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# ‘Economic Well-being’ in National Security Law and Practice

Paul F. Scott  

What does it mean? The mind boggles. It has gone way beyond the Maxwell Fyfe directive. Is MI5 to monitor speculators against sterling? Is it to place the gnomes of Zurich under surveillance? Will Smiley be sent off to the souks of Cairo to make sure that another “Hero from Zero” does not grab hold of Harrods? Is Bulldog Drummond to be sent to the Mexican fastness of Sir James Goldsmith to make sure he is not cornering the market on salmonella-free eggs? What does it mean?<sup>1</sup>

## I. INTRODUCTION

The modern body of national security law in the United Kingdom has always included ‘economic well-being’ (‘EWB’) as a ground upon which the various security bodies may act, and in pursuit of which they may take intrusive action. The concept remains however sufficiently obscure that the House of Lords Constitution Committee has recently suggested that the Intelligence and Security Committee of Parliament assess the concept and its role within the broad corpus of national security law,<sup>2</sup> effectively

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<sup>1</sup> Jonathan Aitken MP, debate on the Security Service Bill: HC Deb 15 December 1988, vol 143 col 1132. ‘Gnomes of Zurich’ is a phrase, coined by Labour MP George Brown, to describe Swiss bankers. ‘Smiley’ is the fictional spy in the novels of John Le Carre. The ‘Hero from Zero’ is Mohamed al-Fayed, the Egyptian businessman who bought Harrods in the mid-1980s. ‘Bulldog Drummond’, the protagonist of the novels of Herman Cyril McNeile (‘Sapper’), is a war veteran who seeks out adventure to overcome the boredom of civilian life. James Goldsmith was an Anglo-French businessman who had retired to Mexico in the late 1980s but was later a prominent figure in the Eurosceptic movement and the founder of the Referendum Party.

<sup>2</sup> House of Lords Constitution Committee, *Covert Human Intelligence Sources (Criminal Conduct) Bill* (HL 2019-21, 174), [9].

asking it to repeat an exercise that it performed early in the modern project of rationalising such law, though this time – one would hope – with greater transparency.<sup>3</sup>

This paper offers the first sustained analysis of the concept of 'economic well-being'. It considers the relevant domestic and – because the language derives directly from the European Convention on Human Rights – international material, and what is in the public domain about the work of the security and intelligence agencies, as well as some of the ways in which national security might have or has been invoked in relation to broadly 'economic' matters. The lesson of this exercise is that economic well-being is an expansive concept, and so the limitations which exist upon (some of) its domestic instantiations are vital to providing it with a shape and a direction which it would otherwise lack. The second half of the paper turns to consider the matter from a normative perspective, assessing both the fears that have been expressed as to the consequences which flow from the inclusion of this language – fears which were perhaps, in the past at least, justified – and the possibility that the concept might be redeemed within the modern national security constitution. The article's argument is that, as far as one can tell from the publicly available information, the limitations which have in most cases been placed upon it to prevent it from undermining the democratic process operate simultaneously to ensure it cannot make a useful and distinct contribution to the work of the security and intelligence agencies. If, therefore, the formulation is to remain within the corpus of national security law then, a direct justification for its continued presence there, of the sort which has not been offered in the last decade of reform of national security law, is required.

## II. ECONOMIC WELL-BEING IN NATIONAL SECURITY LAW

Economic well-being (EWB) is a legal concept by virtue of its inclusion in Article 8 of the ECHR and a range of UK legislation. In this section I consider its shifting uses, first under the ECHR and then in domestic law. What is crucial to note at this stage is that EWB has had, as a matter of law, one of two different statuses within the broader body of national security law. In one – the status it has under the Convention – it is an independent good, a legitimate aim in pursuit of which a limitation of the right to a private and family life might take place provided that the extent of that interference is proportionate to the benefit that arises from it. EWB in that form – separate from and additional to national security etc – does exist in domestic law, but rarely. It must be

<sup>3</sup> In its first annual report the ISC stated that it had taken evidence on the work of the agencies in the UK's economic well-being, and noted that '[t]he whole area is one where there is a need for clear policy guidance on the practical uses to which intelligence may be put': Intelligence and Security Committee, *Annual Report 1995*, Cm 3198 (1996), [31]. This was followed by an unpublished special report to the Prime Minister on the topic in November 1996, the conclusion of which was summarised as being that 'intelligence work in support of economic well-being is an important, valuable and, on the evidence we have taken, properly conducted area of the Agencies' activities': ISC, *Annual Report 1996*, Cm 3574 (1997), [34].

distinguished from those contexts, now more common in domestic law, in which EWB is treated instead as a facet of national security. The two bring with them separate legal and normative issues, and it is necessary to keep the distinction in mind as we consider the different appearances of the concept in the relevant legal orders. A second distinction which exists, within domestic law, is that between defending EWB against threats on one hand and, on the other, actively promoting it. These distinctions are of particular significance given that, as we shall see, the interpretation of EWB in the case law of the Court of Human Rights is exceptionally generous.

### A. Economic Well-being and the ECHR

It is often noted that the term 'national security' has never been defined in statute, and so – it has been claimed – that (particularly for the purposes of the ECHR) it is impermissibly vague.<sup>4</sup> Not only has this argument never found success, but the point loses much of its significance in light of the fact that the term has been the subject of important decisions by the highest courts, most notably in *Rehman*.<sup>5</sup> From that judgment, an understanding of national security as a legal concept can be reconstructed, albeit that the possibility remains that the government acts upon a definition which transcends, without contradicting, anything said therein.<sup>6</sup> With 'economic well-being' the matter is much more vital: not only is there no authoritative consideration of it by the appeal courts, but there has been little or no treatment of the point at all by courts at any level,<sup>7</sup> and the Court of Human Rights has rarely considered the point at length. And yet it is a term perhaps even more lacking in precision than is 'national security', rendering the task of predicting the sorts of circumstances in which the security and intelligence agencies ('SIAs') might act, and might make use of their intrusive powers, a difficult one.

The language of 'economic well-being' makes its only appearance in the text of Article 8 of the Convention: it does not feature in any of the other qualified rights.<sup>8</sup> The historical record shows it to have been originally inserted into the Convention at the insistence of the United Kingdom delegation. AWB Simpson suggests that the

<sup>4</sup> See the argument in *Esbestey v United Kingdom*, application 21482/93 (2 April 1993).

<sup>5</sup> *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153.

<sup>6</sup> See, for example, the discussion of the understanding of 'national security' endorsed in *Rehman* in Paul F Scott, *The National Security Constitution* (Hart Publishing 2018), 281–6.

<sup>7</sup> This was considered in evidence on the draft Investigatory Powers Bill. See for example the comments of Lord Carlile: 'How clear are the criteria of safeguarding the economic well-being of the UK? They are not, if judged by the canons of statutory interpretation. However, defining them would be extremely difficult ... Possibly a non-exhaustive list of examples might be produced in a statute: I believe this would provide helpful guidance.' Lord Carlile of Berriew, *Written Evidence on the Draft Investigatory Powers Bill*, IPB0017, [17]–[18].

<sup>8</sup> '[A]lthough logically there is no good reason why this might not be applicable in the case of freedom of expression and freedom of association.' William A Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015) 405.

motive was the belief of the Chancellor, Stafford Cripps, that the Convention as drafted was incompatible with 'economic planning' and that (in 'what was surely a desperate and wholly implausible attempt by some ingenious mind to make sense of Cripps's claim') it was argued that Article 8(1) was the source of the incompatibility. The Foreign Secretary declined to act on this point ('I cannot see the grounds on which Article 8 is objectionable. It appears to have nothing to do with economic planning, and I should only look foolish if I tried to oppose it on those grounds') but the British delegation nevertheless proposed an amendment to have the EWB formulation included.<sup>9</sup> Rather than deploy Cripp's objection, the delegation noted instead – the *travaux préparatoires* show – that '[i]n its present form this Article does not provide either for the rules under which the party to a civil action may be compelled to give disclosure of his documents to the other party or for the powers of inspection (for example the opening of letters which are suspected of attempting to export currency in breach of Exchange Control Regulations) which may be necessary in order to safeguard the economic well-being of the country':

H.M. Government therefore propose an amendment to the paragraph 2 of this Article to read: '... in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'<sup>10</sup>

This language proposed made it into the draft of the Convention sent to the Consultative Assembly a few days later and – the Assembly having proposed no amendments to Article 8 – into the Convention as it was agreed.<sup>11</sup>

Though the initial justification of the language's inclusion was therefore partly based upon the fairly particular example of currency controls – which would be echoed by the domestic UK debates discussed below – the (scant) case law of the Court of Human Rights demonstrates clearly that economic well-being might be understood much more broadly than that example suggests. So, for example, *Berrehab v The Netherlands* was an application arising out of Dutch immigration policy, with the applicant claiming that his deportation was a violation of his Article 8 rights.<sup>12</sup> One question which arose was whether the relevant rules pursued a legitimate aim according to which an interference with the right to private and family life might be justified. The Netherlands government argued that it did pursue such an aim: 'Mr. Berrehab's expulsion was necessary in the interests of public order, and ... a balance had been very substantially achieved between the various interests involved.'<sup>13</sup> Though the Court agreed with the

<sup>9</sup> For background, see AW Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford University Press 2004), 726–32.

