Introduction

Counter-terrorism judicial review: beyond dichotomies

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The contemporary context of terrorism and counter-terrorism is one in which the impossible has become possible. For most people the conversion of a passenger jet into a weapon that would be purposefully flown into civilian buildings at the cost of thousands of lives was unimaginable before 11 September 2001; today those era-defining images have seeped into the collective consciousness. It had been assumed that debates about the morality of torture had long since been resolved; not so it seems. An actual or perceived threat of terrorism has the capacity to greatly rupture our politics. It creates an atmosphere in which the 'normal' commitment of liberal democracies to constitutionalism and human rights is challenged, with illiberal measures being introduced and potentially embedded. The possible impact of such measures, and the febrile politico-legal counter-terrorism atmosphere, hold such significant possibilities that it is not surprising that understanding and responding to terrorism and counter-terrorism has become such an active field of legal, political, operational and scholarly endeavour. One approach to understanding and responding to (counter-)terrorism is to sometimes reduce the debate to simple dichotomies: terrorist v. freedom fighter; terrorism v. counter-terrorism; vengeance v. protection; fundamentalism v. necessity; security v. liberty. However, such an approach is unhelpful; it masks the murkiness of the subject. After all this is an area in which we cannot even agree on a definition of the core subject matter; as Walter Laqueur declared 'disputes about a detailed, comprehensive definition of terrorism will continue for a long time and will make no noticeable contribution towards the understanding of terrorism'.[1] The depth of this 'murkiness' is further reflected in debates as to the

[1] W. Laqueur, *The Age of Terrorism* (Boston, NJ: Little Brown and Co., 1987), p. 72.

proportionality of responses to attacks or perceived threats, in disputes about the legality of new counter-terrorist mechanisms, and in political and other debates about how far a state ought to go to defend itself and its people against a seemingly uncontrollable risk of terrorist attack. In practice, this 'murkiness' has contributed to some extent to the design, appropriation, implementation and exercise of extensive powers of counter-terrorism, often without even a legislative basis. Even where legislation *is* used, it tends (at least relatively close to the attack in question) to be proposed by the executive and passed by a fairly compliant legislature.[2] All of this means that, generally speaking, counter-terrorism tends to be characterised by (at the very least, an attempt at) executive supremacy and unilateralism in introducing extremely repressive counter-terrorist measures that sit uncomfortably with constitutionalist principles of proportionality, limited power, respect for individual rights, and equal application of the law.[3]

This is of clear concern to many scholars, including us. In 2010 we wrote that

> Within a system of separated powers, there are three potential responses to the limitation of individual liberties resulting from Executive actions during the times of violent, terrorism-related emergency: (i) trust the Executive to behave responsibly and lawfully; (ii) rely on the Legislature and the popular democratic processes to force the Executive to behave responsibly and lawfully and minimize judicial intervention; or (iii) call on the Judiciary to intervene and restrict unlawful behaviour produced by the Executive, the parliament or both acting together.[4]

We both accepted that executive supremacy was inappropriate, agreeing that some restraint on executive power was desirable. The ongoing use of closed material and a general air of secrecy in counter-terrorism give rise to an opaque environment causing us to be even more suspicious of

[2] F. de Londras, *Detention in the 'War on Terror': Can Human Rights Fight Back?* (Cambridge University Press, 2011), ch. 1.

[3] Although supranational bodies involved in counter-terrorism do not generally have a clearly identifiable executive branch per se, Murphy outlines how an executive type power can be observed in these contexts. See Chapter 12 in this volume, C. C. Murphy, 'Counter-terrorism law and judicial review: the challenge for the Court of Justice of the European Union'.

