Exploring the Constitutional Implications of the UK's Contemporary Counter-Terrorism Response(s) through the Lens of 'Political' Constitutionalism

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Contents

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Abstract

The theory of 'political' constitutionalism has for many years provided a distinctive perspective on the inter-relation between constitutional law and politics in the UK. However, recent and growing criticism of this perspective in the academic literature has created a crucial space in which to inquire afresh as to its continuing relevance, and indeed its continuing utility, specifically as a lens through which to explore key contemporary issues in and of the UK constitution. This thesis explores that crucial space; it engages with and thus responds to these various criticisms, in particular those which would characterise political constitutionalism—and the 'legal' paradigm of constitutionalism to which it has primarily emerged as a vital corrective—as presenting (no more than) an essentially highly stylised, abstract 'model' of ideal-type constitutional arrangements, far-removed, that is, from the realities and nuances of how the UK constitution, and the balance of power within it, might be seen to operate in practice. Indeed, a significant portion of the literature on political (and legal) constitutionalism *is* so normatively charged and ultimately conducted in such abstract terms. Yet, the key argument developed in this thesis is that these debates do not, and thus should not be seen to, limit the potential for political constitutionalism to generate important insights (of broader conceptual significance) in and of itself.

In order to explore this potential, the thesis considers the constitutional implications of four key (controversial) areas of contemporary counter-terrorism law and policy in the UK, namely those areas involving measures which operate so as to deprive an individual (or a group of individuals) of their liberty, their privacy, their property, and their life. It is argued that the utility of political constitutionalism is vindicated when viewed primarily as an explanatory lens, in particular one which emphasises, and thus provides key conceptual tools with which to critique, the contestability and contingency of constitutional law and legal norms in each these areas. Though, crucially, the various legal and political developments in these particular areas of counter-terrorism can be seen, in turn, to raise important questions for political constitutionalism itself. The interplay of domestic and international law and politics in the context of counter-terrorism raises a key question as to how the framework of political constitutionalism might accommodate the latter, where, typically, the law/politics dynamic is generally conceptualised as taking place entirely on the domestic plane. Moreover, counter-terrorism highlights examples of constitutional arrangements which very clearly *empower* state actors, especially in ways which might be considered undesirable from a democratic perspective. The question, therefore, is how this might be reconciled with political constitutionalism: a distinctive approach to constitutional analysis which typically espouses only the *virtues* of democratic politics, seldom its vices. The key contribution of the thesis is thus: it considers the various ways in which the insights of political constitutionalism are brought to bear on counter-terrorism law and policy, and, in turn, highlights the ways in which contemporary developments in counter-terrorism law and policy might in turn be seen to generate valuable insights for political constitutionalism.

Introduction

The threat of terrorism, and the many and various controversial measures employed by the state in order to diminish that threat (ultimately so to prevent it from materialising), pose very great challenges for liberal democracies and their constitutional arrangements. In a well-known study of the deeply fraught relationship between these two phenomena, Alex Schmid notes that, fundamentally, the 'main dilemma posed when democracies are confronted by terrorism is the one between ACCEPTABILITY and EFFECTIVENESS':

> Antiterrorist measures have to be acceptable to a democratic society. On the other hand they have to be effective against a particularly unsavoury type of attack. It looks as if we have to make a cruel choice: do we want to sacrifice some democratic substance in order to be effective against terrorism or do we have to tolerate a certain level of terrorism for the sake of maintaining the civil liberties and political rights which we cherish?[1]

Of course, this dilemma has taken on a particular relevance in the last decades, the concerted terrorist attacks in New York, Washington D.C. and Pennsylvania on 11 September 2001 having laid bare to a global audience the immense and unprecedented destructive potential of the modern terrorist threat. Thus, '[t]he resurgence of international terrorism on a grand scale after ['9/11'] caused democracies and the international community to inquire afresh whether the tools at their disposal were suitable to face such a threat'.[2] A debate of particular and ongoing significance in recent years is that of whether, and if so to what extent, the use of extraordinary measures to deal with the contemporary terrorist threat can be reconciled with a constitutional commitment to democratic politics, to the principle(s) of the rule of law, to the protection of the 'fundamental' rights of unpopular minorities. The high stakes of counter-terrorism law and policy establishes a uniquely pertinent context in which to explore the tense interplay of constitutional law and politics. After all, it is in this context that political power is exercised by the state in especially novel, if often egregious ways.

In the United Kingdom, the (often competing) theories of so-called 'legal' and 'political' constitutionalism have exerted a great influence over such key debates. Indeed, such is the predominance of these approaches to the study of the UK constitution in the academic literature, more broadly. 'It is true, of course,' Graham Gee and Grégoire Webber wrote in

[1] Alex P Schmid, 'Terrorism and Democracy' (1992) 4(4) Terrorism and Political Violence 14, 15.

[2] See, eg, Andrea Bianchi and Alexis Keller (eds), *Counterterrorism: Democracy's Challenge* (Hart Publishing 2008) xii.

2010, 'that the idea of a political constitution—one that is associated with holding those who exercise political power to account, for the most part, through political processes and in political institutions—has long since melted into the landscape of constitutional thought, at least in Britain'.[3] Classically—if now perhaps somewhat tritely—'the idea of a political constitution [is juxtaposed] with that of a legal constitution, the latter being associated with holding those exercising political power to account, to a substantial and increasing extent, through judicial review', while '[i]t is also commonplace to suggest that Britain's constitution is slowly evolving away from a political constitution towards something more akin to a legal constitution'.[4] This discourse has spawned an extensive literature, with much attention having been paid, in particular, both to the idea(l) of 'the political constitution', most famously given expression in John Griffith's 1978 Chorley Lecture,[5] and the discrete, distinctively *normative* theory of political constitutionalism to which that idea(l) has given rise.[6] Questions as to, for instance, the contemporary relevance of Griffith's insights, if any, what it might mean to talk of the UK constitution as the archetype 'political constitution', and what, if anything, can be gleaned from adopting this perspective as a means of understanding the inter-relation between law and politics in and of the contemporary constitution, all continue to inspire debate in the pages of the law journals.[7]

It suffices to briefly note here that the development of the theory of political constitutionalism has primarily emerged as a vital corrective to the theoretical or principled claims of the otherwise prevailing 'legal' paradigm of constitutionalism, especially as the latter might be assumed to have any normative or indeed explanatory force in the specific context of the UK's constitutional arrangements. That is, the former is principally oriented to deconstructing the liberal, value-laden conceptions of 'law' and 'constitution' in which the latter has historically been grounded: that in law and legal norms, and in such instruments as 'written' constitutions and legally-entrenched bills of rights, a political community is capable both of identifying a discrete set of *foundational* (liberal) values and principles—including, for example, the rule of law, and 'fundamental' individual rights and civil liberties—and, in turn, of institutionalising their protection by constraining the ostensibly self-serving and potentially destructive practice of (democratic-majoritarian) politics.[8] Rather, political constitutionalism emphasises the *limits* of law and of such legal norms and constitutionally-enshrined 'fundamental' rights in this regard; it challenges the 'liberal-legal' conception of the relationship between constitutional law and politics, (re-)framing this relationship as one in which, fundamentally, both are contingent upon and thus respond to and are conditioned

[3] Graham Gee and Grégoire CN Webber, 'What is a Political Constitution?' (2010) 30(2) OJLS 273.

[4] ibid 273.

[5] JAG Griffith, 'The Political Constitution' (1979) 42(1) MLR 1.

[6] See, especially, Adam Tomkins, 'In Defence of the Political Constitution' (2002) 22(1) OJLS 157; Adam Tomkins, *Our Republican Constitution* (Hart Publishing 2005); Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (CUP 2007); Thomas Poole, 'Tilting at Windmills? Truth and Illusion in 'The Political Constitution'' (2007) 70(2) MLR 50; Graham Gee, 'The Political Constitutionalism of JAG Griffith' (2008) 28(1) LS 20; Gee and Webber (n 3).

[7] See, especially, 'Political Constitutions' (2013) 14(12) German LJ; 'The Political Constitution at 40' (2019) 30(1) KLJ.

[8] See, eg, Martin Loughlin, *Sword and Scales: An Examination of the Relationship between Law and Politics* (Hart Publishing 2000) 193 (emphasis added): 'Constitutionalism … generates a particular conception of the relationship between politics and law. It suggests that law must be conceived as a structure of rules and principles which provides *the foundation of political order*.'

by one another.[9] In other words, political constitutionalism builds on several key arguments first expressed in Griffith's Chorley Lecture, including that 'politics is what happens in the continuance or resolution of … conflicts [within a political community] … [a]nd law is one means, one process, by which those conflicts are continued or may be temporarily resolved'.[10] And in the subsequent development of the particular normative bent of political constitutionalist theory, which embraces a distinctly celebratory account of democratic politics, the conditioning of political power via deliberative and representative political fora (most obviously that of Parliament)—whether, for instance, as a means of enhancing the liberty of the individual in a political community, or valorising the republican and/or collectivist potential of political decision-making—is seen as preferable to the distinctive characteristics of law and legal norms and the (limitations of the) paradigm, adversarial nature of the judicial process.[11]

Yet, notwithstanding the influence and the level of depth and maturity—orthodoxy, even—that the discourse has achieved in recent years (particularly in the UK), there have in fact been recent and growing calls to reject it as an essentially polemical, highly stylised and altogether futile debate.[12] Typically underpinning this criticism is the perception that legal and political constitutionalism necessarily caricature 'law' and 'politics', and archetype 'legal' and 'political' institutions (courts and Parliament, respectively), as in perpetual opposition with one another, vying, it would seem, for ideal-type constitutional arrangements in which law trumps politics, or vice versa. Indeed, one key question in particular on which the discourse can be seen to have lingered, generally, concerns the most desirable means by which constitutional actors may be '*limited*' in the exercise of political power (be that, for instance, most 'democratic', most 'legitimate', most 'effective'): whether by 'law' or by 'politics'; or whether by courts or by Parliament. Thus, however potentially attractive from whatever normative perspective, it has often been said that such an approach to understanding (especially) the UK constitution is deemed to be far-removed from the realities of *actual* constitutional practice. There is, in other words, very little to learn about the constitution if one's perception of it is unduly skewed to only its 'legal' components, or, alternatively, only its 'political' components: the constitution is of course 'mixed', in this respect.[13]

Criticism of this sort is increasingly manifest, also, in contemporary debates in UK counter-terrorism law and policy, particularly those debates on which the conceptual framework(s) of legal and political constitutionalism have been brought to bear. For instance, one such debate concerns the legitimacy and effectiveness of counter-terrorism judicial review, and in particular the question as to whether in fact it is in the court-room (the

[9] Gee and Webber (n 3) 278-79. See, also, eg, Marco Goldoni and Christopher McCorkindale, 'Three Waves of Political Constitutionalism' (2019) 30(1) KLJ 74.

[10] Griffith (n 5) 20.

[11] See, especially, Tomkins, *Our Republican Constitution* (n 6); Bellamy (n 6).

[12] See, especially, Martin Loughlin, 'The Political Constitution Revisited' (2019) 30(1) KLJ 5; Aileen Kavanagh, 'Recasting the Political Constitution: From Rivals to Relationships' (2019) 30(1) KLJ 5. See, also, eg, Robert Brett Taylor, 'The Contested Constitution: An Analysis of the Competing Models of British Constitutionalism' [2018] PL 500.

[13] See, especially, Kavanagh (n 12). See, also, Adam Tomkins, 'What's Left of the Political Constitution? (2013) 14(12) German LJ 2275, in which Tomkins—indeed, once the standard-bearer of especially the *normative* defence of political constitutionalism—argues that 'we should move on from what has become a rather outdated contrast between the political constitution and the legal constitution': '[T]he British constitution is neither exclusively political nor exclusively legal … The British constitution is indeed now a "mixed constitution".'

archetype 'legal' constitutionalist institution) or in Parliament (symbolising 'political' constitutionalism) that the 'fundamental' human rights of those unpopular minorities invariably targeted by the state in the name of combatting the threat of terrorism might be "better" protected.[14] And yet this, it is said, is to portray these issues raised by the state's response to the contemporary terrorist threat in a most simplified form; this is to say nothing, for example, of how the tensions or 'balance' between security and liberty—itself a potentially over-simplified and thus essentially problematic framing[15]—are significantly heightened, perhaps even distorted, in the light of broader debates in which the response to terrorism is characterised as a necessarily 'emergency' response by the state, requiring 'emergency' (executive) powers and a concomitant departure from otherwise 'ordinary' legal and political processes.[16] Ultimately, the key criticism of the dichotomisation of 'legal' and 'political' constitutionalist approaches to these debates is that when applied to the context of (counter-)terrorism, which itself is often framed by unhelpful dichotomies, in which controversy ever abounds, and in which there are seldom any very simple answers to the, in reality, myriad legal, political and constitutional issues which are given rise in this context, such approaches are liable to be doubly problematic. In other words, the often fraught dialectic between courts and Parliament, between judges and politicians, in times of crisis (whether real or perceived) inevitably does much to nuance the scrutiny of counter-terrorism law and policy in ways which any such sharply drawn, abstract categorisations are unable to properly capture. The problem that this thesis seeks to address, therefore, is whether, and if so

[14] See, eg, Mark Tushnet, 'Controlling Executive Power in the War on Terrorism' (2005) 118 Harv L Rev 2673; Mark Tushnet, 'The Political Constitution of Emergency Powers: Parliamentary and Separation-of-Powers Regulation (2007) 3(4) Int JLC 275; Victor V Ramraj, 'Between Idealism and Pragmatism: Legal and Political Constraints on State Power in Times of Crisis' in Benjamin J Goold and Liora Lazarus (eds), *Security and Human Rights* (Hart Publishing 2007); Keith Ewing, 'The Political Constitution of Emergency Powers: A Comment' (2008) 3(4) Int JLC 313; Aileen Kavanagh, 'Judging the Judges under the Human Rights Act: Deference, Disillusionment and the "War on Terror"' [2009] PL 287; Aileen Kavanagh, 'Constitutionalism, Counterterrorism, and the Courts: Changes in the British Constitutional Landscape' (2011) 9(1) ICON 172; Fiona de Londras and Fergal F Davis, 'Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanisms' (2010) 30(1) OJLS 19; Fergal F Davis and Fiona de Londras, *Critical Debates on Counter-Terrorism Judicial Review* (CUP 2013); Alexander Horne and Clive Walker, 'Lessons Learned from Political Constitutionalism? Comparing the Enactment of Control Orders and Terrorism Prevention and Investigation Measures by the UK Parliament' [2014] PL 267; Mark Tushnet, 'Legal and Political Constitutionalism, and the Response to Terrorism' in David Jenkins, Amanda Jacobsen and Anders Henriksen (eds), *The Long Decade: How 9/11 Changed the Law* (OUP 2014).

[15] See, eg, Laura K Donohue, *The Cost of Counterterrorism: Power, Politics and Liberty* (CUP 2008) 3: '[T]he security or freedom framework fails to capture the most important characteristic of counterterrorist law: it increases executive power, both in absolute and relative terms, and, in so doing, alters the relationships among the branches of government with implications well beyond the state's ability to respond to terrorism. But this is not the framework's only omission. Missing, too, are the broad social, political, and economic effects of counterterrorism. The dichotomy also glosses over the complex nature of both security and freedom. The resulting danger is that the true cost of the new powers goes uncalculated – to the detriment of the state.'

[16] See, eg, Ferghal F Davis and Fiona de Londras, 'Introduction: Counter-Terrorism Judicial Review: Beyond Dichotomies' in Ferghal F Davis and Fiona de Londras (eds), *Critical Debates on Counter-Terrorism Judicial Review* (CUP 2013). See, also, in the same volume, Gavin Phillipson, 'Deference and Dialogue in the Real-World Counter-Terrorism Context'. On the framing of contemporary counter-terrorism responses as 'emergency' action by the state, see, eg, Oren Gross, 'Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?' (2003) 112 Yale LJ 1011; David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (CUP 2006); Aniceto Masferrer (ed), *Post 9/11 and the State of Permanent Legal Emergency: Security and Human Rights in Countering Terrorism* (Springer 2012); Alan Greene, *Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis* (Hart Publishing 2018).

how and to what extent, specifically political constitutionalism can potentially overcome (or rather exist in spite of) these criticisms.

Approach to the research

This thesis explores the various ways in which the insights of political constitutionalism, in and of itself, are brought to bear on the constitutional issues which arise in four key areas of contemporary counter-terrorism law and policy in the UK. These areas encompass a range of counter-terrorism measures employed by the state which throughout the thesis are categorised in terms of the particular 'deprivation' that they entail: deprivation of liberty; deprivation of privacy; deprivation of property; and deprivation of life. The thesis engages in doctrinal and theoretical analysis of the relevant legal and policy developments in each of these areas, utilising a broad range of primary and secondary materials. It seeks in each case to establish not only the relevant legal frameworks which relate to the particular counter-terrorism measure(s) under consideration, but also the broader constitutional politics of the very thing being 'deprived' by the state.

In categorising an otherwise disparate range of counter-terrorism measures and responses in this way, a key benefit of this approach is that it highlights potentially important factors which are context-specific, and which impact on the inter-relation of constitutional law and politics in ways that alternative political constitutionalist perspectives are perhaps liable to obscure. For instance, an approach to political constitutionalism which focuses only (or primarily) on the capacity of the parliamentary process to protect 'rights', per se, is liable to overlook the broader constitutional politics of the relevant 'right' in question, as distinguished from another. The approach taken in this thesis thus provides the means to explore potentially revealing differences in the way(s) in which the UK constitution conditions, say, the state's use of lethal force against terrorist suspects (involving deprivation of *life*), as compared with its approach to, for instance, interception of private communications (involving deprivation of *privacy*).

It ought to be noted here, also, that the four 'deprivations' selected for analysis are not intended to provide a comprehensive account of the constitutional implications of the UK's contemporary counter-terrorism response(s). Rather, their selection for the purposes of this thesis is intended to cover a range of key substantive areas of contemporary counter-terrorism law and policy in the UK which is broad enough to draw important overarching conclusions as to, in particular, the utility of political constitutionalism as a distinctive lens through which to explore these issues. Potential areas for further research, which are not explored in this thesis ultimately for reasons of space, include, for instance, deprivation of citizenship. Indeed, the use of powers to deprive suspected terrorists of British citizenship is an increasingly central strand of the UK's response to the contemporary terrorist threat. Its topicality is further underlined by the recent high-profile UK Supreme Court case of *R (on the application of Begum) v Secretary of State for the Home Department*.[17] In particular, that case raises several issues of fundamental constitutional import, not least as to the clash of constitutional principles: between the rights of those whose British citizenship has been

[17] [2021] UKSC 7, [2021] 2 WLR 556.

deprived by the state to appeal that decision in an effective and fair hearing, and the democratic responsibility of the Home Secretary to protect the public from the threat of terrorism.[18]

The thesis is structured as follows. Chapter 1 is a general conceptual chapter which analyses the theories of 'legal' and 'political' constitutionalism. Chapters 2, 3, 4 and 5 are substantive chapters, each exploring a specific 'deprivation', and analysing it in light of the concepts set out in Chapter 1. The conclusion then brings together the overarching themes of the thesis, and reflects on the overall implications of the argument developed throughout.

Outline of argument

The key argument developed in this thesis engages with and thus responds to the contemporary critiques of, specifically, political constitutionalism, and the utility of its distinctive perspective on the inter-relation between constitutional law and politics. In Chapter 1, it is argued that, contrary to the overriding perception (within these critiques) of political constitutionalism as a normative theory which is necessarily, singularly focused on the capacity of Parliament to "better" protect 'fundamental' human rights than judges and courts, rather this does not, and thus should not be seen to, limit the potential for political constitutionalism to generate important insights of broader conceptual significance in and of itself. That chapter highlights two ways in which political constitutionalism can be seen to have *explanatory* value, in particular by providing key conceptual resources with which to critique legalistic analyses of the UK constitution. One way is in its application, if classically, as a *critique* of the problematic legalism of 'legal' constitutionalism (especially in the context of the UK constitution), whilst recognising that the same problems potentially emerge for any reading of political constitutionalism which extols the virtues of democracy, or the ordinary political process. Secondly, the application of political constitutionalism ought to be considered as a means of understanding the inter-relation between law and politics not only, or exclusively, in its power-*limiting* capacity, but rather, crucially, the *empowering*, *enabling*, and *legitimating* function of those dynamics, in and of the constitution. Ultimately, the value of political constitutionalism as a distinctive, though above all *theoretical* approach to constitutional analysis raises a key methodological point. That is, by giving the theoretical or conceptual challenges facing political constitutionalism—or, indeed, legal constitutionalism—a firmer footing in *actual* constitutional practice, this might allow us to understand (even more so than without doing so) the true value of the theory.

These insights are brought to bear on the constitutional implications of four key (controversial) areas of contemporary counter-terrorism law and policy in the UK. Chapter 2 explores the various developments in and of the modern era of 'executive detention' in the UK, involving intensely controversial measures which deprive individual terrorist suspects of their liberty. In particular, that chapter explores the continuing relevance of the 'democratic sceptic' critique(s) of the role, throughout these developments, particularly of the *language* and *legalism* of human rights law—as filtered through the operation of the Human Rights Act

[18] See, eg, ibid 135 (Lord Reed P): '[I]f a vital public interest – in this case, the safety of the public – makes it impossible for a case to be fairly heard, then the courts cannot ordinarily hear it.'

1998 (HRA) / European Convention on Human Rights (ECHR). The impact that this has had on bringing the various measures of 'executive detention' closer to compliance with the right to liberty and security, under art. 5 of the ECHR, is undoubted. Yet, it is argued that, when viewed from a 'democratic sceptic' perspective, the true impact of the HRA / broader human rights paradigm can be seen to emerge: that is, far from representing a 'vindication' of the HRA, rather its centrality throughout these developments has seen the increasingly nebulous, legalistic distinction between 'deprivation' and mere 'restriction' of liberty entrenched as the guiding principles by which debates surrounding the constitutional position of 'liberty' are to be settled. As a consequence, measures involving, for instance, 12-hour curfews and forced relocation (up to 200 miles from one's family and home life), subject only to very low procedural thresholds, have in effect been judicially sanctioned under the HRA, and thus allowed to take root as a permanent feature of the contemporary counter-terrorism framework, all the while purporting to 'comply' with core international human rights obligations.

Chapter 3 considers two 'categories' (broadly speaking) of measures which involve depriving individuals—indeed, potentially a *vast* number of individuals—of their privacy: first, measures of police 'stop-and-search' which, crucially, dispense with grounds for reasonable suspicion as an essential procedural condition to their use; and secondly, measures of 'state surveillance', relating to the interception of communications and to the collection of and access to communications data. In this chapter, the legal protection of privacy across each of these contexts is shown to be contingent, above all, on art. 8 of the ECHR, as enforced in the domestic courts under the HRA. Notably absent from the broader constitutional 'picture' of the protection of privacy, consequently—that is, in any meaningful sense—is the influence of the common law, and of the fundamental constitutional principles that the domestic courts have, increasingly in recent years, sought to instrumentalise. Indeed, a broader theme for which these issues perhaps contribute a compelling evidence base is that of the (in)compatibility of common law constitutionalism, as a conceptual grounding for the constitutional position of privacy, with the 'legal' constitutionalism of (what might be described as the inherently '*legal*' order of) the ECHR.

Indeed, that a potential vindication of 'common law constitutionalism' can be seen, however, to emerge in Chapter 4, which explores several measures specifically entailing the 'freezing' of terrorists' (and suspected terrorists') assets, is significant. In other words, that the values, principles and standards of review of the common law have been brought to bear most acutely, in the contemporary framework of counter-terrorism, on the protection of *property*—and not, for instance, the protection of liberty, much less the protection of privacy, as discussed in previous chapters—potentially offers key insights as to the legal norms truly foremost in 'common law constitutionalist' theory. And yet, there are compelling reasons to doubt to practical significance of the common law's apparently particular disdain for asset-freezing measures, not least given that judicial demands for clear(er) legislative authority for the implementation of such measures in domestic law have consistently been met. The invariable result: a domestic legal basis which far exceeds, both in nature and scope, that which came before. In this context, the tensions which very clearly emerge from the effective 'end-point' of the common law constitution—that is, the reversal of a judicial decision by Parliament, a political institution, in its capacity as sovereign law-maker in the UK

constitution—are situated within the broader context in which a more fundamental tension can be seen to play out: that of the interplay of domestic and international law and politics. These tensions arise at their point of intersection in the domestic constitution in various, significant ways, though which all point, fundamentally, to the incapacity of the rules, principles and standards of review developed in the common law to adequately resolve those tensions. And so, whatever 'victory' might be claimed by or for the common law, here, the key point is that any such 'victory' ultimately achieves nothing to diminish the basic constitutional reality of the UK's dualist approach to international law: that executive action at the international (UN) level extends to the deprivation of 'fundamental' rights in ways that are untouched, *in practice*, by domestic legal arrangements.

This international/domestic dynamic is further explored in Chapter 5, in which it is shown to have particular and significant consequences for the (awkward) constitutional position of the UK Government's contemporary counter-terrorism targeted killing 'policy'. Indeed, the Government has consistently publicly denied that it operates a 'policy' of targeted killing, per se. Not only, though, is this contrary to mounting evidence in practice, involving several examples of the targeted use of lethal force overseas, including against suspected terrorists of British nationality. Rather, it is argued in this chapter that much flows from the fact that both within the prevailing political rhetoric in this area, and indeed the Government's counter-terrorism strategy document, 'CONTEST', the emphasis is very clearly on the *international* dimensions of any such use of lethal force for counter-terrorism purposes. This, crucially, can be seen to establish a potential base from which to negotiate, though crucially without resolving, key tensions in the legal and constitutional positions of such an exercise of power. In particular, the potential for the Government to engage exclusively in international legal argumentation serves as a smokescreen for questions of fundamental *domestic* legal and constitutional import, including whether, for instance, the executive is or could be empowered within the UK constitution to target and kill British citizens, albeit for the purposes of counter-terrorism. Among several important questions which are raised as a result of this is that of whether the constitutional position of targeted killing is at all contingent on the *international* dimension of that action—whether, in other words, the *international* dimension of a targeted killing operation is, of itself, ultimately determinative of the extent to which the Government's targeted killing policy may be legitimately implemented as a matter of UK constitutional law. If this is the case—and indeed it *does* appear to be the case—it results in a peculiar state of affairs in which the domestic legal basis, plainly an essential factor in establishing the constitutionality of the Government's targeted killing endeavours, has, in effect, been "outsourced" to the international legal framework.

Through exploring the various ways in which the insights of political constitutionalism are brought to bear on these discrete areas of counter-terrorism law and policy in the UK, this thesis makes three key contributions to constitutional studies. First, the thesis reveals the utility of political constitutionalism as an *explanatory* lens through which to explore the inter-relation of constitutional law and politics in the UK. In particular, political constitutionalism is shown to provide a vital corrective to legalistic analyses which otherwise foreground and (over-)emphasise the practical significance of constitutional law and legal norms. Secondly, the thesis shows that through the lens of political constitutionalism a number of key themes

of the UK's contemporary counter-terrorism response(s) can be seen to emerge, thus deepening our understanding of counter-terrorism law and policy in practice. Specifically, these themes include the problematic legalism of the human rights paradigm, and the futility of the common law as a source of legal protection of 'fundamental' rights and constitutional principles. And thirdly, the thesis shows how various contemporary developments in these areas of counter-terrorism law and policy in turn generate important insights, or perhaps challenges, for the potential development of the theory of political constitutionalism. One such challenge concerns the conception within political constitutionalism of the *status* of international law in the domestic constitution. Another is that of the constitutional empowerment of state actors (especially in the field of counter-terrorism) in ways which might be considered undesirable from a democratic perspective. Quite how these issues might, if at all, be reconciled by/with political constitutionalism, which typically frames the inter-relation of law and politics exclusive in *domestic* times, and which eulogises the constitutional role of *democratic* politics, is thus unclear.

1

An Overview of the Contemporary Discourse on 'Legal' and 'Political' Constitutionalism, and Its (Contested) Value

I. INTRODUCTION

In the last decades, an extensive body of scholarship has been motivated by the discourse on (often competing) theories of so-called 'legal' and 'political' constitutionalism. The discourse has had—indeed, *continues* to have—particular traction in the UK as a distinctive framework through which to explore, especially, the roles of and inter-relation between law and politics in and of the constitution, and, by extension, that of archetype 'legal' and 'political' institutions (namely courts and Parliament, respectively).[1] That this is so owes much, in the first instance, to the broad and enduring influence of John Griffith's seminal 1978 Chorley Lecture, 'The Political Constitution',[2] from which the emergence of the discrete theory of political constitutionalism can be seen, above all, to have derived.[3] Among various contemporary developments in constitutional practice in the UK which have prompted a 'revival' of Griffith's idea(l) of 'the political constitution' in recent years is that of its having come to be seen as 'something of a bulwark against the rise of legal (or judicial, or common law) constitutionalism'.[4] That is, in light of the apparent and increasing 'juridification'[5] of the

[1] See, eg, Adam Tomkins, *Public Law* (OUP 2003) 18-19: 'A political constitution is one in which those who exercise political power (let us say the government) are held to constitutional account through political means, and through political institutions (for example, Parliament) . . . A legal constitution, on the other hand, is one which imagines that the principal means, and the principal institution, through which the government is held to account is the law and the court-room.'

[2] JAG Griffith, 'The Political Constitution' (1979) 42(1) MLR 1. Indeed, such is the enduring influence of Griffith's Chorley Lecture in contemporary public law scholarship that it has spawned two special-edition collections in recent years: 'Political Constitutions' (2013) 14(12) German LJ, and 'The Political Constitution at 40' (2019) 30(1) KLJ.

[3] See, eg, Thomas Poole, 'Tilting at Windmills? Truth and Illusion in 'The Political Constitution'' (2007) 70(2) MLR 250, in which Griffith's 'The Political Constitution' is described as the 'founding text' of the theory of political constitutionalism.

[4] Marco Goldoni and Christopher McCorkindale, 'A Note from the Editors: The State of the Political Constitution' (2013) 14(12) German LJ 2103, 2103.

[5] The term 'juridification', in essence, denotes a process typically characterised by the proliferation of law and legal mechanisms of decision-making and thus the concomitant extension of the judicial role in influencing a broad(er) range of policy areas. See, eg, Mark Bevir, 'The Westminster Model, Governance and Judicial Reform' (2008) 61(4) Parl Aff 559, in

UK constitution, in particular throughout the period of accelerated constitutional reform under the 'New' Labour Government,[6] those who would advocate the necessary *priority* of the ordinary political process over lofty, value-laden conceptualisations of law and legal norms—both as a means of understanding the nature of the latter in *actually existing* (constitutional) democracy, and, crucially, their limitations in establishing the conditions, in practice, for 'real and not fictitious'[7] accountability—found in Griffith's Chorley Lecture an account of the UK constitution which, at once, gave credence to those notions yet ostensibly fell short of grounding them in an explicit normative defence of democratic politics (in the UK).[8] For instance, Adam Tomkins, who might fairly be described as one of the standard-bearers of the contemporary revival of 'The Political Constitution', lamented that Griffith's 'entirely descriptive' approach offered little in the way of establishing the normative case against such developments:

> [Griffith] may have believed that the political model of accountability was to be preferred over the legal. He may have considered it to be both more democratic and more effective. But he did not believe the political model of accountability to be constitutionally required … It was, for him, simply what for the time being happened.[9]

Broadly speaking, Tomkins' goal—and subsequently that of others, including, for instance, Richard Bellamy,[10] and Graham Gee and Grégoire Webber[11]—was therefore to construct a 'normative interpretation' of 'the political constitution' capable 'of standing as an alternative to the liberal-legal paradigm'.[12] Thus, with insights gleaned from republican political theory, imbued with a distinctly celebratory account of deliberative democratic politics and its capacity to (better) secure the liberty of the individual (than 'law' and the 'legal reasoning' of judicial institutions),[13] Tomkins et al built on the foundations of Griffith's core arguments—that 'political decisions should be taken by politicians';[14] that 'law is not and cannot be a

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which 'juridification' is defined as above all involving 'the increasing role of the courts in processes of collective decision making'.

[6] See, especially, Human Rights Act 1998; Constitutional Reform Act 2005. On the contemporary legacies of the 'New' Labour Government's programme of constitutional reform, see Michael Gordon and Adam Tucker (eds), *The New Labour Constitution: Twenty Years On* (Hart Publishing 2021).

[7] Griffith (n 2) 16.

[8] See, eg, Graham Gee and Grégoire CN Webber, 'What is a Political Constitution?' (2010) 30(2) OJLS 273, 275: 'Griffith seemed to deny normative content to the idea of a political constitution…'

[9] Adam Tomkins, *Our Republican Constitution* (Hart Publishing 2005) 39. Although, cf Poole (n 3) 253, in which it is argued that '[Tomkins] underestimates the polemical dimension of Griffith's work'.

[10] Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (CUP 2007).

[11] Gee and Webber (n 8); Graham Gee, 'The Political Constitutionalism of JAG Griffith' (2008) 28(1) LS 20.

[12] Goldoni and McCorkindale (n 4) 2104. See, also, Martin Loughlin, 'The Political Constitution Revisited' (2019) 30(1) KLJ 5.

[13] See, eg, Philip Pettit, *Republicanism: A Theory of Freedom and Government* (OUP 1997); Quentin Skinner, *Liberty Before Liberalism* (CUP 1998). See, also, Gee, 'The Political Constitutionalism of JAG Griffith' (n 11), in which the author reconstructs the normative grounding of political constitutionalism with reference to the (Conservative) political theory of Michael Oakeshott.

[14] Griffith (n 2) 16.

substitute for politics'[15]—a discrete and, crucially, overtly *normative* theory of political constitutionalism.[16]

In many ways, this, the normativity of political constitutionalism, has come to define its existence as a distinctive approach to the study of the UK constitution (indeed, constitutions and constitutional law more generally): the development of the theory in the last years has been marked by its invariably dogged emphasis on (and clear normative *preference* for) 'politics' *over* 'law', or 'political' over 'legal' mechanisms of constitutional accountability. As discussed in this chapter, political constitutionalism deconstructs the conceptions of 'law' and 'constitution' in which the 'liberal-legal' paradigm of constitutionalism—or, simply, 'legal' constitutionalism—is fundamentally grounded: that in law and legal principles, and in such instruments as 'written' constitutions and legally-entrenched bills of rights, a society is capable both of identifying universal values and principles—including, for example, 'fundamental' individual rights and liberties—and of institutionalising their protection from the ostensibly self-serving and potentially destructive practice of (democratic-majoritarian) politics.[17] It is of particular significance, moreover, as also discussed in this chapter, that insofar as the theory of legal constitutionalism conceives of its primary purpose as the establishment of 'limited government', and thus anticipates an inherently foundational role for law and 'legal' institutions both in establishing and enforcing these limits, the theoretical development of political constitutionalism has, in the main, been oriented to challenging *this particular* supposition—again, from a distinctively *normative* perspective.[18]

It is argued in this chapter that the development of the theory of political constitutionalism along these lines has done much, regrettably, to narrow the terms of the debate. That is, in this way, political constitutionalism presents itself as in perpetual competition with legal constitutionalism, fundamentally at odds over the question as to which of the means by which constitutional actors may be '*limited*' in the exercise of political power is the most ideal (be that, for instance, most 'democratic', most 'legitimate', most 'effective'): whether by 'law' or by 'politics'; whether by 'legal' institutions or by 'political' institutions. Indeed, narrowing further the terms of the debate, it has been suggested that

> the attention of Bellamy, Waldron and Tomkins is focused much less on the question of power than was the case for Griffith … [and so] in response to the claims by legal constitutionalists that rights are best protected by means of constitutional adjudication, the defensive crouch of [the development of 'normative' political constitutionalism] is directed towards the most efficient means—political or legal, legislative or judicial—to protect (civil and political) rights.[19]

The upshot is that this, in turn, radically suppresses the potential for political constitutionalism to be employed as a viable, indeed potentially valuable, analytical framework in and of itself; the discourse on legal and political constitutionalism is liable to

[15] ibid.

[16] See, also, Jeremy Waldron, *Law and Disagreement* (OUP 1999) and Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton University Press 1999) which, although not framed as contributions to the theory of political constitutionalism, per se, undoubtedly must be considered to be thematically linked to its development.

[17] Marco Goldoni and Christopher McCorkindale, 'Three Waves of Political Constitutionalism' (2019) 30(1) KLJ 74.

[18] See, eg, Tomkins, *Republican* (n 9); Bellamy (n 10). See, also, Adam Tomkins, 'In Defence of the Political Constitution' (2002) 22(1) OJLS 157.

[19] Goldoni and McCorkindale, 'Three Waves' (n 17) 81-82.

be (and often is) caricatured as above all entailing an ideologically-charged contest between highly stylised, abstract 'models' of ideal-type constitutional arrangements.[20] And notwithstanding the influence and the level of depth and maturity—orthodoxy, even—that the discourse has achieved in recent years, to the extent that, however potentially attractive from whatever normative point of view, such 'models' are ultimately far-removed from the realities of *actual* constitutional practice, there have been recent calls to reject the discourse as an altogether futile debate.[21]

This chapter explores these various developments in (and contemporary critiques of) the discourse on legal and political constitutionalism. It begins by outlining, in Section II, the emergence of the theory of constitutionalism, per se, focusing in particular on the various ways in which it is grounded, fundamentally, in an overtly legalistic (or '*liberal*-legalistic') conceptualisation of the relationship between constitutional law and politics. This underpins a distinct emphasis on several key theoretical or principled claims which, as highlighted in that section, can be seen to derive from the apparent centrality within 'traditional' or 'conventional' understandings of (the term) 'constitutionalism' of, firstly, 'written' constitutions, as embodying 'higher' or 'fundamental' law and legal principles, and secondly, the idea(l) of 'limited' (or 'limit*ing*') governmental power, as the principal means by which the liberty of the individual may be constitutionally protected. Section III then considers the development of the theory of political constitutionalism, in particular tracing its evolution, as noted above, from a contemporaneous analysis of the UK constitution in the late-1970s to a discrete constitutional theory which challenges both the normative appeal of legal constitutionalism as well as its (limited) explanatory value in the specific context of the UK's constitutional arrangements. Finally, Section IV explores two key contemporary critiques of the discourse on legal and political constitutionalism which highlight the limitations of, respectively, the *normative* dimensions of political constitutionalism, and the oppositional, polarising narrative which has characterised the discourse, per se, in the last years. Ultimately, the key question considered in this chapter is whether, and if so how and to what extent, political constitutionalism can potentially overcome (or rather exist in spite of) these criticisms, and in so doing be employed as a viable *explanatory* lens through which to analyse the UK constitution more broadly, and the constitutional implications of the UK's contemporary counter-terrorism response(s) specifically, 'on its own terms'.[22]

II. THE THEORY OF CONSTITUTIONALISM, AND ITS 'LIBERAL-LEGALIST' FOUNDATIONS

In the opening paragraph of a book chapter intended to 'cast a skeptical eye over the political theory associated with the term "constitutionalism"', its author, Jeremy Waldron, concedes

[20] See, eg, Loughlin (n 12); Aileen Kavanagh, 'Recasting the Political Constitution: From Rivals to Relationships' (2019) 30(1) KLJ 43.

[21] See, eg, ibid.

[22] See, eg, Michael Gordon, 'Parliamentary Sovereignty and the Political Constitution(s): From Griffith to Brexit' (2019) 30(1) KLJ 125, 130-31: 'Although these contrasting models [of legal and political constitutionalism] may usefully be used as a framing device through which to understand competing constitutional arrangements, or to analyse the change to such arrangements, this should not be seen to limit the potential for political constitutionalism to be considered apart from legal constitutionalism, 'on its own terms'.'

that such scepticism (in this particular regard) is the exception, not the norm: 'I know that "constitutionalism" is a term of approbation,' Waldron writes; 'we are all supposed to be constitutionalists now'.[23] Of course, there is no doubt that this is an intentionally glib remark: the fact of the matter, as Waldron proceeds to explain, is that '[t]he potential for "constitutionalism" to degenerate into an empty slogan is exacerbated by the fact that the word is sometimes used in a way that conveys no theoretical content at all'—that is, '[o]ften the term seems to mean little more than the thoughtful or systematic study of constitutions and various constitutional provisions'.[24] And although accepting that '[t]here is nothing wrong with this use of "constitutionalism"'—after all, 'people can use words however they like'—Waldron emphasises that 'the last two syllables – the "ism" – should at least alert us to an additional meaning that does denote a theory or set of theoretical claims'.[25]

This section explores several of these theoretical claims which, as will be discussed, can be gleaned from an understanding of the term 'constitutionalism' as situated in the context of its historical development.

A. Constitutionalism and 'Written' Constitutions

While this chapter is primarily concerned with the oft-made comparison between so-called legal and political constitutionalism, it is of note for present purposes that this distinction is a relatively contemporary (scholarly) innovation—one which departs, that is, from what might be called a 'traditional' or 'conventional' reading of the theory of constitutionalism, per se. Rather, such readings of the theory of (or ideas related to) constitutionalism are said to have emerged, crucially, alongside the phenomenon of 'modern constitutions': at its core, constitutionalism represents what Martin Loughlin describes as the 'political theory' which accompanies the technique employed by the 'modern concept of the constitution', namely the adoption of a formal constitutional document, the text of which serves to establish and regulate institutions of government, their powers and responsibilities.[26] This connects constitutionalism to a specific form of constitutional arrangement, specifically involving the adoption of a 'written' constitution. This is a significant connection insofar as it reveals the underlying 'logic' of constitutionalism and the various theoretical or principled claims in which this logic is fundamentally grounded. That is, the link between constitutionalism and the phenomenon of 'written' constitutions speaks, more broadly, to a specific conception of the former as principally concerned with the roles of 'law' and 'constitutions' both in

[23] Jeremy Waldron, 'Constitutionalism – A Skeptical View' in Thomas Cristiano and John Christman (eds), *Contemporary Debates in Political Philosophy* (John Wiley & Sons 2009) 267.

[24] ibid 267. See, also, TC Grey, 'Constitutionalism: An Analytical Framework' in JR Pennock and JW Chapman (eds), *Constitutionalism: Nomos XX* (New York University Press 1979) 189: 'Constitutionalism is one of those concepts, evocative and persuasive in its connotations, yet cloudy in its analytic and descriptive content, which at once enrich and confuse political discourse.'

[25] Waldron (n 23) 267.

[26] Martin Loughlin, 'What is Constitutionalisation?' in Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism?* (OUP 2010) 55.

generating and sustaining, above all, the *source* of governmental authority itself—as is commonly understood to represent the function of the latter.[27]

This follows from the historical context in which the phenomenon of 'written' constitutions can be seen to have proliferated, involving the subjugation or replacement of (autocratic) monarchical regimes, chiefly within Continental states in the 18th century, with new forms of popular (democratic) self-government. In other words, the phenomenon of 'written'—or, as Loughlin refers to, interchangeably, 'modern'—constitutions is redolent of a wave of constitution-making in which centuries of 'absolute, authoritarian, or arbitrary rule' were brought to an end by the conscious and decisive actions of a people; in their place occupied new governance arrangements, deliberately designed to inhibit the capriciousness of those who held the reins of political power.[28]

When read in this light, the '-ism' in 'constitutionalism' can perhaps be taken to signify the elevation of 'the constitution' which, in turn, denotes a distinctively liberal ideal as to the proper relationship between law and politics, between the state and the individual: one which, as Loughlin notes, promotes and commands respect for a particular form of government 'based on contract, the enumeration of powers, institutionalisation of checks over the exercise of those powers, and protection of the individual's basic rights'.[29] The idea(l) of the constitution here—that is, as understood from this particular historical and political perspective—becomes a legal construct: a form of 'contractual' arrangement drawn up by its framers ('the people') between rulers and the ruled. Fundamentally, it signifies, as Dieter Grimm suggests, the process of the 'legalization of political rule'.[30] And it is at the point at which the text of a constitutional document is regarded as positive law that, as Loughlin suggests, 'the idea of the constitution undergoes an important shift',[31] in which it takes on the status of 'higher' or 'fundamental' law.[32] As a result, the foundations of the political order are ultimately prescribed by this body of (constitutional) law and legal principles and the text of the constitutional document by which they enjoy this superior status.[33]

Thus, in the way that it appeals to the idea(l) of prescribing the necessary conditions for political engagement and collective decision-making—desirably, it seems, through 'written' constitutional arrangements—the theory of constitutionalism provides a distinctive structure through which to conceptualise specifically the *legal* relationship between those who exercise political power and those who are subjected to it. Crucially, it carries with it a bespoke set of liberal principles around which institutions of government ought to be organised and to which they must aspire and give effect. Indeed, it is perhaps in relation to this point that Waldron's

[27] Martin Loughlin, *Sword and Scales: An Examination of the Relationship between Law and Politics* (Hart Publishing 2000) 193 (emphasis added): 'Constitutionalism … generates a particular conception of the relationship between politics and law. It suggests that law must be conceived as a structure of rules and principles which provides *the foundation of political order*.'

[28] Martin Loughlin, *The Idea of Public Law* (OUP 2003) 48. See, also, CH McIlwain, *Constitutionalism: Ancient and Modern* (Cornell University Press 1940) 5, in which the adoption of a 'written' constitution was described as 'the *conscious formulation* by a people of its fundamental law' (emphasis added).

[29] Loughlin, *Idea* (n 28) 48.

[30] Dieter Grimm, *Constitutionalism: Past, Present, and Future* (OUP 2016) 3.

[31] Loughlin, *Idea* (n 28) 48.

[32] The attribution of the status of 'fundamental law' to 'written' constitutions, the idea that a 'constitution is a thing antecedent to government', is associated with the philosophy of Thomas Paine: *Rights of Man* (London, 1791).

[33] Loughlin, *Idea* (n 28) 47.

remark—'we are all supposed to be constitutionalists now'—makes most sense. For insofar as these principles seek to establish and protect the liberty of the individual, they can be seen, ultimately, to represent markers of 'good' governance; they underpin the theory of constitutionalism which, in turn, is perhaps 'best seen as a mindset – a tradition and a sensibility about how to act in a political world'.[34]

A key theoretical claim emerges at this juncture, relating to a particular (sceptical) conception of politics, namely one in which politics is characterised as an inherently partisan discourse—ruled by passion and prejudice and thus ostensibly preoccupied with self-interest and personal aggrandisement—which is capable of bringing about the conditions for tyranny and oppression in the exercise of power. As such, the constitutionalist project of establishing a social order which aspires to a discrete set of liberty-enhancing principles relies on (and therefore emphasises) the suppression of the threat posed by politics.[35] Constitutionalism is therefore grounded in a distinctive conception of 'law' which is independent of and, more importantly, *superior to* the ostensibly self-serving practice of politics.[36] In this vein law is cast as neither 'an assortment of customary practices nor as the commands of a sovereign power but as a set of foundational principles which exist to constrain and channel the conduct of politics'.[37] And to that end, the role of law and legal norms and institutions in erecting obstacles to constrain the (mis)use of political power seeks to ensure that, in a liberal democracy, whomever the populace should return as its elected officials will be in no position, in such a capacity, to exercise political power for ill. (The point at which the use of power is deemed to be the *misuse* of power is assessed against its compatibility with constitutionally-inscribed "goods".) In its embrace of the ideal of (and ideals related to) individual liberty and its guarding against the potential for the rise of despotism, the normativity of the theory of constitutionalism is rooted, clearly, in a 'classical liberalism' worldview. Indeed, that this view has taken on a particular orthodoxy in contemporary readings of the theory of constitutionalism is patent: it is considered a truism that '['liberal'] constitutionalism is the belief that constitutions serve principally to constrain state power *for the benefit of the individual*'.[38]

A second theoretical claim, then, is that in the place of politics and political bargaining, law and legal principles are capable of providing an authoritative account as to the rules by which a social order ought to be constructed, and are therefore equally capable of identifying and instrumentalising universal (liberal) values and principles for the benefit of an entire populace, however diverse. In other words, the theory of constitutionalism 'seeks to provide adequate institutional design to cool passions without forfeiting government efficiency', and '[b]y formalizing these solutions in a legally binding instrument (the constitution), constitutionalism provides the necessary limitations of government (sovereign) power and

[34] Martti Koskenniemi, 'Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalisation' (2007) 8(9) Theo Inq L 9.

[35] Waldron (n 23) 271: 'Constitutionalism seems to assume that the power of the state needs to be restrained or limited or controlled, lest it get out of hand.'

[36] Judith N Shklar, *Legalism: Law, Morals, and Political Trials* (Harvard University Press 1964) 111.

[37] Loughlin, *Sword and Scales* (n 27) 179.

[38] MW Dowdle and MA Wilkinson, 'Introduction and Overview' in MW Dowdle and MA Wilkinson (eds), *Constitutionalism Beyond Liberalism* (CUP 2017) 1 (emphasis added).

affirms the legitimate exercise thereof'.[39] 'Law' and its constitutional role, on this reading, is thus characterised not only as having a neutralising effect on the exercise of political power, but as also possessing the capacity to predetermine the answers to the many fundamental questions which provoke political disagreement. Thus, in the light of Waldron's statement (in the beginning of this section), to be a constitutionalist patently involves accepting the authority of the (positive law of the) constitution.[40] The legitimacy of all other claims to authority, including that of a democratically elected government, are subject to the overriding authority of 'the constitution'. Indeed, in this sense, constitutionalism (as a distinctive theoretical framework) establishes a space in which 'the constitution' and 'democracy' potentially emerge as competing legitimacies.[41]

Above all, in the light of these various theoretical or principled claims it appears, fundamentally, to endorse, the theory of constitutionalism can be seen to rest on a specific functional logic:[42] that institutions of government are constituted—that is, delegated a *limited* authority (by those governed by these institutions) to promote the public good[43]—so as to perform specific functions in the activity of governing, that those functions may be enumerated, and, as such, their nature and scope conceivably delimited. In turn, constitutionalism anticipates that those institutions of government retain the legitimacy and legal authority to govern only insofar as their actions remain within the scope of the powers conferred upon them by the text of the constitutional document (as a form of 'higher' or 'fundamental' law)—or, in other words, to the extent that they act within the boundaries of the consent originally granted by 'the people' at the point of the constitution's inception. And insofar as constitutionalism involves the elevation of 'the constitution' as representing a body of 'higher' or 'fundamental' law which imposes constraints on political power, its explanatory value—when applied to specific constitutional arrangements—may in fact depend on particular arrangements, for instance involving institutions which are organised in such a way as to ensure that these constitutional-legal constraints may be enforced.

B. Constitutionalism as Constraint: Legally 'Limited' (or 'Limiting') Government

A 'traditional' or 'conventional' reading of the theory of constitutionalism, as resting primarily on the existence of a constitutional text which both enables and constrains (the powers of) institutions of government, presents an obvious paradox in the context of the UK's constitutional arrangements. Lacking, as it does, a 'written' constitution—in the sense that the source of the legitimacy of governmental institutions derives not from the text of a singular, fundamental constitutional document, but rather from custom, convention, historical practice, and ostensibly well-established legal and political norms—there appears to be little evidence to support the idea that the theory of constitutionalism (as classically understood)

[39] András Sajó and Renáta Uitz, *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (OUP 2017) 13.
[40] Loughlin, 'Constitutionalisation' (n 26) 56.
[41] See, eg, Richard Bellamy (ed), *Constitutionalism and Democracy* (Routledge 2006).
[42] Paul Scott, '(Political) Constitutions and (Political) Constitutionalism' (2013) 14(12) Germ LJ 2157.
[43] Loughlin, *Idea* (n 28) 46.

has any explanatory value in this context.[44] Indeed, it has been suggested that it is precisely the application of the theory of constitutionalism to the British context which has generated confusion with the meaning of the term 'constitution', itself:

> In the 19th century what was meant by the term "constitution" was reasonably definite and clear. Paradoxically enough, if the word retained some ambiguity, this was because of the British constitution; that is, because the mother country of modern constitutionalism appeared to have an obscure constitution, or even – according to some of the standards that seemed very important elsewhere – no constitution at all.[45]

However, there are perhaps two ways in which this conceptual tension might be resolved. One way is to accept, simply, that what Colin Turpin and Adam Tomkins call '[t]he British version of constitutionalism'[46] clearly rests on different, although by no means *radically* different, foundations. That is, '[a]lthough [the UK] lack[s] a general theory of the constitution, there has come down to us an idea of constitutionalism – of a *constitutional order* which acknowledges the necessary power of government while placing conditions and limits upon its exercise'.[47] Rather, the main difference is that the nature and form of these conditions and limits in the UK has been shaped, primarily, 'by a number of leading ideas or principles [which have] crystallised as rules or doctrines of the constitution'.[48] And, indeed, inasmuch as constitutionalism's theoretical or principled claims will, at times, appear incongruous with those of democracy (as noted above), equally '[i]t will appear that, at times, there is conflict, or tension, between these ideas: between democracy, for instance, and parliamentary sovereignty, or between sovereignty and the rule of law'.[49] Fundamentally, this approach prompts a (re)consideration of the key substantive differences between the ways in which 'written' and 'unwritten' constitutions might constrain the powers of institutions of government. Of this, Adam Tucker writes that '[w]e might say that there is, in principle at least, no limit to the kind of constraints that a written constitution could incorporate': '[a]s long as a limit can be written down, it could be included, even if it is irrelevant or even contrary to the scheme of government that the document otherwise reflects or constructs'.[50] By contrast, an 'unwritten' constitution such as the UK's 'can only incorporate the kind of limits that are capable of emerging as part of a … political decision as to the scheme of

[44] It is of note here, though, that the absence of a 'written' constitution as representing a body of 'fundamental' law has not discouraged attempts to ground traditional accounts of constitutionalism in the UK context which rest primarily on the characterisation of the common law as embodying precepts of 'fundamental' law. See, eg, TRS Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law* (OUP 2013).

[45] Giovanni Sartori, 'Constitutionalism: A Preliminary Discussion' (1962) 56(4) Am Pol Sc R 853, 853. See, also, FF Ridley, 'There Is No British Constitution: A Dangerous Case of the Emperor's Clothes' (1988) 41(3) Parl Aff 340, 359: 'The term British constitution is near meaningless'.

[46] Colin Turpin and Adam Tomkins, *British Government and the Constitution* (7th edn, CUP 2011) 49.

[47] ibid 49.

[48] ibid 49.

[49] ibid 49.

[50] Adam Tucker, 'Constitutional Writing and Constitutional Rights' [2013] PL 345, 361. 'A striking practical example of this point,' Tucker notes, 'is provided by the Second Amendment to the United States Constitution, which protects the right to bear arms': 'This right does not derive from the scheme of democracy that the US Constitution constructs; rather, it is a right which is external to that scheme but incorporated nonetheless by virtue of being written into the constitution. This right could not be developed under the unwritten British Constitution because our scheme of democracy does not entail the right to bear arms. If we wanted that right, then we would need to write it down.'

government that the constitution embodies', which means, crucially, that 'only limits that are derived from the scheme of democracy underlying the unwritten British constitution can feasibly emerge in British constitutionalism'.[51] In other words, 'writtenness' is relevant to the manner in which power is conditioned or limited only insofar as it 'permits limits that are external to the scheme of government generally enacted in a constitution to be appended to its provisions whereas unwritten constitutions are limited in the sense that only limits that are entailed by the scheme of government they enact are feasible'.[52]

A potentially significant development in contemporary understandings of the theory of constitutionalism offers another way of overcoming the difficulties with its application in the context of the UK, namely that of the apparent severing of the link, altogether, between constitutionalism and the phenomenon of 'written' constitutions. It has been suggested that the need to sustain this link is no longer (if it ever was) as pressing as a 'conventional' account of the theory would appear to imply. That constitutionalism is, as Waldron has written, above all concerned with 'controlling, limiting, and restraining the power of the state'[53] is perhaps, as it seems, all that matters. As Paul Scott puts it, 'constitutionalism has broken free from its moorings within the discrete constitution'.[54] This, what Scott refers to as 'the conceptual inflation' of constitutionalism—which, in essence, involves the disaggregation of the theory of constitutionalism and the phenomenon of 'written' constitutions, with the resulting emergence of the former as a 'self-standing ideal'—marks a significant shift in the way in which the concept may apply to specific contexts, especially that of the UK's constitutional arrangements.[55] In line with Waldron's emphasis of the 'controlling, limiting, and restraining' aspects of constitutionalism, and McIlwain's suggestion that the 'one essential quality' of the theory of constitutionalism is its representing a 'legal limitation on government',[56] the theory might be repackaged, simply, as the theory of 'limited government'.

What, though, of the centrality within the theory of constitutionalism of the idea(l) of 'higher' law, and of 'fundamental' legal principles—if not in the specific form of a 'written' constitution? A distinctive approach to this question, as it pertains in particular to the UK's constitutional arrangements, has emerged in the last decades, in which, fundamentally, it is the common law which is positioned as a body of 'higher-order law'[57] to which even the otherwise 'unlimited' law-making power of Parliament is apparently subject.[58] The essence

[51] ibid 361.
[52] ibid 361-62.
[53] Waldron (n 23) 270.
[54] Scott (n 42) 2158.
[55] ibid 2159, in which the examples of internationalisation and national pluralism are drawn upon as evidence of constitutionalism's 'conceptual spread' to new sites of public power. Although, cf Dieter Grimm, 'The Achievement of Constitutionalism and its Prospects in a Changed World' in Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism?* (OUP 2010), in which the opposite is argued: that the example of internationalisation '[opens] up a gap between the exercise of public power and its modes of legitimation which constitutionalism is unable to close'.
[56] McIlwain (n 28) 24 (emphasis added).
[57] Thomas Poole, 'Back to the Future? Unearthing the Theory of Common Law Constitutionalism' (2003) 23(3) OJLS 435.
[58] cf Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart Publishing 2015) ch 3, in which the theory of 'common law constitutionalism' is in fact characterised as posing a 'non-critical challenge' to the doctrine of parliamentary sovereignty. Further, Gordon argues that the theory represents both 'an empirically dubious understanding of the nature of the UK constitution' (at 131) and 'a normatively unattractive conception of UK constitutional practice' (at 137).

of this approach, which is most explicitly developed in the work of Trevor Allan[59] and Sir John Laws,[60] is thus 'the reconfiguration of public law [in the UK] as a species of constitutional politics centred on the common law court'.[61] So-called 'common law constitutionalism' posits that the common law 'comprise[s] a network of moral principles which reflect values considered to be fundamental'.[62] In turn, the role of the courts in reviewing the lawfulness of legislative or administrative action is 'value-oriented (directed at fundamental values) and constitutes the central site of moral/political decision-making in the political community'.[63]

For constitutionalism to exist as a self-standing ideal, then, it appears that it need only require that 'fundamental' legal principles exist *somewhere*, albeit not within (the specific form of) a 'written' constitution. Provided that it represents 'the product of political bargain'—that is, as discussed above, the expression of the contractual arrangement sanctioned by the constitution's framers—the discrete, 'written' constitution may be reduced to little more than a 'useful aid to the activity of statecraft',[64] albeit one which has clearly prevailed as the dominant mode of statecraft in recent history. Yet, more importantly, the upshot is that the theory of constitutionalism can be said to derive its normative and/or explanatory force merely from its embrace of the idea(l) of 'limited', or 'limit*ing*' political power, which—reflecting the liberal principles with which it is imbued—it regards as a precondition for guaranteeing the liberty of the individual.[65]

Two (related) questions are of note at this point. The first concerns the meaning of the term 'limited government'—or what it means, in practice, that constitutionalism speaks specifically to the activity of 'limiting' the scope and nature of the power(s) of governmental institutions. On this point, Waldron suggests that the term 'limited government' refers 'not just to the avoidance of particular abuses, but to a broader sense of what is and what is not the government's proper function'.[66] The philosophy of John Locke is instructive—indeed, perhaps instrumental—in this respect. For in Locke's *Second Treatise of Civil Government*, the idea of 'limited government' is said to derive, in large part, from the notion of original grant: the point at which 'the people' consents to be governed by those institutions which it has itself established. This power-conferring moment—that is, the moment at which political power within the constitution is fundamentally *constituted*—is a crucial aspect of the concept of 'limited government', for it is claimed that the granting of consent by 'the people' involves the giving of 'only a fiduciary duty to act for certain ends';[67] rather, 'the people' retain a 'supreme power', with which they cannot part, to withdraw consent to be ruled by institutions which fall into disrepute, or which no longer serve the salus populi (meaning the 'health', 'safety', or 'security' of 'the people'):

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[59] TRS Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (Clarendon Press 1994); TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (OUP 2003).

[60] John Laws, 'Law and Democracy' [1995] PL 72; John Laws, 'The Constitution: Morals and Rights' [1996] PL 622.

[61] Poole, 'Back to the Future?' (n 57) 439.

[62] Thomas Poole, 'Dogmatic Liberalism? T.R.S. Allan and the Common Law Constitution' (2002) 65(3) MLR 463.

[63] Thomas Poole, 'Questioning Common Law Constitutionalism' (2005) 25(1) LS 142, 162-63.

[64] Loughlin, *Idea* (n 28) 47.

[65] See, eg, Dowdle and Wilkinson (n 38) 1: '[Liberal] constitutionalism is the belief that constitutions serve principally to constrain … for the benefit of the individual.'

[66] Waldron (n 23) 272.

[67] John Locke, *Second Treatise of Civil Government* [1680] §149.

> [A]ll power given with trust for the attaining an end, being limited by that end, whenever that end is manifestly neglected, or opposed, *the trust must necessarily be forfeited*, and the power devolve into the hands of those that gave it, who may place it anew where they shall think best for their safety and security.[68]

The notion of trust thus features prominently in this rendition. Those who possess political power do so *on the condition* that it be used for the good of those who benefit from and are subjected to its exercise. As Loughlin notes, in the context of Locke's theory, '[g]overnors are presented as servants of the people, who are required to account for the powers entrusted to them'.[69]

The second question, then, concerns the apparent centrality within the theory of constitutionalism that these limitations on government are necessarily *legal* in nature. The notion of 'limited government' not only, in this sense, reiterates the significance of the role that law plays in the 'conventional' understanding of the theory of constitutionalism. Rather, the issue here is that the necessarily *legal* dimension of these limits inevitably speaks to specific institutional arrangements, that is, most obviously highlighting the role of the judiciary. As Loughlin suggests, where positive law is treated as 'laying the foundations of political order',[70] the role of the judiciary, as the principal interpretive body of positive law and legal norms, in the context of 'limited government', necessarily involves determining the nature and scope of institutional power(s) dictated by the 'fundamental' or 'higher' law of the constitution. In other words, the theory of constitutionalism accords to the judiciary a significant role in adjudicating not only disputes about the enforcement of 'ordinary' law—for instance, the enforcement of contractual obligations, the righting of tortious wrongs, the punishment of criminal activity, and so on—but disputes as to the nature and content of the law which itself establishes the authority of 'ordinary' law, and, consequently, the rules around which a society is ordered. On this basis, as Waldron notes, '[s]upport for judicial review, therefore, seems to be part and parcel of what is meant by modern constitutionalism'.[71]

Legal constitutionalism places much emphasis on the need to establish the constitutional-legal source of authority for the exercise of political power. The power(s) of governmental institutions are considered to be enumerated, concrete and often only dispensed with in accordance with strict, constitutionally-defined procedures for amendment or repeal. In light of this, it is in relation to the question of exceptional, or 'extra-legal', power that legal constitutionalism becomes somewhat obstructive. The existence of those powers about which constitutions are silent presents for legal constitutionalism a significant challenge. Questions of executive power are radically obscured, which is perhaps deeply unhelpful as a means of understanding the nature and scope of that power in practice, the executive being, in fact, 'the

[68] ibid (emphasis added).
[69] Loughlin, *Idea* (n 28) 46.
[70] ibid 47.
[71] Waldron (n 23) 278. See, eg, Martin Scheinin, Helle Krunke and Marina Aksenova (eds), *Judges as the Guardians of Constitutionalism and Human Rights* (Edward Elgar 2016).

most powerful of state institutions';[72] the conventional understanding of the theory of constitutionalism evinces a preoccupation with 'extra-legal' or discretionary power as representing, in the first instance, a potential *abuse* of legal authority which must be constrained.[73] And insofar as it is concerned with limiting the exercise of, specifically, the *arbitrary* or exceptional exercise of political power, constitutionalism shares an inherent connection with other self-standing ideals such as 'the rule of law' and 'the separation of powers'.

III. POLITICAL CONSTITUTIONALISM

The discussion of the theory of constitutionalism above, and in particular the (liberal) conceptions of 'law' and 'constitution' in which it is fundamentally grounded, has thus far shown that one encounters several fundamental difficulties in seeking to ground an account of this theory in the specific context of the UK. Perhaps inevitably: although as Dowdle and Wilkinson note, 'the modern, liberal vision of constitutionalism … has come to dominate the 'comparative' constitutional imagination', indeed 'like all regulatory ideas, it is a product of particular circumstances: [i]ts foci reflect the concerns of time and place'.[74] 'These concerns and prescriptions are important,' it is suggested, 'but at the same time, they inevitably overlook – or conceal – other concerns that can shape constitutionalism in other times and places'.[75]

As discussed in this section, the discrete theory of political constitutionalism has emerged in recent years as a vital challenge—indeed *corrective*—to the 'liberal-legal' paradigm of constitutionalism; political constitutionalism constructs both a distinctive conceptual critique of (the *normative* appeal of) this paradigm, as well as an empirical critique of its (limited) explanatory value as a theoretical framework through which to explore the inter-relation between law and politics in and of the UK constitution.

A. From Griffith's 'The Political Constitution' to the Theory of 'Political Constitutionalism': The Normative Challenge to the 'Liberal-Legal' Paradigm

Since the term was employed as the title of John Griffith's 1978 Chorley Lecture, it is a truism that the UK constitution is considered to represent the archetype 'political constitution'.[76] Against the backdrop of the 'highly combustible' socio-economic and political landscape of the UK in the 1970s, Griffith's lecture presented an account of the UK constitution as one which rests, above all, on the *inevitability* of such conflict in society. Griffith's view, crucially, was that the means of resolution derived not from the ostensible

[72] Thomas Poole, 'The Executive in Public Law' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9th edn, OUP 2019) 188 (emphasis added).
[73] Loughlin, *Idea* (n 28) 47.
[74] MW Dowdle and MA Wilkinson, 'On the Limits of Constitutional Liberalism: In Search of Constitutional Reflexivity' in MW Dowdle and MA Wilkinson (eds), *Constitutionalism Beyond Liberalism* (CUP 2017) 17.
[75] ibid 17.
[76] See, eg, Keith Ewing, 'The Resilience of the Political Constitution' (2013) 14(12) German LJ 2111, 2111: '[W]ithin liberal democracies there are some constitutional arrangements that can be characterized as political and others as legal, with the British constitution being the paradigm example of the former.'

universality of law, nor in appeals to lofty abstractions such as 'social solidarity, the conscience of mankind or justice or fairness or fundamental legal principles',[77] of which 'written' constitutions purport to be the embodiment and judges the ultimate adjudicators and guardians. (In other words, liberal aspirations of the kind endorsed within 'legal' constitutionalism, as outlined in Section II, above, offer little in the way of conceiving how conflict in society may realistically be managed, per se—much less, that is, in the context of the UK.) Rather, only *political* judgment—that is, 'political decisions taken by politicians'—would, if anything, supply the remedies.[78]

Gee and Webber helpfully distil the core argument developed by Griffith in 'The Political Constitution' into four key ideas.[79] The first is that there is 'no sharp distinction between law and politics',[80] a point to which Griffith alludes in suggesting that law merely represents the continuation of politics by some other means;[81] legal constructions, says Griffith, such as 'written' constitutions and bills of rights, 'merely pass political decisions out of the hands of politicians and into the hands of judges or other persons'.[82] The second idea concerns the inter-relation between law and politics: 'each respond to and are conditioned by' what Griffith recognises as 'conflict…at the heart of modern society'[83].[84] Thirdly, Gee and Webber highlight Griffith's profound scepticism of 'reasoning under the rubric of rights', once again owing, above all, to the fundamental contestability of (the politics of) rights discourse—a technical and elite form of discourse, sure, but a political discourse, involving 'political claims by individuals and by groups',[85] nonetheless, in which questions as to, for instance, "*which* rights?", and "*whose* rights?" ever abound.[86] 'One danger of arguing from rights', Griffith wrote, 'is that the real issues can be evaded': '[w]hat are truly questions of politics and economics are presented as questions of law'.[87] And finally: instead of purporting to capture a bespoke set of essential societal rules in such instruments as legally-entrenched bills of rights, rather the best that we can do, Griffith argues, is to 'enlarge the areas for argument and discussion in the political process',[88] including, that is, argument and discussion about the nature and content of the constitution—that which establishes and regulates those sites of political engagement—itself.[89]

[77] Griffith (n 2) 20.
[78] ibid 16.
[79] Gee and Webber (n 8) 278-79.
[80] ibid 278-79.
[81] Griffith (n 2) 20.
[82] ibid 16.
[83] ibid 2.
[84] Gee and Webber (n 8) 279.
[85] Griffith (n 2) 17.
[86] Gee and Webber (n 8) 279. Gee and Webber refer to what Waldron calls 'the circumstances of politics' to explain this point, which rests on the paradox that individuals are compelled to come together to form a consensus as to a particular 'decision or course of action on some matter', even where agreement on this matter proves elusive: Waldron, *Law and Disagreement* (n 16) 102.
[87] Griffith (n 2) 17.
[88] ibid 20.
[89] Gee and Webber (n 8) 279.

Two overarching themes emerge from these ideas, which, for present purposes, might be labelled 'democratic accountability' and 'the limits of law'.[90] On one hand, these themes cohere to form the basis of the challenge that Griffith's account (of 'the political constitution') poses to the 'liberal-legal' paradigm of constitutionalism (in other words 'legal' constitutionalism), and in particular to the conceptions of 'law' and 'constitution' on which this paradigm is based.[91] On the other hand, these themes are among the particular ideals which underpin what would, in the decades following Griffith's lecture, ground a discrete and explicitly normative theory of political constitutionalism.

The first theme can be seen to relate directly to Griffith's (normative) claim that 'political decisions should be taken by politicians'.[92] In other words, political power ought to be exercised by those who are, in Griffith's terms, 'removable'; that those in public office might exercise power in the knowledge that they face the threat of removal from that office is key to establishing the conditions for 'real and not fictitious' accountability.[93] Inherent to this view, then, and to the conceptualisation of 'the political constitution' more broadly, is the idea(l) of democratic accountability. It has been suggested by Michael Gordon that whilst Griffith does not go so far as to lionise the concept of democracy, per se, 'that Griffith's conception of the political constitution was, ultimately, a democratic one—even if a very thin democratic one—seems apparent in his emphasis on the removability of those in power'.[94]

The theoretical development of political constitutionalism, particularly in the work of Tomkins and Bellamy, involves an attempt to unpack / build upon the normative appeal of this particular aspect of 'the political constitution': democratic-political—as opposed to 'legal'—accountability.[95] For instance, Bellamy's contribution seeks to expose the fallibility of law and legal institutions in facilitating democratic decision-making in two key respects:

> The first is that we reasonably disagree about the substantive outcomes that a society committed to the democratic ideals of equality of concern and respect should achieve. The second is that the democratic process is *more legitimate and effective than the judicial process* at resolving these disagreements.[96]

As to the normativity on which political constitutionalism is ostensibly founded, then, as Gee and Webber note, 'the idea of a political constitution is one that is prescriptive without really prescribing'.[97] In other words, in contrast to the theoretical claims of legal constitutionalism—that is, that in law a (liberal) political community can, indeed *must*, pre-

[90] Thomas Poole similarly characterises 'The Political Constitution' as an essay which develops 'two objections': firstly, 'the "political objection"', namely that 'law is not and cannot be a substitute for politics'; and secondly, 'the "philosophical objection"', which is to say that 'human rights are political claims': Thomas Poole, 'Tilting at Windmills?' (n 3).

[91] See, eg, Scott (n 42) 2162, in which the arguments advanced in Griffith's 'The Political Constitution' are said to have been directed toward proponents of natural law theories: '[T]he political constitution as a phenomenon was identified by Griffith in part as a response to, among others, Ronald Dworkin'. Although, cf Loughlin, 'The Political Constitution Revisited' (n 12) 12, in which the characterisation of Griffith's lecture as having been motivated by a desire to offer an *alternative* to the contemporaneous influence of natural law theories (of which Dworkin was no doubt a prominent advocate) is criticised, and labelled as an exercise in 'historical revisionism'.

[92] Griffith (n 2) 16.

[93] ibid 16.

[94] Gordon (n 58) 296.

[95] Tomkins, *Republican* (n 9); Bellamy (n 10).

[96] Bellamy (n 10) 4 (emphasis added).

[97] Gee and Webber (n 8) 288.

determine certain boundaries to collective decision-making crucially as a means of suppressing the threat of democratic-majoritarian politics—conceiving a constitution within the political constitutionalist paradigm requires political actors to devise suitable arrangements for establishing, sustaining and, where necessary, amending prescriptions for constitution-making; rather, 'it is for us all, for the most part acting through representatives in political institutions, to do the prescribing'.[98] Indeed, that democracy supplies the underlying rationale for this sort of constitution-making is evident, for a true democracy is arguably one which is unbounded in its ability to effect substantive (and ongoing) change—including, importantly, as to the nature and form of the relevant process(es) through which such change may be implemented, and in turn, the constitution itself.

