



## KDO ZNÁ LÉPE PRÁVO? ZÁKONODÁRCE, JUSTICE A ÚSTAVNÍ INTERPRETACE

Platí, že soudní výklad vyšších soudů s konečnou platností určuje, co je obsahem ústavních norem? Nelze přitom zapomenout, že ústavní normy vykládá i zákonodárce. Schválí-li zákon, potom proto, že je podle jeho názoru ústavně souladný. Má vždy konečné slovo soud, nebo tomu může být i jinak? Podíváme se, jaké jsou pravomoci justice a zákonodárce tam, kde soudy mají poslední slovo, a také tam, kde ho nemají. Jaké nároky kladou tyto situace na přesvědčivost soudního výkladu? A jaké jsou za těchto okolností šance soudů svou interpretaci ústavně souladného výkladu prosadit? A stane se, že soudy na vlastní ústavní výklad rezignují, a dají přednost výkladu zákonodárce?

**TUSHNET, M.:** Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law, str. 18 - 41

### **OTÁZKY K ČETBĚ:**

1. Jaké jsou pravomoci justice a zákonodárné moci, pokud jde o ústavní výklad podle jednotlivých ústav? Ve kterých případech jde o „silný“ nebo „slabý“ model ústavního přezkumu?
2. Jaké jsou možné formy ústavního výkladu, přiznávané zákonodárné moci?
3. V jaké oblasti vidí soudy v uvedených rozhodnutích svou věcnou působnost ve vztahu k ústavnímu výkladu? V čem podle jejich názoru spočívá pravomoc exekutivy, a v čem pravomoc zákonodárné moci, pokud jde o ústavní výklad?
4. Z čeho dovozuje Nejvyšší soud U.S.A. svou pravomoc přezkoumat ústavnost zákona?
5. Co znamená vyslovení neslučitelnosti zákona s Human Rights Act podle mínění Sněmovny Lordů?
6. Co může vést podle Vašeho názoru britský Parlament k tomu, aby na základě stanoviska Sněmovny Lordů tento zákon zrušil?
7. Je podle Vašeho názoru základní podmínkou prosazení ústavně souladného výkladu v legislativě „silné“ postavení soudů při posuzování ústavnosti zákonů?
8. Které politické faktory jsou podle Vašeho názoru klíčové v „silném“, a které ve „slabém“ modelu ústavního přezkumu?

**ÚSTAVA ČESKÉ REPUBLIKY ZE DNE 16. PROSINCE 1992, ÚSTAVNÍ ZÁKON Č. 1/1993 SB. VE ZNĚNÍ ÚSTAVNÍHO ZÁKONA Č. 347/1997 SB., 300/2000 SB., 448/2001 SB., 395/2001 SB. A 515/2002 SB.**

[...]

**Článek 4**

Základní práva a svobody jsou pod ochranou soudní moci.

[...]

**Hlava druhá**

**Moc zákonodárná**

**Článek 15**

(1) Zákonodárná moc v České republice náleží Parlamentu.

(2) Parlament je tvořen dvěma komorami, a to Poslaneckou sněmovnou a Senátem.

[...]

**Hlava čtvrtá**

**Moc soudní**

**Článek 81**

Soudní moc vykonávají jménem republiky nezávislé soudy.

**Článek 82**

(1) Soudci jsou při výkonu své funkce nezávislí. Jejich nestrannost nesmí nikdo ohrožovat.

(2) Soudce nelze proti jeho vůli odvolat nebo přeložit k jinému soudu; výjimky vyplývající zejména z kárné odpovědnosti stanoví zákon.

(3) Funkce soudce není slučitelná s funkcí prezidenta republiky, člena Parlamentu ani s jakoukoli funkcí ve veřejné správě; zákon stanoví, se kterými dalšími činnostmi je výkon soudcovské funkce neslučitelný.

**Ústavní soud**

**Článek 83**

Ústavní soud je soudním orgánem ochrany ústavnosti.

[...]

**Článek 87**

(1) Ústavní soud rozhoduje

a) o zrušení zákonů nebo jejich jednotlivých ustanovení, jsou-li v rozporu s ústavním pořádkem,

b) o zrušení jiných právních předpisů nebo jejich jednotlivých ustanovení, jsou-li v rozporu s

ústavním pořádkem nebo zákonem,

c) o ústavní stížnosti orgánů územní samosprávy proti nezákonnému zásahu státu,

d) o ústavní stížnosti proti pravomocnému rozhodnutí a jinému zásahu orgánů veřejné moci do ústavně zaručených základních práv a svobod

[...]

### **Článek 89**

(1) Rozhodnutí Ústavního soudu je vykonatelné, jakmile bylo vyhlášeno způsobem stanoveným zákonem, pokud Ústavní soud o jeho vykonatelnosti nerozhodl jinak.

