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11 September 2001, Counter-terrorism, and the Human Rights Act

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The attacks of 11 September 2001 and the reaction to them has been the gravest challenge to date to the Human Rights Act 1998. The Anti-terrorism, Crime and Security Act 2001 has expanded the remit of the Terrorism Act 2000 and there has been a new concentration on anti-terrorism by government. This article assesses the impact of human rights law on the debate about liberty and security following 11 September. It considers how the provisions of the Human Rights Act have influenced the formulation and interpretation of anti-terrorism laws, and examines the role of the judiciary in adjudicating on disputes between the individual and the state. It ends with some general discussion about the security-driven challenges to human rights that lie ahead.

INTRODUCTION

It is clear that the events of 11 September 2001 have posed a major challenge to the philosophical and political integrity of the Human Rights Act. The basic premise behind the concept of human rights, which is said to be encapsulated in legal form in the 1998 Act,¹ is that of the equality of esteem in which each and every one of us is held in view of our humanity. September 11 has exposed this idea to attack on two fronts by a pair of very different ideological enemies.² First there has been the challenge of politicized religious faith. In its initial manifestation, a highly particular

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- 1 See, for the debates on the Bill in Parliament where its rationale is discussed and explained, J. Cooper and A. Marshall-Williams (eds.), *Legislating for Human Rights. The Parliamentary Debates on the Human Rights Bill* (2000).
- 2 For an anticipation of the kind of problems that human rights was likely to encounter as a result of these structural weaknesses, see M. Koskenniemi, 'The Effect of Rights on Political Culture' in *The EU and Human Rights*, ed. P. Alston (1999) ch. 2.

reading of Islam³ has made possible the use of thousands of innocent people as instruments in an attempt to ignite world-wide Islamic revolution, a denial of the victims' esteem so gross as to amount to as grave an abuse of human rights as has been witnessed in the recent past.⁴ Reacting to these atrocities, and opportunistically drawing strength from them, there has emerged into the international open a different brand of fundamentalism, this time connected to Christianity, which preaches the moral validity of a war against an open-ended category of evildoers, whose humanity matters less than their perfidy.⁵ Joining with the latter sentiment and greatly exacerbating it is a strong collective instinct, beginning in the United States of America but spreading across the world, for national survival, a patriotic devotion to a piece of land that leaves the cosmopolitan citizen first puzzled and then lost for words.⁶ This prioritization of territory over people amounts to a second front in the 'War on Human Rights' that (it is now evident) the inflated language of the 'War on Terror' inevitably entails.

It is with one smallish theatre in this global conflict, the interrelationship between the Human Rights Act and United Kingdom counter-terrorism law and practice, that this chapter is concerned. Has the existence of the Human Rights Act made any difference to the content and enforcement of Britain's terrorism law? Would the human rights situation be worse without the Act, or could it – just conceivably – actually be better? Though in its initial justification not rooted in the demands of anti-terrorism, the invasion and occupation of Iraq, in which this country has been deeply involved, have greatly increased international tension and our alleged vulnerability to terrorism. So it is also relevant to ask here what has been the effect on human rights law – indeed on the very language of human rights itself – of this unpopular military adventure. The meta-question behind these various interrogatives is how, if at all, our concern for the equal dignity of all – of which the Human Rights Act is our clearest legal symbol – can survive in a contemporary political and legal culture that has become so deeply preoccupied with matters of war, politicized religious belief, and national security. It is possible that historians writing just a few years from now will regard the idea of human rights as little more than a quaint reminder of a brief liberal interregnum between two kinds of world conflict, the first ending in 1989, the second starting in 2001.⁷ If this does prove to be the case, what kind of future lies in store for the Human Rights Act? More to the point, what can be done to prevent the emergence of such a dismal narrative?

3 See G. Kepel, *The War for Muslim Minds. Islam and the West* (2004).

4 For an excellent survey, see G. Oberleitner, 'Human Security: A Challenge to International Law?' (2005) 11 *Global Governance*.

5 Kepel, *op. cit.*, n. 3, ch. 2.

6 Epitomized by the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act 2001 (the USA Patriot Act).

7 With more despairingly critical articles like that of K.D. Ewing, 'The Futility of the Human Rights Act' [2004] *Public Law* 829.

ANTI-TERRORISM LAW BEFORE 11 SEPTEMBER 2001

It is important to acknowledge that the tension between anti-terrorism law and human rights in the United Kingdom long predates the attacks on the Pentagon and the Twin Towers. The problem of political violence arising out of the conflict in Northern Ireland had produced a large body of anti-terrorism legislation during the preceding thirty years,⁸ with the European Court of Human Rights in Strasbourg having been frequently called upon to adjudicate in conflicts between terrorist suspects and the state,⁹ and on one celebrated occasion between two states, the United Kingdom and the Republic of Ireland.¹⁰ The power of the Human Rights Act 1998 should not blind us to the importance of human rights standards prior to its enactment; international treaty obligations may not have been enforceable directly by court order but they were treaty obligations nonetheless, and in the case of the European Convention on Human Rights, furthermore, they were duties whose true meaning could be fleshed out by a regional court and whose implementation once subject to such adjudication was (as it still is) overseen by a specialist committee.¹¹ The problem of human rights standards being used to legitimate restrictions on political freedom and on civil liberties generally was also clearly in evidence in this early period.¹²