The second theme, then, emerges in respect of the perceived 'limits' of law. In Griffith's account of 'the political constitution', law is regarded as neither capable of sustaining the necessary conditions for fruitful and legitimate political decision-making, much less capable of providing any truly authoritative statement of the "good" outcome in the resolution of political conflict(s). Instead, law is no more than 'one means, one process, by which those conflicts are continued or may be temporarily resolved'.[99] And it is at this point that the theory of political constitutionalism perhaps most strikingly sets itself apart from the conventional reading of constitutionalism as the theory of (legally) 'limited government'. As Goldoni and McCorkindale suggest, Griffith's account is fundamentally at odds with that which lies at 'the heart of the project of legal (or liberal) constitutionalism: the fiction that these conflicts ought to be contained – and can be contained – by law'.[100] Whereas to give effect to the theory of legal constitutionalism involves ascribing to the constitution a set of universal values which are duly protected by law and legal norms and institutions, political constitutionalism recognises, and more importantly embraces, the *irreducibility* of such ('universal') values on which stable social orders are purportedly founded. This is captured by Griffith's oft-repeated maxim:

> The constitution of the United Kingdom lives on, changing from day to day for the constitution is no more and no less than what happens. Everything that happens is constitutional. And if nothing happened that would be constitutional also.[101]

Here, Griffith emphasises what legal constitutionalism appears to take for granted: the fundamentally *contestable* nature of constitutions. Rather, a constitution is innately dependent on the political forces that both establish and maintain it. The development of the theory of political constitutionalism is marked, therefore, by its deconstruction of these conceptions of 'law' and 'constitution' (in and of 'the political constitution'), and, more importantly, its emphasis on the question—often overlooked or underdeveloped within the 'liberal-legal' paradigm of constitutionalism[102]—as to how political power is not only constituted, but continuously *re*-constituted, and sustained by a broader political discourse, within which law

[98] ibid.
[99] Griffith (n 2) 20.
[100] Goldoni and McCorkindale, 'Three Waves' (n 17).
[101] Griffith (n 2) 19.
[102] See, eg, Waldron (n 23) 273: 'What do constitutions do that constitutionalists downplay? First and foremost they empower…'

operates as one—albeit important—*form* of political interaction, but is political nonetheless.[103] Rather, 'constitutional law does not stand above politics: they are two sides of one coin'.[104] If, therefore, democracy represents the yardstick by which the propriety of institutional arrangements can or should be determined, then the (continuing) legitimacy of constituted power is conditioned by the ebb and flow of the democratic will *for the time being*—as determined not only by substantive and procedural norms as reflected in law and legal arrangements, but by the inputs and outputs of the ordinary political process. And so, far from seeking to *exclude* law, as Gordon notes, '[t]he political constitution … serves to emphasise the limits of law as a social instrument, and—recognising that law and politics are inherently interrelated—to establish the necessary priority of politics'.[105]

B. From the UK's 'Political Constitution' to a 'Legal Constitution'?

The emergence of the discrete theory of 'political' constitutionalism has been presented as a distinct challenge in particular to the normative 'hegemony' of the 'liberal-legal' paradigm of constitutionalism.[106] Among the key debates to which this discourse has given rise, as Gee and Webber suggest, is that which involves the juxtaposition of the idea (and ideals) of a 'political constitution' with that of a 'legal constitution', the latter of which is principally 'associated with holding those exercising political power to account, to a substantial degree and increasing extent, through judicial review'.[107] In turn, this has entailed a tendency to conceive of the contemporary British constitution as 'slowly evolving away from a political constitution towards something more akin to a legal constitution'[108]—that is, from a constitutional order which broadly reflects and/or embraces the ideals of 'political' constitutionalism to one which appears to give effect, whether in theory or in practice, to the principles underpinning the 'rival theory'[109] of 'legal' constitutionalism).[110]

There is scope to question, therefore, whether the discourse on 'legal' and 'political' constitutionalism, especially within the broader context of the UK's constitutional arrangements, primarily involves an exercise in description or prescription: taking stock of what *actually* happens, or postulating what *ought* to happen.[111] In other words, whether, as Gordon writes, 'the necessary constitutional priority of politics was, for Griffith, simply an empirical truth or also a principled position is open to debate'.[112] As Goldoni and McCorkindale's recent contribution makes clear, the development of the theory of political

[103] The empowering aspect of constitutionalism, in particular the question as to whether those who possess the authority to 'make' and 're-make' a constitution can do so without relinquishing that authority to the very institutions that have (crucially as a result of that power-conferral) been established, presents a unique paradox for legal constitutionalism, in which the discrete constitution, once made, ostensibly represents the ultimate source of authority and legitimacy in the relevant political community. See, generally, Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (OUP 2008).
[104] Keith Ewing, 'The Politics of the British Constitution' [2000] PL 405, 436.
[105] Gordon (n 58) 294.
[106] Goldoni and McCorkindale, 'The State of the Political Constitution' (n 4) 2103.
[107] Gee and Webber (n 8) 273.
[108] ibid 273.
[109] Tomkins, *Public Law* (n 1) 21.
[110] Gee and Webber (n 8) 273.
[111] ibid 275.
[112] Gordon (n 58) 294-95.

constitutionalism has so far happened in three stages, or (as the authors put it) 'three waves': first, the 'functionalist wave', embodied by Griffith's scholarship (especially Griffith's Chorley Lecture itself), which critiques the conception of law and legal norms and values on which 'legal' constitutionalism is founded; second, the 'normative wave', associated most directly with the work of Tomkins and Bellamy, which (as outlined in the introduction to this chapter) seeks to mount a distinctively normative defence of the necessary primacy of politics over law, and, by extension, political over legal institutions, specifically in the context of devising constitutional accountability mechanisms; thirdly, and newly, the 'reflexive wave', which seeks to retrieve some of the insights of the first 'wave' whilst seeking to overcome the constraints of the second 'wave', ultimately inquiring as to what, exactly, is 'political' about 'the political constitution' or 'political constitutional*ism*'.[113] That each 'wave' is 'marked by a specific methodological angle'[114] therefore helps to explain why the theory of political constitutionalism can be, and has been, employed as an analytical framework for both descriptive and prescriptive purposes. Added to this, however, is the conflict running through the debate on the theories of 'legal' and 'political' constitutionalism, namely whether, and if so to what extent, such theorising in and of itself potentially offers anything in the way of shedding light on real-word constitutional practice—whether, perhaps, in pitting these theories against one another other, there is in fact little more to gain than the opportunity, merely, to pontificate about which ideal-type, abstract 'model' of constitutionalism is the more normatively desirable.

Though, it is in the reaction to the recent period of significant constitutional reform in the UK that one may readily identify the ways in which the juxtaposition of 'legal' constitutionalism and 'political' constitutionalism has been employed as a potentially effective framework for assessing, rather from an *empirical* (primarily *descriptive*) perspective, changes to the form and substance of the constitution. Often during this period, as Gee and Webber recognise, were claims made to the effect that a marked shift in the UK's constitutional architecture had occurred: a shift from a 'political constitution' to a 'legal constitution'. Tomkins—in whose scholarship this sort of labelling has been readily employed,[115] albeit if no longer[116]—has suggested that this shift (which he in fact describes as 'from a privileging of political constitutionalism in Britain to a privileging of legal constitutionalism') is most explicitly reflected in a series of particular, related developments.[117]

The first development, Tomkins notes, concerns the ostensible decline in both the potency of and faith in political accountability in the UK generally, and in the doctrine of ministerial

[113] Goldoni and McCorkindale, 'Three Waves' (n 17).
[114] ibid.
[115] See, eg, Tomkins, *Public Law* (n 1) 21: 'Traditionally, English public law has been based on the political constitution, but over the past thirty years the tradition of the political constitution has come under increasing pressure from the rival theory of legal constitutionalism.'
[116] See, eg, Adam Tomkins, 'What's Left of the Political Constitution?' (2013) 14(12) German LJ 2275, in which Tomkins argues that 'we should move on from what has become a rather outdated contrast between the political constitution and the legal constitution': '[T]he British constitution is neither exclusively political nor exclusively legal … The British constitution is indeed now a "mixed constitution".'
[117] Adam Tomkins, 'Constitutionalism' in Matthew Flinders, Andrew Gamble, Colin Hay, and Michael Kenny (eds), *Oxford Handbook of British Politics* (OUP 2009) 243.

responsibility specifically.[118] The essence of the doctrine is that ministers are accountable to Parliament—the UK's foremost 'political', democratic institution—for actions taken in the conduct of public office. And insofar as political accountability constitutes one of the foundational tenets of the theory of political constitutionalism, it is no stretch, therefore, to conceive of its compromise as undoing much of the explanatory force, or indeed normative attractiveness, of the theory as a whole. Tomkins thus insinuates that the ostensible loss of confidence in the ability of political actors to sustain the conditions required to hold power-wielders to account effectively is consistent with, and perhaps serves as an viable explanation for, an apparent contemporary shift towards alternative (especially legal) accountability mechanisms.[119]

A second development, then, pertains to an apparent 'strengthening of the rule of law and a furthering of the constitutional role of the courts'.[120] Here, Tomkins cites as evidence of this the cumulative effect of several contemporary judicial developments, including: the courts' increasing interventionism, including in matters such as the exercise of prerogative powers[121]—the legal issue at the heart of *R v Home Secretary, ex p Fire Brigades Union*;[122] the creation of a 'new species of common law constitutional rights', as evidenced by *R v Secretary of State, ex p Simms*;[123] and the introduction of a statutory power to review primary legislation for compatibility with European human rights norms following the enactment of the Human Rights Act 1998.[124] Indeed, the third development which Tomkins highlights, namely that of the now well-known obiter in *Jackson v Attorney General*,[125] ought to be included here too. For the significance of these related developments rests on an appreciation of the rule of law—which itself embodies the idea(l) of government limited by law—as the guiding principle of legal constitutionalism, and especially the 'common law constitutionalist' variant thereof.[126] In *Jackson*, the contemporary propriety of the doctrine of Parliament's 'unlimited' legislative power as the fundamental principle of the UK constitution was, to an unprecedented degree, openly disputed.[127] [128] And thus the particular relevance of this, in the scheme of 'legal' and 'political' 'models' of constitutionalism, may be explained by reference to what Scott has called the 'thematic linkages' between (the ideals of) 'political' constitutionalism and the doctrine of parliamentary sovereignty.[129] That is, the

[118] ibid 243.

[119] See, eg, Janet L Hiebert, 'Governing under the Human Rights Act: The Limitations of Wishful Thinking' [2012] PL 27: 'Concern about Parliament's inability to control the executive spawned new interest in constitutional reforms, including a bill of rights.'

[120] Tomkins, 'Constitutionalism' (n 117) 243.

[121] cf *Council of Civil Service Unions v Minister for the Civil Service* [1984] UKHL 9, [1985] AC 374.

[122] [1995] 2 AC 513. See, also, Tomkins, *Public Law* (n 1) 26, in which *Fire Brigades Union* is described as 'a case where the majority of their Lordships significantly moved forward the frontiers of judicial review'.

[123] [1999] UKHL 33, [2000] 2 AC 115.

[124] Tomkins, 'Constitutionalism' (n 117) 243.

[125] [2005] UKHL 56, [2005] 1 AC 262.

[126] See, eg, Allan, *Law, Liberty, and Justice* (n 59); Allan, *Constitutional Justice* (n 59).

[127] *Jackson* (n 124) [102] (Lord Steyn): 'The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen out of place in the modern United Kingdom … [I]t is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism.'

[128] Tomkins, 'Constitutionalism' (n 117).

[129] Scott (n 42) 2169.

contemplation, by senior members of the judiciary, of legal limits sourced in the common law which might exist to prescribe the policy choices of democratically elected governments, and apparently to ward against complaisant parliamentarians who would legislate contrary to 'fundamental' rights and rule-of-law principles, clearly resonates with the core ideals of legal constitutionalism—especially the ideal of (legally) 'limited' and 'limit*ing*' government. For this reason (as is Tomkins' implication), *Jackson*, the powers to review primary legislation for human rights-compliance under the HRA, and the development of a line of legal reasoning which seeks to establish and instrumentalise a repository of 'common law constitutional rights', may be taken to represent a clear endorsement of these ideals in practice, thus marking a consequential shift in attitude amongst important institutional actors as to which theory or account of the UK constitution—'legal' or 'political'—is, or might be, most consistent with prevailing (if new) constitutional orthodoxy.

For present purposes, Tomkins' survey of these (significant) contemporary constitutional developments is instructive: it provides a vivid example of the way in which a turn to the 'models' of constitutionalism envisaged by the theories of 'legal' constitutionalism and political constitutionalism might serve as a viable, indeed valuable explanatory framework for understanding the UK constitution, how it works, how it changes, or perhaps might *be* changing. The response prompted by the sorts of developments identified by Tomkins primarily concerns the extent to which, empirically, the UK's traditionally 'political constitution' (and concomitant reception, traditionally, of those ideals central within the broader theory of political constitutionalism) can be seen or said to have withstood the adoption of constitutional innovations more readily associated with the idea(ls) of a 'legal constitution' (and thus the accompanying theory of legal constitutionalism). Above all, this demonstrates the way in which the realities of constitutional practice may be tested *with* such 'models' of constitutionalism, per se: whether, that is, developments in constitutional practice can be seen to map onto the blueprint of a constitutional order as conceived within 'legal' or 'political' constitutionalist paradigms. The end to which this style of constitutional analysis is oriented ultimately leads to the question as to whether the nature of a particular constitutional order can be said to rest primarily on either 'legal' or 'political' foundations. Yet, of course, a prominent strand of this scholarship has extrapolated this method, using it as a vehicle to inquire, ultimately, as to whether such fundamental change constitutes a *normatively desirable* development.[130] It is in this respect that the realities of constitutional practice are tested *against* normative 'models' of constitutionalism.

The discourse thus operates on two planes. On one hand, those who would assess real-world constitutional arrangements *against* the normative dimensions of legal and/or political constitutionalism are ultimately oriented to a specific objective: that is, to draw upon the ideals advanced by these abstract 'models' of constitutionalism for the purposes of assessing whether various trends in constitutional developments are deemed to be *normatively* positive or negative—for example, whether they are conducive or obstructive to the ends of, say, the protection of 'fundamental' rights. Therefore, as normative 'models' of constitutionalism which are albeit detached from real-world constitutional practice(s), legal and political

[130] See, eg, Adam Tomkins, 'In Defence of the Political Constitution' (n 18). See, also, Adam Tomkins, *Public Law* (n 1) 30: '[T]his is the crucial question which faces us: not do we want to replace our unwritten constitution with a written one, but do we want to replace our political constitution with a legal one?'

constitutionalism may serve as benchmarks of "the good constitution" against which these developments can be assessed. In this sense, legal and political constitutionalism are employed from a "top-down" perspective: which 'model' is the more accurate 'fit' with current constitutional arrangements, realities, practices? Or, perhaps: which reform(s) ought to be implemented to align the UK's constitutional arrangements with the ideals of, for instance, legal constitutionalism, and so give effect to the ideals endorsed by this theory? (The answer to which, for instance, might include the enactment of an entrenched Bill of Rights, or (further) strengthening the courts' powers to review primary legislation.)

On the other hand, those engaged in a "bottom-up" reading of the constitution—in 'what actually happens'—may derive from practice the sorts of markers of constitutional activity which might happen to be consonant with the ideals of either legal or political constitutionalism. From this angle, constitutional practice may be propped up *alongside* those ideals and justified (or, alternatively, criticised) on the basis of the normative attractiveness of the theory with which they correspond (or, alternatively, fail to correspond). An example of this can be found in the work of Gordon who, whilst insisting that it is not, in fact, necessary to ground the case for establishing the virtue of the doctrine of parliamentary sovereignty in the theoretical framework provided by political constitutionalism, suggests that, nonetheless, '[p]olitical constitutionalism provides the broader framework in which the doctrine of parliamentary sovereignty can most convincingly be located'.[131] Yet, crucially, as Gordon intimates, a "bottom-up" reading of constitutional practice does not absolutely necessitate a turn to the distinctively normative dimensions of the discourse on legal and political constitutionalism. Indeed, where this sort of methodology is adopted—in other words, wherever the normative dimensions of either theory are employed as the measure by which actual constitutional developments are assessed—the need to justify it, and defend its value as a framework for constitutional analysis, is perhaps most pressing. For it begs the question: what can a turn to abstract 'models' of such as these reveal about the *actual* constitution? Gee and Webber perhaps provide something of an answer to this question, noting that it is precisely the lack of agreement as to the precise nature of the UK constitution—which principles it truly embodies, how it 'works', and so on—which creates the potential for meaningful debate as to which abstract 'model' most accurately reflects these constitutional realities:

> Indeed, it is precisely because there is such widespread and whole-hearted disagreement about the nature, content and workings of the constitution as a whole, and precisely because that disagreement runs so deep, that these two models—the legal and the political—can serve as such effective expressions of our constitutional self-understandings.[132]

Yet Gee and Webber also acknowledge the potentially self-defeating problem inherent to the use of abstract constitutional 'models':

> If, on the one hand, a political constitution is no more than a predominantly descriptive account of constitutional practices, there is an argument that it no longer accurately describes—if it ever did—the nature, content and workings of the British constitution. If, on the other hand, a political constitution is

[131] Gordon (n 58) 301.
[132] Gee and Webber (n 8) 299.

> a predominantly normative idea, there is an argument that it no longer supplies—if it ever did—an attractive account upon which to organize the British constitution.[133]

As such, whilst one must acknowledge that the discourse on legal and political constitutionalism, and the development of those theories per se, are imperfect, above all 'models' of constitutionalism merely supply 'an explanatory framework within which *to make sense of* our constitutional self-understandings'.[134] This is key, for this point is often overlooked by those who direct criticism towards those who engage in and have contributed to this discourse.

IV. CONTEMPORARY CRITIQUES OF THE DISCOURSE ON LEGAL AND POLITICAL CONSTITUTIONALISM

As Marco Goldoni opines, 'the antagonism between legal and political constitutionalism has almost monopolised the discussion on constitutional theory during the last years'.[135] Such is the pervasiveness of this contemporary strand of constitutional(ist) discourse. Though, some lament this; the discourse is not without its critics. Martin Loughlin, for instance, has suggested that, indeed, its prevalence 'reveals the impoverishment of public law thought',[136] whereas Aileen Kavanagh considers that the discourse is based, fundamentally, on a 'false dichotomy', the consequence of which is that it 'distorts our understanding of the British constitution'.[137] This section explores two key (related) critiques raised by Loughlin and Kavanagh in particular, respectively: first, that of the explicit normativity of the discourse, which, as outlined in this chapter thus far, has been powered by the emergence of political constitutionalism as a vital corrective to the legal constitutionalist paradigm and (especially) its 'classic liberalism' foundations/precepts; and second, so-called 'oppositional narrative', that is, concerning the (significant) extent to which legal and political constitutionalism appear, fundamentally, to have engendered a distinctively adversarial, polarising debate.

A. The Normative Turn

Often the charges levied at those who engage with and seek to develop the theory of political constitutionalism as a distinctive *normative* challenge to legal constitutionalism fall into one of two categories. The first is that the methodology associated with this body of scholarship precludes any meaningful engagement with real-world constitutional practice which, as such, produces highly stylised, highly selective,[138] and thus likely misleading accounts of how a constitution (generally, and the UK constitution specifically) can be seen to 'work', as it

[133] ibid 275.
[134] ibid 273 (emphasis added).
[135] Marco Goldoni, 'Two Internal Critiques of Political Constitutionalism' (2012) 10(4) ICON 926.
[136] Loughlin, 'The Political Constitution Revisited' (n 12) 10.
[137] Kavanagh (n 20).
[138] See, eg, Colm O'Cinneide, 'Democracy, Rights and the Constitution – New Directions in the Human Rights Act Era' (2004) 57 CLP 175, 180: '[M]any of the normative arguments as to the validity or otherwise of rights review made in the UK and elsewhere are based upon highly selective accounts of how rights and democracy interact. Many of these accounts are constructed using selective examples or excessively determinist descriptions of the impact of rights review upon the functioning of democratic governance.'

were. The second concerns the readiness with which its proponents would associate it with Griffith's scholarship. That is, it has been argued that the 'normative turn' in this respect fundamentally constitutes a mischaracterisation of Griffith's scholarship (especially 'The Political Constitution') which, more broadly, appears to suggest that the theory of political constitutionalism, and its precepts, rest on a flawed foundations.

It is the second category with which this section is principally concerned, for the first—that is, how normative 'models', despite their obvious imperfections, might in fact provide an effective framing device for assessing and understanding, say, constitutional change—has largely been addressed in Section III. Rather, this (second) type of criticism is issued particularly by those who would lambast proponents of political constitutionalism for relying on Griffith's 'The Political Constitution' as the source of their intellectual inspiration. In particular, critics are keen to highlight Griffith's self-professed disinterest in theorising about 'the constitution',[139] which is clearly reflected the style of analysis engendered by the so-called 'the normative turn'. Kavanagh's criticism of those who rely on the discrete theories of legal constitutionalism and political constitutionalism as a framework for constitutional analysis is a key example, here, for she suggests that the theorising of those such as Tomkins and Bellamy 'departed from Griffith's deep scepticism about abstract principles and the pretensions of 'grand theorising''.[140] Indeed, it appears that, at least in part, the gist of this (sort of) critique is that, by cutting them off from a prominent source of their intellectual proclivities, those who would espouse an idealistic reading of constitutional practice of the kind characterised by 'the normative turn' of political constitutionalism ought to be deprived of a share in Griffith's undoubted scholarly influence.[141]

That scholars such as Tomkins and Bellamy have readily marched under Griffith's banner, as it were, is perhaps seen, more broadly, as a marker of the misapprehensions not only of proponents of the theory of political constitutionalism, but of anybody who would engage with this scholarship. This critique has been most explicitly developed in a recent article entitled 'The Political Constitution Revisited' by Martin Loughlin, whose scholarship somewhat paradoxically finds support in the work of the political constitutionalists from whom he is seemingly keen to distance himself.[142] Loughlin targets the readiness with which proponents of the theory of political constitutionalism would associate it with Griffith's scholarship.[143] The thrust of Loughlin's argument is that Tomkins in particular, as the 'main advocate of political constitutionalism',[144] erred in his reception of Griffith's 'The Political Constitution' as representing something of a call-to-arms against the rise of judicial power,

[139] See, eg, JAG Griffith, 'Judicial Decision-Making in Public Law' [1984] PL 564: 'I distrust formulations which begin by developing something called "The theory of the constitution" and go on to describe something else called "what actually happens".'

[140] Kavanagh (n 20) 55.

[141] eg Loughlin, 'The Political Constitution Revisited' (n 12).

[142] Goldoni and McCorkindale, 'Three Waves' (n 17): 'The most coherent and developed effort in the direction of a reflexive take on political constitutionalism is visible in Martin Loughlin's 'political jurisprudence'.' See, eg, Martin Loughlin, *Political Jurisprudence* (OUP 2017).

[143] Loughlin, 'The Political Constitution Revisited' (n 8).

[144] ibid 8.

insofar as it turns Griffith's account into something that it is not: from an explanation grounded in a 'well-established functionalist public law method', to a normative model.[145]

Ultimately, the aim of Loughlin's critique seems to be to highlight the inherent flaw of the 'normative turn': that, not only did this 'turn' cultivate a discrete constitutional theory based on a misguided reading of Griffith's core arguments in 'The Political Constitution'—'political decisions should be taken by politicians', 'law is not and cannot be a substitute for politics', 'the constitution is no more and no less than what happens', and so on—but that it represents something which, although inspired by Griffith's scholarship, produces a way of reading constitutional practice which is wholly incongruous to that which would be procured were Griffith's 'functionalist' method more faithfully observed. As Loughlin notes:

> In the two decades following Griffith's Chorley Lecture, it was generally recognised as a critical assessment of contemporary constitutional ideas according to the functionalist method … Functionalists conceived public law as the law of public institutions. But their descriptive method had been shaped by the underlying conviction that social progress could only be sustained through the growth in the role of public institutions staffed by professionals educated in an ethos of public service.[146]

As such, where, for instance, Tomkins lamented that Griffith had refrained from going further in his argument, and so opt to explicitly endorse the notion that political mechanisms of accountability ought to be 'constitutionally required',[147] Loughlin points out that, rather, the 'functionalist' method was 'based on a Comtean belief in continuing social progress', and that, 'given his views on the nature of the constitution, Griffith's account could never have risen to the level of being 'constitutionally required''.[148] Above all, for Loughlin, the potential value of Griffith's Chorley Lecture rests entirely on an appreciation of the 'intellectual and political context' in which that piece ought to be read.[149]

In addition, Loughlin emphasises that in order for Tomkins to deliver on his ambition (which, as Loughlin recalls, is 'to show that the legal constitutionalist account is not just distorted; it is unconstitutional') he must concede that 'no republican reading of the constitution is possible without embracing some version of the legal constitutionalism he criticises'.[150] In other words, Tomkins is deemed to be guilty of espousing a distorted method of constitutional analysis on two counts: first, by constructing an overtly normative reading of the core arguments developed in 'The Political Constitution' on the flawed assumption that Griffith's methodology was in some way 'deficient' as opposed to being largely unconcerned by normative, theoretical arguments; and second, by engaging in the same 'skewed reading of modern political developments' as the legal constitutionalists whom he criticises. Moreover:

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[145] ibid 9, 14. See, also, Martin Loughlin, 'The Functionalist Style in Public Law' (2005) 55 UTLJ 361, 374: '[T]he orientation [of the functionalist style] is realist, scientific, and sociological, and it maintains a sceptical stance towards jural postulates that are abstract, utilize fictional devices, and are metaphysical in character.'

[146] Loughlin, 'The Political Constitution Revisited' (n 12) 11

[147] Tomkins, *Republican* (n 9) 39.

[148] Loughlin, 'The Political Constitution Revisited' (n 12) 14.

[149] ibid 19.

[150] ibid 14.

> Griffith recognised only too well that the evolved parliamentary constitution rests on a system of government far removed from the republicanism Tomkins promotes. He was suspicious of those who, in the course of describing, eulogised parliamentary practices. And his account of politics was more sober than the normative conception Tomkins advocates; where Tomkins talks of politics as a practice to 'be celebrated' and which 'makes us free' and 'makes us human', Griffith sees a set of practices generated as a consequence of the 'wearisome condition of humanity'. Whatever the virtues of Tomkins' project, there is little evidence to support it in Griffith's work.[151]

The upshot, for present purposes, is this: whilst Loughlin no doubt cogently dissects what is commonly thought to represent a natural lineage—from Griffith's 'The Political Constitution' to the theory of political constitutionalism—the fact remains that the latter now exists, and may continue to exist in and of itself, and that its development may, in turn, continue to lend meaning to constitutional analysis, albeit perhaps not necessarily in the way that Tomkins et al consider. Indeed, Loughlin appears to concede this point, particularly in the last line of the following paragraph:

> ['The Political Constitution'] has been adopted by a new generation of public law scholars as a call-to-arms against the hegemony of liberal normativism/legal constitutionalism but this has entailed significantly distorting [Griffith's] argument. Griffith might not have been unhappy about that: better to be misread for justified political purposes, he could well have said, than ignored because of the strictures of an austere juristic method. But if the discipline is to develop, we must acknowledge the nature of the manoeuvres being made in these reconstructions of Griffith's arguments.[152]

Of this, it could be said that Loughlin's critique of the explicit normative bent of the (development of the) theory of political constitutionalism is one which even its proponents have been forced, recently, to acknowledge. As Goldoni and McCorkindale suggest, '[w]hile initially refreshing, the view put forward by the second wave has soon appeared as too narrow', proceeding to suggest that the 'second wave', like the first (that is, the 'functionalist wave'), was/is 'reactive':[153] its development has suffered from the fact that it above all responds to, and is thus tied to, some other theory or phenomenon—in this case, legal constitutionalism. As noted above, this has led to a further 'turn' in the development of the theory of political constitutionalism—what, as noted above, Goldoni and McCorkindale have labelled the 'third wave' of that development—marked by a new, if still fundamentally conceptual inquiry:

> Neither a functionalist interrogation of the location and exercise of power, nor a normative exercise directed at the legitimacy of political institutions, theirs is an exercise in understanding: understanding not only the grammar of public law but in so doing understanding precisely what it is that is political about the political constitution.[154]

[151] ibid 14-15.
[152] ibid 20.
[153] Goldoni and McCorkindale, 'Three Waves' (n 17).
[154] ibid 74. Examples of the 'reflexive wave' might include, eg, Panu Minkkinen, 'Political Constitutionalism Versus Political Constitutional Theory: Law, Power, and Politics' (2013) 11(3) ICON 585; Goldoni, 'Two Internal Critiques' (n 134); Marco Goldoni, 'Political Constitutionalism and the Question of Constitution-Making' (2014) 27(3) Ratio Juris 387.

Perhaps, then, on one hand, the criticism, as expressed by Loughlin, that the 'normative turn' offers little (if anything) in the way of accentuating the value of 'the political constitution' as a descriptive lens through which to understand the UK constitution—whether at a particular moment in time, or more generally—is one which was recognised some years ago, and thus prompted those who are keen to advance the theory to re-evaluate the way in which it might be advanced (so as to accommodate or respond to such criticism). And yet, that on the other hand the impetus has effectively been towards *more* theorisation is, of itself, problematic. For although such theorising might uncover new and no doubt interesting insights as to, for instance, those '(sometimes spontaneous and unpredictable) sites of political action' that exist beyond Parliament as the paradigm example,[155] it inevitably perpetuates analysis of the constitution in increasingly abstract terms. Indeed, it might be true that 'a reflexive understanding of the political constitution entails a new research agenda for political constitutionalists … [which] should go well beyond a debilitating focus on the functioning of courts vis-à-vis parliaments and should confront political constitutionalists with an internal examination', but quite what this sort of introspection might tell us about the *actual* constitution, how it works and how it changes (or might be changed), remains uncertain.

B. The Oppositional Narrative

The second key critique of the discourse on legal and political constitutionalism concerns what Aileen Kavanagh has called the 'oppositional narrative',[156] namely the pitting of law (and 'legal' institutions) *against* politics (and 'political' institutions), and vice versa, in what has been characterised as, effectively, a 'zero sum game'.[157] Kavanagh has written, recently, that 'casting constitutional issues in terms of an oppositional 'political *versus* legal constitutionalism' narrative goes too far': '[i]t creates an unduly polarised, dichotomised and reductivist picture of constitutional governance, which threatens to distort our understanding of the British constitution'.[158] Such an approach rests on a 'false dichotomy';[159] rather, '[t]he UK constitution—like all other developed constitutions—envisages a role for both Parliament and the courts, thus relying on a combination of political and legal modes of accountability'.[160] In other words, to the extent that the discourse on legal and political constitutionalism is narrowly conceived as cultivating an analytical approach in which law and politics are sharply bifurcated, rather it must be recognised that, in fact, law and politics *cannot* be bifurcated; the constitution is of course 'mixed', with law and politics (and 'legal' and 'political' institutions) 'complementing' one another in the 'joint enterprise of good

[155] Goldoni and McCorkindale, 'Three Waves' (n 17) 75.
[156] Kavanagh (n 20) 45.
[157] Ian Leigh, 'Secrets of the Political Constitution' (1999) 62(2) MLR 298, 308: 'Certainly, the Bill of Rights debate from Griffith's celebrated Chorley Lecture onwards has led to a tendency to see judicial or political accountability as a zero sum game…' See, also, eg, Nicholas Bamforth, 'Accountability of and to the Legislature' in Nicholas Bamforth and Peter Leyland (eds), *Accountability in the Contemporary Constitution* (OUP 2013) 259: 'The priority one accords to different forms of accountability will … depend upon the underlying account of legal or political constitutionalism to which one is committed.'
[158] Kavanagh (n 20) 57.
[159] ibid 57.
[160] ibid 57.

government'.[161] Indeed, claims to this effect are increasingly prominent in contemporary critiques of the discourse on legal and political constitutionalism more broadly. For instance, one commentator has noted, recently, that 'it is only when all three models of constitutionalism are taken together'—namely, 'political', 'legal' and 'common law' constitutionalism—'that a truer image of the constitution appears, and a path towards a more stable constitutional future for Britain emerges'; and only 'if and until we embrace *complementary* constitutionalism, contestability will remain the defining characteristic of the British constitution'.[162]

Though, for Kavanagh, ultimately the problem is one of oversimplification:

> The lens of either model is too narrow to give us an accurate picture of the institutionally diverse constitutional order which combines political and legal elements. It risks blinding us to the complex, interactive and heterogeneous reality of the constitutional order. Indeed, it risks distorting our perception of those realities, by casting a presumptively bad light on any element which does not comply with the one-sided lens. These models are not only partial, but partisan.[163]

It is worth noting here, then, that there is also perhaps a sense in which the 'normative turn' and the 'oppositional narrative' are mutually reinforcing. That is, the normative dimensions of the discourse tend to involve endorsing or promoting one 'model'—whether 'legal' or 'political'—over the other on the basis that one's preferred model speaks to an idealised view of "the good constitution". As Kavanagh writes:

> All told, the dichotomy between political and legal constitutionalism has led to an unfortunate polarisation of the academic debate, with so-called 'political constitutionalists' in one corner and so-called 'legal constitutionalists' firmly in another. Once the key issues are framed as a stark either/or choice about whether we favour democracy on the one hand or 'juristocracy' on the other, all participants are pressed into one side of a false dichotomy between two extreme positions. It forces interlocutors to take sides on the basis of a wholesale orientation towards either Parliament or the courts, when in fact the issues should be evaluated retail, one by one, depending on the context. Clearly, the polarisation becomes intractable if each side of the dispute compares an idealistic and romanticised view of their favoured institution, with a cynical and jaundiced view of its perceived rival.[164]

Just as Kavanagh therefore rejects the polarising dimensions of the discourse, indeed the point is similarly made by Loughlin (also in 'The Political Constitution Revisited', discussed above) that '[t]he formulation 'legal v political' was doomed to lead to an entirely fruitless debate'.[165] Loughlin has in fact long criticised this formulation, noting in 2006 that '[t]he basic question for constitutional lawyers is not whether we have a legal or political

[161] ibid 68. See, also, eg, Aileen Kavanagh, 'The Role of Courts in the Joint Enterprise of Governing' in NW Barber, Richard Ekins and Paul Yowell (eds), *Lord Sumption and the Limits of the Law* (Hart Publishing 2016).
[162] Robert Brett Taylor, 'The Contested Constitution: An Analysis of the Competing Models of British Constitutionalism' [2018] PL 500, 522 (emphasis added).
[163] Kavanagh (n 20) 62-63.
[164] ibid 59.
[165] Loughlin, 'The Political Constitution Revisited' (n 12) 12.

constitution: it is how the idea of law within the political constitution (i.e. the constitution of the polity) might best be conceptualized'.[166]

Beyond the clear sense in which this oppositional, polarising dimension of the discourse mischaracterises the roles of both Parliament and the courts (as archetype 'political' and 'legal' institutions, respectively)—and thus overlooks the potential complementarity of those roles—Kavanagh highlights two further consequences. First: 'by presenting Parliament and the courts as rivals vying for prime position 'at the heart of the constitutional control room', this deflects our attention away from the most powerful branch of government in the UK constitution, namely, the Executive'.[167] For Kavanagh, this represents a 'serious blind-spot': not only is this occlusion 'particularly problematic for a school of thought whose *credo* is to emphasise, prioritise and even celebrate the political dimensions of the British constitutional order', in fact 'it may be doubly dubious because it may allow political constitutionalists to trade on the deliberative and democratic virtues of the legislature, when what is really at stake is the power of an overweening Executive'.[168] Secondly, Kavanagh notes that 'if the nerve of [the dichotomy between legal and political constitutionalism] is a basic disagreement about how best to hold the government to account—whether through Parliament or the courts—we risk treating these institutions not only as rivals, but also (ironically) as institutional equivalents'.[169] And yet:

> [J]ust as it is misguided to assess the legislature against the standards we would expect of courts (such as independence, impartiality or proficiency in legal reasoning) it is equally futile to assess courts against the standards we expect of legislatures (such as democratic responsiveness to constituent concerns or broad-ranging deliberative capacity).[170]

Instead, '[w]hen judging any institution, we should use standards of assessment which are sensitive to the nature, limits and functions of that particular institution'; it is, in other words, 'misguided to hold them to the same standards'.[171]

There is much to agree with in Kavanagh's critique, especially insofar as it exposes the pitfalls of that particular strand of the discourse on legal and political constitutionalism which has done much potentially to over-simplify and over-theorise the inter-relation of law and politics in and of the constitution. Indeed, as Mark Elliott has also written, the binary character of the discourse ultimately begets such oversimplification of otherwise complex and multifaceted constitutional issues (such as, in Elliott's contribution, the question of Parliament's legislative supremacy), and thus the 'distortion' of those issues.[172] Even for those who would recognise value in the discourse, this must clearly represent a compelling counterargument. Though, it is one thing to accept that these (problematic) developments clearly happened in the discourse on legal and political constitutionalism, and, as such, have

[166] Martin Loughlin, 'Towards a Republican Revival? (2006) 26(2) OJLS 425, 435-36.
[167] Kavanagh (n 20) 58. See, eg, Poole 'The Executive in Public Law' (n 72) 188: 'The executive is the most powerful of state institutions.'
[168] Kavanagh (n 20) 58 (emphasis in original).
[169] ibid.
[170] ibid.
[171] ibid.
[172] Mark Elliott, 'Legislative Supremacy in a Multidimensional Constitution' in Mark Elliott and David Feldman (eds), *The Cambridge Companion to Public Law* (CUP 2015) 92.

done much to warrant criticism; it is quite another thing to suggest that the discourse is either *necessarily* or *indelibly* reduced to little more than an ideologically-charged debate about whether archetype 'legal' or 'political' mechanisms of accountability are "better" than one another—whether in deciding difficult constitutional, moral, legal questions, protecting 'fundamental' human rights, and so on. There is scope, also, to question the basis of this characterisation of the discourse in the first place. That is, quite whether the development of the theory of political constitutionalism in particular—which, in Kavanagh's critique, appears to take much of the blame both for the (pitfalls of the) 'normative turn' and the 'oppositional narrative'—is or ever was about *excluding* law, per se (or the role for the courts in 'the political constitution' generally), or otherwise *separating* it from politics, is debatable. Rather, as noted in Section III, above, 'the political constitution' (whether as a normative or empirical phenomenon) specifically conceives law and politics, in effect, as two sides of the same coin: as Griffith noted, 'politics is what happens in the continuance or resolution of [conflicts] … [a]nd law is one means, one process, by which those conflicts are continued or may be temporarily resolved'.[173]

That said, the oppositional narrative which has underpinned a significant (and clearly influential) portion of the discourse is rightly the target of much criticism insofar as it is perceived to bifurcate the UK constitution into two competing 'models' of constitutionalism-as-*limits*: 'legal' and 'political'. But perhaps the real issue is this: an undue focus on legal constitutionalism and political constitutionalism as representing competing 'models' which, respectively, embrace only legal *limits* and political *limits* to the exercise of power in and of the constitution evinces a broader preoccupation, within the discourse, with some of the more misleading features of constitutionalism, per se, as, historically, the theory of 'limited' or 'limit*ing*' government. This is before, even, one considers what "better" could or should mean in the context of 'limiting' governmental power. More 'effective', say, at preventing the executive from acting (that is, exercising power) in this or that context, whether *at all* or in certain ways? More 'democratic', or more 'legitimate'—whatever this necessarily entails? In other words, focusing exclusively on the power-limiting dimensions of law and politics means that the question as to how they interrelate so as to make effective, to democratise and/or to legitimise the exercise of power, and in so doing therefore crucially *empower* and *enable* constitutional actors, is at best significantly underplayed, and at worst entirely ignored. The effectiveness, democratic and/or legitimacy credentials of the legislature vis-à-vis the courts is one (undoubtedly important) thing. Yet crucially, so is that—Kavanagh rightly points out—of the executive (whether in and of itself, or vis-à-vis the legislature or the courts). Although the theory of political constitutionalism is primarily synonymous with (prioritising) the power of Parliament, or legislatures generally, there is nothing inherent in the approach that this theory entails which renders it incompatible with analysis of executive power—including, for instance, in the UK context, that of the royal prerogative. Indeed, it is the normative dimension of the debate—that is, 'judicial v democratic'—which has perhaps made it seem (erroneously) that this is a huge conceptual leap.

If there is value, therefore, in developing or using a theory of political constitutionalism to understand (among other things) the operation, and indeed potential contestation, of

[173] Griffith (n 2) 20.

constitutional law and politics, perhaps it can be found in (at least) two ways—both of which can be seen to engage with or respond to criticisms of the kind made by Kavanagh. First, the value of political constitutionalism might be found in the way in which it critiques, and thus *corrects*, the problematic legalism, and the conceptions of 'law' and 'constitution', on which the theory of legal constitutionalism rests, especially as this might all be applied to the UK's constitutional arrangements. Indeed, it ought to be noted here that Kavanagh appears to accept (or concede?) this point:

> There is no doubt that [the theory of political constitutionalism as developed by Tomkins, Bellamy, etc.] brought valuable insights to bear on constitutional debates. In the post-Human Rights Act era, they rightly warned us to be sceptical rather than sanguine about the potential dangers of a creeping court-centricism in British constitutional practice and thought. Moreover, by highlighting the strengths of the Westminster system of parliamentary government and the achievements of the traditional, uncodified British constitution, *they provided a valuable corrective* to the assumption that we should turn to the courts to resolve every constitutional problem. Without doubt, we should all be wary of assuming that the courts are—or ever could be—a panacea for all constitutional ills and vigilant against the risk of judicial overreach.[174]

This critical lens perhaps represents one of the key strengths of 'the political constitution' (as originally conceived by Griffith) and the theory of political constitutionalism more broadly, that is, as an 'explanatory tool, providing a distinctive perspective on the operation of constitutional law and politics', as Michael Gordon notes.[175] Moreover:

> In foregrounding the political aspects and principles of the operation of our constitutional system, Griffith's work provides an increasingly necessary reminder that we must look at more than simply legal norms to understand the constitution, while also making it clear that the political dimensions of state activity are open to analysis from a perspective which is explicitly constitutional in focus. As such, in emphasising the political character of the constitution, and the potentially constitutional character of the political, Griffith's approach enhances our ability to understand the norms and institutions of the UK's constitutional order (and perhaps any other constitutional order).[176]

Yet, in critiquing the problematic legalism of legal constitutionalism, one must be wary, equally, of a failure to problematise those fundamental precepts of political constitutionalism, including, perhaps most obviously, by eulogising the practices of the ordinary political process and its notional democratic credentials.

It follows from this that, secondly, the value of political constitutionalism might be seen to lie in the extent to which it confronts the *empowering* and *enabling* dynamics of the (UK) constitution (in addition to its power-limiting functions), and specifically the roles of and inter-relation between law and politics within these dynamics. In other words, it is, as Gordon also suggests, 'through [the] exploration of what a political constitution is, how it functions

[174] Kavanagh (n 20) 56-57 (emphasis added). Of course, it is from this point that Kavanagh goes on to criticise the discourse: 'However, despite these insights—mainly as correctives to false claims—I believe that casting constitutional issues in terms of an oppositional 'political *versus* legal constitutionalism' goes too far.'

[175] Gordon, 'Parliamentary Sovereignty and the Political Constitution(s)' (n 22) 125.

[176] ibid 125-26.

and is legitimated—what we might see as engaging with the practice of the political constitution—that any broader theory of political constitutionalism must emerge'.[177]

VI. CONCLUSION

This chapter has explored the development of the contemporary discourse on theories of legal and political constitutionalism. It has considered that the various theoretical or principled ('liberal-legalist') claims on which former is founded does much to undermine its normative or explanatory force when applied to the specific context of the UK's constitutional arrangements, and that the development of the latter emerged, chiefly, as a critical response to, and potentially a vital corrective to, those claims. That is, on one hand, the development of the theory of political constitutionalism, especially in the work of Adam Tomkins, sustained an influential challenge as to the normative desirability of legal constitutionalism (and its key precepts), specifically the idea(l) of government which is constitutionally *limited* by law (and, by extension, legal institutions). On the other hand, the theory of political constitutionalism, emphasising the contestability and contingency of law and legal values both as an inherent aspect of the human condition and as an inevitable consequence of fundamental disagreement within a political community, can be seen to have provided a distinctive perspective (as an 'explanatory tool') on the inter-relation of ('unwritten') constitutional law and politics in and of the UK constitution: one in which, both in theory and crucially in practice, each 'respond to and are conditioned by' conflict which is 'at the heart of modern society'.[178] While much (often warranted) criticism of the discourse hangs on the distinctive normative argumentation it has cultivated—in particular the over-simplification and over-theorisation which this argumentation has tended to beget—this chapter has considered a number of ways in which political constitutionalism can be seen to (continue to) have *explanatory* value above and beyond the limitations of the particular normative challenge it has thus far brought to legal constitutionalism. This includes its application, if classically, as a *critique* of the problematic legalism of the latter (especially in the context of the UK constitution), whilst recognising that the same problems potentially emerge for any reading of political constitutionalism which extols the virtues of democracy, or the ordinary political process. It also includes the application of political constitutionalism as a means of understanding the inter-relation between law and politics not only, or exclusively, in its power-limiting capacity, but rather, crucially, the *empowering*, *enabling*, and *legitimating* function of those dynamics, in and of the constitution.

It ought to be noted at this juncture that this chapter has engaged with—and thus sought to identify ways of potentially navigating—a broader methodological question, namely that which concerns the contemporary relevance, if any, of the 'turn' to theory (and theorising generally) which has characterised the study of UK public law in the last decades.[179] Indeed, as Paul Scott has written recently, there have been clear and profound benefits to this approach:

[177] ibid 126.
[178] Gee and Webber (n 8) 279; Griffith (n 2) 2.
[179] See, eg, Martin Loughlin, *Public Law and Political Theory* (Clarendon Press 1992).

> This work has done much to enhance the study of the UK's constitution, not least by forcing those who study it to reflect upon and then articulate their own assumptions as to, most obviously, the role of the state, and its appropriate relation to the individual; the question of the extent to which the right can be separated from the good, and how that distinction should be reflected in arrangements of governance; the inter-relation between law and politics in the constitution, and the extent to which it should (and can) be reconfigured.[180]

Yet, as Scott emphasises, 'there have been costs', specifically:

> [A] portion of that literature is prone to advancing arguments which are broad and sophisticated, purporting to shed new light on the UK's constitution in particular or public law (or 'constitutionalism') in general, but which are only weakly grounded in the legal rules to which they ostensibly relate and which do not balance out the indulgence of starting from a point other than the basic constitutional landscape with a willingness to end there; to use the insight gleaned to works towards reshaping it.[181]

This is an important point. For overarching the question(s) as to whether, and if so to what extent, specifically the theory of political constitutionalism has any (potential) value as a methodological approach to the study of the UK constitution is a broader question as to how that theory can be brought to bear, in any event, on an understanding of the *actual* constitution, or *actual* constitutional practice. The potential pitfalls of over-theorising political constitutionalism as a means of responding to, or overcoming, its contemporary critics was noted in Section IV, above. To repeat: such theorising might uncover new and no doubt interesting insights as to, for instance, those '(sometimes spontaneous and unpredictable) sites of political action' that exist beyond Parliament as the paradigm example,[182] but, inevitably, this entails perpetuating analysis of the constitution in increasingly abstract terms—increasingly far-removed from *actual* constitutional practice. Surely there is more to be gained, rather, from putting the practice before the theory. That is, by giving the theoretical or conceptual challenges with which political constitutionalism—or, indeed, legal constitutionalism for that matter—is faced a firmer footing in *actual* constitutional practice, this might allow us to understand (even more so than without doing so) the true value of the theory.

[180] Paul F Scott, *The National Security Constitution* (Hart Publishing 2018) 3-4.
[181] ibid 4.
[182] Goldoni and McCorkindale, 'Three Waves' (n 17) 75.

2

Deprivation of Liberty

I. INTRODUCTION

The system of rights-protection instituted by the Human Rights Act 1998 (HRA) at the turn of the 21st century has loomed large over every critical stage of the development of a modern era of 'executive detention' in the UK:[1] from the establishment of a controversial regime of indefinite detention of foreign terrorist suspects,[2] to its subsequent demise (that is, following what is widely regarded as one of the 'landmark'[3] judicial decisions of modern times);[4] to the creation, thereafter, of 'control orders',[5] and the various rights-based challenges to which that measure was subjected both in the Appellate Committee of the House of Lords[6] and, later, in the UK Supreme Court;[7] and, finally, to the introduction, in 2011, of 'terrorism prevention and investigation measures' (TPIMs), the current means for preventing or 'pre-empting' the commission, preparation or instigation of terrorist acts by which those suspected of involvement in terrorism might be (significantly) deprived of their liberty.[8] Indeed, it is perhaps the case that such measures, which have populated the UK's counter-terrorism framework at various points since (and initially in response to) the terrorist attacks in New

[1] A 'modern era', that is, as distinguished from the UK's long history with such measures, most notably those used in response to outbreaks of political violence in Northern Ireland throughout the 20th century. See, eg, Prevention of Violence (Temporary Provisions) Act 1939; Prevention of Terrorism (Temporary Provisions) Acts 1974-98.

[2] Anti-terrorism, Crime and Security Act 2001, pt 4.

[3] See, eg, Mary Arden, 'Human Rights in the Age of Terrorism' (2005) 121 LQR 604, 621; Aileen Kavanagh, 'Constitutionalism, Counterterrorism, and the Courts: Changes in the British Constitutional Landscape' (2011) 9(1) ICON 172, 174; Richard Clayton, 'A v Secretary of State for the Home Department: The Belmarsh Case' in Satvinder Juss and Maurice Sunkin (eds), *Landmark Cases in Public Law* (Hart Publishing 2017).

[4] *A and Others v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68 (hereinafter '*Belmarsh*').

[5] Prevention of Terrorism Act 2005.

[6] *Secretary of State for the Home Department v JJ and Others* [2007] UKHL 45, [2008] 1 AC 385; *Secretary of State for the Home Department v MB and AF* [2007] UKHL 46, [2008] 1 AC 440; *Secretary of State for the Home Department v E and Another* [2007] UKHL 47, [2008] 1 AC 499.

[7] *Secretary of State for the Home Department v AP* [2010] UKSC 24, [2011] 2 AC 1.

[8] Terrorism Prevention and Investigation Measures Act 2011.

York, Washington D.C. and Pennsylvania on 11 September 2001, have presented the HRA with its greatest challenge.[9] As Mark Elliott notes:

> Human rights law is at its most valuable when it stands between the interests of the majority and those of unpopular minorities — of which there can be few better examples than foreign nationals suspected of involvement in terrorism. Such cases constitute the acid test of the commitment of a state, including that of its courts, to fundamental rights.[10]

Plainly such measures, involving often egregious deprivation of liberty outwith the ordinary processes and protections of the criminal justice system, fly in the face of many of the 'fundamental' rights contained in the European Convention on Human Rights (ECHR), to which the HRA gives domestic legal effect[11]—for instance, by empowering the courts to read and give effect to legislation 'in a way which is compatible with the Convention rights',[12] or (as the case may be) to declare its incompatibility with those rights.[13] Not least: the right to liberty and security (art. 5); the right to a fair trial (art. 6); the principle of *nulla poena sine lege* ('no punishment without law') (art. 7); and the right to respect for private and family life, home and correspondence (art. 8). To the extent, therefore, that the HRA ostensibly brings 'rights and rights-based thinking more central to the constitutional agenda'—and does much, in turn, to ensure that 'legislation complies with fundamental constitutional principle'[14]—one question of perennial significance in the last years concerns the capacity of the Act to make good on these promises, and in so doing rein in some of the worst excesses of the post-'9/11' counter-terrorist impetus.

Much has been written as to whether, and if so to what extent, the HRA can be said to have succeeded or failed in this particular regard. This chapter takes as its focus a key debate within this (now-extensive) literature, which might be described, if crudely, as involving those on one side who have argued that the HRA has, in fact, operated as a decisive constraining force in this particular area of the UK's contemporary counter-terrorism framework. Broadly speaking, those on this side of the debate have tended to emphasise the manner in which several critical interventions by the courts, using the powers conferred on them by the HRA, have crucially steered the contemporaneous counter-terrorism law and

[9] See, eg, Conor Gearty, 'Terrorist Threats, Anti-Terrorism and the Case Against the Human Rights Act' in Frederick Cowell (ed), *Critically Examining the Case Against the 1998 Human Rights Act* (Routledge 2019) 121: 'There is surely no field of public discourse that has challenged human rights law more seriously than that of counter-terrorism.'

[10] Mark Elliott, 'The "War on Terror," UK-Style—The Detention and Deportation of Suspected Terrorists' (2010) 8(1) ICON 131, 145.

[11] The operation and constitutional position (and impact) of the HRA, more broadly, is well-documented. See, eg, Conor Gearty, *Principles of Human Rights Adjudication* (OUP 2004); Helen Fenwick, Gavin Phillipson and Roger Masterman (eds), *Judicial Reasoning under the Human Rights Act* (CUP 2007); Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (CUP 2009); Ian Leigh and Roger Masterman, *Making Rights Real: The Human Rights Act in its First Decade* (Hart Publishing 2008); Alison L Young, *Parliamentary Sovereignty and the Human Rights Act* (Hart Publishing 2009). See, also, Vernon Bogdanor, *The New British Constitution* (Hart Publishing 2009) 62, in which the HRA is described as the 'cornerstone' of the UK's 'new' constitution.

[12] HRA, s 3(1).

[13] HRA, s 4.

[14] Kavanagh, *Constitutional Review* (n 11) 6. See, also, eg, Martin Loughlin, 'Rights, Democracy, and Law' in Tom Campbell, Keith Ewing, and Adam Tomkins (eds), *Sceptical Essays on Human Rights* (OUP 2001) 55: 'Symbolically at least, the [HRA] marks the shift from a positivist, liberal democratic model to a rights-based conception of law as a set of architectonic principles which frames the political order.'

policy—that is, away from an initial broad acceptance of measures involving egregious deprivation of liberty, to measures which, although no doubt continuing to ground, themselves, significant deprivation of liberty, are nevertheless (more) rights-compliant (and thus ostensibly less onerous for the subject(s) of those measures).[15] A key example of this perspective can be found in the work of Aileen Kavanagh, who, in 2011, wrote:

> The courts may not have stopped the British government's war on terror post 9/11, but they have slowed it down, curbed its worse [sic] excesses, and strived to ensure that it is more compliant with human rights and the rule of law than might otherwise have been the case. Post-HRA, the courts have shown that they can be an important and useful player in the constitutional politics surrounding national security in the U.K.[16]

More recently, Helen Fenwick has suggested that the evolution of control orders into what is now the TPIM regime decidedly represents a 'vindication of the [HRA]', noting:

> The varying iterations of control order-type measures [from 2005 to present] … are illustrative of the post-9/11 struggle in the UK and elsewhere to reconcile international human rights norms with reliance on non-trial-based measures. The tension and interaction between security needs and such law partly explains … the changing iterations of the control orders model … which exhibit a *human rights tempering* of that model.[17]

Clearly, on this 'side' of the debate the HRA, and human rights norms more generally, are considered to have acted as a—perhaps *the most*—significant barrier within a broader process of consolidation of the constitutional position of (counter-terrorism) deprivation of liberty. However, those on the other 'side' have, from a distinctive 'democratic sceptic' perspective of human rights law,[18] presented an alternative account of the role of the HRA in this area—that is, one which is deeply critical of the 'success story' of the HRA, as it were, and its purported empowering of the courts to protect the liberty of the individual in the context of the contemporary 'War on Terror'. This account has been developed most clearly within the work of Keith Ewing.[19] For instance, in 2004, Ewing wrote:

> It appears that despite the incorporation of Convention rights, there is an extraordinary continuity in the approach of the domestic courts in times of crisis. We find as a result that: Convention rights cannot

[15] See, eg, Aileen Kavanagh, 'Judging the Judges under the Human Rights Act: Deference, Disillusionment and the "War on Terror"' [2009] PL 287; Kavanagh, 'Constitutionalism, Counterterrorism, and the Courts' (n 3); James Welch and Shami Chakrabarti, 'The War on Terror without the Human Rights Act – What Difference has It Made?' (2010) 6 EHRLR 593; Helen Fenwick and Gavin Phillipson, 'UK Counter-Terror Law Post-9/11: Initial Acceptance of Extraordinary Measures and the Partial Return of Human Rights Norms' in Victor V Ramraj, Michael Hor, Kent Roach and George Williams (eds), *Global Anti-Terrorism Law and Policy* (2nd edn, CUP 2012).

[16] Kavanagh, 'Constitutionalism, Counterterrorism, and the Courts' (n 3) 198-99.

[17] Helen Fenwick, 'Terrorism and the Control Orders/TPIMs Saga: A Vindication of the Human Rights Act or a Manifestation of "Defensive Democracy"?' [2017] PL 609, 626 (emphasis added).

[18] See, generally, Jeremy Waldron, *Law and Disagreement* (OUP 1999); Keith Ewing, 'The Human Rights Act and Parliamentary Democracy' (1999) 62(1) MLR 79; Tom Campbell, Keith Ewing, and Adam Tomkins (eds), *Sceptical Essays on Human Rights* (OUP 2001); Tom Campbell, KD Ewing, and Adam Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays* (OUP 2011).

[19] See, especially, Keith Ewing, 'The Futility of the Human Rights Act' [2004] PL 829; KD Ewing and Joo-Cheong Tham, 'The Continuing Futility of the Human Rights Act' [2008] PL 668; KD Ewing, *Bonfire of the Liberties: New Labour, Human Rights, and the Rule of Law* (OUP 2010).

> stop the inexorable drive in the direction of more and more state powers, whether it be identity cards, police powers of stop and search, or greater emergency powers. In times of crisis, the courts do not and will not protect the individual from the state whether the crisis be caused by external or internal threats, whether it be world war, cold war or war against terror.[20]

This ('democratic sceptic') perspective—especially in Ewing's work—has, at various points in the recent years, sustained key challenges to otherwise orthodox, legalistic analyses of, most notably, the House of Lords' ruling in *Belmarsh*, and the subsequent control order litigation. To that end, this perspective has provided an important counterpoint to such analyses, in turn providing a critical lens through which to explore constitutional issues of broader conceptual significance, not least as to the capacity of the human rights paradigm to map out a desirable (liberal-democratic) vision of the UK constitution, and the place of 'liberty' within it.[21]

The purpose of this chapter is not to revisit this debate, per se. Rather, it is to explore, in particular, the relevance of the 'democratic sceptic' critique(s) of the inter-relation between (human rights) law and politics in the specific context of counter-terrorism deprivation of liberty, and indeed its potentially continuing relevance in the light of more recent developments in this area. The chapter argues that, when considered from this perspective, the most compelling questions given rise by contemporary developments in this area are not (necessarily) those as to whether the HRA and human rights norms may or may not have achieved at least some success in constraining the enactment of such extraordinary measures—nor, for that matter, whether it is the courts (the paradigm institution of the 'legal constitution') or Parliament (the paradigm institution of the 'political constitution') which can be seen to have 'better' performed in this respect.[22] Of much greater significance, instead, is that the HRA can be seen throughout these developments to have inculcated into the process of consolidating the constitutional position of counter-terrorism deprivation of liberty the

[20] Ewing, 'Futility' (n 19) 851.

[21] Of course, this is not the view of those on 'the other side' of the debate: see, eg, Kavanagh, 'Judging the Judges' (n 15) 291: '[W]hen reading the variant of democratic scepticism expressed in Ewing's futility thesis, one is reminded of H.L.A. Hart's observation that sceptics are sometimes "disappointed absolutists". They expect everything and when it does not materialise, they are thrown into a state of "abject disappointment and growing disillusionment". Thus, if the HRA cannot achieve the "bald elimination" of all human rights violations and provide an absolute barrier to the relentless "war on terror" waged by an almighty Executive, then it must be condemned as an utterly futile endeavour.' For a similarly critical perspective of Ewing's 'futility' thesis, see, also, Antony Lester, 'The Utility of the Human Rights Act: A Reply to Keith Ewing' [2005] PL 249.

[22] For an example of the problems with this approach, see, eg, Alexander Horne and Clive Walker, 'Lessons Learned from Political Constitutionalism? Comparing the Enactment of Control Orders and Terrorism Prevention and Investigation Measures by the UK Parliament' [2014] PL 267. Horne and Walker argue (at 287-88) that '[i]t is impossible to conclude that political or legal constitutionalism is inevitably more effective in the pursuit of legitimacy and policy effectiveness in relation to counter-terrorism legislation'. To the extent that political and legal constitutionalism are here presented as synonymous with archetype 'political' and 'legal' accountability mechanisms (Parliament and courts, respectively), they must be correct; after all, there are many compelling reasons to doubt the legitimacy or policy effectiveness of *either* Parliament or the courts in the context of counter-terrorism, not least in regards to the various egregious measures considered in this chapter. It is perhaps ironic, therefore, that in Horne and Walker's view it is *political constitutionalism* (again, here portrayed, simply, if reductively, as denoting the parliamentary political process) which is singularly criticised as neither a 'reliable or consistent approach to handling counter-terrorism legislation' (at 288). Again, the same must ring true of legal constitutionalism (if only similarly, and again reductively, taken to be embodied by the judicial process) for reasons explored in this chapter.

language and, ultimately, the *legalism* of the human rights paradigm.[23] A critical perspective of *these* aspects of the human rights paradigm thus offers potentially compelling insights as to the patent limitations of that paradigm as the appropriate (if prevailing) framework within which this process has occurred (and continues to occur) in practice. For, as Michael Gordon writes:

> The legalism which accompanies the conversion of human rights discourse into human rights law … establishes the supremacy of an elite level practice, conducted in a language which is doubly problematic, in that it is vague while ostensibly accessible, but this accessibility is actually illusory. This leads to engagement through terms of art which can be disorienting when it subverts the meaning of otherwise understandable concepts.[24]

That the human rights paradigm has done much to narrow the terms of the broader legal and political debate in this area is especially clear in the light of current plans to radically expand the TPIM regime[25]—beyond, that is, its controversial expansion in 2015 to include previously eschewed powers of 'forced relocation':[26] the legal position/protection of 'liberty' within the UK constitution (in the counter-terrorism context) now appears to hinge on increasingly parochial debates—crucially involving such 'terms of art'—as to whether, for instance, the power to compel a person's relocation some hundreds of miles away from their home and family life itself constitutes a 'deprivation' of that person's liberty or but a 'mere restriction' of it. Surely it is the former.

The chapter begins by outlining, in Section II, the various key developments which led to the creation and subsequent demise of the measures for which Part 4 of the Anti-terrorism, Crime and Security Act 2001 provided, authorising indefinite detention of foreign terrorist suspects. Section III explores the control order regime which followed, including the litigation in which the conditions which might give rise to a 'deprivation of liberty' within the meaning of art. 5 of the ECHR was considered in the senior courts. Turning, finally, to the operation of the TPIM regime, which replaced that of control orders in 2011, Section IV offers some reflections on current developments involving proposals to expand the scope of TPIMs, and, as such, the potential for deprivation of liberty that such expansion would inevitably entail.

II. INDEFINITE DETENTION OF FOREIGN TERRORIST SUSPECTS

The 9/11 terrorist attacks laid bare to a global audience the immense and unprecedented destructive potential of the modern terrorist threat. And to the extent that, as Fiona de Londras suggests, '[p]anic, fear and populist impulses can conspire to create an atmosphere where the imperative turns towards combating a risk, and where that risk is presented and/or

[23] For a critical perspective of the 'language' of human rights, and its potential limitations (for constructing an egalitarian society), see, eg, Conor Gearty, 'Beyond the Human Rights Act' in Tom Campbell, KD Ewing and Adam Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays* (OUP 2011).

[24] Michael Gordon, 'Instrumentalism in Human Rights and the Media: Locking Out Democratic Scepticism?' in Michelle Farrell, Eleanor Drywood and Edel Hughes (eds), *Human Rights in the Media: Fear and Fetish* (Routledge 2019) 259.

[25] Counter-Terrorism and Sentencing Bill 2020.

[26] Counter-Terrorism and Security Act 2015, pt 2.

conceived of as being particularly grave or dangerous',[27] it is a compelling argument that no more acutely in recent decades has such an atmosphere been felt in the UK than in the aftermath of those attacks. Indeed, '[o]ne of the concerns whipped up by the press and others,' Keith Ewing writes, 'was that Britain was now harbouring terrorists cut from the same cloth as those responsible for the events in New York and Washington'.[28] The provocative claim published in *The Times* just three days after the attacks, for instance, was that the presence of 'hundreds of extremists' in the UK had succeeded in turning the country into 'one of the centres for the violent transnational network that inspired and encouraged the barbarism' witnessed in the US.[29]

That this claim was subsequently cited in Parliament by the Home Secretary, David Blunkett,[30] as just one example of many contemporaneous statements made in the same vein, was significant. Above all, it signalled the Government's endorsement of (while also evidencing its crucial role in perpetuating) a key narrative sustained not only by press hostility towards non-citizens, but by the spread of a profound 'moral panic'[31] which would, in turn, prove to have a significant influence upon the design of the powers for which Parliament was immediately called upon to legislate. So went this narrative: that the problem(s) of and solution(s) to the UK's (post-9/11) security situation were grounded primarily in the issue of immigration control; that, indeed, successive British Governments had for too long been a soft touch on immigration, the implications of that fact now having manifested in the presence of an indeterminate network of foreign nationals whose sympathies lay with the perpetrators of the terrorist attacks in the US, whose intentions were to perpetrate, themselves, similarly devastating atrocities on UK soil, and, worse still, whose removal from the UK was ultimately prevented by a deeply irksome constellation of legal—especially human rights—obstacles.[32]

A. Deportation, Immigration Detention and the ECHR

Clearly, it mattered not that this (xenophobic) narrative was entirely unsupported by the Government's own contemporaneous intelligence assessment, which had identified no evidence pointing to a specific terrorist threat to the UK in the aftermath of 9/11—much less, therefore, one derived specifically from foreign nationals who resided in the UK.[33] Still, no moral obligation was owed, argued the Home Secretary, to those whose leave to remain in the UK would or could be exploited as an opportunity to pursue terroristic intentions.[34] Thus, the Government's approach to such individuals, in effect, would be to embrace what Clive

[27] Fiona de Londras, *Detention in the 'War on Terror': Can Human Rights Fight Back?* (CUP 2011) 8.
[28] Ewing, *Bonfire* (n 19) 225-26.
[29] *The Times* (London, 15 September 2001).
[30] HC Deb 19 September 2001, vol 375, col 25.
[31] See, eg, David Dyzenhaus, 'Humpty Dumpty Rules or the Rule of Law: Legal Theory and the Adjudication of National Security' (2003) 28 Aust J Leg Phil 1, 2.
[32] See, eg, Rumyana Grozdanova, 'Individual Terrorist Suspects as the New Folk Devil: New Labour, Rights Tokenism and Security Compulsions' in Michael Gordon and Adam Tucker (eds), *The New Labour Constitution* (Hart Publishing 2021).
[33] HC Deb 15 October 2001, vol 372, col 925 (David Blunkett). Tellingly, this assessment was endorsed by the UK Government even so far as six months after the events of 9/11: House of Commons Select Committee on Defence, *The Threat from Terrorism* (HC 2001-02, 348-I) para 13.
[34] HC Deb 15 October 2001, vol 372, col 924 (David Blunkett).

Walker has described as the 'exit model' response to foreign suspects of terrorism: 'remov[ing] the unwelcome guests by way of deportation or exclusion'.[35] To that end, the Home Secretary confirmed the Government's plan to operationalise as a key tool in its post-9/11 counter-terrorism strategy the discretionary powers of immigration control conferred by the Immigration Act 1971.[36] Under s. 3 of the Act, a non-citizen is liable to deportation from the UK if 'the Secretary of State deems his deportation to be conducive to the public good'.[37] Notably, the Act gives no definition, stipulates no limitation, nor provides any guidance as to the conditions capable of satisfying that test. Rather, the matter is, as noted by Lord Slynn in *Secretary of State for the Home Department v Rehman*,[38] 'plainly in the first instance and primarily for the discretion of the Secretary of State'.[39] And while, under s. 15(1)(a), the 1971 Act confers on the subject of a deportation order a right to appeal the Secretary of State's decision, s. 15(3) curtails the availability of that right in circumstances where the grounds for deportation pertain to matters of national security, international relations (between the UK and any other country), or 'other reasons of a political nature'.[40] As such, this is, undoubtedly, a power of exceptional breadth, the absence of key procedural safeguards serving only to compound that fact. However, its exercise implicates two significant legal obstacles, both of which derive from the UK's international obligations as a signatory to the ECHR, and thus domestic statutory obligations under the HRA.

First and foremost is art. 3 of the Convention, an 'absolute' right (from which, that is, derogation is not permitted in any event) which states, simply: '[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment'. The implications of this provision for cases involving the deportation of foreign nationals was considered by the European Court of Human Rights (ECtHR) in *Chahal v United Kingdom*.[41] That case involved a legal challenge concerning the Convention-compatibility of the repatriation of an Indian national whose continued presence in the UK was deemed 'unconducive to the public good for reasons of national security and other reasons of a political nature, namely the international fight against terrorism'.[42] The applicant had been detained pending deportation in August 1990, pursuant to Paragraph 2(2) of Schedule 3 to the Immigration Act 1971. An application for political asylum, for which the applicant cited a 'well-founded fear of persecution within the terms of the United Nations 1951 Convention on the Status of Refugees', was subsequently rejected by the Home Office.[43]

The applicant's key substantive argument was that his deportation to India would contravene art. 3 of the Convention. It was claimed that the 1995 report of the UN Special

[35] Clive Walker, 'The Treatment of Foreign Terror Suspects' (2007) 70(3) MLR 427, 433. The 'exit model' is one of four (broad) possible responses to foreign suspects of terrorism outlined by Walker, the alternatives being: 'the criminal prosecution model'; 'the war model', which was broadly adopted by the USA; and the 'executive measures' model, which, for reasons discussed in this chapter, came to replace the UK Government's initial preference of deportation and exclusion as the principal method for combating the post-9/11 terrorist threat.

[36] HC Deb 21 November 2001, vol 375, col 383 (David Blunkett).

[37] Immigration Act 1971, s 3(5)(a).

[38] [2001] UKHL 47, [2003] 1 AC 153.

[39] ibid [8].

[40] See, also, *R v Home Secretary, ex p Hosenball* [1977] 1 WLR 766.

[41] (1996) 23 EHRR 413.

[42] ibid para 25.

[43] ibid paras 26-27.

Rapporteur on Torture substantiated this contention, it having affirmed the credibility of allegations as to the existence in India of a 'widespread, if not endemic phenomenon' of abuse perpetrated by state officials of the kind prohibited (again, without qualification) by art. 3.[44] As held in the previous ECtHR case of *Soering v United Kingdom*,[45] the key question to be decided by the Court, therefore, was whether there existed substantial grounds for believing that an individual, if extradited, 'faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country'.[46] Such circumstances, the Court had confirmed in *Soering*, engage art. 3, and so give rise to the obligations imposed on High Contracting Parties under that article.

The UK Government had argued in *Chahal* that the exigencies of national security constituted an implied limitation to art. 3—that is, *even* where a real risk of ill-treatment existed[47]—and that, accordingly, the UK had been availed of its obligations thereunder. Given the 'absolute' nature of the right protected under art. 3, it is perhaps no surprise that this argument was roundly rejected by the Court. This had significant implications for the Government's post-9/11 counter-terrorism response. The effect of the Strasbourg Court's ruling in *Chahal*, Mark Elliott suggests, was to position the Government 'between a rock and a hard place';[48] the problem was that 'many of the individuals [the Government] suspect[ed] of being involving in plotting or carrying out acts of terrorism in the UK originate[d] from precisely the sort of countries to which deportation is forbidden under article 3'.[49] Moreover, the elevated status of the obligations imposed by art. 3 meant that there could be no circumstances in which (even temporary) derogation from those obligations would be permissible.[50]

The substantive (that is, art. 3) aspect of the ruling in *Chahal* had 'gotten in the way' of the Government's efforts to remove suspected terrorists from the UK.[51] Though, it ought to be noted at this juncture that the Court's ruling in that case also had significant ramifications as to the relevant procedure, in the UK, for challenging deportation on national security grounds. As noted above, deportation on such grounds triggers an exception to the availability of appeal rights. Of particular relevance to the applicant's case in *Chahal* was that the Asylum and Immigration Appeals Act 1993 maintains that exception in respect of certain rights of appeal granted under the 1993 Act.[52] The Court expressed concerns particularly as to the denial of the applicant's access to legal representation in appeal proceedings before what was then an 'independent advisory panel', a non-statutory procedure set out in paragraph 157 of the Statement of Changes in Immigration Rules (HC Paper 251, 1990). Noting, further, that the panel was possessed of no power of decision, and that advice given by the panel to the Home Secretary was neither binding nor disclosed, the Court concluded

[44] UN Commission on Human Rights, 'Report of the Special Rapporteur on Torture' (1995) UN Doc E/CN.4/1995/34, para 379.
[45] (1989) 11 EHRR 439.
[46] ibid para 91.
[47] *Chahal* (n 41) para 76.
[48] Elliott (n 10) 133.
[49] ibid 133.
[50] *Chahal* (n 41) para 79.
[51] HC Deb 21 November 2001, vol 375, col 383 (David Blunkett).
[52] Asylum and Immigration Appeals Act 1993, sch 2, para 6.

that 'the advisory panel could not be considered to offer sufficient procedural safeguards for the purposes of Article 13',[53] which confers on the victims of (Convention) rights-violations the right to an effective remedy before a national authority. On this basis, the Court found that the 'independent advisory panel' procedure also fell short of art. 5(4) of the Convention,[54] under which those deprived of liberty by means of their arrest or detention 'shall be entitled to take proceedings by which the lawfulness of [their] detention shall be decided speedily by a court and [their] release ordered if the detention is not lawful'. These developments led, ultimately, to key procedural reforms, culminating in the creation of the Special Immigration Appeals Commission (SIAC).[55] A superior court of record, the Commission has since operated as an integral independent scrutiny mechanism for cases involving deportation of foreign nationals on the grounds of national security. Appeals can be heard in 'closed' proceedings, given the potential for the inclusion of sensitive (for instance, intelligence and security-based) evidence.

Ultimately unable, therefore, to deport those suspected of involvement in terrorism—such that (as in many cases) there existed 'a real risk of [the person's] being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country'—the Government instead proposed to *detain* them. Indeed, the 1971 Act contains such powers: under Schedule 3 of the Act, a person 'may be detained under the authority of the Secretary of State pending the making of a deportation order'.[56] This course of action would, however, give rise to a second legal obstacle, that which stems from art. 5 of the ECHR (and, again, implicates the Government's domestic legal obligations under the HRA). That provision entails that '[e]veryone has the right to liberty and security of person', and that '[n]o one shall be deprived of his liberty save in [certain] cases and in accordance with a procedure prescribed by law'.[57] And although among the various exceptions permitted under art. 5 is that of the 'lawful arrest or detention of … a person against whom action is being taken *with a view to deportation or extradition*',[58] the detention of those who could *not* be deported (given the ruling in *Chahal*) was plainly beyond the scope of this exception.

