

THE RULE OF LAW AND CIVIL CONSTRAINT: CHEATING THE CRIMINAL LAW

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Introduction

1. How does the rule of law respond – for undoubtedly it must respond – where the State designs mechanisms of “civil” constraints upon individual liberty, intended to avoid perceived obstacles associated with basic “criminal” process? Take the response to terrorism. Here is a proposition:

The rule of law requires that an individual's basic freedoms be subjected to ongoing constraints to protect the public against terrorist activity only if three basic protections are secured. There must be the right to: (i) a judicial determination; (ii) with proper transparency; and (iii) a finding of established-wrongdoing.

2. Why should this proposition be accepted as correct? (1) Because such constraints are stigmatising and intrusive controls which call for appropriate minimum standards. (2) Because these are basic characteristics seen in the criminal process but which are so fundamental as to carry across to any “civil” classification, influencing basic fairness as a matter of process and substance. (3) Because they are not ‘obstacles’ so much as fundamental safeguards. (4) Because they should stand impervious to any labelling or design intended (including by Parliament) to avoid or dilute them. (5) Because it can be a distraction to ask whether what has been designed is a “criminal charge”, needing to be so characterised so as to bring in all recognised features of the criminal law. (6) Because the obligations – express and implied, procedural and substantive – found in the European Convention on Human Rights (and the UK’s Human Rights Act 1998) ought to be sufficient to achieve this position. (7) Because, to the extent that the HRA:ECHR cannot assist, constitutional protection under the rule of law should secure the same answer.

Three Fundamental Protections

3. “Criminal” law and “criminal” process are well-recognised as attracting a series of elaborate standards and safeguards, imposed for good reason. But at the very heart of an individual’s experience of the criminal process, are to be found these three basic features. They will arise where the individual is facing constraints at the end of the process which would serve to deprive the individual of their liberty (incarceration), including where the duration of the deprivation of liberty includes a preventative rationale. They also arise where the individual is facing constraints which would operate to control liberty, falling short of incarceration (eg. a disqualification, registration, curfew, fine or confiscation of assets). For the features, at the very essence of the process, are: (i) as to who – the determination is made by an independent judicial tribunal; (ii) as to how – it is made by a transparent process; and (iii) as to what – it is based on established wrongdoing. The individual is found: (i) by a court; (ii) on a case openly ventilated; (iii) to have acted wrongly under the law. The rule of law secures the (i) judicial and (ii) transparent (iii) determination of wrongdoing.
4. If the State seeks to constrain individual liberty by controls which treat these basic features as inconvenient ‘obstacles’, with what response does the rule of law strike back? And does that response operate only within statutory leeway? Can the essential safeguards under the rule of law be abrogated by Parliament so that even human

rights law, absent the interpretative magic of an HRA section 3 interpretation, provides only the consolation prize of a declaration of incompatibility?

5. Such questions are starkly illustrated by those constraints which have been adopted in the UK to address the evils of terrorism. The Prevention of Terrorism Act 2005 introduced control orders with such “*adverse consequences of a very serious kind*” as could be “*devastating for individuals and their families*” (*SSHD v MB* [2007] UKHL 46 [2008] 1 AC 440 (*MB HL*) at §§22-23 (Lord Bingham)). The Terrorism (United Nations Measures) Order 2006 introduced asset-freezing directions so that individuals were “*effectively prisoners of the state*”, their “*freedom of movement ... severely restricted without access to funds or other economic resources, and the effect on both them and their families can be devastating*” (*Ahmed v HM Treasury* [2010] UKSC 2 [2010] 2 AC 534 at §60 (Lord Hope DPSC)). Each was a response to terrorist related activity. Each involved at its heart: (i) executive action; (ii) undisclosed material and (iii) a test of reasonable suspicion. But the rule of law struck back.
6. This is unmistakably a rule of law question. What are the features which “*In a society subscribing to the rule of law ... belong to the ‘criminal’ sphere*” (see *Engel v Netherlands* (1976) 1 EHRR 647 at §82)? What features can properly be surrendered under “civil” process since they would “*by rendering the injunctive process ineffectual, prejudice the freedom of liberal democracies to maintain the rule of law by the use of civil injunctions*” (see *R (McCann) v Manchester Crown Court* [2002] UKHL 29 [2003] 1 AC 787 at §31 (Lord Steyn))? What protections must be defended and maintained, where “civil” constraints involve “*the fundamental rights of the individual ... being severely restricted by the actions of the executive*”, as those which “*the rule of law requires*” (see *Tariq v Home Office* [2011] UKSC 35 [2011] 3 WLR 322 at §81 (Lord Hope))? As Professor Ashworth has put it [2004] LQR 263 at 265:

