

## W201 The Individual and the State

### Suggested answers to questions on civil liberties and human rights

#### Question 1

1. 'Unconstitutional' in the UK means something different from 'illegal'.

*The Home Secretary's power is legal as it is authorised by parliament. To determine if it is unconstitutional one is hampered by the absence of a written constitution. Instead one has to look at a collection of constitutional sources which include statute convention common law constitutional principles and the writings of academics and lawyers.*

*An argument can be made against the new power as unconstitutional because*

*a) it offends the principle of the separation of powers (the executive would be carrying out a judicial function)*

*b) it offends Article 6 ECHR which provides for a fair trial including an 'independent and impartial tribunal' (this applies to sentence as well as the trial itself)*

*c) cases such as **T v UK** and **V v UK** 1999 ECHR and **R (Anderson) v Secretary of State for the Home Department** 2002 Lords make clear that Art 6.1 applies to the Home Secretary (where a breach was found because he was involved in setting the tariff for children and an adult convicted of murder).*

*d) it offends the rule of law - Lord Bingham in **R v Secretary of State for the Home Department ex parte Stafford** (see study note on the role of the Home Secretary in sentencing at page 3) where the Home Secretary refused to release a mandatory life sentence prisoner after the expiry of his tariff - indicated that "The imposition of what was in effect a substantial term of imprisonment by the exercise of executive discretion, without trial, lay uneasily with ordinary concepts of the rule of law".*

2. *Judicial review proceedings allow the Home Secretary's exercise of his power to be challenged. Judicial review could **not** be used to challenge the Act itself unless the judges extended the present law. Even under the Human Rights Act there is no power to strike down incompatible legislation. The most a court could do would be to make a declaration of incompatibility.*

*In judicial review proceedings standing must be established by the applicant. Section 31 (3) of the Supreme Court Act 1981 provides that "the court shall not grant leave unless it considers that the applicant has a sufficient interest". This has allowed pressure groups as well as persons directly affected to bring cases.*

*If however an applicant seeks to rely on a Convention right against a public authority under the Human Rights Act 1998 Section 7 of that Act restricts any action to a 'victim'. This would preclude a pressure group from bringing the case but not from making a third party intervention if a victim could be found to initiate the proceedings.*

*3. If you think Parliament should have the last word you are recognising parliamentary sovereignty and the value of democratic legitimacy as the most important principles.*

*If you favour the courts you are identifying with the rule of law and the separation of powers and the fundamental value of personal liberty as the most important.*

*Either view is acceptable as long as you set out and give weight to the opposing view.*

## **Question 2**

*1. This question raises the issue of whether the end justifies the means in a criminal investigation. One of the values which can be associated with the question is 'due process of law' which is defined in Manual 1 as being the situation where it is more important to ensure that someone has a fair trial than to ensure that a criminal is punished. In this case you are being asked whether it is more important that police pre-trial procedures are fair or that the wrongdoer is convicted. The danger if police action is unregulated is that the fundamental value of personal liberty is infringed. The danger if personal liberty and due process are upheld is that the criminal goes scot free. Courts confront this problem on a daily basis and Sections 76 and 78 of the Police and Criminal Evidence Act (PACE) 1984 (see below) are there to help them.*

*2. This involves an analysis of police powers of arrest and detention. Treat them separately.*

### *Arrest*

*The police have power to arrest without warrant on reasonable suspicion that any offence has been committed and that the person arrested is guilty of it. (Section 24 PACE as amended by the Serious Organised Crime and Police Act 2005).*

*The power to arrest is only exercisable if the constable has 'reasonable grounds' to believe it is necessary to make the arrest. Statutory reasons include prompt and effective investigation of the offence or of the conduct of the person arrested and preventing the prosecution for the offence being hindered by the disappearance of the person arrested. This accords with Article 5.1 of the Convention.*

*The arrested person must be informed either immediately or as soon as reasonably practicable afterwards of the reasons for arrest. (Section 28 PACE). This accords with Article 5.2 of the Convention.*

## *Detention*

*The police power to detain before charge for an offence is up to 24 hours. (Section 41 PACE).*

*This can be extended to 36 hours by a superintendent for an indictable offence. (Section 42 PACE).*

*Applications for a further period of detention of 36 hours (up to a maximum of 96 hours) must be made to a court. (Sections 43 and 44 PACE).*

*Article 5.3 of the Convention provides that 'Everyone arrested or detained... shall be brought promptly before a judge...'*

*In this case the period of 40 hours is too long for a superintendent to authorise.*

*Unless application has been made to the court the detention would be illegal.*

*3. There are two provisions in statute which enable an accused to challenge the admissibility of evidence.*

*The first (Section 76 PACE) relates solely to confessions. The court has power to exclude a confession unless the prosecution can prove beyond reasonable doubt that it was not obtained*

*a) by oppression; or*

*b) in consequence of anything said or done likely... to render unreliable any confession...made by him in consequence.*

*In this case the prosecution would have to prove that the allegation of bullying and the length of questioning (40 hours) did not amount to oppression or render the confession unreliable (either ground would be sufficient for exclusion).*