[4] F. de Londras and F. Davis, 'Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanisms' (2010) 30 *Oxford Journal of Legal Studies* 19.

simply trusting the executive. However, we disagreed on which of the remaining two responses would provide the most effective means of controlling executive power. Since then there has been some convergence of opinion; in some respects we are less absolute in our positions.[5] However, while the common ground has expanded, the end result remains the same: de Londras favours enhanced judicial review while Davis sees judicial review as both ineffective and undermining of parliamentary scrutiny. Our debate – and our disagreements – form only part of a broader set of concerns about judicial review generally, and about judicial review in the context of counter-terrorism (or, indeed, other violent emergency) more particularly. This broader debate, which takes place across legal systems and continents, has a number of branches that are reflected in this collection: institutional appropriateness, quality, sufficiency and internationalisation.

All of these elements of the debate about counter-terrorism judicial review speak to a core concern that we address later in this Introduction: what is the purpose of judicial review? Once we can ascertain that in normative terms, the secondary concern (how can that purpose best be achieved within and outside of judicial review structures?) becomes germane. The purpose of this volume is to deal in an open, although discursive, manner with that second concern. To that end, the collection brings together some of the key contributors to this debate in both scholarship and practice to engage in a dialogue, not with a view to resolving our differences but rather to exploring them.

I What is at stake?

Debates about counter-terrorism judicial review are important and wide-ranging, reflecting the fact that when it comes to counter-terrorism the stakes are high. As Lord Chief Justice Coke stated in *Calvin's Case* the

[5] For example, de Londras has recently called for a more 'virtuous' politics to improve counter-terrorist law and policies both before and in response to judicial intervention: "Guantánamo Bay, the Rise of Courts and the Revenge of Politics" in D. Jenkins, A. Henriksen and A. Jacobsen (eds.), *The Long Decade: How 9/11 Has Changed the Law* (Oxford University Press, 2014), pp. 155–67. Davis has attributed a greater role to courts in the process of dialogue. Where he previously saw them simply as raising an alarm through a simple declaration of incompatibility he now acknowledges a role for judgments to engage popular and parliamentary debate: 'Parliamentary Supremacy and the Re-invigoration of Institutional Dialogue in the UK' (2013) *Parliamentary Affairs* forthcoming.

sovereign is bound 'to govern and protect his subjects'.[6] A successful act of terrorism demonstrates a failure on the part of a sovereign state to fulfil that most basic of duties. This can undermine public confidence and inspire moral panic. Indeed:

> [T]errorism is an anxiety-inspiring method of repeated violent action, employed by (semi-) clandestine individual, group or state actors, for idiosyncratic, criminal or political reasons, whereby – in contrast to assassination – the direct targets of violence are not the main targets. The immediate human victims of violence are generally chosen randomly (targets of opportunity) or selectively (representative or symbolic targets) from a target population, and serve as message generators. Threat- and violence-based communication processes between terrorist (organization), (imperilled) victims, and main targets are used to manipulate the main target (audience(s)), turning it into a target of terror, a target of demands, or a target of attention, depending on whether intimidation, coercion, or propaganda is primarily sought.[7]

If we accept this definition, for the moment at least, it becomes apparent that manipulation of the target is central to terrorism. Given that the target is often the public, this manipulation is likely to impact upon the quality of democratic debate. It is therefore unsurprising that the state of exception arising from an act of terrorism often has a distorting effect on democracy. For example, in the United States post 11 September 2001:

> instead of the rowdy, rhetorical deliberations appropriate to agnostic politics in a healthy pluralistic polity, the nation experienced a wave of patriotic fervor and political conformity in which the expression of dissenting opinions and the defence of civil liberties were equated with anti-Americanism.[8]

This distortion of democracy has an impact on the quality of political debate and meaningful engagement with political society. Where these negative impacts on democracy coincide with a general 'security bias' the resulting impact on liberty can be extreme. Internment without trial, extraordinary rendition, control orders, and special trial procedures such as those employed at Guantánamo Bay, have all been utilised by

[6] 7 Coke Report 4 b, 77 ER 382.
[7] A. P. Schmid and A. J. Jongman, *Political Terrorism: a New Guide to Actors, Authors, Concepts, Data Bases, Theories, and Literature* (Piscataway, NJ: Transaction Publishers, 2005), p. 28.
[8] R. L. Ivie, 'Rhetorical Deliberation and Democratic Politics in the Here and Now' (2002) 5 (2) *Rhetoric and Public Affairs* 277, 281.

otherwise liberal democratic states on the basis that a terror threat needed to be faced down. The illiberal nature of these provisions is, in and of itself, problematic but it also has the potential to impact on the wider legal system through normalisation, (perceived or actual) illegitimacy of state action, and the mounting of a serious challenge to the core elements of constitutionalism.