(2) Vykonatelná rozhodnutí Ústavního soudu jsou závazná pro všechny orgány i osoby.

(3) Rozhodnutí Ústavního soudu, kterým byl podle čl. 87 odst. 2 vysloven nesoulad mezinárodní smlouvy s ústavním pořádkem, brání ratifikaci smlouvy do doby, než bude nesoulad odstraněn.

### **Soudy**

### **Článek 90**

Soudy jsou povolány především k tomu, aby zákonem stanoveným způsobem poskytovaly ochranu právům. Jen soud rozhoduje o vině a trestu za trestné činy.

### **Článek 113**

Tato Ústava nabývá účinnosti dnem 1. ledna 1993.

[...]

**Uhde v.r.**

**Klaus v.r.**



## **CONSTITUTION ACT, 1982**

### **PART I.**

#### **CANADIAN CHARTER OF RIGHTS AND FREEDOMS**

Whereas Canada is founded upon the principles that recognize the supremacy of God and the rule of law:

#### *Guarantee of Rights and Freedoms*

**1.** The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

#### *Fundamental Freedoms*

**2.** Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other means of communication.

(c) freedom of peaceful assembly; and

(d) freedom of association.

[...]

### *Legal Rights*

**7.** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

**8.** Everyone has the right to be secure against unreasonable search or seizure.

**9.** Everyone has the right not to be arbitrarily detained or imprisoned.

**10.** Everyone has the right on arrest or detention

(a) to be informed promptly of the reason therefor;

(b) to retain and instruct counsel without delay and to be informed of that right; and

(c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.

**11.** Any person charged with an offence has the right

(a) to be informed without unreasonable delay of the specific offence;

(b) to be tried within a reasonable time;

(c) not to be compelled to be a witness in a proceedings against that person in respect of the offence;

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

(e) not to be denied reasonable bail without cause;

(f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

(g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or International law or was criminal according to the general principles of law recognized by the community of nations;

(h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and

(i) if found guilty of the offence and if punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

**12.** Everyone has the right not to be subjected to any cruel or unusual treatment or punishment.

**13.** A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

**14.** A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

#### *Equality Rights*

**15.** (1) Every individual is equal before the and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

[...]

#### *Enforcement*

**24.** (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

#### *Application of Charter*

**32.** (1) This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislatures and governments of each province in respect of all matters within the authority of the legislature of each province.

(2) Notwithstanding subsection (1), section 15 shall not have effect until three years after this section comes into force.

**33.** (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or section 7 to 15 of this Charter.

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

(4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

(5) Subsection (3) applies in respect of re-enactment made under subsection (4).

*Citation*

**34.** This Part may be cited as the Canadian Charter of Rights and Freedoms.

[...]



**CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA**

(Adopted on December, 4<sup>th</sup> 1982)

**CHAPTER I. GENERAL PRINCIPLES**

[...]

**Article 3.** The state organs of the People's Republic of China apply the principle of **democratic centralism**. The National People's Congress and the local people's congresses at different levels are instituted through democratic election. They are responsible to the people and subject to their supervision. All administrative, judicial and procuratorial organs of the state are created by the people's congresses to which they are responsible and under whose supervision they operate. The division of functions and powers between the central and local state organs is guided by the principle of giving full play to the initiative and enthusiasm of the local authorities under the unified leadership of the central authorities.

[...]

CHAPTER III. THE STRUCTURE OF THE STATE

[...]

**Article 62.** The National People's Congress exercises the following functions and powers:

- (1) To amend the Constitution;
- (2) To supervise the enforcement of the Constitution;
- (3) To enact and amend basic statutes concerning criminal offences, civil affairs, the state organs and other matters;

[...]

- (7) To elect the President of the Supreme People's Court;
- (8) To elect the Procurator-General of the Supreme People's Procuratorate;

[...]

**Article 63.** The National People's Congress has the power to recall or remove from office the following persons:

- (1) The President and the Vice-President of the People's Republic of China;
- (2) The Premier, Vice-Premiers, State Councillors, Ministers in charge of Ministries or Commissions and the Auditor-General and the Secretary-General of the State Council;
- (3) The Chairman of the Central Military Commission and others on the commission;
- (4) The President of the Supreme People's Court; and
- (5) The Procurator-General of the Supreme People's Procuratorate.

[...]

SECTION 7. THE PEOPLE'S COURT AND THE PEOPLE'S PROCURATORS

**Article 123.** The people's courts in the People's Republic of China are the judicial organs of the state.

**Article 124.** The People's Republic of China establishes the Supreme People's Court and the local people's courts at different levels, military courts and other special people's courts. The term of office of the President of the Supreme People's Court is the same as that of the National People's Congress; he shall serve no more than two consecutive terms. The organization of people's courts is prescribed by law.