<sup>10</sup> European Convention on Human Rights, *Travaux Préparatoires to the Convention*, DH 56 (12), citing Doc. CM 1 (50) 6, page 27 (emphasis in original).

<sup>11</sup> European Convention on Human Rights, *Travaux Préparatoires to the Convention*, DH 56 (12), [14]–[16].

<sup>12</sup> *Berrehab v The Netherlands* (1988) 11 EHRR 322.

<sup>13</sup> (1988) 11 EHRR 322, [25].

Commission that a legitimate aim was indeed being pursued by the relevant immigration restrictions, it disagreed with both the respondent and the Commission as to what that aim was:

The Court has reached the same conclusion. It points out, however, that the legitimate aim pursued was the preservation of the country's economic well-being within the meaning of paragraph 2 of Article 8 rather than the prevention of disorder: the Government were in fact concerned, because of the population density, to regulate the labour market.<sup>14</sup>

And in *Hatton v United Kingdom*<sup>15</sup> – an application alleging violations of the Convention in the context of the government's policy on the operation of night flights at Heathrow Airport – the question of economic well-being arose once more. The UK government justified the policy in question with reference 'not only to the economic interests of the operators of airlines and other enterprises as well as their clients, but also, and above all, to the economic interests of the country as a whole.'<sup>16</sup> This justification was accepted by the Court, which went on to hold that a fair balance had been struck between the legitimate aim being pursued and the interference which had taken place with the applicant's rights.<sup>17</sup>

In the specific context of investigatory powers, even less attention has been paid to the term, though it is – as we shall see below – ever-present in the relevant statutes. In *Campbell Christie v United Kingdom* the applicant – the General Secretary of the Scottish Trades Union Congress – had become aware, via a television documentary, of an allegation that communications he had been receiving from Eastern European trade unions had been intercepted by GCHQ without legal authority.<sup>18</sup> By this point in time, both the Interception of Communications Act 1985 and the Security Service Act 1989 had been enacted. A complaint to the Interception of Communication Tribunal resulted in the verdict that there had been no violation of the 1985 Act; a parallel complaint to the Security Service Tribunal resulted in the usual response that no determination had been made in his favour. Christie's application to the Commission alleged a breach of Article 8 on the basis that the interference with his rights was not in accordance with the law, *inter alia* because 'the function of the Security Service to safeguard the economic well-being of the United Kingdom is undefined'. The Commission rejected the claim that the lack of definition prevented the interference from being in accordance with the law, as it had also rejected similar claims relating to the statutory formulation 'national security'. It noted that the Interception of Communication

<sup>14</sup> (1988) 11 EHRR 322, [26]. In the event, however, the Court held that the government had failed to strike an appropriate balance between the aim it was pursuing and the applicant's Article 8 rights.

<sup>15</sup> *Hatton v United Kingdom* [2003] 37 EHRR 611.

<sup>16</sup> [2003] 37 EHRR 611, [121].

<sup>17</sup> [2003] 37 EHRR 611, [129].

<sup>18</sup> Of the documentary, the Interception of Communication Commissioner said that 'there is not the slightest truth in the suggestion ... that the law is being "bent" by GCHQ, and that British businessmen are being "ambushed" as a matter of routine.' Interception of Communication Commissioner, *Report of the Commissioner for 1991*, Cm 1942 (1992) [13].

Commissioner had outlined his understanding of 'national security' and that the criterion of EWB is, in both the 1985 and 1989 Acts, limited to the acts and intentions of those outside of the British Islands,<sup>19</sup> as though that fact somehow worked to counteract the imprecision of the formulation itself. For this reason, amongst others, the application was held inadmissible, and the question of what EWB may or may not mean does not appear to have been revisited in any of the more recent case law on secret surveillance, whether relating to the United Kingdom or to other parties to the Convention.

Though the formulation is most prominent within the modern body of national security law – discussed in the next section – this broad understanding of economic well-being is reflected in some of the other uses of the formulation on the domestic statute books. The Immigration Act 2014, for example, inserted into the Nationality, Immigration and Asylum Act 2002 a series of provisions seeking to influence how questions about the proportionality of interferences with a person's Article 8 rights caused by decisions under the Immigration Acts were decided by the courts. Courts, it provided, were required, in deciding such questions, to take into account certain considerations. One was that '[i]t is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English (a) are less of a burden on taxpayers, and (b) are better able to integrate into society'.<sup>20</sup> Another was that '[i]t is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons (a) are not a burden on taxpayers, and (b) are better able to integrate into society'.<sup>21</sup> Economic well-being, it seems clear from these provisions, is understood as a broad, general good, and would seem to denote nothing more specific than the financial health of the state, understood in the crudest of terms, whereby income must be maximised and outgoings minimised. On this view, anything which resulted in higher tax take would contribute to the United Kingdom's economic well-being; anything which resulted in lower spending would be similarly so.

The effect, therefore, is that though we know little about the specific boundaries of the (legal) concept of EWB, we can be sure that the concept is much broader than the reasons offered for its initial inclusion in the Convention might have been taken to suggest. Though this lack of certainty is unfortunate, the phenomenon is well-known to national security law, in which many of the central concepts lack precise definition in legislation or exposition in case law. Though it must logically be the case that there is some sort of formalised understanding (either at the level of the state as a whole or perhaps differing as between the various security and intelligence agencies) of what it

19 *Campbell Christie v United Kingdom*, application 21482/93 (27 June 1994).

20 Nationality, Immigration and Asylum Act 2002, s 117B(2).

21 NIAA 2002, s 117B(3).

means to act in the interests of economic well-being, that understanding is (or those understandings are) not available to external observers. Moreover, any such understanding(s) must have been put together on the same somewhat conjectural basis as must those of external observers, there being little in the case law of the Strasbourg Court to guide the task with any precision. Except, of course, where an external observer seeks to reconstruct the legal concept he or she does not, in doing so, effectively demarcate the boundaries of one aspect of the state's surveillance power: an aspect which, history shows (as if logic did not already), is less likely to be challenged than almost any other. The effect is that not only is there no clear or authoritative statement as to the meaning to be given to 'economic well-being' in the context of national security, but what little guidance exist suggests that the phrase is to be taken very literally, meaning something analogous to the general financial health of the state. It is therefore significant that though there is no obstacle in the Convention to it doing so, domestic law does not generally make use of EWB in its full, unalloyed form. Rather, as we shall see in the next section, it subjects it to limits and caveats which have important consequences for how the concept might be translated into national security practice.

## **B. Economic Well-being in Domestic Law**

The concept of 'economic well-being' does not feature explicitly in the Maxwell-Fyfe Directive, by which the Security Service ('MI5') was governed – if that is not too strong a word – for the four and a half decades leading up to the enactment of the Security Service Act 1989 and which predates by a year the coming into force of the ECHR.<sup>22</sup> Instead, the Directive said, the task of the Security Service was 'Defence of the Realm as a whole, from external and internal dangers arising from attempts at espionage or sabotage, or from actions of persons and organisations whether directed from within or without the country, which may be judged to be subversive to the State.'<sup>23</sup> Whether or not the concepts of espionage or sabotage might extend to the economic realm – as opposed to military or political or more limited industrial contexts – the breadth of the third clause, which did not limit the types of 'actions' nor the categories of 'persons' or organisations', was certainly capable of accommodating what might now be understood as threats to the economic well-being of the state. The key question, therefore, was whether the requirement that the acts in question 'may be judged to be subversive to the State' would include those acts which harmed the state's economic well-being. A literal reading of that clause would suggest that was indeed the case.

<sup>22</sup> Nor in its predecessor, the 'Attlee Directive' of 1946, which stated that MI5's role was 'the Defence of the Realm as a whole, from external and internal dangers arising from attempts at espionage and sabotage, or from actions of persons and organisations, whether directed from within or without the country, which may be judged to be subversive of the security of the State.' Quoted in Keith Ewing, Joan Mahoney, and Andrew Moretta, *MI5, the Cold War, and the Rule of Law* (Oxford University Press 2020) 35–7

<sup>23</sup> Quoted in Lord Denning, *Lord Denning's Report*, Cmnd 2152 (1963), [238].



Moreover, recent work has brought to light the existence of a supplementary directive, issued by Rab Butler, which permitted MI5 'from time to time to make enquiries and provide information and reports' to a variety of public authorities 'for the purposes of countering threats of subversive activity and sabotage and for the purposes of preventing the improper disclosure of classified information in the possession of these authorities.' The authorities in question included the Bank of England.<sup>24</sup>

When the Security Service Act 1989 gave MI5 a statutory basis – a response, in part, to the decision of the Court of Human Rights in *Hewitt and Harman*<sup>25</sup> – the Act specified that the Service's function was to be 'the protection of national security and, in particular, its protection against threats from espionage, terrorism and sabotage, from the activities of agents of foreign powers and from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means.'<sup>26</sup> We will return below to the question of whether this definition makes room for threats to economic well-being. Whether or not it does, however, economic concerns were now included explicitly, and packaged separately, with a further provision stating that it was also to be 'the function of the Service to safeguard the economic well-being of the United Kingdom against threats posed by the actions or intentions of persons outside the British Islands.'<sup>27</sup> And so the giving of explicit form to activities and considerations whose capture by the prior rules was, at best, only implicit was accompanied by both an extension and a limitation: an extension in that now mere intentions were captured rather than actions alone; a limitation in that the actions or intentions at issue could no longer be those originating within the state, but only those of persons outside of the British Islands.

