POLITICAL REFLECTION

October • November • December • 2019 • Issue 21

Reflections on the Turkey Syria Conundrum

by Assoc. Prof. Mark Meirowitz

The Era of Coercive Diplomacy in Iranian Nuclear Deal
by Rahimullah Kakar

International Solidarity and Burden-Sharing: The Case of Syrian Refugees
by Emrah Atar

Shall the Court Subject Counter-Terrorism Law to Judicial Review? National Security *vs* Human Rights
by Dr Sharifullah Dorani

The Twilight Zone of Political Transition: Between Revolution and Democratic Change
by Dr Marco Marsili

Rural Afghan Women as Agents for Change and the Failure of Liberal Peacebuilding
by Sarah Edgcumbe

PR Political Reflection Magazine

Established in 2010

Submissions:

To submit articles or opinion, please email:

Rahman.dag@cesran.org
or
editors@cesran.org

Note:

The ideal **PR** article length is from **1000** to **2000** words.
References in both the text and in any endnotes should follow Harvard style.

cesran international
CENTRE FOR STRATEGIC RESEARCH AND ANALYSIS - CESRAN

cesran international

CENTRE FOR STRATEGIC RESEARCH AND ANALYSIS - CESRAN

International Think-tank www.cesran.org

Consultancy

Research Institute

CESRAN International is headquartered in the UK
CESRAN International is a member of the United Nations Academic Impact (UNAI)

CESRAN International is a think-tank specialising on international relations in general, and global peace, conflict and development related issues and challenges.

The main business objective/function is that we provide expertise at an international level to a wide range of policy making actors such as national governments and international organisations. CESRAN with its provisions of academic and semi-academic publications, journals and a fully-functioning website has already become a focal point of expertise on strategic research and analysis with regards to global security and peace. The Centre is particularly unique in being able to bring together wide variety of expertise from different countries and academic disciplines.

The main activities that CESRAN undertakes are providing consultancy services and advice to public and private enterprises, organising international conferences and publishing academic material.

Some of CESRAN's current publications are:

- The Rest: Journal of Politics and Development (tri-annual, peer reviewed) www.therestjournal.com
- Journal of Conflict Transformation and Security (biannual, peer reviewed)
- Political Reflection Magazine (quarterly) www.politicalreflectionmagazine.com
- CESRAN Paper Series
- CESRAN Policy Brief
- Turkey Focus Policy Brief

CESRAN International also organises an annual international conference since 2014, called **International Conference on Eurasian Politics and Society (IEPAS)**
www.eurasianpoliticsandsociety.org

- **Ranked among the top 150 International think tanks**

VOL. 5 - NO. 4

OCTOBER
NOVEMBER
DECEMBER
2019

POLITICAL REFLECTION

"ADVANCING DIVERSITY"

Contents

IEPAS2020

7th International Conference on Eurasian Politics & Society

14 - 15 May 2020

Lisbon (Portugal)

Call for Papers 2020

Abstract Submission Deadline	29 February
Registration Deadline	16 April
Program Announcement	01 May

www.eurasianpoliticsandsociety.org iepas@cesran.org

UNIVERSIDADE AUTÓNOMA DE LISBOA

OBSERVARE
Observatório de Relações Exteriores
UNIVERSIDADE AUTÓNOMA DE LISBOA

cesran international
CENTRE FOR STRATEGIC RESEARCH AND ANALYSIS - CESRAN

the rest
Journal of Politics and Development
ISSN: 2041-1944

Call for Papers

The Rest: Journal of Politics and Development endeavours to become the foremost international forum for academics, researchers and policymakers to share their knowledge and experience in the discipline of international relations and its subfields: international security, international political economy, international organisations, foreign policy analysis, political history, etc.

The Rest: Journal of Politics and Development is an open-access, double-blind peer-reviewed journal. The journal is published at its own website **https://therestjournal.com/***The Rest: Journal of Politics and Development* welcomes submissions of **articles** from related persons involved in the scope of the journal as well as **summary reports of conferences and lecture series** held in social sciences.

Prospective authors should submit 4.000-9.000 words articles for consideration in Microsoft Word-compatible format. For more complete descriptions and submission instructions, please access the Author Guidelines and Style Guidelines pages at the website https://therestjournal.com/ Contributors are urged to read the author guidelines and style guidelines carefully before submitting articles. Articles submissions should be sent through the "MANUSCRIPT SUBMISSION" page at the website.

cesran international
CENTRE FOR STRATEGIC RESEARCH AND ANALYSIS - CESRAN

"Quarterly news-Magazine"

POLITICAL REFLECTION

CALL FOR CONTRIBUTION

Published by CESRAN International

Political Reflection

welcomes contributions

from scholars, students, and professionals

in all aspects of international relations, politics, and political economy.

- Articles submitted should be original contributions and should not be under consideration for any other publication at the same time.
- Articles for the Magazine should be submitted via email to the following addresses:

  Rahman.dag@cesran.org | editors@cesran.org
- Author's name, title and full address with a brief biographical note should be typed on a separate sheet.
- The ideal **PR** article length is from **1000** to **2000** words.
- Political Reflection Magazine adheres to the CESRAN Harvard reference style. View the guidelines below to ensure your manuscript conforms to the reference style. https://therestjournal.com/wp-content/uploads/2019/03/Reference-Style.pdf
- If a submitted article is selected for publication, its copyright will be transferred to **Centre for Strategic Research and Analysis (CESRAN Int.)**. Published papers can be cited by giving the necessary bibliographical information. For re-publication of any article in full-text permission must be sought from the editors.
- Authors bear responsibility for their contributions. Statements of fact or opinion appearing in **Political Reflection Magazine** are solely those of the authors and do not imply endorsement by the Magazine or the **CESRAN Int.**

Shall the Court Subject Counter-Terrorism Law to Judicial Review? National Security *vs* Human Rights

Dr Sharifullah Dorani*
Sharifullah.durrani@cesran.org

Introduction

> 'Terrorist emergencies justify extensive and far reaching security measures that may legitimately restrict the enjoyment of the fundamental rights: to expect the [...] courts to adopt a restrictive approach to such emergency measures is to emphasise concern for abstract ideals over common sense.'[1]

The article's quotation goes into the heart of the British constitution (and those of the most European countries) requiring an answer as to what is the function of each of the three powers, particularly the executive and the court, at times of emergency. Constitutionally, it is the executive with the requisite expertise and competence that is 'legitimately' responsible for making policies and decisions to deal with national security. The judges, on the other hand, are neither elected nor possess the necessary expertise and competence in issues of national security. If they do not defer to the executive's decisions in the field of national security and uphold human rights or civil liberties against the government, they would act foolishly and illegitimately, that is, they would give priority to 'abstract ideals' (the human rights and civil liberties of a few terrorists) over 'common sense' (national security or the protection of the whole nation).

However, the introduction of the Human Rights Act 1998 (HRA), which incorporated the European Convention of Human Rights (ECHR), complicates the constitutional authority of the judiciary and the executive. Art 15 of ECHR is of particular relevance here since it provides that certain conditions have to be met before human rights can be suspended.

The question is: Have the European Court of Human Rights (ECtHR) and the UK (and some European) courts interpreted the conditions strictly to

* *South Asia and the Middle Eastern Editor at CESRAN International*

defend human rights against national security? Four sections are dedicated to answer the question. Section one deals with cases before the introduction of the HRA to provide an understating of what was the constitutional position of the court and the executive. Section two deals with the ECtHR's approach towards derogations made by member states, particularly the UK.

Section three analyses the justification of 'constitutional legitimacy' and studies whether the judges in the HRA era had legitimate and constitutional justifications to adopt a strict approach towards security measures. Section four, in addition to dealing with the justification of 'competence and expertise', studies how the UK courts interpreted Art 15 conditions post HRA-era. The article ends with some concluding remarks.

The article is relevant to both Law and International Relations Courses. Because of the close connectivity of the two subjects, more and more universities in the UK now offer a joint degree in Law and International Relations.

Strictly speaking, however, the article is relevant to IR for the following reasons. Firstly, human rights play an important part in foreign policy decision making; consideration for civil liberties, for example, strongly factored in the George W. Bush Administration's decision to intervene in Afghanistan.[2] Secondly, both human rights and national security are crucial concepts in IR. The article shows how different branches of a state balance the human rights of the terrorists against the concept of national security. Incidentally, while the focus, in most parts, is on the UK, the article is relevant internationally. As sections two and three suggest, the balancing acts/conflicting views by different branches of the state are found in all member states (even in the United States of America), as every single European country struggles to find the right balance between civil liberties and the security of the realm when fighting international terrorism.

