BALANCING HUMAN RIGHTS AND NATIONAL SECURITY IN AN AGE OF TERRORISM: TWO DECADES AFTER THE UK BELMARSH DETAINEES CASE

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ABSTRACT

The response of the UK and some democratic states to the September 11, 2001 attacks on the United States elicited a burning discussion on the balance between security and the rule of law. *A and others* (*Belmarsh detainees*) case became the test case of that balance. The House of Lords decision that the provisions of the anti-terrorism legislation were unlawful was a powerful statement that even in times of threat to national security, the government must act strictly in accordance with the law. This paper examines the contextual import of the *Belmarsh* case. It seeks to enquire whether close to two decades after this landmark decision anything has changed in the rights protection regime of the UK, whether the judiciary has built on the momentum of the case to further protect human rights or whether they have remained deferential to the executive especially in matters of national security. It acknowledges that though progress has been made, the debate between personal liberty and national security remains an ongoing one.

INTRODUCTION

Since Magna Carta 1215 gave effect to the ancient remedy of *habeas corpus*,[i] there has been a long march toward the liberty of individual citizens. In the 20th century, efforts were focused on establishing basic rights and the Rule of Law throughout the wider international community.[ii] However, the later part of the 20th century and the early part of the 21st century have been described as the "age of terrorism."[iii] This is because within this period, Islamic fundamentalism has been seen to be taken to higher levels, the height being the bombing of the World Trade Centre on September 11, 2001 (9/11). This event awakened the world to the harsh reality of global terrorism and its damaging potentials heightened by the spectre of the possible use of nuclear, chemical and biological materials by terrorists, and the fact that these attacks are not so much targeted but indiscriminate.

Arguably, when the war on terror began, many democratic states like the United States and the United Kingdom lost sight of human rights demands in an effort to combat terrorism. This approach which was substantial in some states underlined the need to reinforce human rights and to reverse the trend. The InterAction Council[iv] for example, believed that establishing a common ethic which calls for a responsible balancing of security and the rule of law was a necessity.[v] The Council also believed that governments went too far in their attempts to provide security by infringing upon the rights of the innocent, shifting the burden of proof, and removing due process.[vi]

The "Rule of Law" operates to protect citizens from arbitrary government decisions and liberty cannot be defended without the principles of liberty; it is part of the delicate balance of the UK constitution and this was brought into sharp focus by the decisions of the Law Lords in the case of *A and Others*,[vii] popularly called the *Belmarsh Detainees* case. The *Belmarsh* case therefore became a test case of the constitutional tussle that would ensue in the frantic bid to curb terrorism post 9/11 by the executive *vis-a-vis* the courts' desire to protect human rights. Following 9/11, the UK government concluded that there was a "public emergency threatening the life of the nation" within the meaning of Article 15 of the European Convention for the Protection of Human Rights (ECHR).[viii] Nine suspects were detained giving rise to the *Belmarsh* case. Since all nine were non-nationals of the UK, the House of Lords (now the House of Lords) decided that section 23 of the Anti-terrorism Crime and Security Act 2001 (ATCSA) under which they were detained unjustifiably discriminated against them on grounds

of their nationality or immigration status; furthermore, that such treatment was inconsistent with the UK's international human rights treaty obligations to afford equality before the law and to protect the human rights of all within its territory.[ix]

The impact of the *Belmarsh* case is far reaching in that the case may well be the first time a UK court has dealt such a blow to legislation conferring powers on the executive to meet a threat to national security.[x] This is a startling difference from the approach taken in a case like *Liversidge v Anderson.*[xi] While in *Liversidge v Anderson,* the majority held that the balancing of the interests of national security against those of the individual was the sole prerogative of the Home Secretary,[xii] in *Belmarsh* the House of Lords held that the courts have a duty to review the way in which this balance is struck in order to ensure that both the Home Secretary and Parliament act in conformity with human rights requirements. Their Lordships took the view that there is no jurisdictional barrier to the review of national security decisions and that national security is not a 'no-go' area for the courts of law.[xiii]

Belmarsh is a relatively old case, being that it was decided close to two decades ago. Given its prominence at the time, there were high expectations of change following it. This paper therefore, examines its contextual import; that is, despite being hailed as a victory for human rights at the time, what, if any, has changed eighteen years after? Has the judiciary built on the momentum of *Belmarsh* to further protect human rights especially when it comes to the actions of the executive? Or have the courts remained deferential to the executive especially in matters of national security? Is it the case that the government has sought to circumvent the power of the judiciary in prosecuting terrorist suspects by way of alternative legal procedures? And are these alternative procedures fair, constitutional and human rights compliant?

THE IDEA OF TERRORISM

Terrorism is not new to humanity and yet it is hard to define. Its modern kind has been manifesting itself since the 1960s and the 1970s. Accordingly the bombing of the World Trade Centre on 9/11 was not a one off event. However, the methods terrorists use have changed. They have become more desperate. They now use suicide bombers, women and children.[xiv] Their weapons are changing - the terrorists have recently used planes and missiles. The intelligence material quoted in the Butler Report states that Al Qaeda had been trying to obtain fissile material to make nuclear weapons.[xv] This presents an obvious concern and the need for

better security. Counter-terrorism laws are also needed but rights consciousness dictates that they must be human right compliant.

Terrorism has been one of the defining issues of the last two decades. It raises political, legal, ethical and other issues of great difficulty.[xvi] Most relevantly, anti-terrorist laws have in themselves, presented new challenges to human rights around the globe and in the UK in particular. Indeed, one anti-terrorist law in particular, the Anti-Terrorism, Crime and Security Act 2001 posed the first great challenge to the operation of the UK's Human Rights Act 1998.[xvii] It became the law under which the appellants in the *Belmarsh* case were detained and as such, opened up a new legal frontier from which human rights law in the UK has since then been unfolding.

While most of historical terrorism has been politically or ideologically motivated, today's terrorism has acquired a more or less religious focus. Nigeria for example, and much of west Africa and the middle east have seen the reign of terror unleashed by radical Islamist groups like, *Boko Haram*, Hezbollah, Al qaeda, ISWAP and others. Most often, in addition to gaining political power, their aim is the establishment of an Islamic state by whatever means possible, including by death and destruction. In Nigeria, this has resulted in numerous attacks in which churches,[xviii] government and non-governmental buildings (including the UN building in Abuja – 26 August 2011),[xix] media houses, security formations and police stations have been bombed and attacked, thousands of people killed, while millions are displaced.[xx] Of late, terrorist groups have also laid claim to whole swaths of territory in northern Nigeria.[xxi] In response, the Nigerian government at the time adopted some extreme measures; measures which have been criticized as high handed and disproportionate. These highlight the problems posed by terrorism in human rights protection.

