

Chapter Fifteen

Strapped to the Mast: The Siren Song of Dreadful Necessity, the United Kingdom Human Rights Act and the Terrorist Threat

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Introduction

The United Kingdom (UK) has a long and complex history of engagement with terrorism and other forms of violence directed at achieving political aims.¹ Acts that might be characterised as ‘terrorism’ in contemporary political and media analysis have taken place in the UK as far back as the Fenian bombings of the 1860s. Similar acts occurred during the anarchist scares of the 1890s and 1900s and the repeated Irish Republican Army (IRA) bombing campaigns in Northern Ireland and mainland Britain from the 1950s to the 1990s. Now, the 11 September 2001 (9/11) terrorist attacks on New York and Washington DC and the London tube and bus bombs in July 2005 have resulted in the threat presented by fundamentalist Islamist groups coming to the forefront of public and political concern.

These different waves or spasms of political violence have stemmed from different controversies and ideologies. The tactics, targets and *modus operandi* of the different terrorist groups have varied greatly over time. Nevertheless, the responses that have been adopted by the UK legislative, executive and law enforcement authorities to these threats have tended to conform to a distinct pattern. Acts of political violence make governments determined to show they are ready to take strong action to ensure the safety of the public. This instinctive response is often reinforced by the demands of security services, police and

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¹ The important debate as to what constitutes ‘terrorism’ and whether it serves any meaningful purpose to apply that particular label is not addressed here: for excellent analysis on this issue, see B Golder and G Williams, ‘What is “Terrorism”? Problems of Legal Definition’ (2004) 27 *University of New South Wales Law Journal* 270; C A Gearty, *Terror* (London: Faber and Faber, 1991); C A Gearty, ‘Terrorism and Morality’ [2003] *European Human Rights Law Review* 377; J Waldron, ‘Terrorism and the Use of Terror’ (2004) 8(1) *Journal of Ethics* 5. For a comprehensive discussion of the definition of the term ‘terrorism’ in international law, see B Saul, *Defining Terrorism in International Law* (Oxford: Oxford University Press, 2006). The definition of ‘terrorism’ in the UK legislation is, however, problematic and a source of controversy: see below.

other civil authorities for a freer hand to deal with the threat in question. Often, 'panic' measures are rushed through Parliament, with scant debate.² Subsequent terrorist atrocities (or threats of such atrocities) serve to ratchet up the ensuing sense of threat and panic. These lead in turn to tougher security measures, greater pressure on governments to stand firm and further departures from conventional criminal and public law norms. A cycle of trigger and response is established, where calm, reasoned analysis can be notable for its absence.³

The measures taken to repress the terrorist threat are justified time and again as required by the 'strict necessity' of the circumstances and the need to counter the very real violence caused by terrorist acts.⁴ The emphasis switches from treating violent acts as breaches of the 'ordinary' criminal law to a 'security' model of response, where the executive is conferred with sweeping powers often untrammelled by the normal constitutional checks and constraints.⁵ The threat of imminent disaster serves as a trump card, permitting the suspension of conventional civil liberties, the enhancement of police powers, and the targeting of particular minority groups associated with terrorist groups for special surveillance. This tends to generate resentment amongst these minorities, which in its turn can result in even greater resentment, alienation and radicalisation. A cycle of terror, repression and response is established that can take decades to break.

Further, counter-terrorism measures are usually presented as temporary deviations from the normal constitutional state of affairs. The problem is that these 'temporary' special measures tend to leave a permanent residue. As the threat from particular groups rarely ends at a clear and defined point in time, and new threats from other groups invariably emerge, some elements of emergency legislation become embedded in the conventional criminal law framework. This can result in a gradual and often unchallenged expansion in the coercive power of the state, which again can generate fear, resentment and radicalisation amongst those most exposed and vulnerable to the exercise of this power.

² For comparative discussion of this tendency for legislation to be introduced with speed in 'panic' situations, see J H Marks, '9/11+3/11+7/7=? What Counts in Counterterrorism?' (2006) 37 *Columbia Human Rights Law Review* 559; E A Posner and A Vermeule, 'Emergencies and Democratic Failure' (2006) 92 *Virginia Law Review* 1091.

³ For an analysis of how a similar process of rushed responses to crises resulted in the overly enthusiastic suppression of freedom of expression in the United States during the Second World War, see G R Stone, 'Free Speech in World War II: "When Are You Going to Indict the Seditious?"' (2004) 2 *International Journal of Constitutional Law* 334.

⁴ Loader and Walker have referred to this as a cycle of 'terror, fear and repression': see I Loader and N Walker, *Civilising Security* (Cambridge: Cambridge University Press, 2007) 89.

⁵ See Loader and Walker, *Civilising Security*, *ibid*; see also C A Gearty, 'Human Rights in an Age of Counter-Terrorism: Injurious, Irrelevant or Indispensable?' (2005) 58 *Current Legal Problems* 25; L Zedner, 'Seeking Security by Eroding Rights: The Side-Stepping of Due Process' in B Goold and L Lazarus (eds), *Security and Human Rights* (Oxford: Hart Publishing, 2007).

This general pattern of terror, repression and response has recurred over and over in UK responses to political violence, from as far back as the 1790s (see below) through to the long years of the Northern Ireland conflict. Since 9/11, this cycle has predictably been put into motion once again. In some jurisdictions, the new era of emergency powers and counter-terrorism panic may be experienced as a rupture, an abrupt departure from previous standards and norms. In the UK, it has been greeted to some extent with weary resignation and a sense of 'here we go again'.

However, there are some new dimensions to the current crisis that are worth noting. The scale and savagery of 9/11, the subsequent terrorist attacks in London and elsewhere, and the use of suicide bombers (unfamiliar in the UK even with its long history of political violence) has generated a sense that the current crisis is different and more serious than previous outbreaks of terrorist activity. In addition, the rhetoric of the 'War on Terror', with its eschatological language of 'clash of civilisations', 'good and evil' and 'life and death struggle', has provided new impetus to the sense of crisis. As with other Western countries, a new conception of 'militant democracy' has emerged,⁶ best encapsulated by the warning issued by the then Prime Minister, Tony Blair, soon after the London bombings: '[l]et no one be in any doubt, the rules of the game are changing.'⁷ This has fed and been fuelled in turn by fears of the Muslim 'Other', ensuring a steady political, media and security focus on the UK's large Muslim communities. It has also stirred up populist agitation for greater border control, exclusionary immigration policies and a shift away from the UK's previous fumbling, tentative yet largely well-meaning embrace of multicultural policies towards a new emphasis on cultural integration.⁸ The global dimensions of the current counter-terrorism frenzy also add a new and sinister dimension. There is evidence of some limited UK involvement in the new and opaque transnational mechanisms such as 'extraordinary rendition' that are designed to evade scrutiny in the handling of terrorist suspects.⁹

⁶ C Walker, 'The Treatment of Foreign Terror Suspects' (2007) 70(3) *Modern Law Review* 427, 427, citing A Sajo (ed), *Militant Democracy* (Amsterdam: Eleven International Publishing, 2004).

⁷ *The Times* (London), 6 August 2005, 1.

⁸ See T Modood, 'Muslims and the Politics of Difference' (2003) 74(1) *Political Quarterly* 100; B Hepple, 'Race and Law in Fortress Europe' (2004) 67(1) *Modern Law Review* 1; S Brighton, 'British Muslims, Multiculturalism and UK Foreign Policy: "Integration" and "Cohesion" in and beyond the State' (2007) 83(1) *International Affairs* 1.

⁹ See the findings by the Council of Europe Parliamentary Assembly, *Alleged Secret Detentions and Unlawful Inter-State Transfers of Detainees Involving Council of Europe Member States* (the 'Marty Report') Doc 10957, 12 June 2006 (Strasbourg: Council of Europe, 2006), available at <<http://assembly.coe.int/Documents/WorkingDocs/doc06/edoc10957.pdf>>; see also P Sands, 'The International Rule of Law: Extraordinary Rendition, Complicity and its Consequences' (2006) 4 *European Human Rights Law Review* 408. See also L Arbour, 'In Our Name and on Our Behalf' (2006) 4 *European Human Rights Law Review* 371 for an analysis of the implications and nature of this transnational dimension.

However, the abuses and failures of the past have resulted in some lessons being learnt. In particular, the use and periodic abuse of counter-terrorism measures in Northern Ireland have shown those willing to learn from the past what can go wrong with the over-enthusiastic application of such powers. There have been strong dissenting voices in the UK debates on counter-terrorism since 9/11: media, legal and political debates have raged on the question of how to respond to terrorist threats, and activists such as Shami Chakrabati (director of Liberty, a leading UK human rights non-governmental organisation (NGO)) have been prominent in challenging the government's constant attempts to secure new and expanded powers.

In addition, new constitutional mechanisms recently introduced as part of the New Labour constitutional reform agenda have come into play this time around. In particular, the *Human Rights Act 1998* (UK) (HRA), which incorporates the European Convention on Human Rights (ECHR)¹⁰ into UK law, has made the courts a battleground where the legitimacy of counter-terrorist powers has come under sustained (if not always successful) challenge. Parliamentary mechanisms, such as the Joint Select Committee on Human Rights (JCHR), which was established in late 2001 to provide a parliamentary vehicle for consideration of the human rights implications of legislation and government policy,¹¹ have also played an important role in questioning the inherent logic of the counter-terrorism cycle. The ever-growing case law of the European Court of Human Rights (ECtHR) has also had a considerable influence in shaping and constraining the routes available to the government in securing its objectives.

Perhaps to an unexpected degree, these mechanisms have played some role in impeding the apparently inevitable unfolding of the counter-terrorism cycle and the unthinking adoption of the security model of response. If the use of a somewhat extended and florid metaphor can be permitted, they have played some role in restraining the ship of state from wholly coming under the influence of the 'siren song' of the impulses that generate the counter-terrorism cycle of repression and response: however, the helmsmen of the ship are not securely bound to the mast, and the struggle to control the direction taken in the post-9/11 climate continues.

The Lessons of History

One can trace the outlines of the counter-terrorism cycle of terror and repression in action as far back as the early 1790s, when the radicalism and violence of the French Revolution triggered panic about similar 'subversion' occurring in the

¹⁰ *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 UNTS 222 (entered into force 3 September 1953).

¹¹ On the JCHR and the comparison between it and its Australian equivalent, see C Evans, 'Legislative Scrutiny Committees and Parliamentary Conceptions of Human Rights' (2006) *Public Law* 785.

UK.¹² This resulted in aggressive measures taken by the executive and Parliament against ‘sedition’, with many of the civil liberties that had been won over the preceding period of political activism being rolled back by the tide of reaction. This period is often neglected in contemporary debates about emergency powers and terrorism. Nevertheless, all the key ingredients of the cycle of reaction and response discussed above are present in the panic and clampdown that followed the ‘Terror’ of the 1789 Revolution.

However, the use of special emergency powers first became widely established in the colonial territories of the British Empire, where in periods of crisis (often involving challenges to British rule) normal common law and legislative provisions could be suspended and a regime of emergency powers introduced. The exercise of these powers very often involved the suspension of *habeas corpus*, detention without trial and the use of military tribunals.¹³ The normative standards of the common law and the British ideology of the rule of law, often held out as justifications for the colonial enterprise, were frequently sidelined during these periods of emergency.¹⁴

In a much less morally equivocal context, similar emergency powers were utilised during both World Wars, with the executive given sweeping powers to detain individuals suspected of enemy sympathies and to take necessary measures to safeguard the security of the threatened state. The Second World War case of *Liversidge v Anderson*¹⁵ saw the majority of the House of Lords take the position that the conventional approach to statutory interpretation, whereby legislation affecting the liberty of the subject should be read in favour of the individual, should not be applied to regulations introduced to protect the state in times of ‘public danger’. Despite Lord Atkin’s famous and eloquent dissenting opinion in this case (see below), *Liversidge* established that the executive was entitled to considerable freedom of action when Parliament had conferred emergency powers upon it.