The designation of counter-terrorist law and policy as an 'exceptional' phenomenon, introduced in exceptional situations, is contingent upon what is known as the emergency-normalcy dichotomy.[9] This postulates that there are discrete and quantifiable situations of emergency that exist as aberrations from the (general) normalcy in which the state operates. This dichotomy is reflected throughout law at both domestic and international levels,[10] and it is designed – as Greene has written – to allow for the concept of emergency to act as both a shield and a sword.[11] As a shield it is intended to protect the populace from generally repressive laws by holding the state to strict limits in the normal course of events; as a sword it is intended to give states the latitude they are thought to require to take firm and (we are to hope) decisive action against terrorist threats.[12] However, as is so often the case, law and life are mismatched. The emergency in which exceptional laws and policies are tolerated has tended to extend far beyond the aberrational; it has tended to become entrenched (either generally or in particular regards) domestically and now risks doing so internationally. The risk of entrenchment is the normalisation of emergency measures; their continued application, their widening scope, their recalibrating potential. A core concern in any debate about limiting counter-terrorist activity by judicial review or otherwise has to be the maintenance of a division between the exceptional and the normal and, moreover, the quarantining of repressive powers in terms of time and scope.

A belief in the likelihood of a return to normalcy at the end of a period of exception is dependent on a number of factors. First, it seems likely that the capacity of the various arms of government to 'reclaim their status and functions once the danger has passed' will be dependent on

[9] See generally O. Gross and F. Ni Aolain, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge University Press, 2006), ch. 4.
[10] *Ibid.* chs. 5 and 6.
[11] A. Greene, 'Shielding the State of Emergency: Organised Crime in Ireland and the State's Response' (2011) 62(3) *Northern Ireland Legal Quarterly* 15.
[12] *Ibid.*

the strength of democratic culture in the state.[13] More fundamentally a return to normalcy rests on the ability to define the end of the state of exception. The decade since 11 September 2001 has caused many to question whether the response to terrorism can genuinely be seen as 'exceptional' in the sense of it being temporary.[14] As a result any measures adopted are likely to have an ongoing effect. Furthermore, it can be demonstrated that repealing and unpicking complex counter-terrorism measures is often problematic. For example, although the UK Conservative/Liberal Democrat Coalition government expressed a desire to repeal the worst excesses of the Labour Government's counter-terrorism measures, their Terrorism Prevention and Investigation Measures Act 2011 and Freedom Bill had only limited success if measured against civil liberties yardsticks that would be applied in a period of 'normalcy'. So too is such unpicking dependent on the maintenance of our understandings of the content of rights during the crisis itself. As the contributions from Chan, Jenkins and Fenwick in this collection make clear,[15] that which is exceptional must be named as exceptional; its particularity must be clearly identified *even if* it is to be accepted as necessary and justifiable given the circumstances in which it occurs. To do otherwise is both to potentially apply the emergency power to *everyone* (not just 'the threat') and to ratchet down the starting point of civil liberties and empty out to some degree our understanding of constitutionalism, creating a diminished rights culture after the present crisis (and at the commencement of the next one).[16]

[13] A. Lynch, 'Legislating Anti-terrorism: Observations on Form and Process' in V. V. Ramraj, M. Hor, K. Roach and G. Williams (eds.), *Global Anti-Terrorism Law and Policy* (2nd edn, Cambridge University Press, 2012), p. 151.