The Human Rights Act 1998 itself had an active engagement with terrorism law prior to the events of 11 September. Published in the same year as the measure was enacted was the government's White Paper on terrorism,¹³ building on a report into this brand of political violence which had been published two years before.¹⁴ These were early days in the reception of the language of human rights into the domestic legal culture, and it is therefore perhaps not entirely surprising that this White Paper should have made only scant reference to the implications for its subject of a piece of

8 See L.K. Donohue, *Counter-terrorist Law and Emergency Powers in the United Kingdom, 1922–2000* (2000); C. Walker, *The Prevention of Terrorism in British Law* (1992, 2nd edn.). For a current survey, see C. Walker, *Blackstone's Guide to the Anti-terrorism Legislation* (2002).

9 For example, *Brannigan and McBride v. United Kingdom* (1993) 17 E.H.R.R. 539.

10 *Ireland v. United Kingdom* (1978) 2 E.H.R.R. 25.

11 See C.A. Gearty, 'The United Kingdom' in *European Civil Liberties and the European Convention on Human Rights. A Comparative Study*, ed. C.A. Gearty (1997). A. Tomkins, 'Civil Liberties in the Council of Europe: A Critical Survey' in the same volume contains much useful historical information on the role of the Committee of Ministers.

12 See K.D. Ewing and C.A. Gearty, *Freedom under Thatcher. Civil Liberties in Modern Britain* (1990); C.A. Gearty, 'The Cost of Human Rights: English Judges and the Northern Irish Troubles' (1994) 37 *Current Legal Problems* 19.

13 Home Office and Northern Ireland Office, *Legislation against Terrorism. A Consultation Paper* (1998; Cm. 4178).

14 *Inquiry into Legislation Against Terrorism* (1996; Cm. 3420; Chair, Lord Lloyd of Berwick).

legislation which had emanated from the same department just one month before. The document opened up for discussion the introduction of an executive power of proscription for organizations deemed by the Secretary of State to be involved with 'domestic or international terrorist activities',¹⁵ with the proposed definition of terrorism being wide enough to extend beyond violence to the person to encompass 'serious disruption' of various sorts.¹⁶ This sat uneasily with the guaranteed right to peaceful assembly and association that Parliament had just included in the other measure as a core human right,¹⁷ a right that had in turn been the subject of robust interpretation in two, then very recent, Strasbourg cases.¹⁸ This latter jurisprudence was one, moreover, to which Parliament had just explicitly directed the executive and judiciary to have regard when interpreting the breadth of the rights it had enacted.¹⁹

In the period of further reflection that followed the White Paper and preceded publication of the Bill, the human rights dimension to the proposals was digested and the end result, the Terrorism Act 2000, showed the impact of human rights thinking in several important respects. First, and this was anticipated in the White Paper,²⁰ the statutory power to detain terrorist suspects for seven days without charge was abolished and replaced by a system which involved judicial oversight from an earlier stage, not later than the end of the fourth day in detention.²¹ Second, the thrust of human rights law, which is to assert the primacy of the ordinary criminal process over exceptional police powers, was manifested in the increase in the variety and jurisdictional range of criminal offences related to terrorism.²² Thirdly, the system of proscription eventually set out in the new Act contained various procedural mechanisms which greatly diluted the potential for arbitrariness in the exercise of the power, provided the organizations proscribed with effective opportunities for appeal, and as a result almost certainly brought the whole scheme well within the framework of the Human Rights Act, with the right to freedom of association set out in that Act allowing exceptions where these could be shown to be 'necessary in a democratic society'.²³ It is noteworthy that none of these concessions to human rights law involved the bald elimination (as opposed to mere

15 Home Office, *op. cit.*, n. 13, para. 4.17.

16 *id.*, para. 3.17.

17 Human Rights Act 1998 (HRA), sched. 1, art. 11.

18 *United Communist Party of Turkey v. Turkey* (1998) 26 E.H.R.R. 121; *Socialist Party v. Turkey* (1998) 27 E.H.R.R. 51.

19 HRA, s. 2.

20 Home Office, *op. cit.*, n. 13, ch. 8.

21 Terrorism Act 2000, ss. 40 and 41, reacting to *Brogan v. United Kingdom* (1988) 11 E.H.R.R. 117.

22 *id.*, ss. 54–64.

23 HRA, sched. 1, art. 11(2). So in *R v. Hundal and Dhaliwal* [2004] E.W.C.A. Crim. 389 the unsuccessful challenge to convictions under s. 11 that was mounted in the Court of Appeal did not even seek to rely on art. 11.

procedural elaboration) of powers desired by the executive;²⁴ right from the start the human rights standard set by the Act in the field of anti-terrorism law has been a relatively low one, with the consequence that only a rather undemanding jump by the executive brings its repressive practices within the zone of human rights compliance.