... human rights have their definitions and their boundaries and it may well be legitimate to devise legislative and other schemes that take maximum advantage of those boundaries. But there comes a point when the legislative devices being used or proposed are so disrespectful of fundamental principles that questions have to be asked about their legitimacy in a country committed to the protection of human rights.

7. True it may be that the design and purpose was to avoid such basic safeguards. In designing anti-terrorism control orders, Parliament had “*gone to some lengths to avoid a procedure which crosses the criminal boundary*” (*MB HL* at §24 (Lord Bingham)). They were designed for cases where evidence was insufficient to support a criminal charge (see s.8(2) and *MB* [2006] EWCA Civ 1140 [2007] QB 415 at §53 (*MB CA*)), in the light of the position on intercept evidence and the duty of ‘election’ under public interest immunity principles. Perhaps such purposes should fail. After all, the carrier penalties in the Immigration and Asylum Act 1999 were held by the Court to attract the standards of the “criminal” law, albeit that they were labelled as “civil” in domestic law and had been introduced because of “*difficulties experienced in obtaining proof of facilitation to the requisite criminal standard*” (*International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158 [2003] QB 728 at §14 (Simon Brown LJ)). Even the design of control orders did not prevent the insistence on implying a right to such disclosure to the individual as the rule of law required: see *MB HL* and *SSHD v AF (No.3)* [2009] UKHL 28 [2010] 2 AC 269. That was achieved because there was sufficient room for an HRA s.3 solution (an implied fairness proviso), where there would otherwise have needed to be a declaration of incompatibility. In *Ahmed*, the rule of law was able to insist on a judicialised,

transparent determination of established-wrongdoing. But there the statutory design was to be found in subordinate legislation which overreached the requirements of the UN Security Council Resolution being implemented.