The formulation 'economic well-being' was not, however, new to domestic law in 1989. It had been included also in the Interception of Communications Act 1985, which gave a statutory basis to the interception of communication following the decision of the Court of Human Rights in *Malone*.<sup>28</sup> The 1985 Act included as one of the grounds upon which an interception warrant could be granted that the Secretary of State believed it to be necessary for the 'purpose of safeguarding the economic well-being of the United Kingdom.'<sup>29</sup> A warrant could not be necessary on that ground unless 'the information which it is considered necessary to acquire is information relating to the acts or intentions of persons outside the British Islands.' In both statutes, therefore, there is a dual limitation: the geographical one, which is prominent, but also a more subtle one, whereby economic well-being is not to be promoted, but only to be protected against threats. The term was not defined in either Act. Nor has it been defined by any of the subsequent statutes which repeat it.<sup>30</sup> The transposition

<sup>24</sup> Ewing, Mahoney, and Moretta (n 22) 45.

<sup>25</sup> *Hewitt and Harman v United Kingdom* (1991) 14 EHRR 657.

<sup>26</sup> Security Service Act 1989, s 1(2).

<sup>27</sup> SSA 1989, s 1(3).

<sup>28</sup> *Malone v United Kingdom* (1984) 7 EHRR 14.

<sup>29</sup> Interception of Communications Act 1985, s 2(2)(c).

of the phrase into domestic law was, however, anything but uncontroversial. On the day on which the White Paper which resulted in the 1985 Act was published,<sup>31</sup> it was immediately identified as problematic by Gerald Kaufman, who noted its origins in the Convention but wondered whether the transposition into domestic law might lead to its expansion:

Will it be used, for example, for the surveillance of communications by currency dealers as the level of the pound is a matter of economic well-being? Will it be used for the surveillance of international trade union links in connection with, say, the miners' strike? It could be used for partisan political purposes disguised as the national interest.<sup>32</sup>

And in response to a query as to why it was considered necessary to include this 'new' ground, the Home Secretary responded in a way which supports the analysis offered above of the Maxwell-Fyfe Directive: '[t]he economic criteria', he said, 'have not been publicly stated in this way before, but they are not new.'<sup>33</sup> The former Labour Home Secretary Merlyn Rees would, though, at a later stage of proceedings, claim that he had 'never authorised a telephone tap in the interests of the economic well-being of the country, and nor has anyone else as Home Secretary.'<sup>34</sup>

During debates on both the 1985 and 1989 Acts discussion of the phrase centred around a number recurring questions: whether trade unions would be caught by the language (including perhaps, the dealings between Arthur Scargill and Colonel Gaddafi)<sup>35</sup> or whether it might encompass the actions of currency dealers,<sup>36</sup> or 'LSE professors'.<sup>37</sup> Labour's Andrew Bennett noted the significant ideological baggage of the term: 'The difference between our economic well-being and capitalism would, I

30 Intelligence Services Act 1989; Regulation of Investigatory Powers Act 2000; Investigatory Powers Act 2016.

31 Home Office, *The Interception of Communications in the United Kingdom*, Cmnd 9438 (1985).

32 HC Deb 07 February 1985, vol 72 col 1119 (Gerald Kaufman).

33 HC Deb 07 February 1985, vol 72 col 1121.

34 HC Deb 12 March 1985, vol 75 col 180.

35 'There may be times when it is necessary to protect against threats to the well-being of the United Kingdom. For example, I hope the Security Service was on the ball when Mr. Arthur Scargill went to see Mr. Gaddafi to try to get financial assistance for what definitely was an attempt to overthrow parliamentary democracy.' HC Deb 17 January 1989, vol 145 cols 190-1. The Chief Executive of the National Union of Miners, Roger Windsor, visited Libya during the Miners' Strike, where he was filmed embracing Gaddafi, and it was persistently rumoured that the NUM was receiving funds from the Libyan authorities. The matter is discussed by Seamus Milne, who suggests (at 165) that the apparent connection between the NUM and Libya was a 'a provocation on a grand scale' and canvasses allegations that Windsor was himself working for MI5: Seamus Milne, *The Enemy Within: Thatcher's Secret War Against the Miners*, 4 ed, Verso (2014), chs 3 and 4.

36 'I appreciate that the phrase "economic well-being" is covered by the European convention, but how far will that be expanded in the legislation and in the exercise of the powers? Will it be used, for example, for the surveillance of communications by currency dealers as the level of the pound is a matter of economic well-being? Will it be used for the surveillance of international trade union links in connection with, say, the miners' strike? It could be used for partisan political purposes disguised as the national interest.' HC Deb 7 February 1985, vol 72 col 1119 (Gerald Kaufman).

37 HC Deb 15 December 1988, vol 143 col 1132.

imagine, be hotly debated in this Chamber.<sup>38</sup> In debate on the 1985 Act, the Home Secretary had sought to calm some of these fears about what might be the implications of giving the language a domestic legal status, offering assurances about the concept at a general level. Some of these are the same points which emerge directly out of a reading of the statute. The first was that what we would now call the provision's foreign focus – that it related to those outside the British Islands – distinguished it from the ECHR, where no such limitation is found.<sup>39</sup> The second was that 'interception has to be protective', meaning that it 'must be concerned with safeguarding the country's economic well-being, not with promoting it.'<sup>40</sup> Finally, and more substantively, 'the matter must be one of national significance and cannot be of a trivial kind which is peripheral to that well-being ... such as a threat to the supply of a commodity on which our economy is particularly dependent.'<sup>41</sup> In the House of Lords, the Viscount Whitelaw gave a similar gloss:

Domestic developments cannot give rise to interception on the grounds that they might affect the economy. This provision is obviously not aimed at business people or trade unions in this country. We are talking about interception in support of the Government's overseas policy. A major part of overseas policy has to do with protecting our economy. Adverse developments abroad may have a significant impact on the wellbeing of the economy. We cannot exclude situations where intelligence on such matters could and might be vital to the national interest. That is the purpose of that proposal.<sup>42</sup>

Perhaps the closest we came to an official statement of what specific matters might be encompassed by the phrase during the enactment of these statutes (or indeed any of the later enactments *in pari materia*) was the remarks by the Home Secretary during the

<sup>38</sup> HC Deb 17 January 1989 vol 145 cols 211–2 (Andrew F Bennett)

<sup>39</sup> HC Deb 12 March 1985, vol 75 col 159 (Leon Brittan). See also the comments of Andrew Bennett on this point in 1989: 'On Second Reading several Members spoke of the economic well-being of the nation and the half answer we received from the Home Secretary was to the effect that our economic well-being was well defined and was contained in international treaty. I found that puzzling because if representatives of foreign Governments got together to cause a run on the pound or tried to create some other economic problem for us, that would be a legitimate area for the security services to investigate. But if the same people did the same thing in the City of London, it would appear not to be a legitimate area for investigation ...' HC Deb 17 January 1989 vol 145 col 211 (Andrew F Bennett).

<sup>40</sup> HC Deb 12 March 1985, vol 75 col 159 (Leon Brittan).

<sup>41</sup> HC Deb 12 March 1985, vol 75 cols 159–60 (Leon Brittan).

<sup>42</sup> HL Deb 07 February 1985, vol 459 col 1233 (Viscount Whitelaw). The same pattern of broad reassurance and unwillingness to comment on specific examples was evident in the enactment of the 1989 Act: 'I hope, however, that what I do say on the general purpose and effect of this function will persuade the Committee that there is no question of something trivial or peripheral to the nation's well-being providing a proper foundation for action in pursuit of this function. The purpose of this function is to allow the security service to help to safeguard the economic well-being of the United Kingdom from hostile foreign actions and adverse developments arising from outside these islands. It is important to emphasise that it is hostile actions and adverse developments arising from outside these islands that are in question. By virtue of its reference to the United Kingdom, the potential threat must be a matter of significance, a threat to the nation: nothing less would suffice.' HL Deb 21 March 1989, vol 505 col 593 (The Lord Chancellor, Lord Mackay of Clashfern).

passage of the 1989 Act, where he said that it was 'not difficult to envisage the circumstances in which such a safeguard will be needed':

One does not need to use one's imagination, because two such threats arose in dramatic circumstances over the past 20 years. It can happen that there is a threat from abroad in respect of a commodity upon which we are particularly dependent. One can think of oil as being such an example from the past, though not now. One thinks also of foreign powers employing covert intelligence methods to obtain scientific and technical secrets – though not by using agents, which will be covered either by the Bill or my hon. Friend's alternative.<sup>43</sup>

Against the background of that claim one might link the EWB formulation both to the enactment of the National Security and Investment Act 2021, which permits government intervention of certain business transactions on national security grounds, and the National Security Bill (published in May 2022) which will, if enacted, make it an offence to obtain or disclose trade secrets without authorisation and on behalf a foreign power.<sup>44</sup>

The EWB formulation was included once again in the Security Service Act 1994, which gave a statutory basis to MI6 and GCHQ. Where in relation to MI5, however, EWB was used to define its functions, the 1994 Act instead uses the term in defining the purposes for which the – separately identified – functions of MI6 and GCHQ might be exercised. In relation to GCHQ, these purposes include 'in the interests of the economic well-being of the United Kingdom in relation to the actions or intentions of persons outside the British Islands'.<sup>45</sup> Here, therefore, one of the key limitations of the earlier statutes is absent: there is no reference to protection against threats to EWB, and so the functions in question might be carried out more generally in promoting that well-being even in the absence of any threat to it. The functions of MI6 are under the 1994 Act similarly exercisable for purposes including 'in the interests of the economic well-being of the United Kingdom'.<sup>46</sup> Here, the 'protection' limitation is also absent: MI6, like GCHQ, might carry out its functions in pursuit of promoting the UK's economic well-being, rather than being confined to protecting that well-being against threats.