Indeed, the world has become a global village, and so the problem of terrorism is one which no country is immune to. Terrorism occurs everywhere – in villages and in the cities – and targets mostly innocent people. It may also appear that democratic societies are especially vulnerable to terrorist threats because their devotion to the principles of liberty arguably restricts the government from implementing stringent countermeasures against terrorists. However, parliamentary reaction to the 'war on terror' raised fundamental questions about the balance between national security on the one hand and human rights on the other. The events that followed immediately after the coming into force of the HRA 1998 especially 9/11 indeed tested that balance. When the court decided that the provisions in the anti-terrorism legislation

which followed were unlawful, the world inhabited by British governments had demonstrably and decisively changed.[xxii] The orthodox understanding of parliamentary sovereignty was hanging in a balance. The government would argue once again, that this was not a matter for the courts, but for Parliament. The *Chahal v UK*[xxiii] was a prominent obstacle in the government's way to full implementation of some of its legislative provisions in dealing with terrorist suspects because of the absolute nature of article 3 of the European Convention of Human Rights (ECHR).[xxiv] The HRA 1998 was yet another obstacle because it made Convention rights far more central in UK courts. This is a subject a different conversation all together.[xxv]

In *Belmarsh* - probably the most significant human rights case yet decided by the UK courts,[xxvi] the House of Lords quashed the 2001 Derogation Order and made a declaration that s. 23 of the 2001 Act was incompatible with Articles 5 and 14 of ECHR. While the majority of the judges agreed that the Derogation Order was lawful, Lord Hoffmann dissented. He said 'the real threat to the life of the nation… comes not from terrorism but from laws such as these.'[xxvii]

WHAT ARE HUMAN RIGHTS?

According to Jacques Maritain, the true philosophy of the rights of the human person is based upon the idea of natural law.[xxviii] The idea that human rights are universal and exist independently of legal enactment as justified moral norms, and other such postulations are frequently topics of legal and philosophical debates. Yet 'human rights do not really resolve the tension between competing interests and various visions of how the world should be; rather, human rights ideas provide the vocabulary for arguing about what interests should prevail and how best to achieve the ends we have chosen.'[xxix]

Rights are inherent to all human beings, whatever their nationality, culture, ethnicity, sex, language, colour, religion, political affiliation, economic or any other status. They have been said to be "interrelated, interdependent and indivisible; therefore, the improvement of one right facilitates the advancement of the others. Likewise, the deprivation of one right adversely affects the others."[xxx]

On a supra-national level, human rights are international norms that help protect all people everywhere from severe political, legal and social abuses.[xxxi] These rights exist in morality and in law at national and international levels.[xxxii] Historical sources for bills of rights include the

Magna Carta (1215), the English Bill of Rights (1689), the French Declaration of the Rights of Man and the Citizen (1789), and the Bill of Rights in the United States Constitution (1791). The main sources of the contemporary conception of human rights are the United Nations Universal Declaration of Human Rights (1948) and the many human rights documents and treaties from international organisations like the Council of Europe, the African Union and the Organisation of American States. These legal instruments have been the mainstay of rights protection through the centuries in conjunction with common law principles. Terrorist related cases like *Belmarsh* and others, and the impact of the HRA 1998 however introduced a whole new attitude to judicial rights protection and which in some respects led to some backlash.[xxxiii]

BACKGROUND TO THE BELMARSH CASE

Following large scale terrorist attacks on the USA on September 11, 2001, the UK government concluded that there was a public emergency threatening the life of the nation within the meaning of article 15 of the ECHR.[xxxiv] Accordingly, it made the Human Rights Act 1998 (Designated Derogation) Order 2001,[xxxv] designating the UK's proposed derogation, under article 15, from the right to personal liberty guaranteed by article 5(1) of the Convention, as scheduled to the Human Rights Act 1998.[xxxvi] Also, section 23 of the Anti-terrorism, Crime and Security Act 2001,[xxxvii] provided for the detention of non-nationals if the Home Secretary believed that their presence in the UK was a risk to national security and suspects that they were terrorists who, for the time being could not be deported because of fears for their safety or other practical considerations. The government insisted that detainees were free to leave the UK at any time if they could find a country willing to accept them, and it undertook to continue actively to seek safe destinations for their compulsory removal.

The nine appellants who were detained under the 2001 Act appealed to the Special Immigration Appeals Commission (SIAC). The Commission concluded that there was a public emergency threatening the life of the nation and that, therefore, the government has been entitled under article 15 to derogate from its obligations under the ECHR to the extent strictly required by the exigencies of the situation, which it had done. The European Commission however, quashed the 2001 Order and granted a declaration that section 23 of the 2001 Act was incompatible with articles 5 and 14 of the ECHR in so far as it permitted the detention of suspected terrorists in a

way which discriminated against them on the ground of nationality, since there were British suspected terrorists who could not be detained under those provisions.

The Court of Appeal allowed the Secretary of State's appeal and dismissed the appellant's cross-appeals. The detainees appealed to the House of Lords, which assembled a special nine judge panel (rather than the usual five) to hear the case due to its constitutional importance. The House of Lords held by a majority (eight votes to one) first, that the derogation from article 5 of the ECHR was unlawful by reference to the criteria in article 15 ECHR and secondly, that, section 23 of the 2001 Act was incompatible with articles 5 and 14 of the ECHR. As a consequence, the House of Lords made a declaration of incompatibility under section 4 of the Human Rights Act 1998, and allowed the appeals.

LEGAL ISSUES RAISED BY THE BELMARSH CASE

Two legal issues were essentially involved in the *Belmarsh* case. First, assuming that the measures adopted by the government violated article 5 of the ECHR, was the derogation from article 5 lawful? Secondly, did the measures discriminate unjustifiably against the detainees on grounds of their nationality or immigration status?