The Civil Bypass

8. “Civil” constraints can seek to bypass the rigours associated with the criminal law in two distinct ways. The first is direct. It arises through the imposition of direct controls achieved through the specially-designed civil process. The individual who is on the receiving end of the control order, or the asset-freezing direction, has their individual autonomy seriously constrained by an order made without any resort to a criminal court.
9. The second is by way of indirect control of introducing a platform for consequential criminal process. If it is difficult or inconvenient transparently to establish the wrongdoing of terrorist activity, how much easier it becomes to impose civil constraints and then be in a position readily to prove the wrongdoing should those conditions be breached. This gives rise to the same sort of ‘bypassing’ concern as do civil injunctions in support of the criminal law which would lead to onerous sanctions if the civil injunction were disobeyed: see *Birmingham City Council v Shafi* [2008] EWCA Civ 1186 [2009] 1 WLR 1961 at §26 (Sir Anthony Clarke MR and Rix LJ, citing *B & Q* [1984] AC 754 at 776 (Lord Templeman)).
10. The concerns are real. The opportunism is unmistakable. If the State could not (or would rather not) openly and before a court establish that an individual has been engaged in misconduct (eg. anti-social behaviour), how tempting to impose instead (i) an executive civil control (ii) based on closed evidence and (iii) triggered by reasonable suspicion. Such a control can strictly and directly constrain the liberties of the individual. Moreover, and better still, how readily it can later be proved – in a criminal court – that the individual has not complied with the terms of the civil order. The platform is available: the full weight of the criminal law can be applied, via the judicially and transparently established wrongdoing of breaching the civil controls.
11. Important problems are sought to be bypassed. They can involve questions of substance. Take the test of “reasonable suspicion”. It is familiar that even the individual facing constraining measures under the criminal law may be acted against on the grounds of reasonable suspicion: an arrest; a house search; remand. This is the familiar test from ECHR Article 5(1)(c) addressed in *Fox, Campbell and Hartley v United Kingdom* (1990) 13 EHRR 157 §32, and described in the context of anti-terrorism control orders in *MB CA* at §59. There is, however, a vitally important qualification. These steps, including incarceration under Article 5(1)(c), are interim measures on the path to a judicialised and transparent establishment of wrongdoing. Far from being a point of parallel comforting the Court of Appeal as to the permissibility of an approach to control orders based on reasonable suspicion, *Fox, Campbell and Hartley* and Article 5(1)(c) ought to have served as an alarming point of contrast, calling into serious question the use of reasonable suspicion to justify intrusive final measures.
12. They can involve questions of purpose. Take “preventative purposes”. There can be preventative elements in criminal sanctions, including a sentence of imprisonment. A confiscation order imposed by a sentencing court, for example, may in part be intended to remove the means for future criminal conduct. But the criminal law does not, cannot, step in purely to prevent future crime, however serious. Even civil injunctions in support of the criminal law arise out of previous criminal conduct. The position as to the deprivation of liberty is instructive: it is a cardinal feature of the rule

of law (reflected in HRA:ECHR Article 5) that detention cannot be imposed by the State for purely preventative reasons. That is internment. It is impermissible. Thus, for the State to say that it is acting for a special reason – with a preventative purpose – is not an excusing virtue but a disqualifying vice. This brings into sharp focus this question: to what extent can the State expect to be able to invoke a ‘preventative purpose’ to avoid or dilute fundamental safeguards, where the control falls short of deprivation of liberty. That is of course precisely the location on the legal map where non-derogating control orders fell.

Engel Classification

13. The rule of law maintains its bedrock protections in the face of cleverly designed ‘civil’ constraints using two different techniques. They each involve putting essence (or ‘substance’) above label. The first technique involves applying criminal due process standards to a so-called ‘civil’ constraint by holding that its essence requires that it be recharacterised as involving a “*criminal charge*” (or “*criminal penalty*”). This is an anti-avoidance principle, which prevents “*criminal*” accusations and penalties from being labelled as civil so as to avoid the standards of the criminal law. In ECHR terms it operates under the so-called criteria of the *Engel* line of cases (*Engel* at §82), considering (a) domestic classification (b) nature and purpose and (c) severity of sanction.
14. This technique was the principle which caused the controversy in *International Transport Roth GmbH v SSHD* [2002] EWCA Civ 258 [2003] QB 728. That was the case which concerned the fixed carrier penalty scheme under s.32 of the Immigration and Asylum Act 1999, involving fixed penalties and the impounding of vehicles, adopted in the face of the flow of clandestine entrants into the UK. The Court of Appeal, by a majority, held that the scheme was properly to be characterised as “criminal”, and applied the criminal safeguards in ECHR Article 6 (including the presumption of innocence in Article 6(2)) in deciding whether the scheme was lawful. It was not.
15. The *Engel classification* solution has not proved satisfactory as the answer to Professor Ashworth’s challenge. It involves two major problems. First, it is an ‘all-or-nothing’ line which brings the full range of criminal due process standards. Secondly, it has come to fixate on penalty and penalisation, and to treat executive preventative constraints as having a purpose which is their excusing virtue. That is odd and unsatisfactory. In the context of deprivation of liberty (Article 5), constraints which are purely preventative in their purpose (ie. internment) have for that reason a disqualifying vice. Yet in the context of other “*devastating*” controls on individual liberty, action taken preventatively is for that reason permitted to bypass the standards of the criminal law. This deserves a fresh look, though the first problem – the ‘all or nothing’ nature of classification-based principles – would remain. There is a more nuanced way.

