6

Terror, reason and rights

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The history of emergency legislation is not a proud one. From the appointment of *dictators rei gerundae causa* in the days of the Roman Republic to the invocation of Article 48 of the Weimar Constitution following the Reichstag Fire, measures seemingly meant to preserve constitutional government have too often proved to be its undoing. Good-faith attempts to deal with emergencies have not always fared any better. In 1987, for example, Supreme Court Justice Brennan remarked on the 'shabby treatment' of civil liberties in the US during 'times of war and perceived threats to national security', including Lincoln's attempt to suspend habeas corpus during the Civil War and the internment of Japanese-Americans during World War II:

> After each perceived security crisis ended, the United States has remorsefully realized that the abrogation of civil liberties was unnecessary. But it has proven unable to prevent itself from making the same error when the next crisis came along.[1]

This is not a cycle unique to the United States. The United Kingdom, too, has a long history of dealing with threats to its security, both during wartime and without. More than four centuries have passed since Guy Fawkes first sought to blow up the Houses of Parliament with barrels of gunpowder, for instance, and it is nearly a century and a half since the 1867 Clerkenwell Explosion – the first of many bombings by Irish militants on the mainland UK in the years that followed. And, like the US, the UK's response to security threats has frequently been marked by overreaction followed by remorse.

The government's power of internment during World War II under the infamous Regulation 18B, for example, was afterwards described by

[1] 'The Quest to Develop a Jurisprudence in Times of Security Crises', *Israel Yearbook of Human Rights*, Vol. 18 (1988) p. 11, cited in Tom Bingham, *The Rule of Law* (London: Allen Lane, 2010) at p. 134.

Churchill as 'in the highest degree odious'.[2] This insight, however, didn't prevent the government from reintroducing internment in Northern Ireland during the height of the Troubles in 1971. Nor did the eventual, near-universal acknowledgement of that policy's failure affect Parliament's decision following the 9/11 attacks to allow the indefinite detention without charge of foreign nationals suspected of terrorism.

Indeed, detention without charge is but one of a number of deeply controversial counter-terrorism measures introduced in the UK over the past decade.[3] Since 2001, Parliament has permitted the use of control orders imposing conditions tantamount to indefinite house arrest;[4] extended the maximum period of pre-charge detention in terrorism cases from seven to twenty-eight days,[5] and created a host of new terrorist offences, including that of 'encouraging' terrorism.[6] Yet the evidence showing the need for any of these measures has been scarce indeed. This is not, as George Santayana said, a case of those who cannot remember the past being condemned to repeat it. When it comes to emergency measures, it seems that we recall the past only too well and choose to make the same mistakes regardless.[7]

[2] Regulation 18B(1) of the Defence (General) Regulations 1939 provided the Secretary of State to direct a person's detention where he had 'reasonable cause to believe' they were of hostile origin or had been concerned in 'acts prejudicial to . . . public safety or defence of the realm'. Almost 2000 people were detained under the regulation during World War II: see generally A. W. Brian Simpson, *In The Highest Degree Odious: Detention without Trial in Wartime Britain* (Oxford: Clarendon Press, 1992). In *Liversidge* v. *Anderson* [1942] AC 206, a majority of the House of Lords held that the reasonableness of the Secretary of State's belief under Regulation 18B was not justiciable but the case is now better remembered for Lord Atkin's famous dissent, declaring that 'amidst the clash of arms, the laws are not silent', and referring to his fellow Law Lords as 'more executive-minded than the executive' whose construction of the regulation gave 'an uncontrolled power to the minister'.

[3] Indeed, since July 2000, Parliament has legislated no less than six times on terrorism – the Terrorism Act 2000, the Anti-Terrorism Crime and Security Act 2001, the Prevention of Terrorism Act 2005, the Terrorism Act 2006, the Counter-Terrorism Act 2008 and the Terrorist Asset Freezing (Temporary Provisions) Act 2010. This figure does not include terrorism-related measures in other Acts of Parliament, such as the Civil Contingencies Act 2003 or the extension of the maximum period of pre-charge detention in terrorism cases from seven days to fourteen days which was contained not in terrorism legislation but instead slipped into the Criminal Justice Act 2003.

[4] See the Prevention of Terrorism Act 2005.

[5] Section 23 of the Terrorism Act 2006.

[6] Section 1 of the Terrorism Act 2006. When originally introduced in Parliament in late 2005, this provision was intended to criminalise the 'glorification' of terrorism – 'glorification' is now one way in which the offence of encouragement may be committed under section 1(3)(a).

[7] As Justice Brennan said, 'merely remembering the past has not proved to be enough', n.1 above.

Why do we act this way? The grim truth is that fear has a corrosive effect on a society of equals, especially when the threat in question is associated in the public imagination with the members of a particular minority community. For this reason, we look to the idea of rights as a safeguard of our most fundamental interests, a constitutional check on majoritarian governments acting oppressively. More specifically, we look to the courts – that unelected branch of government that has been deliberately insulated from the public's passions and prejudices – to protect these rights from the overreactions of the executive and Parliament. Yet so strong is the demand for security of late that it is seen by many – including several senior ministers of the previous Labour government – not only as a right in itself but also one capable of trumping other basic rights like procedural fairness and freedom from torture. But if security is a right, then what does this do for the idea of rights as a safeguard against disproportionate, arbitrary and irrational actions *by the state* in times of crisis?

To answer this question, this chapter looks at the concept of security and the role of rights in the context of UK counter-terrorism legislation over the past decade. In particular, I am interested in how these concepts have been used – or, just as often, not been used – to check the tendency of government to overreact. As we shall see, not all the blame for excessive measures of the past decade falls on the government alone. Some of the difficulties that arose were problems inherited from previous governments. Some, indeed, are structural. But in virtually every case they are errors that, at the time of writing, remain uncorrected. And none was inevitable.

1. Security and human rights as concepts in UK law

Although the concept of 'security' undoubtedly runs more broadly than 'national security', this wider concept has no immediate counterpart in UK law. Among the definitions of an 'emergency' under the Civil Contingencies Act 2004 is the idea of 'war or terrorism which threatens serious damage to the *security* of the United Kingdom',[8] but it is clear enough from the context that what is being referred to is 'national security' – a much more familiar formulation which can be found in legislation stretching back to at least the early twentieth century. At the same time, 'national security' already has an expansive

[8] Section 1(1)(c).

definition in UK law – the flavour of which can be gained from the way it was described by Parliament in 1989:

> The function of the [Security Service, also known as MI5] shall be the protection of national security and, in particular, its protection against threats from espionage, terrorism and sabotage, from the activities of agents of foreign powers and from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means.[9]

'National security' includes not only the classic concept of direct threats (whether internal or external) to the safety of the realm but also indirect ones. In its judgment in the case of *Rehman* v. *Secretary of State for the Home Department* handed down a month after 9/11,[10] the House of Lords held not only that the courts should defer to the democratically elected government on questions of national security,[11] but also that the concept could include threats to *other* states. The Special Immigration Appeals Commission had ruled at first instance that Shafiq Ur Rehman's financial support for Islamic militants in Kashmir did not amount to any kind of threat to the UK, nor was it sufficient to justify his deportation to Pakistan. The House of Lords disagreed, ruling that it was legitimate for the Home Secretary to view Rehman's activities as a threat to the national security of the UK because India regarded him as supporting terrorism and, hence, failure to deport him would harm the UK's diplomatic relations with a friendly state. As Lord Slynn said:

[9] Section 1(2) of the Security Service Act 1989. It wasn't until several years later that its functions were amended to include acting 'in support of the activities of police forces and other law enforcement agencies in the prevention and detection of serious crime' (section 1(1) of the Security Service Act 1996). By contrast, MI6's function is simply to 'obtain and provide information relating to the actions or intentions of persons outside the British Islands' (section 1(1)(a) of the Intelligence Services Act 1994) but its functions are only exercisable in 'the interests of national security' (section 1(2)(a)).

