INTERACTION BETWEEN THE RULE OF LAW AND NATIONAL SECURITY: COUNTERTERRORISM JURISPRUDENCE OF THE UNITED KINGDOM'S COURTS SINCE 9/11

Written by ***Janakan Muthukumar***

* Researcher, Queen Mary University of London

INTRODUCTION

Lord Justice Gross in *Guardian News and Media v AB and CD* recognises the rule of law as 'a priceless asset of our country… a foundation of our constitution.' In the same case, he recognises national security as 'a national interest of first importance' (Guardian News and Media v AB and CD, 2014). Although judges like Lord Hope in *Secretary of State for the Home Department v AF (No 3)* acknowledges that the foremost responsibility of the democratic government is to protect individual liberty (Secretary of State for the Home Department v AF (No 3), 2009), such freedoms are often limited by caveats in the form of countervailing measures to respond to the threats to the national security. This pattern has been the post 9/11 context of terrorism.

The 9/11 attack was the 'watershed moment', as Professor Fussey points out, that profoundly shifted the nature of UK counterterrorism policies (Fussey, 2011). The consequence of the tragedy, not only in the United States but also in other countries, including the UK, has given certain exemptions to state actors to develop appropriate counterterrorism policies. These policies allow the government to carry out executive measures to retribute individuals whom the government considers as potential threats to national security. Those executive measures include arbitrary arrest, asset freezing, control orders, and Terrorism Prevention and Investigation Measures (TPIMs). The enactments of antiterrorism statues further have legitimised those executive measures.

Yet these antiterrorism statues have left a very narrow ambit to exercise the rule of law. The Anti-terrorism, Crime and Security Act 2001 (ATCSA), enacted post 9/11, allows the Ministry of Defence to authorise government to provide for the freezing of assets, to amend or extend the criminal law and powers for preventing crime and enforcing that law and to provide for the retention of communications data. It also enables foreigners to be detained for an indefinite period of time as suspected terrorists. The Prevention of Terrorism Act 2005 (PTA) introduced 'control orders'. The Terrorism Act 2006 extended the period of detention of a terrorist suspect up to 28 days without charges. The Justice and Security Act 2013 established Closed Material Procedures (CMPs) that allow courts to take sensitive materials into account without disclosing them to the defendants. The Act expresses that the court can be satisfied with the nondisclosure if the action is in 'the interest of the fair and effective administration of justice in the proceedings to make declaration'.

Although Parliament enacts laws that restrict the fundamental liberty of people to counter terrorism, the UK courts remarkably extend their own version of judicial activism by introducing new measures to the statutory provisions. The courts interpret laws in the light of the fundamental values of individual liberty and the rule of law in these cases while recognising the nature and threat of terrorism. For example, in *Secretary of State for the Home Department v A*, (Secretary of State for the Home Department v AP, 2010) Lord Philip applied the rationale of *A v UK*, noting that 'the controlee must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations' (A v UK, 2009). This also was the claim the European Court of Human Rights (ECtHR) initially put forward in *A and Others v United Kingdom*. There, the court held that Article 5(4) of the European Convention of Human Rights (ECHR) must be guaranteed in the same way that the fair trial is guaranteed under the Article 6(1) in the criminal aspect (A and Others -v- The United Kingdom ECHR, 2008). Such decisions were followed by Lord Bingham in *Secretary of State for the Home Department v MB* and in other cases (Secretary of State for the Home Department v MB, 2007).

The decision in *Secretary of State for the Home Department v A* is a specific example of how the judiciary refines existing laws in balancing the rule of law against counterterrorism mechanisms. The courts do more than interpret the laws; they take solid actions by way of

judicial activism to shape the legal order of the state. It is the power of the domestic judges to conceptualise their roles to strategically evolve laws in light of democratic governance and to act as the inheritors to refine laws through jurisprudence. US Supreme Court Associate Justice Felix Frankfurter claimed that '[i]n those realms where judges directly formulate law because the chosen lawmakers have not acted, judges have the duty of adaptation and adjustment of old principles to new conditions' (Frankfurter, 1947). Lord Mansfield described this as the 'the common law work[ing] itself pure by rules are drawn from the fountains of justice.' However, common law practice is subject to parliamentary sovereignty, so it requires possessing a narrow ambit for activism (Omychund v Barker, 1744).

