

HUMAN RIGHTS AND COUNTERTERRORISM IN THE UK

Clive Walker*

Introduction

Within the dominion of counter-terrorism, policy choices can be stark. One must determine in institutional terms whether the response is to be predominantly military or policing and, cutting across that boundary, which agencies are to predominate and where to direct financial support. There are also choices to be made in corresponding legal regimes around counter-terrorism, ranging from the rules of war and legal states of emergency through to nuanced versions of criminal justice. These counter-terrorism policy choices can determine not only the nature of a society whilst it deals with terrorism but also, as illustrated by the variant experiences of countries such as South Africa or Sri Lanka, compared to Germany and Italy, the nature of that society and its residual scars if and when it emerges from terrorism. It is the thesis here that human rights discourse has grown in importance as a determinant of counter-terrorist strategic choices and modes of tactical delivery. That meaning and impact will be assessed alongside other normative considerations such as democratic accountability.

This promise of human rights impact appears somewhat extravagant, for counter-terrorism has historically been barren ground for the flourishing of human rights. A more evident product of counter-terrorism is its baleful litany of atrocities and abuses, which include numerous British misdeeds in Ireland, such as Bloody Sunday in 1972 (Bloody Sunday Inquiry, 2009), and the more recent abuses of prisoners in Iraq (Baha Mousa Inquiry, 2010) or involvement in unlawful rendition (Gibson, 2013). Yet, the thesis adopted in this paper is that rights protection within counter-terrorism has strengthened since the entry into force (in October 2000) of the Human Rights Act 1998 in the United Kingdom. This Act of Parliament has engendered within the United Kingdom a culture of rights more pervasive than its technical legal requirements (Walker and Weaver, 1999, p.560).

* Professor Emeritus of Criminal Justice Studies, University of Leeds, Leeds LS2 9JT, UK; law6cw@leeds.ac.uk.

There are three institutional support mechanisms boosted by the Human Rights Act: internal governmental 'Strasbourg proofing'; Parliamentary scrutiny; and judicial review which observes a decreasing level of deference. These mechanisms add to the explicit reviews set up under the counter-terrorism legislation itself. By these means, the Act has ensured that relevant parts of an established international treaty, the European Convention on Human Rights and Fundamental Freedoms 1950, must be treated as legally relevant in all legal and administrative transactions to which it applies. Observance is most tightly scrutinised within the domestic sphere, but, as will be illustrated, human rights duties are applied by the legislation to any sphere where effective British control exists – even if overseas. Beyond the Human Rights Act, the European Convention still exerts influence in international law, and decisions from the European Court of Human Rights provide an important final check against wayward nationalistic pleading of national security, whether in regard to detention without trial, rendition, or otherwise, as shall again be illustrated later in this paper. Beyond even the European Convention and other formal instruments, human rights philosophy has proven potent, as evidenced, for instance by the annual human rights review of foreign policy, the latest of which was delivered in 2016 (Foreign & Commonwealth Office, 2016). While taking due cognisance of these wider emanations of human rights discourse, the prime focus in this paper will be on the impact of the Human Rights Act as the most important legal development in counter-terrorism over the past decade.

The principal impacts of all these systemic mechanisms will be considered from several perspectives. The first is a framing perspective by which human rights considerations rule in and rule out potential approaches to counter-terrorism. At the same time, the suppression of terrorism can itself be founded on rights-based arguments, and special laws are certainly not debarred *per se*. Indeed, the European Court of Human Rights has expected effective action against terrorism (*Klass v Germany*, 1978, para.48; *McCann v United Kingdom*, 1995, para.192). The second perspective is rights specific - how individual rights fare in circumstances of terrorist threat. The interpretation adopted in this paper is that activities which are seen as within the purview and expertise of courts - such as procedure - are subjected to stricter standards than activities which less frequently trouble the courts (such as surveillance). The third perspective is temporal - that human rights scrutiny gains traction as counter-terrorism campaigns mature. The fourth

perspective is that the treatment of rights in counter-terrorism can have socially transformative impacts by affecting negatively or positively the mobilising factors for or against terrorism.

Prior to these inquiries, a brief overview of UK counter-terrorism legislation will be provided so as to appreciate the overall nature of the core materials which are being discussed with reference to human rights.

Overview of UK counter-terrorism legislation

Special laws against terrorism have provided a constant feature of political and legal life within the United Kingdom for many years. As described more fully elsewhere (Walker, 2011; Walker 2014), the catalogue is now marked by its complexity, depth, and range. The current legislative collection also builds upon long experience. The notion that it represents an 'emergency' or 'temporary' code is belied by close links to predecessors such as the Civil Authorities (Special Powers) Acts 1922-43 (Northern Ireland), the Prevention of Violence (Temporary Provisions) Act 1939, the Northern Ireland (Emergency Provisions) Acts 1973-98, and the Prevention of Terrorism (Temporary Provisions) Acts 1974-89.

Terrorism Act 2000

The Terrorism Bill reflected a new dispensation – a considered, comprehensive, and principled code rather than hastily considered and fragmented emergency laws. The period of gestation involved the Lloyd Report (1996) as well as the government's response (Home Office, 1998). The passage of the Human Rights Act 1998 also made it advisable to conduct some revision. The government claimed that the Bill was compatible with European Convention rights, especially as it provided for judicial scrutiny of arrest powers instead of the ministerial system which had breached the protection for liberty under article 5(3) of the European Convention on Human Rights and Fundamental Freedoms 1950 in *Brogan v UK* (1988). The derogation notice issued in 1988 was therefore withdrawn, though the Act has since been found wanting in other respects (most notably by denying effective access to lawyers: *Brennan v UK*, 2001). The substantive themes covered by the Act comprise proscribed organisations, terrorist property, special investigatory and policing powers, special offences, and extra measures under Part VII,

mainly in the form of wide policing powers and special ‘Diplock’ non-jury criminal trials, confined to Northern Ireland. The latter were replaced with the Justice and Security (Northern Ireland) Act 2007, but that legislation still provides for non-jury trials.