[10] [2001] UKHL 47.

[11] See especially Lord Hoffman's postscript at para. 62, *ibid.*, noting the 9/11 attacks: 'They are a reminder that in matters of national security, the cost of failure can be high. This seems to me to underline the need for the judicial arm of government to respect the decisions of ministers of the Crown on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security. It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process. If the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove.'

> The United Kingdom is not obliged to harbour a terrorist who is currently taking action against some other state (or even in relation to a contested area of land claimed by another state) if that other state could realistically be seen by the Secretary of State as likely to take action against the United Kingdom and its citizens.[12]

'Take action', however, does not necessarily mean *military* action. There was certainly no suggestion that a UK refusal to deport Mr Rehman would lead to war with India, for instance (nor did it, for Rehman was never deported).[13] Rather, the Lords were persuaded by the government's view that the fight against terrorism was an international one, hence any loss of co-operation by India might imperil the UK's own security.[14] The same argument was deployed with similar success before the House of Lords in 2008 when the UK government persuaded the Lords that the halting of the Serious Fraud Office's investigation into the alleged payment of bribes by BAE officials was justified because of a threat from the Saudi government to withdraw co-operation on security matters, something that would put 'British lives on British streets ... at risk'.[15]

It may come as a surprise to those who claim that human rights takes little account of the importance of security to learn that 'national security' has in fact long been a term of art in human rights law, at least as far as the European Convention on Human Rights 1950 is concerned. Rights under the Convention, which was indirectly incorporated into UK law by the Human Rights Act 1998, fall into four broad categories in terms of their relationship with the concept of 'national security'.

Firstly, there are the so-called 'qualified' rights such the right to free expression under Article 10. These are known as qualified rights because they each contain a list of grounds – including on which the right in

[12] *Ibid.*, para. 19. Emphasis added.

[13] Despite losing his appeal before the House of Lords, the Home Office subsequently withdrew the deportation order against Rehman and he has remained in the UK ever since. As one of the members of the Special Immigration Appeals Commission, Sir Brian Barder, subsequently wrote, '[a]pparently, the threat allegedly posed by the suspect had become one that the security authorities now judged they (and we) could live with after all' ('On SIAC', *London Review of Books*, 18 March 2004).

[14] See e.g., the speech of Lord Hoffman in *Rehman*, n. 10 above, at para. 40, referring to the Home Office's evidence that 'the defence of United Kingdom national security against terrorist groups depended upon international reciprocity and co-operation. It was therefore in the security interests of the United Kingdom to co-operate with other nations, including India, to repress terrorism anywhere in the world'.

[15] *R (Corner House and Others)* v. *Director of the Serious Fraud Office* [2008] UKHL 60 at para. 14 per Lord Bingham.

question may be subject to legitimate interference (although such interference is still subject to the requirement that it must be prescribed by law, necessary in a democratic society and proportionate). Thus, the rights to respect for private and family life (Article 8), free expression (Article 10) and freedom of assembly (Article 11) may each be restricted 'in the interests of national security', among other things. Interestingly, the right to freedom of thought, conscience and religion under Article 9 is the only qualified Convention right that does not contain the national security exception (although it may be circumscribed in the interests of 'public safety' and so forth).

Secondly, there are rights such as the right to liberty (Article 5) or the right to a fair hearing (Article 6). These are known as 'limited' rights, in the sense that they make no explicit allowance for limitation by reference to things like national security or public safety,[16] but the European Court of Human Rights has nonetheless recognised that 'national security' may be legitimate grounds for restricting the scope of the right in certain cases.[17] Even more significantly, the Convention allows that rights such as Articles 5 and 6 can be derogated from in a 'public emergency threatening the life of the nation'. In other words, the Convention permits a state to suspend certain key rights during a crisis, although it may only do so 'to the extent strictly required by the exigencies of the situation'.[18] Examples of situations that have been grounds for public emergency under Article 15 include the Northern Ireland situation before the IRA ceasefire,[19]

[16] The sole exception is the right to a trial in public under Article 6(1).

[17] See e.g., the judgment of the European Court of Human Rights in *Rowe and Davis* v. *United Kingdom* (2000) 30 EHRR 1, para. 61: 'the entitlement to disclosure of relevant evidence [under Article 6] is not an absolute right. In any criminal proceedings there may be competing interests, *such as national security* or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused. In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest' (emphasis added).

[18] Article 15(1). In its 2004 judgment in the Belmarsh case, for instance, the House of Lords rejected the government's argument that the introduction of indefinite detention without charge under Part 4 of the Anti-Terrorism Crime and Security Act 2001 was 'necessary', even though all but one of the Law Lords accepted that the terrorist threat amounted to a state of emergency under Article 15: see e.g., *A and Others* v. *Secretary of State for the Home Department (No. 1)* [2004] UKHL 56 per Lord Bingham at para. 68: 'Article 15 requires any derogating measures to go no further than is strictly required by the exigencies of the situation and the prohibition of discrimination on grounds of nationality or immigration status has not been the subject of derogation.'

[19] *Ireland* v. *United Kingdom* (1978) 2 EHRR 75.

the terrorist threat in south-eastern Turkey,[20] and – most recently – the terrorist threat to the UK post-9/11.[21]

Thirdly, there are the absolute rights such as the right to life under Article 2 or freedom from torture, inhuman and degrading treatment under Article 3 – 'absolute' in the sense that they can never be derogated from, even in a state of emergency. This was illustrated in the judgment of the European Court of Human Rights in the 1996 case of *Chahal* v. *United Kingdom*.[22] Karamjit Singh Chahal was a Sikh who had been living in the UK since 1971. In 1990, the Home Secretary ordered that he should be deported on national security grounds, in particular because of his involvement in the Sikh separatist cause.[23] For his part, Mr Chahal denied involvement in terrorism and said that, were he returned to India, he would likely be tortured by the Punjab police, as he had been when he was previously detained by them. Although the English courts had refused his appeal against deportation, the European Court of Human Rights upheld his complaint that, if returned, he would likely be tortured by the Punjab police. The prohibition against torture under Article 3, the Court held, did not merely prohibit the UK itself from using torture – it also prohibited the UK from deporting or removing a person to a country where they faced a real risk of torture, inhuman or degrading treatment.[24] Most significantly, this obligation applied irrespective of whether the person in question was thought to be a risk to the UK's national security or not.

Fourthly, there are the positive obligations that certain Convention rights have been held to give rise to, in particular Article 2 which directs that 'everyone's right to life shall be protected by law'. As the House of Lords put it in a 2004 judgment:

> The European Court of Human Rights has repeatedly interpreted Article 2 of the European Convention as imposing on member states substantive obligations not to take life without justification *and also to establish a*

[20] *Aksoy* v. *Turkey* (1996) 23 EHRR 553.

[21] *A and Others* v. *United Kingdom*, 19 February 2009.

[22] (1996) 23 EHRR 413.

[23] The Home Office notice of deportation included the claim that Chahal 'had been involved in planning and directing terrorist attacks in India, the United Kingdom and elsewhere' (*ibid.*, para. 30), but no details were ever given.

[24] This was distinct from the position under the 1951 Refugee Convention, Article 33(2) of which created an exception to the rule against refoulement to torture where there are 'reasonable grounds for regarding as a danger to the security of the country in which he is'. Instead, the Court followed the approach of Article 3(1) of the 1984 UN Convention Against Torture which allows no exceptions to the rule against refoulement to torture.