[14] *Ibid.*; but cf. the decision of the European Court of Human Rights in *A* v. *United Kingdom* [2009] ECHR 301 (19 February 2009) holding that temporariness is not a requirement of emergency for the purposes of Article 15 ECHR.

[15] See Chapters 3, 10 and 13 in this volume, D. Jenkins, 'When good cases go bad: unintended consequences of rights-friendly judgments'; C. Chan, 'Business as usual: deference in counter-terrorism rights review'; and H. Fenwick, 'Post 9/11 UK counter-terrorism cases in the European Court of Human Rights: a "dialogic" approach to rights protection or appeasement of national authorities?'.

[16] An important contribution to the debate on control mechanisms has been the extra-legal measures model proposed by Oren Gross, which is fundamentally concerned with attempting to prevent this kind of ratcheting down. Under this model, state actors would make an assessment about whether something was necessary whether or not it was lawful, undertake the action if they considered it necessary, and make a full *ex post facto* disclosure allowing for the risk of censure or of endorsement. In this model, crucially, laws allowing for the previously disallowed are not introduced; rather the positive law

If one thought that emergencies were really containable, and that politics were not opportunistic when it comes to making the most out of a 'good crisis',[17] one might argue that none of this matters *too much* for the short period of time that the emergency or crisis persists. However, history and experience tell us that this is not so, and that counter-terrorism without the counterweight of constitutionalism has significant repercussions for civil liberties. In this respect, counter-terrorism is an iterative and cumulative process. This is well illustrated by the journey from detention without trial to control order 'lite' in the United Kingdom. The Anti-Terrorism, Crime and Security Act 2001 provided for indefinite detention of foreign nationals suspected of terrorism.[18] The control order regime replaced this with a system of virtual house arrest that was repeatedly criticised by the courts[19] and the Joint Committee on Human Rights,[20] and that in turn was replaced by the restrictive Terrorism Prevention and Investigation Measures (TPIMs), now operating, that still allow for extensive restrictions on personal liberty.[21] Although this represents a movement towards less repressive measures, it has also resulted in a shift in judicial and political approaches to accept that being

retains its integrity. The model is critiqued, particularly in its apparent distinction of the positive law from the politico-legal culture in which it operates. The model does not feature prominently in this collection. See O. Gross, 'Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?' (2003) 112 *Yale Law Journal* 1011; D. Dyzenhaus, 'The Compulsion of Legality' in V. V. Ramraj (ed.), *Emergencies and the Limits of Legality* (Cambridge University Press, 2008), p. 33; O. Gross, 'Extra-legality and the Ethic of Political Responsibility' in V. V. Ramraj (ed.), *Emergencies and the Limits of Legality* (Cambridge University Press, 2008), p. 60.

[17] White House Chief of Staff, Rahm Emmanuel, famously said 'You never want a serious crisis to go to waste. And what I mean by that is an opportunity to do things you think you could not do before'. The video clip of him making this statement is available at www.youtube.com/watch?v=1yeA_kHHLow.

[18] Anti-Terrorism, Crime and Security Act 2001, s. 23.

[19] *Secretary of State for the Home Department* v. *JJ* [2006] EWHC 1623 (Admin); *Secretary of State for the Home Department* v. *E* [2008] 1 AC 499; *Secretary of State for the Home Department* v. *MB and AF* [2008] 1 AC 440; *Secretary of State for the Home Department* v. *AF (No. 3)* [2010] 2 AC 269.

[20] See e.g., Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010* (calling for the control orders scheme to be discontinued).