On the first issue, the SIAC accepted that there was a public emergency threatening the life of the nation as required by article 15.1 of the ECHR. On the second issue, it decided that the measures discriminated unlawfully, because they applied only to people without a right to abode in the UK, and that class of people did not correspond to the class of suspected international terrorists. The SIAC therefore held that there had been a violation of article 14 of the ECHR taken together with article 5, and made a declaration of incompatibility under section 4 of the Human Rights Act 1998.[xxxviii] This move by the court raised questions around parliamentary sovereignty in the 1998 Act, as is obvious from pundits' postulations.

For Professor Bradley, "the HRA 1998 in an ingenious way manages to give us the new and tempting cake of 'judicial review of primary legislation' while retaining for our delectation, the old cake of parliamentary sovereignty."[xxxix] The Human Rights Act 1998 preserves parliamentary sovereignty but requires the court to ensure compliance with international human rights guaranteed by the ECHR.[xl] The courts are themselves charged by the Human Rights Act with responsibility from which they cannot abdicate, for ensuring proper protection of the

Convention rights.[xli] Though a declaration of incompatibility (as in *Belmarsh*) tends to undermine the moral legitimacy of the legislation and leads to pressure on the government to introduce amending legislation,[xlii] it does not however, make the legislation invalid and does not affect people's legal rights and liabilities.[xliii]

While the power to make a declaration of incompatibility is undoubtedly unusual, it is not entirely non-legal.[xliv] Thus, Lord Scott[xlv] was quick to pointed out that a declaration of incompatibility makes it an odd exercise of judicial power, which he regarded as inescapably political, albeit one that parliament has thrust on judges through the Human Rights Act 1998.[xlvi] Notably, a declaration of incompatibility establishes that parliament has breached a legal norm, although parliament does not thereby act unlawfully. The courts are declaring a type of legal right even if they cannot enforce it. Yet the inability to give an effective remedy in such a case might be seen as weakness in the structure of the human Rights Act 1998.[xlvii]

THE COURT'S REASONING

The appellants argued that derogation from the Convention rights within the meaning of article 15 of the ECHR[xlviii] is only valid for present purposes where there is a public emergency which threatens the life of the nation and where the measures chosen to address that threat are limited to the extent strictly required by the exigencies of the situation and are not inconsistent with the state's other obligations under international law.[xlix] Thus, a major consideration for the court was the determination of whether there was a 'public emergency threatening the life of the nation.' Lord Hoffmann was of the view that article 15 of the ECHR, the Human Rights Act 1998 and the UK's constitutional traditions alike showed that it was permissible to derogate from the right to be free from deprivation of liberty only in very exceptional circumstances.[l] He took a narrower approach to the kind of danger that amounted to a threat to the life of the nation, dismissing the government's argument that under the ECHR and HRA 1998, it was possible to derogate from the ECHR's general provisions. It was his belief that the "threat to the life of the nation" test was not fulfilled. In his words:

> This is a nation which has been tested in adversity, which has survived physical destruction and catastrophic loss of life. I do not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation... Terrorist violence, serious as it is, does not threaten our institutions of government or

> our existence as a civil community.[li] ...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.[lii]

The other eight Law Lords disagreed with Hoffmann with varying degrees of uncertainty. Lord Bingham, with whom Lord Nicholls, Baroness Hale and Lord Carswell agreed,[liii] gave the leading speech in which he stated that the onus was on the appellants to persuade the House that the Court of Appeal and the SIAC had erred in law when deciding that there was a public emergency threatening the life of the nation.[liv] He decided but with some reservation that the appellants have not discharged that burden.

Examining Strasbourg case-law on the matter, Lord Bingham noted that the longer an exceptional situation of emergency was said to continue, the more stringently it had to be scrutinised.[lv] The learned Justice also observed that no other state had found it necessary to derogate from the Convention rights in order to protect against the Al-Qaeda threat,[lvi] and that the Joint Committee on Human Rights (JCHR) in its earlier report had not been satisfied that there was a public emergency threatening the life of the nation.[lvii] In its 2003-04 report, JCHR also concluded that it did not accept that there was one.[lviii]

Lord Bingham decided against the appellants on this point because: (1) it has not been shown that the SIAC had misdirected themselves in deciding that there was a public emergency threatening the life of the nation;[lix] (2) he considered that the extent of the threat to the UK from Al-Qaeda activities after the attacks on 9/11 were not very different in scope from those which the European Court of Human Rights had held to satisfy this part of the article 15 test;[lx] and (3) that "the more purely political (in a broad or narrow sense) a question is, the more appropriate it will be for political resolution and the less likely it is to be an appropriate matter for judicial decision…. Conversely, the greater the legal content of any issue, the greater the potential role of the court …"[lxi]

In light of the foregoing, the margin of discretion for ministers indicated an area which the courts would seek to exercise judicial review powers. This is well highlighted in the *Farrakhan*[lxii] case in which the High Court quashed a 16-year ban on the Nation of Islam leader, Louis Farrakhan. The government argued that Farrakhan could threaten public order if allowed to enter the UK on the grounds that he had expressed racist and anti-Semitic views. The Court of Appeal however, overturned the High Court's decision that the controversial American political leader should be allowed to enter the UK. Three Court of Appeal judges headed by

the Master of the Rolls, Lord Phillips, backed the judgement of the Home Secretary. The judges said the Home Secretary's ban "did not involve a disproportionate interference with freedom of expression."[lxiii] In this regard, the judiciary continues to display its desire to exercise judicial review powers in this new found constitutional niche.

The question whether the circumstances in *Belmarsh* amounted to a public emergency threatening the life of the nation was at the political, rather than the legal end of the spectrum, and therefore, a matter in which the views of the other organs of government had potential great weight. Thus, Lord Nicholls was emphatic that it was for the executive to decide how to respond to terrorism. He held that "all courts are acutely conscious that the government alone is able to evaluate and decide what counter-terrorism steps are needed and what steps will suffice. Courts are not equipped to make such decisions, nor are they charged with that responsibility."[lxiv] The other judges were however, more concerned with executive restraint in public policy matters. The executive must therefore, play its role with a conscious regard for the legality and proportionality of their actions. This was the thrust of their reasoning.