> *framework of laws, precautions, procedures and means of enforcement which will, to the greatest extent reasonably practicable, protect life.*[25]

In other words, Article 2 of the Convention not only requires states not to unlawfully take life but also have in place a system of laws to protect it, including – of course – the prevention, detection and prosecution of crime (including, logically enough, terrorist offences).[26] In an article published in mid-2010, James Spigelman, the Chief Justice of the Supreme Court of New South Wales claimed that references in human rights literature to 'the right to personal security, coupled with a positive obligation upon the State to protect that right' were 'rare'.[27] If this is so, the very substantial body of the Court's jurisprudence on Article 2 appears to have escaped his attention. The Court has also made clear, however, that the substantive obligation on states and public authorities under Article 2 to protect life cannot be taken too far and – in particular – cannot come at the expense of other, equally important rights. As the Court noted in the 2000 case of *Osman* v. *United Kingdom*, concerning the failure of police to act on complaints from a family concerning a suspect who went on to commit murder:

> [N]ot every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. Another relevant consideration is the need to ensure that the police exercise their powers to control and prevent crime *in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action* to investigate crime and bring offenders to justice, including the guarantees contained in Articles 5 [the right to liberty] and 8 [the right to private life] of the Convention.[28]

Whether or not the Convention's approach accords proper weight to the importance of security is, of course, a separate question. But to claim, as some have, that human rights take little or no account of the importance of security, at least in the sense of threats to life and limb, is exceedingly wide of the mark. At least as far as the European Convention on Human

[25] *R (Middleton)* v. *West Somerset Coroner* [2004] UKHL 10 at para. 2. Emphasis added.

[26] See e.g., *Osman* v. *United Kingdom* (2000) 29 EHRR 245 at para. 115; *Opuz* v. *Turkey* (2010) 50 EHRR 28 at para. 128, in which the Court noted that Article 2 involves 'a primary duty on the State to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions'.

[27] J. Spigelman, 'The Forgotten Freedom: Freedom from Fear', *ICLQ*, Vol. 39 (July 2010), pp. 543–570 at p. 566.

[28] (2000) 29 EHRR 245 at para. 116. Emphasis added.

Rights and, by extension, the Human Rights Act 1998 are concerned, 'national security' – not to mention such associated grounds as 'public safety', 'public order' and 'the protection of the rights and freedoms of others' – have long been recognised as a legitimate basis for imposing restrictions on certain rights, so long as those restrictions can be shown to be rationally connected to the end pursued, 'necessary in a democratic society' and strictly proportionate. As we shall see, however, while government ministers and others have been only too eager to claim security as a right, much less attention has been paid to these requirements of necessity, rationality and proportionality.

2. The UK framework for rights and security prior to 9/11

In light of the UK's long history of experience with terrorism, it would have been reasonable to expect that the legal principles for dealing with such threats were already well established by the time of the 9/11 attacks. In fact, the government's response to those events was the first major test of a new legal and constitutional framework governing counter-terrorism and human rights in the UK, chiefly the Human Rights Act 1998 ('HRA') and the Terrorism Act 2000. In this section, I outline this framework and something of the core principles underlying it.

Although the UK had been bound by the European Convention on Human Rights since 1953,[29] it was not until the coming into force of the HRA in October 2000 that UK courts had the power to give effect to Convention rights in domestic cases. Not only did the Act make it unlawful for public bodies and government ministers to act in a manner incompatible with Convention rights,[30] but it also gave the courts the power to interpret Acts of Parliament compatibly with Convention rights[31] and, where this was not possible,[32] to declare them incompatible. At the same time, the Act was careful to retain the supremacy of Parliament: a declaration of incompatibility had no effect on the legal validity of a statute and – as with an adverse judgment of the European Court of Human Rights – it remained for the government and Parliament to decide whether and how to address the incompatibility.

[29] The UK was one of the first to sign the Convention in 1950, but the Convention itself did not enter into force until 3 September 1953.

[30] Save where Parliament had directed otherwise: see section 6(2) HRA.

[31] Section 3 HRA.

[32] See e.g., the speech of Lord Bingham in *R (Anderson)* v. *Secretary of State for the Home Department* [2003] 1 AC 837 at para. 30; *Ghaiden* v. *Godin-Mendoza* [2004] UKHL 30.

The Terrorism Act 2000 likewise represented a desire to make the law on terrorism more compatible with fundamental rights. Introducing the Bill in Parliament, one Home Office Minister made clear the challenge:

> we will have handed the terrorists the victory they seek if in combating their violence we descend to their level and put at risk the essential freedoms and rule of law which are the bedrock of our democracy. The challenge in framing counter-terrorist legislation is to ensure it provides an effective and proportionate response to terrorism and the threat of terrorism.[33]

The genesis of the Act was an independent review of counter-terrorism legislation commissioned by the previous Conservative government following the IRA ceasefire in 1995, and carried out by Lord Lloyd of Berwick, a Law Lord. The legislative response to the Northern Ireland conflict had been very much piecemeal and ad hoc, and had ultimately required the UK to derogate from the ECHR in order to enable the pre-charge detention of suspects for up to four days.[34] Reporting in 1996, Lloyd recommended replacing the existing laws with permanent counter-terrorism legislation,[35] but also took care to identify a set of principles that should govern any future legislation on this issue, including that 'legislation against terrorism should approximate as closely as possible to the *ordinary criminal law and procedure*' and 'additional statutory offences and powers may be justified, but only if they are necessary to meet the anticipated threat' and must 'strike the right balance between the needs of security and the rights and liberties of the individual'.[36]

Central to Lloyd's approach was the idea that terrorist activity was first and foremost criminal activity and, as such, it should be dealt with – as far as possible – within the framework of the criminal justice system. At the same time, Lloyd was forthright about:

> *the difficulty of obtaining evidence on which to charge and convict terrorists*, particularly those who plan and direct terrorist activities without taking part in their actual execution. This has proved to be a serious weakness in the anti-terrorist effort, especially in Northern Ireland. In many cases the leaders of the paramilitary organisations may be well known enough to the police, but there is insufficient evidence to convict them.[37]

[33] The Parliamentary Under-Secretary of State, Home Office (Lord Bassam of Brighton): 6 April 2000: Column 1427. Emphasis added.
[34] See *Brannigan and McBride* v. *United Kingdom* (1993) 17 EHRR 539.
[35] Lord Lloyd of Berwick, *Inquiry into Legislation Against Terrorism*, Vol. 1 (Cm 3420, October 1996).
[36] *Ibid.*, para. 3.1. [37] *Ibid.*, para. 7.1. Emphasis added.

Indeed, as we shall see below, one of the central issues in UK counter-terrorism policy has been the so-called gap between suspicion and proof – between the authorities' suspicion that a particular individual is involved in terrorism and their ability or, in many cases, willingness to prove it in open court. In particular, the UK has for many years been unique among common law countries in that it prohibits the use of intercept material – the contents of phone calls or emails covertly intercepted by the police and intelligence services – as evidence in criminal proceedings.[38] In other words, an intercepted recording of a suspect discussing his plans to blow up Blackfriars Bridge would be inadmissible as evidence against him. Lloyd therefore recommended the lifting of the ban to enable more prosecutions to be brought. As he told Parliament in 2000:

> We have here a valuable source of evidence to convict criminals. It is especially valuable for convicting terrorist offenders because in cases involving terrorist crime it is very difficult to get any other evidence which can be adduced in court, for reasons with which we are all familiar. We know who the terrorists are, but we exclude the only evidence which has any chance of getting them convicted; and we are the only country in the world to do so.[39]

Lloyd was well aware of the difficulties of prosecuting terrorism cases and the risks that unprosecuted suspects might pose to security but he was firm in his conclusion that these did not justify a radical departure from the criminal justice model, underpinned as it was by the core procedural safeguards of a criminal trial. The rational response to the gap between suspicion and proof was, in his view, to work to make more evidence admissible rather than to resort to exceptional measures.