The 1998 report of the Interception of Communications Commissioner indicates the difficulty thrown up by this contrast between the 1985 and 1994 Acts. The former – noted Lord Nolan – 'presupposes the existence of some threat or possible threat' to the EWB of the United Kingdom, while the latter authorises the agencies 'to act positively in promoting the Country's economic well-being, as distinct from merely protecting it'. At the request of the Commissioner and his Intelligence Services counterpart, a 'consultation paper' was prepared, to be given to the Secretary of State 'in

<sup>43</sup> HC Deb 17 January 1989, vol 145 col 221 (Douglas Hurd).

<sup>44</sup> National Security Bill HC Bill (2022–23) [7], cl 2.

<sup>45</sup> ISA 1994, s 3(2)(b).

<sup>46</sup> Intelligence Services Act 1994, s 1(2)(b).

cases of difficulty over the distinction' between the two statutory regimes.<sup>47</sup> The paper was not published, and later reports indicate that the distinction was being respected by the agencies. No equivalent to the Maxwell-Fyfe Directive appears previously to have defined the functions of the MI6 or GCHQ, and so it is not possible to say whether, and to what extent, the statutory functions as defined in the 1994 Act represent a continuity or a rupture.

In the Regulation of Investigatory Powers Act 2000, which replaced the ICA 1985, warrants for the interception of communication could be granted on a limited number of grounds, including for the purpose of 'safeguarding the economic well-being of the United Kingdom'.<sup>48</sup> As in the 1985 Act, the inclusion of EWB as a ground upon which the interception of communications might take place was subject to the proviso that a warrant was not to be considered necessary on this ground unless 'the information which it is thought necessary to obtain is information relating to the acts or intentions of persons outside the British Islands'.<sup>49</sup> That proviso did not, however, exist in the context of the various powers which RIPA introduced for the first time: that to acquire communications data, for example, but also those relating to surveillance and the use of covert human intelligence sources. In each case, economic well-being was included as a ground, and could – it is clear – justify the use of the powers in question even if being employed to acquire information about persons within the British Islands. The allegedly lesser intrusiveness of the powers therefore was considered to justify the exclusion of a limitation which existed within the domestic law of interception, but whose presence there was not required by the Convention itself.

Many years later, when the topic of interception had – following the Snowden disclosures of 2013 – acquired a new political salience, the language of RIPA was amended so as to introduce a further limitation. It now provided that a warrant could be issued on the grounds of economic well-being only 'in circumstances appearing to the Secretary of State to be relevant to the interests of national security'.<sup>50</sup> The point, of course, is that this change strongly implies that – prior to the amendment – the term was a standalone concept, with interception warrants available where necessary on economic well-being grounds even where there was no connection (however tenuous) between the economic well-being and national security.<sup>51</sup> As with the other restrictions imposed by domestic law, this is a limitation which is not required by the terms of the ECHR, nor by the way in which those terms have been interpreted

47 Interception of Communication Commissioner, *Report of the Commissioner for 1998*, Cm 4364 (1999), [16].

48 RIPA 2000, s 5(3)(c).

49 RIPA 2000, s 5(5).

50 RIPA 2000, s 5(3)(c), as amended by the Data Retention and Investigatory Powers Act 2014.

51 See Home Office, *Data Retention and Investigatory Powers Bill Human Rights Memorandum*, [3]: 'Clause 3 amends RIPA so that a warrant may only be issued, or a notice or authorisation for access to communications data given, on the ground that it is necessary for the purpose of safeguarding the economic well-being of the UK where that purpose is linked to national security. That is already the position taken in practice, and is reflected in statutory codes of practice under section 71 of RIPA.'

by the Court of Human Rights. The Investigatory Powers Act 2016 replicates this amended form of RIPA in most cases. In relation to targeted interception warrants, for example, it provides that they may be granted where necessary 'in the interests of the economic well-being of the United Kingdom so far as those interests are also relevant to the interests of national security' but only if 'the information which it is considered necessary to obtain is information relating to the acts or intentions of persons outside the British Islands.'<sup>52</sup> The same caveat about the acts and intentions of those outside the British Islands applies to targeted equipment interference warrants,<sup>53</sup> and most types of bulk warrants (interception, communications data, and equipment interference).<sup>54</sup> This limit does not, however, apply to the acquisition of communications data,<sup>55</sup> nor to warrants for the acquisition and examination of 'bulk personal datasets'.<sup>56</sup> Moreover, the 'bulk' powers in question (other than that relating to bulk personal datasets) cannot be employed in pursuit of this ground – economic well-being where relevant to national security – alone, but only alongside national security in its 'pure' form.<sup>57</sup>

The provision which limits the use of powers on EWB grounds to situations in which the UK's economic well-being is relevant to the national security of the United Kingdom therefore now occurs in relation to almost all of the 2016 Act's powers, with the bulk version of powers mostly subject to an additional limit beyond that. Though it obviously reflects a clear policy decision, this position is logically suspect. In its report on the draft Bill, the Intelligence and Security Committee argued that this was 'unnecessarily confusing and complicated', for 'if "national security" is sufficient in itself, then "economic well-being ... so far as [is] relevant to the interests of national security" is redundant, since it is a subset of the former.' It noted that no 'sensible explanation' had been offered for this point and recommended that the separate category of EWB be removed.<sup>58</sup> This change was not made. Nor was the broader recommendation of the Joint Committee on the Bill that 'the Bill should include a definition of economic well-being in order to provide clarity to the circumstances in which these warrants can be issued.'<sup>59</sup> The effect is that EWB remains part of domestic national security even though logic suggests that its inclusion is in many cases of no practical effect. In the context of all targeted powers other than that for the acquisition of communications data it can only be invoked where relevant to national security, in which case national security alone might have been invoked. In

<sup>52</sup> IPA 2016, s 20(4).

<sup>53</sup> IPA 2016, s 102(6).

<sup>54</sup> IPA 2016, ss 138(3), 158(3) and 178(3).

<sup>55</sup> IPA 2016, s 61.

<sup>56</sup> IPA 2016, ss 204 and 205.

<sup>57</sup> Eg, IPA 2016, s 138(b)(ii).

<sup>58</sup> Intelligence and Security Committee of Parliament, *Report on the draft Investigatory Powers Bill* (HC 2015–16, 795), [J(i)].

<sup>59</sup> Joint Committee on the Draft Investigatory Powers Bill, *Draft Investigatory Powers Bill* (2015–16, HL 93, HC 651), [696].

the context of most of the bulk powers, it appears doubly redundant: it can be invoked only where relevant to national security and only where national security in and of itself justifies the use of the powers in question. And yet a clear decision has been made in order to retain the language, notwithstanding these points. The United Kingdom has downgraded EWB from the status it enjoys within Article 8 yet has been consistently unwilling to jettison it completely, though without ever explaining what is at stake in the various distinctions now drawn, nor seeking to justify them.

Finally, the 2016 Act contains (in relation to most but not all of the powers it includes) a provision not found in its predecessors which states – in relation to all of the relevant grounds, not merely that of ‘economic well-being’ – that:

The fact that the information which would be obtained under a warrant relates to the activities in the British Islands of a trade union is not, of itself, sufficient to establish that the warrant is necessary on grounds falling within this section.<sup>60</sup>

This is a striking provision, and its effect is again somewhat mysterious. The author(s) of the explanatory notes to the Act gloss the different appearances of the clause in a variety of ways. At the general level, we are told that during the passage of the Bill an amendment was accepted ‘which placed protections for trade unions on the face of the Bill, putting beyond doubt that investigatory powers cannot be used where the only purpose is to intrude on legitimate trade union activity.’<sup>61</sup> In relation to specific powers, we are told that a warrant ‘cannot be considered necessary ... only on the basis that the information that would be obtained relates to trade union activity in the British Islands’ and, elsewhere, that its effect is that ‘that legitimate trade union activity would never be sufficient grounds, of itself, for a communications data authorisation to be considered necessary.’<sup>62</sup> These glosses seem fair, but demonstrate the fundamental emptiness of the provision: on no interpretation of the relevant powers would it have ever been the case that the mere fact that information related to a trade union was sufficient to bring them into play, and so the provision guards against a possibility which did not exist. Equally, however, the provision does nothing to prevent the use of these powers to acquire information relating to legitimate trade union activity if the criteria for their use are otherwise met. It is thus the worst sort of symbolic gesture: one which misleads as to its emptiness and so risks creating a dangerous complacency as to the reality we must confront. It is nevertheless significant, for these are – as we have seen already, and as will be discussed further below – exactly the sorts of concerns by which early statutes employing the language of ‘economic well-being’ were met and which demand a clear explanation of the continued inclusion of the language.