THE QUESTION OF PROPORTIONALITY

The defining characteristics of a "public emergency threatening the life of the nation" are that: (a) the state of affairs relied on is temporary and exceptional, (b) the circumstances are grave enough to threaten the organized life of the entire community, (c) the emergency is actual or imminent in that the threatened danger is about to occur, and (d) the threat is to the life of the nation which seeks to derogate.[lxv] In the court's view, if however, there is such an emergency, the enactment of Part 4 of the Anti-terrorism, Crime and Security Act 2001 and the conferral power on the executive to indefinitely detain foreign nationals without trial is not 'strictly required by the exigencies of the situation' within the meaning of article 15. The applicable test requires the court to assess whether the legislative objective is sufficiently important to justify limiting a fundamental right, whether the measures designed to meet that objective are rationally connected to it and whether the means used to impair the right go no further than necessary to achieve the objective.[lxvi] This is the mainstay of the proportionality argument.

For Professor Feldman then, although proportionality can embody different standards of review in different circumstances, it makes linguistic sense to say, quoting Lord Walker, that "strictly required by the exigencies of the situation" means something much stronger than

"proportionate to the exigencies of the situation."[lxvii] All the judges in *Belmarsh* who approached the question of 'whether the measures adopted by the government were strictly required by the exigencies of the situation' held that the burden was on the Secretary of State to convince the courts that the measures were strictly required, though the learned justices' approaches differed in some respects. Thus for Lord Bingham, it was a question of proportionality, and Lord Carswell agreed.[lxviii]

Lord Scott on his part, held that the Home Secretary "should at least have to show that monitoring arrangements or movement restrictions less severe than incarceration in prison would not suffice."[lxix] This means, as Feldman said, 'questions of proportionality must accordingly be treated as matters of fact not of law, or mixed law and fact.'[lxx] To hold that they are questions of fact with which appellate courts should not concern themselves would emasculate the protection for Convention rights under the Human Rights Act and the ECHR. Thus, in holding that they had to defer to the executive on the questions of proportionality, the SIAC and the Court of Appeal had erred in law.[lxxi]

In view of this general approach, it is remarkable that Lord Bingham followed the classic structure of making a proportionality assessment:[lxxii] (1) was there a legislative objective sufficiently important to justify limiting a fundamental right? (2) Were the measures rationally designed to meet the legislative objective? (3) Were the means used no more intrusive on rights than necessary to achieve the legitimate objective? He affirmed that the right to liberty is fundamental, and any restriction of it must attract strict scrutiny by the judges and such scrutiny contravenes no democratic or constitutional principle.[lxxiii]

As against the Attorney-General's previously argued orthodox position that the executive was entitled to a wide discretionary area in judging national security matters, and that there was a danger of judicial supremacy over democratic decision-makers if the judges applied a standard of strict scrutiny to such a decision, Lord Bingham asserted his firm belief in judicial responsibility for upholding the rule of law regarding human rights cases, even in times of military or terrorist threat. He said:

> It follows from this analysis that the appellants are in my opinion entitled to invite the courts to review, on proportionality grounds, the Derogation Order and the compatibility with the Convention of Section 23 and the courts are not effectively precluded by any doctrine of deference from scrutinising the issues raised. It also

> follows that I do not accept the full breadth of the Attorney General's submissions. I do not in particular accept the distinction which he drew between democratic institutions and the courts. It is of course true that the judges in this country are not elected and are not answerable to Parliament. It is also of course true, as pointed out in paragraph 29 above, that Parliament, the executive and the courts have different functions. But the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself. The Attorney General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision-making as in some way undemocratic... The 1998 Act gives the courts a very specific, wholly democratic, mandate.[lxxiv]

As Professor Jowell put it, "The courts are charged by Parliament with delineating the boundaries of a rights-based democracy."[lxxv] This means that despite concerns about parliamentary sovereignty, the court did not shy away from putting down its feet on a human rights matter such as was presented in the *Belmarsh* case.

COMPATIBILITY OF PART 4 OF THE ANTI-TERRORISM, CRIME AND SECURITY ACT 2001 (ATCSA 2001) WITH ARTICLE 14 EUROPEAN CONVENTION ON HUMAN RIGHTS (ECHR)

Treating like cases alike is a basic principle of democratic constitutions and likewise a general axiom of rational behavior.[lxxvi] Thus, in the *Belmarsh* case, the Lord Justices had to decide whether the ATCSA's detention provision was compatible with article 14 ECHR since the UK could have derogated from article 14 but did not do so. Lord Bingham copiously noted that both nationality and immigration status fall within the words 'or other status' in article 14 ECHR and article 26 of the International Covenant on Civil and Political Rights (ICCPR). Even though nationality is not an expressly prohibited ground for treating people differently under article 14 ECHR, strong reasons would be needed to justify treating people differently on grounds of their nationality.[lxxvii] The home Secretary was also bound by the Race Relations Act 1976, ss. 3(1) and 19(b)(1) not to discriminate on such grounds.[lxxviii]

Lord Bingham accepted that the differential treatment cannot be justified factually or on the basis that aliens, unlike citizens, have no right to be in the UK. The distinction in legal status between alien and citizen, while permissible in terms of immigration control is impermissible in the context of national security in respect of powers of detention.[lxxix] He rejected the argument that imprisoning UK nationals as well as foreign nationals would have been worse than just imprisoning foreign nationals. Any discriminatory measure affects one group more than another, and cannot be justified on the ground that it would have been worse to impose the measure on everybody.[lxxx]

The Attorney-General had argued that international law and the ECHR both allow differential treatments for foreign nationals. This argument however, was not sustainable since none of the international instruments individually or cumulatively suggests that different treatments on grounds of nationality or immigration status in the security context is in accordance with international law.[lxxxi] Differential treatment on grounds of nationality and immigration status is prohibited by article 14.[lxxxii] By choosing immigration control as the means of addressing the threat, the Secretary of State had excluded British nationals who are a significant subset of those posing the relevant risk.

