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NATIONAL SECURITY, TERRORISM, AND CONSTITUTIONAL BALANCE

Protection against threats to the fundamental order and institutions of a society is the most elementary function of the state and its rulers. Thomas Hobbes is perhaps the most celebrated exponent of this view in English political thinking; it led to his (then) radical conclusion that failure to provide such protection would justify refusal to accept the continued rule of the Sovereign. In a Conference held in Germany, it hardly needs pointing out that the same theme was echoed nearly three centuries later by Carl Schmitt, in what – to judge from conversations with legal academics – must be the best-known phrase in modern German constitutional jurisprudence: ‘Souverän ist, wer über den Ausnahmezustand entscheidet’, conventionally translated into English as ‘sovereign is he who defines the exception’. The ‘exception’ of course is the state of emergency, or whatever one wishes to call the state of affairs where the normal constraints of rule-bound government and debate-based politics must be suspended because the existence of the institutions which constitute it are in dire peril.

For both Hobbes and Schmitt it seemed obvious that the organ of government most suited, indeed the only one suited, to this protective function was, in contemporary terms, the executive power. Indeed early in his career Schmitt harked back to Roman times and its institution of dictatorship, although that institution was in fact hedged about with restrictions on the appointment and continuation in office of the dictator. However, in a democratic state, and in particular 21st century democratic states which have proclaimed a permanent commitment to legally-guaranteed human rights, that allocation of power is radically open to challenge. In parliamentary systems – the norm in Europe, France alone being a partial exception – the legislature as the forum of the directly-elected representatives of the people has prima facie a greater legitimacy to take decisions of such grave consequences. Certainly on one conception, the parliamentary executive functions as the agent of the legislature, which is in turn composed of ‘deputies’. This title clearly implies subordination – in this case to the electorate, in whom ultimate sovereignty rests. Moreover, to move human rights from the realm of political rhetoric and moral discourse into legal norms necessarily implies that the courts will be granted powers to enforce them. When those legal rights conflict with measures taken to further other aims or protect other interests, a conflict of norms arises which becomes a matter for the judiciary. How they define their role in such cases is discussed below, but clearly the notion of unrestricted executive discretionary power is no longer sustainable.

In this paper I will address the issue of constitutional balance – though it may be that ‘interaction’ is a more accurate term – among executive, legislature and judiciary in the context of measures taken to protect national security and/or to counter...
terrorism. I will restrict myself largely to the United Kingdom (UK), but I hope the
discussion will be relevant to other states which have in common certain key features
of the European model of parliamentary democracy, notably the fusion of legislative
and executive personnel and therefore at least indirectly of power. The UK is unique
in some respects, notably in governing itself through an unwritten constitution (or in
not possessing a written one) but that characteristic, though important, does not mean
that no useful comparisons or analogies can be made. Indeed there are many states,
such as Canada and Australia, where British constitutional norms have survived and
been transposed in various ways into a complex document and praxis.

Conversely, I do not even attempt to address the issue in the context of a
constitutional order which lays down a formal separation of powers between
executive and legislature, with an explicit textual commitment of certain powers,
notably that of declaring war, to the legislature. The paradigm case here is of course
the United States of America, and the disputes between executive and legislative
branches over the extent of their relative powers have been a consistent theme in
American constitutional history almost from its inception.4 It is perhaps not surprising
that a constitutional system committed to an unusually strict version of separation of
powers produces persistent conflicts, but the converse does not follow: the
parliamentary executive model produces distinct problems of its own.

THE EXECUTIVE AND THE LEGISLATURE

Montesquieu was perhaps the first, and certainly in the English-speaking world is the
best-known, writer to point out the dangers of fusion of power between executive and
legislature. As is well-known, he misunderstood what he saw in England during his
visit in the late 1720s, and imagined that the King (the executive) and the Parliament
enjoyed sharply differentiated powers and served as counterweights to one another.
This misunderstanding was then fed into the American constitution via James
Madison’s analysis in the Federalist Papers, drawing on Montesquieu’s Spirit of the
Laws (1748), of the necessity for what has become known as ‘checks and balances’ to
maintain a free and democratic government.5 Its widespread acceptance as a
fundamental constitutional principle throughout the world of democratic states is
attested by an examination of those constitutions, which may embody the same values
in different institutional forms.6

It is worth considering why the principle is considered to be of such high
importance. It is not primarily for reasons of competence, though that may be
relevant, but for its role as a brake on tyranny. One fear is if those making the laws
were also able to enforce them, they could draft them in openly self-interested or
partisan terms, as weapons against their enemies, whether of a class, religious, ethnic,
ideological or party-political character. Much more important, however, has been the
reverse problem: preventing those charged with the execution of the laws from
gaining the power to formulate them. Concern with this danger grew out of specific
political history, in which the hereditary monarch, controlling the armed forces and
detached from civil society, often sought to engage in wars, spend money, punish
opponents, and suspend the operation of particular laws he found inconvenient to his
purposes. This created great opposition among powerful political and economic
interests among the small property-owning elite, which were sometimes overlaid with
religious disagreements engaging larger numbers of the population. Yet what were at
times parochial conflicts among interest groups had major constitutional fallout. They
eventually produced in west European states a role for the independent legislature as a
countervailing power. In the space between Monarch and Legislature, liberty could
begin to flourish. England, in which these conflicts occupied most of the 17th century,
was the first major state to undergo this evolution.

Liberty may have flourished, but not democracy. That came much later, and (in
terms of the proportion of the population eligible to vote), later in England than
almost everywhere else. ’Democracy’ or ‘democrat’ was a political swearword in
early nineteenth century England, rather like ‘subversive’ and (almost though not
quite) like ‘terrorist’ today. Its advent however reinforces the importance of
separation of legislative and executive powers, and redefines the difference in
functions, in a fundamental way. Citizens in a parliamentary democracy vote for their
representatives or deputies in the legislature. They have no choice in selecting those
who wield executive power. In theory this affront to democratic principle is overcome
by making the executive ‘accountable’ or ‘responsible’ to the legislature; in an
extreme case, to use the English parliamentary parlance, the executive forfeits (by
vote) the ‘confidence’ of the House of Commons and can no longer remain in office.
Thus this element of indirect or attenuated democracy (as contrasted with direct
election of the President in France or the USA) is prevented from becoming an
instrument of oppression because ultimately those directly elected by the people
determine who remains in office.