Anti-terrorism, Crime and Security Act 2001

There was no immediate rush to legislation following the 11 September attacks, and the 2001 Act was in fair part constructed around the Terrorism Act, rather than striking out in the new and alarming direction set by the US ‘war on terror’ (US Presidential Order, 2001). Nonetheless, a major innovation was the revival of detention without trial which did represent a major departure from criminal justice approaches and also confronted normal human rights standards. This 2001 variant was couched in terms of immigration legislation and was aimed exclusively at foreign suspects who, following the determination of the European Court of Human Rights in *Chahal v UK* (1996), could not be deported without breach of international law where there was established a real risk of torture in their country of origin. Given the manifest incursion into the right of liberty under article 5 which was entailed by detention without trial, the enforcement of Part IV could only be justified by a declaration of an emergency threatening the life of the nation, which was pronounced with due legal formality by means of a ‘notice of derogation’ under article 15 of the European Convention.

Prevention of Terrorism Act 2005

The policy of detention without trial under Part IV encountered fierce criticism from the Privy Counsellor Review Committee (2003); it viewed the system as objectionable because of the lack of safeguards, because it did not extend to British terrorists, and because viable alternatives existed. In response, the Home Office Consultation Paper (2004, Pt.I paras.8, 34, Pt.II para.31) regarded Part IV as indispensable and depicted any alternatives as unworkable. There the matter might have rested were it not for the declaration of incompatibility under section 4 of the Human Rights Act 1998 issued by the House of Lords in *A v Secretary of State for the Home Department* (2004). A majority of their Lordships did not condemn the reliance upon the derogation notice. However, two features of Part IV - that foreigners were the exclusive target while ignoring threats from British citizens and that it comprised only a ‘prison with three walls’ (since those foreign detainees were allowed to leave the prison if willing to move abroad)

- meant it was disproportionate, discriminatory, and irrational. In response, lesser executive restrictions, ‘control orders’, were introduced via the Prevention of Terrorism Act 2005. Following the Macdonald Report (2011), control orders were replaced by marginally less restrictive measures under the Terrorism Prevention and Investigation Measures Act 2011 which have also been invoked at a lower rate (Walker and Horne, 2012; Horne and Walker, 2014).

Terrorism Act 2006

The London bombings of 7 July 2005 galvanised apprehension about the radicalisation of British-born ‘neighbour terrorists’ (Walker, 2008). Great controversy ensued around two proposals – an offence of the glorification of terrorism and a maximum police detention period of 90 days (up from the 14 day limit set by the Criminal Justice Act 2003. This Act, through section 306, had already doubled the seven days allowed by the Terrorism Act 2000 and went far beyond the four days in the ‘normal’ regime of the Police & Criminal Evidence Act 1984). Parliamentary opposition forced the refinement of the first measure to the notion of ‘indirect incitement’, while the second measure was defeated albeit with a compromise of 28 days being substituted. That extension has since been reversed, again endorsed by the Macdonald Report (2011), and implemented by the Protection of Freedoms Act 2012; the maximum is again 14 days, subject to the possibility of an extension in times of emergency (Walker, 2014a).

Counter-Terrorism Act 2008

No overarching theme or trigger emerged for the 2008 Act - it deepens and widens existing strands of laws rather than inserts new initiatives (Home Office 2007). Notable political battles in 2008 saw the defeat of 42 day detention but the acceptance of post-charge questioning, another extraordinary measure which was fought over for months but has since never been invoked (Walker, 2016).

Terrorism Asset-Freezing etc Act 2010

The combating of terrorism financing is partly the subject of a series of offences (which may lead to forfeiture) in the Terrorism Act 2000, Pt III, plus the seizure of cash and freezing orders under Pts I and II of the Anti-terrorism, Crime and Security Act 2001 and Pts V and VI of the Counter-Terrorism Act 2008. In addition, a major feature is individual sanctions which are

internationally based and began with the United Nations Security Council Resolution (UNSCR) 1267 on 15 October 1999 and UNSCR 1333 of 19 December 2000 against supporters of the Taliban or Al Qa'ida (now UNSCR 1988 and 1989 of 17 June 2011, plus UNSCR 2253 of 17 December 2015 against Islamic State). Adding to the complexity, the European Union has underwritten the international obligations under UNSCR 1267 so as to ensure consistency in application. In practice the listings are precisely copied across. The European Union has also chosen to bolster UNSCR 1373 autonomously, beginning with Council Common Position 2001/931/CFSP, which required a further listing and asset freezing system to address terrorism affecting multiple member states. Within the United Kingdom, UNSCR 1267 was primarily implemented under the United Nations Act 1946, but this system had to be substantially amended because of the decision in *HM Treasury v Ahmed* (2010) whereby aspects of the Orders were found to be *ultra vires* the United Nations Act 1946. Therefore, Part I of the Terrorist Asset-Freezing etc. Act 2010 deals with designation. The prohibitions on financial dealings which flow from designation and European listings are set out in Pt II.

Counter-Terrorism and Security Act 2015

Lying behind the Counter-Terrorism and Security Act 2015 is the phenomenon of foreign terrorist fighters which has sparked international and national attention. The 2015 Act deals with many facets of counter terrorism legislation, but there are two principal measures (Blackbourn and Walker, 2016). Part I seeks to interdict foreign terrorist fighters by preventing suspects from travelling and by dealing with returnees. The second, broader aspect, of legislative policy, reflecting the UN emphasis on 'Countering Violent Extremism' in UNSCR 2178 of 24 September 2014, is implemented through the statutory elaboration and enforcement in Part V of the 'Prevent' element of the long-established Countering International Terrorism ('CONTEST') strategy (Home Office, 2006) which aims to discourage support for violent extremism.