Transcendental Protections

16. Happily, there is another way. The second technique is more tailored. It involves applying appropriate criminal protections even in an admittedly non-criminal case, where the rule of law so requires in order to secure fairness and proportionality context of the case in question. This means looking at the ‘essence’ of the matter and the standards for which it calls, beyond the classification of “criminal” or “civil”, and beyond even the question of what is classified as “procedure” and what as “substance”. For fundamental protections can ‘transcend’ issues of classification, to achieve what in the relevant context is the requisite measure of procedural and substantive justice. This is the more promising way for the rule of law to secure appropriate protection and guard

against civil constraints which ‘cheat’ on the criminal law. It takes in its stride, indeed weighs as an anxious concern, that a measure may be preventative in its purpose.

17. A good example of this approach is to be found in those ‘civil’ constraint cases in which the criminal standard of proof was adopted. The cases concerned sex offender orders (*B v Avon Chief Constable* [2001] 1 WLR 340), football banning orders (*Gough v Derbyshire Chief Constable* [2002] EWCA Civ 351 [2002] QB 1213) and then anti-social behaviour orders (*McCann*). All of these were readily characterised by the English courts as preventative non-punitive controls, not penalties. They were assuredly “civil” orders. But that was not the end of the road for the attempted invocation of the criminal standard of proof: beyond reasonable doubt. Far from it. The Courts had no difficulty in acknowledging the importance of a criminal standard of proof. Why? Because of the stigmatising and intrusive context of these civil controls.
18. So, when magistrates acting under the Crime and Disorder Act 1998 s.2 imposed the sex offender order on Mr B, requiring him to keep away from children and schools in the face of his conviction for a sex offence, the order was “civil” and not “criminal”. But the Divisional Court was in “*no doubt*” that the statutorily-required conduct (s.2(1)(a): “*the person has acted ... in such a way as to give reasonable cause to believe that an order ... is necessary to protect the public from serious harm from him*”) had to be proved to the criminal standard. That was a “*strictness appropriate to the seriousness of the matters to be proved and the implications of proving them*” (Lord Bingham LCJ at §31). It was a clear conclusion, not requiring the invocation of ECHR Article 6 (civil), which treated a fundamental protection as being impervious to the design of a preventative, civil control.
19. When magistrates acting under the Football Spectators Act 1989 s.14B imposed the football banning order on Mr Gough, requiring him to keep away from the location of designated matches and surrender his passport at designated times corresponding to particular matches abroad, the order was “civil” and not “criminal”. But the Court of Appeal was clear (*Gough* at §§92-92) that the criminal standard of proof statutorily-required conduct (s.14B(4)(a): “*has at any time caused or contributed to any violence or disorder*”) and further condition itself implying conduct (s.14B(4)(b): “*reasonable grounds to believe that making a banning order would help to prevent violence or disorder*”, where “*reasonable grounds*’ will almost inevitably consist of evidence of past conduct”: Lord Phillips MR for the Court of Appeal in *Gough* at §92). That meant relevant conduct must be “*strictly demonstrated*” in a manner “*practically indistinguishable from the criminal; standard*”, and “*proved to the same strict standard of proof*” (at §§91-92). Why? Because these are “*serious restraints on freedoms that the citizen normally enjoys*”, the standard “*must reflect the consequences that will follow if the case for a banning order is made out*”, and “*the necessity in the individual case to impose a restriction upon a fundamental freedom must be strictly demonstrated*” (at §§90-91). For these reasons, a basic safeguard associated with the criminal law was preserved in this anxious civil context.
20. Again, when magistrates acting under the Crime and Disorder Act 1998 s.1 imposed the anti-social behaviour order on the McCann brothers, requiring them to keep out of the Beswick area of Manchester, the order was “civil” and not “criminal”. But the House of Lords concluded of that the statutorily-required conduct (s.1(1)(a): “*has acted ... in an anti-social manner*”) that “*pragmatism dictates that the task of magistrates should be made more straightforward by ruling that they must in all cases under section 1 apply the criminal standard*” (*McCann* per Lord Steyn at §37; also Lord Hope at §83, Lord Hutton at §114). Why? Because of “*the seriousness of the matters*

involved” (Lord Steyn at §37), both “*the seriousness of the matters to be proved and the implications of proving them*” (Lord Hope at §83).