Accordingly, Lord Hoffmann stated: "Freedom from arbitrary arrest and detention is a quintessentially British liberty, enjoyed by the inhabitants of this country when most of the population of Europe could be thrown into prison at the whim of their rulers."[lxxxiii] Baroness Hale therefore concluded that "a democracy value everyone equally. ...it will not be right to lock up only gay, black, disabled or female suspected international terrorists; no more can it be right to lock up only foreign ones."[lxxxiv]

IMMEDIATE EFFECT OF THE BELMARSH CASE

One of the immediate fallouts of the *Belmarsh* case was that the Prevention of Terrorism Act 2005 (PTA 2005) proximately repealed Part 4 of the ATCSA 2001. Instead of a detention regime, the 2005 Act established 'Control Orders,' which in themselves may prohibit or restrict a very wide range of everyday activities that may significantly affect the person's ability to live a normal life.[lxxxv] The Secretary of State may make a Control Order where there is reasonable ground for suspecting that the individual is involved in terrorism related activity. These could be made irrespective of the suspected terrorist's nationality. They were meant to be imposed

only in serious cases and subject to appeal to SIAC. The Home Secretary believed that these changes were justified in the interests of national security.[lxxxvi] Whereas they would raise more questions than answers and ignite further controversies.

The government had hoped that the new non-derogating Control Orders will allow considerable scope to control people's freedom of action without actually reaching the point where they are deprived of their liberty in violation of article 5 ECHR. There were reasons for concern at the time if the government would succeed. This was because the range of requirements that can be imposed by a Control Order are potentially far-reaching that it could prevent a person from living any sort of normal life.[lxxxvii] Even if they retain enough liberty to meet Article 5's requirements, the conditions are likely to engage the right to respect for private life under ECHR article 8, and could well be held to be incompatible with it.[lxxxviii]

Unsurprisingly, the Control Order regime led to a large number of legal challenges and several House of Lords decisions. For example, in the *JJ*[lxxxix] case, the House of Lords agreed with the Court of Appeal that a non-derogating Control Order that prevented a person from leaving a one-bedroom flat for eighteen hours out of twenty-four hours a day and imposed very restricted controls that effectively meant that the person's life was wholly controlled by the Home Office, was contrary to article 5.[xc] Similarly, the House of Lords unanimously decided that evidence obtained by torture cannot be used by the SIAC. This means that the more the legislation interferes with the fundamental human rights of an individual, the closer the judicial scrutiny would be applied. This is further evident from *Her Majesty's Treasury v Ahmed*[xci] case of 2010 where the House of Lords held that article 4 of the Terrorism Control Order 2004 was *ultra vires* and allowed the appeals of Ahmed and others.

Over and above the immediate legal effect of the *Belmarsh* case, the constitutional effect is even more far reaching. Unlike the judiciary's attitude of total deference as displayed in the *Liversigde* v *Anderson*[xcii] case for example, the *Belmarsh* case demonstrated that whatever measures taken by the executive in matters of security will be reviewed by the courts for their legality and proportionality. Post *Belmarsh* therefore, there has been a kind of institutional dialogue, a special interaction taking place between the executive and the judiciary. It was the novel beginning of the court's involvement in scrutinizing matters of national security and the demand for the rule of law in such cases. The judgment signifies the balance between security and lawfulness even in times of emergency. This was hailed as a positive development and a constitutional point scored in favour of democracy. However, it remains an ongoing debate.

What to do with suspects who can neither be charged nor deported (due to article 3 ECHR)[xciii] remains an open question. Thus, not much has changed in this regard since after *Belmarsh.*

Terrorism Prevention and Investigation Measures (TPIMS) which were introduced in January 2012 was an attempt to provide possible answers. TPIMS are placed on terror suspects whom officials decide can neither be charged nor deported by the Home Secretary. The Home Secretary can consider putting a TPIM in place after an MI5 assessment[xciv] of the suspect and must "reasonably believe" he or she is involved in terrorist-related activities. The measures include electronic tagging, reporting regularly to the police and facing "tightly defined exclusion from particular places, and the prevention of oversea travel." A suspect must live at home and stay there overnight, possibly for up to 10 hours. However, they can apply to the courts to stay elsewhere. The suspect is also allowed to use a mobile phone and the internet, to work and study, subject to conditions.[xcv] TPIMS replaced the controversial Control Orders which were much more restrictive in that suspects could be relocated to a town far from their home, face 16-hour curfews and be banned from meeting named individuals and using mobile phones and the internet. As with TPIMS, they were ordered to wear electronic tags and report regularly to the police.

There are however questions as to the robustness of the electronic tags. The 2013 case of a terror suspect, subject to TPIMS who went missing after changing into a burka at a West London Mosque further highlights these questions. Earlier in December 2012, another terrorist suspect subject to TPIMS (Ibrahim Magag) vanished after reportedly hiring a black cab. He has not been seen since. These disappearances within less than a two-year bracket made people wonder if TPIMS were actually a remedy. Might they be too loose perhaps?

In October 2013, the prosecution of three men accused of tampering with their tags were dropped when it emerged they might have inadvertently come loose.[xcvi] Furthermore, in the first official evaluation of the TPIM, in March 2013, David Anderson,[xcvii] suggested that the government needed a higher standard of proof of threat before it applied to the courts for an order.[xcviii] There remains also the wider question of how the police and MI5 will monitor suspects once the TPIMS expire after five years.

SIGNIFICANCE OF THE BELMARSH CASE

In the words of Mary Arden:

> The decision in *Belmarsh* is a landmark decision that will be used as a point of reference by courts all over the world in decades to come, even when the age of terrorism has passed. It is a powerful statement by the highest court in the land of what it means to live in a society where the Executive is subject to the rule of law. The government, and even in times when there is a threat to national security, must act strictly in accordance with the law.[xcix]

In *Belmarsh*, there was a welcome reassertion of the fundamental importance of the right to be free from deprivation of liberty, whether one is a British national or a foreigner without right of abode.[c] Their Lordships made a strong constitutional point about judges' responsibilities and competence. They reasserted the courts' role in conducting judicial review to protect freedom, answering the criticism that such a role is anti-majoritarian and anti-democratic by presenting it both as an essential part of liberal democracy under the rule of law and as a task forced on the courts by Parliament in the Human Rights Acts 1998.[ci] In this case, it is striking to see a careful focusing of the judicial eye on the various aspects of the articles 14 and 15 HRA assessments, applying subtly different persuasive burdens and intensities of review at each point.[cii]

Having declared the detention in *Belmarsh* to be incompatible with human rights, the courts, abetted by an active legal profession, knocked many rough edges off the Control Order system.[ciii] They demonstrated the wisdom in the UK's constitutional settlement of a Human Right Act that gives them the power to warn Parliament but not to override it.[civ]