This essay aims to analyse how the UK's courts have safeguarded the rule of law by refining counterterrorism laws through jurisprudence. The first part analyses the judgements delivered in *Secretary of State for the Home Department v Rehman (2001) (State for the Home Department v Rehman, 2001), A v Secretary of State for the Home Department (2004)* (A and others v Secretary of State for the Home Department, 2004), and *Guardian News and Media Ltd v AB CD (2014)* to understand how have the Superior Courts' positions evolved in balancing national security and the rule of law. The second part addresses the wider analysis of the judicial contribution in two dimensions: first by having a judicial dialogue with the executive, and second by advancing the criminal justice response to provide adequate jurisprudence in reshaping the laws related to counterterrorism within the administration of rule of law.

PART 1

1. Secretary of State for the Home Department v Rehman (2001)

In this case, the Court interpreted national security broadly and dismissed the appeal of Shafiq Ur Rehman against the decision of the Court of Appeal. The court extended its dismissal on the grounds that co-operation between the UK and other states in the fight against terrorism is inevitable in promoting UK's national security (Tomkins, 2010). This decision took action against those who live in the UK, but a potential threat to the national security of any other state is a valid decision (Dyzenhaus, 2005).

Rehman was a Pakistani national who had temporary leave to stay in the UK. While he applied for indefinite leave to remain, his application was refused due to the security service's

assessment, which concluded that he was involved with an Islamic terrorist group and his actions were intended to assist terrorist group in a foreign country. This was despite the fact that the assessment revealed that it was unlikely for him and his followers to carry out any act of violence in the UK.

Rehman's application was rejected because his presence in the UK was likely to be a threat to the national security of other states. The Special Immigration Appeals Commission (SIAC) allowed his appeal on the grounds that 'national security' must have been interpreted narrowly; in a way it is a threat to the national security of the UK, either by targeting the UK or its citizens. The Secretary of State for the Home Department appealed the decision of SIAC to the Court of Appeal, which duly reversed the decision and concluded that its view on national security was 'too narrow' (Wadsworth, 2003). Rehman submitted to the House of Lords that the Court of Appeal had erred on two points: first by extensively broadening the interpretation of 'national security' to include matters beyond the security of the UK, and second by rejecting the decision that the burden of proof of the claimant was a 'high civil balance of probabilities'. The House of Lords dismissed the appeal.

Lord Slynn held that a risk to national security need not be a direct threat to the UK, nor 'in the interest of national security are limited to action by an individual who "targeted at" the UK…' Lord Slynn referred to the statement of Professor Grahl-Madsen, who explained what could be a threat to national security. Professor Grahl-Madsen stated that that if a person '… engages in activities directed at the overthrow by external or internal force or other illegal means of the government of the country concerned or in activities which are directed against a foreign government which as a result threaten the former government with the intervention of a serious nature' then he or she would be a threat to national security (Lauterpacht, Greenwood, & Oppenheimer, 2003). Lord Slynn said that in the current context, activity against a foreign state is sufficient enough to be categorised as a threat to the security of the UK if such infliction is capable in reflecting the safety of the UK (Ramraj, 2012).

The court continued that the executive is given discretionary power to decide how the interests of the UK are to be protected by enforcing precautionary and preventive measures. Therefore, the count noted that the refusal of Rehman by the Secretary of State for the Home Department

is valid. Lords also held that the requirement for establishing a high degree of probability was not relevant to the process to reach the conclusion whether the claimant must be deported for the public good (Zedner, Pre-Crime and Post-Criminology?, 2007). The court, moreover, strengthened the discretionary power of the Home Secretary in this case, noting that although SIAC had the power to review the decision, it must have given due weight to the assessment and conclusion of the Home Secretary, as the Secretary was unquestionably in the best position to judge what national security required, even his decision is open to review (O'Cinneide, 2008).

However, it is also to be noted that the judgement of the Court of Appeal was handed down on 23 May 2000. The decision of the House of Lords was delivered on 11 October 2011, a month after the 9/11 attack. It is factual that 9/11 vigorously created a wave against terrorism and remarkably shifted the administration of national security in a greater detail in the legal context (Rehman, 2007). The decision of the House of Lords to uphold the Court of Appeal was one of the immediate outcomes of the state actor responding to the fear of global terrorist movements. Lord Hoffmann stated in his famous postscript that:

This seems to me to underline the need for the judicial arm of government to respect the decisions of ministers of the Crown on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security. It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process…

Lord Hoffmann further noted the judicial deference to the executive because the latter has secret information and expertise in matters of national security and a democratic legitimacy. However, by such decision, the court blindly rejected to the right of the deportee to be free from the threat of torture or death upon deportation, as discussed in *Chahal v United Kingdom* (Chahal v. The U.K, 1996) and *Saadi and Others v Secretary of State for the Home Department (Regina v Secretary of State for the Home Department Ex parte Saadi and others, 2002).* However, in the case of *A v Secretary of State for the Home Department*, the judiciary retreated from its position in *Rehman*.