Penultimately, it shows how tougher law as part of a response to international terrorism can prove to be counterproductive. Democracies do not see all means as acceptable, especially those used by terrorist groups. It further explains how unlimited powers in the hands of the executive are dangerous, as time and gain we have witnessed that. Finally, the analysis is also relevant to non-Europeans (both within and outside of Europe), as some are under the impression that Western authorities, to put it mildly, are not as attentive to the rights of non-nationals as they are to the rights of the nationals. The article, however, brings to light how the three branches of the government struggle to find the right response. Furthermore, it likewise indicates how the ECtHR struggled with the notion of whether to defend the civil liberties of the nationals or the restriction of human rights by governments.

Constitutional Position of the Courts and the Executive before the Introduction of the HRA

For Fascist legal theorist Carl Schmitt, the executive (not the parliament or the judiciary) is the sovereign as it alone decides both a state of emergency and who the enemy is. Schmitt's claim might have been true in fascist Germany but not in the UK, since in the latter it is the parliament that is the sovereign, and the executive is subject to the control of law 'by judges'. Lord James Atkin's famous dicta in *Liversidge [1942] A. C. 206* suggests that 'in this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace.'[3]

However, the case law since WWII until the introduction of the HRA shows the opposite to what Lord Atkin had said. In *Liversidge* itself the majority held it could not ask the executive for details of the grounds upon which the decision was made in order to assess the validity of the government's decision despite the phrase 'reasonable cause' being substituted for a more subjective one, that is, 'if satisfied that.' Viscount Maugham, the leading judge for the majority, refused Liversidge's argument that if a statute restricted the liberty of a subject, the statute 'must be construed, if possible, in favour of the subject and against the Crown.' Following *R v Halliday [1917] A.C 270*, this rule of interpretation did not apply against the government when 'national security was in issue.' Lord Atkin criticised his colleagues for acting like the court in the old days of Star Chamber where the executive's say was enough to detain a national. For his lordship, the court failed to do its duty by standing 'between the subject and any attempted encroachments onto his liberty by the executive, alert to see that any coercive action is justified in law.'[4]

In *Halliday*, Lord Shaw dissented, too, arguing when the law was 'not the same for all…[it was] poison to the commonwealth.' For Lord Shaw, only those statutes were legitimate which did not breach fundamental common law principles, and the judges were to interpret statutes in accordance with those principles. Further, approving Blackstone, Lord Shaw said that the right to *habeas corpus* (which prohibits interference with an individual's liberty unless it is justified before the court) was of such fundamental importance that the judges should not allow it to be violated by a statute unless the statute says otherwise with express and unambiguous wording.[5]

However, as Brian Simpson claims, it was the majority's decisions in both cases that were a true reflection of reality as the House was very reluctant to interfere with the executive's task of national security. Lord Atkin agreed with this constitutionally allocated function of the executive, but added the court was entitled to test the basis for the secretary of state's belief as to why he had 'reasonable cause to believe.'[6] Simpson claims that Lord Atkin's dissent was unconvincing since how possibly the court could supervise the decisions of the secretary of state when the latter could withhold confidential information on the basis of privilege. Outside the national security, he claims, a huge amount of law has been developed for which the court had 'an important role to play [in] controlling… the exercise of power'; subject to parliament, the judges state their role 'and the principles they then formulate to express this role are called the law.' But this law, as

the cases demonstrated above, does not apply to security decisions made by the government since the government make those decisions on the basis of secret information, and secrecy would always win over the rule of law. Simpson further claims Atkin was concerned more about *role* than *liberty* as the executive was arrogantly disregarding the judges.[7]

David Dyzenhaus disagrees, claiming that Atkin was concerned more about the issues of privilege and confidentiality than role, and particularly he wanted to know the grounds on which the person was detained to be conveyed to the detainee. He was puzzled, and rightly so, that the secretary of state could convey those grounds to the detainee at the committee (where the detainee can go to object to his detention) but not to them in the court. It might be because grounds given to *Liversidge in* the committee were irrelevant and barley offensive and his detention could be described as 'very close to being an example of an order made in bad faith.' If the grounds were conveyed in the court and became subject to the judicial review, as was the case in Ben *Greene*[8] in which Lord Atkin was satisfied, then it would have been in accordance to the common law procedure.

In *Ben Greene* the issue of confidentiality was present but the grounds for detention were still presented to the court. Lord Atkin wanted to subject to judicial review both the necessity of the measures and the standard the secretary of state adopted to decide whether the detainee met the test for detention. Lord Maugham, too, agreed that decisions by the secretary of state could be reviewed but by a 'special tribunal with power to inquire privately into all the reasons for the secretary's action, and without any obligation to communicate them to the person detained.' Therefore, both Lords Atkin and Maugham agreed on the secretary of state's decisions to be reviewed, but they differed as to who to review it. For Atkin, it is the court by applying the common law procedure to ensure liberty is protected rather than restricted by legislation, but Maugham disagreed as the secretary of state could withhold confidential information from the court on the ground of privilege, so it would be 'futile' to try to impose a general requirement on the secretary of state to justify the order to the court.[9]

Lord Denning in *Hosenball*,[10] approving *Liversidge* and *Halliday,* said the balance between an individual's liberty and national security is something to be decided by the Home Secretary. He referred to *Liversidge* and *Halliday*, saying that those cases were decided in war time, but his judgement also applied to times of peace since it too had its dangers. Dyzenhaus submits that the judges would prefer the Atkin dissent when the case does not concern national security. If it did, then the majority in *Liversidge would* either be explicitly or implicitly preferred. Lord Atkin was only cited when it made no difference to the outcome of the decision, just for the judiciary to remind us of their role. [11]

Those cases suggested John Lock was preferred than Blackstone. The former argued that, in terms of constitutionalism, the judges should not apply the rule of law to the executive's decisions based on national security

because the protection of society required the executive to have the 'power of doing public good without a rule.'[12] Those measures should be subjected to political accountability rather than judicial scrutiny. Consequently, fundamental common law principles as well as civil liberties became abstract ideals for the politicians because they would give priority to common sense (national security). Lord Denning's reasoning, which describes the constitutional functions of both the executive and the court in the pre-HRA era, would best conclude this section: 'our history shows that, when the state itself is endangered, our cherished freedoms may have to take second place. Even natural justice itself may suffer a setback. Time after time parliament has so enacted and the courts have loyally followed.'[13]

Has the ECtHR's Given Priority to Human Rights or National Security?

Three conditions under Art 15 of ECHR must be met by the government in order for a derogation to be justified from derogable rights: there must be 'a war or other public emergencies threatening the life of the nation'; the derogation shall be 'strictly required by the exigencies of the situations'; and it must be consistent with the state's 'other international obligations'.

As for condition one, the studies of some of the cases—including *Lawless*, *Ireland v UK*, *McBride* and *Aksoy*[14]—show that, despite calling the decision of executive is reviewable in *Lawless*, despite repeating that a strict standard of review was needed in *McBride*, the ECtHR has generally afforded a wide margin of appreciation to the national state.[15]

In *McBride* it was claimed that the 'semi-permanent' emergency declared by the UK should not qualify as an emergency within the convention terms because it was a long emergency to which the government did not have to respond urgently. The usual standard was argued to be applied. Although the ECtHR was not persuaded by those arguments, it said, however, that the Court, in exercising its supervision of the domestic decisions, would take into consideration 'the nature of the rights affected by the derogation, the circumstances leading to and duration of the emergency situation.'[16]

But the Court in practice neither assessed the circumstances leading to the emergency nor its duration. Oren Gross argues the UK derogated in 1988 in Northern Ireland, and Turkey did in 1990 in South East of Turkey (both derogations were still in effect at the time of her writing, 1998) but the ECtHR ignored their long durations and did not independently assess the existence of the emergency in *McBride* or *Aksoy*.[17]

In the latter the ECtHR ruled that the member state had the responsibility for protracting the life of its nation so it is for the member state to determine whether that life is threatened by a public emergency, and if so, it is again for the member state to decide 'how far it is necessary to go in attempting to overcome the emergency.'[18]

Thus in both Northern Ireland and Turkey the emergency was not exceptional but 'an entrenched feature of everyday life'; in the latter country 'human rights violations', as was argued, took place on daily basis but the ECtHR still accepted the Turkish assessment of emergency threatening the life of the nation, and failed to consider the nature of the rights violated.[19]