**Article 125.** All cases handled by the people's courts, except for those involving special circumstances as specified by law, shall be heard in public. The accused has the right of defence.

**Article 126.** The people's courts shall, in accordance with the law, exercise judicial power independently and are not subject to interference by administrative organs, public organizations or individuals.

**Article 127. The Supreme People's Court is the highest judicial organ.** The Supreme People's Court supervises the administration of justice by the local people's courts at different levels and by the special people's courts; people's courts at higher levels supervise the administration of justice by those at lower levels.

**Article 128. The Supreme People's Court is responsible to the National People's Congress and its Standing Committee.** Local people's courts at different levels are responsible to the organs of state power which created them.

## II.

*In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned [within the judicial power of the United States], the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.*

(U.S. Constitution, Article III, Section 2, Clause 2)

*The Supreme Court shall also have appellate jurisdiction from the circuit courts and courts of the several states, in the cases herein after provided for; and shall have power to issue writs of prohibition to the district courts [...] and writs of mandamus [...] to any courts appointed, or persons holding office, under the authority of the United States.*

(Judiciary Act of 1789, § 13)

U.S.SUPREME COURT

**5 U.S. 137 (1803)**

**5 U.S. 137 (Cranch)**

**WILLIAM MARBURY**

**v.**

**JAMES MADISON, Secretary of State of the United States.**

**February Term, 1803**

[...]

The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognise certain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it nor ought it to be frequently repeated. The principles, therefore, so established are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here; or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing; if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature repugnant to the constitution is void.

This theory is essentially attached to a written constitution, and is consequently to be considered by this court as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further consideration of this subject.

If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. [5 U.S. 137, 178] So if a law be in opposition to the constitution: if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law: the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.

Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions—a written constitution, would of itself be sufficient, in America where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the constitution of the United States furnish additional arguments in favour of its rejection.

The judicial power of the United States is extended to all cases arising under the constitution. [5 U.S. 137, 179] Could it be the intention of those who gave this power, to say that, in using it, the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained.

In some cases then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read, or to obey?

There are many other parts of the constitution which serve to illustrate this subject.

It is declared that 'no tax or duty shall be laid on articles exported from any state.' Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? ought the judges to close their eyes on the constitution, and only see the law.

The constitution declares that 'no bill of attainder or ex post facto law shall be passed.'

If, however, such a bill should be passed and a person should be prosecuted under it, must the court condemn to death those victims whom the constitution endeavours to preserve?

'No person,' says the constitution, 'shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.'

Here the language of the constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare one witness, or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

From these and many other selections which might be made, it is apparent, that the framers of the constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature.

Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies, in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words: 'I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as according to the best of my abilities and understanding, agreeably to the constitution and laws of the United States.'

Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? if it is closed upon him and cannot be inspected by him.

If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank.

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void, and that courts, as well as other departments, are bound by that instrument.

The rule must be discharged.



Jako důsledek útoků 11. září 2001 na WTO a Pentagon přijala Velká Británie protiteroristický zákon (*Anti-Terrorism, Crime and Security Act 2001*). Vláda Velké Británie dospěla k závěru, že jsou dány podmínky veřejného ohrožení existence státu podle čl. 15 Úmluvy, a vydala prohlášení o odstoupení od závazku podle čl. 5 odst. 1 Úmluvy (svoboda pohybu). Vláda se domnívala, že nebezpečí hrozí zejména od cizinců, kteří trvale žijí ve Spojeném království, a představují podpůrnou síť pro extrémistické teroristické operace Al Kajdy. Tito cizinci nemohli být většinou vypovězeni, protože v zemích původu jim hrozilo zlé nakládání v rozporu s čl. 3 Úmluvy. Proto britská vláda prosadila zákon, na jehož základě bylo možno na neurčitou dobu zajistit cizince, pokud měl být vypovězen a existovalo opodstatněné podezření, že jeho pobyt ve Spojeném království je hrozbou pro národní bezpečnost, pro důvodné podezření z mezinárodního terorismu. Na základě právních kroků iniciovaných odvolateli proti příkazům o zajištění britská Sněmovna lordů svým stanoviskem ze dne 16. prosince 2004 vyslovila neslučitelnost (*statement of incompatibility*) ustanovení zákona s HRA (*Human Rights Act 1998*).

**OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE A (FC) AND OTHERS (FC) (APPELLANTS) v. SECRETARY OF STATE FOR THE HOME DEPARTMENT (RESPONDENT) X (FC) AND ANOTHER (FC) (APPELLANTS) v. SECRETARY OF STATE FOR THE HOME DEPARTMENT (RESPONDENT), 16.12.2004, [2004] UKHL 56**

[...]