2. A v Secretary of State for the Home Department (2004)

This is one instance when the judiciary refined the counterterrorism laws by urging Parliament to change the laws related to the treatment of and criminal procedure against terrorism suspects (Mukherjee, 2005). The case concerns nine respondents—Mahmoud Abu Rideh, Jamal Ajouaou and seven anonymous members—who were all non-UK nationals living in the UK. They were confined without trial in the Belmarsh prison because they were connected to terrorist organisations and allegedly constituted a threat to national security.

Coming before SIAC, the respondents challenged their confinement as an infringement of Article 5(1)(f) of the ECHR. They challenged the lawfulness of the ATCSA and the Human Rights Act 1998 (Designated Derogation) Order 2001 which allowed the UK to detain foreign nationals suspected of terrorism in the UK under the 'public emergency' if they cannot be deported under the Article 23(1) of the Act 2001. SIAC decided that their confinement was incompatible with Article 5 and 14 of ECHR, as a form of discrimination on the ground of nationality.

The Court of Appeal accepted the appeal of the Home Department. The court stated that because British and foreign nations are in a distinctive position regarding removal from the country, particularly in the case of 'public emergency', the different treatment can be allowed based on the marginal test, commenting the competent authority to decide would be the executive. The respondents appealed this decision to the House of Lords based on the following questions. The questions were: whether there was an actual 'public emergency' declared by the state; whether such emergency would allow arbitrary detention contrary to the Article 5(1)(f) ECHR and whether derogation is allowed even if it is contrary to the rest of ECHR in the case of public emergency.

In reaching its conclusion, the court considered the validity of Article 5(1)(f) of the ECHR, which permits lawful arrest and detention of a person who should be deported, nonetheless, such detention may be imposed only at the process of deportation. The derogation allows the member state only in time of war, or at other public emergencies under Article 14 of ECHR, subject to information on the measures and reasons for such detention to the Secretary-General of the Council of Europe. The court also considered Derogation Order 2001 of the Human

Rights Act, which conceives the action of foreign nationals present in the UK who are suspected of terrorism to be threats to national security.

Lord Bingham cited *Lawless v Ireland*, in which the public emergency was defined as 'an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed' (Lawless v Ireland (No 1), 1961). He said the threat must be actual and temporal. The judiciary may inquire into the situation, but the government must decide ultimately whether such situation exists. Lord pointed out that although appellants have not shown any reasonable grounds to displace the decision of the Secretary of State, that does not permit the government to take any disproportional measures to combat public emergency. The court found that the government's measures were not necessary and irrational. House of Lords also noted Article 14 of ECHR in relation to the distinct treatment of foreign terrorist suspects, said that a *'decision to detain one group of suspected international terrorists, defined by nationality or immigration status, and not another'* is discriminatory.

In this case, the House of Lords' action of a quashing order in respect of Human Rights Act 1998 (Designated Derogation) Order 2001 and Section 23 of the ATCSA further extended the scope of the judiciary in reshaping the laws related to counterterrorism in the UK (Hickman, 2005). Gearty argues that the decision of the House of Lords led Parliament to create the PTA to partially replace the ATCSA (Gearty, 2005). The PTA allowed SIAC to make control orders to anyone regardless of nationality, which was then repealed by Section 1 of the TPIMA 2011.

The applicants also filed complaints about their detention at the ECtHR under Article 3, which prohibits inhuman or degrading treatment on the ground that they were unable to bring any proceedings in the UK to be entitled to state compensation or to be released. They established their case under Article 3. Whereas Article 5 is about the right to liberty and security, Article 6, concerns the right to a fair trial because they were provided only limited knowledge of the case against them and a limited possibility to challenge, and under Article 13, right to an effective remedy (Gearty, 2005). The ECtHR dismissed the complaints under the Article 3 but found the violation of Articles 5(1), 5(4), 5(5) and compensation was awarded. In this case, Lord Phillips rightfully acknowledged the decision driven by the Grand Chamber in *A v UK*.