However, it is argued that the longer the emergency, the narrower the margin of appreciation should be applied. The ECtHR is urged to take a look at the Israeli court, which has adopted the doctrine of 'prolonged occupation', which means the loner the occupation the more weight the court would attach to civil considerations than security. The Commission itself makes it clear that emergency is only justified if it is: temporal and exceptional; the threat is imminent and affects the organised way of the life of the whole nation; other exceptions in the convention should be ineffective since the danger is exceptional. But these were all rhetoric as none of the conditions were arguably satisfied in *Lawless* but still an emergency existed. For the majority, though, the conditions were satisfied due to: a) the existence of the military organisation (the IRA) within the Irish Republic, who wanted to achieve its objectives through violence, b) the adverse impact this group's operations had had on the republic's foreign relations, c) and, the increase in the group's terrorist activities between 1956 and 1957. The 3-4 July attack was given as an example to demonstrate the scope of those terrorist attacks.[20]

But the dissenting judge said there was not an emergency required by Art 15 because i) the terrorist activities were local and only affected the life of certain parts of the population, not the whole nation which was required by Art 15, ii) the threat, at most, was serious enough to support limiting rights not suspending them, iii) the threat was shown to be potential not imminent as Art 15 required. Gross further argued that the IRA was not posing a risk to the life of the Irish people, as most of its activities were carried out in Northern Ireland, which is not part of the Irish Republic's territory nor under its control and thus did not affect its day-to-day lives of its citizens. Furthermore, none of the conditions laid down in *Greek case* could be met. Gross, therefore, concludes that decisions of the ECtHR show a discrepancy between theory and practice and between 'judicial rhetoric and judicial decisions in the area of emergency law.'[21]

The conditions for the existence of emergency laid down in *Greek case* (explained above) were argued in *A and others*,[22] but it was not surprising the House deferred to the executive by claiming if in *Lawless* the ECtHR accepted the Ireland's declaration of emergency, it would most likely accept the UK's declaration of emergency.

The International Law Association believes the court should be making its own objective assessment as to whether there is an emergency, and if yes, whether the measures adopted were strictly necessary to avert it; but it has not done so yet. In *Ireland v UK*, the court independently assessed the extrajudicial deprivation of liberty, but placed a great deal of emphasis on

the margin of appreciation, concluding the UK was justified by the circumstances. Marks says the ECtHR has been inconsistent in terms of what they require from the government to substantiate an emergency exists. He recommends the government must show it has acted reasonably in the circumstance (or at least not unreasonably) in order to discharge the burden.[23]

In *Landinelli Silva v Uruguay*,[24] the Human Rights Committee refused to afford to the state a wide margin of appreciation, claiming, although the state's sovereign right to declare emergencies had not been questioned yet, the state party was under a duty to give proper detailed account of why it had derogated under art 4 (1). It is hoped that the ECtHR, too, starts to require a detailed account of grounds upon which the member state relies to derogate.

The second precondition is there to enable the court to check abuse or excessive use of power does not take place. In *McBrid*e the applicant, pointing the ECtHR to the Inter-American Advisory Opinion,[25] argued the government's measures were not strictly required because it was not necessary to exclude the judiciary from its role of controlling the detention. The government excluded the judiciary because it was doing the latter favour as it did not want the judges to be seen to be involved in the investigation and prosecution process. This would undermine the public confidence in the judiciary and damage their independence because those decisions administrative (involving detention that required risk assessments) not judicial. The ECtHR accepted this argument as well as the argument that secret information would not be protected if the judiciary were to decide the detention. The second condition was satisfied. Judge Walsh dissented, claiming: 'one would think that such a role [controlling detention] was one which the public would expect the judges to have. As for secret evidence, domestically there were procedures whereby the information can be protected, e.g. proceeding in private. For example, Part 76.26 of the Civil Procedure Rules provides for secret evidence, or 76.22 provides for private hearing of cases dealing with control orders.[26]

The ECtHR considered the derogation was necessary; it did not strictly consider the other two elements of condition two, namely proportionality and duration. It did not apply the strict test of indispensability (strictly required) needed by the second condition, as it previously held in *Handyside v UK*.[27] In both *McBride* and *Lawless*, as well as in *Ireland v UK* , the ECtHR lowered the test to proportionality: even this test was not strictly applied. In *McBride*, the decision of *Ireland v UK* was recent, in which the UK government relied on derogation and the Court accepted the UK's assessment of both the issue of the presence of emergency threatening the life of the nation and on the need for the derogation to combat the emergency.

As for the third precondition, in *McBride*, it was argued that the government was not in compliance with its obligation under International

Covenant on Civil and Political Rights (ICCPR), as Art 4 ICCPR provides for the same exceptions but also adds one more, namely the public emergency must be officially proclaimed. The official proclamation requirement is to ensure that the derogation is not spurious, or is not invoked retrospectively. Also, it makes the people of the state aware that the normal law does not apply. But the ECtHR disregarded the argument, despite the Commission having said in *Cyprus v Turkey* 4EHRR (1982) 482 that it too required some sort of an official proclamation by the state to show normal law no longer applies otherwise Art 15 would not apply. The ECtHR believes that in those cases that concern national security it is constitutionally appropriate to afford a wide margin of appreciation because (in addition to the arguments of 'competence and expertise') the government can denounce the Convention under Art 65 of ECHR if its interests are at stake as a result of an adverse decision (something that Greece did in 1969), or can refuse to recognise the ECtHR's jurisdiction or the Commission's capacity to receive complains under Art 64 of ECHR. Thus the state sovereignty could be another reason, because a sovereign state, such as the UK, does not want to be interfered with by a regional body when making decisions to protect its public.[28]

While the ECtHR is extra careful not to lose state support, it was not in relation to the *Greek case* in which it refused to accept there was an emergency threatening the life of the nation. But this case should be confined to its exceptional circumstances, that is, Greece was controlled by a non-democratic regime of whom the ECtHR did not approve of because the Greek regime itself was the cause of creating the emergency, and there was no political support for Greece from other member states. A decision against it did not make a political difference. For those reasons, the *Greek case* would not make a member state think twice before derogating.[29]

Affording a wide margin of appreciation to the member state's determination of the existence of an emergency has enabled the executive to kill two birds with one stone: on the one hand, it suspends the convention rights, and on the other, makes them present as convention-compliant by relying on the derogations.[30]

However, it does not mean the ECtHR has been ineffective in protecting fundamental human rights at times of emergency. It has been helpful in three ways: firstly, although the ECtHR's decisions did not hold derogation unlawful, they, at least, set the tone for future 'dealings with governmental invocation of the power to derogate.'[31] *Lawless* is an example of those decisions, as this is the authority which established the grounds relied upon the executive should be subjected to judicial review; rejecting the executive's reasoning that emergency was a sole discretion of the executive. The House in *A and Others*, as is studied in sections three and four, has certainly followed the rhetoric in *Lawless*; secondly, the impact of the decision in *Chahal*[32] (studied in section four) is relevant; thirdly, the ECtHR's approach has been strict in cases when there was no derogation by the member state including in *Brogan*.[33]

In *Brogan* the power to arrest a terrorist suspect without charge and detain him for up to 7 days without having to bring him before a judge was found to be incompatible with Art 5 (3), which required a detained person must be promptly brought before a judge. Further since there was no provision in the Act for compensation, a breach of Art 5 (5) was also found.[34]

In *Ireland v UK*, the ECtHR held certain methods used during the interrogation periods, including sleep deprivation and hooding of prisoners, constituted inhuman and degrading treatment contrary to Art 3 of the convention.[35] This decision, together with *McCann v UK*[36] and *Brogan v UK* , have partly facilitated for the UK's change of approach from using special power to adopting a 'criminalisation strategy' in Northern Ireland. Campbell and Connolly suggested that the executive's move to ordinary criminal law as opposed to excessive use of special power helped to calm the conflict in Northern Ireland.[37]

Is the Constitutional Legitimacy a Justifiable Defence to Violate Civil Liberties?

According to the former UK Prime Minister Tony Blair, the nation should know that 'no greater civil liberty [exists than to] live free from terrorist attacks.'[38] Human rights are for the protection of individuals, but when individuals threaten the nation, something must give. According to Art 17 of ECHR, those who do not respect HR, such as the Al Qaeda or ISIL members, their rights could be legitimately restricted. But the scope of terrorist legislation (some of which have become permanent, such as the TA 2000 Act) is not confined to Al Qaeda or ISIL only. Measures passed by the government—including the Terrorism Act 2000 (the TA 2000), the Anti-terrorism Crime and Security Act 2001 (the 2001 Act) and the Prevention of Terrorism Act 2005 (the 2005 Act)—are both over-inclusive and over-serve in impact, that is, they target more suspects than necessary and have the potential to violate many fundamental rights.[39] For example, section 2 (1) of the 2001 Act defines a terrorist as someone who is concerned in the commission and preparation of acts of international terrorism, or has links with terrorist groups. This could include Tamil Tiger or the Kurd fighters (PKK). The definition of terrorism is referred to the TA 2000, which equally defines it very broadly, as it spells out terrorism as serious violence against any person or serious damage to property (nationally or internationally), which will endanger the life of the person, or create a serious risk to the health and safety of the public or section of the public, or seriously disrupt the electronic system.[40] So both Acts must be read together. The combination of those two Acts made the discretion of the secretary of state *unlimited* since it could include, for example, any person who is *concerned* or has *links* with acts targeted against a *property* not only in the UK but also *abroad*.