This theory actually reflected the reality of Victorian Britain. Administrations fell
as they ’lost the confidence of the House’ and were followed by new administrations
composed of a mix of those who had held office in the fallen regime and previous
outsiders. This was notably true of the conduct of war and foreign relations, the
primary activity of government in the days before the Welfare and Regulatory States.
Written immediately after the country’s greatest military disaster of the century, Lord
Tennyson’s celebrated poem ‘The Charge of the Light Brigade’ with its famous line
‘Some one had blunder’d’ is renowned throughout the English-speaking world; much
less well-known is that fact that the Government fell in reaction to the incompetence
of the military authorities on a battlefield a thousand miles distant. The suggestion
that matters of foreign relations or military affairs should not be debated in
Parliament, or were matters exclusively or largely for the Executive, would have been
greeted with horror by the Victorians. They would have viewed it as an assault of the
English constitution and the liberty it protected – nothing less than a revival of the
attitudes of the Stuarts, twice overthrown in the 17th century.

The great irony is that the coming of democracy has brought with it the quiescence
of Parliament in the highest matters of state, in a manner of which the Stuarts would
have approved. Issues of defence and foreign relations, which in the mid-20th century
were subsumed under the general rubric of ‘national security’ are the areas on which
Parliament receives the least information, and debates with diminished frequency and
– even more strikingly – competence. It is in this realm too that Parliament is most
readily ignored when the Executive wishes to move with determination. As I write
this exactly a year after the attacks on New York, in the midst of an intensive political
and public relations offensive orchestrated by the American and British governments to generate support for an invasion of Iraq. Parliament remains in recess. Only a sustained campaign by MPs from all parties, plus growing opposition from trade unions which are an important support of the Labour Party has led the Prime Minister to agree to recall (i.e. convene early) Parliament - it remained a matter entirely within his gift. At the same time, however, it has been decided that MPs will not be given an opportunity to vote directly on whether to support any such invasion. The most effective forum, in the sense of one which may sway the Prime Minister, will remain newspapers and public opinion polls.

The short-circuiting of Parliament is not simply a reaction to the greater speed of decision-making that modern technology sometimes requires: matters such as the sending of troops to the Gulf War, Kosovo - or Iraq - are not decided within hours. It is partly a habit of deference to Executive power that reflects the demands of two World Wars, carried over unthinkingly into the Cold War - although Ministers, civil servants and military leaders have certainly done their best to cultivate the habit. It also reflects two other factors:

1) the wide consensus on national security issues among political elites since 1945, which has meant that only a few figures on the fringes of both ends of the political spectrum sought seriously to challenge key policies, and

2) an obsession with secrecy, going far beyond what was rationally required to protect military effectiveness.

The latter in particular is self-reinforcing, for the more that legislators are kept in ignorance and acquiesce in that allegedly blissful state, the less intelligently can they question or criticise. Hence of course the less attention that needs to be paid to their views by the Executive and the ‘experts’ who serve it, and the less credibly can they present an alternative set of policies to the wider public.

The constitutional pillar on which the Executive’s power rests is known in UK public law as the Royal Prerogative. This is conventionally defined as the legally-recognised powers of the Monarch which require no statutory authority for their exercise. They are emphatically not extra-legal, but are recognised and defined (in the sense of that limits are imposed) by the courts. The legacy and residuum of the days when the Monarch conducted affairs of state personally, they are now exercised by the Prime Minister and Cabinet in the Monarch’s name. Two well-recognised facets or applications of this power concern the conduct of foreign affairs and defence, though bitter historical experience in the 17th century of the dangers to freedom presented by armed forces under the control of the Executive led to a prohibition imposed by the Bill of Rights against maintenance of a peacetime army without consent of Parliament. Thus where royal power under the Prerogative had been abused, the legislature has long been able to assert its powers to combat it. Nonetheless the Executive starts from a position of primacy in these areas, but this too is a legacy, not merely of pre-democratic times, but of an era when the monarch’s power greatly exceeded that of the legislature and was ideologically buttressed by notions of the Divine Right of Kings to rule. In a sense the law badly lagged behind the evolution of constitutional practice as it evolved into the 19th century when, as noted earlier, foreign and military affairs were subject to regular and severe parliamentary scrutiny. This legislative assertiveness did not require, nor did it bring
in its train, any legal alteration; and the stasis of the law served to assist the executive when in the age of total war and mass democracy beginning around the First World War, it reasserted its grip on these vital matters. Any serious attempt at genuine democratisation of British political life must include drastic pruning of the Royal Prerogative in these (and some other unrelated) areas, though it must be said that the American attempt to do so has, at any rate as interpreted in the 20th century, been less than an outstanding success. It is notable too that neither Canada nor Australia, whose constitutions were drafted more than a century ago, have never tried to define or delimit executive power, even as they delineated legislative powers in infinite detail. To take the former example, only nine sections in a document containing 147 sections are devoted to Executive Power, and insofar as they address significant issues at all, are content simply to vest those powers, including the power of commanding all military forces, in the Queen. I have yet to find a good working constitutional model of executive-legislative power sharing in these fields.

The approach to measures devoted to countering ‘terrorism’ has been shaped by these wider trends and developments. ‘Terrorism’ has been subsumed under the national security rubric – mostly obviously and directly in relation to deportation, where alleged terrorists have been expelled from the country under the longstanding catch-all category that their presence is not ‘conducive to the public good’, being detrimental to the ‘interests of national security’. As a result, decisions about the deployment of soldiers overseas with the clear risk of loss of life, and the mobilisation of ships and planes at great extra expense, are taken by the Prime Minister and a few hand-picked reliable members of the Cabinet and simply announced to Parliament. It would be impossible to contend, for example, that the dispatch of British soldiers to Afghanistan in autumn 2001 was adequately debated there.

Even more secretive are the actions of security agencies, whose response to terrorism in the past years has included the extension of surveillance to increased numbers of people and to places (e.g. mosques) that had previously been regarded as off-limits. This is not to suggest that the Security Service should publish a list of their surveillance targets; rather that significant changes of policy at a general level should be announced in advance and require parliamentary debate and approval in principle. For example, during the long guerrilla war with the IRA, Roman Catholic churches were not targets for infiltration by security agencies, despite the sectarian nature of the conflict and, in a few well-known cases, the involvement of priests in paramilitary activities. It seems that mosques are now being treated with less restraint. This issue of apparent discrimination is important, not least because it could feed the hostility of the Muslim community towards the institutions of government and British society in general. Failure to discuss the issue openly could mean that only one set of considerations - those relating to immediate security concerns - would shape policy, without adequate awareness of long-term implications. Of course it may be argued that such open debate carries with it the risk of inflammatory statements and emergence of strong majority sentiment hostile to the religious liberty of a minority portrayed as suspect. To this there are two responses. One is that it is important to point out to advocates of ethnic or religious intolerance that the approach is short-sighted and may have long-range consequences they themselves would not welcome. The second is that, regardless of the outcome, states which proclaim themselves to be
democratic (and preach the superiority of their system to poorer nations round the world) thereby place themselves under a duty to discuss such issues of principle openly and civilly if they wish to earn and retain the right to the title. And though the legislature is only one forum for discussion, it is the only forum in which a decision which can claim the legitimacy of democratic representation may be taken.