He said that he was satisfied the 'the controlee must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations' *(A v United Kingdom, 1998).*

In 2002, the applicants also challenged their certification as a national threat before SIAC. They argued their certification was based on evidence obtained by torture by the foreign intelligence agencies. Although SIAC and the Court of Appeal rejected the application, the House of Lords quashed the decision in 2005, explaining that the use of torture cannot be accepted at any time and is a deplorable practice. This judgement further has shaped the counterterrorism policies of the UK by regulating the exemptions provided to the executive while safeguarding the national security under the scope and governance of law (Bates, 2006).

3. Guardian News and Media Ltd v AB CD (2014)

In this case, defendants AB and CD were charged with committing offences contrary to Section 58 of the Terrorism Act 2000. In addition, AB was charged with having committed an offence contrary to Section 4 of the PTA, and CD was charged contrary to Section 4 of the Identity Documents Act 2010 (Bohlander, 2010). The prosecutors requested that the trial be held in private entirely and the defendants remain anonymous. The Secretary of State for the Home Department and Foreign and Commonwealth Affairs supported the application, with the suggestion that a very limited number of accredited journalists be permitted to attend trial subject to their keeping any information confidential until the conclusion of the trial. The trial was held in open and private and a part was heard in the absence of all, except the prosecutors. The Court ordered the criminal trial to be held in private, with no reports of the trial published and all information on the defendants withheld. The court ordered under Sections 11 and 4(2) of the Contempt of Court Act 1981. The appeal was granted to the *Guardian* newspaper in accordance with Section 159 of the Criminal Justice Act (CJA) 1988.

The Court of Appeal held that the right of the defendant in any circumstances cannot be violated. The court was satisfied with the reason from the prosecution about the parts of the trial must be public and other parts must be held in private. However, the Court noted there would be no risk to the administration of justice if the following elements were heard in open court: (i) swearing of the jury, (ii) reading of the charges to the jury, (iii) part of the Judge's

introductory remarks to the jury, (iv) part of the prosecution's opening, (v) the verdict and (vi) any conviction if resulted. Further, the court directed that under Section 159 of the CJA, leave to appeal must be given. In doing so, the court also gave verdict that: (i) there could be a small number or accredited journalist to the proceedings, (ii) right to make notes, subject to the condition the notes cannot be taken away at the end of the court session but can be stored and (iii) transcript of proceedings to exclude the *ex parte* areas. Moreover, the order must be tailored because the matter cannot be encompassed within any order under Section 4(2) or 11 of the Act 1981.

The court was not convinced that conducting the trial *in camera* would possibly risk the administration of justice by keeping the defendant's identity anonymous (Irving & Townend, 2016). Nor was it satisfied with the prosecution's materials; accordingly, the names of the defendants were permitted. The court also noted the justification for holding part of the hearing in open court and following it with an open judgement; namely, it was a preparatory hearing and subject to statutory reporting restrictions. The court indicated such situation would limit the success of the applicant. However, the court noted that the judgement in May was no longer subject to any order under the above section.

Although the judgement had potential far-reaching significance, it also raised multiple concerns. Firstly, the Court warned about the cumulative effects of secrecy; however, the court considered them only in terms of having an individual criminal trial *in camera*. It did not make any note of how such cumulative effect may be significant over time nor the ways in which the Justice and Security Act provides for secrecy in civil matters (Zedner, Criminal justice in the Service of Security, 2016). Secondly, why would there be only the 'accredited' journalists from the media to attend the trial, and why would they be drawn from the parties of the proceedings (Irving & Townend, 2016) The judgement did not give any consideration to having attendance by organisations that could offer valuable insights. For example, while the court noted that the rule of law safeguards open justice, such justice could have been enhanced if professional bodies, such as the Bar Council and Law Society, were invited to have an independent observer at the trial, subject to confidentiality.