Historically, the 9/11 attacks dramatically changed the mind-set of governments and national leaderships and had a profound influence on leader's approaches to risks and threats. For a man like Tony Blair,[cv] the crucial thing after 9/11 was "the calculus of risk changed."[cvi] He made it clear that the UK and the US could no longer tolerate the risk posed by countries that had or wanted to acquire, weapons of mass destruction (WMD), whether they were linked to terrorist groups or not.[cvii] This was because WMD in the hands of a terrorist group like Al-Qaeda would signal doom for the citizenry. The primary consideration post 9/11 was therefore to send an absolutely powerful message – "if you were a regime engaged in WMD, you had to stop."[cviii] However, two decades post 9/11 and close to two decades after *Belmarsh*, the question could

be asked: was the desperation post 9/11 justified? Were the measures adopted by the government proportionate and non-discriminatory? The judges found them not to be, and had the boldness to assert same; hence the import of the case.

RECOMMENDATION

Again, owing to the events of 9/11 and other such attacks, academics like Lucia Zedner have advocated pre-emptive strategies which will involve a shift towards a pre-crime society where 'the possibility of forestalling risks competes with and often takes precedence over responding to wrongs done,' and 'where the post crime orientation of criminal justice is increasingly overshadowed by the pre-crime logic of security.'[cix] This idea also includes giving the police more powers to deal with activities and associations they suspect to be pre-terrorist. Pre-crime powers therefore help the police whose aim is to anticipate risk and eliminate or at least minimise the harm before it materialises, in the performance of that duty.[cx] This is an approach that is being advocated since the eruption of terrorist threats from 9/11 and one that should be adopted in the current situation knowing that prevention is better than cure.

I am aware that the suggested approach however, raises both ethical and legal questions around detention without trial, increased surveillance, profiling and liberty.[cxi] How the executive balances this pre-emptive approach with the liberty of those who are most likely to be victimised by it remains a big question? Andy Hayman[cxii] on his part, tries to justify this approach by positing that 'public safety always comes first, and the result is that there are occasions when suspected terrorists are arrested at an early stage in their planning and preparation than would have been in the past. Public safety demands early intervention...'[cxiii] However, if this approach deprives people of their right not to be arbitrarily arrested and indefinitely detained, it remains unacceptable.

CONCLUSION

Post *Belmarsh*, one thing was clear: that the judiciary had assumed a decisive role in the evolving constitutional landscape of the UK, and it was no longer a legislative field day where the executive could enact measures without absolute regard to their legality and proportionality. The role of the courts in this context remains an undeniably decisive factor. If the executive

does not think of the legality of measures being put in place at any given time, the courts will make them think. We must keep in mind that fighting terrorism implies long-term measures with a view to preventing the causes of terrorism, by promoting, in particular, cohesion in our societies and a multi-cultural and inter-religious dialogue.[cxiv] Fathali Moghaddam[cxv] was therefore, right when he stated that the best long term policy against terrorism is prevention which is made possible by nourishing contextualised democracy on the ground floor (grassroots).[cxvi] Instances like Abu Ghraib and Guantanamo Bay, and methods like waterboarding, reinforce the radical approach which counter-terrorism laws are meant to eschew. If anti-terror measures are increasing grievance, we are doing something wrong.

It has been suggested that "the 'war on terror' is yet another example of open-ended state of emergency designed to protect the people from allegedly imminent terrorist attacks.[cxvii] However, the use of the word 'war' to describe counter terrorist efforts carries with it domestic implication for criminal justice and legal systems, where its meaning has been manipulated to 'provide an escape route from the constraints of the law.'[cxviii] This manner of evading standard legal procedure does not play well for the rule of law in a renowned democracy like the UK, much less any society. Thus, we must be cautious about the development of counter terror legislation working outside the criminal justice system and must resist a world in which we justify violations of human rights ***with*** human rights.[cxix] The very dangerous false friend is the whole idea of necessary evil. We risk our culture if we collude in the idea that our culture is so valuable that we can depart from it in order to secure it."[cxx]

The destructive effects of terrorism are undeniable, but it needs not upset constitutional balance. The protections afforded by the constitution must continue to be fostered and evolve, and a healthy culture of executive restraint must be encouraged even in the face of public emergencies. It is of course true that judges are not elected but their function of interpreting and applying the law is recognised as a cardinal feature of modern democracy and a cornerstone of the rule of law. We were reminded by the Law Lords in *Belmarsh* that the courts are a restraint on executive excesses. Even in times of threat to national security, the government must act in strict accordance with the law bearing in mind as Lord Hope said in a 2012 BBC documentary, 'without the courts, the extent of the invasion of liberty will widen, people will simply disappear and freedom of the press will be trampled on.'[cxxi] As British society grows more diverse, it is envisaged that judicial interventions would be more commonplace in favour

of rights protection, thereby moving the constitution more towards a legal constitution. But the axe currently sitting at the base of the HRA certainly suggests otherwise.