Indeed, this key limitation to the exercise of statutory powers of detention contained in Schedule 3 of the 1971 Act is in fact reinforced at common law. That is, although the 1971 Act imposes no express limitation of time on the extent to which an individual may be detained, two 'implied' limitations were nonetheless established by the High Court in *R v Governor of Durham Prison, ex p Hardial Singh*:[59] first, that the power conferred upon the Secretary of State cannot be used for any purpose other than to authorise detention pending either the making of a deportation order or the process removal of an individual; and secondly, that those powers are 'impliedly limited to a period which is reasonably necessary' for the purposes of carrying out the deportation of the detainee (dependent, though that question is, upon the particular circumstances of the case).[60]

[53] *Chahal* (n 41) para 154.
[54] ibid para 132.
[55] Special Immigration Appeals Commission Act 1997.
[56] IA 1971, sch 3, para 2(2).
[57] ECHR, art. 5(1).
[58] ibid art. 5(1)(f) (emphasis added).
[59] [1983] EWHC 1, [1984] 1 WLR 704.
[60] ibid [7].

B. Part 4 of the Anti-terrorism, Crime and Security Act 2001

The combined effects of these various legal obstacles presented what the Home Affairs Select Committee called 'an intractable problem'[61] for the Government. In respect of an individual who faced the prospect of suffering torture or inhuman or degrading treatment if repatriated, who could not be deported to a third country, and who could not be charged with a criminal offence, art. 3 (to the extent articulated in *Chahal*) prevented their removal from the UK—crucially, *even if* they were judged to be a threat to national security.[62] The use of detention powers under the 1971 Act offered no lawful alternative in such cases, given that the exception to the right to liberty and security under art. 5(1)(f) permits detention *only* with a view to deportation.

The Government's solution to its 'intractable problem', therefore, was to seek from Parliament 'more effective powers to exclude and remove suspected terrorists from our country'.[63] The Anti-terrorism, Crime and Security Act 2001 (ATCSA), fast-tracked through Parliament in just under one month,[64] provided for such powers—in addition to an extensive range of (equally incredibly) coercive measures relating to, among other things, forfeiture of terrorist property,[65] asset-freezing,[66] and fingerprinting of terrorist suspects.[67] Under Part 4 of the 2001 Act, a 'suspected international terrorist'—so certified under powers conferred on the Secretary of State by s. 21—was liable to be detained, notwithstanding that 'his removal or departure from the United Kingdom was prevented' either by 'a point of law which wholly or partly relates to an international agreement'[68] or 'a practical consideration'.[69]

Indeed, it is a great irony that only a matter of 12 months into the sunlit 'culture of respect for human rights'[70] that the HRA was said to have heralded, Parliament had enacted what at the time was described as 'the most draconian legislation [it] has passed in peacetime in over a century'.[71] That said, the presence of the HRA can no doubt be seen to have had (at least) some influence on the pre-legislative scrutiny of the 2001 Act. In 2005, Conor Gearty suggested that '[a]s a result of section 19 [of the HRA]'—that is, by which a Minister of the

[61] Home Affairs Select Committee, *The Anti-Terrorism Crime and Security Bill* (2001-02, HC 351) [19].

[62] See, eg, ibid [27]: 'We reluctantly accept that there may be a small category of persons who are suspected international terrorists who cannot be prosecuted, extradited or deported and therefore will have to be detained.'

[63] HC Deb 15 October 2001, vol 372, col 924 (David Blunkett).

[64] The Anti-terrorism, Crime and Security Bill was introduced to the House of Commons on 19 November 2001; the Bill received Royal Assent on 14 December 2001.

[65] ATCSA, pt 1.

[66] ibid pt 2. This aspect of the 2001 Act is discussed in detail in Chapter 4.

[67] ibid pt 10.

[68] ibid s 23(1)(a).

[69] ibid s 23(1)(b).

[70] See, eg, Joint Committee on Human Rights, *Minutes of Evidence taken on Monday 19 March 2001* (1999-2000, HL 66-ii, HC 332-ii), in which the then Lord Chancellor, Lord Irvine of Lairg, stated: 'What I mean and I am sure what others mean when they talk about a culture of respect for human rights is to create a society in which our public institutions are habitually, automatically responsive to human rights considerations in relation to every procedure they follow, in relation to every practice they follow, in relation to every decision they take, in relation to every piece of legislation they sponsor. A culture of respect for human rights is one which shows a high degree of sensitivity on the part of our public institutions to the obligations that derive from the [HRA].' For a critical perspective of the HRA's achievements in this respect, see, eg, Janet L Hiebert, 'Governing under the Human Rights Act: The Limitations of Wishful Thinking' [2012] PL 27.

[71] Adam Tomkins, 'Legislating Against Terror: The Anti-terrorism, Crime and Security Act 2001' [2002] PL 205, 205.

Crown must issue a statement in Parliament regarding the relevant Bill's compatibility (or not) with the ECHR[72]—'and also the probability of legal challenge in the future, much of the discussion of the [ATCS Bill] was, in fact, conducted in the language of rights'.[73] Several parliamentary select committees—including the then-newly-established Joint Committee on Human Rights, embracing its role as 'parliamentary guardians of the HRA'[74]—published reports which were deeply critical of the Part 4 provisions.[75] Of course, as Gearty also notes:

> The criticisms that these bodies and other parliamentarians and commentators made were probably not dependant on the Human Rights Act for their existence, in that they would have been made and might well have been successful without the existence of the Act. But their arguments undoubtedly drew strength and energy from being able to point to a piece of legislation which in theory at least posited an alternative legislative vision of the relationship between the individual and the state.[76]

A number of liberalising concessions were successfully obtained from the Government, notably including the condition that sections 21-23 would expire unless renewed for a period not exceeding 12 months (by statutory instrument),[77] and that of the 'sunset clause' according to which the Part 4 provisions would cease to have effect altogether (unless renewed by further primary legislation) 'at the end of 10th November 2006'.[78] Further, each 'certification' issued by the Secretary of State would be subject to independent periodic review by the SIAC.[79] The Secretary of State was also required to appoint a person to review the operation of sections 21 to 23,[80] while the entire scheme of the Act would itself be reviewed by a committee of Privy Counsellors.[81]

Though, in any event, the passage of the 2001 Act can scarcely be taken to represent any sort of ringing endorsement of the HRA or a broader culture of respect for human rights.[82] From the very beginning, the proportionality of the Part 4 measures was questionable at best, even on their own terms—in other words, to the extent that they were designed to overcome the particular dilemma outlined above. For instance, in 2002, Helen Fenwick noted that 'the detention without trial provision [did] not depend on a finding that persons within section 21 cannot be deported due to the risk of Article 3 treatment'; it appeared, rather, 'to represent an attempt to provide the government with broad powers which could be used exceptionally to

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[72] HRA, s 19(1).

[73] Conor Gearty, '11 September 2001, Counter-terrorism, and the Human Rights Act' (2005) 32(1) J L & Soc 18, 23.

[74] Joint Committee on Human Rights, *Anti-terrorism, Crime and Security Bill* (2001-02, HL 30, HC 314) [5].

[75] See, eg, Janet L Hiebert, 'Parliamentary Review of Terrorism Measures' (2005) 68(4) MLR 676.

[76] Gearty, '11 September 2001' (n 73) 23.

[77] ATCSA, s 29(1)-(6). See, eg, Anti-terrorism, Crime and Security Act 2001 (Continuance in force of sections 21 to 23) Order 2004, SI 2004/751, which extended the validity of the relevant provisions until 14 March 2005.

[78] ATCSA, s 29(7).

[79] ibid s 26.

[80] ibid s 28.

[81] ibid s 122. The review of the Privy Counsellor Review Committee, chaired by Lord Newton of Braintree, was published on 12 December 2003: Privy Counsellor Review Committee, *Anti-terrorism, Crime and Security Act 2001: Report* (2003, HC 100) (hereinafter 'Newton Report'). Notably, the 'Newton Report' raised several concerns as the Part 4 provisions, recommending (at [203]) that they 'should be replaced as a matter of urgency.'

[82] See, eg, Gearty, '11 September 2001' (n 73) 24: '[B]ecause the human rights hurdle is set so low in the Human Rights Act – with caveats and exceptions galore, particularly in the national security field – powers that ought to have attracted controversy were more easily secured than would have been the case had the measure been a strongly principled human rights document rather than the rather watery measure that (in this area) it undoubtedly is.'

detain persons indefinitely *who arguably could be deported*'.[83] The (real) reason for introducing such exceptionally broad provisions was perhaps better explained as a means of 'prevent[ing] suspected terrorists leaving Britain to go to countries such as Iraq'.[84] Yet, ultimately, as Laraine Hanlon writes, the Part 4 powers 'proved to be acceptable publicly because of the claimed narrow focus of the detention powers'; again, powers authorising the indefinite detention of (purported) *international* terrorist suspects 'only had to be married to the prevailing resentment of the current foreign influx to the UK and the immigration and asylum controversy, hysterically whipped up by the British media, to become unbeatable'.[85]

So 'coercive and draconian'[86] were those powers, however, that the Government entered a formal derogation from art. 5 of the ECHR, according to the relevant provisions under art. 15(1), which stipulates:

> In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

Section 14 of the HRA requires that an order be made by the Secretary of State to the effect that a prospective derogation from an Article of the ECHR be 'designated' for the purposes of the Act. The Human Rights Act 1998 (Designated Derogation) Order 2001 was duly made on 11 November 2001, effective from 13 November 2001,[87] the schedule to which detailed the 'proposed derogation', and included a statement attesting to the existence of 'a terrorist threat to the United Kingdom from persons suspected of involvement in international terrorism':

> In particular, *there are foreign nationals present in the United Kingdom who are suspected of being concerned in the commission, preparation or instigation of acts of international terrorism*, of being members of organisations or groups which are so concerned or of having links with members of such organisations or groups, and who are a threat to the national security of the United Kingdom. *As a result, a public emergency, within the meaning of Article 15(1) of the Convention, exists in the United Kingdom.*[88]

C. The 'Belmarsh' Litigation: *A and Others v Secretary of State for the Home Department*

Within three months of the coming into force of the ATCSA, nine foreign nationals had been certified by the Home Secretary, under s. 21 of the Act, as 'suspected international

[83] Helen Fenwick, 'The Anti-Terrorism, Crime and Security Act 2001: A Proportionate Response to 11 September?' (2002) 65(5) MLR 724, 756 (emphasis added).
[84] ibid 756.
[85] Laraine Hanlon, 'UK Anti-Terrorism Legislation: Still Disproportionate?' (2007) 11(4) Intl J Hum Rts 481, 506.
[86] Tomkins, 'Legislating Against Terror' (n 71) 205.
[87] Human Rights Act (Designated Derogation) Order 2001, SI 2001/3644 (hereinafter 'the Derogation Order').
[88] ibid (emphasis added).

terrorists'.[89] The individuals were subsequently detained in HMP Belmarsh, south-east London, under powers conferred by s. 23. None had been charged, nor even faced the prospect of being charged, with a criminal offence. Proceedings were brought by the nine detainees before the SIAC in July 2002, in a challenge to the lawfulness of their detention on two main grounds.[90] The first ground was that the threshold conditions for derogation stipulated under art. 15(1) of the ECHR had not been met—that, in other words, there did not exist a 'public emergency threatening the life of the nation' within the meaning of that provision. As such, it was claimed that the UK's purported derogation from art. 5 did not satisfy the relevant requirements of art. 15(1) and was thus ineffectual to justify the individuals' detention. Secondly, it was argued that neither, therefore, could the measures taken in derogation of art. 5 have been 'strictly required by the exigencies of the situation', as art. 15(1) also stipulates. Alternatively, even in the event that a 'public emergency' *could* be said to have existed, the nature of the appellants' detention, under s. 23 of the ATCSA, constituted a disproportionate interference with the right to liberty and security guaranteed by art. 5, while the exclusive application to non-citizens of the relevant powers contained in Part 4 of the 2001 Act amounted to discrimination of the kind prohibited under art. 14 (from which the UK Government had *not*, in fact, derogated).

The SIAC upheld the appeal, save in respect of the appellants' submissions as to the existence of a 'public emergency threatening the life of the nation'; although the evidence on which the Government relied in relation to that issue was subject to 'closed' proceedings, the SIAC was satisfied, having considered the closed material, that such an emergency had been established.[91] However, it was held that the measures for which s. 23 of the ATCSA provided contravened both art. 5 and art. 14 of the Convention. A declaration of incompatibility was issued under s. 4 of the HRA, and the Derogation Order was quashed.

Yet, with the SIAC's decision subsequently overturned just three months later, in a unanimous decision by the Court of Appeal,[92] the case was in 2004 brought before the Appellate Committee of the House of Lords; a specially-constituted panel of nine Law Lords presided over the appeal.[93] Incidentally, only five of the nine detainees had been granted release before the Law Lords' ruling: two had exercised their right to leave the UK—one in December 2001, the other in March 2002; one had been transferred to Broadmoor Hospital on mental health grounds in July 2002; one had been released, albeit with strict bail conditions, in April 2004; and the revocation by the Home Secretary of the certification of another detainee led to their immediate release without conditions in September 2004.[94]

Mirroring the original decision of the SIAC, the Law Lords, by the overwhelming majority of 8:1, quashed the Derogation Order and issued a declaration of incompatibility to the effect that s. 23 of the ATCSA was incompatible with art. 5 and art. 14 of the ECHR. Although the

[89] A total of 17 persons had been certified and detained under the Part 4 regime before its eventual abolition in March 2005: Home Office, *Counter-Terrorism Powers: Reconciling Liberty and Security in an Open Society: A Discussion Paper* (Cm 6147, 2004) [42].

[90] *A and Others v Secretary of State for the Home Department* [2002] HRLR 45.

[91] ibid [36].

[92] *A and Others v Secretary of State for the Home Department* [2002] EWCA Civ 1502, [2003] 2 WLR 564.

[93] The appeal was heard by Lords Bingham, Nicholls, Hope, Scott, Rodger, Carswell, Hoffmann, Walker, and Baroness Hale (as she then was).

[94] *Belmarsh* (n 4) [2].

same majority was prepared to follow the conclusions of the SIAC and the Court of Appeal as to the existence of a 'public emergency threatening the life of the nation',[95] seven of the nine Law Lords held that the Government had gone *beyond* that which was 'strictly required by the exigencies of the situation'.[96] Only Lord Walker dissented on this point, having concluded that, whilst a 'public emergency threatening the life of the nation' *did* exist so as to warrant the UK's derogation from art. 5 of the Convention, the Part 4 measures *could* nevertheless be accepted as 'strictly required by the exigencies of the situation'.[97] For Lord Walker, the measures were 'not offensively discriminatory'; rather, there were, in fact, 'sound, rational grounds' for the different treatment of foreign nationals that those measures engendered.[98]

(i) Derogation, 'public emergencies' and article 15(1) of the ECHR

All but Lord Hoffman, then, found in favour of the Government as to the existence of a 'public emergency threatening the life of the nation'. In a now-famous dissenting opinion, Lord Hoffmann regarded the case as, above all, 'call[ing] into question the very existence of an ancient liberty of which this country has until now been very proud: freedom from arbitrary arrest and detention'; of the power to detain people indefinitely without charge or trial, Lord Hoffmann remarked, '[n]othing could be more antithetical to the instincts and traditions of the people of the United Kingdom'.[99] Concluding, ultimately, that it required the acceptance of too broad an interpretation of the meaning of the phrase 'the life of the nation' to have been persuaded by the Government's submissions on this issue, Lord Hoffmann noted: 'I do not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation'.[100] Rather, only the threatening of 'our institutions of government or our existence as a civil community', it appears, would have convinced Lord Hoffmann to reach a different conclusion.[101] And in one of the more resounding passages of the ruling, Lord Hoffmann opined that '[t]he real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these'.[102]

It ought to be noted at this juncture that Lord Hoffmann's judgment has, itself, been the subject of close(r) analysis, not least given that, as Thomas Poole has written, perhaps the most 'striking feature [of it] lies in the centrality of its appeal to the past'.[103] Where,

[95] Though, not without some reluctance, Lords Bingham, Scott and Rodger each having confessed to 'misgiving', 'very great doubt', and 'some hesitation', respectively, in their rulings on the issue: *Belmarsh* (n 4) [26] (Lord Bingham), [154] (Lord Scott), [165] (Lord Rodger).

[96] Lord Hoffmann was unpersuaded that the 'public emergency' threshold, under art. 15(1), had been satisfied (for reasons outlined in the main text), and, as such, chose not to express an opinion as to whether the measures taken by the Government were 'strictly required by the exigencies of the situation': *Belmarsh* (n 4) [97].

[97] *Belmarsh* (n 4) [215].

[98] ibid [215].

[99] ibid [86].

[100] ibid [96].

[101] ibid [96].

[102] ibid [97].

[103] Thomas Poole, 'Harnessing the Power of the Past? Lord Hoffmann and the *Belmarsh Detainees* Case' (2005) 32(4) J L & Soc 534, 537.

primarily, the case was argued on the basis of and with reference to the ECHR jurisprudence ('with international human rights law providing something of an *éminence grise* by setting the normative backdrop to the decision'), rather 'Lord Hoffmann turned instead to the local': '[i]nternational human rights law receives no mention; there is no international or comparative dimension to the judgment', and '[m]ore striking still, the relevance of the [ECHR] jurisprudence is denied not once but twice'.[104] That is, firstly, Lord Hoffmann regarded freedom from arbitrary arrest and detention as 'a quintessentially British liberty, enjoyed by the inhabitants of this country when most of the population of Europe could be thrown into prison at the whim of their rulers'; on this reading, the freedom derives not from the ECHR, rather it can be found there 'because [the Convention] set out the rights which British subjects enjoyed under the common law'.[105] In the second instance, Lord Hoffmann rejected the utility of 'the European cases', noting that '[a]ll that can be taken from them is that the Strasbourg court allows a wide 'margin of appreciation' to the national authorities in deciding 'both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it' [quoting *Ireland v United Kingdom* (1978) 2 EHRR 25, para 207]'.[106] 'What this means,' it was said, 'is that we, as a United Kingdom court, have to decide the matter for ourselves'.[107]

Among the key issues with the sort of legal reasoning on display here, Poole suggests, is that of an obvious, if problematic, conflation of common law constitutional principle and Convention jurisprudence, resulting in 'the intermeshing of a rationalist, rights-dominated legal framework with a legal system which operated, while staying largely true to its basic anti-rationalist mindset, a venerable but, by contemporary standards, rather flaccid jurisprudence of rights'.[108] Not only does this conflation rest on a deeply contrived reading of the history of (the UK's role and influence in the drafting of) the Convention, in which 'Convention rights ought to be understood as originally British exports to a benighted Europe', and the HRA characterised, in turn, as merely 'the vehicle through which these rights are now being repatriated'.[109] Rather, it highlights a key tension within the human rights paradigm more broadly (which is instructive for present purposes), not least as it now prevails in the UK under the HRA, as one which potentially compounds (as opposed to consolidates) competing constitutional visions, and which presents the paradigm as involving a spectrum of (varyingly desirable) alternatives: at one end, the progressive internationalism of the ECHR as the source and inspiration of modern conceptions of 'fundamental' rights and liberties; and at the other, the inward-looking historicism of the 'common law constitution', and the 'ancient' freedoms, values, traditions, principles and norms which purportedly underpin the incremental development of the UK's otherwise unstructured constitution. To

[104] ibid 537-38.
[105] *Belmarsh* (n 4) [88].
[106] ibid [92].
[107] ibid [92].
[108] Poole (n 103) 539.
[109] ibid 540. See, also, David Dyzenhaus, 'An Unfortunate Outburst of Anglo-Saxon Parochialism' (2005) 68(4) MLR 673, 673: 'In [Lord Hoffmann's] view, the common law sufficed to uphold the appeal, since it was the source of liberty, a value which had to be exported to the lawless Europeans and then enshrined in a Convention for them after World War II. The only reason for the United Kingdom to have subscribed to the Convention was that it set out the 'rights which British subjects enjoyed under the common law'. The United Kingdom could subscribe because subscribing made no difference.'

the extent, therefore, that Lord Hoffmann's ruling can be read as emphasising the contemporary relevance of the latter, specifically as a means of establishing the constitutional position of (counter-terrorism) deprivation of liberty, it is perhaps significant that, on this reading, it was held that 'such a power in any form is not compatible with our constitution'.[110]

Turning, then, to the position of the majority on the 'public emergency' issue: as Kavanagh notes, 'their Lordships made clear that although substantial deference may be appropriate in matters of national security, complete deference was not'.[111] Two key factors ultimately persuaded Lord Bingham—whose leading judgment is instructive insofar as the position of the majority on this question is concerned—that the 'public emergency' threshold under art. 15(1) *had* been met in the circumstances. First, Lord Bingham cited a number of examples in the case law of the ECtHR as evidence that the Court accords a wide margin of appreciation to national authorities on the determination of such matters.[112] The case of *Lawless v Ireland*[113] was of particular note in this respect. For if, in that case, 'it was open to the Irish Government … to conclude that there was a public emergency threatening the life of the nation', it followed for Lord Bingham that 'the British Government could scarcely be faulted for reaching that conclusion in the much more dangerous situation which arose after 11 September'.[114]

If, however, this (first) factor can be seen to represent the 'very model of the 'new internationalism''[115] that the Law Lords (and Lord Bingham in particular) can be seen to have embraced under the HRA (and to which Lord Hoffmann, as noted above, was singularly opposed), the second factor might be said to reflect a judicial self-awareness which sits more broadly within traditional constitutional parameters. That is, the second factor concerned the 'relative institutional competence' of the courts to engage in close scrutiny of ministerial decisions made in the name of national security—in other words, the key question was that of the (constitutionally) appropriate degree of deference which ought to be given by the courts to the executive. On this point, Lord Bingham held:

> The more purely political (in a broad or narrow sense) a question is, the more appropriate it will be for political resolution and the less likely it is to be an appropriate matter for judicial decision. The smaller, therefore, will be the role of the court. Conversely, the greater the legal content of any issue, the greater the potential role of the court, because under our constitution and subject to the sovereign power of Parliament it is the function of the courts and not of political bodies to resolve legal questions. The present question seems to me to be very much at the political end of the spectrum.[116]

Indeed, it is an opinion which echoes—somewhat paradoxically—that of Lord Hoffmann's in *Rehman* (which, in fact, Lord Bingham had signposted). In that case, Lord Hoffmann had noted:

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[110] *Belmarsh* (n 4) [97].
[111] Aileen Kavanagh, 'Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication' in Grant Huscroft (ed), *Expounding the Constitution: Essays in Constitutional Theory* (CUP 2008) 210.
[112] *Belmarsh* (n 4) [28].
[113] (1961) 1 EHRR 15.
[114] *Belmarsh* (n 4) [28].
[115] Poole (n 103) 537.
[116] *Belmarsh* (n 4) [29].

> What is meant by "national security" is a question of construction and therefore a question of law … But there is no difficulty about what "national security" means. It is the security of the United Kingdom and its people. On the other hand, the question of whether something is "in the interests" of national security is not a question of law. It is a matter of judgment and policy. Under the constitution of the United Kingdom and most other countries, decisions as to whether something is or is not in the interests of national security are not a matter for judicial decision. They are entrusted to the executive.[117]

And in a passage subsequently added post-script, three months after the 9/11 terrorist attacks, Lord Hoffmann emphasised, in the light of those attacks, that 'in matters of national security, the cost of failure can be high',[118] and therefore the jurisdiction of the courts to intervene in such matters ought to be determined not only by the question of expertise, but by the question of democratic legitimacy:

> [S]uch decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process. If the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove.[119]

Thus, in *Belmarsh*, Lord Bingham held that, far from potentially undermining the protection of Convention rights, to accord a marked degree of deference to the executive on the grounds of national security rather 'reflects the unintrusive approach of the European Court to such a question'; the appellants had 'shown no ground strong enough to warrant displacing the Secretary of State's decision on this important threshold question'.[120]

Similar conclusions were reached across the various majority judgments. For instance, Lord Hope commented that '[f]ew would doubt that it is for the executive, with all the resources at its disposal, to judge whether the consequences of such events amount to an emergency [within the meaning of art. 15 of the Convention].[121] As such, questions as to 'whether there is an emergency or whether it threatens the life of the nation are pre-eminently for the executive and for Parliament'.[122]

(ii) Proportionality and articles 5 and 14 of the ECHR

The notion of 'relative institutional competence', so instrumental to the majority's ruling on the 'public emergency' question, 'cut much less ice in relation to the justification question'.[123] Indeed, it has been suggested that the Law Lords' ruling on whether the Part 4 measures were 'strictly required by the exigencies of the situation' represents 'the most

[117] *Rehman* (n 38) [50].
[118] ibid [62].
[119] ibid [62]. The passage was added post-script, in the aftermath of the "9/11" attacks.
[120] *Belmarsh* (n 4) [29].
[121] ibid [115].
[122] ibid [116].
[123] Mark Elliott, 'Detention without Trial and the "War on Terror"' (2006) 4(3) ICON 553, 561-62. See, eg, *Belmarsh* (n 4) [192], in which Lord Walker emphasises the courts' 'special duty to look very closely at any questionable deprivation of liberty', which 'plainly invite[s] judicial scrutiny of considerable intensity'.

persuasive aspect of the House of Lords' treatment of the [*Belmarsh*] case'.[124] As Lord Bingham noted, that question—what could or could not be said to be 'strictly required' in these circumstances—is a matter for which 'the Convention imposes a test of strict necessity or, in Convention terminology, proportionality'.[125] The elements of the proportionality test accepted, at the domestic level, in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing*[126] were considered, namely:

> Whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.[127]

It was acknowledged that the 'main thrust' of the appellants' argument was directed to the second and third elements of the proportionality test: even if, that is, the legislative objective of protecting the national security of the UK from (the threat of) Islamist terrorism was sufficiently important to justify limiting the right to liberty, the Part 4 measures were neither rationally connected to nor the least restrictive means capable of achieving that objective.[128]

It is at this point that the grounding of the UK's counter-terrorism strategy in the issue of immigration control can be seen, fundamentally, to have been the undoing of that strategy. As explored in sub-section A, above, and as Adam Tomkins emphasises, '[t]he government consistently presented this as a problem of immigration law requiring a solution within immigration law'.[129] The measures for which Part 4 provided were, in the Government's own words, 'special immigration powers'.[130] That 'immigration' thus provided the foil for targeting exclusively non-nationals in the use of extraordinary security measures was clear. Yet, even before the lawfulness of that approach was considered (and rejected) by the Law Lords, serious concerns had been raised as to its dubious *efficacy* as a means of countering the threat of international terrorism, the Newton Committee having noted in its 2003 report:

> Seeking to deport terrorist suspects does not seem to us to be a satisfactory response, given the risk of exporting terrorism. If people in the UK are contributing to the terrorist effort here or abroad, they should be dealt with here. While deporting such people might free up British police, intelligence, security and prison service resources, it would not necessarily reduce the threat to British interests abroad, or make the world a safer place more generally. Indeed, there is a risk that the suspects might even return without the authorities being aware of it.[131]

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[124] Adam Tomkins, 'Readings of A v Secretary of State for the Home Department' [2005] PL 259, 262.
[125] *Belmarsh* (n 4) [30].
[126] [1998] UKPC 30, [1999] 1 AC 69 [25].
[127] *Belmarsh* (n 4) [30].
[128] ibid [30].
[129] Tomkins, 'Readings' (n 124) 263.
[130] Home Office, *Reconciling Liberty and Security* (n 89) [21].
[131] Newton Report (n 81) [195]. A similar argument is made in Kent Roach, 'Sources and Trends in Post-9/11 Anti-terrorism Laws' in Benjamin J Goold and Liora Lazarus (eds), *Security and Human Rights* (1st edn, Hart Publishing 2007) 239: 'The ultimate aim of immigration law is removal, not punishment, and this is not an optimal position given the international nature of much modern terrorism … The immigration law remedies of removal or deflection may often displace terrorism rather than stop it.'

A similarly critical position was ultimately reflected in several of the majority's rulings. Indeed, for Lord Nicholls, the different treatment accorded to nationals and non-nationals was '[t]he *principal* weakness in the government's case': '[i]t is difficult to see,' Lord Nicholls commented, 'how the extreme circumstances, which alone would justify such detention, can exist when lesser protective steps apparently suffice in the case of British citizens suspected of being international terrorists'.[132] So too was Lord Bingham unconvinced:

> The choice of an immigration measure to address a security problem had *the inevitable result of failing adequately to address the problem* (by allowing non-United Kingdom suspected terrorists to leave the country with impunity and *leaving British suspected terrorists at large*) while imposing the severe penalty of indefinite detention on persons who, even if reasonably suspected of having links with al Qaeda, may harbour no hostile intentions towards the United Kingdom.[133]

Further, Lord Hope commented that 'the indefinite detention of foreign nationals had not been shown to be strictly required, as the same threat from British nationals whom the government is unable or unwilling to prosecute is being met by other measures which do not require them to be detained indefinitely'.[134] It was said that the distinction drawn between these two groups 'raises an issue of discrimination', but 'as the distinction is *irrational*, it goes to the heart of the issue about proportionality also', that is:

> It proceeds on the misconception that it is a sufficient answer to the question whether the derogation is strictly required that the two groups have different rights in the immigration context. So they do. But the derogation is from the right to liberty. The right to liberty is the same for each group. If derogation is not strictly required in the case of one group, it cannot be strictly required in the case of the other group that presents the same threat.[135]

As noted above, Lord Walker, the sole dissenter on this point, considered that there were, in fact, 'sound, rational grounds' for the different treatment of foreign nationals. One such reason, it was suggested, was that, were the power to indefinitely detain terrorist suspects without trial framed so as to *include* British citizens, who, crucially, '[have] no option of going abroad if they chose to do so', it would be 'far more oppressive, and a graver affront to their human rights, than a power to detain in "a prison with three walls" a suspected terrorist who has no right of abode in the United Kingdom, and whom the government could and would deport but for the risk of torture if he were returned to his own country'.[136] At any rate, for Lord Walker, the 2001 Act contained 'several important safeguards against oppression'—such as the various and ongoing independent review mechanisms both of the Part 4 measures specifically and the 2001 Act more broadly, and that of the apparent 'temporary' nature of the legislation, per se—all of which, it was found, 'show[ed] a genuine determination that the 2001 Act, and especially Part 4, should not be used to encroach on human rights any more than is strictly necessary'.[137]

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[132] *Belmarsh* (n 4) [76] (emphasis added).
[133] ibid [43] (emphasis added).
[134] ibid [132].
[135] ibid [132] (emphasis added).
[136] ibid [215].
[137] ibid [217].

Baroness Hale (also rejecting the rationality of targeting exclusively foreign nationals) considered the question, notably, as one involving issues of fundamental democratic principle:

> Democracy values each person equally. In most respects, this means that the will of the majority must prevail. But valuing each person equally also means that the will of the majority cannot prevail if it is inconsistent with the equal rights of minorities.[138]

The distinction between British and foreign (or 'international') terrorist suspects, therefore, was ultimately one which purported to (although inevitably failed) to minimise the potential for egregious deprivation of liberty, contrary to art. 5 of the Convention, to only that which was 'strictly necessary' for the relevant purposes. In so concluding, Baroness Hale drew a compelling analogy:

> No one has the right to be an international terrorist. But substitute "black", "disabled", "female", "gay", or any other similar adjective for "foreign" before "suspected international terrorist" and ask whether it would be justifiable to take power to lock up that group but not the "white", "ablebodied", "male" or "straight" suspected international terrorists. The answer is clear.[139]

D. The (Purported) Constitutional Significance of 'Belmarsh'

Many pages of the law journals have been devoted to analysis of the ruling in *Belmarsh*. Such is its significance, indeed from a broad range of perspectives, including that the Law Lords' speeches contained what has been described as 'statements which are both unprecedented and damning in their criticism of decisions made by government and Parliament'.[140] *Belmarsh* has been taken to represent a vindication of the constitutional principle of the rule of law over the exercise of arbitrary executive power;[141] the turning point in a long history of judicial obsequiousness to the executive on matters of national security;[142] 'the beginnings of a much belated judicial awakening to the fact that even in the context of national security the courts have a responsibility to ensure that the rule of law is respected';[143] and 'perhaps the most powerful judicial defence of liberty' since the 18th century.[144] In a special issue of the Modern Law Review, Martin Loughlin noted 'the extent to which British constitutional discourse has become more nuanced and more complicated' as a consequence of the HRA's introduction, as evidenced in *Belmarsh*; indeed, underlying the 'difficult questions' given rise by these nuances and complications, Loughlin suggests, 'sits a more basic jurisprudential issue

[138] ibid [237].
[139] ibid [238].
[140] Tomkins, 'Readings' (n 124) 259.
[141] Lord Steyn, '2000 – 2005: Laying the Foundations of Human Rights Law in the United Kingdom' (2005) 4 EHRLR 349, 350: '…the *Belmarsh* decision, and in particular Lord Bingham's opinion, was a vindication of the rule of law, ranking with historic judgments of our courts.'
[142] See, eg, Kavanagh, 'Constitutionalism, Counterterrorism, and the Courts' (n 3). See, also, Gavin Phillipson, 'Deference and Dialogue in the Real-World Counter-Terrorism Context' in Fergal F Davis and Fiona de Londras (eds), *Critical Debates on Counter-Terrorism Judicial Review* (CUP 2013) 270: '*Belmarsh* … clearly broke free from a strong precedential tradition of judicial self-abnegation in the area of national security'.
[143] Tomkins, 'Readings' (n 124) 263.
[144] David Feldman, 'Proportionality and Discrimination in Anti-Terrorism Legislation' (2005) 64(2) CLJ 271, 273.

concerned with the meaning that must now be accorded to the terms 'law' and 'constitution' in the British system'.[145] And in a more recent contribution, which considers the legacy of the case as a 'landmark' public law ruling, Richard Clayton remarks that the *Belmarsh* judgment can be seen to represent 'a towering decision, from at least four perspectives':

> First, the House of Lords reached an arresting conclusion in a most unpromising terrain, reviewing administrative detention of aliens, where traditionally the courts have taken a very deferential approach. Second, the political climate in which the decision was made was intense and problematic, as the application to recuse Lord Steyn indicated. Third, the structured proportionality analysis undertaken by Lord Bingham stands almost alone among HRA 1998 cases in terms of its analytical rigour. Last, and, not least, Lord Bingham clearly and unequivocally spelt out the rationale for the [HRA's] constitutional character: under the HRA 1998 the courts are charged by Parliament with delineating the boundaries of a rights-based democracy.[146]

Without doubt, the theme which unifies each of these various critiques, if not celebration, is certainly one which portrays the ruling in *Belmarsh* as representing a significant (constitutional) moment, signalling a break with the past, and in so doing mapping a distinctive and ostensibly desirable (if, vis-à-vis Lord Hoffmann's ruling, clearly *contested*) vision of the UK constitution—and especially the role of the courts in marshalling the protection of 'liberty' within it. Yet, for all of the plaudits, in the light of that which followed, and thus albeit with the great benefit of hindsight, the case has in recent years come to be seen as something of a Pyrrhic victory. '[A]fter the excitement following the *Belmarsh* case,' wrote Keith Ewing and Joo-Cheong Tham in 2008, 'normal service appears thus to have been resumed, in terms of the approach of the courts'.[147] Similarly—and, incidentally, marking a notable climb-down from previous exaltations—Tomkins has since suggested that 'far from establishing itself as a new 'benchmark', [*Belmarsh*] now looks more like a one-off'.[148]

As Paul Scott suggests, there is potentially a compelling argument that *Belmarsh* failed even to conclude the issue at the heart of the case: from the perspective that the House of Lords' ruling in *Belmarsh* 'must be judged not only by its constitutional significance—the question of what role it reflects for the court within the national security constitution—but also on its own terms', the issue of derogation, and particularly of the *correctness* of the majority's decision to quash the Derogation Order, stands out as 'one point of ongoing significance'.[149] In other words, although it has been suggested that *Belmarsh*'s key contribution to the issue of derogation from the ECHR was to authoritatively establish '[t]he extent of the judicial resistance to derogation',[150] an issue as to *jurisdiction* remains unresolved—which might prove important in future instances involving derogation from the ECHR. Lord Scott noted that 'the Attorney-General was content to argue the case [for the Government] on the footing that the [Derogation] Order did have to be justified under article

[145] Martin Loughlin, 'A. v Secretary of State for the Home Department: Introduction' (2005) 68(4) MLR 654.
[146] Clayton (n 3) 180.
[147] Ewing and Tham (n 19) 692.
[148] Adam Tomkins, 'Parliament, Human Rights, and Counter-Terrorism' in Tom Campbell, KD Ewing and Adam Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays* (OUP 2011) 14.
[149] Paul F Scott, *The National Security Constitution* (Hart Publishing 2018) 25.
[150] Tom R Hickman, 'Between Human Rights and the Rule of Law: Indefinite Detention and the Derogation Model of Constitutionalism' (2005) 68(4) MLR 655, 655.

15'.[151] The question, therefore, is whether this is correct as a matter of *domestic* law; whether a determination as to the validity of the Derogation Order is at all contingent on the correct interpretation and application of art. 15(1) of the ECHR—the provision of an international treaty.

Although, as Brice Dickson put it, the decision 'rode a coach and horses through [the Government's] policy',[152] the constitutional significance of *Belmarsh* is ultimately diminished in the light of two key considerations. First, the sum total *legal* effect of the Law Lords' scathing criticism of the powers contained in Part 4 of the ATCSA, and of the declaration of incompatibility issued under s. 4 of the HRA in respect of those powers, was nil.[153] Such is the balance that the HRA carefully preserves, between the protection and promotion of human rights on one hand and the doctrine of parliamentary sovereignty on the other. Thus, far from representing a judicial 'strike down' of primary legislation,[154] the finding of incompatibility with the ECHR in no way detracts from the validity of an Act of Parliament, and as such does not relieve citizens from the burdens imposed by the relevant (offending) provisions for as long as they should remain in force.[155] It ultimately owes to that fact that the *Belmarsh* ruling failed, secondly, to procure the release of the detainees. Not immediately, at least; it was not until March 2005, some three months after the Law Lords' ruling in *Belmarsh*, that the detainees were, in fact, released (albeit on conditional bail). However, by that point Part 4 of the ATCSA had been repealed and replaced the Prevention of Terrorism Act 2005 (PTA), which provided for a new counter-terrorism innovation: the 'control order'. Indeed, it is in the knowledge of the control order regime which followed the decision of *Belmarsh* that the implications particularly of the House of Lords' decision in relation to the discriminatory dimension of s. 23 of the ATCSA also gives cause for a re-evaluation of the true constitutional impact of the case. As noted above, the point was highlighted in *Belmarsh* that insofar as it can be accepted that the existence of a 'public emergency' warranting the UK's (ostensibly temporary) derogation from the ECHR, there is no basis for detaining *only* foreign terrorist suspects and not those with British nationality.[156] *Belmarsh* was thus a 'curious kind of success', insofar as it paved the way for a regime of (severely) restrictive measures which apply to British and non-British citizens alike.[157]

[151] *Belmarsh* (n 4) [152].

[152] Brice Dickson, 'Law Versus Terrorism: Can Law Win?' (2005) 1 EHRLR 11, 19.

[153] Indeed, the point was conceded by Lord Scott: *Belmarsh* (n 4) [144].

[154] cf Kavanagh, *Constitutional Review* (n 11) 290-92, in which it is argued that, in fact, the s. 4 power is not dissimilar in effect to 'strike-down' powers in other jurisdictions, whereby the offending legislative provision is rendered invalid, and often the legislature is legally required to remedy the situation.

[155] *Belmarsh* (n 4) [145].

[156] The Law Lords' ruling on this point was subsequently reaffirmed by the ECtHR, which found, among other things, that 'the derogating measures were disproportionate in that they discriminated between nationals and non-nationals': *A v United Kingdom* (2009) 49 EHRR 29 [190].

[157] Ewing, *Bonfire* (n 19) 252. See, also, Ewing and Tham (n 19) 670: 'Far from vindicating a human rights culture under the HRA, the response to [*Belmarsh*] provides evidence the other way.'

III. CONTROL ORDERS

A. Prevention of Terrorism Act 2005

The control order was defined under s. 1 of the PTA as 'an order against an individual that imposes obligations on him for purposes connected with protecting members of the public from a risk of terrorism'—'obligations', that is, that 'the Secretary of State or (as the case may be) the court considered necessary for the purposes connected with preventing or restricting involvement by that individual in terrorism-related activity'.[158] The list of obligations licenced by the Act was, by any measure, extraordinary; the Act authorised the imposition of prohibitions, restrictions or requirements on an individual, which might have related to: 'his possession or use of specified articles or substances';[159] 'his use of specified services or specified facilities, or … his carrying on specified activities';[160] 'his work or other occupation, or … his business';[161] 'his association or communications with specified persons or with other persons generally';[162] 'his place of residence or … the persons to whom he gives access to his place of residence';[163] 'his being at specified places or within a specified area at specified times or on specified days';[164] 'his movements to, from or within the United Kingdom, a specified part of the United Kingdom or a specified place or area within the United Kingdom';[165] 'his movements as may be imposed, for a period not exceeding 24 hours, by directions given to him in the specified manner, by a specified person and for the purpose of securing compliance with other obligations imposed by or under the order';[166] '[surrendering] his passport, or anything in his possession to which a prohibition or restriction imposed by the order relates, to a specified person for a period not exceeding the period for which the order remains in force';[167] '[giving] access to specified persons to his place of residence or to other premises to which he has power to grant access';[168] [allowing] specified persons to search that place or any such premises for the purpose of ascertaining whether obligations imposed by or under the order have been, are being or are about to be contravened';[169] '[allowing] specified persons, either for that purpose or for the purpose of securing that the order is complied with, to remove anything found in that place or on any such premises and to subject it to tests or to retain it for a period not exceeding the period for which the order remains in force';[170] '[allowing] himself to be photographed';[171] '[co-operating with] specified arrangements for enabling his movements, communications or other

[158] PTA, s 1(3).
[159] ibid s 1(4)(a).
[160] ibid s 1(4)(b).
[161] ibid s 1(4)(c).
[162] ibid s 1(4)(d).
[163] ibid s 1(4)(e).
[164] ibid s 1(4)(f).
[165] ibid s 1(4)(g).
[166] ibid s 1(4)(h).
[167] ibid s 1(4)(i).
[168] ibid s 1(4)(j).
[169] ibid s 1(4)(k).
[170] ibid s 1(4)(l).
[171] ibid s 1(4)(m).

activities to be monitored by electronic or other means';[172] '[complying with] a demand made in the specified manner to provide information to a specified person in accordance with the demand';[173] '[his reporting] to a specified person at specified times and places'.[174] Each of these burdens had a maximum duration of 12 months[175] (but were renewable 'on one or more occasions')[176] and carried with them the threat of criminal sanction for non-compliance without reasonable excuse.[177]

As noted above, unlike the regime of indefinite detention under Part 4 of the ATCSA, control orders would apply to British and non-British citizens alike. Though managing, therefore, to avoid a situation such as that which arose in *Belmarsh*, involving the discriminatory targeting of foreign nationals contrary to art. 14 of the ECHR, the control order legislation nevertheless continued to raise issues concerning compatibility with the right to liberty and security under art. 5.[178] The PTA sought to address this issue by drawing a distinction between so-called 'derogating' and 'non-derogating' control orders.[179] The former would involve the imposition of obligations 'that are or include derogating obligations',[180] and, as such, in recognition of that fact, would necessitate the UK's entering a formal derogation under art. 15 of the ECHR (as in the case of the previous Part 4 provisions). Further, in what Ewing describes as 'a brilliant manoeuvre (intended or otherwise)' by the Government, which 'succeeded in giving this remarkable provision an enhanced respectability', the High Court had 'been offered a central—but limited—part in the drama'.[181] That is, the making of a derogating order required an application by the Secretary of State to the court which would, in turn, determine whether the order should be confirmed (with or without modification). In so deciding, the court would have regard to whether it was 'satisfied, on the balance of probabilities, that the controlled person is an individual who is or has been involved in terrorism-related activity', that 'the imposition of obligations … [was] necessary for purposes connected with protecting members of the public from a risk of terrorism'—that is, one arising, or associated with, 'a public emergency in respect of which there [was] a designated derogation from the whole or a part of [art. 5 of the ECHR]'—and that the relevant obligations were 'derogating obligations of a description set out for the purposes of the designated derogation in the designation order'.[182]

The creation of derogating control orders had the effect, crucially, of building into the new regime the expectation that some (or perhaps a certain combination of) obligations would in fact amount to an interference with a person's liberty *beyond* that which is permitted by art. 5. By contrast, a non-derogating order was one which purported to impose obligations entirely

[172] ibid s 1(4)(n).
[173] ibid s 1(4)(o).
[174] ibid s 1(4)(p).
[175] ibid s 2(4)(a).
[176] ibid s 2(4)(b).
[177] ibid s 9.
[178] Although, when the control orders were introduced in 2005, all of those upon whom they were imposed were, in fact, foreign nationals: Grahame Allen and Noel Dempsey, *Terrorism in Great Britain: The Statistics* (House of Commons Library Briefing Paper, 7 June 2018) 26.
[179] PTA, s 1(2).
[180] ibid s 15.
[181] Ewing, *Bonfire* (n 19) 241.
[182] PTA, s 4(7).

within the parameters of that provision. This (assumption) was reflected in a significant relaxing of the procedural conditions for the making of such an order, as compared, that is, with those relating to derogating orders. Thus, the procedural threshold for the making of a non-derogating order was that of reasonable suspicion,[183] marking a significant reduction both from that of 'reasonable *belief*' under the previous Part 4 provisions, and, in respect of derogating orders, the 'balance of probabilities' (as noted above). Indeed, this lowering of the threshold was rendered all the more significant given the extraordinary range of obligations to which an individual might be made subject, even under a purported *non*-derogating order. Further, the courts played a notably lesser supervisory role in these circumstances: a control order could be made by the Secretary of State provided s/he had 'applied to the court for permission to make the order and ha[d] been granted that permission'.[184] In the case of urgency, and, notably, in the specific cases of those previously certified and detained under Part 4 of the ATCSA (including those involved in the *Belmarsh* litigation), the making of a non-derogating order was open to the Secretary of State *before* approval was given by the High Court.[185] The function of the court, either way, was merely to assess 'whether the decision of the Secretary of State to make the order he did was *obviously flawed*'[186]—'a diluted standard that falls some way below the normal standard for judicial review'.[187]

Yet, crucially, nowhere in the PTA was the 'cut-off between restriction of liberty and its deprivation under Article 5' articulated, nor any 'precise line' between non-derogating and derogating control orders specified.[188] The Independent Reviewer of Terrorism Legislation considered that the imposition upon an individual of restrictions and/or prohibitions the cumulative effect of which amounted to practical 'house arrest'[189] would cross the threshold, in particular those concerning the individual's association or communication with others, and his confinement to a 'specified area' or place of residence in the UK. Indeed, as Ben Middleton writes, the derogating order was conceived as the appropriate mechanism for imposing obligations of such severity as to 'represent *significant* interference with the right to liberty of the controlee'.[190] Plainly, though, such (significant) interference could nevertheless be achieved by the supposed *non*-derogating order, for which the procedural burdens were much easier to overcome. In any event, throughout the lifetime of the control order regime, no derogating order was ever made.

B. 'Deprivation of Liberty' and the Control Order Litigation

The question as to whether, and if so to what extent, the imposition of a non-derogating order could thus be achieved within the scope of art. 5 was raised in several legal challenges heard by the Appellate Committee of the House of Lords. The meaning of 'deprivation of liberty'

[183] ibid s 2(1).
[184] ibid s 3(1).
[185] ibid s 3(1).
[186] ibid s 3(3)(b) (emphasis added).
[187] Ewing, *Bonfire* (n 19) 242.
[188] Lucia Zedner, 'Preventive Justice or Pre-Punishment? The Case of Control Orders' (2007) 60(1) CLP 174, 178.
[189] Lord Carlile of Berriew, *First Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* (2006) [31].
[190] Ben Middleton, 'Control Orders: Out of Control?' [2007] Crim Law 3, 4 (emphasis added).

(within the meaning of art. 5) was first considered by the Law Lords in *Secretary of State for the Home Department v JJ,*[191] a case concerning the complaints of six 'controlled persons' (known only by the initials 'JJ', 'GG', 'KK', 'HH', 'NN', and 'LL') previously upheld both at first instance[192] and in the Court of Appeal.[193] The appellants argued (successfully in the lower courts) that the terms of the non-derogating control orders to which they had been made subject in fact amounted to a 'deprivation of liberty' (thus contravening art. 5), and that, accordingly, those orders ought to be quashed. Among other things, the relevant orders imposed restrictions including: a requirement to remain within a designated 'residence' for 18 hours a day (save between 10am and 4pm), which, in the cases of each of the appellants, meant confinement to a one-bedroom flat (provided either by the local authority or the National Asylum Support Service); a requirement that visitors be authorised by the Home Office; spot searches by the police; locational constraints, including confinement to restricted urban areas (that is, during the six hours in which the appellants would be permitted to leave their residences); a requirement to wear an electronic tag and to report to a monitoring company both pre- and post-curfew hours; and prohibitions on 'using or possessing communications equipment of any kind save for one fixed telephone line in their flat maintained by the monitoring company'.[194]

The decision of the ECtHR in *Guzzardi v Italy*[195] had much bearing on the Law Lords' approach to question of whether the various restrictions constituted a 'deprivation of liberty'. In *Guzzardi*, the Strasbourg Court had reiterated its earlier finding in *Engel and Others v The Netherlands*[196] that the substance of art. 5 'is contemplating the physical liberty of the person; its aim is to ensure that no one should be dispossessed of this liberty in an arbitrary fashion'.[197] Thus, as previously in *Engel*, the Court in *Guzzardi* held that in order to determine whether an individual has been 'deprived' of his liberty contrary to art. 5, 'account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question'.[198] That is, whether a '*deprivation*' of liberty in fact amounts only to a mere '*restriction*' upon liberty is therefore a matter 'of degree or intensity, and not one of nature or substance'.[199] The Court noted, however, that the former may take numerous forms other than 'classic detention in prison', and that whilst it may not be found on the strength of any one factor in isolation, multiple factors considered 'cumulatively and in combination' may 'certainly raise an issue of categorisation from the viewpoint of Article 5'.[200]

Bringing these principles to bear on the appellants' case, the Law Lords (sitting as a panel of five) upheld the complaints, dismissing the Secretary of State's appeal, by a 3:2 majority (Lord Hoffmann and Lord Carswell dissenting). Lord Bingham, Baroness Hale and Lord

[191] [2007] UKHL 45, [2008] 1 AC 385.
[192] [2006] EWHC 1623 (Admin).
[193] [2006] EWCA Civ 1141, [2007] QB 446.
[194] *JJ* (n 191) [20].
[195] (1980) 3 EHRR 333.
[196] (1976) 1 EHRR 647.
[197] *Guzzardi* (n 195) para 92.
[198] ibid para 92.
[199] ibid para 93.
[200] ibid para 95.

Brown each held that the cumulative effect of the obligations imposed upon the six controlled persons amounted to a deprivation of—that is, as opposed to a 'mere restriction' upon—the liberty of those persons. Lord Bingham found that '[t]he effect of the 18-hour curfew, coupled with the effective exclusion of social visitors, meant that the controlled persons were *in practice in solitary confinement* for this lengthy period every day for an indefinite duration'.[201] Baroness Hale concurred: '[t]he requirement to remain in the "residence" for 18 hours each day' constituted 'classic detention or confinement'.[202] 'Undoubtedly,' Baroness Hale suggested, 'these people were deprived of their liberty during the curfew hours'; the fact of their being allowed out for up to six hours a day was considered to have made very little difference given that 'that freedom was also severely curtailed' by, for instance, the various locational constraints, monitoring and reporting obligations to which the controlees were subjected.[203]

Lord Carswell rejected the notion that the relevant control orders contravened art. 5, noting that 'on balance even that very long curfew does not take the cases of JJ and others over the line of deprivation of liberty'.[204] Lord Hoffmann's position signalled a somewhat extraordinary, paradoxical departure from that previously adopted (only a couple of years previously) in *Belmarsh*. As noted above, in that case, Lord Hoffmann characterised the freedom from arbitrary arrest and detention as a 'quintessential British liberty'; indeed, the significance of such a freedom was emphasised once again in *JJ*, wherein Lord Hoffmann suggested that the reason why 'deprivation of liberty [is] regarded as so quintessential a human right that it trumps even the interests of national security [was] … because it amounts to a complete deprivation of human autonomy and dignity'.[205] And yet, insisting on the 'paradigm case of deprivation of liberty' being that of imprisonment, 'in the custody of a gaoler',[206] Lord Hoffmann held that the various restrictions imposed on each of the six controlled persons, notwithstanding their cumulative effects, did *not* contravene art. 5 of the Convention.

In particular, Lord Brown's ruling (for the majority) would prove especially consequential. In it, it was considered that, '[p]lainly there must come a point at which a daily curfew (itself clearly a restriction upon liberty of movement) shades into a regime akin to house arrest, where so little genuine freedom is left that the line is crossed into deprivation of liberty'.[207] Noting that the Secretary of State had in fact contended that a curfew of up to 18 hours a day did *not* breach the threshold into 'deprivation of liberty', Lord Brown commented that 'there is no particular logic in this', adding: '[w]hy not 20 hours, or 22?'[208] At any rate, '[n]o useful comparison can be made with actual imprisonment,' it was suggested, given that 'conditions of imprisonment vary hugely'.[209] Ultimately, Lord Brown held that '[t]aking account of all the other conditions and circumstances of these control orders … and not least the length of

[201] *JJ* (n 191) [24] (emphasis added).
[202] ibid [59].
[203] ibid [61].
[204] ibid [84].
[205] ibid [37].
[206] ibid [36].
[207] ibid [103].
[208] ibid [104].
[209] ibid [104].

time for which they are imposed … 18 hour curfews are simply too long to be consistent with the retention of physical liberty'; such restrictions thus breach art. 5. Though, crucially, Lord Brown endorsed 'the acceptable limit to be 16 hours, leaving the suspect with 8 hours (admittedly in various respects controlled) liberty a day' as a regime which 'can and should properly be characterised as one which restricts the suspect's liberty of movement rather than actually deprives him of his liberty'.[210] And although noting that the distinction could not be said to turn solely on the existence or length of a curfew, per se, Lord Brown concluded that any such curfew beyond this 'absolute limit' ought not to be imposed unless the relevant (and more stringent) conditions for the making of a derogating control order had been met'.[211]

It suffices for present purposes to note only briefly that the subsequent control order litigation can be seen, ultimately (and importantly), to have largely embraced the approach to the 'deprivation'/'restriction' distinction set out in *JJ*.[212] Control orders involving 14-hour curfews, and other (severe) restrictions such as electronic tagging, locational constraints, reporting obligations and police searches of the premises were found *not* to have constituted a 'deprivation of liberty' in *Secretary of State for Home Department v MB and AF*.[213] Moreover, in *Secretary of State for the Home Department v E*,[214] the Law Lords rejected the claim that there had been a 'deprivation of liberty' resulting from restrictions including, notably, a curfew of (only) 12 hours. Thus, as Helen Fenwick and Gavin Phillipson note: '[t]he finding, particularly in *MB & AF*, coupled with the rejection of the eighteen-hour curfew in *JJ*, appeared to imply that the Lords were giving some—albeit, reluctant and qualified—support to the finding of Lord Brown in *JJ* that a sixteen-hour curfew might be the upper acceptable limit'.[215]

The last in this key cluster of cases concerning the compatibility with art. 5 of the control-order regime was that which was considered in 2010 by the (then newly formed) UK Supreme Court in *Secretary of State for the Home Department v AP*.[216] In that case, Lord Brown, with whom each of the six other Justices agreed, considered that 'for a control order with a 16-hour curfew (a fortiori one with a 14-hour curfew) to be struck down as involving a deprivation of liberty, the other conditions imposed would have to be *unusually destructive of the life* the controlee might otherwise have been living'.[217] The controlee was subjected to a 16-hour curfew, electronic tagging and (by this point usual) additional restrictions on association and communication with others.[218] Of particular relevance, however, was the Secretary of State's subsequent modification of the control order to include a requirement that the controlee relocate to an address 'some 150 miles away' from the London area in

[210] ibid [105].
[211] ibid [105].
[212] In the lower courts, see, eg, *Secretary of State for the Home Department v AH* [2008] EWHC 1018 (Admin); *Secretary of State for the Home Department v AU* [2009] EWHC 49 (Admin); *Secretary of State for the Home Department v GG* [2009] EWHC 142 (Admin). Control orders involving up to 16-hour curfews and relocation from homes, family members and associates were upheld in each of these cases.
[213] [2007] UKHL 46, [2008] 1 AC 440.
[214] [2007] UKHL 47, [2008] 1 AC 499.
[215] Helen Fenwick and Gavin Phillipson, 'Covert Derogations and Judicial Deference: Redefining Liberty and Due Process Rights in Counterterrorism Law and Beyond' (2011) 56(4) McGill LJ 863, 880.
[216] [2010] UKSC 24, [2011] 2 AC 1.
[217] *AP* (n 7) [4] (emphasis added).
[218] ibid [7].

which he, his family, friends and associates had always lived.[219] This, it was held, constituted a particularly severe combination of restrictions, resulting in the controlee's effective social isolation; the interference with the controlee's right to private and family life under art. 8 of the ECHR was held to have been 'capable of tipping the balance' between a 'restriction' and a 'deprivation' of liberty under art. 5—that is, decisively towards the latter.

On one hand, the decision in *AP* provided some welcome clarification as to the nebulous art. 5 jurisprudence, and further clarification, in particular, regarding the upper limits (within the context of that jurisprudence) of restrictions imposed under non-derogating control orders. Fenwick and Phillipson have commented that the ruling represents a 'narrowly focused decision' in which 'the UK Supreme Court gave support to most of the core aspects of the control order scheme as implemented by the government, while making clear that if sixteen-hour house detentions are to be imposed, the Home Secretary would have to take full account of the impact of other significant restrictions'.[220] Thus, this signalled 'a more holistic approach towards the adverse impacts of control orders, in particular taking account of their destructive effect upon family life and friendship'.[221] Yet, on the other hand, the 'net result' of the various control order litigation had been such that 'art. 5 [was] interpreted in domestic law to mean that sixteen, but not eighteen, hours' house detention can be imposed and may well not breach art. 5, even when combined with other restrictions on liberty and movement, so long as such restrictions do not have the stringent effect on the controlee described in *AP*'.[222] And as a result:

> [W]hile the majority of their Lordships in *JJ* and the UK Supreme Court in *AP* rejected the explicit executive argument that the ambit of article 5(1) should be narrowed by reference to the needs of national security, the combined effect of these decisions was … to redefine and minimize that ambit by implication, in the domestic context. The obligations imposed could only be viewed as not amounting to a "deprivation of liberty" by relying implicitly on a narrow interpretation of that concept.

Fenwick and Phillipson argue that, crucially, such a narrow interpretation 'is *not* fully supported by the jurisprudence of the ECtHR',[223] whereby, for instance, 'too much emphasis has been placed on the idea of restriction of physical liberty analogous to arrest', contrary to the subjective, case-specific approach endorsed in *Guzzardi*.[224] Thus, 'while the non-derogating orders scheme—as originally envisaged by the executive—relied on presupposing a heavily attenuated version of article 5 that the judges did not accept, the judges [had] nevertheless been partially drawn into the redefining process by accepting an overly restrained concept of deprivation of liberty'.[225]

[219] ibid [7].
[220] Fenwick and Phillipson, 'Covert Derogations' (n 215) 882.
[221] Fenwick and Phillipson, 'UK Counter-Terror Law Post-9/11' (n 15) 488.
[222] Fenwick and Phillipson, 'Covert Derogations' (n 215) 882 (emphasis in original).
[223] ibid 882.
[224] ibid 885: '*MB & AF* in particular appears to represent a drift away from the *Guzzardi* principles, evincing a failure to focus clearly on the overall impact of the restrictions—the key issue in *Guzzardi*.'
[225] ibid 886.

Though, ultimately, the control order regime managed to come through these various legal challenges largely intact, upon entering office in May 2010 the Conservative-Liberal Democrat Coalition Government pledged to 'urgently review' the regime, as part of a 'wider review of counter-terrorist legislation, measures and programmes'.[226] The *Review of Counter-Terrorism and Security Powers,* subsequently published in January 2011, recommended that the regime be repealed, and replaced by 'a system which will protect the public but will be less intrusive, more clearly and tightly defined and more comparable to restrictions imposed under other powers in the civil justice system'.[227] The *Review* specifically promised 'an end to the use of forced relocation and lengthy curfews that prevent individuals leading a normal life'.[228] And whereas '[u]nder control orders the Government could implement any measure deemed necessary provided it was not struck down by a court', the new regime would require the Government to 'specify in greater detail the measures that will and will not be available'.[229] It is notable, also, that whatever would replace the control order regime was described as 'neither a long term nor adequate alternative to prosecution, which remains the priority';[230] the *Review* was clear that the raison d'être of counter-terrorism restrictions on liberty ought, and would be, to 'facilitate further investigation [leading, ultimately, to prosecution] as well as prevent terrorist activities'.[231]

A. Terrorism Prevention and Investigation Measures Act 2011

The Terrorism Prevention and Investigation Measures Act 2011, which entered into force in December 2011, implemented this new approach. The Act abolishes control orders,[232] and makes what have been widely regarded as several significant improvements upon its predecessor. For example, in the first report of the Independent Reviewer of Terrorism Legislation (IRTL) on the operation of the (at that point nascent) TPIM regime, it was noted that 'TPIMs [are] more rights-compliant than control orders, and less likely to be a focus for community grievance'.[233] Indeed, the Act confers on the Secretary of State a broad power to impose, by notice (that is, a 'TPIM notice'), a range of coercive measures, many of which are plainly analogous in substance to those previously permitted under the PTA. But only 14 such measures are listed under Schedule 1 to the TPIM Act, above all marking a significant reduction in the remarkably long list of restrictions for which the PTA provided (as outlined in Section III, above). The TPIM Act permits the imposition of restrictions relating to, among other things, the place of residence of the individual in question, such as a requirement to

[226] HM Government, *The Coalition: Our Programme for Government* (2010) 24.
[227] HM Government, *Review of Counter-Terrorism and Security Powers: Review Findings and Recommendations* (Cm 8004, 2011) 41.
[228] ibid 41.
[229] ibid 41.
[230] ibid 41.
[231] ibid 41.
[232] Terrorism Prevention and Investigation Measures Act 2011, s 1.
[233] David Anderson, *First Report of the Independent Reviewer on the Operation of the Terrorism Prevention and Investigation Measures Act 2011* (2013) 4.

reside in a specified residence, to remain at, or within, that residence overnight (that is, 'between such hours as are specified'), and to notify the Secretary of State of the identity of any cohabitants.[234] Moreover, restrictions might (also) be imposed upon a person's freedom to enter or leave a specified area or place,[235] to access financial services,[236] and to associate and/or communicate with others.[237] And while initially the power to enforce a person's relocation to some other area in the UK was omitted (as promised), that power was subsequently reintroduced under the Counter-Terrorism and Security Act 2015 (CTSA)[238]—very clearly doing much to undermine not only initial impressions of the TPIM regime as 'more rights-compliant than control orders', but one of the key bases on which reform of control orders was sold by the Coalition Government from the outset.

The power to impose such restrictions is subject to several key conditions (A to E). Condition A, originally that the Secretary of State need *reasonably believe* that the individual in question 'is or has been, involved in terrorism-related activity',[239] was also later amended by the CTSA, which elevated the relevant threshold to that of 'the balance of probabilities'.[240] Further: Condition B is 'that some or all of the relevant activity is new terrorism-related activity';[241] Condition C is 'that the Secretary of State reasonably considers that it is necessary, for purposes connected with protecting members of the public from a risk of terrorism, for [TPIMs] to be imposed on the individual';[242] Condition D is 'that the Secretary of State reasonably considers that it is necessary, for purposes connected with preventing or restricting the individual's involvement in terrorism-related activity, for the specified [TPIMs] to be imposed on the individual';[243] and Condition E is that 'the court gives the Secretary of State permission under section 6, or the Secretary of State reasonably considers that the urgency of the case requires [TPIMs] to be imposed without obtaining such permission'.[244]

The Act thus provides for judicial oversight similar to that previously incorporated into the non-derogating control order regime. The Secretary of State may impose a TPIM notice only having obtained the prior permission of the court,[245] once again save, however, in cases of urgency,[246] in which, among other things, the Secretary of State must refer to the court the

[234] TPIMA, sch 1, para 1.
[235] ibid sch 1, paras 2-3.
[236] ibid sch 1, para 5.
[237] ibid sch 1, paras 7-8.
[238] Counter-Terrorism and Security Act 2015, s 16.
[239] TPIMA, s 3(1).
[240] CTSA, s 20(1).
[241] TPIMA, s 3(2). TPIMA, s 3(6) stipulates that there are three circumstances in which 'new terrorism-related activity' can be said to have occurred: '(a) if no TPIM note relating to the individual has ever been in force, terrorism-related activity occurring at any time (whether before or after the coming into force of this Act); (b) if only one TPIM notice relating to the individual has ever been in force, terrorism-related activity occurring after that notice came into force; or (c) if two or more TPIM notices relating to the individual have been in force, terrorism-related activity occurring after such a notice came into force most recently'.
[242] TPIMA, s 3(3).
[243] ibid s 3(4).
[244] ibid s 3(5).
[245] ibid s 6.
[246] ibid s 7.

imposition of the relevant measures '[i]mmediately after serving the TPIM notice'.[247] Though, as with non-derogating control orders, the court's role is to determine both 'whether the relevant decisions of the Secretary of State are obviously flawed' and 'whether to give permission to impose measures on the individual' (with or without exercising the power to direct the Secretary of State as to the relevant measures).[248] The court may consider the application—to be determined on the basis of judicial review principles[249]—'in the absence of the individual', 'without the individual having been notified of the application', and 'without the individual having been given an opportunity (if the individual was aware of the application) of making any representations to the court'.[250] Though, once permission is given by the court, the court must conduct a 'directions hearing' and thereafter a 'review hearing' which the subject of the relevant TPIM notice may attend.[251] In regards to the latter, it is 'the function of the court … to review decisions of the Secretary of State that the relevant conditions [for the imposition of restrictions] were met and continue to be met'—again, to be decided by reference to judicial review principles.[252] The individual in question is entitled to make representations,[253] while the court is empowered to quash the TPIM notice in full or in part, and to give directions to the Secretary of State for, or in relation to, 'the revocation of the TPIM notice' or 'the variation of measures specified in [it]'.[254]

Further safeguards included within the TPIM Act include the maximum time limit of two years on the validity of a TPIM notice. That is, a TPIM notice remains in force for a period of one year following its service on the individual in question ('or, if later, at the time specified for this purpose in the notice').[255] The Secretary of State may by notice extend the effects of the original TPIM notice 'for a period of one year beginning when [it] would otherwise expire', though only if Conditions A, C and D (outlined above) are met, and only on one occasion.[256] In any event, during the period that a TPIM notice is in force, the Secretary of State 'must keep under review whether conditions C and D are met'[257]—albeit that the Act fails to specify the precise nature or form of this review. This is in addition to the Secretary of State's duty to provide quarterly reports on the exercise of powers under the Act, as well as ongoing (annual) review of the Act by the IRTL.[258] And finally, the Act stipulated that the Secretary of State's TPIM powers would 'expire at the end of 5 years beginning with the day on which [the] Act is passed', unless postponed by statutory instrument, following consultation with the IRTL, the Investigatory Powers Commissioner, and the Director-General of the Security Service'. One such postponement was effected in 2016, which

[247] ibid sch 2, para 3(1).
[248] ibid s 6(3).
[249] ibid s 6(6).
[250] ibid s 6(4).
[251] ibid ss 8-9.
[252] ibid ss 9(1), 9(2).
[253] ibid s 9(4).
[254] ibid s 9(5).
[255] ibid s 5(1).
[256] ibid s 5(2)-(3).
[257] ibid s 11.
[258] ibid s 20.

stipulated that the provisions would expire—unless extended further, as seems highly probable at the time of writing—on 31 December 2021.[259]

Two issues of ongoing significance ought to be noted at this point. Firstly, in-keeping with the 'investigative' rationale of TPIMs—and the priority ostensibly accorded, in turn, to securing criminal convictions of those suspected of involvement in terrorism—the Act requires the Secretary of State, before seeking the court's permission to impose restrictions, to consult 'the chief officer of the appropriate police force' specifically as to 'whether there is evidence available that could realistically be used for prosecuting the individual for an offence relating to terrorism'.[260] Thereafter, the chief officer must 'secure that the investigation of the individual's conduct, with a view to a prosecution of the individual for [such an offence], is kept under review throughout the period the TPIM notice is in force'.[261] And yet, TPIMs can scarcely be said to have had any real impact in this respect. In 2014, the IRTL reported that 'TPIMs appear to be no more successful as investigative measures than were control orders'.[262] An inquiry by the JCHR in 2013-14 notably 'failed to find any evidence that TPIMs have led in practice to any more criminal prosecutions of terrorist suspects'; the Committee considered that this in fact confirmed its previous concerns that 'the replacement for control orders were not "investigative" in any meaningful sense'.[263] Indeed, similar criticisms have since been made more recently by the current IRTL, Jonathan Hall, who, in 2020, noted that '[the title 'terrorism prevention and investigation measures'] is something of a misnomer: no measures are imposed specifically for the purpose of investigation'.[264] One reason for this, Helen Fenwick has suggested, is that the dual purposes of 'prevention' and 'investigation' are fundamentally at odds, and so have the effect of 'obscur[ing] the basis for deploying measures such as TPIMs'.[265] In any event, that TPIMs are seemingly incapable of fulfilling (one of) their core functions undermines another of the key bases on which reform of the control order regime was originally sold by the Coalition Government—that is, in addition to the (equally broken) promise on ending 'forced relocation', as noted above—giving yet further cause for concern as to whether TPIMs can in reality be seen to have improved upon its predecessor.

The second issue—which perhaps is directly related to, or indeed a possible explanation for, the first—is that of the very limited use of TPIMs generally in the several years that they have been available within the domestic counter-terrorism framework. On one hand, this might in fact give credence to the perception, fundamentally, that TPIMs are 'more rights-compliant than control orders', it appearing to suggest that, in practice, restrictions have

[259] Terrorism Prevention and Investigation Measures Act 2011 (Continuation) Order, SI 2016/1166.
[260] TPIMA, s 10.
[261] ibid s 10(5).
[262] David Anderson, *Terrorism Prevention and Investigation Measures in 2013: Second Report of the Independent Reviewer on the Operation of the Terrorism Prevention and Investigation Measures Act 2011* (2014) 3.
[263] Joint Committee on Human Rights, *Post-Legislative Scrutiny: Terrorism Prevention and Investigation Measures Act 2011* (2013-14, HL 113, HC 1014) [35]. The Committee's concerns in this respect were previously outlined in its pre-legislative scrutiny report of the then-TPIM Bill: Joint Committee on Human Rights, *Legislative Scrutiny: Terrorism Prevention and Investigation Measures Bill* (2010-12, HL 180, HC 1432) [1.10]-[1.15].
[264] Jonathan Hall, *The Terrorism Acts in 2018: Report of the Independent Reviewer of Terrorism Legislation on the Operation of the Terrorism Acts 2000 and 2006* (2020) [8.4].
[265] Helen Fenwick, 'Redefining the Role of TPIMs in Combatting "Home-Grown" Terrorism Within the Widening Counter-Terror Framework' (2015) EHRLR 41, 56.

generally been imposed more sparingly, as a measure of last resort, than under the previous regime. The number of TPIM notices in force at any one time has been consistently few—only occasionally reaching double figures. For instance, in 2015, the IRTL reported that up until the previous year a total of 10 TPIM notices had been imposed by the Secretary of State, nine of which in fact related to those (British citizens) transferred from control orders in early 2012, the other relating to (at that point) 'the only foreign national to have been subject to the regime', served in October 2012.[266] Although at one stage it appeared that 'TPIMs may be withering on the vine as a counter-terrorism tool of practical utility',[267] more recently there has been a reasonably consistent number of TPIM notices in force (as reported by the IRTL) at any one time: six, as of 31 August 2016;[268] six, again, as of 31 August 2017;[269] and five, as of 30 November 2018.[270]

On the other hand, the paucity of TPIMs can perhaps be explained by the relative and increasing prominence within the contemporary counter-terrorism framework of other preventive measures, such as deportation and 'temporary exclusion' of suspected terrorists,[271] deprivation of citizenship,[272] and indeed prosecution itself—albeit prosecution which does not result from the use of TPIMs, per se. It is in this sense that the use of liberty-depriving, control-order-type preventive measures appears, somewhat ironically, to have come full circle: the contemporary counter-terrorism impetus is seemingly one in which deportation and expulsion of suspected terrorists (once again) take centre stage, as in the early months and years of the UK's post-9/11 response. And this is notwithstanding, crucially, the various questions and issues which, in any event, continue to surround the efficacy of (merely) 'exporting' or 'displacing' the terrorist threat as a primary means of diminishing it.[273] Of particular significance, moreover, is what this perhaps says of the role of the HRA and human rights norms more generally, particularly at *this* (third) stage of the development of a modern era of 'executive detention' in the UK. For, as Paul Scott notes:

> Alongside the tense dialectical interplay of domestic and international legal regimes at the point of intersection in the Human Rights Act, which has influenced both the emergence of TPIMs as the most flagship counter-terrorism measure and the location of the line which TPIMs must walk in trading off the needs of security and those of liberty, the UK's response to the threat of terrorism is therefore subject to a second evolutionary force. The changing foreign policy environment in part precipitated by the UK's foreign misadventures—the invasions of Afghanistan [in 2001] and, more importantly, Iraq [in 2003]—has in that way doubled back upon itself, coming now to influence the domestic aspect of the state's response to threats to its security.[274]

[266] David Anderson, *Terrorism Prevention and Investigation Measures in 2014: Third Report of the Independent Reviewer on the Operation of the Terrorism Prevention and Investigation Measures Act 2011* (2015) [2.3].
[267] JCHR, *Post-Legislative Scrutiny* (n 263) [80].
[268] HM Government, *Memorandum to the Home Office Affairs Committee Post-Legislative Scrutiny of the Terrorism Prevention and Investigation Measures Act 2011* (Cm 9348, 2016) [37].
[269] Max Hill, *The Terrorism Acts in 2017: Report of the Independent Review of Terrorism Legislation on the Operation of the Terrorism Acts 2000 and 2006, the Terrorism Prevention and Investigation Measures Act 2011, and the Terrorist Asset Freezing etc Act 2010* (2018) [5.8].
[270] Hall (n 264) [8.8].
[271] See, eg, CTSA, pt 1.
[272] See, eg, *R (on the application of Begum) v Secretary of State for the Home Department* [2021] UKSC 7.
[273] See, eg, Newton Report (n 81).
[274] Scott (n 149) 32.

