JUSTICE Tom Sargant memorial annual lecture 2008

# Law Lords at the Margin

## Who defines Convention rights?

**Baroness Hale of Richmond**

**Wednesday 15 October 2008**

Dechert LLP, London

JUSTICE

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## Who Defines Convention Rights?

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I have a confession to make. You may remember the title of Conor Gearty's Justice lecture last year, 'Are the Law Lords out of their Depth?'[1] I was the Law Lord whose emailed response to the invitation was headed 'Not waving but drowning'. His argument then was that if the Law Lords got out of their depth they should on no account swim – even if they could. They should stick to the shallow end, by which he meant 'those bits close to their own function' – criminal justice, fair proceedings, civil liberties and the like. They should avoid 'the deep water on the far side, the social, taxation, foreign and other policy stuff that judges did not come across in the course of their day to day work and on which therefore they should not be claiming any special expertise'. There are many civil and family judges who would find that a curious statement. But he went further. We should all stick to 'the shallow end of a rule of law that defers to the wisdom of the crowd – even when convinced of its stupidity'. So it seems that he was counselling two types of caution: first, caution as to the subject matter of cases in which to intervene in the decisions of the democratically elected, whether government or Parliament; and secondly, caution even then as to whether and how to intervene.

So when Roger Smith asked me to give this year's lecture, he invited me to 'carry forward discussion on the role of the judiciary'. Specifically, in his view, 'if we are to have a debate about a bill of rights, it seems to me important that we have a constitutional understanding, articulated in words that schoolchildren can understand, which deters the judicial presumption inherent in *Roe v Wade*[2] while maintaining the ferocity of the test of proportionality in *Belmarsh.*[3]' On top of that challenging agenda, he wanted me to link this to thinking about how the creation of the Supreme Court might affect constitutional developments.

The simplest way of achieving what he seeks would be to retain the services of Lord Bingham as senior Law Lord and President of the new Supreme Court but sadly that cannot be. Nor indeed does the reality of judicial life lend itself to these simple dichotomies, still less to words that schoolchildren can understand. A case comes before us and we have to decide it mainly on the arguments presented to us. Sometimes counsel may come close to saying 'you're in the deep end here, go back', or 'beware judicial presumption', but the arguments are rarely constructed in those terms. They concentrate on the application of the law in question to the facts in question. And because they are common lawyers they tend to treat the Strasbourg jurisprudence in the same way that they would treat the English case law.

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1 (2007) 4(2) Justice Journal 8 – 18.

2 410 US 113 (1973).

3 *A and others v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68.

Take the example of *Roe v Wade* itself. At issue was the Texas law banning abortion unless the woman's life was in danger. The majority in the US Supreme Court constructed a right to privacy from the 14th Amendment's requirement that no-one be deprived of their liberty without due process of law. They balanced that right against the legitimate state interests in protecting the health of the mother and the life of the unborn child. They developed a balance between autonomy and regulation corresponding roughly to the three trimesters.[4] Liberty in the US Constitution is undoubtedly more widely construed than the physical liberty protected by article 5 of the European Convention. The issue between the majority and the minority was the standard against which to judge laws which interfered with liberty. The dissenters thought that no more than a rational connection between the legislation and a legitimate aim was required.

Here we would not be dealing with the 14th amendment but with articles 2 and 8 of the European Convention. The European Court of Human Rights in Strasbourg has so far refused to decide whether an unborn child is protected by the right to life in article 2. It has not ruled out the possibility but has emphasised that the rights of the unborn child would be limited by the mother's rights and interests.[5] Equally it has been very careful not to rule on whether there is a right to an abortion. The furthest it would go in *Tyriac v Poland*,[6] was to say that where abortion was allowed, its regulation fell within the scope of article 8. There was a positive obligation to have an effective means of resolving disputes about whether the mother's health would be endangered by continuing the pregnancy. Former President Wildhaber has told me that this cautious approach was felt necessary to preserve the very existence of the Court, given the strength of opposition to abortion in some of the member states.