Institutional support mechanisms

Since the Terrorism Act 2000 is largely a permanent code, there is no requirement for periodic renewal. According to government Minister, Charles Clarke (2000):

‘We have had so-called temporary provisions on the statute book for 25 years. The time has come to face the fact of terrorism and be ready to deal with it for the foreseeable future. We need to make the powers permanently available, although the fact that those powers are available does not mean that they have to be used.’

It follows that the review mechanisms appear relatively weak. Section 126 simply requires that the Secretary of State shall lay before Parliament an annual report on the working of the legislation. Yet, extraordinary powers should be subjected to extraordinary scrutiny, so it is welcome that the government has adopted the practice of appointing an Independent Reviewer of Terrorism Legislation (Lord Carlile of Berriew from 2001 to 2011, succeeded by David Anderson from 2011 to 2016, for UK legislation and Robert Whalley, from 2008 to 2013, and then David Seymour for Northern Ireland legislation) to assist with the annual reports. These independent review schemes are neither comprehensive nor well-resourced and have been beset by 'pragmatic incrementalism' (Carlile, 2008). The Terrorism Act 2000 is now fully reviewed, as formalised by the Terrorism Act 2006, section 36. The criteria for review make no explicit reference to human rights, but they are given prominence in practice (Anderson, 2014). Between 2000-2007, there was a specific review for the special Northern Ireland measures under Part VII of the Terrorism Act 2000, now replaced by ongoing review of sections 21 to 32 of the Justice and Security (Northern Ireland) Act 2007. But there is no independent review of sections 1 to 9 (non-jury trials) which were time limited by section 9 to two years but have been extended ever since. The Independent Reviewer of Terrorism Legislation can also be commissioned to undertake thematic reviews and has reported on proposals in 2005 and 2007 for extended detention of 90 and then 42 days and on the definition of terrorism (Carlile, 2005, 2007, 2007a). As for the Prevention of Terrorism Act 2005, annual independent review was required, as well as annual renewal subject to Parliamentary approval. By contrast, the Terrorism Prevention and Investigation Measures Act 2011 is subject to annual review but not annual renewal – instead the legislation expires after five years but can then be extended by Ministerial order. There was no specialist review afforded by the Counter-Terrorism Act 2008, but the Counter Terrorism and Security Act 2015, section 44, has extended the purview of the Independent Reviewer of Terrorism Legislation to Parts I and 2 of the Anti-Terrorism, Crime and Security Act 2001 (the

first review of any kind since the Privy Counsellor Review Committee (2003) completed its work in 2003), the 2008 Act as well as Part I (but not the other six parts) of the 2015 Act.

Aside from the work of specialist reviewers, the Human Rights Act 1998 has triggered a number of other institutional support mechanisms, not all strictly required by the Act but in keeping with its desire to foster a human rights culture.

The first feature involves explicit departmental scrutiny of draft legislative from the perspective of its compliance with the European Convention. Though ‘Strasbourg proofing’ occurred before the Human Rights Act (Walker and Weaver, 2000, p.559), it has formalised this process and made it more transparent. The formality is that section 19 of the Act requires that the Minister in charge of presenting a new Bill must before Second Reading make ‘a statement of compatibility’ as to whether the provisions of the Bill are compatible with Convention rights. Any doubts should lead to questioning and debate which will hopefully deter the Minister from sponsoring inimical measures in the first place. To nobody’s surprise, most Ministers at most times have claimed human rights compatibility for terrorism legislation – the sole exception was Part IV of the Anti-terrorism, Crime and Security Act 2001. However, their claims to compatibility have become the subject of explicit Parliamentary inquisition, and this process has been latterly assisted by the willingness of Ministers to state reasons for their declaration in the explanatory notes which accompany the Bill (Cabinet Office, 2013, para.12.14 et seq; Joint Committee on Human Rights, 2008, para.226).

Aside from debates on the declaration of compatibility, Parliament has also improved its scrutiny of human rights issues by increased attention from select committees. Most notable has been the work of the Joint Committee on Human Rights. Though not a creature of the Human Rights Act, the Joint Committee represents a government commitment given during passage of that legislation (Irvine, 1997) and seeks to ensure that the human rights implications, *inter alia* of counter-terrorism, can be subjected to detailed comment and the testimony of independent expert witnesses. For example, even the legislative passage of the Prevention of Terrorism Act 2005, completed in the highly partisan and often confused period of three weeks set by the tight deadline of the expiration of Part IV (Walker, 2007, p.1395), was assisted by two reports from

the Joint Committee on Human Rights (2005a, 2005b). The House of Commons Home Affairs Committee has also often considered the impact of counter-terrorism legislation on human rights, such as the community perceptions of stop and search powers (House of Commons Home Affairs Committee, 2004) and the measures against radicalisation (House of Commons Home Affairs Committee, 2012).

The next aspect of institutional support which has been boosted by the Human Rights Act concerns judicial review. A positivist viewpoint would suggest that the executive knows best in an emergency on grounds of secrecy, speed, and flexibility (Posner and Vermeule, 2007). By contrast, judges are said to be ‘amateurs playing at security policy’ (*ibid.*, p.31). The reality in the UK is that the primacy of the executive and legislature in policy initiative and invocation of measures, especially in an emergency, is accepted by the judiciary (*A v Secretary of State for the Home Department*, 2004, para.29). However, the application of policy to individuals in cases which affects absolute or unqualified rights, such as liberty or due process, should appropriately fall for the ultimate determination of the courts as ‘a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself.’ (*A v Secretary of State for the Home Department*, 2004, para.42 *per* Lord Bingham). On grounds of training, skills, and impartiality, the reported cases on security implementation reveal a generally creditable performance and one which is far superior to the amateurish and unprincipled efforts of executive ministers (Feldman, 2006). The UK judges have moved away from the treatment of security matters as non-justiciable or as subject to thick layers of deference to the executive, as occurred even during the 1990s (Walker, 1997; Thwaites, 2016). A jurisprudence of the control of security powers has begun to develop, encouraged by the statutory requirement of judicial confirmation of ongoing security measures, such as control orders (Walker, 2010) and police detention powers (*In re Duffy*, 2009), as well as by the subsequent facility of judicial review of these and other security-related decisions, such as the proscription of organisations (*Secretary of State for the Home Department v Lord Alton of Liverpool*, 2008) and financial listing (*A v HM Treasury*, 2008). The emergent jurisprudence is highly tempered by the values of individual rights and constitutionalism and by practical experience which demonstrates the value of judicial review and the executive exaggeration of security concerns (Dyzenhaus, 2006, chap.1). Commentators like Agamben (2005) who articulate narrowly an emergency, executive-dominated constitution ‘neglect how the judicial