[21] F. Davis, 'The Human Rights Act and Juridification: Saving Democracy from Law' (2010) 30(2) *Politics* 91, 93; K. Ewing and J. Tham, 'The Continuing Futility of the Human Rights Act' (2008) *Public Law* 668; H. Fenwick and G. Phillipson, 'Covert Derogations and Judicial Deference: Redefining Liberty and Due Process Rights in Counterterrorism' (2011) 56(4) *McGill Law Journal* 863, 865–918.

confined to one's home for up to fourteen hours a day and then limited in activity and interaction outside of that time does not qualify as detention and therefore is not attached with all of the safeguards that the law provides for detainees.[22] The imminent introduction of 'Enhanced' TPIMs also calls into some question how substantive that shift has truly been.[23]

Furthermore, even the most entrenched and normatively accepted constitutionalist standards have been honoured more in the breach than the observance over the past ten years, calling into question their capacity to retain their absolute nature. The prohibition on torture is the clearest example of this.[24] States have used the cover of 'counter-terrorism' to justify the torture of suspected terrorists (themselves, by 'partners', through the collusion of third states and by the involvement of private entities).[25] Indeed, torture has undergone a quasi-rehabilitation following the assassination of Osama Bin Laden, located, it seems, at least partly as a result of information gleaned from Khalid Sheikh Mohammed under 'coercive interrogation' while held incommunicado in a secret prison. The Kafkaesque nature of this kind of scenario can hardly go unnoticed, but there now exists a culture, politics and even a scholarship around torture that was almost unimaginable a decade ago. Such a situation not only has implications for the immediate period of the emergency or crisis but also for the future shape of criminal justice, which can be affected by the 'creeping consequentialism'[26] of counter-terrorist measures.

In addition, the adoption of exceptional counter-terrorism regimes can undermine the perception of the legal system's legitimacy. Legitimacy is,

[22] See especially, L. Zedner, 'Preventive Justice or Pre-Punishment? The Case of Control Orders' (2007) 60 *Current Legal Problems* 174.

[23] See H. Fenwick, 'Designing ETPIMS around ECHR Review or Normalisation of "Preventive" Non-Trial-Based Executive Measures?' (2013) 76(5) *Modern Law Review* 877.

[24] The use of torture and coercive interrogation in the 'War on Terrorism' has attracted substantial amounts of literature. For an excellent collection of essays reflecting on torture in the 'War on Terrorism' see S. Levinson (ed.), *Torture: A Collection* (Oxford University Press, 2004).

[25] F. de Londras, 'Privatised Sovereign Performance: Regulating in the "Gap" between Security and Rights?' (2011) 38 *Journal of Law and Society* 96.

[26] A. Ashworth, 'Crime, Community and Creeping Consequentialism' (1996) *Criminal Law Review* 220; see also L. Donohue, *The Cost of Counter Terrorism: Power, Politics and Liberty* (Cambridge University Press, 2008), ch. 1 and p. 71. The use of control orders against Australia's 'Bikie Gangs', for example, demonstrates a seepage of repressive counter-terrorism measures into the ordinary criminal law: A. Loughnan, 'The Legislation We Had to Have?: the Crimes (Criminal Organisations Control) Act 2009 (NSW)' (2009) 20(3) *Current Issues in Criminal Justice* 457.

of course, a contested concept in law but in constitutional democracies it contains at the very least adherence to democratic principles of deliberation, equality before the law, and inter-institutional respect within separated powers.[27] The past decade of counter-terrorism has called into serious question the legitimacy of a system of law that can allow for what seems to be the outright rejection of these core principles. The detention centre at Guantánamo Bay and the protracted attempts at prosecuting Khalid Sheik Mohammed illustrate this point. Detainees were sent to Guantánamo Bay so that they could be interrogated – not with a view to building a case for criminal prosecution but rather as an intelligence-gathering exercise.[28] The existence of an extra-legal regime at Guantánamo makes it difficult to bring those detainees back within the 'ordinary' legal order. Roach has argued that Guantánamo Bay became a 'symbolic rejection of criminal justice norms'.[29] The reality of that rejection becomes all the more stark when we consider the successful record of the US federal courts in prosecuting hundreds of terrorist suspects since 11 September 2001.[30] It is difficult to maintain a perception of legitimacy around the prosecution of Khalid Sheik Mohammed and his co-accused when they are being tried by a tribunal whose legitimacy they reject on the basis of information that would be excluded for illegality in an ordinary trial, where their previous attempts at pleading guilty were ignored, and when the ordinary courts have provided a sound basis for conducting other terror trials.[31]

The use of counter-terrorist regimes in a manner that (at least seems) discriminatory further undermines the legitimacy of the legal system. Muslim communities have become 'suspect communities'[32] and elements

[27] F. de Londras, 'Can Counter-Terrorist Detention ever be Legitimate?' (2011) 33(3) *Human Rights Quarterly* 592, 597–604.