Despite the government's continuing[40] unwillingness to lift the ban on intercept evidence, the priority of the criminal law was also – broadly speaking – the philosophy that underpinned the 2000 Act. Following a consultation paper issued in 1998 based loosely on Lloyd's proposals, the

[38] The statutory bar on intercept dates from the Interception of Communications Act 1985 and, despite Lloyd's 1996 recommendation, was reconfirmed by section 17 of the Regulation of Investigatory Powers Act 2000. Prior to that, intercept was technically admissible but was not widely used because of official unwillingness to disclose details concerning their methods of interception (see *Intercept Evidence, Lifting the Ban* (JUSTICE, October 2006)).

[39] Debate on the Regulation of Investigatory Powers Bill, Hansard, HL Debates, 19 June 2000, col. 109–110.

[40] Despite Lloyd's recommendation, the ban was reconfirmed by Parliament in 2000 – see n. 38 above.

government brought forward its legislation for a comprehensive terrorism Act in 2000.[41] Among its more controversial measures, the Act allowed for a period of pre-charge detention in terrorism cases up to a maximum of seven days (although Lloyd had argued that a maximum of four days would be sufficient). It also adopted an expansive statutory definition of 'terrorism' which included the threat or use of force against any government anywhere in the world (regardless of how tyrannical it might be). Despite its several flaws, however, it remains possible to see the 2000 Act as at least a principled attempt to establish a coherent legal framework for counter-terrorism policy in the UK, and thereby to avoid the ad hoc response of previous emergencies. As Clive Walker put it:

> The Terrorism Act 2000 represents a worthwhile attempt to fulfil the role of a modern code against terrorism, though it fails to meet the desired standards in all respects. There are aspects where rights are probably breached, and its mechanisms to ensure democratic accountability and constitutionalism are even more deficient ... But at least that result initially flowed from a solemnly studied and carefully constructed legislative exercise.[42]

3. Rights and security after 9/11

a. The 2001 Act and indefinite detention without trial

At the time that the first plane hit the World Trade Center on 11 September 2001, the Terrorism Act 2000 had been fully in force for less than eight months.[43] Any hope that the comprehensive and considered nature of the 2000 Act would remove the temptation to legislate further on the issue of terrorism would prove forlorn. In the introduction to its report on the proposed legislation in November 2001, the House of Commons Home Affairs Committee noted that: [44]

[41] Although for his part, Lloyd lamented the government's failure to implement his recommendations properly: 'I regret to say that I believe the Government have missed an opportunity. They have succeeded in cobbling together two Acts and have done that job very skilfully. But the Acts themselves, which have been put together or consolidated – indeed, it is a form of consolidation – are an extraordinary rag-bag of miscellaneous offences of varying seriousness' (Hansard, HL Debates, 6 April 2000, col. 1444).

[42] Clive Walker, *Blackstone's Guide to the Anti-Terrorism Legislation* (Oxford University Press, 2002).

[43] See Terrorism Act 2000 (Commencement Order No. 3) Order 2001 (SI 2001/421), para. 2.

[44] *Report on Anti-Terrorism Crime and Security Bill 2001* (HC 351, November 2001), para. 1.

> this country has more anti-terrorism legislation on its statute books than almost any other developed democracy. Much of it, rushed through in the wake of previous atrocities, proved ineffective and in some cases counter-productive and needed to be amended. Often it was supposed to be temporary and turned out to be permanent.

Despite this, Parliament proceeded to enact the Anti-Terrorism Crime and Security Act 2001, which contained an additional 129 sections and 8 schedules' worth of measures.

In particular, Part 4 of the 2001 Act gave the Home Secretary the power to detain without charge any foreign national he suspected of being a terrorist, resulting in sixteen men being detained between December 2001 and March 2005. As with Rehman and Chahal before them, there was no public evidence to suggest any of the men were involved in plotting attacks in the UK. Instead, they appear to have been detained on the basis of their involvement with militant Islamist groups in places like North Africa or Chechnya. They were, in short, exactly those individuals whom the government would ordinarily have sought to deport on national security grounds but could not, following the *Chahal* case, because of the risk they would be tortured on return. Responding to the argument that, if individuals were suspected of involvement in terrorism, they should be prosecuted rather than indefinitely detained, a Home Office minister explained:

> If we could prosecute on the basis of the available evidence in open court, we would do so. There are circumstances in which we simply cannot do that because we do not use intercept evidence in our courts.[45]

Such was the strength of the government's refusal to allow intercept evidence to be used in open court that it was better for suspects to be indefinitely detained rather than the law changed to enable their prosecution.

In addition to being indefinitely detained, those suspected of being terrorists were given little opportunity to challenge the case against them, the bulk of the government's evidence being heard in secret sessions before the Special Immigration Appeals Commission (or 'SIAC', introduced following the *Chahal* judgment) from which the detainees and their lawyers were excluded.[46] Instead, the detainees were

[45] Lord Rooker, Hansard, HL Debates, 27 November 2001, col. 146.

[46] See the Special Immigration Appeals Commission Act 1997, in particular section 6 which allows for the appointment of special advocates to represent the interests of defendants in closed proceedings.

represented in the so-called 'closed' hearings by special advocates – lawyers with security clearance who argued on behalf of the detainees but who were forbidden to discuss the closed evidence with them. Lord Bingham, the senior Law Lord, would later liken the role of the special advocate to 'taking blind shots at a hidden target'.[47] Another of his colleagues, Lord Steyn, was even more forthright, saying that it was 'important not to pussyfoot about such a fundamental matter: the special advocate procedure undermines the very essence of justice. It involves a phantom hearing only.'[48]

The 2001 Act was by no means the government's last piece of terrorism legislation that decade. In early 2003, it asked Parliament to extend the maximum period of pre-charge detention in terrorism cases from seven days to fourteen days.[49] At the end of 2003, a group of Privy Counsellors headed by Lord Newton reported on the operation of the 2001 Act, recommending that indefinite detention be repealed 'as a matter of urgency'.[50] For its part, though, the government maintained that the detention power was compatible with fundamental rights, limitations on the liberty of suspects being necessary for the sake of broader public safety.[51] This position became much harder to maintain, however, when in December 2004 the House of Lords ruled indefinite detention without charge violated the detainees' rights to liberty and – because it applied to foreign nationals only – non-discrimination.[52] As Lord Hoffman put it:

[47] *Roberts* v. *Parole Board* [2005] UKHL 45 at para. 18. [48] *Ibid*., para. 88.

[49] Section 306 of the Criminal Justice Act 2003.

[50] Report of Privy Counsellors Review Committee chaired by Lord Newton, *Anti-Terrorism Crime and Security Act 2001 Review: Report* (HC 100: 18 December 2004), para. 200.

[51] See *Counter-Terrorism Powers: Reconciling Security and Liberty in an Open Society*, Cmnd 6147 (London: The Stationery Office, 2004).

[52] *A and Others* v. *Secretary of State for the Home Department (No. 1)* [2004] UKHL 56. Among other things, the Law Lords noted the original finding of SIAC that there were a number of UK nationals that the government also suspected of involvement in terrorism but who were not liable to be detained. As Lord Bingham noted, 'the choice of an immigration measure to address a security problem [Part 4 was essentially an extension of immigration detention] had the inevitable result of failing adequately to address that problem (by allowing non-UK suspected terrorists to leave the country with impunity and leaving British suspected terrorists at large) while imposing the severe penalty of indefinite detention on persons who, even if reasonably suspected of having links with Al-Qaeda, may harbour no hostile intentions towards the United Kingdom' (para. 43). The Newton Committee in 2003 similarly doubted the government's contention that the threat to the UK came primarily from foreign nationals, see Newton Report, para. 193: 'The British suicide bombers who attacked Tel Aviv in May 2003, Richard Reid ('the Shoe Bomber'), and recent arrests suggest that the threat from UK citizens is real. Almost 30 percent of Terrorism Act 2000 suspects in the past year have been British. We have

> The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for Parliament to decide whether to give the terrorists such a victory.[53]

The government's response to the Belmarsh judgment was twofold. On the one hand, it readily adopted the language of security as not only a right, but a trump: Tony Blair, for example, suggested that 'there is no greater civil liberty than to live free from terrorist attack'.[54] His Home Secretary at the time, Charles Clarke, maintained that 'the right to be protected from the death and destruction caused by indiscriminate terrorism is at least as important as the right of the terrorist to be protected from torture and ill-treatment'.[55] A later Home Secretary, John Reid, argued that 'the right to security, to the protection of life and liberty, is and should be the basic right on which all others are based'.[56]

On the other hand, the government was – strictly speaking – under no legal obligation to halt indefinite detention. The House of Lords judgment was a strong predictor of how the European Court of Human Rights would rule, and a final adverse judgment of that Court would put the UK under an obligation under the Convention to give effect to its ruling.[57] But the Convention is only binding on the government at the international level, and the Human Resources Act expressly preserves parliamentary sovereignty in the face of a declaration of incompatibility.[58] The Labour government, then, deserves some limited credit for its decision to accept the Lords' ruling on incompatibility. However, the manner by which it did so, in suggesting that it had no choice but to do otherwise and in particular attacking senior judges for their unrealism, was to prove corrosive for public

been told that, of the people of interest to the authorities because of their suspected involvement in international terrorism, nearly half are British nationals.'