But it is not inconceivable that we might one day be asked to rule on whether some aspect of our law and practice of abortion constituted an unjustified interference with the mother's right to respect for her private life. It would not be judicial presumption for us to try and answer the question. We would have no choice. The question then becomes 'what is the proper role of the judges in interpreting or defining the scope and content of the Convention rights - as well as in applying them to a given set of facts?' To what extent can and should we go further than Strasbourg has gone?

This is a surprisingly controversial question. The starting point is the famous statement of Lord Bingham in *R (on the application of Ullah) v Special Adjudicator*:[7]

> 'It is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more but certainly no less.'

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4 In simple terms, no regulation was permissible in the first trimester; in the second trimester regulation designed to protect maternal health was allowed; and in the third, regulation and even prohibition were allowed to protect the life of a viable foetus, unless abortion was necessary to preserve the life or health of the mother.

5 *VO v France* [2004] 2 FCR 577.

6 [2007] BHRC 155.

7 [2004] UKHL 26, [2004] 2 AC 323, # 20.

To this might be added the words of Lord Brown in *R (on the application of Al-Skeini) v Ministry of Defence*,[8] 'no less but certainly no more'. I have associated myself with both, not only at the time but also in other cases.[9] Sir Stephen Sedley has commented that 'the logic of this is entirely intelligible; it avoids judicial legislation and prevents member states from getting out of step with one another'. Although he points out that 'it carries the risk that, in trying to stay level, we shall fall behind'.[10]

Other commentators, Jonathan Lewis among them,[11] have pointed to more fundamental objections to the *Ullah* doctrine. The first is that the Human Rights Act does not in fact incorporate the Convention into our national law. It deliberately creates new rights and remedies in national law, specifically the right to have public authorities act compatibly with the Convention rights. Those rights are defined in the same words as the rights in the Convention but they are rights protected by national law. This is why it was held in *Re McKerr*[12] that the protection for the right to life provided by the Act did not apply to deaths taking place before the Act came into force.

Secondly, the Act itself only requires the courts to 'have regard' to the Strasbourg jurisprudence,[13] not to follow it. Clearly, it contemplates that we shall keep pace with the Strasbourg jurisprudence, because the object is to avoid a situation where the UK is in breach of its obligations under the Convention and individuals have to go to Strasbourg to have it put right. That would in any event be consistent with the general principle that legislation is to be construed consistently with our obligations in international law. That is why we are most unlikely to disregard a clear and constant line of Strasbourg authority which indicates that the claimant should win. There may be a few exceptions; for example where someone has succeeded in Strasbourg which we find difficult to understand[14] or where the case can be

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8 [2007] UKHL 26, [2008] 1 AC 153, #106.

9 See *DS v HM Advocate* [2007] UKPC 36, [2007] HRLR 28, #92: 'This means that we can only rely on the Convention rights as interpreted in Strasbourg as a basis for invalidating the act of a democratic legislature, for it is only incompatibility with those rights which gives us a ground for doing so.' Also *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15, [2008] 2 WLR 781, #53, where I declared that 'I do not believe that, when Parliament gave us these novel and important powers [to hold legislation incompatible with the convention rights] it was giving us the power to leap ahead of Strasbourg in our interpretation of the convention rights.'

10 'Bringing rights home: time to start a family?' (2008) 28 (3) Legal Studies 327, 332.

11 'The European ceiling on human rights' [2007] Public Law 720 – 747; I have also found T Rainsbury, 'Their Lordships' Timorous Souls' [2009] UCL Human Rights Review, forthcoming, very illuminating.

12 [2004] UKHL 12, [2004] 1 WLR 807.

13 Section 2.

14 Eg in *R v G* [2008] UKHL 37, [2008] 1 WLR 1379, #6, Lord Hoffmann said of *Salabiaku v France* (1988) 12 EHRR 379, 'I think that judges and academic writers have picked over the carcass of this unfortunate case so many times to find some intelligible meat on its bones that the time has come to call a halt. The Strasbourg court, uninhibited by a doctrine of precedent or the need to find a ratio decidendi seems to have ignored it. . . . I would recommend your lordships to do likewise'.

distinguished on its particular facts.[15] But there is nothing in the Act itself which prevents us from going further than Strasbourg has gone or can confidently be predicted to go in the future. Nor is there anything in the Act to support the reluctance shown in *Sheldrake v DPP*[16] to seek such guidance as we can from the jurisprudence of foreign courts with comparable human rights instruments (Canada is the best example), especially on subjects where Strasbourg has not recently spoken.