History has shown that with the application of such unlimited power things would go wrong. The Forest Gate raid and the 'ricin' case can be given as examples. In the former, the police shot and wounded a man only to say

later that they could not bring any evidence to charge the wounded man or other arrestees. In the latter, most of the accused were acquitted due to the lack of real evidence. In the Northern Ireland conflict the interviews of some of the respondents said that the oppression (e.g. house search and the abuse of family members, particularly the mother; the power to stop and search) had led them to commit terrorist activities. Equally, there is plenty of evidence to suggest many Afghans joined the Taliban when they felt their rights were violated by the state.[41]

The application of this unlimited power could easily violate convention rights and run counter to British common law traditions if they are not subject to judicial review. Judicial review or the rule of law could dampen the adverse impact of those Acts. This would in turn help the statute to become more legitimate and less oppressive and would dissuade the targeted community to use violence. This would encourage a move towards a criminalisation approach rather than repression. A move towards a criminalisation approach helped to calm down the Northern Irish conflict after the mid-1980s.[42]

But the government does not seem to be interested in those arguments, and when the court (or civil liberty groups) uphold human rights and civil liberties against the government they, according to the executive, act 'foolishly, illegitimately, or both.'[43] It is the government, argues the executive, which is constitutionally responsible for the protection of its people not the judges or civil liberty groups, and in the event of inaction, it is the government alone that gets the blame.[44] It is the government that sees the intelligence and has to act upon it: neither the judiciary nor the civil liberty groups are in such a position.

A public body such as the government is legitimate on one or all of the following three: representativeness, democratic accountability and tradition. The House of Common, for example, is legitimate because its members are chosen by the people, and the government is legitimate because it has a majority in the House of Common and is indirectly accountable to the people through the two Houses of parliament. The judiciary lacks all of the above three. But the judges, as Feldman claims, derive the legitimacy from their decisions formed on the basis of rational and objective arguments backed not only by their opinions but a variety of legal authorities. Further, the fact the judges are independent from the executive ensures they objectively assess the legality of the Act or a decision made by the executive. Their unaccountability and impartiality, particularly, come to play a part at times of war and terrorism when public opinions are likely to be supporting the executive. At such a time, as the Israeli Court ruled: 'judges must hold to fundamental principles and values; [judges] must embrace [their] supreme responsibility to protect democracy and the constitution.' Feldman, of course, agrees with the constitutional function of the government's policy-making in relation to national security and its constitutional accountability to the parliament; the latter could scrutinise the policies and their implementation of the former.

The judges are not answerable to the parliament or to the executive, and therefore must be slow to hold unlawful the executive's decisions regarding national security.[45] But what if the policy 'collides with the law [?]'[46] The judges cannot ignore *their* constitutionally allocated job to assess the unlawfulness of the policy. Lord Hoffmann considered this in *Rehman*[47] by saying that the court is the ultimate body responsible for deciding the law unless parliament passed legislation expressly giving the task to another body.[48]

Thus it is not only *legitimate* but also *democratic* for the court to subject anti-terrorist legislation to the rule of law because 'the judges charged to interpret and apply the law are universally recognised as a cardinal feature of the modern democratic state.' Further, since the coming into effect of the HRA, it is a matter for the court to protect human rights by the virtue of the HRA if the latter are violated by policies or decisions of the executive. Lord Bingham, the leading judge for the majority in *A and Others*, strongly rejected the government's claim that the doctrine of judicial deference precluded the court from reviewing the consistency and proportionality of Part 4 of the Act with the convention rights.[49] Lord Bingham had legitimate justification under the HRA for his claim.

Those 'abstract ideals' have become part of the UK legal system by the HRA 1998, which came into force in 2000. They could be claimed to be of such a constitutionally higher status that could only be repealed expressly by parliament, as this is evident in the fact that the HRA not only bind legislation passed before it but also those passed *after*.

The court is *now* empowered by section 3 of the HRA to achieve a convention compliance result, if possible, as was the matter in the joint cases of *Sheldrake v DPP; Attorney General's Reference (NO 4 of 2002)*,[50] in which the domestic provision was interpreted compatibly with Art 6 (2). If impossible, the court could declare the provision incompatible under section 4 of the HRA, as it did in *A and Others*. Those two joint decisions suggest the impact of the HRA on the anti-terrorist legislation and also those two decisions together with the decision of *A and* Others, as shall be seen below, outraged the government. But the government must understand that parliament has *obliged* the court, as a public authority, to act compatibly with convention rights under section 6 of the HRA; otherwise a person could bring proceeding against the court under section 7 of the HRA if it does not act compatibly.

The court is further empowered by section 2 (1) of the HRA to take into consideration the ECtHR jurisprudence when dealing when domestic cases concerning a convention right. Using section 2 (1) in many cases including *JJ* (below), the UK courts were quick to bring in the ECtHR's test of proportionality to bring about a convention compliant result which had been achieved in parliament at the time of passing through section 19 (1) (a) of the HRA.

Parliament, therefore, has given the judiciary a great deal of the power of review to enable them to become more 'selective'[51] in applying the doctrine of deference: if national security has not been genuinely at stake, the court has been less prepared to be deferential, e.g. *A and Others*.

Does this mean that the HRA changed the balance in the three powers of the UK constitution? It certainly has favoured the judiciary, as the decision in *A and others* is an example of strengthening the court's function of applying the rule of law.[52] Before the introduction of the HRA, the judges kept deferring to the executive's assessment of risk, e.g. in *Liversidge* and *Hosenball*. But post-HRA, they determine the *proportionality* of the executive measures: this is a huge development in the British constitution. As seen in chapter one, that is something Lord Atkin wanted to be subject to judicial review, but most of the cases showed that the judges were reluctant to do so since the law would place too a great restriction on the powers of the secretary of state to combat the terrorist threats. The law after the HRA seems to be not as silent as it was before the Act.

The UK Courts' Response Post-HRA

A foreign national not charged with any crime could not be detained because of Art 5 (1) of the Convention (charges should be brought against a person and s/he should be brought to justice as soon as possible) even if he was a threat to the national security. Nor he could be deported to his country of origin since Art 3 imposed an absolute obligation on the member state not to deport him (even if he poses a risk to national security) where he was at risk of Art 3 treatment in the receiving country.[53]

A month after the attacks of 9/11, the 2001 Act was hastily rushed through parliament. Since there is no derogation permissible from Art 3 under Art 15, the only option the government was left with in A *and Others* and *JJ*[54] was to derogate from Art 5 (as well as Art 9 of ICCPR). The government thus derogated from Art 5 for Part 4 of the 2001 Act, the most controversial part, which provided for 'detention without trial' of any of the foreign suspects who could not be deported because of the decision in *Chahal*.

The House was to consider whether the government's derogation satisfied Art 15 conditions and whether Part 4 was discriminatory. As far as condition one under Art 15 was concerned, the House accepted the government's assessment of emergency. The government invoked *Lawless*, and the House reasoned that if in *Lawless* a threat to national security existed, the ECtHR would most likely accept the UK's assessment of the threat in *A and others*, since the situation was much more serious in the UK compared to the one in the Irish Republic.[55] Further, the Home Secretary was in a better position to decide 'pre-eminently political judgement compared'[56] to the judiciary. Thus the majority agreed that it was a political judgement and better be made by a competent body: the executive.