In other words, the operation of the HRA was very clearly brought to bear on the *rise* of the TPIM regime, but there is little evidence to suggest that it has, of itself, done very much to bring about that regime's apparent fall.

B. Reform of TPIMs: The Counter-Terrorism and Sentencing Bill 2020

Indeed, recent proposals to radically expand the TPIMs regime perhaps suggest that there is now a further stage to the development of the story explored in this chapter, so to speak, in which the role of the HRA—and the continuing imperative of rights-protection more generally—can also be further examined (if only briefly for present purposes). It ought to be noted at this point that these proposals have emerged in the light of the 'substantial' threat of terrorism faced by the UK in recent years, and indeed currently (meaning an attack is 'likely');[275] there have been a number of terrorist attacks resulting in death and serious injury to members of the British public, including, for instance, at Fishmongers' Hall, near London Bridge, in November 2019, and in Streatham, Greater London, in February 2020. The Counter-Terrorism and Sentencing Bill 2020—which at the time of writing is currently pending Royal Assent—contains several significant reforms to the TPIMs regime, both substantive and procedural in nature. Notably, the Bill proposes to *reduce* the threshold condition as to determining 'involvement in terrorism-related activity' (Condition A), that is, from 'the balance of probabilities' (to which the threshold was in fact raised in 2015) to the much lower standard of 'reasonable suspicion'.[276] Moreover, the Bill proposes to remove the (maximum) 2-year time limit on the duration of TPIMs, rather permitting the Secretary of State, effectively, to impose *indefinite* restrictions on liberty.[277] 'Overnight' residence measures, currently involving curfews presumably not exceeding 10 to 12 hours, are also to be extended.[278]

Without doubt, the effect of these reforms would be to bring TPIMs closer to the previous (non-derogating) control order regime,[279] including, it appears, by embracing even the more contentious elements of that regime (especially in regards to the impact on the liberty of the affected individual).[280] Notably, the view of the former IRTL, Lord Carlile, is that it is 'sensible' that 'the bill proposes that TPIMs follow the example of control orders', for reasons including (that is, in respect of plans to extend the maximum duration of a TPIM notice) that '[t]he focus will shift from arbitrary time limits to necessity'.[281] In Parliament, Lord Carlile noted that, in fact, control orders 'worked well; they were supported by the courts; the standard of proof was adequate; they were justiciable', and so their effective

[275] MI5, 'Threat Levels' <https://www.mi5.gov.uk/threat-levels> accessed 3 March 2021.
[276] Counter-Terrorism and Sentencing HC Bill (2019-21) cl 37.
[277] ibid cl 38.
[278] ibid cl 40.
[279] Indeed, the UK Government has conceded as much: Ministry of Justice / Home Office, *Counter-Terrorism and Sentencing Bill 2020: ECHR Memorandum* (21 May 2020) <https://publications.parliament.uk/pa/bills/cbill/58-01/0129/ECHR%20Memorandum%20-%20Counter-Terrorism%20and%20Sentencing%20Bill%202020.pdf> accessed 3 March 2021 [52].
[280] See, eg, House of Lords Select Committee on the Constitution, *Counter-Terrorism and Sentencing Bill* (2019-21, HL 134) [13]: 'The revised regime for [TPIMs] represents a substantial interference with the liberty of those subject to them.'
[281] *The Times* (9 July 2020).

return (albeit that the 'TPIMs' moniker is retained) 'is correct'.[282] And while, interestingly, Lord Carlile's successor as IRTL, (now) Lord Anderson, also intimated his support for TPIMs generally—accepting, for instance, that 'they are unfortunate necessities for a small number of dangerous individuals who cannot be detained for long periods under criminal investigation … and who cannot be placed on trial or convicted'—this came with a pointed comment as to whether, in fact, 'there is a better balance to be struck consistent with the enhanced public protection that the Bill aims to provide'.[283] Lord Anderson noted that the suggestions of the current IRTL, Jonathan Hall, might achieve this, including 'an upper limit in excess of two years and the retention of the current ['balance of probabilities'] standard of proof, if not in all cases then at least beyond the initial period, which would take care of any valid concerns there may be about urgent cases'.[284] Indeed, as Lord Anderson also suggested,[285] it is of particular note that, consistent with evidence submitted to the House of Commons Public Bill Committee by Assistant Chief Constable Tim Jacques (Deputy Senior National Co-ordinator for Counter-Terrorism Policing), the Government concedes that 'there has not been an occasion on which the security services wanted to give a TPIM but could not do so because of the [current] burden of proof'.[286]

The fact of the matter is that, although replicating the very excesses of the control order regime which TPIMs were fundamentally designed to redress, at the heart of this manoeuvre is the fact that these excesses were found by the courts, in the various control order litigation discussed in Section III, above, to be compatible with the ECHR. The joint Ministry of Justice / Home Office ECHR Memorandum on the Counter-Terrorism and Sentencing Bill emphasises this point (and reiterates the Government's endorsement of the Convention-compatibility of the new TPIMs regime): it is noted that '[t]he enabling powers in the [control order] legislation were not found to be incompatible with ECHR rights – although, in a number of cases, obligations imposed in *individual* cases were found to be incompatible', and so '[t]he case law in this context provides guidance as to the limits of the measures that may be imposed and the factors the Secretary of State must take into account'.[287] For instance, on the extension of 'overnight residence' measures, the Memorandum also notes that '[t]he principle of imposing a curfew on an individual under civil preventative measures does not therefore breach Article 5 and there are protections in place to ensure that measures do not individually or cumulatively amount to a deprivation of liberty'.[288] It is striking, however, that these "protections" are said to entail '[the] duty on the Secretary of State (under section 6 of the [HRA]) to act compatibly with the Convention rights in determining the length of the curfew and any other measures to be imposed under a TPIM notice – taking into account the relevant case law', as well as the Secretary of State's obligation (under the TPIM Act) 'not to impose measures unless they are "necessary", and … to keep the necessity of the

[282] HL Deb 21 September 2020, vol 805, col 1642.
[283] ibid col 1638.
[284] ibid col 1638; Jonathan Hall, 'Note on Counter-Terrorism and Sentencing Bill: TPIM Reforms (1)' <https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2020/06/IRTL-TPIM-1-Note-1.pdf> accessed 3 March 2021.
[285] ibid col 1637.
[286] HC Deb 25 June 2020, vol 677, col 2093 (Chris Philp).
[287] Ministry of Justice / Home Office (n 279) [52].
[288] ibid [67].

TPIM notice and each measure in it under review'.[289] Indeed, it is one thing that the Secretary of State must act compatibly with the Convention rights, taking into account the relevant (control order) case law, and in doing so remain cognisant of the ongoing need to justify the necessity of the relevant measures; it is quite another that the 'compatibility' of such measures, especially in regards to the right to liberty and security under art. 5 of the ECHR, depends entirely on the increasingly nebulous and legalistic distinction between the 'deprivation' and the mere 'restriction' of that right. For if the lessons of the control order litigation are to be remembered, so 'overly restrained' was the interpretation of the former which the courts were eventually drawn into accepting that the Government was effectively permitted to orchestrate a scheme of purportedly '*non*-derogating' preventive measures on the basis of 'a heavily attenuated version of article 5'.[290] The new TPIMs regime will no doubt reopen the debate as to the upper legal limits, within the HRA/ECHR system, of counter-terrorism 'restrictions' of liberty.

V. CONCLUSION

There are a number of (compelling) reasons to be sceptical about whether the various stages of the development of a modern era of 'executive detention' in the UK can be seen to represent a 'vindication' of the HRA, and of the contemporary human rights paradigm more generally.[291] Of course, the system of human rights-protection under the HRA did much, ultimately, to provide the courts with the necessary tools to wrest the UK Government's scheme of indefinite detention of foreign terrorist suspects from its immigration law footing in *Belmarsh*. Rightly so: that footing was always a dubious one, purporting to ground an emergency counter-terrorism strategy which 'sought to distinguish sharply between neighbor [sic] and foreigner, denoting them naively as friend and foe'.[292] And clearly, at least on the face of things, the evolution of control orders into the analogous TPIMs was the product of a desire on the part of the then Coalition Government to cultivate a distinctly rights-compliant approach to counter-terrorism deprivation of liberty—albeit that the courts had by this point endorsed the Convention-compatibility of effective house arrest under the ostensibly 'non-derogating' control order regime. Yet, perhaps the most convincing aspect of contemporary developments in this area is that which shows the human rights paradigm as having, in fact, operated as an *obscuring* (as opposed to *consolidating*) force in marshalling the constitutional position of (counter-terrorism) deprivation of liberty, radically narrowing the terms of the debate, and cultivating, above all, a law-of-diminishing-returns dynamic. That is, each iteration of the various measures explored in this chapter purports to improve upon the human rights situation of that which came before, all the while managing, fundamentally, to continue to ground egregious deprivations of liberty outwith the ordinary processes and procedural safeguards of the criminal justice system.

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[289] ibid [67].
[290] Fenwick and Phillipson, 'Covert Derogations' (n 215) 886.
[291] cf Fenwick (n 17).
[292] Clive Walker, 'Keeping Control of Terrorists Without Losing Control of Constitutionalism' (2007) 59(5) Stan L Rev 1395, 1407.

Recently, and notably, there appears to have been some reflection—indeed resistance—amongst the senior judiciary specifically as to the extent to which the common law should be aligned with the concept of 'deprivation of liberty'. For instance, in the recent case of *R (on the application of Jalloh) v Secretary of State for the Home Department*,[293] then President of the Supreme Court Lady Hale noted that, in fact, '[t]he right to physical liberty was highly prized and protected by the common law *long before* the United Kingdom became party to the [ECHR]'.[294] It was said that the ECtHR's 'multi-factorial approach' in distinguishing between 'deprivation' and 'restriction' of liberty 'is very different from the approach of the common law to imprisonment',[295] and that there is, in light of this, 'no need for the common law to draw such a distinction and every reason for the common law to continue to protect those whom it has protected for centuries against unlawful imprisonment, whether by the State or private persons'.[296] Whilst clearly this can be seen to bring renewed relevance to debates of the kind demonstrated in *Belmarsh*, that is, involving potentially competing visions for the position and protection of 'liberty' within the constitution, over a not insignificant period of two decades the centrality of the HRA/ECHR paradigm has nevertheless seen the increasingly nebulous concept of 'deprivation of liberty' entrenched as the guiding principle by which those debates are to be settled. As a consequence, measures involving, for instance, 12-hour curfews and forced relocation (up to 200 miles from one's family and home life), soon to be subject only to the existence of 'reasonable grounds for suspecting' an individual's involvement in 'terrorism-related activity' (widely defined), have been judicially sanctioned under the HRA, and thus allowed to take root as a permanent feature of the contemporary counter-terrorism framework. The key argument of this chapter, however, is not that the HRA is to be, or must be, blamed for all the ills of the UK's post-9/11 counter-terrorism response, whose mark the contemporary framework can be seen, clearly, to continue to bear. Rather, it is to highlight the enduring relevance of the 'democratic sceptic' scholarship which did so much at key points within the various developments explored in this chapter to provide a necessary reminder that, in the case of the HRA and the protection of human rights, all that glitters is not gold.

[293] [2020] UKSC 4, [2020] 2 WLR 418.
[294] ibid [1] (emphasis added).
[295] ibid [29].
[296] ibid [33].

3

Deprivation of Privacy

I. INTRODUCTION

The UK's contemporary response to the threat of terrorism has been described as having above all involved 'a very significant ratcheting up of the state's coercive powers in terms of the criminal law, police powers, and extraordinary 'pre-emptive' measures'.[1] Among the measures at the forefront of this expansion of the state's coercive powers are those whose effect is to deprive an individual (or, indeed, potentially a *vast* number of individuals) of their privacy. This chapter explores two 'categories' (broadly speaking) of such measures, such that, it is submitted, the broader constitutional implications of counter-terrorism deprivation of privacy can be convincingly located within the various contemporary legal developments manifest in those contexts.

The first category comprises those measures of police 'stop-and-search' which, crucially, dispense with grounds for reasonable suspicion as an essential procedural condition to their use. The chapter explores two sets of powers within this category, which, as an addition to the broad range of existing police powers of stop-and-search,[2] have long been regarded in the UK as a necessary tool for the prevention of terrorist acts.[3] They are: first, s. 44 (now s. 47A)[4] of the Terrorism Act 2000 (TACT), which permits suspicionless stop-and-search within the boundaries of so-called 'specified areas'—including, for instance, the whole or part of the Metropolitan Police District, the City of London, and Northern Ireland;[5] and secondly, Schedule 7 to the 2000 Act, which makes available a range of suspicionless stop-and-search powers at 'a [UK] port or in the border area'.[6] The co-existence of these measures within the

[1] Helen Fenwick and Gavin Phillipson, 'UK Counter-Terror Law Post-9/11: Initial Acceptance of Extraordinary Measures and the Partial Return of Human Rights Norms' in Victor V Ramraj, Michael Hor, Kent Roach and George Williams (eds), *Global Anti-Terrorism Law and Policy* (2nd edn, CUP 2012) 481.

[2] The main police powers of stop-and-search derive from the Police and Criminal Evidence Act 1984 (PACE), s 1. Further powers of stop-and-search available to the police are listed in PACE Code A, and include (but are not limited to): Firearms Act 1968, s 47; Misuse of Drugs Act 1971, s 23; Criminal Justice Act 1988, s 139B.

[3] See, eg, Lord Lloyd, *Inquiry into Legislation Against Terrorism* (Cm 3420, 1996) ch 10.

[4] Protection of Freedoms Act 2012, s 58.

[5] TACT, s 44(4) (as originally enacted); TACT, sch 6B.

[6] TACT, sch 7, para (2)(2)(a). 'Port' is defined under TACT, sch 7, para 1(2) as including 'an airport and a hoverport', whereas 'in the border area' is defined under TACT, sch 7, para 4 as including both '[a] place in Northern Ireland … no more than one mile from the border between Northern Ireland and the Republic of Ireland', and 'the first place in Northern

UK's contemporary counter-terrorism framework ultimately provides a crucial point of comparison. Section 44/47A and Schedule 7 share several key characteristics, not least the wide discretion that they each confer on executive actors—again, unconstrained by the requirement of reasonable suspicion. Although, it forms a key part of that comparison that Schedule 7 in particular has been described as 'amongst the strongest of all police powers',[7] and, as such, of the two measures, is considered to go much further both in terms of the nature and scope of intrusions of privacy for which it provides legal authority. Schedule 7 authorises not only to the stopping[8] and questioning[9] of persons for the (by any measure vague and ill-defined) purpose of determining whether they '*appear*' to be concerned in the commission, preparation or instigation of terrorist acts,[10] but also to the searching[11] and detention[12] of those persons, their property and/or their vehicles.

Within the second category of measures, two further sets of powers are considered, namely those relating to the interception of communications and to the collection of and access to communications data. These powers, in their modern form, are made available under the Investigatory Powers Act 2016 (IPA) both in so-called 'targeted' and, crucially, 'bulk' form. As such, it is in this context, that of state surveillance of communications, that there is great potential for invasions of privacy, especially in the case of the latter: 'the defining feature of a bulk power,' it has been written, 'is that it allows public authorities (in particular, law enforcement and intelligence) to have access for specified purposes to large quantities of data, *a significant portion of which is not associated with current targets*'.[13] The key question, therefore, is whether, and if so to what extent, the relevant legal framework is capable of properly safeguarding against these incidental or collateral invasions of privacy.

The chapter unfolds as follows. Section II outlines the legal and constitutional arrangements relevant to the protection of privacy in the UK, noting, in particular, the (significant) extent to which the indeterminacy of the nature and scope of the freedoms necessarily captured by the concept of privacy is brought to bear on (the complexity of) those arrangements. Indeed, as argued in that section, many of the legal and constitutional implications of the protection of privacy flow fundamentally from this issue. Turning, then, to the first category of counter-terrorism measures noted above, Section III outlines the provisions of s. 44/47A and Schedule 7 before exploring two key legal challenges to those provisions: respectively, *R (on the application of Gillan and another) v Commissioner of Police for the Metropolis and another*,[14] and the more recent case of *Beghal v DPP*.[15] In particular, as discussed in that section, it speaks to a number of issues of broader constitutional significance that the outcomes of both cases, brought within the domestic

Ireland at which [a train travelling from the Republic of Ireland to Northern Ireland] stops for the purpose of allowing passengers to leave'.

[7] David Anderson, *The Terrorism Acts in 2011: Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006* (2012) [9.3].

[8] TACT, sch 7, para 6(1)(a).

[9] ibid sch 7, para 2(1).

[10] ibid sch 7, para 2(1) (emphasis added).

[11] ibid sch 7, paras 7-8.

[12] ibid sch 7, para 6(1)(b).

[13] David Anderson, *Report of the Bulk Powers Review* (Cm 9326, 2016) [1.5] (emphasis in original).

[14] [2006] UKHL 12, [2006] 2 AC 307.

[15] [2015] UKSC 49, [2016] AC 88.

courts, were subsequently overturned by the European Court of Human Rights (ECtHR). Indeed, a similar dynamic can be seen to have prevailed in the context of the contemporary legal framework of state surveillance of communications, which is explored in Section IV. That section outlines the various ways in which the enactment of the IPA, and the various mechanisms of oversight with which that new legislative framework is now populated, reflects the impetus of the last years increasingly towards greater protection of privacy specifically in the context of 'bulk' or 'mass' surveillance practices. It then considers the impact of recent key developments in the ECtHR's jurisprudence on the right to private and family life (under art. 8 of the European Convention), culminating in the ruling in *Big Brother Watch v United Kingdom*,[16] in which the UK's contemporary 'bulk' surveillance practices were found to have violated that right.

Among the key themes that are shown to emerge in this chapter is that of the apparent contingency of the broader constitutional position of privacy along two prominent lines. Firstly, the legal protection of privacy is shown to be contingent, above all, on art. 8 of the ECHR, that provision being directly enforceable in the domestic courts by virtue of the Human Rights Act 1998 (HRA). Notably absent from the broader constitutional 'picture' of the protection of privacy, consequently—that is, in any meaningful sense—is the influence of the common law, and of the fundamental constitutional principles that the domestic courts have, increasingly in recent years, sought to instrumentalise. It thus raises a number of questions of fundamental constitutional import that the application and enforcement by the domestic courts particularly of the test of 'lawfulness' under art. 8(2) of the ECHR has been found in the contexts of each of the specific counter-terrorism measures explored in this chapter to be inconsistent with the Strasbourg Court's jurisprudence. That the incorporation of art. 8 by virtue of the HRA has done much to leverage the protection of privacy at the domestic level is clear (as the discussion in Section II shows). Indeed, as has been noted recently in the UK Supreme Court, reception of a right to privacy in the domestic legal system 'has been relatively recent and almost entirely due to the incorporation into domestic law of the [ECHR]'.[17] Not only, therefore, does the centrality of the ECHR (and, by extension, the ECtHR) in the broader constitutional 'picture' of the protection of privacy in the UK highlight an ever-increasing chasm between the common law's capacity to protect 'fundamental' rights and that of the ECHR: it also brings into sharp focus precisely what is at stake in the light of contemporary and ongoing debates about the future of the HRA and the UK's membership of the Council of Europe.[18]

Secondly, the constitutional position of privacy appears to be contingent on the conceptualisation of privacy, increasingly both at the domestic and supranational levels, in overwhelmingly *formal* or *procedural* (as opposed to *substantive*) terms. The decisions of the domestic courts in *Gillan* and *Beghal* typify this approach, such that they elide any real consideration of the substantive dimensions of the deprivation of privacy resulting from

[16] [2018] ECHR 722.

[17] *R (Catt) v Association of Chief Police Officers of England, Wales and Northern Ireland and another* [2015] UKSC 9, [2015] 1 AC 1065 [2] (Lord Sumption).

[18] On which, see, generally, eg, Conor Gearty, *On Fantasy Island: Britain, Europe, and Human Rights* (OUP 2016). See, also, eg, Helen Fenwick and Roger Masterman, 'The Conservative Project to 'Break the Link between British Courts and Strasbourg': Rhetoric or Reality?' (2017) 80(6) MLR 1111.

suspicionless stop-and-search, focusing instead on the requirement that interferences with art. 8 be 'in accordance with the law'. Moreover, the ECtHR's developing art. 8 jurisprudence can to seen to hang increasingly on the existence and adequacy of procedural safeguards (again, under the 'in accordance with the law' limb of art. 8), of which the ruling in *Big Brother Watch* stands as an important, and for present purposes supremely relevant, recent example. Contingency along this axis in particular speaks to a broader theme for which these issues perhaps contribute a compelling evidence base, concerning the (in)compatibility of common law constitutionalism, as a conceptual grounding for constitutional position of privacy, and the 'legal' constitutionalism of (what might be described as the inherently '*legal*' order of) the ECHR.

II. THE LEGAL PROTECTION OF (THE RIGHT TO) PRIVACY IN THE U.K.

Privacy is a deeply contested concept. Much flows fundamentally from what may only be described as a paradox at the heart of privacy: that although privacy is 'a concept rich in meanings, and it is often highly valued, particularly in its absence', it is nevertheless 'famously difficult to define'.[19] In other words, the concept of privacy invariably generates consensus that the values it embodies are, in fact, essential values which speak more broadly to the essential conditions of the political freedom of the individual—for instance, securing to the individual 'the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others'.[20] And yet, the indeterminacy of the nature and scope of the freedom(s) necessarily captured by the concept of privacy has the effect of obfuscating its essential characteristics in ways that are brought to bear, crucially, on the capacity of the law and legal norms to protect those characteristics.

These issues are certainly reflected in the legal protection of the right to privacy, which is enshrined in several international human rights frameworks.[21] The right to privacy has been described as 'essential to autonomy and the protection of human dignity' and, indeed, 'the foundation upon which many other human rights are built'.[22] Moreover, it is said that '[t]he rules that protect privacy give us the ability to assert our rights in the face of significant power imbalances', and as such, 'privacy is an essential way we seek to protect ourselves and society against arbitrary and unjustified use of power, by reducing what can be known about us and done to us, while protecting us from others who may wish to exert control'.[23] Yet, in-keeping with the theme of paradox sketched out above, it has also been suggested that 'the most striking thing about the right to privacy is that nobody seems to have any very clear idea what it is'.[24] It stands to reason, also, that modern ideas as to the precise content of any such

[19] Leslie P Francis and John G Francis, *Privacy: What Everyone Needs to Know* (OUP 2017).

[20] Samuel Warren and Louis Brandeis, 'The Right to Privacy' (1890) 4 Harv L Rev 193.

[21] See, eg, Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) art 12; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 17; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 8.

[22] Privacy International, 'What is Privacy?' <https://privacyinternational.org/explainer/56/what-privacy> accessed 13 September 2019.

[23] ibid.

[24] Judith Jarvis Thomson, 'The Right to Privacy' (1975) 4(4) Phil & Pub Aff 295, 295.

right to privacy prove even *more* elusive. For significant advances in technology have expanded exponentially the fora in which the right to privacy is increasingly, and necessarily, regarded as a matter of utmost concern. And thus one of the key questions as to the protection of the right to privacy in the modern day concerns the extent to which the increasingly sophisticated means by which privacy is deprived by the state can realistically be captured by the provisions of human rights instruments drafted long before those means could ever have been imagined. For, what does it mean to enjoy a right to privacy in an age where so much of one's private life is recorded 'on-line', and is reduced to modicums such as 'data' and 'meta-data', control over the protection of which has proven limited, at best?[25]

A. The Protection of Privacy at Common Law

One of the key issues surrounding the legal protection of privacy in the UK is that of the marked (and historic) absence from the common law of a general right to privacy.[26] The protection of privacy in this context has instead relied, above all, on the ad hoc development of discrete areas of private law, most notably those involving equitable action of 'breach of confidence',[27] and action grounded in torts relating to public disclosure of information held by the police,[28] 'misuse of private information'[29] and, more recently, 'invasion of privacy'.[30] Although, much of this development has in recent years been powered by the increasing 'convergence between *public law* concepts and reasoning, and private law remedial mechanisms'.[31] In particular, the courts' enforcement of the right to privacy under art. 8 of the ECHR in disputes between private parties can be seen to have had a marked influence on the development of common-law protection of privacy. For instance, in *A v B & C*[32] Lord Woolf CJ opined that the courts can be seen to have 'absorbed' the right protected by art. 8 into the common law, given that, as a 'public authority' under s. 6 of the HRA, which explicitly includes a court or a tribunal within the meaning of that that term,[33] the courts are prohibited from 'act[ing] in a way which is incompatible with a Convention right'.[34] The

[25] See, eg, Joint Committee on Human Rights, *The Right to Privacy (Article 8) and the Digital Revolution* (2019, HL 14, HC 122), in which it was noted that 'the internet, at times, is like the 'Wild West', when it comes to the lack of effective regulation and enforcement'.

[26] *Malone v Metropolitan Police Commissioner* [1979] EWHC 2 (Ch), [1979] 1 Ch 344; *Kaye v Robertson* [1990] EWCA Civ 21, [1991] FSR 62; *Wainwright v Home Office* [2003] UKHL 53, [2004] 2 AC 406.

[27] *Attorney-General v The Observer Ltd* [1988] UKHL 6, [1990] 1 AC 109; *Douglas v Hello! Ltd* [2003] EWHC 786 (Ch), [2003] 3 All ER 996.

[28] *R v Chief Constable of North Wales Police and others, ex parte Thorpe and another; R v Chief Constable for North Wales Police Area and others, ex parte AB and CB* [1998] EWCA Civ 486, [1999] QB 396.

[29] *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457.

[30] *PJS v News Group Newspapers Ltd* [2016] UKSC 26, [2016] AC 1081.

[31] Jelena Gligorijević, 'Privacy at the Intersection of Public Law and Private Law' [2019] PL 563 (emphasis added).

[32] [2002] EWCA Civ 337, [2003] QB 195.

[33] HRA, s 6(3)(a).

[34] *A v B & C* (n 32) [4]. See, also, *McKennitt v Ash* [2006] EWCA Civ 1714, [2008] QB 73 [11] (Buxton LJ): '[I]n order to find the rules of the English law of breach of confidence we now have to look in the jurisprudence of Arts 8 and 10. Those articles are now not merely of persuasive or parallel effect but … are the very content of the domestic tort that the English court has to enforce.'

result, it was said, had been to give 'a new strength and breadth' to action grounded in those aforementioned causes in private law so as to '*accommodate* the requirements of [art. 8]'.[35]

Yet, notwithstanding the domestic courts' apparent embrace of the *values* captured by art. 8[36]—the so-called 'horizontal' enforcement of the Convention rights—significant gaps in the protection of privacy in the contemporary common law constitution can be seen, ultimately, to have prevailed. That is, those gaps have endured the further, recent development of an explicit body of legal reasoning in the domestic courts that recognises (and, more importantly, seeks to instrumentalise) a repository of 'common law constitutional rights',[37] widely considered to represent something of a contemporary 'renaissance' or 'resurgence' in common law constitutionalism.[38] Whilst in recent years the courts have demonstrably made clear strides in this area, not least with regards to the 'constitutional right of access to the courts',[39] the development of the common law has been far less forthcoming on the issue of privacy, per se.[40] As Kirsty Hughes notes, not only does this reflect the common law's 'historic rejection' of a right to privacy, rather the courts continue, presently, to show a 'continuing *disregard* for a right to privacy'.[41] A key problem, it seems, is that simply *because* art. 8 of the ECHR has done much to leverage the protection of privacy in the domestic courts, where, plainly, that protection had previously been inadequate, litigants are invariably disinclined to look beyond art. 8 as the most effective grounds for challenging the lawfulness of invasions of privacy. It is, as Hughes suggests, 'far easier for counsel to turn to Article 8 ECHR and the courts do not appear to be encouraging them to do otherwise'.[42] And as such, '[t]he lack of clarity as to the capacity and direction of the common law means that we may well be waiting for Godot in looking for a case in which non-informational aspects of privacy are litigated using both the common law and Article 8 ECHR'.[43]

A key theme in understanding the courts' historic, and indeed ongoing, resistance to the development of a comprehensive right to privacy, per se, is that of the 'quite remarkable, and rather uncomfortable, flexibility' of that concept, and the difficulties that follow, therefore, in isolating precisely 'what values or interests an ethical right of privacy would seek to protect and, consequently, what form the right should take'.[44] This is evidenced in the recent Court of

[35] *A v B & C* (n 32) [4] (emphasis added).

[36] See, eg, Ian Leigh and Roger Masterman, *Making Rights Real: The Human Rights Act in its First Decade* (Hart Publishing 2008) 248-52.

[37] See, eg, *Osborn v The Parole Board* [2013] UKSC 61, [2014] 1 AC 1115; *Kennedy v The Charity Commission* [2014] UKSC 20, [2015] 1 AC 455; *A v BBC* [2014] UKSC 25, [2015] 1 AC 588. See, generally, Mark Elliott and Kirsty Hughes (eds), *Common Law Constitutional Rights* (Hart Publishing 2020).

[38] See, eg, Lady Hale, 'UK Constitutionalism on the March?' (Constitutional and Administrative Law Bar Association Conference, 12 July 2014); Roger Masterman and Se-shauna Wheatle, 'A Common Law Resurgence in Rights Protection?' (2015) 1 EHRLR 57; Mark Elliott, 'Beyond the European Convention on Human Rights: Human Rights and the Common Law' (2015) 68 CLP 85; Paul Bowen, 'Does the Renaissance of Common Law Rights Mean that the Human Rights Act 1998 is Now Unnecessary?' (2016) 4 EHRLR 361.

[39] *R v Lord Chancellor, ex p Witham* [1998] QB 575; *HM Treasury v Ahmed* [2010] UKSC 2, [2010] 2 WLR 378; *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409.

[40] See, eg, Kirsty Hughes, 'A Common Law Constitutional Right to Privacy – Waiting for Godot?' in Mark Elliott and Kirsty Hughes (eds), *Common Law Constitutional Rights* (Hart Publishing 2020).

[41] ibid 94 (emphasis added).

[42] ibid 112.

[43] ibid 112.

[44] NW Barber, 'A Right to Privacy?' [2003] PL 602, 604.

Appeal case of *ZXC v Bloomberg L.P.*,[45] in which Simon LJ suggested that the nebulousness of the concept of privacy owes, fundamentally, to the variability of 'the circumstances in which there may be interference with a right to personal autonomy', as well as the challenges posed by 'changes in societal attitudes and developments in technology' for articulating such a right.[46] The opinion of Sir Robert Megarry VC in *Malone v Metropolitan Police Commissioner*[47] epitomises the courts' more general and long-standing reluctance to move beyond simply reiterating the conceptual ambiguity of privacy as the primary reason for its non-existence in the common law, it having been noted in that case that '[t]he extension of existing laws and principles is one thing, the creation of an altogether new right is another'; fundamentally, '[n]o new right in law, fully-fledged with all the appropriate safeguards, can spring from the head of a judge deciding a particular case: only Parliament can create such a right'.[48] Subsequently, in *Wainwright v Home Office*[49], Lord Hoffmann reiterated that the protection of privacy 'is an area which requires a detailed approach which can be achieved only by legislation rather than the broad brush of common law principle'.[50]

Though, of course, aspects of privacy and 'private life'—including, importantly, those which are implicated in the contexts of the measures explored in this chapter—*are* nevertheless captured within the ambit of common law constitutional principle(s). In particular, the common law's broader and historic commitment to the principle of the rule of law—of which the decision in *Entick v Carrington*[51] is widely and historically considered to represent the epitome[52]—grounds a number of attendant principles which are brought to bear on the protection of privacy in a number of important ways. This includes, for instance, the principle of legality articulated by Lord Hoffmann in *R v Secretary of State for the Home Department, ex parte Simms,*[53] which recognises that a constitutional arrangement in which unlimited legislative power is ascribed to Parliament means 'that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights'.[54] The principle of legality is thus a tool of (strict or robust) statutory interpretation that is sensitive to the apparent threat posed by Parliament's legislative supremacy over rule-of-law values and principles, and thus requires that '[f]undamental rights cannot be overridden by *general* or *ambiguous* words'. Plainly, this means that whatever power Parliament might confer on the executive to intrude upon a person's privacy (or 'private life') must be clearly defined in statute so as to militate against lawless and arbitrary infringements of such a 'fundamental' right.

The problem, however, is that the courts can scarcely be said to recognise as 'fundamental' a negative right against interference by public authorities. As such, the question of the practical influence in this area, if any, of common law values and principles,

[45] [2020] EWCA Civ 611, [2020] 3 WLR 838.
[46] ibid [51].
[47] [1979] EWHC 2 (Ch), [1979] 1 Ch 344.
[48] ibid 372.
[49] [2003] UKHL 53, [2004] 2 AC 406.
[50] ibid [33].
[51] [1765] EWHC KB J98, (1765) 19 St Tr 1030.
[52] See, eg, Adam Tomkins and Paul Scott (eds), *Entick v Carrington: 250 Years of the Rule of Law* (Hart Publishing 2015).
[53] [1999] UKHL 33, [2000] 2 AC 115.
[54] ibid 131 (Lord Hoffmann) (emphasis added).

including the principle of legality, gives rise to a broader point as to the position of the common law vis-à-vis the protection of privacy. That is, the extension of discrete areas of private law, particularly owing to the courts' embrace of the 'horizontal' effect of art. 8, has done much to accommodate the protection of privacy within the common law in the absence of a general right to privacy. And yet, it makes for an unusual state of affairs, which are shown to manifest perhaps most acutely in the context of 'state surveillance' practices (discussed in Section IV, below), whereby domestic courts can be seen to be 'more comfortable to recognise the horizontal effect of the right to privacy and to apply it in the cases only marginally related to its original content, than to use it in its primary context – namely, as a negative right meant to safeguard individuals against oppressive privacy intrusions by the state'.[55] Fundamentally, any such 'right' to privacy recognised at common law simply does not apply in any meaningful sense to the measures at the forefront of the UK's contemporary counter-terrorism response, which often involve the deprivation of privacy on a potentially industrial scale. Indeed, this maps neatly onto a theme which is perhaps true of the UK's counter-terrorism framework more broadly. For, as Paul Scott notes, it is a central theme of (certainly the evolution of) that framework that '[w]hen resistance emerges to this or that initiative of the state, that resistance is (far) more likely to be grounded in the [ECHR] than it is in the common law, with its values and principles and standards of review'.[56] In the last years, the fulcrum of that resistance in the case of privacy has been art. 8 of the ECHR. As a right to privacy actionable at a level of much greater generality than that which, if at all, is available at common law, art. 8 thus represents a—perhaps *the*—critical legal source of protection of privacy in the contemporary constitution.

B. The Protection of Privacy under Article 8 of the ECHR

Although central to the broader constitutional position of (counter-terrorism deprivation of) privacy, it is not altogether clear, however, that art. 8 of the ECHR is itself capable of providing clarity as to the nature and scope of the freedom(s) captured within the meaning of privacy or 'private life'. That article, which provides that '[e]veryone has the right to respect for his private and family life, his home and his correspondence', has been regarded in the academic literature as 'ill-defined and amorphous',[57] and 'one of the most open-ended provisions of the Convention'.[58] It was suggested by Lord Sumption in the recent UK Supreme Court case of *R (Catt) v Commissioner of Police of the Metropolis* that the right to privacy under art. 8 has in fact 'proved to be the most elastic of the rights protected by the Convention and … has for many years extended well beyond the protection of privacy in its narrower sense'.[59] Indeed, the potential for conceptual clarity is further compounded such that the ECtHR has itself on more than one occasion been given cause to remark that 'the

[55] Irena Ilic, 'Post-Brexit Limitations to Government Surveillance: Does the UK Get a Free Hand?' (2020) 25(1) Comms L 31, 34.
[56] Paul F Scott, *The National Security Constitution* (Hart Publishing 2018) 51.
[57] NA Moreham, 'The Right to Respect for Private Life in the European Convention on Human Rights: A Re-examination' (2008) 1 EHRLR 44, 45.
[58] Bernadette Rainey, Elizabeth Wicks, Clare Ovey, *Jacobs, White & Ovey: The European Convention on Human Rights* (6th edn, OUP 2014) 334.
[59] *Catt* (n 17) [3] (Lord Sumption).

concept of "private life" is a broad term not susceptible to exhaustive definition'.[60] However, Nicole Moreham's study of the Court's case law on art. 8 is particularly instructive in delineating the boundaries of art. 8, having demonstrated that, although extending 'well beyond traditional private law conceptions of privacy', a clear(er) understanding of the freedoms captured by the term 'private life' can be identified as falling broadly within 'five categories of right'.[61] They are: firstly, 'freedom from interference with physical integrity and psychological integrity';[62] secondly, 'freedom from unwanted access to and collection of information';[63] thirdly, 'freedom from serious environmental pollution';[64] fourthly, 'the right to be free to develop one's identity';[65] and fifthly, 'the right to live one's life in the manner of one's choosing'.

It suffices for present purposes to note simply that the measures of 'suspicionless stop-and-search' and 'state surveillance' explored in this chapter can be seen to implicate art. 8 at least insofar as the first and second categories of Moreham's exegesis are concerned. The ways in which the content of art. 8 is brought to bear on the compatibility of those measures is explored more fully in Sections III and IV of this chapter, respectively. Although, the key issue of note at this point is that, as one of the Convention's several 'qualified rights', an interference with the right to private and family life may be justified according to the test set out in art. 8(2). That test has two elements: that is, the relevant interference must be both 'in accordance with the law' and 'necessary in a democratic society'. In respect of the latter, a test of proportionality is applied; the ECtHR considers the extent to which, if at all, the impugned measure strikes an appropriate balance between the relevant interference that it purports to ground and the legitimate objective to which that interference is ostensibly directed. Under art. 8(2), a legitimate objective expressly includes (but is not limited to) 'the interests of national security, public safety or the economic well-being of the country'. And as the ultimate arbiter of the propriety of the balance struck in these instances, it is the Court's role to 'pay utmost attention to the principles characterising a "democratic society"'.[66]

The test of whether an interference is 'in accordance with the law' under art. 8(2) concerns not only the question of whether the impugned measure purporting to ground the interference has some basis in domestic law, but also that which has been referred to in the case law of the Strasbourg Court as the 'quality of the law'. The classic formulation of the test was given in *Sunday Times v United Kingdom*,[67] in which the Court stipulated two fundamental characteristics that the relevant legal basis need possess. The first is that 'the law must be adequately accessible', meaning that 'the citizen must be able to have an indication that is

[60] *Pretty v United Kingdom* (2002) 235 EHRR 1, para 61; *Peck v United Kingdom* (2003) 36 EHRR 719, para 57. See, also, *Niemietz v Germany* (1993) 16 EHRR 97, para 29: 'The Court does not consider it possible or necessary to attempt an exhaustive definition of the notion of "private life".'

[61] Moreham (n 57) 79.

[62] See, eg, *YF v Turkey* (2004) 39 EHRR 34; *Pretty* (n 60).

[63] See, eg, *Leander v Sweden* (1987) 9 EHRR 433; *Rotaru v Romania* (2000) 8 BHRC 449; *S and Marper v United Kingdom* (2009) 48 EHRR 50.

[64] See, eg, *Hatton and others v United Kingdom* (2003) 37 EHRR 611.

[65] See, eg, *Bensaid v United Kingdom* (2001) 33 EHRR 10; *Peck* (n 60).

[66] *Handyside v United Kingdom* (1976) 1 EHRR 737, para 49.

[67] (1979) 2 EHRR 245.

adequate in the circumstances of the legal rules applicable to a given case'.[68] Secondly, the relevant law must be 'formulated with sufficient precision to enable the citizen to regulate his conduct'—in other words, the citizen 'must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail'.[69]

However, it is a key theme of the Court's approach to determining the question of 'lawfulness' in the last decades that the test applied is one which radically expands the meaning of the term 'in accordance with the law' as articulated in *Sunday Times*. As much is illustrated in the contexts of the various measures discussed in this chapter. For, as discussed in this chapter, the Court's approach in the main has been to emphasise the need for domestic law to 'afford a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention', which, above all, requires that 'the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise'.[70] Only on this basis, then, can the relevant measure be considered 'compatible with the rule of law'.[71]

III. 'SUSPICIONLESS' STOP-AND-SEARCH

A. Suspicionless Stop-and-Search in 'Specified Areas': Section 44 (and Section 47A) of the Terrorism Act 2000

Along with powers of arrest without warrant[72] and search of premises,[73] Part V of the Terrorism Act 2000 provides for police powers relating to, in effect, two "types" of stop-and-search. The exercise of powers relating to the first "type" is conditional upon the existence of reasonable grounds for suspicion, and, as such, is relatively orthodox, comparing in many respects to powers also available to the police under s. 1 of the Police and Criminal Evidence Act 1984 and s. 23 of the Misuse of Drugs Act 1971, for instance. Thus, under s. 43 of the 2000 Act, where there are reasonable grounds for suspecting that a person is a terrorist, a police constable may stop and search that person for the purpose of discovering 'whether he has in his possession anything which may constitute evidence' to that effect[74]—that is, evidence to suggest either that the person has committed a terrorism-related offence or is 'concerned in the commission, preparation or instigation of terrorist acts'.[75] Section 43A, inserted into the 2000 Act in 2012,[76] applies to the stop-and-search of vehicles, and permits searches both of their contents and occupants for 'anything which may constitute evidence

[68] ibid para 49.
[69] ibid para 49.
[70] *Gillan and Quinton v United Kingdom* (2010) 50 EHRR 45, para 77; *Beghal v United Kingdom* [2019] ECHR 181, para 88.
[71] *Malone v United Kingdom* (1985) 7 EHRR 14, para 67. See, also, eg, *Rotaru* (n 63) para 52.
[72] TACT, s 41.
[73] ibid s 42.
[74] ibid s 43(1).
[75] ibid s 40(1).
[76] Protection of Freedoms Act 2012, s 60(3).

that the vehicle is being used for the purposes of terrorism'.[77] Equally, the constable is required by the Act to have formed reasonable grounds for suspecting that the vehicle is being so used.[78] So too, moreover, does the procedural requirement of reasonable suspicion apply to powers relating to the seizure and retention of material discovered in the course of (either of) those searches: only that which the constable 'reasonably suspects may constitute evidence that the person is a terrorist',[79] or that which he 'reasonably suspects may constitute evidence that the vehicle is being used for the purposes of terrorism'[80] may, in accordance with the Part V powers, be seized and retained for further investigation.

Until its eventual reform in 2012,[81] s. 44 provided for the second "type" of counter-terrorism stop-and-search, said to reflect an 'all-risks'[82] approach to the policing of terrorism. That section empowered a senior police officer, insofar as it was considered by him 'expedient for the prevention of acts of terrorism',[83] to authorise the stop-and-search of pedestrians and vehicles in a 'specified area' for the purpose of ascertaining the presence of 'articles of a kind which could be used in connection with terrorism'. The power to stop-and-search authorised under s. 44 was available to a police constable, crucially, '*whether or not* the constable ha[d] reasonable grounds for suspecting the presence of articles of that kind'.[84] Once given, an authorisation was valid for a maximum period of 28 days,[85] although provision was made for its renewal at the end of that period.[86] It also required the confirmation of the Home Secretary—who was to be informed 'as soon as [was] reasonably practicable', and in whom the power was vested to reduce the duration of, or to cancel altogether, the authorisation[87]—within 48 hours, after which time it ceased to have effect.[88] Its ceasing to have effect did not, however, 'affect the lawfulness of anything done in reliance on it before the end of that period'.[89] And although in the exercise of the power conferred by an authorisation a police constable was prohibited from requiring a person to 'remove any clothing in public except for headgear, footwear, an outer coat, a jacket or gloves',[90] detention of a person or vehicle was expressly permitted 'for such time as is reasonably required to permit the search to be carried out at or near the place where the person or vehicle is stopped'.[91] Section 47 made it an (imprisonable) offence to fail to comply with a stop-and-search authorised under s. 44.

Section 44 was used extensively throughout England and Wales for over a decade; suspicionless stop-and-search authorised under the provision produced tens of thousands of searches each year between 2000 and 2007, before 'balloon[ing] to 126,500 in 2007/08 and

[77] TACT, s 43A(2).
[78] ibid s 43A(1).
[79] ibid s 43(4B).
[80] ibid s 43A(3).
[81] PFA, s 61. The reforms of 'suspicionless' stop-and-search are explored further in sub-section C, below.
[82] Clive Walker, 'Neighbor Terrorism and the All-Risks Policing of Terrorism' (2009) 3 J Nat Sec L & Pol 121.
[83] TACT, s 44(3).
[84] ibid s 45(1) (emphasis added).
[85] ibid s 46(2).
[86] ibid s 46(7).
[87] ibid s 46(5)-(6).
[88] ibid s 46(4)(a).
[89] ibid s 46(4)(b).
[90] ibid s 45(3).
[91] ibid s 45(4).

210,000 in 2008/09'.[92] This serves to emphasise a broader point about what s. 44 exemplifies: that although, as Keith Ewing noted in 2010, there had been 'serious concerns' about stop-and-search powers for a number of decades,[93] not least as to the manner of their exercise, the broader impetus (particularly in the face of the contemporary terrorist threat) was to nevertheless extend those powers, while, crucially, 'beginning to dilute the statutory safeguards which must accompany their use'.[94]

The safeguards built into the framework of s. 44 operated on two levels—pertaining, that is, to what John Ip characterises as the conferral on executive actors of 'two broad discretions':

> a 'front-end discretion' of a senior police officer and the Secretary of State as to whether to make an authorisation and confirm the authorisation, and a 'back-end discretion' of an individual officer as to whom to target for a particular stop and search.[95]

However, so widely drawn were the provisions of s. 44 that each safeguard relevant to the exercise of the 'front-end discretion' proved notional at best. Throughout the lifetime of the s. 44 framework, there was no recorded instance of the Home Secretary's refusing to grant an authorisation. So-called 'specified areas' in fact included the whole of the City of London and the Metropolitan Police District,[96] while, in practice, authorisations relating to those (extensive) geographical areas were perennially renewed on a rolling 28-day basis. The cumulative effect of these failures of the safeguards built into the s. 44 framework was highlighted by the human rights advocacy group Liberty, in that 'for almost 10 years all of Greater London was designated as an area in which anyone could be stopped and searched without suspicion'.[97]

The failure of the frontloading of the statutory safeguards in ss. 44-47 to counterbalance the absence of the usual requirement of reasonable suspicion at the 'back-end' discretion is particularly critical given the obvious breadth of that discretion. Although s. 45(1)(a) confined the exercise of that discretion to a specific purpose—that of searches only in respect of 'articles of a kind which could be used in connection with terrorism'[98]—it is a convincing argument that the breadth of that formulation nonetheless 'undermines its ability to provide any meaningful limitation on the power's use'.[99] Rather, as Bowling and Marks suggest, 'the wording of s. 44 [did] not preclude the possibility of conducting searches at random'.[100] A statutory obligation to abide by the guidance set out in PACE Code A[101] also impressed upon those exercising powers of stop-and-search the need to 'take particular care not to

[92] Anderson, *The Terrorism Acts in 2011* (n 7) [8.17].
[93] See, eg, Northern Ireland (Emergency Provisions) Act 1973, s 13; Prevention of Terrorism (Temporary Provisions) Act 1989 (as amended), ss 13A-13B.
[94] KD Ewing, *Bonfire of the Liberties: New Labour, Human Rights, and the Rule of Law* (OUP 2010) 24.
[95] John Ip, 'Reform of Counterterrorism Stop and Search after Gillan v United Kingdom' (2013) 13(4) HRLR 729, 731.
[96] TACT, s 44(4)(b).
[97] Liberty, 'Section 44 Terrorism Act' <https://www.libertyhumanrights.org.uk/human-rights/justice-and-fair-trials/stop-and-search/section-44-terrorism-act> accessed 8 January 2020.
[98] Ben Bowling and Estelle Marks, 'The Rise and Fall of Suspicionless Searches' (2017) 28(1) KLJ 62, 71.
[99] Scott (n 56) 37-38.
[100] Bowling and Marks (n 98) 71.
[101] Police and Criminal Evidence Act 1984, s 66.

discriminate against members of minority ethnic groups'.[102] And yet, statistics published annually by the Ministry of Justice consistently evidenced the disproportionate use of s. 44 against those of BAME backgrounds, the consequences of which have been found to include, particularly amongst Asian males, the feeling 'as though the perception of them as inherently suspicious has become normalised'.[103]

Once an authorisation was in place, and suspicionless stop-and-search permitted in a 'specified area', any safeguard provided either by the statutory purpose articulated in s. 45(1)(a) or by the guidance set out in PACE Code A was rendered futile; police constables effectively enjoyed 'an almost limitless discretion as to who to search within the authorised area'.[104] The availability of such widely drawn and widely used powers of stop-and-search often (perhaps inevitably) resulted in their use in contexts far-removed from that of counter-terrorism, including peaceful protests,[105] and in one particularly infamous episode, at a fringe event of the 2005 Labour Party Conference.[106] And so, by 2006, the IRTL, Lord Carlile, reported that '[i]f there is a single issue that can be identified as giving rise to most assertions of excessive and disproportionate police action, it is the use of section 44'.[107]

The statistics also stacked up against s. 44's apparent *effectiveness* as a counter-terrorism measure. Lord Carlile was of the view that the power to authorise so-called 'suspicionless' stop-and-search in specified areas represented a 'necessary and proportionate' response to the contemporary terrorist threat.[108] Yet, whilst the broader purposes of counter-terrorism often justify more onerous, intrusive powers than are available to police officers for the purposes of dealing with "ordinary" criminal activity, it begs the question, not least in the light of s. 44's extensive use in England and Wales although not in Scotland, as to why the terrorist threat in other parts of the UK was capable of being dealt with by other means.[109] In several annual reports as IRTL, Lord Carlile noted that there was 'little or no evidence that the use of section 44 ha[d] the potential to prevent an act of terrorism as compared with other statutory powers of stop and search'.[110] Quite how, therefore, it could in any event be considered to be 'proportionate' is unclear. Lord Carlile's successor as IRTL, David Anderson, recorded the

[102] Home Office, *Police and Criminal Evidence Act 1984: Code A: Code of Practice for the Exercise by Police Officers of Statutory Powers of Stop and Search* (TSO 2015) [2.25]. The same applies to the current framework of 'suspicionless' stop-and-search under s. 47A of the Terrorism Act 2000.

[103] Alpa Parmar, 'Stop and Search in London: Counter-Terrorist or Counter-Productive?' (2011) 21(4) Policing and Society: An International Journal of Research and Policy 369, 379. See, also, Equality and Human Rights Commission, *Stop and Think: A Critical Review of the Use of Stop and Search Powers in England and Wales* (2010).

[104] Fenwick and Phillipson (n 1) 495.

[105] Joint Committee on Human Rights, *Demonstrating Respect for Rights? A Human Rights Approach to Policing Protest* (2008-09, HL 47-I, HC 320-I) [86]-[93].

[106] See, eg, Andrew Sparrow, 'Heckler, 82, Who Dared Call Straw a Liar is Held under Terrorist Law' *The Telegraph* (29 September 2005) <https://www.telegraph.co.uk/news/uknews/1499466/Heckler-82-who-dared-called-Straw-a-liar-is-held-under-terrorist-law.html> accessed 25 July 2020.

[107] Lord Carlile, *Report on the Operation in 2005 of the Terrorism Act 2000* (2006) [52].

[108] ibid [100].

[109] ibid [96].

[110] ibid [98]; Lord Carlile, *Report on the Operation in 2006 of the Terrorism Act 2000* (2007) [114]; Lord Carlile, *Report on the Operation in 2007 of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006* (2008) [130]; Lord Carlile, *Report on the Operation in 2008 of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006* (2009) [148]; Lord Carlile, *Report on the Operation in 2009 of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006* (2010) [185].

remarkable fact that 'during its currency, none of the more than 600,000 stops in Great Britain under section 44 resulted in a conviction for a terrorist offence'.[111]

B. Judicial Scrutiny of Section 44: The *Gillan* Litigation

The main legal challenge to the s. 44 framework, *R (on the application of Gillan and another) v Commissioner of Police for the Metropolis*, reached the Appellate Committee of the House of Lords in 2006. The case stemmed from the use of s. 44 to authorise suspicionless stop-and-search at a peaceful protest in Battersea, London, in 2003. Mr Gillan, a student, and Ms Quinton, a freelance journalist, both of whom had attended the protest, were stopped and questioned by police, and searched for 'articles concerned in terrorism'. In both instances, the procedure was reported to have taken less than 30 minutes; no incriminating evidence was found.[112]

In what has been described as 'one of the most disappointing UK judgments of the post-9/11 era',[113] the appeal, having previously failed at first instance[114] and dismissed in the Court of Appeal,[115] was unanimously rejected by the Law Lords (sitting as a panel of five). The appellants had argued, firstly, that the threshold stipulated in s. 44(3)—that of 'expediency' in the prevention of terrorist acts—insufficiently safeguarded against the arbitrary, excessive or discriminatory exercise of powers previously acknowledged by the Divisional Court as 'sweeping and far beyond anything ever permitted by common law powers'[116].[117] Rather, the correct interpretation of s. 44(3), it was submitted, was that which gave effect to the principle of legality, which (as outlined in Section II, above) requires that '[f]undamental rights cannot be overridden by general or ambiguous words';[118] it was incumbent upon the Law Lords, consistent with that principle, to rein in the expansive meaning of the term 'expedient', such that the making of an authorisation ought only have been permitted 'if the decision-maker ha[d] reasonable grounds for considering that the powers [were] *necessary and suitable*, in all the circumstances, for the prevention of terrorism'.[119] It was also argued that the authorisation granted by the Assistant Commissioner of the Metropolitan Police on 13 August 2003 and confirmed by the Secretary of State on 14 August 2003, under which the appellants had been stopped, was excessive and thus unlawful, to the extent that it (a) applied (unnecessarily) to the whole of the Metropolitan Police District, and (b) was constitutive of a broader pattern of successive authorisations of that nature.[120]

Delivering the leading judgment, Lord Bingham gave short shrift to the exceptional nature and scope of the powers available under s. 44, albeit having recognised the departure effected

[111] David Anderson, *Report on the Operation in 2010 of the Terrorism Act 2000 and of Part 1 of the Terrorism Act 2006* (2011) [8.21].
[112] *Gillan* (n 14) [2]-[3].
[113] Fenwick and Phillipson (n 1) 481.
[114] [2003] EWHC 2545 (Admin), [2003] All ER (D) 526.
[115] [2004] EWCA Civ 1067, [2005] QB 388.
[116] [2003] EWHC 2545 (Admin) [44].
[117] *Gillan* (n 14) [13].
[118] *Simms* (n 53) (Lord Hoffmann).
[119] *Gillan* (n 14) [13] (emphasis added).
[120] ibid [16]-[19].

by those powers 'from the normal rule applicable where a constable exercises a power to stop and search'.[121] Notably, the relevance of the principle of legality in interpreting the scope of the powers available upon authorisation under s. 44 was roundly dismissed, which is perhaps all the more striking given the Law Lords' contemporaneous recognition of the fundamental constitutional status of that principle.[122] '[E]ven if these sections are accepted as infringing fundamental human rights, itself a debatable proposition,' Lord Bingham noted, 'they do not do so by general words but by provisions of a detailed, specific and unambiguous character.'[123] Moreover, it was held that the same (narrow) meaning could not be ascribed to the terms 'expedient' and 'necessary', as the appellants had claimed, there being above all 'no warrant for treating Parliament as having meant something which it did not say'.[124] And among other reasons for rejecting the appellants' argument as to the overbroad nature of s. 44 was that examination of the broader statutory context showed both the procedure for authorisation and the exercise of the power to stop-and-search to have been 'very closely regulated'; Parliament had legislated for a 'series of [effective] constraints', including that 'the authorisation may [have been] given only by a very senior police officer', that 'the authorisation [could not] extend beyond the boundary of a police force area', and that 'the authorisation [was] limited to a period of 28 days, and need not [have been] for so long'.[125]

Yet, perhaps the most disappointing aspect of the judgment in *Gillan* is that of the Law Lords' treatment of the human rights issues evidently given rise in the context of 'suspicionless' stop-and-search. Widespread allegations of misuse and abuse of s. 44 had provided an opportunity, as Ewing writes, 'to test the mettle of the Human Rights Act', (at the time in its infancy,) particularly given 'the challenge which stop and search presents potentially to a number of Convention rights … [and] its use in non-terrorist contexts'.[126] Indeed, it formed the basis of the appellants' second key argument that the s. 44 framework contravened several provisions of the ECHR, namely art. 5 (the right to liberty and security), art. 8 (the right to respect for private and family life), art. 10 (freedom of expression), and art. 11 (freedom of assembly and association). It was claimed, for instance, that the compulsory nature of searches authorised under s. 44 amounted to a 'deprivation of liberty' within the meaning of art. 5, not least insofar as provision had been made for a person's detention at the discretion of the police constable,[127] and that it was open to constables to use reasonable force for the purpose of enforcing compliance.[128] But whilst it was accepted by Lord Bingham that a stop-and-search procedure has 'features' of the kind central to the appellants' complaint, that argument was ultimately rejected on the basis of the test established by the ECtHR in *Guzzardi v Italy*,[129] in which the term 'deprivation of liberty' was distinguished from 'mere restrictions on liberty of movement' (the latter falling short of engaging the provisions of art.

[121] ibid [14].
[122] See, eg, *Jackson v Attorney-General* [2005] UKHL 56, [2006] 1 AC 262 [159] (Baroness Hale): 'The courts will, of course, decline to hold that Parliament has interfered with fundamental rights unless it has made its intentions crystal clear.'
[123] *Gillan* (n 14) [15].
[124] ibid [14].
[125] ibid [14].
[126] Ewing (n 94) 205.
[127] TACT, s 45(4).
[128] ibid s 114(2).
[129] (1980) 3 EHRR 333.

5).[130] To that end, it was held that detention of the kind typically associated with a stop-and-search procedure does not amount to 'being detained in the sense of confined or kept in custody', but rather 'of being detained in the sense of kept from proceeding or kept waiting'.[131] And where it could be said that art. 5 of the Convention *had* been engaged in the course of a stop-and-search authorised under s. 44, it was found that in any event 'the public [were] … subject to a clear obligation not to obstruct a constable exercising a lawful power stop and search for articles which could be used for terrorism'.[132] Any such detention was considered to have properly fallen within the scope of the exceptions permitted under art. 5, for its purpose, above all, is 'to secure effective fulfilment of that obligation'.[133]

The Law Lords' unanimous dismissal of the challenge grounded in art. 8 is of particular relevance to the broader issues explored in this chapter. The basis of the challenge was thus: stop-and-search authorised under s. 44 *necessarily* engages art. 8(1), and as such must therefore be justified in relation to the conditions set out in art. 8(2)—that is, that the interference be both 'in accordance with the law' and 'necessary in a democratic society'. Lord Bingham found it doubtful that 'an ordinary superficial search of the person can be said to show a lack of respect for private life', notwithstanding the broad construction of art. 8(1) 'to embrace wide rights to personal autonomy'.[134] Such that the Convention jurisprudence indicates that 'intrusions must reach a certain level of seriousness to engage [its] operation', it was held that 'an ordinary superficial search of the person and an opening of bags, of the kind to which passengers uncomplainingly submit at airports, for example, can scarcely be said to reach that level'.[135] Lord Scott added that a stop-and-search procedure 'will often be very annoying to the person concerned, and may sometimes produce a feeling of humiliation or a perception of victimisation or discrimination [for that person]', but 'any invasion of privacy will be shortlived'.[136] Lord Brown was equally unpersuaded, noting that

> [u]nwelcome and inconvenient though most people may be expected to regard such a stop and search procedure, and radically though it departs from our traditional understanding of the limits of police power, it can scarcely be said to constitute any very substantial invasion of our fundamental civil liberties.[137]

It did not (for the Law Lords) follow, therefore, that an ordinary stop-and-search *inevitably* involves an interference with art. 8. Nor, at any rate, had any interference been established on the facts. What is clear, though, throughout the Law Lords' rejection of the art. 8 claims in *Gillan* is the perception that a stop-and-search procedure in any event amounts to little more than a trivial interaction between state and citizen. Beyond only a cursory acknowledgement that the powers conferred by that framework *might* fall foul of the substantive dimensions of art. 8—specifically, 'as where (for instance) an officer in the course of a search perused an

[130] ibid paras 92-93.
[131] *Gillan* (n 14) [25].
[132] ibid [25].
[133] ibid [25].
[134] ibid [28].
[135] ibid [28].
[136] ibid [63].
[137] ibid [74].

address book, or diary, or correspondence'[138]—the judgment in *Gillan* elides any real consideration of those dimensions, and instead can be seen to approach the question of deprivation of privacy (resulting from suspicionless stop-and-search) from a wholly *formal* or *procedural* angle.

That is, the appellants' challenge having fell, ultimately, at the first hurdle, the Law Lords were nonetheless invited to consider the compatibility of the s. 44 framework with the conditions set out in art. 8(2), given the respondents' concession that an interference could well be thought to have arisen (again, 'as where (for instance) an officer in the course of a search perused an address book, or diary, or correspondence').[139] Lord Bingham outlined the test of whether an interference with art. 8 is 'in accordance with the law' as implicating 'supremely important features of the rule of law',[140] above all requiring that '[t]he exercise of power by public officials, as it affects members of the public, must be governed by clearly and publicly-accessible rules of law'; 'interference by public officials acting on any personal whim, caprice, malice, predilection or purpose other than that for which the power was conferred' otherwise denotes arbitrariness, 'which is the antithesis of legality'.[141] The appellants argued that the s. 44 framework fell foul of the test, there being a critical lack of transparency as to the process by which both an authorisation and ministerial confirmation could be given: that is, 'a member of the public would know that the section 44 power to stop and search could be conferred on the police, but would not know at any given time or in any given place whether it had been'.[142] Coupled with the 'broad and ill-defined' discretion conferred on a police constable, the potential for arbitrary stop-and-search authorised under s. 44 was, for the appellants, clear.[143] Still, alongside the suggestion that 'the fact or the details of any authorisation' cannot properly be regarded as "law", but rather 'as a procedure for bringing the law into potential effect', Lord Bingham gave a litany of reasons as to why the appellants' claim ought to fail, including: that both the 2000 Act and PACE Code A adequately informed the public as to the availability of the powers and the procedure involved in their exercise; that it would, in any event, 'stultify a potentially valuable source of public protection to require notice of an authorisation or confirmation to be publicised prospectively'; and that in exercising the power, a police constable was 'not free to act arbitrarily', but would nevertheless be amenable to civil suit if he did.[144] In short, there existed, as Lord Hope elsewhere articulated, 'a structure of law within which the [s. 44 power] must be exercised'.[145]

Finally, thought was given only briefly to the question of whether suspicionless stop-and-search is a measure 'necessary in a democratic society'—although perhaps, as it appears, for the sake of completeness. Lord Bingham held that it would be 'impossible to regard a proper exercise of the power, in accordance with [PACE] Code A, as other than proportionate when

[138] ibid [28].
[139] ibid [28].
[140] ibid [34].
[141] ibid [34].
[142] ibid [32].
[143] ibid [32].
[144] ibid [35].
[145] ibid [55].

seeking to counter the great danger of terrorism',[146] noting, also, that any challenge grounded in art. 10 and/or art. 11 would likely fail for the same reason.

Following the Law Lords' ruling, an application was made to the ECtHR, whose consideration of the human rights issues raised in *Gillan* ultimately represents a key turning point in the story, so to speak, of the contemporary legal landscape of suspicionless stop-and-search. The decision of the Strasbourg Court is in stark contrast to that of the Law Lords. The Court held, firstly, that the exercise of coercive powers to 'require an individual to submit to a detailed search of his person, his clothing and his personal belongings amounts to a *clear* interference with the right to respect for private life'.[147] Resisting the analogy drawn by Lord Bingham with searches to which passengers 'uncomplainingly' submit at airports, the Court found, rather, that '[a]n air traveller may be seen as consenting to such a search by choosing to travel'—that, in other words, those who would travel through airports can reasonably expect to be searched in that environment and thus enjoy a 'freedom of choice, since [they] can leave personal items behind and walk away without being subjected to a search'.[148] On this basis, the power to stop-and-search under s. 44 was regarded by the Court as 'qualitatively different' than the search powers at ports and borders to which they had been compared by Lord Bingham; it was noted that, unlike those powers, s. 44 permitted the stopping of an individual 'anywhere and at any time, without notice and without any choice as to whether or not to submit to a search'.[149]

Having therefore established an interference with the right to private and family life guaranteed under art. 8 in the applicants' case, the Court went on to hold that, in fact, the interference constituted a violation of that right. '[B]ut what is striking,' Fenwick and Phillipson suggest, 'is [the Court's] reason for doing so: that ss. 44-7 did not satisfy the 'in accordance with the law' test … [which represents] an unprecedented move in relation to a *modern* British statute – the first time it had happened in the course of the history of the UK's engagement with the ECHR.'[150] Whereas, in other words, the bulk of the Court's art. 8 jurisprudence can be seen to hang on the question of proportionality—that is, whether the interference is 'necessary in a democratic society'—s. 44 failed, remarkably, to overcome the anterior threshold of lawfulness under art. 8(2). The Court reiterated the requirements of lawfulness as including 'the impugned measure both to have some basis in domestic law and to be compatible with the rule of law', the latter being 'expressly mentioned in the preamble to the Convention and inherent in the object and purpose of Article 8';[151] that the domestic legal basis 'must afford a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention'; and that it would 'be contrary to the rule of law … for a legal discretion granted to the executive to be expressed in terms of an unfettered power'.[152] And by application of these principles, the Court found that the 'powers of authorisation and confirmation as well as those of stop and search under sections 44 and 45

[146] ibid [29].
[147] *Gillan and Quinton v UK* (n 70) para 63 (emphasis added).
[148] ibid para 64.
[149] ibid para 64.
[150] Fenwick and Phillipson (n 1) 502.
[151] *Gillan and Quinton v UK* (n 70) para 76.
[152] ibid para 77.

of the 2000 Act [were] neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse'.[153]

The Court's reasoning speaks to a number of issues raised by the appellants (and subsequently dismissed) in the domestic courts. It was noted, for instance, that the power to authorise suspicionless stop-and-search under s. 44 was unduly broad, having been couched in terms of 'expediency'. Yet, '"expedient means no more than "advantageous" or "helpful"', the Court noted, there being 'no requirement at the authorisation stage that the stop and search power be considered "necessary" and therefore no requirement of any assessment of the proportionality of the measure'.[154] It was also considered that any constraint on the exercise of the broad discretion enjoyed by the Secretary of State to refuse confirmation or to reduce the time limit of an authorisation proved equally dubious, such that 'in practice this ha[d] never been done'.[155] Temporal and geographical limitations had failed to 'act as any real check on the issuing of authorisations by the executive', a s. 44 authorisation covering an area as large as the entirety of the Metropolitan Police Force Area having been 'continuously renewed in a "rolling programme" since the powers were first granted'.[156] Moreover, the Court was 'struck' by the number of searches recorded annually by the Ministry of Justice, rising from tens of thousands of searches between 2004 and 2006 to over a hundred thousand in 2007/08.[157]

The Court dismissed the Government's claims that 'safeguards against abuse [were] provided by the right of an individual to challenge a stop and search by way of judicial review or an action in damages'.[158] Although recognising the availability of judicial review as an avenue of challenge to the exercise of the powers of authorisation and confirmation, the Court once again emphasised the deleterious effects of the breadth with which the statutory basis of those powers had been drafted—that applicants seeking to prove that they had been exercised unlawfully thus faced 'formidable obstacles'.[159] In any event, the limitations of the ostensible safeguards identified by the Government were 'clearly demonstrated by the present case'; in particular, the Court noted that, owing to the absence of reasonable suspicion as a procedural requirement to the exercise of stop-and-search powers by an individual officer, 'it is likely to be difficult if not impossible to prove that the power was improperly exercised'.[160]

Finally, the Court chose not to make a determination as to arts. 5, 10 and 11, given its finding in relation to art. 8. Although, the element of coercion associated with a stop-and-search procedure authorised under s. 44 was nonetheless regarded as 'indicative of a deprivation of liberty within the meaning of [art. 5]'.[161] It is also arguable that the Court was more keenly attuned than the Law Lords to the 'risk that such a widely framed power could be misused against demonstrators and protestors in breach of Article 10 and/or 11 of the

[153] ibid para 87.
[154] ibid para 80.
[155] ibid para 80.
[156] ibid para 81.
[157] ibid para 84.
[158] ibid para 86.
[159] ibid para 80.
[160] ibid para 80.
[161] ibid para 57.

Convention'.[162] Indeed, that the Court highlighted these points is, of itself, indicative of the extent to which its decision upended that of the Law Lords.

C. Reform of Suspicionless Stop-and-Search in 'Specified Areas'

Perhaps somewhat ironically, the IRTL, Lord Carlile, noted that the decision of the ECtHR in *Gillan v UK* had 'illustrated the excessive nature and use of section 44'.[163] A remedial order was issued under s. 10 of the HRA,[164] with formal amendments to the s. 44 framework subsequently introduced by the Protection of Freedoms Act 2012.[165] The 2012 Act inserted a new provision—s. 47A—into the Terrorism Act 2000, under which a senior-ranking police officer is similarly empowered to 'give an authorisation … in relation to a specified area', but only if the officer '*reasonably suspects* that an act of terrorism will take place'.[166] The officer need also 'reasonably consider' that, first, 'the authorisation is *necessary to prevent such an act*', second, 'the specified area or place is *no greater than is necessary* to prevent such an act', and thirdly, 'the duration of the authorisation is *no longer than is necessary* to prevent such an act'.[167] Thus, imbued with the requirement of reasonable suspicion (albeit only as to the exercise of the 'front-end' discretion) and now couched in the language of necessity, s. 47A bears the essential procedural safeguards whose absence from the s. 44 framework ultimately led to that framework's demise.

A key question, however, is whether inserting a requirement of reasonable suspicion at the 'front-end' discretion is enough to moderate the challenges posed by stop-and-search, more broadly, to those 'fundamental' principles, norms and values reflected in the common law (as outlined in Section II, above). This question was broached in 2015 in the UK Supreme Court case of *R (on the application of Roberts) v Commissioner of Police for the Metropolis*,[168] albeit involving a challenge to the use of powers derived from s. 60 of the Criminal Justice and Public Order Act 1994. It suffices, here, to simply note that the provisions of that section are comparable in many respects to counter-terrorism stop-and-search under s. 44/47A. For instance, s. 60 of the 1994 Act confers on 'a police officer of or above the rank of inspector', who reasonably believes 'that incidents involving serious violence may take place in any locality in his police area, and that it is expedient to give an authorisation under this section to prevent their occurrence', the power to authorise suspicionless stop-and-search within that locality for a period 'not exceeding 24 hours'.[169] Among the key outcomes of the Supreme Court's decision in *Roberts* is that of the explicit (re)positioning of the common law as the 'starting point' for police powers to stop and search a person or vehicle.[170] The joint opinion of Lady Hale and Lord Reed (with whom Lord Clarke, Lord Toulson and Lord Hodge agreed) foregrounds the courts' particular suspicion of 'giving too much power to the police',

[162] ibid para 85.
[163] Lord Carlile, *Report on the Operation in 2009* (n 110) [54].
[164] Terrorism Act 2000 (Remedial) Order 2011 (SI 631/2011).
[165] PFA, s 61.
[166] TACT, s 47A(1)(a) (emphasis added).
[167] ibid s 47A(1)(b) (emphasis added).
[168] [2015] UKSC 79, [2016] WLR 210 [29].
[169] Criminal Justice and Public Order Act 1994, s 60(1).
[170] *Roberts* (n 168) [29].

with ‘police powers to stop and search without having reasonable grounds to suspect that we are committing or going to commit a crime’ singled out as a particular cause for concern.[171] It was thus reiterated that two ‘fundamental’ principles of the common law are given rise in this context. First, that the police have no power to stop and search, per se—given the levels of coercion and intrusion that this entails—save for that which is explicitly authorised by statute.[172] And secondly, that whilst it is recognised at common law that a police constable is entitled to arrest, without a warrant, any person reasonably suspected of having committed (or of proceeding to commit) a criminal offence, and that that person is then liable to be searched, it is both ‘*contrary to constitutional principle* and illegal to search someone to *establish* whether there are grounds for arrest’.[173]

On one hand, this signifies a much clearer statement of the (common law) constitutional position of stop-and-search powers than that which had previously been endorsed in *Gillan*. In that case, Lord Bingham had claimed that the freedom to go about one’s business in the streets of the land ‘confident that they will be not be stopped and searched by the police unless reasonably suspected of having committed a criminal offence’ had been ‘so jealously guarded’ that it had ‘*almost* become a constitutional principle’.[174] However, in *Roberts*, there was no such caveat; the Supreme Court Justices were unequivocal that, indeed, this *was* a matter of constitutional principle. And yet, on the other hand, there is a compelling argument to be made that, in fact, the position of the Supreme Court flatters to deceive. For although accepting that ‘[a]ny random “suspicionless” power of stop and search carries with it the risk that it will be used in an arbitrary or discriminatory manner in individuals cases’—and so, one must assume, risks compromising the fundamental importance of establishing reasonable grounds for suspecting that a stop-and-search is objectively justified in any such case—the Justices nevertheless went on to find that the common law, its values and principles, *could* in fact accommodate a power of this sort. The basis for the legal challenge to s. 60 in *Roberts* concerned the risk that suspicionless stop-and-search carried in permitting, specifically, arbitrary and disproportionate searches of young people from BAME groups. And yet, the Court noted:

> While there is a concern that members of these groups should not be disproportionately targeted, it is members of these groups who will *benefit most* from the reduction in violence, serious injury and death that may result from the use of such powers. Put bluntly, it is mostly young black lives that will be saved if there is less gang violence in London and some other cities.[175]

The key point is this. There are reasons to doubt the practical effect of an alignment of exceptional police powers and ‘fundamental’ common law constitutional principle—*especially* given the apparent background sentiment in the senior judiciary that the particular risks of misuse and abuse of power against BAME communities are offset by such uses of power being, ultimately (if perversely), for the particular ‘benefit’ of those communities. Still, this is the direction of travel: within the conception of the constitutional position of

[171] ibid [1].
[172] *Jackson v Stevenson* (1897) SC JC 38; *Rice v Connelly* [1966] 2 QB 414; *Kenlin v Gardner* [1967] 2 QB 510.
[173] *Roberts* (n 168) [29] (emphasis added).
[174] *Gillan* (n 14) [1] (emphasis added).
[175] *Roberts* (n 168) [41] (emphasis added).

stop-and-search powers that the Supreme Court here seeks to advance, the requirement that *reasonable* suspicion serves to condition the exercise of powers which deprive a person of their privacy is clearly of the utmost importance. Indeed, that requirement serves at least *some* notion of the rule of law. Reasonable suspicion, at least in principle, 'acts as a check upon an individual officer's suspicion – which might be based on flimsy, instinctive or prejudiced grounds'; to the extent that it ensures, in other words, that 'invasions of liberty only occur at the point at which objectively justifiable grounds for such intervention arise', the requirement of reasonable suspicion militates against the arbitrary exercise of coercive power(s) by an individual (executive) officer, which is 'normally perceived as a desirable attribute of the rule of law'.[176]

To that end, the reform of s. 44 has generally been welcomed. '[I]n large part because of the tightened front-end discretion,' Ip has suggested, '[s. 47A] represents a considerable improvement over its predecessor'.[177] David Anderson, as IRTL, described the repeal of s. 44 as a 'correction in favour of liberty'.[178] And as Ben Middleton notes, although in many ways appearing to represent 'simply a diluted descendent of s. 44', the powers under s. 47A 'are no doubt Convention compliant in the wake of *Gillan* and represent a nuanced compromise between operational requirements and civil liberties concerns'.[179] For the time being, suspicionless stop-and-search in 'specified areas' under TACT thus retains its position within the UK's contemporary counter-terrorism framework. Clearly, that it is now drafted in similar terms to s. 60 of the CJPOA 1994, to which the Supreme Court effectively gave a clean bill of health in *Roberts*, speaks to its likely longevity within that framework.