In Northern Ireland, special powers legislation had been periodically utilised in response to spasms of political violence since partition of the island in 1922.¹⁶ With the modern outbreak of the ‘Troubles’ in 1969, these special powers provisions were triggered anew. However, as the communal violence escalated, these powers were quickly enhanced and supplanted by the *Northern Ireland*

¹² See C Emsley, ‘Repression, “Terror” and the Rule of Law in England during the Decade of the French Revolution’ (1985) 100 *English Historical Review* 801.

¹³ See N Hussein, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (Ann Arbor, MA: University of Michigan Press, 2003).

¹⁴ It should be noted that these colonial special powers provisions, which were incorporated into the legislative framework of the different colonial territories, have subsequently been used with enthusiasm by the newly independent post-colonial states, including Singapore and Malaysia.

¹⁵ [1942] AC 206.

¹⁶ See L K Donohue, ‘Regulating Northern Ireland: The Special Powers Acts, 1922-1972’ (1998) 41(4) *Historical Journal* 1089.

(*Emergency Provisions*) Acts 1973-96 (UK). In Britain, an IRA bombing campaign in 1939 had resulted in the introduction of the *Prevention of Violence (Temporary Provisions) Act 1939* (PVA), which introduced special powers of expulsion, prohibition, arrest and detention. Originally intended to be an interim statute, it remained in force until 1953 and was only repealed in 1973. However, following the outbreak of the IRA bombing campaign in Britain in 1974, new special powers legislation was introduced in the form of the *Prevention of Terrorism (Temporary Provisions) Act 1974* (PTA).¹⁷ The PTA, likewise intended to be a short-term measure, was repeatedly renewed and became bedded-down as a semi-permanent feature of British law.¹⁸

These successive waves of counter-terrorism legislation, often enacted rapidly in response to spiralling patterns of violence in Ulster and atrocities in Britain, introduced an array of measures including: new powers of search, arrest and seizure; suspended jury trial in Northern Ireland for certain types of offences linked to paramilitary activity; and extended detention periods before charge. They also made some erosion into the right to silence and other traditional constraints in the criminal process, introduced a series of new offences and extended police and army powers. Some of these measures, in particular the suspension of jury trial, were necessary responses to the desperate situation in which Northern Ireland found itself for much of the 1970s. Others were excessively far-reaching in nature and were implemented ineffectively and often unfairly, often as a result of their introduction as rushed responses to the pressure of events.

In particular, internment without trial was introduced in August 1971. This was an old tool of state response to political violence, used previously with considerable success both in Northern Ireland and in the Republic of Ireland, but its implementation in 1971 was both notoriously unsuccessful and poorly handled. The introduction of internment and the manner of its implementation triggered a violent backlash.¹⁹ The use of this internment power by the security forces ceased in 1975. However, controversy about the use of the other special search, arrest and interrogation powers became a recurring feature of the Northern Irish political landscape,²⁰ generating enormous resentment and anger

¹⁷ The PTA went through Parliament in a matter of days in 1974: see C Walker, *The Prevention of Terrorism in British Law* (2nd ed) (Manchester: Manchester University Press, 1992) ch 4.

¹⁸ See L K Donohue, *Emergency Powers and Counter-Terrorist Law in the United Kingdom 1922-2000* (Dublin: Irish Academic Press, 2000) for a comprehensive account of the Northern Irish and UK legislation.

¹⁹ R J Spjut, 'Internment and Detention without Trial in Northern Ireland 1971-1975: Ministerial Policy and Practice' (1986) 49(6) *Modern Law Review* 712; K McEvoy, *Paramilitary Imprisonment in Northern Ireland: Resistance, Management, and Release* (Oxford: Oxford University Press, 2001); F Davis, 'Internment Without Trial; The Lessons from the United States, Northern Ireland & Israel' (August 2004), available at <<http://ssrn.com/abstract=575481>>.

²⁰ See G Hogan and C Walker, *Political Violence and the Law in Ireland* (Manchester: Manchester University Press, 1989); D Walsh, *The Use and Abuse of Emergency Legislation in Northern Ireland* (London: Cobden Trust, 1983); K Boyle, T Hadden and P Hillyard, *Ten Years On in Northern Ireland:*

among the Catholic/Nationalist minority community in Northern Ireland in particular.²¹

In 1978, the ECtHR found in *Ireland v UK*²² that certain interrogation practices used in detention centres in Northern Ireland, including hooding of prisoners, sleep deprivation and subjection to noise, constituted inhuman and degrading treatment in breach of Article 3 of the ECHR. Subsequent decisions of the Strasbourg Court found that other aspects of UK counter-terrorist practice had violated the Convention,²³ requiring the UK to derogate from certain provisions of the ECHR.²⁴ Additional legal and political pressure, combined with a growing realisation of the backlash triggered by the excessive application of the counter-terrorist powers, resulted in a shift of approach on the part of the UK government. This involved a change to a 'criminalisation' strategy, whereby the ordinary mechanism of the criminal law would be used to respond to 'terrorist' acts in preference to the counter-terrorist special powers.²⁵

The strategy met with mixed success. Whilst controversy continued to haunt security operations in Northern Ireland, Campbell and Connolly have suggested that the 'dampening' of the excesses of the 1970s counter-terrorist strategy and the move towards 'formal rationality' (rather than overt repression) played a role in 're-framing' and calming the Northern Irish conflict from the mid-1980s onwards.²⁶ There has certainly been wide acceptance that serious errors were committed in the initial flush of emergency in Northern Ireland. However, despite extensive repentance in leisure for these errors, it appears as if these lessons of history have not been adequately learnt.

The Legal Control of Political Violence (London: Cobden Trust, 1980); F Ní Aolain, *The Politics of Force: Conflict Management and State Violence in Northern Ireland* (Belfast: Blackstaff Press, 2000).

²¹ See K McEvoy, 'Paramilitary Imprisonment in Northern Ireland', above n 19, 214; M O'Connor and C Rumann, 'Into the Fire: How to Avoid Getting Burned by the Same Mistakes Made Fighting Terrorism in Northern Ireland' (2003) 24 *Cardozo Law Review* 1657. Whether Nationalist anger at the use of these powers was always justified is open to debate. However, there is no doubt that abuse of these powers occurred and much of the ensuing resentment was genuine and deeply-felt.

²² (1978) 2 EHRR 25. See K O'Boyle, 'Torture and Emergency Powers under the ECHR: *Ireland v. the United Kingdom*' (1977) 71(4) *American Journal of International Law* 674.

²³ See eg *McCann v UK* (1995) 21 EHRR 97; *Brogan v UK* (1989) 11 EHRR 117 — but see *Donnelly and Others v UK*, Application 5577, 5583/73, Decision of the Commission, 5 April 1973.

²⁴ For the effect of the derogation, which permitted the UK to detain individuals for longer than the ECtHR had previously in the *Brogan Case* (ibid) held was compatible with the right to liberty in art 5 of the Convention, see *Brammigan and McBride v UK* (1994) 17 EHRR 539; see also K Cavanaugh, 'Policing the Margins: Rights Protection and the European Court of Human Rights' (2006) 4 *European Human Rights Law Review* 422.

²⁵ See B O'Leary and J McGarry, *The Politics of Antagonism: Understanding Northern Ireland* (London: Athlone Press, 1997).

²⁶ C Campbell and I Connolly, 'Making War on Terror? Global Lessons from Northern Ireland' (2006) 69(6) *Modern Law Review* 935, 953-55.

The *Terrorism Act 2000* and the Post-9/11 Legislation

Despite this change in strategy, many of the special counter-terrorism provisions became permanently embedded in UK law. These powers proved useful tools not only against Irish-linked terrorism but also against animal rights extremists and other groups. As a result, the PTA was at first renewed annually: then, these powers were permanently institutionalised in the *Terrorism Act 2000* (UK). Note the date: this legislation made provision for a separate and permanent 'code' of anti-terrorist legislation before the events of 11 September 2001.²⁷ This codification and extension of the counter-terrorism laws, carried out in 2000 even without the spur of a recent atrocity, shows how the logic of 'security' thrives even when the cycle of terror and repression is not in motion. Once opened, the Pandora's Box of special powers is almost impossible to close again.²⁸

Despite the controversial and far-reaching provisions of the 2000 Act, the events of 9/11 triggered the counter-terrorism cycle afresh. A month after the attacks on New York and Washington DC, the *Anti-Terrorism, Crime and Security Act 2001* was rushed through Parliament. This legislation made provision for extra powers to compel the forfeiture of property and to freeze funds held by individuals linked to terrorist activity. It also extended police powers in areas such as fingerprinting in order to identify terrorist suspects. Most controversially, it permitted the detention without trial of certain categories of non-nationals who, but for the decision of the ECtHR in *Chahal v UK*,²⁹ would be subject to deportation for reasons of national security. That case prohibited the deportation of non-nationals to countries where there was a 'real risk' that they might face torture or inhuman and degrading treatment: the Act now permitted such individuals to be detained on an indefinite basis if they were deemed to constitute a threat to national security.³⁰

The *Belmarsh* Decision and Detention without Trial

It is notable that this provision for detention without trial in Part 4 of the Act attracted comparatively little parliamentary debate or media criticism during its rapid progress through Parliament. This lack of debate was all the more striking given that the power of detention without trial required the UK to derogate from the right to personal liberty guaranteed by Article 5 of the ECHR, as the Convention requires that detained individuals must be charged and brought to

²⁷ Now, to teach students what the London police can do by way of search and arrest under the general codifying police powers legislation, without mentioning the separate and very wide range of permanent anti-terrorist police powers, would be a highly misleading exercise.

²⁸ See C Gearty, 'Terrorism and Human Rights: A Case Study in Impending Legal Realities' (1999) 19 *Legal Studies* 367.

²⁹ (1997) 23 EHRR 413.

³⁰ See H Fenwick, 'The Anti-Terrorism, Crime and Security Act 2001: A Proportionate Response to September 11?' (2002) 65 *Modern Law Review* 724.

trial as soon as possible.³¹ Derogations from the Convention under Article 15 require the existence of a war or ‘public emergency threatening the life of the nation’. The UK was therefore effectively declaring the existence of a national emergency, as it had done previously in Northern Ireland, and suspending the protection of some of the Convention rights. The UK government promptly moved to detain a number of individuals using this new power in the months after the passage of the legislation.³²

However, this detention power subsequently became a major legal and political battleground between government and civil liberties groups, the detainees and their lawyers.³³ In the dramatic *Belmarsh* decision of the House of Lords,³⁴ the Court was prepared to accept that a ‘public emergency threatening the life of the nation’ existed so as to justify derogation from the ECHR (with Lord Hoffmann dissenting on this point, arguing that no such emergency existed).³⁵ However, the detention power itself was found to be outside the permissible scope of derogation from the Convention provided for by Article 15 of the ECHR, which also requires derogating measures to satisfy a test of objective justification. The applicability of the detention power to non-nationals alone was held by a majority of eight to one of the Law Lords (sitting unusually as a nine-judge bench in light of the importance of the case) to constitute discriminatory treatment that could not be shown to be proportionate, given the absence of any clear justification as to why non-nationals were being singled out for special treatment. The Law Lords therefore issued a declaration of incompatibility under the HRA. Such a declaration has no binding legal force and the UK government can, in theory, choose to disregard it.³⁶ However, after initial threats to disregard the *Belmarsh* decision, the government agreed to end the use of the detention power in its current form.³⁷

³¹ See C Walker, ‘Prisoners of “War All the Time”’ (2005) *European Human Rights Law Review* 50.

³² Seventeen detention orders were issued under Part IV, over half of which commenced in December 2001: see C Walker, ‘Keeping Control of Terrorists Without Losing Control of Constitutionalism’ (2007) 59 *Stanford Law Review* 1395, 1406.