[53] *A and Others*, *ibid.*, para. 97.

[54] 'Blair defends anti-terrorism plans', BBC News website, 24 February 2005.

[55] Charles Clarke, Speech to the Heritage Foundation, Washington DC, 5 October 2005, http://charlesclarke.org/archives/310 (accessed 2 May 2011).

[56] 'Reid urges human rights shake-up', BBC News website, 12 May 2007. See also e.g., B. Leapman, 'Reid says human rights laws soft on terrorists', *Sunday Telegraph*, 12 May 2007.

[57] See Article 46(1) of the Convention: 'The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.'

[58] As the European Court on Human Rights has noted, 'there is no legal obligation on the minister to amend a legislative provision which has been found by a court to be incompatible with the Convention' (*Parry* v. *United Kingdom*, admissibility decision on application no. 42971/05, dated 28 November 2006).

understanding of the Human Rights Act.[59] To this day, there remains the widespread belief that judges regularly use the Act to thwart Parliament's intent by overturning key counter-terrorism measures, as they did in the Belmarsh case.[60]

b. The 2005 Act and control orders

Nor was the government's alternative to indefinite detention much of an improvement. In response to the Belmarsh judgment, Parliament legislated again – on an emergency basis in less than seventeen days – this time to introduce the use of control orders under the Prevention of Terrorism Act 2005. This enables the Home Secretary to make a 'non-derogating' order against any person, UK or foreign national, whom she suspects of being 'involved in terrorist-related activity'. An order may specify a broad range of conditions, including curfews of up to sixteen hours a day, having to wear an electronic tag at all times, being required to live at a particular location in a specific town, being barred from using a phone or a computer connected to the internet, and from receiving any visitor not previously cleared by the Home Office. In a judgment in 2007, Lord Bingham agreed with the analogy made by Mr Justice Sullivan (as he was then) that such conditions were equivalent to custody in a minimum security prison:

> [Controlees'] lives were wholly regulated by the Home Office, as a prisoner's would be, although breaches were much more severely punishable. The judge's analogy with detention in an open prison was apt, save that the controlled persons did not enjoy the association with others and the access to entertainment facilities which a prisoner in an open prison would expect to enjoy.[61]

The former Chief Justice of South Africa, Arthur Chaskalson, referred to the UK's system of control orders in the following terms:

> Control orders may be much worse than they sound. They can require the victim of the order to remain at his or her home for up to 18 hours a day, with constraints upon receiving visitors, attending gatherings, meeting people or going to particular places during the 6 hours of 'freedom'.

[59] See Metcalfe, 'Rights and Responsibilities', *JUSTICE Journal*, Vol. 4 (2007), pp. 41–58.

[60] See e.g., Trevor Kavanagh, 'Rip Up the Inhuman Rights Act', *The Sun*, 3 July 2007: 'The British people should not be exposed to the fear of murder outlined by Home Secretary Jacqui Smith because of a shabby Human Rights Act that tolerates intolerance and puts our safety in deadly peril.'

[61] *Secretary of State for the Home Department* v. *JJ and Others* [2007] UKHL 45 at para. 24.

> We had measures like that in South Africa. We called them house arrest, distinguishing between 12 hours house arrest and 24 hours house arrest. The people affected by such orders found it almost impossible to comply with their terms, resulting in their breaking their orders, which in turn led to their often being prosecuted for doing so.[62]

As with indefinite detention, the Home Secretary's decision to make a control order was based largely on classified material, including intercept. Accordingly, appeals against control-order decisions were heard along the same lines as deportation hearings before SIAC – taking place largely in secret, with the detainees and their lawyers being prohibited from seeing any of the closed material. In one case, a High Court judge declared that a defendant had received a fair hearing despite not knowing any of the evidence against him.[63] It was not until June 2009 that the House of Lords would conclude, in light of the judgment of the European Court of Human Rights in *A and Others* v. *United Kingdom*,[64] that a defendant in control-order proceedings was entitled to 'disclosure of sufficient material to enable him to answer effectively the case that is made against him'.[65] As Lord Hope put it:

> [F]or a judge to hold that a hearing in which the party affected has had no opportunity to answer is a fair hearing negates the judicial function which is crucial to the controlled order system . . . The consequences of a successful terrorist attack are likely to be so appalling that there is an understandable wish to support the system that keeps those who are considered to be most dangerous out of circulation for as long as possible. But the slow creep of complacency must be resisted. If the rule of law is to mean anything, it is in cases such as these that the court must stand by principle. It must insist that the person affected be told what is alleged against him.

[62] Arthur Chaskalson, 'The Widening Gyre: Counter-Terrorism, Human Rights and the Rule of Law', 7th Sir David Williams Lecture, Centre for Public Law, University of Cambridge, published in *The Cambridge Law Journal*, Vol. 67/1 (2008), pp. 69–91.

[63] See *Secretary of State for the Home Department* v. *AF* [2007] EWHC 651 (Admin) at para. 146 in which Ouseley J accepted that: '[the government's case] against AF is in its essence entirely undisclosed to him. Answers to a Request for Further Information did not advance AF's understanding. Nor were any allegations of wrongdoing put to him by the police in interview after his arrest, affording him an idea by that side wind of what the case might be.'

[64] (2009) 49 EHRR 29.

[65] *Secretary of State for the Home Department* v. *AF and Others (No. 3)* [2009] UKHL 28 at para. 78 per Lord Hope.

As it turns out, control orders have proved as ineffective in practice as they have been offensive in principle. For, at the time they were introduced, control orders were described by the Home Secretary as being:

> for those dangerous individuals whom we cannot prosecute or deport, but whom we cannot allow to go on their way unchecked *because of the seriousness of the risk that they pose to everybody else in the country.*[66]

Yet, out of the forty-five people who have been made subject to control orders since the Act was passed, no less than seven have absconded – an apparent failure rate of about 15 per cent. Following two abscondments in late 2006, a junior Home Office minister said that he 'did not believe the public was at risk' from the escaped men,[67] and the government-appointed reviewer of terrorism legislation agreed that the disappearances 'present little direct risk to public safety in the UK at the present time'.[68] It is difficult to reconcile the Home Secretary's original claims of dangerousness in 2005 with the mild assessments offered the following year. It is equally difficult to see how control orders could in any event be effective in preventing terror attacks with a failure rate of roughly one in six.

Like indefinite detention, the central justification for control orders was the gap between suspicion and proof, as the Home Secretary explained to Parliament:

> I want to make it clear that prosecution is, and will remain, our preferred way forward when dealing with all terrorists. All agencies operate on that basis, and will continue to do so, but all of us need to recognize *that it is not always possible to bring charges, given the need to protect highly sensitive sources and techniques.*[69]

c. The 2006 Act and twenty-eight days pre-charge detention

As it was, the control-order regime had been in operation less than three months when the 7/7 bombings took place in London, killing fifty-two people in four separate suicide attacks. Within a month of the attacks,

[66] Rt Hon. Charles Clarke MP, Hansard, HC Debates, 23 February 2005, col. 339. Emphasis added.