The Executive does not merely make policies and direct the armed forces and ancillary bodies. It also frames legislation which when enacted may have severe and pervasive impact on the freedom of individuals and the well-being of communities. Most obviously in relation to terrorism, successive British governments have introduced measures granting enhanced coercive powers to the police; restricting access to courts; permitting long-term detention of people without trial; and altering rules of evidence and other aspects of court procedure to make conviction of suspects easier. Equally important, and particularly relevant to acts justified by the purported need to combat terrorism, it may introduce regulations to restrict the scope of human rights instruments, or to give effect to measures agreed with other states, either within the framework of the European Union or more globally. This is of the highest importance in Britain, because such measures are introduced under special procedures. Briefly, they do not require primary legislation (i.e. an Act of Parliament), but only subordinate legislation. The practical importance of the distinction is that the normal legislative process is not required, meaning that the time allocated to the measure is greatly reduced and sometimes minimal, and – most vitally – no amendment to the proposal is permitted. It must either be accepted or rejected in full, which almost invariably results in approval, often at speed.

As a matter of technical drafting, many of these instruments are lengthy and complex; often they are obscurely phrased due to the haste with which they were conceived. In other circumstances, where adequate time is granted, the quality of legislation has been measurably improved by careful scrutiny. Conversely, governments have used the emotional revulsion after some atrocity as a political opportunity, as sort of Trojan horse. As part of a large package of legislative proposals heavily advertised as a response to ‘terrorism’ they have included measures only tangentially related to that end. In the words of a former Home Secretary during the Debates on the most recent anti-terrorism law, some of these provisions were ‘hanging around in the Home Office for a long time’ awaiting a suitable legislative opportunity. Even more insidiously, they have used the same window of opportunity to enact proposals that had previously been defeated after extended debate, relying on the alleged need for speed to curtail further discussion and in effect steamroller them through.

One of the most effective means by which the Executive has usurped legislative powers is through its control of the Parliamentary timetable. In theory – a theory which long precedes democracy – the legislative chamber is the site at which proposals for new laws are subject to intense debate over matters of principle, as well as detailed scrutiny as to whether the specifics of any proposal are well-suited to its intended purpose, and, in a technical sense, well-crafted as a legal instrument. That is not the reality of political life in contemporary Britain. The Government, through its majority, controls the amount of time any particular measure will receive on the floor of the House of Commons. The result is that the Blair Government’s legislative
response to the suicide attacks on the USA – the Anti-Terrorism, Crime and Security Act 2001 [ATCSA], a statute of 129 sections and 8 Schedules running well over one hundred pages in length, received precisely 16 hours consideration by MPs. The special Parliamentary Joint Committee on Human Rights protested this limitation (along with the inclusion of material outside the main purpose of the statute), but to no effect.19 This near-contemptuous treatment of elected representatives in my view strains the democratic legitimacy of the outcome virtually to breaking point.

Ironically, it is the House of Lords, the legislative chamber comprised entirely of hereditary and appointed members20 and thus possessing little obvious democratic legitimacy, which has been the only effective forum of scrutiny, mature consideration and principled opposition. This is partly due to its composition: it numbers amongst its members some of the nation’s most distinguished and experienced lawyers, as well as a significant number of former holders of public office and persons of great distinction in various walks of life. This membership also means that the Government often does not command a majority within it. Equally important is the tradition of independence that animates it as a corporate entity. The result is that for the past 15 years the House of Lords has been the main source of thoughtful and critical debate concerning a large number of Bills introduced by successive governments of both parties. Many of these have concerned criminal justice, another emotionally supercharged issue, but the contrast with its performance and that of the House of Commons in connection with the three pieces of anti-terrorist legislation21 introduced by the Blair Government has been particularly striking. Had protection of human rights (or in traditional English terminology, civil liberties) been left solely to elected representatives, they could have disappeared, not with a bang, but with a whimper. The Lords were not able to scupper many of the provisions it opposed, due to its clearly-understood subordinate place in the constitutional hierarchy compared with the elected first chamber. Yet their ability to chivvy the Government; to force it defend certain controversial proposals and to take a second look at some which in the clear light of debate were exposed as ill-conceived or badly-expressed; to raise public awareness of certain matters which were then picked up in the media; and in some instances to force concessions by putting pressure on the legislative timetable, were the only effective expression of the parliamentary function as traditionally understood. That the site of this expression was found in its pre-democratic element is ironic but perhaps not altogether surprising. The values safeguarded and nourished by separation of powers predate democracy, and indeed are antithetical to one influential conception of it, that of simple majoritarianism. The treatment accorded anti-terrorism legislation is but an extreme case of the pathology of contemporary majoritarian democracy, in which the Executive exercises a tight grip over members of the legislature through the system of party discipline. The tradition of the independent legislator, exercising their own judgement and not serving merely as the mouthpiece of those who elected (or initially selected) them, identified pre-eminently with Edmund Burke,22 is deeply ingrained in British political mythology. It is now nearly extinct or at any rate effectively suppressed and – yet another irony – is actually more honoured elsewhere. A notable example is Germany, where the Basic Law specifically mandates in Art. 38(1) that deputies to the Bundestag ‘shall be representatives of the whole people, not bound by orders and instructions, and shall be
subject only to their conscience’. It would be well worth exploring empirically the extent of the influence of this conception in German political practice.

One mechanism through which even a tame legislature can force some accountability upon the Executive is through so-called sunset clauses. Normally a statute remains in force until explicitly repealed by another statute. A sunset clause inserts into legislation an expiry date, for the Act as a whole or for one particularly controversial portion of it. The underlying idea is to force the Government to rethink the necessity of the law, or (a sometimes unspoken aim) to hope that a different government in office at the later date with a different view of the matter would simply let the measure lapse, a much quicker, easier and less controversial way of ending it than introducing repealing legislation. The Blair Government felt constrained to accept such clauses in its most recent anti-terrorist legislation. The most controversial provisions are those which authorise detention without trial of those purportedly involved or even ‘linked’ to terrorist activities, whom the authorities choose not to prosecute but are unable to deport because European Convention jurisprudence bars deportation to states where torture or inhuman treatment awaits the person expelled. The people affected are held in one of England’s worst prisons in what their solicitor called ‘concrete coffins’, with no knowledge of what they are supposed to be guilty of. Indeed ‘guilt’ is perhaps the wrong word, because they will never have the opportunity of defending themselves in legal proceedings and having a verdict of guilt, or of innocence, pronounced upon them. The Government was able to force this measure through Parliament, but with the concession that authorising legislation is to expire within fifteen months. However, the relevant Minister may instantly revive it repeatedly with the approval of Parliament for up to five years until November 2006, when that power lapses and new legislation is required. There is also an allied requirement of review by a high-powered committee of the Act as a whole, to be undertaken within two years.