³³ A panel of Privy Counsellors established to report on the detention procedure was highly critical and recommended its repeal: see Privy Counsellor Review Committee, *Anti-Terrorism, Crime and Security Act 2001 Review Report*, Session 2003–4, HC 100 (London: Stationery Office, 2004) (‘the Newton Report’). For the official Home Office response, see UK Home Office, *Counter-Terrorism Powers: Reconciling Security and Liberty in an Open Society*, Cm. 6147 (London: Home Office, 2004). For the Home Secretary’s unofficial response, see R Ford and D McGrory, ‘Blunkett Fury as Privy Councillors Attack Terror Laws’, *The Times* (London) 19 December 2003, 4.

³⁴ *A v Secretary of State for the Home Department* [2005] 2 AC 68 (commonly known as the ‘*Belmarsh* decision’ after the prison in which the detainees were being held).

³⁵ On this point, see the contrasting views of T R Hickman, ‘Between Human Rights and the Rule of Law: Indefinite Detention and the Derogation Model of Constitutionalism’ (2005) 68 *Modern Law Review* 655 and S Tierney, ‘Determining the State of Exception: What Role for Parliament and the Courts?’ (2005) 68 *Modern Law Review* 668.

³⁶ See *Human Rights Act 1998* (UK) s 4.

³⁷ For a comprehensive analysis of the background and impact of the *Belmarsh* decision, see Gearty, above n 5. See also A Tomkins, ‘Readings of *A v Secretary of State for the Home Department*’ [2005] *Public Law* 259.

Circumventing *Belmarsh* — Control Orders and Detention Pending Deportation

In the wake of the *Belmarsh* decision, new legislative proposals in the form of the Prevention of Terrorism Bill 2005 were quickly brought before Parliament. This bill made provision for the UK Home Secretary to impose 'control orders' (substantive restraints on liberty in the form of quasi-civil injunctions) on nationals and non-nationals, where the Home Secretary had 'reasonable suspicion' that the individual in question is or has been involved in terrorism-related activity.³⁸ Under the Bill, such orders could come in two forms: 'non-derogating' orders that fell within the permitted extent of restrictions on individual liberty permitted by Article 5 of the ECHR, and 'derogating' orders that went beyond this permissible limit and would have to be imposed by a court, as well as requiring a new derogation from the Convention. The making of the 'non-derogating' orders would be subject to automatic judicial supervision, but the scope of such review was limited to ascertaining whether the Home Secretary had 'reasonable grounds' for making an order.³⁹ Confidential or sensitive intelligence evidence that supported the making of an order would not be subject to examination by the lawyers instructed by those subject to the orders, but instead would be reviewed by 'special advocates': barristers with special security clearance who would 'stand in' for the appellant's lawyers but who were not allowed to share the evidence with them.⁴⁰

This proposed new power to issue control orders was rapidly cobbled together by government lawyers in response to the *Belmarsh* decision: it was intended to allow the UK government to continue to target those who had been detained in *Belmarsh*, as well as to allow UK nationals (who had been exempt from the

³⁸ PTA 2005, above n 17, s 2(1)(a).

³⁹ See Walker, above n 32, 1395-463 for a detailed analysis of the control order mechanism.

⁴⁰ This 'special advocate' procedure was introduced by the *Special Immigration Appeals Commission Act 1997* (UK) in respect of immigration appeals against decisions to deport based on national security concerns, where sensitive intelligence information was at issue. It was based to an extent on a Canadian model, but its introduction was prompted by the *Chahal* decision of the ECtHR, which found a breach of the applicant's right to liberty under art 5(4) of the Convention on the basis that although judicial review was available to challenge decisions by the Home Secretary to deport an individual on the grounds of national security, the effective determination of the actual risk to national security was made by an internal Home Office advisory panel (the 'Three Wise Men') on the basis of sensitive intelligence material, which the deportee had no opportunity to challenge or question. The 2001 Act extended the function of the special advocates to detention cases under Part Four, and the 2005 Act did the same for control orders. The House of Lords has approved the use of the procedure in *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, [2003] 1 AC 153, 159, and accepted that the use of the special advocate procedure is compatible with the ECHR and may be a necessary mechanism: see *Roberts v Parole Board* [2005] UKHL 45. The ECtHR has remained relatively non-committal as yet about the procedure: see *Al-Nashif v Bulgaria* [2002] 36 EHRR 655, 20 June 2002. The Constitutional Affairs Select Committee of the House of Commons has expressed serious reservations about how the special advocate procedure was working in practice: see 7th Report, Session 2004-05, Constitutional Affairs Select Committee, *The Operation of the Special Immigration Appeals Commission (SIAC) and the Use of Special Advocates*, HC 323-I (London: The Stationery Office, 2005). See also the concerns expressed by special advocates themselves in *Abu Qatada v SSHD*, SC/15/2005, 26 February 2007, [528]-[537].

detention powers in the 2001 Act) to be subject to similar controls. Gearty has identified the elements of the proposed control orders that constitute significant departures from normal standards:

The proposed orders will not be criminal; nor (unless there has been a need to derogate) will they be imposed by a court. They will not depend on proof of wrongdoing or even imminent wrongdoing of any sort. The evidence on which they are based will not be exposed to adversarial scrutiny. And yet their effect will be more severe on individuals, perhaps also on their families, dependants and friends, than many criminal sanctions.⁴¹

Other leading commentators have made similar attacks on the scope and nature of control orders, with Zedner describing them as a form of ‘preventative justice’ and as departing ‘so radically from established legal norms that the mere fact of their legal existence poses a challenge to the rule of law that demands our close attention’.⁴² While not precluding the possibility that some form of preventative detention mechanism may have a role in combating terrorism, serious concerns about the nature and scope of control orders have also been expressed by the JCHR⁴³ and the Council of Europe’s Commissioner for Human Rights,⁴⁴ as well as by leading non-governmental organisations (NGOs).⁴⁵

Nevertheless, the Bill establishing this far-reaching new power was once again propelled rapidly through Parliament and faced little sustained political or media attack. With a general election looming, the government raised the spectre of the Belmarsh detainees walking free.⁴⁶ This pressure allowed the government to rush the Bill through Parliament in under two weeks — a speed that left Opposition MPs ‘absolutely incredulous’.⁴⁷ The one concession to Opposition

⁴¹ Gearty, above n 37, 43 [footnote omitted].

⁴² L Zedner, ‘Preventive Justice or Pre-Punishment? The Case of Control Orders’ (2007) *Current Legal Problems* 174. See also L Zedner, ‘Seeking Security by Eroding Rights: The Side-Stepping of Due Process’ in B Goold and L Lazarus (eds) *Security and Human Rights* (Oxford: Hart Publishing, 2007); D Bonner, ‘Checking the Executive? Detention without Trial, Control Orders, Due Process and Human Rights’ (2006) 12 *European Public Law* 45.

⁴³ Joint Select Committee on Human Rights, 10th Report, Session 2004–05, *Prevention of Terrorism Bill*, HL68/HC334 (London: The Stationery Office, 2005); 9th Report, Session 2004–05, *Prevention of Terrorism Bill: Preliminary Report*, HL61/HC389 (London: The Stationery Office, 2005).

⁴⁴ A Gil-Robles, *Report by Mr Alvaro Gil-Robles, Commissioner for Human Rights on his visit to the United Kingdom* Comm DH (2005) 6 (Strasbourg: Council of Europe, 2004) 9.

⁴⁵ See, eg, Liberty, *Renewing the PTA 2005: Submission to the JCHR*, February 2006, available at <<http://www.liberty-human-rights.org.uk/pdfs/policy06/pta-renewal-for-jchr-.PDF>>.

⁴⁶ *The Times* political commentator reported the government pressure placed on its own backbench MPs, the Opposition and the House of Lords as follows: ‘They are basically saying to the House of Lords: if you don’t pass this by March 14, the Belmarsh boys walk free’. See *Times Online*, 21 February 2005. See also G P Phillipson, ‘Deference, Discretion and Democracy in the Human Rights Act Era’ (2007) 60 *Current Legal Problems* 40.

⁴⁷ Phillipson, *ibid.*

concerns following an intense debate in the (unelected) House of Lords was the insertion of a 'sunset clause' in respect of the control orders power.⁴⁸

Subsequent to the introduction of this power, the Home Secretary issued a variety of control orders. The orders imposed a series of far-reaching restrictions upon those persons subject to this new regime of executive supervision (which have included many of the Belmarsh detainees and, for the first time, UK nationals). These control orders included the following provisions, as noted by the JCHR:

an 18 hour curfew, electronic tagging, a ban on use of the garden, requirements to report to a monitoring company twice a day, a ban on visitors and meetings with people anywhere other than those approved in advance by the Home Office, requirements to allow police to enter the house at any time and search and remove any item, and to allow the installation of monitoring equipment, prohibitions on phones, mobile phones and internet access, and restrictions on movement to within a defined area.⁴⁹

At first glance, the sweeping nature of these restrictions would appear to violate the right to personal liberty guaranteed by Article 5 ECHR, which in general can only be restricted via the normal processes of the criminal law. However, the control order scheme was carefully designed to take advantage of a series of ECtHR decisions concerning the imposition by Italy of extensive restrictions on the personal liberty of Mafia suspects: in these cases, the Strasbourg court had distinguished between the total deprivation of liberty (which under Article 5 was required to be based upon a criminal conviction in the ordinary course of law) and restrictions on freedom of movement and residence, which depending on their nature and extent would not necessarily constitute a violation of Article 5 if imposed outside of the ordinary criminal process.⁵⁰ The ECtHR has emphasised that this distinction is a matter of degree: nevertheless, the UK government maintained that the control order scheme in general, and the specific orders that it imposed on the suspect individuals, fell on the acceptable side of this distinction.

In addition, the executive also continued to make use of its extensive detention powers under the immigration control legislation, which permit non-nationals deemed by the executive to pose a threat to national security to be detained

⁴⁸ Ibid. Zedner notes that when the control orders provision was renewed a year later, only 13 MPs were in the House of Commons for the debate: see Zedner, 'Preventive Justice or Pre-Punishment? The Case of Control Orders', above n 42. Subsequent renewal debates have however attracted greater interest and controversy.

⁴⁹ 12th Report, Joint Select Committee on Human Rights (2005-06) [34].

⁵⁰ See *Guzzardi v Italy* (1980) 3 EHRR 533; *Raimondo v Italy* (1994) 18 EHRR 237; *Ciancimino v Italy* (1991) 70 DR 103.

pending deportation.⁵¹ Judicial oversight of decisions to detain pending deportation is available in the form of the Special Immigration Appeals Commission (SIAC). However, in the immediate aftermath of 9/11, the House of Lords in *R v Secretary of State for the Home Department, ex p Rehman*⁵² took the position that SIAC should give considerable deference to executive views as to whether a non-national constituted a threat to national security and therefore was a suitable case for deportation. In addition, detention pending deportation has been deemed to be compliant with the ECHR, if maintained for a fixed period of relatively short- to medium-term duration and periodically reviewed.⁵³

The leeway thus given to the use of the immigration detention powers was exploited by the UK government to ensure the continued detention of many of the Belmarsh suspects. However, many of these individuals could only be deported back to countries where they faced a real risk of being tortured, which again would fall foul of the European Court of Human Rights decision in *Chahal*.⁵⁴ As the immigration control legislation only permitted detention pending deportation, the UK government therefore set diplomatic processes in train with a view to reaching 'no-torture' agreements with some of the potential 'destination' countries (such as Jordan, Algeria and Libya): these agreements were supposed to provide sufficient safeguards against torture to enable the detainees to be returned without breaching *Chahal*. These diplomatic negotiations proved to be a difficult and long-drawn out process: however, in the interim, the UK government has been able to continue detaining a small group of non-nationals.

