Pay Act 1970 as amended by the 2004 Act should take effect subject to Art 141, assuming that Art 141 is directly applicable in national law. It is clear from the ruling of the ECJ in *Defrenne v Sabena* (1975) that Art 141 is directly effective.[1] Therefore, on this basis, it would appear that the claimant would not be barred from proceeding: s 2 of the 2004 Act would be ineffective due to the doctrine of the primacy of EC law and therefore Art 141 would render ineffective the provisions of s 1(2) of the Equal Pay Act 1970 as amended by the 2004 Act. In other words, the claimant would purport to bring a claim under the Equal Pay Act which would then be barred due to the operation of s 1(2) as amended; she could then rely on Art 141.

Of course, under the traditional doctrine of express and implied repeal, the contrary result would be achieved. Since the 2004 Act is the later instrument, s 2(4) of the 1972 Act would be repealed to the extent of its inconsistency with s 2 of the 2004 Act, and Art 141 would take effect subject to s 1(2) of the 1970 Act as amended. However, the UK courts have, with some reluctance, accepted that the traditional understanding of parliamentary sovereignty has had to undergo a modification to deal with the implications of the UK's membership of the EC. When a conflict has arisen between Community law and a subsequent domestic enactment, the UK courts have, where possible, adopted what has been termed a 'purposive' approach. In *Pickstone v Freemans* (1988), the House of Lords determined that the plain meaning of the domestic provision in question would be ignored and an interpretation would be imposed upon it which avoided a conflict with Art 141 of the EC Treaty. Similarly, in *Litster v Forth Dry Dock and Engineering Co Ltd* (1989), the House of Lords interpreted certain UK regulations so as to give them the meaning required by the EC directive they purported to implement.

In the instant case, however, the object of s 1(2) of the 1970 Act as amended is clearly incompatible with the object of Art 141 which is to remove pay discrimination. Thus, it would seem impossible to interpret it in any way which could render it compatible with Art 141. Moreover, both *Litster* and *Pickstone* were concerned with inadequate implementation of a directive: the courts could claim to be fulfilling Parliament's will by adopting a purposive as opposed to a literal interpretation in order to ensure that the provision in question did the job it was intended to do. In the instant case, it is clear that the courts could not make such a claim, first, because the 2004 Act was not passed in order to implement a directive and, secondly, because Parliament's will is clearly expressed to be at variance with Community law in s 2 of the Act.

Had s 2 been omitted from the 2004 Act, *dicta* of Lord Denning in *Macarthy's v Smith* (1981) might have provided a means of resolving the conflict between s 1(2) of the 1970 Act as amended and Art 141:

> …we are entitled to look to the Treaty…not only as an aid but as an overriding force. If our legislation…is inconsistent with Community law… then it is our bounden duty to give priority to Community law.

However, he added:

> If…our Parliament deliberately passes an Act with the intention of repudiating the Treaty or any provision in it—or intentionally acting inconsistently with it—then I should have thought that it would be the duty of our courts to follow the statute.

In other words, the proposition put forward by Lord Denning was to the effect that s 2(4) of the European Communities Act had brought about a variant of the rules of implied repeal but that the rules of express repeal still applied. On this basis, in the instant case, the domestic court would have to apply s 1(2) of the 1970 Act as amended due to the express intention of s 2 of the 2004 Act to legislate contrary to Community law. This receives some support from *Garland v British Rail Engineering Ltd* (1983).[2]

However, in *Secretary of State for Transport ex p Factortame* (1990), the House of Lords and the Court of Appeal may have gone further than Lord Denning in accepting that Community law might impose requirements which would override domestic law. In the Court of Appeal, Bingham LJ said that, where the law of the Community is clear (as arguably it was not in the instant case):

> ... whether as a result of a ruling given on an Art 177 [now 234] reference or as a result of previous jurisprudence or on a straightforward interpretation of Community instruments, the duty of the national court is to give effect to it in all circumstances… To that extent, a UK statute is not as inviolable as it once was.

Therefore, once a ruling from the European Court had been obtained, Lord Bingham held that the Divisional Court would have to apply it even though this involved 'disapplying' an Act of Parliament. He did not expressly enter the caveat that effect would have to be given to express words used in the Merchant Shipping Act 1988 declaring that its provisions should prevail over those of Community law, although he did state: '…any rule of domestic law which prevented the court from giving effect to directly enforceable rights established in Community law would be bad.'

Once the ruling by the ECJ on the issue of interim relief *was* obtained (*Factortame Ltd v Secretary of State for Transport* (1990) (ECJ)), the House of Lords applied it (*ex p Factortame (No 2)* (1991)). Thus, the issue of attempted express repeal of EC law was not clearly determined (any findings would

have been *obiter* in any event), and therefore it is not certain what a UK court would do if faced with a provision such as s 2 of the 2004 Act. In *Secretary of State for Employment ex p EOC* (1994), the House of Lords followed *Factortame* in finding that judicial review was available for the purpose of securing a declaration that UK primary legislation is incompatible with EC law. It was found that certain provisions of the Employment Protection (Consolidation) Act 1978 were indirectly discriminatory and were therefore in breach of Art 141 (ex 119) and the Equal Pay and Equal Treatment Directives.

However, it is at least arguable after *Factortame* that partial entrenchment of s 2(1) of the 1972 Act has been brought about on the basis of a requirement of manner rather than form: if a UK statute is to override Community law, s 2(4) (and, perhaps, s 3(1)) of the European Communities Act must first be repealed. On this argument, it seems that the judge in the instant case would ignore the express intention of Parliament and would refuse to give effect to s 2 of the 2004 Act. The claim would therefore be considered under Art 141, as opposed to s 2(1) of the Equal Pay Act as amended by the 2004 Act.

This conclusion cannot, however, be drawn with any certainty: a court would probably baulk at the constitutional enormity of ignoring such a clear expression of Parliament's will; it would therefore attempt to distinguish the instant case from *Factortame*. It would be possible to do so on the basis that there was some uncertainty as to compatibility between the Merchant Shipping Act 1988 and provisions of Community law and, therefore, it need not be assumed that Parliament intended to legislate contrary to Community law. The UK courts were therefore merely accepting that an outcome should be avoided which would be contrary to Parliament's presumed intention. In the instant case, where Parliament's intention is completely clear, the court might feel itself bound to give effect to it. Such an outcome would arguably be contrary to Lord Bingham's remarks; however, they would not be binding as they were *obiter*. On this argument, the court would not allow the claimant to rely on Art 141 and would consider the claim under the 2004 Act (in which case, it would fail). Alternatively, the court might seek a ruling from the ECJ as to how it should respond to such a dilemma.

(b)

In answering this question, it will be assumed that Art 141 can be treated as though it were an indirectly effective directive. If Art 141 were not directly effective, it would seem from *Duke v GEC Reliance Ltd* (1988) that it would not be given primacy over domestic law; the House of Lords held that s 2(4) of the 1972 Act applied only to directly effective law. However, in *Litster v Forth*

Dry Docks Ltd (1989), the House of Lords (without referring to *Duke v GEC*) determined that even where EC law is not directly effective, priority for EC law should be ensured by means of national law. The House of Lords was prepared to construe the domestic legislation contrary to its *prima facie* meaning, because it had been introduced expressly to implement the directive in question.

However, in the instant case, the 2004 Act has been introduced explicitly in order to depart from Community law. In *Kolpinghuis Nijmegen* (1986), the ECJ held that the obligation on domestic courts to interpret national law to comply with EC law was limited by the general principles of legal certainty and non-retroactivity.[3] At one point, it seemed as if the ruling in *Marleasing SA v La Commercial Internacional de Alimentation SA* (1990) required domestic courts, faced with legislation which ran directly counter to the terms of an indirectly effective directive, to give effect to the directive regardless of the terms of the national legislation. However, in *Faccini Dori v Recreb* (1994), the ECJ made it clear (at para 26) that the obligation on the domestic court was only to ensure such compatibility where the wording of the national law made this possible. The House of Lords in *Webb v Emo Cargo* (1993) had made it clear that for its part, it could not accept the absolutist interpretation of *Marleasing*. In the instant case, if the court bore in mind *Duke v GEC* and the need for legal certainty, the decision might be influenced by the legitimate expectation of the claimant's employer (arising from s 1(2) of the Equal Pay Act as amended by the 2004 Act) that no action could be brought by the claimant until she had been employed by him for five years; if so, the court would refuse to give Art 141 primacy and would give effect, instead, to the 2004 Act. Such an outcome would be in conformity with the *Faccini Dori* position, since it is clearly not possible to construe the 2004 Act into conformity with Art 141.

Notes

1 It may be noted that Art 141 is both horizontally and vertically effective; in other words, although it is addressed to States, it is directly applicable against individuals and against State bodies. Therefore, in the case for consideration, it would be irrelevant that the judge was faced with a claimant bringing a claim against a private employer as opposed to an emanation of the State: the same issues in respect of Community law would arise in either case.

2 Lord Diplock suggested in *Garland v British Rail Engineering Ltd* (1983) that national courts must strive to make domestic law conform to Community law however wide a departure from the *prima facie* meaning may be needed to achieve consistency'. However, he added that they should do so only while it appeared that Parliament wished to comply with EC law.

3 This ruling was seen as creating an exception to what is known as the *Van Colson* principle that domestic courts must (in accordance with Art 10 of the EC Treaty) interpret national law in such a way as to ensure that the objectives of directives are achieved.

Question 9

How far has the principle of parliamentary sovereignty survived the *Factortame* litigation?

Answer plan

The *Factortame* litigation is a popular subject for examiners and, therefore, a question on these lines is commonly set. Such a question is reasonably straightforward, assuming that the examinee is familiar with the convoluted *Factortame* saga.

Essentially, the following matters should be considered:

- the traditional doctrine of parliamentary sovereignty;
- s 2(1) and (4) of the European Communities Act 1972: the primacy of Community law (*Costa v ENEL* (1964));
- the implications of *Secretary of State for Transport ex p Factortame* (1990) (ECJ): the issue of interim relief; the doctrine of express repeal;
- *Secretary of State for Transport ex p Factortame Ltd and Others (No 2)* (1991): the substantive issue;
- conclusion: sovereignty in abeyance.

Answer

The doctrine of parliamentary sovereignty as explained by Dicey means that Parliament has the right to make, unmake or amend any Act of Parliament, and that such power is not open to challenge by any outside body. Since 1688, the doctrine of the supremacy of Parliament has developed to the stage when, in *Pickin v British Railways Board* (1974), it appeared clearly settled that the notion of finding an Act of Parliament invalid could be said to be obsolete. This lack of legal restraint has both a positive and a negative aspect. It means that while Parliament can legislate on any subject, it cannot bind successive Parliaments. If it could, then clearly each successive Parliament would not be free to legislate on any

matter. Thus, where there is inconsistency between a subsequent and a former statute, the later statute impliedly repeals the earlier one to the extent of its inconsistency. Authority for this proposition derives from *Ellen Street Estates Ltd v Minister of Health* (1934).

However, a qualification to the rule deriving from *Pickin* must be introduced due to the UK's membership of the EC. As the UK is a dualist State, Community law had to be given effect by domestic legislation. This was achieved by the European Communities Act 1972 which, by s 2(1), incorporated all existing Community law capable of having direct effect into UK law. No express declaration of the supremacy of Community law is contained in the Act; the words intended to achieve this are contained in s 2(4) of the Act 1972, which reads as follows: '…any enactment passed or to be passed…shall be construed and have effect subject to the foregoing provisions of this section.' The words 'subject to' appear to suggest that the courts must allow Community law to prevail over subsequent Acts of Parliament. '[T]he foregoing' are those provisions referred to in s 2(1) giving the force of law to 'the enforceable Community rights' there defined. Section 2(4) would therefore seem to have protected s 2(1) against implied repeal, thereby running contrary to the traditional view of parliamentary sovereignty.

According to that view, post-accession statutes should prevail over Community law incorporated under the 1972 Act as representing the latest expression of Parliament's will, but the Community doctrine of primacy of EC law and s 2(4) would require Community law to prevail. In this respect, it was clear from the judgments of the European Court of Justice (ECJ) (see *Costa v ENEL* (1964), *Amministrazione delle Finanze dello Stato v Simmenthal SpA* (1978) and *Marleasing SA v La Commercial Internacional de Alimentacion SA* (1990)) that Community law should prevail over both subsequent and previous national law. *Secretary of State for Transport ex p Factortame* (1990) made a contribution to the question of the primacy of EC law because the UK courts had to confront directly the question of conflict between EC law and domestic law.

Under the Merchant Shipping (Registration of Fishing Vessels) Regulations 1988 made under the Merchant Shipping Act 1988, British fishing vessels were required to re-register on a new register from 1 March 1988. Vessels could qualify for entry onto the new register only if their owners or, in the case of companies, their shareholders were British citizens or were domiciled in Britain. The applicants were unable to comply with these conditions and consequently could not qualify for entry. The applicants sought a ruling by way of judicial review that the legislation contravened provisions of the EEC Treaty by depriving them of Community law rights. These included the prohibition of discrimination on grounds of nationality,

the prohibition of restrictions on exports between Member States, the provision for the free movement of workers and the requirement that nationals of Member States are to be treated equally with respect to participation in the capital of companies established in the EC. A ruling on the substantive questions of Community law was requested from the ECJ and, pending that ruling, which could not be expected for another two years, the Divisional Court made an order by way of interim relief, setting aside the relevant part of the 1988 Regulations and allowing the applicants to continue to operate their vessels as if they were British-registered.

This order was set aside by the Court of Appeal. Bingham LJ said, however, that where the law of the Community is clear:

> …whether as a result of a ruling given on an Art 177 [now 234] reference or as a result of previous jurisprudence or on a straightforward interpretation of Community instruments, the duty of the national court is to give effect to it in all circumstances…To that extent, a UK statute is not as inviolable as it once was.

In the instant case, it had not yet been established that the statute was inconsistent with Community law and, in those circumstances, it was held that the court had no power to declare a statute void.

The applicants appealed to the House of Lords, which upheld the ruling of the Court of Appeal and referred to the ECJ for a preliminary ruling on the question of whether Community law required that a national court should grant the interim relief sought. Lord Bridge said that if it appeared after the ECJ had ruled on the substantive issue that domestic law was incompatible with the Community provisions in question, Community law would prevail.

The European Commission then successfully sought a ruling in the ECJ that the nationality requirement of s 14 of the Merchant Shipping Act be suspended (*Re Nationality of Fishermen: EC Commission v UK* (1989)) pending the delivery of the judgment in the action for a declaration. This decision was given effect in the UK by means of the Merchant Shipping Act 1988 (Amendment) Order 1989. The ECJ then ruled on the question of interim relief, relying on *Amministrazione delle Finanze dello Stato v Simmenthal SpA* (1978). Predictably, it found that a national court must set aside national legislative provisions if that were necessary to give interim relief in a case concerning Community rights (*Factortame Ltd v Secretary of State for Transport* (1990) (ECJ)). The House of Lords then granted the interim relief sought, thus applying Community law in preference to UK law (*ex p Factortame (No 2)* (1991)).

Now that the issue as to the question of interim relief is resolved, it appears that the UK courts have accepted that where Community law is certain, it

should be applied in preference to domestic law. Where it is unclear, and the applicants who wish to rely on Community law have a seriously arguable case, the domestic law should be disapplied if that is necessary to give interim relief pending a ruling on the issue from the European Court. Thus, the courts clearly have the power to refuse to obey an Act of Parliament and Parliament is therefore effectively constrained in its freedom to legislate on any subject. If it does legislate inconsistently with Community law, its legislation may be disapplied. If it wishes to avoid this restraint, it will have to use express words demonstrating its intention. Thus, Parliament has succeeded in partially entrenching s 2(1) of the European Communities Act by means of s 2(4) which imposes a requirement of form (express words) on future legislation designed to override Community law. As in practice, such express words would almost certainly not be used, it appears to be impossible for Parliament to depart from the principle of the primacy of directly effective Community law,[1] unless it decided to withdraw from the Community.

Can it further be argued that even if express words were used, a UK court would not give them effect? If so, sovereignty would be at least suspended in the area affected by Community law, unless and until Parliament repealed the European Communities Act 1972. In contrast to *dicta* of Lord Denning in *Macarthy's v Smith* (1981) to the effect that a domestic court would give regard to express words in a statute requiring it to override Community law, Lord Bingham in *Factortame* did not enter a caveat that effect would have been given to express words used in the Merchant Shipping Act 1988 declaring that its provisions should prevail over those of Community law. He came close to suggesting that effect would not be given to such words in observing: '…any rule of domestic law which prevented the court from giving effect to directly enforceable rights established in Community law would be bad.' Perhaps, therefore, one could go so far as to suggest that entrenchment of s 2(1) of the 1972 Act has been brought about on the basis of a requirement of 'manner' rather than 'form': if a UK statute is to override Community law, s 2(4) of the European Communities Act must first be repealed. However, this is a bold assumption as the point has not yet been determined.

In *Secretary of State for Transport ex p Factortame Ltd (No 3)* (1992), the ECJ had to consider the substantive issue. It ruled that while, at present, competence to determine the conditions governing the nationality of ships was vested in the Member States, such competence must be exercised consistently with Community law. The Court then determined that Part II of the Merchant Shipping Act 1988 was discriminatory on the grounds of nationality contrary to Art 43 (ex 52) and, therefore, did not so conform. This ruling means that the UK courts will have to apply Community law in preference to the Merchant Shipping Act 1988, which

must be disapplied. Thus, the case seems to have dispelled doubts as to the supremacy of Community law.

The final result of the *Factortame* litigation seems to be an unequivocal acceptance of the primacy of Community law by the British courts and the consequent fettering of the legislative competence of the UK Parliament. *Factortame* represents a departure from the 'rule of construction' approach to s 2(4) of the 1972 Act, as exemplified in *Macarthy's* and in *Garland v British Rail Engineering* (1983), which arguably left sovereignty intact in that such an approach was applied only where it was clear that Parliament intended to comply with Community law.

Statements made as to the nature of parliamentary sovereignty must now undergo some modification; for example, it might now be said that 'once an instrument is recognised as an Act of Parliament *and is compatible with any enforceable Community law,* no English court can refuse to obey it or question its validity' (a modification of a statement made by Sir Robert Megarry in *Manuel v AG* (1983)). However, it must be remembered that the outcome of *Factortame* is merely consistent with the probable intention of Parliament as expressed in s 2(4) of the European Communities Act 1972; arguably, the case has merely brought about full acceptance of the implications of that provision by the judiciary.[2] Moreover, although the doctrine of parliamentary sovereignty has been greatly affected, it is arguable that it would revive in its original form if the UK withdrew from the Community.

Notes

1 In *Litster v Forth Dry Docks Ltd* (1989), the House of Lords determined that even where EC law is not directly effective, priority for EC law should be ensured by means of national law, even if this meant construing the domestic legislation contrary to its *prima facie* meaning. It was prepared to do this because the relevant national legislation had been introduced expressly to implement the directive in question. However, where domestic legislation bore on its face express words demonstrating that Parliament had intended to avoid implementing the indirectly effective instrument, it is arguable that the court would give them effect.

2 The change in attitude of the UK judiciary could be considered further. Like the judiciary in the other Member States, the UK judiciary has gradually come to a full realisation of the need to achieve a uniform application of Community law throughout the Member States. However, this has taken some time, as can be seen by comparing a case such as *HP Bulmer Ltd v J Bollinger SA* (1974) with *Factortame*. The *Bulmer* case is in this sense similar to a German case: *Internationale Handelsgesellschaft mbH* (1974).

Question 10

'Parliament in 1972 accomplished the impossible and (to a degree) bound its successors'(TRS Allan).

Do you agree?

Answer plan

This is a very popular question on constitutional law papers. It may take the form of the question: 'Would you agree that parliamentary sovereignty has suffered a severe trammeling due to obligations arising from membership of the EC?' The instant question is not as wide ranging as that, but concentrates on the specific issue of partial entrenchment. It should be noted that the assumption made as to the impossibility of entrenchment aside from Community obligations should be attacked, albeit briefly.

The following issues should be addressed:

- the traditional doctrine of parliamentary sovereignty: Parliament cannot bind its successors;
- the possible limitation of this doctrine;
- the provisions of s 2(1) and (4) of the European Communities Act 1972;
- the doctrine of the primacy of Community law as put forward by the European Court of Justice (ECJ);
- the 'purposive' approach to conflict between UK and Community law;
- the partial entrenchment of s 2(1) by means of a requirement of 'form'—express words;
- the partial entrenchment by means of a requirement of 'manner'.

Answer

The traditional doctrine of parliamentary sovereignty as put forward by Dicey includes the notion that the legislative competence of the UK Parliament is unlimited, in the sense that its powers to make laws on any subject, to unmake or amend any Act of Parliament, are not open to challenge. It follows that Parliament may not be bound by its predecessors; it would otherwise suffer a limitation of its power. The statement made by Allan assumes that apart from the effect of accession to the European Communities, no departure from this traditional doctrine is possible. This assumption will be considered briefly before examining the wider issue as to the impact of the European Communities Act 1972 on the traditional doctrine of parliamentary sovereignty.

In *Ellen Street Estates Ltd v Minister of Health* (1934), it was argued that the Acquisition of Land (Assessment of Compensation) Act 1919 prescribed a certain manner for authorising the acquisition of land. It provided in s 7 that other statutes 'shall have effect subject to this Act'. If s 7 applied to subsequent enactments, provisions of the Housing Act 1925 which were inconsistent with the 1919 Act would have no effect. However, Maughan LJ held that Parliament cannot bind itself as to the form of future enactments. Thus, it appears that the courts will not give effect to a statute which is in conflict with a later statute on the basis that the earlier statute has been impliedly repealed to the extent of its inconsistency. However, in *AG for New South Wales v Trethowan* (1932), the Privy Council upheld the requirement of a referendum before a Bill to abolish the Upper House was presented for the royal assent. Although, as De Smith argues, this decision may be of limited application as involving a non-sovereign legislature, it does suggest that a class of legislation exists for which it may be appropriate to delineate the manner and form of any subsequent amendment or repeal.

For example, s 1 of the Northern Ireland Constitution Act 1973 provides that Northern Ireland will not cease to be part of Her Majesty's dominions without conducting a poll in Northern Ireland. If a future Act of Parliament purported to revoke this guarantee without first conducting a poll in Northern Ireland, it is at least arguable that the courts would hold the later statute to be invalid, as occurred in the South African case of *Harris v Minister of the Interior* (1951) (this view is put forward by Jowell and Oliver, *The Changing Constitution,* 1989). This view also receives some support from Slade LJ in *Manuel v AG* (1983), although he did not finally resolve the issue. Thus, although Allan's assumption is broadly correct as to the traditional impossibility of entrenchment, it is at least worth testing. What then has been the impact of the European Communities Act 1972 on this doctrine?

The UK became a member of the European Community with effect from 1 January 1973 by virtue of the Treaty of Accession 1972. Treaties and Community law capable of having direct effect in the UK were given such effect by s 2(1) of the European Communities Act 1972, which incorporated all existing directly effective Community law into UK law. No express declaration of the supremacy of Community law is contained in the Act; the words intended to achieve this are contained in s 2(4), which reads as follows: '…any enactment passed or to be passed…shall be construed and have effect subject to the foregoing provisions of this section.' The words 'subject to' appear to suggest that the courts must allow Community law to prevail over subsequent Acts of Parliament. '[T]he foregoing' are those provisions referred to in s 2(1) giving the force of law to 'the enforceable Community rights' there defined. Section 3(1) provides that questions as to the meaning or effect of Community law are to be determined 'in accordance with the principles laid down by any relevant decision of the European Court'.

The problem arises in respect of statutes passed after 1 January 1973.[1] According to the traditional doctrine of parliamentary sovereignty, the later Act should prevail as representing the latest expression of Parliament's will, but the Community doctrine of the primacy of EC law and s 2(4) would require Community law to prevail. In this respect, it is clear from judgments of the ECJ (see *Costa v ENEL* (1964)) that Community law should prevail over national law. In *Amministrazione delle Finanze dello Stato v Simmenthal SpA* (1978), it was held that conflict between provisions of national law and directly applicable Community law must be resolved by rendering the national law inapplicable, and that any national provision or practice withholding from a national court the jurisdiction to apply Community law even temporarily was incompatible with the requirements of Community law.

How have the UK courts approached this conflict?[2] In *Felixstowe Dock and Railway Co v British Transport Docks Board* (1976), Lord Denning MR dismissed a challenge to UK law on the basis that 'once a Bill is passed by Parliament and becomes a statute, that will dispose of all discussion about the Treaty. These courts will have to abide by the statute without regard to the Treaty at all'. This was the traditional approach; however, it then gave way to what has been termed a 'rule of construction' approach to s 2(4). In *Garland v British Rail Engineering* (1983), Lord Diplock suggested (without resolving the issue) that even where the words of the domestic law were incompatible with the Community law in question, they should be construed so as to comply with it. This approach was applied in *Pickstone v Freemans* (1988) in the House of Lords, although not in the Court of Appeal. The Court of Appeal ruled that domestic legislation—the Equal Pay (Amendment) Regulations 1983 made under s 2(2) of the European Communities Act—was inconsistent with Art

141 (ex 119) of the EC Treaty. It then treated Art 141 as having more authority than the Amendment and made a ruling consistent with Art 141.

The House of Lords avoided this controversial approach but, by a less overtly contentious route, achieved the same result. It held that although the two provisions appeared to be in conflict, a purposive interpretation of the domestic legislation would be adopted; in other words, the plain meaning of the provision in question would be ignored and an interpretation would be imposed upon it which was not in conflict with Art 141. In order to achieve this, the plain meaning of the words 'which, not being work in relation to which para (a) or (b) above applies' in s 1(2)(c) of the Equal Pay Act 1970 as amended had to be ignored. This was done on the basis that Parliament must have intended to fulfil its EC obligations in passing the Amendment Regulations once it had been forced to do so by the ECJ. The House of Lords followed a similar approach in *Litster v Forth Dry Dock Engineering* (1989).[3] These decisions provide authority for the proposition that plain words in a statute will not be given effect if to do so would involve a departure from the provisions of European Community law.

It might appear to follow that Parliament has succeeded in partially entrenching s 2(1) of the European Communities Act by means of s 2(4) by imposing a requirement of form (express words) on future legislation designed to override Community law. However, the House of Lords in both *Litster* and *Pickstone* cloaked its disregard of statutory words by the finding that they were reasonably capable of bearing a meaning compatible with Community obligations. *Dicta* of Lord Denning in *Macarthy's v Smith* (1981) do, however, suggest more clearly that partial entrenchment of s 2(1) of the 1972 Act has occurred:

> …we are entitled to look to the Treaty…not only as an aid but as an overriding force. If…our legislation…is inconsistent with Community law …then it is our bounden duty to give priority to Community law.

Further support for Lord Denning's view comes from the *Factortame* litigation; indeed, support might even be found for the inference that words in a statute, although expressly requiring a court to do so, could not override Community obligations.

Secretary of State for Transport ex p Factortame (1990) concerned the Merchant Shipping (Registration of Fishing Vessels) Regulations 1988 made under the Merchant Shipping Act 1988, whereby British fishing vessels were required to re-register on a new register. The applicants, who were unable to comply with the conditions for registration, sought a ruling by way of judicial review that they contravened the provisions of the EC Treaty by depriving them of Community law rights. A ruling on the substantive

questions of Community law was requested from the ECJ and, pending that ruling, an order was made by way of interim relief, setting aside the relevant part of the 1988 Regulations. This order was set aside by the Court of Appeal and the applicants appealed to the House of Lords which upheld the Court of Appeal ruling on the ground that no court had power to make an order conferring rights upon the applicants which were directly contrary to UK legislation. The result of these two rulings was clearly in accord with the traditional doctrine of parliamentary sovereignty as far as English law was concerned. However, the rulings also accepted that Community law might impose requirements which would be overriding.

In the Court of Appeal, Bingham LJ said that where the law of the Community is clear:

> …whether as a result of a ruling given on an Art 177 [now 234] reference or as a result of previous jurisprudence or on a straightforward interpretation of Community instruments, the duty of the national court is to give effect to it in all circumstances… To that extent, a UK statute is not as inviolable as it once was.

Lord Bingham did not enter the caveat that effect would have been given to express words used in the Merchant Shipping Act 1988 declaring that its provisions should prevail over those of Community law. It could therefore be suggested that entrenchment of s 2(1) of the 1972 Act has been brought about on the basis of a requirement of manner rather than form: if a UK statute is to override Community law, the European Communities Act must first be repealed.

The House of Lords referred to the ECJ for a preliminary ruling on the question of whether Community law required that a national court should grant the interim relief sought. The European Court held that the force of Community law would be impaired if, when a judgment of the Court on Community law rights was pending, a national court was unable to grant interim relief which would ensure the full efficacy of the eventual judgment. Therefore, when the only obstacle to granting such relief was a rule of national law, that rule must be disapplied (*Secretary of State for Transport ex p Factortame Ltd* (1990) (ECJ)). The House of Lords then applied this ruling, granting the interim relief sought (*ex p Factortame (No 2)* (1991)). In *Secretary of State for Employment ex p EOC* (1994), the House of Lords followed *Factortame* in finding that judicial review was available for the purpose of securing a declaration that UK primary legislation is incompatible with EC law. It was found that certain provisions of the Employment Protection (Consolidation) Act 1978 were indirectly discriminatory and were therefore in breach of Art 141 (ex 119) and the Equal Pay and Equal Treatment Directives.

It follows from the decisions of the House of Lords and the Court of Appeal that if it is clear that a statute is inconsistent with EC law which is directly enforceable, the domestic court would have to disapply it. Lord Bingham's words referred to above were *obiter,* but nevertheless support the view that partial entrenchment of s 2(1) of the 1972 Act has indeed occurred, but only where Community law is clear and directly enforceable. In so arguing, it should be borne in mind that the House of Lords has not yet struck down an Act of Parliament.[4] It has therefore accepted the possibility of partial entrenchment of s 2(1) of the 1972 Act by means of a requirement of 'form' or arguably 'manner', but has not yet put it into practice.

Notes

1 Clearly, any Community law will prevail over UK legislation enacted before 1 January 1973. Authority for this can be found in rulings such as those in *Henn* (1980) and *Goldstein* (1983). This is uncontroversial and merely accords with the ordinary operation of the doctrine of parliamentary sovereignty.

2 The difference between indirectly and directly effective instruments could be considered at this point. Some Community law has direct effect in the UK. This will apply in respect of regulations, treaties and some directives (if certain conditions are fulfilled as laid down in *Van Duyn v The Home Office* (1974)). If an instrument is not directly effective, domestic legislation must be introduced to implement it.

3 *Litster,* it could be pointed out, was concerned with an indirectly effective directive. Nevertheless, the approach of the House of Lords suggested that where legislation had been introduced specifically to implement a directive, UK courts must interpret it so as to conform with the directive 'supplying the necessary words by implication' in order to achieve such conformity. Thus, primacy of even indirectly effective instruments was assured, except in instances where no domestic legislation had been introduced to implement them.

4 The conclusion concerns itself only with rulings in the UK courts. It could further be noted that the UK Parliament was forced to accept the primacy of EC law: the European Commission brought a successful action against the UK requiring that the registration conditions in the 1988 Regulations be suspended (*Re Nationality of Fishermen: EC Commission v UK* (1989)); this decision was given effect by the Merchant Shipping Act 1988 (Amendment) Order 1989.

Question 11

Has the Human Rights Act 1998 had any effect on the sovereignty of Parliament?

Answer plan

This is a very topical question, given the recent, important House of Lords case law on s 3(1) of the Human Rights Act (HRA) 1998. It is a tricky question because, on its face, the simple answer to the question is 'no', it being clear that the HRA has, formally speaking, carefully preserved the traditional doctrine of parliamentary sovereignty.

The following issues should be addressed:

- the traditional doctrine of parliamentary sovereignty: Parliament cannot bind its successors;
- the ways in which the HRA preserves this: ss 4(6) and 3(2);
- the evidence that Parliament can apparently limit itself at least as to form: the courts' response to the European Communities Act 1972;
- the argument that s 3 of the HRA, as interpreted, can amount to the suspension of implied repeal;
- the significance of s 19 in avoiding legislative infringements of the Convention;
- conclusion.

Answer

The traditional doctrine of parliamentary sovereignty as put forward by Dicey includes the notion that the legislative competence of the UK Parliament is unlimited, in the sense that its powers to make laws on any subject, to unmake or amend any Act of Parliament, are not open to challenge. It follows that Parliament may not be bound by its predecessors; it would otherwise suffer a limitation of its power. Any statute passed by Parliament is subject either to express repeal or to implied repeal, whereby a later inconsistent statute impliedly repeals any earlier statutes to the extent of their inconsistency with it. It will be argued in this essay that the HRA purports to preserve in full the above, traditional Diceyan doctrine of sovereignty, but that a closer look at certain aspects of the Act and recent case law thereon, together with insights derived from the courts' treatment

of the European Communities Act, reveals that the true picture is rather more complex and nuanced.

The White Paper *Bringing Rights Home* (Cm 3782), which preceded the Human Rights Bill, made it clear that the Act would make no attempt to entrench itself against either express or implied repeal. This was explained to be due to the importance the government attached to the doctrine of parliamentary sovereignty. Thus, the legislation incorporating the European Convention on Human Rights (ECHR) was to follow the traditional British constitutional method: it would be no different in status from legislation regulating dog licensing. The Act contains no statement that it is intended to last 'for all time forth' in the manner of the Union legislation which merged Scotland with England and then Great Britain with Northern Ireland. Nor does it seek to lay down any requirements of manner or form with which future legislation curtailing Convention rights or repealing the HRA itself would have to comply to be valid, as does, for example, the Northern Ireland Act 1998. Most importantly, it provides that if any statutes contain provisions that are found to be inconsistent with any of the Convention rights, such statutes will remain valid and of full effect (ss 3(2)(b) and 4(6)). Section 4 states that a 'a declaration of incompatibility'—made if the court cannot interpret legislation so as to be compatible with the Convention rights—'does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given'. In part, the Act in effect simply confirms the orthodox constitutional position that later statutes override previous inconsistent ones. In this respect, the HRA is of the same status as any other Act of Parliament, although it introduces the innovation of the formal judicial declaration of incompatibility under ss 4 and 10, which can trigger the parliamentary 'fast track' procedure to amend the offending legislation by means of secondary legislation which, however, leaves Parliament entirely free as to whether to remedy the incompatibility which the courts have found to exist.

However, in relation to statutes passed *prior* to the HRA, the Act provides for a departure from orthodoxy. Under the doctrine of implied repeal just mentioned, one would expect that where it was found that a provision in a statute *pre-dating* the HRA was incompatible with one or more of the Convention rights, that provision would be thereby impliedly repealed. However, ss 3(2)(b) and 4(6) do not take this route: by stating that the provisions of *any* statute found to be incompatible with Convention rights remain valid and in force, they have the effect that, in a departure from normal doctrine, the doctrine of implied repeal will not apply. In other words, where a provision of an *earlier* statute is found to be incompatible with a Convention right, it will nevertheless remain in force. In this respect, then, the HRA makes a quite clear alteration to the normal rules of parliamentary sovereignty; already,

therefore, it is possible to conclude that the bald assertion in the title of this essay requires modification at least in this respect.

The HRA may, however, make a further and more important alteration to the traditional understanding of sovereignty. Section 3(1) of the Act provides: 'So far as 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.' This amounts to an attempt to impose a particular interpretative approach on all future statutes, and as such, amounts to a form of protection for the Convention rights which may be as strong as judges care to make it. Since what is 'possible' in statutory interpretation is not defined in the Act and is open to argument, one reading of s 3(1) would see it as giving a mandate to judges to treat *all* legislation as Convention compliant, unless it contains express statements of its incompatibility, using techniques such as reading words into legislation, ignoring words which imply incompatibility, adopting strained linguistic techniques and so on (see *Young* (2002)). Just how much protection can be afforded in this way can be illustrated by reference to the approach judges have taken in relation to the protection of EC law from implied repeal. The equivalent provision to s 3 of the HRA is s 2(4) of the European Communities Act 1972, which reads as follows: '…any enactment passed or to be passed…shall be construed and have effect subject to the foregoing provisions of this section.' The words 'subject to' appear to suggest that the courts must allow Community law to prevail over a subsequent Act of Parliament. The 'foregoing provisions' are those of s 2(1) importing Community law into national law.

The House of Lords in *Pickstone v Freemans* (1988) found that domestic legislation—the Equal Pay (Amendment) Regulations—made under s 2(2) of the European Communities Act appeared to be inconsistent with Art 141 (ex 119). It held that despite this apparent conflict, a purposive interpretation of the domestic legislation would be adopted; in other words, the plain meaning of the provision in question would be ignored and an interpretation would be foisted upon it which was not in conflict with Art 141. This was done on the basis that Parliament must have intended to fulfil its EC obligations in passing the Amendment Regulations once it had been forced to do so by the European Court of Justice (ECJ). The House of Lords followed a similar approach in *Litster v Forth Dry Dock Engineering* (1989).

It might of course be objected that the argument being made here is that Parliament has by ordinary statute (the HRA) altered the rules of parliamentary sovereignty itself, precisely what the orthodox doctrine will not allow. But it is submitted that the literature in this area tends to rule out the possibility of Parliament being able to bind itself as to 'manner and form', as if the two types of restrictions may readily be lumped together. In fact, they

are very distinct: there is now clear evidence that Parliament can bind itself at least as to the *form* of future legislation; there is no such evidence in relation to restrictions as to *manner:* cases from the Commonwealth, such as *AG for New South Wales v Trethowan* (1932), are inconclusive.

What then is the evidence that Parliament may now restrict itself as to the form of future legislation? The clearest example relates to the European Communities Act 1972 again and its interpretation in the case of *Secretary of State for Transport ex p Factortame (No 2)* (1991). The case is well known but, in brief, s 2(4) of the European Communities Act 1972 amounted to an attempt of some kind by the Parliament of 1972 to fetter its successors. As noted above, s 2(4) states that: 'any enactment passed *or to be passed* shall be construed and have effect subject to the foregoing provisions of this section' (emphasis added).

The 'foregoing provisions' were those that made Community law enforceable in the UK. By saying that any enactment *to be passed,* that is, any future enactment, must take effect 'subject to' the provisions of this Act, Parliament appeared to be suggesting that the courts must allow Community law to prevail over subsequent Acts of Parliament. This was clearly an attempt to suspend the normal doctrine of implied repeal. Instead of any later statute which conflicted with EC law impliedly repealing it, such a later statute would have to either be 'construed', that is, interpreted so that it did not conflict with EC law, or if it could not be so interpreted, it would have to be deprived of effect insofar as it conflicted with Community law, that is, given effect 'subject to' EC law.

Parliament was quite evidently, therefore, trying to alter the rule of parliamentary sovereignty itself and the decision in *Factortame (No 2)* appears to indicate that the courts are quite willing to allow it to do so, quite contrary to Wade's view that 'this rule is ultimate and unalterable by any legal authority' ('The basis of legal sovereignty' [1955] CLJ 189).

The case arose because the Merchant Shipping Act 1988 placed restrictions on the abilities of non-British fishermen to fish in British waters. As such, it was in clear conflict with the non-discrimination principle of EC law. The House of Lords held that notwithstanding that the Merchant Shipping Act (MSA) post-dated the European Communities Act, the former would prevail: the MSA must be disapplied to the extent of its inconsistency with EC law.

The clear finding of law to be drawn from the decision is that if Parliament wishes to legislate contrary to EC law, it must use express words, either instructing the court to disregard EC law when applying the particular statute, or possibly by repealing the European Communities Act first. In any event, it is clear that the courts accepted that Parliament could change the law of sovereignty. As Lord Bridge remarked, the decision was not 'a novel and

dangerous invasion by a Community institution of the sovereignty of Parliament', because Parliament had Voluntarily accepted' a diminution of its sovereignty by passing the European Communities Act in 1972. The courts' view at least (and it is the courts which ultimately determine the parameters of the sovereignty doctrine) seems to be that Parliament can, in principle, alter the application of the doctrine of sovereignty to particular statutes. The question is whether they will use s 3(1) of the HRA in order to effect such a change.

Just how potent s 3(1) is can be seen by the decision of the House of Lords in *A* (2001). The case concerned the interpretation to be given to s 41 of the Youth Justice and Criminal Evidence Act 1999, which forbade any evidence to be given in a rape trial of the woman's sexual history, including any previous sexual history with the alleged rapist, except in very limited circumstances. This was thought to raise an issue of compatibility with Art 6 of the ECHR, which provides, *inter alia,* that: In the determination of…any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.' Lords Steyn and Hutton were prepared to hold that, given the very strong wording of s 3(1) and *Pepper v Hart* statements in Parliament to the effect that declarations of incompatibility were to be a remedy of last resort, the only way in which Parliament could legislate contrary to a Convention right would be by 'a clear limitation on Convention rights…*stated in terms*' (emphasis added). This approach led them simply to read into the relevant part of s 41 words which were not there, namely that evidence was to be admitted where that was necessary to achieve a fair trial. It may be noted that Lord Hope, in contrast, considered that this approach went too far, crossing the line from interpretation to legislating. He considered, in what is certainly the more usual understanding of the word 'interpreting', that the judge's task was limited to identifying specific words which would otherwise lead to incompatibility and then re-interpreting those words, clearly not something which Lords Steyn and Hutton—and for that matter Lord Slynn—undertook. Lord Hope's approach arguably found more support from the House of Lords in *Re W and B* (2002), in which their Lordships emphasised the importance of not stepping over the boundary from statutory interpretation to 'statutory amendment'. It is too early to say what will be the general approach taken to s 3(1), since the House of Lords has arguably sent out conflicting signals in the above two decisions.[1] Nevertheless, if the approach in A is followed in even *some* areas of rights protection, the result will be that Parliament has, through s 3(1), succeeded in imposing a requirement of express words upon such of its successors as wish to legislate incompatibly with the Convention rights.

It may be further suggested that there is a more subtle way in which while as a matter of law, the Act represents no threat to sovereignty, it may nevertheless amount to a kind of *de facto* 'higher law', not in reality of the same status as other Acts of Parliament. In this respect, the duty of ministers introducing legislation under s 19 of the HRA is of relevance. Under that section, ministers must make a statement when introducing legislation into Parliament that it does not infringe Convention rights, or that they believe it does, but they wish to proceed in any event. Statements of the latter kind would amount to a declaration that the UK intended deliberately to violate its Treaty obligations and to breach international law. The necessity of making such statements, which would cause immediate international condemnation, will inevitably act as a powerful deterrent against the introduction of such clearly incompatible legislation. Open infringements of the Convention will therefore become almost inconceivable. At the same time, the possibility of *inadvertent* legislative infringements should be removed, since Parliamentary Counsel will have to scrutinise any Bill prior to its introduction into Parliament to ensure its compatibility with the Convention, so that the minister responsible can make the statement of compatibility to Parliament under s 19. What is likely to slip through both these safeguards is ambiguously worded legislation, which *may* infringe Convention rights, depending upon how it is interpreted by the courts. Governments may indeed rely upon the inherent imprecision of many of the Convention rights and the possible consequential lack of legal certainty as to whether particular provisions are Convention compliant in order to argue that doubtful legislation is, in fact, compatible. Arguably, this occurred in relation to the Regulation of Investigatory Powers Act 2000, the Terrorism Act 2000 and the Anti-Terrorism, Crime and Security Act 2001, all of which contain draconian powers of interference with Convention rights. Such legislation should, however, be dealt with by the courts under s 3(1) of the Act: that provision should ensure that *ambiguous* legislation is always interpreted compatibly with Convention rights. Thus, since openly incompatible legislation is most unlikely to be introduced by any government, inadvertent incompatibilities weeded out prior to parliamentary scrutiny, and ambiguities resolved in favour of the Convention by the courts, the effect may be that in practice, Parliament no longer passes legislation which, once interpreted, infringes Convention rights.

All this could of course theoretically be removed simply by repeal of the HRA. Whether this happens or not depends upon whether some convention of respect develops in relation to that Act. At present, it seems clear that at least amongst Conservative politicians, such a convention is so far from developing that they have recently been urging its repeal upon the Labour

government, in the light of action thought necessary to deal with terrorism in the aftermath of the attacks in America on September 11th 2001. In Prime Minister's Questions in October 2001, lain Duncan Smith, Leader of the Opposition, asked whether the Prime Minister recognised 'that the European Convention on Human Rights as incorporated into United Kingdom law is proving an obstacle to protecting the lives of British citizens?'.[2]

In conclusion, it is clear that the HRA alters the doctrine of sovereignty by suspending the doctrine of implied repeal in relation to statutes passed prior to the HRA itself. It is arguable that s 3(1) of the HRA can be used by the judges as a vehicle to safeguard Convention rights against implied repeal: *A* is an example of this, though the radical approach of this case has not been used consistently. Moreover, the broader politico-constitutional picture reveals that it is naïve and crude simply to take the HRA on its face as an 'ordinary' statute: it is not a Bill of Rights, but it does have a different status from other Acts of Parliament.

Notes

1 Students could explore here some of the other decisions on s 3(1). Lord Nicholl's *dicta* in *Re W and B* that a reading of legislation under s 3(1) should not 'depart substantially from a fundamental feature of an Act of Parliament' find support in the *dicta* of Woolf CJ in *Poplar Housing* (2001) and of Lord Hope in *Lambert* (2001); *Offen* (2001) is an activist decision more akin to that of *A*.

2 Students could also draw attention to the apparent lack of respect for the Convention displayed in the hasty decision to derogate from Art 5 of the ECHR following the September 11th attacks in 2001, in order to allow for the detention without trial of certain suspected international terrorists. It should be noted, though, that providing the derogation is found to be lawful by domestic courts and the European Court of Human Rights, there will, technically speaking, have been no violation of the ECHR.

CHAPTER 3

THE HOUSE OF COMMONS

Introduction

This chapter brings together a number of rather disparate topics. The three areas commonly examined are: parliamentary privilege, scrutiny of legislation and the Executive, and delegated legislation.

Parliamentary privilege is a reasonably straightforward and discrete topic and most students find it fairly easy to master the basic and clearly established principles. It is, however, an area replete with unresolved questions and students should ensure that they are aware of the conflicting authorities and views on these questions, are able to offer a sensible evaluation of them, and can formulate their own opinions. Students need to be familiar with the main thrust of the report of the Nolan Committee on parliamentary regulation of Members' outside interests, the rules and mechanisms for their enforcement and the recent controversies surrounding the departure of Elizabeth Filkin as Parliamentary Commissioner for Standards. Also vital is awareness of the fact that in May 2002, the Commons voted to relax the rules regarding their outside interests, a change which may not be covered by textbooks unless they are very up to date. In the area of Members' freedom of speech, the Defamation Act 1996 has introduced a significant change. Both these matters are covered here, as is the possible impact of the Human Rights Act 1998 on both areas of privilege. Finally, students should have some awareness of the reforms proposed by the Joint Committee on Parliamentary Privilege which reported in 1999. It should be noted that the privileges of the Lords and the Commons are basically identical, but that the area almost invariably arises both in practice and in exams in relation to the Commons. The topic lends itself equally well to either essay or problem questions, though the latter seem to be more common in practice.

Scrutiny of legislation and administration is examined by essay questions, which are invariably evaluative in approach. It should be noted that in some syllabuses, particularly on CPE courses, the House of Lords will probably be examined together with the Commons in one question. If a question requires discussion of 'Parliament', this means, of course, both Houses. The two areas of legislation and administration can be examined separately, as in this chapter, or combined together in one question. The basic arguments in the area are fairly easy to grasp, so in order to produce a better than average answer,

students should try to marshall original examples for their arguments from cases and materials books and current events. Particular note should be taken of the ongoing reforms to the Select Committee system being suggested by various Select Committees, including the Modernisation, Public Administration and Liaison Committees of the House of Commons, and also the ongoing controversy over the system for selecting the membership of Select Committees, culminating in a Commons vote in May 2002 which approved some other changes designed to strengthen the Select Committees, but rejected a proposed mechanism for ensuring their independence.

Delegated legislation is an unusually versatile topic for examination purposes. The topic can merely be an area which should be brought into other essays (note that any essay about parliamentary scrutiny of legislation should include a section on delegated legislation), or it can be examined in a separate essay question, which will generally centre around the justifications for delegated legislation and its disadvantages. Alternatively, the topic may appear in the form of a problem question revolving around the legal effects of non-compliance with laying and publishing requirements, with perhaps the addition of an aspect of judicial review. Therefore, to be confident in handling this topic in a problem, students should have a working knowledge of judicial review, for which see Chapter 7.

Checklist

Students should be familiar with the following:

Parliamentary privilege:

- a list of all the privileges, including those virtually defunct, with greater awareness of the important ones;
- the area of freedom of speech: the controversy over what amounts to 'proceedings in Parliament'; the status of written accounts and broadcasts of debates, proceedings of committees, etc; the meaning of 'impeached or questioned' as interpreted by the courts and the impact of the Defamation Act 1996; the decisions in *Prebble* (1994) and *Hamilton v Al Fayed* (2001) and the possible impact of the Human Rights Act 1998 through Art 6 of the European Convention on Human Rights, but the difficulties of using the Act against Parliament; the recommendations of the Joint Committee on Privileges;
- the right of the House of Commons to regulate its own composition and proceedings, with particular reference to the new rules on registration and declaration of Members' interests; the ban on paid advocacy and the

mechanisms for enforcing these rules, including the Parliamentary Commissioner for Standards and Privileges; criticisms of the weaknesses of these mechanisms and the possibility of party interest weakening the authority of the Standards Committee; the Filkin controversy; the May 2002 changes to the rules; the possible impact of the Human Rights Act 1998 as above;
- the concepts of 'contempt' and 'breach of privilege'; conflicts between the House and the judiciary over which body has the right to determine the extent and interpretation of privileges, and the House's right to punish for breach of them.

Scrutiny of administration/legislation including delegated legislation:

- the basic rationale behind the perceived need for effective scrutiny—derived from the separation of powers;
- questions to ministers including limitations on topics and opportunities for short debates; Westminster Hall;
- Select Committees: remit, powers, limitations and effectiveness; recent examples;
- the partial implementation in May 2002 of reforms suggested by the Select Committee on the Modernisation of the House of Commons;
- scrutiny of national finance, the Public Accounts Committee, the Comptroller and Auditor General;
- the argument over the Commons' role in relation to legislation: for publicity, etc, or its acting as a genuine separate legislative body;
- illustrations of government omnipotence: statistics on the number of government Bills which become law; whips and the legislative process;
- an analysis of efficacy in the field of publicity: curtailment of scrutiny by guillotine, closure; the use of timetabling of Bills; the effect on pre-legislative process of the anticipated response of the House;
- the partial implementation of reforms suggested by the Select Committee on the Modernisation of the House of Commons;
- scrutiny of delegated legislation: the Joint Committee on Statutory Instruments, the effectiveness of negative/positive resolution procedure and requirements under the Statutory Instruments Act 1946 and the legal effect thereof; judicial review; the benefits and detriments of delegated legislation.

Note that all references to De Smith are to De Smith and Brazier's *Constitutional and Administrative Law,* 8th edn, 1998. The Joint Committee's Report is HLP 43–41 (1998–99).

Question 12

During a House of Commons debate on a Private Members' Bill to legalise cannabis, Heather MP accuses the recently elected Laurence MP, an Opposition MP who has spoken in favour of the Bill, of being 'bribed' to speak in favour of it and to place his name to an amendment to it by Stoned UK, a group which campaigns for the legalisation of cannabis. She says that this information was given to her in a letter from one of her constituents, Mrs Spod, and that she has passed the letter on to a group of MPs campaigning for legalisation, known as Members for Free Weed (MFW). Heather also says that Laurence has an agreement with Stoned UK to provide it with advice and information on parliamentary feeling on possible legalisation and any relevant legislative proposals, and that he makes use of a research assistant, funded by the group. Laurence responds by accusing Heather (truthfully) of supplying cannabis to other MPs to smoke in the Members' Tea Room.

Laurence approaches the Speaker after the debate and admits that the second part of Heather's accusation, as to his agreement with Stoned UK and the research assistant, is true. He says that he has received a number of letters from members of the group urging him to do all he can in Parliament to support the current Bill, and saying that they hope he will give the group 'a good return in this respect' for its investment in his research assistant.

It subsequently emerges that Mrs Spod blames Laurence for the fact that one of her children has recently started smoking cannabis, a matter about which she is very bitter. The child saw Laurence speaking in a debate and found him very persuasive.

Discuss the parliamentary and legal consequences of the above.

Answer plan

This is a fairly typical question in that it requires students to discuss the protection given to verbal and written statements by the privilege of freedom of speech in a wide range of situations, while throwing in a number of possible infringements of the rules relating to Members' interests and also a criminal offence committed in the House. (This often appears as an assault by an MP on another Member/the Speaker or the damaging of the mace.) The status of the words spoken in the House and the letter from Mrs Spod are fairly uncontroversial, so the answer should devote more time to the letter to MFW and the central problem which it raises of whether such a letter amounts to a 'proceeding in Parliament'—an

issue which will virtually always need discussion in answers on this topic. It is important to consider Laurence's possible violation of the rules relating to Members' interests from the perspective of possible contempts committed by both him *and* Stoned UK. When dealing with any given event, students must always bear in mind the possibility of both legal *and* parliamentary consequences, and the fact that 'legal consequences' can include both civil and criminal liability.

The following matters should be discussed:

- defamatory words spoken in debate: Art 9 of the Bill of Rights confers absolute privilege. Is there a possible breach of privilege by Heather? Does the Human Rights Act (HRA) 1998 have an impact here?;
- the letter from Mrs Spod: is this qualified privilege *but* defeated by malice?;
- the letter to MFW: is it a proceeding in Parliament and therefore absolutely privileged? If not, then is this qualified privilege *but* defeated by malice?;
- whether Laurence may be in breach of the rules governing registration of interests; the production of employment agreements and a declaration of interests by virtue of his association with Stoned UK;
- whether Laurence has breached the 'advocacy' rule by his actions in debate;
- whether Stoned UK has committed a contempt of Parliament by trying to limit Laurence's freedom of action;
- the drug selling by Heather: serious contempt of the House; whether courts have jurisdiction—likely outcomes.

Answer

This question raises the following broad issues: whether actions by Laurence in defamation against Heather and Mrs Spod would succeed; whether Laurence's association with Stoned UK would be viewed by the House as a contempt of Parliament for breach of registration requirements and of the advocacy rules; and what criminal and/or parliamentary consequences would flow from Heather's drug selling activities.

The allegations of Laurence's bribe-taking are *prima facie* defamatory (any possible defence of justification will not be considered in relation to the defaming of Laurence). The words spoken by Heather in debate would be covered by absolute privilege under Art 9 of the Bill of Rights 1688; *Wason v Walter* (1868) confirmed that Art 9 provides complete civil and criminal immunity for Members in respect of words spoken by them during

proceedings in Parliament, and this position was re-affirmed by the Privy Council in *Prebble v Television New Zealand* (1994). Thus, no cause of action would lie for slander. It is possible that at some future point, the European Court of Human Rights might find this absolute bar a violation of the Art 6 right to a fair trial of those such as Laurence, who have no possible means of having the alleged injury to their reputation adjudicated upon in court. In January 2002, the Court declared admissible a complaint against the UK government concerning the lack of a remedy in defamation where a government minister had made serious and, as it turned out, false allegations against a Belgian diamond dealer in Parliament. Whilst Parliament is specifically excluded from the definition of those 'public authorities' which are bound to respect Convention rights (s 6(3) of the HRA), the point could be raised in legal proceedings for defamation, relying on the courts' duty as a public authority itself (s 6(3)) to act compatibly with Convention rights under s 6(1). The courts' reaction to such an argument cannot at present be predicted. In terms of the parliamentary consequences of this matter, the House might regard Heather's repetition of the accusations as a misuse of privilege and therefore a contempt, particularly if she had made no attempt to verify the contents of the letter.[1]

A libel action against Mrs Spod would have a much better chance of success. The letter from Mrs Spod will not be covered by absolute privilege, since it clearly does not amount to a proceeding in Parliament; it may be protected by qualified privilege provided it is in the public interest and there is an absence of malice (*Rule* (1937)). The letter is clearly on a matter of public concern, but the facts suggest that absence of malice may be difficult to establish, since the allegation is substantially untrue and hostility towards Laurence is presumably a motive; therefore, qualified privilege would probably not be available to Mrs Spod as a defence against Laurence.

By sending a copy of the letter to MFW, Heather has re-published the libel therein contained. It is uncertain whether the sending of a letter in this way would amount to a proceeding in Parliament and thus be covered by absolute privilege. The case of *GR Strauss* (1958), in which the MP concerned wrote a letter to the Paymaster General on possible misconduct by the London Electricity Board, is applicable but not conclusive. The Committee of Privileges held that the writing of such a letter was a 'proceeding in Parliament', and thus covered by absolute privilege, but the Commons narrowly rejected this finding on a vote. However, decisions by the Commons on matters of privilege set no binding precedent. Furthermore, subsequent events have suggested that the matter would now be differently decided. In 1967, the Select Committee on Parliamentary Privilege strongly recommended that legislation be enacted to reverse the Commons' decision in *Strauss;* in 1970, the Joint Committee on Publication of Proceedings in

Parliament proposed a definition of 'proceedings in Parliament', which included letters sent between MPs for the purpose of allowing them to carry out their duties. (Their proposed definition was subsequently approved by the Faulks Committee on Defamation 1975 and the Committee of Privileges 1976–77.) However, the recent report of the Joint Committee on Parliamentary Privilege strongly recommended that such correspondence should *not* attract absolute privilege, the Committee deeming such protection unnecessary, given the effectiveness of the qualified privilege defence in protecting MPs over recent years.

In the case of *Rost v Edwards* (1990), the plaintiff wished to adduce evidence contained in a letter alleging the failure of another Member to register an interest from an MP to the Speaker, to be given in court to support a libel action. Popplewell J was of the opinion that the letter added nothing to the evidence in the case but added, *obiter,* that he had 'no hesitation' in stating that he thought the letter was covered by (absolute) privilege. He cited no authorities in support of this view, but presumably regarded the letter as a 'proceeding in Parliament' which could not be questioned outside Parliament under Art 9 of the Bill of Rights. It is hard to say now whether the weight of authority and expert opinion is still in favour of such letters being afforded absolute privilege. However, in the instant case, since the accusations in the letter were directly relevant to an issue then being debated by the Commons, Heather could perhaps hope for a reversal of the *Strauss* verdict.

If such a decision was made, then any attempt by Laurence to continue the action in respect of Heather's re-publishing of the libel could amount to a breach of privilege as the Committee of Privileges considered the Electricity Board's action against Strauss to be.[2]

Turning to the possibility that the letter would not attract absolute privilege, then following *Beach v Freeson* (1972), it should at least be deemed to enjoy qualified privilege since Heather and the recipients, MFW, have a common, legitimate interest in the contents; if Heather can then additionally show that she was not actuated by malice, Laurence cannot succeed. Since, however, 'malice' can mean merely lack of belief in the statements made in the relevant material, Heather would have difficulty in proving lack of malice if the letter had mentioned Mrs Spod's grievance against Laurence, thus giving Heather a reason to doubt the former's good faith.

The possible consequences of Laurence's association with Stoned UK now fall to be considered. Laurence's position raises a number of issues (possible *responses* of the House will be discussed once Laurence's possible breaches of the rules have been considered). First of all, it is clear that his agreement to provide advice to Stoned UK for which he receives a material benefit, namely, a paid research assistant, is an interest which should have been

entered on the Register of Members' Interests. Laurence's association with Stoned UK clearly falls into Category 3 of the Register: '…any provision to clients of services which depend essentially upon, or arise out of, the Member's position as a Member of Parliament.' (*The Guide to the Rules Relating to the Conduct of Members,* para 18; hereafter, *The Guide*.) However, the rules state that registration must take place 'within three months of [Members] taking their seats after…election' (*The Guide,* para 10); we are told that Laurence is 'recently elected', so the time limit for registration may not have expired.

Laurence's obligations go further than mere registration: his agreement with Stoned UK clearly amounts to what a Resolution of the House has described as 'an agreement which involves the provision of services in his capacity as a Member of Parliament' (Resolution of 6 November 1995; see *The Guide,* paragraphs on 'Employment Agreements', following para 34). Therefore, according to that Resolution of the Commons, the agreement must be put into writing and the amount of benefit obtained must be declared by reference to the bands specified in the Resolution. The agreement must then be lodged with the Parliamentary Commissioner for Standards (hereafter, 'the Commissioner'). It appears from *The Guide* (although this is not absolutely clear) that the same time limit applies; so, if Laurence was elected more than three months ago, he will also be in breach of this provision. It is irrelevant that Laurence's agreement may be a verbal one only—it must be placed in written form and lodged with the Commissioner regardless (*The Guide*, para 35).

In addition to being placed in formal written form, there is the issue of declaration. The House's Resolution of 22 May 1974 states that: 'In any debate or proceeding of the House or its Committees…[each Member] shall disclose any relevant pecuniary interest or benefit…he may have.' Plainly, an agreement to provide parliamentary services for a group campaigning for the legalisation of cannabis, in return for a funded research assistant, amounts to a pecuniary benefit relevant to the debate of a Bill to legalise cannabis. Laurence should have declared his interest at the beginning of his remarks in debate. Furthermore, when adding his name to an amendment to a Bill, his interest should have been referred to on the Order Paper (Resolution of the House of 19 July 1995; see *The Guide,* para 42).

The rules of the House go further than mere disclosure and declaration: Laurence may also have fallen foul of the so called 'advocacy rule'. The relevant Resolution of the Commons states that 'no Member…shall, on consideration of any remuneration…or reward or benefit in kind…advocate or initiate any cause or matter on behalf of any outside body or individual… by means of any speech, Question, Motion, introduction of a Bill, or Amendment to a Motion or a Bill' (extract from a Resolution of the House of

15 July 1947, as amended on 6 November 1995; reproduced in *The Guide,* para 53). As guidance provided by the Committee on Standards and Privileges makes clear, a distinction is drawn between: (a) *initiating* a parliamentary proceeding, for example, presenting a Bill; and (b) simply *participating* in a debate started by others. A Member may not *initiate* any proceeding if it 'relate[s] specifically and directly to the affairs and interests of [the body from whom he receives the benefit]' (*The Guide,* para 58.1). However, Members may participate in a debate already under way, provided that their speech does not 'seek directly to confer a benefit *exclusively* upon a body' from which the Member receives the payment (*The Guide,* para 58.2). Plainly, the debate on the legalisation of cannabis 'relates specifically and directly to the affairs and interests' of Stoned UK, a group campaigning for that end. So, the rules forbid Laurence from 'initiating any proceedings' in relation to the Bill. Unfortunately for Laurence, he has put his name to an amendment, something which clearly amounts to 'initiating a proceeding' and thus a breach of the rules (see the definition of 'initiating' a proceeding (*The Guide,* para 58.1)). However, his *participation* in the debate appears not to be in breach of the rules: presuming that his contributions were simply arguments in favour of the Bill, they could not be said to have sought to confer a benefit 'exclusively' on Stoned UK. It is suggested that these words would refer to a speech in a debate which, for example, asked for a special tax concession to be given to the particular organisation in question.

In conclusion, therefore, Laurence has (unless he took his seat less than three months before the events described) failed to register his interest in Stoned UK and has failed to deposit his agreement with the Commissioner as required; in any event, he has failed to declare his interest in debate and breached the advocacy rule by putting his name to an amendment. The above omissions would be investigated, if complaint was made, by the Commissioner and, if he found a *prima facie* case, considered by the Committee on Standards and Privileges. The sanctions they could demand on finding a breach of the rules range from requiring Laurence to apologise to the House at the lowest end to expulsion from the House at the highest. Particularly given that Laurence is new to the Commons and that his 'initiation' of proceedings was at a very low level (merely adding his name to an amendment), the ordering of an apology appears to be the most likely sanction.

In relation to the position of Stoned UK, it is clear that if, as in the *Yorkshire NUM* case (1975), the sponsoring organisation threatens to withdraw financial support in the event of the MP not voting (or abstaining) as desired, there is no doubt that such threats would be viewed as a serious contempt. Here, the threat is not explicit as in the *NUM* case, but Stoned UK's letters clearly amount to an attempt to apply pressure in respect of a specific

matter—the Bill to legalise cannabis—and therefore amount to an attempt to 'control or limit the Member's complete independence and freedom of action' as forbidden by the 1947 Resolution; as such, it would certainly be unacceptable to the House. It is likely that Stoned UK would at the least be required immediately to repudiate the letters, and to make no further attempts to restrict Laurence's freedom of action.

Finally, the probable consequences of Heather's drug selling activities must be examined. The selling of cannabis within the House would certainly amount to a serious contempt, and expulsion might well be considered appropriate. Heather has also committed a criminal offence, which raises the issue of whether the courts would regard themselves as having jurisdiction over an offence such as this committed within the confines of the House. In *Bradlaugh v Gossett* (1884), Stephen J stated that he knew of 'no authority for the proposition that an ordinary crime committed in the…Commons would be withdrawn from the ordinary course of criminal justice'. However, both *Sir John Eliot's Case* (1668), in which the Lords were loath to decide whether an assault on the Speaker was covered by privilege, and the more recent case of *Graham-Campbell ex p Herbert* (1935), in which the High Court considered that a magistrate lacked jurisdiction to prosecute Members for selling alcohol without a licence in the Members' Bar, suggest that the courts are unsure of their right to try such cases in the normal way. The Joint Committee was highly critical of any idea that the simple fact that events happened within the physical premises of Parliament should exempt them from criminal liability, commenting: 'This privilege does not embrace and protect activities of individuals, whether Members or non-Members, simply because they take place within the precincts of Parliament… A criminal offence committed in the precincts is triable in the courts.'

In a matter as serious as drug dealing, it seems clear that the House would not seek to resist the matter being dealt with in the ordinary way by the courts, for it does not have adequate powers to deal with ordinary crime. In any event, Parliament would be anxious to avoid the unfavourable publicity that would undoubtedly ensue from an attempt to protect such an offender through an assertion of immunity by virtue of privilege.

Notes

1 The likely response of the House to this possible contempt could be explored. Mention could be made of the *Colonel 'B'* case in 1978, in which Parliament took no action against MPs who had used their privilege of freedom of speech to break the *sub judice* rule and thus commit a clear contempt of court with impunity. In 1984, a Member committed a breach of the privilege of freedom of speech in seeking to limit the freedom of action of other Members by words

spoken in debate (*Bank's* case (1984)). The Committee of Privileges recommended that no action be taken against the Member. It would seem unlikely, therefore, that Heather would be punished, even if a finding of breach of privilege were made.

2 It could also be noted that in *Strauss,* the vote on whether the Electricity Board had committed a breach of privilege, which went against Strauss, divided substantially along party lines—Strauss being an Opposition MP. Since Laurence is also a Member of the Opposition, if party allegiance was given more weight than expert opinion in the vote, Laurence could likewise receive a verdict that the libel action against him did not constitute a breach of privilege.

Question 13

'…the House [of Commons] ought to relinquish its jurisdiction over breaches of privilege and contempts to the courts…' (De Smith).

Discuss with particular reference to the privilege of freedom of speech.

Answer plan

This is a fairly straightforward question in that it gives the student the chance to range quite widely through the topic, rather than requiring an answer which focuses on a specific area, such as the conflict between the judiciary and Parliament over the right to determine the scope of privilege. That conflict should be examined, and can be used as an argument for De Smith's contention, but students should cast their net more widely. It should be noted that a verdict on De Smith's opinion should be given in concluding the essay. Although it would be safe to agree with the proposition, the more ambitious student should aim to question whether jurisdiction over *all* contempts should be handed over to the courts, and might perhaps conclude with a modified version of the original statement.

The following areas should be covered:

- the conflict between the judiciary and the Commons over freedom of speech—uncertainty over the resolution of this;
- the uncertainty of the extent of freedom of speech caused by the above conflict;
- the unsatisfactory nature of the Commons as arbitrating body: it sets no precedents, uncertainty results and party considerations may intrude;
- the criticisms of the Committee on Standards and Privileges, in particular, the possibility that its proceedings would violate Art 6 of the

European Convention on Human Rights (ECHR); the problems with using the Human Rights Act (HRA) 1998 directly against it;
- is the solution the handover of jurisdiction to the courts or perhaps a partial handover?;
- the views of the Joint Committee on the above.

Answer

The contention by De Smith which is the subject of this question could be understood as relating only to the House's power to deal as it sees fit with a person who commits a breach of privilege or contempt once it has been established that a breach or contempt has taken place. For the purposes of this discussion, however, he will be taken to be arguing that the decision as to whether a particular action amounts to a contempt should also be taken by the judiciary rather than Parliament. Such a change would have the result that the judiciary would, in some cases, have to define the boundaries of privilege in order to ascertain whether any breach had actually occurred. De Smith's proposal, if put into effect, would thus amount to quite a radical change. The discussion below will examine the various difficulties inherent in the present situation, and attempt to establish whether they justify such radical reform.

Not all questions of breach of privilege have caused difficulties; those which affect only Members of Parliament in their capacity as MPs, such as the disciplining of MPs who misuse the parliamentary platform to insult or defame other Members, have been agreed by Parliament and the courts to be under the sole jurisdiction of Parliament. Parliament's handling of these privileges has been relatively unproblematic, though it seems that public dissatisfaction with the Commons' system of self-regulation is growing. This is compounded by a belief that since 1997, the Labour-dominated Committee on Standards and Privileges has been over-lenient with prominent Labour MPs (including Keith Vaz and Geoffrey Robinson) accused of breaches of the rules governing Members' interests, and by the widespread belief that Elizabeth Filkin, the former Standards Commissioner, was in effect forced out for being over-diligent in investigating breaches of the rules.

It is those privileges which in their exercise can affect the legal rights of those outside Parliament which have caused difficulties. The first problem considered will be the conflict between Parliament and the judiciary, which has resulted from Parliament's self-asserted jurisdiction over this type of privilege.

The privilege of freedom of speech has been the most controversial. The exercise of this privilege can give rise to two possible breaches or

contempts: the first is its misuse in the House by MPs which, as has been said, is unproblematic. The second can occur where a litigant sues in defamation in respect of words which Parliament has deemed to be absolutely privileged, that is, immune from civil or criminal proceedings. When this happens, Parliament can regard the action as a contempt and attempt to prevent the litigant from exercising his legal right to sue and enforce the judgment of the court.

This was illustrated in 1839 in the case of *Stockdale v Hansard*. Stockdale brought an action in respect of allegedly defamatory words in a report of prison inspectors published by *Hansard,* by order of the Commons. When the action was tried, the court decided that *Hansard*'s reports were not covered by absolute privilege, so that Stockdale could proceed. The court further adjudged that the House did not 'have the power to declare what its privileges are', while the House passed a resolution affirming that it was the sole judge of its own privileges. The House showed its readiness to back up its resolution with force by imprisoning the Sheriff of Middlesex for contempt when he attempted to enforce the court's judgment in favour of Stockdale by levying execution upon *Hansard*'s property; the courts backed away from confrontation by refusing to grant the Sheriff a writ of habeas corpus.

The court stated that it refused the writ because the Speaker's warrant did not state the facts which allegedly constituted the contempt, and it would not be seemly for them to enquire further since, as De Smith puts it, although 'the House of Commons was not a superior court…it was entitled to as much respect as if it were'.[1]

It is not certain that the matter could again be resolved as it was in *Stockdale*. Calvert considers it uncertain 'that a court of law would meekly accept a general return to a writ' in similar circumstances (*Introduction to British Constitutional Law,* 1985, p 115). Keir and Lawson, in contrast, take the view that the courts 'yielded the key to the fortress' by refusing to question the legality of imprisonment for contempt where no reason is given, implying that a precedent has been set (*Cases in Constitutional Law,* 6th edn, 1979, p 225). Further, if the *Lords* was asked to grant a writ of habeas corpus, it could not avoid questioning the Commons' actions on the grounds that the Commons was a superior court. An appeal was in fact made to the Lords in *Paty*'s case (1704), but the counsel preparing it was promptly imprisoned by the Commons. However, in *Prebble v Television New Zealand* (1994), the Privy Council appeared to accept that parliamentary privileges could not be questioned in court except in exceptional circumstances. The whole area may therefore still be said to be encased in a web of ambiguity; possibly, conflicts could arise in the future because two different bodies may claim competing jurisdictions over the

ambit of privilege. No precedent has been set as to how to resolve these conflicts other than the frustrating by Parliament of the powers of the courts by imprisoning its officers, which in fact is not a resolution but merely a stalemate; further, it is not even certain whether such an outcome would be repeated if the issue arose again.

It is possible that at some future point, the European Court of Human Rights might hold that the prevention by Parliament of the trial of matters raising privilege constitutes a violation of the Art 6 right to a fair trial of those defamed by MPs who have no possible means of having the alleged injury to their reputation adjudicated upon in court. In January 2002, the Court declared admissible a complaint against the UK government concerning the lack of a remedy in defamation where a government minister had made serious and, as it turned out, false allegations against a Belgian diamond dealer in Parliament. Parliament is specifically excluded from the definition of those 'public authorities' which are bound to respect Convention rights (s 6(3) of the HRA). However, the point could be raised in legal proceedings for defamation, relying on the courts' duty as a public authority itself (s 6(3)) to respect Convention rights under s 6(1). The courts' reaction to such an argument cannot at present be predicted and in any event, should Parliament refuse to accept the courts' jurisdiction over the matter, there is no means of resolving the deadlock.

Thus, the present competition for jurisdiction over those privileges which affect persons outside the House clearly gives rise to great difficulties. As stated in the resolution of the Commons in *Stockdale*, Parliament not only reserves the right to punish contemners, but claims to be solely entitled to determine how far privilege extends. This claim, and its denial by the courts, has given rise to a second major problem with the present state of affairs, namely, a real uncertainty as to the *extent* of certain privileges, particularly freedom of speech. Absolute privilege attaches to words spoken in the course of debates or proceedings in Parliament by virtue of Art 9 of the Bill of Rights 1688. The ambiguous words here are 'proceedings in Parliament', and the interpretation to be given to these words is at present shrouded in uncertainty.

This uncertainty can be attributed first to the fact that both the courts and Parliament claim to be entitled to interpret these words. Should conflict flow from them reaching different results, the outcome remains uncertain, as discussed above. The case of *Rost v Edwards* (1990), in which it was said that in dealing with grey areas of privilege, the court should not be astute to see its jurisdiction ousted, shows that the judiciary is in no way retreating from its historic insistence on its duty to interpret privilege according to the common law. As noted above, if an issue is raised regarding the

compatibility of the parliamentary privilege of freedom of speech with the Art 6 right to a fair trial of those defamed in Parliament, UK courts might be forced to determine the matter, though the exclusion of Parliament from the definition of 'public authority' might provide the courts with a means of avoiding the issue.

The second reason for uncertainty lies in the nature of the House of Commons as a decision-making body. If a question of privilege arises, the Committee on Standards and Privileges (CSP) will consider the matter and make a recommendation to the Commons. Unfortunately, the Commons does not always follow the Committee's recommendations, nor is it bound by its previous decisions. Both of these drawbacks are illustrated by the case of *GR Strauss* (1958). Strauss MP wrote a letter to the Paymaster General on possible misconduct by the London Electricity Board. The Committee of Privileges held that the writing of such a letter *was* a proceeding in Parliament, and thus covered by absolute privilege, but the Commons narrowly rejected this finding on a vote. If the situation were to recur, this finding could be changed, and indeed, subsequent reports by various parliamentary committees suggest that the matter should now be decided differently.[2] However, the fact remains that the House would be free to reject this weight of learned opinion and the *obiter* comments of Popplewell J in *Rost v Edwards* (1990) to the effect that letters between MPs and the Speaker were covered by privilege. This possibility is lent credence by the suggestion from *Strauss* that the Commons, being a party political animal, may not always be capable of excluding party considerations from its decisions. The decision to reject the recommendation of the Committee on Strauss' letter split broadly along party lines which, since Strauss was an Opposition MP, meant an unfavourable verdict. One could envisage party considerations intruding themselves, for example, in the case of a senior government figure sued for libel; in determining whether the minister's publishing of the libel was covered by privilege, government MPs might well be more concerned with possible embarrassment for the government than with following expert recommendation.

Thus, the Commons is not ideally suited to make the final decisions on matters of privilege, but the CSP has itself been subject to criticisms as a forum for trying issues which at least theoretically could result in the imprisonment of those it finds to have been in breach of privilege or to have committed contempts. First, it is nominated in proportion to party strengths; it is unusual for it to divide along party lines, but it did so in the *WJ Brown* case (1947), in delivering a verdict which favoured the government MP concerned. Secondly, in denying alleged contemners the right to legal representation, and on occasion condemning them without

giving them the opportunity to put their case (the Electricity Board was condemned unheard in *Strauss*), the Committee is open to the charge of breaching the rules of natural justice. The justice of this second criticism was recognised by the 1967 Select Committee on Parliamentary Privilege, which recommended a number of procedural changes aimed at giving those at risk of condemnation a right to put their case in a proper manner. The Committee's proposals have not yet been enacted.

It might be thought that changes to this unsatisfactory position could be forced on Parliament by an aggrieved MP taking action under the HRA for a declaration that proceedings of the CSP amounted to a breach of Art 6 of the ECHR, and possibly claiming damages; however, it is submitted that this is a remote prospect. Although it is true that in extreme cases, the sanctions recommended by the Committee could, through expulsion of a Member, lead to loss of his livelihood (making the consequences of an adverse judgment more grave than those of many a criminal conviction), nevertheless, Art 6 refers to 'the determination of [a citizen's] civil rights and obligations or… any criminal charge against him', a wording which would not appear to be apt to cover the Committee's remit. Furthermore, even if it could be argued that the Committee's activities were *prima facie* covered by Art 6, it appears that no action could be brought under the HRA, quite apart from the fact that one would expect a court to be minded to refuse jurisdiction in a matter affecting Parliament's regulation of its own affairs. This is because the Act: makes it 'unlawful for a *public authority* to act in a way which is incompatible with a Convention right' (s 6); provides that proceedings may be brought in respect of such an act (s 7); and provides that damages or other remedies may be awarded to the aggrieved claimant (s 8). However, s 6(3) specifically states that neither House of Parliament nor 'a person exercising functions in connection with proceedings in Parliament' count as 'public authorities' for the purposes of the Act. No action could therefore be brought against either the Committee or the House itself by an aggrieved Member. If the action were struck out, or simply lost, the claimant could of course still take his case to the European Court of Human Rights under the right of individual petition enshrined in Art 34 of the Convention, provided that all domestic avenues had been exhausted.

It may further be argued that Parliament's jurisdiction over breaches of privilege is unsatisfactory, since its effect can be to prevent the court from giving adequate weight to freedom of expression and the interests of justice. In *Prebble v Television New Zealand Ltd* (1994), the Privy Council evaded the possibility of a conflict with Parliament in considering an instance in which a litigant wished to rely on words spoken in Parliament in order to raise the defence of justification in defamation proceedings. Certain of the particulars of the justifications relied on statements and actions which took place in

Parliament. The plaintiff applied to strike out those particulars which concerned matters taking place in the House and which were, therefore, under Art 9 of the Bill of Rights 1688, subject to parliamentary privilege. The defendant argued that Art 9 only operated in legal proceedings so as to prevent questioning of statements made in the House when those proceedings sought to assert legal consequences against the maker of the statement, or alternatively that Art 9 did not extend to prevent challenges to the truth of statements made in Parliament when the maker of the statements himself initiated them.

However, it was found that Art 9 could not be limited in this way, bearing in mind the wrider principle (of which Art 9 was said to be but one manifestation) that the courts and Parliament recognise their respective constitutional roles, and the courts will not allow any challenge to be made by evidence led in court to actions or statements in Parliament in performance of its legislative functions or in protection of its privileges. It was recently confirmed by the House of Lords in *Hamilton v Al fayed* (2001) that Art 9 precludes any challenge in court, whether by evidence, cross-examination or submission, to the Veracity or propriety of anything done in the course of parliamentary proceedings' (*per* Lord Browne-Wilkinson). In *Prebble,* the Privy Council went on to say that in very special circumstances, where it was impossible to determine the matter at issue between the parties, a stay might be ordered so that Parliament could determine whether it wished to waive privilege in the interests of justice. Libel actions in which most of the matters of justification were covered by privilege might fall within that special rule. However, in the present case, in which the defendant would still be able to put forward most of the matters relied on in justification, that exceptional procedure should not be followed. While it may be argued that this decision—and *Al Fayed*—avoided addressing the fundamental issue at stake, namely, whether the courts should not assert a right to jurisdiction in such matters where fundamental rights of the citizen—the right to a fair trial—are at issue, deviation from it is unlikely for so long as Parliament claims to be able to determine whether privilege should be waived in a given case. The HRA may require the courts to reassess the balance they strike between the importance of access to justice (guaranteed by Art 6 of the Convention) and parliamentary privilege, which is not a right protected *per se* under the Convention. However, the practice of ordering a stay on trials where the ability of the defendant to adduce his case is seriously handicapped by parliamentary privilege may well satisfy the requirements of Art 6.

It may be noted that following the enactment of the Defamation Act 1996, a claimant MP, suing in respect of allegations relating to his parliamentary conduct, may, if he finds it necessary for his case, waive privilege, allowing both parties to refer to proceedings in Parliament; the action can therefore

proceed. This indeed occurred in *Al Fayed,* and the House of Lords confirmed that the choice lies with the individual MP concerned. Where, however, the defendant *alone* wishes to refer to parliamentary proceedings to defend itself, as in *Prebble,* it has no ability to waive privilege, a position which may be regarded as yet another unfair and undesirable consequence arising from Parliament's—now individual MPs'—claim alone to decide when privilege may be waived and when enforced. A more serious criticism of the change brought about by the Act was made by Lord Lester during the Bill's passage: The immunities written into Art 9 were not included simply for the personal …benefit of Members…but to protect the integrity of individual legislators.' ((1996) NLJ, 17 May, p 719.) It can therefore be argued that if the system whereby Parliament *as a whole* regulated the area of privilege was unsatisfactory, the new position, whereby one individual MP can in the pursuit of his own interests decide whether privilege should apply, is 10 times worse. This criticism was accepted by the Joint Committee on Parliamentary Privilege, which was highly critical of the unfairness represented by s 13 of the Defamation Act 1996; its report suggested that the power to waive privilege be given instead to each House of Parliament.

If it is accepted that Parliament's control over those privileges which affect the rights of those outside Parliament is manifestly unsatisfactory on a number of grounds, two questions naturally arise. First, would the problems be solved by handing over the jurisdiction to the courts as De Smith suggests, and secondly, if this is in general terms an acceptable solution, should control over punishment for *all* contempts be handed over?