21. Subsequent cases have rejected the notion that there is in the law some intermediate ‘hybrid’ civil standard (see *In re D* [2008] UKHL 33 [2008] 1 WLR 1499). But that is not to say that the ‘criminal’ standard is incapable of being applied in a “civil” case. Rather, it is to grasp the nettle of avoiding references to ‘the civil standard flexibly applied’ and identify “civil” cases where a “beyond reasonable doubt” standard is called for: see *In re D* at §49 (Lord Brown); and see *Birmingham CC v Shafi* [2008] EWCA Civ 1186 [2009] 1 WLR 1961 at §49 (confirming the criminal standard as applicable to ASBOs under the decision in *McCann*).
22. The ability to focus on the true question – what basic protections are minimum standards on which the rule of law will insist in the particular context – can be a breath of fresh air. It treats questions of label or classification as incidental matters, distractions even. As Simon Brown LJ explained in *Roth* (at §33):

In short, the classification of proceedings between criminal and civil is secondary to the more directly relevant question of just what protections are required for a fair trial.

This was an observation endorsed in the context of anti-terrorism control orders: see *MB HL* at §17 (Lord Bingham).

23. When standards come to be delineated in a “civil” context, one key question is whether they can nevertheless be located on the human rights map. Most obviously, they may be linked to the guarantee of due process (fair trial) in HRA:ECHR Article 6. For if the protection belongs rather to domestic common law, there is the problem of clear primary legislation which is designed and expressed to be incompatible with the relevant safeguard. Had, for example, the civil standard of proof been indicated on the face of the statutory schemes in *B*, *Gough* or *McCann*, ECHR Article 6 would have been relied on as to the strength of the protection and the remedial responses (interpretation under HRA s.3, or a declaration of incompatibility).
24. Beyond the protections of the HRA, there would be the common law principle of legality and constitutional protection of human rights and the rule of law. At the current state of evolution of the law in the United Kingdom, there are real differences which continue to matter. There are questions which will need more progressive answers than ‘Parliament can legislate to exclude a basic protection, provided that it confronts the political cost’. For the present, it is to be hoped that the protections of the HRA:ECHR can sufficiently cover the necessary ground. And for that, it may be necessary to look beyond Article 6, with its procedural focus and restriction to a “determination of civil rights and obligations”. The substantive Articles of the Convention may also need to find a voice.
25. It has been suggested that there are three most basic characteristics: (i) judicialisation, (ii) transparency and (iii) the establishment of wrongdoing. How have they fared in the context of “civil” controls which otherwise seek to overcome perceived ‘obstacles’ in the criminal law? It is immediately to be noted that each of these three basic safeguards was secured and respected in the line of civil restraint cases discussed above. Parliament did not dare to displace them. Mr B was entitled to a hearing before a court (magistrates), knowing the essence of the case against him, and with a determination of wrongdoing: that he had “*acted ... in such a way as to give reasonable cause to believe that an order ... is necessary to protect the public from*

serious harm from him". Mr Gough was entitled to a hearing before a magistrates court, knowing the essence of the case against him, and with a determination of wrongdoing: that he had "*caused or contributed to any violence or disorder*" and with past conduct identified as giving "*reasonable grounds to believe that making a banning order would help to prevent violence or disorder*". The McCann brothers were entitled to a hearing before magistrates, with the essence of the case against them disclosed, with a determination of wrongdoing: that they had "*acted ... in an anti-social manner*". Is this protection secure as a matter of principle? Is it found in the context of anti-terrorism controls?