**LORD NICHOLLS OF BIRKENHEAD**

My Lords,

74. Indefinite imprisonment without charge or trial is anathema in any country which observes the rule of law. It deprives the detained person of the protection a criminal trial is intended to afford. Wholly exceptional circumstances must exist before this extreme step can be justified.

75. The government contends that these post-9/11 days are wholly exceptional. The circumstances require and justify the indefinite detention of non-nationals suspected of being international terrorists. 76. The principal weakness in the government's case lies in the different treatment accorded to nationals and non-nationals. The extended power of detention conferred by Part 4 of the Anti-terrorism, Crime and Security Act 2001 applies only to persons who are not British citizens. It is difficult to see how the extreme circumstances, which alone would justify such detention, can exist when lesser protective steps apparently suffice in the case of British citizens suspected of being international terrorists.

77. Three years have now elapsed since the terrorist attacks of 11 September 2001. A significant number of persons suspected of terrorist involvement in this country are British citizens. In the case of these nationals the government has, apparently, felt able to counter the threat they pose by other means. Although they too present a threat to national security, in their case the government has not found it necessary to resort to the extreme step of seeking an extended power of detention comparable to that contained in the 2001 Act.

78. No satisfactory explanation has been forthcoming on this point. The government has vouchsafed no persuasive explanation of why national security calls for a power of indefinite detention in one case but not the other. Non-nationals may comprise the predominant and more immediate source of the threat to national security, but they are not the only source.

79. All courts are very much aware of the heavy burden, resting on the elected government and not the judiciary, to protect the security of this country and all who live here. All courts are acutely conscious that the government alone is able to evaluate and decide what counter-terrorism steps are needed and what steps will suffice. Courts are not equipped to make such decisions, nor are they charged with that responsibility.

80. But Parliament has charged the courts with a particular responsibility. It is a responsibility as much applicable to the 2001 Act and the Human Rights Act 1998 (Designated Derogation)

Order 2001 as it is to all other legislation and ministers' decisions. The duty of the courts is to check that legislation and ministerial decisions do not overlook the human rights of persons adversely affected. In enacting legislation and reaching decisions Parliament and ministers must give due weight to fundamental rights and freedoms. For their part, when carrying out their assigned task the courts will accord to Parliament and ministers, as the primary decision-makers, an appropriate degree of latitude. The latitude will vary according to the subject matter under consideration, the importance of the human right in question, and the extent of the encroachment upon that right. The courts will intervene only when it is apparent that, in balancing the various considerations involved, the primary decision-maker must have given insufficient weight to the human rights factor.

81. In the present case I see no escape from the conclusion that Parliament must be regarded as having attached insufficient weight to the human rights of non-nationals. The subject matter of the legislation is the needs of national security. This subject matter dictates that, in the ordinary course, substantial latitude should be accorded to the legislature. But the human right in question, the right to individual liberty, is one of the most fundamental of human rights. Indefinite detention without trial wholly negates that right for an indefinite period. With one exception all the individuals currently detained have been imprisoned now for three years and there is no prospect of imminent release. It is true that those detained may at any time walk away from their place of detention if they leave this country. Their prison, it is said, has only three walls. But this freedom is more theoretical than real. This is demonstrated by the continuing presence in Belmarsh of most of those detained. They prefer to stay in prison rather than face the prospect of ill treatment in any country willing to admit them.

82. Nor is the vice of indefinite detention cured by the provision made for independent review by the Special Immigration Appeals Commission. The commission is well placed to check that the Secretary of State's powers are exercised properly. But what is in question on these appeals is the existence and width of the statutory powers, not the way they are being exercised.

83. The difficulty with according to Parliament the substantial latitude normally to be given to decisions on national security is the weakness already mentioned: security considerations have not prompted a similar negation of the right to personal liberty in the case of nationals who pose a similar security risk. The government, indeed, has expressed the view that a 'draconian' power to detain British citizens who may be involved in international terrorism 'would be difficult to justify': Counter-Terrorism Powers: Reconciling Security and Liberty in an Open Society (February 2004, Cm 6147), para 36. But, in practical terms, power to detain indefinitely is no more draconian in the case of a British citizen than in the case of a non-national. There is no significant difference in the potential adverse impact of such a power on (1) a national and (2) a non-national who in practice cannot leave the country for fear of torture abroad.

84. Part of the explanation for the difference in treatment may be that the government has misconceived the human rights of non-nationals in this situation. A prominent part of the submissions of the Attorney General was to the effect that as a matter of international law (1) states may intern nonnationals who present a threat to national security and (2) states may accord different treatment to nationals and non-nationals. This line of argument suggests that when promoting Part 4 of the 2001 Act and seeking an extended statutory power of indefinite detention the government may have regarded the human rights of non-nationals in this field as less weighty than the corresponding human rights of nationals. If that was the government's understanding, it was in my view mistaken. Unwanted aliens who cannot be deported, as much as nationals, are not to be detained indefinitely without charge or trial save in wholly exceptional circumstances.