The first question, it is submitted, is easily answered. The only one of the above problems which could be readily solved while leaving Parliament in control is the want of natural justice in the CSP. The remainder of the problems are inherent in the nature of the Commons and the attitude of the judiciary. For example, it has been suggested that Parliament could pass an Act defining 'parliamentary proceedings'. To pass such an Act would not, however, solve the problem as to whether Parliament's or the courts' interpretation of the Act would be binding. A complete, rather than a partial solution to the unsatisfactory nature of the current situation can only be achieved, it is submitted, by a handover of jurisdiction to the judiciary.

In relation to the second question, it is hard to believe that De Smith is advocating a handover of control over all contempts to the courts. In any event, this would be impracticable in the case of instant disciplining of MPs who, for example, grossly abuse each other in debate. A sensible line to draw would be that drawn by the courts themselves when they have considered the issue of privilege; punishment for contempts and breaches which affect only Members of the House could properly remain within the exclusive purveyance of Parliament, though MPs should not, it is submitted, be

sheltered from the criminal law as they were in *Graham Campbell ex p Herbert* (1935). However, where the rights of ordinary citizens are affected, the courts should be the sole arbiters.

Notes

1 Students could note that in giving a return which did not state the facts upon which the allegation of contempt was based, Parliament had clearly learnt from *Paty's* case (1704), in which the Speaker gave the grounds for the finding of contempt: one of the judges (Holt CJ), hearing the application for habeas corpus, dissented from the finding that the writ could not be granted, stating that where the reasons given could not amount in law to a breach of privilege or contempt, habeas corpus ought to be granted.
2 These include reports by the 1967 Select Committee on Parliamentary Privilege, the 1970 Joint Committee on Publication of Proceedings in Parliament, the Faulks Committee on Defamation 1975 and the Committee of Privileges (1976–77).

Question 14

'Before the formally dramatic part of the legislative process even begins, almost all the terms of almost all (government) Bills are settled' (Calvert).

Would you agree that the House of Commons is redundant as a legislative body?

Answer plan

This question demands a critical assessment of the effectiveness of the House of Commons in its role as a legislative body. This is the type of question which is most commonly asked. It should be emphasised again that in some examinations, the question will refer to 'Parliament' not 'the Commons', so that any answer would have to include the role of the Lords, which is considered separately in Chapter 4. This answer should confine itself to the Commons' control over legislation; scrutiny of the Executive through, for example, Select Committees is not relevant here. Students should note that there is an implied presumption behind the question, namely, that if the House cannot often alter government Bills, it may be 'redundant'. This presumption must be challenged by the student because it is of rather more interest to discuss what the House should be aiming to achieve rather than what it actually does achieve, although an analysis of the latter is clearly crucial in the answer.

Essentially, the following areas should be covered:

- a brief discussion of the doctrine of the separation of powers and the basic charge against the Commons of failure to control legislation;
- illustrations of government omnipotence and an explanation of how this is achieved: whips and government majority coupled with an indication of the legislative process; examples from the Blair government;
- the argument that the Commons' role lies in scrutiny; the issue of publicity;
- an analysis of effectiveness in this field; the curtailment of scrutiny by guillotine, closure and programming; the effect on the pre-legislative process of the anticipated response of the House; scrutiny of delegated legislation; the greater recent use of pre-legislative scrutiny;
- a brief discussion of the ways in which the Commons could improve its current performance, in particular, those suggested by the Modernisation, Liaison and Public Administration Committees;
- conclusion: does the Commons perform an important function?

Answer

The doctrine of the separation of powers first postulated by John Locke in 1690 and expanded by Montesquieu in the 18th century required, *inter alia*, that a body separate from the Executive should be vested with legislative power in order to guard against the amassing of disproportionate power in the Executive arm of the State. Parliament has never been a legislative body entirely free from the influence of the Executive, but the increasing dominance of the government of the day through organised political parties has led constitutional observers to view the Commons as having lost its role as legislator, becoming instead a body which merely serves to legitimise government legislation. In what follows, the accuracy of this view will be assessed, alternative views of the role of the Commons will be explored, and a verdict on the continuing importance of the Commons will be offered.

If the role of the Commons is seen as being to provide independent assessment of the merit of government Bills and to make numerous amendments and rejections, then there can be little doubt that it is not fulfilling this role. The role of settling the aims and content of legislation is now assumed by the Legislation Committee of the Cabinet. Government Bills are drafted by Parliamentary Counsel on receipt of a

memorandum of instructions from the sponsoring department. Thus, as Calvert puts it, 'the substantial task of legislating will have been largely discharged before the Bill is…read…in the House' (*Introduction to British Constitutional Law,* 1985, p84).

Throughout debate, the system of whipping will operate to subordinate the judgment of individual MPs to personal ambition and party loyalty. Considerable pressures can be brought to bear on potential rebels, and the efficiency of the party whips, together with the overall majority with which the first past the post system is likely to endow the government, will ensure that the vast majority of government Bills will reach the statute books. In the 1985–86 parliamentary session, out of 50 government Bills, 48 became law. The Blair government has not, to date, suffered a single legislative defeat in the Commons, in marked contrast to the position in the much more independent House of Lords, which has imposed important legislative reversals on the government.

The committee stage is often perceived as a time in which party loyalties are less strong and more constructive debate may take place. Unfortunately, MPs are often simply lacking in the expertise required to challenge increasingly complex government legislation from a position of sufficient knowledge. Further, as the Modernisation Committee has put it, the committee stage 'which is meant to be the occasion when the details of the legislation are scrutinised, has often tended to be devoted to political partisan debate rather than constructive and systematic scrutiny', a style which is particularly unsuited to examining the factual and technical background to a Bill (Select Committee on the Modernisation of the House of Commons, First Report (HC 190, 1997–98)). The Standing Committee stage for the Poll Tax legislation—a hugely controversial change to local government finance, which eventually had to be scrapped, at a total cost of £1.5 billion—has been described as 'a futile marathon…mostly a matter of posturing…scrutiny by slogan and sound bite' (Butler, *Failure in British Government,* quoted HC Deb, Col 1098,13 November 1997).

Thus, in general, the committee stage results in the acceptance of government amendments only because, as Griffiths' examination of standing committees found, 'party discipline is largely maintained' ('Standing Committees in the House of Commons', in Walkland and Ryle, *The Commons Today,* 1981, p 130). Further, many Opposition amendments are designed not to increase the effectiveness of the Bill, but to embarrass the government or simply to apply time pressure: the political role of Opposition MPs may prevent them undertaking *constructive* criticism.

Should one conclude from the above that the Commons is redundant? It is suggested that this would be premature. Apart from the fact that the

Commons still acts as a constitutional safeguard against the unfettered power of the Executive, so that governments are aware that they may not be able to rely on their members to pass legislation which would, for example, threaten the basic liberties of citizens, it may be argued that the view which sees the Commons as redundant because it is largely powerless to amend or reverse the government's programme is wrongheaded. In fact, it can be contended that the Commons would be undermining democratic accountability if it substantially changed government Bills, since the legislative programme which attracted the greatest proportion of votes should be enacted in accordance with the voters' presumed wishes. This argument was undoubtedly what Professor Crick had in mind when he wrote 'the phrase "parliamentary control" should not mislead anyone into asking for a situation in which governments can have their legislation changed or defeated…' (*The Reform of Parliament,* 1964, p 80).

Such a point of view is clearly open to a number of objections: it can be plausibly argued that many people vote not after a careful assessment of which legislative programme they would like to see enacted, but on the basis of traditional loyalty, misinformation, misunderstanding, or their reaction to politicians' perceived personalities. Further, it is undoubtedly true that people may vote for a party even though they may object to some of its specific legislative proposals. Finally, the accountability argument in favour of a strong Executive would not apply to non-manifesto government Bills introduced in response to circumstances which have changed since the time of the last General Election. In spite of these arguments, it is submitted that the accountability argument remains attractive as a basic principle, the root of which is not touched by the above objections which are arguably endemic in any party democracy: the United States' political system, which clearly embodies an actual as opposed to a formal separation of powers, is still open to these objections.

The second argument against the supposed redundancy of the Commons points out that it is simply unrealistic to expect the House of Commons to subject government Bills to *independent* scrutiny. The government is the government precisely because it is the party with an overall majority in the Commons. Therefore, by definition, the majority of MPs in the House will be predisposed to support legislation introduced by the government. It is thus built into the nature of parliamentary government that most MPs will not be impartially-minded.

If it is accepted, then, that the role of the Commons is not to reverse or drastically amend the government's manifesto programme, then what useful function does it play other than that of a mainly theoretical constitutional safeguard? It is suggested that four main functions may be

identified. The first is the education of both government and electorate through the publicising effects of debate in the Commons: the electorate will become aware of the issues surrounding a Bill, whilst the reaction of newspapers, commentators and the public to debates on the proposed legislation will help keep the government informed of the drift of public opinion. The second is the influence on the pre-legislative process which both back benchers and Opposition MPs may have, and the third is the limited amount of improvement and amendment which, despite the partisan nature of the Commons, still does take place. The fourth is clarification of the meaning of a Bill which may take place as governments explain and defend their legislation during debate. It is clear that in relation to all of these functions, the amount of time and resources which Members have available to them to devote to scrutiny of legislation will be crucial; the importance of the second and third will be closely tied to the size of the government's majority.

If a voter is to exercise his choice in a meaningful way, it is clearly vital that he should have a basic grasp of current political issues. Parliamentary debate, it is submitted, plays a vital role in disseminating an awareness of the issues surrounding a given piece of legislation. The Opposition has a vested interest in putting forward and publicising every possible argument against a piece of government legislation. Similarly, the government will wish to explain the principles behind the legislation and present the arguments in its favour. It is conceded that other bodies (such as pressure groups and the media) can and do carry out these roles, but parliamentary debate has the advantage of being rather more dramatic and consequently more newsworthy than, for example, a report on a government Bill by an interested body.

The opportunity for debate in the Commons may also have some effect on the pre-legislative stage. The Commons acts as a forum in which the Opposition can express criticisms of legislation from many sources in society, including pressure groups and those who would be directly affected by the proposals. Government spokesmen will wish to know what these criticisms will be in order to be able to deploy counter-arguments. This desire encourages the government to engage in consultation with these relevant groups; there is a general practice that a department will not introduce a Bill affecting a major organisation without prior consultation with that organisation. Further, the government must take into account the likely response of its own back benchers to legislation, as ascertained by the whips. If back benchers are aware of widespread public discontent at proposed legislation, this will be relayed to the government which will wish to avoid the embarrassment of hearing its own supporters expressing public dissent—

dissent which, as P Norton remarks, 'provides good copy for the press' (*The Commons in Perspective*, 1981, p 119). The effect of this anticipated response may be to force the government into modifying its proposals; this was dramatically exemplified in the Labour government's abandonment of its proposed industrial relations legislation in 1969, when it realised that its own MPs did not support the measure. Similarly, in October 1992, John Major's government was forced to abandon its plans for immediate closure of 31 coal pits in order to avoid near certain defeat by Conservative back benchers. The same government, for similar reasons, abandoned its Post Office privatisation plans in 1994. The present government, cushioned by a very large majority, is far more likely to feel strong enough to disregard such threatened rebellions; indeed, it did so shortly after taking power when it forced through a cut in single parent benefit despite a threatened back bench revolt which, when it duly appeared, generated considerable adverse publicity for the government and the measure in question.[1] On other occasions, however, the threat of rebellion did force concessions from government: a recent example relates to legislation on asylum proposed by the Blair government in 1999, as Cowley notes ((2001) Parlt Aff 815). Sixty-one Labour MPs signed an Early Day Motion opposing the proposals, and there was speculation in the press that the government faced potential defeat. Concessions were duly granted by the Home Secretary, buying off most of the rebels.

The opportunities of both back benchers and the Opposition to exert pre-legislative influence on Bills will be markedly increased if the Labour government continues its practice of publishing a number of Bills in draft, to allow more detailed comment on them from Select Committees and other interested bodies. This practice was welcomed by the Modernisation Committee, which commented that such practice would provide 'a real chance for the House to exercise its powers of pre-legislative scrutiny in an effective way' (HC 382, 2000–01, para 19). Important examples have included Bills on the Food Standards Agency, Freedom of Information, Tobacco Advertising, Financial Services and Anti-Terrorism; in a number of cases, amendments proposed by Select Committees were accepted by the government.

It is submitted that the influence of the Commons in these areas does give it a useful role to play. It must be noted, however, that the government can, to a certain extent, muzzle the publicising role of the Commons and reduce the Opposition's chance to embarrass it by curtailing the time available for debate. The use of the 'closure' allows debate to be simply cut off at the instance of government whips (if supported on a vote)[2] while the 'guillotine', in which a set amount of time is allocated by the government for each stage of debate, has been increasingly used in the last 20 years. Six

government Bills were guillotined in the 1987–88 session. Both of these devices undoubtedly inhibit the Commons in its scrutinising function. The present government has made much greater use of what is known as the programming' of Bills: that is, the setting of an agreed timetable, giving reasonable opportunity for debate, in advance, rather than in response to short term time pressures. However, the experiment has been highly controversial. Many commentators view the result of programming all Bills as simply having been to entrench the reduction in scrutiny and remove from the Opposition its power of delay. In one notorious incident, detailed by a dissenting report, set out in the Appendix of a Modernisation Committee Report (HC 382, 2000–01), the time allowed for debate of an important Bill, the Criminal Justice and Police Bill, 'simply proved inadequate. When the guillotine fell at 7 pm in Standing Committee, the Committee had only reached Clause 90 out of 132'. In addition, the whole of Part III of the Bill had not been considered. In an unprecedented move, the government tabled a motion 'deeming' that the Bill had been reported 'as if consideration of it had been completed by the Committee. The dissenting report concluded: 'The proposition that Opposition parties and back benchers will get greater opportunities to debate and vote on the issues of most concern to them simply has not been borne out by experience in this session of the experiment of systematic guillotining of all Bills. Similarly the evidence of this session is that the House has not scrutinised legislation better.' It remains to be seen whether the experiment of programming all government Bills will be continued.

The argument that the Commons plays a valuable role in the scrutiny of legislation is far weaker in relation to delegated legislation. Clearly, as with primary legislation, the Commons only rarely defeats government Bills; however, the publicising and deterrent effects of the Commons' scrutiny are widely regarded as having become of only negligible value. The Select Committee on Procedure (1977–78) warned that 'the system provides only vestigial control of statutory instruments and is in need of complete reform'. Fundamentally, the problem is that instruments subject to negative affirmation are increasingly becoming law without ever having been debated by the Commons: in 1978–79, 71.7% of prayers for annulment were debated; in the 1985–86 session, this percentage had dropped to 30.6%. In practice, it is the government which determines how much time shall be made available for consideration of statutory instruments; it can thus limit scrutiny to negligible proportions.[3]

The third suggested function for the Commons was its ability to achieve a limited amount of amendment and improvement to Bills in Committee. This does happen on occasion, though generally only when the government's majority is small or the measure is not one of party controversy. There are

perhaps two main reasons why this does not happen more: first, as the Modernisation Committee put it, 'There has been a distinct culture prevalent throughout Whitehall that the standing and reputation of ministers have been dependent on their Bills getting through largely unchanged' (HC 382, 2000–01, para 7). Secondly, MPs suffer from a lack of resources and therefore lack the expertise necessary to expose often highly technical legislation to constructive criticism. As Griffith and Ryle comment, 'the Opposition has no back up comparable to that of the minister's Departmental Staff (*Parliament: Functions, Practice and Procedures,* 1989, p 317). Norton, whilst noting that MPs' resources have increased dramatically since 1960, remarks that 'By international standards, [their] office, secretarial and research facilities remain poor' (*Does Parliament Matter?,* 1993, p 20). Further, the *ad hoc* nature of the Committees means that they are unable to build up much expertise in a particular area.

An alternative procedure (under Standing Order 91) allows Bills to go to Special Standing Committees, which can hold Select Committee-like meetings at which oral evidence can be taken from expert witnesses and ministers and relevant documentation examined. The Committee is thus given the time and resources to build up its expertise on the area covered by the legislation in question, before going on to the usual clause by clause examination of the Bill and amendments. This procedure was followed during the passing of the Criminal Attempts Act 1981 and substantial changes were made during the committee stage. The Modernisation Committee has recommended that this or similar alternative procedures should be followed more often. Again, whether more Bills actually follow such a route and the impact which this would have remains to be seen.

Finally, clarification as to the meaning and implementation of a Bill was instanced earlier in this essay as a useful product of parliamentary debate: the recent passage of the Prevention of Terrorism (Additional Powers) Act 1996 is instructive in this respect. Despite the fact that the Bill was guillotined, a few important points emerged from the Home Secretary's speeches during the debate. The most controversial provision in the Bill allowed for the police to stop and search persons for items related to terrorist offences, without any reasonable suspicion. In response to numerous questions during the debate about the safeguards balancing the new power, two key points were made: first, guidance as to the operation of the powers will be issued by the Home Secretary to the police; secondly, and more specifically, the Home Secretary will instruct the police to apply the Police and Criminal Evidence Act (PACE) 1984 Code for Stop and Search to all searches under the new power (HC Deb, Col 265, 2 April 1996). The second point is particularly important and, given the silence of the new

Act itself as to the applicability of the Code, may enable the courts to decide, through perusal of *Hansard* under the *Pepper v Hart* rule, that Parliament's intention was that the Code should be applied. Thus, significant legal consequences could flow from this assurance.

In conclusion, therefore, it has been suggested that the Commons performs a number of useful functions, albeit with varying results, depending on the size of the government's majority. It is thus far from being a redundant body. However, it is clear that it could achieve far more through the use of more varied procedure, particularly in Committee, far greater use of pre-legislative scrutiny by expert Select Committees, something which has already had some impact, the provision of greater resources for members and a shift away from a culture based heavily on confrontation and defence. Its inefficacy in dealing with delegated legislation is a very serious shortcoming which is being exacerbated as such legislation increases in bulk and significance; reform is thus urgently needed if the Commons is not to become redundant in relation to this very important method of law-making.

Notes

1 It could be added here that the government will, of course, expect the Opposition to oppose its Bill, but if it is anticipated that Opposition criticism will have popular support, the government may reconsider its proposals. As Ronald Butt puts it: 'If [the government] suspects that the Opposition will have an attractive case, it will do its best, within broad limits, to make that case less attractive, or to steal and adapt the Opposition's clothes' (*The Power of Parliament,* 2nd edn, 1969, p 317). Butt instances the extensive amending of the capital gains provisions of the 1964 Labour government by the Chancellor produced, he argues, by the exposure of weak elements in the Labour proposals by the Opposition. Again, of course, this influence will tend to be greater when the government's majority is not secure.

2 The Speaker's discretion to refuse to put the matter to a vote could be noted; he or she may not allow a vote, if to allow it would amount to an abuse of the rules of the House or an infringement of the rights of the minority. The motion must then be passed with at least 100 Members in favour.

3 The scrutiny provided by the Joint Committee on Statutory Instruments could be explained here. The Committee has a duty to consider all delegated legislation laid before the House and must draw attention to legislation which is defective or unacceptable in some way, for example, it imposes a tax or makes unexpected use of the power granted by the parent Act. It should be noted that an adverse report by the Committee has no automatic effect. The Committee itself has recommended that a report by it should automatically render an instrument subject to affirmative resolution. This would guarantee debate on it and would be a substantial improvement on the Commons' scrutiny of delegated legislation.

Question 15

Under s 2(1) of the (fictitious) Tourism Act, the Minister for Tourism may make statutory instruments ordering the demolition of structures erected in villages which he considers detrimental to the beauty of the village. Under s 2(2), the minister may make statutory instruments making it a criminal offence to drive cars not fitted with catalytic converters in villages. By s 2(3), orders are subject to a negative resolution of the Commons. By s 3(1) of the Act, the minister may make grants by statutory instrument to villages which in his opinion are of outstanding beauty, to be spent on promoting tourism. Section 3(2) provides that decisions made under s 3 are not to be laid before Parliament. Section 3(3) provides that: '…neither a decision nor anything which purports to be a decision by the minister under this section shall be questioned in any court.'

The following events occur:

- On 3 September, the minister makes an order under s 2(1) of the Act ordering the demolition of Clare's large ugly garage in the village of Sambridge. The order is not laid before Parliament.
- On 3 November, the minister makes a s 2(2) order which is properly laid but not published until 30 December. The order is given much publicity in motor magazines. Daniel is charged with driving a car without a catalytic converter in Sambridge on 20 December.
- On 4 December, the minister awards a grant under s 3 to Rexham, which has 20,000 inhabitants.

(a) Advise Clare and Daniel.
(b) Discuss the legality of the s 3 grant.

Note that you should not consider any possible impact of the Human Rights Act 1998.

Answer plan

This is a reasonably straightforward problem on delegated legislation, requiring consideration of the unresolved problem of whether laying requirements are mandatory or directory and also bringing in the s 3(2) defence in the Statutory Instruments Act 1946, together with the effect of a post-*Anisminic* ouster clause on a clearly *ultra vires* act. Note that the question requires advice to be given to Daniel and Clare and will therefore require a brief mention of *locus standi* and remedies, while the s 3 grant will require

only a consideration of the pure legal principles. The reassurance that the HRA need not be considered arises from the fact that the question technically raises an issue under Art 1 of Protocol 1 of the European Convention on Human Rights (ECHR)—the protection of property. First year students would not generally be expected to be familiar with this.

Essentially, the following matters should be considered:

- Clare: *locus standi;* the effect of non-laying of the s 2(1) instrument: case law (inconclusive), academic opinion and argument from principle;
- Daniel: statutory defence and defeat of defence by the Crown? The general effect of non-publication: this probably does not invalidate the instrument;
- s 3 grant: *ultra vires* decision through error of law/outside powers; ouster clauses: general interpretation and the effect of the particular wording used.

Answer

In order to challenge the decision relating to her garage, Clare must make an application for judicial review of the relevant statutory instrument. She must apply under r 54 of the Civil Procedure Rules promptly, and in any event within three months of the circumstances giving rise to the complaint (r 54.5). Furthermore, she must show that she has a sufficient interest in the decision complained of under s 31(3) of the Supreme Court Act 1981. This should be easy to establish, as Clare clearly has a direct personal interest in the decision to demolish her garage.

It appears from the facts that the order to demolish the garage falls squarely within the purposes of s 2 and so will be lawful, unless Clare can successfully argue that failure to lay the instrument before the Commons has rendered it ineffective. Section 4(1) of the Statutory Instruments Act (SIA) 1946 provides that where an instrument is required to be laid by the parent Act (s 2(3) of the Tourism Act does make such a requirement), the instrument 'shall be laid before…Parliament and…shall be so laid before coming into effect'. Section 4(1) does allow for an instrument to come into effect before laying if this is 'essential', provided that the Lord Chancellor and the Speaker are notified and the reason for the omission to lay is explained to them; this exceptive provision does not seem to be applicable here. There has thus been a complete failure to comply with s 4(1); the effect of this failure to lay on the validity of the instrument will now be considered.

In decided cases on the legality of failure to comply with express procedural requirements, the courts have tended to classify such

requirements as either mandatory or directory. A breach of a requirement seen as mandatory has led to the action in question being held invalid, while breach of a directory requirement has left the act or decision standing. In two 19th century cases, *Bailey v Williamson* (1873) and *Starey v Graham* (1899), the requirement to lay was held to be directory. It should be noted, however, that in *Bailey,* it was found that Parliament had intended the provision to be directory only in that particular instance; the case should not therefore be seen as having established any general principle that laying requirements are always directory. On the other hand, *Springer v Dorley* (1949), a West Indian case, is persuasive authority to the effect that the requirements are directory only. Campbell ([1983] PL 43) cites these authorities, statements made in the House during the passage of the SIA 1946, and the opinions of Erskine May, Allen and Graham-Harrison, First Parliamentary Counsel in 1932, as evidence for his view that the requirement is not mandatory.

There is no direct authority against this view but merely a number of (arguably) persuasive indicators. First, in *Sheer Metalcraft* (1954), Streatfield J spoke of the making of an instrument as being complete 'when it is first of all made by the minister concerned and after it has been laid before Parliament'.[1] Streatfield's comments on laying were strictly *obiter,* but it is submitted that the whole manner in which he analysed the case, contrasting the actions which actually complete the instrument—making and laying—with the 'purely procedural' matter of publishing it, together with the fact that he chose to say that the instrument was complete 'after' it was laid suggests that he regarded laying as a vital part of the process of creating a valid instrument. Secondly, it is urged that the necessity perceived by Parliament of passing an Indemnity Act in 1944, in respect of National Fire Service Regulations which had not been laid, suggests that there was concern that the Regulations were invalid due to the failure to lay. Speeches in the House recognised that it was for the courts to make an authoritative judgment on the issue, but the fact that parliamentary time was made available for the matter suggests that the House did not regard the possibility that the Regulations were invalid as remote.

Thirdly, it is submitted that the general principles used by the courts in deciding the issue of directory/mandatory could be applied to this particular question. The courts tend to consider, *inter alia,* 'the importance of the provision that has been disregarded' (*Howard v Bodington* (1877)) and the effect of non-compliance with the procedure, as in *Coney v Choyce* (1975). More recent cases stress this point—the importance of considering the *impact* of the alleged procedural breach on the person who should have been consulted and on the public at large. Courts following this approach will first ask what the purpose was of the consultation requirement in question. Having established this, it will then go on to consider whether the failure to

take the step in question substantially detracted from the expressed purpose (*Lambeth London Borough Council ex p Sharp* (1986)). If so, the failure to follow the statutory procedure will render the decision or instrument in question void. Using this approach, the courts would surely find it hard to say, in 7effect, that a complete failure to allow Parliament to express a view on the merits of a particular item of delegated legislation did not detract from the purpose of the laying requirements which is to allow precisely that.[2] In view of the above arguments and the fact that Clare's private property is threatened by this instrument—a factor which generally causes the judiciary to be zealous in enforcing procedural requirements—it is submitted that there is a reasonable chance that a court would hold the instrument to be unlawful and of no effect. A quashing order has not been used to control delegated legislation, but if the instrument was found to be unlawful, a declaration to that effect would be granted.

Daniel has both a statutory defence under s 3(2) of the SIA 1946 to the charge against him and a common law argument which he may raise as a collateral challenge as to the validity of the instrument giving rise to the charge. Daniel will have a defence under s 3(2) if he can show that at the date of the alleged offence the relevant instrument had not been issued by Her Majesty's Stationery Office.[3] Since Daniel's offence was allegedly committed on 20 December, and the instrument was not published till 30 December, the defence will be available to him.

The Crown will defeat the s 3(2) defence if it can show that notwithstanding the failure to publish, reasonable steps had been taken to bring the instrument to the attention of those likely to be affected by it. This has been taken to require positive action by the Crown (*Defiant Cycle Co v Newell* (1953)); it is therefore submitted that Daniel's defence would not be defeated if it is merely shown that investigative motoring journalists discovered the instrument and publicised it. Clearly, the court will decide whether reasonable steps had been taken, but the onus is on the Crown to prove the matter.

Daniel's second, though rather more doubtful, defence is the argument that the instrument itself was invalid for want of publication on the day he allegedly committed the offence. *Johnson v Sargant* (1918), in which an importer was held not bound by unpublished regulations, is the sole reported authority for the proposition that instruments come into effect on the date they are published and not before. *Jones v Robson* (1901) is generally cited as authority for the opposite proposition, but as DJ Lanham ((1974) 37 MLR 510) points out, the case concerned a notice a minister was required to give; publication under the SIA 1946 was not an issue. The ruling in *Sheer Metalcraft,* however, seems to flatly contradict *Johnson;* Streatfield J was very clear that publication was not necessary for a valid instrument: it was

complete when made and laid. He pointed out that if, under the common law, the order was invalid without publication, there would have been no need to have a statutory defence preventing the imposition of criminal liability in respect of unpublished instruments.[4]

A compromise view on the issue distinguishes instruments which do not state the date on which they are to come into operation from those which do. The former are held to be valid only from the date of publication (Lanham points out that Professor Wade and Halsbury (*Laws of England*, 3rd edn, Vol 36, p 494) both treat *Johnson v Sargant* as authority for this view), while those which do state a date on which they will come into effect are valid from that date, notwithstanding that they are not published till later. Thus, if the instrument under which Daniel is charged did not specify an operational date on its face, there is at least an argument to be made out that it did not become effective until 30 December, and so cannot be enforced in respect of Daniel's offence committed on 20 December.

The legality of the s 3 grant now falls to be considered. The minister, empowered to make grants to villages, has made one to a settlement of 20,000 inhabitants. It is a fundamental principle of administrative law that a power granted for a certain purpose may not be used for another, as illustrated by cases such as *Hanson v Radcliffe* (1922) and *AG v Fulham Corp* (1921). On this basis, the minister, in awarding a grant to a town rather than a village, has acted *ultra vires*—outside his powers—in the simplest sense. The decision could also be analysed as follows: the minister has misinterpreted the word 'Village' and thus, as *Shah v Barnet LBC* (1983) clearly established, has made an error of law. The minister has therefore asked the wrong question, decided an issue he was not empowered to decide and consequently exceeded the *vires* (following the analysis employed in *Anisminic Ltd v Foreign Compensation Commission* (1969), as confirmed by *Re Racal* (1981)). Clearly, then, the s 3 grant is *prima facie* unlawful and the effect of the s 3(3) ouster clause must now be considered.

The general approach to ouster clauses which provide that a decision 'shall not be questioned in any court of law' was settled in *Anisminic* (still treated as the leading authority in the area in *Cornwall County Council ex p Huntingdon* (1992)). The House of Lords held that such a clause could not protect something which as Lord Reid said 'purports to be a determination but which in fact is no determination at all'. As explained above, a decision tainted by error of law or which was in some other way outside the powers of the relevant body is regarded as a nullity, not a decision. As such, it would not be protected from examination by a standard ouster clause.

However, in this case, the ouster goes further in attempting to protect from consideration anything 'which purports to be a decision'. Such a wording seems to be a direct response to *Anisminic,* There is no authority on how such a clause should be regarded, but *dicta* in *Anisminic* indicate that such a clause would not be held to oust the court's ability to keep the deciding body within the remit defined in the Act setting it up. Lord Wilberforce (discussing tribunals) indicated that regarding an ouster clause as allowing a tribunal to determine its powers would be logically impossible, because to do so would contradict the fundamental purpose of the parent legislation which is 'always' to define 'an area, wide or narrow' which sets the limits of a tribunal's powers'. It is therefore submitted that the ouster clause under consideration would not protect a clearly *ultra vires* decision such as the grant to Rexham from being held unlawful by the courts.

Notes

1 Campbell's view on this point could be given here, pointing out that the question before the judge was whether publishing was necessary to render the instrument valid. He argues that Streatfield was merely confirming that the instrument before him was valid as it stood, before going on to consider the effect of publishing, and was not intending to make any pronouncement on the necessity or otherwise of laying.

2 It could be noted that this is clearly not the view of, for example, the Select Committee on Procedure which in the 1977–78 session produced a report on the present system urging the vital need for reform. The approach taken in *Bailey v Williamson* (1873) was to attempt to elucidate Parliament's intention as to whether the requirement to lay is mandatory. It would be surprising if Parliament itself was of the opinion that its own scrutiny of delegated legislation was of such negligible importance that as a general rule, a minister should be able to flagrantly flout the provisions for parliamentary scrutiny and yet produce a perfectly valid order.

3 It could be noted here that the generally accepted interpretation of s 3(2) (the view acted on in *Sheer Metalcraft*) is that the defence applies only to instruments in relation to which there is a duty to publish; that is, all those instruments which cannot be excused from publication by the minister certifying that they fall within one of the exceptions set out in regs 5–8 of the Statutory Instruments Regulations 1947. It does not appear that the instrument under consideration would fall within one of the exceptions, and in any event there is no indication that the Minister for Tourism has given his certificate of exception.

4 Students could comment on Lanham's response to this argument; he contends that the defence was included merely to confirm the common law position. The fact is, however, that if one accepts Lanham's premise that unpublished instruments are invalid, the defence would, far from confirming the common law

rule, have actually emasculated it by allowing the Crown to enforce liability under the unpublished instrument if it had taken reasonable steps to publicise it in other ways.

Question 16

How far is it true to say that House of Commons' scrutiny of the government 'illustrates again the unequal struggle between MPs and the Executive'? (Hunt, *Open Government*.)

Answer plan

This is a straightforward question, demanding an evaluative description of the various methods deployed by the Commons to scrutinise administration of policy and financial matters. Students should be careful not to stray into the Commons' role in the legislative process except in passing. It is essential for each method to be evaluated in terms of Hunt's quotation—students must not fall into the trap of a mere recitation of methods of scrutiny.

Essentially, the following areas should be covered:

- the rationale behind the perceived necessity for effective parliamentary scrutiny;
- questions to ministers: limitations on topics and evaluation;
- opportunities for short debates: lack of publicity; impact of Westminster Hall;
- Select Committees: remit, powers, limitations and effectiveness; recent reforms;
- scrutiny of national finance: the Public Accounts Committee, the Comptroller and Auditor General;
- concluding evaluation.

Answer

The concern expressed in Hunt's comment arises from the notion that thorough scrutiny of the Executive arm of the State is vital to a democratic system. It is an important convention, essential to the idea of responsible government, that the Executive should be held accountable to Parliament. The convention owes something to the rationale behind the doctrine of the

separation of powers as expounded by Montesquieu, namely, that each organ of the State should act as a check on the powers of the others. The aim of this discussion will be to explore the extent to which Commons' scrutiny of the Executive amounts to effective control over central government. At the outset, it is conceded that the House of Commons in its non-legislative function is not one of the three arms of government in the classical sense; however, it will be argued that it fulfils the rationale behind this classical notion because it acts as a check on central government.

The most obvious forum for scrutiny is the floor of the House of Commons, though it is here that scrutiny can be at its most ineffective. For example, Adjournment Debates are very poorly attended, thus achieving little publicity and requests for Emergency Debates are seldom granted. Early Day Motions were previously only rarely debated; however, the setting up of Westminster Hall as a separate chamber of the Commons has improved this position. Far more publicity is given to the questioning of ministers on the floor of the House. Some 45–50 minutes are set aside every day, except Friday, for oral answers to be given to Members' questions. Over 49,000 questions were put down by MPs in 1995–96, of which 4,464 were for oral answer. The occasion is now often afforded live television coverage. Oral questions and their supplementaries tend to be used as an opportunity to probe ministers' grasp of their portfolios or to attack government policy. They thus have some effect in ensuring that ministers are kept up to the mark and provide an opportunity for weak elements in government policy to be publicly exposed. They are one of the few times in which ordinary back benchers can raise matters directly with Cabinet ministers.

However, the ability of Members to put down really probing questions is reduced by the lack of information and support staff available to back benchers. Ministers, by contrast, have the aid of a skilled team of civil servants who provide them with answers to the tabled questions and undertake research into the questioner's known interests and concerns in an attempt to anticipate and prepare the minister for possible supplementaries. This inequality has led some observers to call for the establishment of a Department of the Opposition to improve the efficiency of Opposition MPs by giving them a staff of civil servants which would go some way to redressing the imbalance between ministers and MPs. Needless to say, no such department has yet been created.[1]

As a method of obtaining information, questions requesting written answers are far more effective. However, as Tomkin has noted, 'An answer to a question cannot be insisted upon if the answer is refused by the minister; the Speaker has refused to allow supplementary questions in these circumstances' ((1996) 16(1) LS 63, p 81). Furthermore, there are a large

number of matters on which a minister will refuse to answer. These excluded areas have been cut down a little—ministers may no longer withhold information on the basis of 'established parliamentary convention', but instead only 'in accordance with relevant statute and the government's Code of Practice on access to information' (see the (non-statutory) *Ministerial Code*— the renamed version of *Questions of Procedure for Ministers*). However, the Code of Practice on access to information specifies very large areas where information should not be given, including where it would harm defence, national security or international relations, or where it would involve disclosing commercial confidences or internal policy discussion, including advice given by officials to ministers. Answers will also be refused where the minister considers that the information requested might prejudice the effective management or administration of any government department or other public authority (see the Code of Practice, Part II, para 7). Sir Richard Scott considered that the categories of areas where answers would be refused required 'serious and urgent revision' (HC 313, 1995–96, Q 412–14). Moreover, certain departments still do not always cite the relevant exemption under the Code when refusing answers, despite repeated government assurances that this will be done (see, for example, the Report of the Public Administration Committee on Parliamentary Questions (HC 622, 2001–02)). In addition, a minister may refuse to answer any question which would be likely to cost more than a certain amount (currently £600) to research. The Speaker will also not allow questions which do not relate to the minister's area of responsibility and may refuse questions on a number of other grounds, including that they do not fulfil the traditional purpose of a question—to ask for information or press for action. Recently answered questions will also be disallowed.

There is no suggestion by parliamentary commentators that factual answers to parliamentary questions are routinely untruthful. There are, however, persistent complaints from MPs, monitored and publicised by reports from the Public Administration Committee, that answers are often partial, that they disregard parts of the question, or that they are given late. The Freedom of Information Act 2000 will for the first time introduce a general right of access to government information, policed by an independent Information Commissioner and which is ultimately enforceable through the contempt jurisdiction of the High Court (s 52), and MPs will of course be able to make as much use of the Act as anyone. It will therefore deal with the basic problem that ministers cannot at present ultimately be compelled to release information. However, the Act is riddled with extremely wide ranging exemptions—broader even than those in the Code, in the view of some commentators. In particular, there is a class exemption in s 35 in relation to all information relating to 'the formulation or development of

government policy'. The only limitation to this astonishingly broad exemption—which is not subject to any burden on ministers to prove that any harm would be caused by releasing the information in question—is that statistical information relating to a decision is no longer exempted once the decision is made. But, for example, evidence of other policy options considered, and the reasons for rejecting them, would be covered by the exemption. The Information Commissioner can order release of the information concerned if satisfied (*per* s 2) that the public interest in withholding information does not outweigh the interest in its reception; however, because the information relates to a central government department, its release can ultimately be vetoed by a Cabinet minister (s 53). Moreover, the Act does not come fully into force until 2005.

Leaving aside the issue of veracity, ministers' questions may have a more hidden but arguably very important result, as postulated by Sir Norman Chester in his 'Questions in the House' (quoted in Walkland and Ryle, *The Commons Today,* 1981, pp 189–99). He points out that many decisions in a department will be taken at a low level without the minister's actual accord or knowledge. The tabling of a question which queries this decision and the subsequent investigation by the minister and senior members of the department will bring the decision to the minister's attention. The minister will then either have to justify it which will bring the decision to public attention, or modify departmental policy if it becomes apparent that it is evolving in a manner which was not originally intended. However, as mentioned above, for such questions to have this effect, back benchers must have the means of gaining information about the day to day running of departments.

It was precisely to give back benchers more in-depth knowledge of government departments that 14 Select Committees were set up in 1979, covering between them each of the major government departments with the exception of the Law Officers Department and the Lord Chancellor's Department, which were brought within the system in 1991.

The Select Committees have three main advantages as a method of scrutiny over questions or debate on the floor of the House. First, since MPs tend to commit themselves to a Committee for a considerable period, they have time to build up a reasonable level of expertise on their area of concern (an ability enhanced by their power to send for papers and records), which clearly enables them to probe more deeply into departmental affairs. Secondly, the Committees tend to be more non-partisan than almost any other Commons organisation; however, members of the Committee of Selection which nominates the MPs to the Committees are themselves chosen by the whips, so that the government can still exercise partial control in an attempt to keep known outspoken and independently-minded MPs off the

Committees. A recent attempt to reform this system, as proposed by the Liaison and Modernisation Committees, was rejected by the Commons in May 2002, though an incident in July 2001 indicates that, occasionally, back bench MPs may revolt in the face of blatant attempts by government whips to keep known independently-minded and critical MPs off Select Committees. Following the June 2001 General Election, the government sought to remove two chairs of Select Committees who it saw as being particularly critical of government policy: Gwyneth Dunwoody, previously chair of the Transport Committee and Donald Anderson, former chair of the Foreign Affairs Committee. The motion was rejected in a large rebellion by Labour MPs. Moreover, it remains true that most Committee reports are unanimous and many are critical of government policy. The Social Services Committee, for example, brought out a report which was critical of the government-introduced Social Fund shortly before the 1992 General Election. More recently, despite its Labour-dominated ranks, the Transport Committee has brought out a number of trenchant, critical reports. Its most important was a forensic dissection of the government's Ten Year Transport Plan—its master-plan for tackling the hugely difficult issue of cutting down car usage and improving public transport as an alternative. The Report (HC 558–1, 2001–02) was widely viewed in the media as sounding the death knell for the plan as originally conceived by John Prescott, while some viewed it as partly responsible for the resignation, in June 2002, of the then Transport Secretary, Stephen Byers. The ability of the Committees to operate in a non-partisan fashion marks their work out particularly clearly from the general character of proceedings in the House, described by one back bench MP as 'government and Opposition, locked into a permanent election campaign' (HC Deb, Col 1099,13 November 1997).

The third advantage of the Committees is their ability to send for civil servants and ministers for questioning which is far more systematic and searching than anything that could take place in the Commons Chamber. This power to question members of the Executive is clearly crucial to the efficacy of the Committees, and not surprisingly has caused controversy. In 1979, the Leader of the House pledged that 'every minister…will do all in his or her power to co-operate with the new system of Committees' (HC Deb, Col 425, 25 June 1979). On the whole, this promise and its necessary concomitant of ensuring civil service co-operation has been honoured. A study of the Select Committees by Nevil Johnson found that 'the new Committees have, as a rule, gained a satisfactory degree of co-operation from …both ministers and officials' (see 'Departmental Select Committees', in Ryle and Richards, *The Commons Under Scrutiny,* 3rd edn, 1988, pp 166–70). However, the Committees have sometimes found themselves frustrated when investigating areas of acute sensitivity by the refusal of certain key

witnesses to attend. For example, in 1984, the government would not allow the Director of Government Communications Headquarters to give evidence to the Select Committee on Employment which was enquiring into the trade union ban at GCHQ. Recently, a number of Select Committees have voiced acute dissatisfaction with the refusal of ministers to allow Special Advisers—widely seen as more influential than many ministers—to attend. This problem is not confined to civil servants: the former Prime Minister, Margaret Thatcher, refused to attend the inquiry of the Foreign Affairs Committee into the Pergau Dam affair, while the Transport Committee recently published a report bitterly condemning the refusal of Treasury ministers to attend its inquiry into the PPP scheme for the London Underground, despite the fact that the Treasury was clearly the moving force behind the scheme (see HC 771, 2001–02).

If a Committee is seriously dissatisfied with a refusal to disclose information, the matter could be put forward for debate in the House and a finding of contempt of Parliament would then be possible. Indeed, in 1981, the Leader of the House gave a 'formal undertaking' that if such refusal to attend or to divulge information caused widespread concern in the House, the government would 'seek' to find time to allow such a debate. Committees have, however, showed themselves unwilling to evoke contempt proceedings, leaving bad publicity from a refusal to attend as the main persuasive sanction. As the Liaison Committee noted, in its 1997 Report (HC 323–1, 1996–97, para 12), the Standards and Privileges Committee now has power to order the attendance of any Member—and indeed to require that specific documents or records in the possession of a Member relating to its inquiries be laid before the Committee. The Liaison Committee recommended that this power should be given to the departmental Select Committees.

An important step forward in accountability was unexpectedly agreed between the Committees and the government in 2002. Up until then, a convention prevented the Select Committees from questioning the most important member of the Executive—the Prime Minister. However, in April 2002, perhaps in an attempt to deflect criticism that Mr Blair's administration had little respect for Parliament, it was announced that the Prime Minister would make himself available for questioning, once a year, by the Liaison Committee, a Select Committee composed of the chairs of the departmental Select Committees. The first session took place in July 2002 and was generally agreed to have gleaned important insights in particular into Blair's views on the internal running of his government.

To some extent, different problems arise in the case of civil servants. Having secured their attendance, the Committee may then find itself hampered by their refusal to divulge certain information on the basis that

to do so would contravene the advice given in the so called 'Osmotherly rules', governing the conduct of civil servants before Select Committees (now entitled *Departmental Evidence and Response to Select Committees* (1997)), which sets out matters about which they should not give evidence; the basic rule is that civil servants should give evidence 'on behalf of the minister and under his instructions. This applies even to the chief executives of the semiautonomous 'Next Steps' Agencies, who have considerable areas of devolved responsibilities, and is thought to be particularly unsatisfactory in their case. On the whole, however, Committees have not found Civil Service recalcitrance a serious handicap; for example, the Select Committee on Trade and Industry stated in its second report of 1985–86: 'In the vast majority of previous…Committees, no serious problem has arisen.' However, the record of the Committees in obtaining the government records they require is less reassuring: in the words of the 1997 Liaison Committee report, 'It is in [this area] that most difficulties have arisen' (para 14). The Committee found that governmental promises to make time for a Commons debate on a refusal to provide requested documentation have not been properly honoured: 'There have been a significant number of cases where Committees have been refused specific documents but the government has not provided time for the subject to be debated.' The Committee recommended that 'the onus should be shifted onto the government to defend in the House its refusal to disclose information to a Select Committee' (para 16).[2] In general, however, it should be conceded that both the restrictions on the divulging of information and the refusal of persons to attend are likely to hamper the Committees in exposing major government embarrassments, but interfere little with their day to day scrutiny of the relevant departments.

A package of proposals to strengthen Select Committees was recently agreed between the Liaison and Modernisation Committees, and most of the key recommendations were accepted by the Commons in May 2002. The key elements include: greater resources for Select Committees, including making available assistance by the National Audit Office and more support staff; the encouragement of an alternative career structure in Select Committees, intended to enhance their prestige by payment for their chairs; greater co-ordination between Committees and clarification of their tasks, which now include much greater involvement in pre-legislative scrutiny as well as an informal role in scrutinising appointments to Next Steps Agencies and other key quangos.

Clearly, scrutiny over the national finances is a vital link in the chain of the Commons' control of the Executive; it is, however, patchy. As Colin Turpin comments, government borrowing 'largely escapes scrutiny', while detailed parliamentary examination of departmental supply expenditure 'was

abandoned long ago' (*British Government and the Constitution,* 1990, p 482). However, in the area of verifying the authorisation of expenditure and ascertaining that value for money has been obtained, the Public Accounts Committee has been notably effective. It is, as De Smith notes, 'scrupulously non-partisan', while the value of its investigations is greatly enhanced by the fact that the Comptroller and Auditor General (an officer of the House and therefore independent from the government and assisted by a staff of several hundred) sits with it.

The Committee seeks to achieve proper accountability by asking for clear objectives to be set, for proper monitoring of programmes to be established from their outset, and by comparing achievement with expectation. In the early 1980s, it exposed the inadequate notice given to the House of the spiralling costs of the Polaris Enhancement Project which had reached £1,000 million from an initial estimate of £175 million. The Committee revealed how such information was being concealed from the Commons and won the significant promise from the government that the Committee would in future be supplied with adequate financial information about defence costs. Its most recent report, at the time of writing, received a great deal of attention, being concerned with the controversial issue of the effectiveness of the Private Finance Initiative (PFI) (HC 460, 2001–02).

Overall, it is clear that the efficacy of the Commons' scrutiny of the Executive is uneven. Supplementaries asked in the House may expose a weak area or force a ministerial investigation into a departmental decision, but on the other hand, they may have been foreseen by a minister's civil servants who will have briefed the minister thoroughly beforehand. Moreover, Select Committees' investigations may be hampered by the refusal of crucial witnesses to attend. Clearly, enhancement of the Select Committees' powers to enforce attendance—as recommended by the Modernisation Committee in 2001 and accepted for consideration by the House in May 2002—would improve their effectiveness. In general, the key to effective scrutiny is undoubtedly sufficient information. Where MPs do not possess it, their questions will often miss the mark. Where, like the Public Accounts Committee, they have access to an abundance of detail, penetrating criticisms can be made—criticisms which can force the government into greater accountability in future. While the Executive is possessed of far more information than the Commons, the struggle to call it effectively to account must remain an unequal one. However, the Select Committees have undoubtedly achieved some small but significant redress of the imbalance of power because they have endowed at least some MPs with a measure of expertise.

Notes

1 Students could point out the disadvantages that could result from such a reform. Douglas Wass, in a lecture proposing a Department of the Opposition, conceded that there were fears that the department might inhibit the emergence of new parties, and that the department's civil servants might 'capture the minds' of the Opposition front bench, encouraging a drift to the middle ground commonly presumed to be favoured by the Civil Service (quoted in Turpin, *British Government and the Constitution*, 1990, p 451).

2 A recent example deriving from the arms to Sierra Leone affair could be given here. Problems arose between the Foreign Affairs Committee and the Foreign Secretary Robin Cook during the Committee's investigation into the affair, in which it appeared that Foreign Office officials had been aware that arms shipments from the UK breached a UN embargo on the export of arms to Sierra Leone. The minister refused to provide the Committee with a number of key telegrams from the UK's High Commissioner in Sierra Leone to the Foreign Office; the objection was the usual one of the need to preserve confidences. A compromise formula, that a summary of the telegrams would be made available to the Committee and members of it would be able to visit the Foreign Office to examine the actual documents to verify the accuracy of the summaries, was eventually reached (see the Committee's reports (HC 760 and 1057–1,1997–98)).

Question 17

Discuss the following views of the role of Select Committees: 'They are intended to redress the balance of power between Parliament and the Executive'; 'they are an institution which is expected to stay on the sidelines.'

Answer plan

This question is quite demanding because it requires detailed knowledge of the operation of Select Committees. It is also topical due to the growing perception that Select Committees provide a surer means of scrutinising the Executive than procedures on the floor of the Commons, the recent package of reforms agreed by the Commons in May 2002 and the increased scope of the Committees' work.

The following matters should be considered:

- the concept of government responsibility to Parliament;
- the role of Select Committees in scrutinising the actions of the Executive; their independence and non-partisan approach;

- the impact of their reports on policy-making;
- the difficulties faced by the Committees in obtaining the persons and papers they need;
- the restrictions on the types of questions which civil servants will be prepared to answer;
- the efficacy of the Public Accounts Committee;
- the recent reform proposals agreed.

Answer

The statements taken together imply that expectations of the constitutional change which would be brought about by the Select Committees were high in some quarters, but that in others, it was always assumed that the new Committees were not intended to fulfil them due to various limitations. It should be noted that the phrase 'stay on the sidelines' may be taken to mean both that the input of the Committees into the policy-making process is bound to be marginal, and also that the Committees' powers, in terms of their ability to gather evidence, are inherently limited and that they are therefore expected to be non-intrusive institutions. Both interpretations will be addressed.

It is clear that the new Select Committees were set up in 1979 due to widespread dissatisfaction with procedures on the floor of the House of Commons as a means of scrutinising the workings of government, and a consequent perception that the balance of power between the Executive and Parliament was not being maintained under the then current arrangements. While written answers to parliamentary questions are a useful source of information, it is widely accepted that oral questioning of ministers on the floor of the House can never be a very effective scrutinising tool, for two reasons. First, there is simply insufficient time for in-depth scrutiny. Secondly, the *culture* surrounding the institution of Question Time is in general that of an adversarial party contest: the key conflict is between the Opposition and the government, rather than between parliamentarians and the Executive. The new Committees were intended to provide opportunities for more in-depth and impartial scrutiny. They were better equipped and organised than their predecessors, set up in the 1966–70 Parliament. Their function was expressed to be 'to examine the expenditure, administration and policy of the principal government departments'. The Committees allow officials and ministers to be questioned in a systematic and searching manner not possible on the floor of the House of Commons. Furthermore, the members of the Committees are (within limits to be discussed) well informed and can call on the

assistance of expert advisers. The published reports of Committees constitute a very significant and valuable source of information about the workings of government. The Committees show an impartiality remarkable in the contentious atmosphere of the Commons; they conduct their business in an inquisitorial as opposed to an adversarial manner dictated by party lines. This can be partly explained by the fact that the Committees' members are chosen from the back benches: no front bench spokesmen are appointed to them, although former ministers may be. The members of the Committee of Selection which nominates the MPs to the Committees are themselves chosen by the whips, so that the government can still exercise partial control in an attempt to keep known outspoken and independently-minded MPs off the Committees; it means that the whips also control both the filling of vacancies on Committees and, more importantly, at what point in a new Parliament they are set up. As the Liaison Committee complained in an influential report, *Shifting the Balance* (HC 300, 1999–2000), there have as a result sometimes been 'long delays' before the Committees are established: the government is thus able to escape scrutiny for sustained periods. A recent attempt to reform this system, as proposed by the Liaison and Modernisation Committees, was rejected by the Commons in May 2002, though an incident in July 2001 indicates that occasionally, back bench MPs may revolt in the face of blatant attempts by government whips to keep known independently-minded and critical MPs off Select Committees. Following the June 2001 General Election, the government sought to remove two chairs of Select Committees who it saw as being particularly critical of its policy: Gwyneth Dunwoody, previously chair of the Transport Committee, and Donald Anderson, former chair of the Foreign Affairs Committee. The motion was rejected in a large rebellion by Labour MPs.

It can be difficult to assess the impact of the Committees on departmental policy-making, because Committee reports may merely contribute to debate which was already occurring. However, an example of a concrete result flowing from a Select Committee report can be seen in the decision to repeal the 'sus' law by means of the Criminal Attempts Act 1981 after a critical report from the Home Affairs Select Committee. More recently, the Labour government responded very positively to the report of the Home Affairs Select Committee on police complaints and the disciplinary procedure for officers accused of misconduct (HC 258–1, 1997–98; the government's response appears as HC 683). A large number of the Committee's findings and recommendations were accepted by the government, including the broad thrust of the Committee's findings that the present procedures of the Police Complaints Authority were inadequate and that significant reform was required to strengthen the complaints system. There is no doubt that a

number of very recent Select Committee reports which were critical of government policy have had a marked impact, receiving extensive publicity in the media, thus always forcing government further to explain and defend its policies from the criticisms made and, on occasion, causing it to reconsider its policies. Despite its Labour-dominated ranks, the Transport Committee has brought out a number of trenchant reports. Its most important was a forensic dissection of the government's Ten Year Transport Plan—its master-plan for tackling the hugely difficult issue of cutting down car usage and improving public transport as an alternative. The report (HC 558–1, 2001–02) was widely viewed in the media as sounding the death knell for the plan as originally conceived by John Prescott, while some viewed it as partly responsible for the resignation, in June 2002, of the then Transport Secretary, Stephen Byers.[1]

Although the role of the Select Committees is probably significantly more valuable than that played by debate in the Commons as a means of subjecting ministers to scrutiny, the Committees are subject to important limitations in terms of time and information available to them (although there has been some marked improvement in some of these areas of late and further reforms were agreed in May 2002). Committees may need to appoint sub-committees in order to discharge their function adequately; up until recently, only three of the Committees have been empowered to set up one sub-committee each. All Committees now have this ability. They have the formal power to send for 'persons, papers, and records', but this power is rarely invoked; they prefer to act by invitation. In any event, Committees cannot compel MPs or ministers to attend before them: an order would have to made by the House, a largely theoretical possibility only. Committees have experienced difficulty at times in acquiring information or interviewing the minister or official they wish to question. For example, in 1984, the government would not allow the Director of Government Communications Headquarters to give evidence to the Select Committee on Employment which was inquiring into the trade union ban at GCHQ. In 1988, the Agriculture Select Committee wished to interview Edwina Currie after the salmonella in eggs affair and she was requested to attend its inquiry. When she refused, the Committee reiterated its request and stated its view that it was for the Committee to determine whether or not her evidence was relevant. Eventually, she did attend, but did not accept that the Committee had power to compel her attendance. Recently, a number of Select Committees have voiced acute dissatisfaction with the refusal of ministers to allow Special Advisers—widely seen as more influential than many ministers—to attend. This problem is not confined to civil servants: the former Prime Minister, Margaret Thatcher, refused to attend the inquiry of the Foreign Affairs

Committee into the Pergau Dam affair, while the Transport Committee recently published a report bitterly condemning the refusal of Treasury ministers to attend its inquiry into the PPP scheme for the London Underground, despite the fact that the Treasury was clearly the moving force behind the scheme (see HC 771, 2001–02).

It is noteworthy that the Standards and Privileges Committee has recently been given power to order the attendance of any member. The Liaison Committee recommended in its 1997 report that this power should be given to the departmental Select Committees (HC 323–1, 1996–97, para 12) and the House is currently considering the matter.

The record of the Committees in obtaining the government records they require gives rise to more concern: in the words of the 1997 Liaison Committee report, 'It is in [this area] that most difficulties have arisen' (para 14). The Committee found that governmental promises to make time for a Commons debate on a refusal to provide requested documentation have not been honoured: There have been a significant number of cases where Committees have been refused specific documents but the government has not provided time for the subject to be debated.' The reference to a debate is to the House's formal power to make a finding that a refusal to supply requested documents—or indeed a refusal to attend a Committee at all—represented a contempt of Parliament. Such a finding could only be made after a debate, and the Committee recommended that The onus should be shifted onto the government to defend in the House its refusal to disclose information to a Select Committee' (para 16) and that the power of the Privileges Committee 'to require that specific documents or records in the possession of a member relating to its inquiries be laid before the Committee' be extended to all Committees.

Not only are the powers of Committees to require the attendance of ministers and officials and the production of documents rather weak and uncertain, the areas about which they may interrogate civil servants and the chief executives of 'Next Steps' Agencies are subject to quite basic restrictions. Under the so called 'Osmotherly rules', governing the conduct of civil servants before Select Committees (now entitled *Departmental Evidence and Response to Select Committees* (1997)), there are a number of matters about which civil servants may not give evidence. The basic rule is that civil servants should give evidence 'on behalf of' the minister and under his instructions. This applies even to the chief executives of the semiautonomous Next Steps Agencies, who have considerable areas of devolved responsibilities, and is thought to be particularly unsatisfactory in their case. As a number of parliamentary and academic commentators have observed, this restriction can hamper the ability of Select Committees to uncover instances where operational failures attributed by ministers to

mistakes by officials or chief executives are in reality the result of ministerial interference, or matters for which the minister is clearly responsible, such as resources or overall policy guidelines. On the whole, however, Committees have not found Civil Service recalcitrance a serious handicap; for example, the Select Committee on Trade and Industry stated in its second report of 1985–86: 'In the vast majority of previous…Committees, no serious problem has arisen.'

Assessment of the Select Committees' efficacy must beware of generalisations; some Committees are perceived as more rigorous in their criticism of government than others. The Public Accounts Committee, set up in 1861, is sometimes viewed as the most successful Select Committee in terms of its efficacy as a means of scrutinising the effects of government policy. It engages in the monitoring of extravagant government spending and imprudent contractual transactions. The Committee seeks to achieve proper accountability by asking for clear objectives to be set, for proper monitoring of programmes to be established from the outset and by comparing achievement with expectation. The value of its investigations is greatly enhanced by the fact that the Comptroller and Auditor General (an officer of the House and therefore independent from the government who is assisted by a staff of several hundred) sits with it.

It is difficult to ascertain the effect of such criticism, though it is generally thought that the Committee's reports are treated with respect by the Civil Service. Further, the Committee has on occasions exacted concessions from the government over the availability of financial information to the House; in the early 1980s, its embarrassing revelations of government non-disclosure of the spiralling costs of the Polaris Enhancement Programme were followed by a government pledge to keep the Committee better informed of defence expenditure.[2]

A package of proposals to strengthen Select Committees was recently agreed between the Liaison and Modernisation Committees, and most of the key recommendations were accepted by the Commons in May 2002. The key elements include: greater resources for Select Committees, including making available assistance by the National Audit Office, and more support staff; the encouragement of an alternative career structure in Select Committees intended to enhance their prestige by payment for their chairs; greater co-ordination between Committees and clarification of their tasks, which now include much greater involvement in pre-legislative scrutiny, as well as an informal role in scrutinising appointments to Next Steps Agencies and other key quangos.

While only time will tell how far these reforms will enhance the quality and effectiveness of the work of Select Committees, in general it is apparent that, certainly at present, the Committees are somewhat hampered in their

scrutinising function. Therefore, although they can go some of the way towards redressing the balance of power between Parliament and the Executive, their power and influence in this respect are limited. It is generally accepted that significant constitutional changes cannot be effected by procedural reform and this was probably recognised at the time when the Committees were set up. The Committees do operate on the sidelines both in the sense that—as G Drewry puts it—they 'are in the business of scrutiny and exposure, not government' (*The New Select Committees*, 1989) and because even their abilities in this respect are curtailed. Their contribution to parliamentary accountability, especially in terms of the information they glean and their ability to subject ministers and officials to sustained, non-partisan scrutiny, has undoubtedly improved the ability of the House to investigate and scrutinise government in some depth.

Notes

1 Students could give a further example at this point: the scathing report of the Culture, Media and Sport Committee on the failure to build a new national stadium at Pickett's Lock at which to hold the National Athletics Championship. A widely quoted paragraph in the Committee's report found that there had been 'a scandalously inept treatment of public money' (HC 264, 2001–02).

2 It might be useful at this point before arriving at the conclusion to draw a brief comparison between the work of the Commons' Select Committees and those of the Lords. In some respects, the Lords' Select Committees may be more valuable in this context than those of the Commons. Their work has changed in nature and increased enormously since 1972. Before that time, they tended to be concerned with the administration and procedure of the House. Since then, a number of Select Committees, such as the European Communities Committee, have been set up in response to specific needs. The Lords' Select Committees tend to have more time to receive evidence than those of the Commons, and may therefore produce more considered reports. They may also have wider terms of reference than those in the Commons. For example, the European Communities Committee was able to consider the merits of legislation, unlike the corresponding Committee in the Commons. Moreover, in contrast to the Commons' Select Committee Reports, the Lords' Reports will always be debated.

CHAPTER 4

THE HOUSE OF LORDS

Introduction

This is a reasonably straightforward area which is examined by means of essay questions. Traditionally, questions tended to focus on the paradox of the House of Lords as an anachronism which yet seemed to play a valuable constitutional role. Recently, however, the Lords has become the focus of the Blair government's constitutional reform programme, with the removal of most of the hereditary peers from the House of Lords in 1999, the Wakeham Report on long term reform, the government's almost universally derided White Paper in response, the influential report of the Public Administration Committee with its counter-proposals for a far more democratic and assertive House, and the recent throwing open of the issue by the government in May 2002 with its proposal for the matter to be referred to a Joint Committee of both Houses with a free vote on its proposals thereafter. Examination questions are therefore very likely to appear on this highly topical area, and are almost bound to focus on one or more of the above elements of reform. Students, however, need to place their knowledge of the various reform proposals within the context of a solid base of knowledge about the current composition and powers of the Lords, the conventional restraints upon the House, the party balance and the nature and distinctive value of the work it does.

Checklist

Students should be familiar with the following areas:

- the limits on the powers of the Lords under the Parliament Acts 1911 and 1949;
- the conventions on the use of the Lords' powers, including recent examples;
- the role of the Lords in relation to legislation emanating in the Commons, including recent examples;
- the scrutiny of delegated legislation of the Executive and of European legislation;

- the Lords' role in initiating legislation; Private Members' Bills emanating in the Lords;
- the composition of the Lords; note that the current composition, including the balance between the different types of peers and the Lords' party make-up, can easily be checked on the Parliament's website at http://www.publications.parliament.uk;
- the removal of the hereditary peers and its consequences;
- further proposals for reform: Wakeham; the White Paper, the Fifth Report of the Public Administration Committee and details of the government's announcement in May 2002.

Note the following references: those to the Public Administration Committee are to its Fifth Report (HC 494, 2001–02); to Wakeham are to the report, *A House for the Future* (Cm 4534); and to the government's White Paper are to *The House of Lords: Completing the Reform* (Cmd 5291).

Question 18

'Although the House of Lords has some value, it is an anomaly in a democracy and should be abolished or radically reformed; the removal of the hereditary peers is no substitute for this.'

Discuss.

Answer plan

This is quite a straightforward example of a question likely to be asked on the House of Lords, since it asks for an evaluation of the Lords as it still is. While the recent reform proposals by Wakeham, etc, are not specifically mentioned, they should be discussed, albeit briefly in the answer, bearing in mind that the question focuses on whether reform is needed, not specifically on what form that reform should take. Students do not therefore need to consider the details of proposed reforms, but merely their broad outlines. The removal of the hereditaries must of course be specifically considered. The discussion of reform *must* be related to the strengths and weaknesses of the House identified earlier in the essay.

Essentially, the following matters should be discussed:

- the anomalous composition of the Lords;
- the role of the Lords in relation to legislation emanating in the Commons; its value and recent examples;

- the value of the Lords' scrutiny of European legislation;
- the limits on the powers of the Lords under the Parliament Acts 1911 and 1949 and by convention;
- The Wakeham, government and Public Administration Committee proposals for reform with a view to improving democratic accountability; the factors arguing against reform;
- the merits and demerits of the removal of the hereditaries.

Answer

The anomalous position of the House of Lords in a modern democracy is perhaps its most remarkable feature: not one member of the UK Parliament's second chamber is elected. All hold their positions either through birth, appointment or the office they hold. There are still these three main groups in the Lords, although following the House of Lords Act 1999, the balance between the life and hereditary peers has swung dramatically in the former's favour. Prior to that Act, by far the largest group, constituting 750 out of a total of 1,273 in 1998, were the hereditary peers, who inherit their title through birth and pass it on from generation to generation. The second largest group was the life peers, 488 strong; the third, 26 Bishops and 26 Law Lords. The position following the 1999 Act is now somewhat different, though no more democratic. As at August 2002, there were 557 life peers and only 91 hereditaries, those selected for retention by a vote of the hereditary peers only. The Bishops and Law Lords remain. Not only is the House thus wholly undemocratic, it is also extremely unrepresentative of women. In 1998, there were only 96 female peers out of 1,273, that is, less than 10%. That was largely due to the fact that the vast majority of hereditary peerages descend only to male issue. This has now improved to 116 women out of a total of 700.

The House's second major affront to democracy formerly lay in the fact that one party, the Conservatives, historically had a permanent strong predominance; the position here has undergone a more marked improvement. In January 1998, out of a total of 1,146 peers, 495 were Conservatives, 322 Cross-Benchers (independent peers), 157 Labour and 68 Liberal Democrat. Conservative peers thus outnumbered Labour Lords by around 4 to 1. The hereditaries, as one would expect, were overwhelmingly Conservative-leaning: 319 took the Conservative whip, compared to only 16 Labour peers. A more useful guide to party influence can be gained by examining the allegiance of those who attend more than 50% of the sessions—only about one-third of peers. The figures for the 1996–97 session showed that out of a total of 399, the Conservatives had

195, or 49%; the Cross-Benchers and Labour both had 83, or 21%; while the Liberal Democrats had 37, or 9%.

Following the removal of the bulk of the hereditaries and a deliberate and successful attempt by Mr Blair to rebalance the Lords through his appointment of large numbers of life peers, the position has undergone a significant change. As at August 2002, the Conservatives remain the largest single party with 219 peers, but Labour is close behind with 191, while the Liberal Democrats have remained about the same with 65. There are 179 Cross-Bench peers, who now represent around 25% of the total. While it is still anomalous that the Conservatives are the largest party, despite coming a clear second in the popular vote in both the last two General Elections, their preponderance has been substantially reduced, and in practice all legislation requires cross-party support to pass.

Despite its undemocratic and unrepresentative nature, most commentators accept that the House of Lords has a valuable part to play in the British constitutional process. Perhaps its most important role lies in scrutinising public Bills passed by the House of Commons, on which it spends around half of its time.[1] The House passes a large amount of amendments to such Bills: in the 1987–90 sessions, the average number of amendments passed was over 2,600. The vast majority of these were subsequently accepted by government (2,038 out of 2,056 in the 1992–93 session), reflecting the fact that most are introduced by government and are technical in nature. But the Lords is not simply a forum in which government can correct its own mistakes. Barnett's conclusion is that 'the Lords is both very active in relation to legislation, and makes a substantial impact on many legislative proposals' (*Constitutional and Administrative Law,* 4th edn, 2002, p 532). A significant number of its amendments represent changes of principle of a minor or major nature. To an extent, therefore, the Lords can compensate for the inadequate scrutiny bestowed by the Commons, scrutiny which is widely perceived as consisting merely of an endless party battle, rather than a rigorous assessment of the merits of legislative proposals. It can therefore provide a much needed check on the government-dominated Commons, a check which is particularly valuable when, as at present, the government in power has a large majority, thereby rendering the Opposition largely ineffective. The Lords may delay controversial or unpopular legislation or it may be able to procure the acceptance of amendments which are unwelcome to the government. It has done both on a number of occasions in the last two decades, during times when Oppositions have been wholly unable to do likewise.

For example, during the 1980s, due to the nature of the parliamentary process, the Labour party was helpless in the face of the large

Conservative majority. In contrast, the Lords inflicted 173 defeats on the government between 1979 and 1991, some of them relating to important and controversial measures. For example, the House passed a wrecking amendment to the Local Government (Interim Provisions) Bill in 1984, with the result that the Conservative government had to reconsider its plans to retroactively nullify the result of the 1984 elections to the Greater London Council. In February 1996, the Lords inflicted a major defeat on the government's Broadcasting Bill by voting to deny Sky Television exclusive rights to the eight most important sporting events of the year, including Wimbledon and the Olympic Games, ensuring that the majority of viewers who did not have Sky would be able to view the events on BBC or ITV. The government was forced to accept the change, described at the time as 'the biggest government upset in the Lords since 1988' ((1996) *The Independent*, 7 February). The defeat undoubtedly represented a blow to the government's free market policy on broadcasting, and thus marked a clear rebuff by the Lords of a central and politically contentious strand of government policy.[2] The Lords has also defied the present government which, with its decisive majority, can steamroller opposition in the Commons in a similar manner. Thus, the Lords thrice rejected a provision in the Teaching and Higher Education Bill 1998 which waived the payment of fees for the fourth year of a degree taken at a Scottish university for Scottish students, but not those from the rest of the UK, a provision which had attracted widespread opposition outside Parliament. The government was eventually forced to promise an independent review of the system within six months of its establishment, an important concession. The Lords has also broken with a (contested) convention in 2000 by rejecting a piece of secondary legislation—the Greater London Authority (Election Expenses) Order 2000—which dealt with the nuts and bolts of the London mayoral and assembly elections, in particular, the amount of electoral expenditure which candidates would be allowed to incur; the Order required only negative approval, that is, it would go through automatically unless voted against. It appears that the Lords only in fact rejected secondary legislation once in the 20th century (see Brazier, *Constitutional Practice*, 2nd edn, 1994, p 254, footnote 119), in 1968, in relation to a sanctions order against Rhodesia. That in fact was an order requiring positive approval from the Lords: Erskine May reveals that it has never voted down orders requiring only the negative approval procedure. Nevertheless, the Lords, to the consternation of the government, threw the order out and, in so doing, quite clearly relied upon their newly reformed status. In 2000, the Lords inflicted a further major defeat on the government over its Criminal Justice (Mode of Trial) Bill. The heart of the controversial legislation was clause 1, which

removed the right of defendants to choose jury trial in 'either way' offences, such as theft and burglary. The crucial part of the debate took part in Committee stage and only got as far as clause 1. The very first amendment put down restored the right of the defendant to be tried by a jury in such cases at his election, and thus ripped the heart out of the Bill. It was therefore what is commonly referred to as a 'wrecking amendment', since it altered the fundamental principle of the legislation.

The Lords is often seen as having a particularly important role to play in the protection of civil liberties, an issue to which the Commons may often show little sensitivity when both main parties feel obliged to show their 'toughness' on law and order issues. The Lords inserted an important amendment to the Police and Criminal Evidence Bill 1984, allowing evidence unfairly obtained to be excluded; this eventually prompted the government to put forward its own amendment which became s 78 of the Act. The War Crimes Bill 1990 was rejected outright by the Lords, on the grounds that the convictions of former Nazi war criminals, which it aimed to facilitate, would be inherently unsafe.

Similarly, in January 1997, the Lords defeated the government to procure an important amendment of principle to the Police Act 1997. As originally conceived, the Bill gave police officers the power to enter premises to plant listening devices to assist in the detection of crime. Authorisation was to be given by the Chief Constable; by contrast, when the police want to tap phones, they must obtain a warrant from the Home Secretary. There was also no exception in relation to bugging premises where conversations involving legal professional privilege might take place—listening devices could therefore have been planted at lawyers' offices. The Lords inserted an amendment to compel the police to seek prior judicial approval before installing listening devices, forcing the government to bring forward its own, similar proposals. Similarly, in 2001, their Lordships imposed a series of major defeats on the government, including a record five in one session in relation to its Anti-Terrorism, Crime and Security Bill 2001 which *inter alia* allowed for the detention without trial for an indefinite period of suspected international terrorists. As is apparent from any reading of the debates, this was done in no narrow partisan spirit—imposing defeats on a governing party just because they are the other side—but out of genuine concern for basic liberties. In the result, the Lords forced some important concessions from the government.

It is first worth asking why the Lords works so much better as a revising Chamber than the Commons (a view widely accepted by commentators). Philip Norton (in Jones (ed), *Politics UK,* 1994, p 354) has suggested three main features of the House of Lords which render it 'particularly suitable' for the task of detailed consideration of legislation.

First, as an unelected body, it cannot claim legitimacy to reject the principle of measures agreed by the elected House; thus, by default, it has to concentrate on the detail. Secondly, its membership includes people who have distinguished themselves in particular fields—law, education, industry, industrial relations—so that it can look at relevant legislation from the point of view of practitioners in the field rather than of professional politicians. Thus, for example, when considering the Criminal Justice Bill 1997, major speakers included former Secretaries, the Master of the Rolls and the Lord Chief Justice. Bogdanor also stresses this factor in relation to the scrutiny of EC legislation. Thirdly, because the House does not consider money Bills, it has more time than the Commons to debate non-money Bills; furthermore, there is no provision for guillotines or closures to be imposed on debate, so that all amendments are discussed unless withdrawn.

It should be pointed out that two of the positive attributes which Norton identifies arise from the fact that the House is not elected. Its lack of legitimacy means it cannot reject the principle of Bills; the fact that it does not consider money Bills is also a reflection of its lower, because undemocratic, status. The paradoxical notion that much of the value which commentators perceive in the Lords is attributable to the one characteristic which most lays it open to attack—its unelected status—is a recurring theme in the literature on the subject.[3]

To this can be added the relative political independence of the Lords. Whilst, as noted above, the Conservatives predominate, this is not as important in practice as might be thought. First of all, the large contingent of Cross-Bench peers ensures a strong input of non-party opinion and analysis. That around 25% of peers are now independents compares strikingly to the single independent MP in the Commons at the present time—himself a rarity. Furthermore, the Lords are not as susceptible to party pressure exerted by the whips as are MPs; most have no political future to safeguard, and so are not as vulnerable to threats or promises. These conclusions are borne out by evidence as to how the Lords behaves in practice: defeats of governments of both political complexions are far more frequent than in the Commons, in which, at least if the government has a workable overall majority, they are almost unheard of. The Blair government has so far suffered no defeats in the Commons on legislation; the Lords has inflicted numerous reversals. However, any claim that the House of Lords defies its own composition to the extent that it is actually even-handed as between the parties would be going too far. As Jack Straw noted in the Queen's Speech debate in 1998, In an average session when the Conservatives have been in power, there have been 13 defeats of government business in [the Lords]. In an average session when Labour has been in power, the figure has been five times that—on average, 60

defeats' (HC Deb, Cols 573–74, 30 November 1998). Despite this, it is incontestable that the Lords shows far greater political independence than does the Commons. Moreover, its bias towards Conservative legislation is likely to decrease now that the parties are far more balanced.

However, while the above factors may facilitate the valuable work the House performs, its unelected and partisan make-up has led it to impose certain conventional restraints on the exercise of its own powers, which essentially mean that it is generally unwilling to impose its will upon the government-dominated Commons. These include the Salisbury Convention, that the Lords should neither vote down the principle of legislation promised in a manifesto nor pass what are known as 'wrecking amendments' to it. Under the legal restrictions on the powers of the Lords introduced by the Parliament Acts, the Lords may only in the end delay a non-money Bill for one year, provided that it has been passed by the Commons in two successive sessions and twice rejected by the Lords. Its powers over money Bills (those which relate exclusively to central government taxation, expenditure or loans) were effectively removed altogether: such Bills can be presented for the royal assent within one month, unless passed unamended by the Lords. Again, these limitations reflect the lower status of the unelected House.

Turning to the issue of reform, it is suggested that in principle, some balance needs to be struck between preserving at least some of those qualities which allow the House to perform its current valuable work—in particular, its expertise across a range of areas, its willingness to examine detail and a relatively weak degree of party control—and remedying the basic problem of the House's undemocratic and unrepresentative nature. It is the fact that the House's undemocratic nature is strongly linked to the current value of its work that has made the problem of its reform so intractable.

As an initial point, it is suggested that mere abolition is not the answer: such a move would leave the whole problem of elective dictatorship via the Executive-controlled Commons untouched, and would mean the loss of the valuable work which the Lords undertakes in relation to government and European legislation. Moreover, the Commons would become hopelessly overworked.

Turning then to proposals for a reformed second chamber, as Brigid Hadfield has pointed out ('Whither or whether the House of Lords' (1984) 35(4) NILQ 313), changing the *composition* of the Lords presents a basic problem. If the members were elected, the chamber could become simply a rival to the Commons, resulting in political impasse. Alternatively, if both chambers were dominated by the same party and the new chamber was as easily dominated by the government as the Commons, it might become redundant. Electing the second chamber might well also jeopardise the

current value of its work, since the appointed independent experts who contribute so much to the value of the Lords' work would be lost, replaced by professional politicians. It was these arguments which led both Wakeham and the government in its White Paper to reject a wholly elected Lords. However, a non-elected House would also pose difficulties, both in terms of arguments over the selection procedure (though any system would seem preferable to having the Prime Minister select peers) and because of the fact that a non-elected senate would have no mandate to assert its will against the elected House of Commons. It was the lack of legitimacy of an appointed Lords, as well as its political unpopularity—clearly seen in the press response to the Wakeham and government proposals—that fatally undermined those proposals. Clearly, some balance is needed: the Lords must have greater democratic legitimacy or it will continue to be a second-class sidelined body, unwilling to assert its will even when it has a strong argument. On the other hand, making it wholly elected would risk impasse with the Commons, and perhaps more importantly jeopardise precisely those qualities of the Lords—expertise, relative independence from a party—which, it is currently agreed, make its work most worthwhile. It is therefore suggested that the way forward for the Lords is to build on the positive aspects of the Wakeham proposals—an independent Commission to make appointments for the non-elected members, in order to remove the unacceptable patronage of the Prime Minister of the day, the duty to achieve greater representation in terms of race, sex and regionalism, the retention of a strong independent body of peers—while increasing the proportion of elected peers to 50% or 60% as suggested by the Public Administration Committee.

The removal of the hereditary peers has had a number of beneficial effects, discussed above, including re-balancing the House, giving it more meritocratic legitimacy and thus a greater willingness to use its powers, and substantially ameliorating its most unacceptable feature. However, it is accepted that this reform is no substitute for the more radical reform suggested above, which should preserve the best features of the existing Lords, whilst giving it the legitimacy to use its powers far more extensively than at present.

Notes

1 Students could note that the Lords also initiates a fair amount of legislation: around one-sixth of its time is spent initiating Bills which tend to concern either law reform measures, international Acts, Acts relating solely to Northern Ireland or Scotland, and matters which are not party-politically

controversial. For example, the Human Rights Act 1998 was introduced into the Lords. In this respect, the fact that the Lords does not have any constituents can be valuable: its members can safely propose and debate legislation on contentious moral issues without fearing a backlash of opinion against them; for example, the initiative to relax the prohibition against homosexual activity came from the Lords.

2 A further example could be given of an important defeat inflicted on a government Bill by the Lords. Despite what were described at the time as 'intensive government efforts to "whip" Conservative peers' into line ((1996) *The Independent,* 1 March), 21 Conservative rebels, including former government ministers, joined with Labour peers to pass an amendment to the Family Law Bill at the end of February 1996, allowing divorcing couples to split their pensions at the time of divorce. The amendment illustrates not only the preparedness of the Lords to oppose the government on matters of principle, but also the relative ineffectiveness of whipping in the Lords in comparison to the Commons.

3 It could be noted at this point that another major area of valuable work undertaken by the House is its scrutiny of EC legislation, a task of great importance, given the ever-growing impact of such legislation on the UK. The main responsibility for this area of the Lords' work lies with the House of Lords Select Committee on the European Communities. The Committee takes evidence from a wide variety of sources; it is not hamstrung, and neither is the whole House when debating its reports, by the battle between Euro-sceptics and Europhiles which is waged interminably in the Commons, but can bring to bear a more rational analysis. Bogdanor states that 'there is widespread agreement that the scrutiny procedures adopted by the Lords are amongst the most effective in the Community' (in *The Changing Constitution,* Jowell and Oliver (eds), 3rd edn, 1994, p 12).

Question 19

'The valuable legislative function of the House of Lords is impaired because such powers as it possesses are not often used to their full effect.'

Do you agree? How far, if at all, has the removal of most of the hereditary peers affected this position?

Answer plan

This is a somewhat tricky version of a typical House of Lords question. Its assumption that the House of Lords does have a valuable legislative function must be questioned, as must the implication that its role is quite severely circumscribed. Clearly, it is vital to address in detail the issue of the removal of the hereditary peers.

Essentially, the following matters should be considered:

- the formal limits on the powers of the Lords under the Parliament Acts 1911 and 1949;
- the conventions on the use of the Lords' powers;
- the importance of conventions as compared to formal limitations;
- the role of the Lords in scrutinising legislation, particularly legislation affecting civil liberties;
- the Private Members' Bills emanating from the Lords;
- the scrutiny of delegated legislation; a convention of restraint?;
- the impact of the removal of the hereditary peers on all the above.

Answer

This question implies that the legislative function of the House of Lords is quite severely circumscribed. Before considering the effect of such circumscription, it should first be determined how far the Lords may be said to refrain from full use of its powers and how far it is restrained from doing so by legislation.

The Lords has the same right to initiate and revise legislation as the Commons, subject to the provisions of the Parliament Acts 1911 and 1949. The Acts allow the House of Commons to assert political supremacy over the Lords in two very important instances. First, when a Bill has been passed by the Commons in two successive sessions and it is rejected for a second time by the Lords, it can be presented on its second rejection for the royal assent. One year must elapse between the second reading of the Bill in the Commons at the first session and its passing in the Commons in the second.

Secondly, if a Bill is a money Bill, as defined in s 1(2) of the Parliament Act 1911 (a measure which relates exclusively to central government taxation, loans or expenditure) and is passed by the Commons but not passed by the Lords without amendment within one month after it receives it, it may be presented to the Queen for the royal assent and become an Act of Parliament. This provision was brought forward after the Lords had rejected the Finance Bill 1909; essentially, it means that the Lords has no powers at all over money Bills.