[67] BBC News, 'Two terror suspects "on the run"', 17 October 2006.

[68] Lord Carlile, 'Report in Connection with the Home Secretary's Quarterly Reports to Parliament on Control Orders' (Home Office, 11 December 2006), para. 21.

[69] Hansard, HC Debates, 26 January 2005, col. 305. Emphasis added. The Lord Chancellor Lord Falconer similarly cited 'the evidential problems in proving the link between the individual, his activity and terrorism' in the Lords debates on the Prevention of Terrorism Bill (Hansard, HL Debates, 1 March 2005, col. 119).

the Prime Minister Tony Blair announced that 'the rules of the game are changing', and within three months had brought forward another Terrorism Bill, this time containing a proposal to raise the maximum period of pre-charge detention in terrorism cases from fourteen days to three months. In doing so, Blair suffered his first parliamentary defeat, but Parliament nonetheless agreed to extend the maximum period to twenty-eight days – by far the longest period in the common law world; longer, even, than in Zimbabwe under Robert Mugabe.[70] Like indefinite detention and control orders before it, the extension was justified by reference to the difficulty with gathering admissible evidence in terrorism cases:

> Public safety demands earlier intervention, and so the period of evidence gathering that used to take place pre-arrest is often now denied to the investigators. This means that in some extremely complex cases, evidence gathering effectively begins post-arrest, giving rise to the requirement for a longer period of pre-charge detention to enable that evidence gathering to take place, and for high quality charging decisions to be made.[71]

The Terrorism Act 2006 also introduced nine new terrorist offences, including that of 'encouraging' terrorism, disseminating terrorist publications, training for terrorism and attendance at a place used for terrorist training. This was notwithstanding the observation of the Privy Council review in 2003 that 'it has not been represented to us that it has been impossible to prosecute a terrorist suspect because of a lack of available offences'.[72] Similarly, as the then Director of Public Prosecutions, Sir Ken Macdonald QC, told the parliamentary Joint Committee on Human Rights in 2004, there is already 'an enormous amount of legislation that can be used in the fight against terrorism' and that the existing criminal law covers 'a huge swathe of activity that could be described as terrorist'.[73]

[70] The current maximum period of pre-charge detention in Zimbabwe under the Criminal Procedure and Evidence (Amendment) Act 2004 is twenty-one days. In February 2004, President Mugabe used regulations under the Presidential Powers (Temporary Measures) Act 1990 to extend pre-charge detention to twenty-eight days but this was later reduced by the 2004 Act.

[71] Letter from Anti-Terrorist Branch of the Metropolitan Police, 5 October 2005, printed as an appendix to the Home Affairs Committee, *Terrorism Detention Powers* (HC 910: June 2006).

[72] Newton Report, n. 50 above, para. 207.

[73] Evidence to the Joint Committee on Human Rights, Q42, 19 May 2004. The Joint Committee itself concluded that the main difficulty in prosecuting terrorist offences was evidential, rather than a lack of offences, and that this problem was 'unlikely to be helped by the creation of still more criminal offences' (para. 67, 18th report, August 2004).

In particular, the government's claim, made in the course of parliamentary debate on the 2006 Act, that an additional offence of encouraging terrorism was needed to combat 'indirect incitement' is credible only if one wilfully ignores the extensive law against incitement that was already in place: section 4 Offences Against the Person Act 1861 (making it a crime to 'encourage, persuade or endeavour to persuade any person to murder any other person'); section 8 Accessories and Abettors Act 1861 (prohibiting those who would 'counsel or procure the commission of any indictable offence'); section 59 Terrorism Act 2000 (inciting another person to commit an act of terrorism wholly or partly outside the UK), to name but a few of the offences that were available before 9/11 to prosecute persons who incite others to commit acts of terrorism.

This wholesale lack of necessity for new terrorism offences was epitomised in the case of Abu Hamza, the firebrand cleric of Finsbury Park Mosque, notorious for his inflammatory speeches. During debates on the 2006 Act, government MPs suggested that Hamza's case illustrated the inadequacies of the existing law and the need for broader measures. As it was, Abu Hamza was found guilty in February 2006 on eleven counts, including six charges of soliciting to murder under the 1861 Offences Against the Person Act. Of all the offences he was found guilty of, the newest was an offence under the 2000 Act. Indeed, of the 1,471 people arrested for terrorism between 11 September 2001 and 31 March 2009, only 340 were charged with terrorism-related offences, and only 196 convicted.[74] Of those 196, less than 25 (12 per cent) have been convicted of an offence created after 2000, the overwhelming majority of which were also convicted of a pre-2001 offence for which they received a more severe sentence.

A month before his resignation as Prime Minister in June 2007, Tony Blair was unrepentant on his government's record on human rights in the fight against terrorism:

> We have chosen as a society to put the civil liberties of the suspect, even if a foreign national, first. I happen to believe this is misguided and wrong . . . 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. Their right to traditional civil liberties comes first. I believe this is a dangerous misjudgement.[75]

[74] Alan Travis, 'Two thirds of UK terror suspects released without charge', *The Guardian*, 13 May 2009.

[75] 'Blair accuses courts of putting rights of terrorist suspects first', by Nigel Morris, *The Independent*, 28 May 2007. See also e.g., 'Blair faces torrent of criticism on human rights',

d. The 2008 and 2010 Acts

At first, the Brown government appeared willing to take a different tack. But the Labour government could not ultimately resist another opportunity to outflank the Conservative opposition on the issue of national security. In 2008, the government made another attempt to raise the maximum period of pre-charge detention in terrorism cases, this time to forty-two days. The proposal foundered again, not least because of the views expressed by Sir Ken Macdonald QC, the serving Director of Public Prosecutions, and Dame Manningham-Buller, who had recently retired as the Director of MI5, that there was no need to do so.[76] Nonetheless, Parliament passed the Counter-Terrorism Act 2008, with another 102 sections and 9 schedules, including forfeiture powers, provision for the post-charge questioning of suspects and more terrorist offences such as that of gathering information about members of the armed forces. Upon his retirement as DPP in 2008, Macdonald wrote in scathing terms of the government's commitment to 'an unwanted war on terror whose primary dividends were too many bad laws'.[77]

In January 2010, in the first case to be heard by the UK Supreme Court, it held that the government had exceeded its power under the United Nations Act 1946 when it introduced a succession of executive orders that had been in operation shortly after 9/11, which enabled the Treasury to freeze indefinitely the assets of any person it suspected of involvement in terrorist financing.[78] One Law Lord, Lord Brown, said

by Colin Brown and Nigel Morris, *The Independent*, 24 February 2006: 'We hear an immense amount about [terror suspects'] human rights and their civil liberties. But there are also human rights of the rest of us to live in safety.'

[76] See Sir Ken Macdonald QC, evidence to the Public Bill Committee on the Counter-Terrorism Bill, HC Hansard, 22 April 2008 Q150 at col. 58: 'our experience is that we have managed comfortably with 28 days, and have therefore not asked for an increase. It is possible to set up hypothetical situations in which you might have nothing after 28 days but suddenly get evidence after that time. I repeat: anything is possible; the question is whether it is remotely likely.' Dame Manningham-Buller, HL Hansard, 8 July 2008, col. 647: 'I do not see on a practical basis or on a principled one that these proposals are in any way workable for the reasons already mentioned and because of the need for the suspect to be given the right to a fair trial.'

[77] Sir Ken Macdonald QC, 'Building bridges is the future', *The Times*, 10 May 2010.