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In considering why it was that the legislature proved sensitive to the demands of an Act that was not yet fully in force, with the Terrorism Act 2000 having received the Royal Assent before the date of full implementation of the Human Rights Act, the significance of section 19 of the latter Act should not be underestimated. This provision came into effect as early as 24 November 1998.²⁵ It required the Minister responsible for a Bill to make, in relation to any such proposed measure, ‘a statement of compatibility’ or of incompatibility between it and the Convention rights set out in schedule 1 to the Human Rights Act. The effect of this provision has been to internalize within the executive branch the need to assess the human rights implications of its legislative initiatives; as such it is ‘an important provision in balancing the role of the executive, Parliament, and the courts’.²⁶

Helpful in relation to the Terrorism Bill, section 19 became an even more important pointer towards the importance of human rights law in the difficult months that followed the atrocities of 11 September 2001. During this period, the Anti-terrorism, Crime and Security Bill was conceived and placed before Parliament, receiving the Royal Assent as early as 14 December 2001 after a speedy and highly controversial passage through both Houses of Parliament.²⁷ In its final form, the measure contains provisions on the disclosure of information,²⁸ the policing of the nuclear²⁹ and aviation industries,³⁰ the retention of communications data,³¹ and general anti-terrorism police powers³² which may with some justification be legitimately considered obnoxious when viewed from a civil libertarian perspective. The

24 Interestingly, the one power entirely removed from the range of terrorism laws by the new Labour Government was the power of exclusion which did not in itself raise human rights problems under the Convention, at least in relation to those provisions to which the United Kingdom was committed in international law.

25 Human Rights Act 1998 (Commencement) Order 1998 (S.I. no. 1998/2882).

26 J. Wadham, H. Mountfield, and A. Edmundson, *Blackstone's Guide to the Human Rights Act 1998* (2003, 3rd edn.) 10.

27 See, generally, P.A. Thomas, ‘September 11th and Good Governance’ (2002) 53 *N. Ire. Legal Q.* 366.

28 Anti-terrorism, Crime and Security Bill 2001, part 3.

29 *id.*, part 8.

30 *id.*, part 9.

31 *id.*, part 11.

32 *id.*, part 10.

seizing of the opportunity to implement the third pillar of the European Union without adequate democratic scrutiny³³ might also be thought to be wrong in principle. There are plenty of valid concerns as well about the sheer bulk of the legislation (129 clauses and eight schedules) with doubts being raised as to exactly how much of it was 11 September-related and how much it amounted to little more than an opportunistic attempt to enact a range of legislative ideas that had been gathering dust in various Home Office cupboards.

As a result of section 19, and also the probability of legal challenge in the future, much of the discussion of the new Bill was conducted in the language of rights. The human rights case against these powers was put in a couple of powerful reports issued by the Joint Committee on Human Rights, a body that would not have existed had it not been for the political atmosphere created by enactment of the Human Rights Act.³⁴ Despite this, the executive persevered with many of its more illiberal initiatives, and was indeed able to use the breadth of the exceptions in the Human Rights Act to camouflage its intentions with a veneer of human rights sensitivity. It is the case, however, that some concessions were secured which arguably might not have been obtained without the 1998 legislation. Plans to introduce retrospective criminal legislation on bomb hoaxes were dropped even before the Bill was published, with Article 7 of the European Convention on Human Rights (prohibiting retrospective punishments) playing a part in the critical response.³⁵ An expansion of the law to include incitement to religious hatred was omitted after a strongly negative report on the proposal from the Home Affairs Committee of the House of Commons.³⁶

The criticisms that these bodies and other parliamentarians and commentators made³⁷ were probably not dependant on the Human Rights Act for their existence, in that they would have been made and might well have been successful without the existence of the Act. But their arguments undoubtedly drew strength and energy from being able to point to a piece of legislation which in theory at least posited an alternative legislative vision of the relationship between the individual and the state. Perhaps the best way to put it would be that the human rights critique was able to bite where there was already strong background unease about government proposals, but that it was not effective where no such concerns existed, and that it was not even

33 *id.*, ss. 111–112.

34 See Joint Committee on Human Rights (JCHR), Second Report, *Anti-terrorism, Crime and Security Bill* HL (2001–2002) 37, HC (2001–2002) 372; JCHR, Fifth Report, *Anti-terrorism, Crime and Security Bill: Further Report* HL (2001–2002) 51, HC (2001–2002) 420.

35 *id.*, Second Report, para. 12.

36 Home Affairs Committee, First Report, *The Anti-terrorism, Crime and Security Bill 2001* HC (2001–2002) 351, paras. 56–61.