These all sound like valuable safeguards, but long experience with the operation of similar provisions makes one very doubtful. For one thing, those undertaking the reviews are appointed by the government, thus ensuring that they are ‘reliable’. Secondly, the Executive will be sure to exercise firm control over votes on extension of the legislation. It is inconceivable that it will be allowed to expire without the Prime Minister’s approval. The paradigm here is the so-called Prevention of Terrorism (Temporary Provisions) Act 1974. Passed at breakneck speed after the IRA bombing atrocity in Birmingham, the Home Secretary Roy Jenkins, who genuinely cared about civil liberties, mollified critics by insisting that the law would initially last for only six months, and would lapse when it was no longer needed. Jenkins soon moved on (to the Presidency of the European Commission) and out (of the Labour Party) and the Act was in fact renewed continuously, at first yearly then every five years, for a quarter of a century. Numerous reviews were undertaken, but they never offered a fundamental reconsideration, concerning themselves with suggesting marginal changes. The last comprehensive review, by a judge sitting in the House of Lords, recommended that the pretence of contingency be abandoned. The law was to be put on a permanent basis, with an even wider definition of ‘terrorism’ to be incorporated. (Some forms of control, notably exclusion orders, were eliminated.) This was carried out in 2000, with the statute enacted after the attacks on the USA
superimposed on that massive piece of legislation the following year. Britain now has
the most comprehensive, and in some respects most draconian, legislation directed
against 'terrorism' anywhere in the world, and certainly in Europe. It is difficult to see
how the review and renewal process has provided, or will provide, much protection
for personal and political freedoms.

With the legislative track record largely one of complaisance and timidity, the sole
recourse available to anyone caught up in the maw of the state machine is to the
courts. Yet, as I will attempt to show, that route is extremely problematic.

THE ROLE OF THE COURTS

Contemporary Western democracies have in the last two decades acquired a new and
notable characteristic element. Virtually all have some form of legally-guaranteed
human rights. Many have entrenched these rights in their constitutions, thereby
according them superior legal status to ordinary legislation, as in Germany, Canada,
USA and all the former Soviet bloc states. Others have either absorbed them through
the position of international law in their legal system (e.g. the Netherlands and France
in relation to the European Convention on Human Rights) or enacted them
domestically in some form (Norway, Sweden, and the UK). Whatever the legal form,
the expectation of citizens in an increasingly 'rights conscious' era is that individuals
will enjoy protections against abuse of fundamental rights by state authorities, and
that these protections will be enforceable in the courts. This is a fundamental change,
for it raises more directly and inescapably than was possible under the constitutional
relationships formerly prevailing, the role of the judicial branch of government in
connection with the issues of power and freedom created by anti-terrorism measures.
Thus the structure of separation of powers is now more appropriately represented by a
triangle; and its dynamic is more complex.

The UK judicial system has certain characteristics which reflect its historical role
as the progenitor of the common law, and also its place in the nation's fluid
constitution. Unlike most civilian legal systems, there is only one High Court of
general jurisdiction, and obviously there is (nor can be) no Constitutional Court.
Many legal issues concerning terrorism will arise in the context of criminal
prosecutions, which will be heard by judges who may not even be full-time members
of the judiciary, and who may very well not be criminal specialists. This is by no
means necessarily a disadvantage in assuring fair proceedings and proper application
of the law, but it does mean that issues of procedure, evidence and application of
human rights norms will all be decided at the same time by the same judge(s), at first
instance and on appeal. Thus issues that elsewhere would involve interpretation of a
specific article of the Constitution (and would be transferred for separate decision to a
Constitutional Court if one existed), and which might even be regarded as of
constitutional significance by the British judges, will be decided by the ordinary
courts along with all other legal issues raised by the particular case.

However some of the most contentious applications of anti-terrorism legislation
concerns deportation and detention without trial. These cases have been channelled
into an unusual specialist body known as the Special Immigration Appeals
Commission, or SIAC. This was established after the UK lost a major decision in
European Court of Human Rights in the case of *Chahal v. UK*, which held that persons detained pending deportation on grounds of national security did not have access to a proper court to determine their appeal. This body is a court-equivalent, or court-substitute, and its most striking characteristic is that it hears evidence in secret proceedings at which the Appellant and his lawyer is excluded. However, following a suggestion by the European Court in the *Chahal* judgment, the Appellant’s interests are looked after by a Special Counsel, who has full access to all secret material and is tasked with putting forward the strongest possible case on his behalf. The Special Counsel is modelled on a similar system operating in Canada and is designed to allow the government to introduce secret material – e.g. the names and activities of informers and the results of telephone intercepts which in the UK are not permitted to be used as evidence in court – whilst allowing security-vetted lawyers to present the strongest possible case for an appellant. SIAC is chaired by a Judge of the High Court, but its two other members are not necessarily of that rank (though they can be), nor indeed be legally-trained; one member can be a person with experience in security matters. Critical issues arising under the latest anti-terrorism statute, including the legality of the UK’s derogation from Art. 5 ECHR so as to permit indefinite detention of terrorist ‘suspects’ who cannot lawfully be deported, will come before this body.

Indeed the courts in the UK play a lesser role in controlling the executive’s use of intrusive and coercive powers than is the case in most other countries, whether common law or civil law jurisdictions. Neither telephone tapping nor ‘bugging’ – the more advanced form of technological surveillance – require prior judicial authorisation. How this can meet the standards of the ECHR, and its recent incorporation into UK domestic law in the form of the Human Rights Act 1998, remains rather mysterious. The result is to leave an enormous amount of discretion to ministers, police and civil servants. To say this is not to imply that they are ever-eager to abuse their powers, nor that they act capriciously. They are mandated to comply with statutory standards before authorising tapping or bugging, and among the 43 chief constables in England and Wales there is considerable variation in attitude and willingness to authorise intrusive measures. In practice, perhaps the most effective constraint on the extent of these intrusions is financial: extended surveillance, including the transcription of the material gathered, most of which is entirely irrelevant to the investigation, is expensive and the costs must be met from the budget of the organisation requesting the operation. It remains an open and genuine question whether, taken as a whole, these non-legal controls are less effective than those which operate in legal systems requiring judicial authorisation but in which other restraints are less important. It remains true that the relatively limited role of the UK courts in this process is, from a comparative perspective, quite striking.