However, the limits on the Lords' power under the Parliament Acts are not as significant as may at first appear. First, not all Bills are subject to the Parliament Acts. Exemption extends to private Bills, statutory instruments, Bills to extend the life of a Parliament and Bills originating in the House of Lords—a fair proportion of government legislation. Secondly, in practice, the government will not want to wait for over a year before securing the passage

of its legislation and so will be prepared to accept compromise amendments. The Parliament Acts procedure has in fact only been used five times since 1911, indicating that the conventional limitations upon the Lords' power—together with the willingness of governments to accept amendments rather than face delay—on the whole preclude the need for the *legal* assertion of the Commons' supremacy.

Perhaps the most important, and certainly the most clearly established, convention of self-restraint has been termed the 'doctrine of the mandate' or the 'Salisbury Convention'. This doctrine was explained by Lord Salisbury in 1964 as a guiding principle that where legislation had been promised in the governing party's manifesto, the Lords would not block it on the ground that it should be regarded as having been approved by the British people. The Salisbury Convention is taken very seriously by the Lords; there has been no clear instance where the Lords has flatly rejected a manifesto Bill since the Second World War.

The application of the Convention to amendments to Bills is less clear. Logically, it should preclude the Lords from amending a Bill in such a way as to remove from it some element which was promised in the manifesto or, in general, changing it so radically that it is no longer recognisable as an implementation of the manifesto pledge. But the Lords has not allowed the government of the day to be the sole judge as to whether a given amendment has this effect: thus, it has, on four occasions in the last 50 years, caused Bills to be lost by insisting on what the Labour governments of the day saw as 'wrecking amendments', thus causing a Bill to run out of time and be lost. The House of Commons (Redistribution of Seats) Bill in 1968–69 was one example. A more recent display of the Lords' activism was provoked by the European Parliamentary Elections Bill 1998, a controversial example, because the Bill itself clearly fulfilled a manifesto pledge—to introduce proportional representation for elections for the European Parliament. As passed by the Commons, the Bill provided that the voting system to be used would see MEPs elected on a 'closed' list system, whereby votes would be cast for a party only, so that the party, not the voter, would select the actual candidates who were elected. The Lords inserted an amendment which would have changed it to an 'open' list system, and then repeatedly re-inserted this amendment upon its repeated rejection by the Commons. Following the Lords' fifth restoration of the amendment, it was clear that the Bill had run out of time and the government announced that it was lost. Defending itself against the charge that its insistence on the amendment breached the Convention, Lord Mackay cited the relevant manifesto pledge: 'We have long supported a proportional voting system for election to the European Parliament', and pointed out there was 'no mention' of the electoral system to be used.

In relation to non-manifesto Bills, there is more of a general practice of self-restraint than a clear convention. The Lords very rarely reject government Bills outright; indeed, the rejection of the War Crimes Bill 1990 and the Parliament Bill 1947 represent the only occasions when this happened in 50 years. The Lords is also reluctant, in practice, to restore amendments to any Bill which the government has had overturned in the Commons. Indeed, O Hood Phillips has suggested (*Constitutional and Administrative Law,* 7th edn, 1987, p 148) that there is almost a convention that the Lords will not return a government Bill to the Commons for reconsideration more than once. That this is indeed not a firm convention, but merely a general description of practice has been vividly illustrated by events surrounding the European Elections Bill, in which, as noted, the Lords restored its rejected amendment no less then five times. It took a similarly assertive stance over the Teaching and Higher Education Bill 1998: a provision in the Bill which waived the payment of fees for the fourth year of a degree taken at a Scottish university for Scottish students, but not those from the rest of the UK, led the Lords to restore on three occasions an amendment rejected by the Commons which equalised the position for students from all parts of the UK. The government was eventually forced to promise an independent review of the system within six months of its establishment, an important concession. In 2000, following the reform of the Lords removing most of the hereditary peers—a matter considered further below—the House took a still more assertive stance in its response to a controversial piece of *primary* legislation, which would have restricted the right of a defendant to choose trial by jury. The heart of the government's Criminal Justice (Mode of Trial) Bill was clause 1, which removed the right of defendants to choose jury trial in 'either way' offences, such as theft and burglary. The crucial part of the debate took part in Committee stage and only got as far as clause 1. The very first amendment put down restored the right of the defendant to be tried by a jury in such cases at his election, and thus ripped the heart out of the Bill. It was therefore what is commonly referred to as a 'wrecking amendment', since it altered the fundamental principle of the legislation. This amendment was carried in the Lords by a large majority. The government spokeswoman, Baroness Jay, immediately announced that since the Bill 'no longer represented government policy', it would be withdrawn. It is important to note that the Bill started life in the Lords, not the Commons. Therefore, by effectively throwing out the Bill, the Lords had prevented the Commons being able even to see it. A report in *The Times* remarked that this was the 'first time in memory' that 'a mainstream Bill' had been 'killed…before it had reached the elected House'.

Although this was perhaps an exceptional case, with the House being generally reluctant to engage in a head-on collision with the Commons and therefore using its powers circumspectly, this does not mean that it has no value as a means of keeping a check on the activities of the other chamber. Indeed, most commentators accept that the House of Lords has a valuable part to play in the British constitutional process. Perhaps its most important role lies in scrutinising public Bills passed by the House of Commons, on which it spends around half of its time. The House passes a large amount of amendments to such Bills: in the 1987–90 sessions, the average number of amendments passed was over 2,600. The vast majority of these were subsequently accepted by government (2,038 out of 2,056 in the 1992–93 session), reflecting the fact that most are introduced by government and are technical in nature. However, the Lords is not simply a forum in which a government can correct its own mistakes. Barnett's conclusion is that 'the Lords is both very active in relation to legislation, and makes a substantial impact on many legislative proposals' (*Constitutional and Administrative Law,* 4th edn, 2002, p 532). A significant number of its amendments represent changes of principle of a minor or major nature. To an extent, therefore, the Lords can compensate for the inadequate scrutiny bestowed by the Commons, scrutiny which is widely perceived as consisting merely of a party battle, rather than a rigorous assessment of the merits of legislative proposals. It can therefore provide a much needed check on the government-dominated Commons, a check which is particularly valuable when, as present, the government in power has a large majority, thereby rendering the Opposition largely ineffective. The Lords may delay controversial or unpopular legislation, or it may be able to procure the acceptance of amendments which are unwelcome to the government. It has done both on a number of occasions during the 1980s and 1990s, at a time when Oppositions have been wholly unable to do likewise.

Thus, during the 1980s, due to the nature of the parliamentary process, the Labour party in the Commons was helpless in the face of the large Conservative majority. In contrast, the Lords inflicted 173 defeats on the government between 1979 and 1991, some of them relating to important and controversial measures.[1] The Lords has also, as noted above, defied the present government which, with its decisive majority, can steamroller opposition in the Commons.

The Lords is often seen as having a particularly important role to play in the protection of civil liberties, an issue to which the Commons may often show little sensitivity when both parties feel obliged to show their 'toughness' on law and order issues. For example, in January 1997, the Lords defeated the government to procure an important amendment of principle to the Police Act 1997. As originally conceived, the Bill gave police officers the

power to enter premises to plant listening devices to assist in the detection of crime. Authorisation was to be given by the Chief Constable; by contrast, when the police want to tap phones, they must obtain a warrant from the Home Secretary. There was also no exception in relation to bugging premises where conversations involving legal professional privilege might take place—listening devices could therefore have been planted at the offices of lawyers. The Lords inserted an amendment to compel the police to seek prior judicial approval before installing listening devices, forcing the government to bring forward its own, similar proposals.

Where, however, civil liberties clash with the fight against terrorism, historically, the Lords has fared no better than the Commons in forcing governments to reconsider sometimes draconian measures. Indeed, it has often offered no resistance at all to the rushing through of legislation, often in response to particular atrocities, refusing to exercise even to a small degree its powers to debate legislation at length. Thus, the Lords offered no resistance in 1974 to the first Prevention of Terrorism Bill, passed through both Houses in a single day, following the outrage generated by the Birmingham pub bombings. The Prevention of Terrorism (Additional Powers) Bill 1996 was likewise passed in one day, as was the Criminal Justice (Terrorism and Conspiracy) Bill 1998, which passed through the Lords in a few hours, despite its far-reaching implications for civil liberties (it allows a conviction of membership of a proscribed organisation to be obtained on the combination of the word of a senior police officer and inferences from silence). Despite expressions of deep unease that were heard from numerous peers, the Lords felt that it would be 'irresponsible' to delay the Bill. Such instances represent particularly marked refusals by the Lords to use its powers.

Again, however, it appears that the removal of the hereditary peers has had some effect here. The Anti-Terrorism, Crime and Security Bill 2001, introduced into Parliament in response to the perceived greater threat from international terrorism following the attacks on America on September 11th 2001, represented a significant test for the Lords. The Bill was a long one: 126 clauses and eight lengthy Schedules. The most controversial part of the Bill allowed for the indefinite detention of suspected international terrorists, albeit with some judicial oversight, which required the UK to derogate from Art 5 of the European Convention on Human Rights. However, much of the Bill did not in fact deal with specific anti-terrorism measures. It included a new offence of incitement to religious hatred which, in itself, would clearly provide no assistance in the fight against terrorism, new police powers extending to all criminal suspects—not just suspected terrorists, and measures to put in place a new Code of Practice on retention of communications data—websites visited, mobile phone calls made and so

on. The approach of the Lords, below, may be contrasted with that of the Commons, which first of all accepted a timetable of only 16 hours in which to scrutinise a Bill 124 pages long, and then imposed not a single amendment on the government. By contrast, their Lordships imposed a series of major defeats on the government, including a record five in one session and, as is apparent from any reading of the debates, this was done in no narrow partisan spirit—imposing defeats on a governing party just because they are the other side—but out of genuine concern for basic liberties. On some points, the government was forced to accept complete defeat: the proposed creation of an offence of incitement to religious hatred was repeatedly rejected by the Lords and eventually dropped from the Bill altogether. The Lords also procured the insertion of 'sunset' clauses against government resistance, whereby the more draconian aspects of the legislation would automatically lapse after a specified period. However, the House did eventually accept compromises from the government on other issues, including on the exclusion of judicial review in relation to the detention of suspected terrorists and on the controversial information-sharing provisions. This compromise in particular—it did not restrict the scope of the information-sharing provision to terrorist-related offences, as the Lords had wanted—seems to illustrate clearly the point that the House's lack of perceived legitimacy as an undemocratic body in the end crucially weakens its resolve to resist proposals approved by the elected Commons.

It should of course be remembered that the Lords' value does not only lie in its ability to amend or delay legislation: Bills which are not seen as contentious in party political terms, such as the National Heritage Bill (1980–81 session), are regularly introduced into the Lords, thus relieving pressure in the Commons. Private Members' Bills may also be put down by peers.[2]

The Lords also performs a valuable service by contributing to the scrutiny of delegated legislation. Its powers in this respect are the same as those of the House of Commons, as they were not curbed by the Parliament Acts. For example, on occasion, a point raised in debate in the Lords may lead the government to withdraw the legislation in question with a view to amending it. However, a very clear picture of self-restraint emerges in this area also: up until 2000, the Lords has only once since 1945 thrown out a piece of delegated legislation, and that was the highly controversial Southern Rhodesia Order 1968. Indeed, some observers were of the view that there was in fact a convention that the Lords would not reject delegated legislation at all. The Wakeham Report appeared to act on this assumption, in recommending that the Lords' unused veto power should be replaced by a short power of delay; this was in spite of the fact that

when, in 1994, it was suggested to the House that a convention had come into being that the Lords would not vote down items of subordinate legislation, their Lordships' response was bullish: a motion by Lord Simon of Glaisdale to the effect that the House had unfettered freedom to vote on any subordinate legislation before it was overwhelmingly approved in October of that year.

In this area, the removal of the hereditary peers seems to have had a particularly clear effect. The Lords in 2000 was unhappy with the refusal of the government, in its legislation governing the London mayor and assembly, to give candidates a free 'mail shot' to the electorate. The Lords chose to express its discontent on the matter in a novel way: it voted on a piece of secondary legislation—the Greater London Authority (Election Expenses) Order 2000, which dealt with the nuts and bolts of the London mayoral and assembly elections, in particular, the amount of electoral expenditure which candidates would be allowed to incur; the Order required only negative approval, that is, it would go through automatically unless voted against. Erskine May reveals that the House has *never* voted down orders requiring only the negative approval procedure. Nevertheless, the Lords, to the consternation of the government, threw the Order out and in so doing, quite clearly relied upon its newly reformed status. During the debate, there was some disagreement about whether the practice of the Lords not to reject secondary legislation had achieved the status of a constitutional convention. Some peers certainly took this view, while others firmly rejected such a notion, pointing to the House's resolution of October 1994 cited above. Others, such as Lord Cranbourne for the Conservatives, still appeared to believe that while there may have been a convention that the House would not reject such legislation, it would not apply now, the House being a reformed chamber, which was not necessarily bound by the conventions of the unreformed House.

In general, there was strong support for a more assertive attitude on the part of the new House. Lord Mackay noted that a government spokesman (the Lord Privy Seal) had stated in the House Magazine on 27 September 1999 that the 'new' House of Lords 'will be more legitimate, because its members have earned their places, and therefore more effective'.

On the whole, however, the general picture is clear: the House of Lords, which is in a weaker position to resist government Bills (both legally and by convention) than the Commons, in fact utilises its ability to improve Bills in matters of detail, to introduce important changes of principle and to force the government to reconsider far more than the theoretically omnipotent Commons. Thus, the criticism outlined in the question applies in fact less to the second chamber than the first.

It may therefore be argued that the Lords has managed to create a delicate balance between appearing as a superfluous body which merely rubber stamps the Commons' decisions, and as an undemocratic and anachronistic body which interferes too far in the legislative function of the elected part of Parliament. It is clear that the removal of the hereditary peers has already resulted in a more assertive attitude from their Lordships. However, given that the core reason for their restraint—their undemocratic status—has not been touched by the removal of the hereditaries—it is unlikely that either the Salisbury Convention or the House's nuanced convention of general restraint will disappear until more comprehensive, democratic reform gives the House unquestionable legitimacy.

Notes

1 Students could give the example of the Lords' response to the government's highly contentious policy of restricting the appeal and social security rights of asylum seekers in the UK, as set out in the Asylum Bill 1996. The basic policy of the Bill is to draw up a 'white list' of countries considered safe; asylum seekers from these countries would face a presumption against their admittance and a 'fast track' procedure for determining their application which would limit their rights of appeal. The amendment carried in the Lords (on 23 April 1996) would exempt from the 'white list' category applicants 'who can show a reasonable claim that [they] have been a victim of torture' in their own country and those 'claiming to fear persecution in a country which has a recently documented record of torture' and would therefore considerably restrict the amount of applicants subject to the new provisions. The amendment thus represents a significant attack on the policy behind the Bill.

2 Students could expand on this point by noting that Private Members' Bills introduced in the Lords may not receive the royal assent, but may be valuable for raising debate and stimulating interest. For example, the Anti-Discrimination (No 2) Bill 1972–73 raised interest when being discussed by the Lords' Select Committee. This led to espousal of the Bill first by back benchers and then by the government. The eventual result was the Sex Discrimination Act 1975. It may also be pointed out that as the Lords has no constituents to whom it is accountable, it may feel free to bring forward Private Members' Bills on emotive and contentious subjects, such as homosexuality and abortion. The initiative for relaxing the law relating to homosexual conduct, which eventually resulted in the passing of the Sexual Offences Act 1967, came from the Lords, not the Commons. However, the Lords' rejection of a provision in the Crime and Disorder Act 1998, which would have equalised the age of consent for heterosexuals and homosexuals at 16, suggests that where the Commons is controlled by a relatively liberal party, as at present, this relative independence of the Lords is revealed as independence to apply innately conservative values.

Question 20

In the light of the current nature and work of the House of Lords and its value, evaluate the Wakeham proposals for comprehensive reform of the House of Lords, contrasting them with those of the government in its White Paper and of the Public Administration Committee in their Fifth Report (HC 494, 2001–02).

Answer plan

This question, or something similar to it, is almost bound to appear on examination papers over the next few years until concrete plans differing from those of Wakeham are brought forward in the form of draft legislation. The version given here is quite tricky, as it requires specific comparisons to be made with both the White Paper and the proposals of the Public Administration Committee (PAC). Because the White Paper proposals are closer to Wakeham than those of the PAC, the answer below discusses the two former proposals together, then contrasts both with the PAC as well as each other. The answer requires evaluation in the light of the value of the current work of the Lords, so specific examples of that work should be given, and an explanation produced as to why that work is valuable and how far different reform proposals might risk jeopardising it in the search for a more legitimate and representative House.

Essentially, the following matters should be considered:

- a brief outline of what is valuable in the current work of the Lords, and how that relates to its composition;
- an outline of the Wakeham proposals, with indications of how the White Paper differs;
- the criticisms of Wakeham and of the White Paper;
- the counter-proposals of the PAC;
- the argument for a wholly elected House;
- conclusion.

Answer

In tackling the above question, the following approach will be taken. In order to set the context for analysis of the value of the current House, a brief outline of its composition will first be given. Secondly, the essay will seek to discuss

briefly what is generally agreed to be of value about the current House of Lords and how this is related to its current composition. Thirdly, it will outline the proposals of Wakeham and the White Paper and indicate the main criticisms of them, in particular, why it is widely felt that the White Paper took a reform package already timid and flawed and weakened it still further. Finally, the essay will contrast these with the reforms suggested by the PAC, and explain why it is argued that these represent a better compromise between the competing aims of reforming this most unusual second chamber.

It is necessary first to describe briefly the current House of Lords. There are still three main groups in the Lords, although following the House of Lords Act 1999, the balance between the life and hereditary peers has swung dramatically in the former's favour. As at August 2002, there were 557 life peers and only 91 hereditaries, those selected for retention by a vote of the hereditary peers only. The Bishops and Law Lords remain in the House with 26 places each. Not only is the House thus wholly undemocratic, it is also extremely unrepresentative of women: there are still only 116 women out of a total of 700. Moreover, the House is representative neither of the different regions of the UK, being weighted heavily in favour of Scotland and the south east of England, nor of its socio-economic make-up. In terms of party balance, the House is also still unsatisfactory. Historically, the Conservatives have had a permanent strong predominance; the position here has undergone a marked improvement following the removal of the bulk of the hereditaries, and a deliberate and successful attempt by Mr Blair to rebalance the Lords through his appointment of large numbers of mainly Labour life peers. As at August 2002, the Conservatives remain the largest single party, with around one-third of the total membership, but Labour is close behind. The Cross-Bench peers now represent around 25% of the total. Thus, in practice, all legislation requires cross-party support to pass. This provides a marked contrast to the position in the House of Commons, where the electoral system generally gives one party an overall majority, and often a large one, as at present, even though that party has not gained a majority of the popular vote.

It may now be asked, what is thought to be of value about the current House and its work, and how is this related to its composition? Answering this question will enable us to take some first steps towards evaluating the various reform packages mentioned in the question. The value of the current House can perhaps be summed up as being: relative independence from party and government control; expertise; and readiness to consider and amend legislation in detail. These points will now be expanded upon.

Despite its undemocratic and unrepresentative nature, most commentators accept that the House of Lords has a valuable part to play in

the British constitutional process. Perhaps its most important role lies in scrutinising public Bills passed by the House of Commons, on which it spends around half of its time. The House passes a large amount of amendments to such Bills: in the 1987–90 sessions, the average number of amendments passed was over 2,600. The vast majority of these were subsequently accepted by government, reflecting the fact that most are introduced by government and are technical in nature. However, the Lords is not simply a forum in which government can correct its own mistakes. Barnett's conclusion is that 'the Lords is both very active in relation to legislation, and makes a substantial impact on many legislative proposals' (*Constitutional and Administrative Law,* 4th edn, 2002, p 532). A significant number of its amendments represent changes of principle of a minor or major nature. To an extent, therefore, the Lords can compensate for the inadequate scrutiny bestowed by the Commons, providing a much needed check on the government, a check which is particularly valuable when, as at present, the government in power has a large majority, thereby rendering the Opposition largely ineffective. The Lords may delay controversial or unpopular legislation, or it may be able to procure the acceptance of amendments which are unwelcome to the government. It has done both on a number of occasions in the last two decades, during times when Oppositions have been wholly unable to do likewise.

Recently, for example, the Lords broke with a (contested) convention in 2000 by rejecting a a piece of secondary legislation—the Greater London Authority (Election Expenses) Order 2000—which dealt with the nuts and bolts of the London mayoral and assembly elections.[1] The Lords has also provided protection for a fundamental right: the right to jury trial. In 2000, the House inflicted a major defeat on the government over its Criminal Justice (Mode of Trial) Bill, which removed the right of defendants to choose jury trial in 'either way' offences, such as theft and burglary. As in this instance, the Lords is often seen as having a particularly important role to play in the protection of civil liberties, an issue to which the Commons may show little sensitivity when both main parties feel obliged to show their 'toughness' on law and order issues. Examples include the amendment inserted by the Lords to the Police and Criminal Evidence Bill 1984 allowing evidence unfairly obtained to be excluded, which eventually prompted the government to put forward its own amendment, which became s 78 of the Act, the rejection of the War Crimes Bill 1990 and the amendment made to the Police Act 1997 to ensure prior judicial approval before the police could install listening devices. Similarly, in 2001, their Lordships imposed a series of major defeats on the government, including a record five in one session in relation to its Anti-Terrorism, Crime and Security Bill 2001, which *inter alia* allowed for the detention without trial for

an indefinite period of suspected international terrorists. The Lords forced some important concessions from the government.

Why then does the Lords work so much better as a revising chamber than the Commons (a view widely accepted by commentators)? Philip Norton (in Jones (ed), *Politics UK,* 1994, p 354) has suggested three main features of the House of Lords which render it 'particularly suitable' for the task of detailed consideration of legislation. First, as an unelected body, it cannot claim legitimacy to reject the principle of measures agreed by the elected House; thus, by default, it has to concentrate on the detail. Secondly, its membership includes people who have distinguished themselves in particular fields—law, education, industry and industrial relations—so that it can look at relevant legislation from the point of view of practitioners in the field rather than of professional politicians. Thirdly, because the House does not consider money Bills, it has more time than the Commons to debate non-money Bills; furthermore, there is no provision for guillotines or closures to be imposed on debate, so that all amendments are discussed unless withdrawn.

It should be pointed out that two of the positive attributes which Norton identifies arise from the fact that the House is not elected. Its lack of legitimacy means it cannot reject the principle of Bills; the fact that it does not consider money Bills is also a reflection of its lower, because undemocratic, status. The paradoxical notion that much of the value which commentators perceive in the Lords is attributable to the one characteristic which most lays it open to attack—its unelected status—is a recurring theme in the literature on the subject.

To this can be added the relative political independence of the Lords. Whilst, as noted above, the Conservatives still predominate, this is not as important in practice as might be thought. First of all, the large contingent of Cross-Bench peers ensures a strong input of non-party opinion and analysis. That around 25% of peers are now independent compares strikingly to the single independent MP in the Commons at the present time—himself a rarity. Furthermore, the Lords are not as susceptible to party pressure exerted by the whips as are MPs; most have no political future to safeguard, and so are not as vulnerable to threats or promises. These conclusions are borne out by evidence as to how the Lords behaves in practice: defeats of governments of both political complexions are far more frequent than in the Commons, in which, at least if the government has a workable overall majority, they are almost unheard of. The Blair government has so far suffered no defeats in the Commons on legislation; the Lords has inflicted numerous reversals. However, any claim that the House of Lords defies its own composition to the extent that it is actually even-handed as between the parties would be going too far. As Jack Straw noted in the Queen's Speech debate in 1998, the House has historically inflicted five times more defeats on Labour than on

Conservative administrations. Despite this, it is incontestable that the Lords shows far greater political independence than does the Commons. Moreover, its bias towards Conservative legislation is likely to decrease now that the parties are far more balanced.

However, while the above factors may facilitate the valuable work the House performs, its unelected and partisan make-up has led it to impose certain conventional restraints on the exercise of its own powers, which essentially means that it is generally unwilling to impose its will upon the government-dominated Commons. These restraints include the Salisbury Convention, that the Lords should neither vote down the principle of legislation promised in a manifesto nor pass what are known as 'wrecking amendments' to it.[2]

In the light of the above, we may now turn to a basic outline of the reforms suggested by Wakeham and others and an evaluation of them. Wakeham's proposals can be briefly stated: the *powers* of the new chamber will be broadly comparable with those of the present Lords, though the report does suggest changes to its powers over delegated legislation; indeed, all the proposals cited in the question broadly leave the powers of the Lords unchanged. They have thus rejected the suggestion, favoured by the Liberal Democrats (amongst others) that the new chamber should have powers to delay a Bill certified by the Speaker as affecting human rights or important constitutional matters for the life of a Parliament, leaving the House markedly out of step with nearly all other second chambers in liberal democracies, which universally have special powers over constitutional legislation, as Russell's research establishes (*Reforming the Lords: Lessons from Overseas,* 2000).

It is Wakeham's proposals on composition that have proved most controversial. The report suggests a mainly appointed House of 550, with a minority of elected members to represent the regions. Unable to agree on an appropriate size for the democratic element, it instead put forward three options: option A, 65 members; option B, 87 members; option C, 195 elected peers, which would be a substantial element at over one-third of the total membership. These first two options are clearly somewhat tokenistic in nature. The remainder of the House would be appointed by a statutory, independent Appointments Committee, which would scrutinise proposals put forward by the parties for new members of the House. It would be under a statutory duty to maintain an independent element of 20% in the House, to ensure that at least 30% of new members were women and that ethnic minorities were represented in numbers at least proportionate to their representation in the total population. It would also aim to ensure that the parties were represented roughly in proportion to the votes cast in the most recent General Election, thus removing the long standing permanent

domination of the House by one party: the Conservatives. The powers of the Prime Minister in this area would be wholly removed: the Committee would have sole jurisdiction over appointments and be under no obligation to accept any nominations put to it.

The White Paper accepted the fundamentals of the Wakeham proposals. The key controversial changes which it proposed in relation to composition were as follows: first, it suggested leaving the parties to nominate the political non-elected members (Wakeham had proposed that the Appointments Commission should do this); secondly, the government proposed allowing both nominated and elected members to stand again; thirdly, it suggested reducing the 15 year terms for members proposed by Wakeham. These changes are controversial, because taken together, their effect would be radically to increase party control over both the selection of members and their likely behaviour—since the threat of not being re-selected for membership could be used to enforce obedience to the whips. Shorter terms would make the threat of de-selection a more pressing one. It was these changes that led the parliamentary members of the Royal Commission to refuse to support the White Paper.

In terms of moving towards evaluation of the Wakeham/government proposals, Russell's work is the leading study in this area, in terms of identifying, through comparative analysis, the crucial factors which make for an effective second chamber. As summarised by the PAC, the reformed Lords should have the following qualities: (i) *distinct composition*—it is important that the House maintains a different make-up from the Commons, as at present; otherwise, it will not make any distinctive contribution to the legislative process. In particular, it is important to maintain its qualities of relative independence and expertise. It is also vital to ensure that the party balance in the chamber is different and more proportional from that in the Commons, to prevent one-party domination, giving the House an alternative and more broadly-based perspective on the development of public policy; (ii) *adequate powers*—if the new Upper House is to make a significant impact, it will need to at least maintain its present, moderate powers; (iii) *perceived legitimacy*—in order to use its powers to the full, the new chamber (unlike the existing House of Lords) will need to be seen to have legitimacy, and be able to carry public support.

The Wakeham proposals clearly fulfil the first of these, in that the membership will be distinct from that of the Commons, in particular, because of the 20% proportion of independent members; just as significantly, party balance in the Lords will form a strong contrast to the position in the Commons, since neither the government nor any other party in the Lords will have an overall majority. The White Paper broadly also ensures this,

though it would make the House far less potentially independent, since the parties would to some extent be able to keep independently-minded members out of the House and exert more control over them in their day to day actions through the threat of de-selection. The current *powers* of the Lords are recognisably at the moderate end of the international spectrum, as Russell finds, though the proposed removal of the absolute veto over delegated legislation would amount to a significant weakening. The case for this change has now also arguably been lost, given that the Lords is now clearly prepared to use its veto power, as with the delegated legislation relating to the London assembly in 2000, cited above. It is in relation to the third factor that Wakeham and *a fortiori* the White Paper fall down. Certainly, the general response to Wakeham and particularly to the White Paper in the press and elsewhere suggests that it would not be seen as sufficiently legitimate. The PAC's view was that the public were simply not prepared to support or even tolerate the continuation of such extensive patronage, certainly not from the political parties, but probably not even from an independent Appointments Commission.

The proposals of the PAC back Wakeham over the Appointments Commission, the 20% proportion of independent members (who should be picked for their expertise and authority in their fields, especially human rights and constitutional matters), and the targets for making the House more representative in terms of gender, race, etc; they aim in essence to preserve the House's independence and expertise; to give it far greater legitimacy by increasing the elected element to a majority of the House's members. The PAC suggested 60%, a figure which they thought represented the 'centre of gravity' amongst MPs.

Before reaching a conclusion on the above proposals, the obvious and seemingly more radical and democratic alternative—a fully elected House—should be considered. Such a House commands considerable public support, according to polls, and is the long standing policy of the Liberal Democrats. However, it is suggested that calls for such a House are simplistic and misguided. As noted above, most commentators on the current House agree that much of its value flows precisely from the fact that it is *not* elected. Amongst other things, its unelected nature leads to its relative political independence, its freedom from populist pressures, and in particular the presence of experts in various fields, which gives its scrutiny of legislation a mastery of important points of detail generally lacking in the Commons. The most common objection to a wholly elected House is that it would become simply a rival to the Commons, resulting in political impasse. It is suggested that this objection is somewhat simplistic, as it fails to take account of the fact that the new chamber could, via legislation, be given a clearly subordinate role and a different

purpose from the Commons (that is, to act at present as a scrutinising and revising House, rather than one which challenges the Commons on matters of basic principle). The argument also does not take into account the legal limitations on the House represented by the Parliament Acts.

It is submitted that the real objection to a fully elected chamber is, as with all elections, that it would be practically impossible for anyone, save perhaps a few well known mavericks, to win a seat without standing as a member of one of the main political parties. Thus, the new chamber would be far more dominated than now by whipped party members. When both chambers were dominated by the same party, as would generally be the case, the second chamber would be most unlikely to offer any distinctive voice in the legislative process. Electing the second chamber might well also jeopardise the current value of its work, in that its expertise and the presence within it of a range of viewpoints beyond party orthodoxies would be wholly lost.

If, for these reasons, it is accepted that the new chamber should have a mixture of party politicians and independents within it, then the PAC proposals begin to look the most attractive of those considered here. The strong elected element would give the House a hugely increased sense of legitimacy and would encourage it to use its powers to make the government think again, particularly where issues of basic human rights, the protection of unpopular minorities and/or constitutional change are at stake, as with the Anti-Terrorism Bill 2001. By contrast, a House based on the Wakeham, or worse, the government's blueprint, could ultimately be brushed aside as being dominated by party appointees. As Russell observes, the Canadian Senate is ultimately an ineffectual House, despite its very strong formal powers, precisely because of its lack of legitimacy as an appointed body. A 20% elected element, as the government suggests (a slight increase on Wakeham's model B proposal), would simply not be enough to give the House enough self-belief to confront the government repeatedly and make it think again. For these reasons, it is concluded that the proposals of the PAC would combine the existing strengths of the House with the legitimacy to make it a far more influential voice in the political process, and are thus most worthy of support.

Notes

1 A further example could be given: the Lords thrice rejected a provision in the Teaching and Higher Education Bill 1998 which waived the payment of fees for the fourth year of a degree taken at a Scottish university for Scottish students, but not for those from the rest of the UK, a provision which had attracted widespread

opposition outside Parliament. The government was eventually forced to promise an independent review of the system within six months of its establishment, an important concession.

2 Students could make the point that this sense of its own lack of legitimacy was, perhaps, the factor that led the House to compromise so markedly in finally accepting many provisions of the Anti-Terrorism Bill 2001 (above) which it had initially rejected.

CHAPTER 5

PREROGATIVE POWERS

Introduction

Essay questions, as opposed to problems, tend to be set in this area and will usually concentrate on the extent to which courts can control the exercise of prerogative power. Interest may, however, start to focus more on the prerogatives relating to the appointment of a Prime Minister and the power to dissolve Parliament, if it seems that proportional representation (much more likely to produce uncertain situations in this respect) is likely to be adopted. Nevertheless, although this area can be tricky, partly due to the difficulty of defining terms such as 'the royal prerogative' or 'act of State', students will probably find it fairly straightforward to revise because they do not need to cover an enormous amount of material. The impact of the Human Rights Act 1998 should also be considered, though at the time of writing, there is no significant case law specifically on its effect on the prerogative.

Checklist

Students should be familiar with the following areas:

- the nature of prerogative powers;
- the expression 'act of State';
- the more important prerogatives: the power to dissolve Parliament, to assent to Bills, to declare war, to dismiss and appoint ministers; the personal prerogative of the monarch: various immunities such as the Queen's personal immunity from suit or prosecution and property rights;
- the ambiguities surrounding the right to dissolve Parliament or to refuse a dissolution, etc;
- the matters which the courts have traditionally considered in relation to the prerogative: its existence and extent, its relationship with statute and the duty of the Crown to compensate citizens affected by prerogative powers;
- *Council of Civil Service Unions v Minister for the Civil Service* (the *GCHQ* case) (1984): powers exercised under the prerogative may be open to review; excluded categories of prerogative power and how they have been cut down since GCHQ;

- the impact of the Human Rights Act 1998 on review of the prerogative;
- acts of State: acts of policy arising in relation to foreign States; acts of policy arising in relation to individuals; *AG v Nissan* (1970); the lack of safeguards as acts of State are non-justiciable; the arbitrary power conferred on Crown servants.

Question 21

How far do you think it is true to say that the role of judges in relation to the exercise of the royal prerogative may now prevent arbitrary Executive action?

Answer plan

This question is often asked in one form or another and is reasonably straightforward. Students should not spend much of their essay rehearsing legal history by outlining the 'old' position; rather, the emphasis should be on the *GCHQ* case and how the 'excluded categories' have fared since then. A brief mention of the impact of the Human Rights Act (HRA) 1998 will also gain marks.

Essentially, the following matters should be discussed:

- a definition of the prerogative;
- the historic willingness of the courts to determine whether a claimed power existed in law;
- the relationship of the prerogative with statute;
- a brief mention of the 'old' position on review of the exercise of the prerogative;
- the *GCHQ* case: powers exercised under the prerogative may be open to review;
- the excluded categories of prerogative powers, and subsequent case law which has whittled them away;
- the likely impact of the HRA.

Answer

In his *Commentaries on the Laws of England,* Blackstone wrote that the prerogative is 'that special pre-eminence which the King has, over and above all other persons, and out of the ordinary course of the common law, in right

of his royal dignity'. The term 'prerogative', then, refers to powers which the sovereign has by common law as opposed to statute. One of the pre-eminent features of British constitutional history has been the gradual transfer of the exercise of these prerogatives from the monarch to ministers, and today, the vast majority are, in practice, exercised by the Prime Minister, the Cabinet or individual ministers. The prerogative includes most key matters relating to foreign affairs, such as the making of treaties, recognition of States and the use of force, and on the domestic front the power to dissolve Parliament, to assent to Bills, to award honours, to pardon criminals, to establish universities, to regulate the Civil Service and to dismiss and appoint ministers. The personal prerogative of the monarch includes various immunities, such as the Queen's personal immunity from suit or prosecution, and property rights. As to judicial control of the prerogative, three broad questions arise. First, who has the power to determine whether a claimed prerogative power exists in law? Secondly, and relatedly, how do the courts police the situation whereby there appears to be a clash between prerogative and statute? Thirdly, are the courts prepared to review the manner in which a prerogative, recognised to exist, has been exercised and if so, what are the limitations upon this review?

The courts have long asserted that it is for them to determine whether a particular prerogative power actually exists and whether the decision taken falls within its scope. The famous *Case of Proclamations* (1611) made the seminal declaration that 'the King hath no prerogative, but that which the law of the land allows him'. The courts will not allow new prerogatives to be created by Executive *fiat*. In *BBC v Johns* (1965), the BBC claimed that a new prerogative had come into existence; in response, Diplock LJ said: 'It is 350 years and a civil war too late for the Queen's courts to broaden the prerogative. The limits within which the Executive government may impose obligations or restraints on the citizens of the United Kingdom without any statutory authority are now well settled and incapable of extension.' However, the courts have, on occasions, been prepared to allow a recognised prerogative to broaden in adapting itself to new situations: in *Malone v Metropolitan Police Commissioner* (1979), the assertion that a prerogative power existed to authorise telephone tapping[1] was based on the argument that no new power was being created, although an old one was being extended to a new situation.

Also disturbing in this respect was the decision in *Secretary of State for the Home Department ex p Northumbria Police Authority* (1989). The case will be considered further below; the key issue for present purposes was whether there was a hitherto largely unrecognised prerogative power to keep the peace, under which the Home Secretary could lawfully offer to supply CS gas and plastic baton rounds to any Chief Constable whose police authority

would not supply him with such equipment. The court found that there was a general prerogative to keep the Queen's peace; while the judges conceded that there was virtually no authority for such a power existing, they used the ingenious argument that the 'scarcity of references in the books to the prerogative of keeping the peace within the realm does not disprove that it exists. Rather, it may point to an unspoken assumption that it does'. It was further said that there was no need to demonstrate the existence of a prerogative to equip or supply the police force. Rather, the power under which the Home Secretary wished to act in supplying CS gas and plastic bullets could be brought under the general umbrella of the prerogative to do all that was reasonably necessary to keep the peace. This rather accommodating approach by the courts to the existence and scope of prerogative powers seems plainly incompatible with the basic notion, derived from *Entick v Carrington* (1765), that any act infringing on liberty must be justified by some positive piece of law. *Entick* had found that specific legal authority to justify government action must be found in the law books, and that if the books were silent, then that was judgment against the government. The court in *Northumbria Police* adopted the opposite view, offering little reassurance that doubtful claims of seemingly novel prerogative powers will be closely scrutinised by a judiciary vigilant to guard against arbitrary power.

The question of whether a claimed prerogative power exists in law is often complicated by the existence of a statute which covers the same or similar legal terrain, but without expressly abolishing the prerogative. Given the doctrine of the supremacy of Parliament, one would expect the statute to prevail in such a situation and, indeed, this has been the position adopted by the courts. Thus, if a statute conflicts with the prerogative without expressly abolishing it, the courts will give effect to the statute on the ground that the prerogative must be treated as in abeyance, although it is not abolished. Thus, in *AG v De Keyser's Royal Hotel* (1920), Lord Atkinson said: '…when a statute is passed…it abridges the royal prerogative while it is in force to this extent: that the Crown can only do the particular thing under, and in accordance with, the statutory provisions.' This basic position was affirmed, *obiter,* by the House of Lords in *Secretary of State for the Home Department ex p Fire Brigades Union* (1995), a case which will be returned to below. However, in the *Northumbria Police* case, the issue as to whether the Home Secretary had power under prerogative to supply riot equipment directly to Chief Constables required the Court of Appeal to consider whether this power had been abridged by provisions of the then Police Act 1964, which allowed the supply of such equipment but only with the consent of the relevant police authority. It was argued that since the

Home Secretary had an undoubted power under the statute to supply equipment, subject to certain requirements, he could not claim a parallel prerogative power to supply such equipment without any safeguards. The court rejected this argument on the basis that the statute did not expressly state that equipment was not to be supplied under any other power, a finding which appeared to come close to stating that statute will only oust the prerogative if it uses express words in doing so.[2] This finding, which allowed decisions in what was an area with some significance for freedom of assembly to be made under a very vaguely defined prerogative power, instead of being subject to the safeguards laid down in the area by Parliament, smacks rather of a judicial abeyance of responsibility than a determination to prevent the exercise of arbitrary power.

However, the subsequent decision of the House of Lords in *Secretary of State for the Home Department ex p Fire Brigades Union* (1995) restores some confidence in the will of the judiciary to hold the Executive to the intention of Parliament, as expressed in statute. It was held that while a statute which has been passed but not yet brought into force cannot have the effect of displacing prerogative powers in the same area, nevertheless, whilst such a statute is in force, ministers may not set up a radically alternative scheme in reliance on the prerogative, as the Home Secretary had purported to do.

Turning to the issue of the propriety of the exercise of prerogatives admitted to exist, again, an increased determination of the judiciary to ensure the legal accountability of the Executive may be discerned. The traditional view of the courts was that where the Executive acted under an admitted prerogative power, the exercise of that power was not subject to review as it would have been had the minister acted under statute (see, for example, *Burmah Oil Co v Lord Advocate* (1965) and *AG v De Keyser's Royal Hotel* (1920)). However, in *Laker Airways v Department of Trade* (1977), Lord Denning remarked: 'Seeing that the prerogative is a discretionary power to be exercised for the public good, it follows that its exercise can be examined by the courts just as any other discretionary power which is vested in the Executive.'

This approach was approved in the landmark case of *Council of Civil Service Unions v Minister for the Civil Service* (the *GCHQ* case) (1984). The House of Lords had to consider a challenge to an Instruction issued by the Prime Minister under Art 4 of the Civil Service Order in Council, which prevented staff at GCHQ belonging to national trade unions. Six members of staff and the union involved applied for judicial review of the Prime Minister's Instruction on the ground that she had been under a duty to act fairly by consulting those concerned before issuing it. It had first to be

determined whether the decision was open to judicial review at all. In general, a person affected by a decision concerning public law matters made under statutory powers may challenge it by way of judicial review under the heads (as classified in the case) of illegality, irrationality and procedural impropriety or breach of natural justice.

However, in this instance, the Prime Minister was exercising powers deriving from the royal prerogative (the Order in Council), which were traditionally seen as not susceptible to judicial review. The House of Lords determined that the mere fact of the power deriving from the prerogative as opposed to statute was not a sufficient reason to exclude it from review. This was particularly the case where the power in question derived from an Order in Council which was almost indistinguishable from a statutory power. The controlling factor determining whether a particular exercise of powers under the prerogative should be open to review was held to be the subject matter of the decision, rather than the source of the power. Lord Roskill suggested a number of prerogative powers which, by virtue of their nature and subject matter, were not amenable to the judicial process; these included the making of treaties, the disposal of the armed forces, the defence of the realm, the dissolution of Parliament, the prerogative of mercy, the granting of honours and the appointment of ministers. He termed these prerogative powers 'excluded categories', and found no reason why the power to regulate the Home Civil Service should fall into such a category.

Having determined that decisions taken under prerogative powers were open to review, the House of Lords then found that the decision-making process had in fact been conducted unfairly. However, the Prime Minister argued that national security considerations had outweighed the duty to act fairly and this was accepted by the House of Lords, although it was held that there must be some evidence of danger to national security; a mere assertion that such danger existed would be insufficient. As some evidence of such a danger had been put forward, the challenge failed.

In a number of cases since *GCHQ*, the courts have begun to whittle away Lord Roskill's excluded categories, suggesting a readiness in principle to review all prerogatives other than those which relate to matters at the heart of the political process, such as the dissolution of Parliament, the appointment and dismissal of ministers and matters of high foreign policy or defence: *Secretary of State for the Foreign Office ex p Rees Mogg* (1994) confirmed that the courts would not entertain challenges to the prerogative power to conclude treaties, in this case, the Treaty of Maastricht. It should be noted, of course, that Lord Roskill's list of excluded categories does not and never did represent an authoritative statement of the law; it was an *obiter* suggestion only.

Thus, in *Secretary of State for Foreign and Commonwealth Affairs ex p Everett* (1989), it was held that the courts were competent to review the exercise of the prerogative power of the Secretary of State to issue passports, although the power was related to foreign affairs and had traditionally been regarded as unreviewable. A further inroad into the excluded areas was made by the decision in *Secretary of State for the Home Department ex p Bentley* (1993), a case which fell squarely within one of Lord Roskill's excluded categories, namely, the prerogative of mercy. The issue was whether the Home Secretary's refusal to recommend a posthumous pardon for Derek Bentley, executed in 1953 for the murder of a policeman, was subject to judicial review. The court held that while the criteria to be used by the Home Secretary in making his decision were 'probably a matter of policy [and so] not justiciable', the Secretary had failed to consider the different types of pardon he could grant in the situation. Declining to make any order, the court 'invited' the Secretary to reconsider the case.

A more generalised attack on the scope of the excluded categories was made in the case of *Ministry of Defence ex p Smith and Others* (1996). A number of homosexual servicemen and women challenged the policy of the armed forces to exclude homosexuals from service. The government argued that the case involved governmental policy in relation to the armed forces, and hence amounted to a challenge to 'the exercise of a prerogative in an area—the defence of the realm—recognised by the courts to be unsuitable for judicial review'. Both the High Court and the Court of Appeal firmly rejected this argument and held the decision to be susceptible to review, although, on the facts, the challenge did not succeed. Smith LJ took the opportunity to put down a more general pointer, commenting that in his view, 'only the rarest cases' would be non-justiciable, those which involved 'national security properly so called and where in addition, the courts really do lack the expertise or material to form a judgment on the point at issue'. The remark was not confirmed by the Court of Appeal, but was not repudiated by it either. It certainly seems that the position has moved on markedly since 1987, when Munro suggested that 'the propriety of *most* exercises of prerogative power will still continue to be unsusceptible to challenge in the courts' *(Studies in Constitutional Law,* 1987, p 182, emphasis added).[3]

The impact of the HRA on this area should also be briefly mentioned. As with other areas of judicial review, the Act adds a fresh, substantive ground of review against which the courts must consider the lawfulness of action taken under the prerogative, where a European Convention right is in issue. Section 6 of the Act states that it is 'unlawful for a public authority to act in a way which is incompatible with a Convention right'. This will have at least one important effect. Section 6(1) impliedly overrules the *dicta* in *GCHQ* about there being some areas of the

prerogative which are still non-justiciable. Actions taken by government ministers under the prerogative will clearly be actions of a 'public authority'. They will therefore be unlawful if they breach Convention rights, according to s 6(1) of the HRA. Whether they fall into a category previously immune from judicial scrutiny will clearly be irrelevant. There will therefore be no areas excluded *per se* from judicial scrutiny where a Convention right is in issue.

However, the courts will doubtless continue to take a cautious line when reviewing decisions with implications for national security—a matter specified as a legitimate ground for curtailing Convention rights in a number of Convention Articles. Decisions under the HRA have already recognised the concept of an 'area of discretionary judgment', a phrase used in DPP *ex p Kebilene* (1999), meaning essentially that in areas such as national security, the courts will tend to defer to the opinion of the Executive as to what is necessary to protect the State. This tendency has been apparent in a number of important decisions under the HRA, including *Secretary of State for the Environment, Transport and the Regions ex p Alconbury Developments Ltd* (2001) and *Brown v Stott* (2001). Moreover, many of the excluded areas (treaty-making, appointment of ministers, granting of honours, etc) will not generally raise human rights issues. Furthermore, it should be noted that the HRA specifically protects acts of the prerogative from being annulled by the courts where they are expressed as Orders in Council. This is because such Orders are included within the definition of 'primary legislation' (s 21(1)) which, by virtue of s 3(2)(b) and (6), may not be struck down by the courts if found to be incompatible with Convention rights. Whether Orders in Council made under the prerogative may at present be struck down by the courts appears to be a matter of doubt; what is clear is that the HRA will insulate acts of prerogative power made in this way from successful assault on Convention grounds. While the courts may make a purely declaratory finding that the Order in question is in breach of the Convention, the sections cited provide that such a declaration will not affect the Order's continuing effect and validity.

But what will be the effect where the Convention does apply, and the decision challenged is not in the form of an Order in Council? In some such cases, it will be enough to show simply that a Convention right has been violated by the decision (because no, or no relevant, exceptions are applicable). In others, where the government can establish that a recognised exception to the right was in play (this is more likely to happen in those challenges relying on Arts 8–11), the applicant may have to establish that the decision assigned a disproportionately low level to the affected right. In both cases, the applicant will have a far less onerous task

than the present one of having to show that the decision was wholly irrational, a hurdle the applicants could not cross in *Smith*.

In conclusion, with the exception of a few doubtful decisions such as *Malone* and *Northumbria,* a general movement first of all to bring the exercise of the prerogative within the remit of judicial review, and then to gradually extend the remit of that review to cover areas previously thought to be immune can be discerned. While a number of important areas remain largely immune from review, overall there has been a significant extension of the scope of the legal accountability of the Executive and hence a sharp restriction on the capacity of government for arbitrary action.

Notes

1 It could be argued that the boundary between creating a new power and adapting an old one is not always clear, and that *Malone's* case is an example of an instance in which it is arguable that a new power was being claimed. It was very doubtful whether a prerogative power to intercept communications between citizens had ever existed; if not, it could not be used as the basis of a power to tap telephones.

2 Students could mention here that a number of commentators have pointed out that this principle, if correct, would make it actually harder to abolish parts of the prerogative than to repeal previous Acts of Parliament, since previous Acts can be impliedly repealed. This would seem to elevate the status of the prerogative over Acts of Parliament, in direct opposition to the basic principle that statute is the highest form of law known in this country.

3 The point could be made here that while the areas excluded from review may be shrinking, it is noticeable that the approach of the courts in a number of the key cases (*GCHQ; Smith; Bentley*) has been very cautious, the applicant failing in two of them and achieving only a partial victory in the third. If this approach prevails, the extension of review in these areas may turn out to be a symbolic rather than a real increase in legal accountability. Much may depend on how the courts apply the HRA in practice. The signs from the cases mentioned in the body of the essay indicate that a deferential approach under the HRA can amount to a level of scrutiny not greatly more exacting than that under *Wednesbury* (1948), though different in reasoning.

Question 22

Would you accept that the concept of an 'act of State' is contrary to the rule of law?

Answer plan

This is a difficult question because the concept of an 'act of State' is so nebulous. Unfortunately, the only recent authority, *AG v Nissan* (1970), has not cleared up the confusion; De Smith called it 'a disaster for students of the law'. However, discussion must revolve around *Nissan* which should be looked at in some detail.

Essentially, the following matters should be discussed:

- an explanation of the expression 'act of State': acts of policy arising in relation to foreign States; acts of policy arising in relation to individuals;
- the doctrine of the rule of law;
- the conflict between the rule of law and an 'act of State': the imprecise nature of acts of State; the arbitrary power conferred on Crown servants; the lack of safeguards as acts of State are non-justiciable, although action must fall within concept: *AG v Nissan* considered and a comparison with the exercise of other prerogative powers;
- the possible effect of the Human Rights Act (HRA) 1998.

Answer

It may be useful to begin an answer to this question by attempting to determine what is meant by an 'act of State'. As will be argued below, the flexibility of this concept has contributed to concern that it is incompatible with the rule of law.

The expression 'act of State' has no precise definition, but it is generally used to describe 'an act done by the Crown as a matter of policy in relation to another State or to an individual who is not within the allegiance to the Crown' (O Hood Phillips, *Constitutional and Administrative Law,* 7th edn, 1987). Thus, although any acts of State may affect individuals, they may be distinguished from each other as initially arising either in relation to an individual or to a foreign State. Acts of State are generally seen as an exercise of the prerogative; in other words, they form part of the powers which the sovereign has by common law as opposed to statute. This does not mean that every exercise of the prerogative is an act of State. Acts of State may tend to be performed outside Her Majesty's dominions, but this factor is not a definitional element of the concept, as it includes actions within them such as the detention of an enemy alien in wartime (as in *Vine Street Police Station Superintendent ex p Liebmann* (1916)).

Following the definition given above, acts of State appear to fall into two groups. First, they may be acts in relation to foreign States such as

the declaration of war (as in *Lynch* (1903)) or the annexation of territory. Secondly, in certain classes of case, an act of sovereign power relating to an individual may be claimed to be an act of State in order to prevent the aggrieved person claiming redress for damage done. The classes include aliens outside or inside British territory.[1] In *Bottrill ex p Kuechenmeister* (1947), a German national was interned during the war; his application for a writ of habeas corpus failed, as such detention was held to constitute an act of State. In *Buron v Denman* (1848), an act of State was successfully advanced as a defence to an action in tort brought by an enemy alien on the ground that the action was subsequently ratified by the Crown. *Dicta* in *AG v Nissan* (1970) even suggest that injury directly inflicted on British subjects may be justified under the plea of an act of State. It is apparent that the above examples merely indicate situations in which the courts will allow an 'act of State' to be asserted rather than providing a definition of the concept. It is unlikely that a more precise definition will emerge from case law due to an Executive-minded reluctance on the part of members of the judiciary to attempt it; Lord Pearson in *AG v Nissan* (1970) said: '…it is necessary to consider what is meant by the expression "act of State", even if it is not expedient to attempt a definition.'

Why should actions of this nature appear to conflict with the rule of law? The concept of the rule of law as put forward by Dicey (*Introduction to the Study of the Law of the Constitution,* 10th edn, 1959) appears to encompass the following notions: first, that powers exercised by politicians and officials must be rounded on lawful authority as opposed to allowing the exercise of arbitrary power, and secondly, that law should conform to certain minimum standards of justice. Such standards connote the following notions: citizens should be equal before the law; the law, particularly that part of it affecting individual liberty, should be reasonably certain, and where the law confers wide discretionary powers, there should be adequate safeguards against their abuse.

Uncertainty as to the scope of acts of State and as to whom they apply to means that citizens cannot know beforehand what their rights are. As noted above, *dicta* in *Nissan* suggest that in some circumstances, direct injury inflicted on British citizens may be justified under the plea of an act of State. Only Lord Reid rejected this view completely. It might further be pointed out in this context that the Crown servant perpetrating the purported act of State may not know at the time whether it can be so classified, because it may not have been authorised by the Crown. Acts of State can be retrospectively validated; the Captain in *Buron v Denman* who captured a Spanish ship did not know that he was acting under the defence of an act of State until the action was subsequently ratified.

Furthermore, it is unclear what is meant in this context by the term 'British citizen'. In *Nissan*, a number of definitions were put forward. Lord Morris wondered whether the term meant 'those owing allegiance to the Crown'. Lord Pearson was uncertain as to whether the term included all those within the wide definition contained in s 1 of the British Nationality Act 1948. Thus, the concept of an 'act of State' infringes the principle that the law should be certain. As Lord Diplock said in *Merkur Island Shipping Corp v Laughton* (1983): 'Absence of clarity is destructive of the rule of law.'

Moreover, it could be argued that the imprecise nature of acts of State suggests that arbitrary power is being exercised: in a particular instance, there may be uncertainty as to whether authority allows an action to be classified as an act of State. Clearly, the concept of the rule of law does not mean that servants of the Crown must always point to lawful authority for their actions; if so, the Crown would be placed in a disadvantageous position in comparison with citizens in general which would infringe the principle of equality before the law.[2] However, under the principle from *Entick v Carrington* (1765), when a Crown servant does an action which without lawful authority would be criminal or tortious, he should be able to point to such authority which should clearly exist. If its existence is in doubt, as it may be due to the nebulous nature of the concept of an 'act of State', arbitrary action on the part of Crown servants is not precluded. In this context, it might further be pointed out that the principle of equality before the law is in any event infringed to the advantage of the Crown because, unlike the ordinary citizen, the Crown does not have to pay for what it takes if its actions may be termed 'acts of State' (*Nissan* (1970)).

A further conflict between acts of State and the rule of law arises due to the lack of safeguards which might act as a check on the use of these powers of uncertain scope. Acts of State are non-justiciable. In *Salaman v Secretary of State for India* (1906), it was held that 'an act of State is essentially an act of sovereign power and, hence, cannot be challenged, controlled or interfered with by municipal courts'. This does not mean that a mere assertion of the defence will suffice to oust the jurisdiction of the courts. The Crown must specifically plead an 'act of State' and the court can then consider whether the particular action does fall within that concept. This was precisely the issue which fell to be determined in *Nissan;* unfortunately, the judgments in that case as already indicated were not very helpful for those who find a precise definition of the concept desirable.

Nissan, a citizen of the UK and colonies, was a lessee of a hotel in Cyprus which was requisitioned and used by British troops engaged in a peace-keeping operation. Nissan brought an action against the Crown in England claiming that he was entitled to compensation for damage to the contents of the hotel and destruction of stores. The Crown argued that as the actions of

the troops were acts of State, no compensation was payable. The case came before the House of Lords on the preliminary question of whether this assertion was correct. It was determined that although the agreement of the British government with the Cyprus government to send peace-keeping forces was almost certainly an act of State, not all actions occurring as a result of that agreement could be classified as acts of State. The decision suggests, then, that only acts which are part of or necessarily incidental to high level policy decisions will be properly classifiable as acts of State.

Insofar as this decision can be said to have narrowed down the concept of an act of State, it is to be welcomed as cutting down the area of non-justiciable action. However, once it has been determined that an action is an act of State, it will be impossible to review it in the courts. The procedure adopted in carrying it out will be entirely the concern of the Crown; furthermore, no compensation will be payable for loss caused to citizens. In both respects, acts of State are therefore distinct from some other exercises of the prerogative. In *Council of Civil Service Unions v Minister for the Civil Service* (the *GCHQ* case) (1984), the House of Lords had to consider a challenge to an Order in Council made by the Prime Minister in the exercise of powers deriving from the royal prerogative. Such powers were traditionally seen as not open to judicial review, as deriving from the common law and not from statute. The House of Lords determined that merely because the power derived from the prerogative as opposed to statute, that was not a sufficient reason why it should not be open to review. The controlling factor determining whether a particular exercise of powers under the prerogative should be open to review should be the subject matter of the decision, rather than the source of the power. Prerogative powers relating to the making of treaties, the defence of the realm, the dissolution of Parliament, the disposal of the armed forces and foreign policy should not, it was thought, be susceptible to judicial review, because their nature and subject matter were not amenable to the judicial process. Lord Roskill termed these prerogative powers 'excluded categories', and found no reason why power to regulate the Home Civil Service should fall into such a category. Thus, this decision effected an erosion of the principle of non-reviewability but clearly had no effect on acts of State, although such acts may arguably impinge severely on British citizens. Although acts of State appear to represent an exercise of the prerogative, they are exempt from the general principle deriving from *Burmah Oil Co v Lord Advocate* (1965) that compensation is payable in respect of actions under the prerogative which cause damage.

An important qualification should, however, be added to the above. If an act of State should *prima facie* infringe a person's rights under the European Convention on Human Rights, the HRA would be applicable. As with other areas of judicial review, the Act adds a fresh, substantive ground of review

against which the courts must consider the lawfulness of action taken under the prerogative, where a Convention right is in issue. Section 6(1) of the Act states that it is 'unlawful for a public authority to act in a way which is incompatible with a Convention right'. This will have at least one important effect. Section 6(1) impliedly overrules the case law discussed above in which acts of State were found to be non-justiciable. Actions taken by government ministers under the prerogative will clearly be actions of a 'public authority'. They will therefore be unlawful if they breach Convention rights, according to s 6(1) of the HRA. Whether they fall into a category previously immune from judicial scrutiny will clearly be irrelevant. There will be no areas excluded *per se* from judicial scrutiny where a Convention right is in issue.

Thus, there are a number of grounds on which it could be argued that the concept of an 'act of State' is contrary to the rule of law, and it may therefore be argued that it should be preserved only for acts against enemies. As presently conceived, it appears incompatible with the notions of fairness and equality connoted by the concept of the rule of law.

Notes

1 It might be pointed out here that a friendly alien within Her Majesty's dominions is entitled to protection so that an act of State cannot be used as a defence to a claim brought in respect of a tortious act done to him on the authority of the Crown: *Johnstone v Pedlar* (1921).

2 *Malone v Metropolitan Police Commissioner* (1979) could be mentioned here and compared with *Entick v Carrington* (1765) in order to illustrate the point. In *Malone,* no tort was committed because there is no tort of invasion of privacy. Since it is accepted that in England, everything which is not forbidden is permitted, the State could claim that it did not need specific lawful authority to tap telephones. In contrast, in *Entick,* the State needed lawful authority which it lacked (due to the general nature of the search warrant) in order to perpetrate an otherwise tortious action.

CHAPTER 6

THE EXECUTIVE

Introduction

The Executive includes the government, the monarchy, the Civil Service, local government, the armed forces and the police. The areas examined within this topic tend to vary, and students should be guided in their revision by their own courses. For example, some courses include a fair amount of material on local government and central-local government relationships. The royal prerogative is a major part of any study of the Executive; it is considered in the previous chapter. This chapter will concentrate on the operation of central government, which includes consideration of the role of the Cabinet and the relationship between ministers, their departments and civil servants. Questions in this area tend to concern the relationship between the Prime Minister and the Cabinet and the extent to which individual ministers and government in general are responsible to Parliament. The latter topic has recently taken on greater importance following the Scott Report and the continuing concern about ministerial responsibility and accountability. Questions on the difficulties and confusions thrown up by the new approach to responsibility and, in particular, the issues raised by the Next Steps Agencies are very likely to be set. Clearly, government and Parliament are closely interlocked: government is part of the Executive but also dominates the legislative body—Parliament—and therefore there is some overlap between this area and Chapter 3 on the House of Commons. Chapter 3 is, however, concerned with the efficacy of scrutinising procedures in the House of Commons whereas, although such matters are touched on in this chapter, its emphasis is on the principle of ministerial responsibility.

Checklist

Students should be familiar with the following areas:

- Conventions relating to Cabinet government: collective Cabinet decision-making; the concept of collective government responsibility to Parliament;

- the basic concept of individual ministerial responsibility to Parliament; the distinction between 'accountability' and 'responsibility'; the difficulties with the distinction;
- the differing types of accountability of civil servants, chief executives of Next Steps Agencies and ministers;
- the obligation on ministers to accept blame/resign for mistakes of 'policy'; ministerial resignation in practice;
- the extent of the obligation to account to Parliament; *The Ministerial Code;* the limitations on the types of questions that must be answered as set out in the government's Code of Practice on access to government information (2nd edn, 1997);
- the findings of the Scott Report; the giving of incomplete information; the concept of 'knowingly' misleading Parliament;
- the Freedom of Information Act 2000, particularly the exemption in s 35 covering information relating to the development of government policy.

Note that references to Woodhouse are to D Woodhouse, 'Ministerial responsibility: something old, something new' [1997] PL 262; references to 'the Scott Report' are to Sir Richard Scott, *Inquiry into Exports of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions* (HC 115–1, 1995–96); and references to the Public Service Committee are to its second Report (HC 231,1995–96), unless otherwise stated.

Question 23

'The conventions of collective Cabinet decision-making and collective and individual ministerial responsibility to Parliament are more honoured in the breach than in the observance; the result has been a movement towards Prime Ministerial government and a consequent diminution of government accountability.'

Discuss.

Answer plan

A question concerning the conventions and the reality of Cabinet government is commonly set and is reasonably straightforward. This question requires a consideration of the operation of the three conventions together and their relationship with each other. It is therefore very wide ranging and it will not be possible to cover one area in depth if a proper essay structure is to be maintained.

The following matters should be considered:

- the convention of collective Cabinet decision-making; the dilution of the power of the Cabinet; the influence of Mrs Thatcher 1979–90 and the continuing influence of Mr Blair;
- the concept of collective Cabinet responsibility to Parliament; procedures on the floor of the House of Commons;
- the relationship between collective ministerial responsibility and individual ministerial responsibility;
- the notion of accepting personal fault for 'policy' only; the difficulties with this;
- the operation of the three conventions and Prime Ministerial government.

Answer

Bagehot, writing in 1867, called the Cabinet 'the most powerful body in the nation' (*The English Constitution,* 1963) and considered that collective responsibility meant that every member of the Cabinet had the right to take part in Cabinet discussion but was bound by the decision eventually reached. In contrast, in 1977, John Mackintosh (*The British Cabinet,* 1977) wrote: '…the principal policies of a government may not be and often are not originated in Cabinet.' Michael Heseltine, in the aftermath of the Westland affair in 1986, said that there had been a 'breakdown of constitutional government', in that the Prime Minister had frustrated collective consideration of the Westland issue.

These suggestions that conventions governing Cabinet government are in decline bear out the statement to be considered. The convention of collective decision-making clearly underpins collective responsibility: the obligation placed upon ministers by the convention of collective responsibility is most readily justified if government decisions are reached collectively. Thus, it will first be considered whether there has indeed been a diminution in the importance of collective decision-making.

The Cabinet is composed of around 22 ministers who agree to pursue a common policy; some ministers will be outside the Cabinet and it may include some whose offices involve few or no departmental responsibilities. The function of the Cabinet is, in theory, to determine finally the policy to be submitted to Parliament and to co-ordinate and control administrative action. However, a number of writers, including Richard Crossman, have considered that Cabinet government is developing into Prime Ministerial government and that therefore collective

decision-making has suffered. Crossman wrote that the power of the Prime Minister to sack ministers, to determine the Cabinet agenda and the existence and membership of Cabinet committees meant that his control over the Cabinet was the most important force within it. Under Mrs Thatcher, who was Prime Minister between 1979 and 1990, the importance of this force became more apparent, not because she increased the power of the Prime Minister, but because she used the available power to the full. In particular, she displaced important decision-making to small informal groups of ministers convened by herself, and exercised the Prime Minister's exclusive right to appoint and reshuffle ministers in order to reshape the Cabinet in accordance with her own ideological outlook. For example, she managed, during the first two years of her administration, to move no less then five out of the seven 'moderates' or 'wets' out of the Cabinet. It seems fairly apparent that Mr Blair makes little use of full Cabinet; key decisions are taken by Cabinet Committees or just small groups of ministers. For example, the crucial decision in May 1997 to give the Bank of England independence and the power to set interest rates was apparently taken by the Prime Minister and the Chancellor of the Exchequer, in consultation with their Special Advisers. Other members of the Cabinet were not even consulted.

However, in diluting and fragmenting the power of the Cabinet in this fashion, it might be argued that Thatcher and Blair were merely taking further a process which had already begun. The use of gatherings other than Cabinet to make decisions—inner Cabinets, Cabinet committees, ministerial meetings—had been growing for the last 30 years, and had arguably undermined the Cabinet as a decision-making body.[1] The general view of constitutional writers seems to be (see Peter Hennessey, *Cabinet,* 1986) that although Mrs Thatcher flouted the spirit of Cabinet government, she did not destroy it. It is arguable that when John Major became Prime Minister in November 1990, the spirit revived, albeit in a form which Bagehot might not recognise. However, the Blair style of governing perhaps takes the process of marginalising Cabinet even further than did Thatcher. It seems clear that Mr Blair wishes to increase central control over the actions of government departments. The appointment in 1998 of Jack Cunningham as a Cabinet minister without portfolio, but charged with the task of overseeing the implementation of agreed government policy across the departments, is a concrete indicator of this.

If the Cabinet as an institution has suffered a decline along with the doctrine of *primus inter pares,* it might appear that the basis of the doctrine of collective ministerial responsibility will also have been undermined. It could also be argued that it has been undermined by the failure of accountability of the Cabinet to Parliament.

Theoretically, a check is kept on the Executive through the operation of the convention of collective ministerial responsibility to Parliament. The convention means that ministers are collectively responsible to Parliament for their actions in governing the country, and therefore should be in accord on any major question. As all ministers are accountable to Parliament for government policy, no minister can disclaim his responsibility on the basis of disagreement with it. He should resign if in disagreement with the policy of the Cabinet on any major question. Examples of such resignations include Sir Anthony Eden's in 1938 over Chamberlain's policy towards Mussolini, and arguably Michael Heseltine's in 1986 due to disagreement with government policy in respect of Westland plc and the requirement to submit statements on the subject to the Cabinet Office for prior clearance.

It appears to follow from this convention that a government should resign after being defeated on a vote of no confidence in the House. On the face of it, unless Parliament can express its disapproval of government decisions and policy in this way, it might seem that it can have little impact on government action. However, only two governments, both in a minority in the Commons, have lost the confidence of the House since 1924. In 1924, Ramsay MacDonald's first Labour government was deserted by its Liberal allies, while in 1976, the Labour government lost its small majority, partly through by-election defeats, and was defeated on a Conservative vote of no confidence in 1979. Apart from these examples, governments which lose in the House on particular issues have managed to muster their majorities and procure a reversal of the vote. For example, in July 1992, the Major government suffered a defeat due to a back bench rebellion in a vote relating to the Maastricht Treaty. However, the Prime Minister put down a motion of confidence the following day, and secured a majority.

However, the government's need to ensure its majority in the Commons means that it must retain the support of back benchers. It can use sanctions such as guillotining or whipping to ensure party solidarity, but a government which has to resort to such sanctions may become unpopular with the electorate. The ultimate sanction of withdrawal of the whip may be counter-productive, partly because it underlines disunity in the party and partly because MPs who have lost the whip may vote against the government. This was clearly seen in 1994 and 1995 after nine 'Euro-sceptic' Conservative MPs lost the whip. Thus, the need to retain the support of the parliamentary party has some impact on government policy. Such impact was clearly evident in the modification of the decision to close 31 coal mines without holding an inquiry in October 1992. The abandonment of the White Paper (Cmd 5291 (2001)) on completing reform of the House of Lords, setting out the government's concrete proposals for reform in response to the Wakeham Report (Cm 4534 (2000)) in the face of virtually unanimous opposition from

the parliamentary Labour party, is another example. However, this sanction underpinning collective cabinet responsibility can only operate if the procedures available to Parliament in order to ensure supervision of government are effective. Such procedures, including debates and questions, are of value not merely because the possibility of defeat in the Commons or the adverse publicity resulting from a reduced majority affects government policy, but also because they are part of the continuous parliamentary scrutiny of the government, forcing it to explain and justify its actions.

However, there are important limitations on the efficacy of certain procedures. Questions to ministers are of limited value, because a minister cannot be compelled to answer any question and there are a large number of matters—now defined by the exceptions set out in Part II of the government's Code of Practice on access to government information, 2nd edn, 1997—on which a minister will refuse to answer. Moreover, even matters which can be legitimately raised may be evaded by the use of various tactics, such as answering questions only in part, or providing only partial explanations in response to the parts that are answered. Due in part to the use of such evasion, questions to ministers have to an extent ceased to be genuine requests for information, and have become an excuse for generating a short debate. However, a minister who is questioned about a departmental decision which was theoretically taken in apparent accord with his departmental policy will then have to consider the decision in detail. It may be that in consequence, he will make modifications to departmental policy if it becomes apparent that it is evolving in a manner which was not originally intended. Questions put down for reply by written answer are a much more effective way for MPs to simply obtain information.

Collective responsibility may further be undermined, it is suggested, by the doctrine of individual ministerial responsibility. If a decision announced by a minister has been taken in the Cabinet, it is arguable that the whole Cabinet should accept responsibility for it. Nevertheless, a minister may sometimes be held individually responsible in order to divert the adverse consequences arising from a strict application of collective responsibility. The resignation of the Secretary for Trade and Industry, Mr Brittan, in 1986 during the Westland affair could be characterised as such an instance; his acceptance of responsibility deflected demands for the resignation of the Prime Minister herself. It was arguable that the same thing happened over the resignation of Peter Mandelson in January 2001 in relation to the Hinduja passports affair. While the decision to grant the Hinduja brothers passports in an expedited manner was almost certainly not a decision made by the Cabinet, there was a strong sense amongst commentators that Mandelson's resignation was forced in order to keep the affair from damaging the Prime Minister himself (see, for example, Rawnsley, *Servants of the People: the Inside Story of New*

Labour (2nd edn, 2001)). In other words, individual responsibility may at times act as a proxy for collective responsibility.

The convention of individual ministerial responsibility means that ministers are responsible to Parliament for the conduct of the Executive, and therefore that for every branch of government business, there is a minister to explain and account for decisions. If a minister is personally blameworthy, he might be expected to resign depending on the nature of the misbehaviour. Conduct unbecoming a minister of the Crown, whether of a private or public nature, would probably lead to resignation (as with the resignation of Ron Davies in October 1998, after an indiscretion of some sort took place on Clapham Common), although the minister might be reinstated when it was thought that his misconduct had expiated itself. The prime example is the reinstatement of Peter Mandelson to the Cabinet less than two years after he had resigned in December 1998 following the revelation that he had been lent a very large sum of money from a fellow government minister, Geoffrey Robinson, and concealed the loan from the Prime Minister.

When departmental maladministration has occurred, matters are less clear cut. It seems that there is no expectation that a minister will accept responsibility, in the sense of personal blame, for every mistake occurring in his department. Although this was sometimes seen as the traditional view of ministerial responsibility, exemplified by the statement of Sir Thomas Dugdale following the Crichel Down affair (1958), researchers have concluded that there has never been an accepted convention that ministers will resign, or even accept blame, for every mistake occurring in their departments. The current trend, as exemplified by many episodes involving the previous Conservative administrations, in particular, the response of Michael Howard to the Learmont Report, and in the present administration of Robin Cook to the Sandline affair, is that ministers will only resign if it can be clearly shown that the fault for what has gone wrong rests with ministerial policy decisions, rather than the decisions of civil servants in their department.[2] A difficult case to classify, perhaps, is the resignation in May 2002 of the Secretary of State for Trade and Industry, Stephen Byers. Byers was forced out after months of hostile press coverage, particularly surrounding the circumstances of the dismissal of Byers' former press officer, Martin Sixsmith, and his refusal to sack another press adviser, Jo Moore, over her notorious 'good day to bury bad news' memo of September 11th 2001. It is not clear that serious problems in his department's *policy* can be laid at his door, though there was extreme discontent in various quarters over his decision to place Railtrack in administration and his plans for its replacement, as well as the state of the railways generally. Moreover he had, through inept presentation (in particular, by apparently misleading Parliament and the public over exactly when Sixsmith had been dismissed),

lost the trust of the general public—principally by relentless media attacks upon him—and so had become a liability to the government. In that sense, Byers' resignation simply reflects the 'realist' interpretation of ministerial 'responsibility': that ministers will be forced to resign only when, on a hard-headed political calculation, their staying on will cause more damage to the governing party than their resignation.

Suspicion has been voiced by various commentators that the split between 'operational matters'—for which the minister must account to Parliament, but need not accept personal responsibility—and matters of policy, for which he must both give an account and accept responsibility, is blurred and open to manipulation by the government of the day. In particular, commentators saw a tendency during the last administration to narrow down the areas of 'policy' for which ministers conceded they were personally responsible to 'high government policy and overall political strategy' (Woodhouse, p 269). The suspicion that the area of departmental activity for which ministers will accept responsibility is an ever-shrinking one is, to an extent, borne out by events during the 18 years of the previous Conservative administration. Although there were a number of major failings in government policy, including the arms to Iraq affair, the BSE crisis, the Poll Tax and the Pergau Dam affair, only one minister, Lord Carrington, actually accepted responsibility for error in his department (the Foreign Office) and resigned; this took place in the wholly exceptional circumstance of the actual loss of British territory—the Falkland Islands—by an armed invasion. Other than this, the only examples of the areas for which ministers will take responsibility are negative ones: where the particular problems that had occurred in the department were found by the minister *not* to be ones which would engage his responsibility.[3] Most resignations in fact occur either over sexual or financial misconduct or indiscreet and damaging remarks which embarrass the government, such as Edwina Currie's pronouncement over the infection of British eggs by salmonella. As noted above, Ron Davies' resignation fits this mould neatly. Woodhouse, writing in 2002, observed that 'in the second half of the 20th century, only the resignations of Dugdale (1954), Carrington (1982) and Brittan (1986) can, with any degree of certainty, be attributed to departmental fault' ([2002] PL 73). Woodhouse, however, sees recognition by Cook (in relation to the Sandline affair in 1998) and Straw (in relation to the passports crisis of 1999) of the principle of what she calls 'explanatory and amendatory responsibility', in that both ministers provided a full account of what had gone wrong (though Cook is criticised for some initial obstruction of the investigation by the Foreign Affairs Select Committee) and put in place remedial action which, in turn, they invited Parliament to scrutinise, thus 'completing the accountability cycle'.

It may perhaps be concluded that the responsibility of the Cabinet to Parliament has real force only when the government has a small majority.

Otherwise, although Parliament may have some influence, it appears to be of an indeterminate and inadequate nature. Furthermore, it might be suggested that the current operation of the three conventions considered merely provides a cloak for Prime Ministerial power without accountability. The Prime Minister can present policies as though they were the product of Cabinet discussion, and can expect ministers who have not participated in such discussion to defend them. If such policies miscarry, ministers may be able to disclaim responsibility, perhaps on the basis that officials have erred, but eventually, if the only alternative is a demand for the resignation of the Prime Minister, an individual minister may be prepared to resign and the Prime Minister may be able to distance himself from what has occurred.

Notes

1 Although this view may be generally acceptable, it could be pointed out that other Committees meeting before Cabinet convenes can strengthen rather than weaken it as an institution. The previous meetings can deal with the non-contentious points, so that Cabinet time is reserved for the really important policy issues.

2 It might be noted at this point that theoretically, a motion of censure may result in the dismissal of a minister but, in practice, such motions can always be defeated by a majority government.

3 Students could give the example of the Child Support Agency. As Woodhouse has pointed out, the CSA had a disastrous first year (1993): performance targets had not been met by a long way and there were countless cases of bad administration. Ministers blamed all the problems on bad management and the chief executive of the Agency resigned. Ministers refused to accept any personal responsibility for the problems despite the fact that, as Woodhouse puts it, 'the ministers' failure to ensure that the Agency was properly established, staffed and resourced directly affected the ability of the Agency to operate effectively' ('Ministerial responsibility', pp 269–70).

Question 24

'The doctrine of individual ministerial responsibility as currently-understood fails to provide a clear and satisfactory framework for the division of responsibility and accountability as between ministers, civil servants and, in particular, the chief executives of Next Steps Agencies; consequently, it allows ministers to evade and displace responsibility for departmental failings and thus fails to provide a firm basis for accountable government.'

Discuss.

Answer plan

This is a much more focused question which requires more detailed knowledge of the subject area, in particular, the problems thrown up by the creation of the Next Steps Agencies. The subject of the question is not the extent of the obligation to give an account (for example, areas excluded from questioning), but rather the issue of responsibility for departmental errors and the allocation of accountability between ministers and officials. Recent examples should be used where possible to illustrate the student's ability to apply the general principles discussed to contemporary political activity.

The following matters should be considered:

- the distinctions between providing an account, being held to account and the acceptance of blame for errors;
- the current position on the acceptance of blame only for 'policy'; difficulties of 'hidden' policy problems and the ability of government to manipulate the concept of 'policy';
- examples of the effects of this difficulty in practice in relation to the prison service and the Child Support Agency (CSA);
- an explanation of how officials may be accountable to Parliament;
- the limitations on this by the Osmotherly rules and the difficulties thrown up by these limitations;
- the particular problems in relation to the Next Steps Agencies;
- the implications of the above difficulties regarding accountability for the problem of locating responsibility and overcoming ministerial evasion of responsibility; the possible impact of the Freedom of Information Act 2000.

Answer

The doctrine of individual ministerial responsibility has recently been the subject of much controversy: the doctrine itself and its efficacy were subject to a rigorous analysis in the Scott Report and the analysis continued, in the light of Scott's findings, by the Public Service Committee's inquiry into ministerial responsibility and accountability. The question suggests that the above review has not resulted in satisfactory solutions to the problems of dividing responsibility and accountability between ministers and officials. In what follows, the particular criticisms contained in the question will be addressed and an assessment made as to whether the charges of ministerial evasion and lack of proper accountability are made out.

It should be asked, first of all, what the notion of responsibility entails. Broadly speaking, two notions are involved: first, that for every area of government policy, there should be a minister who is prepared to explain and justify government policy either personally or via his officials; secondly, that in the case of failings within the department, someone will be prepared to take responsibility for that failure. The doctrine therefore requires both that there be some *obligation* on ministers to give an account of their actions and policies to Parliament, and that if fault is revealed, there must be some means for Parliament to exact some kind of redress. This can broadly be of two types: punitive, in the sense that the minister is 'punished' by being forced to resign; and rectificatory, or amendatory, whereby a minister must promise and execute action to correct the problems and then report back to Parliament on the success of that action, a response which may be more important in practice than whether any resignations are produced. Formally, Parliament does possess the power effectively to get rid of ministers by passing motions of no confidence or censure; it may also pass motions calling for changes in existing policy. In practice, as we shall see, this penal power is virtually never used, though the threat of its use can be important.

This basic distinction between the provision of an account and the reaction to it seems clear enough. However, the terminology which has been suggested and which appears to have been accepted by governments of both political persuasions is somewhat different, though it deploys the same basic concept. Here, a distinction is drawn between the duty to provide an account ('accountability') and the obligation to accept personal responsibility when things go wrong ('responsibility'). In this version, the duty to provide an account extends to answering criticisms, to defending the record of the department in question, even to what was termed above 'rectificatory' redress, namely, promising investigation and remedial action if necessary. So, 'accountability' goes far beyond the mere transmission of information: it means not only 'giving an account', but also 'being held to account', with the proviso that this does not include the acceptance of personal fault by the minister. Acceptance of such fault means acceptance of 'responsibility' and resignation may become an issue. The distinction may be illustrated by the example of a complaint about the poor quality of food in Brixton prison. The Home Secretary may be asked questions about this, may have to put in hand an investigation as to what has gone wrong and report back to Parliament on remedial action and whether this has worked. However, no one would realistically expect that the minister should be seen as personally at fault for this problem. As Jack Straw said when he became Home Secretary in 1997, he could not be blamed every time a prison officer accidentally left a cell door open.

Therefore, the first issue to be addressed is whether this distinction between 'responsibility' and 'accountability' works satisfactorily, or whether it provides a means for ministers to avoid accepting responsibility when they should accept it. Whether there was ever a time when ministers accepted personal blame for every shortcoming in their department is highly doubtful; it now seems well established that ministers will only accept personal fault if it can clearly be shown that the fault for what has gone wrong rests with ministerial policy decisions rather than with the implementation of that policy by their officials.