37 H. Fenwick, 'The Anti-terrorism, Crime and Security Act 2001: A Proportionate Response to 11th September?' (2002) 65 *Modern Law Rev.* 724.

guaranteed to affect outcomes in cases of pre-existing high controversy where the government showed itself determined to act. It needs at this point to be repeated that because the human rights hurdle is set so low in the Human Rights Act – with caveats and exceptions galore, particularly in the national security field – powers that ought to have attracted controversy were more easily secured than would have been the case had the measure been a strongly principled human rights document rather than the rather watery measure that (in this area) it undoubtedly is.³⁸

The most controversial part of the new Act was and remains the detention powers in Part 4. These provisions allow for the holding for an indefinite period and without any need to press criminal charges of a person certified by the Secretary of State (on the basis of a reasonable belief or suspicion) to be either ‘a terrorist’ or someone whose ‘presence in the United Kingdom is a risk to national security’.³⁹ The word ‘terrorist’ is then further defined in a way which broadens the phrase enormously to encompass far more than is popularly understood to be within the meaning of the term.⁴⁰ The power is not one of internment in the strict sense since only those who are subject to immigration control are subject to it, and they are all theoretically free to depart the country if they choose,⁴¹ but for most of those who have been incarcerated under the provision, it has not been possible to leave, either because no country will take them or those that will are run by regimes into the hands of which the suspects have no inclination to fall.

This set of powers has been the subject of immense (and ongoing⁴²) dispute in the United Kingdom, despite the relatively small numbers of suspects held (seventeen according to a recent government paper⁴³) and the fairly elaborate procedural safeguards that have sought to apply some due process standards to the ongoing detention – the latter are nothing like those to be found in a normal criminal process but even in their truncated form they are far more extensive than anything upon which victims of American authority in Guantánamo, Abu Ghraib, and elsewhere around the world have

38 Space does not permit a close textual analysis of the Convention by way of support for the assertions in the text: see arts. 8(2), 10(2), and 11(2) and also the case law on art. 14. See, further, Fenwick, *id.*

39 Anti-terrorism, Crime and Security Act 2001, s. 21(1).

40 *id.*, s. 21(2)–(5). There is a good critique of the definition in Walker, *op. cit.* (2002), n. 8, pp. 20–30.

41 2001 Act, *id.*, ss. 22, 23.

42 The powers have been renewed: The Anti-terrorism, Crime and Security Act 2001 (Continuance in Force of Sections 21–23) Order 2004 (S.I. no. 2004/751).

43 Home Office, *Counter-Terrorism Powers: Reconciling Security and Liberty in an Open Society: A Discussion Paper* (2004; Cm. 6147). Table One sets out the details. Two of the seventeen have chosen to leave the country and one of the group has been certified but is being held under other powers. Note that bail is available and that conditional bail has been granted to one detainee: *G v. Secretary of State for the Home Department* [2004] E.W.C.A. Civ. 265.

been able to rely.⁴⁴ To the ordinary observer unversed in the layers of complexity in the apparently simple phrase ‘human rights law’, it must seem quite amazing that such laws can even exist in a country that is also and apparently at the same time ostensibly devoted to the protection of human rights. The difficult matter to gauge is an important one from the perspective of this essay: how, if at all, has the Human Rights Act affected the nature of this power, in relation to its conceptualization, its framing, and its subsequent deployment by the state?

The first answer to this question is the counter-intuitive and, at initial glance, unsettling one that the power is explicitly a consequence of human rights law. As the Secretary of State for Home Affairs has made clear on numerous occasions,⁴⁵ Part 4 of the 2001 Act was introduced to fill a perceived gap in the law which had resulted from Britain’s inability to remove non-nationals where sending them to their home countries would endanger their human rights, in particular their entitlements to life and to be free from torture. This ‘gap’ flows from clear case-law in the European Court of Human Rights, supported in the United Kingdom courts, that the safeguards in the European Convention on Human Rights have this kind of extra-jurisdictional reach.⁴⁶ It had been opened prior to the Human Rights Act and would have applied even if that Act had not been passed. This is also true of the need to deal with the clear infringement of the right to liberty, set out in Article 5 of the European Convention on Human Rights, which likewise was binding on the United Kingdom under international law before its incorporation into domestic law in the Human Rights Act. The problem was addressed by means of a derogation, a withdrawal from the full extent of human rights law which is itself permitted by the European Convention on Human Rights, with Article 15 authorizing such action where the executive judges this ‘strictly required’ on account of a ‘public emergency ‘threatening the life of the nation’.⁴⁷

44 See, generally, 2001 Act, ss. 24–29. It follows that to describe the situation in Britain as amounting to a mini-Guantánamo is a reckless misuse of language, making it impossible – were such a system to be introduced here – to call it by its proper name. For the very different position in the United States, see D. Rose, *Guantánamo: America’s War on Human Rights* (2004); ‘How US Rewrote Terror Law in Secrecy’ *International Herald Tribune*, 25 October 2004, 1, 4, and 26 October 2004, 2. For a good summary of the legal position in both United Kingdom and United States, see P. Thomas, ‘Emergency and Anti-Terrorist Powers: 9/11: USA and UK’ (2003) 26 *Fordham International Law J.* 1193.

45 See, most recently, Home Office, *op. cit.*, n. 43, paras. 21–41.

46 *Soering v. United Kingdom* (1989) 11 E.H.R.R. 439; *Chahal v. United Kingdom* (1996) 23 E.H.R.R. 413. In the United Kingdom, the leading authority is now *R (Ullah) v. Special Adjudicator: Thi Lien Do v. Secretary of State for the Home Department* [2004] U.K.H.L. 26; [2004] 3 All E.R. 785. The ‘gap’ only arises where it is not possible to detain such individuals by pressing charges under domestic criminal law.