Thirdly, there are some indications in the Parliamentary history that Parliament itself expected us to develop the law ahead of Strasbourg. The White Paper, *Rights brought home: the Human Rights Bill*, explained:[17]

> 'The Convention is often described as a "living instrument" because it is interpreted by the European Court in the light of present day conditions and therefore reflects changing social attitudes and the changes in the circumstances of society. In future our judges will be able to contribute to this dynamic and evolving interpretation of the Convention.'

There were also clear statements by the Home Secretary in the House of Commons[18] and the Lord Chancellor in the House of Lords[19] that the courts must be free to develop human rights jurisprudence and move out in new directions. The Home Secretary also said this about the margin of appreciation which Strasbourg allows to member states in certain areas:[20]

> 'Through incorporation we are giving a profound margin of appreciation to British courts to interpret the Convention in accordance with British jurisprudence as well as European jurisprudence. One of the frustrations of non-incorporation has been that our own judges . . . have not been able to bring their intellectual skills and our great tradition of common law to bear n the development of European Convention jurisprudence.'

Lord Bingham himself, then Lord Chief Justice, told the House that 'British judges have a significant contribution to make in the development of the law of human rights. It is a contribution which so far we have not been permitted to make.'[21] He quoted Milton's *Areopagitica*: 'Let not England forget her precedence of teaching nations how to live'. But in practice the main contribution our judgments make in Strasbourg is to explain why we have *not* found a violation of the Convention in a particular case. Strasbourg may of course disagree with us, but at least it will have had the benefit of a full human rights analysis from us first.

A fourth objection to the *Ullah* principle is that the stated reason for it – that the interpretation of the ECHR should be uniform throughout the member states – does

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15 Eg VgT Verein gegen Tierfabriken v Switzerland (2001) 34 EHRR 159 in R (Animal Defenders International) v Secretary of State for Culture, Media and Sport [2008] UKHL 15, [2008] 2 WLR 781.

16 [2004] UKHL 43, [2005] 1 AC 264, #33.

17 Rights brought home: the Human Rights Bill, 1997, Cm 3782, para 2.5.

18 Hansard (HC Debates), 16 February 1998, vol 306, col 768.

19 Hansard (HL Debates), 18 November 1997, vol 583, cols 514-515.

20 Hansard (HC Debates), 3 June 1998, col 424.

21 Hansard (HL Debates), 3 November 1997, col 1245.

not make much sense. In *Brown v Stott*,[22] Lord Bingham had counselled against implying new rights into the Convention:

> 'Thus particular regard must be had and reliance placed on the express terms of the Convention, which define the rights and freedoms which the contracting parties have undertaken to secure. That does not mean that nothing can be implied into the Convention. . . . But the process of implication is one to be carried out with caution, if the risk is to be averted that the contracting parties may, by judicial interpretation, become bound by obligations which they did not expressly accept and might not have been willing to accept.'

Of course, Lord Bingham cannot have meant that an expansive interpretation in the UK would bind the courts of other member states, for it could not do so. He can only have meant one of two things. That Strasbourg will be cautious in its interpretations for fear of committing member states, which are bound by its decisions, to obligations which they did not want. Or that UK courts should be cautious for fear of committing the UK to obligations which it did not want. This finds an echo in Lord Brown's point in *Al-Skeini*,[23] that an aggrieved claimant can always go to Strasbourg but an aggrieved government can not. But there is no particular reason why either Strasbourg or other member states should object if we go forging ahead in interpreting the scope of the Convention rights in UK law.