85. Be that as it may, for the reason given earlier and the reasons stated more fully by my noble and learned friends Lord Bingham of Cornhill, Lord Hope of Craighead and Lord Rodger of Earlsferry, I too would allow these appeals and make the order proposed by Lord Bingham of Cornhill.

**LORD HOFFMANN**

My Lords,

86. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Bingham of Cornhill and I gratefully adopt his statement of the background to this case and the issues which it raises. This is one of the most important cases which the House has had to decide in recent years. It calls into question the very existence of an ancient liberty of which this country has until now been very proud: freedom from arbitrary arrest and detention. The power which the Home Secretary seeks to uphold is a power to detain people indefinitely without charge or trial. Nothing could be more antithetical to the instincts and traditions of the people of the United Kingdom.

[...]

89. The exceptional power to derogate from those rights also reflected British constitutional history. There have been times of great national emergency in which habeas corpus has been suspended and powers to detain on suspicion conferred on the government. It happened during the Napoleonic Wars and during both World Wars in the twentieth century. These powers were conferred with great misgiving and, in the sober light of retrospect after the emergency had passed, were often found to have been cruelly and unnecessarily exercised. But the necessity of draconian powers in moments of national crisis is recognised in our constitutional history. Article 15 of the Convention, when it speaks of “war or other public emergency threatening the life of the nation”, accurately states the conditions in which such legislation has previously been thought necessary.

90. Until the Human Rights Act 1998, the question of whether the threat to the nation was sufficient to justify suspension of habeas corpus or the introduction of powers of detention could not have been the subject of judicial decision. There could be no basis for questioning an Act of Parliament by court proceedings. Under the 1998 Act, the courts still cannot say that an Act of Parliament is invalid. But they can declare that it is incompatible with the human rights of persons in this country. Parliament may then choose whether to maintain the law or not. The declaration of the court enables Parliament to choose with full knowledge that the law does not accord with our constitutional traditions.

[...]

**LORD SCOTT OF FOSCOTE**

My Lords,

140. I gratefully adopt my noble and learned friend Lord Bingham of Cornhill’s description of the factual and statutory background to these appeals and his exposition of the relevant authorities. I am in complete agreement with the conclusions he has reached and wish to add only a few observations of my own.

*The issue*

141. The issue in these appeals is not whether the indefinite executive detention of these appellants under section 23 of the Anti-terrorism, Crime and Security Act 2001 (“the 2001 Act”) is lawful. The merits of the case against each appellant allegedly justifying his detention has not been argued in these proceedings. That issue is for another day and other proceedings and may well come before your Lordships in due course. It is possible that in those proceedings it will be held in relation to one or some or all of the appellants that his or their

detention was not justified and was therefore unlawful. But that issue is not before your Lordships now.

142. It has not been suggested, nor could it be suggested, that the 2001 Act is otherwise than an effective enactment made by a sovereign legislature. It was passed by both Houses of Parliament and received the Royal Assent. Whether the terms of the 2001 Act are consistent with the terms of the European Convention on Human Rights (“the ECHR”) is, so far as the courts of this country are concerned, relevant only to the question whether a declaration of incompatibility under section 4 of the Human Rights Act 1998 should be made. The making of such a declaration will not, however, affect in the least the validity under domestic law of the impugned statutory provision. The import of such a declaration is political not legal.

143. So what is the point of these proceedings and these appeals, with nine of your Lordships sitting in judgment, with intervention from the National Council of Civil Liberties and from Amnesty International and with avid attention from the media? An answer might be that the object of the proceedings is to obtain a court order quashing the Human Rights Act 1998 (Designated Derogation) Order 2001 (“the Order”), whereby the United Kingdom, purporting to act in pursuance of article 15 of the ECHR, announced its intention to derogate from article 5(1) of the ECHR by enacting Part 4 of the 2001 Act. The Special Immigration Appeals Commission (“SIAC”) did quash the Order and made a declaration of incompatibility of Part 4 with the ECHR. The Court of Appeal disagreed. It set aside the quashing of the Order and the declaration of incompatibility. Your Lordships are asked to reinstate the quashing order and the declaration of incompatibility.