The use of control orders and the power to detain pending deportation has therefore allowed the UK government to circumvent to some degree the impact of the *Belmarsh* decision.⁵⁵ These devious legal strategies have provided mechanisms for constraining the liberty of a small group of suspect individuals: the control order and immigration detention regimes have also served as a useful way of pressuring the non-nationals within that group to return to their home countries. At least two individuals appear to have returned 'voluntarily' to

⁵¹ The *Immigration Act 1971* (UK) permits a form of home detention 'pending deportation'. The government's strategy has been furthered by recent changes to immigration rules and guidelines that widen the permissible grounds of deportation: see Home Office, *Exclusion or Deportation from the UK on Non-Conducive Grounds* (London, 2005); Home Office, *Asylum Policy Instructions on the 'Cessation, Cancellation and Revocation of Refugee Status* (London, 2005); and Walker, above n 6, 434.

⁵² [2001] UKHL 47, [2003] 1 AC 153.

⁵³ See *R (Q) v Secretary of State for the Home Department* [2006] EWHC (Admin) 2690; *Saadi v United Kingdom*, App. No. 13229/03 (Eur Court HR 2006).

⁵⁴ States party to the ECHR cannot derogate from art 3 of the Convention, which guarantees the right to freedom from torture and inhuman and degrading treatment and which was the right at stake in *Chahal*.

⁵⁵ See the comprehensive and excellent analysis in Walker, above n 6.

Algeria.⁵⁶ This twin-track strategy has been carefully designed to take advantage of ambiguities and weaknesses in European and domestic human rights protection: whereas more blunt tools may have been used in Northern Ireland and elsewhere, the 'human rights era' is now apparently marked by the deployment of more subtle tools that nevertheless appear at times to be capable of achieving somewhat similar results.

The Partial Malfunctioning of the Control Order and Deportation Strategy

However, it would be very premature to write off the ability of human rights controls to provide serious obstacles to the exercise of unconstrained executive power in the counter-terrorism context. While initially successful, the use of the twin-track control order/detention pending deportation strategy has over time again mired the UK government in a morass of political and legal controversy. At the political level, the JCHR, along with many civil liberties groups, have expressed consistently strong criticism of the use of the control orders power.⁵⁷ Lord Carlile of Berriew QC, the Independent Reviewer of the legislation, also expressed substantial concerns about both the terms of certain specific orders and how they were being enforced, describing them as verging on 'house arrest'.⁵⁸ The language of human rights has been effectively deployed by campaigners to challenge the government's twin-track strategy.

However, with little political mileage to be extracted from campaigning for the rights of a tiny group of unpopular individuals, the real obstacles to the use of control orders have been generated through legal processes. Several court decisions have applied the HRA so as to restrict the scope of the restraints that can be imposed on individuals by control orders and enhanced the ability of detainees under both the control order and immigration control regimes to challenge the justification for their detention. (The UK has not as yet derogated from the Convention, which would permit the Home Secretary to make use of 'derogating' control orders and therefore to evade judicial scrutiny under the HRA.)

⁵⁶ Press Association, 'Terror Suspect Deported Voluntarily', *The Guardian* (London), 16 June 2006; P Donovan, 'Out of Control Orders', *New Statesman*, 17 April 2008.

⁵⁷ Joint Select Committee on Human Rights, 12th Report, Session 2005-2006, *Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2006*, HL122/HC915 (London: The Stationery Office, 2006); 8th Report, Session 2006-2007, *Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2007*, HL60/HC365 (London: The Stationery Office, 2006); Joint Select Committee on Human Rights, 10th Report, Session 2007-2008, *Counter-Terrorism Policy and Human Rights: Annual Renewal of Control Orders Legislation 2008*, HL 57/HC 356 (London: The Stationery Office, 2008).

⁵⁸ See *Second Report of the Independent Reviewer pursuant to section 14(3) of the Prevention of Terrorism Act 2005* (19 February 2007), available at <<http://security.homeoffice.gov.uk/news-publications/publication-search/independent-reviews/lordcarlile-ann-report.pdf>>. The Independent Reviewer comments on the operation of the UK's anti-terrorism legislation in regular reports (see below).

In *Re MB*,⁵⁹ the first real legal challenge to a control order, Sullivan J accepted that the control orders were civil proceedings and not criminal: this meant that the individuals affected were only entitled to the lower standard of procedural fairness guaranteed in civil proceedings by virtue of the right to fair trial contained in Article 6 ECHR. However, he went on to conclude that the judicial supervisory role within the control orders mechanism was 'very limited indeed', that the standard of proof to be applied by the Home Secretary in deciding to impose an order was too low, and, in the particular case in front of him, that there was substantial reliance on closed material to which the applicant had no access. He therefore considered that the right to fair trial in civil proceedings provided for in Article 6 of the Convention had been violated. On appeal, the Court of Appeal disagreed that Article 6 had been violated: the Court considered that the supervisory role given to SIAC in control order cases was adequate to secure a fair trial. However, this judgment was based upon a finding by the Court that the terms of the Prevention of Terrorism Act 2005 required the Home Secretary to satisfy a more rigorous standard of proof before a control order would be confirmed than Sullivan J had assumed was necessary.⁶⁰ In other words, the Court of Appeal interpreted the 2005 Act as permitting more intensive judicial scrutiny of the grounds for making a control order.

Applying this marginally more intensive standard of review, the Court of Appeal in *Re JJ*⁶¹ subsequently approved another decision by Sullivan J to the effect that the extent of the restraints on the individual's freedom of movement and liberty imposed by the specific control order at issue in that case constituted a violation of Article 5(1) of the ECHR.⁶² Beatson J in *Secretary of State for the Home Department v E*⁶³ subsequently found another control order to have violated Article 5(1). However, the Court of Appeal reversed the decision in *E*, finding that the requirements of the order in question were not sufficiently intrusive upon the individual's personal liberty so as to violate the Convention.

All of these decisions subsequently were appealed to the House of Lords. In *Secretary of State for the Home Department v JJ*,⁶⁴ the House of Lords applied the ECHR jurisprudence on Article 5 discussed above and took the view that control orders that imposed very substantial restrictions on liberty (such as the control order at stake in the *JJ Case* itself, which required the individual subject

⁵⁹ [2006] EWHC (Admin) 1000. It is worth noting that the person subject to the control order in this case was apparently attempting to leave the UK to fight against the Coalition troops in Iraq.

⁶⁰ *Secretary of State of the Home Department v MB* [2006] EWCA (Civ) 1140.

⁶¹ [2006] EWCA Civ 1141; [2007] QB 446.

⁶² Whether a civil order requiring detention will comply with art 5 ECHR will depend on the extent of the restrictions imposed on liberty: see *Guzzardi v Italy*, App. No 7367/76, SerA 39, ECHR; *Raimondo v Italy*, App 12954/87, SerA 281-A, ECHR; *R (Saadi) v Secretary of State for the Home Department* [2001] EWCA Admin 670, [41].

⁶³ [2007] EWHC (Admin) 233.

⁶⁴ [2007] UKHL 45; [2007] 3 WLR 643.

to the order to remain at home for 18 hours in a day) would fall foul of Article 5 ECHR, as they would effectively constitute a total deprivation of liberty. However, the judgments in *JJ* left a considerable degree of ambiguity as to where the distinction should be drawn between total deprivation of liberty and less serious restrictions on freedom of movement, essentially leaving it to the lower courts to consider the application of Article 5 ECHR on a case-by-case basis, taking into account the 'cumulative impact' of the specific orders in question.⁶⁵

In the two other judgments, *Secretary of State for the Home Department v MB*⁶⁶ and *Secretary of State for the Home Department v E and S*,⁶⁷ the House of Lords upheld the position of the Court of Appeal that the lower civil standard of protection under Article 6 ECHR applied in the context of control orders. However, their Lordships also agreed with the Court of Appeal that the Home Secretary was under a duty to consider the possibility of a prosecution in place of using the control order mechanisms and to facilitate regular reviews of the necessity of control orders. In addition, the majority of their Lordships (with Lord Hoffmann dissenting on this point) also took the view that Article 6 ECHR required that the 'accused' in control order proceedings have access to the key evidence against him: in the views of the majority, this requirement meant that the use of the 'special advocate' procedure (discussed above) had to be modified to permit the accused and their lawyers to have access to this evidence where this was necessary to ensure compliance with Article 6. Once again, how this very general guidance was to be interpreted was left to the lower courts.⁶⁸

The approach adopted by the House of Lords in these cases is a muddy compromise: the inherent validity of the control order scheme was accepted, but substantial constraints were nevertheless imposed on the extent and scope of control orders and new procedural rights were introduced into the process. Nevertheless, the overall impact of this sequence of cases has been a greater judicial readiness to strike down or modify the terms of control orders.⁶⁹ The extra procedural safeguards introduced by the House of Lords into the control order procedure, widely seen in the immediate aftermath of the judgment as largely tokenistic, have also been interpreted as requiring greater disclosure of key evidence directly to the accused than was available hitherto.⁷⁰ As the endless process of appeal and counter-appeal proceeds, it is apparent that the control

⁶⁵ For further analysis, see D Feldman, 'Deprivation of Liberty in Anti-Terrorism Law' (2008) 67(1) *Cambridge Law Journal* 4.

⁶⁶ [2007] UKHL 46; [2007] 3 WLR 681.

⁶⁷ [2007] UKHL 47; [2007] 3 WLR 720.

⁶⁸ See C. Forsyth, 'Control Orders, Conditions Precedent and Compliance with Article 6(1)' (2008) 67(1) *Cambridge Law Journal* 1.

⁶⁹ See *SSHD v Rideh and J* [2007] EWCA Civ 804; *SSHD v AF* [2007] EWHC 651 (both of which pre-dated the decisions of the House of Lords in *JJ*, *MB* and *E*); *SSHD v Bullivant* [2008] EWHC B2 (Admin), which post-dated those decisions.

⁷⁰ See *Re Bullivant* [2007] EWHC 2938 (Admin).

order scheme is facing increased judicial resistance. Cerie Bullivant in January 2008 became the first person to be completely liberated from the control order regime, following a decision by Collins J to quash the relevant control order.⁷¹

At a wider political level, there are also clear signs of a growing sense of public concern about the control order process. Several persons subject to control orders have managed to abscond and evade surveillance, exposing the Government to ridicule.⁷² A jury subsequently refused to convict one of these individuals (Cerie Bullivant, once again) for failing to comply with the terms of his control order.⁷³ Politicians have begun to wash their hands of the control order scheme, while blaming the courts for necessitating the introduction of this mechanism in the first place.⁷⁴ The control order strategy therefore appears to be partially unraveling. However, the basic mechanism remains alive and still imposes substantial constraints on certain individuals.

The UK government's 'detention pending deportation' strategy has also run into some trouble. In *A v Secretary of State for the Home Department (No 2)*,⁷⁵ the House of Lords held that evidence obtained through torture could not be admissible in UK court proceedings. Controversially, the majority of the Law Lords however also held that the onus to make an arguable case that evidence was linked to torture rested on the defendant, a burden that may be difficult to discharge in practice. Nevertheless, this means that when courts and SIAC consider control or detention orders, evidence that supports the making of such orders must be discounted if the defendant can make a good arguable case that this evidence was obtained via the use of torture in another jurisdiction. This has resulted in particular evidence being withdrawn by government lawyers in at least one control order case.⁷⁶ In addition, SIAC has released several detainees on the basis that they posed no immediate risk to national security.⁷⁷

The UK government's attempt to circumvent *Chahal* by obtaining reassurances from 'destination' countries that deportees would not be tortured on their return has also run into trouble. The government had some initial success in convincing SIAC that the return of individual detainees to Jordan and Algeria would not

⁷¹ *SSHD v Bullivant* [2008] EWHC B2 (Admin).