The primary means by which the legality of administrative action (which includes the exercise of a discretionary power under statute or the Royal Prerogative) may be challenged in the civil courts is through a process known as judicial review. In the traditional approach, this has involved a relatively weak standard of review known as ‘irrationality’, which meant that any discretionary decision which was not clearly based on extraneous considerations, or appearing virtually inexplicable (often a matter of deduction, since giving reasons for administrative decisions has never been required) was upheld. This is to be contrasted with the more demanding German
approach, which has been adopted in EU administrative law and European Convention law as well, which demands ‘proportionality’ between the aim or policy and the means chosen. However, the incorporation of the ECHR into UK domestic law has meant that where a recognised Convention right is in issue, the proportionality standard must be applied. How this will be interpreted by the English courts is very unclear at this point, with diverse decisions pointing in different directions.33

However, over and above general principles of judicial review (which also include the overseeing the administration’s interpretation of statutes granting it various powers, and insistence upon observance of fair procedures) the courts have developed doctrines of judicial deference in certain areas of decision-making. One of these, broadly, is the realm of socio-economic regulation. Another concerns matters coming under the broad heading of national security. This was illustrated forcefully in a ruling of the House of Lords last year, written before the attacks on New York and Washington though delivered afterwards.34 A Kashmiri Muslim who had at least indirectly supported militant action against what he regarded as Indian conquest of his homeland was served with a order for deportation in 1998, on the grounds of his ‘involvement with an Islamic terrorist organisation’ made him a danger to national security. He appealed to SIAC, which ruled that the case against him was not, on the facts, established to a sufficiently high standard of proof. It also rejected the extremely wide definition of ‘national security’ used by the government, under which Britain’s need for assistance from India to counter the ‘world-wide terrorist threat’ meant that a threat to Indian national security would be considered a threat to UK national security. The House of Lords reversed on both grounds. It held that the question of whether someone’s involvement in terrorism made him a risk required a ‘global approach’ which could be decided by taking into account the ‘executive’s policy’, not a matter of fact to be determined by judicial standards.35 It further held that the executive is entitled to use any definition of ‘national security’ it considered appropriate. This ruling was buttressed by extended analysis of one of the judges, Lord Hoffmann, who insisted that the doctrine of separation of powers requires judicial deference to the executive in this field.36 The result is to give security agencies and the police - who provide the factual basis for the Home Secretary’s decision to deport in any particular case - a remarkable degree of power over individuals’ lives. It also allows the political executive virtually unrestricted power to use immigration control and the admission of refugees as an instrument of foreign policy. And for the reasons argued earlier in relation to the decline of Parliament, these powers are exercised with very little political accountability. By withdrawing from the field, the judiciary have left the executive with literally ir-responsible power - effectively responsible to no one. In these circumstances, I would suggest that the principle of separation of powers, with its ultimate rationale lying in the need to prevent arbitrary power, justifies the courts taking a more active role in protecting the interests of people faced with a devastating sanction and little capability (and in some cases no right) to protect their interests through participation in the political process.

In terms of the tripartite constitutional dynamic, the questions concerning the proper role of the judiciary may be posed as follows:
When should the courts overrule decisions taken by the executive acting under i) prerogative powers or ii) statutory powers to uphold individuals’ rights based on 1) common law 2) statute or 3) the Convention rights enacted by the Human Rights Act, which may be regarded as ‘superstatutory’? Before addressing those questions in the specific context of terrorism and national security, a number of general points, some constitutional and some matters of positive jurisprudence, must be considered.

1) There is no proper role for the UK courts in the absence of some sort of rights recognised in positive law. This may sound obvious, but it has one important implication: it leaves no scope for the sort of case that went to the German Constitutional Court, challenging the use of troops outside German territory. As I understand it, this case involved a dispute about the relative powers of the executive and legislature, with the Bundesverfassungsgericht interpreting the relevant provisions of the Basic Law which allocate the powers of the two branches. As such adjudication is not possible in Britain, the result is to leave the balance of powers between them, and the locus of decision, entirely to the political process, with the consequences discussed earlier in this paper.

2) Principles of common law are always subordinate in the legal hierarchy to provisions of statute. Therefore any rights an individual may have enjoyed as a matter of common law can always be taken away by Parliament. However, in the interpretation of statutes, there is supposed to be a presumption against loss of common law rights, i.e. where there is an ambiguity the statute should be read so as to preserve such rights. However, in practice this presumption tends to be ignored nowadays, with courts more willing to effectuate what they see as the aim of the legislation even if it curbs traditional rights. The present context is one of those in which this modern practice is most clearly manifest.

3) The HRA is a very peculiar statute in the way in which it fits into the legal structure. An important corollary of the Grundnorm of parliamentary sovereignty is that where there is a conflict between two statutory provisions, the later one governs, as being presumptively the most recent expression of the will of Parliament. Putting legislation concerning UK membership in the EU to one side, the HRA is unique in that it explicitly requires the courts to interpret all legislation, 'in a way which is compatible with Convention rights'. Thus regardless of the date of any statutory restriction on a Convention right (but not on a right conferred by an earlier statute, let alone a right based on common law), that restriction must be read in light of, and in some way harmonised with or accommodated to, any applicable Convention right. This is why I described such rights earlier as ‘superstatutory’.

4) Convention rights are of three sorts:
   a) absolute, admitting of no qualifications whatever. Two examples are the right to be free from torture and ‘inhuman or degrading treatment’ (Art. 3);
   b) qualified, which admit of only those restrictions spelled out within the text of the right itself. A primary example is right to ‘liberty and security’ in Art. 5, which is then subject six prescribed exceptions which are meant to be definitive and exclusive;
   c) conditional, where the right is subject to restrictions based on a wide range of aims recognised as legitimate, and which must be ‘necessary in a democratic society’. The right to privacy (Art. 8) and to freedom of expression (Art. 10) are the best known examples.
The judicial role in relation to these three types of rights is quite different. In the first two, the real task – by no means a simple one – is to determine whether the right is engaged or whether the prescribed exception applies to the facts of the case. Thus once a court decides that certain conduct constitutes torture, or that a person was lawfully detained with a view to his deportation (one of the specified exceptions in Art. 5), the litigant wins or loses the case on that relatively precise point. Where conditional rights are engaged, however, the scope for judgements of morality is very much greater, as is the almost unavoidable necessity of venturing into the territory of highly contested issues of public policy.