There are two possible problems here: first, it has been suggested that the distinction between policy on the one hand and its implementation on the other is not a coherent one, and that drawing a sharp distinction simply obscures ministerial responsibility for the overall record of the department. This is because, as Professor Hennessey recently pointed out in evidence before the Public Service Committee: 'There is not actually a proper division between [policy and operations]… These are seamless garments. If, operationally, you hit real trouble, it is usually because the policy is flawed.' In other words, the day to day problems which occur in a department may in actuality be attributable to overall—but hidden—policy problems, such as insufficient funding. So, policy mistakes may be *inferred* from widespread operational difficulties. Government has, however, tended to take the opposite line, relying on a 'bright line' distinction between the two which serves in practice to exonerate ministers from blame after departmental failings have come to light. In fact, save for the resignation of Lord Carrington following the invasion of the Falkland Islands, it is virtually impossible to find any example of ministers admitting that responsibility for major departmental errors or failings lies with them. Thus, ministers have repeatedly denied responsibility for failings in the prison service: following breakouts by IRA prisoners in 1983, James Prior refused to accept blame; again, in 1984, after two IRA prisoners escaped from Brixton, Kenneth Baker refused to resign. More importantly, when the highly critical Learmont Report on the state of Britain's prisons came out, Michael Howard found that all the problems identified were due not to his policies, but to the way they had been put into practice by the head of the prison service, Derek Lewis, who he promptly sacked. The reaction of ministers to the appalling performance in its first year of the CSA is also instructive, as Woodhouse points out ('Ministerial responsibility', pp 169–70). Ministers refused to take any blame for the Agency's failure to meet its performance targets and its already long record of maladministration, despite the fact that as Woodhouse argues, 'the ministers' failure to ensure that the Agency was properly established, staffed and resourced directly affected the ability of the Agency to operate

effectively'. Similarly, Cook, in relation to the Sandline affair in 1998, and Straw, in relation to the passports crisis of 1999, both stated that essentially operational decisions were to blame for the problems that arose in their departments, assertions which to be fair to them have been largely accepted by independent commentators (see, for example, Woodhouse [2002] PL 73). Cook did recognise systemic and cultural problems with the Foreign Office, but given that he had been Foreign Secretary for less than a year, could not reasonably be expected to take personal responsibility for these.

The second related problem is that not only may operational problems be really attributable to hidden policy mistakes, but the notion of 'policy' itself is vague and subject to manipulation by government. Ministers in the Conservative administrations of the 1980s and 1990s showed a tendency to narrow down the areas definable as 'policy', thus making the minister responsible—in the sense of having to take the blame—for an ever-shrinking area. Thus, as Woodhouse points out ('Ministerial responsibility', pp 268–69), after the Brixton prison escapes in 1991, the Home Secretary, when called upon to resign, announced that 'policy' was confined to matters of overall strategy or high government policy, whilst departmental policies, which gave effect to the political preferences, were absorbed into 'administration'; a viewpoint also relied upon by Michael Howard following the Learmont Report in 1995, and described by him as having been accepted for 'years, even generations'.

The focus thus far has been on how well the division between responsibility and accountability works; the above analysis would appear to suggest that not only is the distinction unclear and unsatisfactory, but that the charge in the question that it allows ministerial evasion of their responsibilities appears to have some substance. We will now examine the operation of accountability, whether it enables Parliament to gain the information it needs or whether it contributes to the problems outlined above.

As a matter of common sense, clearly, a minister will not be able to give an account of everything going on within a large and complex government department in which hundreds of decisions may be taken every day. In practice, the minister will often either have to find out what has happened and report back to Parliament, or Parliament will have to question civil servants about the matter directly. The ability of Select Committees to subject civil servants and the heads of Next Steps Agencies ('Agencies') to sustained questioning, in order to obtain first hand information on the workings of the departments under their remit, is generally seen as being one of their main strengths. Additionally, it may be noted that heads of Agencies—with the exception of the head of the prison service—also give written answers to parliamentary questions on operational matters, which appear in *Hansard*.

So, the system does allow first hand questioning of officials, an important ingredient in effective information gathering and hence in ensuring accountability.

However, there are two major restrictions on this ability to engage in first hand questioning. First, ministers continue to assert the right—contested by Select Committees—to choose which particular civil servants appear in front of the Committees, though in practice they have usually acceded to Committee requests in this respect.[1] A particular problem of late has been the refusal of ministers in the Blair government to allow their Special Advisers, thought by many to exercise more power than many ministers, to appear before any Select Committees. The more important limitation in this area arises under what are known as 'the Osmotherly rules': both heads of Agencies and civil servants answer questions 'on behalf of ministers', that is, they remain under ministerial instructions as to how to answer questions at all times. This was recently spelt out in the government's response to the Public Service Committee: 'The government, of course, accepts that civil servants have a duty to…give an account to Parliament, in the sense of providing as full evidence as possible on questions of fact and explanation relating to government policy and actions. [But]…civil servants…give an account to Parliament on behalf of the ministers whom they serve' (HC 67, 1996–97). The Blair government has given this doctrine its full backing: it appears in the 1997 version of the Osmotherly rules.

In practical terms, this restriction means that while an official may give his own account of factual matters, when it comes to providing explanations and justifications of departmental policy, he will provide only the government's view, without criticising it in any way, or suggesting alternatives—a restriction said to be justified by the need to retain Civil Service neutrality. Thus, in giving factual information, civil servants will have to avoid any suggestion that government policy may be flawed in any way. They will therefore give only a limited account. The application of this rule to the chief executives of Agencies is seen as particularly problematic, because it does not match the fact that the executives have full responsibility for operational matters delegated to them under their framework documents with an ability to give to Parliament a full account of the areas *within* that responsibility. The ability of the chief executives to manage their Agencies properly will, of course, be heavily dependent upon policy decisions on which they are forbidden to comment. This is unsatisfactory both for the chief executive and for Parliament. In effect, by instructing civil servants to take a particular line with a Committee, ministers can, to an extent, control the flow of information about the very incident in relation to which he stands accused of possible fault.

A further aspect of the doctrine which has attracted criticism is the fact that ministers still retain the duty to give an account of operational matters

within Agencies, although responsibility for these matters is fully delegated to the chief executives. The whole point of the Agencies is that they are supposed to operate with a large degree of independence from ministers, so that they can be run on much more business-like lines and can be free from constant political interference. Additionally, the idea was that the clear demarcation of responsibility between ministers and chief executives would make the lines of responsibilities stronger and more transparent—it would be clear to Parliament and the public who was responsible for what. Given that this is the whole point of the changes, it seems futile and illogical to continue to maintain that the minister is accountable for everything going on in the Agencies.[2]

The final problem with the Osmotherly rules is as follows: we have noted above a tendency by ministers to attribute failures within a department to the mistakes of certain civil servants rather than to their own policy, thus freeing ministers from personal responsibility and any risk of forced resignation. However, Parliament may wish not simply to take the minister's word on this. It might like to get the other side of the story from the civil servants who are being forced to take the blame. The Osmotherly rules prevent this, giving rise to a situation in which Parliament has no way of independently ascertaining whether the minister's account is correct because civil servants and chief executives are only able to parrot the ministerial line, absolving policy—and thus the minister—of any blame. Thus, if ministers are concealing the fact that policy and not its implementation is responsible for the mistakes, Parliament is unlikely to be able to ascertain this by questioning civil servants. While the Freedom of Information Act 2000 in theory will give both MPs and the public a means of ascertaining the truth, there is a class exemption in s 35 in relation to all information relating to 'the formulation or development of government policy'. The only limitation to this astonishingly broad exemption—which is not subject to a burden on ministers to prove that harm would be caused by releasing the information in question—is that statistical information relating to a decision may be released once the decision is made. But, for example, evidence of other policy options considered and the reasons for rejecting them would not be. While the Information Commissioner can order release of the information concerned if satisfied (*per s* 2) that the public interest in withholding information does not outweigh the interest in its reception because the information relates to a central government department, its release can ultimately be vetoed by a Cabinet minister (s 53). Moreover, the Act does not come fully into force until 2005.

In conclusion, it may be argued that the present understanding of ministerial responsibility relies upon a series of distinctions which are open to manipulation and abuse by government, and that Parliament appears to

be currently deprived of the ability to challenge such manipulation and make its own determination as to where responsibility should be located from a position of comprehensive knowledge, due to the restrictions represented by the Osmotherly rules. It may be further contended that the dogmatic application of these rules to chief executives and the continued accountability of ministers for the workings of the Next Steps Agencies seems illogical and likely to undermine the demarcation of duties between ministers and officials, which the Agencies are supposed to follow and uphold.

Notes

1 Students could give a number of examples here of instances where Select Committees investigating areas of acute sensitivity to the government have found that key witnesses have been withheld from them. Thus, in 1984, the government would not allow the Director of GCHQ to give evidence to the Select Committee on Employment which was investigating the banning of trade unions at that organisation. Similarly, in 1986, the Defence Committee in the course of its inquiries into the Westland affair wished to interview certain named officials; the government minister in question would not allow them to attend. More recently, Robin Cook would not allow certain civil servants to appear before the Foreign Affairs Committee when it was investigating the Sandline affair in 1999.

2 Students could make the further point that the continued accountability of ministers for the day to day running of the Agencies encourages them to interfere with day to day decision-making in order to ensure outcomes that will be more politically acceptable. Thus, the supposed independence of the Agencies from political interference may be undermined by the continued political accountability of ministers for their actions, detracting from their basic *raison d'être*.

Question 25

'The obligation on ministers to give a full and frank account to Parliament of the actions of their departments is limited, uncertain and unsatisfactory in scope and does not in practice prevent Parliament from being misled or, at the least, under-informed.'

Discuss.

Answer plan

This is a fairly straightforward question on the scope of the duty to give an account to Parliament and one which is likely to be popular with examiners, given the findings of the Scott Report and the continued academic and parliamentary interest in accountability. Students should make sure that their answer includes practical examples—the findings of Scott provide the best source—of apparently unsatisfactory answers to parliamentary questions or letters. Students should note that if they are writing an essay on this matter after the Freedom of Information Act 2000 is fully in force, they may have to revise the answer radically in some respects from the outline below.

The following matters should be covered:

- the formulation of the obligation in *The Ministerial Code;* the status of the Code;
- the exceptions to the general duty of openness, as set out in the *Information Code;*
- the impact of the Freedom of Information Act 2000 should be briefly mentioned;
- the permissibility of making untrue statements in Parliament;
- the problem of the giving of incomplete or impartial information to Parliament, which may mislead it;
- the findings of the Scott Report on the above;
- the problems with the fact that the Code only prohibits the 'knowing' misleading of Parliament.

Answer

While Parliament has finally passed a Freedom of Information Act in 2000, it will not be fully in force until 2005. Meanwhile, the obligation of ministers to account to Parliament for the actions and decisions of their departments remains one of the most important guarantees of a reasonable degree of transparency in government. The obligation has received unprecedented attention in the last few years; Lord Justice Scott made a series of findings on how far ministers had satisfactorily discharged their duty of 'explanatory accountability' (to use Marshall's phrase) in the particular context of the Arms to Iraq affair, though he also made some more general findings. The Public Service Committee undertook a comprehensive review of this area in 1995–97; one of the last actions of the Parliament of 1992–97 was to pass a resolution on ministerial accountability (on 20 March 1997) which became

the basis of the governmental view of the extent of the obligation of accountability, set out in what was once *Questions of Procedure for Ministers* and is now, under the Blair administration, renamed *The Ministerial Code.* The question suggests that the convention is still unsatisfactory in formulation and not properly adhered to in practice. Both these assertions will be tested in order to arrive at a considered conclusion.

The obligation, as formulated by the present government, reads:

> It is of paramount importance that ministers give accurate and truthful information to Parliament…correcting any inadvertent error at the earliest opportunity. Ministers who knowingly mislead Parliament will be expected to offer their resignation to the Prime Minister. Ministers must be as open as possible with Parliament and the public, refusing to provide information only when disclosure would not be in the public interest, which should be decided in accordance with relevant statute, and the government's Code of Practice on access to government information [para 1 of *The Ministerial Code,* Cabinet Office, 1997].

This formulation follows more or less word for word the version put forward by the previous government which was approved by the House of Commons on 20 March 1997.[1] The wording of the obligation in the Code is important because the experience of the previous administrations suggests that it is this, the only authoritative formulation of the obligation we have, that will be relied upon by ministers accused of misleading Parliament, and so will set the parameters for debate.

The exceptions to the general duty to give information set out in *The Ministerial Code* itself must first be examined. It should be noted that the new wording, allowing information to be withheld only in accordance with relevant statute and the government's Code of Practice on access to government information (hereafter the *Information Code*), represents a significant tightening of the wording of the old formulation which allowed information to be withheld on the basis of 'established parliamentary convention, the law, and any relevant government code of practice' (*Questions of Procedure for Ministers* (QPM)). Given that the first of these categories was vague in meaning—what is 'established' parliamentary convention?—and meant that extensive research as to what questions had been disallowed in the past would be necessary before it could be ascertained whether a given question was permissible, its removal represents a small but significant step in the direction of openness. However, the excluded categories of information still include all of those set out in the Official Secrets legislation and, more significantly, the broad ones set out in the *Information Code*. These include:

- law enforcement and legal proceedings;
- information which would violate privacy or be a breach of confidence;
- information which might harm national security and defence or international affairs;
- information received in confidence from foreign governments;
- all advice relating to internal discussion and advice, for example, advice from civil servants to ministers or internal consultation;
- information relating to rejected policy options;
- all information on nationality and immigration;
- unreasonable, voluminous or vexatious requests;
- information which would harm the efficient conduct of the operations of a government department or public body, for example, the NHS—this exception, in particular, being very wide and vague;
- finally, information relating to advice on the giving of honours, public employment or appointments is also excluded, so that, for example, the process by which a candidate is recommended and accepted for a life peerage remains secret, as does advice on key appointments such as those of the chief executives of Next Steps Agencies.

It should further be noted that three of the exclusionary categories do not require a harm test: that is, in these categories, it does not even have to be shown that release of the information would cause any harm before the minister can refuse to supply it. The three categories are: communications between ministers and the royal household, information given in confidence and information relating to nationality and immigration. However, the previous government agreed to a change to the Code which should make it harder to refuse information. The second edition of the Code now states that in the categories which put forward a harm test for disclosure—that is, all except the three just mentioned—the presumption remains that the information will be disclosed, unless the harm caused or likely to be caused by disclosure outweighs the public interest in learning of the information in question.

In short, the new regime, with its reliance on the Code and statute alone, might remove some rather anomalous areas and is undoubtedly an advance on the previous position: it means that a minister cannot simply cite the fact that previous governments have refused to answer the questions, but must instead justify the refusal positively, using the Code. However, the width of the excluded areas, their uncertain scope and the fact that there is no outside mechanism to adjudicate upon ministerial compliance with the Code in giving replies to parliamentary questions all appear to give credence to the charge set out in the question that the obligation to account is only limited in scope.[2]

The Freedom of Information Act 2000 will for the first time introduce a general right of access to government information, policed by an

independent Information Commissioner and which is ultimately enforceable through the contempt jurisdiction of the High Court (s 52). It will therefore deal with the basic problem that ministers cannot at present ultimately be compelled to release information. However, the Act is riddled with extremely wide ranging exemptions—broader even than those in the Code, in the view of some commentators. In particular, there is a class exemption in s 35 in relation to all information relating to 'the formulation or development of government policy'. The only limitation to this astonishingly broad exemption—which is not subject to any burden on ministers to prove that any harm would be caused by releasing the information in question—is that statistical information relating to a decision is no longer exempted once the decision is made. But, for example, evidence of other policy options considered, and the reasons for rejecting them, would be covered by the exemption. The Information Commissioner can order release of the information concerned if satisfied (*per* s 2) that the public interest in withholding information does not outweigh the interest in its reception; however, because the information relates to a central government department, its release can ultimately be vetoed by a Cabinet minister (s 53). Moreover, the Act does not come fully into force until 2005.

While *The Ministerial Code* sets out areas in which answers may be refused, it also makes it clear that ministers must always be truthful with Parliament, 'correcting any inadvertent errors at the earliest opportunity'. However, are there then any circumstances in which it is permissible to tell a direct lie to Parliament? The answer appears to be that this would be acceptable only in the most extreme circumstances: examples mentioned by Scott and the Public Service Committee indicate that such a lie might be permissible if it was necessary in order to conceal an imminent devaluation of the currency, where disclosure would be economically catastrophic, or where an untruth was necessary in order to save the life of British citizens: the example has been given of a British MI6 agent arrested in a hostile country where, in order to save the person's life, it might be necessary for ministers to assure Parliament that the person was not working for the intelligence services. It seems to be generally accepted that only in the most extreme circumstances would such an action be permissible.

The more problematic question is whether, and if so when, it is legitimate to give incomplete answers to Parliament. It may be noted here that the version of the obligation to account to Parliament put forward by the Public Service Committee after its exhaustive inquiry included the requirement that ministers must take 'special care' to give information which is 'full and accurate' to Parliament, and that they must conduct themselves 'frankly and with candour' (see Annex 1 of the Report).

Such phrases strongly imply that information given by ministers should be comprehensive, and that ministers should make it clear if only partial information is being given, for whatever reason. The version which appears in *The Ministerial Code,* however, carefully eschews such phrases, using only the adjective 'truthful', not 'full', and saying nothing of 'frankness' or 'candour'. These omissions appear to leave the door open to the view that giving incomplete information is not necessarily misleading—the 'half a picture can be true' thesis put forward by two very senior civil servants, Sir Gore Booth and Sir Robin Butler, and a minister, William Waldegrave, during the Scott Inquiry. Waldegrave made his view explicit to the Public Service Committee: 'There are plenty of cases…where the minister will not mislead the House…but may not display everything he knows about the subject' (HC 27, 1993–94, para 125). The fact that this notion was given such authoritative support during the Scott Inquiry and afterwards suggests that it is one which commands quite widespread acceptance in government. Indeed, a senior civil servant in evidence to the Public Service Committee commented that:

> …there is a commonly accepted culture that the function of [an answer to a PQ] is to give no more information than the minister thinks will be helpful to him or her, the minister, in the process of political debate in the House [HC 313, 1995–96, 20 March 1996, Q 21].

The objection to the 'half the picture' thesis is obvious, and was expressed forcefully in the Scott Report: the problem, Scott commented, is that the person getting the information will not know that the information is only partial. They are therefore 'almost bound…to be misled' (Scott Report, para D4.55). Scott suggested that the information given should, in the absence of compelling public interest reasons, be at the least a 'fair summary of the full picture'. There is nothing in *The Ministerial Code* which expressly deals with this institutionalised problem. This failure may be seen to be a further unsatisfactory aspect of the convention of accountability.

The fear that these deficiencies in the convention itself may lead to the misleading, or at least the under-informing of Parliament is, to an extent, substantiated by the quotes noted above. Further evidence may be found in the Scott Report. For present purposes, Scott's overall conclusion may be cited:

> Government statements made in 1989 and 1990 about policy on defence exports to Iraq consistently failed…to comply with the standard set by [the earlier version of *The Ministerial Code* (QPM)] and, more importantly, failed to discharge the obligations imposed by the constitutional principle of ministerial accountability [para D4.63].

A couple of Scott's findings on particular ministerial statements are illustrative. Following the change in the guidelines on the export of defence-related equipment to Iran and Iraq, so that Iran was governed by the original, stricter guidelines while Iraq was governed by a more relaxed version, which *inter alia* allowed the export of defence-related equipment as long as it was for defensive purposes, a number of letters were sent by ministers to MPs who had inquired about policy on defence exports to the two countries. Four letters said that: 'The government have not changed their policy on defence sales to Iraq and Iran.' Another made reference to 'our firm and *even-handed* position over arms sales to Iran and Iraq' (emphasis added). Scott's comments on these letters were particularly blunt: the statement that policy had not been changed was, he said, 'untrue': 'Mr Waldegrave knew, first hand, the facts that…rendered the "no change in policy" statement untrue.' The statement that the policy was 'firm and even-handed' was, he said, 'not remotely arguable'.

So, the *practice* of governmental accountability to Parliament was found to be deeply unsatisfactory by the most comprehensive public and independent inquiry into the subject undertaken during the 20th century. It is worth noting one of the government's defences to the claims that any of the responsible ministers, in particular, Mr Waldegrave, should resign, because it illustrates another important weakness with the current formulation of the convention of accountability. This was that Mr Waldegrave had not, contrary to the provision in QPM, 'knowingly' misled Parliament at all in saying that the guidelines had not changed, because his personal belief was that they had not. As Scott put it:

> Mr Waldegrave strenuously…asserted his belief, in the face of a volume of …overwhelming evidence to the contrary, that policy on defence sales to Iraq had indeed remained unchanged.

Mr Waldegrave argued that all that had happened was that the old guidelines were being applied 'flexibly', using the new guidelines as 'an interpretative gloss' on the old ones. Scott described this viewpoint as one 'that does not seem to me to correspond with reality' and added, 'The description of [the new policy] as merely a flexible interpretation of the guidelines…[was] bound to be misleading'. Nevertheless, he also said, 'I did not receive any impression of any insincerity on Mr Waldegrave's part' and that 'Mr Waldegrave…did not have any duplicitous intent' in putting forward this explanation.

This latter finding was repeatedly relied upon by the government to refute any argument that Waldegrave should resign: since he had not meant to deceive, it was argued, he had not 'knowingly' misled Parliament and

therefore had not broken the rules. The problem with this approach is that it allows a minister who holds an honest but manifestly unreasonable—even bizarre—view that government policy has not changed simply to tell Parliament that there has been no change, even though he clearly ought to have realised that others might not share this view and thus be misled as to what had actually happened. The present position allows ministers to claim that they have adhered to their duty not to mislead Parliament, provided that it is not manifest beyond all possible argument that the particular interpretation of events they gave to Parliament was untrue. It is suggested that the duty on ministers ought, in cases where the matter is arguable, to be not just to give their view—for example, 'the guidelines have not changed', but to give full factual information as to what has occurred, and allow Parliament to draw its own conclusions. The convention, as set out in the Code, does not appear to require this at present. Very recently, Stephen Byers sought to rely on the defence that he had not 'knowingly' misled Parliament when he had wrongly announced in February 2002 that his former press officer, Martin Sixsmith, had resigned, when in fact this had not been agreed. Byers' story, seemingly accepted by Labour colleagues during a Commons debate in May 2002, was that this had been his genuine, though mistaken, understanding at the time from discussions with his permanent secretary. Byers refused to resign, or even apologise, stating that at all times he had acted in good faith, representing to Parliament—and to the public—the position as he believed it to be. He escaped censure at the time, but was forced to resign later in the month. The causes of his resignation were complex but, in part, came from a widespread perception that he had in fact been duplicitous. The lesson drawn by commentators was, however, that it was the press and not Parliament that had forced the resignation, by making Byers a liability for the government through constant, negative reportage which served to prevent transport policy from being anything other than a 'bad news' story whilst he was in charge of it.

In conclusion, it has been argued that insofar as the convention of accountability is for all practical purposes expressed by the formulation set out in *The Ministerial Code,* the charges made in the question are largely substantiated. There are still very broad and vaguely defined areas where information may be withheld; the Code does not appear to tackle the culture of giving only partial information, and it allows ministers to deny that they have misled Parliament by reference to their own subjective and possibly eccentric interpretations, instead of requiring adherence to a more objective standard. It is therefore submitted that while the present position does represent a small advance upon that which existed pre-Scott, the accountability regime requires both greater strength and greater clarity. Whether the Freedom of Information Act 2000 will significantly strengthen

the ability of Parliament—and the press—to hold ministers to account will depend, crucially, on the readiness of the Information Commissioner to order the release of information relying on the public interest test in the Act, and on how often ministers are prepared to take the possibly damaging step of invoking the ministerial veto against an order to release information relating to their own departments.

Notes

1 Students could note that this is an advance on the previous position, whereby the obligation as set out in *Questions of Procedure for Ministers* (the forerunner of *The Ministerial Code*) was produced simply as a unilateral act of government, thus allowing government to determine the extent of its own accountability. The new statement of the obligation was at least approved by Parliament. However, it should be noted that the wording of the obligation was suggested by the government for approval by Parliament, and that the government had rejected a more radically worded version produced by the Public Service Committee.

2 It could be added here that a further remaining flaw in the system is that it is still the government which decides when the interest in disclosure is outweighed by the harm which would be caused by it—a very vague and openended test. When a member of the public is refused information, he can complain to an MP, who may refer the matter to the Ombudsman and the Ombudsman may make a recommendation that the government disclose the information. Such recommendations were invariably complied with up until 2002, when the Ombudsman published a report complaining of the refusal by the Blair government to release information he had recommended relating to ministers' expenses. In any event, MPs do not have the right to complain to the Ombudsman about a failure to answer parliamentary questions.

CHAPTER 7

JUDICIAL REVIEW

Introduction

This topic is very extensive and is often taught as a separate course in the second or third year of degree courses. However, on constitutional law courses, it is of a manageable size and sometimes attracts two questions in exams—which can make it a good return for your revision. In this area, extensive knowledge of case law is clearly necessary, but must be bound together and informed by a grasp of basic ideas. Questions can appear as either essays or problems and quite often both appear in one paper. Essays will generally demand an evaluation of the effectiveness of judicial review in one form or other. If a problem question asks the student to advise clients, it is important to remember standing, amenability, procedure and remedies, bearing in mind the changes introduced by the Civil Procedure Rules (CPR). Some papers treat natural justice as a separate topic, and this has been reflected in the questions given below. It is not yet clear how the advent of the Human Rights Act (HRA) 1998 will affect the way this question is examined. Most textbooks treat the HRA separately and examiners will probably still want to set questions that test the student's knowledge of the English principles of judicial review, without confusing this with possible claims brought under the Act. In addition, answering a problem question on the HRA would generally require knowledge of the European Convention on Human Rights' (ECHR's) case law, particularly in relation to Art 6, which first year students would not generally be expected to have. There is, in particular, a very complex legal issue as to how far judicial review of a decision taken by a body which does not itself satisfy the requirements of Art 6 of the ECHR can provide a level of protection such that overall, Art 6 is satisfied. Therefore, the answers given to the problem questions here do not include possible HRA points, except in one important area. The HRA has already had the effect of changing the ordinary English law on bias, with the courts accepting that Art 6 of the ECHR requires a modification of the *Gough* test. This is therefore included. Additionally, essay questions on judicial review may well ask for an analysis of how the HRA will change the standard of substantive review in human rights cases. Such a question is included here.

Checklist

Students should be familiar with the following areas:

- the public/private law boundary: r 54 of the CPR, *locus standi* and amenability of bodies to review;
- procedural impropriety other than natural justice; mandatory/directory express requirements, for example, consultation;
- tests for the applicability of natural justice, including 'legitimate expectation';
- the *audi* rule—what it will demand in different situations: when are legal representation, witnesses, cross-examination or an oral hearing required?; the rule against bias and how it has been changed by the HRA;
- illegality: fettering by policy, delegation, improper purpose, inferred purpose or plurality of purposes; irrelevant considerations and concept of error of law; the effect of rulings that all such errors are reviewable; substantive legitimate expectations;
- irrationality: is this the same concept as '*Wednesbury* unreasonableness'?; critiques of the notion;
- remedies: basic knowledge, discretion to refuse, instances when certain remedies are inappropriate or will not lie;
- the likely impact of the HRA; the possible development of proportionality as a ground of review.

Question 26

Prisoners at Burham prison occupy the roof in an attempt to air their grievances. After the disturbance has been brought under control, Abel and Bert, two of the prisoners, are charged with various offences against discipline as laid down in the Prison Rules 1964. Abel is charged with attempting to assault an officer by throwing a slate from the prison roof and is sentenced by the Board of Visitors to the forfeiture of 20 days' remission. Bert is charged with intentionally obstructing an officer in the execution of his duty. He is also dealt with by the Board, which imposes a punishment of 14 days' forfeiture of privileges and 28 days' stoppage of earnings.

Both Abel and Bert are allowed to appear in person at their respective hearings, but both are refused legal representation on the ground that the hearings must be dealt with swiftly. Abel is permitted to call one witness in his defence, but two others are refused on the ground that they have been

dispersed to other prisons. Bert's request to call a witness is refused. Abel is allowed to remain present during his hearing while a prison officer gives evidence against him, but is refused permission to cross-examine him. The Board gives Bert a summary of the allegations made against him by a prison officer, but refuses to allow him to see the full statement. Bert is surprised by the content of the allegations, which appear to be more extensive than those appearing in the statement of charges given to him prior to the hearing. Despite this, the Board refuses to give him time to consider them.

Advise Abel and Bert as to any redress they might have. Disregard any possible impact of the Human Rights Act (HRA) 1998 in your answer.

Answer plan

This is a very straightforward question on the principles of natural justice. At the outset, it is very important to bear in mind that what is meant by a fair hearing will vary from hearing to hearing, and that the more serious the penalty, the higher the standards observed should be. Thus, it is probably a good idea to deal with the hearings separately. It must first be shown that the courts are prepared to review the decision in question on the ground of want of natural justice, and secondly in relation to each hearing separately, that a breach (or breaches) of natural justice has taken place. Although one serious breach might lead to the quashing of the decision, you should strengthen your argument by considering as many as possible.

Essentially, the following matters should be discussed:

- the preparedness of the courts to review prison disciplinary decisions on the ground of want of natural justice *(St Germain* (1979));
- the preparedness of the courts to review decisions of Boards in prison disciplinary hearings on the ground of want of natural justice *(Leech v Deputy Governor of Parkhurst Prison; Prevot v Deputy Governor of Parkhurst Prison* (1988));
- the discretion to allow the calling of witnesses;
- the discretion to allow cross-examination;
- the discretion to allow legal representation which was established in Boards of Visitors' hearings;
- the right of a prisoner to a full opportunity of hearing the allegations against him and to present his case (r 49 of the Civil Procedure Rules (CPR)).

Answer

Both Abel and Bert will wish to show that these decisions were made in breach of the principles of natural justice. In order to seek judicial review to challenge them, they must show that they have a sufficient interest in the matter to which the application relates (s 31(3) of the Supreme Court Act 1981). Clearly, both applicants satisfy this test, as they have both been directly and adversely affected by decisions which relate only to them. It must be determined whether decisions of Boards of Visitors are amenable to judicial review. The new test under r 54.1(2) of the CPR provides that judicial review 'lies to review the lawfulness of … a decision, action or failure to act in relation to the exercise of a public function'. Cases since the CPR were introduced indicate that this test is at least as broad as the old one; case law prior to the CPR indicates that decisions of Boards of Visitors are subject to judicial review (*Board of Visitors of Hull Prison ex p St Germain (No 1)* (1979)). It is clear also that judicial review is the appropriate mode of challenge to such decisions: the applicants have no private law right (*O'Reilly v Mackman* (1983)) which could be vindicated in an ordinary civil action; moreover, r 54.2 of the CPR has now clarified that judicial review 'must be used' where the applicant is seeking, *inter alia*, a quashing order, which will be the remedy sought by both Abel and Bert here. Permission to seek judicial review must be granted by the court (r 54.4); it must be applied for 'promptly, and in any event not later than three months after the grounds to make the claim first arose' (r 54), so Abel and Bert must be advised to make their application swiftly.

Having ascertained that there are no procedural barriers in the way of the applicants, it must next be determined whether the rules of natural justice apply to the process in question. As Abel and Bert are involved in two separate hearings, and the consequences for each differ in degree of seriousness, their cases will be considered separately. It was determined in *Board of Visitors of Hull Prison ex p St Germain (No 1)* (1979) that prison disciplinary hearings were subject to the principles of natural justice. Certain prisoners complained that the disciplinary proceedings which followed the Hull prison riots were not conducted in accordance with the principles of natural justice. The Court of Appeal, in the first such ruling since *Ridge v Baldwin* (1964), held that prisoners only lose those liberties expressly denied them by Parliament—otherwise, they retain their rights under the law. 'The rights of the citizen, however, circumscribed by penal sentence or otherwise must always be the concern of the courts unless their jurisdiction is expressly excluded by statute' (*per* Shaw LJ). This has been followed in numerous cases since then.

The rules of natural justice will therefore apply in Abel's case; however, can it be said that they have been breached? One of the two main principles of natural justice is the right to a fair hearing: the *audi alteram partem* rule. The question, therefore, is whether a disciplinary hearing requires the calling of all or any of the witnesses requested by the prisoner, cross-examination of the witnesses or legal representation in order to be fair. These matters will be looked at in turn.

In *Board of Visitors of Hull Prison ex p St Germain (No 2)* (1979), it was held that Boards of Visitors must be able to exercise a discretion to refuse a prisoner's request for witnesses if they feel that he is purposely trying to obstruct or subvert the proceedings by calling large numbers of witnesses, or if, where the request is made in good faith, they feel that the calling of large numbers of witnesses is unnecessary. However, mere administrative inconvenience would not support a decision to refuse such a request. The principles established in the above case were confirmed in *Deputy Governor of Long Lartin Prison ex p Prevot* (1988), in which the refusal to allow a prisoner to call a material witness led to a decision of a prisoner governor being quashed by the House of Lords. In the instant case, it appears that the only reason for the refusal was the inconvenience involved in recalling the witnesses from other prisons. It seems, therefore, that the Board took into account a factor that it should have disregarded. It does not appear that Abel requested three witnesses with a view to subverting the proceedings. Furthermore, given the fact that Abel was allegedly merely one of a group of prisoners on the roof, it would seem essential that he should be able to challenge evidence that he was present, that he threw the slate and that in doing so, he was attempting to assault a prison officer. It seems unlikely that the case was so straightforward as to require only one witness for the defence. Therefore, if Abel can demonstrate that calling more than one witness was necessary due to the nature of his defence, it would follow that he should have been allowed to call them.[1] The refusal to allow him to do so would amount to a breach of the *audi* rule.

It was determined in *St Germain (No 2)* that cross-examination of hearsay evidence should be made possible if it appertains to the central question of guilt or innocence. In this instance, hearsay evidence is not being presented; nevertheless, many of the arguments used in *St Germain* as to the desirability of allowing cross-examination where hearsay evidence is presented are equally applicable where it is not. Further, in *Board of Visitors ofGartree Prison ex p Mealy* (1981), it was held that the accused should have been allowed to ask questions of a defence witness. On this basis, it may be argued that Abel should have been allowed to cross-examine prison officers.[2]

Abel's final ground of complaint is that he received no legal representation. Does a fair hearing before a Board include the right to legal representation? In *Fraser v Mudge* (1975), the Court of Appeal determined that a prisoner had no such right, while in *Maynard v Osmond* (1977), it was held that it would not be normal to have such a right, although a friend or helper might be permitted to be present. However, in *Secretary of State for the Department ex p Tarrant* (1985), although it was accepted, following *Fraser v Mudge,* that a prisoner could not claim a *right* to legal representation, it was ruled that a Board of Visitors must exercise a discretion as to its grant. The court then suggested certain factors which a Board could properly take into account. These included: the seriousness of the charge and of the penalty; the likelihood that points of law might arise; the ability of the prisoner to conduct his own case; and the need for speed in making the adjudication. The House of Lords in *Board of Visitors ofHM Prison, the Maze ex p Hone* (1988) considered the issue afresh, but determined that no absolute right to legal representation in prison disciplinary hearings could be created; the position would remain as in *Tarrant.* In *Hone,* the House of Lords was eager to deny that a right to legal advice as opposed to a discretion to award it existed, on the basis that otherwise it would be hard to deny such a right in Boards' hearings. It therefore follows that a discretion to award legal advice does exist in Boards' hearings, although it is likely that it will rarely appear necessary to grant it.

On this basis, given that the request for legal advice in the instant case was refused due to the need for expedition, can it be argued that a Board which had properly exercised discretion would have granted it? The charge is fairly serious and it carries a serious penalty. Points of law might well arise; Abel might wish to argue that he did not possess the requisite *mens rea* for attempted assault. This is probably the strongest argument for the grant of legal representation, but possibly it is outweighed by the particular need for speedy adjudication due to the tense situation in the prison. It may be concluded that the Board did exercise its discretion properly.

Thus, proceedings in Abel's case seem to have breached the *audi* rule, in that he was not allowed witnesses and probably in that he was not allowed an opportunity for cross-examination.

The requirements of a fair hearing in Bert's case will differ from those in Abel's because the consequences for Bert are less serious than for Abel: he is losing privileges and earnings rather than being forfeited with remission. In *Aston University ex p Rothy* (1969), it was held that natural justice would apply although there was no kind of legal right in the question; it was necessary to look at all the circumstances—the expectation of a fair hearing and the serious consequences which would

follow from the decision. Possibly, the loss of privileges might not alone be sufficiently serious to warrant the application of the principles of natural justice, but may be so coupled with the loss of earnings—deprivation of a legal right—and on this ground, natural justice may apply. On this argument, *Leech v Deputy Governor of Long Lartin Prison; Prevot v Deputy Governor of Long Lartin Prison* (1988) applies to Bert's hearing, which should therefore have been conducted in accordance with the principles of natural justice.

Was the *audi* rule breached in Bert's case? He has four grounds of complaint: he was not allowed to call witnesses; to have legal representation; or to see a full statement of the allegations against him; and it seemed that the allegations had been added to since he saw the statement of charges against him prior to the inquiry.

Administrative inconvenience is likely to be allowed much more weight since loss of remission is not in question. The tests from *Tarrant* (above) may be applied in the instant case; it may then be argued that the triviality of the penalty involved coupled with the need for speed in making the adjudication outweigh other factors such as the need to deal with points of law, and therefore do not warrant the grant of legal representation.

However, it may be urged that the Board should have exercised its discretion in favour of allowing Bert to call a witness (and perhaps allowing cross-examination of the prison officer whose evidence is presented). The test from *St Germain (No 2)* seems to be satisfied: Bert appears to be making the request in good faith and there seems no sufficient reason for refusing it. The administrative inconvenience involved would be minor, since the witness is presumably present in the prison.

Furthermore, Bert is denied the opportunity to see a full statement of the allegations. The right of notice of the case against a person is normally treated as the most basic of all the requirements of natural justice, since without it, it is impossible for the subject of the allegations to make effective representations. It was determined in *Tarrant* that a prisoner should be given sufficient time to understand what is alleged against him and prepare a defence. Clearly, if somebody is unaware of the extent of the charges against him he will be unable to answer them; the inconvenience involved would have been very minor.

In *Board of Visitors of Gartree Prison ex p Mealy* (1981), Mealy alleged unfairness, because when he came to answer the charges against him, he found that the order of the proceedings had been changed. This took him by surprise and, he believed, adversely affected his ability to defend himself. The Divisional Court found that chairmen of Boards of Visitors should guide prisoners through the proceedings and not surprise them by sudden changes

of format. This could apply to the instant case, as Bert was upset by additional allegations which he had not expected.

Even where loss of liberty is not in question, a reasonable standard of fairness must be observed in prisoners' disciplinary hearings, which does not appear to be the case here. Therefore, Bert may be able to show that the *audi* rule has been breached with regard to all his complaints apart from denial of legal representation.

Thus, since both Abel and Bert are able to show breaches of the principles of natural justice, the decisions will be void. (In the *Anisminic* case (1969), the House of Lords held that a decision which breached the principles of natural justice would be void, not voidable.) Under r 54 of the CPR, a quashing order will be issued to quash the decision in each instance.

Notes

1 A further case could be mentioned at this point: in *Board of Visitors for Nottingham Prison* (1981), it was held that if it were established that a prisoner had asked for and been refused permission to call witnesses, this would *prima facie* be unfair.

2 Students could point out that cases in which the right to cross-examination has not been found to be required by the principles of fair procedure, such as *Bushell v Secretary of State for the Environment* (1981), have occurred in contexts very different from prison disciplinary hearings. Such hearings are basically adversarial procedures where the purpose of the procedures in question is the determination of a person's guilt or innocence. In this respect, they are very similar to court proceedings. In cases involving more polycentric disputes, where an adjudicator is attempting to reach a conclusion on an administrative matter, after hearing evidence from numerous sources and weighing up the conflicting priorities bearing upon his decision, the courts are much more reluctant to impose formal, judicial-style practices, such as cross-examination.

Question 27

Blankshire County Council is empowered by s 3 of the (fictitious) Street Traders Act to grant licences to street traders and withdraw them for, *inter alia*, misconduct. Section 4 provides that if the Council grants more than 10 licences within one month, it 'may consult such interested organisations as it sees fit'. Under the Cautious Party, previously in control of the Council, such licences were granted sparingly. It has been the custom of the Council to grant hearings to consider the case against proposed revocation of licences, provided that a written request is received within six weeks of the decision being announced. The Enterprise Party, now in power, has announced that in six months' time, 50 new licences are to be granted over a six week period.

The following events occur:

- The Association for a Tranquil Blankshire (ATB), a large pressure group, requests consultation with the Council, but is refused.
- Doreen, a current licence-holder, disgruntled by the decision to grant new licences, requests a hearing from the Council. She receives a letter in reply stating that normally, only revocation gives rise to a hearing and that in any event, unprecedentedly low Council funds forbid a hearing.
- Vic and William receive notification that their licences are to be revoked for misconduct, subject to their right to put their case against revocation.
- William is given a fair chance to state his case at a meeting of the Licensing Board. However, he recognises one of the five members of the Board, Bert, as the former husband of Alison; Alison recently left Bert for William in an episode which generated much publicity. The Board orders revocation. After the hearings are over, it emerges for the first time that Bert covertly encouraged Alison to have the affair with William so that he could divorce her and many his secret long standing mistress.
- Vic instructs his solicitor to lodge his application for a hearing in respect of the revocation within the time limit; unknown to Vic and his solicitor, the notice of appeal is destroyed in a post box fire. No hearing therefore takes place and Vic's licence is revoked.

Discuss the issues of 'procedural impropriety' raised by the above.

Answer plan

This is a long and initially rather confusing question. On analysis, however, it can be seen to break down into a number of fairly distinct issues surrounding fair procedure. Students must take care to work out the application of all the given facts to all the applicants before starting to answer the question; for example, the fact that persons whose licences have been revoked have been customarily granted a hearing is primarily relevant not to Vic and William, but to Doreen. Note that discussion of remedies and procedure is *not* required, as the question calls for a discussion of the issues of procedural impropriety, not for advice to be given to possible applicants for judicial review.

Essentially, the following areas should be covered:

- the effect of the failure to consult with the ATB: mandatory or discretionary requirement/impact of failure to consult;
- do the rules of natural justice require a hearing for Doreen?; the argument for 'legitimate expectation' by analogy from existing custom with respect to revocation;
- the effect of non-receipt of Vic's application;
- is there an infringement of the *nemo judex* rule regarding William's hearing?; the test for bias (*Gough*) has been modified; the effect of facts pointing to bias at the time of the hearing, but not subsequently.

Answer

Blankshire Council may have been guilty of procedural impropriety during the revocation of licences and in the taking of the decision to grant new licences. The failure to consult the ATB will be considered first.

The duty to consult interested organisations laid down in s 4 of the Street Traders Act represents an express statutory procedural requirement. In decided cases on the legality of failure to undertake such statutory consultation, the analysis employed by the courts traditionally focused on a classification of such requirements as either mandatory or directory. Breach of a requirement seen as mandatory has led to a finding that the relevant decision was invalid. Breach of a directory requirement has left the act or decision standing, although compliance may be secured by other means, or damages obtained. In general, as Emery and Smythe note, 'where statute imposes on a public body a duty to…consult…persons likely to be affected by proposed action, the requirement will usually be treated as mandatory' (*Judicial Review,* 1986, p 209). The more recent approach, exemplified by the

decision in *Lambeth London Borough Council ex p Sharp* (1986), is to ask what the impact of the failure to consult has been on the persons who should have been consulted and on the public at large, in the light of the *purpose* of the consultation requirement in question. That is, has the failure to consult substantially detracted from the purpose served by consultation? Since large increases in the number of street traders will have some impact on the local community, as well as on the existing traders, it may plausibly be suggested that at least one of the purposes of the consultation requirement is to allow local people to have some input into the decision to grant large numbers of licences. If the ATB is genuinely representative of local people, in that its membership is local, and the court considers that it could have provided a useful source of input for the Council, it may find that the refusal to consult with it defeated the purpose of the consultation requirement. The interests of local people are likely to be seen as particularly significant given that the proposed increase in stalls is so large and, therefore, more likely to have some impact on the public at large. One of the effects that the increased number of stalls would have is increased noise and trade, a matter with which the ATB is directly concerned.

The language of the statute will not greatly assist the ATB but, it is submitted, will probably not be decisive: the wording implies a directory requirement only in using the word 'may' rather than 'shall'; in addition, a subjective choice as to the bodies to be consulted seems to be imported by the words 'as it sees fit'. However, in dealing with such discretionary choices, the courts take the view that the choice should be informed by notions of reasonableness and is not, therefore, purely subjective. For example, in *Secretary of State for Education and Science v Tameside* (1977), a minister was given statutory power to take certain action against a local authority 'if satisfied' that it was acting unreasonably. The court held that he could only take action if he had grounds on which he could properly be so satisfied. [1] On balance, it is submitted that the ATB could reasonably hope for a finding that there were no good grounds for the refusal to consult it and that any subsequent issuing of licences was, therefore, invalid.[2]

The question of Doreen's possible entitlement to a hearing will be considered next. It should be noted, initially, that she would not qualify for consultation under s 4 as she is not an 'organisation'. One of the two rules of natural justice is *audi alteram partem* which, at its most basic level, denotes that both sides should be heard in making certain decisions. In *Ridge v Baldwin* (1963), Lord Reid, in the course of his judgment, stated (strictly *obiter*) that the crucial characteristic of a hearing or decision which would render it subject to the rules of natural justice is that a person's rights would be affected by the outcome; he disposed of the

fallacy that the proceedings had to have the further characteristic of being quasi-judicial. In the instant case, Doreen could claim that her right to trade granted by her licence would be affected to her detriment by a massive increase in competition.

Further, it can be argued that Doreen has a 'legitimate expectation' of a hearing. This notion was first formulated by Lord Denning MR in *Schmidt v Home Secretary* (1969) and its principles were clarified in *Council of Civil Service Unions v Minister for the Civil Service* (1984). Lord Fraser stated that a legitimate expectation 'may arise either from an express promise or from the existence of a regular practice which the claimant can reasonably expect to continue'. Doreen may be able to argue that she has a legitimate expectation based on the Council's 'custom' of consultation over revocation of licences. It is arguable that if it is legitimate to expect consultation over revocation of licences—an expectation particularly strong where economic loss may be caused by the revocation—then it would also be reasonable to expect consultation over a decision which would greatly devalue licences in existence and similarly cause economic loss. Lord Denning put forward this line of reasoning (*obiter*) in *Liverpool Corp ex p Liverpool Taxi Fleet, etc* (1972) (a decision approved in *Devon County Council ex p Baker; Durham County Council ex p Curtis* (1995)), in which it was held that taxi drivers were entitled to be consulted over a proposal to increase the number of taxicabs; in that case, an express promise had been given of full consultation with existing taxi drivers, so it is not directly applicable to the instant situation.

Against this point of view, the Council could contend that its unprecedented shortage of funds prevented a reasonable expectation of a hearing arising in a marginal case. This argument would be unlikely to prevail, however, in view of the fact that the decision may cause serious financial loss and bearing in mind the small cost of a basic hearing. The Council, then, by its failure to grant Doreen a hearing which she could legitimately have expected, is probably in breach of the *audi* rule.[3]

In considering Vic's situation, it can be established at the outset that the setting of a time limit in which applications for a hearing must be made does not, in itself, amount to any breach of the rules of natural justice. Clearly, administrative necessity demands that the Council should not allow applications to remain open indefinitely: at some point, the licence must actually be revoked and the imposition of a six week period in which to apply after receiving notification cannot be considered unreasonably short. The problem lies in the fact that Vic, through no fault of his own, has been denied the chance of a hearing. The question is: does natural justice require that a hearing should be held if the applicant is entitled to it, or merely that the decision-making body should not itself commit any

impropriety? In 1985, the Court of Appeal held in *Diggines ex p Rahmani* that where a person fails to gain a hearing to which he is entitled through no fault of his own, a breach of natural justice has occurred, a principle which on appeal, Lord Scarman (*obiter*) thought was of great importance assuming it was good law. However, in *Al-Mehdawhi v Secretary of State for the Home Office* (1990), when the House of Lords considered the issue, it decided that this principle was not good law. An applicant's solicitors sent letters to the wrong address, and consequently the applicant did not appear at his appeal against deportation and was not represented. The applicant's appeal was dismissed. The Lords declined to quash the decision, ruling that natural justice was solely concerned with the propriety of the decision-making process, which had not been at fault. This decision is open to criticism in that it denies any remedy to one who has suffered from an effective, if not a technical lack of natural justice. However, it is undoubtedly good authority and, on the face of it, the revocation of Vic's licence would almost certainly stand: in essence, the circumstances of his case are identical to those in *Al-Mehdawhi.*

Finally, the fact that Bert sits on the Board which hears William's case falls to be considered. Clearly, the perception of his probable hostility towards William raises questions about the fairness of William's hearing. The second main rule of natural justice, *nemo judex in causa sua,* is commonly expressed to forbid bias on the part of the decision-maker. It must initially be established whether personal animosity towards the applicant by the decision-maker can amount to bias for the purposes of natural justice. The persuasive authority of *Re Elliott* (1959) suggests that it can, and in the recent decision of *Locabail* (2000), Lord Woolf expressly mentioned 'personal animosity' as a circumstance that could found a legitimate claim of bias. However, in cases where the decision-maker has neither a pecuniary interest in the outcome, nor is actually involved with an organisation which is a party to a case (the further category added by the *Pinochet* decision: *Bow Street Stipendiary Magistrates ex p Pinochet Ugarte (No 2)* (2000)), it is not enough simply to establish the facts pointing to bias, without more. The new test for such cases, following the House of Lords' decision in *Porter v Magill* (2002), is that the decision will be quashed where 'the fair-minded and informed observer, having considered the [relevant] facts would conclude that there was a real possibility that the tribunal was biased'. Thus, the court is concerned not to ascertain whether there was *in fact* 'a real danger of bias' (the old test under *Gough* (1993)). It is concerned with whether a fair-minded observer would so conclude, in recognition of the fact that the appearance of the matter is just as important as the reality (as Lord Nolan observed in *Pinochet*). Such an observer would not have to think that it was more probable than not that there was bias, merely that it

was a real, not a fanciful possibility. On the facts of the present case, a perception of bias might well have arisen at the time of the hearing, since observers would know only that Bert's wife had left him for William—presumably common knowledge in view of the widespread 'publicity' that the affair created—and would therefore be very likely to apprehend bias on the part of Bert. The ruling in *Bremer Handelsgesellschaft mbh v Ets Soules et Cie* (1985) suggested that 'the apparent fairness of the process must be judged in the light of the facts as they would have appeared to the reasonable man *at the time when they mattered, that is, when the procedure was in progress*' (emphasis added), presumably in reliance on the well known principle that justice must not only be done, but must be seen to be done. However, in *Steeles v Derbyshire CC* (1985), the court stated that the reasonable man in making his judgment knows all relevant matters whether available to the public or not. *Dicta* in the recent decision in *Director General of Fair Trading v Proprietary Association of Great Britain and Proprietary Articles Trade Association* (2001), however, support the approach in *Bremer*: the judges repeatedly spoke of what the perception would be 'at the material time', which must mean the time when the decision was made. Even if, therefore, it could be established in evidence that given that his wife's departure was not unwelcome to him, Bert bears no grudge against William, a court would probably find that a fair-minded observer would inevitably have suspected bias at the time. If this were the case, the decision relating to William would be quashed.

Notes

1 Students could explain at this point that the rationale for this apparent conversion of subjective into objective language is that, in the court's view, Parliament must be taken to have intended to endow an authority with a discretion in order that it should exercise it in a rational and considered rather than capricious manner.

2 Though the point is strictly outside the ambit of the question, it could be noted that if the application for judicial review was not heard until after the issuing of the licences, a court might refuse to issue a quashing order on the basis that substantial prejudice would result to the new licence-holders from the invalidation of their licences. If the case was heard before the issuing of the new licences, however, the court could simply make a mandatory order to compel the board to consult with the ATB.

3 Note 2 above applies equally here to Doreen.

Question 28

The Opticians' Regulatory Body, established by statute, is empowered to designate certain opticians' practices as being 'ORB approved', if it appears to the ORB that the practice concerned is 'a credit to the profession'. Upon such a designation being made, a central government grant will be made to the practice. ORB may also publicly designate opticians it considers to be 'negligently run' as 'not recommended'. The following events occur in Dansfield Town:

(a) Edward's practice is designated 'not approved'; at his hearing, the Dansfield Town branch of the ORB tells him that it considers his practice 'too small to provide an efficient service'. Edward is very unhappy with this decision, but puts off seeking legal advice for some time because of his fear of going to court.
(b) Thirty practices, making up the I Can See Clearly conglomerate, are given block approval by the Dansfield Town branch of the ORB. In response, Julia, the chair of the national Citizens Against Government Waste (CAGW) group, points out that many of the ORB members sit on the Dansfield local council, which is very concerned about unemployment among secretaries in the area; she admits, however, that all the practices concerned are meritorious.
(c) Three months after the announcement of the block approval, Fanny, who has been running a practice for two months which has been lauded as a model of efficiency in letters to the *Dansfield Herald,* requests a favourable designation from the Dansfield Town branch of the ORB. At her hearing, she is told that the body has a policy of refusing to approve practices which are less than one year old, and that in any case, an optician in her practice has been accused of failing to diagnose cataracts in a patient. The Panel tells her that the evidence of this came from gossip overheard by an ORB member in a pub. Fanny indignantly denies that any such misdiagnosis has ever taken place. Her practice is not approved.

All the hearings given are in accordance with the principles of natural justice.

Advise Edward and Fanny, who wish to challenge the decisions about their practices, and Julia, who wishes to question the legality of the block approval of 30 practices.

Answer plan

This is a fairly typical problem question which includes decisions which may be open to attack under various heads of judicial review. Students should note that unlike in the last question, they are asked to advise possible claimants, rather than to 'discuss issues'. Consequently, matters of standing, procedure and remedies *must* be covered. Natural justice should obviously not be discussed here; it should be noted, however, that one issue of natural justice is sometimes thrown into a question which is otherwise mainly concerned with illegality and irrationality.

The following areas should be covered:

- a brief mention that the ORB as a public body will be subject to judicial review if grounds exist;
- the procedure for all three claimants; r 54 of the Civil Procedure Rules (CPR), time limits—applicability to Edward; *locus standi*—requires a full argument in Julia's case; standing not to be considered wholly separately from merits;
- Edward's challenge—illegality: error of law/jurisdictional fact; misinterpretation of grounds; remedy;
- Fanny's challenge—illegality: the fettering of discretion in relation to policy; basing a decision on no evidence; irrationality in deciding on the basis of gossip; remedy;
- Julia's challenge: irrelevant considerations; partially improper purpose and the correct purpose inferred from the Act; remedy.

Answer

The Opticians' Regulatory Body is a public body, established by statute; its decisions will therefore be subject to the supervisory review jurisdiction of the High Court on the basis that it clearly exercises a 'public function' as r 54.1(2) of the CPR requires. This would also be the case under the case law prior to the new CPR. If the above applicants are to succeed in challenging any of the Body's decisions, they must use the correct procedure, demonstrate that they have the requisite standing and make out a case that the ORB's decisions impugn one or more of the various principles of judicial review.

It is clear that judicial review is the appropriate mode of challenge to such decisions: the applicants have no private law right (*O'Reilly v Mackman* (1983)) which could be vindicated in an ordinary civil action; moreover, r 54.2 of the CPR has now clarified that judicial review 'must be used' where the

applicant is seeking either a quashing order or mandatory order, which will be the remedies sought by the applicants here. Under r 54.4 of the CPR, applicants must initially seek the courts' permission to apply for judicial review; this must be done 'promptly, and in any event not later than three months after the grounds to make the claim first arose' (r 54.5 of the CPR). It will be assumed that all three potential claimants are within this basic time limit. However, in *Independent Television Commission ex p TVNI* (1991), the Court of Appeal emphasised that applications for judicial review would be refused if not made with the utmost promptness, even if within the three month time limit. Since Edward has delayed his application for no good reason, he may be refused leave; however, the Court of Appeal indicated that leave is more likely to be refused if third party rights are involved, which is not the case here.

Applicants must show that they have a sufficient interest in the matter to which the application relates (s 31(3) of the Supreme Court Act 1981). Edward and Julia will be seeking a quashing order to quash the relevant ORB decisions, while Fanny will require a mandatory order to compel a reappraisal of the decision not to approve her. The standing required for both remedies was equated in IRC *ex p National Federation of Self-Employed, etc* (1982). Clearly, Edward and Fanny have sufficient interest, as the decisions by the ORB have given them an individual grievance. Julia, however, may have more difficulty establishing standing. In *ex p National Federation,* the House of Lords held that the National Federation did not have a sufficient interest to challenge the legality of an IRC decision to grant an amnesty to casual labourers over previous tax avoidance. The fact that it had no personal interest in the IRC decision was decisive. However, although Julia also does not have any personal grievance, her case can be distinguished from *ex p National Federation.* Lord Wilberforce seems to have been much influenced in his judgment by the fact that the affairs of any individual taxpayer are strictly confidential; he considered that allowing judicial review of the way the IRC had dealt with such individuals would breach that principle of confidentiality. In the instant case, the result of ORB approval is a government grant; it can be argued that the outlay of government money *is* a matter for public concern and scrutiny, unlike the affairs of individual taxpayers. However, the decision in *Secretary of State for the Environment ex p Rose Theatre Trust Co* (1990), which indicates that pressure groups whose only interest in a decision is concern about the issues involved will not in general have locus *standi* to challenge the decision, represents a further difficulty.

However, since the *Rose Theatre* decision, the courts have begun to take a much more flexible and accommodating approach to the question of standing when a sufficiently important issue is raised by the application, such that the case is now generally regarded as being out of line with the

general thrust of judicial policy. Thus, in *Secretary of State for Foreign and Commonwealth Affairs ex p Rees-Mogg* (1994), it was found that the applicant had standing 'because of his sincere concern for constitutional issues'. In *Secretary of State for Foreign Affairs ex p the World Development Movement* (1995), the WDM was granted *locus standi* on the basis of a number of factors, including the importance of the issue raised (the possibly illegal use of the government's overseas aid budget), the absence of any other challenger and the prominence and expertise of the applicant pressure group in relation to the issues raised by the case. In other cases, the courts have stressed the importance of pressure groups representing people living in the area affected by the contested decision. Thus, in *Inspectorate of Pollution ex p Greenpeace* (1994), the judge stressed the fact that 2,500 supporters of Greenpeace lived in the local area (Cumbria), the health of whom might be affected by emissions from a nuclear plant; the court therefore found that members of the group had a personal interest in a matter of substantial concern—public health. Similarly, in *Secretary of State for the Environment ex p Friends of the Earth* (1994), in which Friends of the Earth and its director were granted leave to challenge a decision related to the quality of drinking water in certain specified areas, the fact that the director lived in one of those areas—London—and hence had a personal local interest in the matter was stressed as significant. The expertise of the respective pressure groups as a factor in their favour was also emphasised in both cases.

Thus, in cases involving decisions with a particular impact on one region or area of the country, the courts seem to stress the importance of pressure groups having a genuine interest in that area, via their membership (see Hilson and Cram (1996) 16(1) LS 3). The pure 'public interest' approach appears so far to have been saved for cases such as *World Development Movement* and *Rees-Mogg,* where the decisions were of general national importance, with no local interest.

Applying these criteria to Julia and the CAGW, her claim for standing appears rather weak. The challenge is mainly one of local interest, so the pure public interest approach is not really applicable; applying the *Greenpeace* and *Friends of the Earth* cases cited, the courts will probably inquire whether Julia or the group have any local connection, as the general public interest in the issue appears quite weak. On the other hand, the CAGW may have some expertise in the area of government waste, a point which would count in its favour. Probably, the issue of standing would ultimately therefore turn upon whether the courts considered that Julia's challenge raised serious issues of possible unlawful action, a matter which will be considered below.

The substantive merits of each of the applicant's challenges will now be considered, starting with the decision to designate Edward's practice as 'not

approved'. Such a designation may be made only if the ORB considers a practice to be 'negligently run'. There is, it is submitted, a clear argument that the ORB has made an error of law by misinterpreting the word 'negligent'. The word would probably be treated as a legal term of art like the words 'successor in title' in *Anisminic Ltd v Foreign Compensation Commission* (1969) and, as such, its interpretation would be a matter for the court to decide upon if necessary, substituting its own judgment for that of the ORB. An error in interpreting such a word would mean, as *Anisminic* established, that the decision-making body would have 'asked itself the wrong questions… thereby stepping outside its jurisdiction'.

It is apparent from the reasons given to Edward that the ORB has taken the word 'negligently' to mean 'not sufficiently efficient'. It is therefore apparent that the question asked by the ORB in the course of deciding Edward's case was: 'Does Edward's practice conform to a certain standard of efficiency?' This may conceivably connote an ordinary usage of the word 'negligently', but it is not the legal understanding. Assuming that the courts would view the word as a term of legal art, it is submitted that the question which should have been asked was: 'Is Edward's practice run with a lack of reasonable care for those who might foreseeably be harmed by lack of such care on his part?' It is apparent that the answer to that question would be in the negative, as the only complaint against Edward is that the practice is small, not that it is run with lack of reasonable care. (There is no suggestion that the practice is so small that it creates a risk to the health of those using it.) If it is accepted that the ORB has asked itself the wrong question, the result would be, *per* Lord Diplock in *Re Racal Communications Ltd* (1981), 'that the decision they reached would be a nullity', as it would have decided a matter which it was not empowered to decide and thus exceeded its *vires.* Therefore, a quashing order will lie to quash the decision.

The ORB might argue in its defence that the decision as to whether a practice is 'negligently run' is, rightly construed, one of fact and that errors of fact are not generally a ground of challenge on judicial review. However, an important exception relates to what are known as jurisdictional facts. This exception refers to instances where the decision-maker is only entitled to enter upon his inquiry if a particular fact exists. Here, 'the exercise of power, or jurisdiction, depends on the precedent establishment of an objective fact. In such a case, it is for the court to decide whether that precedent requirement has been satisfied' (*White and Collins v Minister of Health* (1939)). Since the ORB may only take the decisive action of designating a business as 'not approved' should it be 'negligently run', it would seem possible to characterise the existence of such negligence as a precedent fact, and therefore a matter for the court. If 'negligence' is taken as a factual, rather than a legal term, the court is likely to attribute a rather more broad range of

meanings to it, but the notion of 'inefficiency' *simpliciter* does not, on its face, seem congruent with the concept of negligence. The ORB might, however, argue that to make the court the assessor of whether a given business is 'negligently run' is to deprive it of the exercise of judgment in its area of expertise—a freedom which Parliament intended to give it under the statute. In other words, it could contend that the finding of negligence is not a precedent fact which entitles it to enter upon the real inquiry, but rather one of the principal roles it is given under the statute. Recent developments, however, indicate that the courts are becoming more willing to strike decisions down on the basis of error of fact, even if that fact is not jurisdictional. In *Criminal Injuries Compensation Commission ex p A* (1999), four of their Lordships accepted that a decision on a 'crucial matter' which was tainted with a material error of fact could be quashed. Clearly, the finding that Edward's business is 'negligently run' is the crux of the matter. Provided that the error is clear and unarguable, rather than a matter of opinion on which the court would consider itself bound to defer to the expertise of the ORB, Edward should succeed on this ground.

The decision not to approve Fanny's practice now falls to be considered. The ORB's policy with respect to recently established practices will be considered first. There can be, as Lord Reid observed in *British Oxygen Co Ltd v Board of Trade* (1971), 'no objection' to a body evolving even a fairly precise policy with respect to its area of remit. What it must not do is apply this policy rigidly in every case; it must still decide each case on its merits and consider whether an exception to the policy should be made. Thus, in the *British Oxygen* case, the Board had a policy of not giving grants for items costing less than £25, but their Lordships found that it was willing to hear reasons from any applicant as to why the policy should not be applied in his case. By contrast, in *Secretary of State for the Environment ex p Brent LBC* (1982), the minister refused to hear representations from the authority before applying his policy; consequently, his decision was unlawful. In the instant case, the ORB granted Fanny a hearing; if it could show that it knew the age of Fanny's practice before it held the hearing, there would be a strong inference that it was prepared to consider making an exception, since otherwise the hearing would have been a waste of time. This argument would be hard to refute; it could be claimed that the ORB only held the hearing to avoid falling foul of the rules of natural justice, and if Fanny could convince the court that the apparent preparedness to consider exceptions was only a sham, *North West Lancashire Health Authority ex p A and Others* (2000) is authority for the proposition that the policy would therefore be considered as truly rigid and thus unlawful. However, without actual evidence of this, it would be hard to destroy the inference that the ORB must have been holding the possibility open of making an exception to its policy, and therefore made a lawful decision.[1]

The ORB's other ground for making its decision about Fanny may now be considered. Clearly, if the allegation in the overheard gossip against Fanny's practice were to be true, the practice could not reasonably be considered a 'credit to the profession', and approval would have been properly withheld. The ORB may, however, have made a finding of fact on the basis of no evidence. There is much *dicta* of high authority to support the proposition that, as du Parcq LJ said in *Bean v Doncaster Amalgamated Colleries Ltd* (1944), 'to come to a conclusion which there is no evidence to support is to make an error in law'. Thus, in *Coleen Properties v Minister of Housing and Local Government* (1971), the minister had disagreed with an inspector's recommendation that it was not reasonably necessary to purchase a given property in order to redevelop an area, but had cited no evidence to justify his disagreement. The decision was quashed. However, it would appear that in cases where there is any evidence at all, however flimsy, 'its weight is entirely for the inferior court' (*per* Lord Sumner in *Nat Bell Liquors Ltd* (1922)). The exception appears to be where the evidence is so flimsy that reliance upon it may be considered perverse. In *Puhlhofer v Hillingdon LBC* (1986), Lord Brightman remarked:

> Where the existence or non-existence of a fact is left to the judgment and discretion of a public body, and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of that fact to [that body], save where it is obvious that the public body, consciously or unconsciously, is acting perversely.

However, the recent decision in *ex p A* (above) appears to have tightened up this requirement. It could, in any event, plausibly be argued on behalf of Fanny that to make an important decision with a severe effect on someone's livelihood, on the basis of unsubstantiated gossip from what may be an anonymous source, is a wholly irresponsible and indeed perverse act, or alternatively that such gossip cannot reasonably be said to amount to 'evidence' at all.[2] Either argument would seem quite likely to succeed.

The decision not to approve Fanny's practice could also be attacked under the head of irrationality. It is arguable that in effect, to condemn a practice which has been widely praised because of overheard gossip which could well be malicious or mere rumour is a decision which is 'so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it'—the test laid down in the *GCHQ* case. Such an argument may well have more chance of success than the illegality argument, although because of the somewhat subjective nature of the irrationality head, it is difficult to predict how a court

will receive it. It is therefore submitted that Fanny has some chance of success on this basis.[3] She will probably be seeking a mandatory order to compel the ORB to reassess her practice, as in *Padfield v Minister of Agriculture* (1968).

Julia's grounds of complaint will now be considered. It is well established that where an authority is endowed with power to achieve one goal, and uses it to achieve another, that exercise of power is unlawful (*Hanson v Radcliffe* (1922)). In the instant case, no purpose is stated in the parent Act, but the courts have been prepared on a number of occasions to infer a purpose (as in *Padfield's* case) and then hold a decision *ultra vires* for not conforming with that purpose. It could be sensibly inferred here that the statute creating the ORB had the purpose of raising standards amongst opticians by providing performance incentives through grants to meritorious practices. If the block approval was made with the purpose of decreasing unemployment (the hope being that the practices receiving the grants would expand and employ more staff), or even if the ORB was influenced by that consideration, then the decision will be a nullity for illegality or possibly for unreasonableness.

The situation is, however, complicated by the fact that all the practices approved are, as Julia concedes, meritorious and therefore could properly be approved within the purposes of the Act. Where a decision has been taken with both a proper and an improper purpose in mind, the approach of the courts has been to ask whether it would have been taken in the absence of the improper consideration. If it would not (as in *ILEA ex p Westminster City Council* (1986)), then the decision is unlawful. If the same decision would have been taken without the improper motive, as in *Brighton Corp ex p Shoosmith* (1907), then it will be allowed to stand. In the instant case, the motives behind the ORB's decision would be a matter for evidence, but *prima facie* it would seem unlikely that a block approval of 30 practices would have taken place without the additional motive of the Councillors. Moreover, the *ILEA* case also suggested that the test of whether the improper purpose 'materially' affected the decision could be used; a test which would clearly be easier to satisfy. Assuming that the ORB was materially influenced by the desire to address the problem of unemployment, Julia would have a reasonable chance of demonstrating the decision to be unlawful. If so, as discussed in relation to Edward, a quashing order would lie to quash it.

Notes

1 Students could note that as Emery and Smythe point out, any policy developed must be 'consistent with the objects' of the relevant Act ((1986), p 196). If it is not, then paying heed to it would amount to taking irrelevant

factors into account when making a decision which can render a decision vitiated for unreasonableness as, for example, in *Padfield v Minister of Agriculture* (1968). The statute creating the ORB can reasonably be presumed to have the purpose of raising standards amongst opticians by providing performance incentives through grants to meritorious practices. It may be considered reasonable to withhold approval from practices until they have established their efficiency over a reasonable period of time, in order to avoid grants being given on the basis of a very short term effort by a practice.

2 Students could put the further, alternative argument that the case can be distinguished from *Nat Bell*, because that case involved a criminal trial in which the laws of evidence disallowed the kind of 'evidence' upon which Fanny's case has been decided, so that Lord Sumner was pronouncing upon evidence which did have some basic credibility as being legally admissible.

3 The further point could be made that for the case built on the ORB's consideration of the gossip against Fanny to be successful, Fanny would also have to satisfy the tests considered in the last paragraph of the text above relating to Julia.

Question 29

'It is often said that judicial review is intolerably uncertain and amounts to little more than a licence for judges to interfere arbitrarily with the machinery of government and administration' (Emery and Smythe, *Judicial Review*, 1986).

Is this a fair criticism? If so, is this a failure on the part of the judiciary?

Answer plan

This is a fairly typical essay question on judicial review, in that it demands an evaluative approach. Essays in this area are often concerned with the efficacy of judicial review. In this case, the focus is narrowed to a discussion of the charge of uncertainty, but this still leaves a very large area which could be discussed. However, students would not be expected to assess every sub-head of judicial review for certainty. A sensible solution, therefore, would be to focus on the controversial, ambiguous areas, while indicating briefly which are the more settled grounds. The answer below selects certain of these areas; it would be perfectly legitimate, however, to use other examples, such as the uncertain scope of the duty to give reasons or the issue of when legitimate expectations may receive substantive protection.

Essentially, the following areas should be covered:

- the areas of uncertainty in procedural impropriety: express requirements analysed as mandatory/directory; the chances of intervention are uncertain, even if requirement is mandatory: the conflicting views on when courts should refrain from intervention;
- natural justice: the duty to act fairly—the vagueness of the test for applicability;
- illegality: notions of fettering by policy/delegation are reasonably settled; the notion of error of law: inconsistencies and the problem of determining error in applying law to facts; improper purpose—a problematic notion; uncertainty in determining what is a relevant or irrelevant consideration;
- irrationality: incoherence of the notion; its essentially subjective nature; radically different approaches to the protection of human rights;
- conclusion: an uneven picture.

Answer

A comprehensive discussion of the above criticism of judicial review would clearly be impossible in this context if any depth of discussion is to be maintained. Accordingly, in what follows, discussion will focus on those heads which are the subject of particular debate and controversy. An effort will be made to ascertain how fixed the principles governing intervention are, and to reveal whether, in certain cases, apparent principles are merely a cloak to allow improper intervention.

Procedural impropriety is one of the three main grounds of review identified by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* (1984); it can denote both a failure to observe express procedural requirements (most commonly consultation) and a breach of the common law rules of natural justice. When dealing with the effects of failure to undertake statutory consultation, the courts have tended to classify such requirements as either mandatory or directory. Breach of a mandatory requirement will render the decision or act in question invalid, in contrast to breach of a directory requirement which will not. Unfortunately, no determinative tests for deciding when the test should be classified mandatory and when directory were developed, other than whether the language used was imperative or permissible. Since, however, in many cases, the courts found that use of words such as "the minister may consult" did not give him an open-ended discretion on the matter, certainty remained elusive. Since Parliament generally gives very little guidance as to whether such requirements must be complied with, the courts have started to turn towards a more 'impact-based' approach. This recent

approach, exemplified by the decision in *Lambeth London Borough Council ex p Sharp* (1986), is to ask what impact the failure to consult has had on the persons who should have been consulted and on the public at large, in the light of the *purpose* of the consultation requirement in question. In other words, the test is whether the failure to consult has substantially detracted from the purpose which would have been served by consultation. Since it may often be easier to determine the purpose of a duty to consult than whether it was intended to be compulsory, this approach is likely to lead to somewhat more certainty.

Clearly, much of the responsibility for the present uncertainty must be borne by Parliament which, as Emery and Smythe note, does not specify the consequences of a breach of the requirement imposed 'in the vast majority of cases' (*Judicial Review,* 1986, p 208). Indeed, it is arguable that by constantly leaving the matter open in the knowledge that the status of the requirements will be determined by the judiciary, Parliament is signalling its acquiescence in the court's tendency to take a pragmatic and flexible approach at the expense of certainty.[1]

However, the judiciary is perhaps open to criticism for having failed to resolve uncertainty as to the fundamental rationale for intervening in this area; the case law seems to reveal substantial disagreement on this point. In *Secretary of State for Social Services ex p Association of Metropolitan Authorities* (1986), the court refused to quash delegated legislation it had found to be unlawful, on the ground that to do so would cause great administrative inconvenience. This decision seems to imply that the courts' role is that of a pragmatic administrative facilitator; in stark contrast, Lord Denning has said that 'Even if chaos should result, still the law must be obeyed' (*Bradbury v Enfield* (1967)), a statement which seemed to be advocating an absolutist enforcement of the law for its own sake. Thus, as the basic justification for intervention is the subject of dispute, there can be little prospect of consistency in intervention. Therefore, leeway is created for an appearance of arbitrary intervention.

In the area of natural justice, the *audi* rule will be discussed as being the less settled of the two rules. There are perhaps two main questions to be considered. One is the issue as to when the rules will apply, the other the controversy concerning what will satisfy the rules in a given situation. In their treatment of the second of these areas, the courts have again taken the flexible approach—in this case, by allowing compliance with the *audi* rule to be fulfilled by widely differing conduct in different situations.[2]

The growth of the notion of the 'duty to act fairly' (perhaps originating from *Re HK* (1967)), an even more flexible concept than the *audi* rule, epitomises the apparent determination of the judiciary to avoid laying down rigid rules or to force administrative decision-makers into adopting a

more judicial approach. Rawlings, among others, has commented that from the point of view of an administrator anxious to know what he must do to ensure his decision is correct, this notion is 'hopelessly imprecise', for 'all [the administrator] knows is that he must be "fair"—and what fairness requires in the particular circumstances he can only find out when the court…tells him that he has or has not been fair' ((1986) 64 Public Administration 140–41).

It is arguable that Rawlings is somewhat overstating the case: for example, an administrator *does* know that a person must be informed of the substance of the case against him (*Secretary of State, etc ex p Philippine Airlines Inc* (1984)), but his argument that flexibility has been taken too far is certainly attractive. It is, however, difficult to see how a degree of uncertainty could have been avoided, given the huge range of situations to which natural justice applies. A greater rigidity in the rules might create the risk that either low-level administrative decisions would be shackled with inappropriately stringent procedural requirements, with a consequent loss of efficiency and speed, or that disciplinary hearings would give insufficient procedural safeguards to those whose cases they were trying. Again, in allowing the situation to develop as it has, Parliament must shoulder some responsibility for not attempting greater clarification through legislation.[3]

In considering the head of 'illegality', one might reasonably expect that the tests determining when a body has stepped outside its jurisdiction would be more precisely defined; indeed, this expectation is to a certain extent borne out by practice. There are a number of reasonably clearly defined acts that will render a body's decision unlawful. These include doing an act which an authority is not in the simplest sense empowered to do (for example, establishing a commercial laundry when empowered to provide municipal wash houses: *AG v Fulham Corp* (1921)), and effectively failing to exercise a statutory discretion by applying a policy rigidly in every case or by improperly delegating the decision to another body or person (*Secretary of State for the Environment ex p Brent LBC* (1982) and *Ellis v Dubowski* (1921) respectively). It is also clear law that public bodies may not use powers granted to fulfil one objective for quite another (*Porter v Magill* (2002)).

It could be noted, however, that ambiguity can arise in the case of decisions made for a plurality of purposes—some proper, some improper. This ambiguity is nicely illustrated by the fact that Glidewell LJ, embroiled in the complexities of such a case in *ILEA ex p Westminster City Council* (1986), drew 'comfort' from the fact that the area was admitted by De Smith to be 'a legal porcupine which bristles with difficulties'. A further issue in the application of the 'purpose axiom' arises from those cases where the statute under which the body makes its decisions does

not lay down its overall purpose or does so only in the most general terms. In dealing with this area, the courts have been accused of using their practice of inferring a purpose as a means whereby to interfere with policy. Often, the purpose inferred is uncontroversial or the courts only go so far as stating—in effect—that, whatever the purpose of the body's power may be, it is not to enable it to do the act complained of (as in the well known case of *Barnsley MBC ex p Hook* (1976)). In other cases, however, the judiciary has been accused of inferring an unwarrantably narrow purpose from an act which appears to grant broad discretion, and then holding a decision unlawful because it is not in conformity with this purpose. Arguably, this technique was adopted by the Lords in *Bromley London Borough Council v GLC* (1983) in order to quash a GLC policy to subsidise public transport from the rates.

Other difficulties arise in relation to the principle that taking into account irrelevant considerations can invalidate a decision, as can failure to have regard to relevant matters. The problem is simply that it may be extremely difficult for a decision-maker to predict what will be seen as a relevant or irrelevant matter by a court. Again, Parliament must share some of the responsibility here, as it very often paints discretion in the broadest of language, leaving it almost wholly unclear as to what may or may not be taken into account. For example, the courts have had to face, in a number of recent cases, the question of whether local authorities, in making various decisions which involve resources (for example, provision for old people and children with special educational needs), may take into account their own limited financial resources, and if so, at what stage of the decision-making process. In *Gloucester County Council ex p Barry* (1997), the Council, if it considered that a disabled person had certain 'needs', was under a statutory duty to make arrangements to cater for them. Barry had been previously assessed as having certain needs, which were fully catered for in 1992 and 1993. In 1994, the Council told him that due to central government cuts in its funding, it was no longer able to provide for his full needs. The House of Lords held, by a 3:2 majority, that in assessing 'need', the Council had to consider what was an acceptable standard of living. In assessing that, the authority could have regard to its own resources, and so had not acted unlawfully. In contrast, in *Sefton Metropolitan Borough Council ex p Help the Aged* (1997), the court drew a distinction between: (a) assessing a person's needs; and (b) deciding what to provide in order to meet those needs. In determining the first question, the court said that an authority could, following *Barry,* take into account resources, but once it had decided that a particular person was in need, it came under a binding duty to provide for those needs and lack of resources was not relevant. *Barry* was distinguished again in *East Sussex County Council ex p Tandy* (1998). Here, a

local authority had a duty to provide 'suitable education' for the children in its area. Tandy had been unable to attend school and had received five hours a week tuition, funded by the Council. In 1996, the authority reduced this to three hours because of financial constraints. On its face, the situation seemed very similar to *Barry*—an initial provision being reduced to save money. However, the court found that the concept of 'suitable education', unlike a person's 'needs' (as in *Barry*), was objective, and did not vary according to resources. In taking account of its own resources in deciding what was 'suitable', the authority had had regard to an irrelevant consideration. These cases scarcely leave local authorities with clear guidance on the issue. How was a council to know in advance that the concept of a 'suitable education' is to be assessed entirely independently of resource availability, whereas a person's 'needs' are resource-relative? It could in fact be argued that it is difficult to assess what is a suitable education without considering the resources available for that and other levels of education, whereas the concept of 'need' is more objective. There is a strong whiff of arbitrariness about these decisions; they certainly provide the most uncertain guidance to councils struggling to reconcile statutory duties with scarce resources.

It has also been clearly established, by *Anisminic Ltd v Foreign Compensation Commission* (1969) that any error of law made by a body, such as misinterpreting a statutory provision as in *Anisminic* itself, will (as Lord Diplock said in *Re Racal* (1981)) 'result in [it] having asked [itself] the wrong question with the result that the decision…would be a nullity', a finding clearly and emphatically restated by the House of Lords in the case of *Boddington v British Transport Police* (1998). The rationale is that by asking the wrong question, the body had decided an issue it was not empowered to decide and thus exceeded its *vires.* The courts have certainly made a great stride towards greater clarity and simplicity in the law by abolishing the arcane and elusive distinction between jurisdictional and non-jurisdictional errors. The basic principle is now clear enough, but probing deeper, one may find areas of uncertainty. Just one will be highlighted here, namely, the defining of errors of law made in applying the law to the facts or drawing inferences. While it is now clear that any error of law can lead to the decision being quashed, the question is what is meant by 'error'. In many cases, the answer to what the law requires will be one on which reasonable people will disagree. Will the court invariably substitute its opinion of what the law is or what finding it should yield in the particular case for the opinion of the tribunal? The courts have drawn a distinction here between two things: (a) what is the correct interpretation of the law?; and (b) what is the 'right answer' when you apply that legal test to the facts of the situation?

Broadly speaking, the courts have held that they can substitute their opinion on (a) for the original decision-maker, but that when it comes to (b), they will take a more restrained approach. A good illustration of the distinction and its application may be seen in the case of *Monopolies and Mergers Commission ex p South Yorkshire Transport Ltd* (1993). Here, the Secretary of State could refer a proposed merger to the Commission if the merger would mean that the supply of over 25% of the service in question 'in a substantial part of the United Kingdom' would be in the hands of only one person. The question at issue was whether the 'substantial part of the UK' test was satisfied. On the interpretation point, the House of Lords said that it was the courts' role to decide what 'substantial' meant in the context of that statute. But if, having been defined, the test for 'substantial' was so imprecise that different decision-makers, applying it to the facts in front of them, might reasonably come to different conclusions, the conclusion the decision-maker had reached would only be quashed if it was not within the range of reasonable responses open to a reasonable decision-maker.

One objection to this is that it imports the inherently uncertain *Wednesbury* unreasonableness test into what is supposed to be the more 'hard edged' area of illegality. However, it seems apparent that the practice of drawing a distinction between the question of what the word 'substantial' means when used in a particular statute, and whether any given geographical area in fact fits that definition is eminently sensible. For the test appears, broadly speaking, to assign questions of statutory interpretation to the specialists in that area (the judiciary) and what are ultimately questions of fact and common sense to those with the relevant knowledge of the area concerned. Moreover, it acknowledges openly that the question of whether a given piece of land comes within an inherently broad and flexible test such as 'substantial' has no 'right' answers, so that the decision may as well be taken by the person with the best knowledge of local, relevant circumstances. The test means, in effect, that only errors in making 'judge'-like decisions are subject to judicial review. There is clearly room for differences of judicial opinion as to what kind of decisions on factual matters are perverse, or outside the range of reasonable possible responses, and therefore a degree of uncertainty is associated with the test. However, it is submitted that it is based on reasonably workable distinctions and cannot therefore be fairly assessed as intolerably uncertain.