<sup>60</sup> IPA 2016, s 20(6).

<sup>61</sup> Investigatory Powers Act 2016, Explanatory Notes, [9].

<sup>62</sup> Investigatory Powers Act 2016, Explanatory Notes, [178].

### III. ECONOMIC WELL-BEING IN NATIONAL SECURITY PRACTICE

'Economic well-being' therefore occupies an important, though apparently diminishing, place within the modern body of national security law, its inclusion within which is as direct as a result of the status granted to the concept by its place in the text of Article 8 of the ECHR. It helps define, though in subtly different ways, the missions of the security and intelligence agencies. Sometimes it is a good which must be protected against threats; at other times it is a more general telos in pursuit of which the agencies might employ their powers. Sometimes it is a ground upon which intrusive powers might be used, given equal status to national security and the prevention and detection of serious crime. More usually now, though, it justifies the use of such powers only to the extent that economic well-being is relevant to national security, the supreme good. Mostly, but not invariably, it is made relevant in national security law only insofar as the relevant powers can be used to acquire information about the actions and intentions of those outside of the British Islands, in recognition of the ways in which using the concept to define the scope of the state's intrusive powers risks making those powers available within the context of the cut and thrust of ordinary politics.

And though there is a general dearth of detail in the public domain, it is clear that the inclusion of EWB in the various domestic statutes is of practical rather purely theoretical significance. Indeed, as a statutory ground for the interception of communications it was made use of from the beginning. In his first annual report, the Interception of Communications Commissioner noted – in relation to the requirement that EWB warrants relate to the acts or intentions of persons outside the British Islands – that 'in all cases that I have seen where it has been sought to justify a warrant on the ground of economic well-being, it has been clear beyond doubt that the persons about whose acts or intentions information has been sought have been persons outside the British Islands.'<sup>63</sup> This clearly indicates the grant of multiple such warrants, but no breakdown was given then, nor for many years thereafter. The first report of the Investigatory Powers Commissioner – for 2017 – shows that a total of 8 warrants were issued on EWB grounds in that year: not a negligible number, but less than a quarter of one per cent of the total of 3,535 warrants issued.<sup>64</sup> Economic well-being is also a ground upon which communications data might be acquired; the most recent IPCO report shows that, in 2020, 60 communications data authorisations were made for that purpose.<sup>65</sup>

Below, I consider some of the fears which were expressed about the possible implications of the inclusion of economic well-being in the key provisions of domestic law. Before doing so, however, it is useful to consider certain of the matters which were repeatedly assumed or asserted to fall within the formulation, and the legitimacy of

<sup>63</sup> Interception of Communications Commissioner, *Annual Report for 1986*, Cm 108 (1987), [32].

<sup>64</sup> Investigatory Powers Commissioner's Office, *Annual Report of the Investigatory Powers Commissioner 2017* (HC 2017-19, 1780), 42 (Fig 7).

<sup>65</sup> Investigatory Powers Commissioner's Office, *Annual Report of the Investigatory Powers Commissioner 2020* (HC 2021-22, 897), 141 (Fig 20.8).



which does not seem to have been questioned. Foremost amongst these, we have seen, is the question of currency and, in particular, the possibility that speculators would attack the pound sterling. Currency was present both in the original argument for including the language of EWB in the Convention and in several of the responses to its transposition into domestic law over the years. The status of the pound has varied over the period under discussion. The pound was pegged against the dollar as part of the Bretton Woods system, before floating freely after 1971, including during the sterling crisis of 1976, when the UK was forced to accept a loan from the IMF.<sup>66</sup> A brief period within the Exchange Rate Mechanism after 1990 ended on Black Wednesday in September 1992, as the United Kingdom proved unable to maintain the value of the pound against the Deutschmark.<sup>67</sup> The dangers of speculation were greatest when the United Kingdom was attempting to maintain a peg against one or another currency: speculation might require it either to raise interest rates to make the pound more attractive to buyers (and in doing so dampen the domestic economy) or to use up finite foreign currency reserves purchasing pounds on the exchange markets. If neither path was tolerable or possible – because, for example, the level of foreign currency reserves required to maintain the peg were greater than the Bank of England possessed – then the pound would have to be devalued (as it was by around 30% in 1949 under Attlee and again by around 14% in 1967)<sup>68</sup> or the peg abandoned (as in 1992). Though the policy responses available are less drastic, these dangers exist even under a floating exchange regime such as now exists, with speculation which drives down the value of the pound potentially leading to an increase in the price of imported goods and/or forcing the raising of interest rates and potentially slowing economic growth.

A related tool – which might be employed either in a fixed-exchange rate system or one in which a currency floats freely on the market – is that of exchange controls, in which the amount of the domestic currency which might be removed from the country or converted into foreign currency is limited.<sup>69</sup> These too prevent or limit speculation on the domestic currency, and were introduced in the United Kingdom at the beginning of the Second World War, before being given a more permanent footing in the Exchange Control Act 1947.<sup>70</sup> They survived the end of the

<sup>66</sup> On which see Kathleen Burk and Alec Cairncross, *'Good-bye Great Britain': The 1976 IMF Crisis* (Yale University Press 1992) and Douglas Wass, *Decline to Fall: The Making of British Macro-economic Policy and the 1976 IMF Crisis* (Oxford University Press 2008).

<sup>67</sup> See William Keegan, David Marsh and Richard Roberts, *Six Days in September: Black Wednesday, Brexit and the making of Europe* (OMFIF Press 2017).

<sup>68</sup> See Alex Cairncross and Barry Eichengreen, *Sterling in Decline: The Devaluations of 1931, 1949 and 1967* (Palgrave Macmillan, 2nd edn 2003).

<sup>69</sup> See the 'The U.K. exchange control: a short history' in the Bank of England's 'Quarterly Bulletin' (1967) 245: 'The main object of exchange control in this country was to conserve and increase the gold and foreign currency reserves, and to ensure that they were used for the maximum national benefit. This objective, however, had to be weighed against the desirability of interfering as little as possible with the earning power abroad of U.K. industry, merchants, bankers and other commercial interests.'

<sup>70</sup> For contemporary analysis, see FA Mann, 'The Exchange Control Act, 1947' (1947) 10 *Modern Law Review* 411. At 413, Mann notes that 'It is almost useless to enumerate all the prohibitions contained

Bretton-Woods system before being abolished early in the tenure of Margaret Thatcher.<sup>71</sup> It was, it will be remembered, exchange controls and the need for powers to enforce them that were specifically cited by the British delegation as requiring the inclusion of the language of economic well-being in the Convention on Human Rights. And that issues around currency, and devaluation in particular, are of special – perhaps unique – significance is suggested also by the fact that devaluation has been identified as representing one of a number of very limited circumstances in which it is permissible to mislead the House of Commons. Adam Tomkins cites a letter from John Major as Prime Minister to the Treasury and Civil Service Committee, in which he noted that 'it is clearly of paramount importance that ministers give accurate and truthful information to the House' and if they knowingly fail then they should resign, except – Major suggests – 'in the quite exceptional circumstances of which a devaluation or time of war or other danger to national security have been quoted as examples.'<sup>72</sup> The classic threat to economic well-being is here equated to the concept of national security generally.

It is not immediately obvious from these interventions, however, why the question of currency speculation is distinctive from other elements of the general economic health of the state, so as to justify its status as an aspect of or (at least at one point in time) the conceptual core of the legal formulation 'economic well-being'. If a distinction can or could be drawn, a number of possible ways of doing so suggest themselves. One is the implicit sense, possibly rising to the level of an explicit belief, that currency speculation involves some identifiable other actor, one whose ends may be to undermine the British economy or, more likely, simply to profit, and who may be a private entity or even some manifestation of a foreign state. Guarding against currency manipulation (to the extent it remains a threat) is therefore encompassed by the EWB in its negative sense, as something to be protected against threats. It might well, therefore, be within the purview of MI5. But that is not a general limitation: it does not exist in relation to MI6, for example, nor in relation to many of those powers of whose use EWB is one of the possible grounds.

Another explanation might be found in the fact that currency – not only a store of value exchange but also a unit of account and a medium of exchange – differs from other forms of property. Though a particular token of currency may well be property – the coin one holds in one hand, in its most obvious form, is tangible and alienable – currency is also the frame within which the entire economic system operates. It is issued by an organ of the state and guaranteed by it in one form or another. The

in the Act. The practitioner must become firmly aware of the fact that the Act makes almost everything and anything illegal (in the absence of a licence) that has any contact, however remote it may be, with abroad.'

71 Jack Copley, 'Why were capital controls abandoned? The case of Britain's abolition of exchange controls, 1977–1979' (2019) 21 *British Journal of Politics and International Relations* 403.