So we have the *Ullah* principle and we have all these objections to it and no doubt there are many more. The issue has recently come up in an obscure little family law case from Northern Ireland, *Re P and others.*[24] The claimants were an unmarried opposite sex couple who wished jointly to adopt the woman's 10 year old daughter. English law has permitted joint adoptions by unmarried couples, whether of the same or opposite sexes, since the Adoption and Children Act 2002 came into force in 2005. Scotland will permit it once the Adoption and Children (Scotland) Act 2007 comes into force. But Northern Ireland retains the old law, in the shape of article 14 of the Adoption (Northern Ireland) Order 1987, which restricts joint adoptions to married couples (and even failed to include civil partners when the Civil Partnership Act 2004 was passed). Single people, whether or not they are in a stable opposite or same sex relationship, can adopt alone but the child will not become their partner's child or a member of their partner's family. While Northern Ireland was still under direct rule from London, civil servants produced an impressive review which concluded that the law should be brought into line with the rest of the UK. Consultation had produced some strong opposition, mainly from the Protestant churches, and particularly to adoption by same sex couples. But the review found good reasons to reject all of their arguments. Then devolution happened and the relevant Minister in the Northern Ireland government had not yet made a decision about what to do. It does not take much imagination to realise how difficult it must be for any elected politician in Northern Ireland to take such a step.

The couple, with the support of the Official Solicitor acting on behalf of the child, argued that to prevent them from adopting was to discriminate against them in the enjoyment of the right to respect for their private and family lives on the ground of

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22 [2003] 1 AC 681.
23 [2007] UKHL 26, [2008] 1 AC 153, #106.
24 [2008] UKHL 38, [2008] 3 WLR 76.

their lack of marital status. The Crown accepted that the right (more correctly a claim) to adopt a child fell within the ambit of article 8 but initially argued that, while marriage was a status covered by article 14, lack of marriage was not. We had little difficulty in disposing of that point, although old-fashioned family lawyers would understand it. Marriage is a status in the technical sense that it affects the legal position of people other than the parties to it. But the concept of status in article 14 is much wider than that. The real battleground was over whether the difference in treatment could be justified.

I found this much more difficult than at least three of my colleagues, no doubt because I had been party to the 1992 Review of Adoption Law on which the 2002 Act was based.[25] This recommended the retention of the marriage rule. It survived all later consultations[26] and into the Bill which was introduced into Parliament. The change was the result of back bench pressure as the Bill went through the Commons and was hotly contested in the Lords. The arguments in favour of the new rule are simple. The best interests of the child are to be the paramount consideration governing the actions of adoption agencies and courts. The refusal of a couple to commit themselves to the legal consequences of marriage (or civil partnership) might well cast doubt upon whether an adoption would be in the best interests of the child. Should the relationship break down for any reason, both the surviving parent and the child will be much less well protected. But it is difficult to find good reasons for a blanket ban. It is, as Lord Hoffmann put it, to turn a reasonable generalisation into an irrebuttable presumption.[27] Bright line rules may be appropriate in some cases, but not where the object is to promote the welfare of children. There could well be cases, especially where the child was already living with the couple and had no contact at all with the other half of her birth family, where adoption by them both would be better for the child than the status quo. In reaching his conclusion abut what the law should be, Lord Hoffmann prayed in aid the decision of the South African Constitutional Court in *Du Toit and Vos v Minister for Welfare and Population Development*,[28] which was about a same sex couple.

But if it is our task to keep pace with the Strasbourg jurisprudence as it evolves over time, what would Strasbourg say? There is no case directly in point but there are two recent cases about adoption by single gay or lesbian people. In *Fretté v France*[29] it was held by a narrow majority that refusing to allow a single gay man to adopt on his own was justified. But in *EB v France*[30] it was held that refusing to allow a single lesbian woman to adopt was not. Strasbourg has for some time looked with deep suspicion at discrimination based on sexual orientation and single adoption by heterosexual people was allowed. We can quite confidently predict that Strasbourg would not approve of the continued exclusion of civil partners from joint adoptions. But this does not necessarily help us to predict what Strasbourg would say about *joint* adoptions by unmarried (or unregistered) couples. Lord Walker and I thought that this was a case in which Strasbourg might well apply the margin of

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25 *Review of Adoption Law: Report to Ministers of an Interdepartmental Working Group*, published by the Department of Health and Welsh Office as a Consultation Document in 1992.

26 *Adoption: The Future*, 1993, Cm 2288; *Adoption – A Service for Children*, 1996; *Adoption: A New Approach*, 2000, Cm 5017.

27 [2008] UKHL 38, [2008] 3 WLR 76, #20.

28 (2002) 13 BHRC 187.

29 (2002) 38 EHRR 438.