This accusation can, it is submitted, have more applicability to the head of irrationality. The head seems to be expressed in two different ways, both of which reveal muddled judicial thinking. Lord Diplock's definition of irrationality in the *GCHQ* case seems essentially redundant; it is hard to visualise circumstances in which a decision which is outrageously

immoral or illogical would not in any event be seen by the judiciary as being outside the purposes of the governing statute and therefore *ultra vires*. The head of irrationality is alternatively expressed as referring to decisions which are so unreasonable that no reasonable person could come to them. Three comments can be made about this definition. First, such decisions would again surely be outside the purpose of the parent Act; secondly, as Jowell and Lester argue, the definition is tautologous (a decision is unreasonable if a reasonable man could not have made it). Thirdly, the definition seems to be merely another way of saying that the decision has fallen foul of the test considered above: in other words, the decision-maker has come to a conclusion which is not *capable* of being considered correct. For these reasons, it is submitted that the doctrine of unreasonableness as currently understood adds nothing to the law of judicial review and should be abandoned as its subjective nature inevitably renders it uncertain. In that respect, Lord Cooke's recent comment in *Secretary of State for the Home Department ex p Daly* (2001), 'I think that the day will come when it will be more widely recognised that [*Wednesbury*] was an unfortunately retrogressive decision in English administrative law', is a welcome harbinger of possible future change. However, in going on to say only that it 'may be that the law can never be satisfied' merely by finding that a decision was not absurd, Lord Cooke adds further uncertainty to the law.

It is clear that, overall, a mixed picture has emerged. In some cases, incoherent doctrines have left judges open to charges of unwarranted interference. However, many workable principles have been developed, and uncertainty can be due to the range of situations to which review applies, or to Parliament's failure to legislate clearly on the subject in hand. The charge of intolerable uncertainty can therefore, it is submitted, have only uneven application to the law of judicial review.

Notes

1 Students could note that the factors employed to draw the distinction include the 'relation of the provision to the general object intended to be secured by the Act' (*Howard v Bodington* (1877)), whether prejudice will be caused by the proposed action to those supposed to be consulted, and whether the failure to (for example) give reasons for an act can be remedied in some other way (as in *Howard v Environment Secretary* (1975)).

2 Examples could be given of this wide variation. Thus, in the context of disciplinary hearings of prisoners before the Board of Visitors, the rules of natural justice (in tandem with limited statutory provision) demand that prisoners should be allowed to call witnesses, cross-examine those giving

evidence against them (*Board of Visitors of Hull Prison ex p St Germain (No 2)* (1979)) and, in some circumstances, be allowed legal advice (*Secretary of State for the Home Department ex p Tarrant* (1985)) while, at the other end of the scale, in the context of a decision by the minimum wage board, natural justice did not require an oral hearing (*Judge Amphlett* (1915)).

3 Students could note that in the area of determining when natural justice will apply, the judiciary can be criticised not only for leaving the law uncertain but for unwarranted intervention in decision-making. In *Home Secretary ex p Khan* (1984), the court held that the Home Secretary could not depart from a previously expressed policy under which a foreign child would have been given clearance to enter the UK, without notifying the applicant (who wished to adopt the child) of the change. In its judgment, the Lords was arguably blurring the notion of the applicant's right to be heard in relation to the new policy with the notion that the applicant had a right *simpliciter* that the policy would remain the same as it had been. It can be contended that here, the judiciary was using a flexible principle as a cloak under which to reverse a change of policy which it considered unfair.

Question 30

'The law of judicial review before the Human Rights Act 1998 provided uncertain and unsatisfactory levels of protection for civil rights and freedoms.'

Consider how far you agree with this statement, and how far the Human Rights Act has changed this situation. Take into account decided cases under the Act.

Answer plan

The first part of this question is currently a very popular subject with examiners, given the current dynamic state of the law in this area, while the issue of the impact of the HRA is almost bound to come up during the next few years.

Essentially, the following matters should be discussed:

- the traditional approach of judicial review to civil rights;
- the approach suggested by Laws J;
- how this approach found some acceptance in subsequent case law;
- conclusion on the state of protection prior to the HRA;
- the impact of the HRA: the rights and exceptions to them;
- the new duty of statutory construction: infringement of rights to become a new ground of review.

Answer

Historically, judicial review has not been greatly concerned with the protection of human rights *per se.* Since its traditional basis has been the *ultra vires* doctrine, and since liberties have been mainly residual rather than being granted positively by statutes, this is perhaps not surprising. Cases such as *GCHQ* (1984) showed some recognition of the importance of civil rights—in that case, freedom of association—but up until quite recently, they have generally played a marginal role in public law. This essay will examine how much impact the more rights-orientated approach of recent years has had, the limitations inherent in this approach, and the change brought about by the Human Rights Act (HRA) 1998.

Calls for a more rights-based approach to judicial review had multiplied in the years before the HRA. Jowell and Lester, in a well known article ([1987] PL 368) argued that the *Wednesbury* unreasonableness test had for some time been used as a cloak under which substantive principles of review—proportionality, respect for human rights and legal certainty—had been cautiously and sporadically deployed. The authors called for a more explicit acceptance and application of these values; they made the concrete proposal that the courts, when reviewing decisions taken under statute, could perfectly legitimately apply a presumption—displaceable only by clear statutory language—that Parliament did not intend to authorise actions incompatible with the UK's obligations under the European Convention on Human Rights (ECHR).

Such an approach was roundly rejected by the House of Lords in the *Brind* case (*Secretary of State for the Home Department ex p Brind* (1991)), on the basis that the imposition of such a presumption would amount to *de facto* incorporation of the Convention 'by the back door', since the effect would be to render all administrative decisions violating the Convention unlawful, even if there was clear authorisation in the accompanying statute. This, the Lords thought, would be a usurpation of judicial power, given Parliament's persistent refusal to introduce the Convention through legislation.

Partly in response to this decision, Laws J put forward a thesis as to how judicial review could be developed ([1993] PL 59) which, he argued, avoided their Lordships' objection to the Jowell and Lester approach, but would afford far greater protection to fundamental rights than the traditional *Wednesbury* grounds. The main thrust of his argument is briefly as follows. Laws J proposed that review could develop such that in a case in which the exercise of discretion could have an adverse impact on fundamental rights, a two stage test would be imposed by the courts. The first stage would be the imposition of an interpretative presumption, that no statute's purpose could include interference with fundamental rights

embedded in the common law, and that such interference will only be allowed if it is demonstrated that reading the statute to permit such interference is the only interpretation possible. Laws argued that their Lordships had been invited in *Brind* to make a presumption that the statute they were considering was not intended to give power to infringe Art 10 of the ECHR. This approach was rightly rejected, he argued, on separation of powers principles, which forbade incorporation 'through the back door'. The correct approach, he argued, would be to view that the norms implicit in the ECHR are already reflected in the common law—an approach which gained some support from the House of Lords' decision in *Derbyshire (Derbyshire CC v Times Newspapers* (1993)) -and that it is the importance that the common law consequently attaches to fundamental rights which makes a presumption that statutes do not intend to facilitate infringement of such rights a permissible, indeed, legitimate one.[1]

This approach was demonstrated in some notable cases. *Lord Chancellor ex p Witham* (1997), a judgment of Laws J himself, concerned a challenge to a decision of the Lord Chancellor, who, acting under a general power to make regulations as to the level of court fees, removed the exemption from such fees for persons on income support. Given that the fee for issuing a High Court writ was simultaneously increased to £500, this effectively meant that unemployed people were not able to commence proceedings, and hence effectively were denied access to the courts. Following his own suggested approach, the judge first of all found that access to the courts was a fundamental right; secondly, that in the absence of very clear wording, it was presumed that Parliament had not given power to a minister to invade this right; and thirdly, that the statute did not contain any such wording, being phrased in general terms. He thus adjudged the rule removing the exemption from court fees for those on income support to be *ultra vires* and struck it down.

This approach gained acceptance from the House of Lords in two important decisions. Lord Hoffmann remarked in *Secretary of State for the Home Department ex p Simms* (2000) that 'fundamental rights cannot be overridden by general or ambiguous words'. The House of Lords found that general words in a statute were not sufficient to warrant a rule laid down by the Home Secretary that prevented a prisoner from contacting journalists with a view to starting a campaign that his own conviction amounted to a miscarriage of justice. Freedom of expression was held to be a common law right, to be ousted only by express words or necessary implication. In *Secretary of State for the Home Department ex p Pierson* (1998), Lord Browne-Wilkinson summarised the principle thus:

> A power conferred by Parliament in general terms is not to be taken to authorise the doing of acts by the donee of the power which adversely

> affect the legal rights of the citizen…unless the statute conferring the power makes it clear that such was the intention of Parliament.

These decisions show how far the basic doctrine of *ultra vires*, coupled with a readiness to impose strong presumptions as to legislative intent on Parliament, can go.[2] Indeed, in stating that express words would be required to remove the right of access to the courts, Laws J in *Witham* effectively gave notice that there were certain rights in defence of which the judiciary would be prepared to suspend the doctrine of implied repeal, an approach which, as we shall see, is actually more radical than that of the HRA itself. The essential problem with this situation was that with the exception of certain established categories, it was very difficult to know when a judge would decide that a given right is sufficiently firmly 'embedded' in the common law to justify the imposition of such strong legislative presumptions.

The second stage of Laws' suggested approach was perhaps more ambitious. He notes that it is well established that the courts insist that relevant considerations should be taken into account when making a decision, but hold that the *weight* to be given to those considerations is entirely for the decision-maker to determine. He then suggests that on principle, while this may be a reasonable approach when the matter under consideration involves such issues as economic policy, in cases where fundamental rights are at stake, this would mean that the decision-maker would be free 'to accord a high or low importance to the right in question, as he chooses' which 'cannot be right' if the right is to be taken seriously. The courts, he suggested, should therefore insist that the right could only be overridden if an 'objective, sufficient justification' existed so that the infringement was limited to what was strictly required by the situation.

In *Ministry of Defence ex p Smith* (1996), this approach appeared to find partial acceptance: Sir Thomas Bingham MR accepted the following submission of David Pannick QC that: '…the more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable' (p 263). This sounds almost like an echo of Laws' prescription. However, the sting lies in the meaning of the word 'reasonable'; it denotes only a decision which is 'within the range of responses open to a reasonable decision-maker'. In other words, the prescription adopted seems to be this: the decision-maker is required to take account of human rights in appropriate cases; further, he must have a more convincing justification the more his decision will trespass on those rights. But that decision remains primarily one for the decision-maker. The courts will only intervene if the decider has come up with a justification which no reasonable person could consider trumps the human rights considerations—a position which seems to take us almost back to

classic *GCHQ* irrationality. At present, therefore, the more rights-oriented approach may appear merely as a gloss only superficially overlaying traditional principles.

Where, therefore, the *ultra vires* approach used in *Simms* and *Witham* could not plausibly be used, and the approach had to be framed in terms of *Wednesbury,* the attempt to utilise judicial review to provide a strong defence of rights met with flat rejection from the higher judiciary. In *Cambridge Health Authority ex p B* (1995), which concerned a challenge to the Health Authority's decision not to allocate funds to the treatment of a young girl suffering from leukaemia, Laws J applied his own second stage approach, reasoning that the girl's right to life, threatened by the Authority's decision, could only be overridden by a substantial public interest justification, the sufficiency of which would be determined by the judge. Finding that no such justification had been provided, he found the Authority's decision to have been unlawful. His judgment was swiftly overturned on appeal. Lord Bingham MR found that the appropriate test was straightforward, narrow *Wednesbury:* the court could only intervene to quash a manifestly perverse decision. The threshold of unreasonableness had not even been approached by the Authority and its decision should stand.

Thus, the pre-HRA position revealed great potential in the law of judicial review for greater rights protection and some manifestation of that potential. But, it also revealed radical divisions within the judiciary, uncertainty as to which rights will merit strong protection and disagreement as to how strong that protection should be. In some cases, such as *ex p Smith,* the rhetoric of rights yielded barely any greater protection in practice than the old *Wednesbury* approach. Moreover, there are cases on the books in which may be found refusals even to recognise the existence of the claimed right (privacy in *Malone* (1979)) or, less extremely, denials of any duty to modify the traditional grounds of review to ensure rights protection (*Secretary of State for the Environment ex p Nalgo* (1993)). Consistency and coherence are conspicuously lacking.

How far then has this situation been remedied by the introduction of the HRA? It is suggested that six key changes have been brought about. These are considered in turn, with discussion of relevant case law where necessary.

First of all, the Act, by incorporating the ECHR, has made it clear which rights are recognised as fundamental; this is no longer left to the views of individual judges. Secondly, the Convention spells out the permissible grounds for derogating from the rights. Although the exceptions to Arts 8–11 are expressed in very broad and general terms, Arts 3 and 6 have no express exceptions, whilst Arts 2, 4 and 5 permit only tightly defined and narrow exceptions. Moreover, even in relation to the rights with generalised exceptions (Arts 8–11), at least some of the detailed work in elucidating the

appropriate balance between particular rights and particular exceptions has been done by the European Court of Human Rights; such jurisprudence has to be taken into account by UK judges (s 2 of the HRA). Moreover, *dicta* in *Alconbury* (2001) instruct the courts that they should follow the 'clear and settled case law' of the European Court of Human Rights, save in exceptional circumstances.

Thirdly, and perhaps most importantly of all, s 6(1) of the HRA makes it clear beyond doubt that infringement of a Convention right will, *per se*, render an administrative decision or provision in delegated legislation unlawful, unless the enabling legislation clearly allows for or mandates the infringement (s 6(2)). Thus, there is now no uncertainty as to whether Convention rights are restraints upon broad discretions, mandatory considerations or even optional considerations, although as we shall see in a moment, that straightforward provision has given rise to a surprising amount of difficulty for the judiciary.

Fourthly, the pre-HRA doubts as to whether legislation can be presumed not to give power to infringe rights has been dispelled: in accordance with s 3(1) of the HRA, past and future legislation has to be read and given effect in a way which is compatible with Convention rights, if this is possible (incompatible legislation remains valid and of full effect (s 3(2) and s 4). The decision in *A* (2001) has made it clear that this very powerful rule of construction is to be applied rigorously, and may allow for the implication of words into statutory provisions, as well as strained readings of statutory language. *Re W and B* (*Children*) (*Care Order*) (2002) has tempered the strongly activist stance taken in *A* by clarifying that the courts may not effectively read entirely new provisions into statutes.

It is fair to say that decisions on s 3(1) have not removed all uncertainty as to its scope. Lord Nicholl said in *Re W and B* that a reading of legislation under s 3(1) should not 'depart substantially from a fundamental feature of an Act of Parliament' and similar *dicta* may be found in *Poplar Housing* (2001), *per* Woolf CJ and in *Lambert* (2001), *per* Lord Hope, but arguably this is precisely what occurred in A. The provision in question was intended to *exclude* judicial discretion to admit evidence of a woman's sexual history with the defendant, unless the specified, very narrow conditions set out by Parliament in the provision in question were met The effect of the majority decision was effectively to restore that discretion. How far s 3(1) allows the judiciary to go has not therefore been wholly settled. But the position is still far clearer than before the HRA.

The fifth effect of the Act is that it is no longer necessary to 'tag' human rights arguments onto existing grounds, such as *ultra vires* or *Wednesbury*, as in the cases discussed above. Section 7 of the HRA provides for proceedings

against public authorities simply on the basis that they have infringed Convention rights.

The final effect of the HRA is not as clear cut. On the face of it, the wording of s 6(1), 'It is unlawful for a public authority to act in a way that is inconsistent with a Convention right', meant that questions of whether rights have been violated become a matter of statutory construction of the Convention and its case law: thus, so it appeared, the question would be a hard-edged legal one, for determination by judges. There would be no more division between a primary decision by the decision-maker and a secondary review of it by the courts: the issue of infringement would be one in relation to which the courts must substitute their judgment of the matter for that of the decision-maker. So, at least, one would think from a straightforward reading of s 6(1) (see, for example, Leigh [2002] PL 265). However, the position, it turns out, is more muddy than that. In order to understand why, it is necessary to rehearse the three stage proportionality test as developed by the European Court of Human Rights which is applied to determine whether a *prima facie* violation of a right is nevertheless justified (the court must also find a basis in law for the interference). First, it must be asked whether the value protected by the proposed restriction on the right falls into one of the exceptions set out in the relevant Convention Article. In other words, was there a 'legitimate aim'? Secondly, if so, is it 'necessary in a democratic society' to protect the value threatened by the right? This has been interpreted as requiring a court to ask whether there is a 'pressing social need' so to act. Thirdly, it must be asked whether the action taken to protect the value in question went no further than was necessary.

It is in conducting this proportionality inquiry that the courts have somewhat detracted from the clear change that s 6(1) appeared to bring about. Some early judgments seemed intent on watering down s 6(1) into merely a modified *Wednesbury* test, so that the court would merely *review* the minister's own decision as to whether infringement of a Convention right was justifiable, interfering only if he had struck a manifestly unfair balance between the primary right and the competing social interests (see, for example, *Mahmood* (2001)). The courts in such cases emphasised that the HRA did not mean that they now stood in the minister's shoes, deciding for themselves whether the actions taken breached the Convention. Laws LJ spoke of a 'principled distance' between the courts' review and the minister's original decision. Standing in the minister's shoes seemed, however, to be precisely what s 6(1), in making the matter one of *law,* required of the courts and it was not long before the House of Lords reminded the lower courts of this, in *Daly* (2001). Lord Bingham said clearly that 'domestic courts must *themselves* form a judgment whether a Convention right has been breached', while Lord Steyn stressed that under

the Convention proportionality test, the courts were required to assess the balance struck by the decision-maker between the primary right and the competing interests, looking at the previously forbidden territory of the *weight* assigned by the decision-maker to the various factors in the balance. *Daly* therefore seemed to have scotched any attempt to equate the protection given under the ECHR with the heightened *Wednesbury* test used in *Smith* (above), though as Leigh notes, the decision in *Samaroo* (2001), with its emphasis on assessing whether the decision-maker had struck a 'fair balance' between the right and societal interests, was an attempt to shift the ground back to the *Mahmood* approach.

However, even if further cases stamp out these backslidings, one principle that judges have developed, related to the approaches taken in *Samaroo* and *Mahmood*, will continue to inject uncertainty into the rigour of the courts' review of Convention compliance in ministerial and other decisions. This is the notion of the 'area of discretionary judgment'. Essentially, when the court is deciding whether a given decision, which impacted on a Convention right, was proportionate to the aim pursued, it will extend an area of latitude to the body it is reviewing, thus abjuring a rigorous enquiry into proportionality, in deference to the 'area of judgment' or 'discretion' of another body. *DPP ex p Kebilene* (1999) provided an early endorsement of this doctrine, and it has been deployed in many cases since (perhaps most importantly in *Brown v Stott* (2001)). Effectively, the court affords great weight to the view of the decision-making body itself on the question of proportionality; this can lead it to intervene only where that body has manifestly got the question wrong. This can lead straight back to the approach in *Mahmood* and a dilution of the Convention protection. On the other hand, in some cases, it would seem undesirable for the court to rush to substitute its judgment where the matter was primarily one of real expertise, or of a considered social policy choice made by the legislature. The trouble at present is that some uncertainty has been imported into the application of the HRA, in that the courts have not yet made much progress in indicating when it is appropriate to apply a wide area of discretion, and when a narrow area, or no area.

In conclusion, the HRA has forcibly plunged the judiciary into the task of interpreting a series of broadly worded guarantees, around which a formidable and complex jurisprudence has already been generated. While this will create a period of uncertainty as to the detailed accommodation to be made between the rights and their inbuilt exceptions, particularly when further latitude—of as yet uncertain scope—has to be given to the views of the original decision-maker, the advent of the HRA has firmly dispelled the quite fundamental uncertainties as to the place fundamental rights hold in public law which pertained before its coming into force.

Notes

1 Students could note the problem with this approach, namely, that it is uncontroversial to assume that power is only granted on the understanding that it will be exercised rationally—indeed this could be said to be a basic requirement of the rule of law. By contrast, to assume that power is never granted to infringe basic liberties is to make a *substantive* claim about Parliament's values and priorities—a far more controversial claim.

2 It could be pointed out that both of these cases were examples of a rights-based approach sheltering behind an apparent deference to Parliament's intent. The real concern of the courts was not to enforce Parliament's intent, but to prevent the government from invading individual rights. The notion that Parliament could not have intended such outrages was largely a fiction—a particularly unconvincing one in the second case, as shown by the response of government and Parliament to the judgment: precisely those rules which the courts had said Parliament could not have intended to authorise were re-enacted, but this time in the form of primary legislation.

CHAPTER 8

OMBUDSMEN

Introduction

Questions about the Ombudsman system tend to concentrate on the Parliamentary Commissioner for Administration (PCA), but the Ombudsman system has been extended into a number of areas and, as explained below, does not operate in the same way in each. Therefore, it is necessary to be aware of other Ombudsmen. A knowledge of parliamentary procedures and of the scope of judicial review is valuable in tackling this area, because a typical question might concern the extent to which the Ombudsman system provides remedies for the aggrieved citizen not available by those means. The question most commonly asked concerns the efficacy of the Ombudsman despite the limitations of the system. Students should note that the PCA has an important role in policing adherence to the government's Code on Access to Information; this aspect of his work is dealt with in Chapter 10.

Checklist

Students should be familiar with the following areas:

- the provisions of the Parliamentary Commissioner Act 1967 and the setting up of the Ombudsman system, in particular: the nature of 'maladministration' under s 10(3); matters excluded from the scrutiny of the Ombudsman under Scheds 2 and 3 to the Act;
- the extension of the system: Local Commissioners, Health Service Commissioners, the Parliamentary Commissioner for Northern Ireland;
- the characteristics of the system (which do not apply equally to all Ombudsmen): lack of direct access, informal procedures, lack of formal remedies, the ability to persuade bodies to make widespread changes in administrative practices;
- the reforms suggested by the Cabinet Office Review (2000);
- the use of parliamentary procedures as a means of providing redress for maladministration.

Question 31

'The constraints on the Parliamentary Commissioner which appear to limit his power are actually a source of strength; if they were lifted, his role would, paradoxically, be less valuable.'

Discuss.

Answer plan

A question concerning the extent to which the Parliamentary Commissioner, or Ombudsman, is effective despite several factors impairing his efficiency is commonly set and is quite straightforward. This question introduces a variation on that theme, as it suggests that the Ombudsman is effective because of the restrictions rather than despite them. However, the issues to be discussed are the same in either case: what are the restrictions and what effect do they have? The further issue that this particular question raises concerns the extent to which the restrictions are beneficial and probably inherent in his role. A distinction could be drawn between such restrictions (if any) and those which are arguably not a necessary concomitant of his role.

The following matters should be considered:

- the aim in setting up the Ombudsman system;
- the nature of 'maladministration';
- the matters excluded from scrutiny;
- the detriment caused by the lack of direct access to the Parliamentary Commissioner for Administration (PCA);
- the informal procedure adopted by the PCA;
- the lack of coercive remedies available to the PCA and the beneficial impact of this;
- the impact of reforms suggested by the Cabinet Office Review (2000).

Answer

In addressing this question, a distinction will be drawn between two types of constraint on the PCA: first, those which appear to be a necessary concomitant of his role as presently conceived and which, if removed, would arguably create not only a completely different body but also a less effective one; secondly, those which, it will be argued, are *not* a necessary concomitant of his office and that impair his efficacy. The thrust of the argument will be

that on the whole, contrary to the statement to be discussed, constraints on the PCA weaken his efficacy, although it will be agreed that some are indeed a source of strength.

It will first be necessary to consider the role the PCA was set up to fulfil. The system was set up under the Parliamentary Commissioner Act 1967 (hereafter 'the Act') as a result of the perception which arose after the Crichel Down affair in 1954 that pre-existing judicial and parliamentary remedies did not provide adequate redress for members of the public who had suffered as a result of maladministration in central government. The PCA was given the ability to investigate a wider range of complaints than could be investigated in a court and given greater investigative powers than those available to MPs. He is empowered to consider 'maladministration' (under s 10(3) of the Act) as opposed to illegality. There will be some overlap between the range of administrative actions he can consider and those which can be considered where there is a statutory right of appeal or in judicial review proceedings, but it will not be great. A court can intervene in judicial review proceedings only where a decision is *ultra vires,* where it is considered *Wednesbury* unreasonable, where there has been a breach of natural justice or a breach of rights protected under the European Convention on Human Rights (ECHR), as incorporated into UK law via the Human Rights Act (HRA) 1998 (s 6(1)). In contrast, 'maladministration' has been described as 'bias, neglect, inattention, delay, incompetence, ineptitude, perversity, turpitude, arbitrariness and so on' (Richard Crossman in the debate on the Parliamentary Commissioner Bill 1967). The PCA in 1994 fleshed out the definition a little, making clear that it also included matters such as rudeness, discrimination, refusal to answer reasonable questions, neglecting to inform a person of a right of appeal against decisions and 'failure to mitigate the effects of rigid adherence to the letter of the law where that produces manifestly inequitable treatment' (HC 345,1993–94, para 10). Although these words are wide, they suggest a limitation of his role in that the PCA is, on the whole, concerned with procedural defects rather than with the merits of a decision. This distinction is contained in s 12(3) of the Act, which provides that the PCA may not investigate the merits of a decision taken without maladministration.

However, the distinction between substance and procedure is not always easy to draw (as appears from the contrast between the judgment of Nolan J at first instance and that of Lord Donaldson in the Court of Appeal in *Local Commissioner ex p Eastleigh BC* (1988)) and the PCA has complied with the demand from the Parliamentary Select Committee on the PCA to interpret his role widely. Therefore, this apparent limitation on the PCA's remit is less significant than may at first appear.

It must not be forgotten that once maladministration is found, it must be shown that it caused 'injustice' (s 10(3) of the Act). It was recently clarified in the case of *Parliamentary Commissioner for Administration ex p Balchin (No 2)* (2000) that 'injustice' is specifi cally *not* limited to identifiable loss or damage, but includes 'a sense of outrage caused by unfair or incompetent administration'.

However, there are a number of limitations on the powers of the PCA which, it will be argued, are *not* inherent in the nature of his office and *do* impair his efficacy. He is unable to investigate at all in certain areas. The bodies affected by the Act, which are set out in Sched 2, do not include public corporations, tribunals, the Criminal Injuries Compensation Board or, crucially, the police. The National Health Service and local authorities have their own Commissioners; three for the NHS were established progressively in 1972 and 1973 and Local Commissioners were established in 1974. Prior to 1987, the PCA's jurisdiction was limited to central government departments and agencies, but the Parliamentary and Health Service Commissioners Act 1987 amended the 1967 Act in order to add about 50 non-departmental public bodies (NDPBs) such as the Arts Council and the EOC to its remit. The Scotland Act 1998 requires the Scottish Parliament to legislate for the creation of an Ombudsman to investigate actions of the Scottish Executive (s 91), and the Scottish Public Services Ombudsman Act 2002 in fact creates an Ombudsman with a much broader remit, encompassing the devolved institutions, local government and the Scottish NHS. In relation to Northern Ireland, an Assembly Ombudsman was established under the Northern Ireland Act 1998 (see SI 1996/1298 (NI 8)). Under s 111 of the Government of Wales Act 1998, the Crown appoints a Welsh Administrative Ombudsman with power to investigate and report on complaints of maladministration on the part of the Welsh Assembly, its members, officers and a number of other Welsh public bodies (see Sched 9). In relation to the UK PCA, certain matters, set out in Sched 3 to the Act, are excluded from investigation. These include extradition and fugitive offenders, the investigation of crime by or on behalf of the Home Office, security of the State, action in matters relating to contractual or commercial activities, court proceedings and personnel matters of the armed forces, teachers, the Civil Service or police. The government has always resisted the extension of the Ombudsman system into these areas.

Of these restrictions, those attracting the most criticism have been the exclusion of contractual and commercial matters and of public service personnel matters. The *Fourth Report from the Select Committee on the PCA*, 1979, considered that both exclusions were unjustified. It considered that government was under a duty to use its purchasing power fairly and that this was particularly important where there was a risk that such power might be

used as a political weapon. Therefore, where commercial decisions were taken with maladministration, the PCA should be able to question them. Drewry comments that, 'Looking at other Ombudsman systems, such exclusions are rare—and the Northern Ireland PCA (whose office is modelled closely on that of the mainland PCA) does exercise jurisdiction in this area, without this causing any apparent difficulties' ('The Ombudsman: parochial stopgap or global panacea?', in Leyland and Woods (eds), *Administrative Law Facing the Future,* 1997, p 99). However, as Seneviratne notes (*Ombudsmen in the Public Sector,* 1994), in practice, this exception 'has accounted for few rejections, perhaps because its scope has been limited by successive PCAs who have decided that a service does not become commercial [merely] because a charge is made for it' (p 23). As regards public service personnel, the Select Committee accepted that matters relating to discipline, promotion and rates of pay should be outside the PCA's remit, but considered that no evidence had been shown of harm likely to accrue if other purely administrative acts of the government in its capacity as an employer were brought within it. Whatever justification might be put forward for this limitation, it is hard to show that the PCA derives positive benefit from being excluded from these areas and the PCA himself has said that such exclusion from his scrutiny may not reflect Parliament's intentions (PCA Annual Report for 1988). The Cabinet Office Review was generally cautious as to jurisdiction, merely recommending that there should be no overall reduction in the jurisdiction of the new Commission. By contrast, the Public Administration Committee, in its Report on the Review (HC 612, 1999–2000), took a more radical line: in answering the question, 'Should the legislation specify the bodies which are not within the Ombudsmen's jurisdiction, rather than those which are?', it answered, firmly, 'This change has been consistently recommended by our predecessor Committees and it should be seen as a basic principle of any new system'. One of their witnesses put it thus: 'The onus of jurisdiction needs to be shifted in favour of the complainant. All State agencies and their activities should be in jurisdiction unless otherwise specifically excluded.'

A further important limitation, the system of making the complaint through a Member of Parliament, has been much criticised: it is thought that this 'screening' of complaints does not serve the best interests of complainants.[1] The screening of complaints by MPs either before or after the PCA receives them could arguably undermine the importance of the PCA as a means of making up for the inefficacy of some parliamentary procedures. Select Committees and Questions in the House operate within the doctrine of ministerial responsibility; in other words, the expectation is that the minister in question will remedy matters. The PCA, on the other hand, looks behind that expectation and considers the workings of the administrative body itself. The

involvement of MPs in the process may mean that complaints which should lead to investigation in the department in question are dealt with through inadequate parliamentary procedures. The present system, as Justice pointed out in 1979, weakens the PC A, because he is unable to publicise himself as available to receive complaints when he is not so available.[2]

Some amelioration of this system has occurred: since 1978, where the PCA receives a complaint directly from a member of the public, the complainant's MP will be contacted and, if he is in agreement, the PCA will investigate. This system does not, however, encourage citizens to complain directly to the PCA and, due to his low profile, many will in any event be unaware that a complaint is possible. The primary concern of MPs about removing their screening function is the fear that allowing direct access would undermine their constitutional role as defenders of the citizen against the Executive (the main recent discussion may be found in the Select Committee Report, HC 33-II, 1993–94). Apart from any symbolic undermining, the concrete threat, according to the Select Committee, appears to boil down to the fear that 'direct access will result in the denial to members of expertise in the problems facing their constituents… This is to impoverish parliamentary, and thus, political life' (para 76). This argument seems flawed in its own terms: it fails to recognise that direct access by the public to the PCA need not necessarily cause any decrease at all in either the involvement of MPs in the matters raised or in the flow of information to them, the second of which is certainly vital to their role as scrutinisers of the Executive. The Committee argued that 'the publication of anonymised reports can never be a genuine substitute for direct involvement in the case which the member has referred' (HC 33–11, 1993–94). But this is not the only alternative to the present system. If direct access were introduced, the continued involvement and knowledgability of MPs could be ensured very simply: the PCA would simply copy the appropriate MP in with any complaint received, and with news of the investigation of the complaint (if he decided to take it up) as it proceeded. It does not seem clear that MPs' constitutional role necessarily demands that they should have to make the decision as to whether a complaint should be investigated, particularly as it may reasonably be feared that their political allegiance could distort their judgment in sensitive cases. It may be added that MPs would, of course, continue to receive numerous complaints on a variety of matters, many of which would be outside the PCA's jurisdiction. There thus seems to be no sufficient argument for requiring complaints to come only via MPs. In New South Wales, where complaints can come directly from the public or from MPs, the vast majority of complaints come directly from the public.

It appears that the above arguments have eventually won the day and that the days of the MP filter are probably numbered. The Cabinet Review (2000), the PCA himself and the Public Administration Committee (Third Report,

HC 612, 1999–2000) agreed that the MP filter had outlived its usefulness and should be removed. It is particularly significant that the Public Administration Committee, whose predecessor Committees, as seen above, had consistently argued for the *retention* of the filter, has now changed its view and expressed it in such firm terms: 'We believe that the idea of an MP filter…is now inconsistent with the world of public service charters and ought to be replaced by direct public access to the public sector Ombudsmen' (para 12). It is noteworthy that there is no equivalent filter in the new Scottish Public Services Ombudsman Act 2002, and the government has now accepted that the filter should be removed from the PCA (see HC Debs, 20 July 2001, WA Col 464w).

The current lack of direct access to the PCA may account for the very small number of complaints received in comparison with the number of administrative decisions taken. The Select Committee on the PCA, in its 1994 Report (HC 64, 1993–94), noted the far greater volume of complaints received in a sample year, 1991, by Ombudsmen in countries with far smaller populations than the UK: the Danish Ombudsmen, catering for a population of five million, received 2,000 complaints; the Swedish Ombudsmen, 4,000 complaints (population eight million); while the UK Ombudsmen, from a population of 55 million, received at that time only 766 complaints. These figures are striking. Moreover, the majority of complaints are rejected as being outside the jurisdiction of the PCA, or for some other reason. The case load of the PCA has only been one-sixth of what was anticipated, though it continues to rise quite sharply, climbing to 1,933 in 1996 and levelling out at 1,721 in 2001.

A further limitation on the role of the PCA arises due to the lack of power to award a remedy. The PCA can neither order compensation nor apply to a court to enforce his findings; compliance is therefore voluntary. The remedies recommended vary: *ex gratia* payments to individuals adversely affected by maladministration appear to be made in roughly half the cases in which the PCA makes a finding against the department concerned (in 92 out of 177 cases in 1992, and in 108 cases out of 236 in 1995). However, although this inability to award compulsory remedies might appear to weaken the PCA severely, it is arguable that the need for such a limitation is inherent in his role. If the PCA could award remedies, it would be hard to avoid making the investigative proceedings more formalised so as to give the body complained of a full opportunity to answer the allegations made. Probably, some of the procedures would have to be conducted in public. The fact that the PCA operates informally and privately has been thought to enhance his powers of persuasion. Where a particular complaint seems to be merely symptomatic of a deep-seated problem in a department, the PCA can sometimes persuade it to change its general procedure. This occurred in the *Ostler* case (1977): the Department of the Environment was persuaded to introduce new procedures

in order to prevent a repetition of the situation which led to Ostler's complaint. In his Annual Report for 1993, the PCA noted that as a very significant byproduct of his investigation into the mishandling of claims to disability living allowance, the Department of Social Security was persuaded to revise its general departmental compensation scheme. Thus, this apparent weakness in the PCA's powers may underlie one of his main strengths.

Furthermore, research indicates that the influence of the PCA is far greater in practice than his limited formal powers might suggest. Writing in 1994, Rodney Austin noted that 'Whitehall's record of compliance with the non-binding recommendations of the Ombudsman is actually outstanding: on only two occasions have government departments refused to accept the PCA's findings and, in both cases, the PCA's recommendations were [nevertheless] complied with'. However, Austin goes on to note that 'compliance with the PCA's recommendations usually involves the payment of an *ex gratia* compensation, or an apology, or the reconsideration of a prior decision by the correct process. Rarely does it involve reversal on merits of an important policy decision' ('Freedom of information: the constitutional impact', in Jowell and Oliver (eds), *The Changing Constitution*, 1994, p 443). Since this was written, the government rejected the adverse findings of the PCA's report on the blight caused by the Channel Tunnel Rail Link (HC 193, 1994–95); although faced with unanimous Select Committee backing for the PCA's findings (HC 270, 1994–95), the relevant department did eventually agree to award some *ex gratia* compensation to some of those affected, though without admitting any fault. The government in 2002 also refused a recommendation by the PCA to release information under the Code on Access to Official Information.

It is sometimes further argued that if the PCA appears too demanding and, *a fortiori*, if he were afforded coercive powers, he might exacerbate the very problems he is expected to solve. Administrators might be reluctant to take bold decisions for fear of the consequences; 'defensive administration' might be undertaken: time-wasting procedures designed not to further administrative efficiency but to deflect criticism. However, against this, it could be argued that administrators take the benefit of a courageous decision which turns out well in the form of promotion and will, therefore, accept the risk that it will turn out badly. It could be argued that the PCA has gone too far in the direction of placating government departments to the detriment of citizens who have been maltreated.

It may be said that accepting the need to appear reasonably emollient is endemic in the PCA system and even desirable, as being more likely to allow its persuasive powers to take effect. However, this assumption could be attacked on the basis that if other restrictions were lifted, the PCA might not have to tread such a careful path. Probably, the need to do so is inherent in the role of

the PCA as currently conceived, but it is arguable that it is not a necessary part of it. If, for example, members of the public could contact the PCA directly, and if his role were publicised, he might feel more able to incur the displeasure of government departments because he would be supported by public opinion.

Thus, although the PCA at present has arguably evolved a limited role for himself as a gentle instrument of change which may represent a departure from the role it was hoped he would fulfil, it is submitted that this was not inevitable but occurred due to some of the constraints which were externally imposed. In this respect, a distinction should be drawn between allotting the PCA formal powers to award coercive remedies which, as argued above, might well detract from his efficacy, and removing certain of the limitations on him particularly as regards direct public access. The removal of such limitations would, it is submitted, lead to a more bold approach and would benefit the people he is expected to serve.

Notes

1 It could be mentioned here that there is wide variation among MPs as to the number of complaints they submit each year to the PCA. For example, in 1986, 40% of MPs submitted no complaints at all. Therefore, the availability of the PCA service may depend on where a complainant happens to live.

2 It could further be noted that limitation of access also prevents the PCA reporting directly to the complainant. Further, Ombudsmen cannot transfer complaints to one another. The Cabinet Office Review proposes unifying all the various Ombudsmen, including the PCA, into one Public Sector Ombudsman, so that the public would have a one-stop shop with any complaint about public sector matters. Complaints would be channelled internally.

Question 32

'In a number of respects, the Ombudsman system has proved more effective as a means of providing redress for the citizen mistreated by government authorities than have judicial and parliamentary remedies.'

Discuss.

Answer plan

A more straightforward question than the last. It again raises the question of whether the Ombudsman system is effective, but it is of wider scope as it: (a) includes a comparison with two other means of redress; and (b) concerns the

whole of the Ombudsman system, not just the Parliamentary Commissioner for Administration (PCA). It must be remembered that in some respects, certain Ombudsmen may be more effective than others in comparison with other available remedies.

The following matters should be considered:

- the aim in setting up the Ombudsman system;
- the extension of the system;
- the nature of 'maladministration' as opposed to illegality;
- the informal procedure adopted by the PCA: comparison with the courts;
- the lack of coercive remedies available to the PCA: the impact of such a lack with particular reference to the Local Commissioners;
- the use of parliamentary procedures as a means of providing redress for maladministration;
- the detriment caused by the lack of direct access to the PCA;
- the matters excluded from scrutiny;
- the reforms suggested by the Cabinet Office Review (2000), as relevant.

Answer

In addressing this question, it should be borne in mind that the Ombudsman system was not set up as a replacement for other remedies, but in order to remedy their deficiencies and to fill gaps they created. It will be argued that although the system does have advantages over pre-existing judicial and parliamentary remedies, its limitations mean that it is hampered in fulfilling its aims. As the statement applies to the whole of the Ombudsman system, it will be argued that in some respects, certain Ombudsmen may be more effective than others in comparison with other available remedies.

The PCA was set up under the Parliamentary Commissioner Act 1967 (hereafter 'the Act') as a result of the perception which arose after the Crichel Down affair in 1954 that pre-existing judicial and parliamentary remedies did not provide adequate redress for members of the public who had suffered as a result of maladministration in central government. Thus, defective administrative action was going unremedied either because it fell outside the jurisdiction of the courts or because MPs did not have sufficient powers to investigate it satisfactorily. In providing a further means of investigating complaints, the intention was that the PCA would not only uncover maladministration, but would also enable civil servants wrongly accused of maladministration to clear their names. The Ombudsman system was extended to the Health Service with the establishment of three Health Service Commissioners in 1972 and 1973, to Northern Ireland under the

Commissioner for Complaints Act (Northern Ireland) 1969, and to local government under the Local Government Act 1974. Prior to 1987, the PCA's jurisdiction was limited to central government departments and agencies, but the Parliamentary and Health Service Commissioners Act 1987 amended the 1967 Act in order to add about 50 non-departmental public bodies (NDPBs) such as the Arts Council and the EOC to its remit. The Scotland Act 1998 requires the Scottish Parliament to legislate for the creation of an Ombudsman to investigate actions of the Scottish Executive (s 91), and the Scottish Public Services Ombudsman Act 2002 in fact creates an Ombudsman with a much broader remit, encompassing the devolved institutions, local government and the Scottish NHS. In relation to Northern Ireland, an Assembly Ombudsman was established under the Northern Ireland Act 1998 (see SI 1996/1298 (NI 8)). Under s 111 of the Government of Wales Act 1998, the Crown appoints a Welsh Administrative Ombudsman with power to investigate and report on complaints of maladministration on the part of the Welsh Assembly, its members, officers and a number of other Welsh public bodies (see Sched 9 to the Act).

In being required to consider 'maladministration' (under s 10(3) of the Act) as opposed to illegality, Ombudsmen are empowered to investigate a wider range of complaints than could be investigated by a court. A court can intervene in judicial review proceedings only where a decision is *ultra vires*, or where it is considered *Wednesbury* unreasonable, or where there has been a breach of natural justice or a breach of rights protected under the European Convention on Human Rights (ECHR), as incorporated into UK law via the Human Rights Act (HRA) 1998 (s 6(1)). Alternatively, in some instances, there may be a statutory right of appeal to a tribunal. 'Maladministration' may cover some instances which would give rise to redress in a court or tribunal, but it goes further than that. It has been described as 'bias, neglect, inattention, delay, incompetence, ineptitude, perversity, turpitude, arbitrariness and so on' (Richard Crossman in the debate on the Parliamentary Commissioner Bill 1967). Where a court or tribunal could consider such defective administration, the PCA will not investigate the matter unless it would not be reasonable to expect the complainant to seek redress in litigation.

Although maladministration is a wide concept, it does mean that the PCA is broadly concerned with procedural defects rather than with the merits of a decision. This distinction is contained in s 12(3) of the Act, which provides that the PCA may not investigate the merits of a decision taken without maladministration. However, the distinction between substance and procedure is not always easy to draw (as appears from the contrast between the judgment of Nolan J at first instance and that of Lord Donaldson in the Court of Appeal in *Local Commissioner ex p Eastleigh BC*

(1988)), and the PCA has complied with the demand from the Parliamentary Select Committee on the PCA to interpret his role widely. Therefore, this apparent limitation on the PCA's remit is less significant than may at first appear.

Procedurally, the Ombudsman system may have advantages over a court hearing: its informality in investigation may be more effective at times in discovering the truth than the adversarial system in the courts. Moreover, in court, the Crown may plead public interest immunity to avoid disclosing documents; in contrast, the PCA can look at all departmental files.[1] Such flexibility is also reflected in the fact that the Ombudsman procedure is not circumscribed by rules as regards time limits, and therefore may provide a remedy in instances which cannot be considered by a court. The *Ostler* case (1977) illustrates the advantage of such flexibility in comparison with judicial review proceedings. The challenge concerned a complaint that there had been a secret agreement between the department concerned and a third party. The Court of Appeal held that the complainant's challenge to the proposals in question was barred because the statutory time limit for challenges had expired. Ostler then complained to the PCA, with the result that the department made him an *ex gratia* award to cover his court costs and also introduced changes in its procedures in order to deal with the problems exposed by his complaint.

On the other hand, unlike a court, the PCA lacks the power to award a remedy, although *ex gratia* payments to individuals may at times be made. In some situations, this lack might be said to amount to a weakness in the PCA system. In *Congreve v Home Office* (1976), the applicant succeeded in showing that the Home Office had acted unlawfully as regards television licence fees and a refund was awarded. The situation had already been investigated by the PCA, which had found inefficiency on the part of the Home Office but had not recommended a remedy for licence-holders. However, although the lack of formal power to award a remedy might appear to weaken the PCA severely, it is arguable that the need for such a limitation is inherent in his role. If the PCA could award remedies, it would be hard to avoid making the investigative proceedings more formalised, so as to give the body complained of a full opportunity to answer the allegations made. Probably, some of the procedure would have to be conducted in public. The fact that the PCA operates informally and privately has been thought to enhance his powers of persuasion. Where a particular complaint seems to be merely symptomatic of a deep-seated problem in a department, the PCA can sometimes persuade it to change its general procedure. As already mentioned, this occurred in the *Ostler* case. Thus, the apparent weakness of the PCA's powers may underlie one of his main strengths.

This is not, however, true of all Ombudsmen. The Local Commissioners have sometimes reported difficulty in securing compliance with their recommendations.[2] Seneviratne notes that by 1992, the total number of cases in which 'the local authority has not provided a satisfactory remedy after a finding of maladministration and injustice' amounted to 186, 'about 6% of all cases of maladministration and injustice'. She concludes that 'Non-compliance is, therefore, a serious problem…[as] recognised by Justice which felt that it was bringing the LGO [Local Government Ombudsmen] into disrepute' (Seneviratne, *Ombudsmen in the Public Sector,* 1994, pp 98–99). Sections 26 and 28 of the Local Government and Housing Act 1989, which amended the Local Government Act 1974, were supposed to address this difficulty but have been criticised for their very modest nature (see, for example, Jones [1994] PL 608). The provisions require a statement to be made by the local authority within three months from the date of an Ombudsman's adverse report as to the action to be taken in response, and for publication of a statement giving reasons for the decision not to comply with it where that is the case. In contrast, when the Commissioner for Complaints in Northern Ireland finds that an individual has sustained injustice as a result of maladministration, the individual concerned can apply to the county court under s 7(2) of the Commissioner for Complaints Act (Northern Ireland) 1969, which may award damages at its discretion. It has been suggested by Birkinshaw and Lewis (*When Citizens Complain,* 1993) that giving the LGO such powers would imperil their relationship with local authorities which, they fear, would become defensive and 'minimalist' in their responses to LGO recommendations; the current practice of negotiating the response of the authorities in a consensual and informal way would be placed in jeopardy (p 39). In response to this, it may be argued that even if the LGO were given enforcement powers, consensual methods would still be used; that they would still be, and would be presented as being very much the norm; that court action would be kept largely out of mind, seen as an exceptional and rarely resorted-to last resort. It must be borne in mind that arguments as to the harm which might be caused by the introduction of enforcement powers are in the end speculative hypotheses which must be weighed against a concrete harm—the 6% of LGO findings which are currently going unenforced. Overall, however, the Cabinet Office Review (2000) drew favourable conclusions as to the work of the LGO: 'Stage II of the Financial Management and Policy Review of the CLA in 1996, which drew on polls by MORI in 1995, concluded that the work of the LGO was generally well respected by complainants, their advisers and local authorities; although there was widespread concern about delays. A survey by MORI of complainants to the LGO in 1999 reported "a broadly encouraging improvement from the 1995 survey'" (para 1.5).

It may be concluded that where a body is susceptible to informal persuasion, this method has advantages over litigation as a means of improving administrative procedures. Otherwise, it is arguably desirable to make the Ombudsman's recommendations enforceable in the courts, on the basis that it would be worth the risk of damaging the relationship between him and the body in question in order to bring about such enhancement of his power. Where there is a need for such enforcement which has not yet been met, it may be argued that litigation, where it is available, may represent a surer means of bringing about change. It is worth noting in this respect that the Cabinet Office review recommended that the Ombudsman should continue to work by persuasion, rather than having the power to award compulsory remedies. Aside from the reasons canvassed above, it was feared that if the Commissioner had such a power, it could become subject to Art 6 of the ECHR, thus imposing a more formal, court-like procedure.

Thus, the statement that the Ombudsman system offers advantages which litigation does not has some substance but needs qualification. On the other hand, there are clear advantages for the aggrieved citizen in using the Ombudsman service rather than relying on an MP to resolve the problem. Although MPs are of course able to hear a wide range of complaints, their powers of investigation are limited. The PC A in contrast has wide powers of investigation. Under s 7 of the Act, he may examine all documents relevant to the investigation, and the duty to assist him overrides the duty to maintain secrecy under the Official Secrets Acts. Furthermore, MPs may be hampered or may appear to be hampered by their political allegiance in contrast to the Ombudsman, who is independent. Although MPs may not know the political allegiance of a constituent who makes a complaint regarding the activities of central government and might, in any event, be uninfluenced by it, the constituent might assume that the complaint would be more forcibly pursued by an Opposition MP.

Parliamentary procedures such as Questions and Select Committees may be less efficacious than the Ombudsman. Such procedures operate within the doctrine of ministerial responsibility; in other words, the expectation is that the minister in question will remedy matters. The PCA, on the other hand, looks behind that expectation and considers the workings of the administrative body itself. The PCA's procedure can be more flexible than that of a Select Committee due to its informal, private nature and may get closer to the root of a problem.

However, although the Ombudsman system may offer an effective means of redress to citizens who manage to invoke it, many citizens who need to do so cannot get access to it either because they do not know of its existence or because, having contacted an MP with a complaint, the MP decides not to refer the complaint on to the PCA.[3] The PCA cannot be

contacted directly by a citizen, because it is thought that to allow such contact would be to undermine the constitutional principle that an MP should defend the citizen against the Executive. However, Local Commissioners can now be contacted directly and, since 1978, where the PC A receives a complaint directly from a member of the public, the complainant's MP will be contacted and if he is in agreement, the PCA will investigate it. Inroads have therefore been made into the principle of disallowing direct access, but it still remains as an obstacle which may account for the very small number of complaints received in comparison with the number of administrative decisions taken.[4] Clearly, the PCA cannot address the difficulties created by his low profile while he cannot advertise himself as available to receive complaints.

Even if a complaint is referred to the PCA, it may be rejected as being outside his jurisdiction. The PCA cannot investigate bodies which are not ultimately under ministerial control. Various bodies, as already mentioned, have their own Ombudsmen, but this division of jurisdiction between Ombudsmen creates difficulties of access, as one Ombudsman cannot refer a complaint directly to another. Secondly, certain matters, set out in Sched 3 to the Act, are excluded from investigation. These include extradition and fugitive offenders, the investigation of crime by or on behalf of the Office, security of the State, action in matters relating to contractual or commercial activities, court proceedings and personnel matters of the armed forces, teachers, the Civil Service or police. The government has always resisted the extension of the Ombudsman system into these areas. The fact that contractual and commercial matters and public service personnel matters are excluded has, in particular, led to the rejection of many complaints.

Therefore, as a system, the Ombudsman has many limitations; its informal procedures can be effective in securing change, but at the same time, in comparison with litigation, may lead to problems of enforcement. Lack of direct access to the Ombudsman or want of jurisdiction can mean that for many citizens the system is merely irrelevant; the screening of complaints by MPs, either before or after the PCA receives them, may undermine the importance of the PCA as a means of making up for the inefficacy of some parliamentary procedures. Moreover, the recent review by the Cabinet Office (2000) found a further, major problem with the current Ombudsman system. In order to combat these problems, the Review recommended a radical solution—the restructuring of the PCA, Local Commissioners and Health Service Commissioners into one collegiate structure of Public Sector Ombudsmen, able to take complaints about any matter within jurisdiction regardless of whether it concerned a local authority, the NHS or a government department.

Notes

1 It could be noted here that the PCA does not, however, have access to Cabinet papers; the courts, on the other hand, claim the power to order such access.
2 However, the Report of the Local Commissioners 1992 showed an improvement in this respect; few local authorities had failed to comply with the reports of the Commissioners.
3 Students could note that there is wide variation among MPs as to the number of complaints they submit each year to the PCA. In 1986, for example, 40% of MPs submitted no complaints. Therefore, the availability of the PCA service may depend on where a complainant happens to live.
4 It could be pointed out that although the number of individual cases considered is small, the very existence of the Ombudsman may improve administrative practice. This effect was given formal expression when amendments introduced by the Local Government and Housing Act 1989 gave Local Commissioners the power to issue advice as to good administrative practice to particular local authorities or to all authorities.

CHAPTER 9

PROTECTION FOR HUMAN RIGHTS

Introduction

The very first edition of this book dealt in considerable detail with the Bill of Rights debate, the advantages and disadvantages of a written human rights guarantee and the deficiencies of the European Convention on Human Rights (hereafter 'the Convention'). It also considered the various human rights enforcement mechanisms. The reception of the Convention into UK law via the Human Rights Act (HRA) 1998 has rendered that debate largely defunct, but knowledge of the history of the Convention in the UK remains essential. Political and public support for some form of Bill of Rights grew overwhelming by the mid-1990s, but the resulting statute, the HRA, bears the marks of several compromises. The debate is now likely to centre upon the status of the Convention in UK law, its effectiveness as a human rights guarantee and the improvements in domestic human rights protection which are resulting from it and will result from the introduction of the HRA. Essay questions are likely to ask you to consider gaps and inadequacies in both the Convention and the 1998 Act. Now that the HRA has been fully in force for some years, some commentary on the significant early case law will be expected. The role of judges has now come under fresh scrutiny, since they hold an important new role as human rights watchdogs, yet lack the ultimate power of overriding legislation which breaches the Convention. Many different styles of essay question are possible on this large and wide ranging topic; the following questions cover most of the debate at the time of writing. Certain relevant issues are also touched on in Chapter 2.

Checklist

Students must be familiar with the following areas and their inter-relationships:

- the legal position before the introduction of the HRA and the former difficulties of relying on the Convention in UK courts;
- the drive towards incorporation of the Convention;
- the doctrine of parliamentary sovereignty;

- the key provisions of the HRA and the Convention;
- key case law on the Convention;
- key HRA cases.

Question 33

Critically examine the implications of introducing the Human Rights Act (HRA) 1998 as the UK's human rights guarantee.

Answer plan

This is a reasonably straightforward essay question which is likely to be commonly set. However, it is important that the answer should not degenerate into a list of advantages and disadvantages of the Act and the Convention. The implications include: comparison with the previous situation; the changed role of judges; the impact on public authorities; and the new dimension to all domestic legal cases which raise human rights issues. One further implication, which should be touched on briefly, is the choice of the HRA mechanism as opposed to the introduction of a Bill of Rights on the US model.

The following matters should be discussed:

- the comparison with the pre-HRA position with examples of statutory provisions;
- the impact of the Act on post-HRA legislation—s 19;
- the interpretative obligation under s 3: examples of its use in practice;
- the change in the judicial role;
- the impact on public authorities;
- the choice of the HRA mechanism, as opposed to entrenching the Convention;
- an evaluation.

Answer

Until 1998, the precarious and disorderly state of civil liberties and human rights in the UK was a strong argument in favour of the adoption of some form of Bill of Rights. In certain areas of civil liberties, the existing statutory and case law safeguards against abuse of power were less comprehensive and, arguably, less effective than in many other democratic countries. Citizens of the UK did

enjoy a reasonable level of tolerance of individual behaviour, but there were serious gaps and the tolerance itself, because it was not bolstered by a formal guarantee of rights, was fragile, especially in times of crisis. The law sought to protect certain values, such as the need to maintain public order but, in doing so, curtailed the exercise of certain freedoms because nothing prevented it from disregarding them. Thus, human rights had a precarious status, in that they only existed, by deduction, in the interstices of the law.

For example, the Public Order Act 1986 contains extensive provisions in ss 12 and 14 which allow stringent conditions to be imposed on marches and assemblies. Such conditions are intended to enhance the ability of the police to maintain public order, but they are not balanced by any provision in the Act which takes account of the need to protect freedom of assembly. Equally, the Official Secrets Act 1989 arguably provides a more efficient means of preventing the disclosure of official information than did its predecessor, but it was not intended to allow the release of any information at all to the public (although later statutes have done just that).

Not all statutes suggest the same reluctance to protect the freedom which their provisions may infringe; the Contempt of Court Act 1981, while primarily concerned with protecting the administration of justice, contains provisions in s 5 for allowing 'discussions in good faith of public affairs…if the risk of prejudice to the particular legal proceedings is merely incidental to the discussion'. However, the Contempt of Court Act 1981 was, in fact, passed in response to the ruling by the European Court of Human Rights (ECtHR) in the *Sunday Times* case (1979) that UK contempt law had infringed Art 10 of the Convention. The Contempt of Court Act may be contrasted with the Broadcasting Act passed in the same year, which allowed the Secretary to prohibit the broadcasting of 'any matter or class of matter'. This is typical of a number of provisions in domestic law which had the potential to undermine human rights very significantly and would have done so, had not discretion been exercised in their interpretation and invocation. This essay will argue that the Convention, as afforded further effect in domestic law by the HRA, would appear to provide a better safeguard than the previous reliance placed upon such forbearance. In particular, it should obviate the need to enforce rights at Strasbourg, as occurred in the *Sunday Times* case.

In contrast to the previous situation, the HRA now represents a minimum guarantee of freedom. Certain fundamental values have been placed, theoretically and temporarily at least, out of the reach of any political majority unless the government decides to seek to persuade Parliament to pass legislation which deliberately infringes the Convention rights. The HRA allows it to do so (see s 19(1)(b) and s 3(2)), but it is notable

that no Bill has been presented to Parliament unaccompanied by a statement of its compatibility with the rights. Even the Anti-Terrorism, Crime and Security Act 2001 was accompanied by a statement of compatibility, although the government had to derogate from Art 5(1) in order to make the statement. Formally speaking, citizens of the UK no longer have to rely upon the ruling party to ensure that its own legislation does not infringe freedoms. They can at least be sure that the government has made some effort to ensure that a Bill is Convention compliant before it becomes an Act of Parliament. If, despite the statement of compatibility, laws are passed which conflict with some fundamental Convention guarantee, courts will now have to interpret such laws in order to bring them into compliance with the Convention if at all possible under s 3 of the HRA (see *A (No 2)* (2001)). They must also do so in respect of pre-HRA statutes. They have to consider, taking account of the Convention jurisprudence under s 2, to what extent, if at all, the freedoms may legitimately be curtailed. If, having striven to achieve compatibility, it is found to be impossible, a court of sufficient seniority can issue a declaration of incompatibility (s 4), although it will merely have to go on to apply the law in question (see *R(H) v Mental Health Tribunal, North and East London Region and Another* (2001)). The position under s 3 is in strong contrast to the prior situation, where the courts had no choice but to apply a provision of an Act of Parliament, no matter how much it might breach the Convention (although where there was ambiguity, a Convention compliant interpretation was usually adopted in the years immediately preceding the inception of the HRA).

The HRA 1998 has therefore created a far more active judicial role in protecting basic rights and freedoms. If a court does issue a declaration of incompatibility, it is expected that the government will act promptly to take remedial action—although it does not have to do so (s 10). The interpretation of the US constitution illustrates what could happen in this country, although probably to a lesser extent; vast edifices of civil rights have been constructed out of innocuous and ambiguous phrases. The generality of terms of the Convention means that its interpretation is likely to evolve in accordance with the UK's changing needs and social values; this is, in any case, one of the basic principles of Strasbourg-based Convention jurisprudence, since the Convention is intended to be a living document which is not bound by time or venue, but can develop to suit both in any jurisdiction. Thus, it is possible that soon there will be two versions of the Convention relevant to the UK: the domestic version as incorporated by the HRA and interpreted domestically; and the Convention as interpreted at Strasbourg, providing a still-existing opportunity to take a persistent grievance to the ECtHR.

Incorporation of the Convention under the HRA has already had a number of advantages. Citizens may obtain redress for human rights breaches without needing, except as a last resort, to apply to the ECtHR in Strasbourg. This saves a great deal of time and money for the citizen and thus greatly improves access to justice. The range of remedies available under the HRA is the same as in any ordinary UK court case, and so includes injunctions and specific performance where appropriate, rather than simply damages. British judges are already making a contribution to the development of a domestic Convention rights jurisprudence (see, for example, *Lambert* (2001), *Offen* (2001) and *A* (2001)). But a major disadvantage, or at least a source of anxiety, is the doubt as to whether UK judges can be trusted to give a vigorous interpretation to the Convention. The British judiciary is, in general, highly regarded, but it is an elite group, drawn mainly from a certain stratum of society and therefore, to varying degrees, out of touch with the working class. It has been trained in techniques of legal analysis which include deciding cases without the responsibility of considering their human rights repercussions, although it is fair to say that its attitude to such repercussions was changing in the years immediately prior to the inception of the HRA (see *ex p Simms* (1999)). It is doubtful whether three days of human rights awareness training will have overturned years of adoption of its traditional stance. The interpretations given by judges to the

Convention may greatly dilute its impact. The watering down of Art 6 which occurred in *Brown v Stott* (2001) exemplified this problem. Further, the new role of the judiciary which is more important and, therefore, more overtly political might eventually mean moves towards more political involvement in its appointments—a development which has taken place in the US. Conversely, it may be argued that UK judges have at times shown themselves capable of bearing in mind the public interest in, for example, freedom of speech. Apart from *ex p Simms,* a clear example comes from Scott J's ruling in *AG v Guardian (No 2)* (1988) (the *Spycatcher* case), which boldly rejected the argument that the need to maintain confidentiality outweighed the public interest in freedom of expression. Judges have shown themselves capable of activism in the area of privacy in *Douglas v Hello!* (2001) and the *Campbell* case (2002), although *A v B and C* (2002) may be viewed as sounding a clear cautionary note. The HRA appears to have a fair chance of aiding in the creation of a more comprehensive right to respect for private and family life than the patchy and piecemeal one currently protected under various other names in domestic law.

Apart from its implications for legislation, public authorities have been greatly affected by the inception of the HRA due to the requirements of s 6. Under s 6, it is unlawful for a public authority to act in a way which is

incompatible with a Convention right. This is the main provision giving effect to the Convention rights; rather than incorporation of the Convention, it is made binding against public authorities. Under s 6(6), 'an act' includes an omission, but does not include a failure to introduce in or lay before Parliament a proposal for legislation or a failure to make any primary legislation or remedial order. Section 6(6) was included in order to preserve parliamentary sovereignty and prerogative power: in this case, the power of the Executive to introduce legislation. Thus, apart from its impact on legislation, the HRA also creates obligations under s 6 which bear upon 'public authorities'. Such obligations have a number of implications. Independently of litigation, public authorities must put procedures in place in order to ensure that they do not breach their duty under s 6. A number of public authorities and bodies that have a public function have already undergone HRA training and have had to modify their practices in response to the HRA. Thus, the HRA has had immense implications for all bodies in the UK that are public authorities or have a public function. In stark contrast to the previous situation, such bodies act illegally if they fail to abide by the Convention rights. Previously, unless forced impliedly to adhere to a particular right legislatively (for example, under s 58 of the Police and Criminal Evidence Act 1984, imposing on the police, in effect, a duty to abide by one of the implied rights within Art 6(1)), they could disregard the rights in their day to day operations with impunity.

So far, this essay has indicated that the HRA has immense implications for the interpretation of legislation and for the operations of a large number of bodies in the UK. But there are limitations on its impact. The choice of the HRA as the enforcement mechanism for the Convention itself has implications since at present, the use of a different mechanism is precluded. Currently, the Convention is incorporated into domestic law, but not entrenched on the US model; thus, it could be removed by the simple method of repeal of the HRA. It is submitted that this is a sensible situation at present, both in terms of the maintenance of parliamentary sovereignty and to avoid handing over too much power to the unelected judiciary. Moreover, the judiciary cannot strike down incompatible legislation. However, it does mean, as indicated earlier, that Parliament can deliberately legislate in breach of the Convention. It also means that if prior or subsequent legislation is found to breach the Convention in the courts and cannot be rescued from doing so by a creative interpretation, it must simply be applied. Thus, citizens cannot always be certain of being able to rely on their Convention rights domestically.

In conclusion, the new scheme should allow for the incremental improvement of the UK's recognition and enforcement of domestic

human rights. Certain weaknesses are identifiable[1] within the HRA 1998 and the Convention, but the method chosen is a reasonable compromise between protection for human rights and parliamentary sovereignty. It represents a first step towards creating a rights-based culture in UK law and society.

Note

1 Obvious deficiencies of the HRA include: the missing Art 13 (guarantee of a legal remedy for infringement of a Convention right); the exceptions made in the definition of 'public authority'; the narrow definition of a Victim'; the fact that most of the Convention rights which it incorporates are heavily qualified, or weak (Art 14); and the lack of a direct power by which courts could strike down offending legislation. Each of these could be discussed in greater detail.

Question 34

Critically evaluate the provisions of the Human Rights Act 1998 which are intended to ensure that legislation is compatible with the Convention, and comment on their impact in practice.

Answer plan

This is a question which requires a sound knowledge of ss 3, 4, 10 and 19 of the Human Rights Act (HRA) 1998, of some of the academic criticism generated by those provisions and of some of the key cases. Close analysis of those provisions of the Act, which are in some respects quite technical, is required. This is a question which is highly likely to be set at the present time. Note that the question does not require you to consider the efficacy of the Convention itself or the implications of receiving it into UK law. Also, it deliberately focuses on s 3 and the related provisions; it does not ask you to discuss the definition of a public authority under s 6.

The following matters should be discussed:

- the interpretative obligation under s 3: its use in practice so far;
- the declarations of incompatibility under s 4: their use in practice;
- the 'fast track' procedure under s 10;
- the impact of the Act on post-HRA legislation—s 19;
- evaluation.

Answer

The HRA 1998 is of immense constitutional significance. The Act provides further protection for the European Convention on Human Rights in UK law. Once it came fully into force in 2000, UK citizens had, for the first time, civil rights (in the sense of rights which may be claimed against public authorities) instead of civil liberties: instead of having residual freedoms they have guarantees of rights. However, the likely impact of the reception of the Convention into domestic law is still unclear, since the Act contains a number of complex, interesting and unusual features which are determining and will determine its impact in practice.

The intention was not simply to incorporate the Convention into domestic law so that it became, in effect, a statute. The most significant provision, which largely determines the status of the Convention in domestic law, is s 3. Under s 3(1), primary and subordinate legislation must be given effect in a manner which makes it compatible with the Convention rights; the judiciary is under an obligation to ensure such compatibility 'so far as it is possible to do so'. This goes well beyond resolving ambiguity in statutory provisions by adopting the Convention-based interpretation which, of course, was already occurring in the pre-HRA era. Section 3 appears to place the judiciary under an obligation to render legislation compatible with the Convention if there is any loophole at all allowing it to do so.

It is now apparent that s 3(1) of the HRA may allow judges to read words into statutes (*A* (2001)) or to adopt a broad or doubtful interpretation; in *Cachia v Faluyi* (2001), the Court of Appeal held that 'action' in s 2(3) of the Fatal Accidents Act 1976 should be construed as 'served process'. In *Secretary of State for the Home Department ex p Aleksejs Zenovics* (2002), the Court of Appeal added the words 'in respect of that claim' in the Immigration and Asylum Act 1999 to the end of the provision in question. Section 3(1) does not, however, allow for wholesale revision: *Re S and W (Care Orders)* (2002); *Donaghue v Poplar Housing* (2001) or, probably, the reading in of words where the provisions themselves offer no 'avenue' to so doing. Thus, it is clear that the judges are prepared to use the powerful tool of s 3(1) to its fullest extent, even if this means twisting or ignoring the natural meaning of the statutory words or, most dramatically, reading words into statutory provisions. Thus, the judges have in some instances adopted a role which is close to a legislative one. Possibly, in so doing, they have pushed the interpretative obligation under s 3 too far, as in *A*, and should instead have issued a declaration of incompatibility.

Section 3(2) provides that this interpretative obligation does not affect the validity, continuing operation or enforcement of any incompatible

primary legislation. Thus, the Convention cannot be used to strike down any part of an existing statute as unconstitutional. This is clearly an important limitation. It means that parliamentary sovereignty is at least theoretically preserved, since prior and subsequent legislation which cannot be rendered compatible with the Convention cannot be struck down due to its incompatibility by the judiciary.

If a court cannot render a statutory provision compatible with the Convention, despite its best efforts, the claimant wishing to rely on the right will have to suffer a breach of his Convention rights for a period of time. This is clearly unsatisfactory; the solution chosen by the Labour government was to include s 4 in the Act. Section 4 allows certain higher courts to make a declaration of incompatibility, while s 10 allows for a 'fast track' procedure, whereby a minister may by order amend the offending primary or subordinate legislation if there are compelling reasons to do so. A number of comments may be made on this procedure. In general, Executive amendation of legislation is objectionable. However, parliamentary scrutiny of the order is provided for under s 12. Further, the usual objections to such a procedure are arguably inapplicable since the order is intended to bring UK law into harmony with the Convention, thereby raising the standard of human rights at the expense, in many instances, of the Executive.

Other objections to this procedure are less easily overcome. The minister is under no obligation to make the amendment(s) and may only do so if there are compelling reasons. In other words, the fact that a declaration of incompatibility has been made is not, in itself, a compelling reason. Thus, there may be periods of uncertainty during which citizens cannot rely on aspects of their Convention rights. Further, in some instances, a declaration of incompatibility may not be obtained for some time. If, for example, a lower court (a court outside the meaning of 'court' within s 4(5)) finds in criminal proceedings that the police have bugged a person's home in accordance with the Police Act 1997, but possibly contrary to Art 8 (providing a right to respect for private life) of Sched 1 to the 1998 Act, the court may be unable to exclude the evidence derived from the bugging, since that would probably be contrary to the 1997 Act. The court cannot make a declaration of incompatibility and the defendant would have no interest in appealing to a higher court in order to obtain such a declaration, since it would provide him with no personal benefit. No damages could be awarded due to the provisions of s 6(2). Thus, changes to particular parts of the law in order to ensure compatibility with the Convention rights may be slow in coming.

The courts may seek to address the inadequacy of the declaration of incompatibility procedure—awarding the claimant a 'booby prize'—in two ways. First, the lower courts may come to be very reluctant to find that a statutory provision is incompatible with the Convention. Given the broad

and open-ended wording of the Convention, it will often be easy to find that compatibility exists. In the example given above, the lower court could seek to twist the wording of the Police Act 1997 to ensure compliance with Art 8. The danger in this approach is that instead of 'levelling up', that is, bringing UK law up to the level of the Convention standards, UK courts may level down—adopt the interpretation of the Convention which gives the lowest possible level of protection. It is suggested that this occurred in *Brown v Stott* (2001), in which Art 6(1) was watered down in order to avoid having to declare s 172 of the Road Traffic Act 1988 incompatible with it. Secondly, the defendant—often a public authority—may tend to appeal to a higher court on the issue of compatibility, arguing that once the relevant UK law was properly interpreted, it could be found to be in compliance with the Convention. The defendant would hope that a higher court would be prepared to adopt a more creative interpretation than the lower one and that the interpretation obtained would be favourable to him. This occurred in the *Alconbury* case (2001). These tendencies, while avoiding making declarations of incompatibility, are tending to place aspects of Convention rights in a doubtful and precarious position. This is especially a matter of concern where criminal proceedings are in question, due to the implications for the defendant while the matter of compatibility is being resolved.

Declarations of incompatibility in civil proceedings are perhaps less likely to occur. The Convention, as a civil rights measure, consists of a series of rights guaranteed to the citizen against the power of the State. That power is usually, although by no means always, encapsulated in the criminal law. A glance through the pages of texts on the Convention as an international instrument will show that proceedings brought against Member States often began as criminal proceedings in the Member State. Thus, many cases in which Convention rights are invoked in UK courts are criminal ones, and the question raised tends to concern an aspect of criminal procedure (see *A* (2001) and *Offen* (2001)). Articles 5 and 6 are frequently invoked since they protect, *inter alia*, a fair criminal trial and the right to liberty of the person.

Nevertheless, Convention issues are arising in civil proceedings, either substantively under, for example, Art 8 (*Re S and W (Care Orders)* (2002)) or procedurally under Art 6(1) as in *Alconbury.* If the Convention guarantees affect an area of the common law which applies between private individuals, such as breach of confidence, the common law will be interpreted or reformed to harmonise with the Convention (see *Douglas v Hello!* (2001)). If a statute affects the legal relations between private individuals (for example, employment statutes which cover private companies and their employees), s 3 applies.

However, if a statute governing part of the civil law was found in a lower court to be incompatible with the Convention, the claimant or defendant would be denied a remedy, even if their Convention rights had been breached. The claimant or defendant could in theory appeal to a higher court, arguing that no incompatibility arose. However, since public funding is likely to be unavailable, only those persons who can fund the action themselves will have any certainty that they will be able to do so. Others may be able to do so on a contingency fee basis, but Convention-based cases tend to be especially unpredictable, and therefore lawyers may not consider that the chances of success are sufficiently high.

There is probably not much previous legislation which cannot be rendered compatible with the Convention,[1] but it is clear that any such legislation will persist for some time, even though the HRA is fully in force, since it is largely a matter of chance whether a suitable case comes to court. Subsequent legislation is in a somewhat different position due to the provisions of s 19. Under this section, when a minister introduces a Bill into either House of Parliament, he must make and publish a written statement to the effect either that, in his view, the provisions of the Bill are compatible with the Convention rights, or that although he is unable to make such a statement, the government wishes nevertheless to proceed with the Bill. If the latter statement is made, it is possible that the judiciary will allow the provisions of the legislation to override the Convention, just as it would if a clause was included in it stating 'this statute is to be given effect notwithstanding the provisions of Art X of the Human Rights Act 1998'. On the other hand, s 3 would still apply and the judges should therefore strive to achieve compatibility through interpretation, even if ultimately it is impossible to do so. So far, all legislation passed post-HRA has been accompanied by a statement of its compatibility with the rights.

The formal difference between declarations under s 19 and the more usual form of notwithstanding clauses (as used in the Canadian Charter) will become apparent if the minister makes a statement to the effect that the legislation is compatible with the Convention, but subsequently it appears that it is not compatible. It would seem that in such circumstances, the judiciary would do its utmost to ensure compatibility, even going so far as to disregard the absolutely plain meaning of statutory language, on the basis that Parliament must have intended this to occur. Its duty to do so will arise both from the general need to construe legislation in order to ensure compatibility with the Convention if at all possible (s 3), and from the particular need flowing from s 19 to do so where subsequent legislation was thought to be compatible with the Convention when introduced into Parliament.

In conclusion, it may be said that for the reasons discussed, the impact of the HRA may be realised slowly in practice. Nevertheless, it represents a radical change in the traditional means of protecting civil liberties. It has become much less likely that legislation will be introduced which will have the clear effect of limiting a liberty, since such legislation might eventually be declared incompatible with the guarantees of rights under the Act (s 4). Further, when the legislation was introduced, the relevant minister would have to declare that a statement of compatibility could not be made under s 19—something that ministers are clearly reluctant to do due to the political embarrassment which would be created. Even future non-liberal governments would probably be deterred thereby from an obvious infringement of the Convention guarantees. Similarly, existing legislative protection for a Convention right is unlikely to be repealed, since a citizen might then challenge the failure to provide the right under s 7(1)(a), so long as the right was one exercisable against a public authority. Thus, the Act, despite its complexities and limitations, represents a break with previous legislative tradition; due to the operation of s 3, it is creating a much greater awareness in the judiciary of fundamental human rights issues. But while the operation of s 3 has had this laudable effect, it may also be pointed out that the judiciary should bear in mind the mechanisms of the HRA which were supposed to preserve parliamentary sovereignty—ss 3(2) and 4—and show a greater preparedness to use them.

Note

1 An example could be given which would illustrate the complexity of the process of reform. Section 10 of the Contempt of Court Act as currently interpreted is arguably incompatible with Art 10 of the Convention due to the ruling to that effect of the European Court of Human Rights in *Goodwin v UK* (1996). Thus, s 10 is a clear candidate for reform under s 3 of the HRA. But it is almost certain that no declaration of incompatibility is necessary. A court could simply re-interpret s 10 in the light of the ruling of the European Court, overturning the ruling of the House of Lords in *X v Morgan Grampian Publishers* (1991), which led to the ruling in *Goodwin v UK*. This would be a bold move, but it appears to be required by the provisions of s 3. At present, the House of Lords has, however, avoided a finding that *Morgan Grampian* has been overturned on the basis that there was sufficient flexibility in the *Goodwin* case to allow the two to be reconciled: see *Ashworth v MGN* (2002).

Question 35

In terms of enhanced human rights protection, would it have been better to have introduced a tailor-made Bill of Rights for the UK rather than enacting the Human Rights Act 1998?

Answer plan

This is a fairly demanding question which requires quite detailed knowledge of the European Convention on Human Rights (the Convention), the Human Rights Act (HRA) 1998, early decisions on it and key Convention decisions. It is also necessary to say something about the differences between an entrenched Bill of Rights and the HRA in terms of enhanced human rights protection, although it should be pointed out that a Bill of Rights need not be entrenched.

Issues to be discussed include:

- the possibilities available in terms of constructing a tailor-made Bill of Rights;
- the exceptions to the primary rights of the Convention;
- the effect of the margin of appreciation in certain European Court of Human Rights (ECtHR) decisions;
- the general restrictions on Convention rights;
- the weaknesses of some substantive Convention rights, for example, Art 14;
- the deficiencies of the HRA 1998 in comparison with an entrenched Bill of Rights—early HRA cases illustrating the problems.

Answer

The HRA 1998 has given the European Convention on Human Rights and Fundamental Freedoms further effect in UK law, as will be discussed, using the mechanism of an ordinary Act of Parliament. It has not sought to entrench its own provisions or the Convention, and it has not introduced any new rights apart from those of the Convention. The possibility of introducing a tailor-made Bill of Rights has been considered but rejected. Apart from the cumbersome nature of the process of deciding on the rights to be protected, a Bill of Rights might have taken too much account of the interests of the government in power at the time when it was passed. But although producing a tailor-made Bill of Rights would certainly have been difficult, it

can be argued that the UK should nevertheless have attempted it, rather than incorporating the ready-made Convention, which is arguably defective in content. This essay will argue that the attempt should have been made to introduce a Bill of Rights which would have been unique to the UK. It will also consider the possibility of entrenchment, which is associated with Bills of Rights—as in the US. The HRA is arguably a weak mechanism for the protection of human rights when compared to an entrenched Bill of Rights.

The Convention is a cautious document: it is not as open-textured as the American Bill of Rights and it contains long lists of exceptions to most of the primary rights—exceptions which suggest a strong respect for the institutions of the State. These exceptions have at times received a broad interpretation in the ECtHR and it is likely that such interpretations will have a great influence on domestic courts as they apply the rights directly in the domestic arena under the HRA. For example, Art 10, which protects freedom of expression, contains an exception in respect of the protection of morals. This was invoked in the *Handyside* case (1976) in respect of a booklet aimed at schoolchildren which was circulating freely in the rest of Europe. It was held that the UK government was best placed to determine what was needed in its own country in order to protect morals, and so no breach of Art 10 had occurred. The decision in *Otto-Preminger Institut v Austria* (1994) was on very similar lines: it was found that the 'rights of others' exception could be invoked to allow for the suppression of a film which might cause offence to religious people since, in allowing such suppression, the State had not overstepped its margin of appreciation. A somewhat similar course was adopted in *The Observer and The Guardian v UK* (1991) (the *Spycatcher* case), which will be considered in some detail as an example of the readiness of the ECtHR to afford a wide meaning to the exception provisions of the Convention.

The newspapers claimed that temporary injunctions granted to restrain publication of material from *Spycatcher* by Peter Wright violated the Art 10 guarantee of freedom of expression. The court found that, although the injunctions clearly constituted an interference with the newspapers' freedom of expression, those in force during the period before publication of the book in the US in July 1987 fell within the exception provided for by para 2 of Art 10 in respect of protecting national security. The injunctions had the aim of preventing publication of material which, according to evidence presented by the Attorney General, might have created a risk of detriment to MI5. The nature of the risk was uncertain, as the exact contents of *Spycatcher* were not known at that time, since the book was still only in manuscript form. Further, the court ensured the preservation of the Attorney General's right to grant a permanent injunction; if *Spycatcher* material had been published before that claim could be heard, the subject matter of the action could have been

damaged or destroyed. In the court's view, these factors established the existence of a pressing social need, which the injunctions answered.

The court then considered whether the actual restraints imposed were proportionate to the legitimate aims represented by the exceptions. It found that the injunctions did not prevent the papers from pursuing a campaign for an inquiry into the operation of the security services, and although preventing publication for a long time—over a year—the material in question could not be classified as urgent news. Thus, it was held that the interference complained of was proportionate to the ends in view. It is suggested that in this ruling, the court accepted very readily the view that the authority of the judiciary could best be preserved by allowing a claim of confidentiality, set up in the face of a strong competing public interest, to found an infringement of freedom of speech for over a year.[1]

In other areas, there has been an equal willingness to allow the exceptions a wide scope in curtailing the primary rights. In *CCSU v UK* (1988), the European Commission on Human Rights, in declaring the unions' application inadmissible, found that national security interests should prevail over freedom of association, even though the national security interest was weak, while the infringement of the primary right was very clear: an absolute ban on joining a trade union had been imposed. It is worth noting that the ILO Committee on Freedom of Association had earlier found that the ban breached the 1947 ILO Freedom of Association Convention.

However, these were all instances in which the doctrine of the 'margin of appreciation' had an influence on the decision in question. In other words, the view was taken that in certain particularly sensitive areas, such as the protection of morals or of national security, the domestic authorities had to be allowed a certain discretion in determining what was called for. In less sensitive areas, the ECtHR has been more bold. In the *Sunday Times* case (1979), it determined that the exception to Art 10, allowing restraint of freedom of speech in order to protect the authority of the judiciary, was inapplicable in an instance where the litigation in question which could have been affected was dormant. The Court has also been relatively bold in the area of prisoners' rights, holding in *Golder* (1975) and *Silver* (1983) that a prisoner's right to privacy of correspondence must be respected, and rejecting the UK government's arguments that an express or implied exception to Art 8 could be invoked.