habitus, in its rearticulation of the rule of law via individual cases, affirms due process values and continues to provide some protection from arbitrary state power' (Vaughan and Kilcommins, 2008, p.13). As will be further illustrated in this paper, the judges have forcefully resisted 'legal back holes' (Steyn, 2004). Whilst shades of grey persist (Dyzenhaus, 2006a), the executive can no longer count on judicial indulgence, even in highly sensitive areas affecting foreign policy security collaborations, as was illustrated by the civil action involving Binyam Mohamed who sought the disclosure of communications with the US Department of State (*R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs*, 2010). However, the judicial stance has arguably become more cautious since that decision, and collaborations over drone strikes (*R (Khan) v Secretary of State for Foreign and Commonwealth Affairs*, 2014) have not been fully scrutinised. Given that drone strikes in Syria have now been undertaken by the UK government and even against British citizens, some clarification is now needed of the legal bases and processes, with greater respect for human rights norms (Joint Committee on Human Rights, 2016).

The impacts of human rights

The framing of narratives and legislation

The first claim made regarding the impact of human rights is that human rights operate as important framing devices. They perform this role in several respects, but just three examples will be provided here.

The first example links back to the issue just covered above, that of systemic review. Though the brief of the Independent Reviewer of Terrorism Legislation does not explicitly require regard for rights, more episodic reviews have explicitly been set in the context of human rights. Thus, Lord Lloyd asserted as a guiding principle that 'Additional statutory offences and powers ... must strike the right balance between the needs of security and the rights and liberties of the individual' (1996, para.3.1). Next, the Privy Counsellor Review Committee, while not directed by section 122 of the Anti-Terrorism, Crime and Security Act 2001 nor by any further ministerial direction (2003, Part I para.68) to have regard to rights, endorsed the views of Lord Lloyd (2003, Part I para.94). Equally, the last major comprehensive review, the Macdonald

Report (2011, paras.4, 5) adopted the premises that ‘some risks are worth running in order to enjoy liberty [and] the British are strong and free people, and their laws should reflect this’.

The second aspect of framing is that the government itself views human rights as shaping the environment for its own proposals and actions, as indeed is required under section 6 of the Human Rights Act. In regard to proposals, the Home Office response to the Privy Counsellor Review Committee’s report, while rejecting much of what was proposed in detail, did at least propound that ‘the Government is willing to consider any realistic alternative proposals and approaches which take account of the Government’s human rights obligations’ (Home Office, 2004, para.44). Again in 2011 in response to the Macdonald Report, the Home Secretary, Theresa May, expressed the determination to (Home Office, 2011, p.3):

‘...correct the imbalance that has developed between the State’s security powers and civil liberties, restoring those liberties wherever possible and focusing those powers where necessary. The review’s recommendations, once implemented, will do this. They will ensure that the police and security agencies have the powers to protect the public and help preserve our cherished freedoms.’

As regards the importance of human rights to the delivery of official counter-terrorism action, the strongest signal is delivered in the core official strategy against international terrorism, ‘CONTEST’ – Countering International Terrorism, which was issued in 2006 and has since been constantly reiterated (Home Office, 2006, 2009, 2010, 2011a, 2013, 2014, 2015, 2016), whereby (Home Office, 2009, para.0.30):

‘The protection of human rights is a key principle underpinning our counterterrorism work at home and overseas. A challenge facing any government is to balance measures intended to protect security and the right to life, with the impact on other rights which we cherish. The Government has sought to find that balance at all times.’

The ultimate aim of CONTEST – ‘to reduce the risk to the UK and to its interests overseas from international terrorism, so that people can go about their lives freely and with confidence’ (Home

Office, 2009, para.0.73) – thus reflects the enjoyment of human security in a broad sense. Of course, these official claims to give meaning to human rights must be treated with caution, and the commitment to training, enculturalisation, and practical implementation should be gauged. One instance of excellent practice concerns the Human Rights Programme of Action of the Police Service of Northern Ireland, as overseen by the Northern Ireland Policing Board and its Human Rights Adviser (Police Service of Northern Ireland, 2016, p.1). However, no other security organisation has emulated this level of commitment and effort.

The third aspect of framing is at the level of tactical legal response to terrorism. As has been mentioned previously, the perspective of human rights does not rule out an ongoing need for distinct anti-terrorist laws. They can be justified at three levels. The first level concerns the powers and duties of States. In principle, it is justifiable for liberal democracies to be empowered to defend their existence, and it might be truly claimed that 'The first priority of any Government is to ensure the security and safety of the nation and all members of the public.' (Home Office, 2009, p.4) This approach is reflected in the European Convention on Human Rights, article 17 (prohibiting the engagement in any activity aimed at the destruction of rights and freedoms) and the power of derogation in time of emergency threatening the life of the nation under Article 15. There is next a State responsibility to act against violence in order to safeguard the protective right to life of citizens (under article 2 of the Convention). Under United Nations instruments, such as UN Security Council Resolution 1373 of 28 September 2001, states must not harbour or condone terrorism. State duties were reiterated in the case of Islamic State by UN Security Council Resolution 2178 of 24 September 2014. The second level of justification for special laws is more morally grounded and points to the illegitimacy of terrorism as a form of political expression. As recited by UN Security Council Resolution 2178, 'terrorism in all forms and manifestations constitutes one of the most serious threats to international peace and security and ... any acts of terrorism are criminal and unjustifiable regardless of their motivations'. Many of its emanations are almost certainly common crimes, crimes of war, or crimes against humanity, even if the political cause of the terrorist is deemed legitimate. The third level of justification is that terrorism may be depicted as a specialised form of criminality which presents peculiar complications for policing and criminal justice processes because of its structure, capacity to intimidate, and sophistication. A specialist response is thereby legitimised

to surmount these complications, in the same way as specialist responses are encouraged by international law to deal with, for instance, drugs crimes, child sexual abuse, and human trafficking.