30 *EB v France* (2008) 47 EHRR 21.

appreciation. They might accept that secular societies where living together outside marriage was commonplace could take one view on the matter, whereas deeply religious societies where it was still frowned upon might take another. The Irish Constitution, for example, requires that special protection be given to the marital family.[31] The rest of the United Kingdom is in advance of many other European countries. The European Adoption Convention 1967 still requires that joint adoptions be limited to married couples (although revisions are under discussion) so the UK had to denounce the relevant provisions in order to change the law. Northern Ireland still has much higher rates of religious observance and lower rates of living together and extra-marital birth than the rest of the United Kingdom. The review and consultation exercise had shown how difficult it would be to get the same changes through the Northern Ireland Assembly.

So was this a case where we should 'stick to the shallow end of a rule of law that defers to the wisdom of the crowd – even when convinced of its stupidity'? Or was it a case where we should make a small but significant advance upon the Strasbourg jurisprudence? Lord Walker, while agreeing that 'opposition to the proposed change in Northern Ireland adoption law seems to be based on the fallacy of turning a reasonable generalisation into an irrebuttable presumption',[32] would have left the matter to the Northern Ireland Assembly. He gave three reasons.[33] First, he thought it 'far from clear that the Strasbourg court would hold that the Adoption Order infringes the ECHR. So long as the 1967 Convention remains in force the Court would be more likely, in my opinion, to reach the opposite conclusion'. Second, the decision was one which ought to be made by a democratically elected legislature. Third, judges, lawyers, officials and agencies would be faced with a very abrupt change in the law and he suspected that there would be many practical difficulties. He would therefore have dismissed the appeal, but with a clear warning that if within two or three years a clear consensus emerged in Europe and Northern Ireland did not legislate in line with that consensus, the issue would have to be reconsidered and the result would probably be different.[34]

Lord Hoffmann, Lord Hope and Lord Mance all took a different view of the likely outcome of the case in Strasbourg. Lord Hoffmann thought it 'not at all unlikely' that Strasbourg would hold that the discrimination violated article 14.[35] But even if Strasbourg would leave it to the margin of appreciation, this should make no difference. He pointed out that Lord Bingham's famous words in *Ullah* were not made in the context of a case in which Strasbourg has declared a question to be within the national margin of appreciation. Different states could give different answers. Nor would Strasbourg be concerned about whether it was the legislature, the executive or the judiciary which gave that answer. None of the normal reasons for following the Strasbourg decisions – the desirability of uniformity and respect for the decisions of a foreign court – apply where the foreign court has deliberately said that the matter is up to us. In a rather swift leap from this conclusion, he then decided that it was for the court to 'apply the division between the decision-making powers of courts and Parliament in the way which appears appropriate for the United Kingdom'.[36] Although this was a matter of social policy, where the legislature

31 Article 41.3.1.
32 [2008] UKHL 38, [2008] 3 WLR 76, #79.
33 #82.
34 #83.
35 #27.
36 #37.

was free to decide between two rational solutions to a social problem, it was not free to discriminate on an irrational basis.[37]

Lord Mance also agreed that if the matter was within our domestic margin of appreciation the court was free to put it right. He made the additional point, based on some observations of Lord Steyn in *R(S) v Chief Constable of South Yorkshire Police*,[38] that there is a distinction between the basic content of the right, which should generally receive a uniform interpretation throughout the member states, and the justifications for interference, where different cultural traditions might be material. And he agreed with me that the cultural differences between Great Britain and Northern Ireland would not justify a different approach on this question.[39] In fact, it was those very differences which might make it more difficult for the legislature to act to put the matter right.

In the end my conclusions were the same as the other three and for much the same reasons. I did take the precaution of checking through the rest of the Adoption Order to ensure that telling the court to ignore the fact that the couple were not married would not lead to difficulties with other provisions. Rather surprisingly, it did not. This was subordinate legislation within the meaning of the Human Rights Act so it could simply be disregarded by the courts. We therefore made a declaration that it was unlawful for the Family Division of the High Court of Northern Ireland to reject the claimants' application to adopt on the ground only that they were not married to one another. Had it been primary legislation, of course, we could only have made a declaration of incompatibility. But in the general approach to the interpretation of the Convention rights it made no difference whether it was primary or subordinate legislation.