Feldman does not agree with the argument of 'competence and expertise' made by both the ECtHR and the domestic courts to justify the doctrine of deference. He believes the executive or parliament was not more competent than the court. For him, the executive institutions, including the security services and the police, tend to exaggerate the risk and overreact to it, as Blair himself admitted this; albeit the former Prime Minister only referred generally to public bodies. These executive bodies concentrate on the *consequence* of the risk rather than the *likelihood* in order to get more powers and resources and, by being more defensive, to reduce the chances of public condemnation and legal liabilities. The government is provided with a risk assessment by those bodies, who tend to overestimate the risk. The government does not seem to examine the accuracy of their assessments, as Labour MP John Denham criticised the government for having failed to check the police's grounds upon which it had decided the 90 days pre-charge detention was needed. Parliament is not even provided with the actual report of a risk assessment, but only with the conclusion that there exists such and such a risk to national security and measures are required to avert it. Parliament, therefore, is unable to check the accuracy of the risk assessment. Thus it is incorrect of the majority in *A and Others* (or generally in any case) to say that government and parliament in particular, are better equipped than the judiciary to make those assessments.[57]

On the contrary, the court might have more access to intelligence information than parliament. That is, the High Court, as explained above, for example, could hear cases concerning control orders in private and see materials that parliament would not be able to see. It is true that parliament is the only *constitutional* body to determine the validity of the statute, and the government is only accountable to parliament when it comes to those political decisions such as national security. But the problem with this assumption is that parliament would pass terrorist legislation with the best intention, but it has got no effective parliamentary procedure to check whether those Acts have been applied correctly in practice.[58] Further, the way that legislation is drafted, it makes it easier to confer a great deal of power to a public authority such as the police. This makes it difficult for the government and the two Houses to assess the proportionality of the need for power. The body or its minister upon whom the power is conferred would argue parliament should not worry since if s/he acted disproportionately to the Convention, it would be unlawful. The question is who determines the unlawfulness? The answer would be: the court. However, the House was not prepared to second guess the emergency declared by the government in *A and Others*.

However, Lord Hoffmann dissented (and he is of the same opinion even after the terrorist atrocities of 7/7 as he made it clear in *JJ [2007] UKHL* 45 at [44]), arguing the power to derogate at peacetime is narrower since violence based on political or religious motivations, even threatening serious loss of life, would not necessarily threaten the life of the nation within the meaning of the Convention because the 'liberty of the subject

and the right to habeas corpus are too precious' to be sacrificed for any reason other than to safeguard the survival of the state.[59]

Gearty claims that, at times of emergency, politicians would not lose seats if they restrict human rights and civil liberties. Conversely, they could be praised by the public for being tough on terrorism. The public is more likely to see the civil liberty groups, particularly since 9/11, as the protectors of the rights of terrorists and criminals, something the public could consider anti-patriotic.[60] The police and security services, knowing the public is on their side, would not consider the less oppressive option when they make a policy that engages human rights. To the contrary, their 'challenge is to decide how extensive interference with rights can be justified in order to combat the risk.'[61]

Here the second test under Art 15 comes to play a part, as the court (the only body that is independent) would decide whether the measure in question is strictly required by the exigency of the situation. In *A and Others* it was argued that the measures were not strictly required since there were already other measures that can be used against terrorism, and also no other EC member derogated from Art 5. Further, part 4 'went beyond what was strictly required by the exigencies of situations in covering a wide range of international terrorist.' The House adopted a strict proportionality test holding measures under Art 15 went no further than required by the exigencies of the situation, but sections 21 and 23 of Part 4 did not rationally address the threat to the UK security since i) they did not deal with the threat posed by the UK nationals, ii) they allowed the non-nationals suspected of terrorist activities to continue their behaviour abroad once deported, iii) and the provisions allowed to detain those who could not pose a threat to the security of the UK. Further, if the UK nationals could be dealt with without the infringement of their right to liberty, why the same could not be applied to non-nationals? Hence such 'a paradoxical conclusion was hard to reconcile with the strict exigencies of the situation.' By a majority of 8 out of 9, it was held that the government did not objectively justify why it only singled out non-national for detention, and consequently Part 4 power was not within the scope of derogation. It was held to be incompatible with Arts 14 and 5. Art 14 was breached because the government had not derogated from it, or from Art 26 of ICCPR.[62]

Art 14 is dependent on other Arts, but in *Abdulaziz v UK*[63] the ECtHR said even if there was no violation of other articles, it did not mean there was no violation of Art 14. The decision of *A and Others* was a huge blow to the government. The article's quotation could be a reaction to *A and Others* or to a case with a similar outcome. *A and others* was not only a victory for the human rights activists but was also for the court. It changed the balance of powers between the executive and the court in favour of the latter, as Hoffmann in *Rehman* said before the HRA the court could not question the validity of a statute and therefore could not decide whether the threat to the nation was sufficient to justify the suspension of *habeas corpus*. But now

the HRA has enabled the court to declare the statute incompatible, sending a signal to the parliament that the 'law does not accord with our constitutional traditions.'[64]

The outcome of the case was met with mixed reactions. In Tierney's opinion, it was not constitutionally appropriate for Hoffmann in *A and Others* to claim the determination of emergency was a question for the court. Tierney argues that the House was right to defer to the executive's decision. It was right from both perspectives: the constitution and the Convention. In terms of the constitution, it is the executive's task to make decisions on national security as the executive has access to intelligence and the judges do not. Further, the executive is accountable to the parliament not to the judiciary. It was, therefore, not surprising that the majority deferred to the executive on the basis of 'capacity or expertise argument.' From the ECtHR's perspective, the House was right because it followed the ECtHR's approach adopted in Lawless and *McBride*, where the ECtHR had left the decision of the existence of an emergency to be determined by the internal organs such as the government or parliament. Although he admits that parliament did not meet the standard of review required from a national body by the ECtHR in 2001 when it passed the 2001 Act and the judgement on the proportionality of the measures was hence unsurprising.[65]
Hickman, on the contrary, applauds Hoffmann's dissent, claiming a derogation allows the government to operate outside the human rights remit, but its actions still remain to be subject to the rule of law. For him, the court should apply a strictly robust approach in order to eliminate unnecessary derogations. Hickman is disappointed in the House in *A and Others* interpreting the pre-conditions under Art 15 so widely to hold there was an emergency in existence. This would persuade the government not to show evidence to parliament and to the court to establish there existed an emergency within the convention terms. Hickman is also disappointed by Lord Bingham's application of the test of proportionality, as in derogation cases, following *Handyside v UK* (1976) 1 EHRR 737 at Para 48, the ECtHR would apply the test of indispensability, which demands that the measure to be 'strictly required.' Many of their lordships, including Lord Hope, however, applied it, holding the measures were not strictly required. This test would ask the government to prove it had looked at the alternatives and the measure in question was the less intrusive option. Hickman states that Bingham came to the same conclusion, but it would not always be the case.[66]

The government argued that the decision shackled the government's 'hands'. It called for some unspecified modification of the way the Convention rights were applied in the UK under the HRA.[67]

Apparently, the government, using the minority in *Chahal* and some passages from *Soering* as the authority, intended to amend the HRA to enable the court to balance the potential risk of torture in the receiving country against national security. The UK government intervened in

Ramzy v Netherlands in which the Dutch government wanted to deport a detainee to Algeria in order to weaken the ruling in Chahal. But the government's attempts were failed since the ECtHR had clearly stated that the prohibition against torture was not only prohibited but had achieved the *ius cogens* status.[68]

However, the government, particularly former Prime Minister Blair, believed the judiciary and the civil liberty groups underestimated the nature of the threat. Blair disagreed with both Lord Hoffman's opinion in *A and Others* and with the assertion that the right to traditional civil liberties came first, arguing that it was a dangerous misjudgement as the extremism that posed the risk today was very different than before and hence the government needed to use every means it possessed, including tougher law, to confront it; tougher law was a signal to show to the extremists that they are not welcomed in Great Britain. If the government was to apply the ECtHR's standard of constraining, it would utterly endanger the 'defence of the realm',[69] hence the rules of the game needed to change.

There were two reasons for a strict approach: the nature of the problem has changed and; secondly, and therefore, there should be a shift from putting a lot of emphasis on the right of the suspect (a few terrorists) towards convicting the guilty: a shift from freedom to security. Feldman disagrees with both reasons. As for the nature of the problem, the government argued that the investigation was far more complex since, among others, they had to chase suspects abroad, computer checks that needed to be made; people had to be arrested at an early stage, all of which meant the police would not have the time to gather enough evidence before the arrest. One of the first rules the government pushed for, unsuccessfully, was the 90 days pre-charge detention in order to give the police more time to overcome the above difficulties. But Feldman argues that in other crimes, including drug trafficking or corporate fraud, the investigating teams would face the same problems but they have never asked for a pre-charge detention period. Thus, for him, today's problem is not *differen*t than before. Feldman, as mentioned above, also disagrees with the claim that times of emergency require a shift from freedom to security since lessons should be learned from Israel, where the Supreme Court held that to use torture to combat terrorism was unlawful. Of course, the Supreme Court knew its decision was not going to help the fight against terrorism, but '[t]his is the destiny of democracy—it does not see all means as acceptable, and the ways of its enemies are not always open before it …The rule of law and the liberty of an individual constitute important components in its understanding of security.'[70] The UK courts, however, preferred security over freedom in *A and Others* and in *Rehman*.