Thirdly, the judgement is a victory for the government and security agencies, because having minimal transparency in the course of the trial is adequate and consistent with all previous judicial approaches of the Appellate Courts. The Court held that:

where there is a serious possibility that an insistence on open justice in the national security context would frustrate the administration of justice, for example, by deterring the Crown from prosecuting a case where it otherwise should do so, a departure from open justice may be justified. The question of whether to give effect to a Ministerial Certificate (asserting, for instance, the need for privacy) such as those relied upon by the Crown here is ultimately for the Court, not a Minister. However, in the field of national security, a Court will not lightly depart from the assessment made by a Minister. (Guardian News and Media v AB and CD, 2014)

This somehow leads to the continuation of normalising secrecy. Compared to the above discussed, however, it must be noted that previous judgements in *Home Department v Rehman* and *A v Secretary of State for the Home Department* and in the instant case express a clear vision of the judiciary standing for the notion of the rule of law. The judiciary does so by articulating, though perhaps not the best, far more justifiable methods and regulations for access to justice, and the degree of openness and transparency in court procedures in the cases of terrorism (Fenwick, 2015).

Understanding how the Superior Courts have evolved in balancing national security and the rule of law in these case studies, and the degree of such decisions in contributing to refining the counterterrorism laws, the second part of this essay provides a wider analysis of how the UK courts contribute to reshaping the counterterrorism laws within the effective rule of law by engaging in a judicial dialogue with the executive and advancing criminal justice system.

PART 2

JUDICIAL DIALOGUE WITH THE EXECUTIVE

The UK courts conduct judicial dialogue with the executive by its modest intervention in making executive measures less appealing, as in *A v Secretary of State for the Home*

Department and *Guardian News and Media Ltd v AB CD*. While intervening, the courts are mindful to maintain a balanced approach between national security and the rule of law.

The countermeasures carried out by the UK post 9/11 particularly focused on introducing new measures, including the power to restrict the liberty of suspected terrorists outside of the original criminal justice system. Special detention powers reassure fundamental fear towards national security, while also greatly restricting the rule of law by executive interventions (Fenwick, 2015). On the other hand, the judiciary intervened in the executive measures very modestly and diluted the scope and application of laws related to counterterrorism. The courts also reassure the importance of national security and the executive measures to maintain the judicial dialogue with the executive (Chilcot, 2008).

Executive measures in emergency situations have been in operation since the Napoleonic Wars, where *habeas corpus* was suspended and laws allowed the authorities to detain individuals without providing public justification (O'Cinneide, 2008). Such expedience was subsequently adopted during the two World Wars and at a number of imperial crises, including in Northern Ireland in 1970 (Bonner, Executive Measures, Terrorism and National Security: Have the Rules of the Game Changed?, 2008). Such measures allowed governments proactive responses, rather relying on the criminal justice system. Remarkably, the Human Rights Act 1998 (HRA) provides a solid nature to the judiciary in interpreting laws in such a way that the right to liberty was prominent within judicial thinking. HRA further mandates to the judges additional measures to nudge through the declaration of incompatibility, recognise the incompatibilities in the current law contrary to the ECHR and flag to Parliament to address. The judges perceive such declarations as mechanisms for providing impetus towards legislative reform without overstepping the limits of their constitutional duties (Hennessey, 1997).

For example, in *A v Secretary of State for the Home Department*, Lord Bingham expressed that the '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.' In doing so he affirmed that issuing the declaration of incompatibility 'is not, of course, to override the sovereign legislative authority of the Queen in Parliament' (Londras, 2011). Shai Dothan, a strategic actor theorist, recognises that such statements shows a critical

approach of the court to extend a 'constrained reasoning' to encourage compliance with the rule of law (O'Cinneide, 2008). While quashing the control orders in the same case, the Lords once again support 'the legally troubling practice of indefinite preventative restrictions based on anticipatory risk assessment.'

In *Secretary of State for the Home Department v MB*, Lord Bingham extended this rationale in observing how 'the court has not been insensitive to the special problems posed to national security by terrorism. … It has . . . eschewed the formulation of hard-edged and inflexible statements of principle from which no departure could be sanctioned whatever the background or the circumstances' (Secretary of State for the Home Department v MB, 2007). Aileen Kavanagh says that the jurisprudence of UK courts in making executive measures less attractive cannot be portrayed as a radical departure because it is merely the judges who act as the policymakers, but their powers rely on the executive (Kavanagh A. , 2011).