⁷² A Travis and A Kumi, 'Manhunt as Terror Suspect Escapes Control Order: Man Absconds Four Days After Restrictions Imposed: British Citizen Wanted to Go Abroad "For Terrorism"', *The Guardian* (London), 17 January 2007, 6; S Tendler, 'Terror Suspect on Run After Breaking Out of Mental Unit', *The Times* (London), 17 October 2006, 2; *BBC Online*, 'Three on Control Orders Abscond', 23 May 2007; *BBC Online*, 'Control Orders Flawed, Says Reid', 24 May 2007.

⁷³ See *BBC Online*, 'Court Clears Control Order Nurse', 13 December 2007. The fact that this headline refers to the accused as a 'control order nurse', instead of identifying him as a 'terrorist suspect' as has previously been more likely to have been the case, is in itself indicative of the changing public attitude.

⁷⁴ T Blair MP, 'Shackled in War on Terror', *Sunday Times* (London), 27 May 2007.

⁷⁵ [2005] UKHL 71 [2005] All ER (D) 124 (Dec); [2006] 1 All ER 575.

⁷⁶ See *Rideh*, above n 69.

⁷⁷ See *BBC Online*, 'Terror Suspect Cannot Be Deported', 14 May 2007; see also *G v SSHD* [2004] EWCA Civ 265, SIAC.

violate Article 3 of the ECHR. However, it has had much greater difficulty in doing the same in respect of Libya.⁷⁸ Subsequently, the Court of Appeal have taken the view that there was a real risk of treatment in violation of Article 3 if the individuals in question were returned to Libya, Jordan and Algeria, effectively throwing the government's strategy into chaos.⁷⁹ In addition, the European Court of Human Rights in *Saadi v Italy*⁸⁰ has recently decisively reaffirmed its ruling in *Chahal*, despite an invitation to reconsider its earlier judgment presented by Italy and the UK, which intervened in this case in a (predictably) vain attempt to shift the position of the Strasbourg court.⁸¹

As a consequence, the use of both control orders and deportation powers is running into difficulties. The short-term rushed strategy of detention of key suspects, which was initiated in 2001 and which has continued ever since, looks badly flawed. However, it is worth noting that those suspects caught up in the process have been detained or kept under effective house arrest for the best part of six years, often under psychologically distressing and uncertain conditions.⁸² Many remain subject to considerable restrictions, which effectively make it impossible for them to live normal lives: at least one detainee has been hospitalised in a mental health institution.⁸³

The Other Problematic Dimensions of the Counter-Terrorism Legislation: The Definition of 'Terrorism', Stop and Search Powers and Ninety-Day Detention

There are additional by-products of the cycle of response and counter-response. The wide definition of 'terrorism' used in s 1 of the *Terrorism Act 2000* generates significant problems, as it potentially encompasses a very broad range of activity and activism. It includes: 'the use or threat of action' where it endangers life, or poses a serious risk to health or to property, and is 'designed to influence the government [or international governmental organisation] or to intimidate the public or a section of the public', and where 'the use or threat is made for the purpose of advancing a political, religious or ideological cause'. Crucially, the

⁷⁸ See, for the decision on Algeria, *Y v SSHD*, SC/36/2005, 24 August 2006. For the Jordan decision *Abu Qatada v SSHD* SC/15/2005, 26 February 2007; for the Libya decision, see *DD and AS v SSHD*, SC/42 and 50/2005, 27 April 2007, available at <<http://www.justice.org.uk/images/pdfs/DD%20AND%20AS%20OPEN%20JUDGMENT%2020%20APRIL.%202007.pdf>>.

⁷⁹ *AS & DD (Libya) v Secretary of State for the Home Department* [2008] EWCA Civ 289; *Othman (Jordan) v Secretary of State for the Home Department* [2008] EWCA Civ 290. See also *MT (Algeria) v Secretary of State for the Home Department* [2007] EWCA Civ 808.

⁸⁰ Application No. 37201/06, Decision of 28 February 2008, Grand Chamber.

⁸¹ The European Court of Human Rights in *Saadi* also made clear that the existence of any agreement with a 'destination' state not to torture would not preclude it from assessing whether a real risk to the deportee nevertheless still existed: *ibid* [148].

⁸² See the facts established in *SSHD v Rideh and J* [2007] EWCA Civ 804; see also I Robert et al, 'Psychiatric Problems of Detainees under the Anti-Terrorism Crime and Security Act 2001' (2005) 29 *Psychiatric Bulletin* 407.

⁸³ See Robert, *ibid*.

definition extends to action outside the UK.⁸⁴ As financially supporting terrorist activities or organisations, or ‘encouraging’ terrorism, are now offences, the effect of the broad definition is that expressing support for proscribed ‘terrorist’ organisations such as Hizballah or advocating attacks against coalition forces in Iraq can potentially leave one as exposed to the application of the counter-terrorism powers as a supporter of internal terrorism within the UK. As this definition triggers many of the special powers provided for in the legislation, as well as opening the door for the imposition of criminal liability, its potential width is a real problem.⁸⁵

Stop and search powers under the 2000 Act continue to be applied with enthusiasm. In *R (Gillan) v Commissioner of Police for the Metropolis*,⁸⁶ the Law Lords upheld a decision by police officers to apply these stop-and-search powers to protestors outside an arms fair in East London. The Lords felt that the courts should not intervene to second-guess decisions by senior police personnel as to what might constitute a terrorist target. However, it appears that the police are making very intensive use of stop-and-search powers. Under the powers provided for in s 44 of the 2000 Act, 29,407 stop and searches were conducted from October 2003 to September 2004 alone.⁸⁷ There have also been some very questionable instances of the application of other counter-terrorist powers. For example, the use of powers conferred under the 2000 Act to eject protesters from party political conferences has attracted media controversy.⁸⁸

Furthermore, the cycle of response and counter-response continues to roll on, generating new offences, new legal problems and new pressure on the groups most exposed to the application of the legislation. The London bombs in July 2005, with their terrible loss of life, were followed by what, in the context of UK counter-terrorism policy, was an unusual period of calm and restraint.⁸⁹ However, the UK government subsequently unveiled yet more new counter-terrorist powers, accompanying them with a drumbeat of rhetoric about the need for tough measures to fight the terrorist threat. The upshot of this was the introduction of the *Terrorism Act 2006*, which provided for new offences of a potentially very broad and uncertain nature. These include the prohibition of

⁸⁴ See s 1(4)(a) of the 2000 Act.

⁸⁵ See C Walker, ‘The Legal Definition of “Terrorism” in United Kingdom Law and Beyond’ [2007] *Public Law* 331; Joint Select Committee on Human Rights, 3rd Report, Session 2005-06, *Counter-Terrorism Policy and Human Rights: Terrorism Bill and Related Matters*, HL75/HC 561, (London: Stationery Office, 2005) [12]-[13]; Lord Carlile, *The Definition of Terrorism: A Report*, Cm 7052 (London: Home Office, 2007).

⁸⁶ [2006] UKHL 12.

⁸⁷ See C Fraser, ‘Are The Police Misusing Stop and Search?’ *BBC Online*, 23 October 2005.

⁸⁸ See, eg, BBC News, ‘Labour Issues Apology to Heckler’, 28 September 2005. In this particular case, an 82-year-old man who had fled from Nazi Germany in 1937 was ejected from the Labour Party Conference for heckling a senior minister and was prevented from re-entering the venue under the 2000 Terrorism Act.

⁸⁹ See Walker, above n 6, 427.

behaviour that might 'glorify' or 'encourage' terrorism, as well as acts 'preparatory' to terrorism.⁹⁰ (Note however that the Court of Appeal in *R v Zafar*⁹¹ has recently adopted a restrictive interpretation of the definition of what will constitute possession of material for a 'purpose connected with the commission, preparation or instigation of an act of terrorism', which is prohibited by s 57 of the *Terrorism Act 2000*. If a similar approach is applied to the new offences introduced by the 2006 Act, this may limit their potential scope of application.)

The 2006 Act also widened the grounds on which organisations can be proscribed and extended the permissible period of detention without charge upon arrest from 14 days to 28 days.⁹² The Government originally sought to extend the detention period to a maximum of 90 days,⁹³ but this proposal was defeated following a backbench revolt in the House of Commons.⁹⁴ The debate on the 90-day detention proposal was notable for the failure of the government to present solid reasons for the need to use such an extended detention period.⁹⁵ Nevertheless, the temptation to be seen to be responding to the July 2005 atrocity and to deliver every conceivable tool that might be of use to the police and security services still appears to be overwhelming. The government at the time of writing is seeking Parliamentary approval of a maximum period of 45-day detention subject to some limited judicial controls.⁹⁶ This persistence is all the more striking given the previous rejection of the attempt to introduce 90-day detention in 2006, the availability of alternative detention methods (including the government's own control order scheme) and the widespread opposition from police officers, the media and other political parties that this proposal has attracted. It also appears very likely to be contrary to the ECHR, but the UK Government appears willing to take this risk.⁹⁷ In addition, press leaks in May

⁹⁰ See ss 1 and 5 of the 2006 Act. For criticism of these new offences, see Joint Select Committee on Human Rights, 3rd Report, Session 2005-06, *Counter-Terrorism Policy and Human Rights: Terrorism Bill and Related Matters*, HL75/HC 561, (London: Stationery Office, 2005) [18]-[25]. See also D Barnum, 'Indirect Incitement and Freedom of Speech in Anglo-American Law' [2006] *European Human Rights Law Review* 258.

⁹¹ [2008] EWCA Crim 184.

⁹² The period had been originally increased from seven days by s 306 of the *Criminal Justice Act 2003* (UK), an extension that was again justified on the grounds of the need to combat terrorism.

⁹³ See *Terrorism Bill 2005-06*, HC No. 55, cl 23.

⁹⁴ Even the shorter 28 day period has been criticised as disproportionately long by the JCHR: see Joint Select Committee on Human Rights, *Counter-Terrorism Policy and Human Rights: The Terrorism Bill and Related Matters*, 2005-06, HL 75, HC 561, [92].

⁹⁵ See the analysis of the Joint Select Committee on Human Rights, 3rd Report, Session 2005-06, *Counter-Terrorism Policy and Human Rights: Terrorism Bill and Related Matters*, HL75/HC 561, (London: Stationery Office, 2005) [64]-[103].

⁹⁶ 'Undesirable and Unproven', *The Independent* (London), 21 November 2006, at <http://comment.independent.co.uk/leading_articles/article2001493.ece>.

⁹⁷ See the analysis of the Joint Select Committee on Human Rights, 3rd Report, Session 2005-06, *Counter-Terrorism Policy and Human Rights: Terrorism Bill and Related Matters*, HL75/HC 561, (London: Stationery Office, 2005) [64]-[103], and the response by the government, Joint Select Committee on

2007 indicated that the Government was contemplating introducing legislation to extend stop and question powers, despite the apparent bemusement of senior police officers, who see little need for the new proposal.⁹⁸

The Siren Song of Necessity: Why the UK Government is Addicted to Devising More and More Emergency Counter-Terrorist Powers

Stepping back from this narrative, it is possible to draw some conclusions about the legal, political and institutional factors that appear in the UK context to drive this apparently unrelenting counter-terrorism cycle. The UK government is obviously attached to the use of sweeping emergency powers, even despite the difficulties it has faced since *Belmarsh* in having its own way in this area. As Gearty has argued, the rhetoric of the 'War on Terror' seems to have resulted in a loss of historical perspective on the causes and nature of political violence.⁹⁹ Despite increasing political and media restiveness about the use of the emergency powers, the Government appears committed to its course. Senior ministers have called for unspecified modifications to the UK and European human rights frameworks.¹⁰⁰

The general stance of the UK government in recent years is well illustrated by a recent comment piece written by Tony Blair MP:

Over the past five or six years, we have decided as a country that except in the most limited of ways, the threat to our public safety does not justify changing radically the legal basis on which we confront this extremism ... [The] right to traditional civil liberties comes first. I believe this is a dangerous misjudgment. This extremism, operating the world over, is not like anything we have faced before. It needs to be confronted with every means at our disposal. Tougher laws in themselves help, but just as crucial is the signal they send out: that Britain is an inhospitable place to practise this extremism.¹⁰¹

In this piece, the then Prime Minister directly indicated his fundamental disagreement with Lord Hoffmann's opinion in the *Belmarsh* decision that the UK was not threatened by a serious state of emergency. In his view, the nature of the current terrorist threat has been seriously underestimated by civil libertarians and the judiciary.