5) The Grundnorm of parliamentary sovereignty requires the courts to accept the validity of any Act of Parliament. To put the point conversely, no statute can be annulled by the courts on grounds that it violates some human right or other constitutional guarantee.41 This avoids any direct conflict between legislature and judiciary. However, statutes concerning terrorism and national security are almost invariably structured so as to confer very wide discretion on ministers or administrative officials, including police and immigration authorities. The issue for the courts – and it is on this apparently technical level that the true effectiveness of legal protections is tested – is whether to imply any limitations on the breadth of that discretion. This can be done in several ways – by requiring a factual demonstration to a high standard of proof of the basis of such suspicion or belief; by implying procedural protections for the person subject to special powers if none, or none sufficient, has been created by statute. In the mythology that has grown up over centuries exalting the common law and its judges as protectors of liberty, such interpretative practices would be the normal response to open-ended grants of executive discretion that abridge personal freedoms. However, since the First World War, the judges have fallen in behind the executive, applying what a distinguished legal historian has called ‘the Reading presumption of executive innocence’42 – Lord Reading being the Lord Chief Justice who delivered a series of rulings in favour of the executive in internment cases, in one of which he stated: ‘It is of course always to be assumed that the executive will act honestly and that its powers will be reasonably exercised.’43

This presumption is nothing less than a betrayal of judicial responsibility. Judges above all others should have an instinctive scepticism of untested factual assertions, born of awareness of the dangers of factual inaccuracies, and of prejudice replacing proof. It is to avoid these dangers that criminal accusations must satisfy a high standard of proof and must be tested by a forensic procedure which allows the accused person the opportunity to subject the case against him to rigorous interrogation. The repeated history of mistakes and dragnet operations sweeping up the totally innocent in various wartime and ‘emergency’ internments in the UK alone44 should provide a stark warning against a lax approach. Yet instead the courts in national security and wartime internment cases have developed a series of practices that might be called ‘games judges play’ – informal and subtle ways of lightening the difficulty for the Government in supporting its case, whilst imposing extra burdens of persuasion on those challenging executive decisions - that make effective challenge
to those decisions virtually impossible. This is not justified by obedience to the will of Parliament, for the statutes in question seldom explicitly command the action challenge, and in instances where the power in question derives from the Royal Prerogative, Parliament has not spoken at all.

6) The effect of the jurisprudence of the Strasbourg Court is ambiguous. For one thing, that Court operates a doctrine known as the ‘margin of appreciation’, under which deference is granted to national authorities, including national courts, as best placed for various reasons to make judgments about what measures are required to combat particular evils. This is an extremely controversial doctrine, as inspection of any treatise or textbook on the Convention will quickly show, as it runs the risk of abdicating the Court’s functions to the very national bodies whose restrictions on Convention rights are supposed to be challengeable in Strasbourg, at any rate as a last resort. Without going too deeply into its complexities, which would require a extensive paper of itself, it may be said that the application of this doctrine seems to vary depending upon which rights are at stake. In particular, it seems to operate more generously with some of the conditional rights than with the qualified rights. Notably in relation to the procedural rights in Art. 5 and Art. 6 (which governs fair trial), the Court seems less willing to leave matters to national variation, subject however to the very important qualification that it has repeatedly held that Art. 6 does not mandate adoption of any particular rules of evidence.

Not many cases involving anti-terrorist measures have been decided by the ECtHR, and almost all of them have arisen out of attempts by the UK or Irish authorities to curb Irish republicanism. Considered collectively, the judgements send out mixed messages. On the one hand, ‘terrorist crime’ has been said to manifest a ‘special nature’, and in some instances the Court has upheld the conduct of the police where it seems doubtful the same result would have been reached if the appellant had been involved in ‘ordinary’ crime, however serious. On the other hand, the majority of cases has recognised this principle but gone on to find violations of Convention rights in relation to length of detention without judicial supervision, absence of adequate justification for arrest, and violation of the right to silence and the right against self-incrimination. It seems clear, however, that the Court has up to now firmly set its face against easy acceptance of ‘the need to combat terrorism’ as a justification for radical erosion of Convention rights. It is doubtful, however, whether this stance will extend to cases involving conditional rights such as privacy, where countervailing public interests such as national security and public safety are given more prominence in the textual definition of the right itself. This will be of particular importance in relation to various forms of surveillance.

In addition, a major test of its integrity as a judicial body may emerge in the political climate engendered by the attacks on New York and Washington last year, when it comes to consider the legislation and administrative practices adopted in several states, including the UK. However, given the glacial pace at which litigation in Strasbourg proceeds, (it takes about four years on average from the date of admissibility to the rendering of a final decision by the Court), it will be years until any such issues reach the Court, so prediction as to the outcome would be little more than speculation. Yet if a climate of fear is present at the time, there is so much ambiguity in existing precedents and principles that they could readily be interpreted.
and applied so as to uphold various forms of repression, whilst claiming that the jurisprudence has itself remained unchanged. A truly testing case, in all senses of the term, will be a challenge, presently working its way through the English courts, to the UK’s ‘derogation’ (i.e. temporary withdrawal, permitted by Art.15 ECHR) from Art. 5 in respect of the internment of non-citizens suspected of involvement in terrorism who cannot be deported because they face torture or execution in their home countries. To justify the derogation the UK, as required by Art. 15, has claimed that the country in a state of ‘public emergency threatening the life of the nation’. This hardly accords with the experience of daily life, and it is also notable that no other member state of the Council of Europe has entered a similar derogation. The ECtHR has required that any such measure be limited to the ‘extent strictly required by the exigencies of the crisis’, yet in the same breath (or rather, paragraph) it has also accorded a substantial margin of appreciation to national authorities in such cases. The fear is that politics rather than law will determine the outcome.

7) It often seems that something is lost in the transition (or is it translation?) from Strasbourg to the UK courts, where the ECtHR’s references to the necessary ‘balance’ between individual rights and public interests has led – and not only in the context of terrorism – to the ‘balancing away’ of defendants’ rights in a manner that arguably fails to comply with Convention requirements. This seems particularly marked in the sphere of criminal procedure, where the English judges’ reassuring message to each other has very much been that the Convention is really what we have been doing all along, only with different words. I would suggest that this is, as a matter of positive jurisprudence, quite mistaken in many cases, and the practical import is that the seductive metaphor of ‘balance’ can readily be used to override Convention and other protections when the public clamour is loud enough. It takes some courage to resist popular pressure, even for a judiciary which enjoys solid security of tenure. The difficulty with ‘balancing’ is that the courts are forced to weigh incommensurables: there is no common measure, for example, between damage to privacy or freedom of expression and prevention of disorder and crime. Judges are understandably tempted to allow the political branches of government considerable latitude in their conclusions about what the public interest requires. There is a danger that they will do so by narrowing the meaning or devaluing the importance of the right in question, rather than facing up to the fact that in upholding an act of the executive they are in effect saying that a particular right, though generously conceived and of high importance, must give way to some specified public interest for certain fully-explained reasons. The stakes are high in such cases, and it is unacceptable to reach such a result by ignoring the implications or hiding behind a purportedly mechanistic process of ‘balancing’. There may, in other words, be sound constitutional or policy reasons to uphold the executive in a particular case, but the result must be reached candidly.