(i) Judicialisation

26. The civil standards of ECHR Article 6 provide of course for "*an independent and impartial tribunal*" in any case involving "*the determination of a civil right or obligation*". That requirement, together with the statutory procedure for the High Court to approve the making of control orders, combined to secure adequate judicialisation in the case of control orders. Absent statutory control by the High Court, it is inevitable that the common law jurisdiction of judicial review would have been invoked. That is what happened in the context of asset-freezing directions, where the Courts had resort to the common law protection of judicial review as a necessary and fundamental protection. In the case of control orders and asset-freezing directions, that meant the Court would be exercising familiar "*judicial review principles*". Happily, these can involve a full merits review where the context means that this is necessary and appropriate: see *MB CA* at §48.
27. But what lies beneath is an important constitutional question. What if Parliament had by primary legislation clearly and expressly purported to exclude any judicial review of an executive control order or asset-freezing direction? In the case of a control order, as a determination of civil rights and obligations, HRA:ECHR Article 6 would (absent any interpretative solution under HRA s.3) produce a declaration of incompatibility. However, the right of access to a judicial review Court is a fundamental constitutional protection under the rule of law. There are clear indications that it cannot be abrogated even by clear primary legislation: see *R (Jackson) v Attorney General* [2005] UKHL 56 [2006] 1 AC 262 at §102 (Lord Steyn); and *R (Cart) v Upper Tribunal* [2009] EWHC 3052 (Admin) [2010] 2 WLR 1012 (DC) at §§34-41 (Laws LJ). If, then, it is the case that asset-freezing directions are not a determination of a civil right or obligation (as to which see the somewhat surprising decision in *R (Khaled) v SS for Foreign and Commonwealth Affairs* [2011] EWCA Civ 350), and were the fundamental protection of judicialisation to be excluded, there would be a monumentally important constitutional issue which would surely see judicial review preserved.

(ii) Transparency

28. The law has settled upon a recognition of the core irreducible minimum standard which is necessary, in an appropriate context, to preserve the right to know the State's case against the individual. Individuals facing control orders are entitled to know the essence of the case against them: *AF (No.3) v SSHD* [2009] UKHL 28 [2010] 2 AC 269. That is achieved by means of the fairness proviso implied (under HRA s.3) into the 2005 Act (see *MB HL*), because control orders involve a determination of civil rights and obligations, avoiding the declaration of incompatibility which would otherwise follow. So far so good.
29. This minimum standard of transparency is not incorporated wholesale into every "civil" case, whatever the context and whatever the issue: see *Tariq v Home Office* [2011] UKSC 35 [2011] 3 WLR 322. The context in which the standard applies has been helpfully identified in the following way (*Tariq* at §81 per Lord Hope):

... the context for the argument is what matters... [In AF (No.3)] the fundamental rights of the individual were being severely restricted by the actions of the executive. Where issues such as that are at stake, the rule of law requires that the individual be given sufficient material to enable him to answer the case that is made against him by the state.

30. The same standard should surely be capable of being insisted upon, in such a context, by the common law as a constitutional fundamental. As Lord Hope pointed out in *AF (No.3)* at §83: “*The rule of law in a democratic society*” entails as a “*fundamental principle ... that everyone is entitled to the disclosure of sufficient material to enable him to answer effectively the case that is made against him*”.
31. The strength, status and remedial effect of the common law constitutional principle are tested in contexts which lie beyond the boundaries of the “determination of a civil right or obligation”. Suppose it is said (see *Khaled*) that an asset-freezing direction is a ‘public function’ with a dramatic impact on individual rights, rather than a “determination of civil rights and obligations”. The law would expect the standard of minimum transparency to be the same at common law: hence the comments in *Khaled* at §8 and §§31-32 about whether the question of classification is one which should matter; surely the standards are the same. True, they must be. But the problem may be rather as to status and remedy. Absent the HRA remedial responses, the bedrock legal standard may be displaced by the statutory scheme, there being no scope for the s.3 fairness proviso or a declaration of incompatibility: see *R (Bhutta) v HM Treasury* [2011] EWHC 1789. These cases will need to get back on the rails of Article 6 (civil), or of similar implied standards of due process in other applicable Convention rights (notably Article 1P), or perhaps through the medium of the EU Charter (whose due process protection extends deliberately wider than Article 6). Failing those, there ought to be a fresh look at the constitutional implications of basic procedural fairness and whether it can always be displaced by primary legislation. If the right to a court can serve as a constitutional fundamental which cannot be excluded, then why not the basic right of natural justice?