[78] *Ahmed and Others* v. *HM Treasury* [2010] UKSC 2. As it happened, the case did not involve the *statutory* framework of asset-freezing powers that had been introduced under the Anti-Terrorism Crime and Security Act 2001. They had languished unused on the statute books until the global financial crisis of 2008 when they were used to freeze the assets of the Icelandic government. See the Landsbanki Freezing Order 2008 (SI 2008/2668).

that the 'draconian nature of the regime imposed under these asset-freezing Orders can hardly be over-stated'.[79] The Deputy President of the Supreme Court, Lord Hope, said:

> The consequences of the Orders that were made in this case are so drastic and so oppressive that we must be just as alert to see that the coercive action that the Treasury have taken really is within the powers that the 1946 Act has given them. *Even in the face of the threat of international terrorism, the safety of the people is not the supreme law. We must be just as careful to guard against unrestrained encroachments on personal liberty.*[80]

In response to this ruling, the government rushed the Terrorist Asset Freezing (Temporary Provisions) Act 2010 through Parliament, effectively validating the orders that the Supreme Court had quashed. (At the time of writing, the 2010 Act's proposed replacement – the Terrorist Asset Freezing etc. Bill – is currently before Parliament.)

Despite a recommendation of the Privy Council Review Committee in February 2008 that the law on intercept could be changed to allow its use as evidence in terrorism cases,[81] the statutory ban still has not been lifted.

e. The Coalition government and the 'rapid review'

There are signs that the UK government has now entered what Justice Brennan spoke of as the 'remorseful realisation' phase of the cycle. In May 2010, the new Coalition government promised a 'full programme of measures to reverse the substantial erosion of civil liberties', including the introduction of safeguards 'against the misuse of anti-terrorism legislation'.[82] In July, it announced a 'rapid review' of counter-terrorism powers. At the time of writing, the outcome of this review is unknown but – at the very least – the government has committed itself to ending the use of the stop-and-search power under section 44 of the Terrorism Act 2000, after the European Court of Human Rights ruled in January that there were insufficient safeguards to prevent it from being used in

[79] *Ibid.*, para. 192. [80] *Ibid.*, para. 6. Emphasis added.

[81] *Privy Council Review of Intercept as Evidence* (Cmnd 7324, 4 February 2008). Although the review in principle favoured the use of intercept, its recommendations were in fact heavily weighted towards continuing control of intercept material by the intelligence services. In late 2009, the Home Secretary unsurprisingly enough reported to Parliament that the Home Office implementation team had been unable to come up with a viable model that would meet Chilcot's recommendations while remaining compatible with Convention rights: see *Intercept as Evidence* (Cm 7760, December 2009).

[82] *The Coalition: Our Programme for Government* (Cabinet Office, May 2010), p. 11.

an arbitrary and discriminatory manner by police.[83] Whether the control-order regime will be repealed remains unknown but there at least seems a very real prospect that the maximum period of pre-charge detention will revert from the current twenty-eight-day limit back to the fourteen days set by Parliament in 2003.

In September 2010, in his first speech as the newly appointed Leader of the Opposition, Ed Miliband admitted that 'too often' the previous Labour government had 'seemed casual' about 'British Liberties [that were] hard fought and hard won':

> Like the idea of locking someone away for 90 days – nearly three months in prison – without charging them with a crime. Or the broad use of anti-terrorism measures for purposes for which they were not intended.[84]

A few weeks later, a somewhat contrite Jack Straw MP, who had been Home Secretary when the Human Rights Act 1998 was introduced and Foreign Secretary during the events of 9/11 and 7/7, suggested that the 9/11 attacks gave rise to conditions that tested 'close to destruction, some of the key foundations of any liberal democracy'.[85] As he explained:

> It is hard to exaggerate the pressures that those with responsibility encounter when a population, or part of it, is scared. In a flash, sometimes the same people who might have been seeking greater controls on the intelligence services will want to know why we didn't have more intelligence, why we hadn't acted sooner, or why known 'bad people' hadn't been incarcerated earlier.

4. Rights and reason

How well, then, did the UK's constitutional structure prevent overreaction by government and Parliament after 9/11 and 7/7?

It is true, of course, that in two cases, Parliament *did* check the executive's desire to massively increase the maximum period of pre-charge detention in terrorism cases to ninety days in 2005 and forty-two days in 2008. But Parliament's own efforts saw the limit rise from seven days in 2000, to fourteen days in 2003, to twenty-eight days in 2005. With the UK pre-charge detention limit far in excess of any other common law country, Parliament is hardly to be congratulated for its restraint.

[83] *Gillan and Quinton* v. *United Kingdom* (2010) EHRR 45.
[84] Labour Party Conference, 28 September 2010.
[85] Jack Straw, 'Let's Bring Human Rights Home', *The Guardian* 26 October 2010.

Nor did Parliament act as much of a check on the government's even more egregious counter-terrorism measures such indefinite detention, control orders, asset-freezing or the near-endless proliferation of new terrorist offences. And, nearly a decade and a half after Lord Lloyd's report, Parliament has refused to legislate to allow intercept evidence to be used in terrorism cases. The underlying problem – the executive's dominance of the House of Commons – is a structural one that affects many areas of populist concern including criminal justice and immigration. Nonetheless, where fear is at its greatest – as it is with terrorism – so too is the problem at its most acute.

One feature of emergency legislation that has frequently been touted as a safeguard is the requirement for independent review and so-called 'sunset' clauses, requiring annual renewal of contentious provisions. A decade later, their value seems decidedly limited. The Newton Committee's report in 2003 was an important work of independent review yet its conclusions were roundly ignored by the government and only proved useful when adopted by the House of Lords a year later. Similarly, provisions in the 2005 Prevention of Terrorism Act for independent statutory review and annual renewal by Parliament did not prevent, for example, the government's unlawful use of eighteen-hour curfews. It was not until the House of Lords judgment in *JJ* in October 2007 that this was corrected. Lord Carlile's annual reviews of the 2000, 2001 and 2005 Acts have had their uses, but it is only on stop-and-search that his conclusions proved at all helpful. The annual sunset clause on indefinite detention actually became a reason for rushing replacement legislation through Parliament in seventeen days. The same has happened again with the sunset clause in the Terrorist Asset Freezing (Temporary Provisions) Act 2010, with the Treasury using the need to have replacement legislation in place by the end of 2010 as a reason not to undertake the broader overhaul of the laws in this area, as recommended by the Supreme Court and the Privy Council report as long ago as 2003. For as long as Parliament remains dominated by the executive, the benefits of independent review and sunset clauses will make little substantial difference to counter-terrorism policy.

What, then, of the courts? It is true that the Belmarsh judgment proved a watershed, not just in declaring the use of indefinite detention incompatible with basic rights, but also in terms of setting out the courts' role in reviewing the actions of the executive and Parliament on matters of counter-terrorism policy. Responding to the Attorney

General's argument that it was 'not for the courts to usurp authority properly belonging elsewhere',[86] Lord Bingham said:

> I do not ... accept the distinction which [the Attorney] drew between democratic institutions and the courts. It is of course true that the judges in this country are not elected and are not answerable to Parliament. It is also of course true ... that Parliament, the executive and the courts have different functions. But the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself. The Attorney-General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision-making as in some way undemocratic. It is particularly inappropriate in a case such as the present in which Parliament has expressly legislated [under the Human Rights Act] to render unlawful any act of a public authority ... incompatible with a Convention right ... The effect is not, of course, to override the sovereign legislative authority of the Queen in Parliament, since ... the validity of the legislation is unaffected ... and the remedy lies with the appropriate minister ... who is answerable to Parliament. The 1998 Act gives the courts a very specific, wholly democratic, mandate.