72 Letter dated 5 April 1994, cited by Adam Tomkins, 'A right to mislead Parliament?' (1996) 16 *Legal Studies* 63, 69.

state, by taxing in the relevant currency, ensures an ongoing demand for that currency, and has an overriding interest in its integrity, including ensuring so far as possible to maintain its value vis a vis other currencies. When the pound is attacked by speculators, to make the point more bluntly, it is not like the destruction of a building – the buildings around which remain standing, and the building itself which can be rebuilt in time – but affects the entire balance of the economy, disrupting the intentions of policy-makers and causing effects which ripple into every area of policy, and which are – in the era of the Bank of England's independence as regards monetary policy – beyond the immediate control of the government of the day.

If so, the example of currency suggests, EWB was best understood – including by those who proposed it – as relating to the most profound fundamentals of the economy: those which give it its shape and structure its basic functioning, rather than those which determine the particular manner in which economic activity unfolds over time. This, though, as we have seen, is not the approach required by the Strasbourg Court, whose interpretation of the terms seems to be far looser, perhaps even impressionistic, than is this sort of (admittedly reconstructed) reasoning. The bar the Court sets is, in short, far lower than the example of currency and the issues which whirl around it. And, in an era of floating currencies, there would seem to be a case for thinking that no individual issue is as both (a) as important as was that of currency at the time the ECHR was drafted and (b) as susceptible to the deliberate interference of external, perhaps hostile, perhaps state, actors. This discrepancy between what EWB might have meant in the past and what it could, compatibly with the ECHR, be interpreted to mean, therefore justifies a reconsideration of the normative elements of the concept, in order to understand both why its inclusion in the body of national security law was originally greeted with such scepticism and whether (and if so how) its continued presence there might be justified.

#### IV. THE DANGERS OF ECONOMIC WELL-BEING

As emerges from the discussion above regarding the concept of economic well-being, there is considerable suspicion of the idea that it should be capable in law of grounding the use of highly intrusive powers by the state and its agents. Some proportion of that suspicion is shared by figures across the political spectrum. This includes that portion of the scepticism which is formal in nature, relating to the lack of precision in the formulation and the associated lack of clarity as to what might follow from it: Jonathan Aitken, whose speculation as to what it might mean in practice was quoted at the opening of this article, was no leftist. Scepticism which is substantive, however, is also found across the political spectrum, reflecting for the most part a generic civil-libertarian bent, whereby the powers which the state possesses in this domain are sufficiently intrusive that their availability should be as limited as possible, and tested

according to strict necessity. Implicit – and sometimes explicit – in this view is that while national security may well be sufficiently important to justify the use of powers of, say, interception or equipment interference, economic well-being is a lesser end and, notwithstanding its inclusion in the text of the ECHR, it should not be permitted, as a matter of domestic law, to bring these powers into play.<sup>73</sup> This view, or something like it, would seem to be implicitly accepted by those more recent statutory provisions which limit the relevance of EWB to situations in which it is relevant to national security: in this reformulation – which now dominates – national security retains its place at the summit of a hierarchy, with economic well-being reduced to a contingent aspect thereof rather than a separate and equally important policy end.

More interesting is the position, dominant for obvious reasons on the political left, which objects to the inclusion of EWB specifically for its implications for the political activity characteristic of the left and the associated trade union movement. The inclusion of EWB in national security legislation, the logic goes, potentially permits state actors to spy on trade unionists and others whose plans to take industrial action might, on even a fairly plain interpretation of the key formulation, be considered to be detrimental to the EWB of the United Kingdom. And given the linkages between the trade union movement and the political left – primarily the Labour Party – this sort of surveillance might operate as a backdoor via which the political left might itself be surveilled notwithstanding the rules – originally the ‘Wilson doctrine’ – which limit the possibility of carrying out direct surveillance of Members of Parliament themselves.<sup>74</sup> That expression of such concerns was the immediate response to the inclusion of the term in what became the 1985 Act was noted above. The concerns expressed included the question of whether the power created by the formulation would ‘be used for the surveillance of international trade union links in connection with, say, the miners’ strike?’ and the observation that it ‘could be used for partisan political purposes disguised as the national interest.’<sup>75</sup> It is the legacy of this sort of thinking which we see in the – as discussed above, formally empty – provision which occurs throughout the Investigatory Powers Act 2016, whereby the fact that ‘the information which would be obtained under a warrant relates to the activities in the British Islands of a trade union is not, of itself, sufficient to establish that the warrant is necessary’ on EWB grounds. This fear – which is, as discussed below, by no means unreasonable – recalls discussions of the definition of ‘subversion’ which took place in earlier decades. In ‘In from the Cold’, Leigh and Lustgarten argued in strong terms against

<sup>73</sup> See also in this vein, House of Lords Constitution Committee (n 2) [8], where the Committee said that while it recognised that ‘threats to the “economic wellbeing of the United Kingdom” may justify a security response, we are concerned about the use of such a broad concept to authorise serious criminal conduct.’

<sup>74</sup> See Andrew Defty, Hugh Bochel & Jane Kirkpatrick, ‘Tapping the Telephones of Members of Parliament: The “Wilson Doctrine” and Parliamentary Privilege’ (2014) 29 *Intelligence and National Security* 675 and *Lucas v Security Service* [2015] UKIPTrib 14/79-CH. See now Investigatory Powers Act 2016, ss 26 and 111.

<sup>75</sup> HC Deb 07 February 1985, vol 72 col 1119 (Gerald Kaufman).

the 'pressure to treat economic desires or wishes as matters of national security', on the basis that 'giving national security so wide-ranging a meaning is potentially extraordinarily oppressive, for it erodes the distinction between the civil and military spheres of social life, or at any rate between a liberal and an authoritarian society.' In an authoritarian society 'anything which obstructs productivity and hence "prosperity" or "development" is regarded as at best dangerously anti-social, and is often made illegal' and severe measures 'are taken to control political and economic life so as to ensure uninterrupted production', including 'the co-optation of or outlawing of trade unions and strikes.'<sup>76</sup>

Lord Denning had said that the powers of MI5 were 'not to be used so as to pry into any man's private conduct, or business affairs: or even into his political opinions, except in so far as they are subversive, that is, they would contemplate the overthrow of the Government by unlawful means.'<sup>77</sup> The reference to the lawfulness of the means, however, was dropped upon transposition of this idea into law, and the Security Service Act provides instead, as discussed above, that MI5 is to concern itself with threats to national security arising from – alongside espionage, terrorism and sabotage – with 'actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means.'<sup>78</sup> The dual inclusion of the ambiguous term 'undermine' and the term 'industrial means' potentially includes much lawful trade union activity, if it is considered that the activity in question poses a threat to national security. Though the matter of 'economic well-being' is also part of MI5's functions, it is so only insofar as the threats to it are posed by 'the actions or intentions of persons outside the British Islands.'<sup>79</sup> The effect of these provisions is that there are a number of ways in which matters which are primarily economic might lawfully become the business of MI5: either via the concept of national security or, alternatively, that of economic well-being. The limitation of the latter is undermined – perhaps rendered moot – if the same matters enter into MI5's remit via the former.

This latter critique of the inclusion of EWB within the body of national security legislation – that the national security apparatus of the state might be deployed against the political left in one form or another – is, it must be noted, not without historical justification.<sup>80</sup> The national security powers of the state were used disproportionately against those on the political left long before they were formalised into law: processes of security vetting, though always framed in balanced terms, designed to weed out of the public service communists on one hand and fascists on the other,

<sup>76</sup> Laurence Lustgarten and Ian Leigh, *In from the Cold: National Security and Parliamentary Democracy* (Clarendon Press 1994) 27–8.

<sup>77</sup> *Lord Denning's Report*, Cmnd 2152 (1963), [230].

<sup>78</sup> Security Service Act 1989, s 1(2).

<sup>79</sup> SSA 1989, s 1(3).

<sup>80</sup> See, for a recent archival consideration of the phenomenon, Ewing, Mahoney, and Moretta (n 22), especially ch 5.

were vastly more likely to catch the former rather than the latter.<sup>81</sup> Trade Unions were frequently spied on under the rubric of 'subversion', often justified on the basis of the alleged Communist sympathies of their leadership (sometimes crystallised in membership of the Communist Party of Great Britain) or because of their acceptance of financial or other support from the Soviet Union or its proxies. Christopher Andrew has written that by 1947, the Government 'had a tendency to identify all industrial stoppages with Communist subversion',<sup>82</sup> with the Security Service warning in 1948 that the Communist Party of Great Britain aimed 'to secure control of each individual union and, through the union, of the General Council and the Annual Assembly of the Trades Union Congress, potent forces in political life'.<sup>83</sup> This continued through the decades to come, with MI5 alleging to the Official Committee on Communism in 1956 that 'the CPGB strategy was to used industrial unrest as a means of capturing and consolidating positions of power and influence in the trade union movement' and that, partly as a result, 'one in eight union officials and members of the executive committees were either Party members or Communist sympathisers'.<sup>84</sup>

This concern with the doings of the CPGB and its links with and infiltration of the unions remained a constant feature of the Cold war.<sup>85</sup> It loomed large in the government's response to strikes called by miners in the 1970s.<sup>86</sup> A threat assessment made in the early period of the Callaghan administration claimed that amongst the leadership of a group of major trade unions the figure for CPGB members or sympathisers was now one in five, but that even this 'underestimated the extent of Communist influence' for a 'small, disciplined Communist group, backed by the CPGB's industrial apparatus, was capable of exerting disproportionate influence on any union executive whose other members did not act in concert'.<sup>87</sup> It seems, however, to have been MI5's assessment that the 'Winter of Discontent' which brought down Callaghan's government was not the result of any sort of subversive plan.<sup>88</sup> During the 1984–5 miners' strike, the Security Service was again – according to Andrew – more sanguine than were Ministers as to the role of 'subversives'.<sup>89</sup> Nevertheless, Arthur Scargill had been the subject of an interception warrant going back more than a decade on the basis of his contact with the CPGB and such surveillance, along with that of (at least) 'leading Communist and Trotskyist militants, and those judged to have close links with them', continued throughout the strike.<sup>90</sup> One implication of the link between the idea of subversion

81 See the discussion in Paul F Scott, 'The Contemporary Security Vetting Landscape' (2020) 35 *Intelligence & National Security* 54.