Human Rights, 10th Report, Session 2005–06, *Government Response to the Committee's Third Report of this Session: Counter-Terrorism Policy and Human Rights: Terrorism Bill and Related Matters* HL 114/HC 888, (London: Stationery Office, 2005).

⁹⁸ M White, V Dodd and D Pallister, 'Minister's Plan for New Stop-and-Question Powers Takes Senior Officers by Surprise', *The Guardian* (London), 28 May 2007.

⁹⁹ C Gearty, 'Rethinking Civil Liberties in a Counter-Terrorism World' (2007) 2 *European Human Rights Law Review* 111.

¹⁰⁰ *BBC Online*, 'Reid Urges Human Rights Shake-Up', 12 May 2007.

¹⁰¹ Blair, above n 74.

Following the replacement of Tony Blair by Gordon Brown MP as Prime Minister, there has been a tendency for ministers to adopt a softer and more nuanced tone. This was particularly noticeable in the wake of the attempted bombings in London and Glasgow in June 2007, where both the new Prime Minister and the newly appointed Home Secretary refrained from calling for fresh new powers in their moderate response to the attempted attacks.¹⁰² However, it appears as if the policy of the UK government on issues such as extending the time for which terrorist suspects can be detained has not altered significantly, despite the change of leadership and tone.

This enthusiasm for introducing more and more new counter-terrorism legislation may seem unwarranted. Civil libertarian groups are fond of calling the effectiveness of counter-terrorism powers into question. As Crenshaw has pointed out, there is little evidence of their unqualified success.¹⁰³ However, it is also important to appreciate the driving forces behind the UK government's attachment to emergency action. The executive is expected by the public to defend the state: as a consequence, politicians feel the need to be seen to do something.¹⁰⁴ Government ministers see the intelligence reports and phone intercept transcripts and are naturally influenced by this material. Concerns about the toll that can be exacted by suicide bombing add a new dimension to these motivational factors: the possible consequences of inaction appear very grave.

In addition, there exists a clear perception in government, the police and the security services that counter-terrorism powers are effective. While they may not generate many successful prosecutions in themselves, they are seen as vital tools to enable police surveillance of suspect groups and to reassure an anxious public.¹⁰⁵ There also exists the belief that desperate times require desperate measures, and that the pressing necessity to combat extremism justifies strong action. As the historical pattern repeats itself, yet again the siren song of necessity demonstrates its attractiveness. Governments feel compelled to act, and the consequences of the application of emergency powers are readily dismissed as collateral damage. This tendency to reach repeatedly for emergency powers, appears to be structural, the product of institutional and political expectations about how governments should act in times of terrorist threat.

¹⁰² P Wintour, 'Ministers Step Up Muslim Hearts and Minds Campaign', *The Guardian* (London), 3 July 2007.

¹⁰³ M Crenshaw, 'The Psychology of Terrorism: An Agenda for the 21st Century' (2000) 21 *Political Psychology* 405.

¹⁰⁴ A point well made by Gearty, above n 37.

¹⁰⁵ See Donohue, above n 18.

The Damaging Impact of Counter-Terrorism Powers

The problem with this powerful lure is that the immediate imperatives of responding to the necessity of the moment can blind policy-makers to the long-term consequences of their actions. The development of law through legislation, case law or constitutional principles is usually the product of a long drawn out process of trial and error, experimentation and cumulative experience. However, the demands of necessity, when expressed in the context of counter-terrorism, tend to short-circuit all of this carefully installed hard-wiring. This can result in bad law that is disjointed and alien to the norms and expectations of the system.

For example, the criminal law as developed over time attempts to provide clarity, certainty and proportionate responses: counter-terrorism laws frequently cut through this careful organic growth, and establish parallel systems of control and repression that can contradict the values of the 'mainstream' legal code. Control orders and the massive expansion of police powers under the 2000 Act are both recent examples of this phenomenon. The language of necessity, with its emphasis on short-term response, also often serves to camouflage the reality that temporary counter-terrorism measures have a bad habit of becoming permanent parts of legal systems. As they become embedded in national law, these repressive measures leave a permanent residue that rubs against the grain of the prevailing norms of the system.¹⁰⁶

In addition, the demands of necessity often serve as a cloak for utilitarian approaches to complex social issues. Emergency measures inevitably confer greater powers on organs of state security, including the police. Occasionally, these powers are abused, or used in a procedurally correct manner that nevertheless generates an unjust outcome. The use of such powers has a tendency to generate certain distinct negative consequences: a) they are often *over-inclusive* in impact, targeting (and thereby radicalising) a much wider segment of the 'suspect' minority than necessary, and b) they are often perceived to be *over-severe* in impact, often resulting in serious deprivations of fundamental rights that again alienate the 'target communities'.

Radicalisation also flows from the abuses and mistakes committed by state security and the media hysteria that accompanies the emergency. The result is the enhancement of siege mentalities among the affected communities. This in turn can breed more violence, perpetuating the cycle of terror, repression and response. Once again, there seem to be structural factors built into the operation

¹⁰⁶ See C Walker, 'Terrorism and Criminal Justice: Past, Present and Future' [2004] *Criminal Law Review* 311, 325-26. The gradual expansion of the use of the special advocate system discussed above at n 40 could serve as an example of this. See the discussion in *Roberts v Parole Board* [2005] UKHL 45, especially the concerns expressed by Lord Bingham, dissenting, [26]-[30].

and design of counter-terrorism powers that perpetuates this apparently inescapable cycle.

Campbell and Connolly in their insightful work on how law both impacts upon and is affected by the counter-terrorism cycle have described this cycle as involving a 'symbiosis ... of repression and mobilisation'.¹⁰⁷ The law is used as a tool of repression: this repression can trigger mobilisation and resistance in the targeted communities, which in turn can feed greater repression, or at least expose these communities to greater targeting. Campbell and Connolly use qualitative research from Northern Ireland to illustrate how this symbiotic process functioned in the 1970s with respect to the increasingly radicalised Catholic/Nationalist community.¹⁰⁸

This process seems to some extent to be repeating itself again in how counter-terrorism powers are impacting upon the UK Muslim population. The overwhelming majority of Muslims in the UK reject political violence, however, the use of counter-terrorism powers is increasingly seen as impacting to an excessive and unfair extent upon Muslim communities. Specific incidents have tended to reinforce this belief. For example, a high-profile police raid in Forest Gate in East London in June 2006 resulted in the shooting and wounding of a Muslim man and arrests that received considerable media coverage, only for the police to admit subsequently that they lacked any real evidence of wrong-doing.¹⁰⁹ Other anti-terrorist raids have generated much media coverage, but have resulted in a limited number of successful convictions.¹¹⁰ The counter-terrorism cycle is seen as generating repressive and unfair outcomes, which in turn is threatening to delegitimise the state in the eyes of many in the Muslim community.

'Dampening': How Legal Mechanisms Can Offer a Partial Respite from the Counter-Terrorism Cycle

This 'symbiotic' relationship between counter-terrorism measures and political violence, and the apparently inevitable negative impact of the use of emergency

¹⁰⁷ See Campbell and Connolly, above n 26, 955.

¹⁰⁸ Ibid. See also O'Connor and Rumann, above n 21.

¹⁰⁹ *The Times* (London), 3 June 2006, 1; 10 June 2006, 2. On 13 February 2007, the Independent Police Complaints Commission (IPCC) released a report on its inquiry into the raid, which concluded that Scotland Yard should apologise to the families affected: see *IPCC Independent Investigations into Complaints Made Following the Forest Gate Counter-Terrorist Operation on 2 June 2006* (London: IPCC, 2007), available at <http://www.ipcc.gov.uk/forest_gate_2_3report.pdf>. See also M Wainwright, 'Kurds and Police Meet Over "Old Trafford Plot": Community angry at raids that led to no terror charges', *The Guardian* (London), 8 May 2004.

¹¹⁰ Following the acquittal of most of the accused in the 'ricin' case of April 2005 (which involved allegations of an attempt to prepare a form of nerve gas from castor beans), several of those acquitted were subsequently detained pending deportation, to the public horror of several jurors in the original criminal trial. See R Verkaik, 'Jurors Attack Deportation of Cleared "Ricin Plot" Suspect', *The Independent* (London), 25 August 2006.

powers upon ‘target’ communities, would indicate that it makes sense to be very cautious in the use of such powers. However, the impact on individuals and ‘target’ communities can be too easily disregarded when set against the apparent demands of the greater good. Justice Jackson’s famous quote in *Terminiello v Chicago*¹¹¹ that the United States Bill of Rights should not be turned into a ‘suicide pact’ has considerable resonance in times of crisis, and often is used as a catch-all response to the ‘bleatings’ of civil libertarians.¹¹² The structural factors discussed above that appear to drive the response of successive UK governments to terrorist acts seem to invariably result in a depressing repetition of mistakes.

However, certain legal processes appear to have some capacity to slow down the excesses of the counter-terrorism cycle. What is becoming apparent in the UK context since 9/11 is that there are factors at play this time round that were not in play in the early years of the Northern Irish crisis. A series of parliamentary, judicial and transnational mechanisms are now in place that appear to have some moderate ‘dampening’ effect on the application of emergency powers.

This phrase ‘dampening’ is borrowed from Campbell and Connolly, who have recently suggested that law can play a ‘dampening’ role on the progression of the counter-terrorism cycle before it reaches its end. Legal processes can provide an avenue of political opportunity and mobilisation in their own right, whereby the ‘relatively autonomous’ framework of a legal system can be used to moderate the impact of the cycle of repression and backlash. They also suggest that this ‘dampening’ effect can ‘re-frame’ conflicts in a manner that shifts perceptions about the need for the use of violence or extreme state repression.¹¹³ State responses that have been subject to this dampening effect may have more legitimacy and generate less repression: the need for mobilisation in response may therefore also be diluted.

Campbell and Connolly suggest that such ‘dampening’ in the form of greater caution in the use of counter-terrorist powers, and a move towards relying upon ordinary criminal law instead of emergency powers, played a role in re-framing the Northern Irish conflict from the mid 1980s.¹¹⁴ If this analysis is correct, and it appears convincing, it suggests that even where the repeated pattern of attack, repression and response has begun, legal processes may open up avenues for nudging the use of emergency powers towards greater conformity with normal criminal law and human rights standards. The key question, is whether law is

¹¹¹ 337 US 1 (1949).

¹¹² See R Posner, *Not a Suicide Pact: The Constitution in Times of Emergency* (New York: Oxford University Press, 2006).

¹¹³ Campbell and Connolly, above n 26, 942-45, 955.

¹¹⁴ *Ibid* 953-55.

capable of playing such a 'dampening' role at present in the UK. Also, Campbell and Connolly concentrate their analysis upon the potential 'dampening' effect of legal processes: however, other 'relatively autonomous' processes could doubtless have a similar effect. Do such alternative processes exist?