*The second is Section 78 PACE relates to any evidence the court decides is unfair.*

*The court could decide (even if there was no question of oppression or unreliability) that 'the circumstances in which the evidence was obtained' meant that fairness demanded its exclusion. The court can take into account breaches of PACE or the Codes of Practice and a judge would be entitled to have regard to breaches of the Convention.*

*Section 78 is a wider safety net power to exclude **any** evidence considered unfair.*

*Section 76 is a narrower power limited to confessions and limited to 'oppression' and 'unreliability'.*

*The relevant convention right is Article 6 - the right to a fair trial. This has been held to*

*cover the exclusion of a solicitor from a police station when a suspect is being questioned and maltreatment in the obtaining of evidence.*

*The sort of evidence the court might rely on to determine oppression reliability and fairness would be*

- was Mack allowed a solicitor? (Section 58 PACE)*
- was Mack a juvenile or a mentally disordered or handicapped person? (Codes of Practice would apply).*
- was there bullying?*

### **Question 3**

*1. Article 8 Right to privacy.*

*2. Article 10 Freedom of expression.*

*3. Article 8.2 and 10.2 Rights of others.*

*4. Section 12(4) of the Human Rights Act attempts to resolve conflict by providing that courts should have 'particular regard' to freedom of expression. It had been thought that this gave Article 10 special status but in the case of **Douglas v Hello** the Court of Appeal indicated that an unjustifiable invasion of privacy was entitled to no less regard than the right to publish and the wording of Section 12(4) did not affect that.*

*5. This is the same as asking - does the Convention have horizontal effect? (Where neither party is a 'public authority').*

*Lord Irvine expressed the view before the Act took effect that the Convention would be used in developing the common law in cases between individuals.*

*The Court of Appeal in **Douglas v Hello** 2001 have confirmed that Article 10 and Article 8 could apply between private litigants.*

### **Question 4**

*Convention rights*

*Herbet can rely on Article 9 (Freedom of thought, conscience and religion) and Article 10 (Freedom of Expression).*

*Both Articles are subject to restrictions in Article 9.2 and 10.2 including "the protection or morals". Do these restrictions afford a defence?*

*Herbet will argue that the rights in these two Articles should be construed broadly and the restrictions narrowly on the basis that the Obscene Publications Act must be shown to be proportionate.*

*The state will argue that there is a wide margin of appreciation allowed in matters of morals **Handyside v UK 1976 ECHR**. Significantly this case demonstrates how difficult it is to mount a successful challenge based on the Convention to English obscenity laws.*

## **Question 5**

*1. Police powers to ban or control public meetings include:*

*a) Bye laws and local statutes (eg in Trafalgar Square)*

*b) Common law powers to prevent a breach of the peace. If police fear a breach of the peace they could ask the speaker to disband the meeting and if he refused arrest him. **Duncan v Jones 1936** supports such police action. The politician would rely on **Beatty v Gillbanks 1882** (No offence by Salvationists when an opposing meeting threatened unlawful acts).*

*c) If the meeting were on a highway the police could arrest for obstruction of the highway if they could show it was unreasonable. **Highways Act 1980 Section 137**.*

*d) There is a statutory power for a local council to ban a trespassory assembly at the request of a chief police officer under Section 14A of the Public Order Act 1986. For this to apply the police officer would have to believe the meeting would be trespassory (ie on private land without permission or represent an unreasonable use of the public highway) and might result in serious disruption to community life or damage to land and buildings.*

*e) The police can arrest for individual public order offences under the Public Order Act 1986 eg*

- riot* *12 or more persons*
- violent disorder* *3 or more persons*
- affray* *2 or more persons*
- incitement to racial hatred*
- threatening behaviour likely to cause fear of personal violence*
- threatening behaviour likely to cause harassment alarm or distress*

*depending on the numbers present and the degree of violence.*

*If you think that the police should always exercise their powers whenever the law is broken (without exercising discretion) then you are promoting the values of legal certainty and equality.*

*If you feel that the police should use their judgment and common sense you are favouring allowing a degree of executive discretion for the police.*

2. *There is an offence of using threatening abusive or insulting words or behaviour if racial hatred is likely to be stirred up thereby Section 18 Public Order Act 1986. This requires the Attorney General's consent for a prosecution.*

3. *The relevant Convention rights are:*

- *Article 10 Freedom of expression*
- *Article 11 Freedom of peaceful assembly*

*both rights are subject to limitations which include*

- *public safety*
- *prevention of disorder or crime*
- *the rights of others*

*the government would seek to justify the public order legislation principally on the ground of 'prevention of disorder or crime'. Commentators have suggested that the threatening behaviour offence based on harassment alarm or distress (and not violence) is very wide and may go beyond the Conventions limitations if construed in accordance with the doctrine of proportionality. (ie you can stop people expressing themselves in a violent demonstration but it is a disproportionate response to arrest people who are exercising their right to freedom of expression if they only cause distress).*