ENDNOTES

[i] A writ requiring a person under arrest to be brought before a judge or into court, especially to secure the person's release unless lawful grounds are shown for their detention.
[ii] <http://www.interactioncouncil.org/human-rights-and-human-responsibilities-age-terrorism-0> accessed January 14, 2022.
[iii] Conor Gearty, Professor of human rights law at the London School of Economics, challenges this assumption in his 2006 Oxford Amnesty Lecture, arguing that we actually live in "the age of anti-terror, not the age of terror. <http://www.lse.ac.uk/humanRights/articlesAndTranscripts/Oxford_Amnesty_Lecture.pdf> accessed October 14, 2022.
[iv] An independent international organization that mobilises the experience and energy of a group of statesmen who have held the highest office in their own countries. They develop recommendations and practical solutions for the political, economic and social problems confronting humanity.
[v] InterAction Council <http://www.interactioncouncil.org/human-rights-and-human-responsibilities-age-terrorism-0> accessed January 14, 2022.
[vi] Ibid.
[vii] *A and Others* v *Secretary of State for the Home Department* [2004] UKHL 56.
[viii] The European Convention for the Protection of Human Rights, art 15, para 10.
[ix] *A and Others* v *Secretary of State for the Home Department* [2004] UKHL 56.
[x] Mary Arden, 'Human Rights in the Age of Terrorism' (2005) 121 LQR 604.
[xi] *Liversidge v Anderson* [1942] AC 206.
[xii] Ibid.
[xiii] Andrew Le Sueur, *Public Law* (OUP, Oxford 2010) p. 834.
[xiv] Mary Arden, 'Human Rights in the Age of Terrorism' (2005) 121 LQR 604.
[xv] Ibid.
[xvi] Ibid.
[xvii] Ibid.
[xviii] Over 50 worshippers in a Catholic Church in Owo, southwestern Nigeria were killed during a Mass on Pentecost Sunday 2022 by suspected members of the ISWAP terrorist group. See https://www.bbc.com/news/world-africa-61707872 > accessed August 10, 2022.
[xix] See https://www.bbc.com/news/world-africa-14677957> accessed August 30, 2022.
[xx] https://www.unhcr.org/nigeria-emergency.html> accessed August 30, 2022.
[xxi] See John Sunday Ojo (2020) Governing "Ungoverned Spaces" in the Foliage of Conspiracy: Toward (Re)ordering Terrorism, from Boko Haram Insurgency, Fulani Militancy to Banditry in Northern Nigeria, African Security, 13:1, 77-110, DOI: 10.1080/19392206.2020.1731109> accessed September 1, 2022.
[xxii] Tony Wright, British Politics: *A Very Short Introduction* (OUP, Oxford 2003) p. 104.
[xxiii] [1996] 23 EHRR 413.
[xxiv] Article 3 of the ECHR prohibits torture, and "inhuman or degrading treatment or punishment." There are no exceptions or limitations on this right.
[xxv] So much so that the UK Parliament is about to jettison the HRA 1998 and replace it with what appears to be 'a more rational Bill of Rights.' Consultations to that effect are currently ongoing.
[xxvi] Andrew Le Sueur, *Public Law* (OUP, Oxford 2010) p. 829.
[xxvii] *A and Others* v *Secretary of State for the Home Department* [96].
[xxviii] Jacques Maritain, *The Rights of Man and The Natural Law* (First published 1942, Ignatius Press, San Francisco 2011) p. 106.
[xxix] Andrew Clapham, *Human Rights; A very Short Introduction* (OUP 2007) Preface.
[xxx] United Nations, Office of the High Commissioner for Human Rights. <http://www.ohchr.org/EN/issues/page/whatareHumanRights.aspx-> accessed 12 November 2013.
[xxxi] Stanford Encyclopedia of Philosophy <http://plato.stanford.edu/entries/right-human/> accessed November 12, 2013.

[xxxii] Ibid.
[xxxiii] Parliament now intends to revise and reform the "flaws" identified, and replace the Human Rights Act with a modern Bill of Rights, one which reinforces freedoms under the rule of law, but also provides a clearer demarcation of the separation of powers between the courts and Parliament.
[xxxiv] The ECHR, article 15 gives member states a limited right to derogate from some articles of the Convention (including article 5, although not article 3).
[xxxv] The derogation related to article 5(1)(f), of the ECHR.
[xxxvi] It was first provided by paragraph 2(2) of Schedule 3 to the Immigration Act 1971 that the Secretary of State might detain a non-British national pending the making of a deportation order against him.
[xxxvii] Section 23(1) is the provision that is most directly challenged in this appeal.
[xxxviii] *A and Others* v *Secretary of State for the Home Department* [2004] UKHL 56.
[xxxix] A. W. Bradley, 'Relations Between Executive, Judiciary and Parliament: An Evolving Saga?' (2008) Public Law 3.
[xl] Human Rights Act, Sections 4 and 6.
[xli] See *International Transport Roth Gmbh v Secretary of State for the Home Department* [2003] QB 728 [26-29], [54]; Opinion 1/2002 of the Council of Europe Commissioner for Human Rights (Comm. DH 92002) 7, 28 August 2002; Eighteenth Report (Session 2003-2004) of the Joint Parliamentary Committee on Human Rights (HL Paper 158, HC 713), 21 July 2004, paras 15-23.
[xlii] David Feldman, 'House of Lords on Anti- Terrorism, Crime and Security Act 2001 in *A and Others v Secretary of State for the Home Department*. Terrorism, Human Rights and their Constitutional Implications' (2005) ECLR 2.
[xliii] Ibid. p 3.
[xliv] David Feldman, 'House of Lords on Anti- Terrorism, Crime and Security Act 2001 in *A and Others v Secretary of State for the Home Department*. Terrorism, Human Rights and their Constitutional Implications' (2005) ECLR 2.
[xlv] One of the Law Lords in the *Belmarsh* case.
[xlvi] *A and Others* v *Secretary of State for the Home Department* [142] - [145]
[xlvii] Ibid.
[xlviii] The European Convention for the Protection of Human Rights.
[xlix] *A and Others* v *Secretary of State for the Home Department* [142] - [145].
[l] Ibid. [88] - [90]
[li] Ibid. [96]
[lii] Ibid. [97]
[liii] Ibid. [85], [219], [240]
[liv] Ibid. [26]
[lv] Ibid. [17] - [18]
[lvi] Ibid [23]
[lvii] JCHR, Second Report of 2001-02, Anti-terrorism, Crime and Security Bill, HL paper 37, HC 372, para 30.
[lviii] JCHR, Sixth Report of 2003-04, Anti-terrorism, Crime and Security Act 2001: Statutory Review and Continuance in Force of Part 4, HL Paper 38, HC 381, para 34.
[lix] *A and Others* v *Secretary of State for the Home Department* [27]
[lx] *Lawless v Ireland* (1961) 1 EHRR 15, [28] - [29] (Lord Bingham).
[lxi] *A and Others* v *Secretary of State for the Home Department* [36]
[lxii] Farrakhan, *R (on the application of) v Secretary of State for the Home Department* [2002] EWCA Civ 606.
[lxiii] Ibid.
[lxiv] Ibid [79].
[lxv] See 'The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights' (1985) 7 HQR 1, para 39.
[lxvi] See *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Land and Housing* [1999] 1 AC 69.
[lxvii] David Feldman, 'House of Lords on Anti- Terrorism, Crime and Security Act 2001 in *A and Others v Secretary of State for the Home Department*. Terrorism, Human Rights and their Constitutional Implications' (2005) ECLR 2, p. 5.
[lxviii] *A and Others* v *Secretary of State for the Home Department* [30], [240]
[lxix] *A and Others* [76], [155]. These criticisms of Part 4 may make it difficult for the Government to seek to meet human rights considerations simply by extending Part 4 to UK nationals.