Having justified the persistence of counter-terrorism codes, some repressive states have treated them as an excuse for the repression of dissent rather than terrorism. The United Nation's Special Rapporteur on the promotion and protection of human rights while countering terrorism (an office devised by the Human Rights Commission in 2005) does not wholly absolve the United Kingdom of blame on this score because of the use of offences of incitement in the Terrorism Act 2006 (Special Rapporteur on the promotion and protection of human rights while countering terrorism, 2006), para.7). But the relative handful of prosecutions under that measure (Walker, 2011, chap.8) hardly compares with the state's past harrying of political leaders, such as the exclusion from Britain of Gerry Adams until 1994 (Walker, 1997). Nor has there been prosecution under terrorism laws of political leaders comparable to other countries, such as Marwan Barghouti in Israel (*State of Israel v Marwan Barghouti*, 2004), Leyla Zana in Turkey (*Sadak v Turkey (no. 2)* (2002); EU Turkey Civic Commission, 2008), Eric McDavid in the US (*US v McDavid*, 2008), or Roy Bennett in Zimbabwe (Zimbabwe Times, 2009). Of course, the avoidance of some of these extremes of policy does not mean that the delivery of counter-terrorism activity in the United Kingdom has always been flawless. The tragic error of the lethal shooting of Jean Charles de Menezes in 2005 is a stark example of excessive state response. However, even in that case, and perhaps mindful of the standards of respect for the right to life and due process set by articles 2 and 6, there has been no official move to modify in favour of security forces the rules on lawful force, nor to curtail the subsequent independent investigation into the events, nor to intervene in the prosecution of the Commissioner of the Metropolitan Police for health and safety breaches (*R (da Silva) v Director of Public Prosecutions*, 2006; Independent Police Complaints Commission, 2007a, 2007b). The European Court of Human Rights also endorsed these state responses (*da Silva v United Kingdom*, 2016).

More fundamentally, human rights considerations have weighed against any further resort to departure from normal rights standards by the issuance of a notice of derogation. This trend is evidenced by the determination to issue only non-derogating control orders, even though

derogating orders remained an equal possibility under the Prevention of Terrorism Act 2005. The current trend contrasts with those in the past. In the context of Northern Ireland terrorism, the derogation facility was repeatedly invoked - up to 1984, and from 1988 until 2001. The withdrawal was found to be premature in *Brogan v United Kingdom* (1988), but its reinstatement was upheld in relation to a scheme of seven days police detention in *Brannigan and McBride v United Kingdom* (2001). The Terrorism Act 2000 allowed that notice of derogation to be withdrawn. A further derogation was entered in respect of the detention under Part IV of the Anti-terrorism, Crime and Security Act 2001 but was in turn withdrawn on 14 March 2005.

The current abeyance from derogation consequently stands in stark contrast to the experiences of previous decades and persists despite two contra-indications favouring a new notice. One indication is the bombings in London on 7 July 2005, more manifest evidence of public danger even than at the time of the derogation notice in 2001. Second, the 2001 notice of derogation was upheld as lawful by the UK courts in *A v Secretary of State for the Home Department* (2004). According to the Appellate Committee of the House of Lords, the jurisprudence of the European Court of Human Rights did not require the actual experience of widespread loss of life as opposed to a clear and present danger. Lord Bingham was content to apply the Strasbourg approaches, including the recognition of a 'margin of appreciation' for executive discretion on the recognition of an emergency (*ibid.*, para.29). The approach of the House of Lords was largely endorsed by the Strasbourg court in *A v United Kingdom*, (2009), taking due notice of the later attacks in 2005, of a standard which did not require the life of the nation to be threatened in its entirety, and of being 'acutely conscious of the difficulties faced by states in protecting their populations from terrorist violence' (*ibid.*, para.126). Though the terrorism threat level was downgraded in July 2009 (Home Office, 2009a), the prevailing conditions could arguably justify a derogation, taking account of the involvement in *jihadi* terrorism by British citizens and the continuing involvement of British security forces in operations in Afghanistan and elsewhere which terrorists such as the 7/7 bomber Mohamad Sidique Khan have interpreted as an enduring justification for their violence (Khan, 2005).

Aside from deterring resort to derogation, another aspect of tactical restraint due to human rights concerns is counter-terrorism abroad. As already mentioned, a 'war on terror'

approach cannot be applied within the domestic jurisdiction. Even in extreme times, there must be observance of the terms of derogation under article 15 which requires scrutiny and ongoing justification and rules out coercive interrogation techniques, such as water-boarding (*A v Secretary of State for the Home Department (No 2)*, 2005), or extraordinary rendition (*R v Horseferry Road Magistrates' Court, ex parte Bennett*, 1994; *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs*, 2010; *Al Rawi v Security Service*, 2011). A further indication of the onward emboldening of human rights jurisprudence is that human rights standards must even be applied during overseas counter-insurgency activity. This phase of recognition was sustained in the UK courts in *R (Al-Jedda) v Secretary of State for Defence* (2007), relating to a long-term internee in Iraq. His detention was found to be justiciable but lawful under the United Nations Security Council Resolution 1546 of 8 June 2004. This verdict sanctions an abdication from Article 5 standards but on the explicit condition of clear United Nations authority. The consequence is that British authorities cannot unilaterally establish any detention regime equivalent to Guantánamo Bay but must act within one international law regime or another. Offering practical solutions to the considerable difficulties arising from the application of European Convention standards to foreign conflict situations, while at the same time avoiding resort to derogation, has been challenging not only for the UK courts but also to the European Court of Human Rights, which has even countenanced some loosening of Article 5 constraints (*Al-Saadoon & Mufdhi v United Kingdom*, 2010; *Al-Skeini and Others v United Kingdom*, 2011; *Al-Jedda v United Kingdom*, 2011; *Hassan v United Kingdom*, 2014).