SUMMATION

In light of the foregoing, I would offer the following suggestions as to the constitutionally appropriate role for the judiciary in terrorism and national security cases:
1) The more policy-laden a particular decision and the less it directly affects fundamental rights of individuals, the greater the degree of deference owed to the executive. A good example is a Canadian case called *Operation Dismantle v. the Queen*. The applicants there argued that Government’s decision to allow testing of Cruise missiles on Canadian soil undermined arms control and made nuclear attack more likely, and thus violated their rights to liberty and security under s. 7 of the Charter of Rights and Freedoms. The Supreme Court of Canada said that although the decision could be scrutinised under the Charter, the effect of the decision was too hypothetical to give rise to a violation. My own view is that such a decision involves so many considerations, short-term and long-term, of politics and strategy as to be entirely non-justiciable – i.e. not appropriate for a legal decision which should be grounded in principles, rules and precedent. Moreover the connection between the right said to have been violated and the action challenged was so speculative and tenuous that, again, there is little scope for a judge to substitute his or her view of the matter as a rule of law.

*Operation Dismantle* was an extreme case, however. Where statutes use open-textured terms like ‘national security’ or ‘public safety’, that seems to me to be an inescapable invitation to the courts to exercise their normal function of interpretation without deference to the executive. Hence, contrary to the House of Lords in the *Rehman* case, I believe the courts should have decided that ‘national security’ could not properly encompass the sort of lateral extension for which the Government contended. Notwithstanding that the term is so inchoate, the dangers of permitting such a wide interpretation should have dictated a narrower reading consistent with the fundamental purpose of protecting the nation as a whole. The danger of course is that the British government has in effect incorporated the political interests (in this case, India’s continued control of its conquered territory, Kashmir) into its security apparatus, and is using the might of its immigration powers to punish those who take an opposing view of their homeland’s future. Since the people of Kashmir have never been offered a free choice as to their political status, the alignment of the power of British state with military conquest is an affront to the democratic values which that state claims to represent. Whether Britain should recognise India’s claim to Kashmir as a matter of foreign policy and international law is a pre-eminent example of a non-justiciable issue; but that is a very different matter from saying that the power of deportation should be used against those who, in these particular circumstances, resist the claim.

The view advocated here implies that courts or tribunals would have to investigate and evaluate claims about the political situation in a given country, but that is no longer a novelty: asylum appeals regularly involve determinations of the likelihood of persecution of particular ethnic or political minorities in scores of nations round the world. This entails intensive scrutiny and extensive evidence of the political situation and attitude of governments and security agencies towards various groups.

However, whether a particular measure is necessary for safeguarding the judicially-inspired interpretation of national security is a matter on which greater deference is due. Thus a decision by the Home Secretary, based on an intelligence assessment that acts undertaken in Britain to further the aims of a particular organisation – for example, personal involvement in a political group’s plans to attack
opponents, or in training members in military techniques – are so serious as to be detrimental to British national security (as opposed to being a minor irritant), that evaluation should in principle be respected. However – and the importance of this qualification cannot be stressed too much – the judges have a vital role in demanding clear and convincing evidence that the person alleged to have undertaken these activities in fact did so. In abandoning this paramount role of testing factual assertions – the function for which the judicial process is pre-eminently suited – the UK courts in the Rehman case did a great disservice to the maintenance of the rule of law.

Finally, I would suggest that a sort of sliding scale should operate, by virtue of which the stronger the right (absolute > qualified > conditional), the more rigorous and intense judicial scrutiny is demanded. When an alleged terrorist faces extended interrogation and police detention – and *a fortiori* imprisonment, internment, or deportation – the constitutional balance of a free society demands a strict judicial control over the exercise of these executive powers. Parliament is too remote to offer any effective response, even it could break free of the shackles of party government, and public opinion is likely to be either unaware or actively hostile to those perceived as threats. But if the judges look the other way, abuse of power, calculated or casual, is sure to follow: the beast grows upon what it has fed.

**CODA**

In December 2004 the House of Lords, Britain’s highest court, gave judgement in an appeal brought by those interned without trial under provision of the anti-terrorism legislation discussed in this article. Sitting as a panel of nine judges, itself a rarity which highlighted the historic importance of the issues involved, it found firmly, with only one dissent, against the Government’s legal position. The decision has produced what some newspapers have called a ‘constitutional crisis’ – a key element of Government policy has been declared unlawful by the courts. For Britain this is a novelty, and the House of Lords – which reversed rulings in the lower courts in the Government’s favour – displayed an admirable and, for many, unexpected fortitude in insisting upon the paramount judicial function of protecting statutory human rights.

However, the actual decision turned on a relatively narrow point. Only two judges were prepared to reject the derogation from Art. 5 of the ECHR, a position which would, at least under current conditions, have made detention without trial legally impossible. The central issue was not the legality of internment, but its limitation to non-citizens; in effect the Government had made immigration law the fulcrum of anti-terrorist measures. It was the violation of Art. 14, the non-discrimination clause of the ECHR, that was the Government’s undoing. In theory at least, this means that an internment measure that swept up all suspects, citizen and alien, would satisfy the judgment. This is almost certainly politically impossible, as the judges would have been well aware. Thus whilst the decision is to be welcomed and some of the language about the constitutional position of the judiciary in relation to the executive quite encouraging, it is by no means clear whether less crass invasions of human rights in the name of ‘national security’ or combating ‘terrorism’ would meet the same robust judicial response.
NOTES

1 This essay was completed in the autumn of 2002. Subsequent legal and political developments confirm, in the author’s view, the constitutional and policy analysis offered below. Hence no attempt has been made to discuss subsequent judicial decisions or reports of review bodies; any such discussion, if present, would have been for illustrative purposes only.


10 See especially the material presented in Henkin, above n. 3. See also H. Koh, The National Security Constitution (New Haven, Conn., 1990).

11 Constitution Act 1867 (the Constitution of Canada), Chap. III, ss. 9-16. This of course means in practice the Prime Minister and Cabinet.

12 Immigration Act 1971, s. 3 (5), read together with s. 15 (3). These are the current form of provisions that have been part of immigration legislation for many decades.