(iii) Established-Wrongdoing

32. This third key component, the establishment of wrongdoing, has not fared so well. It has become the surrendered (or forgotten) feature in United Kingdom law. The law has been rightly anxious to respond to control orders and asset-freezing directions by emphasising the protections of judicialisation (the who) and transparency (the how). But where has been the equal anxiety in relation to the absence of established-wrongdoing (the what)? Ought not the basic substantive protection to be at least as important as the two procedural ones?
33. The 2005 Act framed control orders by reference to a test of reasonable suspicion (s.2(1)): “*reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activity*”). This, moreover, in a statutory scheme whose object was described as follows (short title):

An Act to provide for the making against individuals involved in terrorism-related activity of orders ...

34. It is somewhat bizarre that the law has been so anxious, as has been seen above, to reinforce the position of a Mr B, a Mr Gough and a Mr McCann, recognising that it is clear from the seriousness of the matters in question and of the implications of the order sought that a high standard of established wrongdoing is called for in the case of

their conduct, but that wrongdoing need not be established to any standard at all in the case of these most stigmatising and intrusive measures as control orders.

35. The answer cannot simply be that reasonable suspicion is the statutorily-chosen test on the face of the legislation. After all, closed process was the statutorily-chosen procedure on the face of the 2005 Act, but the rule of law would not permit it. Article 6 standards led to the insertion of a fairness proviso into the 2005 Act, absent which possibility there would instead have been a declaration of incompatibility. The statutory scheme is what raises the questions. The rule of law is what answers them.
36. In *Ahmed v HM Treasury* [2010] UKSC 2 [2010] 2 AC 534 the test of “*reasonable suspicion*” arose in a statutory instrument made by the executive, not in primary legislation nor in the United Nations Security Council Resolution which the instrument purported to implement. That provided a ready answer to the problem: the Supreme Court held that the instrument was ultra vires the enabling Act in adopting a more restrictive test than that set out in the UNSCR. Parliament responded by enacting the Terrorist Asset-Freezing Act 2010, with a statutory test of “*reasonable belief*” notwithstanding the Joint Committee on Human Rights urging (4th Report Session 2010-2011 at §1.8) a test of established-wrongdoing (at least to the civil standard).
37. The difficulty is probably to be found in the distinction between matters of “process” and matters of “substance”. In *MB CA* the Court of Appeal addressed the ‘reasonable suspicion’ basis for control orders and overturned Sullivan J’s finding that established-wrongdoing was a necessary safeguard in a fair system (see *MB CA* at §66). The Court accused Sullivan J of confusing substance and procedure (§67), since Article 6 was concerned only with procedural fairness and not the fairness of a substantive criterion (see §36). Here, the substantive criterion was determined by the statute itself, albeit that as a matter of process Article 6 standards could be invoked to insist on a merits review whereby the reviewing Court would determine the relevant objective question (reasonable suspicion) for itself (§60).
38. This strict delineation between fair process and fair substance is unattractive. A preferable approach is that which the Divisional Court took in the *Roth* case, recognising that matters of process and substance were inextricably linked, in asking whether the civil carrier penalty scheme was so draconian as to be unfair. Article 6 (fair trial) and Article 1P (property rights) were each in play, and were held to overlap (see §§30-31). The scheme was unfair as to the scale and inflexibility of what was imposed. The strict liability (absence of scope for mitigation) was a criterion of the statutory scheme, as was the fixed penalty (absence of judicial discretion). It was not necessary rigidly to separate out the process from the substance.
39. Insofar as it is appropriate to emphasise the distinction between substance and procedure, it does not follow that Sullivan J’s concerns were unfounded. Rather, they may simply have been gathered under the wrong heading. Ultimately, one can put to one side the application – or otherwise – of the civil standards of Article 6. Control orders involve interferences with a range of substantive Convention rights, and asset-freezing directions are a plain and obvious interference with Article 1P. That brings into play the principles of necessity and proportionality, as a matter of substance and fair balance (substantively). Moreover – if it matters – the substantive Convention rights can carry implied procedural protections. The point resolves into a single question, which it is the responsibility of the Court – not the executive and not Parliament – to determine.