The Inevitable Limits of Parliamentary Control over Counter-Terrorism Powers

In line with the 'political constitution' of the UK, the validity or otherwise of the deployment of counter-terrorism measures has historically been seen as a matter solely for parliamentary debate and determination, a presumption confirmed by the *Liversidge* decision.¹¹⁵ However, the mistakes arising out of the application of emergency powers in Northern Ireland made it clear that reliance on parliamentary mechanisms alone might be not enough, especially when the political situation of the day ensured that no real political opposition to the use of such powers existed within Westminster.¹¹⁶ The same concerns exist today. An additional problem is that it is easy for Parliament to pass counter-terrorism measures with the best of intentions, but no really effective parliamentary mechanism exists to monitor the application of these measures in practice.¹¹⁷

The cycle of terror, panic and repression can itself cow parliamentary opposition to such measures. The UK experience has been that substantial parliamentary opposition to counter-terrorism measures often only begins to stir well after the initial legislation has been rushed through, and often only in response to challenges to the legislation elsewhere. As Gearty has argued, the *Belmarsh* decision of the House of Lords was probably influenced to a significant extent by NGO campaigning and a growing sense of something awry in the application of the counter-terrorism legislation.¹¹⁸ However, it was only in the wake of the *Belmarsh* decision that parliamentary opposition became really emboldened and ready to challenge the logic of the government's counter-terrorism response, culminating in the decision to reject 90-day detention in 2006.

When Parliament does take action to reduce the impact of counter-terrorism measures, such steps obviously benefit immensely from the seal of democratic validity. Court decisions lack the *imprimatur* of parliamentary votes, and can, in any case, usually be reversed or circumvented with reasonable ease. However, the track record of parliamentary intervention to dampen down the consequences

¹¹⁵ See above n 15.

¹¹⁶ See Donohue, above n 18, for an analysis of the political position in respect of counter-terrorism legislation in Northern Ireland from the early 1970s to 2000.

¹¹⁷ See M Tushnet, 'Controlling Executive Power in the War on Terrorism' (2005) 118 *Harvard Law Review* 2673 for an excellent critique in the US context of the inability of the legislature to control the use of executive use of emergency powers.

¹¹⁸ Gearty, above n 37.

of the counter-terrorism cycle is poor. The political process is insufficiently insulated against the chill wind of panic that accompanies the repeated pattern of terror and repression. Also, executive concerns too readily set the agenda. This is a particular problem in the UK with the executive's usual iron de facto grip on its parliamentary majority.

The Independent Reviewer

This leaves open the question of whether other institutional structures can play an active role in 'dampening' the use of counter-terrorism powers. Some element of non-political consideration of the impact of counter-terrorist measures was introduced in the 1990s by means of the independent reviewer mechanism, whereby an appointed legal expert would report on the operation and implementation of the anti-terrorism legislation, recommending changes if necessary. Lord Lloyd, acting as independent reviewer, produced a significant analysis of the flaws of the existing legislation in 1996.¹¹⁹ The use of this mechanism was extended with the codification of counter-terrorism law in the 2000 Act, with Lord Carlile QC being given a watching brief to report on the operation of this legislation and that of the subsequent 2001, 2005 and 2006 Acts. The Newton Committee of Privy Counsellors was also established to report on the detention power under the 2001 Act.

The independent reviewer is a valuable and useful innovation, as is the use of the Newton Committee. However, no independent reviewer has yet been appointed who disagrees with the government policy of the day when it comes to the fundamental issues: Lord Carlile is widely respected, but has nevertheless been subject to sharp criticism from Liberty for his stance on control orders.¹²⁰ The opinions of independent reviewers can in any case be disregarded by the Government and its parliamentary majority, as was the recommendation by the Newton Committee in favour of repeal of the detention powers provided for in the 2001 Act. It took the *Belmarsh* decision to provoke a change in the law. In other words, the institutional mechanism that has provided the most effective 'dampening' effect upon the use of emergency powers in recent experience has been the legal process of court-enforced domestic and transnational human rights guarantees. It is therefore worth having a closer look at how effective this process might be in reining in the use of counter-terrorist powers.

The Potential of Human Rights

The most significant constitutional shift since the years of the Northern Irish emergency has been the incorporation of the ECHR into UK law via the *Human*

¹¹⁹ Lord Lloyd, *Inquiry into Legislation against Terrorism*, Cm. 3420 (London: Stationery Office, 1996).

¹²⁰ See Liberty, Press Release, 'Independent Reviewer Calls to Renew Prevention of Terrorism Act 2005', 2 February 2006, available at <<http://www.liberty-human-rights.org.uk/news-and-events/1-press-releases/2006/carlile-calls-for-renew-of-pta.shtml>>.

Rights Act 1998, and the growing salience of human rights ideology in NGO activity, public debate and legal argumentation. Human rights approaches can be viewed as attempts to steer or 'orientate' legal systems away from the easy discounting of individual rights:¹²¹ they obviously therefore have some potential to act as a brake on the cycle of counter-terrorism responses. The JCHR has been established in Parliament to ensure that the language and perspectives of rights ideology are fed into the parliamentary process. The UK courts have new authority under the HRA to interpret legislation in a manner compatible with the ECHR where possible and to strike down secondary legislation that does not satisfy the Convention, while the Strasbourg Court retains a watching brief over the UK at the regional level.

However, applying human rights approaches in the counter-terrorism context can be a double-edged sword. Gearty has warned that the security approach to counter-terrorism can readily adopt the language and clothes of human rights. Protecting the rights of many can become the justification for severely restricting the rights of the few.¹²² In addition, counter-terrorist measures can readily be designed to be formally 'Convention-compliant'. Once this exercise in legal design is completed, such measures can benefit from their purported 'human rights friendly' status, while the cycle of repression continues. The architecture of the 'non-derogating' control orders introduced by the 2006 Act (see above) is a classic example of this: government lawyers designed a legal avenue to effectively place individuals under house arrest, while straining to remain within the substantial scope apparently afforded by the Strasbourg Court to similar types of restraint.¹²³

Further potential problems exist. The Convention mechanisms, as is common among constitutional and international rights instruments, build in the possibility of derogation, offering a ready escape hatch for governments facing terrorist attacks.¹²⁴ Also, the academic literature is replete with critiques of the stance

¹²¹ For this concept of 'orientation' and how it plays out in the UK context, see C O'Connell, 'Democracy and Rights: New Directions in the Human Rights Era' [2004] 57 *Current Legal Problems* 175.

¹²² See C Gearty, *Can Human Rights Survive?* (Cambridge: Cambridge University Press, 2006) ch 5, and in particular his criticism of Michael Ignatieff's views at 132-35.

¹²³ It should be noted that the relevant Strasbourg jurisprudence mainly concerned the very different context of injunctions sought by the Italian authorities to restrain the movement of individuals allegedly involved with the Mafia or similar organisations: see *Guzzardi v Italy*, App. No 7367/76, SerA 39, ECHR; *Raimondo v Italy*, App 12954/87, SerA 281-A, ECHR. It remains to be seen what the ECtHR will think of control orders: the UK government is perhaps too confident that they would survive a challenge in Strasbourg.

¹²⁴ Gearty, above n 37, 40. He also uses at p 31 the nice phrase 'confetti at a funeral' to describe the sprinkling of the language of rights over the hard reality of counter-terrorist strategies. See also L Zedner, 'Securing Liberty in the Face of Terror: Reflections from Criminal Justice' (2005) 32 *Journal of Law and Society* 507, 525-9.

of the judiciary in times of emergency.¹²⁵ In any case, it may inevitably be unwise to place responsibility for invalidating emergency measures on unelected individual judges, who, often conscious of being deprived of the intelligence information available to the executive, have a tendency to defer to expert opinion,¹²⁶ and who are unable to indulge in the luxury of comment without immediate impact that is available to academics and NGOs. As has been argued by Jackson, judges live in the 'same universe of fear' as the rest of the menaced population. It may be unreasonable and even inappropriate for them to take a more active role.¹²⁷ Tushnet has also made the point that judicial mechanisms for upholding rights claims are very slow: witness the considerable time delays in the endless litigation surrounding the original Belmarsh detainees and the ability of the government thus far to circumvent the judgments in which it has been defeated.¹²⁸

These considerations all raise legitimate concerns about the capability of human rights frameworks to act as a check or brake on the counter-terrorism cycle. These concerns have been emphasised by critical scholarship and 'civil libertarian pessimists', who are sceptical in general about the ability of rights frameworks to constrain state power although strongly committed to the importance of civil liberties.¹²⁹ This scepticism has underpinned the recent interest in Carl Schmitt's contention that executive control of the emergency power constitutes the real 'effective' power in the liberal state order.¹³⁰ For Schmitt, as well as for Agamben and others, the pretensions of the liberal state to tolerance and adherence to the rule of law dissolve when emergency powers are triggered.¹³¹ In Kelsen's phrase, the mask slips, the 'Gorgon' of state power is exposed, and those subject to the chill blast of counter-terrorism powers become the *homo sacer* or sacred man of Agamben's analysis, cut loose and cast adrift from the *polis* and deprived of the

¹²⁵ See, eg, M Tushnet, 'Defending Korematsu?: Reflections on Civil Liberties in Wartime' (2003) *Wisconsin Law Review* 273; Tushnet, above n 117; K D Ewing, 'The Futility of the Human Rights Act' [2004] *Public Law* 829.

¹²⁶ See, eg, the considerable degree of weight given to the opinion of a Foreign Office diplomat in *Abu Qatada v SSHD* SC/15/2005, 26 February 2007, [339]-[343].

¹²⁷ V C Jackson, 'Proconstitutional Behaviour, Political Actors and Independent Courts: A Comment on Geoffrey Stone's Paper' (2004) 2 *International Journal of Constitutional Law* 368, 369.

¹²⁸ See M Tushnet, 'The Political Constitution of Emergency Powers: Parliamentary and Separation of Powers Regulation' (2007) 3 *International Journal of Law in Context* 275.

¹²⁹ See P A J Waddington, 'Slippery Slopes and Civil Libertarian Pessimism' (2005) 15(3) *Policing and Society* 353, for a critical analysis of the views of 'civil libertarian pessimists'.

¹³⁰ See, eg, O Gross, 'The Normless And Exceptionless Exception: Carl Schmitt's Theory Of Emergency Powers and The "Norm-Exception" Dichotomy' (2000) 21 *Cardozo Law Review* 1825; J P McCormick, 'The Dilemmas of Dictatorship: Carl Schmitt and Constitutional Emergency Powers', in D Dyzenhaus (ed), *Law as Politics: Carl Schmitt's Critique of Liberalism* (Durham, NC: Duke University Press, 1997) 217-51.

¹³¹ See the excellent analysis of this strain of thought in W E Scheuerman, 'Survey Article: Emergency Powers and the Rule of Law After 9/11' (2006) 14(1) *Journal of Political Philosophy* 61; see also, eg, C Schmitt, *Legality and Legitimacy* [1932], trans Jeffrey Seitzer (Durham, NC: Duke University Press, 2003).

shelter of the law.¹³² This line of analysis certainly resonates to a degree with the UK experience since 9/11. The Belmarsh detainees resemble living embodiments of Agamben's *homo sacer*, existing as exiles outside the law. The experience of the Muslim community at times does call into question the promises of tolerance and fidelity to the rule of law values that the UK constitutional order is supposed to embody.

If any sort of limited 'dampening' effect is to be generated in any way other than merely waiting for the executive to soften its counter-terrorism strategies, then the application of human rights principles within the UK's legal system needs to rise to the challenge. Actors working with rights principles, whether judges, activists or lawyers, need to be wary about unduly accommodating emergency powers, and to require counter-terrorism responses to respect rights and conform more closely to the standard modes of criminal law.¹³³ The civil libertarian pessimists may doubt the ability of human rights principles to achieve this. However, as Gearty has suggested, this may be the only realistic aspiration to hope for at present:

the 'alien codes' generated by the cycle of terror and repression may be transformed into something which much more closely resembles ordinary criminal law than it does at present. Given that it is unlikely that the terrorism laws are going to disappear anytime soon, this is certainly a goal worth working towards.¹³⁴

Interestingly, there are distinct signs of this step occurring in the UK: the historical predictions about the propensity of human rights frameworks to do little more than accommodate the counter-terrorism cycle appear to be a little over-deterministic in their approach and assumptions. A 'dampening' effect has been generated through the *Human Rights Act* and other legal processes. This has ensured that some pressure now exists upon the UK executive to make more use of conventional criminal law processes and less use of its sweeping counter-terrorism powers. Perhaps unexpectedly, it has been the willingness of the judiciary to engage with the ECHR standards and apply them to the executive's use of emergency powers that has made a substantial contribution towards the generation of this dampening effect.