47 Human Rights Act 1998 (Designated Derogation) Order 2001 (S.I. no. 2001/3644). United Kingdom anti-terrorism law had led to earlier derogations despite the then

The question that is impossible conclusively to answer is whether the very existence of this self-destruct button made such an explicit erosion of liberty *more* rather than *less* likely. On balance this would not seem to be the case. Parliament has had no difficulty in the past in agreeing draconian infringements of individual liberty at the behest of the executive,⁴⁸ and it seems unlikely that the derogation power tempted the authorities to act in a way that they would otherwise not have done. Relevant here is the apocalyptic language that the Prime Minister in particular has used; his anxieties about the threat of global terrorism⁴⁹ would surely have been likely, if given the free legislative rein that existed in pre-Convention days, to have resulted in more rather than less invasions of liberty. It needs also to be remembered (as the government has recently found, to its cost) that the derogation provision does not amount to a blank cheque, and judges are empowered to assess the legitimacy of what is asserted to be required under its head.⁵⁰ Maybe those who see the derogation procedure as a constraint on government rather than a cue for illiberal action, if not a red then an amber rather than a green light,⁵¹ have the better of the argument. This is particularly the case in light of the recent House of Lords judgment on the issue.⁵²

What the language of human rights has undoubtedly done has been to provide a focus for the unease felt by parliamentarians at being asked to vote for so explicit an invasion of a right to liberty that just three years before they had been invited by the same government to agree was fundamental. This is evident from the legislative debates,⁵³ the parliamentary committee

absence of any domestically enforceable rights' instrument: see Donohue, *op. cit.*, n. 8, pp. 345–52. See, also, C.A. Gearty and J.A. Kimbell, *Terrorism and the Rule of Law. A Report on the Laws Relating to Political Violence in Great Britain and Northern Ireland* (1995).

48 For the record during the First and Second World Wars, see K.D. Ewing and C.A. Gearty, *The Struggle for Civil Liberties. Political Freedom and the Rule of Law in Britain, 1914–1945* (2000) chs. 2 and 8.

49 See T. Blair, 'The Threat of Global Terrorism', speech in Sedgefield, 5 March 2004. For a revealing insight into the Prime Minister's approach to the implications of the extra-territorial reach of the European Convention where the removal of non-nationals to other countries is concerned, see *Youssef v. Home Office* [2004] E.W.H.C. 1884 (Q.B.).

50 The lead Strasbourg authority is *Brannigan and McBride*, *op. cit.*, n. 9; see, generally, C. Warbrick, 'The Principles of the European Convention on Human Rights and the Response of States to Terrorism' [2002] E.H.R.L.R. 287. It is true that the judicial oversight may be deferential, but that is not the same as saying it is non-existent. For how the British judges have actually approached this task, see *A (FC) and others (FC) v. Secretary of State for the Home Department ; X (FC) and another (FC) v. Secretary of State for the Home Department* [2004] U.K.H.L. 56, overturning (in part) *A v. Secretary of State for the Home Department* SIAC 30 July 2002; [2002] E.W.C.A. Civ. 1502, [2002] 1 All E.R. 816.

51 C. Harlow and R. Rawlings, *Law and Administration* (1984).

52 *A (FC) and others (FC)*, *op. cit.*, n. 50.

53 D. Nicol, 'The Human Rights Act and the Politicians' (2004) 24 *Legal Studies* 451.

reports,⁵⁴ and the general engagement of civil society in the proposals.⁵⁵ It is clear also in the report of the committee of privy counsellors that was so trenchantly critical of the need for the detention power when it published its review in December 2003,⁵⁶ and in the subsequent treatment of the subject by the Joint Committee⁵⁷ and the statutory reviewer Lord Carlile.⁵⁸ Once again it is hard to say whether or not all this would all have happened even without a Human Rights Act, but at very least, the rights formulation proved helpful in framing the discussion as one in which it was necessary to seek to balance freedom and security, rather than to allow an entirely blank cheque to the latter. Liberal thinkers may balk at even permitting such a balancing exercise to take place,⁵⁹ but a tenuous hold on public discourse is surely better than no hold at all.

In contrast, the traditional language of civil liberties – the term that would have needed to have done all the work had there been no Human Rights Act – has many of the definitional vulnerabilities of which human rights are often accused,⁶⁰ and its exposure to the demands of a sovereign parliament is greater than that of human rights, there being no equivalent of the Human Rights Act's insistence on compatibility with its requirements.⁶¹ On the other hand, the legitimizing effect of presenting human rights violations as in compliance with human rights does not apply to traditional civil liberties, where no such repressive sleight-of-hand is available. In the final analysis, much probably depends on the public mood of the day, and in this, government plays a very important role. Speculating on hypotheticals plays an honourable part in human rights studies,⁶² and in the present context tempts us to ask how a Conservative government led by Michael Howard with as large a majority as Labour but without the Human Rights Act would have acted. Any credible answer to this surely suggests that, from a civil libertarian/human rights perspective, the Human Rights Act (and the government that introduced it) must have done some good.