But a threat is a threat whether posed by a national or non-nation: so why one is subject to the detention and the other is not? Lord Woolf's reply to this question in *A and Others* in the Court of Appeal was as follow: the measures, which was subject to derogation, were required by the exigency of the situation because they were aimed at a small number of people that

posed the threat; they were not discriminatory since 'British nationals are not in an analogous situation to foreign nationals who currently cannot be deported because of fears for their safety'. Lord Woolf's reasoning is hardly convincing, however, since non-nationals also did not want to be deported for fear of Art 3 treatment either, and this meant they would have remained in detention indefinitely. In practice there was *no* distinction. Helen Fenwick claims that if those schemes only aimed at Al Qaeda members or supporters regardless of their nationalities, it would have created a 'more confined invasion', as Al Qaeda is defined by ideology not by nationality. What Lord Woolf's reasoning does is to strengthen Jackson's argument that the judiciary cannot take an active role since they live in the 'same universe of fear' as the rest of the anxious population.[71]

Rehman is another example that adds credibility to the Jackson's argument. In this case the Special Immigration Appeals Commission (SIAC) rejected the argument that the decision of what constituted a threat to national security to be decided only by the secretary of state, as 'the definition of national security was a question of law which it had jurisdiction to decide.' Consequently, the secretary of state was found to have interpreted national security too broadly, as Rehman's activity did not threat national security of the UK because it was not targeted at the UK, its citizens, or at any other foreign government to take reprisal against the UK. Further, the standard of proof with regards to the allegations was too low, as it did not meet 'high civil balance of probabilities.' The House, however, overturned (including Lord Hoffmann) the decision since the existence of emergency engaged the doctrine of separation of powers and the government was the legitimate body with the requisite expertise and competence to make such decisions. As far as the allegations were concerned, they were not unlawful unless the defendant showed they were absurd. Giving *Rehman* as an example, Dyzenhaus concludes that the court could only review those decisions of the executives which are *absurd*, even in the HRA era.[72]

The 'critical scholarships and Civil libertarian pessimists' likewise doubt whether the court could really protect human rights by virtue of the HRA in times of emergency. The pessimists argue for a number of reasons (although mostly their concerns are based on the judiciary's lack of expertise and competence in security matters): firstly, both the ECtHR and the UK courts, due to derogation and exception clauses, were unable to protect convention rights in many cases and, therefore, accepted the government's suspensions/restrictions of human rights as legitimate (e.g. *Lawless* and *Rehman*). Once the executive justifies the conditions for a derogation, the HRA has no role to play whatsoever: the law is still silent amidst the clashes of arms. The high degree of latitude afforded to the executive by both the ECtHR and the domestic courts are because of the 'fragility of linguistic safeguards built into the exceptions and derogations clauses.' Those clauses, which provide for legitimate restriction of human rights, have further weakened civil liberties, since there was no such linguistic option available to the government before the language of human

rights to restrict civil liberties; secondly, the doctrine of margin of appreciation has further emboldened the government to restrict certain rights and then *domestically* rely on the ECtHR's decisions to justify the restriction. For example, the executive invoked *Lawless in A and Others* to justify the existence of an emergency. It did not matter that *Lawless* had been decided almost half a century ago when human right were still in a fragile state, but now they are internationally established and respected. Further, the House has failed to consider that margin of appreciation is an ECtHR invention, and should not be relied domestically, as there is no authority at community level to say otherwise.[73]

One of the reasons that the ECtHR affords a wide margin of appreciation, and arguably the most important one, is that the ECtHR is still an international body and does not want to put pressure on the member state for reasons of Arts 65 and 64, but this is not the case domestically. The influence of the margin of appreciation on the decisions by the ECtHR must be disentangled before it is domestically relied upon. However, as mentioned, this is usually forgotten by the UK courts, and for those two reasons the pessimists could have a strong case.

O'Cinneide, however, believes the HRA and the ECtHR's jurisprudence have played a 'push back' effect by reducing the adverse impact of terrorist legislation. The effect was two-fold: it restricted the UK government attempts to adopt new terrorist powers (e.g. 90 day detention), and the decision of *A and Others* made the politician and media to question the effectiveness of terrorist legislation in combating terrorist threats. This could be evident in the 2005 Bill which was subject to severe scrutiny in both Houses, and the disagreement between the Common and Lords was never seen in 'modern history.'[74]

A and Others also facilitated for the lower courts to adopt a rigorous test of proportionality, especially regarding cases dealing with control orders. Control orders are preventative, which engage 'control' by the police; it is not to do with a crime that has already taken place, but it is the idea that the threat of terrorism demands an early police intervention at the preparatory stage to detect the crime. However, it is argued to be corrosive to constitutionalism because individuals' rights would be violated without proper evidence, particularly, when the standard of proof is lowered than beyond reasonable doubt since the evidence is intelligent-gathered. Thus like the detention power, the court needs to interfere to maintain the constitutionalism in control orders.[75]

Relying on the HRA, the court has made some remarkable decisions, including *MB*,[76] in which Sullivan J accepted the control order was civil proceeding rather than criminal so the lower standard of procedural fairness within the convention terms were applicable. However, when decisions were taken by a body that was not independent such as the secretary of state, continued the High Court, it was crucial there was an independent review of those decisions by the court. The court found that the supervisory

role of the judiciary was very limited under section 3 (2) of the 2005 Act because the court could not apply the standard of review required under Art 6 (1), as the secretary of state had relied substantially on closed materials and had adopted a lower standard of proof. Even the special advocate procedure (a barrister acting for the defendant's lawyers but is not allowed to share evidence with them) was not enough to guarantee the power was fairly applied, and a declaration of incompatibility was made under section 4 of the HRA. But the Court of Appeal did not agree with a breach of Art 6 as the supervisory function given to the court was adequate because of section 11 (2), which provided that the court could apply the standards of the HRA. Section 11 (2) enabled the court to read down section 3 (10) to determine whether the decision of the secretary of state was flawed at the time of the court hearing, not just at the time the order was made. As for the standard of proof under section 2 (1) (a), which required 'reasonable grounds' for suspicion, the court must satisfy itself that there had been reasonable grounds to indicates the controlee was involved in terrorism. Having established this, the court should be more deferential when determining the necessity of the order under section 2 (1) (b). Art 6 was satisfied, held the Court of Appeal, since the court was able to form its own view as to whether there were reasonable grounds for the decision. The allowance of closed materials was held not to be in violation of Art 6, as ECtHR as well as the British courts had made this clear.[77]

The House overturned the decision of the Court of Appeal (with Lord Hoffmann dissenting). Lord Bingham, giving the leading judgment, reasoned that the justification for the obligations imposed on MB based fully on closed materials and hence his Lordship found it difficult to accept. 'MB has enjoyed a substantial measure of procedural justice, or a fair hearing has not been impaired."[78] Further, the presence of special advocate was not helpful since MB could not see the evidence and hence could not tell his advocate what defence he had against the charges made against him.

The court could not review the making of a non-derogating order but only review whether the government had 'reasonable ground' for making a particular order.[79] Gearty says that those orders are neither criminal nor issued by the court (unless it is a derogating order); and they are not dependent on the evidence of wrongdoing or imminent wrongdoing. Zender describes them as 'preventative justice and as departing so radically from established legal norms that the mere fact of their legal existence poses a challenge to the rule of law that demands our close attention'. The JCHR, the Council of Europe's Commissioner for Human Rights and some leading NGOs have expressed their concerns about the nature and scope of the control orders. Those voices of the NGOs, JCHR and some academics could have really played a major part in influencing the judiciary to take a restrictive approach towards those terrorist Acts, especially towards the most controversial aspect of control orders, their scope.[80]

In *JJ*[81] the Court of Appeal this time agreed with the decision of Sullivan J in which he had found a breach of Art 5 (1). He held that the cumulative

impact of the obligations had amounted to a breach of the respondents' rights to freedom of movement and liberty. The obligations imposed under section 1 (9) of the 2005 Act included: confined for 18 hours a day in the house and was electronically tagged; the house could be searched at any time; visitors were to provide their full details before a visit; outside the period of confinement, they could meet people only by prior arrangements. The Court of Appeal reasoned that in practice the secretary of state had made a derogating order, which he had no power to do under section 2, and hence the order was quashed.[82]

JJ was appealed to the House and heard in July 2007, but the House dismissed it by 4-1, with Hoffmann dissenting. Lord Bingham, said that the ECtHR had given more weight to the degree and intensity of the restriction of the right to liberty, and the House had to follow suit.[83] Lord Alex Carlile, the independent reviewer of the legislation, also criticised the lengthy obligations, particularly the 18 hours curfew, as they were too much to qualify as a non-derogating order. The Home Office did not take this warning seriously, but the court certainly did. In *JJ*, the Court of Appeal, unlike the High Court, did not grant a stay and it was a humiliating defeat for the government as it was revealed that one of the suspects had escaped. *JJ* was another decision, like *A and Others,* that shows a 'meticulous scrutiny of the judges' that kept the executive on its toes, requiring it to modify the obligations under the control orders. This decision equally weakens the pessimist's claim.[84]

The adverse effect of the control orders, as claimed by Gearty, could be 'more severe on individuals, perhaps also on their families, dependants and friends, than many criminal sanctions.'[85] This was the case in *E*,[86] as multiple rights violations were raised including Arts 3 and 8 of the wife and children of *E*.