The extension of domestic rights norms has been taken a stage further wherever it can be established that there is effective control of territory or facilities by British state forces (Vladeck and Walker, 2015). The point is illustrated by *R (Al-Skeini) v Secretary of State for Defence* (2007) which concerned Baha Mousa, who died from physical injuries consistent with severe assaults while held in British military custody in Basrah in 2003. The House of Lords held that his death required a full investigation which is compliant with Article 2 of the European Convention. The same level of enhanced human rights standards can equally apply to the potential mistreatment of British soldiers, as in *R (Smith) v Assistant Deputy Coroner for Oxfordshire* (2009).

The impression should not be garnered that human rights are wholly thriving at the hands of the UK government or judiciary in its pursuit of terrorism. Aside from the issue of the use of drones, already mentioned, the standards applicable to the deportation of foreign suspects at risk of torture abroad has remained a source of friction. The UK government sought unsuccessfully to challenge the decision in *Chahal* (1998) but was rebuffed by the European Court of Human Rights in *Saadi v Italy* (2008). The latter judgment was applied against the UK government in *NA v United Kingdom* (2008), where intended deportation of an asylum-seeker linked to the Tamil Tigers was declared to be a potential breach of Article 3. Misgivings about assurances of proper treatment relating to the deportation to Jordan of Abu Qatada were dismissed by the House of Lords in *RB and OO v Secretary of State for the Home Department* (2009). However, the UK government was later reminded in *Othman v United Kingdom* (2012) of the requirement not to deport to a country which would inflict a flagrant breach of due process contrary to Article 6. The government is now seeking to alleviate such difficulties through the tactic of diplomatic assurances, which was endorsed in *Othman*, though it has found the practical obstacles to be formidable and so has resorted to various other measures against foreign terrorist suspects including refusal of entry and citizenship deprivation (Walker, 2007a; Anderson, 2016).

Variable rights-specific impacts

The second perspective to be considered is rights-specific - how affected individual rights fare in circumstances of terrorist threat. The thesis is that activities which are perceived as within the expertise of courts - such as their own procedures for preparing and holding trials - are subjected to stricter standards than activities which rarely trouble the courts and occur without their sanction (such as surveillance). An example from each category –judicial activism and judicial in activism - will now be given.

An example of a low-level terrorism policing power which has proven to be of low judicial visibility (in terms of activism) is the power of stop and search under section 44 of the Terrorism Act 2000. Any police constable in uniform could stop a vehicle and search the vehicle, the driver or any passenger, and also to stop and search a pedestrian, if located within an area or at a place specified in an authorisation. An authorisation could be granted only if the senior police officer giving it considers it ‘expedient’ for the prevention of acts of terrorism.’ (section

44(3)) An authorisation, which could be valid for up to 28 days and could be renewed, was given by an Assistant Chief Constable or a Commander of a London force. Section 46 required the police to inform the Secretary of State as soon as is reasonably practicable. The authorisation lapsed if not confirmed within 48 hours.

It was made clear in section 45(1)(b) that there could be a random or blanket search — the power ‘may be exercised whether or not the constable has grounds for suspecting the presence of articles of that kind.’ There were some limits to the exercise of the powers. By section 45, powers was exercisable only for the purpose of ‘searching for articles of a kind which could be used in connection with terrorism’ (section 45(1)(a)). The powers could not involve a person being required ‘to remove any clothing in public except for headgear, footwear, an outer coat, a jacket or gloves.’ (section 45(3)) Next, when exercising stop and search powers, police officers had to have regard to Police & Criminal Evidence Act Code A. According to paragraph 1.1 of Code A, powers to stop and search must be used ‘fairly, responsibly, with respect for people being searched and without unlawful discrimination’; paragraph 1.2 provides that the ‘intrusion on the liberty of the person stopped or searched’ has to be brief and that any detention ‘must take place at or near the location of the stop.’ On the other hand, since the power was not applied on the basis of reasonable suspicion, there were some doubts as to the applicability of the warning in paragraph 2.2 not to exercise the powers based on ‘generalisations or stereotypical images [or] A person’s religion’.

These extraordinary powers were considered by the House of Lords, in *R (Gillan) v Metropolitan Police Commissioner* (2006). An Assistant Commissioner of the Metropolitan Police gave an authorisation under section 44(4) covering the whole of the Metropolitan Police District. That authorisation was confirmed and was then renewed on a continuous basis since February 2001. Both applicants were stopped in the vicinity of a weapons exhibition being held at the ExCel Centre, Docklands. Nothing incriminating was found; the length of the transaction was up to 20 minutes. The House of Lords accepted that an authorisation might be expedient under section 44(3) if, and only if, the person giving it considered it likely that the stop and search powers would be ‘of significant practical value and utility in seeking to achieve ... the prevention of acts of terrorism.’ (*ibid.*, para.15) Lord Bingham was satisfied that the

authorisation and confirmation processes had not become a ‘routine bureaucratic exercise’ (*ibid.*, para.18), even though a London-wide authorisation had been repeatedly enforced since 2001.

At the stage of implementation, some of their Lordships were troubled by the dangers of discrimination. Lord Bingham emphasised that the implementing constable was not free to act arbitrarily and must not stop and search people who are ‘obviously not terrorist suspects’ (*ibid.*, para.35) while, in Lord Hope’s view (*ibid.* para.45), ‘the mere fact that the person appears to be of Asian origin is not a legitimate reason for its exercise.’ But these formulae did not rule out racial or ethnic profiling as one lawful element in decision-making (Moeckli, 2008, pp.198, 200).