54 See nn. 34 and 36 above.

55 See E. Metcalfe, 'Necessity and Detention: Internment under the Anti-terrorism, Crime and Security Act 2001' (2004) 1 *Justice J.* 36; Liberty, *Recognising Security and Liberty in an Open Society* (2004); Fenwick, *op. cit.*, n. 37.

56 Privy Counsellor Review Committee, *Anti-Terrorism, Crime and Security Act 2001 Review: Report* HC (2003–2004) 100.

57 JCHR, Sixth Report, *Anti-terrorism, Crime and Security Act 2001: Statutory Review and Continuance of Part 4* HL (2003–2004) 38, HC (2003–2004) 381.

58 Lord Carlile of Berriew QC, *Anti-terrorism, Crime and Security Act 2001, Part IV Section 28 Review 2003* (2004).

59 J. Waldron, 'Security and Liberty: The Image of Balance' (2003) 11 *J. of Political Philosophy* 191.

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

61 HRA, s. 3(1).

62 J. Rawls, *A Theory of Justice* (1999, revised edn.); S. Lukes, 'Five Fables about Human Rights' in *On Human Rights*, eds. S. Shute and S. Hurley (1993).

RECONCILING TERRORISM LAW WITH HUMAN RIGHTS:
THE ROLE OF THE COURTS

As a matter of historical record, it has generally been wrong to expect much from the British courts in their supposed capacity as defenders of civil liberties and political freedom, and, until the House of Lords' remarkable decision in December 2004, the judges' interpretation of the anti-terrorism law outlined above has proved no exception to this general proposition.⁶³ What had been surprising up to that point had been the extent to which the senior judiciary had been willing to justify egregious attacks on civil liberties as *sanctioned* by, rather than *an affront to*, the Human Rights Act. There had not been conflict, with declarations of incompatibility aplenty and ongoing tension over judicial efforts to rein in executive excess. Instead, there had been the quiet of a code of human rights always anxious not only to see but also to lie down before the other point of view. While even before the Lords' ruling there had been one or two examples of principled judicial decision-making⁶⁴ or at least outcomes that even a most civil libertarian judge would have found hard to avoid, the overall picture had been bleak indeed.⁶⁵

This early tone was set in a case in the House of Lords decided shortly after 11 September 2001, when Lord Hoffmann remarked by way of a 'postscript' to his judgment that the events of that day were a reminder that 'in matters of national security, the cost of failure can be high' and that this 'underline[s] the need for the judicial arm of government to respect the decisions of ministers of the Crown'.⁶⁶ His lordship noted 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'.⁶⁷ There is at

63 Ewing, *op. cit.*, n. 7 goes into the record in great detail, and sets it in its political and legal context. For Lords' decision, see *op. cit.*, n. 50.

64 *Attorney General's Reference (No 4 of 2002)* [2004] U.K.H.L. 44 [burden of proof in Terrorism Act 2000 s. 11 prosecutions]; *M v. Secretary of State for the Home Department* [2004] E.W.C.A. Civ. 324 [Special Immigration Appeals Commission (SIAC) correct not to regard suspicious circumstances as the same as reasonable suspicion for the purposes of the exercise of the detention power under Part 4 of the Anti-terrorism, Crime and Security Act 2001]; *G*, *op. cit.*, n. 43. Note, however, that the first case is a rather traditional one on the burden of proof, a topic on which judges have always taken a keen interest, and that each of the latter two cases involved the court of appeal in supporting judgments in favour of detainees which had already been made by SIAC.

65 *Rankin v. Prosecutor Fiscal, Ayr* High Court of Justiciary, 1 June 2004, involving a prosecution for wearing items indicative of support for a proscribed organization. No human rights point appears to have been made in the case.

66 *Secretary of State for the Home Department v. Rehman* [2001] U.K.H.L. 47, [2002] 1 A.C. 153, para. [62]. The specific question before the lords related to whether support for terrorist activities in a foreign country constituted a threat to national security, but Lord Hoffmann's remarks can clearly be read more generally than this.

67 *id.*

the core of these remarks an important truth about the need for accountability in this area in particular; Lord Hoffmann is surely right to observe that '[i]f the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove'.⁶⁸ But his lordship's willingness to recognize executive responsibility here is uncomfortably close to a judicial posture of de facto total acquiescence, and this is a line to which the senior judiciary pretty rigidly stuck until the House of Lords took a radically different turn, with Lord Hoffmann in the vanguard of liberalism, in December 2004.