Although theoretically the judicial intervention seems intelligible, the application is hard because such cases provide considerable scope for divergent policy-driven jurisprudence (Ewing & Tham, 2008). As in *Secretary of State for the Home Department v MB*, Lord Phillips characterises that it is a spectrum of judicial positions in reaching conclusions about the level of disclosure under the control order with the right to have a fair hearing, as a substitute for an absolute decision. In such cases at the appellate level, the latitude of judges is at stake; however, any ambiguous push could convey misleading messages to the government (Kavanagh A. , 2009). For example, in *Belmarsh Detainees case* (A and Others -v- The United Kingdom ECHR, 2008), Lord Hoffmann's decision in the executive measure was contrary to the majority decision in detention without trial, where he attempted to shield the judiciary from claims of overreaching (Poole, 2005). In *JJ Control Order case* (Secretary of State for the Home Department vJJ, KK, GG, HH, NN and LL , 2006) the dissenting judgement of Lord Hoffmann and Lord Charswell point out that, while the majority was giving an expansive interpretation to the concept of liberty, such expansive interpretation undermines the scope and nature of the concept as it was compared to the qualified rights of freedom of movement and association (Gies, 2011).

The government maintains its stance on having an executive measure, as Lord Hoffmann held in the case of AF in the form of a control order. The dissenting judgement addressed in a way of endorsement of the domestic court to the executive measure of the control order. As Lord Hoffman stated:

> I agree that the judgment of the European Court of Human Rights (ECtHR) in A v United Kingdom . . . requires these appeals to be allowed. I do so with very considerable regret because I think that the decision of the ECtHR was wrong and that it may well destroy the system of control orders which is a significant part of this country's defences against terrorism.

This judgement further weakened the process of activism of the Superior Court (Campbell, 2009).

In *CD v Secretary of State for the Home Department*, while there were plans by Parliament to replace the control orders, Simon J in relation to the threat posed by the controlee accepted the validity of the control order relocation. He stated:

> [T]he relocation obligation is a necessary and proportionate measure to protect the public from the risk of what is an immediate and real risk of a terrorist-related attack. While he is living in London there is a significant risk that he will take part in terrorism-related activities… (CD v Secretary of State for the Home Department, 2011).

This judgement significantly impacted the discussion over replacing the control order and certainly affected the activism of other judges in replacing control order. Furthermore, creating a precedent within the UK hierarchical court system magnified such judgement. In the common law system, the judges of the appellate courts have strategic influence over the government's policies. However, such influence is impacted at times when judges are powerful enough to voice as one (Villa, 2008). Such dissenting arguments weaken the judiciary's impact on government policy-making, but mostly distract the judicial activism carried out by other judges.

On the other hand, even if the judges push for such judicial restriction, this does not necessarily influence the policymakers. When there are other factors for the legislators to worry about, the subtle pushes of judges are less likely to be noticed. However, how the UK government adopted the decision of *Belmarsh Detainees* case to augment counterterrorism offences through the

Terrorism Act 2006. Prohibiting the control order and introducing TPIMs to abolish relocation powers are few examples of successful judicial advocacy of the UK courts in attempt to balance national security and the rule of law (Joint Committee on Human Rights HC, 2014).

ADVANCE CRIMINAL JUSTICE RESPONSE IN TERRORISM CASES

Introducing Specific Offences

The courts' responses to the criminal justice standard in terrorism cases receive much less consideration compared to the legislative initiatives as the result of judicial dialogue with executives. The importance is given to the succeeding control order (Constitution Committee, 2011), although criminal justice responses are equally important in channelling the government far from the executive measures.

One reason for the government to adopt executive measures was the criminal justice system is neither ready to tackle terrorism nor able to secure counterterrorism convictions (DD v Secretary of State for the Home Department, 2015). Consequently, strategic judicial action could combat such perception only by advancing the scope for action under the criminal justice system. Lord Bingham in *R v Z* addressed how the judiciary can intervene to respond and how the criminal justice system can be an avenue for the counterterrorism policies (R v Z (Proscription of Real IRA), 2005). In that case, the trial judge ruled out that the Real Irish Republican Army (IRA) was not a proscribed organization within the meaning of the Terrorism Act 2000; it was not listed within the schedule 2 of the Act as it had broken apart from the Provisional IRA (Walker, 2005). However, on appeal, Lord Bingham adopted a permissive approach in this case, whereby the House of Lord held that when IRA was referenced, the legislator's intention in referencing the IRA is adequate in covering all of its manifestations. Therefore, the Real IRA can be subject to the definition. Understanding the complexity of the network of terrorist groups and their different names means the power to ban was maintained by judicial latitude (Walker, 2005).