I did find the whole matter a great deal more difficult than the others. This may be because of my background in family law. It may be because of my hitherto unqualified support for *Ullah*. Or it may be because of the 'democratic sensitivity' so kindly referred to by Conor Gearty last year. I am a mostly loyal disciple of Lord Bingham in that respect. This looks like the deep end in more ways than one – not just the subject matter but also in the decision to bypass the elected representatives. But I take comfort from the thought that 'democracy values each person equally even if the majority does not'. The courts in a democracy should therefore be especially vigilant to protect people from unjustified discrimination.

So we seem to have reached the following position. The 'Convention rights' given effect by the HRA are in the same words as the rights laid down in the ECHR. But they are rights which are given effect in national law. National law is free to define them for itself. In defining the substantive content of a right, the courts will generally respect a clear and constant line of Strasbourg jurisprudence unless there is good reason not to do so. If it is clear that the claimant would win in Strasbourg, then we will not hesitate to tell the politicians so, whatever the subject-matter. *Bellinger v Bellinger*[40] on the recognition of trans people's marriages in their reassigned gender is a good example. We may also make reasonable predictions of

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37 #20.

38 [2004] UKHL 49, [2004] 1 WLR 2196, #27; see also *M v Secretary of State for Work and Pensions* [2006] UKHL 11, [2006] 2 AC 91, #130.

39 [2008] UKHL 38, [2008] 3 WLR 76, #121.

40 [2003] UKHL 21, [2003] 2 AC 467.

how Strasbourg might answer the same question if it has not recently done so. *Ghaidan v Godin-Mendoza* in the Court of Appeal is a good example.[41] But if it is clear that the claimant would lose in Strasbourg, we are still unlikely to forge ahead regardless.[42] And the matter is or likely to be within the margin of appreciation which Strasbourg would allow to member states, then it is up to us to define the right as best we can. There may be more room for differing national interpretations in deciding upon the justifications for limiting rights than upon the content of the rights themselves. Local conditions may well play a part in this. We should not bother with whether this is defining the right or simply applying it to the facts[43] – the result will be the same.

This still does not give us a completely free hand. When deciding whether a particular limitation upon an established right is 'necessary in a democratic society' we are bound to give great weight to a considered decision of Parliament on the issue. Recent illustrations are the bans on political advertising[44] and hunting with dogs, both of them the result of prolonged debate and consideration by the legislature. In the Hunting Act case I may have put it too high in saying that 'this House should not attempt to second guess the conclusion that Parliament has reached'.[45] *Re P* shows us that it may be otherwise with legislation passed some time ago and without reference to human rights. But this is obviously worthy of more respect if it is going in the same direction as international human rights law rather than in the reverse. An illustration of this is the ban on corporal punishment in schools.[46]

There is another point on which I may have put it too high. In *DS v HM Advocate*,[47] for example, I said that 'The legislature can get ahead of Strasbourg if it wishes and so can the courts in developing the common law. But it is not for us to challenge the legislature unless satisfied that the Convention rights, as internationally agreed and interpreted in Strasbourg, require us to do so.' It is tempting to draw a distinction between leaping ahead of Strasbourg when developing the common law[48] and leaping ahead of Strasbourg in telling Parliament that it has got things wrong. It is in the latter context that most of the strongly *Ullah* type statements have been made. Yet the concept of the 'Convention rights', upon which all our powers and duties under the Human Rights Act depend, cannot mean different things depending upon whether we are developing the common law, controlling the executive, or confronting the legislature. So the dilemma remains, even if *Re P* has softened it at the margin.

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41 [2002] EWCA Civ 1533, [2003] Ch 380; soon vindicated by *Karner v Austria* [2003] 2 FLR 623, (2003) 14 BHRC 674.

42 There are statements to this effect in *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2005] UKHL 57, [2006] 1 AC 529, #25, ##33-34, # 88, although it is on a rather different point of territorial application.

43 Cf Lord Hope in *R v DPP, ex p Kebilene* [2000] 2 AC 326, 380.

44 *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15, [2008] 2 WLR 781.