40. The question is this: is it truly necessary in a democratic society for stigmatising and intrusive controls on the liberty of the individual to be imposed on the basis of reasonable suspicion? The answer is no. What strikes the requisite fair balance is a scheme in which a court, and under a process respecting the core standard of fair disclosure, determines not suspected conduct but the conduct itself.
41. If one returns to the *Gough* case in which the Court of Appeal identified the reason why proof of wrongdoing to a high standard was justified, one finds the link to this principle of substance (*Gough* at §91): “*the necessity in the individual case to impose a restriction upon a fundamental freedom must be strictly demonstrated*”. The same substantive principle is what controls the legality of the substantive criterion of reasonable suspicion.
42. A confession. The intervener JUSTICE (whose Lead Counsel hereby accepts responsibility) has consistently failed to have this seen as a troubling issue, in successive cases where the point has not been raised by the principal parties. The Law Reports, at least, record the argument:

It cannot be necessary in a democratic society for the court ... to impose intrusive controls on individual freedoms and autonomy on the basis of suspicion of terrorist activity (MB HL at 459H)

Control orders ... involve judicial final orders restricting fundamental rights based on suspicion of wrongdoing ... That basis is not well founded in human rights terms. It has not been shown to be necessary in a democratic society for a final order, highly intrusive and restrictive of fundamental rights, to be made by a court on that basis (AF (No.3) at 326H-327B)

... a final order which is intrusive of human rights cannot be justified (as necessary or proportionate) on the basis of a test of reasonable suspicion (Ahmed at 595F).

Conclusion

43. This is a context in which the rule of law must be at its most resolute. Basic protections can ‘transcend’ questions of classification. The rule of law must look beyond labels and classifications of “criminal” and “civil” controls, and beyond concepts such as “determination of civil rights and obligations”. It must embrace the linked questions of “procedure” and “substance”. It must respond resolutely to, and not merely within, statutory frameworks even where deliberately designed to avoid or dilute such basic safeguards.
44. There are three basic protections, not two. The safeguards extend to substance, not merely procedure. The third basic feature – the right to established-wrongdoing – should be acknowledged, alongside the first two: the right to a Court and the right to minimum fair disclosure. In *Roth* the Divisional Court thought that a statutory scheme of carrier penalties was unfair and unjustified, in part because of the undemanding nature of the substantive criteria which were applied. In *Gough* the Court of Appeal thought that a statutory scheme of banning orders was fair and justified, in part because of the rigour which could be attached to the substantive criteria to be applied. In *MB Sullivan J* held that the statutory scheme of control orders was unfair and unjustified because what was needed was a judicialised process with proper transparency and established-wrongdoing. He has been vindicated as to the need for

a judicial determination involving proper transparency. But Sullivan J was also right about the need for established-wrongdoing.

45. The individual has the right, before intrusive and stigmatising restraints are imposed, to a process before a Court, with disclosure of the essence of the case against them, and a determination of whether they have actually done that of which the State suspects them. To fall short of this is to allow the State to operate an unfair system of control of individual civil liberties. It is to deny the individual out of the most essential characteristics of fairness, which transcend the criminal/civil distinction. It is to allow the State to cheat the criminal law.

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