Yet in the years that followed, the Belmarsh judgment seemed less like a watershed than a high-water mark.[87] The following year, the House of Lords unanimously condemned the use of evidence obtained by torture before SIAC but a majority held that, where any doubt existed, the material should be admitted unless the court was satisfied that torture had been used. Of the majority's test for admissibility, Lord Bingham complained that it was 'inconsistent with the most rudimentary notions of fairness to blindfold a man and then impose a standard which only the sighted could hope to meet'.[88] Fair trial rights in the context of control orders also suffered: with the exception of Mr Justice Sullivan at first instance and Lord Bingham on appeal, the courts proved unwilling to declare the extensive use of secret evidence under the Prevention of Terrorism Act 2005 incompatible with Convention rights. It was not

[86] See *A and Others* v. *Secretary of State for the Home Department (No. 1)* [2004] UKHL 56 at para. 37.

[87] But see e.g., Adam Tomkins, 'National Security and the Role of the Court: A Changed Landscape?' *Law Quarterly Review*, Vol. 126 (October 2010), pp. 543–67, at p. 544, referring to the view 'in the years since the *Belmarsh* judgment, the House of Lords has not once returned to the high ground it staked out for itself in that decision'. Tomkins himself suggests that the picture is more complicated, whereby the courts at first instance have evolved a different approach than the appellate courts.

[88] *A and Others* v. *Secretary of State for the Home Department (No. 2)* [2005] UKHL 71 at para. 59.

until June 2009 – more than four years after control orders were first introduced – that the Law Lords ruled that controlees were entitled to sufficient disclosure of the case against them in order to be able to meet it. Even then, a majority of Law Lords did so grudgingly, prompted onwards by the February 2009 ruling of the European Court of Human Rights which had established the same principle in detention cases before SIAC.

Lord Hoffmann, the great hero of the Belmarsh case, had by this point reverted to the conservatism of his pre-Belmarsh days, declaring that Strasbourg's ruling 'was wrong and may well destroy the system of control orders which is a significant part of this country's defences against terrorism'.[89] For Hoffmann, a fair trial was simply a matter of balancing the obvious unfairness of non-disclosure to a suspect against the larger risk to the general public that the suspect might in fact be dangerous:

> There are practical limits to the extent to which one can devise a procedure which carries no risk of a wrong decision. It is sometimes said that it is better for ten guilty men to be acquitted than for one innocent man to be convicted. Sometimes it is a hundred guilty men. The figures matter. A system of justice which allowed a thousand guilty men to go free for fear of convicting one innocent man might not adequately protect the public.

All of which suggests that the control-order regime is 'a system of justice' concerned with determining 'guilt' or 'innocence', which of course it is not. After all, concepts like 'guilt' and 'innocence' are part of the procedural safeguards of a criminal trial which require not only the reasonable suspicion of wrongdoing, but also proof sufficient to satisfy a jury beyond a reasonable doubt. As Justice Brennan said in 1958:

> There is always in litigation a margin of error, representing error in fact-finding, which both parties must take into account. Where one party has at stake *an interest of transcending value – as a criminal defendant his liberty* – this margin of error is reduced as to him by the process of placing on the other party the burden . . . of persuading the fact finder at the conclusion of the trial of his guilt beyond a reasonable doubt.[90]

What Lord Hoffmann's jeremiad against the dangers of fairness manages to ignore completely is that the entire control-order system was set up to avoid those safeguards, being thought too onerous. There is, in other words, no requirement to prove guilt in order to establish a control order. It is enough that the Home Secretary merely has reasonable

[89] *Secretary of State for the Home Department* v. *AF (No. 3)* [2009] 28 at para. 70.
[90] *Speiser* v. *Randall* 357 US, p. 513 at pp. 525–6, emphasis added.

suspicion that a person is involved in terrorism. When one bears in mind that 'reasonable suspicion' is the normal basis for *arrest*, not conviction, it becomes obvious that Lord Hoffman's concerns about letting guilty men go free puts the cart before the horse.

Their natural conservatism aside, the primary reason for the courts' reluctance to interfere too much on detail of national security is the idea of respect for the relative institutional competence of the executive and Parliament. Lord Bingham's speech in the Belmarsh case paid respect to this idea even as it stressed its limits, but the idea that the government has access to expertise on national security that the courts do not goes a long way towards explaining the courts' general approach. There are, of course, excellent reasons to doubt the government's assessment of risk. First of all, the technical competence of the agencies may be overstated. Secondly, the agencies involved in advising government may have institutional reasons for exaggerating the threat or seeking greater powers to respond to a risk they cannot accurately gauge. Thirdly, and most critically for this chapter, the government's own assessment may be coloured by fear of the electoral response and – less charitably – by calculations of electoral advantage. As we have seen from the forty-two-days debate, it fell to the Director of Public Prosecutions and the recently retired Director of MI5, rather than the head of the Metropolitan Police, any of the serving Directors of MI5, MI6 or GCHQ, or any of the UK's fifty-one Chief Constables to speak out against the increase. From this, we can conclude it is a brave public official in matters of national security who turns down more powers to combat a difficult threat.[91]

Given the obvious part that fear can play in decision-making, then, it becomes all the more important for the judiciary to second-guess the reasoning of the executive and Parliament on issues of national security,

[91] See D. Feldman, 'Human Rights, Terrorism and Risk: The Role of Politicians and Judges' [2006] *Public Law* 332 at pp. 343–4: 'A small likelihood of disastrous consequences tends to provoke a response geared to the scale of the possible consequences rather than to the degree of the likelihood that they will materialise. No public body wants to face the obloquy and legal liabilities that might result from running the risk so bodies become excessively risk averse and defensive in their responses. A high level of risk aversion tends to lead to the conferral of enlarged powers and increased resources on the public bodies responsible for responding to the risk. If those bodies are also responsible for assessing the risk, they have an institutional interest in playing up the risk as much as possible in order to strengthen their position in the fight for powers and resources. Where terrorism is concerned, the people who assess the risk are those who claim to have a monopoly over the information needed to assess it, and they are also the people who have the most to gain in terms of power and resources from any governmental or legislative response: namely the police and the security service.'

to be sceptical rather than to assume without argument their relative institutional competence on such matters. If fear corrodes reason and weakens our adherence to principle, then it is only by strict conformity to reason and evidence that we can hope to break the cycle of overreaction and remorse. As Waldron says, fear is only half a reason for modifying a right in the name of security: 'the other and indispensable half is a well-informed belief that the modification will actually make a difference to the prospect we fear'.[92] In fact, as far as human rights law is concerned, even a rational connection is only the first step. It needs to be shown that the limitation of the right is necessary and proportionate. Nor are these concepts somehow limited to the courts. For rights to be truly effective, these principles need to be at the heart of the analysis of government and Parliament too.

5. Conclusion

Lacking faith in our own self-restraint, we trust in the design of our political institutions to check our own tendency to overreact, yet time and again our constitutional safeguards have been found wanting. Still, overreaction should not be seen as inevitable. The 2004 Madrid bombings, for instance, resulted in the deaths of 191 people with over 1,500 people injured, yet Spain did not rush to legislate or introduce disproportionate measures.

There are some indications that the senior judiciary is once again exercising greater oversight of the executive's claims in matters of national security, as the first Supreme Court judgment in *Ahmed and Others* and the recent judgments of the Court of Appeal in the cases of *Al Rawi* and *Binyam Mohamed* indicate. And it may be that the Coalition government's review of counter-terrorism powers will yet see the repeal of control orders and the lowering of the current twenty-eight-day limit on pre-charge detention. Parliament will have an opportunity to show its own mettle as the Prevention of Terrorism Act 2005 and the pre-charge provisions of the Terrorism Act 2006 come up for their next annual renewal in 2011. But for as long as exceptional measures are still being justified by reference to evidential difficulties in criminal prosecutions – caused in large part by the UK's own self-denying ordinance on the use of intercept evidence – our counter-terrorism policies can never claim to be truly rational.

[92] Jeremy Waldron, 'Security and Liberty: The Image of Balance', in *Torture, Terror, and Trade-Offs: Philosophy for the White House* (Oxford University Press, 2010).

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