[28] M. Davis, 'Historical Perspectives on Guantánamo Bay: the Arrival of the High Value Detainees' (2009) 42 *Case Western Reserve Journal of International Law* 115.

[29] K. Roach, 'The Criminal Law and its Less Restrained Alternatives' in V. V. Ramraj, M. Hor, K. Roach and G. Williams (eds.), *Global Anti-Terrorism Law and Policy* (2nd edn, Cambridge University Press, 2012), pp. 91, 108.

[30] E. Holder, 'Statement of the Attorney General on the Prosecution of the 9/11 Conspirators' (4 April 2011), available at www.justice.gov/iso/opa/ag/speeches/2011/ag-speech-110404.html.

[31] K. Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press, 2011), p. 213; E. Pilkington, '9/11 families angered over behaviour of alleged plotters at Guantánamo Bay', *Guardian*, 6 May 2012, available at www.guardian.co.uk/world/2012/may/06/9-11-families-angered-guantanamo-trial?INTCMP=SRCH.

[32] On the concept of the suspect community see P. Hillyard, *Suspect Community: People's Experience of the Prevention of Terrorism Acts in Britain* (London: Pluto Press, 1993); for

of religious practice important to many (although not all) Muslims have come under what to many seems like Islamaphobic attack; laws have been crafted in expressly discriminatory terms (such as the section 23 power of detention under the Anti-Terrorism, Crime and Security Act 2001 in the United Kingdom) or applied in what seems like a discriminatory manner even when neutrally worded.[33] Suspected terrorists detained in Guantánamo Bay and accused of inchoate offences have their capacity even to see a lawyer severely curtailed before being tried (if at all) in military commissions without full capacity to build a defence, while people who perpetrate vicious gun attacks in mainland United States, killing dozens of people, get full and fair trials. It is not difficult to see why at least some people at the sharp end of these measures lose their faith in the law, the state and the international community with potentially devastating effects in the future.

II Counter-terrorist judicial review

All of this shows clearly that when it comes to counter-terrorism the stakes are high, not just from a security perspective but also for law, the legal system and the normative integrity of the state. The question with which this collection is fundamentally concerned is whether what we term 'counter-terrorism judicial review' can help to protect the state from the corrosive impact of counter-terrorism and 'the people' from its more invidious effects. In this respect, and for the purposes of placing parameters on the debate undertaken and engaged with in this book, we can define counter-terrorism judicial review as the use of judicialised processes to challenge state behaviours that fall into the broad category of 'counter-terrorism'.[34] Thus, 'traditional' or administrative judicial review can be counter-terrorism judicial review, but so too can other judicialised

the Muslim community's experience see e.g., T. Choudhury and H. Fenwick, *The Impact of Counter-Terrorism Measures on Muslim Communities*, Equality and Human Rights Commission Research Report 72 (2011).

[33] See e.g., the operation of Schedule 7 to the Terrorism Act 2000 in the United Kingdom (the port search provision), which is perceived as having a disproportionate impact on Muslim communities. (See Choudhury and Fenwick, *The Impact of Counter-Terrorism Measures on Muslim Communities*, n. 32 above.)

[34] Although we refer to 'state' here, this can also encompass judicialised challenges to counter-terrorism measures undertaken by supranational bodies such as the EU. This is discussed in Chapter 12 in this volume, C. C. Murphy, 'Counter-terrorism law and judicial review: the challenge for the Court of Justice of the European Union'.