Following to the decision in *Belmarsh Detainees* and the enactment of PTA, criminalisation became enforceable by the police in offences of possession of materials (Terrorism Act 2000, s 57) and information related to terrorism. These offences gradually developed, and in the landmark case of *ex parte Kebilene* (R v DPP ex parte Kebilene , 2000) Lord Bingham extended

the scope of criminalisation, noting that 'the possession of articles and items of information innocent in themselves but capable of forming part of the paraphernalia or operational intelligence of the terrorist.' Although the PTA expressed criminalisation, it has neither provided the degree of the connection of information nor the connection of materials. In *R v Zafar* (R v Zafar, 2008), students were convicted of possessing 'ideological propaganda' materials that could be used for the terrorist activity, Lord Phillip asserted a narrow interpretation of section 57 of PTA. He said, the section requires a direct connection between the materials possessed and the act of terrorism in order to establish the crime. A similar interpretation was made in *R v K*, where the Lord noted that the reasonable suspicion must be established in regard to the fact that the defendants have intended to assist in the commission of the terrorist act. These interventions extended that 'when the prosecution can assert without ridicule … it is indeed time to slam on the judicial brakes.' In *Zafar*, the court understood Parliament's realisation of the need to introduce specific offence dealing with terrorist propaganda (R v K, 2008). Although if the Terrorism Act 2006 were not enacted, possibly there would have been specific rules related to Sections 57 and 58. The judges were persistent that no lacuna would result in the matrix of counterterrorism offences.

Enhanced counterterrorism powers to Police

1. No Suspicion Stop-and-Search Power

As a method of the courts' attempt to advance the criminal justice system, the judiciary advanced counterterrorism powers to the police. The police are empowered to stop and search suspects without any court warrant (Pantazis & Pemberton, 2009). For example, in *Gillan*, (R (Gillan (FC)) v Commissioner of Police of the Metropolis, 2006), the police enforced the Terrorism Act to stop and search with no suspicion a student who was demonstrating against the arms trade and a journalist who covered the demonstration (Terrorism Act 2000, ss 44, 45). In that case, the Lords affirmed that the powers police employed satisfied the expectation of Article 8 of ECHR, and reassured there was no discrimination in the stop and search. The court stated that 'It is true that [the constable] need have no suspicion before stopping and ... that the person is of Asian origin may attract the constable's attention in the first place. But a further selection process will have to be undertaken, perhaps on the spur of the moment otherwise the opportunity will be lost before the power is exercised.'

However, the court also noted that in exercising this power, the constable is not free to perform arbitrarily. Lord Bingham noted that:

> [i]n exercising the power the constable is not free to act arbitrarily, will be open to the civil suit if he does. It is true that he needs to have no suspicion...This cannot realistically be interpreted as a warrant to stop and search people who are obviously not terrorist suspects, which would be futile and time-wasting.

This decision indicated that the court would not limit the ambit of police power, but instead would re-examine the way police employ such powers in society. These powers, however, are restricted by the Terrorism Act 2000 (Remedial) Order 2011 (SI 631/2011) and Section 61 of the Protection of Freedoms Act 2012, (Terrorism Act 2000 (Remedial) Order 2011 (SI 631/2011) and Protection of Freedoms) following the claims of Strasbourg as those powers were insufficiently constrained. Although Strasburg noted that stopping and searching any passengers in airports and ports is required to assess the links between any passengers and terrorist groups, any detention of passengers should be limited to 9 hours (R (Gillan (FC)) v Commissioner of Police of the Metropolis, 2006). Nonetheless, these powers became under scrutiny following to the detention of David Miranda.

In *Miranda*, police argued the purpose of detention was to inquire, whether Miranda carries documents that contain information connected to the national security of the US or UK, between Greenwald, the journalist, and Edward Snowden, the whistle-blower of the US National Security Agency. Miranda brought a legal claim against the police, which was rejected by the Divisional Court (Miranda v Secretary of State for the Home Department). The court rejected the legal challenge, accepting that the definition of terrorism was broad enough to justify the arrest. The court considered the arrest and detention of Miranda were valid, given his link to Snowden and his publication of materials could impact the policies of the government and possibly endanger UK agents. The court noted that the power was given to the police to find a possibility that the traveller 'may be involved… directly or indirectly, in any of a range of activities enumerated in s 1(2).'

Although the arrest and detention were claimed disproportionate because Miranda's actions involved the freedom of the press, the Court ruled out that in such cases of public interest, the proportionality is required in light of national security (O'Cinneide, 2008). Anderson noted

that bombings and shootings were described as the classic and familiar type of terrorist actions (Anderson, 2014). The court's decision in *Miranda* was an acceptance of the theoretical elements constituting terrorist actions while maintaining the definition of terrorism. Anderson pointed out that the publication of words, if they could possibly advance a political, religious, racial or ideological cause to influence the government or to endanger life, must also be treated as terrorist actions.