An even more stark aspect of the indulgence in this judgment is that the House of Lords even denied that the stop and search process had involved any intrusion into rights to liberty under article 5. However, the Court’s depiction of the stop and search process as no more threatening or oppressive than waiting until the light turns green at a pedestrian crossing (*ibid.*, para.25), is wholly unconvincing for two reasons. Firstly, section 45 involves the exercise of an official coercive power not a directive power — the person waiting for the green light can give up and try another route. Nor is the time of ‘non-detention detention’ pending search (which was alleged to endure for up to 20 minutes) as fleeting as suggested.

In conclusion, the treatment of section 44 exemplifies the attitude of the courts to low-level policing, including the growth of profiling. As a result, like the imaginary American crimes shaped by racial profiling or racial prejudice, such as ‘driving while Black’ or ‘flying while Arab’, section 44 created the nasty British equivalent of ‘perambulating while Muslim’ (Walker, 2008, p.298). The liberty of the individual is of prime concern to the judges, as signalled in the ‘remarkable’ (Arden, 2005, p.606) case of *A v Secretary of State for the Home Department* (2004). As already recounted in connection with the Anti-terrorism, Crime and Security Act 2001, the House of Lords declared the policy of detention of foreign terror suspects to be incompatible with human rights standards, an outcome which deserves to be counted as ‘the finest assertion of civil liberties’ (Gearty, 2005, p.37). But the *Gillan* case sadly illustrates that what counts as ‘liberty’ may be affected by judicial disinterest in low-level, routinised surveillance. As a result, it has been the executive and legislature which have been at the

forefront of the reform of section 44. The power was repealed and replaced by a more restricted power in section 47A, as substituted by the Protection of Freedoms Act 2012. By section 47A(1), a senior police officer may authorize the invocation of section 47A when the officer '(a) reasonably suspects that an act of terrorism will take place' and (b) reasonably considers that the authorization is necessary to prevent terrorism and extends no further in area or duration than necessary. This threshold for authorization is higher than the 'expedient for the prevention of acts of terrorism' standard in the former section 44. The scheme also imposes stricter limits as to time and place than under section 44. An individual decision to stop will rest on factors such as behaviour, clothing and carried items; officers must avoid racial or religious profiling but may focus searches on people matching the description of particular suspects. Random stops are not mentioned but are still not forbidden if they can be rationalized. Since the power came into force, it has never been used in England and Wales, a remarkable turnaround to the usage of section 44 which reached tens of thousands per annum.

The contrasting approach of judicial activism, whereby the judges are assertive of the rights of individuals, despite counterclaims relating to national security imperatives, concerns the enforcement of due process rights within the context of control orders. The key case is *Secretary of State for the Home Department v MB and AF* (2007). The material which justified MB's control order included open (disclosed) and closed (secret) statements. The open allegations were admitted to be 'relatively thin' (*ibid.*, paras.39, 66). The essence of the Secretary of State's case against AF was in the closed material (*ibid.*, para.42). The House of Lords concluded that neither suspect had enjoyed a substantial measure of procedural justice, and so there was a breach of article 6. Lord Bingham accepted that 'the application of the civil limb of art 6(1) does in my opinion entitle such person to such measure of procedural protection as is commensurate with the gravity of the potential consequences' (*ibid.*, para.24).

The outcome was not wholly in favour either of the controlled persons or the Home Office but has significantly aided the former. The High Court will have to assess whether 'a substantial measure or degree of procedural justice' (*ibid.*, para.32) has been accorded. Since article 6 protects fundamental rights, any obstacles to its enjoyment must be counterbalanced by the procedures adopted by the judicial authorities such as extra disclosure or the appointment of

special advocates. Thus, the Home Office now faces a stark decision as to whether to compromise compelling security arguments in favour of disclosure or whether to avoid reliance on the sensitive information and hope that less sensitive submissions will carry the day, or to abandon altogether the control order option. The House of Lords confirmed in *AF (No 3)* (2009, para.59) that there must always be some level of disclosure, so that

‘... the controlee must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations.... Where, however, the open material consists purely of general assertions and the case against the controlee is based solely or to a decisive degree on closed materials the requirements of a fair trial will not be satisfied...’.

Several control orders have been abandoned by the Home Office as a result of these strictures, though speculation that the device is becoming unworkable has proven exaggerated (Walker, 2010). Indeed, the government has felt sufficient confidence in the workability of ‘closed material procedures’ (which also involve special advocates to assist the tribunal) that it has made available corresponding rules to any civil proceedings under the Justice and Security Act 2013 so as to ensure that disclosures of information are not made where they would be damaging to national security (Walker, 2015).

Temporal transitions

The next assertion about the impact of rights on counter-terrorism laws is that it is temporal - that rights gain traction and better observance as counter-terrorism campaigns mature. One might speculate that the factors behind this effect arise from a growing public understanding of the conflict and a better estimation of its threat and severity, whereas information is at a premium at the time of attack either because the details are unknown, because emotions outweigh reason, or because of the imposition of state security itself causing insecurity. The judiciary and legislature might also become later emboldened by the revelation of executive mistakes made in the earlier phases of conflict.

The performance of the courts on security matters in previous decades has been characterised as involving short judgments, which relied upon bald assertion, which sought refuge in narrow technical issues, and which adopted the perspective of dangers to security rather than to rights (Livingstone, 1994; Gearty, 1994). Evidence of a transition in these judicial attitudes can be plotted in several cases. The judicial deference approach is illustrated by this comment of Lord Hoffman in *Secretary of State for the Home Department v Rehman* (2001, para.62):

‘Postscript. I wrote this speech some three months before the recent events in New York and Washington. 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.’

But events following 9/11 gave substantial pause for thought about the viability of a policy of holding in detention suspected international terrorists without trial and without any overall time limit (Walker, 2005), not least on the part of Lord Hoffman, who in *A v Secretary of State for the Home Department* (2004, paras.96, 97) stated:

‘Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community ... 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.’