One point of increasing significance in recent years, however, is that of the implementation of s. 47A having coincided with a significant reduction in the number of searches resulting from the use of such powers.[180] Writing in early 2017, at which point the powers under s. 47A had in fact never been used,[181] Bowling and Marks suggested that '[the] 20-year experiment with suspicionless searches in England and Wales seems to have come to a conclusive end'.[182] Section 47A was, however, used for the first time in Great Britain in September 2017, following the terrorist attacks in Parsons Green, London; a s. 47A authorisation was issued by four separate police forces, including the British Transport Police, though none of these authorisations lasted longer than 48 hours, with one authorisation subsequently revoked after just a matter of 23 minutes.[183] The reason for this, the IRTL noted, was that '[i]n each case the authorisation was based on the raising of the general United Kingdom threat level to Critical, rather than any intelligence of a particular threat in a particular geographical area (or in the case of the British Transport Police, to the

[176] Fenwick and Phillipson (n 1) 500.
[177] Ip (n 95) 755.
[178] David Anderson, *Report on the Operation in 2010* (n 111) [8.29].
[179] Ben Middleton, 'Rebalancing, Reviewing or Rebranding the Treatment of Terrorist Suspects: The Counter-Terrorism Review 2011' (2011) 75 J Crim L 225, 245.
[180] Bowling and Marks (n 98).
[181] The measure had been used in Northern Ireland, however, in 2013: David Anderson, *The Terrorism Acts in 2013: Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006* (2014) [6.9]-[6.11].
[182] Bowling and Marks (n 98) 88.
[183] Jonathan Hall, *The Terrorism Acts in 2018: Report of the Independent Reviewer of Terrorism Legislation on the Operation of the Terrorism Acts 2000 and 2006* (2020) [4.12].

rail network)', although it was 'not clear why no other Forces granted authorisations, since the basis of the authorisations could have been applied equally to many other, if not all, Forces'.[184] Ultimately, in the year ending 31 March 2018, 149 stops and searches under s. 47A were recorded, 145 of which were conducted by the British Transport Police alone, and a total of only five arrests having been made.[185] The measure was not used at any point in the years ending 31 March 2019 and 31 March 2020.[186] Indeed, the apparent dormancy of the revised regime might in part be explained by the concurrent exponential rise, in recent years, of stop-and-search under s. 60 of the 1994 Act, it appearing to highlight the relative ease of use of that section to ground suspicionless stop-and-search in large geographical areas.[187] Whatever, despite some activity in late-2018, Bowling and Marks' inclination to call time on the post-9/11 suspicionless stop-and-search 'experiment' appears, for now, to have been vindicated.

D. Suspicionless Stop-and-Search at UK Ports and Borders: Schedule 7 to the Terrorism Act 2000

The co-existence within the UK's contemporary counter-terrorism framework of suspicionless stop-and-search powers under s. 44/47A of TACT and those contained in Schedule 7 to the Act provides a crucial point of comparison. Indeed, it forms a key part of that comparison that the nature and scope of the instrusions into a person's privacy for which the latter provides legal authority far exceed those of the former. Given effect by s. 53 of the 2000 Act, Schedule 7 confers on 'examining officers'—which includes police constables, immigration officers and designated customs officers[188]—an extensive range of coercive powers exercisable 'at a [UK] port or in the border area'.[189] A person whose presence the examining officer believes is 'connected with his entering or leaving Great Britain or Northern Ireland or his travelling by air within Great Britain or Northern Ireland' may be stopped, searched, questioned and detained for the purpose of determining whether 'he appears to be a person falling within section 40(1)(b)'—that is, a 'terrorist' within the (wide) meaning of that provision[190]—crucially '*whether or not*' the examining officer has formed reasonable grounds for suspecting a person's involvement in terrorism-related activity.[191] The threshold to the exercise of powers under Schedule 7 is thus appreciably lower than that of s. 44/47A. To use the analogy employed by Ip in relation to the s. 44/47A framework (discussed above), there is no 'front-end' safeguard (for example, the need to obtain prior

[184] ibid [4.17].
[185] Home Office, *Police Powers and Procedures, England and Wales, Year Ending 31 March 2018: Statistical Bulletin 24/18* (2018) 26.
[186] Hall (n 183) [4.12].
[187] Home Office, *Police Powers and Procedures, England and Wales, Year Ending 31 March 2020 – Second Edition* (2020) 12: 'In the year ending March 2020, police in England and Wales (excluding Greater Manchester Police) carried out 18,081 stops and searches under section 60 CJPOA, an increase of 35% compared with the previous year (when 13,414 such searches were undertaken).'
[188] TACT, sch 7, para 1(1).
[189] ibid sch 7, para 2(2)(a).
[190] ibid sch 7, para 2(1).
[191] ibid sch 7, para 2(4) (emphasis added).

authorisation to exercise suspicionless stop-and-search powers) capable of counterbalancing the risk of arbitrariness in the individual officer's decision-making.

This issue goes to the heart of the (breadth of) discretion available under Schedule 7, and renders all the more striking the panopoly of coercive measures to which a person stopped under Schedule 7 is potentially exposed, including: detention for up to a maximum period of six hours (reduced in 2014 from nine hours), where questioning may exceed one hour;[192] searches of that person (including the performance of strip-searches)[193] and 'anything which he has with him, or which belongs to him';[194] a statutory obligation to 'give the examining officer any information in his possession which the examining officer requests', including travel and identity documents;[195] detention, for a period of up to seven days, of property given to or found by an examining officer in the course of a Schedule 7 examination.[196] 'Wilful' failure to comply with any duty imposed under or in relation to Schedule 7, as well as 'wilfully' obstructing or seeking to frustrate a search or examination, constitutes a criminal offence carrying a custodial sentence of up to three months.[197]

Given its wide use in recent years, Schedule 7 has generated a considerable degree of controversy, attracting criticism not least from human rights advocacy groups such as Liberty, by whom the measure has been labelled 'ripe for overuse and abuse' and 'invariably used in a discriminatory fashion … based on stereotype rather than genuine suspicion'.[198] Concerns were also notably articulated by the Supreme Court in 2013, where, in *R v Gul*,[199] it was considered that Schedule 7 is 'not subject to any controls', and thus gives rise to the risk of 'serious invasions of personal liberty'.[200] Against this backdrop, a number of legal challenges involving the use of Schedule 7 powers have prompted the courts to clarify somewhat the outer limits of those powers. For instance, in *CC v The Commissioner of Police of the Metropolis and another*,[201] the High Court emphasised that the scope of Schedule 7 is anchored to the purpose stipulated in para 2(1)—the same vague and problematic purpose, that is, of determining 'whether a person appears to be [a terrorist]'. Although, whilst it was held, therefore, that Schedule 7 cannot be construed as permitting questioning for the purpose of gathering evidence in pursuit of criminal proceedings—the basis of the challenge in *CC*—the High Court nevertheless noted that para 2(1) is to be 'properly given a wide construction',[202] owing, among other things, to the expansive definition of 'terrorist' under s. 40(1)(b) of TACT to which it corresponds.

The extraordinary reach of Schedule 7 subsequently formed the basis of the high-profile legal challenge in *R (Miranda) v Secretary of State for the Home Department*.[203] The case

[192] ibid sch 7, para 6A, as amended by Anti-Social Behaviour, Crime and Policing Act 2014, sch 9, para 2.
[193] ibid sch 7, para 8(5).
[194] ibid sch 7, para 8(1).
[195] ibid sch 7, para 5.
[196] ibid sch 7, para 11.
[197] ibid sch 7, para 18.
[198] Liberty, 'Schedule 7' <https://www.libertyhumanrights.org.uk/human-rights/countering-terrorism/schedule-7> accessed 7 January 2020. See also, eg, CAGE, *Schedule 7: Harassment at Borders: The Impact on the Muslim Community* (2019).
[199] [2013] UKSC 64, [2013] 3 WLR 1207.
[200] ibid [64].
[201] [2011] EWHC 3316 (Admin), [2012] 2 All ER 1004.
[202] ibid [35].
[203] [2014] EWHC 255 (Admin), [2014] 1 WLR 3140; [2016] EWCA Civ 6, [2016] WLR 1505.

concerned the use of Schedule 7 powers to stop, search, question and detain at Heathrow Airport, in August 2013, the spouse of a *Guardian* journalist complicit in the publication of classified documents obtained by the former (US) National Security Agency intelligence analyst-turned-whistleblower Edward Snowden. The appellant argued, firstly, that his questioning and the confiscation of items found in his possession, which included encrypted storage devices,[204] was done without legal authority, there being no basis to rely on Schedule 7, a tool of counter-terrorism, for the confiscation of journalistic material. It was also submitted that if the purpose to which the powers conferred under Schedule 7 are oriented (as noted above) was properly adhered to in the circumstances, the measure nevertheless represents a disproportionate interference with the freedom of expression protected by art. 10 of the ECHR (that is, on the grounds of national security). In 2016, the Court of Appeal held that although the use of Schedule 7 was in the circumstances lawful, the measure was incompatible with art. 10 of the ECHR to the extent that legal safeguards against its arbitrary use in relation to journalistic material were inadequate.[205]

There has, as yet, been no specific legislative response to the Court of Appeal's decision in *Miranda.* Nor, in fact, does any such response now seem likely in the near future, certainly given that the furore surrounding the *Miranda* litigation has long since passed. The Home Office issued a press release in the immediate aftermath of the Court of Appeal judgment, to the effect that the updated Schedule 7 Code of Practice sufficiently safeguards against examination of journalistic material.[206] Although, the *Miranda* litigation has done much to generate a level of scrutiny of Schedule 7 the likes of which had not been achieved for over a decade. At any rate, in between the decisions of the High Court and the Court of Appeal, several reforms to the Schedule 7 regime were introduced by Parliament in the Anti-Social Behaviour, Crime and Policing Act 2014. This included: the reduction of the maximum period of detention permitted under Schedule 7, as noted above (that is, from nine hours to six);[207] the introduction of a ban on 'intimate searches';[208] and the imposition on senior officers of a duty to periodically review a person's detention.[209] The Act also conferred on those detained and questioned under Schedule 7 the right 'to have someone informed and to consult a solicitor',[210] in response to the decision in *R (Elosta) v Commissioner of Police for the Metropolis,*[211] in which the refusal by examining officers to delay a Schedule 7 interview pending the arrival of a solicitor requested by the individual concerned was held by the High Court to be unlawful. Although, these changes can scarcely be said to amount to very much—not least by way of curtailing the more severe coercive powers made available under Schedule 7. And, indeed, among the changes implemented by the 2014 Act was, in fact, an

[204] See, eg, [2014] EWHC 255 (Admin) [13]: 'Mr Oliver Robbins, Deputy National Security Adviser for Intelligence, Security and Resilience in the Cabinet Office, indicates in his first witness statement (paragraph 6) that the encrypted data contained in the external hard drive taken from the claimant contains approximately 58,000 highly classified UK intelligence documents.'

[205] [2016] EWCA Civ 6 [118]-[119].

[206] BBC News, 'Airport Stop of Snowden's Reporter's Partner David Miranda 'Lawful' (19 January 2016) <https://www.bbc.co.uk/news/uk-35343852> accessed 14 February 2020.

[207] TACT, sch 7, para 6A.

[208] ibid sch 7, para 8(4).

[209] ibid sch 8, pt 1A.

[210] ibid sch 8, para 7A.

[211] [2013] EWHC 3397 (Admin), [2014] 1 WLR 289.

extension of those coercive powers, namely in respect of the making and retention of copies of anything confiscated by an examining officer (albeit only where the officer is a police constable) for the purposes of being used as evidence in relation to criminal and/or deportation proceedings.[212]

E. Judicial Scrutiny of Schedule 7: The *Beghal* Litigation

Of the various legal developments involving Schedule 7 in recent years, certainly the most significant, not least for present purposes, is that of the UK Supreme Court case of *Beghal v DPP*.[213] In January 2011, Beghal, a British national, was stopped, searched and detained for interview under Schedule 7 at East Midlands Airport for the purpose of establishing whether or not she was a person concerned in the commission, preparation or instigation of acts of terrorism. Beghal had returned to the UK from Paris, where she had visited her spouse, a French national, who was in custody for offences relating to terrorism. The ordeal was reported to have lasted almost two hours in total, the interview having been concluded in around 30 minutes. Beghal refused to answer most of the questions put to her, for which she was subsequently charged and later convicted of the offence, under para 18 of Schedule 7, of wilfully failing to comply. The appeal against her conviction reached the Supreme Court in 2015, and raised several issues concerning the compatibility of Schedule 7 with the ECHR—specifically art. 5, art. 6 (right to a fair trial) and, crucially, art. 8.

A panel of five Justices of the Supreme Court presided over the appeal. The Court's dismissal of the appeal by a 4:1 majority (Lord Kerr dissenting) signalled its retreat from the concerns about Schedule 7 it had previously expressed in *R v Gul* (noted above).[214] Delivering the leading judgment for the majority, Lord Hughes (with whom Lord Hodge agreed) decided that '[t]he question of the compatibility of the power of detention with article 5 only barely arises in the present case'. Thus, following a 'rather perfunctory'[215] discussion of the art. 5 dimensions of the appeal, it was held: '[t]o the extent that there was *any* deprivation of liberty in the present case, it seems clear that it was no longer than was necessary for the completion of the process'.[216] Equally, the majority rejected the appellant's claim that the requirement to answer questions put to those interviewed under Schedule 7 was incompatible with the right to a fair trial guaranteed by art. 6 of the Convention, because '[t]he appellant was at no stage a defendant to a criminal charge and no question of a breach of a right to a fair trial arises'.[217]

In relation to the issues surrounding art. 8, it was 'right', Lord Hughes noted, that there was 'no dispute before [the Court] that Schedule 7 questioning and search under compulsion constitutes an interference with the private life of a person questioned'.[218] This point, of itself, is significant, for in so finding the Supreme Court in *Beghal* departs from the Law Lords' rather narrow interpretation in *Gillan* as to what constitutes an interference with the

[212] TACT, sch 7, para 11A.
[213] [2015] UKSC 49, [2016] AC 88.
[214] Shona Wilson Stark, 'Suspicion-Less Minds: Anti-Terrorism Powers at Ports and Borders' (2016) 75 CLJ 8.
[215] ibid 10.
[216] *Beghal* (n 213) [56] (emphasis added).
[217] ibid [69] (Lord Hughes).
[218] ibid [28].

right to privacy protected under art. 8. It ought to be reiterated at this point that stop-and-search under compulsion under s. 44 was described in that case as 'unwelcome and inconvenient', although above all scarcely 'any very substantial invasion of our fundamental civil liberties'.[219] As such, in *Beghal*, the question of compatibility with art. 8 turned on whether the interference arising from the use of Schedule 7 satisfied the two-pronged test stipulated in art. 8(2)—again, whether the measure is both 'in accordance with the law' and proportionate to the legitimate objectives of national security.[220] The former required the relevant legislative provision 'to contain sufficient safeguards to avoid the risk that power will be arbitrarily exercised and thus that unjustified interference with a fundamental right will occur'.[221] Whether the impugned measure meets the test of proportionality, on the other hand, was said to depend 'on the balance between the level of intrusion for the individual and the value of the power in community purpose served'.[222]

It is at this point that the comparison between stop-and-search authorised under s. 44/47A of TACT and that of Schedule 7 crystallises. For the majority in *Beghal* held that Schedule 7 fulfils *both* of the conditions set out in art. 8(2), crucially distinguishing the judgment of the ECtHR in *Gillan and Quinton v UK*. As to the Strasbourg Court's finding that, albeit notionally confined to a 'specific area', suspicionless stop-and-search of the kind permitted under s. 44 was 'neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse',[223] in *Beghal* Lord Hughes noted that among the reasons for the Court's conclusion in that case was '[t]he fact that the power was exercisable without depending on any prior suspicion, subjective or objective'.[224] Yet, whilst acknowledging that the absence of the procedural requirement of reasonable suspicion is common both to s. 44 and Schedule 7, the conclusion reached in *Beghal* was that 'there are otherwise very significant differences' between those provisions. In what presents as a direct parallel to the decision of the Law Lords in *Gillan*, it was held that the safeguards applicable to the exercise of Schedule 7 powers sufficiently militate against the risk of arbitrary misuse of those powers, thus satisfying the requirement that the interference with art. 8 be 'in accordance with the law'. It was also, on this basis, held that 'the principle of legality is satisfied'.[225]

In a remarkably strong dissenting opinion, Lord Kerr would have held both that the use of Schedule 7 powers in the present case, and indeed the nature and scope of the measures themselves, contravened each of the impugned Convention articles. Lord Kerr suggested that '[t]he opportunity to exercise a coercive power in an arbitrary or discriminatory fashion is antithetical to its legality',[226] and that, crucially, powers capable of being used in such a way 'are not transformed to a condition of legality simply because they are of proven utility'.[227] Quite how, though, such an opportunity would be prevented in the case of *any* coercive power is perhaps unclear.

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[219] *Gillan* (n 14) [74] (Lord Brown).
[220] *Beghal* (n 213) [29].
[221] ibid [30].
[222] ibid [47].
[223] *Gillan and Quinton v UK* (n 70) para 87.
[224] *Beghal* (n 213) [36].
[225] ibid [45].
[226] ibid [93].
[227] ibid [93].

The most recent development of the *Beghal* litigation is that of the decision of the ECtHR in May 2019,[228] which speaks directly to a key theme highlighted in this chapter. The Strasbourg Court held that the absence of a 'reasonable suspicion' requirement did not, of itself, render the provisions under Schedule 7 incompatible with the ECHR; rather, the power to examine an individual without reasonable grounds for suspecting their involvement in terrorism-related activity, *in combination with other factors*—including the maximum duration of examination (which, at the time of the applicant's detention was 9 hours), the statutory obligation to answer questions without the right to have a lawyer present, and the limited possibility of judicial review of the exercise of the power—meant that 'the Schedule 7 powers were not "in accordance with the law"'.[229] In a marked departure from the decision of the Supreme Court, the ECtHR held that there had, as such, been a violation of art. 8 of the Convention. Notably, the Court went on to imply that the powers under Schedule 7 could also be challenged, successfully, on the grounds that they violate art. 5 of the Convention:

> In reaching this conclusion the Court has only had regard to the Schedule 7 power to examine as it was at the time the applicant was stopped. It has not considered the amendments which flowed from the Anti-Social Behaviour, Crime and Policing Act 2014 and the updated Code of Practice; *nor has it considered the power to detain under Schedule 7, which has the potential to result in a much more significant interference with a person's rights under the Convention*.[230]

Ultimately, it is clear is that the increasing number of legal challenges to Schedule 7 has succeeded in generating a broader awareness of the measure, and indeed has to some extent stimulated a broader impetus for reform (so far culminating in the amendments implemented under the Anti-Social Behaviour, Crime and Policing Act 2014). Moreover, Home Office statistics indicate that there has, in fact, been an appreciable reduction in their use in recent years.[231] Yet, it nevertheless seems that Schedule 7 is, at least for the foreseeable future, here to stay. That its provisions have in effect been taken as a blueprint for Schedule 3 to the recently enacted Counter-Terrorism and Border Security Act 2019 suggests that the key legal obstacles have, again, if only for the time being, been overcome. The powers contained in Schedule 3 of the 2019 Act are drafted in similarly (strikingly) broad terms, and target those who are or have been engaged in so-called 'hostile activity'—activity, that is, which (a) threatens national security, (b) threatens the economic well-being of the UK in a way relevant to the interest of national security, or (c) is an act of serious crime.[232]

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[228] *Beghal v United Kingdom* [2019] ECHR 181.

[229] ibid para 109.

[230] ibid para 110 (emphasis added).

[231] See, eg, Home Office, *Operation of Police Powers under the Terrorism Act 2000 and Subsequent Legislation: Arrests, Outcomes, and Stop and Search: Great Britain, Year Ending December 2019* (2020) 23 (emphasis added): 'In the year ending 31 December 2018, a total of 9,540 persons were subject to the use of [Schedule 7] in Great Britain. This was a fall of 20% compared with the previous year (when there were 11,876 examinations), *and of 85% since the data were first collected in the year ending 31 March 2012* (when 63,902 persons were examined under Schedule 7). Since the data collection began there have been average annual falls of 23%.' See, also, Home Office, *Operation of Police Powers under the Terrorism Act 2000 and Subsequent Legislation: Arrests, Outcomes, and Stop and Search: Great Britain, Year Ending September 2020* (2020) 22, in which it is noted that, in the latest year, 4,486 persons were subject to the use of Schedule 7 powers, which marks 'a fall of 57% compared with the previous year'.

[232] Counter-Terrorism and Border Security Act 2019, sch 3, para 1(6).

IV. STATE SURVEILLANCE OF COMMUNICATIONS

A. An Overview of the Contemporary (Post-'Snowden') Legal Framework of Surveillance Powers

This section explores the privacy-implications of state surveillance of communications—an increasingly common, indeed increasingly integral, aspect of modern investigations conducted by the security and intelligence agencies (SIAs), law enforcement and other public authorities into terrorism-related activity.[233] The section focusses, in particular, on the implications for (the protection of) privacy of powers involving the interception of communications and the collection of and access to communications data. These powers are derived from an area of law which has been described as having 'grown exponentially in recent years, in terms of its volume, complexity and sophistication';[234] they sit alongside the many and various other forms of surveillance in which the state also engages for the purposes of (although not limited to) counter-terrorism, which are now provided for, in the main, by the Investigatory Powers Act 2016 (IPA).[235] This includes, for instance, measures involving so-called 'equipment interference'[236]—a term which can be understood, essentially, to refer to a legalised form of computer 'hacking'—and the use of 'bulk personal datasets',[237] which contain personal information—relating to, among other things, medical records, banking, driving and vehicle licences—about large numbers of people. Space precludes discussion of these measures, albeit that they, too, are inevitably implicated in the broader constitutional position of (counter-terrorism deprivation of) privacy with which this chapter is concerned; nor, for reasons of space, is this section able to account for the (long) history and development of the broader legal framework of investigatory powers from which these measures derive. Rather, this section explores the interception of communications and the acquisition of communications data given their place as two of the most widely used—and arguably most controversial—measures of surveillance in and of the contemporary legal framework, far and away the most comprehensive analysis of which in the literature is given by Paul Scott (whose work greatly informs the key issues considered herein).[238]

It suffices for present purposes to begin by noting that the contemporary legal framework is the product of recent and significant reform, the impetus for which can be seen to derive from several key developments in the UK relating to the Snowden disclosures in 2013. Those disclosures, involving the leaking of highly classified documents held by the US National

[233] See, eg, Intelligence and Security Committee, *Access to Communications Data by the Intelligence and Security Agencies* (Cm 8514, 2013). See, also, eg, David Lowe, *Policing Terrorism: Research Studies into Police Counterterrorism Investigations* (Taylor & Francis Group 2015) ch 3.

[234] AW Bradley, KD Ewing, and CJS Knight, *Constitutional and Administrative Law* (17th edn, Pearson 2018) 436.

[235] cf Regulation of Investigatory Powers Act 2000, pt II, which provides for powers relating to 'directed surveillance' (s 28), which is 'covert but not intrusive and is undertaken for the purposes of a specific investigation or a specific operation' involving, for example, the monitoring of a person's movements; 'intrusive surveillance' (s 32), which is 'carried out in relation to anything taking place on any residential premises or in any private vehicle and involves the presence of an individual … or is carried out by means of a surveillance device'—for example, an audio-recording or 'bugging' device; and the use of 'covert human intelligence sources' (s 29), such as undercover officers and police informants.

[236] IPA, pt 5.

[237] ibid pt 7.

[238] See, especially, Scott (n 56) ch 2.

Security Agency, exposed a secret global network of surveillance programmes in which, notably, the UK's SIAs were revealed to be complicit. For instance, it was reported by *The Guardian*—one of the select few media outlets to whom the documents had been leaked by Snowden—that one programme in particular, codenamed 'Tempora', had been carried out by the UK's Government Communications Headquarters (GCHQ) for almost two years 'without any form of public acknowledgement or debate'; the programme involved GCHQ's gaining access to private telephone communications and Internet traffic by 'tap[ping] into and stor[ing] huge volumes of data drawn from fibre-optic cables for up to 30 days so that it can be sifted and analysed'.[239]

Among the key controversies given rise by the Snowden disclosures—and, indeed, the now well-known existence of GCHQ surveillance programmes of the kind exemplified by 'Tempora'—is that of the sheer scale of the SIAs' surveillance activities, which, crucially, were shown to far exceed anything that the relevant legislative framework at the time appeared to sanction.[240] Only in litigation brought before the Investigatory Powers Tribunal (IPT)—that is, the independent, specialist statutory body established with limited jurisdiction to hear complaints about the SIAs' surveillance activities[241]—was it made apparent that GCHQ purported to ground the 'Tempora' programme of 'bulk' interception of communications and acquisition of communications data in s. 8(4) of the Regulation of Investigatory Powers Act 2000 (RIPA). That provision dispensed with rules to the effect that a warrant authorising interception of communications need name or describe either 'one person as the interception subject' or 'a single set of premises as the premises in relation to which the interception to which the warrant relates is to take place' in circumstances involving, among other things, although crucially, the 'interception of external communications'.[242] Although subsequently held by the IPT to have been *within* the scope of that provision, as well as compliant with art. 8 of the ECHR,[243] s. 8(4) of RIPA can be seen to typify a fundamental flaw of the legal framework of investigatory powers which was rendered explicit in 2013, whereby, as Scott writes:

> [I]n certain cases investigatory powers were derived from statutory provisions sufficiently ambiguous or obscure that the practices allegedly authorised by them were effectively secret, with no possibility of legal or political accountability for their use.[244]

The post-'Snowden' legal framework of surveillance powers (with which this section is concerned) is one, therefore, which confronts and thus seeks to rationalise the vast and ever-increasing capabilities of the state, in an age of significant technological advancement, to intrude upon the private lives of its citizens. The IPA updates and consolidates the legal framework of surveillance powers which hitherto had developed 'piecemeal', and thus

[239] Ewen MacAskill, Julian Borger, Nick Hopkins, Nick Davies and James Ball, 'GCHQ Taps Fibre-Optic Cables for Secret Access to World's Communications' *The Guardian* (21 June 2013) <https://www.theguardian.com/uk/2013/jun/21/gchq-cables-secret-world-communications-nsa> accessed 15 June 2020.

[240] See, eg, Keith Ewing, Joan Mahoney and Andrew Moretta (eds), *MI5, the Cold War, and the Rule of Law* (OUP 2020).

[241] RIPA, s 65.

[242] ibid s 8(4)(a) (as originally enacted). The term 'external communication' referred to 'a communication sent or received outside the British Islands' (RIPA, s 20).

[243] *Liberty and Others v GCHQ (No 1)* [2014] UKIPTrib 13_77-H, [2015] 3 All ER 142.

[244] Scott (n 56) 59.

rendered the law in this area both 'difficult to understand' and 'unnecessarily secretive'.[245] In David Anderson's comprehensive and influential report on the review of investigatory powers in 2015, many of the recommendations of which went on to be implemented in the new legal framework, RIPA—the principal statutory basis for much of the SIA's surveillance practices which the IPA has since replaced—was the subject of particularly searching criticism; the Act was described as having been 'obscure since its inception', 'patched up so many times as to make it incomprehensible to all but a tiny band of initiatives', and, as such, produced an 'undemocratic, unnecessary and – in the long run – intolerable state of affairs'.[246] Thus, among the various key innovations of the IPA is that it secures to a more explicit legal basis the availability and oversight of powers (including those relating to interception of communications and acquisition of communications data) in so-called 'bulk' form—powers which, in essence, allow public authorities 'to have access for specified purposes to large quantities of data, *a significant portion of which is not associated with current targets*'.[247] This is in stark contrast to the relevant legal provisions in which the SIAs had previously purported to ground 'bulk' surveillance. Whilst, as Scott notes, in this respect the IPA constitutes 'a significant expansion of the statutory powers available to the executive', with self-evident and far-reaching implications for privacy, rather the key impact of the new legislative framework is that it 'in part codifies and in part makes manifest practices which were already taking place'.[248] Where previously, for example, the SIAs sought to ground an extensive regime of 'equipment interference' in several general provisions of the Secret Service Act 1989 and the Intelligence Services Act 1994[249]—contrary, it was only recently found, to the common law principle of legality[250]—crucially the IPA is now transparent as to the availability of such powers.[251] To that end, it has been noted that '[t]he IPA can be seen as an improvement on the previous situation', for '[i]n consolidating the basis for surveillance powers … the IPA makes the system arguably more transparent and reduces the risk of gaps between oversight regimes, thus potentially improving oversight'.[252]

Moreover, to existing statutory bodies of oversight in the form of the Investigatory Powers Tribunal (IPT)[253] and the Intelligence and Security Committee of Parliament (ISC),[254] the

[245] Intelligence and Security Committee, *Privacy and Security: A Modern and Transparent Legal Framework* (2015, HC 1075) [275].
[246] David Anderson, *A Question of Trust: Report of the Investigatory Powers Review* (2015) [35].
[247] Anderson, *Report of the Bulk Powers Review* (n 13) [1.5] (emphasis in original).
[248] Scott (n 56) 60.
[249] Intelligence Services Act 1994, s 5 (as originally enacted).
[250] *Privacy International v Investigatory Powers Tribunal* [2021] EWHC (Admin) 27. In that case, it was held that 'computer network exploitation' ('hacking') carried out on the basis of 'thematic' or 'general' warrants issued under s 5 of the Intelligence Services Act 1994 was unlawful. In particular, at [45], it was noted: '[I]t is a fundamental right of an individual under the common law that he or she should not be apprehended, or have property seized and searched, save by decision of the person legally charged with issuing the warrant. Expressed in modern legal language, a general warrant is one which requires the exercise of judgment or discretion by the official executing the warrant as to which individuals or which property should be targeted. It follows that a general warrant gives rise to an unlawful delegation of authority by the legally entrusted decision-maker to the executing official. This unlawful delegation breaches a fundamental right.'
[251] IPA, pt 6, ch 3.
[252] Lorna Woods, 'The Investigatory Powers Act 2016' (2017) 3(1) Eur Data Prot L Rev 103.
[253] Intelligence Services Act 1994, s 10, sch 3.
[254] Justice and Security Act 2013, ss 1-4, sch 1.

IPA adds a further, and crucial, oversight mechanism: the Investigatory Powers Commissioner (IPC), a role which combines the functions previously split, under RIPA, between three separate bodies—namely, the Interception of Communications Commissioner, the Intelligence Services Commissioner, and the Chief Surveillance Commissioner.[255] The occupant of the new IPC role is to be appointed by the Prime Minister,[256] who, in turn, is also to appoint 'such number of other Judicial Commissioners as the Prime Minister considers necessary for the carrying out of the functions of the Judicial Commissioners'.[257] Both the IPC and the JCs ought to hold or have held 'high judicial office'.[258] The role of the JCs is central to what is referred to as the 'double-lock'[259] feature of the new regime, for it involves their reviewing the relevant conclusions of the Secretary of State that a decision to issue a warrant authorising, for instance, targeted interception of communications is 'necessary on relevant grounds' and that 'the conduct that would be authorised by the warrant is proportionate to what is sought to be achieved by that conduct'.[260] And although, as discussed in more detail in sub-section D, below, there are several compelling reasons to suspect that the effectiveness of the 'double-lock' in practice may, in fact, be somewhat limited, the oversight provided by quasi-judicial bodies in the forms of the IPC and the JCs performs an important function in terms, more broadly, of ensuring the new regime's compatibility with the ECHR. That is, the 'double-lock' does much to align the current regime with the Strasbourg Court's apparent recent endorsement in the art. 8 case law of a line of reasoning which highlights (sufficient) independent oversight of executive/ministerial authorisation of surveillance powers—perhaps, specifically, and crucially, by a judicial actor—as an essential precondition of 'lawfulness' under art. 8(2).[261]

It is against the backdrop of this new legal framework—and the various new (extensive) measures and oversight mechanisms with which it is populated—that powers relating to ('targeted' and 'bulk') interception of communications and acquisition of communications data are to be considered in this section. Four key issues concerning the legal protection of privacy, which are brought to bear on the exercise of these substantial powers, are then explored: firstly, the 'general duties in relation to privacy' now imposed upon public authorities under Part 1 of the IPA,[262] and in particular the way in which those duties might operate at the level of application, with the oversight role of the JCs given as a key example; secondly, that of art. 8 of the ECHR, and the (increasingly onerous) requirements of 'lawfulness' developing within the Strasbourg Court's case law, as evidenced most recently in the ECtHR case of *Big Brother Watch v United Kingdom*; thirdly, the position of the common law, and specifically the oversight role of the 'ordinary' courts in relation to, or as distinguished from, that of the IPT; and fourthly, the continuing relevance of the key legal

[255] RIPA, ss 57, 59, 62 (as originally enacted).
[256] IPA, s 227(1)(a). The current IPC is Sir Brian Leveson, who was appointed to the role in October 2019.
[257] ibid s 227(1)(b).
[258] ibid s 227(2).
[259] The term was used as the basis for recommendations given in David Anderson's review of investigatory powers: *A Question of Trust* (n 246).
[260] IPA, s 23(1).
[261] *Szabó and Vissy v Hungary* (2016) 63 EHRR 3; *Zakharov v Russia* (2016) 63 EHRR 17.
[262] IPA, s 2(1).

categories of ‘content’ and ‘metadata’, which are distinguished within the IPA for reasons which can be traced ultimately to the objective of protecting privacy.

B. Interception of Communications under the IPA

Powers relating to the interception of communications are among the most intrusive available under the IPA, authorising access to the contents of the relevant communication as well as the collection of data relating to it. The significance of the distinction between ‘content’ and ‘communications data’—especially in the context of the protection of privacy—is discussed in more detail in sub-section D, below. Rather, it suffices to note here that interception of communications implicates both (‘content’ and ‘communications data’), and thus can be described as revealing not only what was *said* in a communication, but also by whom and to whom the communication was sent, where from and where to, when, and by which means. The use of intercept powers has increased in recent years; figures published by the newly established Investigatory Powers Commissioner’s Office (IPCO), including totals for law enforcement agencies, the UK intelligence community and the Ministry of Defence, confirm that 2,795 targeted interception authorisations were given in 2014, rising to 3,576 authorisations in 2018,[263] although reducing somewhat, to 3,329, in 2019.[264] 30 ‘bulk’ interception warrants, issued under the new IPA powers which came into effect in 2018 (as outlined below), were authorised in 2019.[265]

The IPA carries over from the previous legal framework the basic rule that, beyond certain exceptions,[266] it is unlawful for a person to intercept a communication in the course of its transmission in the UK—that is, ‘by means of (i) a public telecommunication system, (ii) a private telecommunication system, or (iii) a public postal service’—where that person ‘does not have lawful authority to carry out the interception’.[267] A person has lawful authority, under s. 6 of the Act, if the interception is carried out in accordance with any one of several warrants for which the IPA provides: a targeted interception warrant or mutual assistance warrant (the latter relating, essentially, to circumstances involving intelligence-exchange between UK SIAs and foreign agencies);[268] a bulk interception warrant;[269] or, ‘in the case of communication stored in or by a telecommunication system’, a targeted equipment interference warrant or a bulk equipment interference warrant.[270]

As noted in sub-section A, above, the IPA explicitly distinguishes between ‘targeted’ and ‘bulk’ powers. The former ostensibly by their nature entail a level of specificity as to the individual/s whose privacy is/are to be invaded as a result of their use—including, for instance, that the individual/s be named in the relevant warrant authorising the interception of communications or acquisition of communications data. As such, in these circumstances, the

[263] Investigatory Powers Commissioner’s Office, *Annual Report 2018* (HC 76, 2020) 117.
[264] Investigatory Powers Commissioner’s Office, *Annual Report 2019* (HC 1039, 2020) 143.
[265] ibid 146.
[266] IPA, ss 44-52. Exceptions include the sender’s consenting to interception (s 44), as well as interception in prison settings (s 49), psychiatric hospitals (s 50) and immigration detention facilities (s 51).
[267] IPA, s 3(1).
[268] ibid s 6(1)(a)(i).
[269] ibid s 6(1)(a)(ii).
[270] ibid s 6(1)(c)(i).

invasion of privacy is notionally limited, if only in the sense that it is properly directed to those 'who are suspected of being a threat to the UK'.[271] By contrast, 'bulk' powers are those which are said to 'involve the Agencies casting their nets wider and analysing large volumes of information, [and so] enable the Agencies also to find linkages, patterns, associations or behaviours which might demonstrate a serious threat requiring investigation'.[272] The implications for the protection of privacy in the case of 'bulk' powers are thus self-evident, and, indeed, are manifestly more severe than those derived from 'targeted' powers: 'bulk' powers effectively maximise the capacity of the SIAs and law enforcement, say, to identify a credible terrorist threat, but crucially at the expense of those—in any case likely very many—whose communications or personal data are of no concern whatsoever to investigators of terrorism-related activity. Not only, therefore, is the distinction between 'targeted' and 'bulk' powers straightforwardly predicated on the bare fact that the latter entails the potential for intrusions of privacy on a much broader scale than the former: 'bulk' powers are to be distinguished, also, by their speculative nature as an intelligence-gathering tool, such that the decision to authorise their use may be vindicated (if at all) only at the point at which subjects of interest are identified and thus require further investigation. For this reason, it has been noted that 'bulk' capabilities 'nevertheless require some degree of targeting in order to ensure that a human eye only looks at that which is most likely to be of intelligence evidence'.[273]

The corollary of this, therefore, is that procedural conditions as to the exercise of powers which are 'bulk' in nature are more restrictive than those which apply in the context of 'targeted' powers. Those conditions apply both at the stage of authorisation and, crucially, at the stage of selection for examination of 'bulk' communications or communications data. For example, under the 2016 Act only 'on an application made by or on behalf of the head of an intelligence service' may the Secretary of State issue a warrant authorising bulk interception of communications or bulk acquisition of communications data—again subject, that is, to the approval of a JC.[274] Rather, in the contexts of the '*targeted*' variants of those powers, the list of those who may apply for issue of the relevant warrant is much broader, extending not only to the heads of the intelligence services, but to, among others, the Director General of the National Crime Agency, the Commissioner of Police of the Metropolis and chief constables of the respective Police Services of Scotland and Northern Ireland, and the Commissioners for Her Majesty's Revenue and Customs.[275]

(i) 'Targeted' interception of communications

The IPA provides for the issuing of warrants relating specifically to 'targeted' interception of communications in two forms. One form, a 'targeted examination warrant', applies to circumstances involving the selection for examination of 'any content of communications intercepted by an interception authorised or required by a bulk interception warrant under

[271] ISC, *Privacy and Security* (n 245) [18].
[272] ibid [18].
[273] ibid [18].
[274] IPA, ss 138, 140, 158, 159.
[275] ibid s 18(1).

Chapter 1 of Part 6 [of the Act]'[276] (considered in more detail below). The other, as noted above, is a 'targeted interception warrant', which authorises 'the interception, in the course of their transmission by means of a postal service or telecommunication system, of communications described in the warrant', 'the obtaining of secondary data' (in the course of their transmission by the same means), and 'the disclosure, in a manner described in the warrant, of anything obtained under the warrant to the person to whom the warrant is addressed or to any person acting on that person's behalf'.[277] A targeted interception warrant may be issued by the Secretary of State on an application of any of the relevant 'intercepting authorities' listed in s. 18. The list includes (but is not limited to) the head of the Security Service (MI5), the Secret Intelligence Service (MI6), or GHCQ; the Director General of the National Crime Agency; the Commissioner of Police of the Metropolis and chief constables of the respective Police Services of Scotland and Northern Ireland; and the Commissioners for Her Majesty's Revenue and Customs. The relevant grounds on which it may be considered by the Secretary of State necessary to issue a targeted interception warrant include 'in the interests of national security'[278] and 'for the purpose of preventing or detecting serious crime'.[279] A warrant may also be considered necessary 'in the interests of the economic well-being of the United Kingdom', but only insofar as 'those interests are also relevant to the interests of national security'[280] and, crucially, 'only if the information which it is considered necessary to obtain … relat[es] to the acts or intentions of persons outside the British Islands'.[281] The Secretary of State's decision to issue a targeted interception warrant is subject to the approval of a JC,[282] there being provision, however, in urgent cases, for a warrant to take effect without such approval.[283] In those circumstances, statutory obligations are imposed such that '[t]he person who decided to issue the warrant must inform a [JC] that it has been issued',[284] and that before 'the period ending with the third working day after the day on which the warrant was issued', the JC must 'decide whether to approve the decision to issue the warrant' and 'notify the person of [the outcome of that] decision'.[285] Where a JC refuses to approve the relevant decision, the warrant both 'ceases to have effect (unless already cancelled) and 'may not be renewed'.[286] The person to whom the refusal is addressed must 'so far as reasonably practicable, secure that anything in the process of being done under the warrant stops as soon as possible',[287] while the JC may thereafter 'direct that any of the material obtained under the warrant is destroyed' or 'impose conditions as to the use or retention of any of that material'.[288]

[276] ibid s 15(3).
[277] ibid s 15(2).
[278] ibid s 20(2)(a).
[279] ibid s 20(2)(b).
[280] ibid s 20(2)(c).
[281] ibid s 20(4).
[282] ibid ss 23-24.
[283] ibid s 24.
[284] ibid s 24(2).
[285] ibid s 24(3).
[286] ibid s 24(4).
[287] ibid s 25(2).
[288] ibid s 25(3).

One key issue which it suffices to highlight here is that the IPA can be seen to have innovated as to the substance of targeted interception powers in a number of ways which distinguishes those powers from the corresponding provisions in the previous legislative framework (under RIPA).[289] Among the effects of this, crucially, is an evident expansion of the scope of intercept powers within the new regime and, as such, the potential for intrusions of privacy. One key example relates to the range of potential subject-matter to which a targeted interception warrant may apply. The relevant provision, s. 17 of the IPA, provides that a warrant may apply not only to 'a particular person or organisation' or 'a single set of premises', but also to 'a *group* of persons who share a common purpose or who carry on, or may carry on, a particular activity', or '*more than one person or organisation*, or *more than one set of premises*, where the conduct authorised or required by the warrant is for the purposes of a single investigation or operation'.[290] In so providing, that section renders explicit the availability of what is described in the relevant Code of Practice as a 'targeted "thematic" warrant'.[291] So-called 'thematic warrants', although given no formal definition within the Act, can be understood, essentially, as 'warrants which identify the persons and property to whom they apply by virtue of a theme which connects them, rather than their specific identity'.[292] It is in this sense that 'thematic' warrants are an important illustration of the way in which, in practice, intercept powers are exercisable at a level of much greater generality than the term 'targeted' would appear to imply. Indeed, the level of obfuscation surrounding that fact within RIPA was widely considered among the most compelling arguments for the need to reform that framework. For provisions concerning the content of targeted interception warrants under RIPA read, simply, that either 'one person' or 'a single set of premises' ought to have been named in the authorisation;[293] only in the general interpretation provision of the 2000 Act, s. 81, was it made apparent 'person' was given the meaning under that section as including 'any organisation and *any association or combination* of persons'.[294]

(ii) 'Bulk' interception of communications

Whatever the potential scope for intrusions of privacy under 'targeted' interception warrants, even in the form of 'thematic' warrants, it pales in comparison to so-called 'bulk' interception warrants, the relevant provisions for which are found in Part 6, Chapter 1 of the IPA. A bulk interception warrant—the only means, within the Act, by which interception of communications on this scale may be authorised—is defined thereunder as a warrant which satisfies two key conditions (A and B).[295] Condition A is that 'the main purpose of the warrant' is 'the interception of overseas-related communications' and/or 'the obtaining of

[289] RIPA, s 5 (as originally enacted).
[290] IPA, s 17 (emphasis added).
[291] Home Office, *Interception of Communications: Code of Practice* (2018) [5.11].
[292] Paul F Scott, 'General Warrants, Thematic Warrants, Bulk Warrants: Property Interference for National Security Purposes' (2017) 68(2) NILQ 99, 105.
[293] RIPA, s 8 (as originally enacted).
[294] ibid s 81 (emphasis added).
[295] IPA, s 136(1).

secondary data from such communications'.[296] Condition B is that the warrant 'authorises or requires the person to whom it is addressed to secure, by any conduct described in the warrant, any one or more of the following activities':

> (a) the interception, in the course of their transmission by means of a telecommunication system, of communications described in the warrant;
>
> (b) the obtaining of secondary data from communications transmitted by means of such a system and described in the warrant;
>
> (c) the selection for examination, in any manner described in the warrant, of intercepted content or secondary data obtained under the warrant;
>
> (d) the disclosure, in any manner described in the warrant, of anything obtained under the warrant to the person to whom the warrant is addressed or to any person acting on that person's behalf.

So great is the potential scope for intrusions of privacy associated with bulk interception of communications that the conditions imposed upon the power to issue a warrant authorising those measures are among the most restrictive on the face of the 2016 Act. As noted above, only 'on an application made by or on behalf of the head of an intelligence service'—again, meaning the Security Service (MI5), the Secret Intelligence Service (MI6), or GCHQ[297]—may the Secretary of State issue a bulk interception warrant.[298] The decision of the Secretary of State to issue a warrant must be approved by a JC,[299] and may be justified on the grounds that the Secretary of State considers the warrant both necessary 'in the interests of national security'[300] and 'proportionate to what is sought to be achieved by [the conduct authorised in the warrant]'.[301] A warrant may be considered necessary also (that is, in addition to, but not exclusive of, 'in the interests of national security')[302] 'for the purpose of preventing or detecting serious crime',[303] or 'in the interests of the economic well-being of the United Kingdom so far as those interests are also relevant to the interests of national security',[304] although (in respect of the latter) 'only if the information which it is considered necessary to obtain is information relating to the acts or intentions of persons outside the British Islands'.[305]

Another important condition is imposed upon the exercise of bulk interception powers in the form of the so-called 'operational purposes' for which material intercepted pursuant to a bulk interception warrant might subsequently be examined. That is, a warrant 'must specify the operational purposes for which any intercepted content or secondary data obtained under

[296] ibid s 136(2).
[297] ibid s 263(1).
[298] ibid s 138(1).
[299] ibid s 138(1)(g).
[300] ibid s 138(1)(b)(i).
[301] ibid s 138(1)(c).
[302] ibid s 138(1)(b)(ii).
[303] ibid s 138(2)(a).
[304] ibid s 138(2)(b).
[305] ibid s 138(3).

the warrant may be selected for examination',[306] the Secretary of State having, therefore, to satisfy herself that each of the operational purposes so specified 'is a purpose for which the examination of intercepted content or secondary data obtained under the warrant is or may be necessary'[307] (on any of the grounds on which the warrant itself is considered by her to be necessary).[308] A list of operational purposes is to be maintained by the heads of the intelligence services,[309] overseen by the ISC 'at the end of each relevant three-month period',[310] and reviewed annually by the Prime Minister.[311] Statutory arrangements for additions or modifications to the list include that '[a]n operational purpose may be specified in the list … only with the approval Secretary of State',[312] who, crucially, 'may give such approval only if satisfied that the operational purpose is specified in a greater level of detail than the descriptions contained in section 138(1)(b) or (2)'[313]—that is, 'in the interests of national security', and so on.

A potential limitation of the 'operational purposes' requirement, however, is that very little detail is made available as to what those purposes might include. Indeed, the lack of clarity in this regard was considered by the ISC in its report on the Draft Investigatory Powers Bill to be 'completely unsatisfactory', for it 'contradicts the primary purpose of the [IPA], to provide some much-needed transparency in this area'.[314] Examples are given in the UK Government's 'Operational Case for Bulk Powers' published in 2016, which includes (but is not limited to): '[t]o detect and disrupt direct threats to the UK and allied interests overseas from Daesh and its affiliates'; '[t]o understand the scale and nature of the cyber threat to the UK and allied interests'; and '[t]o detect and disrupt child sexual exploitation and abuse'.[315] Yet, even assuming that the operational purposes are in practice outlined in more detail than the examples given here, the requirement itself that they be specified by the Secretary of State 'at a greater level of detail than the descriptions contained in section 138(1)(b) or (2)' can scarcely be said to impose any meaningful obstacle to the Secretary of State's ability to add to or modify the list of operational purposes. Descriptions such as 'in the interests of national security' and 'for the purpose of preventing or detecting serious crime' are themselves, by any measure, vague and invariably all-encompassing, and thus it is perhaps no tall order to improve upon their specificity whilst continuing to undermine transparency in the SIAs' surveillance activities. And in any event, that the Secretary of State is in a key position to influence the process of establishing the relevant operational purposes raises questions as to the effectiveness of that condition as an essential limit on the Secretary of State's power to authorise 'bulk' interception of communications.

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[306] ibid s 142(3).
[307] ibid s 138(1)(d)(i).
[308] ibid s 138(1)(d)(ii).
[309] ibid s 142(4).
[310] ibid s 142(8).
[311] ibid s 142(10).
[312] ibid s 142(6).
[313] ibid s 142(7).
[314] Intelligence and Security Committee, *Report on the Draft Investigatory Powers Bill* (HC 795, 2016) [J].
[315] HM Government, *Operational Case for Bulk Powers* (2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/504187/Operational_Case_for_Bulk_Powers.pdf> accessed 5 August 2020.

One final point which also ought to be noted here is that the exercise of 'bulk' powers is subject to the general principle that they may only be used in respect of 'overseas-related communications'.[316] And while exceptions to that rule include, notably, bulk acquisition of communications data—an arrangement which can be traced, ultimately, to the (increasingly contested) content/metadata distinction discussed below—that that requirement applies to 'bulk' powers at all reflects the assumption adopted by the IPA that powers authorising the interception of communications or the acquisition of communications data by the state on a massive scale are tolerable in the UK only to the extent that they may not be used against the domestic population at large. One question of perennial importance as to the scrutiny of the operation of 'bulk' surveillance regimes, therefore, is that of whether the relevant legal framework sufficiently circumscribes the instances in which (if at all) such territorial restrictions might be compromised.

C. Acquisition of Communications Data under the IPA

The collection of and access to communications data, a form of so-called 'metadata' which can be understood to mean 'data about use made of a telecommunications or postal service but not the contents of the communications themselves',[317] has been described as 'a basic tool in the investigator's armoury', it having played 'a significant role in every counter-terrorist operation MI5 has run in the past decade'.[318] Indeed, so integral are communications data to the work of the SIAs—a 2013 report by the ISC suggesting, for instance, that 'it is used in practically all investigations conducted by the Security Service'[319]—it is perhaps unsurprising that powers relating to its acquisition are used widely. In the IPCO's annual report for 2018, published in March 2020, statistics show that some 210,755 requests for ('targeted') communications data acquisition were approved, issued or given in 2018;[320] in total, 808,214 items of communications data were applied for and obtained in the same year.[321] The IPCO's annual report for 2019, published in December 2020, notes that '[c]ommunications data requests continue to be the most voluminous of the authorisations for covert powers'; the report confirms that 200,655 requests were approved in 2019.[322]

(i) 'Targeted' acquisition of communications data

The relevant powers need only be considered briefly for present purposes. It suffices to note, simply, that of the various measures considered in this section of the chapter, the procedural conditions that apply to targeted acquisition of communications data under the IPA can be seen to be the least imposing. As noted above, the IPA makes available the power to obtain communications data to a wide range of public authorities; a 'designated senior officer' of the relevant public authority may 'authorise any officer of the authority to engage in any

[316] IPA, s 136(2)(a).
[317] Anderson, *Question of Trust* (n 246) [6.6].
[318] ibid [7.43]-[7.44].
[319] ISC, *Access to Communications Data* (n 233) [23].
[320] IPCO, *Annual Report 2018* (n 263) 115.
[321] ibid 135.
[322] IPCO, *Annual Report 2019* (n 264) 144.

conduct' which is 'for the purpose of obtaining data from any person', and relates to 'a telecommunication system' or 'data derived from a telecommunication system'.[323] There is a requirement that an authorisation be necessary for any one of a relatively long list of purposes[324]—as compared, that is, with the list of purposes for which targeted interception of communications might be considered necessary, reflecting, in turn, the many and various contexts (beyond that of 'national security') in which acquisition powers are routinely used. Of course, featured within that list are the purposes of 'in the interests of national security', 'preventing or detecting crime or of preventing disorder' and 'in the interests of public safety'.[325] So too is there an additional requirement that an authorisation be necessary to obtain the data 'for the purposes of a specific investigation or a specific operation', or 'for the purposes of testing, maintaining or developing equipment, systems or other capabilities relating to the availability or obtaining of communications data'.[326] In any case, the conduct authorised ought to be 'proportionate to what is sought to be achieved'.[327]

(ii) 'Bulk' acquisition of communications data

The strategic importance of bulk acquisition of communications data to the UK's contemporary counter-terrorism response is highlighted in the 2016 *Report of the Bulk Powers Review*, in which GCHQ is quoted as stating that '[t]ogether with communications obtained through bulk interception, this power is the primary way in which [it] discovers new threats to the UK'.[328] Statistics as to the use of the relevant IPA provisions on bulk acquisition are only recently made publicly available in the IPCO's annual reports, those provisions having only come into force in February 2019. Previous reports reveal that, in 2017, 15 'directions' had been made pursuant to s. 94 of the Telecommunications Act 1984—the previous legislative basis for bulk acquisition powers—with over 20,500 applications to access communications data obtained pursuant to those directions were made, relating to 98,798 items of communications data.[329] And in 2017, nearly 10% of GCHQ's 'end product reports' included material acquired bulk provisions.[330] In the IPCO's most recent annual report, which covers the year 2019, it is confirmed that 18 bulk acquisition warrants were approved in that year.[331]

It suffices for present purposes to simply note that, analogous to the difference in approach, generally, to the regulation of 'targeted' and 'bulk' interception of communications, bulk acquisition of communications under the IPA is subject to greater restrictions than the 'targeted' equivalent of those powers. Indeed, the conditions applicable to the power to issue a bulk acquisition warrant in many ways replicate the relevant provisions (outlined above) on bulk interception of communications. Thus, similarly only 'on

[323] IPA, s 61(2).
[324] ibid s 61(1)(a).
[325] ibid s 61(7).
[326] ibid s 61(1)(b)(i).
[327] ibid s 61(1)(b)(ii).
[328] Anderson, *Report of the Bulk Powers Review* (n 13) 152.
[329] Investigatory Powers Commissioner's Office, *Annual Report 2017* (HC 1780, 2019) [9.9]-[9.10].
[330] ibid [9.11].
[331] IPCO, *Annual Report 2019* (n 264) 146.

an application made by or on behalf of the head of an intelligence service' may the Secretary of State issue a warrant authorising bulk acquisition of communications data;[332] the Secretary of State's decision may be justified on national security grounds,[333] or on those grounds and for the purposes of 'preventing or detecting serious crime' or 'the economic well-being of the United Kingdom so far as those interests are also relevant to the interests of national security';[334] and the decision ought to be approved by a JC (on which, see the discussion in sub-section D, below).[335] Arrangements concerning the 'operational purposes' for which communications intercepted under a bulk warrant may be examined also apply in the context of acquisition of communications data—so too therefore, do the same issues as to the potential dubiousness of those arrangements arise here.

D. The Protection of Privacy in the Contemporary Legal Framework of Surveillance Powers

(i) 'General duties in relation to privacy' and the role of the Judicial Commissioners

Alongside the various reforms aimed at improving transparency and oversight of the use of surveillance powers, the IPA can be seen to demonstrate a (renewed) commitment to the protection of privacy. That Part 1 of the IPA provides for 'general privacy protections' is the clearest example of that commitment. Specifically, under that Part the Act imposes upon public authorities a range of 'general duties in relation to privacy' which apply to the myriad circumstances in which decisions concerning the use of invasive powers of surveillance are made—decisions that relate, for example, to the issue, renewal, or cancellation of a warrant authorising the use of those powers.[336] Duties include the need, in those circumstances, to have regard to 'whether what is sought to be achieved by [a] warrant, authorisation or notice could reasonably be achieved by other less intrusive means';[337] 'whether the level of protection to be applied in relation to any obtaining of information by virtue of [a] warrant, authorisation or notice is higher because of the particular sensitivity of that information' (with items covered by legal privilege,[338] information relating to journalistic sources,[339] and correspondence between MPs and their constituents[340] given as relevant examples of 'sensitive information');[341] 'the public interest in the integrity and security of telecommunication systems and postal services';[342] and 'any other aspects of the public interest in the protection of privacy'.[343] These duties are 'subject to the need to have regard to

[332] IPA, s 158(1).
[333] ibid s 158(1)(a)(i).
[334] ibid ss 158(1)(a)(ii), 158(2).
[335] ibid s 158(1)(e).
[336] ibid s 2(1).
[337] ibid s 2(2)(a).
[338] ibid s 2(5)(a).
[339] ibid s 2(5)(b).
[340] ibid s 2(5)(c).
[341] ibid s 2(2)(b).
[342] ibid s 2(2)(c).
[343] ibid s 2(2)(d).

other considerations that are also relevant in [the particular] context',[344] which, besides the familiar requirements of 'the interests of national security or of the economic well-being of the United Kingdom'[345] and 'the public interest in preventing or detecting serious crime',[346] also include 'whether the conduct authorised or required by the warrant, authorisation or notice is *proportionate*', 'whether it is *necessary* to act for a purpose provided for by [the] Act',[347] 'the requirements of the [HRA]',[348] and 'other requirements of public law'.[349]

Notwithstanding that by grounding the protection of privacy as a key objective across the contemporary legal framework of surveillance powers the IPA has been commended for 'proffer[ing] a welcome human rights approach from the UK Government',[350] among the key questions given rise in this context is that of the effect, if any, that 'general duties in relation to privacy' per se will have on the operation of that regime at the level of application. Perhaps, in other words, the inclusion of the 'general duties' in the IPA is, in fact, tokenistic—statutory recognition, simply, of the broader heightening of sensitivities about the privacy-implications of state surveillance powers and practices post-'Snowden'. One point which does emerge from the various 'general duties' outlined above, however, is that the key standards to be applied in their stead—proportionality, necessity—are evidently those derived from the ECHR, once again reflecting the extent to which the domestic protection of privacy hangs, ultimately, upon the legal norms and values developed in the Convention jurisprudence. By contrast, the practical significance, if any, of those principles developed and protected in the common law (to the extent that they can be separated from Convention norms)—which the term 'other requirements of public law' probably encompasses—appears much less clear-cut.

Although, one area in which principles of the common law are, in fact, brought to bear is that of the role of the JCs in deciding whether to approve a person's decision to issue a warrant authorising, for instance, targeted interception of communications. (In the specific context of those powers,) s. 23 of the Act stipulates that in reviewing the relevant person's conclusions that 'the warrant is necessary on relevant grounds' and that 'the conduct that would be authorised by the warrant is proportionate to what is sought to be achieved by that conduct', the JC must '*apply the same principles as would be applied by a court on an application for judicial review*', as well as having to consider the matter 'with a sufficient degree of care' so as to ensure compliance with the Part 1 'general duties'.[351] (Incidentally, quite what constitutes 'a sufficient degree of care' in respect of the obligation owed by the JCs under the Act's 'general duties in relation to privacy', and how, if at all, that standard might be enforced, are among the key questions surrounding the issue noted above, concerning the (un)likely effectiveness of those duties in practice.)

[344] ibid s 2(3)(b).
[345] ibid s 2(4)(a).
[346] ibid s 2(4)(b).
[347] ibid s 2(4)(c).
[348] ibid s 2(4)(d).
[349] ibid s 2(4)(e).
[350] Simon Hale-Ross, 'The Investigatory Powers Act 2016: The Human Rights Conformist' in Simon Hale-Ross and David Lowe (eds), *Terrorism and State Surveillance of Communications* (Routledge 2019) 87.
[351] IPA, s 23(2) (emphasis added). Analogous requirements apply as to the role of the JCs in the contexts of retention of communications (s 84), equipment interference (both in 'targeted' (s 108) and 'bulk' form (s 179)), bulk interception warrants (s 140), bulk acquisition warrants (s 159), bulk personal datasets (s 208) and approval of notices (s 254).

Much hangs on the requirement that 'principles of judicial review' be applied, it having been noted that the 'practical significance' of the JCs' role—especially in terms of ensuring the effectiveness of the 'double-lock' feature of the new regime—'depends in large part upon the approach taken to review and, in particular, how the 2016 Act's reference to [those principles] is interpreted'.[352] Broader implications concerning the independence of the JCs in overseeing the executive's surveillance activities—as a form of 'hybrid institution'[353] or 'trusted intermediary'[354] operating somewhere in-between a legal-judicial and political-parliamentary oversight function—and the contingency of that factor upon, again, the interpretation of the term 'principles of judicial review', include those which are to be read in the light of the Strasbourg Court's developing jurisprudence on the requirements of 'lawfulness' under art. 8(2). The nature and significance of those requirements are considered in more detail below, although for present purposes it suffices to note that insofar as chief among them is the existence of 'adequate safeguards' capable of allaying the risk of abuse of surveillance measures—not least where those measures are used covertly—the ECtHR has noted that a process of authorisation involving 'a non-judicial authority may be compatible with the Convention … provided that that authority is sufficiently independent from the executive'.[355]

For these reasons, the level of uncertainty that surrounds the meaning intended for the reference to 'principles of judicial review' produces an unsatisfactory state of affairs, particularly given that the Act fails to clarify even the basic issue of exactly *which* principles are to be applied. On one reading, the relevant principle would be that of 'reasonableness', on which basis the JC would be tasked with assessing whether the Secretary of State's conclusions (as to the necessity and proportionality of a warrant) fell within the range of reasonable conclusions open to her in the relevant circumstances. However, were 'reasonableness' the requisite standard to be applied, bound as it is to the extraordinarily stringent threshold first established in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*,[356] that would result in oversight by the JCs which, in effect, was 'weaker than that carried out by [the previous] Surveillance Commissioners', for whom the key question was not 'whether a decision was outwith the range of reasonable conclusions open to the decision-maker', but rather 'whether there [were] reasonable grounds for it'.[357] Review of the kind associated with '*Wednesbury* reasonableness' being, in reality, of the lightest touch in the vast majority of circumstances, it follows, therefore, that this approach would risk 'collapsing [the 'double-lock'] into a purely cosmetic exercise' and, as such, fall foul of the increasingly stringent requirements of 'lawfulness' under the ECHR.[358]

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[352] Paul F Scott, 'Hybrid Institutions in the National Security Constitution: The Case of the Commissioners' (2019) 39(3) LS 432, 451.

[353] ibid.

[354] Lorna Woods, Lawrence McNamara and Judith Townsend, 'Executive Accountability and National Security' (2021) 0(0) MLR 1.

[355] *Zakharov* (n 261) [258].

[356] [1947] EWCA Civ 1, [1948] 1 KB 223. See, also, *Council of Civil Service Unions v Minister for the Civil Service* [1984] UKHL 9, [1985] AC 374 (Lord Diplock): '['*Wednesbury* reasonableness'] … applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.'

[357] Scott, 'Hybrid Institutions' (n 352) 451.

[358] Scott, *National Security Constitution* (n 56) 81-82.

In an 'Advisory Notice' published by the IPCO on 'Approval of Warrants, Authorisations and Notices by the Judicial Commissioners', the relevant approached was stated as follows:

> The purpose of the so-called "double lock" provisions of the Act are to provide an independent, judicial, safeguard as to the legality of warrants, in particular to their necessity and proportionality. In cases engaging fundamental rights, the Judicial Commissioners will not therefore approach their task by asking whether a Secretary of State's decision that a warrant is necessary and proportionate is Wednesbury reasonable, as this would not provide the requisite independent safeguard.
>
> This is the approach that is taken by domestic courts in judicial review cases when reviewing measures and decisions that interfere with fundamental rights under the Human Rights Act 1998 and when applying EU law, and a similar approach is adopted when considering interferences with common law rights. Since the Judicial Commissioners are required to adopt the same approach as would be applied by a court in judicial review proceedings, the Judicial Commissioners will adopt this approach in such cases.[359]

Thus, '*Wednesbury* reasonableness' was explicitly rejected as the appropriate standard of review '[i]n cases engaging fundamental rights'. Of course, on one hand, this decision is to be welcomed, such that it clearly avoids the pitfalls outlined above. Yet, there are several reasons to be doubtful about the IPCO's interpretation of the 'principles of judicial review' requirement—that is, not only as to whether it is the correct one, but also as to whether, in fact, it is desirable as far as the protection of privacy is concerned.

The key problem is one of the likelihood of practice aligning (or *not*, more to the point) with asserted principle. In other words, an interpretation of the 'principles of judicial review' requirement which is in any way aligned with the *common law's* approach to proportionality-style review is liable not to bode well for the protection of privacy. Indeed, that approach is one which can be described as *at best* tentative, so heavily dependent is the availability of proportionality as a standalone ground of review at common law (that is, outwith the scope of the HRA/ECHR and EU law) upon contextual factors—indeed, contextual factors about which there is no clarity in the development of the common law on this issue.[360] For reasons outlined in Section II, above, the common law can scarcely be said to recognise as 'fundamental' a negative right against interference by public authorities of the kind warranting the (increased) intensity of scrutiny that comes with the test of proportionality (as compared, that is, with the test relating to the '*Wednesbury* reasonableness' standard of review). It is not at all convincing, therefore, that an invasion of privacy of the kind associated with state surveillance of communications is, on the IPCO's interpretation, sufficient to ground (what the common law would recognise as) the relevant conditions for proportionality-review. Neither, for similar reasons, may any encouragement be gleaned from the suggestion that the IPCO's approach is justified insofar as 'a similar approach is adopted [by the domestic courts] when considering interferences with common law rights'. There is, in fact, a certain irony in that the Advisory Notice cites as relevant authority for that proposition, among others, the case of *R v Secretary of State for the Home Department, ex*

[359] Investigatory Powers Commissioner's Office, *Advisory Notice 1/2018: Approval of Warrants, Authorisations and Notices by the Judicial Commissioners* (2018) [19]-[20].

[360] See, eg, *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39, [2014] AC 700; *Kennedy v Charity Commission* [2014] UKSC 20, [2015] 1 AC 455; *Pham v Secretary of State for the Home Department* [2015] UKSC 19, [2015] 1 WLR 1591.

parte Daly.[361] For that case is in many ways emblematic of the domestic courts' inadequate approach to the protection of privacy; as Scott writes, that case 'which might have been conceptualised as relating to individual privacy … [was] determined on the basis that the policy governing the search of prisoners' cells was a violation of the fundamental right of access to the courts'.[362]

In any event, the effectiveness of the JCs' oversight may be hamstrung by another, perhaps more glaring issue. As Scott notes:

> [The IPCO's approach] interprets the double-lock requirement in a strong form, though falls short of an approach in which the JCs decide for themselves whether the issue of the warrant is necessary and proportionate, as evidenced by the assertion that 'in deciding whether to approve a decision to issue a warrant, the Judicial Commissioners will ask themselves *whether the Secretary of State's decision* to issue a warrant is necessary and proportionate.[363]

On this basis, that proportionality is the requisite standard of review appears altogether incapable, of itself, of remedying the JCs' apparent subordinate status in the 'double-lock' mechanism.[364]

(ii) Compatibility with the right to private and family life under art. 8 of the ECHR

The second key issue as to the legal protection of privacy considered to be considered in this section is that of the compatibility of contemporary state surveillance practices with art. 8 of the ECHR. Interception of communications and the collection of and access to communications data are among the various forms of state surveillance which have been recognised by the ECtHR as engaging the right to respect for private and family life under art. 8.[365] As noted in Section II, above, the compatibility of such measures ultimately falls to be assessed on two grounds (stipulated under art. 8(2)): first, whether the interference with art. 8 is 'in accordance with the law'; and secondly, whether the interference is 'necessary in a democratic society', in pursuit of some broader objective—including (but not limited to) 'the interests of national security, public safety or the economic well-being of the country'. The availability of powers authorising 'bulk' interception of communications and acquisition of communications data speaks, in many ways, to the question of 'necessity', and, in turn, to the Court's role in mediating—by application of the test of proportionality—the 'inevitable tension between individual privacy and state security' which powers of such incredibly extensive scope and application undoubtedly agitate.[366] Moreover, the question of necessity is rendered all the more pressing by the secrecy in which state surveillance practices are customarily enshrouded; the Court has noted that '[p]owers of secret surveillance of citizens,

[361] [2001] UKHL 26, [2001] 2 AC 532.
[362] Scott, 'Hybrid Institutions' (n 352) 451.
[363] ibid 452 (emphasis in original).
[364] ibid 452: 'Even interpreted aggressively, therefore, the subordinate nature of the role – deriving from the clear statutory language – is inescapable.'
[365] See, eg, *Klass and Others v Germany* (1979) 2 EHRR 214; *Leander v Sweden* (n 63); *Malone v United Kingdom* (n 71); *Liberty and Others v United Kingdom* (2009) 48 EHRR 1; *Zakharov* (n 261).
[366] Nick Taylor, 'To Find the Needle Do You Need the Whole Haystack? Global Surveillance and Principled Regulation' (2014) 18(1) Int J Hum Rts 45.

characterising as they do the police state, are tolerable under the Convention only in so far as strictly necessary for safeguarding the democratic institutions'.[367] Still, as with measures of suspicionless stop-and-search (discussed in Section III, above), it is the question of 'lawfulness' which is brought to bear most acutely on the Court's approach to assessing the Convention-compatibility of surveillance powers, including those made available in 'bulk' form. It is also in relation to the particular legal test attached to the question of 'lawfulness', as opposed to that of 'necessity', that the covert nature of surveillance by the state is uniquely problematic: the absence of transparency—not least in respect of the intelligence/evidence-basis on which key decisions as to the exercise of intrusive powers are made—is anathema to the fundamental requirements of 'accessibility' and 'foreseeability' outlined in the case of *Sunday Times v United Kingdom*.[368]

As much was recognised by the ECtHR in *Weber and Savaria v Germany*,[369] that case having involved an assessment as to the compatibility with art. 8 of a regime of covert interception of communications, in which it was noted:

> foreseeability in the special context of secret measures of surveillance, such as the interception of communications, cannot mean that an individual should be able to foresee when the authorities are likely to intercept his communications so that he can adapt his conduct accordingly.[370]

Given, though, that 'the implementation in practice of measures of secret surveillance of communications is not open to scrutiny by the individuals concerned or the public at large', in *Weber* the Court reiterated that 'it would be contrary to the rule of law for the legal discretion granted to the executive or to a judge to be expressed in terms of an unfettered power'.[371] As such, it was held that 'lawfulness' in this context above all requires that the relevant legal basis (purporting to ground the interference) 'must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity to give the individual adequate protection against arbitrary interference'.[372] Accordingly, the Court has developed 'minimum safeguards that should be set out in statute law in order to avoid abuses of power', which includes:

> the nature of the offences which may give rise to an interception order; a definition of the categories of people liable to have their telephones tapped; a limit on the duration of telephone tapping; the procedure to be followed for examining, using and storing the data obtained; the precautions to be taken when communicating the data to other parties; and the circumstances in which recordings may or must be erased or the tapes destroyed.[373]

Three key issues are of note, here. The first issue concerns the question as to whether the *Weber* principles, developed in the specific context of interception of communications, apply also (and equally) to measures involving acquisition of communications data. Notably, the

[367] *Klass v Germany* (n 365) para 49.
[368] *Sunday Times* (n 67).
[369] (2008) 46 EHRR SE5.
[370] ibid para 93.
[371] ibid para 94.
[372] ibid para 94.
[373] ibid para 95.

Court has typically prevaricated somewhat on this issue, leaving open to interpretation the position of the ECHR as to the content/metadata distinction. Although, in *Uzun v Germany*,[374] a case in which the applicant complained of an infringement of art. 8 arising from state surveillance in the form tracking via Global Positioning System (GPS), the Court held:

> While the Court is not barred from gaining inspiration from [the *Weber*] principles, it finds that these rather strict standards, set up and applied in the specific context of surveillance of telecommunications … are *not applicable* as such to cases such as the present one, concerning surveillance via GPS of movements in public places and *thus a measure which must be considered to interfere less with the private life of the person concerned than the interception of his or her telephone conversations.*[375]

As such, the Court appeared in *Uzun* to have implied that the applicability of the *Weber* principles depends, at least in part, on the substance of the relevant interference—the paradigm case being interception of communications. The Court proceeded to assess the alleged interference in *Uzun* by reference to 'the more general principles on adequate protection against arbitrary interference with Article 8 rights'[376]—that is, 'accessibility' and 'foreseeability' as understood in the context of *Sunday Times v United Kingdom*. It would seem, in light of the Court's approach in *Uzun*, that the compatibility with art. 8 of the acquisition by the state of what is properly described as metadata need only be assessed in this way, too. In which case the position of the Court (and, by extension, art. 8 of the ECHR) as to the content/metadata distinction is one which manages only to perpetuate the increasingly unconvincing assumption that communications data is intrinsically incapable of betraying one's privacy any more (or, at the very least, equally as) severely than the contents of one's communications.