It is not possible at the moment to come to general conclusions about the response of UK judges under the HRA to interpretations of the Convention rights at Strasbourg, but some observations can be made. The judges are failing to take the view that they should not apply a particular decision because it has been affected by the margin of appreciation doctrine. In other words, they could be said to be importing the doctrine 'through the back

door', even though it is an international law doctrine that has no application in the domestic sphere. To an extent, this was the approach adopted in the leading pre-HRA case of *DPP ex p Kebilene* (1999); although the doctrine itself was rejected, the outcomes of applications at Strasbourg were taken into account without adverting to the influence the doctrine had had on them. Arguably, a similar stance was taken in the post-HRA case of *Alconbury* (2001). Thus, the watering down effect at Strasbourg of this doctrine may also be occurring under the HRA. The judges are also giving full weight to the express exceptions under Arts 8–11 of the Convention, even where possibly Strasbourg might have decided on a different outcome. This may be said of *Interbrew SA v Financial Times Ltd* (2002), where the Court of Appeal found that on the facts of the case no protection for a media source need be given.

Apart from the express exceptions to Arts 8–11, there are also general restrictions to the operation of the rights. All the Articles except Arts 3, 4(1), 6(2) and 7 are subject to certain restrictions, either because certain limitations are inherent in the formulation of the right itself, or because it is expressly stated that certain cases are not covered by the right in question. Even the right to life under Art 2 is far from absolute: 'unintentional' deprivations of life are not covered, and the use of necessary force is justified even where it results in death. Derogations from certain rights are also possible. Now that the Convention has been incorporated and the interpretative jurisprudence of the ECtHR is being used in domestic cases as a guide (s 2 of the HRA), such exceptions and restrictions tend to offer judges a means of avoiding a controversial conflict with the government and possibly make it unlikely that a radical impact on UK law will exist in the long term. Woolf LCJ had made it clear that Convention rights should be argued only where they truly apply and that any sudden explosion of human rights arguments, where strictly unnecessary in UK courts, will not be supported. Indeed, the domestic courts have succeeded in finding exceptions even to rights that appear to be largely unqualified, such as Art 6(1): this was evident in *Brown v Stott* (2001) and in *Alconbury* (2001). They have done so by relying on a case at Strasbourg, *Sporrong and Lonnroth v Sweden* (1982), in which it was said that the search for a balance between individual rights and societal concerns is fundamental to the whole Convention. Thus, it may be argued that the domestic judiciary has explored methods of watering down the rights which might not have been so readily available had a tailor-made Bill of Rights been introduced.

However, the judges do have an important function in giving the language of rights primacy, even if, eventually, an exception to a particular right is allowed to prevail. The Strasbourg jurisprudence and the rights themselves make it clear that the exceptions are to be narrowly construed and that the starting point is always the primary right. This is in contrast to the previous position, in which the judges merely applied the statute in

question without affording much or any recognition to the freedoms it affected. This could bring about important changes in relation to such statutes, including the Public Order Act 1986 and the Official Secrets Act 1989. In considering the effect of such statutes, their human rights dimension should at least, in future, be recognised even if, as in the *Shayler* case (2002), it has not yet prevailed. A tailor-made Bill of Rights could hardly have afforded greater primacy to the primary rights, even though, in theory, it could have included exceptions that were more narrowly drawn and perhaps a greater number of absolute rights, on the lines of the First Amendment in the US.

However, it can also be argued that a tailor-made Bill of Rights could have contained a more extensive list of rights including social and economic rights. In particular it could have included a free-standing anti-discrimination guarantee. In contrast, Art 14 of the Convention prohibits discrimination on 'any ground such as sex, race, colour, language, religion', but only in relation to any other Convention right or freedom. It has been determined in a string of cases since *X v Federal Republic of Germany* (1970) that Art 14 has no separate existence, but that, nevertheless, a measure which is, in itself, in conformity with the requirement of the Convention right governing its field of law may, however, infringe that Article when it is read in conjunction with Art 14, for the reason that it is discriminatory in nature. In *Abdulaziz, Cabales and Balkandali v UK* (1985), it was held that although the application of Art 14 does not presuppose a breach of the substantive provisions of the Convention and is therefore, to that extent, autonomous, it cannot be applied unless the facts in question fall within the ambit of one or more of the rights and freedoms. Thus, in one sense, Art 14 will be largely ineffective in strengthening the existing provisions of sex discrimination and race relations legislation which tends to be invoked in the context of employment, because general employment claims fall outside the ambit of the other rights and freedoms. Yet, conversely, Art 14 is almost certain to have an immediate and great impact on the forms of discrimination which will be unlawful in situations where another Convention right or freedom does apply, since Art 14 prohibits discrimination on any ground, not just the UK's current grounds of sex, race and disability. Case law exists on discrimination on the basis of sexuality and transsexuality, religion, lifestyle, political opinion, residence or wealth, which will all be argued in UK courts very soon and are likely to shake up the UK's narrow discrimination laws considerably, at least as far as the activities of public authorities are concerned. Further, it should be remembered that cases clearly state that discrimination on grounds of sex or race will be very difficult to justify (for example, *Schmidt v Germany* (1994)).

The HRA itself has limitations in terms of enhanced human rights protection. The choice of the HRA as the enforcement mechanism for the Convention means that the Convention is incorporated into domestic law,

but not entrenched on the US model; thus, it could be removed by the simple method of repeal of the HRA. Moreover, the judiciary cannot strike down incompatible legislation. Entrenchment was rejected in order to maintain parliamentary sovereignty and to avoid handing over too much power to the unelected judiciary. This means that Parliament can deliberately legislate in breach of the Convention. It also means that if prior or subsequent legislation is found to breach the Convention in the courts and cannot be rescued from doing so by a creative interpretation, it must simply be applied (see *R(H) v Mental Health Tribunal, North and East London Region and Another* (2001)). Thus, citizens cannot always be certain of being able to rely on their Convention rights domestically. An entrenched Bill of Rights on the US model would have provided them with that certainty and, at the sacrifice of parliamentary sovereignty as traditionally understood in the UK, would have therefore delivered an enhanced degree of rights protection.[2]

In conclusion, it should be pointed out that the Convention was never intended to be used as a domestic Bill of Rights. It has been argued that the creation of such a new guarantee from scratch would be an incredibly difficult and complex task, and so it is understandable why the incorporation of the Convention has been chosen as a (comparatively) quick and easy 'fix'. But it may further be argued that due to the deficiencies of the Convention as a human rights guarantee for the UK, there should be a commitment towards creating a new Bill of Rights in the future, once it can be judged to what extent the HRA 1998 has been a success. Once the impact of the HRA can be more fully evaluated, there will be room to consider whether further entrenched rights legislation is necessary and the form it should take. If such a course were taken in the UK, then it would be brought into line with the experience of most of the other European signatories. These States already possess codes of rights enshrined in their constitutions, but the majority also adhere to a general practice of incorporation of State Treaties into domestic law, either automatically, as in Switzerland, or upon ratification, as in Luxembourg. The dual system of the Convention rights and a domestic code of rights seems to operate well in these countries. Thus, the HRA could become an interim measure to secure the further protection of the rights provided by the Convention, in the hope that a domestic Bill of Rights would later cure the gaps, defects and inadequacies of the Convention. If a domestic Bill of Rights is ever created (in spite of the current government's lack of will to do so, as evidenced in the White Paper, *Bringing Rights Home* (1997)), then the two documents could exist side by side in UK law and each could be invoked when its protection of rights on a point was stronger than the other.[3] However, while the deficiencies identified here leave room for

argument that at some stage, a supplementary and complementary Bill of Rights should be enacted in order to create a more tailor-made and comprehensive human rights guarantee for the UK, the likelihood that this will occur does not appear to be very great. The very reasons for settling on the compromise of the HRA would probably preclude it.

Notes

1 Further features of this decision could be considered: the court seems to have been readily persuaded by the Attorney General's argument that a widely framed injunction was needed in July 1987, but it is arguable that it was wider than it needed to be to prevent a risk to national security. It could have required the newspapers to refrain from publishing Wright's material which had not been previously published by others until (if) the action to prevent publication of the book was lost. Such wording would have taken care of any national security interest; therefore, wording going beyond that was disproportionate to that aim.

2 It could be pointed out that there are advantages in incorporating the Convention as opposed to introducing a domestic instrument. In particular, if a right is violated here, since primary legislation mandates the violation, the possibility of recourse to Strasbourg remains.

3 An example could be inserted here. Cyprus adopted a course similar to this when it became independent in 1960. It used the Convention as a drafting prototype for certain fundamental rights and freedoms which then became part of its new constitution. The Convention itself was incorporated into the law of Cyprus and was then invoked before the Cypriot courts as a supplementary aid to interpreting corresponding Articles of the constitution. This apparently circular method is not without success and may be likely to highlight weaknesses in the constitutional protection for human rights.

Question 36

Critically evaluate the extent to which the Human Rights Act 1998 will be likely to bring about change in substantive law in the 'civil liberties' field.

Answer plan

This is likely to become an extremely common type of examination question, although it may appear in many forms. The question is confined to the 'civil liberties' field and within that field you will have to be selective—and make your selection clear at the outset. In order to

answer the question, it is essential that you should be able to explain and evaluate cases on selected rights of the European Convention on Human Rights (the Convention), and further to predict whether and how UK law will have to change in the coming years to reflect those Convention rights and the relevant jurisprudence. Changes that have already occurred should be identified. When a question is phrased as generally as this one, students should avoid the temptation to refer to a long list of instances where domestic law will be likely to be challenged; it is crucial to include some depth of argument and analysis of the case law. Examiners may also ask students to refer to one or more specific areas of domestic law, such as criminal law and evidence, or to refer to one or more Convention rights, such as privacy, expression, discrimination or torture. It is therefore essential that students have detailed knowledge of current issues concerning Convention rights and their status in domestic law. If the question is phrased generally, it will be necessary to be selective about the rights referred to in the answer and to make this clear in the introduction.

The following matters must be considered:

- the ways in which the Human Rights Act (HRA) 1998 is able to have an impact on domestic law;
- the leading European Court of Human Rights (ECtHR) cases which raise issues about the UK's enforcement of human rights in key areas, for example, privacy, police powers of covert surveillance and freedom of protest;
- the examination of the current and probable impact of the HRA in the areas chosen;
- evaluation—the role of domestic courts and Parliament in interpreting and giving effect to the new rights.

Answer

Under s 3 of the HRA, many statutes will be opened to rights-based scrutiny and may be vulnerable to declarations of incompatibility issued by a higher court under s 4. A tide of legislation apparently designed to ensure compliance is also underway, including, for example, the Regulation of Investigatory Powers Act 2000 and the Terrorism Act 2000. Since October 2000, public authorities within the UK have been under a duty to act in compliance with the Convention. Since the term 'public authorities' includes the courts, it is clear that very significant changes in UK law are likely to occur, since the courts must seek to ensure that

current common law doctrines are in compliance with the Convention rights. Such changes are already underway, as discussed below. Courts are being deluged with arguments based on the Convention, and so the existing case law of the ECtHR has become a vital tool for interpretation purposes, although it is not binding (s 2 of the HRA). However, it remains to be seen to what extent new rights will be created in areas of the law where rights are at present weak, and whether the interpretation of Convention rights taken by the government (as evidenced in new Bills put forward to Parliament) and by the judiciary will be similar to that taken by Strasbourg. Obviously, if those interpretations rely on a watered down version of the rights, the impact of the Convention will be lessened.

It should be remembered that neither the HRA 1998 nor the Convention, on which the latter is based, give human rights free rein within domestic law; each has its own exceptions and limitations. The key HRA provisions, especially ss 3(1), 3(2), 6(1) and 6(2), show that it is intended to create a delicate political balance; the rights which it contains only bind public authorities unless incompatible primary legislation means that they must act in contravention of the right (s 6(2)). Existing legislation which contravenes the rights is not automatically invalid, but remains in force under s 3(2) whether or not a declaration of its incompatibility is made under s 4. Article 13 of the Convention, the right to an effective remedy before a domestic court, has 'disappeared' from the text of the Act. It would be possible, although unlikely, for very little change to result from the whole exercise if Parliament regularly decided to take advantage of its power to legislate contrary to the rights.

The Convention was itself a compromise document which attempted to identify core values applicable in a range of very different signatory countries: it contains few economic and social rights; most of the rights it does contain have exceptions for such matters as national security and the prevention of crime. The doctrine of the 'margin of appreciation' has traditionally allowed a significant leeway to States as regards the means and methods of upholding rights, and the rights and freedoms within the Convention sometimes have to be balanced against each other in the same case, since, for example, one person's exercise of freedom of expression may infringe another's right to respect for his private life. In spite of these and other limitations, it is, however, possible to predict many fields of law which will require at least re-evaluation in the light of Convention rights. Since the potential areas of change in the 'civil liberties' field are so many and varied, the current and future impact on three will be examined here: privacy; police powers of surveillance and freedom of public protest.

In the field of public protest it is now clear, due to the HRA, that the Convention must be taken into account. Where protest is in question, there seems to be a preparedness evident from the decision in *DPP v Percy* (2001) to look to Art 10. In other words, protest is not merely treated under the HRA as a form of disorder, as it often was in the past, but as an exercise of freedom of expression; the freedom of expression dimension is recognised—even afforded weight. When a new public order statute is passed, its impact on freedom of assembly and public protest will have to be considered so that it can be declared compatible with the Convention rights under s 19. Clearly, it is possible that a minimal interpretation of the Convention requirements may be relied upon, but at least the human rights dimension of such statutes will be recognised. They will not be considered in Parliament only in terms of their ability to curb the activities of football hooligans or late night revellers, as in the past. Thus, s 41 of the Criminal Justice and Police Act 2001 was considered to be compatible with Arts 10 and 11. Clearly, the courts may take a different view when cases arise under it; if so they can use s 3 of the HRA to seek to bring s 41 into conformity with the rights if that has not already been achieved.

There is no substantive right to privacy in either domestic law or, strictly speaking, under the Convention. However, domestic law has long recognised a collection of disparate privacy-related rights, which fall within the scope of land law, tort, criminal law and a handful of statutes. Further, Art 8 of the Convention requires respect for family and private life, and it is this requirement which may bring about change in domestic law now that the HRA 1998 is in force, with strong arguments now existing in favour of the introduction of one concrete right to privacy. However, any such right would, of necessity, have limitations and exceptions to allow for the contrasting Convention rights to freedom of expression and freedom of information, for example, to be enforced; s 12 of the HRA suggests that freedom of expression may take priority over any emerging right to privacy where there is a conflict.

Whilst the relevant ECtHR cases are qualified and the European Court has arguably tended towards caution in its interpretation of Art 8, it is clear that both respect for private life and for family life require more clarity than they have at present in domestic law. The case of *X and Y v The Netherlands* (1986) held that the State is under a positive obligation to ensure respect for an individual's private and family life, even where the interference comes from a non-State source, such as another private individual. Such an individual is not bound by the Convention rights, but since the Court itself is a public authority under s 6 of the HRA, it has a duty to develop existing common law doctrines (in particular, in this

instance, breach of confidence) compatibly with Art 8. In the case of *Douglas v Hello!* (2001), it appeared that due to the influence of Art 8, s 12 and to an extent s 6, a right to respect for privacy might be emerging from the doctrine of confidence. The findings in *A v B and C* (2002) appear at present, however, to have curbed this development: those who wish to assert 'privacy rights' will have to rely on confidence, but they can seek to rely on the Court's duty under s 6 in relation to the development of that area of law.

The legal basis for powers of covert surveillance and of interception has undergone a change, partly as a result of the inception of the HRA. In this instance, the change has been statute-based, rather than relying on judicial interpretation. There is a right to peaceful enjoyment of the home (*Sporrong and Lonnroth v Sweden* (1982), *Powell and Rayner v UK* (1990)). Invasions of the home or office, even when carried out under warrant by State officials, are open to special scrutiny (*Niemietz v Germany* (1993)). The interception of communications and covert surveillance must be carried out only in accordance with stringent safeguards and with an easily accessible method of appeal for an aggrieved party (*Khan v UK* (2000); *Klass v Germany* (1979)). The Regulation of Investigatory Powers Act 2000 was introduced in order to provide a broader statutory basis for surveillance and interception, to ensure that the 'in accordance with the law' requirement of Art 8(2) was met. The Act probably meets that objective. However, it arguably fails to meet the standards laid down at Strasbourg in terms of proportionality and necessity under Art 8(2), since it provides such wide powers for the interception of communications and for surveillance accompanied by a low level of protection for the privacy of citizens.

It has been argued that the HRA has so far had a patchy impact on certain existing areas of law. As indicated above, legislation has been introduced post-HRA which has been said by the government to be in compliance with the Convention and which is apparently intended to ensure that the exercise of powers by certain State bodies is human rights compliant. Such legislation includes the Regulation of Investigatory Powers Act 2000, which has already been discussed, and the Terrorism Act 2000. However, it is arguable that the Terrorism Act, with its extremely broad definition of terrorism and the Regulation of Investigatory Powers Act, which places 'directed surveillance' on a statutory basis but provides very meagre human rights safeguards, are based on minimal readings of the Convention.[1] Thus, it is concluded that while an awareness of the human rights dimension of legislation and of the common law is becoming apparent, the pace of change is likely to be very slow. This is largely due, it is suggested, to the readiness with which

minimal interpretations of the Convention rights can be adopted both by the judiciary and by the government.

Note

1 The example of Part III of the Anti-Terrorism, Crime and Security Act 2001 could also be given. A broad statutory basis for the sharing of personal and other information by public authorities has been created, which affords minimal respect for Art 8 rights.

CHAPTER 10

OFFICIAL SECRECY AND FREEDOM OF INFORMATION

Introduction

The most important value associated with freedom of information is the need for the citizen to understand as fully as possible the working of government, in order to render it accountable. One of the main concerns of the questions in this chapter is therefore the methods employed by governments to ensure that official information cannot fall into the hands of those who might place it in the public domain, and methods of preventing or deterring persons from publication when such information has been obtained. This chapter also places a strong emphasis on the choices that were made as to the release of information relating to public authorities—not only to central government—in the Freedom of Information Act 2000.

Examiners tend to set general essays rather than problem questions in this area; the emphasis is usually on the degree to which a balance is struck between the interest of the individual in acquiring government information and the interest of the State in withholding it. The balance between what may be termed State interests, such as defence or national security, and the individual entitlement to freedom of expression and information is largely struck by the Official Secrets Act 1989 and various common law provisions. However, the interpretation of the 1989 Act and the application of those provisions may be affected by the Convention rights as applied under the Human Rights Act 1998. Where information held by central government or by other public authorities is not covered by the 1989 Act, the citizen may be able to obtain access to it under the Freedom of Information Act 2000, when it comes fully into force. The 2000 Act is a very significant new development which is highly likely to feature on exam papers.

Checklist

Students should be familiar with the following areas:

- the Official Secrets Act 1989;
- DA Notices;

- the basic scheme of the Public Records Act 1958 and data protection legislation, particularly the Data Protection Act 1998;
- the basic aspects of freedom of information measures in other countries, particularly Canada and the US;
- the relevant aspects of common law contempt;
- the doctrine of breach of confidence as used by the government;
- the aspects of the voluntary government Code on Access to Information;
- the key aspects of the Freedom of Information Act 2000.

Question 37

'The Freedom of Information Act 2000 is a grave disappointment to those who are genuinely committed to the principle of freedom of information.'

Do you agree?

Answer plan

This is a very specific essay question which requires a detailed and critical evaluation of the 2000 Act. It should not be attempted unless the student has quite detailed knowledge (with references to sections) of this complex Act. In a form similar to that taken here, this question is highly likely to appear on exam papers at the present time.

Essentially, the following matters should be discussed:

- the general right of access to information under the Act;
- the exemptions under the Act; implications of the tests for exemptions;
- the use of and nature of the harm tests;
- the role of the Information Commissioner;
- the enforcement mechanisms in general;
- concluding evaluation of the Act.

Answer

'Unnecessary secrecy in government leads to arrogance in governance and defective decision-making…people expect much greater openness and accountability from government than they used to' (White Paper: *Your Right to Know,* Cm 3818). These words expressed the intention of the Labour government to introduce the new freedom of information legislation.

The Act of 2000 provides a general right of access to the information held by a range of bodies. The Act covers 'public authorities' and s 3 sets out the various ways in which a body can be a public authority. In Sched 1, the Act covers all government departments: the House of Commons, the House of Lords, quangos, the NHS, administrative functions of courts and tribunals, police authorities and chief officers of police, the armed forces, local authorities, local public bodies, schools and other public educational institutions and public service broadcasters. Under s 5, private organisations may be designated as public authorities insofar as they carry out statutory functions, as may the privatised utilities and private bodies working on contracted-out functions. Section 1(1) provides that any person making a request for information to a public authority is entitled to be informed of whether it holds information of the description specified in the request and if it holds the information it must communicate it. Thus, the right of access to the information is accompanied by a right to know whether or not the information is held by the body in question—this is referred to in the Act as 'the duty to confirm or deny'. Once it comes fully into force in 2005, individuals will be able to gain access to information relating to them personally, such as tax and medical records. They will also have the right to obtain information on other, general matters from the departments and bodies covered. For example, journalists and consumer groups might wish to obtain information concerning food safety, medical safety or pollution.

Thus, the Act begins with an apparently broad and generous statement of the rights it confers; it is also generous in its coverage.[1] However, the rights are subject to a wide range of exceptions and exemptions. In this crucial respect, it will be argued, the Act is indeed a disappointment to those who were committed to the freedom of information ideal. In particular, the Act came as a disappointment after the White Paper, which did not propose a wide range of exemptions. Under the White Paper, seven specified interests were indicated. The test for disclosure was, with one exception, will this disclosure cause substantial harm to one of these interests? The first of these interests covered national security, defence and international relations. A further six interests were: law enforcement, personal privacy, commercial confidentiality, the safety of the individual, the public and the environment, and information supplied in confidence.

Thus, the exemptions under the White Paper were relatively narrow and were subject to quite a strict harm test. They may be sharply contrasted with those that emerged under the Act. The harm-based exemptions under the Act are similar to those indicated in the White Paper: they require the public authority to show that the release of the information requested would (or would be likely to) cause prejudice to the interest specified in the exemption. However, this test for harm is of course less restrictive than that proposed

under the White Paper. Further, a number of exemptions are class-based, meaning that in order to refuse the request, the authority only has to show that the information falls into the class of information covered by the exemption, not that its release would cause or be likely to cause harm or prejudice.

However, the Act provides a public interest test in relation to some but not all of the class exemptions, and almost all of the 'harm exemptions'. The authority, having decided that the information is *prima facie* exempt (either because the information falls into the requisite class exemption or because the relevant harm test is satisfied, as the case may be), must still then go on to consider whether it should be released under the public interest test set out in s 2. This requires the authority to release the information unless 'in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information'. It has been argued that the application of the public interest test to class exemptions in effect transformed them into 'harm-based' exemptions. However, where information falls into a class exemption and an authority objects to disclosure even under the public interest test, it will be able not only to argue that the specific disclosure would have harmful effects, but also that the public interest would be harmed by any disclosure from within the relevant class of documents, regardless of the consequences of releasing the actual information in question. By contrast, under a prejudice test, the authority must be able first to identify that harm would be caused by releasing the *specific information* requested, and then go on to show that that specific harm outweighs the public interest in disclosure.

The discussion in this essay cannot cover all of the freedom of information class exemptions, but will consider some of the more controversial ones. Section 23(1) covers information supplied by or which relates to the intelligence and security services. The bodies mentioned in this exemption are not themselves covered by the Act at all. This exemption therefore applies to information which is held by *another public authority,* but which has been supplied by one of these bodies. Because it is a class exemption, it could apply to information which had no conceivable security implications, such as evidence of a massive overspend on MI5 or MI6's headquarters. Bearing in mind the complete exclusion of the security and intelligence services from the Act, the use of this class exemption unaccompanied by a harm test and not subject to the public interest test is likely to mean that sensitive matters of great political significance remain undisclosed, even if their disclosure would ultimately benefit those services or national security. Section 32 covers information *which is only held* by virtue of being contained in a document or record served on a public authority in proceedings, or made by a court or tribunal or party in any proceedings, or contained in a document lodged with

or created by a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration. The public interest test does not apply.

Certain class exemptions are subject to the public interest test. In relation to these exemptions, in practice, while the Information Commissioner will always have the last word on whether the information falls into the class in question, he will not always be able to enforce a finding that it should nevertheless be released on public interest grounds if the information is held by certain governmental bodies, since the ministerial veto may be used (see below). Section 30(1) provides a sweeping exemption, covering all information, whenever obtained, which relates to investigations that may lead to criminal proceedings. It represents a specific rejection of the recommendation of the Macpherson Report that there should be no class exemption for information relating to police investigations. It overlaps with the law enforcement exemption of s 31, which does include a harm test. There are certain aspects of information relating to investigations which would appear to require disclosure in order to be in accord with the principle of openness enshrined in the Act. For example, a citizen might suspect that his telephone had been tapped without authorisation or that he had been unlawfully placed under surveillance by other means. Under the Act, no satisfactory method of discovering information relating to such a possibility will exist. It is therefore unfortunate that telephone tapping and electronic surveillance were not subjected to a substantial harm or even a simple harm test.

The s 30(1) exemption extends beyond protecting the police and the Crown Prosecution Service (CPS). Other bodies will also be protected: it will cover all information obtained by safety agencies investigating accidents. It will cover routine inspections as well as specific investigations, since both can lead to criminal prosecution. Thus, anything from an inspection of a section of railway track by the Railway Inspectorate to a check upon hygiene in a restaurant by the Health and Safety Executive could be covered. It is particularly hard to understand the need for such a sweeping class exemption when s 31 specifically exempts information which could prejudice the prevention or detection of crime, or legal proceedings brought by a public authority arising from various forms of investigation. That exemption will ensure that no information is released which could damage law enforcement and crime detection.

The other major class exemption in this category, under s 35, has been equally criticised. It amounts to a very broad exemption covering virtually all information relating to the formation of government policy. This exemption is presumably intended to prevent government from having to decide policy in the public gaze—to protect the freeness and frankness of Civil Service advice and of internal debate within government—but once again it appears to go far beyond what would sensibly be required to achieve this aim. Section

36 contains a harm-based exemption which covers almost exactly the same ground. Since it covers all information whose release might cause damage to the working of government—and is framed in very broad terms—it appears to be unnecessary to have a sweeping class exemption covering the same ground. Moreover, this exemption is not restricted to Civil Service advice; it covers also the background information used in preparing policy, including the underlying facts and their analysis.

The Act is much more restrictive in this respect than the present, voluntary Code of Practice on Access to Government Information. The latter requires both facts and the analysis of facts underlying policy decisions, including scientific analysis and expert appraisal, to be made available once decisions are announced. Material relating to policy formation can only be withheld under a harm test—if disclosure would 'harm the frankness and candour of internal discussion'. The White Paper preceding the Bill proposed that there should be no class exemption for material in this area, but rather that, as under the Code, a harm test would have to be satisfied to prevent disclosure. While information in this category is subject to a public interest test, it is important to note that because by definition it will generally be information held by a government department, if the Commissioner orders disclosure on public interest grounds, the ministerial veto will be available to override him.[2]

The enforcement review mechanism under the Act is clearly crucial, but it is also open to criticism in certain key respects. The rights granted under the Act are enforceable by the Data Protection Commissioner, to be known as the Information Commissioner. Importantly, the Commissioner has security of tenure, being dismissible only by the Crown following an address by both Houses of Parliament. An appeal lies from decisions of the Commissioner to the Information Tribunal which is made up of experienced lawyers and 'persons to represent the interests' of those seeking information and of public authorities (Sched 2, Part II).

Section 50 provides that any person can apply to the Commissioner for a decision as to whether a request for information made by the complainant to a public authority has been dealt with in accordance with the Act. In response, the Commissioner has the power to serve a 'Decision Notice' on the authority, stating what it must do to satisfy the Act. He may also serve 'Information Notices' upon authorities, requiring the authority concerned to provide him with information about a particular application or its compliance with the Act generally. The Commissioner may ultimately force a recalcitrant authority to act by serving upon it an 'Enforcement Notice' (s 52(1)) requiring it to take the steps specified in the Notice. If a public authority fails to comply with a Decision, Enforcement or Information Notice, the Commissioner can notify the High Court, which (s 52(2)) can deal with the authority as if it had committed a contempt of court.

However, the Commissioner's decisions are themselves subject to appeal to the Information Tribunal, and this power of appeal is exercisable upon the broadest possible grounds. The Act provides that either party may appeal to the Tribunal against a Decision Notice and a public authority against an Enforcement or Information Notice (s 57(2) and (3)) either on the basis that the notice is 'not in accordance with the law', or 'to the extent that the Notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently' (s 58(1)). The Tribunal is also empowered to review any finding of fact on which the Notice was based. There is a further appeal from the Tribunal to the High Court, but on a 'point of law' only (s 59). In practice, this will probably be interpreted so as to allow review of the Tribunal's decisions, not just for error of law, but also on the other accepted heads of judicial review. The Convention rights under the Human Rights Act 1998 could be invoked at this point.

Enforcement can be affected by the ministerial veto, which is another highly controversial aspect of the Act. The veto can be exercised if two conditions are satisfied under s 53(1): first, the Notice which the veto will operate to quash must have been served on a government department, the Welsh Assembly or 'any public authority designated for the purposes of this section by an order made by the Secretary of State'; secondly, the Notice must order the release of information which is *prima facie* exempt but which the Commissioner has decided should nevertheless be released under the public interest test in s 2. The White Paper made no provision for such a power of veto, on the basis that to do so would undermine confidence in the regime. Such a veto clearly dilutes the basic freedom of information principle that a body independent from government should enforce the rights to information.

In conclusion, it is suggested that the Act is indeed disappointing. It creates so many restrictions on the basic right of access that depending upon its interpretation, much information of any conceivable interest could still be withheld. Whether this turns out to be the case in practice will depend primarily upon the robustness of the stance taken by the Commissioner, particularly in applying the public interest test to the class exemptions under the Act, where it will provide the only means of obtaining disclosure. However, certain restrictions, in particular that represented by the ministerial veto, will be difficult, if not impossible to overcome, however robust a stance is taken. Nevertheless, the Act does represent a turning point in British democracy since, for the first time in its history, the decision to release many classes of information has been removed from government and from other public authorities and placed in the hands of an independent agency, the Information Commissioner. Most importantly, for the first time, a statutory 'right' to information, enforceable if necessary through the courts, has been established.

Notes

1 The use of statutory publication schemes under the Act could be considered briefly here as part of the discussion of the more favourable aspects of the Act.
2 The issue of exemptions could be considered further and it could be pointed out that the Act, through amendments to the Public Records Act, provides that some of the exemptions will cease to apply after a certain number of years, though these limitations are hardly generous. Examples of exemptions that will cease to apply at all after 30 years (s 63(1)) can be given, for example, s 28 (inter-UK relations), s 30(1) (information obtained during an investigation), s 32 (documents generated in litigation) and s 36 (information which could prejudice effective conduct of public affairs). Still less generously, information relating to the bestowing of honours and dignities (s 37(1)(b)) only ceases to be exempt after 60 years, while it will be necessary to wait 100 years before the expiry of the exemption for information falling within s 31. One of the absolute exemptions—information provided by the security, intelligence, etc, services (s 23(1))—will cease to be absolute after 30 years, that is, the public interest in disclosure must be considered once 30 years has expired.

Question 38

Critically evaluate recent developments in the law of confidence and their likely impact on freedom of information and government secrecy.

Answer plan

This topic might obviously appear as part of a general and wide ranging essay or, as here, in its own right. It is concerned with the use of prior restraint under the doctrine of breach of confidence as a means of preventing publication of information and, of course, will involve consideration of the *Spycatcher* case and then of the impact of the Human Rights Act (HRA) 1998 in this area as indicated in *AG v Tomlinson* (2001).

Essentially, the following matters should be considered:

- breach of confidence—balancing public interest in disclosure of information against the interest in keeping it confidential;
- the nature of the public interest defence (*Lion Laboratories v Evans and Express Newspapers* (1985));
- the fact that the duty of confidence can bind third parties—use of interim injunctions (*AG v Guardian Newspapers Ltd* (1987));

- the essential aspects of the judgment of the European Court of Human Rights (ECtHR) on the Art 10 issue *(The Observer and The Guardian v UK* (1991); *The Sunday Times v UK* (1991));
- the use of common law contempt in conjunction with the law of confidence;
- s 12 of the HRA and Art 10 of the European Convention on Human Rights (the Convention);
- *AG v Blake* (2000);
- *AG v Tomlinson* (2001).

Answer

Breach of confidence is a civil remedy affording protection against the disclosure or use of information which is not generally known, and which has been entrusted in circumstances imposing an obligation not to disclose it without authorisation from the person who originally imparted it. This area of law developed as a means of protecting secret information belonging to individuals and organisations. However, it can also be used by government to prevent disclosure of sensitive information and is, in that sense, a back-up to the other measures available to government, including the Official Secrets Act 1989. In some respects, it may be more valuable than the criminal sanction provided by the Act. It may attract less publicity than a criminal trial, it offers the possibility of quickly obtaining an interim injunction, and no jury will be involved. The possibility of obtaining an interim injunction is very valuable since, in many instances, the other party (usually a newspaper) will not pursue the case to a trial of the permanent injunctions, because the secret will probably no longer be newsworthy by that time. The government has in the past found it very useful to obtain interim injunctions to suppress information. However, with the advent of the HRA, limitations have been placed upon its use of this tool.

In the pre-HRA era, some restrictions were apparent: where the government, as opposed to a private individual, is concerned, the courts did not merely accept that it was in the public interest that the information should be kept confidential. The government had to show that the public interest in keeping it confidential, due to the harm its disclosure would cause, was not outweighed by the public interest in disclosure. Thus, in *AG v Jonathan Cape* (1976), when the Attorney General invoked the law of confidence to try to stop publication of Richard Crossman's memoirs on the ground that they concerned Cabinet discussions, the Lord Chief Justice accepted that such public secrets could be restrained, but only on the basis that the balance of the public interest came down in favour of suppression.

Since the discussions had taken place 10 years previously, it was not possible to show that harm would flow from their disclosure; the public interest in publication therefore prevailed. The nature of the public interest defence—the interest in disclosure—was clarified in *Lion Laboratories Ltd v Evans and Express Newspapers* (1985). The Court of Appeal held that the defence extended beyond situations in which there had been serious wrongdoing by the plaintiff. Even where the plaintiff was blameless, publication would be excusable where it was possible to show a serious and legitimate interest in the revelation.

The leading case in this area is the House of Lords' decision in *AG v Guardian Newspapers Ltd (No 2)* (1990), which confirmed that the *Lion Laboratories Ltd v Evans* approach to the public interest defence was the correct one, and also clarified certain other aspects of this area of the law. As will be indicated below, the findings in this case should now be considered in the light of the HRA. In 1985, the Attorney General commenced proceedings in Australia in an attempt to restrain publication of *Spycatcher* by Peter Wright. The book included allegations of illegal activity engaged in by MI5. In 1986, after *The Guardian* and *The Observer* published reports of the forthcoming hearing which included some *Spycatcher* material, the Attorney General obtained temporary *ex parte* injunctions preventing them from further disclosure of such material. In 1987, the book was published in the US and many copies were brought into the UK. After that point, the House of Lords decided (relying on *American Cyanamid Co v Ethicon Ltd* (1975)) to continue the injunctions against the newspapers on the basis that the Attorney General still had an arguable case for permanent injunctions, since publication of the information was an irreversible step. The House of Lords' decision, which gave little weight to freedom of expression, was eventually found to be in breach of Art 10 of the Convention; the effect of that decision will be considered below.

In the trial of the permanent injunctions (*AG v Guardian (No 2)* (1988)), the Crown argued that confidentiality should be maintained in the public interest, since unauthorised disclosure of the information was thought likely to damage the trust which members of the service have in each other and might encourage others to follow suit. On the other hand, some of the information in *Spycatcher,* if true, disclosed that members of MI5 in their operations in England had committed serious breaches of domestic law; the book also included the allegations that members of MI5 attempted to destabilise the administration of Mr Harold Wilson, and that the director general or deputy director general of MI5 was a spy. The newspapers contended that the duty of confidentiality does not extend to allegations of serious iniquity of this character. It was determined that no detriment to national security had been shown that could outweigh the public interest in

free speech, given the publication of *Spycatcher* that had already taken place, and therefore continuation of the injunctions was not necessary.[1] Thus, the massive publication of *Spycatcher* seems to have tipped the balance in favour of the newspapers.

In the judgment in the ECtHR on the temporary injunctions granted in the *Spycatcher* case (*The Observer and The Guardian v UK; The Sunday Times v UK*), it was found that the injunctions in force before publication of the book in the US had the aim of preventing publication of material which, according to evidence presented by the Attorney General, might have created a risk of detriment to MI5.[2] The injunctions did not prevent the papers pursuing a campaign for an inquiry into the operation of the security services and, though preventing publication for a long time—over a year—the material in question could not be classified as urgent news. Thus, the interference complained of was proportionate to the ends in view. However, proportionality was not established in relation to the injunctions obtained after publication of the book in the US since their aim was no longer to keep secret information secret, it was to attempt to preserve the reputation of MI5 and to deter others who might be tempted to follow Peter Wright's example.[3] Thus, a breach of Art 10 was found. It is arguable that this was a very cautious judgment. The court seems to have been readily persuaded by the Attorney General's argument that a widely framed injunction was needed in July 1986, but it is arguable that it was wider than it needed to be to prevent a risk to national security.[4]

Further developments occurred during the *Spycatcher* saga which allowed breach of confidence a greater potential than it previously possessed to prevent dissemination of government information. While the temporary injunctions were in force, *The Independent* and two other papers published material covered by them. It was determined in the Court of Appeal (*AG v Newspaper Publishing plc* (1990)) that such publication constituted the *actus reus* of contempt. The case therefore affirmed the principle that once an interlocutory injunction has been obtained restraining one organ of the media from publication of allegedly confidential material, the rest of the media may be in contempt if they publish that material, even if their intention in doing so is to bring alleged iniquity to public attention. Such publication must be accompanied by an intention to prejudice the eventual trial of the permanent injunctions. Thus, the laws of confidence and contempt were allowed to operate together as a significant prior restraint on media freedom, and this principle was upheld by the House of Lords (*Times Newspapers and Another v AG* (1991)).

It seems fairly clear that although the government eventually lost in the *Spycatcher* case, the decision did not have any liberalising impact as far as enhancing the ability of newspapers to publish information about

government is concerned. The most pernicious aspect of breach of confidence—the ease with which interim injunctions may be obtained—will remain unaffected by this case, except in instances where a great deal of prior publication has occurred. Where such an injunction is obtained, it will affect all of the media, in the sense that they will not wish to risk criminal liability for contempt of court.

Case law since *Spycatcher* has, however, indicated that there are limits to the scope of breach of confidence and similar doctrines. In *Lord Advocate v The Scotsman Publications Ltd* (1990), a former member of MI6 published privately a book of memoirs. The Lord Advocate sought an injunction restraining any publication of extracts from the book in *The Scotsman.* The House of Lords, however, refused to grant an injunction. In the light of the Lord Advocate's concession and the fact that the book had already received some circulation (albeit limited), there was no reason to restrain publication by the press. More recently, in *AG v Blake* (2000), the courts considered the publication of the memoirs of a notorious spy. The Attorney General did not even seek to base his case on breach of confidence in this instance, since the events described took place more than 30 years previously. The House of Lords, however, while not restraining publication, ordered that all royalties otherwise payable to Blake should be forfeited to the Attorney General. This was on the basis that Blake was in breach of a contractual obligation dating from his employment by the security services not to disclose any information about his work, and this was a case where, exceptionally, an account of profits was the appropriate remedy for a breach of contract.

In the area of statutory provisions which affect the liability for breach of confidence, there has been the Public Interest Disclosure Act 1998. This aims to protect 'whistleblowers' by providing a defence of public interest and overriding the law of confidence. It renders such whistleblowers vulnerable, however, if they disclose the information to a person other than an employer or a relevant regulatory body. It remains to be seen how effective this legislation will be in restricting actions based on breach of confidence.

But the doctrine is being affected most significantly by the HRA. Just as the Official Secrets Act creates a direct interference with political speech, the doctrine of confidence as employed by the government can do so too. Therefore, the use of the doctrine in such instances will require careful scrutiny, with Art 10 in mind. Since this is a common law doctrine, s 3 will not apply. But the courts have a duty under s 6 of the HRA to develop the doctrine compatibly with Art 10. The duty of the courts in relation to the doctrine of confidence under the HRA was considered by Sedley LJ in *Douglas and Others v Hello! Ltd* (2001). He found that following ss 2 and 6 of the Act, the courts must themselves act compatibly with the Convention rights. Thus, a court, itself a public authority under s 6, is obliged to give

effect to Art 10, among other provisions of the Convention, when considering the application of this doctrine. Section 12(4) of the HRA is also applicable where interference with the right to freedom of expression is in issue, as it inevitably will be in this context. Section 12(4) requires the court to have particular regard to the right to freedom of expression under Art 10. Thus, s 12(4) provides added weight to the argument that in the instance in which the State seeks to suppress the expression of an individual using this doctrine, the court must consider the pressing social need to do so and the requirements of proportionality very carefully, interpreting those requirements strictly. In considering Art 10, the court should, under s 12(4)(a), take into account the extent to which the material is or is about to become available to the public and the public interest in publication. These two matters are central in breach of confidence actions. They imply that the State's task in obtaining an injunction where a small amount of prior publication has taken place—or is about to—has been made harder.

Section 12(3) of the HRA provides that prior restraint on expression should not be granted except where the court considers that the claimant is 'likely' to establish at trial that publication should not be allowed. Moreover, *ex parte* injunctions cannot be granted under s 12(2), unless there are compelling reasons why the respondent should not be notified or the applicant has taken all reasonable steps to notify the respondent. All these requirements under the HRA must now be taken into account in applying the doctrine of confidence and the rule from *AG v Newspaper Publishing plc* (1990). Current developments suggest that the result is likely to be that the doctrine will undergo quite a radical change from the interpretation afforded to it in the *Spycatcher* litigation. The case of AG *v Times* (2001) is significant. A former MI6 officer wrote a book, *The Big Breach,* about his experiences in MI6 which *The Sunday Times* intended to serialise. There had been a small amount of publication of the material in Russia. The Attorney General sought an injunction to restrain publication.

The key issue concerned the degree of prior publication required before it could be said that the material had lost its quality of confidentiality. The two parties agreed on a formula: that the material had already been published in any other newspaper, magazine or other publication whether within or outside the jurisdiction of the court. The Attorney General, however, contended that the defendants had to demonstrate that this was the case, which meant that they had to obtain clearance from the Attorney General before publishing. The newspaper invoked Art 10 and also relied on s 12(4) of the HRA. It was argued that the restriction proposed by the Attorney General would be disproportionate to the aim pursued and therefore could not be justified in a democratic society. The decision in *Bladet-Tromsø v Norway* (1999) was referred to, in which the court said that it is incumbent on the

media to impart information and ideas concerning matters of public interest. It was found that the Attorney General had failed to demonstrate why there was a public interest in restricting publication; therefore, no injunction was granted. The requirement to seek clearance should not, it was found, be imposed: the editor had to form his own judgment as to whether the material could be said to be already in the public domain. That position was, the court found, most consonant with the requirements of Art 10 and s 12.

This decision suggests that, bearing in mind the requirements of the HRA, an injunction is unlikely to be granted where a small amount of prior publication has already taken place. It does not, however, decide the question of publication where no prior publication has taken place, but the material is of public interest (which could clearly have been said of the Wright material). Following *Bladet-Tromsø v Norway*, it is suggested that an injunction should not be granted where such material is likely, imminently, to come into the public domain, a position consistent with the demands of s 12(4), which refers to such a likelihood. Even where this cannot be said to be the case, it would be consonant with the requirements of Art 10 and s 12 to refuse to grant an injunction on the basis of the duty of newspapers to report on such material. The burden would be placed on the State to seek to establish that a countervailing pressing social need was present and that the injunction did not go further than necessary in order to serve the end in view. Thus, although breach of confidence remains a fairly important weapon in the government's armoury, it is likely to be of more limited effect in the future than seemed probable at the time of the *Spycatcher* litigation.

Notes

1 It was further determined that an injunction to restrain future publication of matters connected with the operations of the security service would amount to a comprehensive ban on publication, and would undermine the operation of determining the balance of public interest in deciding whether such publication was to be prevented; accordingly, an injunction to prevent future publication which had not yet been threatened was not granted.

2 It could be pointed out that the House of Lords wanted to preserve the Attorney General's right to be granted a permanent injunction; if *Spycatcher* material had been published before that claim could be heard, the subject matter of the action would have been damaged or destroyed. In the court's view, these factors established the existence of a pressing social need.

3 It could be noted further that after publication in the US, it was not possible to maintain the Attorney General's rights as a litigant since the substance of his claim had already been destroyed; had permanent injunctions been obtained against the papers, that would not have preserved the confidentiality of the material in question.

4 This point could be pursued further: the injunction could have required the newspapers to refrain from publishing Wright's material which had not been previously published by others until (and if) the action to prevent publication of the book was lost. Such wording would have taken care of any national security interest; therefore, wording going beyond that was disproportionate to that aim. The judgment could also have set itself against the narrow view that the authority of the judiciary is best preserved by allowing a claim of confidentiality, set up in the face of a strong competing public interest, to found an infringement of freedom of speech for over a year.

Question 39

Critically evaluate the means currently available to the government to prevent disclosure of information. Taking some account of recent developments, including the introduction of the Freedom of Information Act 2000, would it be fair to say that the tradition of government secrecy is finally breaking down?

Answer plan

This is clearly quite a general and wide ranging essay which requires knowledge of a number of different areas. It is concerned both with methods of ensuring that information cannot fall into the hands of those who might place it in the public domain, and with methods of preventing or deterring persons from publication when a leak has occurred. Both issues are aspects of freedom of expression and are touched on in Chapter 11, but the first is given greater prominence here. The question asks you, in essence, to present a critical analysis of the current scheme preventing disclosure of certain information, and to consider whether the right of access to information recently introduced in the 2000 Act (not yet in force) will dramatically improve the public's access to information. Since the essay is so wide ranging, you are not expected to engage in a detailed analysis of the 2000 Act.

Essentially, the following areas should be considered:

- the impact of the Official Secrets Act 1989: 'harm tests' and the Public Interest Disclosure Act 1998;
- the relationship between the Official Secrets Act, the Security Services Act 1989, the Intelligence Services Act 1994, the Interception of Communications Act 1985 and the Regulation of Investigatory Powers Act 2000;

- the use of the common law as a means of preventing disclosure of information—common law contempt and breach of confidence;
- a comparison with the DA Notice system—criticism of the system as currently operated;
- freedom of information measures in other countries;
- the operation of the Public Records Acts 1958 and 1967, as amended and the Data Protection Act 1998, as amended;
- the efficacy of the current voluntary Code and the likely effect of the Freedom of Information Act 2000.

Answer

It has often been said that the UK is more obsessed with keeping government information secret than any other Western democracy. It is clearly advantageous for the party in power to control the flow of information in order to ensure that citizens are unable to scrutinise some official decisions. The justification for this climate of secrecy is that freedom of information would adversely affect 'ministerial accountability'. In other words, ministers are responsible for the actions of civil servants in their departments, and must therefore be able to control the flow of information emanating from the department in question. However, this doctrine is not easy to defend in a democracy; it might be thought that ministers would be made more accountable, not less, if the workings of officials were made fully open to public scrutiny. However, s 2 of the Official Secrets Act 1911 created a climate of secrecy in the Civil Service which greatly hampered the efforts of those who wished to obtain and publish information about the workings of government.

The Official Secrets Act 1989, which decriminalised disclosure of some official information, was therefore heralded as amounting to a move away from obsessive secrecy. However, since it was in no sense a freedom of information measure, it did not allow the release of any official documents into the public domain, although it does mean that if certain information is disclosed outside the categories it covers, the official concerned will not face criminal sanctions. (He might, of course, face an action for breach of confidence as well as disciplinary proceedings.)

The narrowing down of the official information covered by the Act was supposed to be achieved by introducing 'harm tests', which took into account the substance of the information. Clearly, such tests are to be preferred to the width of s 2 of the Official Secrets Act 1911, which covered all official information, no matter how trivial. However, there is no test for harm at all in the category of information covered by s 1(1) of the 1989 Act,

which prevents members or former members of the security services from disclosing anything at all about the operation of those services. All such members come under a lifelong duty to keep silent, even though their information might reveal serious abuses of power in the security services or some operational weakness. Equally, there is no test for harm under s 4(3) of the Act, which covers information obtained by or relating to the issue of a warrant under the Interception of Communications Act 1985 or the Security Services Act 1989.

The harm tests under the Act are further diluted in various ways. Under s 3(1)(b), which covers confidential information obtained abroad, the mere fact that the information is confidential 'may' be sufficient to establish the likelihood that its disclosure would cause harm. In other words, a fiction is created that harm may automatically flow from such disclosure. The Act contains no explicit public interest defence and it follows from the nature of the harm test that one cannot be implied into it; any good flowing from the disclosure of the information cannot be considered, merely any harm that might be caused. Moreover, no express defence of prior publication is provided; the only means of putting forward such an argument would arise in one of the categories in which it was necessary to prove the likelihood that harm would flow from the disclosure; the prosecution might find it hard to establish such a likelihood where there had already been a great deal of prior publication. Thus, the Act was unlikely to have a liberalising impact on the publication of information allowing the public to scrutinise the workings of government.

The Public Interest Disclosure Act 1998 is also far from being a likely source of greater freedom of information; although, in principle, it affords a defence of 'public interest' disclosure to those facing Official Secrets Act disciplinary proceedings, full protection only exists where the disclosure is made in good faith to an employer or regulatory body. Thus, disclosure to the media is still a risky method and will be justified only where the malpractice is exceptionally serious or the whistleblower acts to avoid victimisation or a cover-up, or an inept official investigation has occurred.

The Official Secrets Act 1989 works in tandem with other measures designed to ensure secrecy. Sections 1 and 4(3) work in conjunction with the provisions of the Security Services Act 1989 to prevent almost all scrutiny of the operation of the security service. Even where a member of the public has a grievance concerning the operation of the service, it will not be possible to use a court action as a means of bringing such operations to the notice of the public—under s 5 of the Security Services Act, complaints can only be made to a tribunal and, under s 5(4), the decisions of the tribunal are not questionable in any court of law. Furthermore, the Act provides for

no real form of parliamentary oversight of the security service, but this has to some extent been remedied by s 10 of the Intelligence Services Act 1994, which set up for the first time a Parliamentary Committee to oversee the operation of MI5, MI6 and Government Communications Headquarters (GCHQ). However, since the Committee is not a Select Committee, its powers are limited. In a similar manner, s 4(3) of the Official Secrets Act, which prevents disclosure of information about telephone tapping, works in tandem with the Regulation of Investigatory Powers Act 2000. Under the 2000 Act, complaints can be made only to a tribunal (set up under the Act), with no possibility of scrutiny by a court.

Developments in the use of the common law doctrine of confidence as a means of preventing disclosure of information provide a further method of ensuring secrecy where information falls outside the categories covered by the Official Secrets Act, or where it falls within one of them, but a prosecution is not undertaken. *AG v Guardian Newspapers* (1987), which concerned the publication of material from *Spycatcher* by Peter Wright, demonstrated that temporary injunctions could be obtained to prevent disclosure of official information, even where prior publication has ensured that there is little confidentiality left to be protected. The House of Lords decided (relying on *American Cyanamid Co v Ethicon Ltd* (1975)) that temporary injunctions could be continued where there was still an arguable case for permanent injunctions. However, the House of Lords eventually rejected the claim for permanent injunctions on the basis that the interest in maintaining confidentiality was outweighed by the public interest in knowing of the allegations in *Spycatcher.* Moreover, it was impossible to sustain a restriction based on confidentiality when the worldwide publication of the book meant that the information it contained was clearly in the 'public domain'.

There are other methods of seeking to deter persons from publishing information relating to the security and intelligence services. In *AG v Blake* (2000), a former security services operative published his memoirs. The Attorney General did not seek an injunction on grounds of breach of confidence, because the information concerned was at least 30 years old, and did not in itself prejudice national security. The House of Lords, however, held that the Attorney General was entitled to an account of any profits from the publication of the memoirs, because such publication involved a breach of a contractual duty on the part of the operative, dating from his employment by the security services, not to disclose any information about his work.

A restraint over obtaining an injunction or damages for breach of confidence is now to be found in s 12 of the HRA 1998. This requires any court considering such relief not to grant any interim injunctions unless it

is satisfied that the claimant is likely to be successful at trial. Moreover, it must have particular regard to the importance of freedom of expression, and in relation to journalistic, literary or artistic material, consider both the public interest and the extent to which the relevant information is or is about to be in the public domain. It therefore appears that in future, courts will apply existing statutory and common law rules with a far greater focus upon the public right to know. In this respect, the case of *AG v Times* (2001) is significant. A former MI6 officer wrote a book, *The Big Breach*, about his experiences in MI6 which *The Sunday Times* intended to serialise. There had been a small amount of publication of the material in Russia. The Attorney General sought an injunction to restrain publication. It was found that he had failed to demonstrate why there was a public interest in restricting publication; therefore, no injunction was granted. The requirement to seek clearance should not, it was found, be imposed: the editor had to form his own judgment as to whether the material could be said to be already in the public domain. That position was, the court found, most consonant with the requirements of Art 10 and s 12. This decision suggests that bearing in mind the requirements of the HRA, an injunction is unlikely to be granted where even a very small amount of prior publication has already taken place.

Apart from the action for breach of confidence, the government can seek to prevent the publication of some forms of information by means of a curious institution known as the DA Notice system. This system, which effectively means that the media censor themselves in respect of publication of official information, may preclude the need to seek injunctions to prevent publication. The DA Notice Committee was set up with the object of letting the press know which information could be printed: it was intended that if sensitive political information was covered by a DA Notice, an editor would decide against printing it.[1]

It is clear from the discussion so far that the government has a range of measures available to it to prevent publication of forms of State information, but that the measures have recently become more liberal. The 1989 Act is a narrower measure than its predecessor and the action for breach of confidence has a narrower application due to the impact of the HRA. However, the narrowing down of the measures available to the State to prevent disclosure of information does not in itself mean that access to official information is available. The mere fact that a Crown servant will not be prosecuted for disclosing information and is unlikely to face civil liability does not in itself mean that the citizen can obtain access to the information.

Information of historical interest may be obtainable via the UK Public Records Act 1958, as amended by the Public Records Act 1967 and the

Freedom of Information Act 2000. However, under the 1958 Act, public records in the Public Records Office are not available for inspection until the expiration of 30 years, and longer periods can be prescribed for sensitive information. Some information can be withheld for 100 years or forever and there is no means of challenging such decisions. For example, at the end of 1987, a great deal of information about the Windscale fire in 1957 was disclosed, although some items are still held back. Thus, the 1958 Act, even after amendment, can hardly be viewed as being equivalent to a statutory right of access to current information.

However, for the past decade, there has been a slow but progressive movement towards freedom of information legislation for the UK, culminating in the Freedom of Information Act 2000. The then Conservative government published a White Paper in July 1993 setting out its intentions in relation to freedom of information, which included the means of allowing citizens access to some government information. A voluntary Code allowing the citizen access to official information in certain specified areas was introduced in 1994. However, it is suggested that a voluntary Code cannot replace a statutory right of access. The promise to release information only related to 'useful' or 'useable information'. However, in countries which have freedom of information, the usefulness of the information is determined by the person who seeks it, rather than by government ministers or civil servants. Usefulness is not an objective quality, but depends on the purposes of the seeker which only he can appreciate, and therefore it may be argued that this is an unwarranted limitation on the principle of 'openness'. Challenge through an Ombudsman cannot be as effective as challenge in a court.

Voluntary open government asks the citizen to trust the government to act against its own interests. Clearly, government departments may be prepared voluntarily to release some information which is innocuous, but they are less likely to do so where the information will cause political embarrassment and may enable the Opposition to make a more informed and therefore more damaging attack on government. When the Labour government came to power, it promised to introduce a Freedom of Information Act in the White Paper: *Your Right to Know,* Cm 3818. This promise took shape in the form of the Freedom of Information Act 2000, which will be brought fully into force over the next few years (with a final deadline of 2005). Once in force, the Act will have a number of important consequences. Primarily, it places a general right of access to information on a statutory basis for the first time, in s 1. The new right will allow the public access to information held by a very wide definition of public authorities, including local government, the NHS, schools and colleges, and the police. An Information Commissioner has been appointed to

supervise the new scheme and the public will be able to contact him directly. Public authorities must, on request, indicate whether they hold information required by an individual and, if so, communicate that information to him within 20 working days.

However, a number of forms of information will be exempt, including that relating to security matters or which might affect national security, defence or the economy. The exemptions proposed under the White Paper were relatively narrow and were subject to quite a strict harm test. They may be sharply contrasted with those that emerged under the Act. The harm-based exemptions under the Act are similar to those indicated in the White Paper: they require the public authority to show that the release of the information requested would or would be likely to cause prejudice to the interest specified in the exemption. However, this test for harm is less restrictive than that proposed under the White Paper. Further, a number of exemptions are class-based, meaning that in order to refuse the request, the authority only has to show that the information falls into the class of information covered by the exemption, not that its release would cause or be likely to cause harm or prejudice.

However, the Act provides a public interest test in relation to some, but not all, of the class exemptions and almost all the 'harm exemptions'. The authority, having decided that the information is *prima facie* exempt (either because the information falls into the requisite class exemption, or because the relevant harm test is satisfied, as the case may be), must still go on to consider whether it should be released under the public interest test set out in s 2. This requires the authority to release the information unless 'in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information'.

Section 32 provides a particularly controversial class exemption: it covers information *which is only held* by virtue of being contained in a document or record served on a public authority in proceedings, or made by a court or tribunal or party in any proceedings, or contained in a document lodged with or created by a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration. The public interest test does not apply. It overlaps with the law enforcement exemption of s 31, which does include a harm test. The other major class exemption, under s 35, has been equally criticised. It amounts to a very broad exemption covering virtually all information relating to the formation of government policy. Section 36 contains a harm-based exemption which covers almost exactly the same ground.

The imprecise terms used to indicate the exempted information and the introduction of class exemptions may allow the government to exempt

from the disclosure provisions much information which is merely embarrassing or damaging to its reputation. Some such information may also be subject to the ministerial veto, where it relates to central government, which means that it cannot be disclosed even if it is not exempt.[2] However, where the veto is not used, a right to appeal to the information tribunal is granted by the Act to complainants and much will depend upon future interpretations of the statute by the Commissioner and the courts. To an extent, it remains to be seen whether the new Act will be a substantial step towards greater openness in central government. In relation to other public authorities operating in non-exempt areas, the Act clearly represents a significant further step in the direction of freedom of information. It is concluded that the developments described here do suggest that a movement away from the tradition of government secrecy has been occurring over the last two decades, culminating in the Act of 2000. Nevertheless, the existence of class exemptions in the Act and of the ministerial veto suggest that some aspects of that tradition are reflected, ironically, in that Act.

Notes

1 It could be pointed out that the system is entirely voluntary, and in theory, the fact that a DA Notice has not been issued does not mean that a prosecution under the Official Secrets Act 1989 is precluded, although, in practice, it is very unlikely. Press representatives sit on the Committee as well as civil servants and officers of the armed forces.

2 The veto can be exercised if two conditions are satisfied under s 53(1): first, the Notice which the veto will operate to quash must have been served on a government department, the Welsh Assembly or 'any public authority designated for the purposes of this section by an order made by the Secretary of State'; secondly, the Notice must order the release of information which is *prima facie* exempt but which the Commissioner has decided should nevertheless be released under the public interest test in s 2. The White Paper made no provision for such a power of veto, on the basis that to do so would undermine confidence in the regime. Such a veto clearly dilutes the basic freedom of information principle that a body independent from government should enforce the rights to information.

Question 40

'A comparison between the Code of Practice on access to government information introduced by the Conservative government and the Freedom of Information Act 2000 demonstrates that the Act is inadequate, since it provides very little more than the Code. It therefore appears that although with the introduction of the Act, the UK has gone a little way down the path towards freedom of information, there is still a long way to go.'

Discuss.

Answer plan

This is clearly quite a specific topic which calls for an answer confined to access to information, rather than a general and wide ranging answer looking at the whole area of government secrecy. In order to answer it, it is necessary to have detailed knowledge of both the Code and the key provisions of the Act of 2000.

Essentially, the following areas should be considered:

- the Code of Practice on access to government information—exceptions and enforcement;
- a comparison between the Code and the statutory right of access to government and public authority information under the 2000 Act;
- other freedom of information measures—the Data Protection Acts 1984 and 1998, and statutory access rights to manual files;
- conclusions as to the stage reached in freedom of information terms.

Answer

The then Conservative government published a White Paper in July 1993 which set out its intentions in relation to freedom of information. Instead of freedom of information legislation, the Major government favoured the introduction of an unenforceable Code of Practice on access to government information. It came into effect in 1994 and the second edition was published in 1997. In contrast to the voluntary Code, the Labour government promised a statutory right of access to official information and this was established with the introduction of the Freedom of Information Act in 2000, although it will not be fully in force until 2005. In the following discussion, certain key features of the Code will be identified and these will be contrasted with the

provisions of the Act. When the Code is compared with the Freedom of Information Act, it is found that both exhibit features which are found in freedom of information Codes or Acts abroad, but in almost every instance where various possibilities are available, the Code chooses the course which disadvantages the seeker of information and undermines the principle of 'openness'. The picture that emerges under the Act is more mixed. Four particular key features of the Code will be considered in order to emphasise the contrasts between the Act and the Code. The argument will be that the Act creates a superior freedom of information scheme, but that it displays a number of weaknesses.

The Code provides that non-exempted government departments will publish a range of information and will also provide information on receipt of specific requests. The presumption is in favour of disclosure; after the 1997 revision, the Code provided that information should be disclosed, unless the harm likely to arise from disclosure would outweigh the public interest in making the information available: Part II. The 2000 Act is based on similar principles, but in strong contrast to the unenforceable Code, it will give UK citizens, for the first time, a statutory right to non-exempt official information enforceable by an independent Information Commissioner, who as a last resort can enforce his orders through invoking the courts' power to punish for contempt of court.

One of the weaknesses of the Code is that it only provides for release of information as opposed to documents (para 4 of Part I). As the Campaign for Freedom of Information has pointed out, this is 'a potentially overwhelming defect: the opportunities for selective editing are obvious'. In contrast, the right conferred under s 1(1)(b) of the Freedom of Information Act covers original documents as well as 'information'. Section 84 defines information broadly to cover information 'recorded in any form', and in relation to matters covered by s 51(8), this includes unrecorded information. In this respect, the Act is clearly an improvement on the Code.

The implied and express exemptions from the Code are extremely wide. Certain matters set out in Sched 3 to the Parliamentary Commissioner Act (PCA) 1967 are excluded from the investigation by the Parliamentary Commissioner for Administration (PCA). These include the investigation of crime by or on behalf of the Home Office, security of the State, and personnel matters of the armed forces, teachers, the Civil Service or police. A large number of matters are excluded from the Code, although the majority of these—after the 1997 revision—are subject to a harm test. They include defence, security and international relations; internal discussion and advice; law enforcement and legal proceedings; immigration and nationality; effective management of the economy and of the public service; research, statistics and analysis; privacy of an individual; and information given in

confidence. Of these restrictions, those attracting the most criticism have been the exclusion of contractual and commercial matters and of public service personnel matters.

In relation to major policy decisions (para 3(i) of Part I), the Code relates only to information considered relevant by the government. In countries which have freedom of information legislation, the usefulness or relevance of documents containing information is determined by the person who seeks it rather than by government ministers or civil servants. Usefulness is not an objective quality, but depends on the purposes of the seeker which only he can appreciate.

The introduction of harm tests, which mirror some of those under the Official Secrets Act 1989, is to be welcomed since it limits the width of the exemption in question, but the tests are so wide and imprecise that they are unlikely to have much impact in narrowing the exemptions. The harm tests are varied and some are more complex than others, but none of them provide a precise explanation of the meaning of 'harm'. Thus, in relation to defence, security and international relations, part of the harm test is concerned with 'information whose disclosure would harm national security or defence'. Exemption 2 covers 'information which would harm the frankness and candour of internal discussion'.

The exceptions under the Act of 2000 will be, on the whole, less wide ranging than those under the Code, taking into account the limitations of the PCA's remit—the PCA does not cover many of the bodies which are covered by the Act and therefore the question of exemptions does not arise. In certain respects, however, the Code is on its face more generous. In particular, the total exemption under s 21 does not appear in the Code in as broad a form (para 8 of the Code refers to information obtainable under existing statutory rights) and the exemption under s 35 is broader than the equivalent exemption under the Code (in para 2). The exemptions under the Act rely on the key distinction between 'class' and 'harm-based' exemptions. The harm-based exemptions under the Act are similar to those indicated in the White Paper: they require the public authority to show that the release of the information requested would or would be likely to cause prejudice to the interest specified in the exemption. However, a number are class-based, meaning that in order to refuse the request, the authority only has to show that the information falls into the class of information covered by the exemption, not that its release would cause or would be likely to cause harm or prejudice.

The Act provides a public interest test in relation to some but not all of the class exemptions and almost all the 'harm-based exemptions'. However, where information falls into a class exemption and an authority objects to disclosure even under the public interest test, it will be able not only to argue

that the specific disclosure would have harmful effects, but also that the public interest would be harmed by any disclosure from within the relevant class of documents, regardless of the consequences of releasing the actual information in question.

This discussion cannot cover all of the Freedom of Information Act class exemptions, but will consider some of the more controversial ones. Section 23(1) covers information supplied by or which relates to the intelligence and security services. The bodies mentioned in this exemption are not themselves covered by the Act at all. This exemption therefore applies to information which is held by *another public authority*, but which has been supplied by one of these bodies. Because it is a class exemption, it could apply to information which had no conceivable security implications, such as evidence of a massive overspend on MI5 or MI6's headquarters. The use of this class exemption unaccompanied by a harm test and not subject to the public interest test is likely to mean that sensitive matters of great political significance remain undisclosed, even if their disclosure would ultimately benefit those services or national security. Section 32 is another broad and controversial class exemption; it includes information *which is only held* by virtue of being contained in a document served on a public authority in proceedings or made in any proceedings. The public interest test does not apply.

Section 30(1) provides a sweeping class exemption, covering all information whenever obtained which relates to investigations that may lead to criminal proceedings. It represents a specific rejection of the recommendation of the Macpherson Report that there should be no class exemption for information relating to police investigations. This s 30 exemption extends beyond protecting the police and the Crown Prosecution Service. Other bodies will also be protected: it will cover all information obtained by safety agencies investigating accidents. It is particularly hard to understand the need for such a sweeping class exemption when s 31 specifically exempts information which could prejudice the prevention or detection of crime, or legal proceedings brought by a public authority arising from various forms of investigation.[1]

A further major class exemption under s 35 has been equally criticised. It amounts to a very broad exemption covering virtually all information relating to the formation of government policy. This exemption is not restricted to Civil Service advice; it covers also the background information used in preparing policy, including the underlying facts and their analysis. Section 36 contains a harm-based exemption which covers almost exactly the same ground.[2] In contrast to the position under most other freedom of information regimes, s 35 allows the *analysis* of facts to be withheld. The 2000 Act is much more restrictive in this respect than the present, voluntary Code

of Practice. The latter requires both facts and the analysis of facts underlying policy decisions, including scientific analysis and expert appraisal, to be made available once decisions are announced. Material relating to policy formation can only be withheld under a harm test. While information in the s 35 category is subject to a public interest test, it is important to note that because by definition it will generally be information held by a government department, if the Commissioner orders disclosure on public interest grounds, the ministerial veto will be available to override him (see below).

The third feature of the Code to be considered relates to the role of the Parliamentary Commissioner for Administration (Ombudsman) in policing it. If a citizen fails to obtain information or full information in a non-exempt area, he can complain to an MP, who will probably pass the complaint to the Ombudsman. If the Ombudsman recommends that a department should reveal information and the department does not accept the recommendation, departments may be called upon to justify themselves before the Select Committee on the PCA. However, the Committee cannot compel a department to release information. Thus, the Ombudsman has no means of enforcing his recommendations unless he takes the means of redress into his own hands by disclosing the disputed information. No provision of the Code envisages that he might do this. He might be reluctant to take this course since it would probably damage relations between himself and the department in question, which would almost certainly have repercussions in relation to other aspects of his role. Thus, the Code is perhaps most open to criticism due to its lack of 'teeth'.

The enforcement review mechanism under the Act is far stronger than the mechanism established under the Code. The internal review of a decision to withhold information, established under the Code, was formalised under the Act and the role of the Ombudsman was taken over by that of the Information Commissioner. The Commissioner's powers will be much more extensive than those of the Ombudsman: he will have the power to order disclosure of the information by means of an enforcement notice (s 52(1)) and can report a failure to disclose information to the High Court (s 52), which can treat it in the same way as contempt of court.[3] However, the ministerial veto weakens the enforcement of the access where government departments are involved. It is therefore another highly controversial aspect of the Act. The White Paper made no provision for such a power of veto, on the basis that to do so would undermine confidence in the regime. Such a veto clearly dilutes the basic freedom of information principle that a body independent from government should enforce the rights to information, and since in cases where the release of information could embarrass ministers, it constitutes them as judge in their own cause, it is objectionable in principle.[4] Thus, the enforcement mechanism under the Act, while stronger than that available

under the Code, exhibits clear failures of commitment to the freedom of information ideal.

The final and most fundamental criticism of the Code is that in principle, the case for a voluntary Code as opposed to a general statutory right of access to information is not a strong one, mainly because voluntary open government asks the citizen to trust government to act against its own interests. Clearly, government departments may be readily prepared to release voluntarily some information which is out of date or innocuous for some other reason, but this may be less likely where the information will cause political embarrassment and may enable the Opposition to make a more informed and, therefore, more damaging attack on the governing party. The grace and favour nature of this scheme, it is argued, is inappropriate in relation to freedom of information, although the recommendatory nature of the PCA may be appropriate in relation to his main function. The fact that the PCA operates informally and privately has been thought to enhance his powers of persuasion. However, in relation to complaints under the Code, the lack of a power to award a remedy may in some situations appear to amount to a weakness in the PCA system. The fact that adherence to the Code is voluntary may mean that it is not taken seriously unless the PCA takes up a complaint.[5]

It is argued that the introduction of a statutory right of access to official information is clearly preferable to relying on a voluntary Code. However, it must be acknowledged that the Commissioner's power to force government to disclose information is weakened by the existence of the ministerial veto. This is one of the major concerns about the Act. The other is the great number and width of the exemptions it contains and the fact that many of these amount to class exemptions. It is concluded that the current Code of Practice on access to government information, and the developments preceding it, represented a clear movement towards freedom of information, but an inadequate one. Despite the concerns expressed above, it is suggested that a far more significant step in that direction will be taken once the Act of 2000 is fully in force.

Notes

1 It could be pointed out that where it has been decided that the information falls into the protected class, the authority must then go on to consider whether it should be released under the public interest test. Since most of the information above will not be held by a government department (discussed later in the essay), the Commissioner will be able to order disclosure if he thinks that the information should be released under this provision, with no possibility of a ministerial veto.

2 The sole, and very limited exception to this exemption appears in sub-s (2) of s 35; it applies only 'once a decision as to government policy has been taken' and covers 'any statistical information used to provide an informed background to the taking of the decision'.

3 Further discussion of the enforcement mechanism could be included. The Commissioner's powers are buttressed by powers of entry, search and seizure to gain evidence of a failure by the authority to carry out its obligations under the Act or comply with a Notice issued by the Commissioner (detailed in Sched 3). However, the Commissioner's decisions are themselves subject to appeal to the Tribunal, and this power of appeal is exercisable upon the broadest possible grounds (s 57(2) and (3); s 58(1)). The Tribunal is empowered to review any finding of fact on which the Commissioner's notice was based and, as well as being empowered to quash decisions of the Commissioner, may substitute any other notice that he could have served. It may also be noted that no civil liability is incurred if a public authority does not comply with any duty imposed by the Act (s 56).

4 For the veto to be exercisable, two conditions must be satisfied under s 53(1): first, the Notice which the veto will operate to quash must have been served on a government department, the Welsh Assembly or 'any public authority designated for the purposes of this section by an order made by the Secretary of State'; secondly, the Notice must order the release of information which is *prima facie* exempt but which the Commissioner has decided should nevertheless be released under the public interest test in s 2.

5 A survey published in March 1997 (see the journalists' magazine, *UKPG*, 7 March 1997, para 9) showed that public bodies are not meeting the standards of openness laid down in the government Code. Fifty government departments were asked for information to which the public is entitled under the Code. Eleven gave wrong or inadequate information and three refused to reply at all. Among those showing poor practice were the Legal Aid Board and the Commission for Racial Equality. The Department for Education and Employment and the Office for National Statistics were among those which refused to reply.

CHAPTER 11

FREEDOM OF EXPRESSION

Introduction

This is a key area in the protection of human rights element of constitutional law courses. Examiners tend to set general essays in this area; the emphasis is usually on the degree to which a balance is struck between freedom of expression and a variety of other interests. It is now essential in your answers to take the European Convention on Human Rights (the Convention) into account, especially Art 10, which provides a guarantee of freedom of expression. The Convention was received into UK law when the Human Rights Act (HRA) 1998 came fully into force in October 2000. Until that time, Art 10 and other Convention Articles relevant in this area were not directly applicable in UK courts, but the judiciary referred to the Convention more and more in resolving ambiguity in statutes in the run-up to the inception of the HRA. The HRA has now been in force for some time and there are certain early significant decisions in the field of freedom of expression (such as *Interbrew SA v Financial Times Ltd* (2002) and *Shayler* (2002)). Section 3 requires that: 'So far as it is possible to do so, primary and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.' Section 3(2)(b) reads: '…this section does not affect the validity, continuing operation or enforcement of any incompatible primary legislation.' This goes beyond the *current* obligation to resolve ambiguity in statutes.

All statutes affecting freedom of expression and media freedom will therefore have to be interpreted so as to be in harmony with the Convention if that is at all possible. Under s 6 of the HRA, Convention guarantees are binding only against public authorities. These are defined as bodies which have a partly public function. The definition is therefore quite wide, but probably means that private bodies, including most of the media (apart from the 'public bodies', such as the BBC, Independent Television Commission (to be replaced by Ofcom) and the Press Complaints Commission) can violate Convention rights unless a part of the common law, which will also be interpreted in conformity with the Convention, bears on the matter.

Thus, exam questions will reflect this extremely significant development and will expect an awareness of the Art 10 jurisprudence and of the likely impact of the HRA on freedom of expression.

Checklist

Students should be familiar with the following areas:

- Art 10 of the Convention, other relevant rights such as Art 6, Art 10 jurisprudence and the HRA 1998;
- early decisions taking account of the HRA and Art 10 such as *Interbrew SA v Financial Times Ltd* (2002) and *Shayler* (2002);
- key aspects of the Contempt of Court Act 1981 and common law contempt;
- the doctrine of breach of confidence;
- basic aspects of the Broadcasting Acts 1990 and 1996 and the Office of Communications Act 2002;
- the Obscene Publications Act 1959;
- the Cinemas Act 1985;
- the Official Secrets Act 1989;
- blasphemy;
- the basic principles of defamation.

Question 41

In the light of statutory developments in the fields of official secrecy and the administration of justice in the 1980s and the 1990s, how far, if at all, would you say that UK law may require reform in order to ensure compatibility with Art 10 of the European Convention on Human Rights under the Human Rights Act 1998?

Answer plan

This is clearly a fairly narrowly focused essay. Note that only *statutory* developments in the two areas in question need be considered. Also, unless the answer is not to become unmanageably long, it would be wise to interpret the question as unconcerned with other aspects of freedom of expression such as public protest (see Chapter 13) or freedom of information—which is linked to media freedom of expression (see Chapter 10). Usually, if a question expects those aspects to be discussed, it will make that clear.

The following matters should be considered:

- Art 10 and the HRA—ways in which the HRA influences the law;
- key aspects of the Strasbourg freedom of expression jurisprudence;

- the Official Secrets Act 1989; *Shayler;*
- ss 2 and 5 of the Contempt of Court Act 1981;
- s 10—*Goodwin v UK* (1996);
- *Interbrew SA v Financial Times Ltd* (2002); *Ashworth Hospital Authority v* MGN Ltd (2002);
- conclusions.

Answer

Freedom of expression tends to come into conflict with other interests to a greater extent than any other liberty. In considering how far the 'balance' between freedom of expression and other interests was affected by statutory developments in the field of freedom of expression in the 1980s and the 1990s, it should be remembered that freedom of expression is not affected only by changes in domestic law. Article 10 of the European Convention on Human Rights (the Convention) guarantees freedom of expression to citizens of Member States and, although the Convention was not at the time directly applicable in UK courts, it had some influence on domestic law in this area, since the judiciary increasingly referred to the Convention in resolving ambiguity in statutes. But now it is not only possible, but also necessary for public authorities and the courts to take a stronger stance in favour of freedom of expression due to the impact of the HRA which receives the Convention, including the guarantee of freedom of expression under Art 10, into domestic law.

Legislation must be read by the courts in a manner which gives effect, so far as is possible, to the Convention rights (s 3 of the HRA); if this is not possible, a declaration of incompatibility may be issued (s 4), and remedial action may be taken as a result (s 10). Further, the HRA gives special regard to the importance of freedom of expression (s 12) and forbids restraint of publication before a full trial, unless the court is satisfied that the applicant is very likely to win at trial.

The Strasbourg freedom of expression jurisprudence demonstrates that Art 10 is one of the most significant Articles of the Convention. The Court has repeatedly asserted that freedom of expression 'constitutes one of the essential foundations of a democratic society' (*The Observer and The Guardian v UK* (1991)) and that it is applicable not only to 'information' or 'ideas' that are regarded as inoffensive, but also to those that 'offend, shock or disturb' (*Thorgeirson v Iceland* (1992)). Particular stress has been laid upon 'the preeminent role of the press' which, 'in its vital role of 'public watchdog', has a duty 'to impart information and ideas on matters of public interest' which the public 'has a right to receive' (*Castells v Spain*

(1992)). However, it is a marked feature of the Strasbourg jurisprudence that clearly political speech receives a much more robust degree of protection than other types of expression. Thus, the 'political' speech cases of *Sunday Times* (1979), *Jersild v Denmark* (1994), *Lingens v Austria* (1986) and *Thorgeirson v Iceland* (1992) all resulted in findings that Art 10 had been violated and all were marked by an intensive review of the restriction in question in which the margin of appreciation was narrowed almost to vanishing point. By contrast, in cases involving artistic speech, an exactly opposite pattern emerges: applicants have tended to be unsuccessful and a deferential approach to the judgments of the national authorities as to its obscene or blasphemous nature has been adopted (*Müller v Switzerland* (1991); *Handyside v UK* (1976); *Otto-Preminger Institut v Austria* (1994); *Gay News v UK* (1982)). It may be noted that in the years immediately preceding the inception of the HRA, UK judgments frequently reflected these values—or, as they would put it, discovered that they were in any event a significant aspect of the common law; as Lord Steyn has put it: 'freedom of speech is the lifeblood of democracy' (*Secretary of State for the Home Department ex p Simms* (1999)).

Thus, it is submitted that the statutory developments to be considered in this essay are undergoing and will undergo fresh scrutiny, with a possible change in the balance they create between protecting freedom of expression and protecting other interests, such as national security and the administration of justice. Article 10, unlike domestic law, provides a clear means of attempting to consider the extent to which the 'balance' in question is maintained, since its starting point is the primacy of freedom of expression, and Art 10(2) provides a number of tests that must be satisfied before a restriction of expression can be justified.

The Official Secrets Act 1989 represents a highly significant development which is arguably likely to prove more effective in preventing disclosure and publication of information than its predecessor. The Act was supposed to bring about an increase in the information which could be disclosed to the public without incurring criminal liability, by introducing a test which took into account the substance of the information. However, it is apparent that there is no test for harm at all in certain of the categories of information covered, including s 1, which prevents members of the security services disclosing anything, however trivial, about the operation of those services. In the categories covered by s 3(1)(b), although there appears to be a test for harm, it may in fact be satisfied merely by establishing the nature of the information. In other words, once it is shown that the information is of a certain nature, it is accepted that harm may automatically flow from its disclosure. The Act contains no explicit public interest defence and it follows from the nature

of the harm test that one cannot be implied into it; any good flowing from the disclosure of the information cannot be considered, merely any harm that might be caused. Thus, the Act was always unlikely to have a liberalising impact on the publication of information, allowing the public to scrutinise the workings of government.

In 2002, David Shayler was tried under the Act on the basis that he had infringed ss 1 and 4 by divulging MI6 secrets. He alleged that MI6 had been involved in a plot to assassinate Colonel Gaddafi; further allegations exposed, Shayler claimed, serious illegality on the part of MI6, and were necessary to avert threats to life and limb and to personal property. Since the HRA is in force, Shayler can seek to rely on s 3 which provides: 'So far as it is possible to do so, primary and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.' Since s 1 of the 1989 Act provides no means of balancing any harm to the security and intelligence services against the interests of freedom of expression, it might have been expected that it would be found to be incompatible with Art 10. A preliminary hearing was held regarding the effect of the HRA on s 1(1). It was argued that since ss 1(1) and 4(1) are of an absolute nature, they are incompatible with Art 10 of the Convention under the HRA, owing to the requirement that interference with expression should be proportionate to the legitimate aim pursued. In other words, using s 3 of the HRA in a creative fashion to seek to resolve the incompatibility would be unfruitful, since compatibility could not be achieved. This argument was rejected by the House of Lords (*Shayler* (2002)) on the basis that avenues of complaint were available to Shayler. There were various persons to whom the disclosure could be made, including those identified in s 12. Further, significantly, under s 7(3) of the 1989 Act, a disclosure can be made to others if authorised; those empowered to afford authorisation are identified in s 12. Shayler could have sought authorisation to make his disclosures from those identified under s 12 or from those prescribed as persons who can give authorisations. Assuming that this ruling is followed, Art 10 will have no impact on s 1(1).

The problem with the argument accepted by the House of Lords is that the means viewed as available to members or former members of the security services to expose iniquity are very unlikely to be used. It seems, to say the least, highly improbable that such a member would risk the employment detriment that might be likely to arise, especially if he then proceeded to seek judicial review of the decision. It appears that it would place him in an impossible position vis à vis colleagues and superiors. Both current and former members may be deterred from using this route, for the simple reason that they will probably view it as inefficacious. It would probably be impossible to prove to a court that security service work was

creating dangers to persons without adducing evidence which itself would be covered by s 1(1). One of the most important principles recognised at Strasbourg is that rights must be real, not tokenistic or illusory. It is argued that the right to freedom of expression—one of the central rights of the Convention—is rendered illusory by ss 1(1) and 4(1) of the Official Secrets Act in relation to allegedly unlawful activities of the security services—a matter of great significance in a democracy.