144. The effect, my Lords, of all this on the lawfulness under domestic law of the incarceration of the appellants is nil. A challenge to the lawfulness of their incarceration requires a challenge to be made to the exercise by the Home Secretary of the statutory powers conferred on him by section 23 of the 2001 Act. That challenge is not made in these proceedings. The SIAC judgment (delivered by Collins J), and your Lordships’ opinions if these appeals succeed, may show that the enactment of Part 4 of the 2001 Act represented a breach of the United Kingdom’s treaty obligations under the ECHR but will not show that the detention of the appellants is unlawful under domestic law. The ECHR is not part of domestic law except to the extent that it has become so under the 1998 Act. The 1998 Act did not entrench the articles of the ECHR so as to bar Parliament from subsequently enacting legislation inconsistent with those articles. Parliament can, if it wishes to do so, enact such legislation. The courts, whose duty it is to construe and apply Parliamentary enactments, will not readily assume that Parliament has intended the inconsistency. But if the statutory language is clear, and *a fortiori* if, as here, Parliament has expressed its intention to enact a provision inconsistent with the ECHR article in question, the courts must apply and give effect to the statutory language notwithstanding the inconsistency. The statutory provision may represent a breach by the United Kingdom of its treaty obligations under the ECHR but will nonetheless constitute valid and enforceable legislation. The 1998 Act did not, and could not, deprive Parliament of its power to legislate inconsistently with the ECHR.

145. The normal and proper function of the courts of this country is to adjudicate on the rights and liabilities under domestic law of citizens (or of institutions with legal personality) or to adjudicate on the validity of executive actions or omissions that may affect those rights and liabilities. It is not, normally, the function of the courts to entertain proceedings the purpose of which is to obtain a ruling as to whether an Act of Parliament is compatible with an international treaty obligation entered into by the executive. The executive cannot make laws for the United Kingdom otherwise than pursuant to and within the constraints imposed by an enabling Act of Parliament. The executive has extensive and varied prerogative powers that it can exercise in the name of the Crown but none that permit lawmaking. In being asked, therefore, to perform the function to which I have referred, the courts are, it seems to me,

being asked to perform a function the consequences of which will be essentially political in character rather than legal. A ruling that an Act of Parliament is incompatible with the ECHR does not detract from the validity of the Act. It does not relieve citizens from the burdens imposed by the Act. It provides, of course, ammunition to those who disapprove of the Act and desire to agitate for its amendment or repeal. This is not a function that the courts have sought for themselves. It is a function that has been thrust on the courts by the 1998 Act.

[...]

### **BARONESS HALE OF RICHMOND**

My Lords,

219. I have read with admiration and complete agreement the opinions of my noble and learned friends Lord Bingham of Cornhill, Lord Nicholls of Birkenhead, Lord Hope of Craighead, Lord Scott of Foscote and Lord Rodger of Earlsferry. They have said everything that could possibly be said. I have nothing original to add. But this is the most important case to come before the House since I have been a member. Perhaps the most helpful thing that I can do is to provide a simple summary of the principles governing what we are doing and why we are doing it.

220. We do not have power in these proceedings to order that the detainees be released. This is not a challenge to the individual decisions to detain them. That may come before us in future. It is in that context that the issue of the admissibility of evidence which may have been obtained by the use of torture abroad could arise. But that issue is not before us at present. Before us is a challenge to the validity of the law under which the detainees are detained. That law is contained in an Act of Parliament, the Anti-terrorism, Crime and Security Act 2001. The Human Rights Act 1998 is careful to preserve the sovereignty of Parliament. The courts cannot strike down the laws which the Queen in Parliament has passed. However, if the court is satisfied that a provision in an Act of Parliament is incompatible with a Convention right, it may make a declaration of that incompatibility (under section 4 of the 1998 Act). This does not invalidate the provision or anything done under it. But Government and Parliament then have to decide what action to take to remedy the matter.

221. The Convention right in question here is the right under article 5(1): “Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases .. .”.

222. There are then listed six possible reasons for depriving a person of his liberty, none of which applies here. These people are not detained under article 5(1)(f) “with a view to deportation or extradition” because they cannot be deported and no other country has asked for their extradition. They are being detained on suspicion of being international terrorists, a reason which does not feature in article 5. It does not feature because neither the common law, from which so much of the European Convention is derived, nor international human rights law allows indefinite detention at the behest of the executive, however well-intentioned. It is not for the executive to decide who should be locked up for any length of time, let alone indefinitely. Only the courts can do that and, except as a preliminary step before trial, only after the grounds for detaining someone have been proved. Executive detention is the antithesis of the right to liberty and security of person.