Yet, it ought to also be noted that an area in which the Court has been more assertive as to the application of the *Weber* principles is that of 'bulk' surveillance measures. The Court has remarked that it 'does not consider that there is any ground to apply different principles concerning the accessibility and clarity of the rules governing the interception of individual communications, on the one hand, and more general programmes of surveillance, on the other'.[377] It follows that such measures may, in principle, be compatible with art. 8, and specifically the requirements of necessity, proportionality, and 'lawfulness' upon which that question is to be decided.

The second issue relevant to the applicability of the *Weber* principles is that of their reach—whether, in other words, the 'minimum safeguards' apply to circumstances involving surveillance of those located (at the material time) outside of the territory of the UK.[378] That issue goes more broadly to the question of 'jurisdiction' within the meaning of art. 1 of the

[374] *Uzun v Germany* (2011) 53 EHRR 34.
[375] ibid para 66 (emphasis added).
[376] ibid para 66.
[377] *Liberty and Others v United Kingdom* (n 365) para 63.
[378] See, eg, Marko Milanovic, 'Human Rights Treaties and Foreign Surveillance: Privacy in the Digital Age' (2015) 56(1) Harv Intl LJ 81.

ECHR,[379] and in particular the Court's developing jurisprudence as to the extraterritorial application of Convention obligations.[380] That question is particularly pertinent in the context of 'bulk' surveillance given that the exercise of those powers is generally limited to 'overseas-related communications'—those which are sent or received by 'individuals who are outside the British Islands'.[381] Although having not (yet) been considered by the ECtHR, in a legal challenge brought by several human rights campaigners in the light of the Snowden revelations, the IPT determined that 'a contracting state owes no obligation under Article 8 to persons both of whom are situated outside its terroritory in respect of electronic communications between them which pass through that state'.[382] While, in fact, broadly consistent with the Strasbourg Court's interpretation of 'jurisdiction', the decision has been criticised as one which demonstrates 'a lack of proper engagement with the underlying principles at stake'[383]—including, above all, that of the protection of privacy.

And finally, the third issue of note for present purposes relates to the Court's recent expansion of the *Weber* principles, including, especially, an apparent requirement of judicial oversight of surveillance regimes. In *Szabó v Hungary*—one of several cases in recent years in which the Court has been tasked with assessing the compatibility with art. 8 of a 'bulk' surveillance regime—the Court held that 'an interference by the executive authorities with an individual's rights should be subject to an effective control which should normally be assured by the judiciary, at in least in the last resort, judicial control offering the best guarantees of independence, impartiality and a proper procedure'.[384] The question, therefore, is whether further developments to this effect in the Convention jurisprudence on secret surveillance measures will see the Court's insisting upon judicial authorisation as an essential requirement of the art. 8-compatibility of those measures.

The ruling of the ECtHR, in 2018, in *Big Brother Watch v United Kingdom*[385] represents a major development in the art. 8 jurisprudence generally, but also specifically in regards to the application of the *Weber* principles to 'bulk' surveillance practices. In that case, which crucially marks the first intervention of the ECtHR in relation to the UK's 'bulk' surveillance practices post-'Snowden', several aspects of the UK's 'bulk' surveillance practices—including bulk interception of communications and acquisition of communications data—were found to have violated arts. 8 and 10 of the ECHR. Although relating primarily to those practices grounded in the previous legal framework (RIPA), the decision has obvious and significant ramifications for the operation of the current surveillance regime now provided for, chiefly, by the IPA. In its assessment of the many and various issues raised by such practices, the Court began by accepting that 'the decision to operate a bulk interception regime in order to identify hitherto unknown threats to national security is one which

[379] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 1: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.'

[380] See, eg, *Banković v Belgium* (2007) 44 EHRR SE5; *Al-Skeini and Others v United Kingdom* (2011) 53 EHRR 18; *Chagos Islanders v United Kingdom* (2013) 56 EHRR SE15.

[381] See, eg, IPA, s 136(3).

[382] *Human Rights Watch v Secretary of State for Foreign and Commonwealth Affairs* [2016] UKIPTrib15_165-CH [60].

[383] Lea Raible, '*Human Rights Watch v Secretary of State for Foreign and Commonwealth Affairs*: Victim Status, Extraterritoriality and the Search for Principled Reasoning' (2017) 80(3) MLR 510, 520.

[384] *Szabó* (n 261) para 77.

[385] [2018] ECHR 722.

continues to fall within States' margin of appreciation'.[386] The Court also reiterated, however, the potential for abuse of those regimes, especially 'where the true breadth of the authorities' discretion to intercept cannot be discerned from the relevant legislation'.[387] In light of that issue, the Court firstly addressed the question of the adequacy of the *Weber* requirements. Notably, the Court considered that judicial authorisation 'is not inherently incompatible with the effective functioning of bulk interception',[388] and that 'while [it] considers judicial authorisation to be an important safeguard, and perhaps even "best practice", by itself it can neither be necessary nor sufficient to ensure compliance with Article 8 of the Convention'.[389] 'Rather,' it was said, 'regard must be had to the actual operation of the system of interception, including the checks and balances on the exercise of power, and the existence or absence of any evidence of actual abuse'.[390] Yet, as Hughes suggests, this perhaps represents a 'weaker' position than that adopted by the Court in the recent cases of *Szabó* and *Zakharov*; appearing to rein in its apparent endorsement, in those cases, of the virtues of judicial involvement in authorising secret surveillance practices, rather the Court in *Big Brother Watch* 'reasoned that judicial authorisation is not necessary, and that states can operate without it provided that there is an adequate system of independent oversight'.[391]

Nevertheless, the Court found several of the 'minimum safeguards' to have been 'adequately', 'sufficiently clearly' or 'effectively' provided for, including those concerning (in the Court's phrasing): the 'duration of the secret surveillance measure';[392] the 'procedure to be followed for storing, accessing, examining and using the intercepted data';[393] the 'procedure to be followed for communicating the intercepted data to other parties';[394] and 'the circumstances in which intercepted material must be erased or destroyed'.[395] However, a number of issues were identified as to 'the scope of application' of the bulk interception regime (under RIPA) considered in that case. Specifically, three questions were raised in this respect, which the Court identified as relating, broadly, to the first two *Weber* 'minimum safeguards' (namely, 'the nature of the offences which might give rise to an interception' and the 'definition of the categories of people liable to have their telephones tapped').[396] The first question was 'whether the grounds upon which a warrant can be issued are sufficiently clear'; the second, 'whether domestic law gives citizens an adequate indication of the circumstances in which their communications might be intercepted'; and thirdly, 'whether domestic law gives citizens an adequate indication of the circumstances in which their communications might be selected for examination'.[397] Although the Court was satisfied that 'the circumstances in which and the conditions on which a section 8(4) warrant might be issued'

[386] ibid para 314.
[387] ibid para 315.
[388] ibid para 318.
[389] ibid para 320.
[390] ibid para 320.
[391] Kirsty Hughes, 'Mass Surveillance and the European Court of Human Rights' (2018) 6(6) EHRLR 589, 593.
[392] *Big Brother Watch* (n 385) paras 358-60.
[393] ibid paras 361-64.
[394] ibid paras 365-69.
[395] ibid paras 370-74.
[396] Ibid para 328.
[397] ibid para 330.

were ‘sufficiently clear[ly]’ outlined under s. 5(3) of RIPA[398]—and thus the first question having been adequately resolved—the bulk interception regime was found lacking, crucially, with regards to the second and third questions.

In addressing those questions, the Court recognised the ‘wide’ category of people ‘liable to have their communications intercepted’.[399] The key issue was that of the limit (generally) imposed upon the bulk interception of communications as to the targeting (as far as possible) of ‘external’ communications. For although, as the Court noted, there was some ‘confusion about the application of the terms “external communications” and “internal communications” to modern forms of communications’, the relevant legal framework was clear: that is, ‘[i]n practice, one of the grounds set out in s. 5(3) of RIPA must be satisfied, bulk interception must be proportionate to the aim sought to be achieved, and – at least at the macro level of selecting the bearers for interception – only external communications can be targeted’.[400] Given, however, the sheer volume of communications intercepted pursuant to a bulk warrant, that it is in many ways impractical to ensure the interception of *only* ‘external’ communications at the stage of *authorisation* of a bulk interception warrant was recognised by the Court:

> [E]ven where it is clear that a communication is “internal”, as it is between two people in the British Islands, in practice, some or all of its parts might be routed through one or more other countries, and would therefore be at risk of being intercepted under the section 8(4) regime.[401]

And given that, at any rate, s. 5(6) of RIPA expressly permitted the interception of communications ‘not identified in the warrant’, the risk that the ‘external’/‘internal’ divide might be rendered nugatory was clear. Clearly, therefore, of the utmost importance to regimes of ‘bulk’ interception of communications—indeed, including that now provided for by the IPA—are procedures relating to the selection for examination of material acquired pursuant to a bulk warrant, it having been noted by the Court that ‘the exclusion [from selection] of communications of individuals known to be in the British Islands is … an important safeguard’.[402] Reflecting a—if perhaps *the*—fundamental norm of the ‘targeted’/‘bulk’ powers distinction (as noted sub-section A, above), this, the Court suggested, was because ‘[t]he intelligence services should not be permitted to obtain via a bulk warrant what they could obtain via a targeted warrant’.[403]

Crucially, several flaws in the relevant procedures (under the RIPA) were identified, chief among which was the Court’s finding that ‘the list from which analysts [were] selecting material [was] itself generated by the application of selectors and selection criteria which were not subject to any independent oversight’.[404] And although the Court found ‘no evidence to suggest that the intelligence services [were] abusing their powers’, ultimately it was ‘not persuaded that the safeguards governing the selection of bearers for interception and

[398] ibid para 335.
[399] ibid para 336.
[400] ibid para 337.
[401] ibid para 336.
[402] ibid para 343.
[403] ibid para 343.
[404] ibid para 346.

the selection of intercepted material for examination [were] sufficiently robust to provide adequate guarantees against abuse';[405] of 'greatest concern', it was noted, was the absence from the regime of bulk interception (under RIPA) of 'robust independent oversight of the selectors and search criteria used to filter intercepted communications'.

(iii) The Investigatory Powers Tribunal and the position of the common law

The ECtHR's recent decision in *Big Brother Watch* can be seen also to have broader implications for the role of the IPT within the contemporary legal framework of investigatory powers in the UK. The question as to, in particular, the effectiveness of the Tribunal as a mechanism of oversight and accountability within that framework arose in *Big Brother Watch* given that only one of the three joined applications had previously been the subject of proceedings before it—the outcome of which, incidentally, was that there had been no violation of the Convention in respect of GCHQ's 'bulk' surveillance practices.[406] One of the key arguments proposed by the UK Government, therefore, was that the two remaining applications ought to have been dismissed as inadmissible, the relevant applicants having failed to exhaust all available domestic remedies (contrary to the criteria stipulated under art. 35(1) of the Convention)—including, that is, lodging a complaint with the IPT.[407] The applicants sought, rather, to rely on the Court's previous decision in *Kennedy v United Kingdom*.[408] In that case, it was held that the relevant Convention jurisprudence at the material time did not require that an effective remedy be provided 'where the alleged violation arise[d] from primary legislation';[409] in other words, it was not incumbent upon applicants to bring proceedings before the IPT in cases involving *general* (as opposed to *individual*) complaints as to the compatibility with art. 8 of the relevant framework.

In *Big Brother Watch*, the Court reiterated that '[t]he obligation to exhaust domestic remedies … requires an applicant to make normal use of remedies which are available and sufficient in respect of his or her Convention grievances',[410] there being, however, 'no obligation to recourse to remedies which are inadequate or ineffective'.[411] Further, it was noted that where an applicant seeks to challenge the general legal framework for secret surveillance measures—as in the present case—the Court had more recently identified (in the case of *Zakharov v Russia*) 'the availability of an effective domestic remedy as a relevant factor in determining whether that applicant was a "victim" of the alleged violation', the reason being that 'widespread suspicion and concern among the general public that [such powers] were being abused' is, in the absence of such a remedy, likely to arise.[412] Noting both 'the manner in which the IPT has exercised its powers in the fifteen years that have elapsed since [the Tribunal's ruling in the *Kennedy* litigation], and the very real impact its judgments have had on domestic law and practice', the Court considered that its previous

[405] ibid para 347.
[406] *Liberty and Others v GCHQ* (n 365).
[407] *Big Brother Watch* (n 385) [238].
[408] (2011) 52 EHRR 4.
[409] ibid para 197.
[410] *Big Brother Watch* (n 385) para 246.
[411] ibid para 247.
[412] ibid para 249.

concerns as to the effectiveness of the IPT 'as a remedy for complaints about the general compliance of a secret surveillance regime' no longer hold.[413] Consequently, the present position is such that applicants ought firstly to exhaust domestic remedies, which now 'as a general rule' includes the IPT—save, that is, where 'special circumstances' absolve an applicant of that obligation.[414] Although, in the case of the present applicants, the Court accepted that 'special circumstances' *did*, in fact, exist to that effect: '[the applicants] could not be faulted for relying on *Kennedy* as authority for the proposition that the IPT was not an effective remedy for a complaint about the general Convention compliance of a surveillance regime'.[415]

Beyond simply providing an insight as to how and why two of the three joined applications in *Big Brother Watch* came to be accepted as admissible by the Court (in the face of some ambiguity deriving from the Convention case law), the Court's decision in this respect is particularly consequential from the perspective that it gives what might only be described as a glowing reference as to the work of the IPT. The Court noted the IPT's 'extensive post-*Kennedy* case-law' as 'demonstrat[ing] the important role that [the Tribunal] can and does play in analysing and elucidating the general operation of surveillance regimes'[416]—a role which the Court considers of 'invaluable assistance' to it 'when considering the compliance of a secret surveillance regime with the Convention', such that it involves determining questions of fact or the proper interpretation of domestic law (both of which, the Court reiterated, are outwith its supervisory role).[417] The effectiveness of the IPT was said to be 'further underlined by the fact that it can, as a matter of EU law, make an order for reference to the CJEU where an issue arises that is relevant to the dispute before it', the Court having noted that 'the protection of fundamental rights by Community law can be considered "equivalent" to that of the Convention system'.[418] And of the applicants' complaint that the IPT cannot issue a declaration of incompatibility (DOI) under s. 4 of the HRA—an issue which, it was argued, goes to the (in)effectiveness of the IPT as a mechanism of redress in cases involving alleged violations of art. 8 arising from primary legislation—the Court merely emphasised that the non-binding nature of the DOI mechanism rendered uncertain the practice of giving effect to the national courts' use of that mechanism; rather, the Court suggested, 'the relevant question is not whether the IPT can issue a [DOI], but whether the practice of giving effect to its findings is sufficiently certain'.[419] Indeed, the Court concluded that it was. The upshot of the Court's treatment of the 'IPT as an effective remedy' issue is this: the Court expressed an esteem for the IPT which, as Kirsty Hughes writes, 'suggests that it is likely [in future] to be deferential to [the Tribunal's] decisions'.[420] Clearly, the effect of this is that of entrenching the IPT's position as the principal legal mechanism of accountability in the contemporary framework of surveillance powers.

[413] ibid para 253.
[414] ibid para 265.
[415] ibid para 268.
[416] ibid para 255.
[417] ibid para 256.
[418] ibid para 263.
[419] ibid para 264.
[420] Hughes, 'Mass Surveillance' (n 391) 591.

At this juncture, the position of the common law ought to be considered, specifically the way in which oversight by the "ordinary" courts is, in light of the above, brought to bear on the contemporary legal framework of surveillance powers. Although, for reasons outlined here, in fact the key theme of the oversight provided in this context—indeed, one of the key themes of this chapter, more broadly—is that of its general inadequacy, especially as far as the protection of privacy is concerned. This has so far been shown, in this chapter, to stem from the domestic courts' historic reluctance (if perhaps inability) to recognise the availability at common law of, much less enforce, a negative right against interference by public authorities. As discussed in Section II, above, reasons for this include the conceptual ambiguity in which the content of that right is enshrouded, and thus the difficulty inherent to the task of establishing its proper scope and application without proper democratic deliberation or input. And to the extent that key common law principles, values and standards of review are, in fact, inculcated within statutory mechanisms of oversight of surveillance powers, the role of the JCs in the IPA's 'double-lock' system stands as one (important) example in which the effect of this imposition has been shown to potentially obfuscate rather than enhance those mechanisms.

The key factor as to the futility of the common law in this area, however, is that of the *marginalisation* of the "ordinary" courts from the institutional structures of that framework. Not least, that is, given the centrality within those structures of the IPT, the decisions of which the relevant legal framework seeks generally to immunise from oversight by the 'ordinary' courts. Given the typically sensitive nature of evidence relevant to complaints heard by the IPT—which might include, for example, information concerning specific intelligence-gathering operations carried out by the SIAs—the Tribunal's proceedings are invariably required to be conducted in private.[421] That undoubtedly raises several issues of fundamental constitutional import regarding, for instance, the extent to which, if at all, so-called 'secret' trials are capable of being reconciled with common law principles of 'open justice'.[422]

Although, the most significant contemporary constitutional development concerning the immunisation of the IPT's activities is that of the UK Supreme Court's decision in *R (on the application of Privacy International) v Investigatory Powers Tribunal & Others*.[423] That case, which reached the UK Supreme Court in May 2019, concerned the effect of s. 67(8) of RIPA, which purported to "oust" the jurisdiction of the High Court to hear challenges or appeals in respect of 'determinations, awards, orders and other decisions of the Tribunal (including decisions as to whether they have jurisdiction)'.[424] Overturning the decisions of both the High Court[425] and the Court of Appeal,[426] in which it was held that s. 67(8) effectively precluded judicial review of the IPT, a 4:3 majority of the Supreme Court found that the provision had no such effect. In the leading majority judgment delivered by Lord Carnwath (with whom

[421] Investigatory Powers Tribunal Rules 2000, SI 2000/2665, r 9.
[422] See, eg, *Scott v Scott* [1913] UKHL 2, [1913] AC 417.
[423] [2019] UKSC 22, [2019] 2 WLR 1219.
[424] RIPA, s 67(8).
[425] *R (on the application of Privacy International) v Investigatory Powers Tribunal* [2017] EWHC 114 (Admin), [2017] 3 All ER 1127.
[426] *R (on the application of Privacy International) v Secretary of State for Foreign and Commonwealth Affairs and Others* [2017] EWCA Civ 1868, [2018] 1 WLR 2572.

Lady Hale and Lord Kerr agreed), it was noted that '[t]here is an obvious parallel with the "ouster clause" considered by the House of Lords in the seminal case of *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147'; in that case, the House of Lords held that s. 4(4) of the Foreign Compensation Act 1950—which provided, '[t]he determination by the commission of any application made to them under this Act shall not be called in question in any court of law'—was ineffective to exclude review by the courts of the legal basis of the Commission's decision. Famously, the Law Lords interpreted the word 'determination' in such a way as to find that it *could not* be taken to include any such 'determination' made *beyond* the Commission's jurisdiction; as Lord Carnwath noted, the courts were found in that case not to have been precluded 'from inquiring whether or not the order of the commission was a nullity'.[427] And so the 'central issue' for the Supreme Court in *Privacy International* was thus: 'what if any material difference to the court's approach is made by any differences in context or wording, and more particularly the inclusion, in the parenthesis to section 67(8), of a specific reference to decisions relating to "jurisdiction"?'

It would be 'odd', Lord Carnwath claimed, if specifically the reference (in s. 67(8)) to 'decisions as to whether they [the IPT] have jurisdiction' in fact made any difference in this regard. Noting the decision of the IPT which Privacy International sought ultimately to challenge, namely the lawfulness of the issue of 'thematic' warrants under s. 5 of the Intelligence Services Act 1994 authorising extensive computer 'hacking', Lord Carnwath held that this 'raised a short point of law, turning principally on the reading of the word "specified" in section 5'.[428] It followed, therefore, that '[o]n no ordinary view could [this] be regarded as a decision "as to whether [the IPT] had jurisdiction"; indeed, 'the present wording [of s. 67(8)] seems designed if anything to emphasise that the exclusion is directed specifically at decisions about jurisdiction made by the IPT itself'.[429] Lord Carnwath also commented:

> I am unimpressed by arguments based on the security issues involved in many (though not all) of the IPT's cases. As this case shows, the tribunal itself is able to organise its procedures to ensure that a material point of law can be considered separately without threatening any security interests. The Administrative Court can also ensure that the grant of permission is limited to cases raising points of general significance, and that its proceedings are conducted without risk to security concerns. Further, in the case of the IPT, the potential for overlap with legal issues which may be considered by the ordinary courts … makes it all the more important that it is not able to develop its own "local" law without scope for further review.[430]

This latter point fed into Lord Carnwath's discussion of the secondary dispute, namely 'as to the power of the legislature, *consistently with the rule of law*, to entrust [the task of independent legal interpretation] to a judicial body such as the IPT, free from any possibility of review by the ordinary courts (including the appellate courts).[431] That is, of 'the need to ensure that the law applied by the specialist tribunal is not developed in isolation ("a local

[427] *Privacy International* (n 423) [2].
[428] ibid [108].
[429] ibid [108].
[430] ibid [108].
[431] ibid [127] (emphasis added).

law"), but conforms to the general law of the law', Lord Carnwath reiterated that this has long been 'a central part of the function of the High Court as constitutional guardian of the rule of law'.[432] Indeed, that point 'applies with particular force in the present context where there is a significant overlap between jurisdictions of the IPT and of the ordinary courts':

> The legal issue decided by the IPT is not only one of general public importance, but also has possible implications for legal rights and remedies going beyond the scope of the IPT's remit. Consistent application of the rule of law requires such an issue to be susceptible in appropriate cases to review by ordinary courts.[433]

In what will no doubt go down as a memorable passage of Lord Carnwath's ruling, it was thus held:

> [There is] a strong case for holding that, consistently with the rule of law, binding effect cannot be given to a clause which purports wholly to exclude the supervisory jurisdiction of the High Court to review a decision of an inferior court or tribunal, whether for excess or abuse of jurisdiction, or error of law.[434]

Indeed, as much is echoed by Lord Lloyd-Jones (also for the majority), who notes:

> the exclusion of the review jurisdiction of the High Court in cases of error of law, *if achievable at all*, would require a provision of much greater clarity [than that apparently achieved by s. 67(8)] making abundantly clear that that was what it sought to achieve.[435]

Two key points, specifically concerning the protection of privacy, are raised by these developments. On one hand, in ultimately preserving the supervisory jurisdiction of the "ordinary" courts in relation to the IPT—contrary, it would certainly appear on the face of things, to Parliament's intention—the decision in *Privacy International* clearly does much to erect a key obstacle to the common law's increasing marginalisation from the contemporary legal framework of surveillance powers. Indeed, Lord Carnwath highlights one particularly important issue (above) that this might serve to address: it prevents the IPT from arrogating to itself too much, if perhaps all of the responsibility of ensuring the effective legal oversight of the executive in this area, and in so doing carving out of the common law a developing jurisprudence which the latter is unable to retrieve and, if necessary, correct. And in the context of protecting privacy, there are clear benefits, at the very least, that the IPT, with its (albeit to a large extent necessarily) secretive processes, is not *further* immunised from transparency and accountability for its own decision-making. On the other hand, though, is the question as to whether this might have any bearing at all on the protection of privacy in practice. After all, there are reasons to be sceptical that oversight of the IPT by the "ordinary" courts will ensure anything other than lightest-touch review of the Tribunal's decisions—including, crucially, decisions which nevertheless involve scrutinising the SIAs' compliance with art. 8 of the ECHR. Not least: among the key insights to have emerged from *Privacy*

[432] ibid [139].
[433] ibid [139].
[434] ibid [144].
[435] ibid [167] (emphasis added).

International is that of the apparent equivalent constitutional status of the IPT and the High Court: the IPT engages in the same kind of review of the conduct of public authorities—being required, that is, to 'apply the same principles for making their determination in those proceedings as would be applied by a court on an application for judicial review'[436]—and is populated by the same judicial personnel who preside over such applications in the High Court.[437] Indeed: '[w]hether this will offer any substantial additional accountability for the activities of the intelligence services scrutinised in the Tribunal, or will simply elongate the standard avenues of legal challenge, remain to be seen'.[438]

Though, of course, the legal challenge in *Privacy International* was not about the protection of privacy, per se. It is no surprise, therefore, that this appears to have had no bearing whatsoever on the Supreme Court's approach to the question as to whether the IPT's activities are or ought to be amenable to judicial review. The rationale of the majority decision was steeped, rather, in the overriding imperative(s) of the principles of the rule of law. For instance, Lord Carnwath emphasised that '[t]o deny the effectiveness of an ouster clause is … a straightforward application of principles of the rule of law': '[c]onsistently with those principles, Parliament cannot entrust a statutory decision-making process to a particular body, but then leave it free to disregard essential requirements laid down by the rule of law for such a process to be effective'.[439] Indeed, the broader significance of this aspect of the Supreme Court's decision is perhaps that it can be seen to reflect the common law's approach to the regulation of surveillance and investigatory powers more generally. For as Scott notes, the regulation of these powers in the UK has 'always been heavily influenced by the common law's approach to the rule of law, whereby the executive must have authority for any of its actions which interfere with the legal rights … of the individual'.[440] Beyond that bare principle, for which '[u]sually identified as authority … is *Entick v Carrington*', Scott highlights several other key themes of the modern constitutional position of these powers which are equally manifest in the decision in *Entick*. Among these themes is, firstly, that of the courts' insistence upon the *clarity* of the relevant legal basis which purports to ground an interference by the state as to one's privacy[441]—a theme which, in the contemporary constitution, is reflected in the principle of legality (outlined in Section II, above), which looks to ensure that '[f]undamental rights cannot be overridden by general or ambiguous words'.[442] A second theme—which Scott describes as a 'partly subsidiary but also more wide-reaching … example of the common law's commitment to the rule of law'—is that of the suspicion with which the courts are (or ought to be) inclined to treat claims to the effect that the law must vary with the needs of the state.[443] Thirdly, and finally, is that of the rule-of-law implications of 'general' warrants, the key problem with which is that 'they require

[436] RIPA, s 67(2).
[437] On this point, see, eg, Mike Gordon, 'Privacy International, Parliamentary Sovereignty and the Synthetic Constitution' (UK Constitutional Law Association Blog, 26 June 2019) <https://ukconstitutionallaw.org/2019/06/26/mike-gordon-privacy-international-parliamentary-sovereignty-and-the-synthetic-constitution/> accessed 16 March 2021.
[438] ibid.
[439] ibid [123].
[440] Scott (n 56) 61.
[441] ibid 62.
[442] *Simms* (n 53).
[443] Scott (n 56) 62-63.

those executing the warrant—rather than the person issuing it—to decide for themselves whether or not there exists sufficient evidence against particular individuals to justify executing the warrant'.[444]

Though, *Privacy International* perhaps points to a fourth (key) theme: that the common law provides substantive protection within the context of state surveillance powers, albeit in narrowly defined circumstances, namely those in which the relevant legal framework purports to "oust" the oversight of the "ordinary" courts from it. Clearly, any sense in which the protection of privacy at common law can be seen to derive from this is, however, incidental. After all, the courts have been explicit, and consistent, in the self-image that they have long projected in the context of protection of privacy: that this 'is an area which requires a detailed approach which can be achieved only by legislation rather than the *broad brush of common law principle*'.[445] Still, a principled, rule-of-law-based resistance to the marginalisation of the common law from the contemporary framework of surveillance powers is one significant way in which this 'broad brush' approach is nonetheless brought to bear on this area.

(iv) The 'content'/'metadata' distinction in the contemporary framework of surveillance powers

As discussed throughout this section so far, underpinning the contemporary legal framework of surveillance powers are several key distinctions which together look to ensure as a basic rule that the greater the (perceived) potential for the invasion of privacy associated with the relevant powers, the more imposing the procedural conditions to their exercise. One such distinction has been highlighted already (in sub-section A, above): that which distinguishes between 'targeted' and 'bulk' powers. Though, the distinction between 'interception' and 'communications data'—in other words, between 'content' and 'metadata'—has been described as, in fact, '[t]he *basic* distinction that governs the operation of the law in this area'.[446] That distinction (which, as also discussed in sub-section A, above, the IPA carries over from the previous legal framework) grounds a fundamental, and longstanding, although increasingly tenuous, normative position: that gaining access to the contents of a communication—what was *said*—denotes a greater level of intrusion of privacy than obtaining information from which (only) the details *about* a particular communication can be derived—by whom it was sent and received, where, when, and by which means. Powers relating to interception of communications, which operate in the realm of 'content', ostensibly continue, therefore, under the 2016 Act, to be more tightly controlled than those which relate (merely) to the collection of and access to communications data, a form of so-called 'metadata', which can be understood to mean 'data about use made of a telecommunications or postal service but not the contents of the communications themselves'.[447]

[444] ibid 63. See, also, *Privacy International v Investigatory Powers Tribunal* (n 250).
[445] *Wainwright* (n 49) [33] (emphasis added).
[446] Anderson, *A Question of Trust* (n 246) [6.2] (emphasis added).
[447] ibid [6.6].

The conceptual distinction between 'content' and 'metadata' can be seen as the basis of arrangements concerning the relatively limited availability of intercept powers, generally, as compared with powers which apply in the context of communications data. Again, whereas the decision to issue a warrant authorising targeted interception of communications is a matter for the Secretary of State alone[448] (albeit subject to the subsequent approval of a JC),[449] the power to grant an authorisation for the targeted acquisition of communications data is extended, rather, to a wide range of public authorities; the decision of the relevant official—'a designated senior officer'—need not, in fact, be approved by a JC.[450] It ought to also be noted, moreover, that implied within each of the distinct legal categories of 'content' and 'metadata' themselves is a sliding scale of intrusiveness, whereby certain types of communications and related data are measured to be more sensitive (as a matter of privacy) than others. As such, within the provisions relating to authorisation of interception of communications, additional safeguards apply in respect of the communications of Members of Parliament,[451] items subject to legal privilege,[452] confidential journalistic material,[453] and sources of journalistic information.[454] For example, in the case of a warrant authorising interception of MPs' communications, the Secretary of State is required to obtain the approval of the Prime Minister.[455] Equally, that some forms of 'metadata' are considered more sensitive than others is reflected in the imposition of (greater) restrictions to access of, for example, 'internet connection records'.[456]

There are a number of reasons to be sceptical, however, that the content/metadata distinction is one which can be sustained, and, as such, one that continues to justify a significant relaxing of procedural safeguards, generally, in regards to the collection of and access to communications data. This is especially the case insofar as the level of intrusion considered to be associated with measures relating to communications data is—especially when compared with interception of 'content'—practically nominal. One example concerns the way in which the IPA appears to expand the meaning of the term 'secondary data' as it applies in the context of intercept powers available under s. 16 (outlined above). For, as Scott writes, '[w]here RIPA had employed in this context the concept of 'related communications data', defined in such a way that only metadata was included within it, the definition of 'secondary data' in the IPA shifts the boundary into the domain of content'.[457] The reason for this is that s. 16 of the IPA defines 'secondary data' as such to include two forms of data. The first is 'systems data which is comprised in, included as part of, attached to or logically associated with the communication (whether by the sender or otherwise)'.[458] Though,

[448] IPA, s 19.
[449] ibid ss 23-24.
[450] ibid s 61. 'Relevant public authorities' are listed in Schedule 4 to the IPA, and ranges from various governmental departments, the police, armed forces and SIAs to bodies such as the Food Standards Agency and the Gambling Commission.
[451] IPA, s 26.
[452] ibid s 27.
[453] ibid s 28.
[454] ibid s 29.
[455] ibid s 26(2).
[456] ibid s 62.
[457] Scott (n 56) 79.
[458] IPA, s 16(5).

'systems data' is of no real consequence to the content/metadata distinction, being broadly consistent with the meaning of metadata as generally understood: it encompasses no element of 'content', referring only to 'any data that enables or facilitates, or identifies or describes anything with enabling or facilitating, the functioning of', among other things, 'a postal service' or 'a telecommunication system'.[459]

Rather more problematic is the inclusion within the meaning of 'secondary data' of 'identifying data which is comprised in, included as part of, attached to or logically associated with the communication', 'is capable of being logically separated from the remainder of the communication', 'and if it were so separated, would not reveal anything of what might reasonably be considered to be the meaning (if any) of the communication, disregarding any meaning arising from the fact of the communication or from any data relating to the transmission of the communication'.[460] This is because 'identifying data' is defined in the Act as including data which may be used to identify, or assist in identifying, among other things, 'any person, apparatus, system or service', 'any event', or 'the location of any person, event or thing'.[461] The key issue, therefore, is that although the relevant provisions on the collection of 'identifying data', as a form of 'secondary data', clearly extend only to that which 'would *not* reveal anything of what might reasonably be considered to be the meaning (if any) of the communication', this would perhaps imply that, in fact, there *are* circumstances in which the contents of the relevant communication may (whether intentionally or not) be discerned. Of course, the exception is there to prevent this. But such data which reveals the meaning of the communication *might* be acquired, and crucially it is impossible to know whether, in fact, that meaning is revealed without the intercepting authority having looked at that data in the first place. This, Scott notes, 'makes it difficult to know where exactly the boundary will be drawn in practice'.[462]

It ought to be noted here, also, that in *Big Brother Watch* the ECtHR addressed the exemption of 'related communications data'—that is, the term applied throughout RIPA in reference to what would now more widely be understood as 'metadata'—from the safeguards applicable to the searching and examining of 'content' (under s. 16 of that Act). This issue goes to the heart of the content/metadata distinction, and as such presented a key opportunity for the Court to (further) clarify the relevant position of the Convention which hitherto—typified by the Court's decision in *Uzun* (discussed above)—has generally been characterised by ambiguity. In particular, it presented an opportunity for the Court to decide whether the *Weber* requirements applied also (and equally) to the acquisition of metadata as with the interception of communications. The Court made several important points in this respect, noting, firstly, that 'communications data is a valuable resource for the intelligence services', and one which 'can be analysed quickly to find patterns that reflect particular online behaviours associated with activities such as a terrorist attack'.[463] It was also suggested that 'related communications data', although 'not to be confused with the much broader category of "communications data"', nevertheless 'represents a significant quantity of data'. Most

[459] ibid s 263(4).
[460] ibid s 16(6).
[461] ibid s 263(2).
[462] Scott (n 56) 80.
[463] *Big Brother Watch* (n 385) para 353.

importantly, however, are the Court's remarks to the effect that it was 'not persuaded that the acquisition of related communications data is *necessarily less intrusive* than the acquisition of content', metadata being capable, that is, of 'reveal[ing] the identities and geographic location of the sender and recipient and the equipment through which [a] communication was transmitted'.[464]

In the face of clear indications that the Court 'might be willing to finally overturn the content/communications data distinction',[465] it is disappointing that the Court found it ultimately unnecessary to decide that issue, having explained, rather, that 'save for the section 16 safeguards, the section 8(4) regime treats intercepted content and related communications data in the same way'.[466] It was suggested in *Big Brother Watch* that the key question for the Court was thus 'whether the justification provided by the Government for exempting related communications data from [the s. 16 safeguards] is proportionate to the legitimate aim pursued'.[467] The Court found against the Government in this respect, noting that 'it does not consider that the authorities have struck a fair balance between the competing public and private interests by exempting ['related communications data'] in its entirety from the safeguards applicable to the searching and examining of content'.[468] Although, the key point that ought to be taken from the Court's approach in this regard is that it is one which can be seen to be paradigmatic of a more general and apparently deeply entrenched reluctance to engage with the deprivation of privacy in substantive terms. In other words, despite offering several compelling reasons as to why the content/metadata distinction no longer—if it ever did—accurately reflects the privacy-implications of acquisition of communications data as compared with the interception of content, the Court's decision in *Big Brother Watch* simply (further) entrenches the *procedural* ('in accordance with the law') angle as the one that dominates in cases involving the deprivation of privacy and art. 8.

V. CONCLUSION

Two key themes have been shown to overarch the constitutional implications of the various counter-terrorism measures explored in this chapter. The first theme is that of the marked and perennial inadequacy of the common law as a key legal source of protection of privacy in the UK. Any such 'right' to privacy which the common law can be seen to have developed over the years simply does not apply in any meaningful sense in the contexts of those legal frameworks which empower the state to intrude upon the private lives of its citizens for the purposes of investigating potential (threats of) terrorist activity. Though, in fact, it might be said that the common law's abject record in this area merely reflects a deeper, more fundamental point: that the common law has neither the conceptual tools for developing, much less enforcing, a negative right against interference by public bodies. Indeed, this is a limitation of the domestic courts' self-proclaimed 'broad brush'[469] approach to the protection

[464] ibid para 356 (emphasis added).
[465] Hughes, 'Mass Surveillance' (n 391) 594.
[466] *Big Brother Watch* (n 385) para 352.
[467] ibid para 352.
[468] ibid para 357.
[469] *Wainwright* (n 49) [33].

of privacy, which relies primarily on the application of first principles of the rule of law. And while in the *Privacy International* litigation, and thus the specific context of "ouster clauses", such an approach has nevertheless carved out a key area of substantive protection in the legal framework of surveillance powers, it fails to convince that this might properly be regarded as a victory for the protection of privacy, per se, whether in principle or, more importantly, in practice. This is to say nothing, moreover, of those cases involving extraordinarily wide powers of (suspicionless) stop-and-search, in which the rule of law, or the derivative principle of legality, had no bearing on the lawfulness of those measures in any substantive sense. Rather, the general truth of the common law's failure to protect privacy in and of itself holds true, which is, in turn, no doubt a lasting consequence of its 'historic rejection' and 'continuing disregard for a right to privacy'.[470]

The second key theme can be seen to follow from the first: it is *because* of this general truth that the constitutional position and protection of privacy is to all intents and purposes contingent on the operation of the HRA/ECHR. The right to private and family life under art. 8 of the Convention has done much—indeed, more than anything else—to leverage a significant level of protection of (the right to) privacy in the UK which, plainly, without it would not exist. It is, as a result, incredibly difficult to envisage the removal of art. 8—if, that is, the long-threatened repeal of the HRA is ever carried out—as doing anything other than to radically diminish that level of protection. Moreover, the importance of art. 8 in this regard is rendered all the more striking in light of the gaping difference in approach between the domestic courts and the ECtHR to its application and enforcement. The decisions of both the Appellate Committee of the House of Lords and the UK Supreme Court in *Gillan* and *Beghal*, respectively, are key examples of this. As discussed in this chapter, in both instances the domestic courts were subsequently found by the ECtHR to have erred in their approach to the question of the 'lawfulness', under art. 8(2), of the relevant stop-and-search powers contained in the Terrorism Act 2000. Indeed, that it fell, once again, to the Strasbourg Court in *Big Brother Watch* to remedy the violation of art. 8 in respect of the UK's 'bulk' surveillance regime ultimately highlights a damning pattern: clearly, this is a difference in approach which, it has been said, 'would doubtless be important if we ever had to rely exclusively upon the common law for protection'.[471] But what it also reveals is that *even with* the benefit of art. 8, which has been instrumental in guiding the development of an otherwise non-existent public law jurisprudence on the protection of privacy, the domestic courts have consistently undersold the protection that it ought to provide.

[470] Hughes, 'Waiting for Godot' (n 40) 94.
[471] ibid 94.

4

Deprivation of Property

I. INTRODUCTION

The UK has been a key player in the so-called 'Financial War on Terrorism' of the last decades—that (core) strand of the contemporary global response to the threat of terrorism which has been powered, in the main, by the proliferation of coercive measures designed to stem the flow of funding to terrorists and terrorist groups.[1] This chapter explores the domestic constitutional implications of several such measures, namely those which specifically entail the 'freezing' of terrorists' (and suspected terrorists') assets. In sharp contrast to the extensive criminal regime in the UK for which Part III of the Terrorism Act 2000 provides, relating to 'terrorist property' offences,[2] asset-freezing involves the imposition by the state (often, as discussed in this chapter, at the behest of international institutions) of severe financial sanctions upon individuals and entities which, crucially, are not dependent upon criminal conviction. Rather, these sanctions—including, for example, 'limit[ing] the provision of certain financial services' and 'restrict[ing] access to financial markets, funds and economic resources'—are 'preventive', or 'pre-emptive', in nature; they work, among other things, to 'constrain a target by denying them access to key resources needed to continue their offending behaviour, including the financing of terrorism'.[3] And although in this sense

[1] See, eg, Nicholas Ryder, *The Financial War on Terrorism: A Review of Counter-Terrorist Financing Strategies since 2001* (Routledge 2015) 62: '[T]he 'Financial War on Terrorism' can be defined as attacking, whether via criminalisation, confiscation, forfeiture, freezing, sanctioning the financial assets of, known or suspected terrorists.'

[2] See Terrorism Act 2000, s 14(1), under which 'terrorist property' is defined as 'money or other property which is likely to be used for the purposes of terrorism (including any resources of a proscribed organisation)', as well as the proceeds of 'the commission of acts of terrorism' and those of 'acts carried out for the purposes of terrorism'. Offences include, eg, terrorist fund-raising (s 15); using or possessing money or other property for the purposes of terrorism (s 16); entering into or becoming concerned in 'an arrangement as a result of which money or other property is made available or is to be made available to another' (s 17); and terrorist money-laundering (s 18). The 2000 Act also authorises the forfeiture of property belonging to those convicted of an (abovementioned) offence (ss 23, 23A, 23B) and supplements these various provisions with statutory duties—backed by the threat of criminal sanction—concerning the disclosure to employers or to the police of beliefs or suspicions that any of the above offences has been committed (ss 19, 20). Offences involving failure to disclose knowledge or suspicion of money laundering (for the purposes of terrorism) also apply to the regulated sector, more broadly (s 21A).

[3] Office of Financial Sanctions Implementation, *Financial Sanctions: Guidance* <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/862451/OFSI_general_guide_to_Financial_Sanctions.pdf> accessed 20 August 2020.

comparable to the (since abolished) 'control order',[4] for it effectively 'places unending restrictions on individual liberty based on suspicion rather than proof',[5] asset-freezing is in many ways revealed to be uniquely egregious. Indeed, it has been suggested that sanctions of the kind associated with asset-freezing 'entail the *worst* effects of pre-emptive action on the individual': not only do they involve subjecting targets to 'a system that seriously infringes their rights', they do so 'in a way that appears to be immune to swift correction by the legal process'.[6]

Two key themes of the contemporary counter-terrorism asset-freezing regime are explored in this chapter. The first theme, which, it is argued, reflects both a symptom and a cause of much legal and constitutional complexity in this area, is that of the interplay of domestic and international law and politics. Indeed, the contemporary counter-terrorism asset-freezing 'regime' in reality comprises several, invariably overlapping regimes, simultaneously implicating legal and political arrangements at the domestic, supranational (European Union) and international (United Nations) levels. And whilst, as discussed in this chapter, a range of key features are replicated across each of those regimes—not least including that they each confer broad discretionary powers on executive actors to unilaterally 'designate' or 'list' persons and organisations as the subjects of financial sanctions—it is in the various ways that they differ which has a particular, and crucial, distorting effect on the domestic constitutional position of asset-freezing. The potential for independent oversight of or challenge to key decision-making—whether by legal or political means—varies radically between regimes, as do, for instance, the relevant conditions as to the exercise of asset-freezing powers, and the regularity with which use is made of those discrete sets powers in practice. Of particular (constitutional) significance, in this respect, is the distinction between those asset-freezing regimes which are derived from and governed by international legal arrangements (though are given legal effect in the UK via enabling powers both in primary or secondary legislation), and those which are, by contrast, purely the creation of domestic law. For although themselves in many ways imperfect (for reasons outlined in Section IV of this chapter), accountability mechanisms and procedural safeguards are nonetheless (relatively) more robust in the case of the latter than in that of the former. In other words: it matters, therefore, that, as Clive Walker writes, '[i]n grave doubt are the accountability and the constitutional governance of *international* listings', for it is in the context of those circumstances that '[t]hose affected are left beyond democratic governance and are subject primarily to political spheres of influence at international level'.[7]

The second key theme explored in this chapter is that of the particularly vehement liberal-legal(ist) response which has been provoked by the flagrant undermining of legal protections of human rights and of core rule-of-law principles in this area of counter-terrorism. The judicial response is of particular import, in this respect. For in order to overcome the constitutional constraints and legitimacy deficits at the domestic and supranational levels, vis-

[4] Prevention of Terrorism Act 2005. The control order regime is discussed in Chapter 2.

[5] Liberty and JUSTICE, *Liberty and JUSTICE Joint Committee Stage Briefing on the Terrorist Asset-Freezing Etc. Bill in the House of Lords* (2010) [28].

[6] Cian C Murphy, *EU Counter-Terrorism Law: Pre-emption and the Rule of Law* (Hart Publishing 2012) 115 (emphasis added).

[7] Clive Walker, *Terrorism and the Law* (OUP 2011) 438 (emphasis added).

à-vis the international legal processes of UN Security Council counter-terrorism sanctions, the domestic and European courts have instead exacted especially robust scrutiny of the various legislative instruments by which those sanctions have been translated into the relevant municipal legal orders. Some key examples are discussed in this chapter,[8] in which, notably, judicial resistance to the counter-terrorism sanctions regime(s) to which these various instruments give effect has above all been grounded both in 'fundamental' constitutional principle(s) and human rights—and, specifically in the UK context, in the protection of 'fundamental' *common law* constitutional principle(s) and rights. Indeed, that it should be so that a potential vindication of 'common law constitutionalism' has resulted from the courts' intervention in disputes involving the protection of *property*—and not, for instance, the protection of liberty, much less the protection of privacy, as discussed in previous chapters—is, of itself, significant. For this potentially offers key insights as to the norms and values truly foremost in 'common law constitutionalist' theory, and how that theory is brought to bear on the UK constitution in particular, which also clearly have important consequences, therefore, for the constitutional position of asset-freezing—and of the UK constitution more broadly—as understood from that perspective.

The chapter begins by outlining, in Section II, the international counter-terrorism sanctions regime which has grown exponentially since (and primarily in response to) the 9/11 terrorist attacks. It then considers the various means by which that regime has been and is currently given domestic legal effect in the UK—that is, both via primary and secondary legislation. A key focus of that section is the UK Supreme Court's ruling in *HM Treasury v Ahmed*,[9] which, in addition to representing one important example of the much broader liberal-legal(ist) critique of counter-terrorism asset-freezing mentioned above, can also be seen to represent a critical turning point in the contemporary legal landscape of asset-freezing. In particular, Parliament's response to *Ahmed* led to significant fragmentation of this legal landscape which, itself, is the source of much ongoing legal and constitutional complexity in this area. Section III then outlines those asset-freezing measures contained in Part 2 of the Anti-terrorism, Crime and Security Act 2001 and Schedule 7 to the Counter-Terrorism Act 2008, which exist alongside, though are entirely independent of, the international regime (and indeed the relevant legal instruments which incorporate the international regime into domestic law). That section concludes with some brief reflections on the recent introduction of a third discrete domestic legal basis for asset-freezing, the Sanctions and Anti-Money Laundering Act 2018, following the UK's withdrawal from the EU on 31 January 2020. Indeed, to the extent that the 2018 Act now dovetails (if only part) of the international sanctions regime and that which is otherwise "purely" domestic, several key questions are raised. Not least, for instance, as to what impact this will have, if any, in potentially resolving much of the fragmentation which has been perpetuated in the development of the contemporary legal framework of asset-freezing.

[8] See, in Section II, Case C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-6351; and *HM Treasury v Ahmed* [2010] UKSC 2, [2010] 2 AC 534. See, also, in Section III, *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 38, [2014] AC 700.
[9] *Ahmed* (n 8).

II. THE INTERNATIONAL COUNTER-TERRORISM SANCTIONS REGIME(S)

The escalation of terrorist violence perpetrated by Al-Qaida and affiliated networks at the turn of the 21st century prompted an international legal response focused to an unprecedented degree on combatting the financing of terrorism.[10] The UN General Assembly's adoption, in 1999, of the International Convention for the Suppression of the Financing of Terrorism[11] signals the extent to which the issue had risen (exponentially) on the international agenda during that period.[12] Described as 'unique amongst its 12 sister international conventions tackling terrorism in that it is the first to address the root causes and lifeblood of the phenomenon',[13] the Terrorist Financing Convention obliges signatories to, among other things, 'adopt such measures as may be necessary' so as to give effect to, and thus make punishable, 'terrorist financing offences in domestic law'.[14] Moreover, it mandates the taking of 'appropriate measures … for the identification, detection and freezing or seizure of any funds used or allocated for the purposes of committing [these] offences'.[15] Although initially (infamously) having failed to attract a sufficient number of signatures for ratification,[16] the 9/11 terrorist attacks triggered a significant upturn in this respect. As of August 2019, 189 states are now party to the Terrorist Financing Convention, making it one of the most successful international anti-terrorism treaties in terms of its breadth and uptake.

Of particular significance for present purposes are the various counter-terrorism-financing measures adopted and enforced under the auspices of the UN collective security framework. As the institution on which the Member States of the UN have conferred 'primary responsibility for the maintenance of international peace and security',[17] the UN Security Council enjoys extensive powers in this regard, under Chapter VII of the UN Charter. Upon determining 'the existence of any threat to the peace, breach of the peace, or act of aggression'[18]—for which, again, the Security Council is both solely responsible and afforded

[10] See, eg, Ryder (n 1) 32: 'The international community was ill-equipped to tackle terrorist financing prior to the terrorist attacks in September 2001. The stance of the international community towards financial crime concentrated on tackling the proceeds of drug trafficking, a point illustrated by the then limited scope of the [United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988)].'

[11] UNGA International Convention for the Suppression of the Financing of Terrorism (adopted 9 December 1999, entered into force 10 April 2002) 2178 UNTS 229 (Terrorist Financing Convention); UNGA Res 54/109 (25 February 2000) UN Doc A/RES/54.

[12] On the significance of the Terrorist Financing Convention, see, eg, Luca G Radicati di Brozolo and Mauro Megliani, 'Freezing the Assets of International Terrorist Organisations' in Andrea Bianchi (ed), *Enforcing International Law Norms Against Terrorism* (Hart Publishing 2004), in which the Convention is described as '[t]he most far-reaching instrument relating to the financing of terrorism'.

[13] Alexander Culley, 'The International Convention for the Suppression of the Financing of Terrorism: A Legal Tour de Force?' (2007) 29 Dublin ULJ 397, 397-98.

[14] Terrorist Financing Convention, art 4.

[15] ibid art 8.

[16] Of the requisite 22 ratifications required under art 26 of the Terrorist Financing Convention, only four—which, as of 7 March 2001, included the UK—had been achieved by the time of the 9/11 terrorist attacks.

[17] United Nations, *Charter of the United Nations* (1945) 1 UNTS XVI (UN Charter) art 24(1).

[18] ibid art 39. See, eg, Jeremy Matam Farrall, *United Nations Sanctions and the Rule of Law* (CUP 2007) 82: 'The text of Article 39 suggests that, prior to applying sanctions, the Council should first determine the existence of a threat to the peace, breach of the peace or act of aggression.' Indeed, such a determination was made, post-9/11, in respect of the threat of 'any act of international terrorism': UNSC Res 1368 (12 September 2001) UN Doc S/RES/1368.

a wide discretion[19]—it falls to the Security Council to also 'decide what measures shall be taken … to maintain or restore international peace and security'.[20] Article 41 of the UN Charter empowers the Security Council to 'decide what measures not involving the use of armed force are to be employed to give effect to its decisions', and to 'call upon the Members of the United Nations to apply such measures', which include (but are not limited to) 'complete or partial interruption of economic relations'.[21]

One key point which ought to be noted at this juncture is that the international counter-terrorism sanctions regime established pursuant to the UN Security Council's Chapter VII powers (discussed below) follow, and indeed perpetuate, what has been described as a 'sea change' in the Council's practice in the last decades, involving 'significantly advanc[ing] the sophistication of the sanctions instrument'.[22] That is, where historically art. 41 had established a legal basis for (non-military) enforcement action primarily targeting recalcitrant states, the shift in focus 'from comprehensive to more selective measures'[23] of the kind typified by the increasing imposition of so-called 'individualised' counter-terrorism sanctions had been prompted by several factors, including an increased awareness of the broader (severe) humanitarian and economic implications of such a state-centric approach—for example, the imposition of general trade sanctions, wide restrictions on travel and aviation, and expansive embargoes on the sale and transport of arms. This shift in the UN Security Council's practice in the last decades thus represents a significant international (legal and constitutional) development, per se, about which much has been written.[24] As Ben Murphy notes, '[t]he contemporary importance of this practice is demonstrated by the fact that … 'sanctions' sit at the top of two important lists: by some distance, they simultaneously constitute *the most commonly invoked and the most controversial aspect* of the Council's recent practice'.[25] It is against the backdrop of the controversies of this particular development, therefore, that the counter-terrorism sanctions regime ought to be considered; a number of questions of fundamental legal and constitutional import are given rise as to whether, and if so to what extent, the UN Security Council can itself be held accountable—whether legally or politically—for the far-reaching human rights implications of its use of economic sanctions (for counter-terrorism purposes).

[19] Although not, it is argued, an 'unlimited' discretion: see, eg, Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* (Hart Publishing 2004) ch 4.
[20] UN Charter, art 39.
[21] ibid art 41.
[22] David Cortright, George A Lopez and Linda Gerber-Stellingwerf, 'The Sanctions Era: Themes and Trends in UN Security Council Sanctions Since 1990' in Vaughan Lowe et al (eds), *The United Nations Security Council and War: The Evolution of Thought and Practice Since 1945* (OUP 2008) 207.
[23] ibid 207.
[24] See, eg, Lisa Ginsborg, 'UN Sanctions and Counter-Terrorism Strategies: Moving Towards Thematic Sanctions against Individuals?' in Larissa van den Herik (ed), *Research Handbook on UN Sanctions and International Law* (Edward Elgar 2017).
[25] Ben L Murphy, 'UN Security Council Sanctions and International Peace and Security: Context, Controversies and (Legal) Challenges' in Sergey Sayapin (ed), *International Conflict and Security Law: Protected Values, Law, and Institutions* (forthcoming) (emphasis in original).

A. UN Security Council Resolutions 1267 (1999) and 1373 (2001)

Building on several such measures adopted in response to the terrorist attacks carried out by Al-Qaida on US embassies in Kenya and Tanzania in 1998,[26] the Security Council established under UNSCR 1267 (1999)[27] a regime of economic sanctions uniquely targeting individuals and entities from whom Al-Qaida terrorist networks derived financial support. In particular, this included the then-ruling Taliban regime in Afghanistan, which was roundly condemned by the Security Council for 'continu[ing] to provide safe haven to [the leader of Al-Qaida] Usama bin Laden and … [for] allow[ing] him and others associated with him to operate a network of terrorist training camps from Taliban-controlled territory'.[28] Thus, in addition to prohibitions on, for instance, aircraft taking off or landing in Taliban-controlled territory,[29] UNSCR 1267 required all states to

> Freeze funds and other financial resources, including funds derived or generated from property owned or controlled directly or indirectly by the Taliban, or by any undertaking owned or controlled by the Taliban … and ensure that neither they nor any other funds or financial resources so designated are made available, by their nationals or by any persons within their territory, to or for the benefit of the Taliban or any undertaking owned or controlled, directly or indirectly, by the Taliban, except as may be authorized by the Committee on a case-by-case basis on the grounds of humanitarian need.[30]

Moreover, following the 9/11 terrorist attacks, the UN sanctions regime was significantly expanded under UNSCR 1373 (2001),[31] which constitutes a general international mandate (existing alongside that of UNSCR 1267) for the freezing of terrorists' (and suspected terrorists') assets. The provisions of UNSCR 1373 are equally wide-ranging, and impose on all states a range of obligations, including, for instance, to '[f]reeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts',[32] and to '[b]ecome parties … to the relevant international conventions and protocols relating to terrorism, including the [Terrorist Financing Convention].[33]

The counter-terrorism asset-freezing regime established by UNSCR 1267 ought to be considered here, for, of the two, that regime is arguably the more controversial, and certainly the more far-reaching in terms of its implications for (the protection of) international human rights norms. UNSCR 1267 established the Al-Qaida and Taliban Sanctions Committee ('the 1267 Committee'), charged with overseeing the effective implementation of asset-freezing measures. The Committee, comprising all 15 members of the Security Council, enjoys broad powers to 'designate' funds or other financial resources meeting the relevant criteria (noted

[26] See, eg, UNSC Res 1189 (13 August 1998) UN Doc S/RES/1189; UNSC Res 1193 (28 August 1998) UN Doc S/RES/1193; UNSC Res 1214 (8 December 1998) UN Doc S/RES/1214.
[27] UNSC Res 1267 (15 October 1999) UN Doc S/RES/1267.
[28] ibid.
[29] ibid para 4(a).
[30] ibid para 4(b).
[31] UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373.
[32] ibid para 1(c).
[33] ibid para 3(d).

above).[34] Since 2004, the Committee has been supported by the Analytical Support and Sanctions Monitoring Team.[35] The mandate of the Committee has been renewed annually since its inception, whilst its remit has been expanded significantly on several occasions so as to encompass further categories of persons and organisations with links to Al-Qaida.[36] In particular, UNSCR 1333 (2000) specified that asset-freezing measures be implemented against 'Usama bin Laden and individuals and entities associated with him as designated by the Committee, including those in the Al-Qaida organization'.[37] More recently, in 2011, the adoption of UNSCRs 1988 (2011)[38] and 1989 (2011)[39] effectively split the UNSCR 1267 regime in two: pursuant to the former, the Security Council established a Committee mandated to oversee the implementation of the various asset-freezing measures against individuals and entities associated specifically with the Taliban;[40] the latter established the 'Al-Qaida Sanctions List', with the relevant Sanctions Committee charged with overseeing the implementation of the various sanctions specifically against individuals and entities associated with Al-Qaida.[41] Yet, with the rapid rise of the ISIL/Da'esh terrorist organisation—a splinter group of Al-Qaida—in the last years, the remit of the 'Al-Qaida Sanctions Committee' was further extended in 2015 so as to encompass those individuals and entities with links to that organisation also, leading to its renaming, once again, as the 'ISIL (Da'esh) and Al-Qaida Sanctions Committee'.[42]

A detailed examination of the procedure by which individuals come to be 'listed' as the subjects of UN Security Council-mandated financial sanctions is beyond the scope of this chapter. It suffices, for present purposes, to note two key points. The first point concerns the general absence of transparency in and of the decision-making process at the Sanctions Committee level. For instance, meetings of the ISIL (Da'esh) and Al-Qaida Sanctions Committee are generally held in closed sessions, with members of the Monitoring Team invited to attend at the discretion of the Chair.[43] Names of individuals and/or entities are proposed for inclusion on the Sanctions List by Member States, in whose power it is to specify that their status as designating State(s) is not to be made known.[44] Decisions are deemed adopted—and thus the relevant name(s) included in the Sanctions List—unless a

[34] UNSC Res 1267, para 6(e).
[35] UNSC Res 1526 (30 January 2004) UN Doc S/RES/1526.
[36] See, eg, UNSC Res 1333 (19 December 2000) UN Doc S/RES/1333; UNSC Res 1390 (16 January 2002) UN Doc S/RES/1390; UNSC Res 1455 (17 January 2003) UN Doc S/RES/1455; UNSC Res 1526 (30 January 2004) UN Doc S/RES/1526; UNSC Res 1617 (29 July 2005) UN Doc S/RES/1617; UNSC Res 1735 (22 December 2006) UN Doc S/RES/1735; UNSC Res 1822 (30 June 2008) UN Doc S/RES/1822; UNSC Res 1904 (17 December 2009) UN Doc S/RES/1904.
[37] UNSC Res 1333, para 8(c).
[38] UNSC Res 1988 (17 June 2011) UN Doc S/RES/1988.
[39] UNSC Res 1989 (17 June 2011) UN Doc S/RES/1989.
[40] UNSC Res 1988, para 1.
[41] UNSC Res 1989, para 1.
[42] UNSC Res 2253 (17 December 2015) UN Doc S/RES/2253, para 1. See, also, UNSC Res 2368 (20 July 2017) UN Doc S/RES/2368.
[43] See, eg, ISIL (Da'esh) and Al-Qaida Sanctions Committee, *Guidelines of the Committee for the Conduct of Its Work* (2018) para 3.
[44] ibid para 6(i).

'hold' or an 'objection' is conveyed to the Committee by the relevant Member(s) within 'ten full working days'.[45]

It follows, secondly, that the lack of transparency is exacerbated by 'the difficulty that individuals and entities face in challenging a decision [to impose sanctions upon them]'.[46] Indeed, for some several years the imposition of financial sanctions was effectively done in secret, there being no way for the relevant individual or entity—who were not informed—to know that a decision had even been made. And although this eventually changed in 2008, with the introduction of mandatory notification (of the relevant decision) of those concerned,[47] 'this did little to quell criticisms', as Murphy notes, 'for it was not coupled with an obligation to give reasons.[48] For instance, the addition of a name to the ISIL (Da'esh) and Al-Qaida Sanctions List requires the Committee, 'with the assistance of the Monitoring Team and in coordination with the relevant designating State(s), [to] make accessible on the Committee's website *a narrative summary of reasons for listing for the corresponding entry or entries*'.[49]

The position of a 'listed' person is thus an incredibly onerous one. Above all, '[t]o seek a justification to explain their listing, or ultimately to seek delisting, those targeted have no direct access to the Sanctions Committee'.[50] Certain developments have improved the situation somewhat. In particular, the establishment of an Office of the Ombudsperson, in 2009,[51] which would 'receive requests from individuals and entities seeking to be removed from the Consolidated List',[52] is said to represent 'by far the most important change' to the 'listing' procedure in this regard.[53] As 'an office independent of the Security Council with the mandate to receive listing appeals and promote dialogue between the various parties involved in it, including the individual, listed person', this development clearly did much to enhance the (otherwise abysmal) transparency of the 'listing' procedure, whilst providing a crucial point of contact for the affected individual or entity to, at the very least, establish the relevant basis for the decision to impose sanctions upon them.[54]

The 'listing' procedure is certainly an intensely controversial feature of the UN sanctions regime, though represents just one aspect of the much wider criticism of that regime in the last decades. As Larissa van den Herik writes, '[o]ver the years, a great variety of actors have voiced their concerns or outright condemnation of the accountability deficit that exists for UN sanctions regimes which target individuals'.[55] Notably, this includes a range of judicial actors who have denounced the UN sanctions regime for (among other things) its denial of

[45] ibid para 6(n).
[46] Murphy (n 25).
[47] UNSC Res 1822, para 17.
[48] Murphy (n 25).
[49] ISIL (Da'esh) and Al-Qaida Sanctions Committee (n 43) para 6(q) (emphasis added).
[50] Murphy (n 25).
[51] UNSC Res 1904, para 20.
[52] ibid para 21.
[53] CH Powell, 'The United Nations Security Council, Terrorism and the Rule of Law' in Victor V Ramraj, Michael Hor, Kent Roach and George Williams (eds), *Global Anti-Terrorism Law and Policy* (2nd edn, CUP 2012) 36.
[54] ibid 36.
[55] Larissa J van den Herik, 'Peripheral Hegemony in the Quest to Ensure Security Council Accountability for its Individualized UN Sanctions Regimes' (2014) 19(3) JC&SL 427, 427-28.

basic principles of procedural fairness,[56] and for its far-reaching human rights implications—not only, that is, for the subjects of financial sanctions themselves, but also for members of their families.[57] Indeed, several key issues are raised from this perspective, not least including the compatibility of the UN sanctions regime with the legal norms reflected in the ECHR and the fundamental rights, freedoms and principles integral to the EU's legal order.[58]

The latter were brought to bear on the lawfulness of Council Regulation (EC) No 881/2002—the relevant EU legal basis which gave effect to UNSCR 1267—in the long-running *Kadi* litigation. In what has been described as a 'landmark'[59] decision, the European Court of Justice considered that

> the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the [Treaty on European Union], which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty.[60]

Regulation 881 was thus annulled on the basis that its provisions could not be taken 'to authorise any derogation from the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article 6(1) [of the Treaty on European Union] as a foundation of the Union'.[61] Moreover, the Court noted:

> [I]n light of the actual circumstances surrounding the inclusion of the appellants' names in the list of persons and entities covered by the restrictive measures contained in Annex 1 to [Regulation 881], it must be held that the rights of the defence, in particular the right to be heard, and the right to effective judicial review of those rights, were patently not respected.[62]

The decision was subsequently upheld by the General Court of the (renamed) Court of Justice of the European Union (CJEU), in 2010,[63] and the Grand Chamber of the CJEU, in 2013.[64]

The interventionism of the ECJ/CJEU is mirrored by that, increasingly in recent years, of the ECtHR. The Court has found a number of violations of the Convention rights concerning the use of asset-freezing measures, in particular art. 6 ('right to a fair trial'),[65] art. 8 ('right to respect for private and family life'),[66] art. 13 ('right to an effective remedy'),[67] and art. 1 of

[56] See, eg, *Abdelrazik v The Minister of Foreign Affairs* [2009] FC 580 [51] (Zinn J): 'There is nothing in the listing or de-listing procedure that recognises the principles of natural justice or that provides for basic procedural fairness.'
[57] *R(M) v HM Treasury (Note)* [2008] UKHL 26, [2008] 2 All ER 1097.
[58] See, eg, Charter of Fundamental Rights of the European Union (EU Charter, as amended) art 7 ('respect for private and family life'), art 17 ('right to property'), art 47 ('right to an effective remedy and to a fair trial'), art 48 ('presumption of innocence and right of defence').
[59] See, eg, Katja S Ziegler, 'Strengthening the Rule of Law, but Fragmenting International Law: The *Kadi* Decision of the ECJ from the Perspective of Human Rights' (2009) 9(2) HRLR 288.
[60] *Kadi* (n 8) para 285.
[61] ibid para 303.
[62] ibid para 334.
[63] Case T-85/09 *Kadi v Commission* [2010] ECR II-5177.
[64] Joined Cases C-584/10P, C-593/10P and C-595/10P *Kadi v Commission and Others* [2014] 1 CMLR 24.
[65] See, eg, *Al-Dulimi and Montana Management Inc v Switzerland* [2016] ECHR 576, in which the ECtHR found that there had been a violation of art 6(1) of the ECHR.
[66] *Nada v Switzerland* (2013) 56 EHRR 18.

Protocol 1 ('protection of property').[68] For example, in what has been described as signalling the Court's 'broad affirmation of the *Kadi* judgment',[69] in *Nada v Switzerland*,[70] the Court held that the imposition of asset-freezing measures upon the applicant in that case had violated art. 8: the relevant measures 'did not strike a fair balance between [the applicant's] right to the protection of his private and family life, on the one hand, and the legitimate aims of the prevention of crime and the protection of Switzerland's national security and public safety, on the other'.[71] Indeed, as Erika de Wet notes, 'the *Nada* decision … has indicated that even where the language of a UNSC resolution leaves no apparent scope for reinterpretation, States remain under an obligation to find some way to give effect to international human rights standards'.[72]

B. Domestic implementation of UN sanctions: the Terrorism (United Nations Measures) Orders and the Al-Qaida and Taliban (United Nations Measures) Orders

In the UK, domestic legal effect was given to UNSCRs 1267 and 1373 via s. 1 of the United Nations Act 1946, which provides:

> If, under [art. 41 of the UN Charter] … the Security Council of the United Nations call upon His Majesty's Government in the United Kingdom to give effect to any decision of that Council, His Majesty may by Order in Council make such provision as appears to Him necessary and expedient for enabling those measures to be effectively applied, including (without prejudice to the generality of the preceding words) provision for the apprehension, trial and punishment of persons offending against the Order.

Enacted on 10 October 2001, the Terrorism (United Nations Measures) Order 2001 enforced, in the UK, the general (international) legal mandate for the imposition of counter-terrorism asset-freezing measures under UNSCR 1373.[73] Though initially regulations made pursuant to s. 2(2) of the European Communities Act 1972 provided the domestic legal basis for the UNSCR 1373 sanctions regime enforced separately under EU law,[74] both strands of that regime—domestic and EU—were consolidated under the Terrorism (United Nations Measures) Order 2006 (hereinafter 'TO 2006'), and the later Terrorism (United Nations Measures) Order 2009.[75] Once again, both Orders in Council were made via the enabling power in the 1946 Act. Thus, a person was deemed to be the subject of UN sanctions—that

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[67] ibid.

[68] On the implications for 'protection of property', albeit in the context of asset-freezing for the purposes of criminal proceedings, see, eg, *Džinić v Croatia* [2016] ECHR 428, para 59: '[T]he seizure of the applicant's property by prohibiting its alienation or encumbrance amounted to an interference with the applicant's right to peaceful enjoyment of his possessions.'

[69] Cian C Murphy, 'Counter-Terrorism Law and Judicial Review: The Challenge for the Court of Justice of the European Union' in Fergal F Davis and Fiona de Londras (eds), *Critical Debates on Counter-Terrorism Judicial Review* (CUP 2013) 288.

[70] *Nada* (n 66).

[71] ibid para 198.

[72] Erika de Wet, 'From *Kadi* to *Nada*: Judicial Techniques Favouring Human Rights over United Nations Security Council Sanctions' (2013) 12 Chinese J Intl L 787, 806.

[73] Terrorism (United Nations Measures) Order 2001, SI 2001/3365.

[74] Terrorism (United Nations Measures) Order 2001 (Amendment) Regulations 2003, SI 2003/1297.

[75] Terrorism (United Nations Measures) Order 2009, SI 2009/1747 (hereinafter 'TO 2009').

is, a 'designated person'—if identified in either the Council Decision 2006/379/EC, implementing art. 2(3) of Council Regulation (EC) No 2580/2001, or in a direction given by HM Treasury.[76]

As under the previous TO 2001, art. 4 of the TO 2006 empowered the Treasury to designate persons where there existed 'reasonable grounds for suspecting that the person is or may be' (one or more of the following): 'a person who commits, attempts to commit, participates in or facilitates the commission of acts of terrorism'; 'a person identified in the Council Decision'; 'a person owned or controlled, directly or indirectly, by a designated person'; or 'a person acting on behalf of or at the direction of a designated person'.[77] The effects of designation upon the individual(s) concerned were onerous. For instance, once given, a direction prohibited a person ('including the designated person') from 'deal[ing] with funds or economic resources belonging to, owned or held by' the designated person, unless done 'under the authority of a licence granted under article 11 [of the TO 2006]'.[78] So too was it an offence to contravene prohibitions on 'mak[ing] funds, economic resources or financial services available, directly or indirectly, to or for the benefit' of designated persons and those involved in terrorism-related activity.[79]

UNSCR 1267 was similarly incorporated into domestic law via secondary legislation enacted under the authority of the 1946 Act.[80] Following the 9/11 terrorist attacks, the Al-Qa'ida and Taliban (United Nations Measures) Order 2002,[81] and subsequently the Al-Qaida and Taliban (United Nations Measures) Order 2006 (hereinafter 'AQO 2006'),[82] were enacted so as to enforce, in the UK, the various sanctions to which those named in the Consolidated List of the 1267 Sanctions Committee were made subject. Thus, for the purposes of the AQO 2006, 'designated persons' included then-leader of the Al-Qaida terrorist organisation Usama bin Laden, as well as 'any person designated by the Sanctions Committee'.[83] Notably, the regime implemented by the AQO 2006 came to be regarded as 'even more draconian'[84] than that of the TO 2006. Such was the particular severity of the consequences of designation under the former for those concerned. Indeed, both the TO 2006 and the AQO 2006 provided that those identified in or affected by a direction given by the Treasury were able, upon application to the High Court or, in Scotland, the Court of Session, to have the direction set aside (on traditional common law grounds of judicial review).[85] And yet, where, as noted above, designation pursuant to the TO 2006 required the Treasury to establish reasonable grounds for suspecting that the individual in question 'is or may be … a person who commits, attempts to commit, participates in or facilitates the commission of acts of terrorism', the effect of the AQO 2006, by contrast, was that it 'transposed the UN list on to the domestic level automatically, *without reference to individual designation by Treasury*

[76] TO 2006, art 3.
[77] ibid art 4(2).
[78] ibid art 7(1).
[79] ibid art 8.
[80] See, originally, Afghanistan (United Nations Sanctions) Order 1999, SI 1999/3133; Afghanistan (United Nations Sanctions) Order 2001, SI 2001/396; Afghanistan (United Nations Sanctions) (Amendment) Order 2001, SI 2001/2557.
[81] Al-Qa'ida and Taliban (United Nations Measures) Order 2002, SI 2002/111.
[82] Al-Qaida and Taliban (United Nations Measures) Order 2006, SI 2006/2952.
[83] ibid art 3.
[84] *A, K, M, Q & G v HM Treasury* [2008] EWHC 869 (Admin), [2008] 3 All ER 361, [11] (Collins J).
[85] TO 2006, art 5(4); AQO 2006, art 5(4).

decisions'.[86] In other words, those captured by the provisions of the AQO 2006 became 'designated persons'—both as matter of domestic and international law—*without* the (need for) involvement of the Treasury, meaning that, crucially, no such direction had been given, and therefore no such relief was available; the only means of challenging one's designation in such circumstances were those provided for by the UN Security Council (noted above). And although, with the introduction of 'financial restrictions proceedings' under Part 6 of the Counter-Terrorism Act 2008, persons affected by 'any decision of the Treasury in connection with the exercise of any of their functions under ['the UN orders']' may apply to the courts under s. 63 of the Act to have the decision set aside, the same (aforementioned) reasons precluded the availability of judicial review: once again, where the Treasury had played no role in bringing about a person's addition to the 1267 Sanctions List, there was no domestic act on which a legal challenge could possibly hang.