The Dampening Effect of Human Rights Norms

Admittedly, the UK courts over the last few decades have instinctively adhered to the position established in *Liversidge*, where the majority followed an earlier

¹³² G Agamben, *State of Exception*, trans Kevin Attell (Chicago: University of Chicago Press, 2005).

¹³³ For similar arguments, see B Dickson, 'Law Versus Terrorism: Can Law Win?' [2005] *European Human Rights Law Review* 11; Walker, above n 32.

¹³⁴ Gearty, above n 99, 126.

decision by the House of Lords in the First World War case of *R v Halliday*¹³⁵ and adopted a highly deferential approach to the executive's use of emergency powers.¹³⁶ As Dyzenhaus notes, Lord Atkin's famous dissenting opinion in *Liversidge*, to the effect that 'amid the clash of arms, the laws are not silent', has been enthusiastically embraced and quoted with approval throughout English administrative law, but quietly sidelined in the national security context.¹³⁷ Post-9/11, a similar approach appeared to be inevitable. In *Secretary of State for the Home Department v Rehman*,¹³⁸ the Law Lords adopted a very deferential stance towards the executive's views on what constituted a threat to national security, with Lord Hoffmann adding an extraordinary postscript to his judgment explicitly linking the need for this deference to the events of 9/11.¹³⁹

However, the *Belmarsh* decision marked a dramatic change in direction. While the judgment itself changed little, especially for the individuals caught up in the government's detention/control order/deportation strategy, it was remarkable for the rejection by eight of the nine Law Lords of the appropriateness of deferring to the executive in assessing the proportionality of measures taken under the cloak of national security.¹⁴⁰ (In contrast, the majority showed considerable deference on the issue of whether a national emergency existed, which arguably was the correct decision, based on the ECHR jurisprudence and the UK constitutional framework.)¹⁴¹ While the subsequent stop and search case of *Gillan*¹⁴² saw a less robust approach taken by the Law Lords, the *Belmarsh* decision has opened the door for lower courts to apply a stricter proportionality analysis in other counter-terrorism cases, including those involving control orders.¹⁴³

More significantly, perhaps, *Belmarsh* has opened up the political and legal debate about the necessity of adhering to the logic of the cycle of terror and repression. In particular, the decision served to embolden campaigning NGOs

¹³⁵ [1917] AC 260.

¹³⁶ [1942] AC 206.

¹³⁷ See D Dyzenhaus, 'Intimations of Legality Amid the Clash of Arms' (2004) 2(2) *International Journal of Comparative Constitutional Law* 244, 250-253. See also Lord Denning's opinion in *R v Secretary of State ex parte Hosenball* [1977] 1 WLR 776, at 778 that '[t]here is a conflict between the interests of national security on the one hand and the freedom of the individual on the other. The balance between these two is not for a court of law. It is for the Home Secretary. He is the person entrusted by Parliament with the task.'

¹³⁸ [2002] 1 All ER 122.

¹³⁹ *Ibid* 142, [49].

¹⁴⁰ For a robust defence of this approach, see D Feldman, 'Human Rights, Terrorism and Risk: The Roles of Politicians and Judges' (2006) *Public Law* 364.

¹⁴¹ See S Tierney, 'Determining the State of Exception: What Role for Parliament and the Courts?' (2005) 68(4) *Modern Law Review* 668, 668-72.

¹⁴² *Above* n 86.

¹⁴³ Gearty, usually a sceptic about the efficacy, likelihood or desirability of judicial activism, has suggested the judiciary have for the most part joined much of the UK's legal community in being 'civil libertarians now' *above* n 99, 112.

and political opposition to the legislation, by confounding the automatic assumption that counter-terrorism measures were untouchable. A climate of resistance has developed to the executive's adherence to the logic of the counter-terrorism cycle. This has led to increasing pressure from NGOs, commentators and some politicians for a shift away from the 'security' emergency powers paradigm to a more restrained approach, based around the use of the normal avenues of the criminal law to deal with the terrorist threat, and adherence to conventional human rights norms.

For example, the JCHR has indicated in a recent report its strong preference for normal criminal law routes to be used to deal with terrorist suspects rather than the counter-terrorism legislation.¹⁴⁴ Pressure upon the government has also been growing to permit intercept evidence obtained by the intelligence services to be admissible as evidence in ordinary criminal trials. The current automatic exclusion in UK law of such evidence is based on a desire to protect the sources of intelligence information: however, its exclusion is often also used to justify government reluctance to bring prosecutions against terrorist suspects and instead to reach for the cudgel of control orders. Liberty, the JCHR and others have called for this exclusion rule to be repealed and for terrorist suspects to be prosecuted under ordinary criminal law and procedure.¹⁴⁵ In addition, the High Court has begun to take the reasonableness of a ministerial decision not to seek an 'ordinary' criminal prosecution into account when assessing the legitimacy of control orders made against an individual.¹⁴⁶

Not all of this pressure for a return to a more conventional 'criminalisation' approach has its origins in the *Belmarsh* decision. Much of it originally stems from the persuasive arguments made by academics and NGOs. However, these criticisms and the recent judicial decisions mutually reinforce each other, and generate more political and legal pressure on the Government. This is reinforced by public outrage about the behavior of Coalition troops in Iraq and Guantánamo Bay, where again attempts to use the legal process to compel adherence to rights standards and an increasingly concerned public opinion have combined to put pressure on the executive for a change of policy.¹⁴⁷

In addition, it is worth emphasising the ongoing constraints imposed on government action by the Strasbourg jurisprudence. The ECtHR has the

¹⁴⁴ Joint Select Committee on Human Rights, 24th Report, *Counter-Terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention*, HL 240/HC 1576 (London: Stationery Office, 2006).

¹⁴⁵ *Ibid.*

¹⁴⁶ See, eg, *SSH D v E* [2007] EWHC (Admin) 233.

¹⁴⁷ Members of the judiciary have been forthright in condemning the 'legal black hole' of Guantánamo Bay, with Lord Steyn commenting that it would be 'forever be a historical reference point for our time', a 'stain on American justice', 'utterly indefensible' and 'reminiscent of the worst actions of totalitarian states'. Lord Steyn, 'Democracy, the Rule of Law and the Role of Judges' (2006) 3 *European Human Rights Law Review* 243, 253; see also Lord Steyn, 'Guantanamo Bay: the Legal Black Hole' (2004) 53 *International and Comparative Law Quarterly* 1.

advantage of being abstracted from the domestic situations in the Convention's states parties, which has historically given it a degree of insulation from prevailing political pressures. Its case law on the use of emergency powers is mixed: it has tended to show considerable deference to states asserting the existence of states of emergency,¹⁴⁸ but has been more assertive in assessing the proportionality of what states have done, an approach now reflected in the *Belmarsh* decision.¹⁴⁹ The Strasbourg Court has also held fast thus far to its jurisprudence on the right to life and freedom from torture and inhuman and degrading treatment. This has meant that decisions such as *Chahal and Ireland v UK* still substantially constrain what the UK government is capable of doing while remaining within the Convention.

This umbilical cord to European standards continues to act as a significant 'dampening' factor on the counter-terrorism cycle.¹⁵⁰ The UK government can try to work around these limitations, but it remains hemmed in to some extent, both by the Convention and by the HRA incorporating those standards internally. Taken together, the impact of the ECHR/HRA with the shift in approach in the *Belmarsh* decision has created a 'push back' factor, which, along with other factors, is generating some resistance to the counter-terrorism cycle.

It appears that, as Scheuerman has noted, it is too easy to assume that the liberal constitutional order is incapable of generating meaningful internal resistance to the unfolding counter-terrorism cycle.¹⁵¹ The 'relative autonomy' of national and transnational legal processes from prevailing political winds opens up these processes as an avenue for activists to challenge the use of emergency powers and the apparently inevitable unfolding of the counter-terrorism cycle. This is not to underestimate the potency of the symbiosis between terror, repression and backlash. Nor is it to downplay the way in which the rhetoric of emergency and the distorting impact of counter-terrorism strategies can continue to dominate the government response to the terrorist threat. The views of the 'civil libertarian pessimists' as to the inevitable limits of the protection that legal processes can offer are not unfounded, being rooted in both history and contemporary events. They may however underestimate to some extent the ability of the new regime of human rights protection to generate some sort of 'dampening' effect.¹⁵²

¹⁴⁸ *Lawless v Ireland* (1960) 1 EHRR 1; *Brannigan and McBride v UK* (1993) 17 EHRR 539; Cavanaugh, above n 24; S Marks, 'Civil Liberties at the Margin: The UK Derogation and the ECHR' (1995) 15 *Oxford Journal of Legal Studies* 69; O Gross, "'Once More Unto the Breach": The Systematic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies' (1998) *Yale Journal of International Law* 437.

¹⁴⁹ See, eg, *Aksoy v Turkey* (1996) 23 EHRR 553.

¹⁵⁰ See J Fitzpatrick, 'Speaking Law to Power: The War Against Terrorism and Human Rights' (2003) 14 *European Journal of International Law* 241.

¹⁵¹ See Scheuerman, above n 131. See also Dyzenhaus, above n 137.

¹⁵² For more on this, see O'Conneide, 'Controlling the "Gorgon" of State Power in the State of Exception: A Reply to Professor Tushnet' (2008) 3(4) *International Journal of Law in Context* 15. For a similar argument in the US context, see D Cole, 'Judging the Next Emergency: Judicial Review and Individual

Conclusion

Over time, the UK experience has been that the counter-terrorism cycle of terror, panic and repression recurs again and again, with consequent negative results for civil liberties, the integrity of the law and suspect minorities. Interestingly, however, and perhaps contrary to some academic expectations, the HRA and ECHR have in the wake of 9/11 played a role in disrupting the repetition of the usual cycle of responses to terrorism. First, the existence of the HRA has very much restricted what the UK government has attempted to achieve using new anti-terrorist powers. It has forced the government to use 'Convention-compliant' routes. While these routes can readily be used to evade the requirements of the Convention, some real obstacles still remain in the path of the cycle. Second, the greater salience given to human rights discourse since the incorporation of the HRA, and in particular the symbolic impact of the *Belmarsh* decision, has galvanised political and media scepticism about the deployment of anti-terrorist powers.

It would be erroneous to argue that the HRA has fundamentally changed the political landscape. The UK government is still constantly pushing at the boundaries of what it can achieve within the constraints of the ECHR/HRA. Dorling has drawn an interesting contrast between Spain, the European country to suffer the worst terrorist attack since 9/11, and the UK. She notes that Spanish political office-holders remain committed to adhering to conventional human rights norms and the use of ordinary criminal law, while the UK government has in general been dismissive of human rights norms and attached to using its panoply of ever-expanding counter-terrorism powers.¹⁵³ However, the UK experience since 9/11 shows that the constraints imposed by legal processes that build in some commitment to human rights do have some teeth, even in 'states of exception'. Legally-enforceable rights mechanisms are perhaps more durable than has been feared. Human rights may not prevent the siren song of 'strict necessity' from setting the course of state policy, but can play some role in impeding its traditional bulldozing progress.

Rights in Time of Crisis' (2003) 101 *Michigan Law Review* 2565; see also by the same author 'The Priority of Morality: The Emergency Constitution's Blind Spot' (2004) 113 *Yale Law Journal* 1753.

¹⁵³ K Dorling, 'An Exceptional Situation? A Comparative Assessment of Anti-Terrorism Arrest and Detention Powers in the UK and Spain and of their Compliance with the European Convention on Human Rights' (2007) 4(1) *Essex Human Rights Review* 1.