223. Yet that is what the 2001 Act allows. The Home Secretary may issue a certificate (under section 21) if he reasonably (a) believes that a person’s presence here is a risk to national security, and (b) suspects that he is a terrorist. A terrorist is someone who takes part in acts of international terrorism, belongs to an international terrorist group, or merely supports or assists such a group. These are all likely to be criminal offences under the Terrorism Act 2000 or other legislation. But a person so certified can be detained indefinitely (under section 23) without being charged with or tried for any criminal offence (indeed one of the detainees

has been tried and acquitted of such an offence). There are safeguards, as the Attorney General has rightly pointed out, greater than under any earlier internment powers. Belmarsh is not the British Guantanamo Bay. Their cases must be reviewed by the Special Immigration Appeals Commission (SIAC). SIAC can see all the material which was available to the Home Secretary. But much of this is 'closed' so that the detainee and his lawyers cannot see it. Instead there are 'special advocates' who can see it, cross-examine witnesses, and make representation to SIAC about it, and may even persuade SIAC that some of the material should be disclosed to the detainee. But they cannot discuss it with or take instructions from the detainee, so they do not know whether he might have an answer to it. The detainee does not know a good deal of the case against him. He is not even interviewed by the authorities so that he can attempt to give some account of himself, (although that might be rather limited if they cannot tell him what they have against him). SIAC does know the case against him, but all it can do is decide whether the Home Secretary's belief and suspicion were in the circumstances reasonable. SIAC does not decide whether the detainee actually is an international terrorist as defined in the Act, merely whether the Home Secretary reasonably suspects that he is. Suspicion is an even lower hurdle than belief: belief involves thinking that something *is* true; suspicion involves thinking that something *may be* true. It is not surprising that, of the 16 who have been detained under section 23 so far, only one has had his certificate cancelled by SIAC. Another has had his certificate discharged by the Home Secretary. Two others have left for other countries. For the rest there is no end in sight and no clear idea of what they might be able to do to secure their release. One has been transferred to Broadmoor (we have not been told the legal basis for this) and another has been granted bail by SIAC on very strict conditions of house arrest because of his mental condition. If we have any imagination at all, this should come as little surprise. We have always taken it for granted in this country that we cannot be locked up indefinitely without trial or explanation.

224. Article 5 applies to 'everyone'. States who are parties to the European Convention are required by article 1 to secure the rights and freedoms defined in the Convention to 'everyone within their jurisdiction'. This includes everyone physically present within their territory. So it was necessary for the United Kingdom to depart from its normal obligations under the Convention in order to enact this legislation. Departure is permitted under article 15: "In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under the Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law."

225. The rights defined in the Convention have become rights in United Kingdom law by virtue of the Human Rights Act; but section 1(2) provides that the rights defined in the Convention articles shall have effect subject to any 'designated derogation'. This means a derogation designated in an order made by the Secretary of State under section 14, in this case the Human Rights Act 1998 (Designated Derogation) Order 2001. Such an order would not be within his powers if it provided for a derogation which was not allowed by the Convention. Section 30(2) and (5) of the 2001 Act allow the detainees to challenge this derogation from their article 5(1) rights in proceedings before SIAC and in an appeal from SIAC's decision. Thus it is that we have power to consider the validity of the Derogation Order made by the Secretary of State and to quash it if it is invalid. If the Derogation Order is invalid, it follows that detention powers under the 2001 Act are incompatible with the Convention rights as defined in the Human Rights Act and that we have power to declare it so. It will then be for Parliament to decide what to do about it.

226. The courts' power to rule on the validity of the derogation is another of the safeguards enacted by Parliament in this carefully constructed package. It would be meaningless if we could only rubber-stamp what the Home Secretary and Parliament have done. But any

sensible court, like any sensible person, recognises the limits of its expertise. Assessing the strength of a general threat to the life of the nation is, or should be, within the expertise of the Government and its advisers. They may, as recent events have shown, not always get it right. But courts too do not always get things right. It would be very surprising if the courts were better able to make that sort of judgment than the Government. Protecting the life of the nation is one of the first tasks of a Government in a world of nation states. That does not mean that the courts could never intervene. Unwarranted declarations of emergency are a familiar tool of tyranny. If a Government were to declare a public emergency where patently there was no such thing, it would be the duty of the court to say so. But we are here considering the immediate aftermath of the unforgettable events of 11 September 2001. The attacks launched on the United States on that date were clearly intended to threaten the life of that nation. SIAC were satisfied that the open and closed material before them justified the conclusion that there was also a public emergency threatening the life of this nation. I, for one, would not feel qualified or even inclined to disagree.

227. But what is then done to meet the emergency must be no more than “is strictly required by the exigencies of the situation”. The Government wished to solve a problem which had three components: (1) it suspected certain people living here of being international terrorists – in the very broad definition given to that term by the Act; but (2) either it could not or it did not wish to prove this beyond reasonable doubt by evidence admissible in a court of law; and (3) it could not solve the problem by deporting them, either for practical or for legal reasons.

228. The Government knew about certain foreign nationals presenting this problem, because they were identified during the usual immigration appeals process. But there is absolutely no reason to think that the problem applies only to foreigners. Quite the reverse. There is every reason to think that there are British nationals living here who are international terrorists within the meaning of the Act; who cannot be shown to be such in a court of law; and who cannot be deported to another country because they have every right to be here. Yet the Government does not think that it is necessary to lock them up. Indeed, it has publicly stated that locking up nationals is a Draconian step which could not at present be justified. But it has provided us with no real explanation of why it is necessary to lock up one group of people sharing exactly the same characteristics as another group which it does not think necessary to lock up.