C. *HM Treasury v Ahmed & Ors*

The validity of both the TO 2006 and the AQO 2006 was the subject of litigation which reached the UK Supreme Court on appeal in October 2009.[87] The case, *HM Treasury v Ahmed & Ors*, was brought by five appellants. Four of the appellants—referred to, throughout proceedings, as 'G', 'A', 'K', and 'M'—had been designated under art. 4 of the TO 2006 (and later re-designated under the terms of the TO 2009) on the basis that the Treasury had reasonable grounds for suspecting that they were, or might be, persons who facilitated the commission of acts of terrorism.[88] They were each informed by the Treasury that 'the effect of the direction was to prohibit [them] from dealing with [their] funds and economic resources and to prevent anyone notified of the freeze from making funds, economic resources or financial services available to [them] or for [their] benefit'.[89] The circumstances of the appellant known as 'G' are particularly revealing of the issues concerning the absence of transparency, of legal clarity and of basic due process in the automatic 'listing' regime under UNSCR 1267 / AQO 2006. That is, having initially been the subject of a direction given by the Treasury under the provisions of the TO 2006, 'G' was subsequently informed by the Foreign and Commonwealth Office that his name had been added to the consolidated list maintained by the 1267 Committee, and as such was deemed, also, to be a designated person pursuant to the AQO 2006. Of this, the Supreme Court noted that '[n]o mention was made at that stage of the domestic measure under which the restrictions were being imposed on him'.[90] Rather:

> ['G'] was told that he could petition the Committee to seek de-listing. He was not told until later that his listing had been at the request of the United Kingdom. It was not until March 2007 that he was told that his listing meant that he was a designated person under the AQO … It appears to have been assumed on his behalf that a direction was made against him under article 4(1) of the AQO. But there is

[86] Angus Johnston and Eva Nanopoulos, 'The New UK Supreme Court, the Separation of Powers and Anti-Terrorism Measures' (2010) 69(2) CLJ 217, 218 (emphasis added).
[87] On appeal from: *A, K, M, Q & G v HM Treasury* [2008] EWCA Civ 1187, [2009] 2 All ER 747.
[88] *Ahmed* (n 8) [1], [3].
[89] ibid [1], [3].
[90] ibid [2].

> no evidence that this ever happened, and it would have been unnecessary as he was a designated person for the purposes of that Order simply by reason of the fact that he had been listed.[91]

Finally, having also previously been 'listed' by the 1267 Committee (in September 2005), the fifth appellant, 'HAY', whose interest in the proceedings was described as 'virtually identical to those of G and A, K and M', was also a designated person pursuant to the AQO 2006.[92]

The issue central to the appeal in *Ahmed* was 'whether the Treasury was empowered by section 1 of the 1946 Act to introduce an asset freezing regime by means of an Order in Council'.[93] Several arguments were submitted in this respect. The appellants 'A', 'K' and 'M' contended that the TO 2006 was beyond the scope of the enabling power conferred by the 1946 Act on multiple grounds at common law: that the Order had been passed (unlawfully) without parliamentary approval; that it 'lacked legal certainty and proportionality'; and that it failed to establish procedures that 'enabled designated persons to challenge their designation'.[94] It was argued by the appellant 'G' that the AQO 2006 was likewise ultra vires the 1946 Act, and that the incompatibility of that Order, and the TO 2006, with the ECHR—specifically art. 8 ('right to respect for private and family life) and art. 1 of Protocol 1 ('protection of property')—contravened the obligation imposed upon public authorities under s. 6 of the HRA.[95] The appellant 'HAY''s complaint also concerned the AQO 2006; it was submitted that the Order was outwith the 1946 Act on the grounds that it violated the fundamental common law right of access to a court for an effective remedy.[96]

The Supreme Court (sitting as a panel of seven) unanimously held that the TO 2006 was ultra vires s. 1 of the 1946 Act, and ordered that it be quashed in full. Lord Hope (with whom Lord Walker and Lady Hale agreed) gave the leading judgment, in which it was decided that '[t]he crucial question is whether the section confers power on the executive, without any Parliamentary scrutiny, to give effect in this country to decisions of the Security Council which are targeted against individuals'.[97] It was considered that judicial scrutiny of the extent to which the relevant measures ought to be considered 'necessary' and 'expedient' within the meaning of s. 1 of the 1946 Act was above all guided by the (common law) principle of legality. As outlined by Lord Hoffmann in *R v Secretary of State for the Home Department, ex parte Simms,*[98] whilst recognising that '[p]arliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights', that principle demands that 'Parliament must squarely confront what it is doing and accept the political cost', and, as such, that '[f]undamental rights cannot be overridden by general or ambiguous words'.[99] Thus, for Lord Hope, '[t]he closer [the relevant measures] come to affecting what [in *Simms*] Lord Hoffmann described as the basic rights of the individual, the more exacting this scrutiny must become'.[100] 'If the rule of law is to mean anything,' it was suggested,

[91] ibid [33].
[92] ibid [3].
[93] ibid [40].
[94] ibid [40].
[95] ibid [40].
[96] ibid [40].
[97] ibid [44].
[98] [1999] UKHL 33, [2000] 2 AC 115.
[99] ibid 131 (Lord Hoffmann).
[100] *Ahmed* (n 8) [45].

'decisions as to what is necessary or expedient in this context cannot be left to the uncontrolled judgment of the executive'.[101] And although '[t]he words "necessary" and "expedient" both call for the exercise of judgment', 'this does not mean that its exercise is unlimited'; rather, '[t]he wording of the [TO 2006] must be tested precisely against the words used by the Security Council's resolution and in the light of the obligation to give effect to it that article 25 [of the UN Charter] lays down'.[102]

On this basis, Lord Hope examined the implications, in particular, of the 'reasonable suspicion' test as a key condition to the exercise of powers to designate persons under the TO 2006. Noting that '[UNSCR 1373] is not phrased in terms of reasonable suspicion', but instead refers, simply, to persons 'who commit, or attempt to commit, terrorist acts',[103] Lord Hope suggested that the introduction of this test could not be taken to be 'necessary' (within the meaning of s. 1 of the 1946 Act), though '[i]t may well have been expedient to do so, to ease the process of identifying those who should be restricted in their access to funds or economic resources'.[104] Yet, extending the scope of the Order in this way raised several 'fundamental questions', as to, for instance: 'the standard of proof that should be required'; 'whether the directions should be capable of being challenged by an effective form of judicial review'; and 'whether they should last indefinitely or be time limited'.[105] The key question in this respect, therefore, was whether it is 'acceptable that the exercise of judgment in matters of this kind should be left exclusively, without any form of Parliamentary scrutiny, to the executive'.[106]

Ultimately, Lord Hope concluded that 'by introducing the reasonable suspicion test as a means of giving effect to [UNSCR 1373], the Treasury exceeded their powers under section 1(1) of the 1946 Act'.[107] Of particular concern was that the restrictions resulting from the use of those (wide) powers 'strike at the very heart of the individual's basic right to live his own life as he chooses'.[108] This was 'a clear example of an attempt to adversely affect the basic rights of the citizen without the clear authority of Parliament',[109] in contravention, that is, to the principle of legality as articulated both in *Simms* and in the earlier case of *R v Secretary of State for the Home Department, ex p Pierson*.[110] Indeed, applying that principle to the present facts, it was held that '[t]he absence of any indication that Parliament had the imposition of restrictions on the freedom of individuals in mind when the provisions of the 1946 Act were being debated makes it impossible to say that it squarely confronted those effects and was willing to accept the political cost when that measure was enacted'.[111]

By a 6:1 majority (Lord Brown dissenting), the Supreme Court ordered that the AQO 2006 also be quashed in part, specifically on the basis that art. 3(1)(b)—under which, as noted above, 'any person designated by the [1267] Sanctions Committee' was *automatically* liable

[101] ibid [45].
[102] ibid [47].
[103] ibid [58].
[104] ibid [58].
[105] ibid [58].
[106] ibid [58].
[107] ibid [61].
[108] ibid [60].
[109] ibid [61].
[110] [1997] UKHL 37, [1998] AC 539.
[111] *Ahmed* (n 8) [61].

to asset-freezing measures as a matter of domestic law—was also ultra vires the 1946 Act. As noted above, the complaints raised in this respect related to the legal protection of fundamental rights, both within the scheme of the HRA and at common law. Those complaints grounded in the HRA were dismissed; the Supreme Court found that the operation of the HRA/ECHR had no bearing on the validity of the Orders. In so deciding, the Court distinguished the approach adopted by the ECJ in *Kadi* (as discussed above). For instance, Lord Hope accepted that, in that case, the ECJ held that

> it did not follow from the principles governing the international legal order under the United Nations that any judicial review of the internal lawfulness of the contested regulation in the light of fundamental freedoms was excluded by virtue of the fact that that measure is intended to give effect to a resolution of the Security Council adopted under Chapter VII of the Charter of the United Nations.[112]

However, the point was noted that '[t]he ECJ was not faced in [*Kadi*] with the problem that article 103 of the UN Charter gives rise to in member states in international law, as the institutions of the European Community are not party to the UN Charter', and so it was not (at that point in time) appropriate to presume the stance of the Strasbourg Court on the question of the hierarchy of UN Charter obligations.[113] Rather, the proper approach as a matter of domestic law, it was held, was that previously adopted by the Appellate Committee of the House of Lords in *R (Al-Jedda) v Secretary of State for Defence*,[114] in which obligations derived from the UN Charter were taken to have prevailed over those derived from any other international treaty, including the ECHR.[115]

Yet, no such limitation applied to the protection of fundamental rights as derived from the common law: it was said that '[t]wo fundamental rights were in issue in G's case, and as they were to be found in domestic law his right to invoke them was not affected by article 103 of the UN Charter': first, 'the right to peaceful enjoyment of [one's] property, which could only be interfered with by clear legislative words'; and second, the 'right of unimpeded access to a court'.[116] 'There must come a point,' Lord Hope remarked, 'when the intrusion upon the right to enjoyment of one's property is so great, so overwhelming and so timeless that the absence of any effective means of challenging it means that this can only be brought about under the express authority of Parliament'.[117] And so, once again, the principle of legality was in play, directing that the interference with these fundamental rights could 'only be done by express language or by necessary implication', and that 'it was not open to the Treasury to use its powers under the general wording of section 1(1) of the 1946 Act to subject individuals to a

[112] ibid [68]; *Kadi* (n 8) para 287.
[113] *Ahmed* (n 8) [71]. The same point was made by Lord Phillips at [106].
[114] [2007] UKHL 58, [2008] 1 AC 332.
[115] Although, the decision of the House of Lords was later overturned by the ECtHR in *Al-Jedda v United Kingdom* (2011) 53 EHRR 23. The Court held, at para 102: '[I]n interpreting [UN Security Council] resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights. In the event of any ambiguity in the terms of a Security Council Resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations.'
[116] *Ahmed* (n 8) [75].
[117] ibid [76].

regime which had these effects'.[118] Lord Hope noted that, in part the complaint raised by the appellant concerned not only 'the inability of the 1267 Committee's procedures to provide an effective remedy … [but also] the means that had been used in domestic law to subject G to the AQO's regime'.[119] As such, the 'essential point' raised by counsel for the appellant G '[was] that G ought not to have been subjected to this by an Order made under section 1 of the 1946 Act which avoids Parliamentary scrutiny'; the 'fundamental objection', therefore, which Lord Hope ultimately accepted, '[was] directed to the dangers that lie in the uncontrolled power of the executive'.[120] As a 'designated person' under the UNSCR 1267 / AQO regime, G, and equally the appellant HAY, had been denied an effective remedy within that regime to challenge the basis on which they came to be so designated.[121] The point was reiterated by Lord Rodger (with whom Lady Hale agreed):

> [B]y enacting the general words of section 1(1) of the 1946 Act, Parliament *could not have intended to authorise* the making of AQO 2006 which so gravely and directly affected the legal right of individuals to use their property and which did so in a way which deprived them of any real possibility of challenging their listing in the courts.[122]

And in the view of Lord Mance, so 'radical' are the consequences for personal and family life of 'designation as an "associate" of a rogue state or non-state organisation' that 'one would expect [it] to be subject to judicial control, before or after the designation'.[123] Thus:

> [S]ection 1(1) was and is an inappropriate basis for the Al-Qaida Order, freezing indefinitely the ordinary rights of individuals to deal with or dispose of property on the basis that they were associated with Al-Qaida or the Taliban, without providing any means by which they could challenge the justification for treating them as so associated before any judicial tribunal or court, at a domestic or international level.[124]

One key question which ought to be considered here is that of the extent to which the Supreme Court's decision in *Ahmed* can properly be understood to represent a vindication of the common law constitution, in and of itself. That that might be so in any event clearly follows from the foregrounding, throughout the decision, of the common law principle of legality, and thus the judicial role, more broadly, in protecting the rule of law. Indeed, the Court reiterated the demands of the rule of law in several instances, including in relation to (warding against) 'the uncontrolled judgment of the executive';[125] the requirement that 'the actions of the Treasury in this context be subjected to judicial scrutiny';[126] the perception that exceptional measures (such as asset-freezing) 'trea[d] the boundaries of what is compatible with respect for fundamental rights and the rule of law';[127] and the foundational principle (of

[118] ibid [76].
[119] ibid [80].
[120] ibid [80].
[121] ibid [81]-[82].
[122] ibid [185] (emphasis added).
[123] ibid [249].
[124] ibid [249].
[125] ibid [45].
[126] ibid [53].
[127] ibid [133].

the rule of law) of '[a]ccess to a court to protect one's rights'.[128] And of the fact that it was the common law which ultimately established the crucial source of protection of fundamental rights, especially in the absence of the HRA/ECHR, it has been written:

> *Ahmed* thus exemplifies that, in post-HRA cases where reliance on the HRA has been impossible due to external exigencies but where English common law could be relied on, the Supreme Court has been fastidious in upholding fundamental rights which are protected at common law, even ordinary property rights.[129]

However, there are a number of compelling reasons to doubt that *Ahmed* might best, or otherwise *primarily* be seen as an example of the common law constitution's (and/or the rule of law's) triumph over 'uncontrolled' executive power. One such reason is that this would perhaps be to overlook, rather, the *balance* that the Supreme Court can be seen to have attempted to strike in its invocation of the principle of legality, namely that of the power(s) and accountability functions of the courts and those of Parliament. In other words, the principle of legality was deployed in *Ahmed* above all as a means to buttress Parliament's scrutiny role, whereby interference (by the executive) with fundamental rights—including the right to protection of one's property, and the right to access to a court—ought to be clearly and unambiguously authorised by Parliament in full knowledge of the 'political cost' it might be required to pay as a result.[130] This follows, also, from the majority's criticism of the apparent undermining of Parliament: that the asset-freezing regime implemented via secondary legislation lay 'wholly outside the scope of Parliamentary scrutiny' meant that it was 'far more draconian' than the scheme for the freezing of assets established under Part 2 of the ATCSA (outlined in Section III of this chapter, below).[131] And, indeed, the point was unequivocally stated by Lord Phillips:

> Nobody should conclude that the result of these appeals constitutes judicial interference with the will of Parliament. On the contrary it *upholds* the supremacy of Parliament in deciding whether or not measures should be imposed that affect the fundamental rights of those in this country.[132]

This, Walker suggests, demonstrates that '[t]he Court was conscious of its overt challenge to government policy and, as in the *Belmarsh* judgment in 2004, raised the constitutional shield of the protection of democracy rather than asserting judicial superiority, per se'.[133]

Yet, there is another, if less edifying, comparison to be drawn with the earlier ruling in *Belmarsh*: as in that case, grand statements of common law constitutional principle notwithstanding, the plight of those subjected to severe counter-terrorism measures ultimately

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[128] ibid [146].
[129] Eirik Bjorge, 'Common Law Rights: Balancing Domestic and International Exigencies' (2016) 75(2) CLJ 220, 237.
[130] *Simms* (n 98).
[131] *Ahmed* (n 8) [5].
[132] ibid [157] (emphasis added).
[133] Walker (n 7) 430. See, similarly, Adam Tomkins, 'What's Left of the Political Constitution?' (2013) 14(12) German LJ 2275, 2279: 'The major counter-terrorism cases lost by the Government in the UK Supreme Court are cases in which *the judges have sought to bolster the political constitution*, not to undermine it. Thus, in *Ahmed v. HM Treasury* the court ruled that ministers could not rely on order-making powers to authorize the freezing of terrorist assets, but required clear parliamentary authority.'

remained unchanged. That is, just as the Law Lords' ruling did nothing to bring about the immediate release of those indefinitely detained in Belmarsh prison, the Supreme Court's ruling in *Ahmed* did nothing to alleviate the undermining of the fundamental rights of those such as G and HAY, whose status as 'designated persons' nonetheless continued to flow from the (unaffected) fact of their 'listing' as a matter of international law.

Indeed, it is the question of the common law's (in)capacity to resolve key tensions in and of the intersection of international and domestic law and politics—not least, that is, in the case of the UNSCR 1267 / AQO regime—which emerges, in *Ahmed*, as perhaps the most constitutionally significant. Whether or not the principle of legality can be seen to do much to reconcile the democratically appropriate balance of power between the courts and Parliament, the key point, after all, is that it is the executive which can be seen to hold all the cards, here. That underpinning the Supreme Court's principled stance is the fact that *Parliament*—the foremost democratic constitutional actor in the UK—had not confronted the 'political cost' in authorising the domestic implementation of those sanctions therefore crucially misapprehends the constitutional position of the executive in domestic law vis-à-vis its position in international law. There is, in other words, in the latter context an effective inversion of the (legal and political) hierarchy between Parliament and the executive which the principle of legality—a common law rule of *domestic* constitutional arrangements—is liable to obscure. It is the executive which 'speaks' for the UK on the international stage, not Parliament. It is the executive which, as a permanent, veto-wielding member of the UN Security Council, was and is uniquely and centrally involved in the development and implementation of financial sanctions under UNSCR 1267 specifically, and under the auspices of the UN collective security framework more broadly. It is the executive, therefore, which is in fact the foremost democratic constitutional actor at the *international* level. And it follows from that fact that it was *international* politics which compelled the executive to implement the UN sanctions regime(s). So too does it follow from that fact that there is also the parallel, and equally constitutionally distorting dynamic between domestic and international *law*. As Lord Brown (dissenting) noted, alongside the principle of legality, there is also 'an important countervailing principle also in play here', namely the principle that the UK abide by its legal obligations under the UN Charter.[134] Of this, Lord Brown said:

> When one considers the ravages of terrorism and war and the gross invasions of human rights which they inevitably entail, it is difficult to think of any greater imperative than that member states should fully honour their international law obligation to implement Security Council decisions under article 41. The existence of such an obligation could not be plainer. Article 25 of the Charter mandates it and article 103 expressly dictates that it is to prevail over any conflicting international law obligation.[135]

Indeed, this 'clash of conflicting principles'[136] meant that, crucially, '[n]ot merely was the UK entitled to introduce this asset-freezing scheme in respect of those designated by the Sanctions Committee; it was (under international law) *bound to do so*'.[137] And so:

[134] *Ahmed* (n 8) [194].
[135] ibid [194].
[136] ibid [195].
[137] ibid [203] (emphasis added).

> The *Simms* principle is intended to ensure that human rights are not interfered with to a greater extent than Parliament has already unambiguously sanctioned. The loss of such rights is not to be allowed to "[pass] unnoticed in the democratic process". "Parliament must squarely confront what it is doing and accept the political cost." But in this case the Security Council by Resolution 1267 unambiguously stated what was required of the UK and the 1946 Act equally unambiguously provided that that measure could be implemented by Order in Council. There could surely be no political cost in doing what, unless [the UK] were flagrantly to violate our UN Charter obligations, the UK had no alternative but to do.[138]

These issues are undoubtedly brought to bear on the question of *Ahmed*'s contemporary constitutional significance, especially as regards what it says, or *might* say, about the role and impact of those common law principles, values and norms in the broader context of the UK's contemporary counter-terrorism framework. The key point for present purposes is that these issues can in fact be seen to reveal a more complex set of questions than the otherwise narrow focus on that, simply, of the (appropriate) balance between legal and political mechanisms of accountability in and of the UK constitution alone. And, indeed, in the context of what followed, outlined in the next section, it is primarily these questions—concerning, for instance, the inter-relation of domestic and international law and politics—which continue to reveal important insights as to the constitutional significance of *Ahmed*.

D. Domestic implementation of UN sanctions after *Ahmed*

On 4 February 2010, one week after judgment was handed down in *Ahmed*, a majority of the Supreme Court (Lord Hope dissenting) refused a petition by the UK Government to suspend the effects of the decision to quash the TO 2006 (in whole) and the AQO 2006 (in part).[139] Parliament responded by enacting—via emergency, 'fast-track' legislation procedures—the Terrorist Asset-Freezing (Temporary Provisions) Act 2010, retrospectively validating the making of the TO regime(s). (The continuation of the AQO regime was achieved via different means, discussed below). Thus, in a direct rebuke of the Supreme Court's ruling, the Act deemed 'every provision of those Orders' to be within the power conferred under s. 1 of the United Nations Act 1946 for the period beginning 4 February 2010 (the date of the Act's coming into force) and ending 31 December 2010.[140] Things 'done or omitted' during that period were equally deemed to be 'valid, lawful and effectual' as if the Orders had been validly made under the enabling power in the 1946 Act, and 'every provision of them had been within that power'.[141] Legal effect was also given to directions made and licences granted pursuant to the Orders—including the making and granting of further such directions and licences—as well as to 'prohibitions and obligations' imposed by them.[142]

[138] ibid [204].
[139] *HM Treasury v Ahmed & Ors* [2010] UKSC 5, [2010] 2 AC 534.
[140] Terrorist Asset-Freezing (Temporary Provisions) Act 2010, s 1(2).
[141] ibid ss 2(1)-(2).
[142] ibid s 1(3).

(i) The Terrorist Asset-Freezing etc. Act 2010

The Terrorist Asset-Freezing (Temporary Provisions) Act 2010 was subsequently replaced in December of that year by the Terrorist Asset-Freezing etc. Act 2010 (TAFA). It ought to be noted here that, following the UK's withdrawal from the EU on 31 January 2020, Part 1 of the 2010 Act was subsequently repealed on 31 December 2020, though remained in force throughout the ('transition') period between these dates pursuant to regulations made under the authority of the Sanctions and Anti-Money Laundering Act 2018 (discussed in Section III, below).[143] It suffices to outline the Part 1 provisions briefly here.

Once again mirroring the provisions of the abolished TO regime(s), the TAFA provided that 'designated persons' include either 'a person designated by the Treasury' or 'a natural or legal person, group or entity including in the list provided for by Article 2(3) of Council Regulation (EC) No 2580/2001'.[144] Prohibitions resulting from designation imposed under the TAFA, as well as provisions concerning exceptions and the granting of licences by the Treasury,[145] are also analogous to those of the previous Temporary Provisions Act, and of the TO and AQO regimes. They included, for instance, restrictions in relation to 'deal[ing] with funds or economic resources owned, held or controlled by a designated person',[146] as well as to making funds, financial services or economic resources available to a designated person or for the benefit of that person.[147]

However, one area in which the TAFA innovated is in relation to the conditions imposed upon the Treasury's power to designate persons, which was made available in two forms: 'interim designation' and 'final designation'. Whilst in either circumstances the Treasury was required to 'consider that it is necessary for purposes connected with protecting members of the public from terrorism that financial restrictions should be applied in relation to the [relevant] person',[148] the relevant threshold for designation differed. 'Interim' designation required the Treasury to establish reasonable grounds for *suspecting* that the person 'is or has been involved in terrorist activity', that s/he 'is owned or controlled directly or indirectly by a person [involved in terrorist activity]', or that s/he 'is acting on behalf of or at the direction of a person [involved in terrorist activity]'.[149] The same criteria as to a person's involvement in terrorist activity were relevant to 'final' designation, though, notably, the Act elevated the threshold by which those criteria were to be met in such circumstances to that of 'reasonable *belief*'.[150] Indeed, this reflects the relative severity of 'final' designation as compared with 'interim' designation. For instance, the latter, once made, expired 'at the end of the period of 30 days beginning with the date on which it was made' or 'on the making of a final designation in relation to the same person'—'whichever is the earlier'.[151] By contrast, 'final' designation was renewable at 'the end of the period of one year beginning with the date on

[143] Counter-Terrorism (Sanctions) (EU Exit) Regulations 2019.
[144] Terrorist Asset-Freezing etc. Act 2010, s 1.
[145] ibid ss 16-17.
[146] ibid s 11(1).
[147] ibid ss 12-15.
[148] ibid s 2(1)(b), 6(1)(b).
[149] ibid s 6(1)(a).
[150] ibid s 2(1)(a).
[151] ibid s 8(1).

which it was made',[152] and, as such, potentially imposed financial restrictions for an indefinite period.

The question as to the appropriate threshold for the use of asset-freezing powers is, of itself, an important one—and one which, as discussed in Section III, below, can be seen to resurface in relation to the new regime under the 2018 Act. For as the Independent Reviewer of Terrorism Legislation highlighted in a 2011 report, no matter how efficient the system for 'designating' the subjects of asset-freezing measures, '[it] is likely to be experienced, by anyone at liberty in the United Kingdom who is subject to it, as intrusive, demoralising and humiliating'.[153] And yet, it is a matter of some dispute as to whether in fact the raising of the threshold to reasonable belief can be said to establish any real procedural safeguard vis-à-vis the Treasury's power to make a designation. Indeed, the question of the appropriate threshold for designation was considered in pre-legislative scrutiny of the TAFA by the Joint Committee on Human Rights, in which it was recommended that 'the balance of probabilities' replace 'reasonable belief' as the requisite standard of proof.[154] Moreover, Adam Tomkins, Helen Fenwick and Liora Lazarus questioned the effect that the distinction between thresholds (for 'interim' and 'final' designation), if any, would have in practice. In 2011, they argued that 'something more than reasonable suspicion should have been required before the powers could be exercised [in relation to interim designation]', and that '[t]he same may be said of the 'reasonable belief' threshold, which appears to denote only a marginally higher standard'.[155] 'The lower the threshold for triggering the use of the power in any particular case,' it is suggested, 'the more robust must be the judicial and other procedural safeguards'.[156]

Elsewhere, however, the 2010 Act can be seen to have improved upon the regime(s) that it replaced, specifically in terms of procedural safeguards and (legal and political) oversight. Designated persons are permitted under the Act to appeal against Treasury decisions—including as to the making, varying, renewal or revocation of the relevant designation—to the High Court or, in Scotland, the Court of Session (though, without that affecting the validity of the decision to which the appeal relates).[157] The court is empowered to set aside the decision on the traditional grounds of judicial review, and thereafter 'make any such order, or give any such relief, as may be made or given in proceedings for judicial review'.[158] In addition, when in force, the Treasury was required to produce a quarterly report on the operation of Part 1 of the TAFA,[159] whilst ongoing review of the regime fell within the remit of the IRTL.[160] Indeed, in this sense, the TAFA has been highlighted as a key example of the ways in which the international sanctions regime can be reformed, more broadly, with increasingly progressive results. For instance, it has been suggested that there are particular advantages to

[152] ibid s 4.
[153] David Anderson, *First Report on the Operation of the Terrorist Asset-Freezing Etc. Act 2010* (2011) [7.29].
[154] Joint Committee on Human Rights, *Legislative Scrutiny: Terrorist Asset-Freezing etc Bill (Second Report); and other Bills* (2010-11, HL 53, HC 598) [1.8].
[155] Adam Tomkins, Helen Fenwick and Liora Lazarus, 'Terrorist Asset-Freezing – Continuing Flaws in the Current Scheme' (2011) 25(3) Intl Rev L Computers & Tech 117, 119.
[156] ibid 119.
[157] TAFA, s 26.
[158] ibid s 27.
[159] ibid s 30.
[160] ibid s 31, as amended by the Counter-Terrorism and Security Act 2015, s 45(2).

the 'patriated provisions'[161] in the UNSCR 1373 sanctions regime—as reflected in the 2010 Act—which render it preferable to the alternative UNSCR 1267 regime: the former 'allows states to set evidential standards and review processes which are superior to the UNSCR 1267 standards or the EU Council Regulation (EC) 2580/2001 requirements'.[162] Thus:

> the benefit of resort to the UNSCR 1373 regime is that any decision to list at national level can secure a form of judicial review accessible directly by the listed individual in their own local court system and not a remote UN committee or Ombudsperson.[163]

Though, one point which stands out in particular from the various reports of the oversight mechanisms noted above is that of the consistently limited use of the TAFA powers in practice. For example, the IRTL reported that in the first three review periods of the new Act—December 2010 to September 2013—'no new entities and only six new individuals were designated under TAFA 2010 by the Treasury'.[164] The IRTL noted that 'the number of Treasury designations under TAFA 2010 and its predecessors declined steeply, from 162 at the start of 2008 to 38 by September 2011'.[165] The 'major cause of this decline', however, 'was the implementation of a policy whereby persons who were already subject to UN or EU asset freezes were no longer subject to duplicate Treasury designations, save where this was necessary to support an EU asset freeze'.[166] So too did 'pruning on grounds of lack of 'necessity'' have an impact, particularly 'where there were no apparent UK-based assets, save where the UK Government's proposal was the basis for the EU listing'.[167] By September 2013, the number of in-force Treasury designations 'barely changed', totalling 39, whilst that number in fact decreased to 33 exactly a year later.[168]

Yet, over the last years there has been a further, significant decrease in these numbers. For instance, in the January-March 2017 reporting period, the Treasury confirmed that the total number of individuals designated under the TAFA was 14; in the same period, the total number of those designated under Council Regulations (EC) 2580/2001 and 881/2002 was 13 and 263, respectively.[169] Since then, only one new public designation has been made under the TAFA (in the January-March 2020 reporting period).[170] And so, following the changes implemented under the 2018 Act, which now consolidates both the domestic (TAFA) and EU sanctions regimes, it remains to be seen what impact, if any, this will have on these numbers.

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[161] Max Hill, *The Terrorism Acts in 2016: Report of the Independent Reviewer of Terrorism Legislation on the Operation of the Terrorism Acts 2000 and 2006* (2018) [3.12].

[162] Karen Cooper and Clive Walker, 'Heroic or Hapless? The Legal Reform of Counter-Terrorism Financial Sanctions Regimes in the European Union' in Federico Fabbrini and Vicki C Jackson (eds), *Constitutionalism Across Borders in the Struggle Against Terrorism* (Edward Elgar 2016) 69.

[163] ibid 69.

[164] David Anderson, *Fourth Report on the Operation of the Terrorist Asset-Freezing etc. Act 2010 (Review Period: Year to 16 September 2014)* (2015) [3.16].

[165] ibid [2.2].

[166] ibid [2.2].

[167] Cooper and Walker (n 162) 70.

[168] Anderson, *Fourth Report* (n 164) [2.2]-[2.3].

[169] HC Deb 29 November 2017, vol 632, cols 15-16WS.

[170] HC Deb 24 September 2020, vol 680, cols 21-22WS.

(ii) UN sanctions through the (EU) back door: the Al-Qaida and Taliban (Asset-Freezing) Regulations 2010

As noted above, the continuation of the UNSCR 1267 / AQO asset-freezing regime following the Supreme Court's decision in *Ahmed* was achieved via different means. That is, Parliament's response to the quashing of the AQO 2006 (in part) was to effectively reproduce the Order via further secondary legislation, this time establishing a legal basis in s. 2(2) of the European Communities Act 1972. Thus, the Al-Qaida and Taliban (Asset-Freezing) Regulations 2010,[171] later superseded by the ISIL (Da'esh) and Al-Qaida (Asset-Freezing) Regulations 2011,[172] maintained in domestic law the various financial sanctions to which those named in the consolidated list of the 1267 Committee were subject, as enforced under Council Regulation (EC) No 881/2002. Crucially, this included those individuals who were in fact successful in their appeal in the Supreme Court, once again calling into question the extent to which *Ahmed* may properly be understood as a victory for the common law constitution, if indeed a 'victory' in any ordinary sense of the word.

The key point to note for present purposes is that the new regulations were implicated in further litigation, involving one such individual, which reached the Supreme Court on appeal in November 2015.[173] The individual in question challenged the lawfulness of the Secretary of State's decision in 2005 to lift a 'hold' which the UK, as a member of the 1267 Sanctions Committee, had earlier placed on his designation by that Committee. Indeed, as a result of this, the individual's status as a 'designated person' under the UNSCR 1267 / AQO regime automatically followed. This was despite evidence earlier disclosed in the *Ahmed* proceedings which revealed not only that the Government had in fact decided the appellant 'no longer met the criteria for designation', but that between 2009 and 2012 'the Secretary of State actively supported [the individual's] removal from the Sanctions Committee's Consolidated List, and attempted to persuade other members to agree, but without success'.[174] Ultimately, the question to be decided by the Supreme Court was whether the individual's status as a 'designated person'—and the severe deprivation of property that this entails—had been effected by the exercise of royal prerogative powers for the conduct of foreign relations. If so, this, the appellant argued, would constitute a violation of the common law principle—'the *Entick* principle'[175]—that 'interference by the state with individual property rights cannot be justified by the exercise of prerogative powers, unsupported by specific statutory authority'.[176] Previously in the Court of Appeal, it was held that 'if the Foreign Secretary's release of the hold on the claimant's designation rested solely on the Prerogative power, then it would appear to have been done without legal authority'; the position, however, was that '[a]s a matter of domestic law the Foreign Secretary was *obliged* to apply the Consolidated List regime to its proper subjects by force of … Regulation 881/2002'.[177] In this sense, legal

[171] Al-Qaida and Taliban (Asset-Freezing) Regulations 2010, SI 2010/1197.
[172] ISIL (Da'esh) and Al-Qaida (Asset-Freezing) Regulations 2011, SI 2011/2742.
[173] *Youssef v Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 3, [2016] AC 1457.
[174] ibid [4].
[175] *Entick v Carrington* [1765] EWHC KB J98, (1765) 19 St Tr 1030.
[176] *Youssef* (n 173) [31].
[177] *Youssef v Secretary of State for Foreign and Commonwealth Affairs* [2013] EWCA Civ 1302, [2014] 1 QB 728 [26] (emphasis added).

authority derived ultimately from the relevant EU legal instrument by which the 1267 Sanctions List was incorporated in the UK. As such, because Regulation 881/2002 grounded sufficient legal authority for the relevant action, it was held that the principle of legality provided 'no added force to the appellant's case'.[178] Notably, counsel for the Government opted against this approach in the Supreme Court: it was argued that the royal prerogative *did* provide sufficient legal authority for the Secretary of State to approve the designation, though in fact '[i]t was not that decision which resulted in interference with the appellant's rights, but rather the decision of the European Commission, giving effect in turn to the decision of the 1267 committee'.[179]

The Supreme Court (sitting as a panel of five) was unanimous in holding that '[t]he respective submissions, and indeed the reasoning of the Court of Appeal, pay insufficient regard to the legal means by which the listing took effect *in this country*'.[180] After all: '[i]t is here that the interference with the appellant's rights, like the intrusion on Mr Entick's property, took place'.[181] The Court held that the interference was 'directly and specifically authorised by regulation 881, *which was given legislative effect in this country by the European Communities Act 1972*'.[182] Moreover, it was held that '[n]o issue had been raised as to the effectiveness of the Act for that purpose'; rather, '[Regulation 881], taken with the 1972 Act, provides ample statutory authority to satisfy the *Entick* principle'.[183] It was reiterated that for the purpose of domestic law, Regulation 881 was 'given effect by a United Kingdom statute [and so] stands on its own feet'.[184] This, in turn, meant that the Secretary of State's action at the UN Committee level was done (properly) under the authority of the relevant royal prerogative power; this had no bearing on the deprivation of the appellant's property rights and thus 'involved no breach of any common law principle'.[185]

The significance of this decision ought, clearly, to be considered in light of that previously made by the Supreme Court in *Ahmed*. Two key points are of note here. The first is patent: *Youssef* very clearly marks an about-turn by the Court, and does much, as a result, to entirely undermine whatever advances may previously have been made (in *Ahmed*) for the common law constitution—that is, both in and of itself, and specifically its potential role in the UK's contemporary counter-terrorism framework. Indeed, so similar are the facts of *Ahmed* and *Youssef* that the difference in approach by the Supreme Court, not least as to the relevance of the principle of legality, is rendered all the more striking. For instance, it is not clear that, consistent with that principle, the general words of the ECA 1972 authorise the Secretary of State to deprive a person of their property rights *any more plainly* than the UN Act 1946.[186]

[178] ibid [27].
[179] *Youssef* (n 173) [33].
[180] ibid [34] (emphasis added).
[181] ibid [34].
[182] ibid [34] (emphasis added).
[183] ibid [34].
[184] ibid [34]
[185] ibid [34].
[186] This point was noted by Laws LJ in the Court of Appeal: *Youssef* (n 177) [26]: 'There might be an argument on the question whether the general words of the [ECA 1972], by virtue of the Regulation has the force of law in the United Kingdom, are sufficient to authorise the EU legislature to empower or require the Secretary of State to deprive an individual of access to any economic resources (with or without proper proof of what was said against him); but no such argument has been run in this or any case, and it would plainly not be appropriate to canvass it now.'

The second point is that, in *Youssef*, the Supreme Court can perhaps be seen to have in fact done more to confront the awkward constitutional reality of the competing legal frameworks at play here. As noted in sub-section C, above, one of the key constitutional implications of the contemporary legal landscape of asset-freezing is that it renders explicit the effective inversion, at the international level, of the (legal and political) hierarchy between Parliament and the executive which the principle of legality—a common law rule which bites only on *domestic* constitutional arrangements—is liable to misconstrue. That is, its application may have compelled Parliament to provide unambiguous legal authority for the freezing of assets in domestic law—which of course it later did, under the TAFA—but it did nothing to change the legal status of the relevant 'designated persons' in international law. In other words, it did nothing to diminish the fundamental point of the UK's dualist approach to international law that executive action at the international (UN) level extends to the deprivation of 'fundamental' rights in ways that are untouched, *in practice*, by domestic legal arrangements. And whereas this point was perhaps largely overlooked in *Ahmed*, it is, however, more clearly reflected in the Supreme Court's reasoning in *Youssef*, wherein it is suggested:

> From the victim's point of view it may seem strange that a process which, as applied under domestic legislation, was found to involve an unacceptable interference with his property rights, should be capable of automatic and immediate reinstatement by the indirect route of a European regulation. Indeed, it is unclear from the substantive judgments in *Ahmed* to what extent the court was made aware of the limited practical effects of its decision.[187]

III. THE DOMESTIC LEGAL FRAMEWORK(S) OF COUNTER-TERRORISM ASSET-FREEZING

A. Part 2 of the Anti-terrorism, Crime and Security Act 2001

Alongside those various legal frameworks in the UK discussed in Section II, above, whose purpose is to give domestic legal effect to the international counter-terrorism sanctions regime(s) of the UN Security Council, there has also developed a "purely" domestic legal framework from which broad, discretionary powers to *unilaterally* impose targeted financial sanctions are derived. The first set of such powers to be considered are those which were incorporated in the Anti-terrorism, Crime and Security Act 2001 (ATCSA), as part of the raft of emergency measures for which that legislation provided in response to the 9/11 terrorist attacks. As well as (significantly) expanding several aspects of the 'terrorist property' regime contained in the Terrorism Act 2000,[188] the ATCSA provides for asset-freezing powers which had their basis, originally, in legislation re-enacting wartime measures.[189] That is, Part 2 of the 2001 Act confers on HM Treasury the power to impose a 'freezing order',[190] which 'prohibits persons from making funds available to or for the benefit of a person or persons

[187] *Youssef* (n 173) [48].

[188] See, eg, ATCSA, sch 1, pt 1, which replaced and extended powers authorising the seizure of 'terrorist cash' (originally under TACT, s 24) to allow for confiscation 'at any place in the United Kingdom'.

[189] Emergency Laws (Re-enactments and Repeals) Act 1964, s 2.

[190] Anti-terrorism, Crime and Security Act 2001, s 4.

specified in the order',[191] subject to two conditions: the Treasury need reasonably believe, firstly, that 'action to the detriment of the United Kingdom's economy (or part of it)' or 'action constituting a threat to the life or property of one or more nationals … or residents of the United Kingdom' either has been or is likely to be taken by a person or persons,[192] and secondly, that the 'person' is a foreign government or 'a resident of a country or territory outside the [UK]'.[193] Notably, parliamentary scrutiny is built into the procedural requirements for making a freezing order under the 2001 Act: the power to make a freezing order is exercisable by statutory instrument, which must be laid before Parliament within 28 days of having been made; an order ceases to have effect unless approved by a resolution of each House of Parliament ('but without that affecting anything done under the order or the power to make a new order').[194] Once made, it is an offence, among other things, to fail to comply with a prohibition imposed by the order;[195] to engage in an activity in the knowledge or with the intention that it will 'enable or facilitate' the contravention by another person of a provision of the order;[196] and to fail (without reasonable excuse) to disclose information, or to knowingly or recklessly provide false information, when required to do so under the terms of the freezing order.[197] The Act requires that amendments to and revocations of existing orders also be made via statutory instrument.[198] In any event, a freezing order expires 'at the end of the period of 2 years starting with the day on which it is made',[199] it being incumbent on the Treasury, moreover, that they be kept under review[200]—though, it is not made clear quite what the terms of this review might include.

These are, by any measure, remarkably broad provisions. Indeed, all the more so in light of the fact that, as Keith Ewing notes, the power to impose a freezing order under s. 4 of the 2001 Act 'can be exercised without any prior judicial authority or approval to justify the deprivation of property on what could be a grand scale, and no need for a warrant before [it] can be invoked'.[201] It speaks, also, to what has been described as 'the danger of ambiguous, or in this case, deliberately overbroad, definitions in "emergency" legislation'[202] that the purposes for which s. 4 establishes a legal basis for asset-freezing measures far exceed that of combatting (the financing of) terrorism.[203] As much was rendered explicit in the circumstances in which the power was invoked for the first time, in 2008, which related not to terrorist activity, but rather to the collapse of the Icelandic national bank, Landsbanki. The relevant freezing order prohibited persons from making funds available to the bank—as well as to 'the [Icelandic] Authorities' or to the Government of Iceland—after the bank had

[191] ibid s 5(1).
[192] ibid s 4(2).
[193] ibid s 4(3).
[194] ibid s 10.
[195] ibid sch 3, para 7(2).
[196] ibid sch 3, para 7(3).
[197] ibid sch 3, para 7(4).
[198] ibid ss 11-12.
[199] ibid s 8.
[200] ibid s 7.
[201] KD Ewing, *Bonfire of the Liberties: New Labour, Human Rights, and the Rule of Law* (OUP 2010) 197.
[202] Genevieve Lennon and Clive Walker, 'Hot Money in a Cold Climate' [2009] PL 37, 41.
[203] Similarly on this point, see Peter Binning, 'In Safe Hands? Striking the Balance between Privacy and Security, Antiterrorist Finance Measures' (2002) 6 EHRLR 737, 744: 'The Freezing Order regime also applies to a far wider range of activities than acts of terrorism.'

entered receivership.[204] In a voluntary memorandum subsequently given by the Treasury to the Joint Committee on Statutory Instruments, the point was emphasised that 'the manner in which section 4 is worded and the legislative and Parliamentary history of Part 2 of the Act [show] that *it is not a power limited to terrorism*'.[205] Thus, in this case, 'the power to make a freezing order was used in circumstances where the primary concern was to prohibit the flow of funds held of controlled by Landsbanki's UK branch out of the UK and back to Iceland'.[206]

The episode highlighted several controversial features of the Part 2 regime which further compound its breadth and coerciveness. This includes the absence from the 2001 Act of a right to appeal the Treasury's decision to impose a freezing order. Rather, the best for which the Act itself provides is that where a person specified in a s. 4 freezing order as 'a person to whom or for whose benefit funds are not to be made available' makes 'a written request to the Treasury to give him the reason why he is so specified', the Treasury is obliged to comply—giving that person the relevant reason(s) in writing—as soon as is practicable.[207] This, as Genevieve Lennon and Clive Walker have noted, rendered the Landsbanki Order vulnerable to challenge on the grounds that the Part 2 provisions fell foul of the rights contained in the ECHR, including, art. 6, which confers the right to 'a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law', and art. 1 of Protocol No. 1 to the Convention, which provides that '[n]o one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law'.[208] Though, ultimately, no such challenge was forthcoming, the situation was improved somewhat, albeit belatedly, with a range of reforms contemporaneously introduced by the Counter-Terrorism Act 2008. Part 6 of the 2008 Act provided for 'financial restrictions proceedings', expressly allowing for those affected by 'any decision of the Treasury' concerning the exercise of any of their functions under Part 2 of the ATCSA to apply to the High Court or, in Scotland, the Court of Session to have the order set aside on the traditional (common law) grounds of judicial review.[209] Incidentally, general provisions about rules of court in the context of such proceedings include 'the need to secure that the decisions that are the subject of the proceedings are properly reviewed' and 'the need to secure that disclosures of information are not made where they would be contrary to the public interest'.[210]

Another factor which contributes to the particular severity of the Part 2 regime is that of the failure of the Act, more broadly, to establish a permanent mechanism of *independent* review of freezing orders imposed by the Treasury. This is in sharp contrast, in particular, with the regime established under the Terrorist Asset-Freezing etc. Act 2010 (discussed in Section II, above). Although, the absence of a bespoke independent review mechanism of the

[204] Landsbanki Freezing Order, SI 2008/2668, art 4(1). The relevant authorities included the Central Bank of Iceland, the Icelandic Financial Services Authority, and the Landsbanki receivership committee.
[205] Joint Committee on Statutory Instruments, *Twenty-eighth Report of Session 2007-08* (2007-08, HL 182, HC 38-xxviii) app 3 (emphasis added).
[206] ibid.
[207] ATCSA, sch 3, para 11(1).
[208] Lennon and Walker (n 202) 39.
[209] Counter-Terrorism Act 2008, s 63.
[210] ibid s 66(2).

Part 2 regime can be explained, at least in part, by the particular circumstances of the ATCSA's enactment. That is, given its conception as an 'emergency' legislative response to the 9/11 terrorist attacks, s. 122 of the ATCSA required that a committee of Privy Counsellors (appointed by the Secretary of State) conduct a review of the Act within two years of it having been passed. The 'Newton Report' was subsequently published in 2003, and notably recommended that 'freezing orders for specific use against terrorism should be addressed again in primary terrorism legislation, based on the well tested provisions of the [TO regime]'.[211] The recommendations of the Newton Report having been passed over, however, the effect of the absence of independent oversight was rendered particularly acute for a number of years, given that, curiously, it was not until 2015 that the ATCSA was brought within the remit of the IRTL.[212] Section 44 of the Counter-Terrorism and Security Act 2015 authorised the IRTL to report on the operation of the Part 2 regime, albeit to the extent that it 'applies in cases where a use or threat of the action referred to in section 4(2) of [the ATCSA] would constitute terrorism'.[213] This reform, in addition to those implemented by the CTA 2008, undoubtedly improves oversight of and broader accountability arrangements for the ATCSA, Part 2 asset-freezing framework. Though, one point of ongoing significance is that that framework has been routinely overlooked in practice as a necessary, if appropriate, domestic legal basis for the freezing of terrorists' assets. Notwithstanding their contemporaneous entry into force, the asset-freezing provisions contained in Part 2 of the ATCSA played no part in the domestic implementation of the UN Security Council's counter-terrorism-financing initiatives after 9/11. And in the two decades since its enactment only a handful of s. 4 freezing orders have been imposed.[214] Indeed, the Part 2 regime appears at present to have fallen into something approaching obsolescence; as of January 2020, only two persons were listed as the subjects of freezing orders under the 2001 Act.[215]

Two key issues can be gleaned from the relative dormancy of the Part 2 regime. The first is that, fundamentally, it exemplifies (once again) the centrality of *international* legal and political co-ordination of counter-financing measures designed to meet the contemporary terrorist threat. As Clive Walker suggests, the Part 2 regime was enacted as 'a bridging measure between the domestic measures and internationally imposed measures', allowing for 'unilateral and summary action by domestic authorities where there is a foreign element'.[216] This, Walker notes, is consistent with the former Government's view of the regime around the time of its enactment, as expressed by Lord McIntosh of Haringey (then Government Deputy Chief Whip in the House of Lords) during parliamentary debate: 'The power is just one part of the sanctions regime,' Lord McIntosh stated; thus, '[i]f a decision to impose

[211] Privy Counsellor Review Committee, *Anti-terrorism, Crime and Security Act 2001: Report* (2003, HC 100) [142] (hereinafter 'Newton Report').

[212] See, eg, David Anderson, 'The Independent Review of Terrorism Legislation' (2011) 5 EHRLR 544, in which this arrangement was criticised by the incumbent: 'It is not obvious why there should be no provision for independent review of the Anti-Terrorism, Crime and Security Act 2001…'

[213] Counter-Terrorism and Security Act 2015, s 44(2)(b).

[214] Not including the orders which subsequently amended and revoked the Landsbanki Order, this includes: Landsbanki Freezing Order (n 204); Andrey Lugovoy and Dmitri Kovtun Freezing Order 2016, SI 2016/67.

[215] Office of Financial Sanctions Implementation, *Consolidated List of Financial Sanctions Targets in the UK* <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/859121/uk_freezing_orders.pdf> accessed 20 August 2020.

[216] Walker, *Terrorism* (n 7) 417.

sanctions is taken at European Community level or under a United Nations Security Council resolution, it would not be appropriate to use the power [under s. 4 of the 2001 Act]'.[217] This reading was also subsequently endorsed in the Newton Committee report, it having been noted that financial sanctions of the kind permitted under the Part 2 regime 'have more impact where they can be implemented internationally on the basis of multilateral agreement'.[218] As such, the Committee recognised that '[Part 2] is geared to those other occasions where action has not yet been agreed internationally, or where it is appropriate for the United Kingdom to impose sanctions unilaterally'.[219] And yet, now that a range of discrete regimes have evolved from the intermeshing of international and domestic legal frameworks, plainly there is no part for the ATCSA to play, if ever there was, in establishing a relevant legal basis for the imposition of asset-freezing measures for the purposes of counter-terrorism.

Indeed, this point is reflected in the second key issue, here. As Ewing writes, '[t]he powers of the 2001 Act … raise important questions about constitutional propriety and human rights', though far from being 'embarrassed about such powers', the reason why they have not been used is that the Government has simply 'found other vehicles to get to the same destination more quickly'.[220] It ought to be noted at this juncture, however, that the Newton Report regarded these "other vehicles" as in fact having 'a number of advantages which distinguish [them] from [Part 2]'. For instance, the TO regime was said to have 'give[n] a clear and narrowly limited definition of terrorism, drawn directly from the Terrorism Act 2000', '[was] not limited in application to foreign nationals', and 'explicitly permit[ted] an appeal by individuals and affected firms through the High Court'.[221] And yet, none of the alternative domestic legal bases involve processes of parliamentary scrutiny of the making of freezing orders of the kind built into the 2001 Act. It is therefore a great irony of the ATCSA, Part 2 regime that although constituting, by any measure, a draconian and apparently increasingly obsolete legal framework for combatting the financing of terrorism, still it manages to inculcate key procedural safeguards which are notably, and crucially, absent in the alternative regimes with which it has co-existed.

B. Schedule 7 to the Counter-Terrorism Act 2008

Schedule 7 to the Counter-Terrorism Act 2008 (given effect under Part V of that Act)[222] establishes an alternative ("purely") domestic legal basis for the unilateral imposition of counter-terrorism asset-freezing measures. It confers on HM Treasury the power to give directions not only to 'a particular person' or to 'any description of persons' operating in the

[217] HL Deb 28 November 2001, vol 629, col 353 (Lord McIntosh).
[218] Newton Report (n 211) [142].
[219] ibid [142].
[220] Ewing (n 201) 198.
[221] Newton Report (n 211) [148]. Though, of course, the same could not be said of the discrete AQO regime (as noted in Section II.)
[222] Counter-Terrorism Act 2008, s 62.

financial sector, but also, crucially, to 'all persons operating in that sector'.[223] As such, directions may impose restrictions of incredibly expansive coverage, specifically relating to 'transactions or business relationships' with persons or companies (including subsidiaries) resident or incorporated in a particular country, or, indeed, the government of that country. Such requirements as may result from the imposition of these restrictions expressly include 'enhanced customer due diligence measures';[224] 'enhanced ongoing monitoring of any business relationship with [the subject(s) of a Treasury direction]';[225] systematic reporting, such as 'provid[ing] such information and documents … relating to transactions and business relationships with designated persons';[226] and limiting or ceasing business (with a designated person) altogether.[227]

The Schedule 7 regime is comparable to that of ATCSA, Part 2 in a number of ways, not least in the manner of its creation.[228] Though, one of the key differences of Schedule 7, it has been suggested, is that it does not allow for 'the same degree of freedom of action [as under Part 2] … since legal action is made dependent on initial advice from the [Financial Action Task Force]'.[229] Indeed, that it is a core aim of the Schedule 7 regime to give effect to the recommendations of the FATF is certainly reflected in the conditions to the exercise of the power to issue a direction; it is one of three conditions that 'the [FATF] has advised that measures should be taken in relation to the country because of the risk of terrorist financing or money laundering being carried on in the country, by the government of the country, or by persons resident or incorporated in the country'.[230] The second condition is that the Treasury reasonable believe both that such a risk exists, and 'that this poses a significant risk to the national interests of the United Kingdom'.[231] Finally, the third condition is that the Treasury reasonably believe that 'the development or production of nuclear, radiological, biological or chemical weapons in the country', or, alternatively, that 'the doing in the country of anything that facilitates the development or production of any such weapons' poses, once again, 'a significant risk' to the UK's national interests.[232]

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[223] ibid sch 7, para 3. The term 'persons operating in the financial sector' is defined as 'a credit or financial institution' that 'is a United Kingdom person' or 'is acting in the course of a business carried on by it in the United Kingdom' (CTA, sch 7, para 4).

[224] CTA, sch 7, para 10.

[225] ibid sch 7, 11.

[226] ibid sch 7, 12.

[227] ibid sch 7, 13.

[228] See, eg, Lennon and Walker (n 202) 40-41, in which the enactment of Schedule 7 is described as '[r]edolent of the experience of s. 4 [of the ATCSA]', being, that is, the result of 'last-minute, unheralded, and complex amendments to the Counter-Terrorism Bill'. See, also, eg, Walker, *Terrorism* (n 7) 422: 'The same criticisms of an absence of constitutional governance can be made about Pt V as were made about the ATCSA 2001. Indeed, the House of Lords' Select Committee on the Constitution picked Pt V as a prime example of the late tabling of amendments nullifying the input of legislators and public experts. The lack of transparency of the FATF itself deepens the disapproval.'

[229] Walker, *Terrorism* (n 7) 420. The FATF is an intergovernmental body responsible for standardising and promoting effective implementation of global policy initiatives relating to anti-money laundering, whose remit was expanded to include the financing of terrorism: Financial Action Task Force, *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation* (FATF, 2012-2019) <http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf> accessed 19 October 2020.

[230] CTA, sch 7, para 1(2).

[231] ibid sch 7, para 1(3).

[232] ibid sch 7, para 1(4).

There is, in any event, a requirement that a direction must be proportionate—that is, having regard to the advice of the FATF or, as the case may be, to the relevant risk perceived by the Treasury.[233] Moreover, the power to issue a direction is not exercisable in relation to an EEA state.[234] Any direction which purports to impose restrictions in relation to business done either by or with a designated person 'must be contained in an order made by the Treasury'; as under the ATCSA, Part 2 regime, the order must be laid before Parliament after being made and ceases to have effect if not approved by a resolution of each House of Parliament within 28 days.[235] The Treasury is required to 'take such steps as they consider appropriate to publicise the making of the order', as well as any changes to the order or its ceasing to have effect.[236] '[I]f not previously revoked and whether or not varied', the relevant order expires a year after having been made.[237] Directions can be challenged in 'financial restrictions proceedings', for which the 2008 Act also provides.[238] And the operation of the regime is subject to review by the IRTL, under s. 44(2)(c) of the CTSA 2015.

Like the ATCSA, Part 2 powers, Schedule 7 has scarcely been used in over a decade; to date, only three directions have been issued by the Treasury under Schedule 7. One such direction, issued in 2009,[239] prohibited transactions and business relationships with two Iranian financial institutions (including any of their branches): the Islamic Republic of Iran Shipping Lines and Bank Mellat.[240] A statement issued by the Treasury read:

> The Treasury is satisfied, as required by the Act, that activity in Iran that facilitates the development or production of nuclear weapons poses a significant risk to the national interests of the UK. Iran continues to fail to meet its international obligations.[241]

It was also claimed that 'vessels of the Islamic Republic of Iran Shipping Lines (IRISL) have transported goods for both Iran's ballistic missile and nuclear programmes', while 'Bank Mellat had provided banking services to a UN listed organisation connected to Iran's proliferation sensitive activities, and has been involved in transactions related to financing Iran's nuclear and ballistic missile programme'.[242]

The order was subject to a legal challenge which reached the UK Supreme Court in early 2013, implicating questions both of procedure and substance.[243] In regards to the latter, it was alleged by the appellant, Bank Mellat, that it had been denied by the Treasury the opportunity to make representations before the order was made, that the CTA 2008 failed to confer a statutory right to such an opportunity, and that this was, in any event, 'required at common law and by article 6 and article 1, Protocol 1 of the [ECHR]'.[244] As to the substantive ground

[233] ibid sch 7, para 9(6).
[234] ibid sch 7, para 1(5).
[235] ibid sch 7, para 14(2).
[236] ibid sch 7, para 16.
[237] ibid sch 7, para 16(4).
[238] ibid s 63.
[239] Financial Restrictions (Iran) Order 2009, SI 2009/2725
[240] ibid art 3.
[241] HC Deb 12 October 2009, vol 497, col 1WS.
[242] ibid col 2WS.
[243] *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 38, [2014] AC 700.
[244] ibid [10].

of appeal, the appellant argued that the decision to make the order was 'irrational, disproportionate and discriminatory, that the Treasury failed to give adequate reasons for making it, and that their reasons were vitiated by irrelevant considerations or mistakes of fact'.[245]

The Supreme Court allowed the appeal on both grounds.[246] Lord Sumption delivered the majority leading judgment (with which Lady Hale, Lord Kerr, and Lord Clarke agreed in whole; Lord Neuberger and Lord Dyson agreed only on the procedural grounds, Lord Carnwath only on the substantive grounds). As to the substantive issue, it was noted, firstly, that 'by reference to the various statements of Treasury ministers, the justification for the measure which was given to Parliament was that there was a particular problem about Bank Mellat which did not apply to the generality of Iranian banks'.[247] And while it could not be said, Lord Sumption suggested, 'that the Schedule 7 direction in this case had no rational connection with the objective of frustrating as far as possible Iran's weapons programmes', it was held that 'the distinction between Bank Mellat and other Iranian banks which was at the heart of the case put to Parliament by ministers was an arbitrary and irrational distinction and that the measure as a whole was disproportionate'.[248] A key reason for this was that 'once it is found that the problem is not specific to Bank Mellat but an inherent risk of banking, the risk posed by Bank Mellat's access to those markets is no different from that posed by the access which comparable banks continue to enjoy'.[249] Thus:

> Nothing in the Treasury's case explains why we should accept that it is necessary to eliminate Bank Mellat's business in London in order to achieve the objective of the statute, if the same objective can be sufficiently achieved in the case of comparable banks by requiring them to observe financial sanctions and relevant risk warnings.[250]

In regards to the procedural ground, the key point raised by the Treasury was that 'the legislative form of a Schedule 7 direction takes it out of the area in which the courts can imply a duty of fairness or prior consultation'.[251] It was emphasised by Lord Sumption, however, that '[w]here the courts have declined to review the procedural fairness of statutory orders on the ground that they have been subject to Parliamentary scrutiny, they have not generally done so on the ground that Parliamentary scrutiny excludes the duty of fairness in general or the duty of prior consultation in particular'.[252] Yet, crucially, '[w]ith a measure such as this one, targeted against "designated persons"', Lord Sumption found that 'it is not possible to say that procedural fairness is sufficiently guaranteed by Parliamentary scrutiny or to suppose that Parliament in enacting the Counter-Terrorism Act ever thought it was'.[253] Indeed:

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[245] ibid [10].
[246] A 6:3 majority allowed the appeal on the procedural grounds; a 5:4 majority allowed the appeal on the substantive ground.
[247] *Bank Mellat* (n 243) [23].
[248] ibid [27].
[249] ibid [27].
[250] ibid [27].
[251] ibid [39].
[252] ibid [44].
[253] ibid [47].

> The justification for the direction depends on the particular character and conduct of the designated person, about which Parliament cannot have the same plenitude of information as it is assumed to have about matters of general legislative policy. Many of the essential facts about the particular target will be peculiarly within the designated person's knowledge, and even those known to the Treasury will not necessarily be publicly disclosed.[254]

In the specific case of Bank Mellat, among other things 'the Bank was not in a position to defend itself against the Treasury's allegation that they had had dealings with entities involved in the Iranian weapons programmes until the Treasury identified the entities that they were referring to'.[255] Notably, this was not done 'in the course of justifying the order in Parliament', and neither was the Bank made aware of the relevant entities until *after* the relevant parliamentary processes were completed.[256] The Treasury's designation was thus 'unlawful for want of prior notice to [the Bank] or any procedure enabling them to be heard in advance of the order being made'.[257]

The key point to note here is that *Bank Mellat* clearly stands as another important example, very much in a similar vein to *Ahmed*, of common law principle(s) and standards of review getting in the way of counter-terrorism powers of extraordinary breadth and severity. And yet Parliament's response to the *Bank Mellat* litigation—indeed, even before judgment was eventually handed down in the Supreme Court—was such as to render explicit, once again, that any obstacle that the common law might erect to the exercise of such powers can very straightforwardly be overcome in practice. Thus, following the expiry of the first direction, a second direction was issued in 2011,[258] followed by a third a year later,[259] both of which extended restrictions on business and transaction in relation to *any* 'credit institution incorporated in Iran', as well as the 'Central Bank of Iran', and branches or subsidiaries of either, 'wherever located'.[260] Though, with effectively the same restrictions against Iran having been implemented at the EU level in 2012,[261] the direction was subsequently revoked.[262]

C. Sanctions and Anti-Money Laundering Act 2018

The UK's withdrawal from the EU on 31 January 2020 necessitated key changes in the legal framework of asset-freezing, not least given that, as has been shown throughout this chapter, the EU legal order has for many years operated as a critical layer of governance in the intermeshing of domestic and international legal enforcement of asset-freezing measures. In a

[254] ibid [47].
[255] ibid [48].
[256] ibid [48].
[257] ibid [49]. This, it was said, made it 'unnecessary to consider the more difficult question whether a duty of prior consultation arose by virtue of Article 6 of the European Convention on Human Rights or Article 1 of the First Protocol'.
[258] Financial Sanctions (Iran) Order 2011, SI 2011/2775.
[259] Financial Sanctions (Iran) Order 2012, SI 2012/2904.
[260] Financial Sanctions (Iran) Order 2011, art 3; Financial Sanctions (Iran) Order 2012, art. 3.
[261] Council Regulation (EU) No 1263/2012 of 21 December 2012 amending Regulation (EU) No 267/2012 concerning restrictive measures against Iran.
[262] Financial Sanctions (Iran) (Revocation) Order 2013, SI 2013/162.

public consultation document published by the UK Government in 2017, it was noted that while '[t]he UK has some limited domestic powers to impose some sanctions … these are not sufficient to replicate the full range of sanctions currently in force through the UN and EU'; new powers would be needed to replace those (at the time) provided for by the ECA 1972, and so enable the Government 'to preserve and update UN sanctions, and to impose autonomous UK sanctions in coordination with our allies and partners'.[263]

The relevant powers were subsequently introduced under the Sanctions and Anti-Money Laundering Act 2018. What is striking, however, is that the Act makes available a range of powers which are plainly capable of being used for a number of purposes far exceeding simply that of ensuring compliance with international obligations and coordination with the extant (though now entirely independent) EU asset-freezing regime. For instance, s. 1 permits the making of sanctions regulations where a Minister considers that it is 'appropriate' to do so, though not only for the purposes of 'compliance with a UN obligation'[264] or 'any other international obligation',[265] but for 'discretionary purposes',[266] including that it would: 'further the prevention of terrorism, in the United Kingdom or elsewhere';[267] 'be in the interests of national security'[268] or 'in the interests of international peace and security';[269] 'further a foreign policy objective of the [UK Government]';[270] 'promote the resolution of armed conflicts or the protection of civilians in conflict zones';[271] 'promote accountability for or be a deterrent to gross violations of human rights', or otherwise 'promote compliance with international human rights law' or (merely) 'respect for human rights';[272] 'promote compliance with international humanitarian law;[273] 'contribute to multilateral efforts to prevent the spread and use of weapons and materials of mass destruction';[274] or 'promote respect for democracy, the rule of law and good governance'.[275] Indeed, it is difficult to imagine a purpose for the imposition of far-reaching financial sanctions which is *not* covered by this extraordinary list. It is equally difficult to imagine the additional requirement that the Minister ought to consider 'whether there are *good reasons* to pursue'[276] the relevant purpose, and that 'the imposition of sanctions is a *reasonable course of action* for that purpose',[277] imposes any particularly exacting procedural burden, whether in principle or in practice. Though, in any event, the Minister is also required to report to Parliament as to the reasons for introducing sanctions regulations pursuant to such 'discretionary purposes'.[278]

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[263] HM Government, *Public Consultation on the United Kingdom's Future Legal Framework for Imposing and Implementing Sanctions* (Cm 9408, 2017) 7.
[264] Sanctions and Anti-Money Laundering Act 2018, s 1(1)(a).
[265] ibid s 1(1)(b).
[266] ibid s 1(1)(c).
[267] ibid s 1(2)(a).
[268] ibid s 1(2)(b).
[269] ibid s 1(2)(c).
[270] ibid s 1(2)(d).
[271] ibid s 1(2)(e).
[272] ibid s 1(2)(f).
[273] ibid s 1(2)(g).
[274] ibid s 1(2)(h).
[275] ibid s 1(2)(i).
[276] ibid s 2(a) (emphasis added).
[277] ibid s 2(b) (emphasis added).
[278] ibid s 2(4).

Several other familiar procedural safeguards and oversight mechanisms feature in the new Act, including, for instance, ongoing review and reporting by ministers and an independent appointee,[279] and a right to apply to the courts to have designation decisions set aside (on the basis of judicial review principles).[280] Yet, it suffices to highlight a second key area in which the 2018 Act can be seen to have significantly expanded the scope of domestic powers to impose asset-freezing measures. That is, not only does the Act confer the power to designate named persons,[281] it confers the power to designate persons 'by description',[282] albeit subject to several key conditions, including: that 'a reasonable person' would know whether a person fell within the description of persons specified in the relevant designation;[283] that 'at the time the description is specified, *it is not practicable* for the Minister to identify and designate by name all the persons falling within that description at that time;[284] that there are *reasonable grounds to suspect* that persons falling within the description are so involved (in terrorism-related activity, etc.);[285] and that (again) the Minister considers it '*appropriate*' to make such a designation having regard to the many and various purposes outlined above.[286]

Even from this very brief survey of these powers, one thing is abundantly clear: the very real need not only to ensure the continuing domestic legal basis for EU sanctions *throughout* the UK's 'transition' from Member State to third country, but also to ensure the patriation of those sanctions at the end of that process, has given way to opportunism. The 2018 Act has resulted in the creation of a new, "purely" domestic legal basis for the imposition of asset-freezing measures which, without doubt, is far broader, involving procedural safeguards (and legal thresholds) which are much lower, than anything which came before. The UK Government has already begun to make use of the new powers at its disposal, imposing sanctions for the first time which cover a range of foreign nationals and organisations involved in 'some of the most notorious human rights violations in recent years'.[287] Quite how the new powers will be used for the purposes of counter-terrorism in the coming months and years, and quite how far, if at all, the legal challenges which will inevitably ensue will impact their nature and scope, remains to be seen.

IV. CONCLUSION

Arguably the defining characteristic of the contemporary constitutional position of asset-freezing is that of its complexity. This chapter has shown that much of this complexity can be seen to derive primarily from the intermeshing of domestic and international governance arrangements, not least insofar as these arrangements have led to excessive fragmentation of the law in this area. This, in turn, has resulted in the implementation of asset-freezing measures whose domestic legal basis is liable to shift, depending, that is, on whether the

[279] ibid ss 30-32.
[280] ibid s 38.
[281] ibid s 11.
[282] ibid s 12.
[283] ibid s 12(3).
[284] ibid s 12(4) (emphasis added).
[285] ibid s 12(5)(a) (emphasis added).
[286] ibid s 12(5)(b) (emphasis added).
[287] HC Deb 6 July 2020, vol 679, col 664 (Dominic Raab).

decision to impose such measures is to be or has been made under the auspices of the UN collective security regime, in Brussels, or in HM Treasury. And it serves only to compound the complexity which flows from the co-existence of these various legal bases that across each of them the potential for (legal and/or political) oversight of or challenge to key decision-making varies greatly, indeed inasmuch as, for instance, the relevant procedural safeguards to which the exercise of the discrete sets of powers are subject.

Key tensions in and of the domestic and international law and politics of asset-freezing have been shown in this chapter to arise at their point of intersection in the domestic constitution in various, significant ways. In particular, the chapter has highlighted a number of examples which all point, fundamentally, to the incapacity of the rules, principles and standards of review developed in the common law to adequately resolve those tensions. Perhaps the clearest example of this is the UK Supreme Court's decision in *Ahmed*. Indeed, that decision might in fact be taken to represent something of a 'victory' for the common law constitution. For, of course, it was the common law principle of legality—not, on this occasion, the ECHR—in which the Supreme Court grounded an explicit and ultimately effective rule-of-law-based resistance to the deprivation of property: only with Parliament's clear and unambiguous approval, in primary legislation, can the executive be taken to have been so authorised to deprive such a 'fundamental' right. And yet, it very clearly calls into question whether *Ahmed* represents a 'victory' in any ordinary sense of the word that Parliament responded by retrospectively validating what the Supreme Court considered to represent a deficient domestic legislative basis for the enforcement of UN sanctions. Indeed, the reversal of a judicial decision by a political institution perhaps signals the 'end-point' of the common law constitution. Above all, whatever 'victory' might be claimed by or for the common law, here, the key point is this. Any such 'victory' ultimately achieves nothing to diminish the basic constitutional reality of the UK's dualist approach to international law: that executive action at the international (UN) level extends to the deprivation of 'fundamental' rights in ways that are untouched, *in practice*, by domestic legal arrangements.

5

Deprivation of Life

I. INTRODUCTION

On 21 August 2015, Reyaad Khan, a British citizen, was killed whilst travelling in a vehicle in the city of Raqqa, Syria, in what was described by (then) Prime Minister David Cameron, in a statement to the House of Commons, as 'a precision airstrike carried out … by an RAF remotely piloted aircraft'.[1] The House was informed that Khan had been operating as a member of the radical Islamist terrorist group ISIL/Da'esh[2], and was 'involved in actively recruiting ISIL sympathisers and orchestrating specific and barbaric attacks against the west', including directing terrorist atrocities on UK soil.[3] The operation, said to have been carried out after 'meticulous' planning, also resulted in the deaths of two of Khan's 'ISIL associates', one of whom, Ruhul Amin, was identified as a UK national.[4]

In authorising the airstrike which killed Khan (and two others), the UK Government had engaged in a method of counter-terrorism its predecessors had consistently denounced as 'contrary to international law'.[5] This was, above all, a 'targeted killing': 'the intentional, premeditated and deliberate use of lethal force, by [a State or its agents] acting under colour of law … against a specific individual who is not in the physical custody of the perpetrator'.[6] And then there was the location of the airstrike—Raqqa, Syria—appearing to position Khan,

[1] HC Deb 7 September 2015, vol 599, col 25.

[2] The group is known by a number of aliases, including 'Islamic State', 'IS', 'ISIS', 'ISIL', and 'Da'esh'. For the sake of consistency throughout this chapter, the moniker 'Da'esh' will be used. However, in parts, for the sake of accuracy, quotations which refer to either of the aliases noted in this footnote will remain unedited.

[3] HC Deb 7 September 2015, vol 599, col 25. (The veracity of the Government's claims as to Khan's involvement, as a member of ISIL / Da'esh, in planning terrorist attacks in the UK have never really been questioned. However, it is noteworthy that the subsequent report of the Intelligence and Security Committee concluded that the full facts concerning the intelligence basis for the targeted killing operation in relation to Khan may *not* have been disclosed for scrutiny: Intelligence and Security Committee, *UK Lethal Drone Strikes in Syria* (HC 2016-17, 1152) [72].)

[4] HC Deb 7 September 2015, vol 599, col 25.

[5] See, eg, Christine Gray, 'Targeted Killings: Recent US Attempts to Create a Legal Framework' (2013) 66 CLP 75, 75-76, in which the following are cited as evidence of this: HC Deb 17 October 2005, vol 437, col 731W (Jack Straw); 'United Kingdom Materials on International Law 2005' (2006) 76(1) BYIL 683, 903.

[6] UNGA, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston' (2010) UN Doc A/HRC/14/24/Add.6, [1]. See, also, eg, Nils Melzer, *Targeted Killing in International Law* (OUP 2008) 5: '[T]he term 'targeted killing' denotes the use of lethal force attributable to a subject of international law with the intent, premeditation and deliberation to kill individually selected persons who are not in the physical custody of those targeting them.'

crucially, *outside* of an area recognised by the UK at the material time as a legitimate theatre of armed conflict.[7] This is without precedent, 'the first time in modern times that a British asset has been used to conduct a strike in a country where [the UK was] not involved in a war';[8] it signals what has been described as a 'sea-change' in the UK's broader legal position on the use of force, that position now appearing to have been closely aligned 'with several US legal positions in the 'war on terror' which, hitherto, no European state has formally embraced'.[9]

Ambiguity surrounds the lawfulness of targeted killing in several international legal frameworks which govern the state-sponsored deprivation of life.[10] It is of note, therefore, that the Government subsequently endeavoured to characterise the airstrike as having formed part of ongoing hostilities in Iraq (extending into Syrian territory)—that is, despite all the talk of this marking a 'new departure' for the UK.[11] Indeed, this is of profound contextual significance to the issues explored in this chapter. For this manoeuvre ultimately speaks to a key tension in the relationship between the legal and constitutional positions of targeted killing: targeted killing may be "constitutional" whilst at the same time patently unlawful, and the opposite is seemingly also true. In recasting the legal basis for Khan's killing as the law of armed conflict ('jus in bello') instead of the (less permissive) self-defence exception to the general prohibition on the use of force ('jus ad bellum'), the Government can be seen, above all, to have attempted to consolidate the *legal* position of targeted killing. And yet that, decisively, entailed undermining the authority of the nascent War Powers Convention as the apparent principal mechanism by which accountability arrangements for the exercise of domestic war powers are organised in the contemporary constitution.[12]

In accordance with the Convention, the essence of which, as explored in this chapter, is that the House of Commons ought to be given the opportunity to debate proposed military action *before* the fact,[13] the Government had proposed to honour its defeat in 2013 on a motion in support of deploying British armed forces in Syria.[14] This particular vote was in fact taken to signify the new authority of the War Powers Convention; Parliament had voted *against* military action in Syria, and so the Government (initially) obliged, appearing to accept that such a course of action was without adequate parliamentary (and thus democratic) support.[15] That the targeted killing of Khan entailed the deployment of a British military asset in that very location thus indicated otherwise.