The performance of Parliament in 2001 might be contrasted with its efforts in later years (Horne and Walker, 2016). Select committees have become more vigorous. For example, in the febrile atmosphere of the 2001-02 session, the Joint Committee on Human Rights produced just two terrorism-related reports. In session 2007-08, which also witnessed new legislation, albeit shorter and less draconian, there were nine such reports. The debates have also become more

assertive, with major changes inflicted on the legislation in 2005, 2006, and 2008 (notably, the rejection of 42 and 90 day police detention). Earlier victories were more minor or peripheral (House of Commons Home Affairs Committee, 2001, paras.56-61). At the same time, parliamentary oversight cannot be claimed to have produced frequent or substantive alterations to government stances. In this way, affirmation is more often given to ‘process legitimacy’ rather than to ‘output legitimacy’. The key battleground seems to be around the outset of a law or policy. Furthermore, parliamentary procedures produce markedly uneven performances that are very much affected by circumstances (especially the circumstances of crisis), personalities, timing and time pressures. Nonetheless, subsequent reviews of legislation and policy can focus the minds of legislators, not least by making them incur higher political costs by having to defend unpalatable legislation in public which may sometimes germinate later changes.

Social transitions

The final assertion concerns the socially transformative impacts of the treatment of rights in counter-terrorism – that their treatment can affect negatively or positively the level of conflict either as a source of recruitment for terrorism or as part of conflict resolution.

During the time of ‘The Troubles’ in Northern Ireland, the impacts of what were perceived to be human rights breaches proved to be important waypoints in the conflict. Four such illustrations may be cited. One concerns the imposition of internment and the selective use of inhuman treatment through ‘deep interrogation’ in 1971, as later condemned in *Ireland v UK* (1978). This security crackdown galvanised IRA opposition to the security forces and removed nationalist community acquiescence in their presence, processes which were boosted by the killings on Bloody Sunday in 1972 (Bishop and Mallie, 1987, chap.10). The next example arose through the prisoner hunger-strikes in 1981 which ‘marked a dramatic improvement in the fortunes of the republican movement ... with the IRA restoring their credentials among sections of the Catholic community as freedom fighters’. (*ibid.*, p.299). The final example concerns the impact of routine exercises of security powers, such as house searches and vehicle check points, which produced resentment, both individual and communal, and thereby mobilised violent challenges (Campbell, C., and Connolly, I., 2006, p.948).

This mobilising effect is perhaps less apparent with *jihadis*. Though concern has been expressed about stop and search powers, the sanctioned intrusion into personal liberty and privacy are on a much lower scale and duration than the operations suffered in Northern Ireland. Furthermore, *jihadis* do not emanate from any ethnically united, socially cohesive, or geographically concentrated community the entirety of which can then be treated as a suspect community (Greer, 2008, p.169). While perceptions of inequitable treatment may not be a prime generator of *jihadi* sentiment, deleterious effects are experienced in terms of police-community relations and the willingness of the latter to volunteer information to the former (Mythen, 2009). Furthermore, perceived breaches of human rights abroad rather than at home – in Afghanistan, Iraq, and Palestine - formed the core of the plaint in the suicide video of Mohammed Sidique Khan, one of the four July 7 bombers: 'Until you stop the bombing, gassing, imprisonment and torture of my people we will not stop this fight ... We are at war and I am a soldier. Now you too will taste the reality of this situation.' (Khan, 2005)

Conversely, human rights observance and restoration can be important elements of conflict resolution and transitional justice (Bell, 2000). Examples already cited include the emphasis within the Northern Ireland police on human rights audit. The tempering effects of judicial and legislative review also encourage an impetus towards conflict resolution by, first, ruling out militaristic solutions which involve grievous breaches of international law and, second, by maintaining the recognition of common humanity between protagonists (Dickson, 2006). Mention has also been made of the inquiries into past controversial events, such as the Bloody Sunday Inquiry (2010), which were established in the expectation that fair and open inquiry into historical wrongs and then asserting justice and human rights over them can assist a peace process. Of course, the actual delivery of such idealistic goals is often hugely problematic. The Bloody Sunday Inquiry was established in 1998 but took until 2010 to deliver its report (Bloody Sunday Inquiry, 2010). While unequivocally damning of the actions of the British Army, the belated Report could hardly impact on the protagonists (with no soldiers being charged or disciplined and no compensation yet being paid) or influence strongly the course of events in the Peace Process. Even the impact of the paradigmatic Truth and Reconciliation Commission in South Africa remains contested (Wilson, 2001).

Conclusions

Counter-terrorism laws have become no more transitory than other ‘special’ laws dealing with other forms of serious criminality such as organised crime, sexual violence, or serious frauds (Gross and Ní Aoláin, 2006, chap.1). In that context, human rights can be counted as ‘one of the greatest civilizing achievements of the modern era’ (Gearty, 2006, p.1), and their impact upon crises of national security has been growing. Despite the broadly progressive picture depicted in this paper, there remain substantial paradoxes and weaknesses in the protection of human rights (Starmer, 2007; Gearty, 2007). However, that proviso is a far cry from claims about the ‘futility’ of human rights (Ewing, 2004; Ewing, and Tham, 2008) which misreads the emergent jurisprudence of national security controls now being devised by courageous judges, legislators, and officials. The lessons of recent history and the prospects for the future of national security jurisprudence also point towards the rejection of the gullible belief (such as evident in Campbell, 2009) that a return to positivism in which the executive dominates the security agenda on the basis of subjective and secretive assessments will afford better protection for individuals and for collectives against the excesses of counter-terrorism or indeed a better chance of success against terrorism. Therefore, the current UK government policy of the replacement of the Human Rights Act 1998 with a ‘UK Bill of Rights’ (Commission on a Bill of Rights, 2012; Conservative Party, 2015, p.60) should involve the reinforcement of human rights and their adaptation to the context of counter-terrorism, for any watering down of human rights norms or enforcement will surely prove counterproductive and unjust.

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