13 The justification for the present approach is that some imams and preachers are using mosques as places of recruitment, and it is they rather than the mosque or the congregation generally that are the target. However, this distinction is difficult if not impossible to maintain in practice, as was seen in the strikingly analogous Cold War example of the surveillance of Left-wing organisations. The Security Service has long maintained that it was concerned only to keep tabs on members of the Communist Party, and that other members of organisations in which Communists participated (trade unions, nuclear disarmament groups, etc.) came under their scrutiny only in their relations with these targeted individuals. Not only is this hard to credit, it makes little difference to someone whose telephone calls may be overheard or whose movements come under surveillance - the invasion of privacy is in no way diminished.

14 Examples include vastly expanded powers of arrest and search of people not necessarily suspected on any particular act but of having been ‘concerned in’ commission or preparation of acts of terrorism; detention for extended periods which only since 2000 has been reviewable by a judge; and several special measures in Northern Ireland, including abolition of jury trials and admission of evidence of the opinions of police officers as ‘experts’ on the question of the accused’s membership in a proscribed organisation. The detention powers in the Act of 2001 are considered later in this essay.

15 This is of growing importance as the EU moves towards a common asylum policy and uniform extradition rules, which are implemented domestically in this manner. Derogations from the requirements of the ECHR (see below, pp. 27-28) are also enacted this way.


17 Two notable examples: Part XI of ATCSA had been proposed and withdrawn in the face of parliamentary opposition during the passage of the Regulation of Investigatory Powers Act 2000 the previous year; and Part III, concerning disclosure of information among government departments had been withdrawn in the same circumstances only months before (see ibid. at p. 209).

18 Many important pieces of legislation receive clause by clause consideration in what are known as Standing Committees. However, legislation passed in circumstances of particular urgency, like that discussed in the text, are not considered in this way.

20 The number of the former has recently been substantially reduced but remains at 92, of a total membership of approximately 700.

21 The Criminal Justice (Terrorism and Conspiracy) Act 1998, passed through a specially-recalled Parliament in two days in response to the worst bombing atrocity in Northern Ireland’s history; the Terrorism Act 2000 (the longest of all) and ATCSA 2001.

22 Burke was an eighteenth century MP and political philosopher, now best known for his critical Reflections on the Revolution in France (1790). His ‘Address to the Electors of Bristol, 1774’ (a small number of propertied men, as it happens) is the most famous expression of this view in English. See his Speeches and Letters on American Affairs (London, 1908), p. 68.

23 Under the accelerated procedure with very limited debate described above at TAN 10.

24 ATCSA 2001, ss. 28-29.

25 To be composed of Privy Councillors, who have sworn a centuries-old oath regarding the secrecy of matters of state, and are regarded as particularly reliable and trustworthy. Mostly they are retired politicians or judges.

26 ATCSA 2001, s. 122.

27 Australia I believe remains the only significant exception.


30 For details see Lustgarten and Leigh, op.cit., pp. 81-84, 159-160, 191-92. This material was cited to the Strasbourg judges in the written submission on behalf of Mr Chahal.

31 Telephone taps are authorised by a Cabinet Minister, usually the Home or Northern Ireland Secretary; other forms of electronic surveillance by a very senior police officer. There is an oversight mechanism whose effectiveness must be regarded as doubtful, if only because there has never been a successful complaint about telephone tapping in nearly 20 years. The relevant legislation is now found in RIPA 2000, Pt. I and the Police Act 1997, Pt. III.

32 RIPA ss. 5-6; the Police Act 1997, which authorises bugging, is in similar terms.

33 Telephone taps are authorised by a Cabinet Minister, usually the Home or Northern Ireland Secretary; other forms of electronic surveillance by a very senior police officer. There is an oversight mechanism whose effectiveness must be regarded as doubtful, if only because there has never been a successful complaint about telephone tapping in nearly 20 years. The relevant legislation is now found in RIPA 2000, Pt. I and the Police Act 1997, Pt. III.


35 [2001] 3 W. L. R. at para. 29, per Lord Steyn approving the judgement of Lord Woolf M. R. in the Court of Appeal.

36 Id., paras. 50-54


38 It is not simply the absence of a written constitution that is dispositive, but also the ideology and practice that has grown up around it. I believe that the Canadian courts, having received the UK constitutional traditions, would construe the relevant provisions of the Constitution (above, TAN 10) so as to leave any such dispute to be decided by political actors, i.e. would refuse to entertain any challenge based on excess of executive power in similar circumstances.

39 And also because, if the earlier one were held to govern, it would in some sense be regarded as superior to the later one, thus enabling one parliament to bind its successors – a logical negation of parliamentary sovereignty as traditionally understood.

40 HRA 1998, s. 3.

41 Always excepting the impact of EC/EU law which does not yet extend to the area under discussion, though that may well happen in the near future.


44 The UK has operated internment – detention without trial – in both World Wars, the Gulf War, and now under ATCSA 2001. In addition it has operated regional internment regimes in Ireland on many occasions, including briefly in the early 1970s when it was then abandoned as its notable effectiveness in recruiting new IRA members was recognised. Documentation of the harsh verdict expressed in the text may be found in Simpson, op.cit., passim; K. D. Ewing and C. A. . Gearty, The Struggle for Civil Liberties (Oxford, 2000), chs. 2 and 7; N. Stammers, Civil Liberties in Britain in the Second World War (London, 1983), passim, and Lustgarten & Leigh op.cit., Ch. 7.
These abuses pale behind the wholesale roundup of all persons of Japanese ancestry, regardless of citizenship, and internment into what should be recognised were concentration camps (though of course not extermination centres) in the USA and Canada in the Second World War.

For further discussion of this point, see Lustgarten & Leigh, op.cit., pp. 330-334.


46 See above p. 23 for explanation of this terminology.

47 See above p. 23 for explanation of this terminology.


49 No case involving German or Italian legislation or other measures adopted in the 1970s to deal with domestic terrorism reached the Court, though some were heard and dismissed at Commission level.


53 See also Klass and others v. Germany, App. No. 5029/71 (1978), a national security case with overtones of anti-terrorism. Surveillance cases fall under Art. 8.

54 In marked contrast to the experience of Northern Ireland before the current ceasefire, in relation to which a similar derogation was understandably upheld in Brannigan & McBride v UK, App. No. 14553/89, 26 May 1993.


56 See further Ashworth, op.cit., pp. 62-80.

57 Here there are some exta-curial encouraging sings. In a public lecture delivered on 15th October 2002, the Lord Chief Justice, Lord Woolf, said that it was ‘almost inevitable’ that the government would infringe human rights as it tried to combat international terrorism, and that the judges, serving as a ‘longstop’ under the Human Rights Act would have to risk unpopularity to prevent long-term damage to democracy.

58 (1985) 18 DLR (4th) 481.

59 Above pp. 20-21.