82 Christopher Andrew, *The Defence of the Realm: The Authorized History of MI5* (Allen Lane 2009) 406.

83 Quoted in Andrew (n 82) 406.

84 Andrew (n 82) 408.

85 Ewing, Mahoney, and Moretta (n 22), ch 12.

86 Andrew (n 82) 594–5 and 598–9.

87 Andrew (n 82) 656.

88 Andrew (n 82) 666–7.

89 Andrew (n 82) 667–8.

90 Andrew (n 82) 676–7.

and the activities of trade unions, Andrew claims in defence of the modern MI5, is that the return of the miners to work in April 1985 'marked the beginning of the end of counter-subversion as one of the Service's main priorities.'<sup>91</sup>

Trade Unions were not alone in attracting the Cold War attention of MI5: another recurring target of its activities, often on the same basis – the possibility of Communist links or infiltration – was the peace movement, especially bodies such as the Campaign for Nuclear Disarmament, designated as subversive because it was believed to be controlled by members of the Communist Party.<sup>92</sup> Another target of MI5's Cold War surveillance – as revealed by the whistle-blower Cathy Massiter – was the National Council for Civil Liberties ('Liberty'). And as the unions, the peace movement and civil liberties organisations overlapped with and fed into left-wing party politics (so that, for example, the two members of the NCCL who brought an ECHR claim against the UK relating to surveillance of them by MI5, Harriet Harman and Patricia Hewitt,<sup>93</sup> both went on to become prominent members of Labour governments) any attention paid to these bodies would inevitably bring the Security Service into the orbit of the Labour Party. Most famously, if controversially, it has been consistently argued that elements within MI5 plotted against Harold Wilson, leader of the Labour Party for 13 years and Prime Minister between 1964 and 1970 and then again from 1974 to 1976.<sup>94</sup>

To the extent that these persons were – or might reasonably have been believed to be – supporters of ending the democratic process in the United Kingdom, such surveillance might be thought justified from the point of view of the democratic principle thus protected. But organisations of whom some members, even leaders, were subversives in this sense had many members – a vast majority, even on the Service's own figures – who were engaged in legitimate political activity, while the line between activity which was subversive and that which was not was both difficult to draw and difficult to adhere to in practice. Andrew claims that during the 1970s, '[i]n some respects the Service, so far from exaggerating the threat of subversion, had a more realistic view of it than ministers and was less likely to see subversion as a key element in industrial disruption'<sup>95</sup> but nevertheless admits that it had in that period 'devoted too much of its resources ...

<sup>91</sup> Andrew (n 82) 680.

<sup>92</sup> Andrew (n 82) 675–6. See Richard J Aldrich and Rory Cormac, *The Black Door: Spies, Secret Intelligence and British Prime Ministers* (William Collins 2016), 356–7, noting that that the Chair of CND, Joan Ruddock, had 'unwittingly' held meetings with Soviet officials who were in fact KGB officers and that the KGB had made 'exaggerated claims' about the links between the KGB and the peace movement: 'the security service had "fears" that if these claims were reported to Thatcher she would take them "too literally"'. MI5 did not trust Thatcher on this issue, and Thatcher did not trust MI5.'

<sup>93</sup> *Hewitt and Harman v United Kingdom* (1991) 14 EHRR 657. The Commission held that the interference with the applicants' right to a private and family life was not 'in accordance with the law'.

<sup>94</sup> See, eg, Jon Moran, 'Conspiracy and contemporary history: revisiting MI5 and the Wilson plot[s]' (2014) 13 *Journal of Intelligence History* 161, arguing that we 'may never know the full details of any plotting that took place but there is enough evidence to show that MI5 was itself something of a paranoid organisation in its attitude towards anything viewed as subversive – as long as it arose from the left.'

<sup>95</sup> Andrew (n 82) 667.

to monitoring often insignificant political activities of the CPGB and its sympathisers.<sup>96</sup> Other accounts agree that MI5 felt the need at times to push back against the desire of politicians that it employ its capacities against the ordinary – non-subversive – work of trade unions.<sup>97</sup> And even allowing for the possibility that the language of subversion made (some) trade unionists and through them (some) trade unions legitimate targets, it is more difficult – probably impossible – to justify the attention paid by MI5 to targets such as the NCCL on that basis.

Even more difficult to justify from that democratic point of view is the sort of interference which might be grounded in law via the language of 'undermining' rather than entirely overthrowing Parliamentary democracy, and which was presumably similarly possible before the process of formalising surveillance powers in law began in 1985.<sup>98</sup> An analysis of that formulation offers an insight into the logic which might permit the use of the state's security apparatus to interfere with the democratic process. The idea represented by this formulation seems to be something along the lines of the following: there is a natural functioning of the parliamentary process – the promises that parties would, under ordinary conditions, make; the votes that electors would, under those same conditions cast – that acts as a sort of baseline. That natural process might, though, be disrupted, in the first place via 'violent' means. Parties will adopt positions that they would not in the absence of the relevant acts; votes will, perhaps as a consequence, be directed somewhere other than would have been the case had the act not been done. The proper functioning of the system has thus been undermined, by a type of act – a violent one – which is at odds with the logic according to which the democratic order operates. Even accepting that violent acts have no place in a properly-functioning democracy (though a very significant role, history shows, in achieving that democracy in the first place), the application of the logic to 'industrial' acts is deeply concerning, implicitly positing such acts as outside the scope of the legitimate democratic process. If, though, this is the underlying logic of the Security Service Act, it remains to explain what it might mean to undermine the democratic process by a 'political' act. The idea would seem to be that, notwithstanding that an act is neither violent nor industrial, it is nevertheless outside of the bounds of legitimate political practice, calculated – or fated – to undermine its functioning rather than to operate within it. The implication, therefore, is that certain political acts undermine Parliamentary democracy not because of their form, but because of the ends in pursuit of which they are carried out. This is a troubling conclusion.

<sup>96</sup> Andrew (n 82) 667.

<sup>97</sup> See Aldrich and Cormac (n 92) 301–2, describing Ted Heath's 1970 demand that MI5 eavesdrop on a meeting of unions during action by workers in power stations. They quote MI5's deputy director, Anthony Simkins, as fearing that 'an eavesdropping attack against this target would take us right outside the field in which the security service had operated throughout my twenty-five years with it'. The surveillance did not go ahead.

<sup>98</sup> For the circumstances in which this definition of subversive activities first emerged, see Ewing, Mahoney, and Moretta (n 22) 51.



Similarly, once we see that 'economic well-being' is broadly synonymous with the financial health of the state – as it is under the ECHR – we see the danger inherent in the use of the concept as a trigger for the state's most intrusive powers. Even if it catches a range of activities which are not only illegitimate but sufficiently so as to be treated on a level with direct threats to national security, the economic well-being formulation would potentially catch a range of political activities which should be not only tolerated but encouraged in a healthy democracy purely because they the ends at which they aim are incompatible with the prevailing economic system and its assumptions about what is good for the state's financial position and what is not. It is here, then, that the more recent approach – which requires EWB to be relevant to national security, rather than as a separate end of equal status to it – becomes crucial. But, as we have noted above, that inclusion leads to a redundancy: if the matter encompassed by EWB must also be relevant to national security, then the concept of EWB does not appear to be doing any work. And so the dangers which have been – quite reasonably – identified with the inclusion of the concept in national security law have been in many cases mitigated in more recent years, to the point that it must be asked whether, and if so why, it continues to exist there.

## V. DOING WITHOUT ECONOMIC WELL-BEING

We noted above some of the criticism offered by Leigh and Lustgarten of the inclusion of EWB in national security legislation. It is striking however that, even in making that criticism, they seemed open to the possibility that the concept need not be condemned entirely; that action in pursuit of EWB might in some ways be less difficult to incorporate into a system of national security law than are the more orthodox activities of the security services. Referring to the then-impending creation of a statutory basis for MI6 and GCHQ, they noted that it would be 'astounding' if EWB was not included within the mandate of the latter organisation and suggested that this was 'the ideal occasion to open up to the British public a fundamental issue that has never been adequately debated, nor indeed debated at all: what are the intelligence agencies for, and what principles should restrict the range of their inquiries?':

It is certainly possible to argue that obtaining information about foreign companies, and about large enterprises rather than individuals, raises none of the of the human rights issues that would require prohibition on activities affecting domestic political or trade union activities. These are precisely the kinds of issues that require public argument, not executive decision by default.<sup>99</sup>

Whether or not this is correct as a matter of law, it captures well the intuition that EWB might be redeemed; that there might, that is, be a place for the state to use its capacities

<sup>99</sup> Lustgarten and Leigh (n 76) 394.

in this domain which does not put at risk the freedom of individuals or the integrity of the domestic political process in the manner which has always been assumed. The argument of this final section is that though this intuition is correct – that there are points at which economic issues are the legitimate concern of the security and intelligence agencies – that this fact does not require the inclusion of language of economic well-being in the relevant statutory frameworks, for the use of the language of 'national security' already captures it, while avoiding (at least in their starkest form) the dangers of politicisation described in the previous section.