229. The Attorney General’s arguments were mainly directed to the entirely different question of whether it is justifiable in international law to treat foreigners differently from nationals. The unsurprising answer is that some differences in treatment are indeed allowed. Foreigners do not have to be given the same rights to participate in the politics and government of the country as have citizens (see article 16 of the Convention). Nor do they have to be given the same rights to come or to stay here; if they are here, they may be refused entry or deported (and detained for that purpose under article 5(1)(f)). But while they are here they have the same human rights as everyone else. This includes not being forcibly removed to a place where they are liable to suffer torture or other severe ill-treatment contrary to article 3 of the Convention. It also includes not being locked up except in the circumstances allowed under article 5.

230. The Attorney General did argue that it would have been discriminatory to lock up the nationals as well as the foreigners, because the foreigners are free to leave this country if they can and want to do so, but nationals have no other country which has an obligation to receive them. It is correct that we have no power to force our nationals to go, unless some other country wishes to extradite them. But if it is necessary to lock anyone up in a ‘prison with three walls’, the reality is that it will depend upon the personal circumstances of each individual whether he has in fact somewhere else to go. Some nationals may, for example, have dual nationality or friends in foreign countries which are happy to receive them. But the

very fact that it is a prison with only three walls also casts doubt upon whether it is “strictly required by the exigencies of the situation”. What sense does it make to consider a person such a threat to the life of the nation that he must be locked up without trial, but allow him to leave, as has happened, for France where he was released almost immediately?

231. The conclusion has to be that it is not necessary to lock up the nationals. Other ways must have been found to contain the threat which they present. And if it is not necessary to lock up the nationals it cannot be necessary to lock up the foreigners. It is not strictly required by the exigencies of the situation.

232. It is also inconsistent with our other obligations under international law from which there has been no derogation, principally article 14 of the European Convention. This states: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

233. This has five components, some of which overlap: (i) people belonging to a particular group or status (ii) must not be singled out for less favourable treatment (iii) from that given to other people who are in the same situation (iv) in relation to the enjoyment of their Convention rights (v) unless there is an objective justification for the difference in treatment.

234. Article 14 would make it unlawful to single out foreign nationals for less favourable treatment in respect of their article 5 rights whether or not the derogation from those rights was “strictly required by the exigencies of the situation”. It is wrong to single them out for detention without trial if detention without trial is *not* strictly required to meet the exigencies of the situation. It is also wrong to single them out for detention without trial if detention without trial *is* strictly required, if there are other people who are in the same situation and there is no objective justification for the difference in treatment. Like cases must be treated alike.

235. Are foreigners and nationals alike for this purpose? The Attorney General argued that they are not. The foreigners have no right to be here and we would expel them if we could. We only have to allow them to stay to protect them from an even worse invasion of their human rights. Hence, he argued, the true comparison is not with suspected international terrorists who are British nationals but with foreign suspected international terrorists who can be deported. This cannot be right. The foreigners who can be deported are not like the foreigners who cannot. These foreigners are only being detained because they cannot be deported. They are just like a British national who cannot be deported. The relevant circumstances making the two cases alike for this purpose are the same three which constitute the problem: a suspected international terrorist, who for a variety of reasons cannot be successfully prosecuted, and who for a variety of reasons cannot be deported or expelled.

236. Even then, the difference in treatment might have an objective justification. But to do so it must serve a legitimate aim and be proportionate to that aim. Once again, the fact that it is sometimes permissible to treat foreigners differently does not mean that every difference in treatment serves a legitimate aim. If the situation really is so serious, and the threat so severe, that people may be detained indefinitely without trial, what possible legitimate aim could be served by only having power to lock up some of the people who present that threat? This is even more so, of course, if the necessity to lock people up in this way has not been shown.

237. Democracy values each person equally. In most respects, this means that the will of the majority must prevail. But valuing each person equally also means that the will of the majority cannot prevail if it is inconsistent with the equal rights of minorities. As Thomas Jefferson said in his inaugural address: “Though the will of the majority is in all cases to prevail, that will to be rightful must be reasonable . . . The minority possess their equal rights, which equal law must protect, and to violate would be oppression.”

238. No one has the right to be an international terrorist. But substitute “black”, “disabled”, “female”, “gay”, or any other similar adjective for “foreign” before “suspected international terrorist” and ask whether it would be justifiable to take power to lock up that group but not the “white”, “ablebodied”, “male” or “straight” suspected international terrorists. The answer is clear.

239. I would therefore allow the appeals, quash the derogation order, and declare section 23 of the 2001 Act incompatible with the right to liberty in article 5(1) of the European Convention.

[...]