If ss 1 and 4 of the Official Secrets Act make little effort to balance national security and the protection for use of covert surveillance against freedom of expression, the Contempt of Court Act 1981 does make an effort to create a balance between protecting the administration of justice and media freedom of expression. The 1981 Act was designed to modify the common law in response to the findings of the European Court of Human Rights in the *Sunday Times* case (1979) without bringing about radical change. It introduced various liberalising factors, but it was intended to maintain the stance of the ultimate supremacy of the administration of justice over freedom of speech, while moving the balance further towards freedom of speech. In particular, it introduced stricter time limits (s 2(3)), a more precise test for the *actus reus* (s 2(2)) and allowed some articles on matters of public interest to escape liability even though prejudice to proceedings was created (s 5).

Section 5 reflects the guarantee under Art 10. It affords a high value to political speech, broadly defined, and therefore reflects the value placed upon such speech at Strasbourg. If it appears that s 2(2) is fulfilled, it must next be established that s 5 does not apply. *AG v English* (1983) is the leading case on s 5 and is generally considered to provide a good example of the kind of case for which s 5 was framed. Lord Diplock's test under s 5 may be summed up as follows: looking at the actual words written (as opposed to considering what could have been omitted), was the article written in good faith and concerned with a question of general legitimate public interest which created an incidental risk of prejudice to a particular case? It seems that the discussion can be triggered off by the case itself; it need not have arisen prior to it. This ruling gave an emphasis to freedom of speech which tended to bring the strict liability rule into harmony with Art 10 as interpreted by the European Court's ruling in the *Sunday Times* case. Due to the interpretation afforded to s 5, it is probable that the 1981 Act is already in harmony with the demands of Art 10 and therefore the inception of the HRA may not require a change in the balance it strikes between the two interests in question.

However, in other respects, it might have been expected that the Act would require reform or at least re-interpretation due to the inception of the HRA. Section 10 of the 1981 Act provides some protection for media

sources, unless a court finds that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime. Thus, s 10 creates a presumption in favour of journalists who wish to protect their sources which is, however, subject to four wide exceptions, of which the widest arises where the interests of justice require that disclosure should be made. The House of Lords clarified the nature of the balancing exercise to be carried out under s 10 in *X v Morgan Grampian Publishers and Others* (1990), and moved that balance away from protection for media freedom, in its finding that the applicant's right to take legal action against the source outweighs the journalist's interest in maintaining the promise of confidentiality made to him. In *Goodwin v UK* (1996), the European Court found that Art 10 had been infringed in the *X v Morgan Grampian Publishers* decision, since insufficient weight had been given to the need of journalists to protect their sources. It might have appeared, therefore, that s 10 would require re-interpretation under s 3 once the HRA was in force, in order to take the *Goodwin* decision into account.

However, in *Interbrew SA v Financial Times Ltd* (2002) and *Ashworth Hospital Authority v MGN Ltd* (2002), the Court of Appeal and House of Lords respectively considered that the journalists in question had to reveal the source of the information in the interests of justice, interpreting that phrase quite widely. The two decisions therefore clearly do not offer reassurance to sources who are uncertain whether to come forward, although it could be argued that the source in the *Interbrew* case came forward for his own (arguably improper) motives, and was hardly in the position of the nervous source who wishes to reveal wrongdoing but is afraid of the repercussions. On the other hand, potential sources are unlikely to understand the nuances of the cases, but may merely receive the message that the protection for their anonymity is in jeopardy. Although this comment is arguably inapplicable or not fully applicable to these two cases themselves, it might appear in general that the courts are protecting the right of institutions or companies to bring actions against employees and others in order to ensure that they can maintain effective cover-ups. Both these decisions took account of the effect of the HRA and the courts considered that the outcomes were consistent with the demands of Art 10 of the Convention.

In the post-HRA instances considered so far, the interests of the State or its agents in keeping sensitive information secret, or the interests of justice have tended to prevail over free speech interests despite the effects of Art 10. However, it is not suggested that the judiciary is unconcerned with the need to protect freedom of speech, whether as a result of the HRA or of following common law principle. It is suggested, rather, that it wishes to

provide such protection, but is most confident in doing so when faced with a competing public interest lying outside the areas under discussion in which it has traditionally been receptive to claims that freedom of expression must be suppressed. In conclusion, it appears that while the HRA may not ensure that protection of freedom of speech is enhanced where it comes into conflict with the interests of the State, especially the interest of national security, the judiciary does show an awareness of the need to afford such protection. The HRA 1998 requires judges to take an activist stance in this area and it is possible that eventually Art 10 will be used to create clearer, fairer boundaries to restrictions on freedom of expression, outside matters relating to the security and intelligence services. However, judicial determination to create a proper balance between freedom of speech and other interests may find expression only where it is not countered by judicial reluctance to allow the needs (or apparent needs) of national security to be abrogated. It would appear that UK law does not require reform in order to ensure compatibility with Art 10 of the Convention under the HRA, but that this does not necessarily mean that freedom of expression receives the degree of protection it would receive at Strasbourg.

Question 42

'The Broadcasting Acts 1990 and 1996 and the Obscene Publications Act 1959 strike a balance between freedom of expression and protecting other interests, such as the need to maintain proper standards of taste and decency, which can now be viewed as in accordance with Art 10 of the European Convention on Human Rights.'

Discuss.

Answer plan

This is a reasonably straightforward essay question. It is important to consider these statutes only and not the common law in this area, except where there is some particular relationship between the common law and the statute in question when the common law could be considered. Obviously, the question could be 'attacked', in the sense that you might argue that no balance at all should be struck between, for example, freedom of expression on the one hand and maintaining proper standards of taste and decency: freedom of expression should entirely outweigh the other value, since the latter is too broad and vague to

justify restrictions. You could argue that allowing freedom of expression to outweigh that other value entirely would be in accordance with Art 10. Alternatively, it might be argued that the balance to be struck should differ from medium to medium. In other words, different standards should be maintained for broadcasting than for films shown in the cinema. You need to remember that the European Convention on Human Rights (the Convention) has been afforded further effect in domestic law under the Human Rights Act (HRA) 1998; it cannot merely be considered as an instrument administered at Strasbourg or afforded some effect domestically as a means of resolving statutory ambiguity as in the pre-HRA era.

Essentially, the following areas should be considered:

- Art 10 of the Convention and the HRA 1998;
- the subsequent restraints under the Obscene Publications Act 1959;
- the curbs on broadcasting and internal censorship on grounds of taste and decency under the Broadcasting Acts 1990, 1996; the Office of Communications Act 2002;
- political censorship under the Broadcasting Act 1990 and the duty of impartiality;
- proposals for reform—the White Paper, *A New Future for Communications;*
- conclusions regarding compatibility of the statutory provisions and Art 10 of the Convention.

Answer

In attempting to determine how far the statutes in question afford any recognition to freedom of expression, it must be remembered that they were framed by a Parliament which had no legal brake upon its powers; it still does not have to have regard to a written constitution forcing it to take freedom of speech into account. Thus, until recently, it was prepared to frame laws which, if fully enforced, would severely damage freedom of expression. However, such laws are not always fully enforced; if they were, the consequent clash between the media and the government would tend to bring the law into disrepute. Thus, although by examining the provisions of these statutes, an indication of the 'balance' Parliament had in mind may be gained, other more nebulous factors, including public concern for media freedom, must also be taken into account. This essay will consider whether that balance, such as it is, accords with the demands of Art 10. Clearly, it is now necessary for public authorities and the courts to take a stronger stance in favour of freedom of expression due to the impact of the HRA which

receives the Convention, including the guarantee of freedom of expression under Art 10, into domestic law.

The legislation in question must be read by the courts in a manner which gives effect, so far as is possible, to the Convention rights (s 3 of the HRA 1998); if this is not possible, a declaration of incompatibility may be issued (s 4) and remedial action may be taken as a result (s 10). Further, the HRA gives special regard to the importance of freedom of expression in s 12. Public authorities, which include media 'watchdog' bodies such as the Broadcasting Standards Commission (BSC) (to be replaced by Ofcom under the powers of the Office of Communications Act 2002), are bound by the Convention rights under s 6 unless s 6(2) applies. Thus, it is submitted that these statutory restrictions on freedom of expression may undergo fresh scrutiny, with a possible change in the balance against decency. The regulatory regimes which the statutes set up create a number of public authorities which should ensure that Art 10 is not infringed in their decision-making.

The regulation and licensing of broadcasting or cinemas does not necessarily in itself infringe Art 10. Article 10(1) specifically provides that the Article 'shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises'. It is significant that this provision arises in the *first* paragraph of Art 10, thereby providing a limitation of the primary right that on its face is not subject to the test of para 2. However, a very restrictive approach to this sentence has been adopted. It has been found to mean that a licensing system is allowed for on grounds not restricted to those enumerated in para 2; the State may determine who is to have a licence to broadcast. But in general, other decisions of the regulatory bodies which normally grant licences and oversee broadcasting, etc, are not covered by the last sentence of para 1 and must be considered within para 2 (*Groppera Radio AG v Switzerland* (1990)). Thus, content requirements must be considered under para 2. Certain forms of expression which may be said to be of no value may fall outside the scope of Art 10(1) and it is arguable that, for example, material gratuitously offensive to religious sensibilities (*Otto-Preminger Institut v Austria* (1994)) or depictions of genitals in pornographic magazines intended merely for entertainment (*Groppera Radio AG v Switzerland* (1990)) may fall outside its scope. On the other hand, 'hardcore' pornography has been found by the Commission to fall within Art 10(1).

Clearly, political speech receives a much more robust degree of protection than other types of expression. Thus, the 'political' speech cases of *Sunday Times* (1979), *Jersild v Denmark* (1994), *Lingens v Austria* (1986) and *Thorgeirson v Iceland* (1992) all resulted in findings that Art 10 had been violated, and all were marked by an intensive review of the restriction in question in which the

margin of appreciation was narrowed almost to vanishing point. By contrast, in cases involving artistic speech, an exactly opposite pattern emerges: applicants have tended to be unsuccessful and a deferential approach to the judgments of the national authorities as to its obscene or blasphemous nature has been adopted (*Müller v Switzerland* (1991); *Handyside v UK* (1976); *Otto-Preminger Institut v Austria* (1994); *Gay News v UK* (1982)). In *Otto-Preminger Institut v Austria* (1994), the Court found that a State may restrict expressions which may offend a particular population, although otherwise freedom of expression includes freedom to disseminate unpopular, shocking and disturbing information and ideas. Although there is no universal concept of morality (*Handyside* (1976)), the ECtHR does give high value to public interest arguments in favour of publication, as demonstrated in recent cases. Under Art 10(2), an interference with the guarantee of freedom of expression under Art 10 can be justified if it is prescribed by law, has a legitimate aim and is necessary in a democratic society. Strasbourg affords a very high value to freedom of expression and, in particular, as indicated, views the scope for interference with political expression as very limited. Even in respect of artistic expression, which appears to have a lower place in the hierarchy of expression, the discussion below indicates that no decisions defending restrictions on the freedom of expression of adults can be found, except in respect of hardcore pornography, or where a risk to children is also present, or in the context of offending religious sensibilities.

While the Broadcasting Acts 1990 and 1996 are specifically aimed at the broadcast media, the Obscene Publications Act covers all media under s 1(2), now that the Broadcasting Act 1990 has brought radio and television within its ambit. The Broadcasting Acts were passed because it was thought that due to its particular impact on audiences, television required a system of prior restraints, whereas books and other printed material did not. It is very unlikely, therefore, that a broadcast could attract liability under the Obscene Publications Act; nevertheless, it provides a further possibility of restraint and can also be used as a guide to the standards that censorship will observe.

Of the three statutes, the Obscene Publications Act is the one which could most clearly be said to make a specific attempt at creating a balance between protecting morality on the one hand and safeguarding freedom of speech on the other. The provisions aimed at achieving this balance are ss 1(1) and 4. Section 1(1) prohibits publication of material which tends to deprave and corrupt its likely audience. The meaning of this test has caused the courts some difficulty: the House of Lords held in *Knuller v DPP* (1973) that it did not connote something which might lead to social evil in the sense that the material in question would be likely to cause a person to act in an anti-social fashion. The House of Lords found that such a test would be too narrow and would fail

to catch a great deal of material.[1] Further, it is balanced by the 'public good' defence contained in s 4. This defence requires a jury to ask first whether an article is obscene and, if so, to consider whether its merits outweigh its obscenity. This test was included as a means of giving protection to freedom of expression in relation to publications of artistic merit. However, it has been criticised by Robertson as requiring a jury to embark on the very difficult task of weighing an intrinsic quality against a predicted change for the worse in the minds of the group of persons likely to encounter the article. Further, the defence can be avoided by bringing a charge of indecency at common law; as *Gibson* (1990) demonstrated, the merits of an obscene object may, paradoxically, prevent its suppression while the merits of less offensive objects will not.

However, the application of these tests at the present time, as seen in the trial for obscenity of the book *Inside Linda Lovelace* in 1976, suggests that no book of any conceivable literary merit will be prosecuted for obscenity. Other publications, however, are a different matter: under s 3 of the Act, magazines and other material such as videos can be seized in forfeiture proceedings, which may mean that the full safeguards provided by the Act can be bypassed: full consideration may not be given to the possible literary merits of such material. It seems, therefore, that the protection afforded by the Act to freedom of speech depends more on the willingness of the prosecuting authorities to refrain from bringing prosecutions or on the tolerance of magistrates, rather than on the law itself.[2]

Clearly, any prosecutions under the Act or forfeiture actions constitute interferences with the Art 10 guarantee of freedom of expression under the HRA, although subject to justification. In relation to any particular decision, the public authorities involved are bound by s 6 of the HRA to ensure that the tests under Art 10 are satisfied, while the provisions of the 1959 Act must be interpreted consistently with Art 10 under s 3 of the HRA. Section 12 of the HRA does not appear to apply to criminal proceedings (s 12(5)). Forfeiture proceedings have the hallmarks of criminal proceedings in certain respects, although a conviction is not obtained, and therefore they may be outside the ambit of s 12.

Given the wide margin of appreciation afforded to the domestic authorities in the relevant decisions, little guidance as to the requirements of Art 10 in this context is available, especially where the material is directed at a willing adult audience. The domestic judiciary is therefore theoretically free to take a different stance. The decisions considered above at Strasbourg on the 1959 Act indicate that the statutory regime relating to publication of an obscene article under s 2 is broadly in harmony with Art 10 of the Convention. Nevertheless, a specific decision might not meet the proportionality requirements, scrutinised more intensively than at Strasbourg.

The UK forfeiture regime has not itself been tested at Strasbourg. The HRA requirements may be especially pertinent in relation to forfeiture: the magistrates conducting the proceedings are, of course, bound by Art 10 and therefore would be expected to approach the task with greater rigour. In particular, it is arguably necessary to examine each item, even where a large scale seizure has occurred, rather than considering a sample of items only (see *Snaresbrook Crown Court ex p Commissioner of the Metropolis* (1984)). But since, in practice, a vast amount of material is condemned as obscene in legal actions for forfeiture, the practical difficulties facing magistrates make it possible, especially initially, that the impact of the HRA will be more theoretical than real. It seems probable that in practice, magistrates will not examine each item and will give only cursory attention, if any, to considering the application of the somewhat elusive Strasbourg case law. However, if on occasion publishers seek to contest s 3 orders before a jury, the proportionality of the measures adopted may receive more attention. Moreover, it is arguable that Art 6 of the Convention might be breached by the procedure since it could be said to lack impartiality, given that the same magistrate may sign the seizure order and determine forfeiture.

The Broadcasting Act 1990 is only partly concerned with restraining freedom of expression, but its effect in that area is far more wide ranging than that of the Obscene Publications Act, which can be seen as setting a minimum standard. As part of the 'de-regulation' of television, the Act sets up the Independent Television Commission (ITC) to replace the Independent Broadcasting Authority (IBA) as a public body charged with licensing and regulating non-BBC television services. Under s 6(1)(a), the ITC must attempt to ensure that every licensed television service ensures that nothing is included in its programmes 'which offends against good taste and decency'. The ITC published an updated Programme Code dealing with those matters in 2000. It attempts to strike a balance between preserving good taste and decency on the one hand and avoiding too great a restraint on freedom of speech on the other. It therefore allows sexual scenes, so long as they are presented with tact and discretion. As far as films are concerned, it follows the guidelines laid down by the British Board of Film Classification (BBFC) (see below); '18' rated films may be shown, but only after 'the watershed', which varies according to the channel. Furthermore, the BBFC standards are to be regarded as minimum ones; the mere fact that a film has an '18' certificate is not to be taken as implying that it would be proper to broadcast it. The role of the ITC in this respect was to an extent duplicated by the Broadcasting Standards Council, set up in 1988 to monitor the standards being maintained in programmes.

The Broadcasting Act 1996 replaced the Council with the BSC, an independent body to which appointments are made by the Home Secretary. The BSC is placed under a duty to create and implement a Code of Guidance for broadcasters which deals with matters of decency, with particular attention to the depiction of sex and violence (s 108). The BSC is also under a duty to deal with complaints about indecency, sex or violence in broadcasts, and it may have a hearing to enable it to reach a decision (ss 110 and 116). However, its only sanction is to force the broadcaster against whom the complaint has been made to publish its findings. The BBC has similar duties under its Royal Charter and Licence.

In some respects, the new arrangements could be said to represent a slackening of restraint on what may be broadcast, in the sense that the television companies will no longer have to submit their controversial programmes to an outside body for preview and censorship. As the Annan Committee pointed out in 1977, the old system meant that programmes might be subject to dual censorship in being considered first by the IBA and then by the company concerned. However, although such censorship is now solely in the hands of the companies themselves, the ITC has a number of sanctions to use against a company which fails to abide by the Programming Code, ranging from a requirement to broadcast an apology to the power to revoke its licence. The financial penalties available are very severe and may deter the companies from taking risks in their interpretation of what is allowed by the Code.

Censorship of television programmes may be based on political grounds, not only on those of taste and decency. An impartiality clause was introduced by s 6 of the Broadcasting Act 1990, requiring the ITC to set up a Code to require that politically sensitive programmes must be balanced to ensure impartiality. Such programmes can be balanced by means of a series of programmes; it is not necessary that any one programme should be followed by one specific balancing programme. However, the requirement may mean that some politically controversial programmes are not made, since the expense and difficulty of setting up balancing programmes may prove to have a deterrent effect. The ITC Code makes it clear that a company cannot use the argument that a programme which might be said to have an anti-government bias may be balanced by programmes broadcast by other companies; the company has to achieve impartiality in its own programming. In interpreting this Code, the companies may again act cautiously and may interpret what is meant by 'bias' broadly. Thus, although this provision may seek to balance a need for impartiality against the need to protect freedom of expression, it may not achieve that balance in practice.

Journalists, film makers and groups such as Amnesty, whose advertising has been rejected, could challenge media regulators,

including, in future, Ofcom (which will replace the BSC) directly by invoking s 7(1)(a) of the HRA. Decisions as to licensing, political advertising, adjudications regarding taste and decency and impartiality could be subjected thereby to a more intensive scrutiny. Assuming that the independent television companies are not public authorities under s 6 of the HRA, which is almost certainly the case, they could also bring such proceedings as Victims' under the HRA. The use of s 7(1)(a) would mean that such decisions would be tested more directly against Convention standards than they have been by means of judicial review. Section 12 of the HRA would be applicable. The application of the various Codes of Practice could also be challenged in such proceedings. Provisions of such Codes could be struck down by the courts, unless primary legislation prevented the removal of the incompatibility. Given that the detailed provisions are commonly contained in the Codes, this is a significant possibility.

Clearly, it can be said, as indicated above, that those Convention standards are themselves quite flexible in respect of the 'protection of morals'—they very clearly leave room for the adoption of a range of approaches. The stance under Art 10 considered above might well support quite far-reaching restrictions on broadcasting owing to the possibility that children might be affected, since it comes into the home. But the Strasbourg standard as regards political expression is much stricter. The use of the Convention jurisprudence considered above on both political and, if afforded a creative interpretation, artistic expression might enable pressure to be brought to bear, tending to promote the representation of a wider range of views, including views of minority groups, in broadcasting.

Apart from the restraints already mentioned, the government obtained the widest possible power to censor television under the Broadcasting Act 1981 and this was continued in the 1990 Act. This power was challenged in *Secretary of State for the Home Department ex p Brind and Others* (1990). The Secretary of State issued directives under s 29(3) of the Broadcasting Act 1981 and clause 13(4) of the BBC's Licence and Agreement, requiring the BBC and the IBA to refrain from broadcasting words spoken by persons representing certain extremist groups or words spoken supporting or inviting support for those groups. The ban was challenged in *Secretary of State for the Department ex p Brind and Others* (1991). The applicants submitted that the Home Secretary's discretionary powers were exercisable only in conformity with Art 10 of the European Convention and that in curtailing freedom of expression where there was no pressing social need to do so, the directives contravened Art 10. The House of Lords agreed that the Convention could be used as a rule of statutory construction to resolve ambiguity in subsequent primary

legislation, but disagreed with the submission that the issuing of the directives was therefore *ultra vires,* on the ground that it could not be presumed that discretionary powers were, by analogy, limited by the terms of the Convention. It was found that such a presumption would go far beyond the resolution of an ambiguity, as it would assume that Parliament had intended to import the text of the Convention into domestic administrative law. As Parliament had chosen not to incorporate the Convention into domestic law, this, it was found, was an unwarranted assumption.[3]

Clearly, the inception of the HRA has had the effect of reversing the decision in *Brind* as regards the effect of the Convention on administrative powers. If the power of censorship is invoked again, it will have to be used within Convention limits and any ban would have to be proportionate to the aim pursued. In *The Observer and The Guardian v UK* (1991) *('Spycatcher')*, the Commission considered that a strict test of necessity must be applied where the government seeks to restrict journalistic freedom, and in *Goodwin v UK* (1996), the Court stated that it will tip the balance of competing interests in favour of the interest of democratic society in securing a free press. According to the Court in *Jersild v Denmark* (1994), it is for the media, not the courts, to decide which reporting techniques are appropriate to their task in acting as a public watchdog. If a broadcast, taken as a whole, raises issues of public concern or public interest, then interference by the State or the courts is not justified.

The Strasbourg cases discussed appear to show that freedom of expression may in future be given greater guarantees in UK courts. It does appear to an extent that the domestic means of protecting freedom of speech pre-HRA were weak; its protection depended partly on the discretion of the government and prosecuting authorities, rather than the law. Therefore, it is arguable that the HRA 1998 may provide greater protection. Domestic judges could find that some sections of the statutes considered here are unsustainable now that freedom of speech has been given primacy. The chances that they will do so may not be high, especially as in relation to the protection of morality, the Strasbourg jurisprudence leaves open room for a number of interpretations, domestically. It is arguable, as indicated, that the provisions considered are compatible with Art 10 and strike a balance which is broadly consistent with its demands. However, the HRA may inculcate a greater awareness of freedom of expression jurisprudence among judges and even among media bodies and media regulators themselves.

Notes

1 This is an important point which could be pursued further—the test is known as 'the contemporary standards' test—it derives from *Calder and Boyars* (1969). Because juries will apply this test, the concept of obscenity is, at least theoretically, able to keep up to date.

2 Proposals for reform could be mentioned. The Williams Committee recommended in 1979 that the printed word should not be subject to any restraint and that other material should be restrained on the basis of two specific tests: first, material which might shock should be available only through restricted outlets; and secondly, material should not be prohibited unless it could be shown to cause specific harm. Clearly, these proposals would give greater weight to freedom of speech than the protection of morals, in that they would allow greater differentiation between the kinds of harm which might be caused by the various media. These proposals have not been implemented, and therefore the uncertain 'deprave and corrupt' test remains as an arguably unacceptable restraint on artistic freedom.

3 The case could be discussed further. It was further submitted that administrative action can be challenged by way of judicial review if it is disproportionate to the mischief at which it is aimed, and that this particular exercise of power went further than was necessary to prevent terrorists increasing their standing. The House of Lords held that lack of proportionality was merely to be regarded as one aspect of *Wednesbury* unreasonableness, not as a separate head of challenge. The question to be asked was therefore whether the minister's decision was one which no reasonable minister could have made. Taking into account the fact that the directives did not restrict the reporting of information, but merely the manner of its presentation—direct speech—it was found that this ground of challenge had not been made out. The House of Lords indicated that the challenge might have succeeded had the interference been more wide ranging.

CHAPTER 12

POLICE POWERS, INDIVIDUAL LIBERTY AND THE RIGHTS OF SUSPECTS

Introduction

This area concerns the balance struck by the law between the powers conferred on the police and the maintenance of individual freedom and of due process.

Examiners often set problem questions in this area, as the detailed rules of the Police and Criminal Evidence Act 1984 (hereafter PACE) and the Codes of Practice made under it lend themselves to such a format. The questions usually concern a number of stages from first contact between police and suspect in the street up to the charge. This allows consideration of the rules governing stop and search, arrest, searching of premises, seizure of articles, detention, treatment in the police station and interviewing. (It must be borne in mind that interviews do not invariably take place in the police station; an important area in the question may concern an interview of the suspect which takes place in the street or in the police car.) You need to be aware of ss 34–37 of the Criminal Justice and Public Order Act 1994 which curtail the right to silence and therefore affect police interviewing. You should also be aware of the extension of police powers in the public order context, contained in Part V of the 1994 Act. The common law power to arrest to prevent a breach of the peace is still extensively used and may need to be considered.

The rules governing obstruction and assault on a police officer in the execution of his duty under s 89 of the Police Act 1996 may be relevant as necessitating analysis of the legality of police conduct, in order to determine whether or not a police officer was in the execution of his duty. Finally, the question may call for an analysis of the forms of redress available to the suspect in respect of any misuse of police power. If essay questions are set, they often tend to place an emphasis on the balance struck by PACE between the suspect's rights and police powers.

Articles 5 and 6 of the European Convention on Human Rights (hereafter the Convention), which provide guarantees of liberty and security of the person and of a fair trial respectively, were received into UK law once the Human Rights Act (HRA) 1998 came fully into force in 2000. It should be noted that Art 6 protects a fair hearing in the civil and criminal contexts, but

our concern is with the criminal trial, and in particular with pre-trial procedures which may affect the fairness of the trial and which, therefore, may need to be considered under Art 6 *(Teixeira v Portugal* (1998)). Now that the 1998 Act is fully in force, Arts 5 and 6 and other Convention Articles relevant in this area, such as Art 8 (which provides a right to respect for private life and for the home), are directly applicable in UK courts; they should also be taken into account in interpreting common law and statutory provisions affecting the powers of State agents, including the police. Section 3 of the HRA requires that: 'So far as it is possible to do so, primary and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.' Section 3(2)(b) reads, 'this section does not affect the validity, continuing operation or enforcement of any incompatible primary legislation'. This goes beyond the *current* obligation to resolve ambiguity in statutes by reference to the Convention. All statutes affecting this area, in particular, PACE, will therefore have to be interpreted so as to be in harmony with the Convention, if that is at all possible.

Under s 6, Convention guarantees are binding only against public authorities. These are defined as bodies which have a partly public function. In this context, this will normally mean that if the police or the security services use powers deriving from any legal source in order to interfere with the liberty or privacy of the citizen, the citizen may be able to bring an action against them under Arts 5, 6 or 8 (and/or any other relevant Article). Within the criminal process, citizens will be able to rely on Art 6 in order to ensure the fairness of the procedure under s 7(1)(b) of the HRA. Exam questions are likely to reflect this development and will demand greater awareness of the Arts 5, 6 and 8 jurisprudence and of the likely impact of the HRA in this area.

Checklist

Students must be familiar with the following areas:

- the provisions under PACE and the Codes of Practice which affect the areas mentioned above;
- the provisions under the Criminal Justice and Public Order Act 1994 relevant to police powers, especially ss 34, 36, 37 and 60;
- s 58 of the Youth Justice and Criminal Evidence Act 1999—inserts 34(2A) into the Criminal Justice and Public Order Act 1994;
- the obstruction and assault on a police officer in the execution of his duty under s 89 of the Police Act 1996;
- the issues raised by the revisions of the Codes of Practice made under PACE;

- the PACE rules governing exclusion of evidence, particularly s 78;
- the relevant tortious remedies;
- the police complaints mechanism under Part IV of the Police Act 1996;
- the Security Services Act 1989, the Intelligence Services Act 1994 and the Interception of Communications Act 1985;
- Arts 5, 6 and 8 of the Convention;
- the HRA, especially ss 2, 3, 6,10 and 19.

Question 43

Albert and Bill, two policemen in uniform and driving a police car, see Colin outside a factory gate at 11.30 pm on a Saturday. Albert and Bill know that Colin has a conviction for burglary. Colin looks nervous and is looking repeatedly at his watch. Bearing in mind a spate of burglaries in the area, Albert and Bill ask Colin what he is doing. Colin replies that he is waiting for a friend. Dissatisfied with this response, Bill tells Colin to turn out his pockets, which he does. Bill seizes a bunch of keys which Colin produces and, still suspicious, asks Colin to accompany them to the police station. Colin then becomes abusive and when Bill takes hold of him to restrain him, Colin hits Bill in the mouth. Albert and Bill then bundle Colin into the police car and tell him that he is being arrested for 'assaulting a police officer in the execution of his duty'. They then proceed to Colin's flat and search it, despite his protests. They discover nothing relating to a burglary, but do discover a small amount of cannabis, which they seize.

Albert and Bill then take Colin to the police station, arriving at 12.20 am. He is cautioned, informed of his rights under Code C by the custody officer and told that he is suspected of dealing in cannabis. Colin asks if he can see a solicitor, but his request is refused 'for the time being'. Colin is then questioned and eventually admits to supplying cannabis. All the interviews are tape recorded. He is then charged with supplying cannabis and with assaulting a police officer in the execution of his duty.

Advise Colin.

Answer plan

This is a reasonably straightforward question, but it does cover a wide range of issues. The most straightforward approach is to consider the legality of the police conduct at every point. Once this has been done, the applicability of the possible forms of redress can be considered. It should be noted that the examinee is merely asked to 'advise Colin'; therefore, all relevant possibilities

should be discussed—albeit briefly due to the time constraint. European Court of Human Rights (ECtHR) cases should be considered in relation to the relevant Articles of the Convention, contained in Sched 1 to the HRA, and the effects of ss 3 and 6 of the HRA should be discussed.

Essentially, the following issues should be considered:

- the legality of the search under ss 1 and 2 of the Police and Criminal Evidence Act (PACE) 1984 and Code of Practice A; Art 5 of the Convention;
- assaulting a police officer in the execution of his duty under s 89(1) of the Police Act 1996;
- the legality of the arrest under s 25 of PACE;
- the legality of the search of premises and the seizure of the cannabis under ss 18 and 19 of PACE; Art 8 of the Convention;
- access to legal advice under s 58 of PACE—legality of the refusal of advice; Art 6 of the Convention;
- the exclusion of evidence under ss 76 and 78 of PACE;
- the free-standing action under s 7(1) (a) of the HRA relying on Art 8;
- the relevant tortious remedies;
- the police complaints procedure under Part IV of the Police Act 1996.

Answer

The legality of the police conduct in this instance will be considered first; any possible forms of redress open to Colin will then be examined. The impact of the HRA which affords the Convention further effect in domestic law will be taken into account at a number of significant points.

The first contact between the police officers and Colin appears to be of a voluntary nature: the officers are of course entitled to ask questions, which Colin may answer if he wishes to *(Rice v Connolly* (1966)). It is not therefore necessary to ask whether Albert and Bill are invoking powers of stop and search under s 1 of PACE at this stage. When Colin is asked to turn out his pockets, this appears to be a request which he could refuse. It may therefore be characterised as part of a voluntary search. Although it is not clear that Colin consented to the search, Albert and Bill were under a duty only to explain that he may withhold consent (Code A, Note 1D(b)) and, on that basis, as Colin accedes to the request made, they could be said to have fulfilled the current requirements of Code A in respect of consensual searches.

However, the seizure of the keys does not appear to be done with Colin's consent and therefore will only be lawful if it is part of a lawful stop and search. Thus, it must be shown that the police officers complied

with the provisions of ss 1 and 2 of PACE and of Code A. Under s 1(2), a police officer may search for stolen or prohibited articles if he has reasonable grounds (s 1(3)) for believing that he will find such articles. The necessary reasonable suspicion is defined in paras 1.6 and 1.7 of Code A. There must be some objective basis for it which will relate to the nature of the article suspected of being carried. Various factors are mentioned in para 1.6, which may be taken into account in arriving at the necessary reasonable suspicion. These include the time and place, the behaviour of the person concerned and the carrying of certain articles in an area which has recently experienced a number of burglaries. In the instant situation, the lateness of the hour and the fact that Colin is outside a factory in an area which has recently experienced burglaries, coupled with his nervous behaviour, might give rise to a generalised suspicion, but it may be argued that the suspicion does not relate specifically enough to a particular article, since there is very little to suggest that Colin is carrying any particular article. Following this argument, no power to stop and search arises; the seizure of the keys is therefore unlawful. In any event, even if it could be established that reasonable suspicion is present, the search and seizure is unlawful, since the procedural requirements of s 2 of PACE are breached.[1] This outcome would appear to be consistent with the demands of Art 5 which the police must abide with under s 6 of the HRA; while short detentions for stop and search purposes may be compatible with Art 5, this will only be the case if an exception, in this instance, that under Art 5(1)(c), applies. The exceptions are strictly interpreted and it does not appear that Art 5(1)(c) applies since reasonable suspicion has not been established.

The request made to come to the police station appears to assume that Colin will come on a voluntary basis; therefore, it is not necessary at this point to consider whether a power to arrest arises. However, after Colin becomes abusive, Bill takes hold of him to restrain him. If this restraining is not part of a lawful arrest and therefore lawful under s 117 of PACE, it could be characterised as an assault on Colin. Have Albert and Bill a power to arrest at this point? Any such power would have to concern an arrest on suspicion of participation in burglary and therefore would arise under s 24, as burglary is an arrestable offence. However, in order to invoke the power under s 24, Albert and Bill would have to show reasonable suspicion that Colin is involved in burglary and, as already considered in relation to s 1, no such suspicion arises on the facts. Colin's abusiveness could not be said to add anything to the suspicion already present (this conclusion would appear to accord with the findings in the leading case on reasonable suspicion, *Castorina v Chief Constable of Surrey* (1988)), since the need for an objective basis for suspicion, even if it is not of a very high level, is not met.

Therefore, no power to arrest arises; the restraint of Colin is unlawful. In any event, it seems that the restraint may not have been an integral part of an arrest; if so, following *Kenlin v Gardner* (1967), it was clearly unlawful. Either argument obviously produces the same result.

Albert and Bill then arrest Colin for assault on a police officer in the execution of his duty, an offence arising under s 89(1) of the Police Act 1996. Is this arrest lawful? There is no power to arrest under s 89 of the Police Act 1996 and the offence in question is not an arrestable offence under s 24. Therefore, the arrest power must arise, if it arises at all, under s 25 or at common law, on the basis that the assault amounted to a breach of the peace. If it is to arise under s 25, two tests must be satisfied. First, it must be shown that one of the general arrest conditions under s 25(3) was fulfilled. It may be argued that the arrest was necessary to prevent Colin causing further physical harm to Bill; in that case, the condition under s 25(3) (d)(i) would be satisfied. Secondly, Albert and Bill must have reasonable suspicion that the assault has been perpetrated. It can be argued that Bill was not at that point in the execution of his duty, as he had laid hands on Colin unlawfully; therefore, can Albert and Bill be said to have reasonable suspicion as to that aspect of the offence? It may be argued, following *Marsden* (1868) and *Fennell* (1970), that since Bill had exceeded his authority in restraining Colin, Colin was entitled to resist by way of reasonable force; any such resistance would be lawful and therefore could not amount to an assault. Assuming that Colin's action amounted to no more than reasonable force, he has not committed an assault. Thus, it is arguable that no power to arrest arises; the arrest therefore appears to be unlawful. When Colin is bundled into the car, Albert and Bill are not therefore entitled to use reasonable force under s 117, as they are not in the exercise of an arrest power. Thus, the subsequent detention is presumably also unlawful.

It can further be noted that the reason given for the arrest, following *Christie v Leachinsky* (1947) and receiving some support from *Abassy v Metropolitan Police Commissioner* (1990), must ensure that the arrested person knows which act he has been arrested for, but that there is no need to be more precise than that. But, more recently, in *Mullady v DPP* (1997), where the arrest reasons were given as 'obstruction' (which is also not arrestable), it was held that where the reasons given to a suspect for his arrest are invalid or are the wrong reasons, then the arrest itself is unlawful. The reason given in the instant case conveyed the fact that the arrest was for striking Bill; arguably, this was sufficient but of course this conclusion does not affect the earlier finding that the arrest was unlawful. These findings as to the arrest would appear to accord with the demands of Art 5(1) and (2).

The search of Colin's flat also appears to be unlawful. Under s 18, a power to enter and search premises after arrest arises, but only in instances

when the arrest is for an arrestable offence. As the arrest has been effected under s 25, this condition is not satisfied. It follows from this that the power of seizure under s 19(2) does not arise, as it may only be exercised under s 19(1) by a constable lawfully on the premises. The seizure of the cannabis is therefore unlawful. The search of the home also appears to breach Art 8 under the HRA.

At the police station, Colin is denied access to legal advice. Delay in affording such access will be lawful if one of the contingencies envisaged under s 58(8) of PACE will arise if a solicitor is contacted. Following *Samuel* (1988), the police must have a clear basis for this belief. In this instance, the police made no effort to invoke one of the exceptions and have therefore breached s 58 and para 6 of Code C, which provides that once a suspect has requested advice, he must not be interviewed until he has received it.

Having identified a series of illegal acts on the part of the police, it will now be necessary to consider the redress, if any, available to Colin in respect of them. The first such act was the unlawful seizure of the keys. The appropriate tortious cause of action in this instance will be trespass to goods; damages will, however, be minimal.

In taking hold of Colin outside the context of a lawful arrest, Bill commits assault and battery and breaches Art 5 of the Convention. The facts of the instant case closely resemble those of *Collins v Willcock* (1984) or *Kenlin v Gardner* (1967), which established this principle. Further, the unlawful arrest and the subsequent unlawful detention will support a claim of false imprisonment. The entry of the flat was unlawful, as was the seizure of the cannabis; Colin could therefore sue the police authority for trespass to land and to goods. Alternatively, Colin could sue under s 7(1)(a) of the HRA, receiving compensation under Art 5(4) and under s 8 for an arguable breach of Art 8 in respect of the entry of his home. But, since the tort action is available, there would be no need to rely on the HRA.

Colin may hope that the cannabis will be excluded from evidence under s 78 of PACE, as it was found during the course of an unlawful search. However, according to *Thomas* (1990) and *Effick* (1992) and confirmed in *Khan* (1997), real evidence is admissible subject to a very narrow discretion to exclude it. That discretion might be exercised if it was obtained with deliberate illegality. The first instance decision in *Edward Fennelly* (1989), in which a failure to give the reason for a stop and search led to exclusion of the search, is out of line with the other authorities. It may be that Albert and Bill merely misconstrued their powers in thinking that a power of entry to premises arose in the circumstances, rather than deliberately perpetrating an illegal stop and search. In any event, it may be very hard to show that they acted in bad faith. If so, it appears that no strong argument for exclusion of the cannabis from evidence arises, and this outcome appears to

be in accordance with the demands of Art 6 under s 3 of the HRA. Section 78 must be interpreted in accordance with Art 6, but no change in the current interpretation appears to be required due to the findings in *Khan v UK* (2000).

Can a reasonable argument be advanced that Colin's admissions should be excluded from evidence under s 76? Following *Alladice* (1988) and *Hughes* (1988), unless it can be shown that the custody officer acted in bad faith in failing to allow Colin access to a solicitor, it seems that s 76(2)(a) will not apply. Following *Delaney* (1989), it is necessary to show under s 76(2)(b) that the defendant was in some particularly difficult or vulnerable position, making the breach of PACE of special significance. Since this does not appear to be the case here, it seems that s 76(2)(b) cannot be invoked.

On the other hand, Colin's admissions may be excluded from evidence under s 78 on the basis that the police breached s 58. Following *Samuel* (1988), it must be shown that the breach of s 58 was causally related to the admissions made in the second interview. It may be that Colin was aware that he could keep silent (although he was aware that this might disadvantage him at trial), but decided to make admissions and would have done so had he had advice. This argument succeeded in *Dunford* (1990) and *Alladice* (1988), on the basis that the appellants in those cases were experienced criminals, aware of their rights. It appears that Colin did remain silent for some time; possibly, therefore, he would have made the admissions in any event. It might be argued that access to legal advice would have added nothing to his ability to weigh up the situation.[2] On this analysis, the requisite causal relationship does not exist and the admissions might not, therefore, be excluded from evidence under s 78.

On the other hand, the ECtHR has placed considerable importance on the right of access to legal advice in cases such as *Murray (John) v UK* (1996) and *Averill v UK* (2000). It has held that delay in access where the defendant faces the possibility that adverse inferences may be drawn from silence can amount to a breach of Art 6 of the Convention. These decisions may make the court more willing to exclude admissions obtained while access to legal advice was refused. It is concluded that taking Art 6 into account, the admissions are likely to be excluded from evidence under s 78. There is also the possibility of Colin being able to bring an action against the police under s 7(1)(a) of the HRA 1998, claiming infringement of his Art 6 rights.

A further possibility is that the actions of the police could be the subject of a complaint, as could the other unlawful actions mentioned. Under s 84, the complaint would go in the first instance to the chief officer of police of the force Albert and Bill belong to.

Finally, Colin may want to know whether the charge of assaulting a police officer in the execution of his duty will succeed. Clearly, it will fail on the argument that Colin's actions did not amount to an assault, as he was entitled to resist Bill. Moreover, it has been determined that Bill was outside the execution of his duty.

Thus, in conclusion, a number of tort actions are available to Colin, as well as the possibility of an HRA 1998 action, or of making a complaint in respect of Albert and Bill's behaviour. It further seems that the charge of assaulting a police officer will be unsuccessful. However, it remains in doubt whether Colin's admissions and the cannabis found will be admissible in evidence against him.

Notes

1 Had it been found that the stop and search was lawful, the seizure of the keys would be lawful on the basis that the keys fall into the category of articles which may be seized if discovered under s 1(6).

2 This argument could be explored in more detail. It could be argued that despite his conviction, Colin may not be well equipped to withstand questioning. Possibly, had his solicitor been present, he might have been able to help Colin to keep silent (if that appeared to be in his best interests, despite the provision of s 36 of the Criminal Justice and Public Order Act 1994 that a failure to account for having a substance in his possession might lead to the drawing of adverse inferences at trial) even after the prolonged questioning.

Question 44

At 12 midnight on Saturday, Carl and Bert, two policemen in uniform and driving a police car, see Ali, an Asian youth, hurrying through the street. Bearing in mind a knife attack perpetrated at 11.50 pm by Asian youths in the area, they approach Ali and ask him where he has just been. He refuses to answer their questions and they ask him to get into the police car. Bert then says, 'We're going to search you. OK?'. Ali does not reply but makes no resistance to the search. Carl and Bert then search him and discover a knife. Carl cautions Ali, and then questions him as to the whereabouts of the others involved in the attack; Ali admits that he was with some other youths in the street where the attack took place at 11.50 pm. No notes are taken during the questioning. Bert then informs Ali that he is under arrest for wounding.

They arrive at the police station at 12.35 am. Ali is re-cautioned and informed of his rights under Code C by the custody officer, Doris. He makes a request to contact his solicitor but Eileen, the investigating officer, is unable to contact the solicitor. Eileen then asks Ali whether he is prepared to go ahead with the interview without a solicitor and he reluctantly agrees to do so. A period of two hours elapses. He is then questioned and after half an hour, he admits that he participated in the knife attack, although he says that he acted in self-defence. (The interview is tape recorded.) He is asked to sign the notes (compiled later in the station) of the questions and answers in the police car and does so.

At 8 am on Sunday morning, he is charged with wounding and is remanded in custody.

Ali (who has no previous convictions but was cautioned for theft two years previously when he was 16) now alleges that his confession was untrue, that he knew nothing of the attack until informed of it by the police and was merely carrying the knife as a precaution. He says: '1 only confessed because 1 was desperate to get home. I wasn't even there; I only said I was because I was scared of them.'

Advise Ali as to whether the interviews and the finding of the knife will be admissible in evidence against him. Do *not* consider any other possible advice that could be given regarding aspects of the problem.

Answer plan

This is a fairly tricky problem question since it involves police behaviour that is close to rule bending as opposed to rule breaking. It is fairly narrowly focused: it is concerned *only* with the question of exclusion of evidence. It must first be established that breaches of the Police and Criminal Evidence Act (PACE) 1984 have occurred and then asked whether or not they are likely to lead to exclusion of admissions made during any interview affected. You should take into account the cautioning provisions under Code C. Note that the question *expressly* does not call for consideration of forms of redress available to Ali other than exclusion of evidence. Also, it does not ask you to consider whether adverse inferences will be drawn from his silence, assuming that it is not excluded from evidence.

Essentially, the following matters should be considered:

- the lawfulness of Ali's arrest under s 24 of PACE; Art 5 of the Convention;
- the legality of the stop and search; relevance of Art 5 of the Convention;

- the applicability of the prohibition on interviews outside the police station under para 11.1 of Code C, bearing in mind the exception under para 11.1(b);
- the possible breach of para 11.5 of Code C in respect of the first interview (in the police car): impracticability of contemporaneous recording?;
- the exclusion of the first interview from evidence under ss 76 and 78 of PACE; Art 6 of the Convention;
- the possible breach of para 6 of Code C affecting the second interview in the station; the admissibility of the second interview; Art 6;
- the likelihood that the second interview will be excluded from evidence; ss 76 and 78 of PACE; relevance of Art 6 of the Convention under the Human Rights Act (HRA) 1998;
- the likelihood that the knife will be excluded from evidence under s 78; Art 6 of the Convention.

Answer

Confessions may be excluded from evidence under s 78 or s 76 of PACE. Non-confession evidence, in this instance, the knife, may be excluded from evidence under s 78 of PACE. A first step in the direction of exclusion from evidence of the admissions made by Ali and the knife is to demonstrate that substantial and significant breaches of PACE or the Codes have occurred. The impact of the HRA which affords the Convention further effect in domestic law will be taken into account at a number of significant points.

The facts of the instant case may support an argument that Ali was unlawfully arrested. If the arrest was unlawful, the subsequent detention would also be unlawful, as his detention is dependent on the power to detain for questioning under s 37(2) of PACE, which is in turn dependent on an 'arrest', not an unlawful arrest. Ali is arrested for wounding, an offence arising under s 18 or s 20 of the Offences Against the Person Act 1861. Both offences are arrestable offences under s 24(1)(b) of PACE. In order to arrest under the section, it is necessary to show that Carl and Bert had reasonable grounds for suspecting that Ali had committed the wounding. Ali's proximity in time and place to the offence coupled with his possession of the knife is, it is submitted, sufficient to give rise to the necessary suspicion. This outcome would appear to be consistent with the demands of Art 5 which the police must abide with under s 6 of the HRA, since it appears that the exception under Art 5(1)(c) applies.

The knife is discovered during the course of a stop and search of doubtful legality. Any illegality of the stop and search is significant. It may be argued that the stop and search was consensual and therefore lawful. (Since Ali is 18,

he does not fall within a category of persons exempt from consensual searches under Note 1E of Code A.) It is not clear that Ali gave consent to the search and Carl and Bert are under a duty to seek his consent (Note 1D(b) of Code A). Nevertheless, this provision is contained only in a Note for Guidance, which is not part of Code A (para 1.2 of Code A) and therefore may not be regarded as binding. Ali's co-operation may be sufficient to render the search consensual, although this argument cannot be regarded as conclusive. On this basis, Carl and Bert may be said to have fulfilled the requirements of Code A in respect of consensual searches. On this argument, the stop and search was lawful and the necessary reasonable suspicion for the arrest was properly arrived at.

The alternative argument is that Note for Guidance 1D(b) should be regarded as part of para 1 of Code A (see *Cox* (1993)) and therefore as binding. If so, it may be argued that the search is not consensual as that concept is understood within Code A. Arguably, since para 1 of Code A should be interpreted compatibly with Art 5 of the Convention under s 3 of the HRA, this is the better view, on the ground that where there is a doubt as to consent to a deprivation of liberty, a strict view should be taken giving the emphasis to the primary right (*Murray v UK* (1994)). Following this argument, the stop and search must be based on s 1 of PACE, which requires reasonable suspicion that prohibited objects or offensive weapons are being carried. The nature of the suspicion required is described in paras 1.6 and 1.7 of Code A. The fact that Ali was Asian and was hurrying through the street near the scene of the attack only 10 minutes after it had taken place might be enough to give rise to the reasonable suspicion that a weapon was being carried required by paras 1.6 and 1.7 of Code A.[1] However, Carl and Bert do not provide Ali with the information specified under s 2 of PACE, thereby rendering the search unlawful. Nevertheless, nothing in PACE provides that evidence obtained from an unlawful search may not be used to fuel reasonable suspicion under s 24, allowing for an arrest. Further, if the above argument as to the reasonable suspicion is correct, there may be sufficient suspicion for s 24 purposes, even without the finding of the knife. Thus, on this argument also, s 24 would be satisfied. The possible consequence of the unlawful search in evidential terms will be discussed below.

The next question to consider is whether by questioning Ali in the police car, Carl and Bert breached the prohibition on interviews outside the police station under para 11.1 of Code C. If para 11.1 is to apply, two conditions must be satisfied: the questioning must constitute an interview under para 11.1 A of Code C; and the decision to arrest must have been made at the point when the questioning took place. It is apparent that the first of these conditions has been met, as questions were put to Ali which concerned his suspected involvement in the wounding. The second is less clearly satisfied:

the police might argue that until Ali admitted that he was in the street where the wounding took place, the level of suspicion was not high enough to justify an arrest. However, the stronger argument is that the other factors present (the finding of the knife, his proximity to the offence already observed by the officers) gave rise to a level of suspicion sufficient to justify an arrest, even before the admission in question was made. Therefore, the questioning falls within para 11.1 and should not have taken place at all until the police station was reached, unless the exception under para 11.1(b) can apply. The exception may be invoked if a delay in interviewing would be likely to 'lead to the alerting of other persons suspected of having committed an offence but not yet arrested for it'. The questions were directed to determining the whereabouts of the other youths involved in the attack who might be alerted by the news of Ali's arrest. It is only necessary to show a likelihood that such a contingency might arise, not a reasonable suspicion; therefore, it appears that this exception may be invoked. No breach of para 11.1 has therefore occurred.

If an interview takes place outside the police station but falls outside the para 11.1 prohibition, the verifying and recording provisions under paras 11.10 and 11.5 will apply, with the proviso that contemporaneous recording may be impracticable. The mere fact that an interview is conducted in the street or in a police car, as here, may not be enough to support an assertion that it could not be contemporaneously recorded. This seems to follow from the decision in *Fogah* (1989). What is impracticable does not connote something that is extremely difficult, but must involve more than mere inconvenience (*Parchment* (1989)). Note taking while the suspect was dressing and showing the officers round his flat was held to be impracticable. However, Carl and Bert are in the police car at the time and Ali has shown no sign of violence. While it might have been inconvenient to record the interview in the police car, it would not have been difficult. It appears, then, that para 11.5 has been breached. It should be noted that Carl and Bert assumed wrongly that the minimum level of protection provided by para 11.13 for comments made outside the context of an interview applied: a written record was made at the police station of the interview and the notes were offered to Ali to sign.

Could it be argued that the interview should be excluded under s 76 as it was not contemporaneously recorded in breach of para 11.5? Under s 76(2)(a), the prosecution must prove beyond reasonable doubt that Ali's confession was not obtained by oppression. According to the Court of Appeal in *Fulling* (1987), 'oppression' should be given its dictionary definition: '…the exercise of authority or power in a burdensome, harsh or wrongful manner.' The breach of para 11.5 could fall within this definition on the basis that the police acted in a wrongful manner. However, the Court of

Appeal in *Hughes* (1988) ruled that oppression could not arise in the absence of 'misconduct' on the part of the police; in the context of the case, 'misconduct' clearly meant bad faith. On that basis, and assuming that Carl and Bert merely misinterpreted the level of suspicion connoted by the wording of para 11.1, the holding of the interview in the police car could not be termed oppressive.

Under s 76(2)(b), it is necessary to show that something was said or done in the first interview in circumstances conducive to unreliability. Following the rulings of the Court of Appeal in *Delaney* (1989) and *Barry* (1991), it is essential under this head to identify some special factor in the situation (such as the mental state of the defendant or an offer made to him) which makes it crucial that the interview should be properly recorded. In other words, a single breach of PACE cannot amount to both 'circumstances' and 'something said or done' under s 76(2)(b).

However, even if the first interview is admissible under s 76, the trial judge will still have a discretion to exclude it from evidence under s 78 if, due to the circumstances in which it was obtained, its admission would have a significantly adverse effect on the fairness of the trial. Can it be argued under s 78 that the first interview should be excluded from evidence as unreliable due to the lack of contemporaneous recording? Ali is not alleging that he did not make the admissions in question, but that they are untrue. Presumably, he signed the interview record as a means of indicating his acceptance that he had made the admissions, although he intended to allege later that he had lied out of fear. Thus, admission of the first interview which was not recorded contemporaneously may not have the necessary adverse effect on the fairness of the trial: its recording under para 11.13 may be sufficient and therefore may not lead to its exclusion under s 78.[2]

It will now be considered whether the second interview would be excluded from evidence under s 76, on the basis that Ali's consent to be interviewed without legal advice must be treated as vitiated due to the failure to advise him of the duty solicitor scheme (this argument is considered fully below in relation to s 78). Unless it can be shown that Eileen acted in bad faith in failing to inform Ali of the duty solicitor scheme (which as argued below does not appear to be the case), s 76(2)(a) will not apply. As noted above, if an argument under s 76(2)(b) is to succeed, it would have to be shown that Ali was in a vulnerable position in the interview. No specific factor can be identified which might support such an argument. The courts appear to take the view (see *Canale* (1990)) that when a defendant of ordinary ability to withstand questioning is interviewed in breach of one of the PACE provisions, s 78 should be considered rather than s 76(2)(b). Therefore, although it could be argued that the failure to afford him legal advice could

amount to 'something said or done' conducive to unreliability, some special circumstance as identified in *Delaney* is missing.

It will now be considered whether a reasonable argument for the exclusion from evidence of the interview under s 78 can be advanced. Again, it will be necessary to identify some impropriety occurring in the police station. It will be argued that insufficient effort was made to comply with Ali's request for legal advice. Under para 6.6(d) of Code C, a suspect who has requested advice can change his mind and consent to the commencement of the interview even though he has not obtained it. However, it can be argued that the suspect should not be misled into giving such consent. Once she had failed in her effort to contact Ali's solicitor, Eileen failed to inform him that he could obtain the services of the duty solicitor; it could therefore be argued that his consent was vitiated as based on the misapprehension that unless he obtained advice from his own solicitor, he could not obtain it at all. However, in the case of *Hughes* (1988), the Court of Appeal considered that a consent to go ahead with an interview after a suspect had been led to believe that the duty solicitor was unavailable could be treated as a genuine consent. The police had given this information in good faith although the duty solicitor was, in fact, available. In principle, there is little difference between leading a suspect to believe that the duty solicitor is unavailable and failing to inform the suspect of the duty solicitor scheme. Thus, following *Hughes,* Ali's consent to go ahead with the interview could be treated as genuine; on this analysis, para 6.6 has not been breached.[3]

On the other hand, even if Eileen acted in good faith, it could be argued that a requirement to inform of the duty solicitor scheme is implied in para 6 (rather than arising only from Note 6B, which is not a Code provision according to para 1.3 of Code C) and that therefore the instant situation is not analogous to that in *Hughes.* It is submitted that this is the better view, since it accords with the prominence given to legal advice in the PACE scheme. It is also in accordance with the need to interpret the Code provisions compatibly with Art 6 under s 3 of the HRA. The European Court of Human Rights has placed considerable importance on the right of access to legal advice in cases such as *Murray (John) v UK* (1996) and *Averill v UK* (2000). It has held that delay in access where the defendant faces the possibility that adverse inferences may be drawn from silence can amount to a breach of Art 6 of the Convention. Adoption of this interpretation is supported by the provision of para 6.4 of Code C that no attempt must be made to persuade the suspect to forgo advice; a failure to provide the requisite information could be characterised as part of such an attempt in the sense that it might have the effect of persuading the detainee to forgo advice. It is also supported by the first instance decision of *Vernon* (1988)

which concerned a situation almost exactly in point with that of the instant case, and by the strict approach to the legal advice provisions taken in *Beycan* (1990) by the Court of Appeal.

On this argument, a breach of para 6.6 has occurred. However, this breach may not be causally related to the admissions made in the interview (see *Samuel* (1988)). It may be that Ali would have made the admissions had he had advice. This is suggested since the solicitor would be aware that under s 34 of the Criminal Justice and Public Order Act 1994, recognised in the para 10.4 caution, it is disadvantageous to a defendant to hold back a defence. On the other hand, his confession in the interview may suggest that he gave in eventually to pressure to confess and that the 'defence' he puts forward is just part of a false confession. A solicitor who believed him would probably still have advised him to remain silent. On this analysis, it is possible that the requisite causal relationship exists, and the interview may therefore be excluded from evidence under s 78, following *Samuel*. Such an interpretation would appear to accord with the demands of Art 6(1), on the basis of the argument that where a detainee has not had access to legal advice and makes admissions, that fact may suggest that he is more vulnerable than a detainee who manages to remain silent. Had Ali remained silent, a breach of Art 6(1) would probably have been established if the interview was admitted into evidence and adverse inferences drawn from the silence (*Murray v UK*).

Will the knife be excluded from evidence under s 78? According to the analysis above, the stop and search could be characterised as non-consensual. On that basis, it would be possible to argue, bearing the breach of s 2 of PACE in mind, that following *Edward Fennelly* (1989), the products of the search should be excluded from evidence. According to *Thomas* (1990), however, physical evidence will be excluded only if obtained with deliberate illegality.

Following the decision of the House of Lords in *Khan* (*1997*), evidence, other than involuntary confessions, obtained improperly is nevertheless admissible, subject to a narrow discretion to exclude it. The House of Lords took Art 6 of the Convention into account in reaching this conclusion. They found that Art 6 does not require that evidence should be automatically excluded where there has been impropriety in obtaining it, basing this finding on *Schenk v Switzerland* (1988). In *Khan* itself, it was found that the trial judge had properly exercised his discretion to include the improperly obtained evidence under s 78. In general, the courts have been prepared to exercise the discretion under s 78 to exclude confessions (for example, *Scott* (1991)) or identification evidence (for example, *Payne and Quinn* (1995)) where a substantial and significant breach of PACE has occurred. They have been much less ready to exclude physical evidence, and this position has

been unaffected by the reception of Art 6 into domestic law under the HRA (*AG's Reference (No 3 of 1999)* (2001)) on the basis that the admission or exclusion of evidence is largely a matter for the national courts. The courts have therefore taken the view that the position that has developed under s 78 regarding non-confession evidence need not be modified by reference to s 3 of the HRA or to the duty of a court under s 6. Therefore, it is probable that a judge would exercise his discretion to include the knife in evidence under s 78, despite the breach of s 2.

In conclusion, the stronger argument seems to be that the second interview will be excluded from evidence under s 78. The first interview and the knife will, however, probably be admissible in evidence.

Notes

1 The question of the meaning of reasonable suspicion could be considered in more detail at this point, bearing in mind the provision of para 1.7 of Code A, which states that reasonable suspicion cannot be supported on the basis of personal factors (including colour) alone. However, where colour is a genuinely identifying factor, as it appears to be in this instance, it would appear that it should be taken into account, although the extent to which it is identifying will depend on the racial mix of the persons in the area at the time in question.

2 However, if, at trial, the particular unfairness likely to arise from the improper recording is not specified but the breaches of the recording provisions affecting this interview are pointed out, it may appear that it cannot be relied on; it will then be excluded from evidence under s 78. A similar situation arose in *Keenan* (1989); the Court of Appeal held that the admissions in question should have been excluded under s 78. In *Canale* (1990), the importance of contemporaneous recording was stressed. However, in those instances, the defendant had not signed the interview record. Thus, although these points might be raised, the conclusion will remain the same.

3 There are two arguments which could be used to escape from this conclusion. One is set out above; the other is indicated here. It might be possible to show that Eileen deliberately failed to mention the duty solicitor scheme in order to obtain a confession from Ali more readily. In *Hughes,* the consent in question would have been treated as vitiated had the police acted in bad faith. However, it may be that the failure to advise Ali of the duty solicitor scheme arose because Eileen mistakenly believed that he did not need to be specifically advised of it again after the notification of rights by Doris and the reminder before the third interview that advice was available. Eileen is not specifically required to remind a suspect unable to obtain advice from his own solicitor of the duty solicitor scheme before he gives consent to be interviewed, although this can perhaps be implied from the wording of Note 6B.

Question 45

Toby, who has a history of mental disorder and has two convictions for possessing cannabis, is standing on a street corner at 2 am on Sunday when he is seen by two police officers in uniform, Andy and Beryl. Andy says: 'What are you up to now, Toby? Let's have a look in your pockets.' Toby does not reply, but turns out his pockets and produces a small quantity of cannabis. Andy and Beryl then ask Toby to come to the police station; he agrees to do so.

They arrive at the police station at 2.20 am. Toby is cautioned, informed of his rights under Code C by the custody officer and told that he is suspected of dealing in cannabis. He asks if he can see a solicitor, but his request is refused by superintendent Smith, on the ground that this will lead to the alerting of others whom the police suspect are involved. Toby is then questioned for two hours, but makes no reply to the questions. He then has a short break; when the interview recommences, he is re-cautioned and reminded of his right to legal advice although he is again told that he cannot yet exercise the right. After another hour, he admits to supplying cannabis. The interviews are tape recorded. He is then charged with supplying cannabis.

Toby now says that he only confessed because he thought he had to in order to get home.

Advise Toby as to any means of redress available to him.

Answer plan

This question is fairly demanding and quite tricky, since it covers the problem of apparently voluntary compliance with police requests and the particular difficulty created when the police are dealing with a mentally disordered person. The most straightforward approach is probably to consider the legality of the police conduct at every point. Once this has been done, the applicability of the possible forms of redress in respect of each possible breach can be considered. As special problems arise in respect of each, they should be looked at separately. It should be noted that the examinee is merely asked to 'advise Toby as to any means of redress'; therefore, all relevant possibilities should be discussed. It is important to remember to consider whether adverse inferences are likely to be drawn at trial from Toby's silence under ss 34 and 36 of the Criminal Justice and Public Order Act 1994.

Essentially, the following issues should be considered:

- the legality of the search under s 23(2) of the Misuse of Drugs Act 1971 and Code A of the Police and Criminal Evidence Act (PACE) 1984—relevance of Note 1E;
- is this a voluntary detention or an arrest under s 24 of PACE?—legality of the arrest?;
- access to legal advice under s 58 of PACE—exceptions under s 58(8)—the legality of the refusal of advice;
- the failure to ensure that an appropriate adult was present during the interview as required under para 11.14 of Code C;
- the exclusion of evidence under ss 76 and 78 of PACE—relevance of s 36 of the Criminal Justice and Public Order Act 1994; Art 6 of the Convention; *Khan v UK* (2000);
- inferences to be drawn at trial from Toby's silence under s 34 of the Criminal Justice and Public Order Act 1994; relevance of ss 34(2A) and 36; Art 6 of the Convention;
- relevant tortious remedies;
- police complaints and disciplinary action.

Answer

The legality of the police conduct in this instance will be considered first; any possible forms of redress open to Toby will then be examined. In both instances, the impact of the Human Rights Act (HRA) 1998 will be taken into account.

The first contact between the police officers and Toby appears to be of a voluntary nature: the officers are entitled to ask questions; equally, Toby can refuse to answer them (*Rice v Connolly* (1966)). No adverse inference can be drawn from his silence at this point since he is not under caution (s 34(1)(A) of the Criminal Justice and Public Order Act) and he has not had the opportunity of having legal advice (s 34(2A)). When Toby is asked to turn out his pockets, this appears to be a request which he could refuse. It may therefore be characterised as part of a voluntary search. Although it is not clear that Toby gave consent to the search, Andy and Beryl were under a duty only to explain that he could withhold consent and to seek his consent (Note 1D(b) of Code A of PACE) and, on that basis, as Toby accedes to the request made, could be said to have fulfilled the requirements of Code A in respect of consensual searches. However, he has a history of being mentally disordered and so belongs to one of the vulnerable groups who may not be subject to a voluntary search at all under Note 1E of Code A. As the police know him, they may be aware of this fact. Even if they are not aware that he has a specific mental disorder,

they may recognise him as a person incapable of giving an informed consent to the search; if so, the Note 1E provisions will still apply. Arguably, since the police must abide by Art 5 of the Convention under s 6 of the HRA, this is the better view, on the ground that where there is a doubt as to consent to a deprivation of liberty, a strict view should be taken giving the emphasis to the primary right (*Murray v UK* (1994)).

Thus, the search should not have taken place unless the police officers can show reasonable suspicion as the basis for the exercise of the power. In order to do so, it must be shown that the police officers complied with the provisions of s 23(2) of the Misuse of Drugs Act 1971 and of Code A. Under s 23(2), a police officer may search for controlled drugs if he has reasonable grounds for believing that he will find such articles. The necessary reasonable suspicion is defined in paras 1.6 and 1.7 of Code A. There must be some objective basis for it, which might include various factors which are mentioned in para 1.6, including the time and place and the behaviour of the person concerned. In the instant situation, the lateness of the hour might give rise to some suspicion, but it is apparent that the suspicion does not relate specifically enough to the possibility that Toby is in possession of drugs *(Black v DPP* (1995)). Following this argument, no power to stop and search arises; the seizure of the cannabis is therefore unlawful. It should further be noted that the procedural requirements of s 2 are breached (see *Osman v DPP* (1999), in which it was found that s 2 is mandatory). There are therefore two bases on which the search is unlawful.

The request made to come to the police station appears to assume that Toby will come on a voluntary basis; however, it might be argued that if Toby is deemed incapable of giving consent to a stop and search, he cannot be viewed as capable of consenting to a voluntary detention. Again, the demands of Art 5(1) would favour this view. If this assumption is correct, it is necessary to consider whether a power to arrest arises. Toby is presumably arrested for possessing cannabis, an offence arising under s 5(3) of the Misuse of Drugs Act 1971. It is an arrestable offence under s 24(1)(b) of PACE, as it carries a sentence of five years or more (Sched 4 to the Misuse of Drugs Act). In order to arrest under s 24, it is necessary to show that Andy and Beryl had reasonable grounds for suspecting that Toby was in possession of the cannabis. Clearly, this is the case. However, the cannabis is discovered during the course of an illegal stop and search. It may appear strange that an illegal stop and search could provide the reasonable suspicion necessary to found a lawful arrest. However, nothing in PACE provides that it cannot do so. Nevertheless, even assuming that reasonable suspicion is present, the 'arrest' (if it may be characterised as such) is clearly unlawful due to the failure to state the fact of the arrest and the reason for it as required under s 28 of PACE and Art 5(2) of the Convention.

At the police station, Toby is not afforded access to legal advice. Delay in affording such access will be lawful if one of the contingencies envisaged under s 58(8) will arise if a solicitor is contacted. In this instance, the police will wish to rely on the exception under s 58(8)(b), allowing delay where contacting the solicitor will lead to the alerting of others suspected of the offence. Leaving aside the lack of any substantial evidence that others are involved at all, it will be necessary for the police to show, following *Samuel* (1988), that some quality about the particular solicitor in question could found a reasonable belief that he would bring about one of the contingencies envisaged if contacted. There is nothing to suggest that the police officers have any basis for this belief, especially as Toby has not specified the solicitor he wishes to contact. He may well wish to contact the duty solicitor. A further condition for the operation of s 58(8) is that Toby is being detained in respect of a serious arrestable offence. He is in detention at this point in respect of possession of cannabis. This is an arrestable offence under s 24, although he has not been arrested for it. Whether or not the offence can be termed a serious arrestable offence depends on the provisions of s 116. The section as amended includes as serious arrestable offences under sub-s (2)(a) 'offences mentioned in paras (a) to (f) of s 1(3) of the Drug Trafficking Act 1994'. As supplying cannabis is included in this section, this condition is fulfilled. However, the lack of any basis for the necessary reasonable belief under s 58(8) means that there has been a breach of s 58. This strict approach to s 58 is supported by the approach of the European Court of Human Rights to the right of access to legal advice. It has placed considerable importance on the right in cases such as *Murray (John) v UK* (1996) and *Averill v UK* (2000). It has held that delay in access where the defendant faces the possibility that adverse inferences may be drawn from silence is likely to amount to a breach of Art 6 of the Convention.

Since Toby is mentally disordered, he should not have been interviewed except in the presence of an 'appropriate adult' as required under para 11.14 of Code C. Therefore, a further breach of PACE has occurred, unless it could be argued that the officers.were not aware of his disorder; if so, following *Raymond Maurice Clarke* (1989), no breach of the Code provision occurred. The behaviour of Andy suggests, however, that the officers were aware of Toby's condition.[1]

Having identified a series of illegal acts on the part of the police, it will now be necessary to consider any redress available to Toby in respect of them. The first such act was the unlawful seizure of the cannabis.[2] The appropriate cause of action in this instance will be trespass to goods; damages will, however, be minimal.

Will the cannabis be excluded from evidence under s 78? According to the analysis above, the stop and search could perhaps be characterised as

consensual but even if this is the case, a breach of Note 1E of Code A took place. However, this provision is only a Note for Guidance and therefore it does not have the same legal status as Code provisions. If a court was prepared to have regard to the breach at all, the view might be taken that the decision to include the provision concerned only as a Note should be respected: it should be treated as general guidance only and no consequences adverse to the prosecution should flow from its breach. However, in *DPP v Blake* (1989), the Divisional Court impliedly accepted that breach of a Note for Guidance can be considered and, on this basis, s 78 might be invoked. It could also be argued that since the search was not voluntary, it was unlawful, as argued above. On either argument, it would then be possible to argue, following *Edward Fennelly* (1989), that the products of the search should be excluded from evidence on the basis that there was no power to search in the circumstances. According to *Thomas* (1990) and *Effick* (1992), however, physical evidence will be excluded only if obtained with deliberate illegality; the pre-PACE ruling of the House of Lords in *Fox* (1986) would also lend support to this contention. Following the decision of the House of Lords in *Khan* (1997), evidence other than involuntary confessions obtained improperly is nevertheless admissible, subject to a narrow discretion to exclude it. The House of Lords took Art 6 of the Convention into account in reaching this conclusion. They found that Art 6 does not require that evidence should be automatically excluded where there has been impropriety in obtaining it, basing this finding on *Schenk v Switzerland* (1988). In *Khan* itself, it was found that the trial judge had properly exercised his discretion to include the improperly obtained evidence under s 78. This position has been unaffected by the reception of Art 6 into domestic law under the HRA (*AG's Reference (No 3 of 1999)* (2001)) on the basis that the admission or exclusion of evidence is largely a matter for the national courts. The courts have therefore taken the view that the position that has developed under s 78 regarding exclusion of non-confession evidence need not be modified. It may be concluded that the cannabis would not be excluded from evidence.

Toby could make a complaint under the provisions of Part IV of the Police Act 1996 in respect of the illegal seizure of the cannabis, if it could be characterised as resulting from a non-consensual search in breach of s 23(2) of the Misuse of Drugs Act 1971 and of Code A. However, assuming that it was consensual, the only breach which occurred was that of Note 1E of Code A. Breach of a Note is not a breach of the police disciplinary Code under s 67(8) of PACE, although breach of a Code provision would be (Code A Notes are not part of Code A under para 1.2).

Assuming that the arrest was unlawful (which cannot be determined with certainty), Toby could bring an action for false imprisonment for the

whole period of his detention. There is also the alternative possibility of taking action under s 7(1)(a) of the HRA 1998 based on the infringement of his rights under Art 5 of the Convention. A further option might be to make a complaint in respect of the failure to observe the provisions of s 28 of PACE.

Can a reasonable argument be advanced that the admissions made by Toby will be excluded from evidence under s 76? Following *Alladice and Hughes* (1988), unless it can be shown that the custody officer acted in bad faith in failing to allow Toby access to a solicitor, it seems that s 76(2)(a) will not apply. However, following *Delaney* (1989), which was concerned with the operation of s 76(2)(b), if the defendant was in some particularly difficult or vulnerable position, the breach of PACE may be of special significance. Toby may be said to be in such a position due to the fact that he is mentally disordered. On this basis, it seems that s 76(2)(b) may be invoked to exclude the admissions from evidence.

The admissions may also be excluded from evidence under s 78, on the basis that the police breached s 58. If so, following *Samuel* (1988), it must be shown that the breach of s 58 was causally related to the admissions made in the second interview. It may be that Toby would have made admissions had he had advice. The adviser might have considered that he should make admissions, since a failure to account for the cannabis would be commented on adversely in court under s 36 of the Criminal Justice and Public Order Act 1994. On the other hand, the adviser might have considered that this risk should be taken. This seems the stronger argument, bearing in mind Toby's mental disorder. It appears that Toby may have needed such advice. This argument failed in *Dunford* (1990) and *Alladice* (1988) on the basis that the appellants in those cases were experienced criminals, aware of their rights. It appears that Toby did remain silent for some time; possibly, therefore, he would have made the admissions in any event. As he has convictions, he will be aware of police procedures and know that he can keep silent. It might be argued that access to legal advice would have added nothing to his understanding of the situation. On the other hand, given his mental condition, it is unlikely that he would fully understand the implications of silence; he was obviously more vulnerable than the appellant in *Dunford*. On this analysis, the requisite causal relationship exists and the admissions may also be excluded from evidence under s 78. This approach is given additional weight by the importance attached to access to legal advice by the European Court in cases such as *Murray (John) v UK* (1996) and *Averill v UK* (2000). Under ss 6 and 2 of the HRA 1998, these decisions will need to be taken into account in considering whether the evidence should be excluded; they would be likely to tip the balance in favour of exclusion.

It has further been argued that a breach of para 11.14 of Code C occurred, in that Toby was interviewed, although no appropriate adult was present.[3] Following DPP *v Blake* (1989), the judge would therefore be likely to use his discretion to exclude the interview under s 78 on the basis that it may be unreliable or because Toby would not have made the admissions at all had the adult been present.[4]

The breach of s 58 could also be the subject of a complaint, as could the breach of para 11.14 of Code C.

It follows from the above analysis that the first interview, which may be said to be causally related to the breach of para 6.6, may be excluded from evidence under s 78, since had Toby had legal advice, he might *not* have decided to remain silent. The solicitor, weighing up the situation, might well have decided that he should offer his explanation of the facts rather than allow an adverse inference to be drawn at trial from a failure to do so. This would be in accordance with s 34 of the Criminal Justice and Public Order Act 1994, which provides that where a person fails to mention a fact which he subsequently relies on in his defence, adverse inferences can be drawn from such a failure. He has also failed to account for the presence of the cannabis. The solicitor might also have advised him to account for its presence of the knife since, under s 36 of the 1994 Act, an adverse inference can be drawn from a failure to so account. Exclusion of the first interview under s 78 would appear to accord with the duty of the court under s 6 of the HRA since the European Court of Human Rights has, as indicated above, held that delay in access where the defendant faces the possibility that adverse inferences may be drawn from silence is likely to amount to a breach of Art 6 of the Convention. Such a breach could be avoided by excluding the interview.

Since the possibility that the interview will not be excluded cannot be ruled out, it must be considered whether adverse inferences would be likely to be drawn from Toby's silence during it. Section 34(2A) of the Criminal Justice and Public Order Act 1994, introduced in order to satisfy Art 6 of the Convention under the HRA, applies. Under s 34(2A), inferences cannot be drawn if the defendant has not had the opportunity of having legal advice. This appears to apply to Toby, especially as he has been unlawfully denied the opportunity, as argued above. Thus, no adverse inferences can be drawn.

Notes

1 This point is strengthened by the provisions of Note 11B of Code C, in respect of the likelihood that mentally disordered persons might make an unreliable confession.

2 It could be noted that under s 67(10) of PACE, no civil liability can arise from a breach of the Codes and, therefore, *a fortiori* from a breach of a Note for Guidance (in this case, Note 1E). If the search is voluntary, so presumably is the seizure; the only illegality might therefore arise from the breach of the Note. Assuming then that the search is voluntary, it would appear that no cause of action will arise.

3 The breach of para 11.14 could also be considered under s 76 but, if so, the argument would not differ from that in respect of the breach of s 58. Note that since Toby is mentally disordered, as opposed to mentally handicapped, the special provisions of s 77 in respect of the mentally handicapped do not apply. Nevertheless, as in *Delaney*, courts will be particularly vigilant when determining whether to exclude confessions of the mentally disordered under either s 76 or s 78. The ruling in *MacKenzie* (1993) supports this point.

4 It could be pointed out that if the police deliberately failed to afford Toby access to an appropriate adult, s 76(2)(a) might be invoked to exclude the admissions; alternatively (following *Alladice* (1988)), s 78 would be invoked without needing to discuss the question of reliability or of the requisite causal relationship between the breach and the confession.

Question 46

The Police and Criminal Evidence Act 1984 and the Codes of Practice made under it were supposed to strike a fair balance between increased police powers and greater safeguards for the suspect. Taking the effect of the Human Rights Act 1998 and any other relevant provisions into account, how far would it be fair to say that such a balance is currently evident?

Answer plan

This is a reasonably straightforward essay question which is commonly set on PACE. It is clearly much more wide ranging than the one that follows it and therefore needs care in planning in order to cover provisions relating to the key stages in the investigation.

Essentially, the following points should be considered:

- the arrest provision under s 25 of PACE; Art 5 of the Convention;
- the stop and search provision under s 1 and Code of Practice A and the efficacy of the procedural safeguards;
- the detention provisions under Part IV; Art 5 of the Convention;
- the safeguards for interviews under Part V and Codes C and E—relevance of ss 34–37 under the Criminal Justice and Public Order Act 1994; Art 6 of the Convention;

- the identification procedures under Code D;
- a brief overview of the redress available for breaches of these provisions—tortious remedies, the police complaints mechanism, exclusion of evidence; the impact of the Human Rights Act (HRA) 1998, especially Art 6 of the Convention.

Answer

It will be argued that although the Police and Criminal Evidence Act (PACE) 1984 and the Codes of Practice contain provisions capable of achieving a reasonable balance between increasing the power of the police to detain and question and providing safeguards for the suspect, that balance is not maintained in practice. This failure arguably arises partly because many of the safeguards can be evaded quite readily and partly because there is no effective sanction available for their breach. It will further be contended that while the relevant Articles of the Convention, afforded further effect in domestic law under the HRA, are likely to have some impact in encouraging adherence to the rules intended to secure suspects' rights, they will not have a radical effect, especially in terms of encouraging the exclusion of evidence where the rules have not been adhered to. Certain key provisions will be selected in order to illustrate this argument.

Before the inception of PACE, the police had no general and clear powers of arrest, stop and search or entry to premises. They wanted such powers put on a clear statutory basis, so that they could exercise them where they felt it was their duty to do so, without laying themselves open to the possibility of a civil action. In s 1, a general power to stop and search persons is conferred on the police if reasonable suspicion arises that stolen goods or prohibited articles may be found. This general power is balanced in two ways. First, the concept of reasonable suspicion, which is defined in paras 1.6 and 1.7 of Code A, allows it to be exercised only when quite a high level of suspicion exists. Secondly, the police must give the person to be searched certain information, including the object of the search and the name of the police station to which the officer in question is attached. However, these safeguards can be evaded if the search is made on an apparently voluntary basis, although certain restrictions on voluntary searches under Code A go some way towards addressing this problem.[1] It should be pointed out that s 1 of PACE may be undermined in any event by s 60 of the Criminal Justice and Public Order Act 1994, which in certain circumstances allows stop and search without reasonable suspicion if authorisation has been given by a superintendent.

However, the HRA may tend to encourage a stricter adherence to the rules providing safeguards for suspects since the police are bound under s 6 of the HRA to adhere to the Convention requirements and, under s 3 of the HRA, PACE and other relevant provisions must be interpreted compatibly with those requirements if it is possible to do so. Article 5, contained in Sched 1 to the HRA, provides a guarantee of liberty and security of person'. It appears that the short period of detention represented by a stop and search is sufficient to constitute a deprivation of liberty (*X v Austria* (1979)). Deprivation of liberty can occur only on a basis of law and in certain specified circumstances, including, under Art 5(1)(b), the detention of a person in order to secure the fulfilment of any obligation prescribed by law and, under Art 5(1)(c), the 'lawful detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence'. Both these provisions may cover temporary detention for the purposes of a search but, since they provide exceptions to a guarantee of a fundamental right, they may tend to require a restrictive approach to the use of stop and search provisions and to apparently voluntary stops, due to the duty of the police under s 6 of the HRA. Whether this occurs in practice is, however, debatable.

The exercise of the powers under s 60 of the Criminal Justice and Public Order Act (CJPOA) 1994 may be of doubtful compatibility with Art 5(1)(c), since reasonable suspicion is not required, although the power may fall within Art 5(1)(b). In appropriate cases, bearing in mind the recent evidence of a police tendency to show racial bias in decisions to stop and search, violation of Art 5(1)(b) or (c) might be found when read with the Art 14 guarantee of freedom from discrimination in the enjoyment of the Convention rights. This possibility may be of less significance given the amendments made to the Race Relations Act 1976 in 2000, allowing claimants to bring actions against the police in respect of direct or indirect discrimination in policing decisions, including decisions to stop and search. However, a defendant would also have the option of raising an Art 5 and 14 argument during the criminal process. The use of force in order to carry out a stop and search is permitted under s 117 of PACE, but under Art 3, the use of force must be strictly in proportion to the conduct of the detainee. Under it, the use of extreme force is permissible if necessitated by the conduct of the detainee, but if the use of such force causes death, it would appear to breach Art 2, which permits the use of lethal force to 'effect an arrest', not to effect a detention short of arrest.

The police also acquired a general power of arrest under s 25. However, this power does not merely allow an officer to arrest for any offence so

long as reasonable suspicion can be shown. Such a power would probably have been viewed as too draconian. It is balanced by what are known as the general arrest conditions which must also be fulfilled. One of these conditions (s 25(3)(c)) consists of a failure to furnish a satisfactory name or address, so that the service of a summons later on would be impracticable. The others concern the immediate need to remove the suspect from the street. The inclusion of these provisions implies that the infringement of civil liberties represented by an arrest should be resorted to only where no alternative exists. The concept of reasonable suspicion, which should ensure that the arrest takes place at quite a late stage in the investigation, also limits the use of this power, although the concept tends to be flexibly interpreted. Article 5, as received into domestic law under the HRA, may have some impact on the interpretation of the concept. This can be found if the leading post-PACE case on the meaning of the concept, *Castorina v Chief Constable of Surrey* (1988), is compared with the findings of the Strasbourg Court in *Fox, Campbell and Hartley v UK* (1990).