The psychological impact of the order had caused *E* depression and his children stress. However, reasoned the court, the national security interests justified the Art 8 interference because the secretary of state put forward strong evidence to suggest E was a significant risk. As for Art 3, the impact of the order on the children's mental health was not sufficient enough to humiliate or degrade them and possibly break their moral resistance. As a whole, the Home Office lost the case on Art 5 (because of cumulative impact of the obligations) and on the failure to considerer to bring possible prosecutions under section 8 (4). Clive Walker claims that the government gives priority to control orders rather than criminal prosecutions, as it is evident in the fact that some individuals issued with control orders had not been interviewed by the police. The reason for the priority is that control orders are more appropriate in dealing with anticipatory threat. Carlile also criticised the reasons given by the police for not bringing a prosecution against individuals issued with control orders, warning that investigation without a view to prosecution under section 8 should not be preferred.[87]

The effect of these decisions, particularly *JJ*, thanks to the HRA, was that 'other control orders have been struck down or modified following the JJ decision, with the more rigorous burden of proof being imposed upon the government'. If a derogation is made, the impact of the orders 'would still have to be proportionate to the exigencies of the security situation under Art 15'.[88] The procedure used in control orders must be in line with Art 6 requirements, as the court must consider whether the executive made the control order on the basis of reasonable grounds for suspicion. Further, Lord Bingham at Para 16 and Lord Hoffmann at Para 34 pointed out in *JJ*[89] that if qualified rights are engaged, the government has to satisfy para 2 requirements: the interference to be proscribed by law, has to have a legitimate aim, be necessary (pressing social need) in a democratic society and should not be applied on discriminatory grounds. The interference must be further proportionate to the aim pursued. Any control order (or any proscription under Terrorism Act 2006), or its conditions that violate a convention right but could not satisfy those para 2 requirements, would be obviously flawed and the court might quash it or require the secretary of state under sections 3 and 4 of the 2005 Act to revoke it. The same applies to derogating control orders under section 4 (3), that is, Art 15 conditions must be satisfied. Now the Civil Procedure Rules have changed and the HC can have closed hearing.

Conclusion

It was seen in *Liversidge*, *Halliday* and in *Hosenball* that the judiciary was always deferential towards the executive decisions based on national security. The court was also unwilling to assess the proportionality of the measures as seen in *Liversidge*.

However, the language of the ECHR, namely Art 15, provided for conditions that must be satisfied before human rights are suspended. Such an option was not available before the ECHR or other human rights instruments. As the cases in section two demonstrated, the ECtHR has not interpreted those conditions strictly yet, but its rhetoric has been influential in terms of alerting the domestic courts to be stricter towards the government's derogations.

The House, invoking the HRA, has certainly followed the rhetoric in many cases, including *A and Others* and *JJ*. Those decisions showed the judicial awakening to the fact that even in context of national security the court has a 'responsibility to ensure that the rule of law is respected.'[90] *Rehman*, could be distinguished from *A and Others* on the basis that in the former the House was to determine the existence of an emergency, whereas in the latter the House was dealing with the necessity and proportionality of the *action of* the government.[91] It is because the House, like the ECtHR, is *still* deferential when determining condition one. As for the second condition, as the decision of *A and Others and JJ* would suggest, the House is less deferential by applying a strict test of proportionality. This is the result of the HRA (though some might doubt this) whereby parliament has given the

power to the court through a combination of sections including 2, 3, 4 and 6 to determine the compatibility of the domestic measures with the Convention rights. Therefore, the article's quotation could represent the reality of 50 years ago in the UK, but it certainly does not stand for constitutional functions of the court in the HRA era.

Selected References

Textbooks

Dorani S (2019) America in Afghanistan: Foreign Policy and Decision Making From Bush to Obama to Trump, London: I.B. Tauris, Bloomsbury Publishing Plc.

Fenwick H (2007) 'Civil Liberties and Human Rights', fourth ed, Cavendish.

Jacobs & White (2006) 'European Convention on Human Rights', ed. Ovey & White, 4th Ed.

Loveland I (2003) 'Constitutional law; Administrative law and Human Rights: A Critical Approach', Third Ed, Lexisnexis.

Robertson G and Nicol A (2002) 'Media Law', 4th ed.

Statutes

The Terrorism Acts 2000 and 2006.

Anti-Terrorism, Crime and Security Act 2001.

The Prevention of terrorism Act 2005.

Human Rights Bodies

Joint Select Committee on Human Rights, Counter-Terrorism Policy and Human Rights: 42 Days, 14th December 2007, HL 23/HC 156.

Joint Select Committee on Human Rights, Counter-Terrorism Policy and Human Rights, 1st August 2006, HL 240/HC 1576.

Academic Articles

Lester A and Beattie K (2005), 'Risking Torture', 6 European Human Rights LR 565.

Campbell C and Connolly I. (2006) 'Making War on Terror? Global Lessons From Northern Ireland', Modern Law Review 69, 935.

Dorani S (2019) 'The Foreign Policy Decision Making Approaches and Their Applications; Case Study: Bush, Obama and Trump's Decision Making towards Afghanistan and the Region', Rest: Journal of Politics and Development.

Dyzenhaus, D (2004) 'Intimations of Legality Amid the Clash of Arms', International Journal of Comparative Constitutional Law 2(2): 244.

Dyzenhaus D (2005) 'An Unfortunate Outburst of Anglos- Saxon Parochialism', 68(40) MLR, p. 674.

Feldman D (2006) 'Human Rights, Terrorism and Risk' (2006) Public Law 364.

Gearty C (2003) 'Reflections on Civil Liberties in an Age of Counter-Terrorism', 41 Osgoode Hall Law Journal 185.

Gross O (1998) 'Once More Unto the Breach': The Systematic Failure of Applying the ECHR to Entrenched Emergencies", Yale Journal of International Law 437.

Hierbert, JL (2005) 'Parliamentary Review of Terrorism Measures, 68(4) MLR 676.

Hickman T (2005) 'Between Human Rights and the Rule of Law: Indefinite Detention and the Derogation Model of Constitutionalism', 68(4) MLR 655.

Marks S (1995) 'Civil Liberties at the Margin: The UK Derogation and the ECHR', 15 Oxford Journal of Legal Studies 69.

O'Cinneide C (2008) 'Strapped To The Mast: The Siren Song Of Dreadful Necessity, The UK Human Rights Act And The Terrorist Threat.

Tomkins A (2002) 'legislating against terror', Public law 205.

Tomkins A (2005) 'Reading of A v Secretary of State for the Home Department', Public Law 259.

Tierney S (2005) 'Determining the State of Exception: What Role for Parliament and the Courts?', 68 (4) MLR 668.

Walker C (2007) 'The Treatment of Foreign Terror Suspects', 70 (3) Modern Law Review 427.

Walker C (2007) 'Keeping Control Of Terrorists Without Losing Control Of Constitutionalism', 59 Stanford Law Review 1395.

Cases

A v Secretary State for the Home Department [2004] EWCA Civ 1123, [2005] UKHL 71.

Abdulaziz v UK(1985) 7 ECRR 471.

Aksoy v Turkey (1996) 23 EHRR 553.

Brogan & Others v UK , Publ Eur Ct HR, Ser A, No 145-B.

CCSU v Minister for the Civil Service [1985] AC 374.

Chahal v U.K. (1997) 23 EHRR 413.

Cyprus v Turkey 4EHRR (1982) 482.

Habeas Corpus in Emergency Situations, Advisory Opinion OC-8/87, 30 Jan 1897,11 EHRR 333.

Handyside v UK[1976] 1 EHRR 737.

Ireland v UK (1978) 2 EHRR 25.

Landinelli Silva v Uruguay UN Doc A/36/40, 130.

Lawless v Ireland (1960) 1 EHRR 1.

Liversidge v. Anderson [1942] A.C. 206.

McCann v UK (1995) 21 EHRR 97.

R v Halliday [1917] AC.

R v Secretary of State ex parte Hosenball, [1971] 1 W.L.R. 766.

R v. Secretary of State ex parte Hosenball [1977] 1 W.L.R.776.