That claim can be evidenced in the first place with the redundancy discussed above, whereby the language of EWB is used in various statutes with the immediate caveat that to justify the use of many investigatory powers the EWB in question must be relevant to national security. The logic of that formulation is that not only does EWB go beyond 'national security', but 'national security' already encompasses aspects of what is captured by EWB. The question, of course, is what are those aspects? We might offer an answer with reference the manner in which the concept of national security has been deployed in the context of the recent dealings of the United Kingdom with its Overseas Territories ('OTs'), of which there are 14, varying significantly along a number of axes. Some – the British Antarctic Territory, the British Indian Ocean Territory, South Georgia and the South Sandwich Islands – have no permanent population. One, the Sovereign Base Areas of Akrotiri and Dhekelia, was carved out from Cyprus on its independence and is a primarily military entity. What many of the others have in common, however, is the dominance within them of financial services, often as a result of low-tax, high-secrecy (or is it privacy?) regimes which sees them designated by some as tax havens.<sup>100</sup> But in the economic domain, it is clear that the interests of the OTs are not only often distinct from that of the UK, but might in some cases pose a (perhaps significant) threat to the United Kingdom. As noted above, the prevailing interpretation of the concept of EWB would seem to encompass such a situation. If the tax-haven status of the OTs reduces to a (non-negligible) extent the UK's tax revenues, then the UK could invoke the concept against that status. What is striking, however, is that the steps taken in the recent past have been justified not on that basis, but on the grounds of national security and have been aimed not at the implications of tax havens for revenue generally but at a more specific problem.

In its report on 'Russian corruption' in the United Kingdom, the Foreign Affairs Committee emphasised the threat posed to the United Kingdom by money laundering, which 'allows those who would do harm to the UK to obscure their sources of financial support, and enables human rights abusers and kleptocrats to hide money

<sup>100</sup> See Tax Justice Network, *Corporate Tax Haven Index 2019*, which 'ranks the world's most important tax havens for multinational corporations' and in which the top three spots were taken by the British Virgin Islands, Bermuda, and the Cayman Islands, each an Overseas Territory of the United Kingdom: <https://corporatetaxhavenindex.org/introduction/cthi-2019-results>. See also Ronen Palan, Richard Murphy and Christian Chavagneux, *Tax Havens: How Globalization Really Works* (Cornell University Press 2009) ch 5.

that they have stolen from their own people.<sup>101</sup> It noted in this regard that investigations such as those emerging out of the leaks of the 'Panama papers' and the 'Paradise papers' had shown 'the key role that shell corporations, which can be used to disguise the real ownership of the assets that are transferred through them, play in funnelling dirty money into the UK' and that such shell corporations 'are often registered in the OTs ...'.<sup>102</sup> Though some OTs had begun to make available to UK law enforcement registers of beneficial ownership, others had declined to do even that. The Committee recommended that the government take steps to address this phenomenon, justifying the decision to do so specifically by reference to the implications of this phenomenon for the United Kingdom and, in particular, its national security:

... money laundering is now a matter of national security, and therefore constitutionally under the jurisdiction of the UK. The Overseas Territories and Crown Dependencies are important routes through which dirty money enters the UK. This cannot continue. While we recognise the important innovations that Overseas Territories such as the British Virgin Islands have made in making registers of beneficial ownership available to UK law enforcement, the scale of the problem and the implications for the UK's security now demand a greater response.<sup>103</sup>

Eventually, the government's hand was forced by a backbench amendment made to what became the Sanctions and Anti-Money Laundering Act 2018. This provides first of all that for the purposes of 'the detection, investigation or prevention of money laundering' the Secretary of State must 'provide all reasonable assistance to the governments of the British Overseas Territories to enable each of those governments to establish a publicly accessible register of the beneficial ownership of companies registered in each government's jurisdiction'.<sup>104</sup> It went much further, however, providing that the Secretary of State 'must, no later than 31 December 2020, prepare a draft Order in Council requiring the government of any British Overseas Territory that has not introduced a publicly accessible register of the beneficial ownership of companies within its jurisdiction to do so'.<sup>105</sup> This provision was strongly – bitterly – resisted by a number of the OTs,<sup>106</sup> and a later report by the Foreign Affairs Committee noted that the United Kingdom's 'relationships with the OTs were placed under strain' by its inclusion in the 2018 Act but that it continued to support the introduction of the registers, as 'Parliament has judged public registers of beneficial ownership to be a matter of national

<sup>101</sup> House of Commons Foreign Affairs Committee, *Moscow's Gold: Russian Corruption in the UK* (HC 2017-19, 932), [45].

<sup>102</sup> House of Commons Foreign Affairs Committee (n 101) [62].

<sup>103</sup> House of Commons Foreign Affairs Committee (n 101) [68].

<sup>104</sup> Sanctions and Anti-Money Laundering Act 2018, s 51(1).

<sup>105</sup> SAMLA 2018, s 51(2).

<sup>106</sup> The Premier of the Cayman Islands, for example, claimed that the inclusion of the provision was 'reminiscent of the worst injustices of a bygone era of colonial despotism': Dan Sabbagh, 'MPs prepared to force Channel Islands and Isle of Man to reveal firms' owners' *The Guardian* (2 May 2018).

security ...<sup>107</sup> A matter, that is, which might have been initially conceptualised as a question of EWB in the form of the loss of tax revenue was narrowed down to a consideration of the use of shell corporations and so transformed into a matter of national security. Though this is of course not a legal judgment it nevertheless points to the heart of the modern dilemma. In order to address the political dangers of permitting the exercise of highly intrusive powers on economic grounds, the modern legal approach largely limits the use of investigatory powers for EWB purposes. These limits, however, work simultaneously and necessarily to prevent the inclusion of the concept of EWB in national security law from bringing a distinct area of human activity into the sphere of the security and intelligence areas.

## VI. CONCLUSION

In its report on what became the Covert Human Intelligence Sources (Criminal Conduct) Act 2021, which permits state informants to participate in criminality,<sup>108</sup> the House of Lords Constitution Committee noted that while 'threats to the "economic wellbeing of the United Kingdom" may justify a security response' it was 'concerned about the use of such a broad concept to authorise serious criminal conduct.'<sup>109</sup> It suggested that it would be valuable for the Intelligence and Security Committee to 'assess this issue in respect of this legislation and other statutes that contain the same justification.'<sup>110</sup> This article has shown why such a report would be a valuable use of the ISC's time. The transposition of the language of 'economic well-being' from Article 8 of the ECHR into domestic law has attracted little attention over the years, though the political and economic background has changed significantly since the concept was first formulated. The formula is ever-present in the modern body of national security law, though with some interesting and telling modifications, most of which work to subordinate it to the concept of national security and which in many cases seem now to render its continued inclusion redundant.

The additional limits placed upon its domestic invocation (as compared to what might be compatible with the Convention itself) no doubt reflect in part the fear – by no means unjustified – that the concept risks justifying the use of the state's surveillance capacities against those on the political left, and organised labour in particular: those whose arguments and actions can be seen, on even a workaday interpretation

<sup>107</sup> House of Commons Foreign Affairs Committee, *Global Britain and the British Overseas Territories: Resetting the relationship* (HC 2017-19, 1464), [33]. It continued "Those who seek to undermine our security and that of our allies must not be able to use the OTs to launder their funds. We cannot wait until public registers are a global norm and we cannot let considerations of competitiveness prevent us from taking action now. The lowest common denominator is not enough."

<sup>108</sup> See Paul F Scott, 'Authorising Crime: The Covert Human Intelligence Sources (Criminal Conduct) Act 2021', (2022) 85 *MLR* 1218.

<sup>109</sup> Constitution Committee (n 2) [8].

<sup>110</sup> Constitution Committee (n 2) [9].

of the formulation, to harm the economic well-being of the state, by – say – stifling the growth of GDP or reducing the revenue it might otherwise bring in. Even in a post-cold war world this concern is rational, and so the question arises of why EWB remains a feature of the national security constitution at all. That is: what work has it done in national security law over the last 40 or so years, since the introduction of the Interception of Communications Act 1985, and what work does it continue to do in those circumstances in which it exists in law as an addition to, rather than subordinate of, the concept of national security? Given the change in circumstances which have occurred since the language first found its way into the Convention, one is driven to conclude that if the concept is to remain an aspect of UK national security law, its continued inclusion must be actively argued for, and a much fuller explanation than has until now been provided for the implications and importance of doing so must be provided.

#### DISCLOSURE STATEMENT

No potential conflict of interest was reported by the author(s).

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