45 *R (Countryside Alliance) v Attorney General* [2007] UKHL 52, [2008] 1 AC 719, #126

46 *R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15, [2005] 2 AC 246.

47 [2007] UKPC 36, [2007] HRLR 28, #92; see note 9 above.

48 Lewis' argument, note 11 above, was concerned with developing the common law, not with finding legislation incompatible.

No doubt there are many who would like us to continue to tread carefully, mindful of the deep unpopularity of human rights in the popular press. No doubt there are some who would like us to go further. Why, for example, when a point comes up which has not been decided in Strasbourg, should we try to predict what Strasbourg would do with it? Why should we not work out what we think the Convention rights require, using a broad range of national and international materials to guide us? Indeed, one does not have to be a very radical or activist judge to hold the view that it is preferable to have a broadly defined right and to concentrate on whether the state has good reasons for interfering with it.[49]

These problems exist because we have a Human Rights Act which gives effect to the rights defined in an international treaty whose signatories are subject to the jurisdiction of a supranational court. What would be the position if we had our own British Bill of Rights, as the Joint Committee on Human Rights now believes that we should?[50] The whole object would be to develop distinctively British rights, defined by British law, certainly no less and possibly some more than the present Convention rights. The Committee's sample Bill makes it clear that if a right corresponds to an ECHR right it shall be interpreted as having at least the same scope as the Convention right.[51] But when dealing with a British Bill the *Ullah*-type reasoning would not apply.

The Committee's outline Bill is an interesting mixture of the Human Rights Act and the Canadian Charter. It creates the same remedies for violation of the British rights as the Human Rights Act does for violation of the Convention rights. However, it contains a general 'limitation of rights' clause,[52] very like the Canadian charter clause, which seems therefore to do away with the distinction between absolute and qualified rights. It also imports from Canada a 'notwithstanding clause' enabling Parliament deliberately to enact incompatible legislation.[53] In practice, this is not used in Canada, where Parliament seems prepared to trust the courts to get the balance right even though they have the power to strike legislation down.

So what would our approach be to such a Bill? We could no longer appeal to Strasbourg to support our reluctance to tell Parliament or even government that it has got things wrong. We would have to develop our own principles. We could of course do so by sticking to the shallow end and meddling only in those subjects which Conor Gearty thinks are our bread and butter. But as already seen, we cannot do that when it is clear that the claimant would win in Strasbourg. Or we could stick mainly to the shallow end and meddle in other areas only where we could find no rational connection between aim and interference. Or we could do what the legislation told us to do, assuming it took a similar form to the joint committee's outline, which is to define the rights and decide whether the limitations were acceptable. In doing that we would continue to give great weight to the recent and carefully considered judgments of the elected legislature and government. We would continue to think that there were many areas about which they might know

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49 Eg *R (Countryside Alliance) v Attorney-General* [2007] UKHL 52, [2008] 1 AC 719, 121; Lords Rodger and Brown would have liked to extend the scope of article 8 to cover hunting with hounds and only did not do so because it is such a very public spectacle.

50 *A Bill of Rights for the UK?* 29th Report of Session 2007-2008, HL Paper 165-I, HC 150-I.

51 Annex 1: Outline of a UK Bill of Rights and Freedoms, clause 11.

52 Clause 5.

53 Clause 4.

more than we did, although I am not sure that these would be the same areas as Conor Gearty's deep end. And we would continue I hope to apply the proportionality principle with rigour if not ferocity.

We have a great deal to learn from our closest neighbours in this, the Supreme Court of Canada and the Constitutional Court of South Africa. But it is worth pondering one lesson from the United States. Their Supreme Court has so far tried very hard to solve the terrorism cases which have come before it on grounds other than the Bill of Rights. Perhaps they have been afraid that if they use the Constitution to reach what may seem an acceptable solution to the particular case, lasting damage may be done to that very Constitution. Our present situation, of implementing an international treaty rather than a home grown constitutional instrument, has imposed a discipline but it has also given us a freedom which we might be unwise to give up. I could well see us being even more cautious in interpreting and applying a home grown Bill of Rights than we have been with the European Convention. And perhaps that is what the politicians would like.

Turning to the final question in my examination paper, I believe that the answer is clear. The creation of the new Supreme Court will make no difference one way or the other.