The derogation which permits the detention provision has been subject to one of the earliest and most sustained of challenges.⁶⁹ The Lord Chief Justice Lord Woolf remarked, in upholding the government line when the matter came before him:

[w]hile the courts must carefully scrutinise the explanations given by the executive for its actions, the courts must extend the appropriate degree of deference when it comes to judging those actions.⁷⁰

The House of Lords agreed by the overwhelming margin of 8-1 when the case came before it that not even the deference rightly given in the field of national security could permit the indefinite detention of suspected non-national (but not national) terrorists. Their lordships ruled that the derogation was not valid and, at the same time, made a declaration of incompatibility in relation to the detention provision of the 2001 Act, on the grounds that these breach both Articles 5 and 14 of the Convention.⁷¹ In making these rulings, the Lords have gone some way towards redeeming the reputation of the courts in the field of civil liberties. It remains to be seen whether the decision initiates a pattern of judicial activism, or whether it is merely a reflection both of the huge opprobrium that was heaped on these provisions in particular and of the government's ham-fisted response to that criticism.

A particularly welcome aspect of the Lords' decision is the way in which it approaches the Human Rights Act in a more principled way than had Lord Woolf and his colleagues⁷² in the court below. That decision had met with much criticism.⁷³ Perhaps the most depressing feature of the case in the Court of Appeal had been the way in which the judges seem to have misunderstood the structure of the Human Rights Act: its careful preservation of

68 *id.*

69 See n. 50 above. This is one of the cases that has been argued on appeal to the House of Lords.

70 [2002] E.W.C.A. Civ. 1502, para. [44].

71 Note that SIAC had originally also ruled the detention power to be in breach of Article 14 viewed with Article 5, but that this decision had been overruled by the Court of Appeal: *op. cit.*, n. 50.

72 *Brooke and Chadwick LJJ.*

73 See, for example, *Ewing, op. cit.*, n. 7.

parliamentary sovereignty should have given them the confidence to rule on human rights violations when they saw them, with the declaration of incompatibility procedure in section 4 being designed to ensure that no immediately (and from the executive's point of view) disruptive results should flow from any such intervention. Instead, in this case, the Court of Appeal seemed to have treated itself as though it had the final say and, having made this false assumption, then built in a whole fresh layer of deference to prevent itself from producing a difficult or unsettling (but not legally obligatory) outcome for government.⁷⁴ The House of Lords has now gone a long way towards rectifying this error.

It was decided too late for *R (Gillan) v. Metropolitan Police Commissioner*, decided on 29 July 2004.⁷⁵ Here random stop-and-search powers, supposedly provided by way of special authorization under the Terrorism Act 2000 to assist in police action against the threat of terrorism, were being constantly renewed, without any careful consideration of their specific and ongoing necessity. Under these powers, a man on his way to demonstrate outside an arms fair at the Excel Centre in Docklands was stopped and searched. Papers relating to the protest – which had absolutely nothing to do with terrorism – were seized. Another person, a journalist, was also stopped and searched and ordered to stop filming. The Court of Appeal found all this compatible with the human rights to freedom of assembly and expression that it was agreed each individual enjoyed. Because the law was limited to searching for evidence of terrorism, there was nothing in these powers that threatened either the right to freedom of expression or the right to assembly. The judges took the view that:

the courts will not readily interfere with the judgment of the authorities as to the action that is necessary. They will usually therefore not interfere with the authorities' assessment of the risk and the action that should be taken to counter the risk.⁷⁶

According to the Court of Appeal, the stop and search of the two did not even amount to a technical breach of their right to liberty.⁷⁷ Nor was the rolling programme of constantly renewing these powers at all objectionable from a human rights point of view.⁷⁸ It is true, but little consolation, that a close reading of the judgment reveals occasional flickers of anxiety on the part of the judges, a mounting concern about the implications of their reasoning, almost as though they were in the centre of a repressive maelstrom but unable to do anything about it.⁷⁹

74 On this point see, generally, C.A. Gearty, *Principles of Human Rights Adjudication* (2004) ch. 5.

75 [2004] E.W.C.A. Civ. 1067.

76 *id.*, para. [33] *per* Woolf LCJ giving the judgment of the Court.

77 *id.*, paras. [37]–[46].

78 *id.*, para. [51].

79 See *id.*, paras. [54] and [56].

The final case in this brief overview is the most antagonistic of all to human rights, *A v. Secretary of State for the Home Department (no 2)*,⁸⁰ a decision that is at the time of writing also coming up for a definitive ruling in the House of Lords. Here we learn that in considering evidence certified by the Secretary of State for the Home Department as to why he had detained a person as a suspected terrorist, the Special Immigration Appeals Commission could take into account material produced in interviews of third parties allegedly obtained by torture. This decision has deserved the opprobrium that has been heaped upon it.⁸¹ There are no weasel words available to dilute the impact of what the court is saying: we live in a human rights culture so will not torture ourselves, but where others bring us the benefits of such torture (or more accurately the alleged benefits: torture is not a particularly efficient means of obtaining information), we will gratefully accept them. This is the anti-terrorism logic brought right into the core of our supposedly human-rights-sensitive system of laws: unless the Lords rule otherwise, a man or woman can be detained here, on the basis of evidence procured by the torture of somebody else – and not only is this not unlawful, it is entirely lawful. It is hard to see how this can be compatible with any version of human rights, and hopefully the House of Lords speaking with its new liberal voice will say so unequivocally.