[lxx] David Feldman, 'House of Lords on Anti- Terrorism, Crime and Security Act 2001 in *A and Others v Secretary of State for the Home Department*. Terrorism, Human Rights and their Constitutional Implications' (2005) ECLR 2, p. 6.
[lxxi] *A and Others* v *Secretary of State for the Home Department* [44].
[lxxii] See for example, *De Freitas v The Permanent Secretary* [1998] UKPC 30.
[lxxiii] *A and Others* v *Secretary of State for the Home Department* [2004] UKHL.
[lxxiv] Ibid. [42].
[lxxv] Jeffrey Jowell, 'Judicial Deference: Servility, Civility or Institutional Capacity?' (2003) PL 592, 597. See also Clayton, 'Judicial Deference and 'Democratic Dialogue': The Legitimacy of Judicial Intervention Under the Human Rights Act 1998' [2004] PL 33.
[lxxvi] Per Lord Bingham in *A and Others* [46], quoting Lord Hoffmann in *Matadeen v Pintu* [1999] 1 AC 98, P.C. at 109.
[lxxvii] *Gaygusuz v Austria* [1996] 23 EHRR 364, ECtHR.
[lxxviii] *A and Others* v *Secretary of State for the Home Department* [49].
[lxxix] Ibid [54]; See also *R v Secretary of State for the Home Department, ex parte Khawaja* [1984] AC 74.
[lxxx] *A and Others* v *Secretary of State for the Home Department* [68]
[lxxxi] Ibid. [68] - [70]
[lxxxii] *Gaygusuz v Austria* [1996] 23 EHRR 364, ECtHR.
[lxxxiii] *A and Others* v *Secretary of State for the Home Department* [88]
[lxxxiv] Ibid. [236] - [238]
[lxxxv] Prevention of Terrorism Act s.1 (4) - (7).
[lxxxvi] Weekly Hansard, Issue No. 2020, January 26, 2005, col.305.
[lxxxvii] David Feldman, 'House of Lords on Anti- Terrorism, Crime and Security Act 2001 in *A and Others v Secretary of State for the Home Department*. Terrorism, Human Rights and their Constitutional Implications' (2005) ECLR 2, p. 2.
[lxxxviii] Ibid.
[lxxxix] *Secretary of State for the Home Department v JJ* [2007] UKHL 45.
[xc] *Secretary of State for the Home Department v JJ* [2006] EWCA Civ 1141.
[xci] *Her Majesty's Treasury v Ahmed* [2010] UKSC 2.
[xcii] *Liversidge v Anderson* [1942] AC 206.
[xciii] Article 3 of the ECHR prohibits torture, and "inhuman or degrading treatment or punishment." There are no exceptions or limitations on this right.
[xciv] MI5 is The Security Service responsible for protecting the United Kingdom against threats to national security. It was established in 1909 as the Secret Service Bureau of the United Kingdom.
[xcv] TPIMS expires after a maximum of two years unless new evidence emerges of involvement in terrorism. But the Changes to the Terrorism Prevention and Investigation Measures (TPIM) Act 2011 increased the maximum duration of a TPIM from two years to five years. Breach of a TPIM can lead to jail.
[xcvi] <http://www.bbc.co.uk/news/uk-24803069> accessed February 26, 2022.
[xcvii] A senior lawyer and the government's independent reviewer of terror legislation.
[xcviii] BBC <http://www.bbc.co.uk/news/uk-24803069> accessed February 26, 2022.
[xcix] Mary Arden, 'Human Rights in the Age of Terrorism' (2005) 121 LQR tyr604, 614.
[c] David Feldman, 'House of Lords on Anti- Terrorism, Crime and Security Act 2001 in *A and Others v Secretary of State for the Home Department*. Terrorism, Human Rights and their Constitutional Implications' (2005) ECLR 2. p. 9
[ci] Ibid.
[cii] Ibid.
[ciii] David Anderson, Control Orders in 2011; Final Report of the Independent Reviewer on the Prevention of Terrorism Act 2005 (The Stationary Office Ltd, London 2012) 3.82 - 3.83.
[civ] David Anderson, 'Shielding the Compass: How to Fight Terrorism Without Defeating the Law' (2013) EHRLR Issue 3, 245.
[cv] Former UK Prime Minister.
[cvi]< http://www.theguardian.com/uk/2010/jan/29/blair-defence-september-11-iraq> accessed August 22, 2022.
[cvii] Ibid.
[cviii] Ibid.
[cix] Lucia Zedner, 'Pre-crime and Post Criminology?' (2007) 11 Theoretical Criminology 261-262.
[cx] Phil Palmer, 'Dealing with the Exceptional: Pre-Crime Anti-Terrorism Policy and Practice' (2012) 22 IJRP 520
[cxi] Ibid.

[cxii] Former Head of Anti-terrorism and Assistant Commissioner.
[cxiii] Andy Hayman, 'Three Month Pre-Charge Detention.' Metropolitan Police Briefing Paper (2005) p. 2.
[cxiv] Council of Europe Committee of Ministers, Document H (2002) 4 Strasbourg.
[cxv] Director, Conflict Resolution Programme, Georgetown University, Washington D.C.
[cxvi] Fathali Moghaddamm, 'The Staircase to Terrorism; A Psychological Exploration' (2005) 60 (2) American Psychologist 161-169.
[cxvii] Theodora Kostakopoulou, 'How to do things Post 9/11' (2008) 28 (2) OJLS 322.
[cxviii] Federic Megret, 'War? Legal Semantics and the Move to Violence' (2002) 13 (2) EJIL 361.
[cxix] Conor Gearty, 'Human Rights in an Age of Counter-Terrorism' (2006 Oxford Amnesty Lecture). <http://www.lse.ac.uk/humanRights/articlesAndTranscripts/Oxford_Amnesty_Lecture.pdf >accessed January 14, 2022.
[cxx] Ibid.
[cxxi] <http://www.youtube.com/watch?v=PZtYENfNa7k&feature=player_detailpage> accessed March 23, 2022.