2. Police Power – Pre-Charged Detention

The Terrorism Act 2006 authorise pre-charged detention in police custody for 28 days (Feldman, 2006). It is a controversial aspect introduced to the criminal justice system following the 7/7 attacks (Terrorism Act 2006, s 25). These powers would be overseen by the judiciary to ensure while the investigation requires continued detention of the suspect (Terrorism Act 2006, sch 8). Although Strasbourg was concerned about the breach of the right to liberty of the detainee, (Brogan v UK) and criticises that the judges who supervise have no knowledge of the circumstances of the investigation, (Jones & others, 2006), the UK courts maintain its position not to call this power into question. For example, in *Re Duffy's Application for Judicial Review (No.2)*, the Court of Appeal of Northern Ireland noted that the 28-day detention period is compatible with Article 5 of ECHR. It also noted that the 'proportionality and justification are the fundamental aspects of the review process' (Sher v Chief Constable of Greater Manchester Police , 2010).

3. Anticipatory Risk Management

Lord Hughes in his judgement in *Da Costa* reaffirmed the position of the Terrorism Act 2006 that preparations for terrorism (Terrorism Act 2006, s 5.) and training for terrorism purpose (Terrorism Act 2006, s 6.) fall under the scope of criminal law (R v Da Costa, 2009). The law related to training for terrorism includes training 'in any skills…any method or technique…is capable of being done for the purpose of terrorism.' De Costa challenged the formulation based on Sections 57 and 58 of the Terrorism Act 2000 and of the jurisprudence of the *Zafar* case (R v Zafar, 2008). De Costa argued that such formulation is contrary to the common law principle of criminal law and contrary to the Article 5 and 7 of the ECHR. However, Lord Hughes rejected the argument, pointing out that any activity, including physical training, is a crime when it is undertaken with the intention to engage in terrorism. He said the method and

technique used by De Costa are satisfactory to consider the training he underwent was with basic militaristic style, thus along with the intention it could be concluded as a criminal offence. Lord also pointed out that the certainty of the section is the matter of Parliament, and the complaint was not about the certainty of Section 58.

Lord Hughes's decision in *R v A* noted that the viability of the preparatory actions of terrorism is captured by the criminal law, even if they had yet to undertake any activity to a plot (R v A, 2010). Lord Carlile shares the same view, noting that the assembly of bomb-making ingredients, the preparation for a beheading and the sending of equipment to terrorists who fight abroad can be considered under Section 57 (Carlile, 2005). However, Lord Hughes also noted that the Act is clear on the matter that sufficient intention is not enough to trigger the offence if there is no proximate to the act of terrorism. In *R v Roddis*, Lord Hughes noted that Section 57 cannot be applied if the suspect merely possessed the ingredients for bomb-making (R v Roddis, 2009); he should have the knowledge of preparing them as well (Hodgson & Tadros, 2009).

CONCLUSION

The judiciary's role in extending the criminal justice approach and having a judicial dialogue with the executive becomes a normalised feature in UK counterterrorism jurisprudence (Bonner, Executive Measures, Terrorism and National Security: Have the Rules of the Game Changed?, 2008). These processes continuously require judicial engineering in refining laws; therefore, the rule of law can have its stake without being overburdened by national security concerns. Judges who attempt to make executive measures less appealing and the criminal justice system more attractive have certainly changed the view of how the UK's counterterrorism laws are enforced. Although scholars like Walker warn that the criminal justice system itself needs to be perfect to address nationally important matters, like counterterrorism and restraining executive measures, the adoption of a broader definition of terrorism by the UK courts, the adoption of tail processes compatible with the provisions of HRA, the provision of special powers to police, and the interpretation of Sections 57 and 58 of Terrorism Act 2006 certainly validate the counterterrorism jurisprudence of the UK in light of the rule of law. On the other hand, the aspect of detention without trials and abolishment of

control orders further have strengthened the scope of rule of law in reacting to the national security concern. However, the enactment of Counter-Terrorism and Security Act 2015 which reintroduces the relocation powers for TPIMs and creation of a new executive measure, i.e. Temporary Exclusion Order entails judiciary's far greater responsibility in the future to find balance in between the national security and rule of law.

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