CONCLUSION

The re-election of George W. Bush in the United States presidential election of November 2004 makes it probable that the ‘Global War on Terror’ will continue, that it might even up a number of gears and become a legitimating basis for aggression around the world. The American electorate – albeit by a small majority – seems to have given its verdict on the place of human rights in this new discourse, namely, that it has little or no place at all: we can expect the officials and administration members responsible for formulating and executing policies of torture and indefinite detention without trial to be promoted, and it is perfectly possible that the chief legal apologists of such practices will shortly be elevated to the post of US Attorney General.⁸² The language of human rights is not yet merely

80 The full citation is *A, B, C, D, E, F, G, H, Abu Rideh and Ajouaou v Secretary of State for the Home Department* [2004] E.W.C.A. Civ. 1123.

81 See the leading article, ‘Tortured Logic’, in the *Guardian*, 12 August 2004; M. Evans, ‘The Blind Eye of the Law’ *Guardian*, 14 August 2004. Note that the Court was divided on the point, with Pill and Laws LJ forming the majority and Neuberger LJ dissenting. An excellent but more general critique is J. Jowell, ‘Beware the tools of tyranny’ *Guardian*, 28 October 2004.

82 See A. Lewis, ‘Making Torture Legal’ *New York Review of Books*, 15 July 2004, 4–8.

‘quaint’⁸³ on this side of the Atlantic, and there remains here a robust debate not about whether human rights has a place in the new security-sensitive paradigm but what that place should properly be.⁸⁴

It is vital that human rights advocates and civil libertarians enter into this discussion with gusto and determination. The door is not yet closed here though unrealistic and uncompromising assertions of supposedly pure principle might lead it to being slammed shut. For example, the recent trend towards the criminal prosecution of suspected terrorists within the jurisdiction is greatly to be welcomed as a paradigm of how things should be done.⁸⁵ Likewise the various legislative and executive initiatives, such as proposals for the admissibility of intercept evidence in court, the tagging of suspects, the use of curfew powers, and the like need to be given serious consideration if they are presented as part of a range of measures designed to replace the detention power: the issue in such cases is surely one not of principle but of proper implementation (with accountability and adequate control of discretion). In this regard, Liberty’s response to the government White Paper on counter-terrorism powers repays careful reading.⁸⁶ Even the subject of identity cards is surely not beyond the pale of rational debate, and the human rights problems with such documents are not obvious, at least at the level of principle.

The House of Lords decision aside, probably the most significant contribution of the Human Rights Act in this particular field has been to create new mechanisms for civil libertarian input and a fresh language for the articulation of traditional liberal concerns. The most recent report of the Joint Committee on Human Rights⁸⁷ is a reminder of how much important work that committee continues to do in this important field, and the role of individual members of Parliament should also not be underestimated. At the European level, a very good set of guidelines on the role of human rights in counter-terrorism has been published by the Council of Europe⁸⁸ and the EU has also been active in engaging with the human rights strand to its action on

83 The word used by White House counsel Alberto Gonzales to describe the Geneva Conventions which ought to regulate the treatment of prisoners in wartime: see Lewis, *id.*, p. 4. For critical perspectives on the United States position, see M. Welch, ‘Trampling Human Rights in the War on Terror: Implications to the Sociology of Denial’ (2003) 12 *Critical Criminology* 1; P. Chevigny, ‘Repression in the United States after the September 11 Attack’ (2004) 1 *SUR – International J. on Human Rights* 143.

84 Home Office, *op. cit.*, n. 43.

85 See (all from the *Guardian*) ‘Surveillance led to terror arrests’, 5 August 2004; ‘Terror plot suspects face charges’, 18 August 2004; ‘Terror suspects in court’, 26 August 2004; ‘Abu Hamza charged with inciting murder’, 20 October 2004.

86 Liberty, *op. cit.*, n. 55, especially ch. 7.

87 JCHR, *op. cit.*, n. 57.

88 Guidelines on Human Rights and the Fight against Terrorism (Council of Europe, 11 July 2002) 57 *Human Rights Information Bull.* 40; <<http://humanrights.coe.int>>.

anti-terrorism.⁸⁹ The basic building blocks of human rights – equality of esteem; a respect for law; a commitment to the democratic process – remain in place in Europe and the United Kingdom, but the price that needs to be paid every day to ensure the survival of these ideals in these difficult times takes the form of constant vigilance, endless community energy, and ongoing civil libertarian solidarity. If it were to depend on litigation alone, then the human rights spirit would quickly wither on the vine, as would the civil libertarian impetus of past generations. And if those who care about human rights let their attention wander, even for a short while, then they might return from their daydreaming to find a radically different society. The challenges are likely to get even tougher in the future, with the savage stupidity of the war on terror producing more of that which it was supposedly designed to end.⁹⁰

89 See D. Bonner, 'Managing Terrorism while Respecting Human Rights? European Aspects of the Anti-terrorism, Crime and Security Act' (2002) 8 *European Public Law* 497. See, for update of EU developments, <http://www.europa.eu.int/comm/justice_home/news/intro/news_intro_en.htm>.

90 'Anti-terror measures "alienate Muslims"' *Guardian*, 21 September 2004.