Rehman v Secretary of State for the Home Department [2001] UKHL 47; [2003] 1 AC 153.

Secretary of State for the Home Department v MB [2006] EW HC (Admin) 1000., [2007] UKHL 46.

Secretary of State for the Home Department v JJ [2006] EWCA (Admin) 1623, [2007] UKHL 45.

Secretary of State for Home Department v E [2007] EWHC (Admin) 223, [2007] UKHL 47.

Sidropoulos v Greece (1998) (unreported).

Secretary of State for the Home Department [2004] UKHL 56.

Sheldrake v DPP; Attorney General's Reference(NO 4 of 2002) [2004] UKHL 43.

Soering v U.K. (1989) 11 EHRR 439.

Endnotes

[1]The article is an edited version of my Master's Degree from University Collage London. The quote belongs to the course's booklet.
[2] Dorani S (2019) 'The Foreign Policy Decision Making Approaches and Their Applications; Case Study: Bush, Obama and Trump's Decision Making towards Afghanistan and the Region', Rest: Journal of Politics and Development; Dorani S (2019) America in Afghanistan: Foreign Policy and Decision Making From Bush to Obama to Trump, London: I.B. Tauris, Bloomsbury Publishing Plc, chapter 1.
[3] Dyzenhaus D (2004) 'Intimations of Legality Amid the Clash of Arms', International Journal of Comparative Constitutional Law 2(2): 244, pp. 245.
[4] All quotes are from: Dyzenhaus, 2004: 251, 252, 257.
[5] Dyzenhaus, 2004: 257.
[6] Dyzenhaus, 2004: 257.
[7] Dyzenhaus, 2004: 246, 252, 257.
[8] A case simultaneously decided with Liversidge: found (and the quotes) at Dyzenhaus, 2004: 253.
[9] For all the quotes, see Dyzenhaus, 2004: 254.
[10] R v Secretary of State ex parte Hosenball, [1971] 1 W.L.R. 766.
[11] Dyzenhaus, 2004: 258-9.
[12] Hickman T (2005) 'Between Human Rights and the Rule of Law: Indefinite Detention and the Derogation Model of Constitutionalism', 68(4) MLR 655, p. 658.
[13] CCSU v Minister for the Civil Service [1985] AC 374; Dyzenhaus, 2004: 258.
[14] Lawless v Ireland (1960) 1 EHRR 1; Ireland v UK (1978) 2 EHRR 25; Brannigan and McBride v UK (1993) 17 EHRR 539; Aksoy v Turkey (1996) 23 EHRR 553.
[15] Tierney S (2005) 'Determining the State of Exception: What Role for Parliament and the Courts?' 68(4) MLR, p. 669.
[16] Marks S (1995), 'Civil Liberties at the Margin: The UK Derogation and the ECHR', 15 Oxford Journal of Legal Studies 69, pp. 50, 77.
[17] Gross O (1998) 'Once More Unto the Breach': The Systematic Failure of Applying the ECHR to Entrenched Emergencies", Yale Journal of International Law 437, pp. 482, 486.
[18] Jacobs & White (2006) 'European Convention on Human Rights', ed. Ovey & White, 4th Ed, p. 445.
[19] Gross, 1998: 487.
[20] Gross, 1998: 457, 483, 487.
[21] Gross, 1998: 445, 462-3.
[22] A Secretary of State for the Home department [2004] UK HL, at [28].
[23] Marks, 1995: 74-6; Jacobs & White, 2006: 447.
[24] UN Doc A/36/40, 130 at 132-3 (para 8.3).
[25] Habeas Corpus in Emergency Situations, Advisory Opinion OC-8/87, 30 Jan 1897,11 EHRR 333.
[26] Marks, 1995: 79.

[27] [1976] 1 EHRR 737, at [48].
[28] Marks, 1995: 74-5, 81.
[29] Tierney, 2005: 669; Gross, 1998: 469.
[30] Gearty C (2003) 'Reflections on Civil Liberties in an Age of Counter-Terrorism', 41 Osgoode Hall Law Journal 185, p. 205.
[31] Gross, 1998: 464.
[32] Chahal v UK (1997) 23 EHRR 413.
[33] Brogan & Others v UK , Publ Eur Ct HR, Ser A, No 145-B.
[34] Marks, 1995: 70-71.
[35] Gross, 1998: 471-2.
[36] (1995) 21 EHRR 97.
[37] O'Cinneide C (2008), 'Strapped To The Mast: The Siren Song Of Dreadful Necessity, The UK Human Rights Act And The Terrorist Threat, p. 6.
[38] Hierbert, J.L, 'Parliamentary Review of Terrorism Measures, (2005) 68(4) MLR, p. 678.
[39] O'Cinneide, 2008: 17.
[40] Section 1 of TA 2000, as amended by section 34 of the Terrorism Act 2006.
[41] Campbell C and Connolly I. (2006) 'Making War on Terror? Global Lessons From Northern Ireland', Modern Law Review 69, 935, p. 974; Dorani, 2019 (book): see chapter 5; O'Cinneide, 2008: p. 17.
[42] Campbell and Connolly, 2006: 954-5.
[43] Feldman D (2006) 'Human Rights, Terrorism and Risk' (2006) Public Law 364.
[44] O'Cinneide, 2008: 16.
[45] All the quotes are from Feldman, 2006: 7-8.
[46] Feldman, 2006: 7-8.
[47] Rehman v Secretary of State for the Home Department [2001] UKHL 47; [2003] 1 AC 153.
[48] Feldman, 2006: 8.
[49] Loveland I (2003) 'Constitutional law; Administrative law and Human Rights: A Critical Approach, Third Ed, Lexisnexis, 57-8; Feldman, 2006: 8.
[50] [2004] UKHL 43.
[51] Fenwick H (2007)'Civil Liberties and Human Rights', fourth ed, Cavendish, p. 1337.
[52] Hickman, 2005: 668.
[53] Chahal v UK (1997) 23 EHRR at [80]. In Chahal, the Court relied on Soering v UK (1998) 11 EHRR 39.
[54] Secretary of Sate for the Home Department v JJ [2007] UKHL 45.
[55] At [28].
[56] *A and Others*, at [29].
[57] Feldman, 2006: 9-11; Fenwick, 2007: 140.
[58] O'Cinneide, 2008: 19.
[59] Secretary of State for the Home Department v JJ [2007] UKHL 45, at [44].
[60]Gearty, 2003:188-9.
[61] O'Cinneide, 2008: 9.
[62] The quotes are from Fenwick, 2007: 1436-8.
[63] (1985) 7 ECRR 471.
[64] Dyzenhaus D (2005), 'An Unfortunate Outburst of Anglos- Saxon Parochialism', 68(40) MLR, p. 674.
[65] Tierney, 2005: 669-72.
[66] Hickman, 2005: 659- 66.
[67] O'Cinneide, 2008:15.
[68] Lester A and Beattie K (2005) 'Risking Torture', 6 EHRLR 565, pp. 2-3.
[69] O'Cinneide, 2008: 15
[70] Feldman, 2006: 4-6.

[71] O'Cinneide, 2008: 22; Fenwick, 2007: 1433-4.
[72] Dyzenhaus, 2005: 260-1.
[73] The analysis (and the quotes) are based on Robertson G , Nicol A (2002) 'Media Law', 4th ed, p. 59; O'Cinneide, 2008: 22; Dyzenhaus, 2005: 674; Gearty, 2003: 204.
[74] O'Cinneide, 2008: 26-7; Walker C (2007) 'Keeping Control Of Terrorists Without Losing Control Of Constitutionalism', 59 Stanford Law Review 1395, p. 1408.
[75] Walker, 2007: 1400-1.
[76] Secretary of State for the Home Department v MB [2006] EW HC (Admin) 1000.
[77] Walker, 2007: 1448-50.
[78] Secretary of State for the Home Department v MB [2007] UKHL 46 at [41].
[79] Walker, 2007: 1450.
[80] Those views are found in O'Cinneide, 2008: 9, 25.
[81] Secretary of State for the Home Department v JJ [2006] EWCA (Admin) 1623.
[82] Walker, 2007: 1450-51.
[83] Secretary of State for the Home Department v JJ [2007] UKHL 45, at [17] and [19].
[84] Walker, 2007: 1445, 1451, 1454.
[85] O'Cinneide, 2008: 9.
[86] Secretary of State for Home Department v E [2007] EWHC (Admin) 223.
[87] Walker, 2007: 1432, 1453-4.
[88] O'Cinneide, 2008: 12; Fenwick, 2007: 1460.
[89] [2007] UKHL 45.
[90] Tomkins A (2005) 'Reading of A v Secretary of State for the Home Department', Public Law 259.
[91] Tomkins, 2005: 2005.