In *Castorina,* the grounds for suspicion regarding a burglary of a firm were that the suspect was a former employee who appeared to have a grudge and the burglary appeared to be an 'inside job'. However, the suspect was not considered by the victim to be likely to commit burglary and she had no criminal record. Nevertheless, the court found that reasonable suspicion had been established. In *Fox, Campbell and Hartley v UK* (1990), the applicants had been arrested in accordance with s 11 of the Northern Ireland (Emergency Provisions) Act 1978, which required only suspicion, not reasonable suspicion. The only evidence put forward by the government for the presence of reasonable suspicion was that the applicants had convictions for terrorist offences and that when arrested, they were asked about particular terrorist acts. The government said that further evidence could not be disclosed for fear of endangering life. The Court found that although allowance could be made for the difficulties of gathering evidence in an emergency situation, reasonable suspicion which arises from facts or information which would satisfy an objective observer that the person concerned may have committed the offence had not been established. The arrests in question could not, therefore, be justified. It is debatable whether the UK courts are in general applying a test of reasonable suspicion under PACE or other provisions for arrest which reaches the standards which the European Court had in mind, especially where terrorism is not in question. The departure which the HRA brings about is to encourage stricter judicial scrutiny of decisions to arrest.

Prior to PACE, the police had no clear power to hold a person for questioning. Such a power was put on a clear statutory basis under s 41,

and it was made clear under s 37(2) that the purpose of the detention is to obtain a confession. The detention can be for up to 24 hours. In the case of a person in police custody for a serious arrestable offence (defined in s 116), it can extend to 36 hours with the permission of a police officer of the rank of superintendent or above, and may extend to 96 hours under s 44 after an application to a magistrates' court. These are very significant new powers. However, they are supposed to be balanced by all the safeguards created by Part V of PACE and by Codes C and E. The most important safeguards available inside the police station include contemporaneous recording under para 11.5 of Code C, tape recording under para 3 of Code E, the ability to read over, verify and sign the notes of the interview as a correct record under para 11.10 of Code C, notification of the right to legal advice under s 58 and para 3.1 of Code C, the option of having the adviser present under para 6.6 of Code C and, where appropriate, the presence of an appropriate adult under para 11.14 of CodeC.[2]

However, there are methods of avoiding these safeguards without actually breaking the rules. For example, in *Hughes* (1988), the detainee, disappointed of obtaining advice from his own solicitor, inquired about the duty solicitor scheme, but was erroneously informed (but apparently in good faith) that no solicitor was available. Under this misapprehension, he gave consent to be interviewed and the Court of Appeal took the view that his consent was not thereby vitiated.

Further, access to legal advice and tape recording can be evaded and rendered worthless if the suspect is interviewed outside the police station. There has been an attempt to address the problem of such evasion: under para 11.1 as revised, such interviewing can no longer occur unless the decision to arrest the person being interviewed has not been taken or the exchanges do not amount to 'the questioning of a person regarding his involvement or suspected involvement in a criminal offence or offences' (para 11.1 A), or unless urgent interviewing is necessary to prevent various contingencies arising. This provision may have encouraged the police to take suspects to the police station to be questioned, where an arrest was likely to occur in any event, but it is unclear that the number of suspects questioned in the street has dropped significantly and in any event, the number and width of the express or implied exceptions to the prohibition are likely to have lessened its impact.

The right of access to legal advice was intended to bolster the right to silence. However, that right, originally included in the PACE scheme under Code C, was severely curtailed by ss 34–37 of the CJPOA 1994, thereby disturbing the 'balance' which was originally created. However, s 34(2A) was inserted into the CJPOA 1994 by s 58 of the Youth Justice and Criminal Evidence Act 1999. The amendations provide that if the defendant was at

an authorised place of detention and had not had an opportunity of consulting a solicitor at the time of the failure to mention the fact in question, inferences cannot be drawn. This is a very significant change to the interviewing scheme, which was introduced as a direct response to the findings of the European Court of Human Rights in *Murray v UK* (1996). Had this change not been made, ss 34–37 might have been found to be incompatible with Art 6 under s 3(2) of the HRA.

However, it need not be assumed, conversely, that Art 6 will be satisfied where a defendant has access to legal advice before being questioned under caution. Cases such as *Condron* (1997) or *Bowden* (1999), where the defendants had had legal advice and had acted on it in remaining silent, should be considered on their particular facts, in relation to the Art 6 requirements. Such cases differ from *Murray* on the issue of the relationship between silence and legal advice. In *Condron,* the defendants acted on legal advice in refusing to answer questions; in *Murray,* a breach of Art 6(1) was found on the basis of inference-drawing in the absence of legal advice (not on the basis of inference-drawing *per se*). In *Condron,* the fact of having legal advice was not to the defendants' advantage, possibly the reverse, since in a sense they may have been misled into remaining silent. It is arguable that allowing adverse inferences to be drawn in that context—where the innocent explanation for silence was that it was on legal advice—could in certain circumstances be viewed as a breach of Art 6(1). For example, this might be argued where the adviser had failed to point out that adverse inferences might be drawn despite the advice and/or where the defendant could not be expected—due to his low intelligence, youth or other vulnerability—to decide to speak despite the advice. To hold otherwise might be viewed as undermining the value attached in *Murray* to granting access to legal advice where adverse inferences would be drawn from silence.

It may appear that throughout PACE, a reasonable balance was originally struck between safeguards and increased police powers. However, as has been pointed out, the safeguards may be evaded, even though the powers may of course be used to the full. The HRA provides opportunities, as indicated, of seeking to restore the balance originally created. However, where it is clear, whether due to adoption of a stricter interpretation under s 3 of the HRA or otherwise, that evasion or breach of the safeguards has occurred, thereby destroying the balance, there will not always be an effective remedy available which could go some way towards restoring it. This may continue to be the case despite the inception of the HRA.

Damages will be available at common law in respect of some breaches of PACE. For example, if a police officer arrests a citizen where no

reasonable suspicion arises under s 24 or s 25 of PACE, an action for false imprisonment might arise. Equally, such a remedy would be available if the provisions governing time limits on detention were breached. The question of whether damages are available in respect of property unlawfully seized was considered in *Chief Constable of Lancashire ex p Parker and McGrath* (1993). It was argued on behalf of the police that s 22(2)(a) of PACE, which allows the retention of 'anything seized for the purposes of a criminal investigation', would be superfluous, unless denoting a general power to retain unlawfully seized material. It was held, however, that the sub-section could not bear the weight sought to be placed upon it: it was merely intended to give examples of matters falling within the general provision of s 22(1). Therefore, the police were not entitled to retain the material seized. This decision re-affirmed the need to retain the balance between safeguards for the subject of the search and the police power to search, which might have been disturbed had the various issues been resolved differently.

However, tortious remedies were inapplicable to the provisions of the Codes under s 67(10) and seem to be inapplicable to the most significant statutory interviewing provision, the entitlement to legal advice. There is no tort of denial of access to legal advice: the only possible tortious action is for breach of statutory duty. Whether this tort lies is a question of policy in relation to any particular statutory provision, and so the application of this remedy was purely conjectural.[3] Under s 7(1)(a) of the HRA 1998, it is possible to bring an action against the police for breach of the Convention rights. However, it is possible that this remedy is not available in relation to breaches of Art 6 (which would cover the legal advice scheme), on the basis that Art 6 is concerned with the trial as a whole and therefore potential breaches of it should be addressed within the trial itself.

The police complaints mechanism covers any breaches of PACE, including breaches of the Codes under s 67(8), but it is generally agreed that it is defective as a means of redress. It does not allow for compensation to the victim or for the victim to attend any disciplinary proceedings. In any event, most complaints do not result in disciplinary proceedings and it appears that none have been brought in respect of breaches of the Codes. The suspect concerned might, in many instances, be unaware that a breach of the Codes had occurred, and while theoretically another officer could make a complaint leading to disciplinary proceedings for such a breach, in practice, this appears to be highly unlikely. Furthermore, despite the involvement (albeit limited) of the Police Complaints Authority, the complaints procedure tends to be perceived as being administered by the police themselves. The police disciplinary system has been found to provide an insufficient remedy for Convention breaches, under Art 13, in

Khan v UK (2000), which criticised both its lack of independence and its lack of real remedies. The HRA 1998 has gone some way towards redressing this problem by allowing Convention-related issues, including Art 5 and 8 complaints against police, to be raised in ordinary courts and to receive the normal range of remedies.

The context in which many breaches of PACE have been considered is that of exclusion of evidence. Confessions may be excluded under s 76 if obtained by oppression or in circumstances conducive to unreliability. Any evidence may be excluded under s 78 if its admission would be likely to render the trial unfair. It must be borne in mind that the PACE mechanism for exclusion of evidence provides a means of redress for such breaches only in one circumstance—that the case is pursued to trial and the defendant pleads not guilty. In this one instance, they can be of great value, in that the defendant may be placed in the position he would have been in had the breach not occurred, and the police may seem to be 'punished' for their non-compliance with the rules by being prevented from profiting from their own breach. In this sense, exclusion of evidence does provide an effective means of redress. For example, in *Canale* (1990), the police failed to record an interview contemporaneously in breach of para 11.3 of Code C; it was excluded as possibly unreliable under s 78. In *Samuel* (1988), the police unlawfully denied the appellant access to legal advice; the court took the view that if a breach of s 58 had taken place which was causally linked to the confession, s 78 should be invoked. It could be said that in *Samuel,* the court succeeded in restoring the balance between the police power to detain and question, which had been used fully in the case, and the safeguards that the detainee should have had, in the sense that the outcome was what it would have been had the proper safeguards been in place. However, the provisions of ss 34–37 of the CJPOA 1994, reflected in the new caution introduced under the 1995 revision of Code C, make it less likely that advisers will advise silence, since adverse inferences may be drawn at trial from silence. Thus, it may be more difficult to establish the causal relationship in question relying on the method used in *Samuel.* Section 78 may become less effective as a means of maintaining the balance between police powers and suspects' rights.

Theoretically, the *Samuel* argument as to the causal relationship between an impropriety and a confession could be applied to non-confession evidence, but in practice, it appears that it will not be. According to *Thomas* (1990) and *Effick* (1992), physical evidence will be excluded only if obtained with deliberate illegality. Following the decision of the House of Lords in *Khan* (1997), evidence other than involuntary confessions obtained improperly is nevertheless admissible, subject to a narrow discretion to exclude it. The House of Lords

took Art 6 of the Convention into account in reaching this conclusion. They found that Art 6 does not require that evidence should be automatically excluded where there has been impropriety in obtaining it, basing this finding on *Schenk v Switzerland* (1988). In *Khan* itself, it was found that the trial judge had properly exercised his discretion to include the improperly obtained evidence under s 78. This position has been unaffected by the reception of Art 6 into domestic law under the HRA (*AG's Reference (No 3 of 1999)* (2001)) on the basis that the assessment of evidence is largely a matter for the national courts. The courts have therefore taken the view that the position that has developed under s 78 regarding exclusion of non-confession evidence need not be modified under the HRA.[4]

Thus, although exclusion of evidence can provide a means of redress when police have not complied with one of the PACE safeguards, it may be unavailable where the evidence obtained due to the breach is non-confession evidence. It may be unavailable in any event: first, even where a clear breach of PACE has occurred, the evidence may nevertheless be admissible; secondly, exclusion of evidence is irrelevant to the majority of defendants who plead guilty. Thus, the police had an incentive to break the rules by, for example, refusing a request for legal advice in the hope of obtaining admissions and a guilty plea. If, in such circumstances, a defendant did plead guilty, he had suffered denial of a fundamental right with no hope of redress apart from that offered by a complaint. Now, however, the HRA 1998 enables any person who believes his arrest or trial have been unfair due to the behaviour of the police to argue breaches of, *inter alia,* Art 5 or 6, and *Khan* (2000) makes it clear that an effect on the fairness of proceedings, viewed as a whole, can create a breach of Art 6. Thus, courts are able to monitor and sanction police powers to a greater extent, and the remedies for most PACE breaches have been expanded.

In conclusion, it appears that the balance between safeguards and police powers has not always been maintained, due to the ease with which certain of the domestic safeguards may be evaded or ignored. Clearly, if safeguards are not observed, the justification for increasing police powers to stop, arrest, search premises, detain and question is lost. It is possible that courts will use the HRA and the Convention to create stronger protection in these areas for individual rights, thus restoring the balance that has been lost, but it is too early to discern a consistent pattern in post-HRA decisions.

Notes

1 The problem of voluntary searches and provision for them could be considered in more detail. Note for Guidance 1E provides that certain persons—juveniles,

the mentally handicapped or mentally disordered and any person who appears incapable of giving an informed consent—should not be subject to a voluntary search at all. However, this provision is currently contained only in a Note for Guidance and may therefore be even more likely to be disregarded than an ordinary Code provision. Persons who do not fall within the groups mentioned may be subject to a voluntary search under Note 1D(b), but the officer should 'always make it clear that he is seeking the co-operation of the person concerned'. When the 2003 version of Code A comes into force, voluntary searches will be forbidden under para 1.5.

2 It could be mentioned that a similar caution was shown in the introduction of video identification as an alternative to a parade or a group identification; it was accompanied by various new safeguards: under para 2.15 of Code D, the suspect must be reminded that free legal advice is available before taking part in the identification procedure and, under the new para 2.16, the identification procedure and the consequences if consent to taking part is not forthcoming must be explained in a written notice which the suspect must be given reasonable time to read.

3 Theoretically, use of a false imprisonment claim might be available; an argument could be advanced at this point that where gross breaches of the questioning provisions had taken place, such as interviewing a person unlawfully held incommunicado, a detention in itself lawful might thereby be rendered unlawful. However, although the ruling in *Middleweek v Chief Constable of Merseyside* (1985) gave some encouragement to such argument, it now seems to be ruled out, due to the decision in *Weldon v Home Office* (1991) in the context of lawful detention in a prison. It seems likely, therefore, that access to legal advice will continue to be unaffected by the availability of tortious remedies.

4 This important issue could be considered further. The first instance decision in *Edward Fennelly* (1989), in which a failure to give the reason for a stop and search led to exclusion of the search, is not consistent with *Khan*. Furthermore, even if the principles developed under s 78 with respect to confession evidence could properly be applied to other evidence, *Edward Fennelly* would still be a doubtful decision, as no causal relationship could exist between the impropriety in question and the evidence obtained.

Question 47

'The Police and Criminal Evidence Act 1984 provides important safeguards for the suspect during interviews in the police station, but no adequate means of redress is available if the police do not comply with them.'

Discuss.

Answer plan

This is a reasonably straightforward essay question which is quite often set on the Police and Criminal Evidence Act (PACE) 1984. It is important to take the provisions of the Criminal Justice and Public Order Act (CJPOA) 1994 into account and to bear in mind the changes consequent to Code C. It should be noted that it is only concerned with the interviewing scheme and its applicability inside the police station. It is not concerned therefore with safeguards for stop and search, for example. It is important to take the Human Rights Act (HRA) 1998 into account in your answer, since it provides new possibilities of creating redress in relation to safeguards for police interviews.

Essentially, the following matters should be considered:

- the nature of the safeguards available under Parts IV and V of PACE and Codes of Practice C and E;
- the curtailed right to silence under ss 34–37 of the CJPOA 1994;
- the relevant tortious remedies;
- the efficacy of the police complaints mechanism;
- the nature of the PACE scheme for exclusion of evidence;
- the relevance of ss 34–37 of the CJPOA 1994;
- the value of exclusion of evidence as a form of redress;
- the new possibilities under the HRA 1998.

Answer

It is generally accepted that the safeguards for interviews introduced by PACE, particularly access to legal advice and tape recording, can reduce the likelihood that an interview will be unreliable. However, it will be argued that the forms of redress available in respect of breaches of these provisions are inadequate, either as a means of encouraging the police to comply with them or as a means of compensating the detainee if they do not. The HRA allows for European Convention on Human Rights (the Convention) arguments to be raised in any proceedings under s 7(1)(b), and provides for a free-standing cause of action where a public authority has breached a Convention right, under s 7(1)(a); remedies are available under s 8. Obviously, the extent to which the HRA can affect adherence to the interviewing rules depends on the relationship between the rules and the Convention Articles. This issue will be considered below. In general, it will be contended that while the relevant Articles of the Convention, afforded further effect in domestic law under the HRA, are likely to have some

impact in encouraging adherence to the interviewing rules, they will not have a radical effect, especially in terms of encouraging the exclusion of evidence where the rules have not been adhered to.

The most important safeguards available inside the police station include contemporaneous recording under para 11.5 of Code C or tape recording under para 3 of Code E, the ability to read over, verify and sign the notes of the interview as a correct record under para 11.10 of Code C, notification of the right to access to legal advice under s 58 and para 3.1 of Code C, the option of having the adviser present in the interview under para 6.6 and, where relevant, the presence of an appropriate adult under para 11.14. The right to silence, encapsulated in the old Code C caution, has been viewed as a valuable safeguard, but it has now been greatly curtailed by ss 34–37 of the CJPOA 1994, which provide that in certain circumstances, adverse inferences can be drawn from silence. These provisions were reflected in the current and much more complex caution introduced in the 1995 revision of Code C. No adverse inference can be drawn from silence unless the suspect is under caution (s 34(1)(A) of the CJPOA 1994) and he has had the opportunity of having legal advice (s 34(2A)). Section 34(2A), inserted by s 58 of the Youth Justice and Criminal Evidence Act 1999, is therefore a significant new provision since it may tend to encourage adherence to the legal advice scheme. It was introduced to satisfy the demands of Art 6 of the Convention.

The interpretation given to these provisions by the courts has meant that the circumstances in which non-compliance with a provision will be lawful have been narrowed down. In particular, in *Samuel* (1988), the Court of Appeal had to consider s 58(8), which provides that access to legal advice may be delayed where, *inter alia,* allowing such access might alert others involved in the offence. It was determined that s 58(8) could not be fulfilled by an unsubstantiated assertion that this contingency would materialise if a solicitor was contacted. After this ruling, in order to fulfil s 58(8), the police must be able to demonstrate a reasonable belief in some particular quality of naïvety or corruption possessed by the solicitor in question.

Equally, the courts have not been willing to accept that compliance with PACE was impracticable even in informal situations. In *Absolam* (1988), the custody officer questioned the detainee in the heat of the moment, without first advising him of his right to legal advice. At first instance, it was determined that the detainee was only entitled to his right to consult a solicitor as soon as it was practicable under para 3.1 of Code C and, further, that the questions and answers did not constitute an interview; therefore, para 3.1 did not apply. The Court of Appeal, however, held that the questions and answers did not constitute a formal interview, but were nevertheless an interview within the purview of para 6.3. Since the appellant's situation was

precisely the type of situation in which the Code's provisions were most significant, there could be no question of waiving them. Paragraph 3.1 of Code C had been breached.

However, although the courts may be quick to find that a breach of PACE has occurred, this does not mean that redress will automatically be available to the detainee who has thereby been disadvantaged. What form of redress might such a detainee seek?

Tort damages will be available in respect of some breaches of PACE. For example, if a police officer arrests a citizen where no reasonable suspicion arises under s 24 or s 25 of PACE, an action for false imprisonment will be available. Equally, such a remedy would be available if the Part IV provisions governing time limits on detention were breached. However, tortious remedies are inapplicable to the provisions of the Codes under s 67(10) and may not be available in respect of the most significant statutory interviewing provision, the entitlement to legal advice. There is no tort of denial of access to legal advice: the only possible tortious action would be for breach of statutory duty. Whether such an action would lie is a question of policy in relation to any particular statutory provision.[1] At present, the application of this remedy must be purely conjectural. Theoretically, an action for false imprisonment might lie; an argument could be advanced that where gross breaches of the questioning provisions had taken place, such as interviewing a person unlawfully held incommunicado, a detention in itself lawful might thereby be rendered unlawful. However, although the ruling in *Middleweek v Chief Constable of Merseyside* (1985) gave some encouragement to such an argument, it now seems to be ruled out due to the decision in *Weldon v Office* (1991) in the context of lawful detention in a prison. It seems likely, therefore, that access to legal advice, like the rest of the safeguards for interviewing, will continue to be unaffected by the availability of the established tortious remedies. However, the HRA provides various possibilities of redress which may affect adherence to the safeguards.

Access to custodial legal advice can be viewed as an implied right under Art 6(1), where the detainee is aware that adverse inferences may be drawn from silence (*Murray v UK* (1996); *Averill v UK* (2000)). However, at present, it is very doubtful whether Art 6 can be viewed as providing free-standing rights. Breaches of Art 6 are clearly most likely to be addressed within the criminal process itself. The Strasbourg jurisprudence does not cover instances in which the pre-trial procedure is flawed in a manner which might be viewed, potentially, as infringing the Art 6(1) guarantee of a fair trial, but where no court action in fact occurs. However, given that certain of the rights, and in particular the implied right of access to custodial legal advice under Art 6(3)(c), clearly have value outside the trial context, an action based on s 7(1)(a) or on a breach of the statutory duty under s 58 of PACE, but raising Art

(3)(c) arguments under s 7(1)(b), might resolve this issue in favour of the complainant, domestically. Other Convention Articles may have some impact on police interviewing practices and techniques, and where those Articles are breached during detention and interviewing, a free-standing action will arise.

Where provisions of Arts 3, 8, 5 or 14 are coterminous with Code safeguards, liability to pay damages under the HRA for breach of the Convention guarantees might provide the Code provisions with a form of indirect protection, as the more detailed embodiment of the Convention requirements. Certain aspects of the Convention guarantees, including aspects of the Art 3 requirements, have no domestic statutory basis but are recognised only in certain Code provisions. In the *Greek* case (1969), the conditions of detention were found to amount to inhuman treatment owing to inadequate food, sleeping arrangements, heating and sanitary facilities combined with overcrowding and inadequate provision for external contacts. It was also found that conduct which grossly humiliates may amount to degrading treatment contrary to Art 3. Such treatment may include racially discriminatory and, probably, sexually discriminatory questioning and treatment in detention (*East African Asians* cases (1973)). In *Lustig-Prean and Beckett v UK* (1999) and *Smith and Grady v UK* (2000), it was found that grossly humiliating, intrusive interrogation could, if of an extreme and prolonged nature, amount to a breach of Art 3. Possibly, it could also fall within Art 8. Where discrimination is a factor, Art 14 would also be engaged. The creation of new tortious liability indirectly protective of the Code provisions but also creating new safeguards for interviewing under the HRA would be a very significant matter, since it might lead to a regulation of police interviewing practices and techniques which has been largely absent from UK law.

The police complaints mechanism covers any breaches of PACE, including breaches of the Codes under s 67(8), but it is generally agreed that it is defective as a means of redress. It does not allow for compensation to the victim or for the victim to attend any disciplinary proceedings. In any event, most complaints do not result in disciplinary proceedings and it appears that none have been brought in respect of breaches of the Codes. The suspect concerned might, in many instances, be unaware that a breach of the Codes had occurred, and while theoretically another officer could make a complaint leading to disciplinary proceedings for such a breach, in practice, this appears to be highly unlikely. Furthermore, despite the involvement (albeit limited) of the Police Complaints Authority, the complaints procedure tends to be perceived as being administered by the police themselves, although the government under current proposals intends to introduce into it a somewhat greater independent element in the form of civilian investigators in certain

cases. In *Khan v UK* (2000), the European Court of Human Rights (ECtHR) found a violation of Art 13 of the European Convention, on the basis that the Police Complaints Authority does not provide a sufficient means of redress for Convention breaches. It was found to be insufficiently independent as the provider of a remedial procedure since complaints can be handled internally, the chief constable of the area is able to appoint from his own force to carry out an investigation and since the Secretary of State is involved in appointments to the Police Complaints Authority. Thus, reform is necessary. However, as indicated above, the HRA 1998 may divert some complaints to the courts under s 7(1)(a) where police malpractice also falls within the ambit of a Convention right (apart, probably, from Art 6 as discussed above) and so limit this problem.

The context in which breaches of Code C and of the entitlement to legal advice have been considered is that of exclusion of evidence. It must be borne in mind that the PACE mechanism for exclusion of evidence provides a means of redress for breach of the interviewing provisions only in one circumstance—that the case is pursued to trial and the defendant pleads not guilty. In this one instance, it can be of great value in that the defendant may be placed in the position he would have been in had the breach not occurred (the approach taken in *Absolam* (1988)), and the police may seem to be 'punished' for their non-compliance with the rules by being prevented from profiting from their own breach.

The Act contains three separate tests which may be considered after a breach of the interviewing rules has been shown and, in theory, all three could be considered in a particular instance. Under the 'oppression' test (s 76(2)(a)), once the defence has advanced a reasonable argument (*Liverpool Juvenile Court ex p R* (1987)) that the confession was obtained by oppression, it will not be admitted in evidence unless the prosecution can prove that it was not so obtained.[2] In *Fulling* (1987), the Court of Appeal proffered its own definition of oppression: 'The exercise of authority or power in a burdensome, harsh or wrongful manner.' The terms 'wrongful' and 'burdensome' used in this test could cover any unlawful action on the part of the police, and would therefore mean that any breach of the Act or Codes could constitute oppression. This wide possibility has been pursued at first instance (in *Davison* (1988)), but the Court of Appeal in *Hughes* (1988) held that a denial of legal advice due not to bad faith on the part of the police, but to a misunderstanding, could not amount to oppression. In *Alladice* (1988), the Court of Appeal also took this view in suggesting, *obiter,* that an improper denial of legal advice, if accompanied by bad faith on the part of the police, would certainly amount to 'unfairness' under s 78 and probably also to 'oppression'.

The test for oppression then does not appear to depend entirely on the nature of the impropriety, but rather on whether it was perpetrated

deliberately. Thus, bad faith seems to be a necessary, but not sufficient condition for the operation of s 76(2)(a), whereas it seems that it will automatically render a confession inadmissible under s 78.

The test under s 76(2)(b), the 'reliability' test, is concerned with objective reliability: the judge must consider the situation at the time the confession was made and ask whether the confession would be likely to be unreliable, not whether it is unreliable. It is not necessary under this test to show that there has been any misconduct on the part of the police.[3] In *Delaney* (1989), the defendant was 17, had an IQ of 80 and, according to an educational psychologist, was subject to emotional arousal which would lead him to wish to bring a police interview to an end as quickly as possible. These were circumstances in which it was important to ensure that the interrogation was conducted with all propriety. In fact, the officers offered some inducement to the defendant to confess by playing down the gravity of the offence and by suggesting that if he confessed, he would get the psychiatric help he needed. They also failed to make an accurate, contemporaneous record of the interview in breach of para 11.5 of Code C. Failing to make the proper record was of indirect relevance to the question of reliability, since it meant that the court could not assess the full extent of the suggestions held out to the defendant. Thus, in the circumstances existing at the time (the mental state of the defendant), the police impropriety did have the necessary special significance.

Thus, it appears that the 'circumstances existing at the time' may be circumstances created by the police in breaching the interviewing rules; equally, following *Mathias* (1989), such a breach may amount to something said or done. However, a single breach of the interviewing rules, such as a denial of legal advice in ordinary circumstances, would not, it seems, fulfil both limbs of the test.

Due to the need to find some special factor in the situation in order to invoke either head of s 76, breaches of the interviewing rules unaccompanied by any such factor are usually considered under s 78. The idea behind the section was that the function of exclusion of evidence after police misconduct must not be disciplinary, but must be to safeguard the fairness of the trial. The first question to be asked under s 78 is whether a breach of the rules has occurred at all and then whether it is significant and substantial (*Keenan* (1989)). Once such a breach is found, the next question to be asked will be whether admission of the confession gained during the improperly conducted interview will render the trial unfair. This might occur if, for example, as in *Canale* (1990), there has been a failure to make contemporaneous notes of the interview in breach of para 11.5 of Code C. The defence may then challenge the interview record on the basis that the police have fabricated all or part of it, or may allege

that something adverse to the detainee happened during the interview which has not been recorded. The court then has no means of knowing which version is true, precisely the situation which Code C was designed to prevent. In such a situation, a judge may well exclude the confession on the basis that it would be unfair to allow evidence of doubtful reliability to go before the jury.[4]

Breaches of the recording provisions will normally be considered under s 78 as opposed to s 76(2). Allegedly fabricated confessions cannot fall within s 76(2), due to its requirement that something has happened to the defendant which causes him to confess; its terms are not therefore fulfilled if the defence alleges that no confession made by the defendant exists. Secondly, s 76(2)(b) requires that something is said or done in special circumstances; a breach of the recording provisions could amount to something said or done in the *Delaney* sense (see above), but unless special circumstances such as the particular vulnerability of the defendant exist, the other test under the section is unsatisfied. In *Canale* (1990), the police breached the recording provisions and allegedly played a trick on the appellant in order to obtain the confession. Ruling that the confession should have been excluded under s 78, the Court of Appeal took into account the fact that the appellant could not be said to be weak-minded; it was therefore thought inappropriate to invoke s 76(2)(b). Equally, such instances would not normally fall within s 76(2)(a), because it may not be apparent that the police deliberately breached the recording provisions. On the other hand, if the defence alleges that the police made threats or *deliberately* tricked the detainee into confessing, the prosecution might not be able to prove beyond reasonable doubt that the police had in fact behaved properly, due to the breach of the recording provisions. This line of argument could have been considered in *Canale*.

Moreover, a significant and substantial breach of the interviewing rules, although unaccompanied by bad faith, may have caused the defendant to confess and on that basis, admission of the confession could be said to render the trial unfair, even though it appears that the confession is reliable. The difficulty here lies in determining whether the defendant confessed for other reasons. In *Samuel* (1988), the Court of Appeal determined that the police impropriety—a failure to allow the appellant access to legal advice—was causally linked to the confession: the appellant was not a sophisticated, hardened criminal able to handle the interview without advice. Conversely, in *Dunford* (1990), the Court of Appeal determined that the criminally experienced appellant had made his own assessment of the situation in deciding to make certain admissions and legal advice would not have affected his decision; the failure to allow legal advice was not therefore causally linked to the confession. Curtailment of the right to silence under ss 34–37 of the CJPOA 1994 means that legal advisers are less likely to

advise silence and, therefore, the causal relationship in question will be more difficult to establish. Section 78 may therefore become less effective as a means of providing a form of redress where there is a failure to comply with the PACE provisions.[5] On the other hand, the importance attached to access to legal advice by the European Court in cases such as *Murray (John) v UK* (1996) and *Averill v UK* (2000) may encourage greater use of s 78, since the courts' duty under s 6 of the HRA 1998 means that these decisions should be taken into account in considering whether interviews should be excluded from evidence where breaches of the legal advice provisions have occurred.

Section 34(2A) of the CJPOA may be likely to encourage the police to afford access to legal advice. Whether it does so in practice will depend on the interpretation of the terms given to the provision. It provides essentially that adverse inferences shall not be drawn from a suspect's silence under caution before or after charge at an authorised place of detention if he has not been allowed an 'opportunity' to consult a solicitor before that point. Clearly, the term 'opportunity' may be taken to mean that formally, an opportunity had been offered, but the suspect had not availed himself of it. This interpretation would not curb the use of ploys by the police discouraging the suspect from having legal advice. Such an interpretation would not appear to accord with Art 6(1) jurisprudence, and therefore a broad interpretation of the term 'opportunity' could be adopted under s 3 of the HRA.

In conclusion, it is apparent that the courts are concerned to uphold the safeguards created by the PACE interviewing rules, but it must be questioned whether exclusion of evidence is an adequate or appropriate method of doing so. The majority of defendants plead guilty. Thus, the police have an incentive to break the rules by, for example, refusing a request for legal advice in the hope of obtaining admissions and a guilty plea. If, in such circumstances, a defendant does plead guilty, he has suffered denial of a fundamental right with little hope of redress, apart from that offered by a complaint. However, whilst not a direct remedy for breaches of PACE and its Codes, the incorporation of the Convention by the HRA 1998 has provided a separate method of redress for many situations which involve a PACE breach; if the pre-trial proceedings are unfair, viewing the trial process as a whole, then there will be a breach of Art 6 issue, for which any domestic court may provide any available remedy (s 8 of the HRA), including quashing any conviction obtained. Thus, the HRA may have some impact in making up for the deficiencies in the PACE remedial scheme.

Notes

1 The tone of the only relevant case (a 1985 unreported application to prevent a breach of s 58) was unpropitious: '…were I to make the order sought it would be unreasonable, a hindrance to police inquiries may be caused.'

2 The meaning of oppression could be considered in more detail. The only evidence given in the Act as to its meaning is the non-exhaustive definition contained in s 76(8): 'In this section, "oppression" includes torture, inhuman or degrading treatment, and the use or threat of violence (whether or not amounting to torture).' The word 'includes' ought to be given its literal meaning according to the Court of Appeal in *Fulling* (1987). Therefore, the concept of oppression may be fairly wide: the question is whether it could encompass breaches of the interviewing scheme unaccompanied by any other impropriety.

3 There are two limbs to the test, as *Harvey* (1988) illustrates: the defendant, a mentally ill woman of low intelligence, may have been induced to confess to murder by hearing her lover's confession; the 'something said or done' (the first limb) was the confession of the lover, while the 'circumstances' (the second limb) were the defendant's emotional state, low intelligence and mental illness.

4 The question of any other available evidence as to what occurred could be pursued further at this point. In *Dunn* (1990), the defence had an independent witness to what occurred—a legal representative—and the judge admitted the confession as the defence had therefore a proper basis from which to challenge the police evidence.

5 For completeness, s 82(3), which preserves the whole of the common law discretion to exclude evidence, could be mentioned at this point, although it should be noted that in practice, its role in relation to breaches of the interviewing rules is largely insignificant, due to the width of s 78.

CHAPTER 13

FREEDOM OF ASSEMBLY AND PUBLIC ORDER

Introduction

This chapter is concerned with the conflict between the need on the one hand to maintain order and on the other to protect freedom of assembly. The topic lends itself readily to problem questions or essays, but in either case, its concern will be with those provisions of the criminal law most applicable in the context of demonstrations, marches or meetings. The common law power to prevent a breach of the peace is still extensively used. Students should be aware of recent decisions on this power. The Public Order Act 1986 is still the most significant statute, but it is also particularly important to bear in mind the public order provisions of the Criminal Justice and Public Order Act 1994. Problem questions sometimes call on the student to discuss *any* issues which may arise, as opposed to considering criminal liability only, in which case, any tortious liability incurred by members of an assembly or by police officers may arise as well as questions of criminal liability. The possibility of judicial review of police decisions may also arise.

At the present time, the Human Rights Act 1998 is of course especially important and is relevant in all problem questions on public protest and assembly. Examiners will expect some discussion of its relevance and impact. Articles 10 and 11 of the European Convention on Human Rights, which provide guarantees of freedom of expression and of peaceful assembly respectively, were received into UK law once the Human Rights Act 1998 came fully into force in 2000. (Note that Art 10 protects 'expression', not merely 'speech', thus covering many forms of expressive activity, including forms of public protest.) Therefore, Arts 10 and 11 and other Convention Articles relevant in this area are directly applicable in UK courts, and should be taken into account in interpreting and applying common law and statutory provisions affecting public protest. Section 3(1) of the HRA requires: 'So far as it is possible to do so, primary and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.' Section 3(2)(b) reads: 'this section does not affect the validity, continuing operation or enforcement of any incompatible primary legislation.' Section 3(1) goes well beyond the pre-HRA obligation to resolve

ambiguity in statutes by reference to the Convention. All statutes affecting freedom of assembly and public protest therefore have to be interpreted so as to be in harmony with the Convention, if that is at all possible.

Under s 6, Convention guarantees are binding only against public authorities; these are defined as bodies which have a partly public function. In the context of public protest, this will normally mean that if the police, local authorities or other public bodies use powers deriving from any legal source in order to prevent or limit peaceful public protest, the protesters can bring an action against them under s 7(1)(a) of the HRA relying on Art 11, probably combined with Art 10. It also means that if the protesters are prosecuted or sued, they can rely on those Articles as providing a defence and/or re-interpretation of the legal provision involved. Depending on the interpretation afforded to those Articles, including the exceptions to them, the protesters might be successful unless a statutory provision absolutely unambiguously supported the limitation or banning of the protest. Where a statute limiting/affecting public protest is applied, the court is likely to rely on s 3 of the HRA; where a common law provision creating such a limitation is relevant, the court will rely on s 6. (For further discussion, see Chapter 9.)

Checklist

Students should have general knowledge of the background to the Public Order Act 1986 and the public order provisions of the Criminal Justice and Public Order Act 1994 and, in particular, should be familiar with the following areas:

- the freedom of assembly and public protest jurisprudence under Arts 10 and 11 of the European Convention on Human Rights;
- the Human Rights Act 1998, especially ss 3 and 6;
- the notice requirements under s 11 of the Public Order Act 1986;
- the conditions which can be imposed under ss 12 and 14 of the Act on processions and assemblies;
- the banning power under ss 13 and 14A of the Act;
- the liability under ss 3,4,4A and 5 of the Act;
- the liability for assault on, or obstruction of, a police officer under s 89 of the Police Act 1996;
- the common law power to prevent a breach of the peace;
- public nuisance;
- the obstruction of the highway under s 137 of the Highways Act 1980;
- the public order provisions of Part V and s 154 of the Criminal Justice and Public Order Act 1994.

Question 48

Section 3 of the Human Rights Act (HRA) 1998 requires that statutes should be interpreted, if possible, so as to accord with the demands of the European Convention on Human Rights (the Convention). Is it fair to say that the restraints on assemblies of ss 11–14C of the Public Order Act 1986, as amended, create a balance between the public interest in freedom of assembly and in the need to maintain order which is in harmony with Arts 10 and 11 of the Convention, and that therefore no re-interpretation of those provisions under s 3 is necessary?

Answer plan

The Public Order Act (POA) 1986 remains the central statute in this area, but its amendment by the Criminal Justice and Public Order Act (CJPOA) 1994 created a significant new area of liability. The general public order scheme now created by the two statutes is very likely to appear on examination papers. This essay question requires a sound knowledge of certain key POA 1986 provisions which are particularly relevant to public assembly and protest. It also requires an awareness of the provisions of Arts 10 and 11 as interpreted at Strasbourg, and of their potential impact on this area of UK law under the HRA. It is suggested that a distinction should initially be drawn between prior and subsequent restraints contained in the POA 1986 as amended. The provisions in question operate largely as prior restraints.

Essentially, the following matters should be considered:

- the value of freedom of assembly;
- the provisions of Arts 10 and 11 as interpreted by Strasbourg;
- the provisions aimed specifically at processions and assemblies under ss 11, 12, 13, 14, 14A, 14B and 14C of the 1986 Act (as amended by the 1994 Act);
- the need for further protection of assembly by re-interpretation of the provisions under s 3 in accordance with the demands of Arts 10 and 11 as received into UK law under the HRA;
- conclusions.

Answer

The State and citizens have a legitimate interest in maintaining order, but citizens also have a legitimate interest in the protection of the freedoms of expression and assembly. The restraints available under ss 11–14C of the POA 1986 as amended by the CJPOA 1994 affect demonstrations, marches and meetings. To an extent, the number of restraints available is unsurprising because the range of State interests involved is wider than any other expressive activity would warrant: they include the possibilities of disorder, of violence to citizens and of damage to property. Clearly, the State has a duty to protect citizens from the attentions of the mob. The need to give weight to these interests explains the general acceptance of freedom of assembly as a non-absolute right, even though it may be that violent protest is most likely to bring about change.

Public protest is tolerated in free societies due to its close links with freedom of speech; in particular, it fosters participation in the democracy. One aspect of this is the use of protest as a means of demonstrating to the government that it has strayed too far from the path of acceptability in policy-making. The question is where the balance is to be struck: what is the proper middle way between allowing free rein to the riotous mob on the one hand and on the other imposing an absolute prohibition on public meetings? The middle way clearly involves the use of controls; the need is to apply them sensitively in order to avoid arbitrary suppression of freedom of assembly. Articles 10 and 11 of the Convention, afforded further effect in domestic law under the HRA, seek to avoid such suppression in providing guarantees of freedom of expression and of peaceful assembly, subject to exceptions under Arts 10(2) and 11(2) which may prevail only if they are prescribed by law, have a legitimate aim, and are 'necessary in a democratic society'. The European Court of Human Rights has found that the right to organise public meetings is 'fundamental' (*Rassemblement Jurassien Unite Jurassienne v Switzerland* (1979)) and that the protection of free speech extends equally to ideas which 'offend, shock or disturb' (*Handyside v UK* (1976)). All forms of protest that can be viewed as the expression of an opinion fall within Art 10, according to the findings of the Court in *Steel v UK* (1998). In *Ezelin v France* (1991), the Court found that Art 11 had been violated; it found that the freedom to take part in a peaceful assembly is of such importance that it cannot be restricted in any way, so long as the person concerned (whose freedom of assembly has suffered interference through arrest, etc) does not himself commit any reprehensible act.

This essay will ask whether the UK controls under ss 11–14C of the POA 1986 as amended are in harmony with Arts 10 and 11, taking into account the above Strasbourg jurisprudence. In so doing, it will consider the varying

effects of these prior restraints on freedom of assembly, taking into account their very significant extension under the CJPOA 1994. In particular, it will be borne in mind that prior restraints are especially restrictive since their use may mean that the whole purpose of the assembly—to express a point of view—is lost.

The POA 1986, as amended by ss 70 and 71 of the CJPOA 1994, contains various prior restraints on assemblies, which may mean that they cannot take place at all or can take place only under various limitations. These restraints are contained in ss 12, 13, 14, 14A, 14B and 14C of the Act. Sections 12 and 13 are underpinned by s 11, which provides that the organisers of a march (not a meeting) must give advance notice of it to the police. This statutory national notice requirement was imposed for the first time under the 1986 Act, although in some districts, a notice requirement was already imposed under local Acts. The notice must specify the date, time and proposed route of the procession and give the name and address of the person proposing to organise it. Under s 11(7), the organisers may be guilty of an offence if the notice requirement has not been satisfied or if the march deviates from the date, time or route specified. Clearly, s 11 may have some deterrence value to organisers; such persons obviously bear a heavy responsibility in ensuring that any deviation does not occur. It can be argued that the word 'any' should not be interpreted so strictly as to exclude spontaneous processions where a few minutes were available to give notice, because to do so would defeat the intention behind including the provision. If read in combination with the requirements as to giving notice by hand or in writing, it should be interpreted to mean 'any written notice' under s 3 of the HRA. If it were not so interpreted, it might be argued that s 11 breaches the guarantees of freedom of assembly under Art 11 and of expression under Art 10, since it could lead to the criminalisation of the organisers of a peaceful spontaneous march. Such an interpretation would seem to be in accordance with the findings in *Ezelin v France*.

Sections 12 and 13 grew out of the power under s 3 of the POA 1936 allowing the chief officer of police to impose conditions on a procession or apply for a banning order if he apprehended serious public disorder. The power to impose conditions on public assemblies under s 14 was an entirely new power. The power to impose conditions on processions under s 12 is much wider than the old power, as it may be exercised in a much wider range of situations. It is identical to the power under s 14 and can be exercised in one of four situations: the senior police officer in question must reasonably believe that serious public disorder, serious damage to property or serious disruption to the life of the community may be caused by the procession. The fourth 'trigger' condition, arising under ss 12 and 14(1)(b), consists of an evaluation of the purpose of the assembly rather than an apprehension that a

particular state of affairs may arise. The senior police officer must reasonably believe that the purpose of the assembly is 'the intimidation of others with a view to compelling them not to do an act they have a right to do or to do an act they have a right not to do'.

'Serious disruption to the life of the community' is a very wide phrase and clearly offers the police wide scope for interpretation. It may be interpreted broadly where police officers wish to cut down the cost of the policing requirement for an assembly because the conditions then imposed, such as requiring a limit on the numbers participating, might lead to a reduction in the number of officers who had to be present. The fourth 'trigger' requires a police officer to make a political judgment as to the purpose of the group in question. It must be determined whether the purpose is coercive or merely persuasive. Asking police officers to make such a judgment clearly lays them open to claims of partiality in instances where they are perceived as being out of sympathy with the aims of the group in question.

The conditions that can be imposed if one of the above 'triggers' is thought to be present are very wide in the case of processions: *prima facie*, any condition may be imposed which appears necessary to the senior police officer in order to prevent the mischief envisaged occurring. Obviously, they are not completely unlimited; if the condition imposed bears no relationship to the mischief it was intended to avert, it may be open to challenge. The conditions which may be imposed under s 14 are much more limited in scope, presumably because it was thought that marches presented more of a threat to public order than meetings. The scope for challenging the conditions was very limited in the pre-HRA era: there was no method of appealing from them; it was only possible to have them reviewed for procedural errors or unreasonableness in the High Court. It was made clear in *Secretary of State for the Home Department ex p Northumbria Police Authority* (1987) that such a challenge would succeed only where a senior officer had evinced a belief in the existence of a 'trigger' which no reasonable officer could entertain: no presumption in favour of freedom of assembly would be imported. In the post-HRA era, a challenge could be mounted under s 7(1)(a) of the HRA, relying on Arts 10 and 11. The very fact that such an avenue of challenge is now available, and that the police as a public authority under s 6 of the HRA should take Arts 10 and 11 into account in imposing the conditions, provides an implied limitation on them, possibly obviating the necessity of re-interpretation of the condition-imposing powers of ss 12(1) and 14(1) under s 3.

Under s 13, a ban must be imposed on a march if it is thought that it may result in serious public disorder. This reproduces the old power under s 3 of the Public Order Act 1936. Assuming that a power was needed to ban

marches expected to be violent, this power was nevertheless open to criticism, in that once a banning order had been imposed, it prevented all marches in the area it covered for its duration. Thus, a projected march likely to be of an entirely peaceful character would be caught by a ban aimed at a violent march. The Campaign for Nuclear Disarmament attempted to challenge such a ban after it had had to cancel a number of its marches (*Kent v Metropolitan Police Commissioner* (1981)), but failed due to the finding that an order quashing the ban could be made only if there were no reasons for imposing it at all. It is arguable that the 1986 Act should have limited the banning power to the particular marches giving rise to fear of serious public disorder, but this possibility was rejected by the government at the time on the ground that it could be subverted by organisers of marches who might attempt to march under another name. It would therefore, it was thought, have placed too great a burden on the police who would have had to determine whether or not this had occurred. However, in making this decision, it is arguable that too great a weight was given to the possible administrative burden placed on the police and too little to the need to uphold freedom of assembly.

Originally, the 1986 Act contained no power to ban assemblies, possibly because it was thought that such a power would be too draconian, but provision to allow for such bans was inserted into it by s 70 of the CJPOA 1994. The banning power, arising under s 14A, provides that a chief officer of police may apply for a banning order if he reasonably believes that an assembly is likely to be trespassory and may result in serious disruption to the life of the community or damage to certain types of buildings and structures. If an order is made, it will subsist for four days and operate within a radius of five miles around the area in question. Apart from these restrictions, this is a much wider power than that arising under s 13, since it is based on the very broad and uncertain concept of 'serious disruption to the life of the community'. Since it uses the same trigger as that operating under ss 12 and 14, it appears to leave a complete discretion to the police as to whether to ban or to impose conditions. Section 14A is backed up by s 14C (inserted into the 1986 Act by s 71 of the 1994 Act). Section 14C provides a very broad power to stop persons within a radius of five miles from the assembly if a police officer reasonably believes that they were on their way to it, and that is subject to a s 14A order. Thus, this power operates before any offence has been committed and hands the police a very wide discretion.

The meaning and ambit of s 14A were considered in *Jones and Lloyd v* DPP (1997), which concerned an assembly on the road leading to Stonehenge, at a time when a s 14A order was in force. The key finding of the House of Lords was that since *the particular assembly in question* had been found by the tribunal in fact to be a reasonable user of the highway, it was

therefore not trespassory and so not caught by the s 14A order. The Lords' conclusion was that the demands of this 'right' to assemble are satisfied, provided merely that an assembly on the highway is not invariably tortious. This interpretation did little, it is suggested, to ensure that s 14A is compatible with Arts 10 and 11, since it allows interferences with peaceful assemblies.

In general, it is argued that ss 12–14A appear to be out of accord with the demands of Arts 10 and 11 of the Convention. Sections 12 and 14 allow for the imposition of conditions on the basis of serious disruption of the life of the community—an aim not recognised in Arts 10 and 11. Sections 13 and 14A allow for the possibility of imposing blanket bans. Under all of those provisions, it is possible that those organising or taking part in protests and demonstrations can be subject to criminal penalties and hence to an interference with their Arts 10 and 11 rights, even though they themselves were behaving wholly peacefully. (For example, a march might be peaceful and yet arguably disruptive of the 'life' of the community under s 12; it might fall foul of a s 13 ban imposed due to the concerns generated by the projected march of a violent group.) Thus, the effects of ss 12–14A appear to be contrary to the statement of principle set out in *Ezelin,* above, since the arrest and conviction of demonstrators under them cannot be seen to be directly serving one of the legitimate aims of preventing public disorder or ensuring public safety under para 2 of Arts 10 and 11. It is therefore arguable that the use of bans or conditions always constitutes breaches of Arts 10 and 11 when they catch entirely peaceful protesters, since the 'legitimate aim' test is unsatisfied. Even if this is not accepted, on the basis that ss 12–14A have a more general aim in preventing disorder, it might be argued that the arrest of peaceful protesters is disproportionate to this legitimate aim.

On the other hand, there is a consistent line of case law from the European Commission on Human Rights which indicates that bans—and therefore *a fortiori* the imposition of conditions—on assemblies and marches are in principle compatible with Art 11, even where they criminalise wholly peaceful protests (*Pendragon v UK* (1998); *Chappell v UK* (1988)) or prevent what would have been peaceful demonstrations from taking place at all (*Christians Against Racism and Fascism v UK* (1980)).[1] A court which preferred the *Ezelin* stance and formed the view that blanket bans *per se* were essentially incompatible with the Convention could enforce this view through a radical re-interpretation of s 14A under s 3(1) of the HRA. It would entail reading into s 14A(5) the requirement that a given assembly, as well as being trespassory and within the geographical and temporal scope of a subsisting s 14A order, must also itself pose a threat of disorder, or otherwise satisfy one of the exceptions to Art 11. Since such an

interpretation would mean that s 14A effectively ceased to bestow a power to impose blanket bans and is only doubtfully necessary under the Convention, it is, however, unlikely to be adopted.[2]

Under s 14A, attention will therefore probably focus upon scrutiny of the risk of Serious disruption to the life of the community' in granting the original ban. This method could also be used to bring ss 12 and 14 into line with the Convention. Courts could be required to determine that the nature of the risk anticipated is one which would constitute one of the legitimate aims for limiting the primary rights under Arts 11 and 10. This vague and ambiguous phrase could be re-interpreted under s 3 of the HRA by reference to Arts 11(2) and 10(2) of the Convention. Given the terms of these criteria, the grounds for the ban/imposition of conditions would have to be justified either on the basis of protecting 'the rights of others' or because the 'serious disruption' feared amounted to 'disorder' for the purposes of Arts 11(2) and 10(2). If those aims were established, the ban/conditions would also have to be necessary and proportionate to them, on the basis that disruption that could be curbed without imposing a ban/conditions could not be viewed as 'serious'. Thus, s 3 would be used to limit and structure the tests allowing for the use of these curbs on protests.

Section 13 could be re-interpreted under s 3 in order to achieve compatibility with Arts 10 and 11 in various ways. For example, it could be argued that a power to seek an order to ban all marches could be interpreted as a power to ban all espousing a particular message, using s 3 of the HRA creatively, as the House of Lords did in *A* (2001). Alternatively, the words 'or any class of public procession' used in s 13(1) could be utilised to afford leeway to include potentially disruptive marches (using 'disruptiveness' as the method of defining their membership of the class), and therefore to exclude marches expected to be entirely peaceful.

It is concluded that the far-reaching nature of the public order scheme under discussion argues strongly for establishing further protection for freedom of assembly under the HRA 1998, by re-interpretation of a number of the provisions under s 3. To say this is not to argue that the scheme is completely out of harmony with Arts 10 and 11. The scheme is to an extent pursuing legitimate aims—the prevention of disorder and crime—under those Articles, but insofar as certain of its provisions allow for interference with peaceful assemblies, it appears, as indicated, that in certain respects it goes further than is necessary in a democratic society. However, ironically, the very fact that the scheme employs imprecise phrases such as 'serious', possibly in an attempt to afford maximum discretion to the police, works against it in favour of freedom of protest, since it renders the task of re-interpretation under s 3 of the HRA relatively straightforward.

Notes

1 The alternative argument could be pursued here: it would therefore be open to a court to follow the Commission case law on the basis that it is more directly applicable to ss 12–14A, since it deals directly with prior restraints, unlike *Steel* and *Ezelin*. On such an approach, the imposition of conditions under ss 12 or 14 or of bans under s 13 would be substantively unaffected by the HRA, since the police assessment of the need to impose the condition or seek the ban would be deferred to. In relation to s 14A, this approach would probably require the court to satisfy itself that there was some risk of disorder or property damage to justify the making of the original s 14A order.

2 There would be strong grounds to justify a departure from *DPP v Jones,* on the basis that it affords too precarious a level of protection to a fundamental right in allowing peaceful, non-obstructive protests to be interfered with merely because a magistrates' court has found the assembly to be 'unreasonable'. The question would then be how far a court wished to go in establishing a new approach to s 14A. The civil trespass finding could be modified: a court could find that if an assembly is peaceful and non-obstructive, it must always be termed reasonable and therefore non-trespassory, and so outside the terms of any s 14A order in force.

Question 49

Clare is a member of the City Youth Club. She and 40 other teenagers attend the youth club on Friday evenving and are told that it has to close down that night due to sudden drasticcuts in funding imposed by the council. All the teenagers immediately walk out of the club in protest and assemble on the pavement outside. While they are angrily discussing the closure of the club, Edwin and Fred, two police officers in uniform, approch the group.

Clare begins to address the group, telling them that they must remain peaceful in order to air their grievances more effectively. Edwin tells her that she must disperse part of thr group if she wants to hold a metting. She ask some of the teenagers to leave, but takes no action when they make no attempt to do so. The meeting continues and becomes more heated. Clare then suggets that they should march through the town.

The group sets off, Clare leading. Traffic is held up for 10 minutes as the group enters the town. Edwin asks Clare to disperse half the group of marchers. Clare asks two of the teenagers to leave, but takes no further action when they fail to comply with her request. Edwin then says that she will have to give him the names and addresses of the members of the

group. She refuses, and Edwin then informs Clare that he is arresting her for failing to comply with his orders.

Consider the criminal liability (if any) incurred by Clare.

Answer plan

This is a fairly typical problem question dealing with issues which arise mainly but not entirely under the Public Order Act (POA) 1986 in respect of marches and assemblies. It also requires an awareness of the provisions of Arts 10 and 11 as interpreted at Strasbourg, and of their potential impact on UK law under the Human Rights Act (HRA) 1998. If any of the statutory provisions considered leave open any room at all for a different interpretation (not only on the grounds of ambiguity), they should be interpreted in harmony with Arts 10 and 11 of the European Convention on Human Rights (the Convention).

It is very important to note that the answer is confined to the question of possible criminal liability incurred by Clare. Possible tortious liability incurred by Clare or the police officers is therefore irrelevant, as is the possibility that Clare could seek to challenge the police decisions by way of judicial review. The demands of Arts 10 and 11 as received into UK law under the HRA 1998 will be relevant at a number of points.

The essential matters to be discussed are:

- introduction—a mention of the need to consider the HRA 1998 and the demands of Arts 10 and 11 of the Convention;
- notice requirements under s 11 of the POA 1986; s 3 of the HRA;
- 'triggers' under ss 12 and 14 of the POA 1986; s 3 of the HRA;
- conditions which can be imposed under ss 12 and 14 of the POA 1986 on processions and assemblies;
- liability which may arise under ss 12 and 14;
- public nuisance; s 6 of the HRA;
- obstruction of the highway under s 137 of the Highways Act 1980; s 3 of the HRA;
- conclusions—dependent on interpretation of statutory provisions based on the demands of Arts 10 and 11 as received into UK law under the HRA 1998.

Answer

Liability in this case arises mainly, but not exclusively, under the Public Order Act (POA) 1986. Since the question demands consideration of possible restrictions on protest and assembly, the requirements of Arts 10 and 11 as received into UK law under the HRA must be taken into account.

Under s 11 of the POA 1986, advance notice of a procession must be given if it falls within one of three categories. This march falls within s 11(1)(a), as it is intended to demonstrate opposition to the action of the local authority in closing the youth club. As no notice of the march was given, Clare may have committed an offence under s 11(7)(a) of the POA 1986 as she is the organiser of the march. However, the notice requirement does not apply under s 11(1) if it was not reasonably practicable to give any advance notice. This provision was intended to exempt spontaneous demonstrations such as this one from the notice requirements, but is defective due to the use of the word 'any'. This word would suggest that a phone call made five minutes before the march sets off would fulfil the requirements, thereby exempting very few marches. Although the march sets off suddenly, it is possible that Clare had time to make such a phone call; on a strict interpretation of s 11, she is therefore in breach of the notice requirements, as it was reasonably practicable for her to fulfil them. However, it can be argued that notice was informally and impliedly given to the police officers already on the scene, or alternatively that the term 'reasonably practicable' should be interpreted, under s 3 of the HRA, so as to exempt spontaneous processions from liability even where a few minutes were available to give notice, because to fail to do so would be out of harmony with Art 11, which protects freedom of peaceful assembly (*Ezelin v France* (1991)). Thus, on either argument, liability will not arise under s 11.

Clare may be liable under s 14(4) of the POA 1986, as she was the organiser of a public assembly, but failed to comply with the condition imposed by the most senior police officer present at the scene (Edwin) to disperse part of the group (where the officers are of equal rank, this condition will be fulfilled when one of them issues an order). It should be noted that as the group was in a public place and comprised more than 20 persons, it constituted a public assembly under s 16 of the POA 1986. Edwin can impose conditions on the assembly only if one of four 'triggers' under s 14(1) is present. The third of these, and arguably the easiest to satisfy, provides that the police officer in question must reasonably believe that 'serious disruption to the life of the community' may be caused by the assembly. In the case of *Reid* (1987), it was determined that the 'triggers' should be strictly interpreted: the words used should not be diluted. Clearly, it would be in accordance with Art 11, and indeed Art 10 (see *Steel v UK* (1998)) to adopt such an interpretation under s 3

of the HRA, since otherwise an interference with assemblies outside the legitimate aims of the second para of Arts 10 and 11 might be enabled to occur. In the instant case, a group of over 40 teenagers are gathered on the street in the evening; even if it could be argued that such a circumstance might cause some disruption in the community (in terms of noise or a blockage of the pavement), it is less clear that a reasonable person would expect the disruption to be serious. On this argument, Edwin had no power to impose conditions on the assembly; no liability therefore arises under s 14(4). The question of whether the failure to comply with the condition imposed arose due to circumstances beyond Clare's control need not, therefore, be addressed.

Will Clare incur liability under s 12(4) of the POA 1986, as she was the organiser of a public procession, but failed to comply with the conditions imposed by Edwin to provide the names and addresses of the group or to disperse part of it? Edwin can impose conditions on the procession only if one of the four 'triggers' under s 12(1) is present. The triggers are identical to those under s 14(1). The third of these may possibly arise. The group of teenagers was marching through the town; in such circumstances, it may be more readily argued that serious disruption to the life of the community may reasonably be apprehended. Such disruption could be argued for either on the basis that passers-by may be jostled by the group, especially if it has grown more excitable, or on the basis that traffic may be seriously disrupted. The fact that traffic has already been held up for 10 minutes may support a reasonable belief that such disruption may occur. Serious obstruction of the traffic might arguably amount to some disruption of the life of the community. Both possibilities taken together could found a reasonable apprehension that the life of the community will be seriously disrupted. However, courts are required under both ss 6 and 3 of the HRA to determine that the nature of the risk anticipated is one which would constitute one of the legitimate aims for limiting the primary rights under Arts 11 and 10. The vague and ambiguous phrase, 'serious disruption to the life of the community', could be re-interpreted under s 3 of the HRA by reference to Arts 11(2) and 10(2) of the Convention. The grounds for imposing the conditions would have to be justified, either on the basis of protecting 'the rights of others' or because the 'serious disruption' feared amounted to 'disorder' for the purposes of those second paragraphs. Alternatively, the discretion as to the imposition of the conditions in s 12 could be viewed narrowly (possibly on ordinary principles of statutory construction). It could be argued that the restrictions are necessary in order to protect the rights of others. However, arguably, they are disproportionate to that aim, bearing in mind the importance of freedom of assembly (*Ezelin*). In particular, a requirement to provide names and addresses appears disproportionate to the

aim in view, since it is unclear that it could serve that aim. In order to avoid breaching Arts 10 and 11, a court which took this view could adopt a strict interpretation of s 12, finding either that the behaviour in question is not serious enough and /or that the conditions could not be viewed as 'necessary'

On the other hand, a court could rely on *Christians Against Racism and Fascism v UK* (1980), in which a ban on a peaceful assembly was not found to breach Art 11. *A fortiori,* a mere imposition of conditions might be found to be proportionate within the terms of Art 11(2). Following this argument, Edwin would be entitled to impose conditions on the march. The conditions imposed would have to relate to the disruption apprehended; this may be said of the requirement to disperse half the group, but not of the order that Clare should disclose the names and addresses of the group. Thus, liability may arise only in respect of the failure to comply with the former condition. Clare made some attempt to comply with it but did not succeed; she would, therefore, following this argument, incur liability under s 12(4) unless she can show that the failure arose due to circumstances outside her control. Although the powers of an organiser to disperse members of a march are limited, it may be argued that in approaching only two members of the group, Clare made in any event a token effort only; it is therefore arguable that she has committed an offence under s 12(4).

Clare may further have incurred liability under s 137 of the Highways Act 1980, which provides that a person will be guilty of an offence if he 'without lawful authority or excuse in any way wilfully obstructs the free passage of the highway'. In *Nagy v Weston* (1965), it was held that a reasonable use of the highway will constitute a lawful excuse, and that in order to determine its reasonableness or otherwise, the length of the obstruction must be considered, its purpose, the place where it occurred and whether an actual or potential obstruction took place. There is no evidence to suggest that the group assembled outside the youth club caused obstruction; however, the march did cause a brief obstruction of the highway. In *Arrowsmith v Jenkins* (1963), it was held that minor obstruction of traffic can lead to liability under the Highways Act. However, the question of the purpose of the obstruction, mentioned in Nagy, was given greater prominence in *Hirst and Agu v Chief Constable of West Yorkshire* (1986): it was said that courts should have regard to the freedom to demonstrate.

This approach was to an extent confirmed by *DPP v Jones* (1999), where the House of Lords recognised that a demonstration should not be treated as an improper use of the highway unless it causes undue disruption to other users. Such an approach is, of course, given added weight by the need for the courts to give appropriate weight, by virtue of s 3 of the HRA, to the rights of freedom of expression and assembly in Arts 10 and 11 of the Convention.

One possibility would be to interpret the uncertain term 'excuse' in order to seek to ensure harmony between s 137 of the Highways Act and Arts 10 and 11 under s 3 of the HRA, since otherwise s 137 would allow interferences with peaceful, albeit obstructive, assemblies, arguably contrary to the findings of the European Court of Human Rights in *Steel* and in *Ezelin.* On this basis, the brevity of the obstruction and its purpose as part of a legitimate protest suggest that the march amounted to a reasonable use of the highway. The stronger argument seems to be that liability under the Highways Act for inciting the group to obstruct the highway will not be established.[1]

Clare may also have incited the group to commit a public nuisance by blocking the highway. However, according to *Clarke* (1964), the disruption caused must amount to an unreasonable use of the highway in order to found liability for public nuisance. Thus, once obstruction has been shown, the question of reasonableness arises. In this instance, there has been some obstruction of the highway for 10 minutes. However, as has already been pointed out, it is arguable that to cause such a minor disruption for a legitimate purpose does not constitute an unreasonable use of the highway. It is unlikely that a use of the highway could be reasonable under the Highways Act but nevertheless able to amount to a public nuisance. This seemed to be accepted in *Gillingham Borough Council v Medway Dock Co* (1992). This argument is strengthened by consideration of the duty of the court and the police officers, under s 6 of the HRA, to abide by the Convention rights which include the right to freedom of assembly. On this argument, liability for public nuisance will not arise.

Thus, in conclusion, Clare is most likely to attract liability under s 12(4) of the POA 1986, but this depends on the interpretation afforded to the term 'serious disruption' in s 12(1)(a) under s 3 of the HRA.

Note

1 It could be argued further that Clare's conduct could not be described as 'wilful', in the sense that at the point when the obstruction is caused, Edwin appears to be giving some sanction to the march and Clare may be relying on his official connivance. Such a restrictive interpretation would offer a further means, under s 3 of the HRA, of limiting the application of s 137 to protesters.

Question 50

The Asian community in Northton become increasingly concerned about apparent racism in Northton City Council employment practices. A number of council workers have recently been made redundant; a disproportionate number of them are Asians. A group of 40 Asians decides to hold a demonstration outside the Civic Centre on the lawns and courtyard in front of it. On the day appointed, they assemble, appoint Ali and Rashid as their leaders, and shout at workers going into the Centre telling them not to go in but to join the demonstration. When the workers do not respond, some of the Asians, including Ali, become angrier; they shout and wave their fists threateningly at some of the workers, but make no attempt to impede them physically. Some of the workers appear to be intimidated.

One of the Asians, Sharma, tries to persuade workers not to enter the Civic Centre and to support the anti-racism protest, but eventually becomes involved in a heated argument with a group of white workers. He continues more angrily to attempt to persuade them not to enter; they threaten to beat him up if the Asian group continues with its efforts.

Three police officers arrive on the scene. One of them, John, arrests Sharma, stating that this is for breach of the peace since the group of white workers is about to become violent. Sharma tries to leave, pushing John aside in the process; John seizes Sharma's arm. Belinda, one of the police officers, orders Ali to disperse half of the group; when he makes no effort to comply, she says that she is arresting him for failing to comply with the order. She also orders Rashid to leave the area. He fails to do so.

Discuss.

Answer plan

This question is partly concerned with liability which may arise in respect of assemblies under the Public Order Act (POA) 1986 and under ss 68 and 69 of the Criminal Justice and Public Order Act (CJPOA) 1994. The common law power to prevent a breach of the peace is significant in the question. The statutory provisions considered should be interpreted in harmony with Arts 10 and 11 of the European Convention on Human Rights (the Convention) (and any other relevant Articles) under s 3 of the Human Rights Act (HRA) 1998; the common law doctrine of breach of the peace must be interpreted and applied in accordance with the duty of the court under s 6 of the HRA. It should be borne in mind that the problem concerns an assembly only, and not a march. Further, the assembly is not taking place on the highway. Therefore,

liability particularly associated with marches and with assemblies on the highway will not arise. Note that a broad, wide ranging discussion is called for due to the use of the word 'discuss'.

Essentially, the following matters should be discussed:

- introduction—a mention of the need to consider the HRA; demands of Arts 10 and 11 as received into UK law under the HRA;
- 'triggers' under s 14 of the Act;
- conditions which may be imposed under s 14; s 3 of the HRA;
- liability under ss 3, 4, 4A and 5 of the POA 1986; s 3 of the HRA (ss 3 and 4 are covered in the Notes);
- liability under ss 68 and 69 of the CJPOA 1994; s 3 of the HRA;
- arrest for breach of the peace; s 6 of the HRA; liability under s 89(1) of the Police Act 1996;
- is there liability in tort?;
- conclusions.

Answer

Liability in this case may arise mainly, but not exclusively, under the POA 1986. Since the question demands consideration of possible restrictions on protest and assembly, the requirements of Arts 10 and 11 as received into UK law under the HRA must be taken into account. Article 14, which provides protection from discrimination in the context of another right, will also be considered briefly.

Ali may attract liability under s 14(4) of the POA 1986, as he was the organiser of a public assembly, but failed to comply with the condition imposed by the most senior police officer present at the scene (where the officers are of equal rank, this condition will be fulfilled when one of them issues an order) to disperse half of the group. It should be noted that as the group was in a public place and comprised more than 20 persons, it constituted a public assembly under s 16 of the POA 1986. Belinda can impose conditions on the assembly only if one of four 'triggers' under s 14(1) is present. Under s 14(1)(a), the police officer in question must reasonably believe that serious public disorder, serious damage to property or serious disruption to the life of the community may be caused by the assembly. The fourth 'trigger', arising under s 14(1)(b), consists of an evaluation of the purpose of the assembly rather than an apprehension that a particular state of affairs may arise. The senior police officer present must reasonably believe that the purpose of the assembly is 'the intimidation of others with a view to compelling them not to do an act they have a right to do or to do an act they have a right not to do'.

Possibly, the third 'trigger' could apply to this situation, but that point need not be considered because the fourth 'trigger' seems to be most clearly indicated: the Asians are trying to prevent persons entering the Civic Centre and are therefore trying to prevent persons doing something they have a right to do (presumably in the sense that there is a right to pass along the highway to a place of work); the question is whether their actions have gone beyond what might be acceptable as part of a legitimate demonstration and could suggest an intention to intimidate. In the case of *Reid* (1987), it was determined that the triggers should be strictly interpreted: the words used should not be diluted. In *Reid,* the defendants shouted, raised their arms and waved their fingers; it was determined that such behaviour might cause discomfort but not intimidation and that the two concepts could not be equated. In *News Group Newspapers Ltd v SOGAT 82* (1986), it was held that mere abuse and shouting did not amount to a threat of violence for the purposes of intimidation under s 7 of the Conspiracy and Protection of Property Act 1875. In the instant case, it could be argued that the Asians' behaviour in merely shouting at the Civic Centre workers could not amount to intimidation, but that in making threatening gestures with their fists, it crossed the boundary between discomfort and intimidation.

However, since the imposition of conditions, the arrest of Ali and (potentially) the imposition of criminal liability under s 14 create interferences with the rights under Arts 11 and 10 of assembly and expression (*Steel v UK* (1998)). Therefore, it must be asked whether the demands of s 14 as applied in this instance are in accordance with those rights. One possibility is that s 14(1)(b) could be re-interpreted under s 3 of the HRA by reference to Arts 10 and 11 of the Convention. The interference it represents (since it allows for the imposition of conditions) would have to be justified on the basis of protecting 'the rights of others'. It could be argued that the restriction is necessary in order to protect the rights of others, since that is precisely what s 14(1)(b) is aimed at, and that the requirements of s 14 in terms of applicability to this situation are proportionate to that aim. In *Ezelin v France* (1991), the Court considered the issue of proportionality under Art 11 and found that the freedom to take part in a peaceful assembly is of such importance that it cannot be restricted in any way, so long as the person concerned does not himself commit any reprehensible act. It may be argued that the intimidation of others is reprehensible and that therefore the tests under Art 11(2) (and Art 10(2)) are satisfied by the application of s 14 in this instance, without requiring its re-interpretation under s 3 of the HRA.

On that basis, it appears that Belinda had the power to impose a condition on the assembly, and the condition itself appears to relate quite

closely to the mischief in question—the intimidation.[1] Ali made no effort to comply with the condition imposed. The question of whether the failure to comply with it arose due to circumstances beyond his control need not, therefore, be addressed. Thus, Ali's arrest appears to be justified under s 14(7) and he may be likely to incur liability under s 14(4). Other members of the Asian group who were aware of the condition may commit the offence under s 14(5).[2]

Ali, Rashid, and possibly other members of the Asian group may also incur liability under s 68 of the CJPOA 1994. The section requires, first, that the defendant has trespassed. This seems to be satisfied, since Ali, Rashid and the other protestors appear to have exceeded the terms of an implied licence to be in the courtyard, and the courtyard is not excluded from s 68 since it is arguably 'land in the open air'—it is clearly not part of the highway (s 68(5)(a)). Secondly, it must be shown that the defendant intended to disrupt or obstruct a lawful activity or to intimidate persons so as to deter them from that activity. This last requirement may also be satisfied by the Asians' behaviour in shouting at the workers entering the Civic Centre. It may perhaps be inferred that Ali and others did intend to intimidate the workers since they made threatening gestures towards them. Rashid (and possibly other Asians aware of John's order that members of the assembly should disperse) may also commit the offence under s 69 of failing to leave land after a direction to do so is given, founded on a reasonable belief that the offence under s 68 is being committed. Belinda tells Rashid to leave the land and he refuses to do so.

However, these possibilities of liability under ss 68 and 69 must be considered in relation to the HRA. The European Court of Human Rights made a clear finding in *Steel* (1998), confirmed in *Hashman* (2000), that protest which takes the form of physical obstruction nevertheless falls within the protection of Art 10—and presumably Art 11. Thus, it is necessary to decide whether the interference with Ali's and the other protestors' Convention rights is justifiable under the second paragraphs of those Articles. If not, s 68 may require re-interpretation under s 3 so as to exclude behaviour such as that of Ali and Rashid, or possibly a declaration of incompatibility may eventually have to be made between s 68 and Arts 10 and 11 under s 4 of the HRA. In *Steel* the Court appeared to be readily convinced of the necessity and proportionality of the interferences with the two direct action protests complained of by the first two applicants. In contrast, the Court in *Ezelin* (1991) found that it was impossible to justify interferences with the freedom of peaceful assembly, unless the person exercising the freedom himself committed a 'reprehensible act'. Therefore, in order to reconcile the two decisions, it must be assumed either that *obstructive* protest, while it does fall within at least Art 10, does not

constitute that class of purely 'peaceful' protest which, according to *Ezelin*, 'cannot be restricted in any way', or that any restriction is more readily justifiable. It seems clear from the findings in *Steel* as to the first and second applicants, and from the Commission decision in *G v federal Republic of Germany* (1980), that where a protestor is engaged in obstructive, albeit non-violent activity, arrest and imprisonment are in principle justifiable under the Convention. It is arguable therefore that s 68 is Convention compliant under s 3, and that the imposition of liability in this instance is compatible with the duty of the court under s 6 of the HRA. On this basis, liability under s 69 would also be established since it is dependent on establishing a reasonable belief that the offence under s 68 has been committed; this appears to be the case, bearing in mind that it has not been found necessary to re-interpret s 68 by reference to s 3 of the HRA.

It could also be argued that in shouting and waving their fists at the Civic Centre workers, Ali and the other demonstrators may incur liability under s 5 of the POA 1986. Their behaviour must amount to 'threatening, abusive or insulting words or behaviour or disorderly behaviour' which takes place 'in the hearing or sight of a person likely to be caused harassment, alarm or distress thereby'. These three terms must be given their ordinary meaning following *Brutus v Cozens* (1973). The word 'likely' imports an objective test into the section: it is necessary to show that a person was present at the scene, but not that he actually experienced the feelings in question. The demonstrators shout and gesture aggressively; this behaviour may clearly be termed disorderly or even threatening, and it is arguable, given the width of the concept of harassment, that it would be likely to cause feelings of harassment, although probably not of alarm, to the workers. It appears then that the demonstrators may incur liability under s 5 subject to the argument below as to the *mens rea* requirement under s 6(4). On the same argument, liability under s 4A of the POA 1986 may be established, assuming that they *intended* to cause harassment and did cause it.

However, it is necessary to consider whether ss 4A and 5, interpreted as covering the behaviour in question, are compatible with Arts 10 and 11 under s 3 of the HRA (see *Percy v DPP* (2002)). Compatibility may be achieved by affording a broad interpretation to the defence of reasonableness in both sections (ss 5(3)(c) and 4A(3)(b)). It was determined in *DPP v Clarke* (1992) that the defence is to be judged objectively, and it will therefore depend on what a bench of magistrates considers reasonable. In that case, the behaviour of the protestors outside an abortion clinic was not found to be reasonable. The use of pictures and models of aborted foetuses appeared to contribute to this conclusion. This decision does not give much guidance to protestors seeking to determine beforehand the limits or meaning of 'reasonable' protest. As a deliberately ambiguous term, it obviously leaves enormous

discretion to the judiciary to adopt approaches to its interpretation under s 3 of the HRA in accordance with Arts 10 and 11 as interpreted in *Steel*. Offensive words used by protestors could be found to fall within this defence, on the basis that in the context of a particular demonstration which had a legitimate political aim, such behaviour was acceptable and therefore reasonable (*Percy v DPP* (2001)). However, in the context under discussion, the demonstrators appear to have intended to intimidate others, rather than to make points which others could find offensive. It is arguable that the instant behaviour would fall outside the meaning of 'reasonable', even bearing the requirements of Arts 10 and 11 in mind.

Under s 6(4), it must be established in respect of s 5 that the defendant intended his words, etc, to be threatening, abusive or insulting or was aware that they might be. Under s 4A, intent to cause harassment alone is needed. In *DPP v Clarke* (1992), it was found that to establish liability under s 5, it is insufficient to show only that the defendant intended to or was aware that he might cause harassment, alarm or distress; it must also be shown that he intended his conduct to be threatening, abusive or insulting or was aware that it might be. Both mental states have to be established independently. Thus, showing that the defendant was aware that he might cause distress was not found to be equivalent to showing that he was aware that his speech or behaviour might be insulting. Applying this subjective test, the magistrates acquitted the defendants and this decision was upheld on appeal. Using this test, it was found that anti-abortion protestors had not realised that their behaviour in shouting anti-abortion slogans, displaying plastic models of foetuses and pictures of dead foetuses would be threatening, abusive or insulting. This decision allows those who believe fervently in their cause, and therefore fail to appreciate that their protest may insult or offend others, to escape liability. It therefore places a significant curb on the ability of s 5 (and to an extent, impliedly of s 4A) to interfere with Art 10 and Art 11 rights. Persons participating in forceful demonstrations may sometimes be able to show that behaviour which could be termed disorderly and which might be capable of causing harassment to others was intended only to make a point, and that they had not realised that others might find it threatening, abusive or insulting. This does not appear to be the case here, since the threats appear to be used not in order to make a point forcefully, but to intimidate.

Sharma may have committed a breach of the peace or his behaviour might have given rise to a reasonable belief that a breach of the peace was threatened; breach of the peace is not in itself a criminal offence, but it would justify the arrest of Sharma by John. If the arrest was lawful, Sharma's action in pushing John away would be an assault on an officer in the execution of his duty, an offence under s 89(1) of the Police Act 1996. In *Howell* (1981), the court said that

a breach of the peace will arise if a positive act is done or is threatened to be done which: harms a person or, in his presence, his property, or is likely to cause such harm, or which puts a person in fear of such harm. In *Nicol v DPP* (1996), it was found that a natural consequence of lawful conduct could be violence in another only where the defendant rather than the other person could be said to be acting unreasonably and, further, that unless rights had been infringed, it would not be reasonable for those others to react violently. However, in *Redmond-Bate v DPP* (1999), it was found that, taking Art 10 into account, the court should ask where the threat was coming from; the person causing the threat should be arrested. In the instant case, following *Nicol,* a court might take the view that Sharma was acting unreasonably in attempting to dissuade the workers from entering their place of work, and that the workers' rights were infringed. On the other hand, the threat would appear to be coming from the white workers. Therefore, it may be argued that the police breached their duty under s 6 of the HRA in arresting Sharma, since they did not comply with Art 10 (and arguably Art 14—the right to non-discrimination which arises in the context of another right). Further, the court's findings in *Steel v UK* (1998) may be taken to suggest that the power to prevent a breach of the peace may infringe Arts 5, 10 and 11 when used against an entirely peaceful protestor. In the instant case, Sharma may have remained peaceful, albeit 'heated' and angry. On this interpretation, therefore, which would accord with the court's duty to shape the common law in accordance with the Convention under s 6 of the HRA, Sharma should not have been arrested; therefore, he has not committed the offence under s 89(1) of the Police Act 1996. He could sue John in tort for assault if the arrest is found to be unlawful. Following this argument, it is therefore possible that if the protestors who used intimidatory tactics had been arrested for breach of the peace, their arrests would not have breached Art 10.

In conclusion, therefore, it appears that Ali may incur liability under ss 5, 4A and 14 of the POA 1986 and under s 68 of the CJPOA 1994. Sharma appears not to have committed a breach of the peace and not to have incurred liability under s 89(1) of the Police Act 1996; he may have a tort action for assault against John. Rashid will be likely to incur liability under ss 4A and 5 of the POA 1986 and under s 69 of the CJPOA 1994.[3] Other members of the Asian group, including Rashid and Sharma, may have committed an offence under s 14(5) of the POA 1986 and possibly under s 68 of the CJPOA 1994.

Notes

1 In finding that the imposition of the condition in question did not itself breach Art 11, a court could rely on *Christians Against Racism and Fascism v UK* (1980), in

which a ban on a peaceful assembly was not found to breach Art 11. *A fortiori*, a mere imposition of conditions might be found to be proportionate within the terms of Art 11(2). As indicated, the conditions imposed must relate to the mischief apprehended or occurring, following both s 14(1)(b) (the condition must appear 'necessary' to prevent the intimidation) and the test of proportionality in Art 11(2); both are arguably satisfied by the requirement to disperse half the group.

2 Following the above argument in relation to s 14, Rashid and Sharma may be liable under s 14(5) of the 1986 Act for taking part in a public assembly and knowingly failing to comply with the condition imposed. However, this point cannot be settled as it is unclear from the facts whether or not they were aware of the condition imposed or, following *Vane v Yiannopoullos* (1965), were wilfully blind as to its existence.

3 It might be worth considering the argument that a number of the Asians, including, of course, Ali and Rashid, also incur liability in respect of the offence of affray under s 3 of the POA 1986. In order to establish an affray, it must first be shown that the defendant used or threatened unlawful violence towards another, and secondly, that his conduct was such as would cause a person of reasonable firmness present at the scene to fear for his personal safety. As the Asians use threatening gestures, it may be argued that the first limb of s 3(1) is fulfilled, but a strong argument can be advanced that the second is not; due to the fact that the gestures are part of a demonstration, it is probable that a person of reasonable firmness would not fear unlawful violence, even though such a person might feel somewhat distressed. In *Taylor v DPP* (1973), Lord Hailsham, speaking of the common law offence, said 'the degree of violence…must be such as to be calculated to terrify a person of reasonably firm character'. The Act of course refers to 'fear' as opposed to terror, but this ruling suggests that 'fear' should be interpreted restrictively. On this argument, no liability will arise in respect of s 3. Section 4 of the POA 1986 could also be considered, but for similar reasons liability is unlikely to be established, especially taking into account the need for a restrictive interpretation in this context (of a public protest) under s 3 of the HRA.

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