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[7] HC Deb 7 September 2015, vol 599, col 30.

[8] ibid.

[9] Nehal Bhuta, 'On Preventive Killing' (*EJIL:Talk!*, 17 September 2015) <https://www.ejiltalk.org/on-preventive-killing/> accessed 12 November 2018.

[10] See, eg, Melzer (n 6) ch 3.

[11] Letter from the UK Permanent Representative to the UN to the UN Security Council, 7 September 2015.

[12] Veronika Fikfak and Hayley J Hooper, *Parliament's Secret War* (Hart Publishing 2018).

[13] Cabinet Office, *Cabinet Manual: A Guide to Laws, Conventions and Rules on the Operation of Government* (Cabinet Office 2011) [5.38].

[14] HC Deb 29 August 2013, vol 566, cols 1551-55.

[15] See, eg, James Strong, 'Why Parliament Now Decides on War: Tracing the Growth of the Parliamentary Prerogative through Syria, Libya and Iraq' (2015) 17(4) BJPIR 604; Gavin Phillipson, ''Historic' Commons' Syria Vote: The Constitutional Significance: Part I (UK Constitutional Law Association Blog, 19 September 2013) <https://ukconstitutionallaw.org/2013/09/19/gavin-phillipson-historic-commons-syria-vote-the-constitutional-significance-part-i/.> accessed 20 May 2019.

Several key questions are given rise by these developments. Not least that of whether, and if so to what extent, the constitutional position—that is, the constitution*ality*—of targeted killing is contingent on the operation of the War Powers Convention. Indeed, subsequent developments have shone yet more light on these controversial issues, targeted killing and the use of 'drones' appearing to occupy an increasingly central position in the UK Government's contemporary counter-terrorism strategy. The chapter explores these issues as follows. Section II outlines the UK's domestic arrangements for authorising the use of force, and specifically the awkward position of targeted killing and the use of drones within those arrangements. That section highlights the key tensions underlying a seemingly tenuous distinction between "constitutional" and "unconstitutional" behaviour in the exercise of domestic war powers, to the extent that that distinction is now determined principally by reference to the scope and operation of the War Powers Convention. Section III then gives an overview of the Government's apparent recent embrace of targeted killing as a response to the contemporary terrorist threat, specifically insofar as that threat is primarily characterised in *international* terms. That section considers that this development is situated in a broader strategic context, in particular one which involves the increasing legitimisation of targeted killing, per se, as a method of counter-terrorism in the global 'War on Terror', and the nebulousness of the European Court of Human Rights' approach to the enforcement of the Convention rights in military operations abroad. Finally, Section IV considers the implications of the Government's targeted killing policy in the context of the general (international) prohibition on the use of armed force. Key issues are raised, it is argued in that section, particularly insofar as the Government's approach to targeted killing clearly anticipates (and evidently presumes the lawfulness, in international law, of) the use of force against pre-identified individuals even *outside* active areas of armed conflict. The sorts of international legal arguments defended by the UK Government in the circumstances of (and crucially since) the targeted killing of Khan serve only to expose the significant, if constitutionally dubious role that international law plays in legitimating—that is, "constitutionalising"—the exercise of domestic war powers.

II. WAR POWERS IN THE UK CONSTITUTION

A. The Domestic Legal Framework

In the UK constitution, the legal power to deploy armed forces overseas formally derives from the royal prerogative,[16] the 'residue of discretionary or arbitrary authority, which at any given time is *legally* left in the hands of the Crown'.[17] As a matter of constitutional practice, therefore, the decision to deploy armed forces is reasonably straightforwardly stated: the decision is, to all intents and purposes, one for the Government, alone, to make.[18] Rosara Joseph notes that, over four centuries of constitutional development, 'orthodox theoretical and political discourses' have consistently asserted the executive's dominance in the exercise

[16] *China Navigation v A-G* [1932] 2 KB 197; *Chandler v DPP* [1962] UKHL 2, [1964] AC 763. This applies to the 'regular' armed forces; the deployment of 'reserve' forces is, by contrast, regulated by statute: Reserve Forces Act 1996, s 56.
[17] AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, Macmillan 1915) 282 (emphasis added).
[18] House of Lords Constitution Committee, *Constitutional Arrangements for the Use of Armed Force* (2013-14, HL 46) [5].

of war powers,[19] albeit that many varied justifications for this arrangement have been advanced over time. Theories of 'ancient constitutionalism' and divine right imputed legitimacy to the executive in matters of war and foreign policy primarily on the grounds of historical precedent, while 'institutional arguments' inclined to (the advantages of) pragmatism, efficiency and effective governance in the execution of powers in defence of the realm were common of the development of parliamentary government in the 18th century, and continue to hold sway today.[20] Throughout the 20th century, executive dominance of war powers consistently went unchallenged by the courts,[21] illustrating a level of deference which Joseph attributes to a deep-rooted acquiescence to the Crown's perceived benevolence in the exercise of prerogative powers:

> The presumption of good faith in executive motives has an especially entrenched history in the national security sphere, and it has conditioned the courts to accept executive assertions as to what was done in the name of the war prerogative.[22]

That such deference is both unambiguously and properly the courts' constitutional role in matters of the war prerogative, and of national security more broadly, was emphasised by the (Appellate Committee of the) House of Lords in *Council of Civil Service Unions v Minister for the Civil Service*.[23] Of this, Lord Fraser said:

> [T]he courts will inquire into whether a particular prerogative power exists or not, and, if it does exist, into its extent. But once the existence and the extent of a power are established to the satisfaction of the court, the court cannot inquire into the propriety of its exercise. That is undoubtedly the position as laid down in the authorities to which I have briefly referred and it is plainly reasonable in relation to many of the most important prerogative powers which are concerned with control of the armed forces and with foreign policy and with other matters which are unsuitable for discussion or review in the law courts.[24]

Moreover, Lord Scarman referred to the principle that 'all matters relating to the disposition and armament of the armed forces are left to the unfettered control of the Crown' as 'undoubted'.[25] And Lord Diplock, in no uncertain terms, reiterated that '[n]ational security is the responsibility of the executive government': '[i]t is par excellence a non-justiciable question'; '[t]he judicial process is totally inept to deal with the sort of problems which it involves'.[26]

[19] Rosara Joseph, *The War Prerogative: History, Reform, and Constitutional Design* (OUP 2013) 41.
[20] ibid 42.
[21] See, eg, *China Navigation Co Ltd* (n 14); *Liversidge v Anderson* [1941] UKHL 1, [1942] AC 206; *Chandler v DPP* (n 14); *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75.
[22] Joseph (n 19) 115.
[23] [1984] UKHL 9, [1985] AC 374.
[24] ibid.
[25] ibid.
[26] ibid.

B. The War Powers Convention

As Paul Scott notes, '[t]he key contemporary implication of the power to go to war being found in the prerogative is that it is – as a matter of law – exercisable at the discretion of the executive of the day, without any formal safeguards or procedural limitations'.[27] Indeed, this is true of the legal position, per se. Yet, significant changes to the UK's domestic use-of-force arrangements have been effected in recent years, the most important of which is that the House of Commons has occupied an increasingly central and important role in scrutinising the exercise of the domestic legal power to deploy armed forces. This is notwithstanding that, as noted above, the orthodox constitutional position is that the exercise by the executive (that is, the Crown) of domestic war powers is in practice conditional upon ministerial 'advice'. The initiative to advise the exercise of legal powers derived from an undemocratic and anachronistic source of the constitution is conferred upon those whose democratic credentials offset those qualities. On several occasions since the Iraq War in 2003, a further conventional arrangement has emerged in which the Government has sought the 'approval' or 'consent' of the House of Commons on the issue of whether to deploy armed forces to conflict situations overseas. Indeed, '[t]he complexion of the war prerogative therefore, has critically changed since 2003':[28] it is now widely accepted that the exercise of the war prerogative is subject to a separate, distinct 'War Powers Convention': that the House of Commons should be given the opportunity to debate and thus scrutinise the exercise by the Government of the power to deploy armed forces (via the war prerogative) *before* fact, save in exceptional circumstances, such as an emergency.[29]

While this practice can be seen to have commenced in the context of the events leading up to the Iraq War in 2003, during which MPs were, for the first time, asked to vote on a substantive motion in support of British military intervention,[30] it has since operated on a number of occasions over the last years, including in relation to UK military intervention in Libya, in 2011,[31] Syria, in 2013,[32] and Iraq, in 2014.[33] The most recent example of this practice concerned the Government's proposed extension of the UK's military campaign against Da'esh in Iraq to neighbouring Syria.[34] So entrenched, it would appear, is this new practice that it has been suggested that substantive Commons votes on British military intervention has in fact supplanted the war prerogative, establishing, rather, a 'parliamentary prerogative'.[35] This term is perhaps unhelpful, though, especially given that Parliament's consultative and approval role 'is not a legal requirement, and the Commons also lack the power of initiative over military employment decisions … [and further,] there are no standards for the information Parliament would be privy to in such discussions'.[36] Whatever,

[27] Paul F Scott, *The National Security Constitution* (Hart Publishing 2018) 112.
[28] Tanzil Chowdhury, 'Taming the UK's War Prerogative: The Rationale for Reform' (2018) 38(3) LS 500, 503.
[29] *Cabinet Manual* (n 13) [5.38].
[30] HC Deb 18 March 2003, vol 401, cols 902-11.
[31] HC Deb 21 March 2011, vol 525, cols 802-06.
[32] HC Deb 29 August 2013, vol 566, cols 1551-55.
[33] HC Deb 26 September 2014, vol 585, cols 1360-66.
[34] HC Deb 2 December 2015, vol 603, cols 495-99.
[35] Strong (n 15).
[36] Chowdhury (n 28) 503.

that the War Powers Convention now represents an important, if permanent feature of those arrangements is confirmed by its codification in the Cabinet Manual:

> In 2011, the Government acknowledged that a convention had developed in Parliament that before troops were committed the House of Commons should have an opportunity to debate the matter and said that it proposed to observe that convention except when there was an emergency and such action would not be appropriate.[37]

A key theme of the Convention's crystallisation over the last years is that it has generally been heralded as a positive development, not least given the extent to which it appears to enhance the broader 'democratisation' of the UK's domestic use-of-force arrangements.[38] But as a constitutional rule of a non-legally binding nature—qua constitutional conventions—its effectiveness depends, above all, on the political will to enforce it; the courts have no jurisdiction to preside over the enforcement of constitutional conventions.[39] Indeed, the content of the Convention, its reach, and the increasingly nebulous 'emergency' exception which provides for its dispensation are all, so to speak, contingent upon the ebb and flow of the political will for the time being. The extent to which the War Powers Convention can be seen to genuinely enhance accountability, participation and transparency in the domestic use-of-force-decision-making process is, as a result, contingent upon its operation and impact in practice.[40]

For instance, there are a number of examples in which the terms and expectations of the Convention appear to have been undermined, though which, in the relevant circumstances, were explained (away) as circumstances in which the Convention either did not apply at all, or applied only to the extent that its 'emergency' exception had been invoked. The deployment of British troops in Mali in 2013, ostensibly at the request of the French Government for the purposes of providing 'additional logistical and surveillance support' to French armed forces,[41] was neither subject to nor authorised by a parliamentary vote. Of this, however, the Government said:

> [W]e will observe the existing convention that before UK troops are *committed to conflict*, the House of Commons should have an opportunity to debate and vote on the matter, except when there is an emergency and such action would not be appropriate. One should also recognise … that the role of British troops *is clearly not a combat role and it is not our intention to deploy combat troops*.[42]

It seemingly follows, therefore, that the Convention applies only to the deployment of armed forces specifically, and exclusively, to *conflict* situations overseas.

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[37] *Cabinet Manual* (n 13) [5.38].

[38] Fikfak and Hooper (n 12) 9.

[39] See, eg, *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61 [146]: 'Judges … are neither the parents nor the guardians of political conventions; they are merely observers. As such, they can recognize the operation of a political convention in the context of deciding a legal question … but they cannot give legal rulings on its operation or scope, because those matters are determined within the political world.'

[40] These are the values against which the operation and effectiveness of the War Powers Convention have been measured in the recent academic literature: Fikfak and Hooper (n 12).

[41] Ministry of Defence, 'RAF Sentinel Aircraft Deploys to Africa' (25 January 2013) <https://www.gov.uk/government/news/raf-sentinel-aircraft-deploys-to-africa> accessed 10 March 2021.

[42] HC Deb 31 January 2013, vol 557, cols 1059-60 (Andrew Lansley) (emphasis added).

However, of particular and growing significance are the increasing number of instances in which the Government has purported to deploy armed forces overseas, indeed in *conflict* situations, though in accordance with the 'emergency' exception to Convention. A recent example of this is the UK's military intervention in Syria, in 2018, carried out in response to a chemical weapons attack by the Syrian Government on its own people in Douma. The intervention was not authorised under the auspices of the UN collective security regime; rather, the position of the UK Government was that military intervention was justified so as to 'alleviate the extreme humanitarian suffering of the Syrian people by degrading the Syrian regime's chemical weapons capability and deterring their future use'.[43] The key point to note for present purposes is that a full seven days separated the atrocities in Douma and the UK's military response. In Parliament, after the fact, the then Prime Minister, Theresa May, stated that '[t]he speed with which we acted was essential in co-operating with our partners to alleviate further humanitarian suffering and to maintain the vital security of our operations'.[44] Indeed, such factors are without doubt essential considerations as to whether Parliament can or should be included in the domestic decision-making process to authorise the deployment of armed forces overseas; the deliberative and open nature of parliamentary debate is anathema to both speed and confidentiality. Though, perhaps when read in the context of the parliamentary vote in 2013, which the then Government lost, it is clear that such arguments appear essentially to exploit the 'emergency' exception so as to bypass debate in the House of Commons.[45] Thus, as Tanzil Chowdhury writes, 'despite the incremental development of a seemingly strong convention of general parliamentary deference, the 2018 strikes substantially undermined it'.[46]

Thus, despite its now-seemingly central role in the UK's domestic use-of-force arrangements, questions (continue to) surround the precise nature and extent of the War Powers Convention. There is a growing sense, perhaps, which is clearly evinced both by these various contemporary developments in practice and by increasingly sceptical critiques in the academic literature, that the War Powers Convention promises much, yet delivers far less. 'The aim of the War Powers Convention,' write Fikfak and Hooper, 'was to provide a more democratic process through which military troops are deployed into battle': '[t]he idea was to strengthen the position of Parliament vis-à-vis the Government and to give the House of Commons an active role in compelling the Government to articulate its motives and formulate long-term strategy'.[47] And so in this sense, fundamentally, it is 'an inappropriate and ineffective tool to deliver on what it promised'.[48]

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[43] HM Government, 'Syria Action – UK Government Legal Position' (14 April 2018) <https://www.gov.uk/government/publications/syria-action-uk-government-legal-position/syria-action-uk-government-legal-position> accessed 21 March 2021.

[44] HC Deb 16 April 2018, vol 639, col 42.

[45] I have argued elsewhere that the UK Government's authorisation of military action in Douma, Syria, in April 2018, is demonstrative of an expansion of the 'emergency' exception: Mark Bennett, 'The Ever-Expanding 'Emergency' Exception: Syria, the War Powers Convention, and the Bypassing of Prior Parliamentary Debate' (UK Constitutional Law Association Blog, 25 April 2018) <https://ukconstitutionallaw.org/2018/04/25/mark-bennett-the-ever-expanding-emergency-exception-syria-the-war-powers-convention-and-the-bypassing-of-prior-parliamentary-debate/>.

[46] Chowdhury (n 28) 504.

[47] Fikfak and Hooper (n 12) 100.

[48] ibid 103.

Indeed, these questions are particularly pertinent in the present context, that of targeted killing, not least given that unmanned aerial vehicles—"drones" —appear to have been carved out of the War Powers Convention as one of its seemingly numerous and increasingly broad exceptions. Drones are capable of being deployed remotely, to situations which may or may not constitute active areas of armed conflict in the eyes of international law, and thus appear to render unnecessary the exercise of war powers for the purposes of establishing and directing a full-scale military campaign. As such, it is unclear whether the use of drones, specifically outside of an existing armed conflict situation, falls within the remit of the War Powers Convention. As Fikfak and Hooper note:

> Whilst the picture is still unclear, it is more than likely that in the future the use of drones for targeted killings outside recognised armed conflict will escape parliamentary oversight. This will occur either because they are used in an 'emergency', providing the Government the flexibility it needs to 'surprise' the unexpected targets, or because the Government will claim that they do not involve the deployment of British troops in the literal sense.[49]

It therefore stands to reason that the use of drones—including, crucially, their use in targeted killing operations—occupies an awkward position within the constitutional accountability arrangements instituted by the War Powers Convention.

III. THE U.K. GOVERNMENT'S CONTEMPORARY TARGETED KILLING 'POLICY' IN ITS STRATEGIC CONTEXT

No UK Government has ever formally endorsed a 'policy' of targeted killing, per se, whether or not as part of a broader counter-terrorism strategy. Rather, as Nils Melzer notes:

> Traditionally, public debate in the United Kingdom never seriously considered that targeted killing could be a legitimate method of law enforcement, even in the face of decades of terrorist activities related to the conflict in Northern Ireland.[50]

And yet, the circumstances in which Reyaad Khan and Ruhul Amin were killed in August 2015 (as briefly described in the introduction to this chapter) are symptomatic of a paradigm-shift in the UK's response to the contemporary terrorist threat—particularly, that is, in relation to threats emanating from sources external to the UK. Above all, those circumstances appear to suggest that the UK Government now conceives of targeted killing as a legitimate method of counter-terrorism. Indeed, since that episode, the viability—and, so it would seem, the *desirability*—of targeted killing has become an increasingly conspicuous feature of the Government's contemporary counter-terrorism rhetoric; in recent years, there has been a significant and marked ramping-up of political rhetoric appearing to (ever) openly endorse targeted killing, in spite of its dubious legal and moral legitimacy.[51] For instance, in December 2017, the then Secretary of State for Defence, Gavin Williamson, signalled the

[49] ibid 99.
[50] Melzer (n 6) 23.
[51] See, generally, Tamar Meisels and Jeremy Waldron, *Debating Targeted Killing: Counter-Terrorism or Extrajudicial Execution?* (OUP 2020).

Government's apparent embrace of targeted killing as part of a broader, aggressive military response to the threat posed by so-called "foreign terrorist fighters"—namely, 'individuals who have travelled from their home states to other states to participate in or support terrorist acts'.[52] Williamson was reported as having stated in an interview with the *Daily Mail* that British citizens who travel abroad in support of terrorist groups such as Da'esh should, in no uncertain terms, be 'hunted down and killed to ensure they never return to the UK'.[53] After all, Williamson was quoted as saying, '[a] dead terrorist can't cause any harm to Britain'.[54] Some two weeks later, then Prime Minister Theresa May also shed light on the Government's increasing amenability to the targeted killing of terrorist suspects operating in foreign countries. The Prime Minister expressed her support in Parliament for the deployment of lethal force in so-called 'precision airstrike[s]' against terrorist suspects abroad, albeit as 'the last resort in a host of counter-terrorism measures to prevent and disrupt plots against the UK at every stage in their planning'.[55]

Public and parliamentary scrutiny of the UK Government's targeted killing 'policy' has since intensified, not least given that, crucially and controversially, the availability of the use of lethal force for counter-terrorism purposes manifestly transcends the boundaries of lawful armed conflict.[56] That there have been a number of reports of unintended civilian casualties as a result of UK involvement in targeted killing operations only serves to compound the legal and moral ambiguities surrounding this course of action.[57] A compelling body of evidence also points towards the UK's broader involvement in targeted killing operations led by foreign states, especially the US.[58] Parliament was informed that Junaid Hussain and Mohammed Emwazi (the latter of whom was infamously dubbed "Jihadi John" by the mainstream media), both British-born members of Da'esh, were killed in targeted drone strikes conducted by the US military in August[59] and November 2015,[60] respectively. Subsequently, in October 2017, it was reported in the media that Sally Jones, also a British

[52] OSCE Office for Democratic Institutions and Human Rights, *Guidelines for Addressing the Threats and Challenges of "Foreign Terrorist Fighters" within a Human Rights Framework* (OSCE/ODIHR 2018) 8.

[53] Jessica Elgot, 'British Isis Fighters Should Be Hunted Down and Killed, Defence Secretary Says' *The Guardian* (8 December 2017) <https://www.theguardian.com/politics/2017/dec/07/british-isis-fighters-should-be-hunted-down-and-killed-says-defence-secretary-gavin-williamson> accessed 3 November 2018; Larisa Brown, 'Defence Secretary is Accused of Dreaming Up a Netflix-Style Plot by Threatening to 'Eliminate' UK Jihadis Before They Can Return to Britain' *Daily Mail* (6 December 2017) <https://www.dailymail.co.uk/news/article-5153613/Gavin-Williamson-Brits-fighting-be.html> accessed 3 November 2018.

[54] ibid.

[55] HC Deb 20 December 2017, vol 633, col 62W.

[56] ISC (n 3) [2]-[3].

[57] Spencer Ackerman and Alice Ross, 'Airstrike Targeting British Hacker Working for ISIS Killed Three Civilians Instead, US Admits' *The Guardian* (29 January 2016) <https://www.theguardian.com/us-news/2016/jan/29/sis-airstrike-syria-civilians-killed-us-military-junaid-hussain> accessed 15 May 2019. See, also, HC Deb 2 May 2018, vol 640, col 12W (Gavin Williamson): '[A] UK air strike on 26 March 2018, targeting Daesh fighters in eastern Syria, resulted in an unintentional civilian casualty.'

[58] See, eg, Drone Wars, *Joint Enterprise: An Overview of US-UK Co-Operation on Armed Drone Operations* (Drone Wars UK 2020).

[59] HC Deb 7 September 2015, vol 599, col 26 (David Cameron).

[60] HC Deb 17 November 2015, vol 602, col 521 (David Cameron).

citizen, and the wife of Hussain, was also killed in a joint UK-US drone-strike operation.[61] And so, despite consistently publicly rebutting claims that it operates a 'policy' of targeted killing, including a policy of maintaining a secret 'kill list' of high-profile terrorist suspects,[62] in evidence subsequently given to the Joint Committee on Human Rights, the Government all but confirmed, from the Committee's point of view, that it *does* have a broader policy to use lethal force abroad, outside armed conflict, for counter-terrorism purposes:

> Despite the sometimes confusing explanations offered by the Government, we are now clear about what the Government's policy is. Although the Government says that it does not have a "targeted killing policy", it is clear that the Government does have a policy to use lethal force abroad outside armed conflict for counter-terrorism purposes. We understand why the Government does not want to call its policy a "targeted killing policy". In our view, however, it is important to recognise that the Government's policy on the use of lethal force outside of areas of armed conflict does contemplate the possibility of pre-identified individuals being killed by the State to prevent a terrorist attack.[63]

Whether or not the Government would ever acknowledge that this is tantamount to operating a targeted killing 'policy', its apparent embrace of targeted killing as a method of counter-terrorism is consistent with what Melzer calls 'the broader trend towards legitimatisation', a process which has involved, in essence, targeted killing's 'escaping the shadowy realm of half-legality and non-accountability, and of gradually gaining legitimacy as a method of counter-terrorism and 'surgical' warfare'.[64] In the 2011 report of the former UN Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions, it is noted that a number of States 'have adopted policies, either openly or implicitly, of using targeted killings, including in the territories of other States'.[65] Those policies have been justified as a 'legitimate' counter-terrorism response and 'as a necessary response to the challenges of "asymmetric warfare"',[66] a type of armed conflict characterised by the 'radically different means and methods of violence and radically divergent levels of brute firepower' which both sides bring to that conflict.[67] Indeed, the process described by Melzer has accelerated in the post-9/11 era, and the normalisation of a range of aggressive, militarised responses under the US 'War on Terror' counter-terrorism paradigm.[68] The US targeted killing programme emerged as a 'central strategy'[69] of President George W. Bush's counter-terrorism policy, and

[61] Ewen MacAskill, 'British ISIS Member Sally Jones 'Killed in Airstrike with 12-Year-Old Son' *The Guardian* (12 October 2017) <https://www.theguardian.com/world/2017/oct/12/british-isis-member-sally-jones-white-widow-killed-airstrike-son-islamic-state-syria> accessed 24 February 2021.

[62] See, eg, Nicholas Watt, 'The 'Kill List': RAF Drones Have Been Hunting UK Jihadis for Months' *The Guardian* (8 September 2015) <https://www.theguardian.com/uk-news/2015/sep/08/drones-uk-isis-members-jihadists-syria-kill-list-ministers> accessed 9 March 2021; Alice Ross, 'MPs Call on Theresa May to Release 'Kill List' for UK Drone Strikes' *The Guardian* (23 Feburary 2017) <https://www.theguardian.com/world/2017/feb/23/mps-theresa-may-release-kill-list-for-uk-drone-strikes> accessed 9 March 2021.

[63] Joint Committee on Human Rights, *The Government's Policy on the Use of Drones for Targeted Killing* (2015-16, HL 141, HC 574) [2.39].

[64] Melzer (n 6) 10.

[65] UNGA (n 6) [1].

[66] ibid [2].

[67] Andrew Altman, 'Introduction' in Claire Finkelstein, Jens David Ohlin, Andrew Altman (eds), *Targeted Killings: Law and Morality in an Asymmetrical World* (OUP 2012) 2.

[68] See, eg, Gray (n 5).

[69] Claire Finkelstein, 'Targeted Killing as Preemptive Action' in Claire Finkelstein, Jens David Ohlin and Andrew Altman (eds), *Targeted Killing: Law and Morality in an Asymmetric World* (OUP 2012).

was thereafter significantly expanded under the subsequent Obama administration. Indeed, it was in this context, as Christine Gray notes, 'that the USA expanded its wide doctrine of self-defence against non-state actors in third states'.[70] In other words, the legitimisation of targeted killing can be seen to have depended primarily on the redefining of key tenets of the general (international) prohibition on the use of armed force, under art. 2(4) of the UN Charter. One question to which this has given rise is whether, in principle, the '*targeted*' use of force against *individual* terrorist suspects can be seen to engage art. 2(4) at all. As Helen Duffy writes:

> On a perhaps extreme view, it would be unnecessary to invoke self-defence as there would be no use of force in prima facie violation of Article 2(4). One question in this vein is whether limited incursions on to another state's territory, for the purposes of a targeted killing, for example (as opposed to the large-scale military interventions that characterised early resort to force in the 'war on terror'), should be considered to violate territorial integrity or political independence envisioned in Article 2(4) at all. The fact that states often emphasise the 'limited' nature of incursions may suggest that this is relevant to the determination of lawfulness.[71]

Indeed, the strategic use of language such as '*precision*' airstrikes ought clearly to be read in the context of this potential ambiguity.

That targeted killing has increasingly been accepted as a legitimate method of counter-terrorism is symptomatic of the increasingly fluid perception of the contemporary terrorist threat—again, not least given that the global response to that threat has itself consistently been characterised, since 9/11, as entailing 'war on terror'. Yet, from the perspective of the UK, the issue of targeted killing has historically been viewed in the context of Northern Ireland-related terrorism: a *domestic* matter. There was, in other words, no sense in which it could be plausibly argued in these circumstances that the use of lethal force could be deployed, consistent with the legal rules of *international* armed conflict. Rather, the issue of the state-sponsored deprivation of life, in that respect, was embroiled in the controversies surrounding the "shoot-to-kill" policy which domestic (UK) law enforcement were alleged to have been operating against members of Irish-nationalist terrorist organisations.[72] Notably, the view that that policy was 'clearly illegal' was widely and strongly held.[73] Indeed, as much was confirmed by the Grand Chamber of the European Court of Human Rights in *McCann and Others v United Kingdom*,[74] in which it was held that the killings of three members of the Provisional Irish Republican Army during the course of an operation conducted by British soldiers in Gibraltar contravened human rights law, specifically the right to life protected under art. 2 of the Convention, which states:

> 1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

[70] Christine Gray, *International Law and the Use of Force* (4th edn, OUP 2018) 234. See, also, eg, Christian J Tams, 'The Use of Force against Terrorists' (2009) 20(2) EJIL 359.
[71] Helen Duffy, *The 'War on Terror' and the Framework of International Law* (2nd edn, CUP 2015) 310.
[72] Melzer (n 6) 22.
[73] ibid 23.
[74] (1996) 21 EHRR 97.

> 2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defence of any person from unlawful violence;
>
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

The Court considered that deprivation of life ought to be subject to

> the most careful scrutiny, particularly where deliberate lethal force is used, taking into consideration not only the actions of the agents of the State who actually administer the force but also all the surrounding circumstances including such matters as the planning and control of the actions under examination.[75]

As such, the violation of art. 2 was, in this case, found to have resulted from various failings in the conduct of the operation, including (but not limited to) 'the failure of the authorities to make sufficient allowances for the possibility that their intelligence assessments might, in some respects at least, be erroneous'.[76]

Of particular significance for present purposes, moreover, are the comments of the Court in relation to the nature and scope of art. 2. In particular, the Court emphasised that art. 2(2) 'does not primarily define the situations where it is permitted to intentionally kill an individual, but describes the situations where it is permitted to "use force" which may result, as an unintended consequence, in the deprivation of life'.[77] Yet, of utmost importance, the Court noted, is that '[t]he use of force … must be no more than "absolutely necessary" for the achievement of one of the purposes set out in sub-paragraphs (a), (b) or (c)',[78] and that '[i]n this respect the use of the term "absolutely necessary" … indicates that *a stricter and more compelling test of necessity* must be employed from that normally applicable when determining whether State action is "necessary in a democratic society" under paragraph 2 of Articles 8 to 11'.[79] Fundamentally, this can be seen to highlight the particularly elevated status of the right to life in a democratic society; the level of scrutiny to be applied under the legal framework of the ECHR exceeds even that relating to interference with 'qualified rights' (namely, arts. 8 to 11) where—as discussed in Chapter 3, for instance—the Court has shown itself willing to be particularly interventionist.

It is against this backdrop that the Government's attempt to construct a narrative which evidently foregrounds the *international* dimensions of targeted killing action can be seen to represent, in turn, an attempt to keep a lid on the human rights implications of that action. It ought, firstly, to be noted here that the (latest version of the) Government's counter-terrorism

[75] ibid para 150.
[76] ibid para 213.
[77] ibid para 148.
[78] ibid para 148.
[79] ibid para 149 (emphasis added).

strategy document, 'CONTEST', published in June 2018,[80] makes clear that the international dimension of the contemporary terrorist threat is a prominent—perhaps defining—feature of that threat. The document notes that '[a] large proportion of terrorist plots that have targeted the UK in recent years have had an *international* link or have begun *overseas*'.[81] Specifically, Islamist terrorism is said to account for 'the largest proportion of terrorist attacks globally, with most carried out by Daesh, Al Qa'ida and their respective affiliates'.[82] Whilst it is also noted that terrorism related to Northern Ireland 'remains a serious threat, particularly in Northern Ireland itself', and that 'extreme right-wing terrorism' represents a 'growing threat',[83] the combination of 'the rise of Da'esh and the creation of its cult-like "Caliphate"' and the 'persistent threat of Al Qa'ida' is identified as the principal cause of the 'increased [terrorist] threat' to the UK in recent years.[84] The level of that threat, which is assessed by the Joint Terrorism Analysis Centre 'on the basis of both the intent and capability of an individual or group to commit a terrorist act',[85] is currently set at 'SUBSTANTIAL', indicating that the possibility of an attack is 'likely'.[86] The threat level relating to 'international terrorism', which includes terrorist groups such as Da'esh and Al Qa'ida, has remained primarily at 'SEVERE' (meaning an attack is 'highly likely') since 29 August 2014, having actually been elevated to 'CRITICAL'—the highest grade on the Security Services' 'Threat Levels' metric, indicating that a terrorist attack is 'expected imminently'[87]—on two occasions during that period: between 23-27 May 2017 and 15-17 September 2017,[88] prompted by the terrorist attacks carried out in Manchester Arena[89] and on the carriage of a District Line train at Parsons Green, west London,[90] respectively.

Two key issues ultimately flow from this, relating specifically to the position of the ECHR (and the applicability of art. 2 in particular). First, efforts to legitimise targeted killing as a means of combatting the contemporary threat of terrorism—again, as an essentially *international* threat—engage, if albeit implicitly, with the tropes of human rights argumentation, especially the language of 'necessity'. For instance, these efforts have been made very clearly in the context of the apparent futility of a 'criminal justice' model of counter-terrorism. Where, in other words, the Government has come closest to publicly making the case for targeted killing as a legitimate counter-terrorism response is in the context of its having emphasised the practical obstacles created by the global and crucially asymmetric character of the contemporary terrorist threat. The Prime Minister's remarks in relation to the targeted killing of Reyaad Khan can be seen to illustrate this point, in which it

[80] HM Government, *CONTEST: The United Kingdom's Strategy for Countering Terrorism* (Cm 9608, 2018); HC Deb 4 June 2018, vol 642, cols 5-6WS.
[81] *CONTEST* (n 80) [279] (emphasis added).
[82] ibid [37].
[83] ibid [4].
[84] ibid [2] (emphasis added).
[85] HM Government, *CONTEST: The United Kingdom's Strategy for Countering Terrorism* (Cm 8123, 2011) [3.12].
[86] MI5, 'Threat Levels' <https://www.mi5.gov.uk/threat-levels> accessed 3 March 2021.
[87] ibid.
[88] ibid.
[89] See, eg, BBC News, 'Manchester Attack: 22 Dead and 59 Hurt in Suicide Bombing' (23 May 2017) <https://www.bbc.co.uk/news/uk-england-manchester-40010124> accessed 25 March 2019.
[90] See, eg, Ian Cobain, Vikram Dodd and Haroon Siddique, 'London Tube Bombing: PM Says Terror Threat Level Raised to Critical' *The Guardian* (16 September 2017) <https://www.theguardian.com/uk-news/2017/sep/15/parsons-green-district-line-suspended-in-west-london-over-incident> accessed 25 March 2019.

was repeatedly noted that '[w]e took this action because there was no alternative', that, further, 'there is no Government we can work with [in Syria]', and that 'we have no military on the ground to detain those [such as Khan] preparing plots'.[91] The effect of this is that it does much, if only by way of shaping the prevailing political narrative, to shift the locus of the use of lethal force (and targeted killing practices) increasingly *away* from the paradigm of domestic law enforcement, for it is in that context in which the right to life (under art. 2)—as demonstrated in *McCann*—clearly bites deeply on the lawfulness of state deprivation of life.

The second key issue raised by this dynamic is perhaps the more consequential from an explicitly legal standpoint, speaking more broadly to the tenuous position of the ECHR in the context of the use of lethal force abroad—specifically, that is, the Strasbourg Court's developing doctrine on the extra-territoriality of the Convention rights. Space precludes a detailed discussion of this issue, which has generated much academic scholarship in recent years.[92] Rather, it suffices for present purposes to note that much hangs, in this respect, on the concept of 'jurisdiction' within the meaning of art. 1 of the Convention, which states that '[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in … this Convention'. Classically, the question of 'jurisdiction' has been interpreted as relating primarily to territorial boundaries.[93] And yet, crucially, in recent years the Court has endorsed an increasingly expansive view of this issue. For instance, in *Bankovic v Belgium*,[94] the Court reiterated that territorial limitations indeed remain the primary factor in any assessment as to competence of the relevant High Contracting Party to 'secure' the Convention rights to the relevant individual(s),[95] though went on to accept that 'other bases of jurisdiction' might be applicable, albeit that they are 'exceptional and requir[e] special justification in the particular circumstances of each case'.[96] Within such exceptional circumstances, the key question is whether the respondent State

> through the *effective control* of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government.[97]

In particular, the Court explicitly rejected the applicants' claim, in that case, to the effect that 'the positive obligation under Article 1 extends to securing the Convention rights in a manner proportionate to the level of control exercises in *any* given extra-territorial situation'.[98] Such an approach was regarded as 'tantamount to arguing that anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or

[91] HC Deb 7 September 2015, vol 599, cols 25-26. See, also, HC Deb 7 September 2015, vol 599, col 34, where, once again, the Prime Minister went on to repeat the point: 'When we are dealing with people in ISIL-dominated Syria—there is no Government, there are no troops on the ground—there is no other way of dealing with them than the route we took.'

[92] See, eg, Conall Mallory, *Human Rights Imperialists: The Extraterritorial Application of the European Convention on Human Rights* (Hart Publishing 2020). See, also, eg, Stuart Wallace, *The Application of the European Convention on Human Rights to Military Operations* (CUP 2019).

[93] See, eg, *Soering v United Kingdom* (1989) 11 EHRR 439, para 86, in which it was noted by the ECtHR that 'Article 1 … sets a limit, *notably territorial*, on the reach of the Convention' (emphasis added).

[94] (2007) 44 EHRR SE5.

[95] ibid para 59.

[96] ibid para 61.

[97] ibid para 71 (emphasis added).

[98] ibid para 75 (emphasis added).

its consequences felt, is thereby brought within the jurisdiction of that State for the purpose of Article 1 of the Convention'.[99] Moreover, the Court held that

> the wording of Article 1 does not provide any support for the … suggestion that the positive obligation in Article 1 to secure "the rights and freedoms defined in Section 1 of this Convention" can be divided and tailored in accordance with the particular circumstances of the extra-territorial act in question.[100]

Rather, this, it was noted, 'does not explain the application of the words "within their jurisdiction" in Article 1 and even goes so far as to render those words superfluous and devoid of any purpose'.[101] In other words, the capacity of the Contracting State to secure 'the rights and freedoms defined in Section 1 of [the] Convention' ought to be taken to mean the *full* range of Convention rights.

Some several years after the ruling in *Bankovic*, the question of the extra-territorial application of the Convention was once again considered—and indeed further expanded—by the Court in *Al-Skeini v United Kingdom*.[102] The Court once again reiterated that '[j]urisdiction is presumed to be exercised normally throughout the State's territory',[103] noting, however, with reference to the ruling in *Bankovic*, that 'as an exception to the principle of territoriality, a Contracting State's jurisdiction under Article 1 may extend to acts of its authorities which produce effects outside of its own territory'.[104] One of several 'defining principles'[105] of the Convention's extra-territorial jurisdiction, it was said, is that 'the use of force by a State's agents operating outside its territory may bring the individual thereby brought under the control of the State's authorities into the State's Article 1 jurisdiction'.[106] Whilst, however, that principle had (in the art. 1 case law)[107] clearly been applied 'where an individual is taken into the custody of State agents abroad', the Court emphasised that it 'does not consider that jurisdiction … [arises] solely from the control exercised by the Contracting State over the buildings, aircraft or ship in which the individuals [are] held'; instead, '[w]hat is decisive … is the exercise of *physical power and control* over the person in question'.[108] Notably, the Court appeared to U-turn on the question of the indivisibility of the Convention rights, its previous stance, in *Bankovic*, unequivocally *against* the notion that they may be 'divided and tailored' to particular circumstances. Thus, 'the State, [which] through its agents, exercises control and authority over an individual, and thus jurisdiction … is under an obligation under Article 1 to secure to that individual the rights and freedoms … that are *relevant to the situation of that individual*'; it is '[i]n this sense, therefore, [that] the Convention rights can be "divided and tailored"'.[109] Moreover, the

[99] ibid para 75.
[100] ibid para 75
[101] ibid para 75.
[102] (2011) 53 EHRR 589.
[103] ibid para 131.
[104] ibid para 133.
[105] ibid para 133.
[106] ibid para 136.
[107] See, eg, *Issa and Others v Turkey* (2005) 41 EHRR 27; *Öcalan v Turkey* (2005) 41 EHRR 45; *Al-Saadoon and Mufdhi v United Kingdom* (2010) 51 EHRR 9.
[108] *Al-Skeini* (n 102) para 136 (emphasis added).
[109] ibid para 137 (emphasis added).

territorial paradigm of 'jurisdiction' was also found to admit of two further exceptions: firstly, 'when, as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside that national territory';[110] and, secondly, 'where the territory of one Convention State is occupied by the armed forces of another', in which circumstances 'the occupying State should in principle be held accountable under the Convention for breaches of human rights within the occupied territory'.[111]

The Court's ruling in *Al-Skeini* has potentially far-reaching implications for a UK policy of targeted killing of terrorist suspects operating overseas. The reason why this ought to be framed, however, as only having "potential" implications is that, fundamentally, the link between extra-territorial 'jurisdiction' and specifically 'the exercise of physical power and control' is clearly very tenuous in the context of targeted killing. Not least, that is, given that many and various fundamental questions are raised as to whether so-called 'precision airstrikes' and the use of remotely-controlled aerial vehicles can, per se, constitute such an exercise of physical power and control. And whilst the ECtHR has yet to elaborate on this particular issue, it is notable that, in a legal challenge considered both by the High Court and the Court of Appeal, two radically different approaches have so far been offered. That challenge related to the use of force by British military against individuals in Iraq when neither the individuals in question were in British custody, nor was Britain in occupation at the material time. The question, therefore, was whether the principle of 'jurisdiction' as considered in *Al-Skeini* extended to these circumstances. In the High Court, Leggatt J noted that '[w]hether the exercise of physical control over an individual outside a state's own territory should be sufficient to bring that individual within the scope of the Convention is far from obvious'.[112] Yet, the point was emphasised that '[u]sing force to kill is indeed the *ultimate* exercise of physical control over another human being', there being, moreover, no clear basis for

> a principled system of human rights law [to] draw a distinction between killing an individual after arresting him and simply shooting him without arresting him first, such that in the first case there is an obligation to respect the person's right to life yet in the second case there is not.[113]

Thus, in any event:

> The essential principle … is that *whenever and wherever* a state which is a contracting party to the Convention purports to exercise legal authority or uses physical force, it must do so in a way that does not violate Convention rights.[114]

However, this proposition was subsequently, and notably, rejected by the Court of Appeal, in which it was held that the intention of the ECtHR in *Al-Skeini* ought to be read as implying that something *more* than the mere use of lethal force was required to bring the affected

[110] ibid para 138.
[111] ibid para 142.
[112] *Al-Saadoon and Others v Secretary of State for Defence* [2015] EWHC 715 (Admin), [2015] 3 WLR 503 [95].
[113] ibid [95] (emphasis added).
[114] ibid [106] (emphasis added).

individual within the 'jurisdiction' of the relevant State.[115] In particular, 'the intention of the Strasbourg court was to require that there be an element of control of the individual *prior* to the use of lethal force'.[116] 'It may well be,' the Court noted, 'that it will be difficult to draw sensible distinctions between different types or degrees of power and control'; indeed, so 'inherently imprecise' is the test of physical power and control.[117] Though, whatever conclusion ought to be drawn as to those distinctions, it was decided that it 'must be drawn by the Strasbourg court itself and not by a national court'.[118]

That, for the time being at least, the concept of 'jurisdiction' remains deeply contested, is crucial: it sustains a critical grey area in the UK's human rights obligations in which the Government can (continue to) ground key political arguments as to the legitimacy of a policy of targeted killing of terrorist suspects overseas. The key point to note here, however, is that if in some future application the ECtHR were to endorse an expansive approach to the question of 'jurisdiction' such as that of Leggatt J in *Al-Saadoon*, a policy of targeted killing would unequivocally be vulnerable to legal challenge under the HRA / art. 2 of the ECHR. Though, it is not clear quite what the HRA/ECHR remedy may be in this context, nor how effective it would be. Given the ECtHR ruling in *McCann*, outlined above, a declaration that targeted killing is unlawful under s. 6 seems unlikely; rather, intervention by the courts would perhaps more likely establish a framework within which uses of power in this way *might* be lawful, no doubt subject to the strict requirements of 'necessity' and 'proportionality'.

IV. 'CONSTITUTIONALISING' TARGETED KILLING

A key theme for which the human rights implications of targeted killing can be seen, more broadly, to evince is that of the ambiguity which surrounds the lawfulness of state-sponsored deprivation of life. Indeed, these ambiguities are crucial to establishing the context in which the UK Government sought to justify its actions in relation to the targeted killing of Reyaad Khan, which, in turn, can be seen to have important implications for the constitutional position of those actions.

A. The Targeted Killing of Reyaad Khan: Unlawful, but 'Constitutional'?

In a statement to the House of Commons, the then Prime Minister, David Cameron, acknowledged the unprecedented nature of the targeted killing of Reyaad Khan:

> [I]s this the first time in modern times that a British asset has been used to conduct a strike in a country where we are not involved in a war? The answer to that is yes. Of course, Britain has used remotely piloted aircraft in Iraq and Afghanistan, but this is a new departure, and that is why I thought it was important to come to the House and explain why I think it is necessary and justified.[119]

[115] *Al-Saadoon and Others v Secretary of State for Defence* [2016] EWCA Civ 811, [2017] 2 WLR 219.
[116] ibid [69].
[117] ibid [70].
[118] ibid [70].
[119] HC Deb 7 September 2015, vol 599, col 30.

But there was some ambiguity as to what, exactly, was meant by the Prime Minister's reference to 'a new departure'. This is symptomatic of the fact that there were two immediately relevant contexts in which the killing of Khan could have been considered to have represented such a 'new departure'.[120]

The first relates to the operation of the War Powers Convention. Indeed, from this perspective, much turns on the location in which Khan was killed. Two previous instances in which the terms and expectations of the Convention had been triggered produced the definitive answer that the House of Commons did *not* support British military intervention specifically in Syria: in August 2013, in the context of the Assad regime's use of chemical weapons and the developing humanitarian crisis in Syria;[121] and in September 2014, in which the Commons voted in support of airstrikes against Da'esh in Iraq, subject to the explicit caveat that airstrikes do not extend to Syrian territory.[122] Fikfak and Hooper note that it was therefore the Prime Minister's intention to characterise the action as 'a new departure' in an attempt to 'avoid the [Government's] previous defeat (2013), and the decision of Parliament prohibiting action in Syria (2014)'.[123]

In what has been described as a 'generous' interpretation of the Government's action,[124] the JCHR was prepared to accept the operation of the War Powers Convention as an adequate explanation for the Prime Minister's remarks:

> We are satisfied that the strike on Reyaad Khan was a new departure in terms of the domestic constitutional convention governing the use of military force abroad. It was not, however, a new departure in the sense of being a use of lethal force outside of armed conflict, because we accept, as a matter of international law, that it was part of the wider armed conflict with ISIL/Da'esh already taking place in Iraq and spilling over into Syria.[125]

The airstrike which killed Khan and two others was therefore unprecedented, a 'new departure', in that, for the first time since the emergence of the War Powers Convention, the Government had invoked the 'emergency' exception for which the Convention allows in exceptional circumstances.

Though, the second context in which the killing of Khan could be said to have represented a 'new departure' is perhaps the more convincing—indeed, perhaps the more consequential. From this perspective, talk of a 'new departure' is in reference to the apparent shift in the Government's broader legal position on the issue of targeted killing, per se.[126] Yet, in this sense, the operation of the War Powers Convention can be seen to obscure the serious ambiguities in this legal position, as articulated—or perhaps not—in the aftermath of Khan's killing. As Christof Heyns et al note, 'for a particular drone strike to be lawful, it must satisfy the legal requirements under all applicable international legal regimes, namely: the law

[120] See, eg, Christine Gray, 'Targeted Killing Outside Armed Conflict: A New Departure for the UK' (2016) 3(2) J Use of Force & Int L 198.
[121] HC Deb 29 August 2013, vol 566, cols 1551-55.
[122] HC Deb 26 September 2014, vol 585, cols 1360-66.
[123] Fikfak and Hooper (n 12) 97.
[124] ibid 97.
[125] JCHR (n 63) [2.29].
[126] Gray, 'Targeted Killing Outside Armed Conflict' (n 120).

regulating the use of force (ius ad bellum); international humanitarian law and international human rights law'.[127] Further:

> [T]he legality of a drone strike under the ius ad bellum does not preclude the wrongfulness of that strike under international humanitarian law or international human rights law, and that since those latter obligations are owed to individuals, one State cannot consent to their violation by another State.

The Government failed to defend a coherent legal position on the killing of Khan, instead resting its actions on multiple, often contradictory, legal bases in international law.[128] The effect of the Government's oscillating between, in fact, directly contradicting legal positions situated the airstrike which killed Khan and two others within the scope of two wholly incongruous (international) legal frameworks. On one hand, the Government contended that the drone strike had been conducted *within* the operational remit of the wider coalition military action against Da'esh in Iraq, to which the UK was party at the relevant point in time.[129] The applicable legal framework against which the lawfulness of the Government's actions is assessed in these circumstances is thus the jus in bello, or 'international humanitarian law' (IHL). Yet, the Prime Minister informed the House of Commons that Khan was killed by a British military asset *outside* an area considered by the UK to be an active theatre of armed conflict.[130] And so in these circumstances, the UK's obligations under the jus ad bellum and international human rights law (IHRL) are given rise.

Ultimately, on account of the dichotomy presented by the Government, there are, as Nehal Bhuta notes, 'two different ways of understanding the targeted killing'.[131] They are primarily distinguished by the balance struck between the distinct legal and constitutional ramifications of the Government's actions. For instance, the legal dimensions of the former scenario are, when compared to the latter, largely unproblematic. Insofar as it is accepted that the UK was, at the time of the strike, engaged in a 'non-international armed conflict' with Da'esh, the legality of the killing primarily rests on whether the jus in bello principles of 'distinction', 'proportionality', 'military necessity' and 'unnecessary suffering' have been sufficiently adhered to. As Bhuta suggests, this version of events 'does not require any kind of radical re-interpretation of international law governing the use of force'; rather, the main controversy this creates centres on 'some difficult constitutional and public law questions for the UK government'.[132] That is, the Government's sanctioning of the use of force in Syria, albeit as part of a wider military engagement against Da'esh in Iraq, has direct implications for the authority of the nascent constitutional convention concerning parliamentary assent to the Government's use-of-force-decision-making. Given that, on 26 September 2014, the House of Commons supported the Government's motion on military intervention against Da'esh in

[127] Christof Heyns, Dapo Akande, Lawrence Hill-Cawthorne and Thompson Chengeta, 'The International Law Framework Regulating the Use of Armed Drones' (2016) 65(4) ICLQ 791.
[128] Gray, 'Targeted Killing Outside Armed Conflict' (n 126).
[129] Letter from the UK Permanent Representative to the UN to the UN Security Council (7 September 2015).
[130] HC Deb 7 September 2015, vol 599, col 30.
[131] Bhuta (n 9).
[132] ibid.

Iraq on the explicit condition that it did *not* extend to Syria,[133] the killing of Khan plainly undermines that authority.

It is the extent to which the Government was prepared to defend the lawfulness of its actions in the latter scenario—that is, where the context situated Khan *outside* of an active area of armed conflict—which prompted an escalation in parliamentary scrutiny as to the Government's policy on targeted killing, as considered in Section III, above.[134] Bhuta suggests that these circumstances in fact bring about a 'sea-change' in the Government's broader legal position on the use of force, that position now appearing to have been closely aligned 'with several US legal positions in the 'war on terror' which, hitherto, no European state has formally embraced'.[135] The report by the JCHR also highlights the conspicuous parallels between what the Government appeared to be attempting to achieve in its legal machinations on the killing of Khan and the controversial counter-terrorism paradigms espoused by successive US Governments in the post-9/11 era:

> The United States has caused controversy in the years since 9/11 by arguing that it is involved in a single, global non-international armed conflict with Al Qaida, so that the permissive rules of the Law of War, rather than the stricter rules of human rights law, apply to the use of lethal force against members of Al Qaida wherever in the world they may be found.[136]

The legal position defended by the Prime Minister in the House of Commons was entirely at odds with that explained, in a letter to the UN Security Council, by the UK Permanent Representative to the UN. Whereas the former relied only on the 'UK's inherent right to self-defence' as the legal basis for the airstrike, giving explicit assurances that the Government's actions were 'not part of coalition military action against ISIL in Syria', the latter reneged on that assurance, indicating the lawfulness of military action taken against Da'esh/ISIL in Syria in 'the collective self-defence of Iraq'[137] and thereby offering that as an equally adequate legal justification for the airstrike.

For present purposes, the upshot of these developments is that they expose the deeply fraught questions surrounding the lawfulness of such action, and indeed the awkward reality for the UK Government seemingly intent on following the trail blazed by the US in its aggressive military response to the contemporary terrorist threat. Above all, the UK Government's interpretation of the international legal framework relating to the use of armed force—and therefore, by extension, any such 'policy' of targeted killing it might be seen to have developed—is found wanting. In its inquiry into the Government's use of drones, the JCHR reiterated that

> When dealing with an issue of such grave importance, taking a life in order to protect lives, the Government should have been crystal clear about the legal basis for this action from the outset. They

[133] HC Deb 26 September 2014, vol 585, cols 1360-66.

[134] See, eg, JCHR (n 63); ISC (n 3); All Party Parliamentary Group on Drones, *The UK's Use of Armed Drones: Working with Partners* (July 2018) 25 <http://appgdrones.org.uk/wp-content/uploads/2014/08/INH_PG_Drones_AllInOne_v25.pdf> accessed 21 January 2019.

[135] Bhuta (n 9).

[136] JCHR (n 63) [3.50].

[137] Letter from the UK Permanent Representative to the UN to the UN Security Council (7 September 2015).

> were not. Between the statements of the Prime Minister, the Permanent Representative to the UN and the Defence Secretary, they were confused and confusing.[138]

It is of particular significance, however, that the Committee was ultimately willing to 'accept that in extreme circumstances such uses of lethal force abroad may be lawful, even outside of armed conflict':

> Indeed, in certain extreme circumstances, human rights law may even impose a duty to use such lethal force in order to protect life. How wide the Government's policy is, however, depends on the Government's understanding of its legal basis. Too wide a view of the circumstances in which it is lawful to use lethal force outside areas of armed conflict risks excessively blurring the lines between counter-terrorism law enforcement and the waging of war by military means, and may lead to the use of lethal force in circumstances which are not within the confines of the narrow exception permitted by law.[139]

The problem, fundamentally, is that in reality these issues can be seen to evince the broader undermining of the War Powers Convention, seemingly *as a matter of policy*. In other words, accepting that targeted killing could be lawful and thus legitimate albeit in 'extreme circumstances' would, in any such event, perhaps give a plausible explanation that the 'emergency exception' to Parliament's ex ante role in scrutinising the deployment of armed forces was in play. After all, targeted killing of this kind is inherently ad hoc and reactive, and so it is structurally always going to be an 'emergency' rather than a large scale action, very clearly calling into question whether the War Powers Convention will, of itself, ever be able to deal with this. The Committee's role, here, effectively entrenches the 'emergency' exception as, in fact, the norm, and thus shifts the otherwise clear expectation(s) of the War Powers Convention to one in which Parliament's role is merely to be consulted *after* the fact—indeed, when the horse has bolted, as it were.

B. 'Outsourcing' the Domestic Legal basis for Targeted Killing?

The case of Reyaad Khan thus offers several important insights as to the role of international law in "constitutionalising" the Government's targeted killing endeavours. As outlined above, in those circumstances the Government sought to justify its actions by covering as many plausible (international) legal bases as possible, to the point that they, in fact, directly contradicted one another. It may be, of course, that this simply suggests the Government's recognition of international law's overriding monopoly on the use of force. Though, that would perhaps be too generous a reading. Indeed, the precariousness of that reading is particularly exposed when considered, for instance, in the light of the absence since 2015 of the explicit commitment previously included in the Ministerial Code, that Ministers 'comply with the law *including* international law and treaty obligations'.[140] Rather, the distinct

[138] JCHR (n 63) [3.18].

[139] ibid [2.40].

[140] Cabinet Office, *Ministerial Code* (Cabinet Office 2010) [1.2] (emphasis added). The relevant section of the (latest) August 2019 version of the Ministerial Code thus now reads, simply, '[t]he Ministerial Code should be read against the background of the overarching duty on Ministers to comply with the law and to protect the integrity of public life': Cabinet Office, *Ministerial Code* (Cabinet Office 2019) [1.3].

emphasis by the Government on *quantifying* rather than *qualifying* the international legal basis of its actions is perhaps more convincingly explained, therefore, as an attempt to *mis*use international law for domestic political (constitutional) purposes. Those purposes, again, include legitimising by "legalising" the exercise of power—here the royal prerogative power to deploy UK armed forces abroad—the relevant constitutional position of which is, in practice, deeply ambiguous.

The Government's practice suggests that it is only seriously willing to make the case for the targeted killing of terrorist suspects (including those of British nationality) in *overseas* locations. The question which presents itself, as the corollary of this, is whether the constitutional position of targeted killing is entirely contingent on the *international* dimension of that action—whether, in other words, the *international* dimension of a targeted killing operation is, of itself, ultimately determinative of the extent to which the Government's targeted killing policy may be legitimately implemented as a matter of UK constitutional law. If this is the case—and indeed it *does* appear to be the case—it results in a peculiar state of affairs in which the domestic legal basis, plainly an essential factor in establishing the constitutionality of the Government's targeted killing endeavours, has, in effect, been "outsourced" to the international legal framework.

This has a number of significant implications for the nature and extent of the Government's targeted killing policy, particularly where the target of that counter-terrorism action is a British national. The potential for the Government to engage exclusively in international legal argumentation ultimately obscures questions of fundamental *domestic* legal and constitutional import, not least as to whether the Government is or could be empowered within the UK constitution to target and kill British citizens, albeit for the purposes of counter-terrorism. In (not so improbable) circumstances involving the absence of unequivocal, even persuasive, international legal justification, the key question is: might the Government be willing, indeed constitutionally *able*, to rest its targeted killing counter-terrorism strategy on an entirely *domestic* legal basis? This question necessitates consideration of the interaction between primary sources of the constitution, that legal basis being, again, as a matter of orthodoxy, the royal prerogative; the exercise of that power being subject the terms of the War Powers Convention, as a constitutional arrangement of a politically binding character; and the broader constitutional commitment to the principle of the rule of law.[141] Notwithstanding the courts' customary light-touch scrutiny of prerogative powers relating to national security,[142] it stands to reason that a legal power derived from an undemocratic source of the constitution, conferred upon the executive, to execute individuals, including those of British nationality, cannot readily be squared with a broader constitutional commitment to the rule of law.

The interaction between domestic and international legal frameworks on the use of force thus produces an anomalous outcome in the scheme of the UK's constitutional arrangements and, particularly, the position of the Government's targeted killing policy within those arrangements. Namely, the Government is constitutionally empowered to act in a particular way *outside* of the UK's jurisdiction that it seemingly is not (or, at least, would not appear to

[141] That commitment having been placed on a statutory basis: Constitutional Reform Act 2005, s 1.

[142] *Liversidge* (n 21); *Burmah Oil Co Ltd* (n 21); *Council of Civil Service Unions* (n 23).

seriously contemplate) *within* that jurisdiction. In other words, the Government's approach to targeted killing has been to imply that it is constitutionally legitimate to target and kill its *own* citizens in foreign jurisdictions, without judicial oversight, whether or not as part of an ongoing armed conflict situation, where to do so within the UK would likely be widely considered unconstitutional, and give rise to the risk of criminal responsibility on behalf of those involved in the targeted killing operation.[143]

Since the circumstances of the targeted killing of Reyaad Khan, in practice the Government now routinely seeks to justify its increasing reliance on the use of (armed) drones with reference principally to *international* law. In 2016, the response of Penny Mordaunt, as then Minister for the Armed Forces, to oral questions in the House of Commons about the lawfulness of the Government's policy on targeted killing is paradigmatic of this approach:

> We have been very clear that this is *guided by international law*. Where there is an identified, direct and immediate threat to the United Kingdom, and where we have no other means of dealing with it, we reserve the right to use force.[144]

Indeed, that statement is now reflected in the latest version of 'CONTEST', which confines to one short paragraph the Government's willingness to resort to lethal force for the purposes of counter-terrorism:

> We are clear that where we identify an imminent threat to the UK, which could include a terrorist threat, we will take lawful action to address it. Lethal force would only be used as a last resort when all other options have been exhausted, and we would always do so *in accordance with international law* and report to Parliament *after we have done so*.[145]

This statement perhaps speaks to a broadly orthodox account both of the availability, in law, of the right to use force and of the relationship between (and priority accorded to) domestic and international legal frameworks on the use of force within the UK's constitutional arrangements. It is, after all, a truism that questions concerning the lawfulness of the use of force (including targeted killing) in international law are ultimately independent of questions as to the propriety or legitimacy of legal and/or constitutional arrangements in accordance with which that use of force is authorised on the domestic plane.[146] Equally, international legal questions are customarily treated as non-justiciable by domestic courts in the UK.[147] And so in this sense, the Government's exclusive emphasis on international legal justification may signal a broader attempt to evade domestic legal accountability for the implementation of its targeted killing policy.

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[143] See, eg, Simon Gardner, 'The Domestic Criminal Legality of the RAF Drone Strikes in Syria in August 2015' [2016] Crim LR 35.

[144] HC Deb 27 June 2016, vol 612, col 15 (emphasis added).

[145] *CONTEST* (n 80) [283] (emphasis added).

[146] *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 14, [263]; Colin RG Murray and Aoife O'Donoghue, 'Towards Unilateralism? House of Commons Oversight of the Use of Force' (2016) 65 ICLQ 305, 306.

[147] *Campaign for Nuclear Disarmament v Prime Minister & Others* [2002] EWHC 2777 (Admin), [2003] LRC 335.

That the statement is silent as to the domestic legal arrangements relating to the initiation of and accountability for the use of force may, however, be read as perpetuating a more consequential state of affairs with important constitutional ramifications. This involves, in effect, the "outsourcing" of those arrangements to the international legal framework. The Government's willingness to be 'guided by international law' thus potentially serves above all as a means to evade domestic constitutional accountability in terms of parliamentary oversight, but also questions about the authority structures in which these powers exist. Again, the international legal framework is ignorant as to the domestic process on which the lawful engagement of that framework ultimately depends. To wave all of this away as simply a matter of international law is, consequently, to shift the locus of legal authority for the use of force onto the legal framework which governs interstate armed conflict (that is, the 'jus ad bellum'). Indeed, that framework is to be preferred to international human rights law (IHRL)—which nevertheless also applies to the state-sponsored deprivation of life *outside* of armed conflict situations—for it allows for a greater degree of latitude in the (lawful) use of lethal force; IHRL subjects the deprivation of life to more stringent conditions, imposing upon the state the obligation to prove that the use of lethal force falls within a limited scope of possible derogations from the protections afforded to the targeted individual.[148]

The constitutional implications of this are most starkly illustrated in circumstances where (as in the case of Reyaad Khan) the targeted individual is a British citizen. For, in fact, the individual's status as a British citizen is ultimately rendered inconsequential within the framework relating to interstate armed conflict. The conduct of international relations between states is, from a constitutional perspective, a matter for the Government alone, exercising political judgment.[149] And so a seemingly anomalous state of affairs is established in which the Government's actions appear to imply that it is constitutionally legitimate to target and kill its *own* citizens (albeit for the purposes of counter-terrorism), whether or not as part of an existing armed conflict situation, without domestic judicial oversight, so long as this takes place in a foreign jurisdiction—simply "out there" or "somewhere other" than the UK. Ultimately, very dubious assumptions of constitutionality flow from the question of legality in this instance. On one hand: better, it seems, to argue that the power to target and kill (say, by drone-strike) a British citizen, albeit for the purposes of counter-terrorism, derives from and is conditioned by the international legal framework rather than the royal prerogative. The former, ostensibly founded on mutual respect for the sovereignty of individual nation-states, the principle of reciprocity, and so forth, seemingly confers a level of democratic legitimacy upon such an egregious power (and its use) which the latter, an ancient, undemocratic source of the constitution, plainly cannot achieve alone. Yet, on the other hand, the key point is that domestic political accountability mechanisms are shown to have very little, if any, impact on these issues. Rather, the Government's framing of the targeted killing of terrorist suspects as an essentially *international* legal issue radically suppresses very important questions about the authority structures, and mechanisms of political accountability, within the domestic constitution.

[148] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 2; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 6.

[149] *R (Gentle) v Secretary of State for the Home Department* [2008] UKHL 20, [2008] AC 1378 [24].

V. CONCLUSION

This chapter has shown that the UK Government's targeted killing 'policy'—indeed, whether or not the Government would publicly acknowledge the existence of such a policy—is above all contingent on the international dimensions of the contemporary terrorist threat. The constitutional implications of this are striking. For this has produced an intensely controversial state of affairs, whereby a critical source of the domestic constitutional legitimacy of the Government's targeted killing counter-terrorism policy—that is, its *domestic* legal basis—appears to have, in effect, though perhaps by design, been "colonised" by the international legal framework which governs the use of force.

On one hand, there are clear benefits to exploring these issues from the distinctive perspective of political constitutionalism. One important benefit, for instance, is that political constitutionalism provides critical resources with which to explore an evident felt need amongst institutional actors in the UK—certainly in this context as much as any—to legitimise-by-"legalising" the exercise of power. It is from this critical perspective that an important dynamic can clearly be seen to emerge: that very dubious assumptions as to the constitutionality of targeted killing can be seen to flow from the emphasis on its (purported) legality. Thus, when contrasted with 'legal' constitutionalism, from which perspective international law—inasmuch as domestic law—would perhaps readily accept the former as a discrete source of legal authority for the actions of domestic institutional actors, a political constitutionalist approach gives cause to distrust the democratic credentials of that ostensible source of authority.

Yet, equally, these issues ultimately raise a number of important questions concerning a potential weakness of political constitutionalism as an explanatory tool. For what has been described in this chapter as the effective "outsourcing" of the domestic legal basis for targeted killing leads also, and equally, to the writing-out of the constitutional 'picture' in this context the domestic political accountability and authority structures within which these powers exist. That, in other words, all of this increasingly takes place *outside* of a democratic framework very clearly creates problems for an explanatory approach which espouses the essential constitutional—and constitution*alising*—role of democratic politics. It is perhaps also unclear whether a policy of targeted killing of terrorist suspects *could* be (re-)accommodated by or within domestic accountability arrangements, and particularly whether, and if so to what extent, the ostensible democratic politics of this process are truly of the sort embraced in political constitutionalist theory. Indeed, one possible solution is to reinvigorate existing arrangements, most obviously those instituted by the War Powers Convention: in other words, to do this 'better'.[150] Perhaps, alternatively, only an Act of Parliament—a 'War Powers Act'—conferring on the UK Government an explicit legal power to engage in targeted killing operations, or alternatively prohibiting such action altogether, is the only means to truly democratise the exercise of state power in this context. Whatever the answer, it is clear, in the meantime, that the current state of affairs is deeply unsatisfactory from a

[150] See, eg, Fikfak and Hooper (n 12) ch 5, in which a range of solutions aimed at what the authors term 're-arming Parliament' and 'fostering politics' under the current (War Powers Convention) arrangement are considered.

democratic perspective. The key point to note here, however, is this: it is only with the broader set of critical resources which political constitutionalism provides—that is, above and beyond a narrow and problematic emphasis on legality and rule-of-law lip service—that these fundamental democratic issues are properly given the attention that they deserve.

Conclusion

Through exploring the various ways in which the insights of political constitutionalism are brought to bear on counter-terrorism law and policy in the UK, this thesis makes three key contributions to constitutional studies. First, the thesis has shown the utility, and contemporary relevance, of political constitutionalism as providing a distinctive perspective on the inter-relation of (constitutional) law and politics in the UK. Secondly, the thesis has shown that this perspective highlights a number of key themes of the UK's contemporary counter-terrorism response(s) in particular, and as such can be seen to deepen our understanding of counter-terrorism law and policy in practice. And thirdly, the thesis has shown how various contemporary developments in UK counter-terrorism law and policy in turn generate important insights for the potential development of the theory of political constitutionalism itself.

1. The Utility of Political Constitutionalism

A key argument developed throughout this thesis is that political constitutionalism has particular value as an *explanatory* lens through which to explore the role(s) and inter-relation of law and politics in and of the UK constitution: one which emphasises, fundamentally, and thus provides key conceptual resources with which to critique, the contestability and contingency of constitutional law and legal norms in particular contexts. Political constitutionalism can thus be seen, above all, to provide a vital corrective to legalistic analyses which otherwise foreground and (over-)emphasise the practical significance of such legal norms within these contexts. Rather, it emphasises the inherently political character of constitutional law: that 'constitutional law does not stand above politics: they are two sides of one coin'.[1] And as such, it entails an approach to the study of the constitution which recognises that the exercise of power by the state is sustained by a broader political discourse, within which law operates as one—albeit important—*form* of political interaction, but is political nonetheless.[2] The classic expression of this point is John Griffith's: 'politics is what happens in the continuance or resolution of … conflicts [within a political community] … [a]nd law is one means, one process, by which those conflicts are continued or may be

[1] Keith Ewing, 'The Politics of the British Constitution' [2000] PL 405, 436.
[2] JAG Griffith, 'The Political Constitution' (1979) 42(1) MLR 1, 20.

temporarily resolved'.[3] One must be distrustful, Griffith argued, of the capacity of law and legal norms, in and of themselves, to resolve the many and various questions and conflicts and tensions which provoke political debate: '[o]ver-simple, conservative diagnosis of our ills—that minority Governments have too much power and need to be restrained by written constitutions and a supreme court, and the rest—take us no step nearer the resolution of conflicts or at least their voluntary containment'.[4] Nor, equally, 'will we find even temporary solutions in appeals to reference points like social solidarity, the conscience of mankind or justice or fairness or fundamental legal principles': indeed, these 'cannot be guidelines for legislative or administrative activity, because such principles, in their application to particular situations, are the very questions which divide not unify opinion'.[5]

In many ways this might simply be considered to represent the application of political constitutionalism in a *conventional* sense—that is, as a *normative critique* of 'legal' constitutionalism, of 'law', of the judicial process, and so on. In Chapter 1, the potential limitations of the particular normative dimensions of political constitutionalism were shown to have been the focus of growing criticism in the academic literature. It suffices to reiterate here that the premise of the so-called 'normative turn' in the development of the theory of political constitutionalism—most directly associated with the work of Adam Tomkins[6] and Richard Bellamy[7]—has been perceived to involve the distortion of Griffith's core arguments in 'The Political Constitution', engendering, moreover, an 'oppositional narrative' within contemporary constitutional scholarship, whereby UK constitution is bifurcated into two *competing* 'models' of constitutional accountability: 'legal' and 'political'.[8] In this rendition, political constitutionalism is said to represent a 'model' constitutional arrangement which posits the parliamentary process as the most normatively desirable means by which constitutional actors—including, most obviously, the executive—may be 'limited' in the exercise of political power. The justifications for this are typically given in terms of Parliament's effectiveness and democratic legitimacy vis-à-vis the (alternative) judicial process, both as a means of enhancing the liberty of the individual in a political community, and of valorising the republican and/or collectivist potential of political decision-making. Yet, in this sense, political constitutionalism's normative critique of legal constitutionalism is thus said to ground an approach to constitutional studies which caricatures both 'law' and 'politics', and archetype 'legal' and 'political' institutions (courts and Parliament, respectively): 'the political constitution' is distinguished from, and crucially locked in opposition with, 'the legal constitution', and ultimately presented as a highly stylised view of "the good constitution" in which politics trumps law.

The argument in this thesis engages with, and thus responds to, this (mis)characterisation of political constitutionalism. Specifically, this thesis has shown that political constitutionalism's distinctly critical approach to the role (and especially the limits) of law in

[3] ibid 20.
[4] ibid 20.
[5] ibid 20.
[6] See, especially, Adam Tomkins, *Our Republican Constitution* (Hart Publishing 2005).
[7] See, especially, Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (CUP 2007).
[8] See, eg, Martin Loughlin, 'The Political Constitution Revisited' (2019) 30(1) KLJ 5; Aileen Kavanagh, 'Recasting the Political Constitution: From Rivals to Relationships' (2019) 30(1) KLJ 43.

specific constitutional contexts can be seen to have particular and enduring value, above and beyond, that is, the ways in which this approach has been developed in the work of Tomkins and Bellamy, for instance. Above all, such an approach need not be seen to espouse the necessary *exclusion* of law and legal argumentation, and by extension the courts or the common law more generally, from such contexts. Leaving to one side the question of whether or not that were even possible, rather the key point is that in showing the limits of law as a means of conditioning the exercise of political power, one can obtain an understanding of how the constitution 'works' in practice. Political constitutionalism has value, therefore, as a critique of the *explanatory* potential of 'legal' constitutionalism, crucially revealing the balance of power as it *actually* exists in specific, real-world (as opposed to hypothetical or abstract) contexts. The key benefits of this approach are shown throughout its application in this thesis: it explains that, certainly in those counter-terrorism contexts explored here, political institutions not only typically overcome any legal obstacles which might prevent the exercise of power in certain (often controversial) ways, but also that the legitimating structures of law and legal argumentation can be, and are, exploited as a means to justify such uses of power.

Of course, it is important to note the potential pitfalls to this approach, including, perhaps, that an essentially descriptive mode of study of the UK constitution might appear to strip the constitution of its values. Indeed, it is one thing to accept the ebb and flow of democratic political decision-making as a viable explanation for the contestability and contingency of the constitution—that, ultimately, 'the constitution is no more and no less than what happens'.[9] And yet, in the context of counter-terrorism as much as any, in which the standard democratic justifications for the exercise of power are very often tenuous, there is clearly scope to question the extent to which this might 'threate[n] to cloak irresponsible, unaccountable and even authoritarian government power in the reassuringly respectable garb of the British constitutional tradition'.[10] Political constitutionalism thus has a distinct explanatory value, but this, of itself, can be seen to reveal key tensions which themselves might not be easily resolved by mere description. Though, crucially, once these tensions are revealed, political constitutionalism provides a broader set of analytical resources—beyond, that is, legal norms such as the rule of law and principle(s) of legality—against which (normative) critique of these tensions can be better developed.

2. Key Themes of the UK's Contemporary Counter-Terrorism Response(s)

A second key contribution of this thesis is that in bringing the critical insights of political constitutionalism to bear on various contemporary developments in UK counter-terrorism law and policy, two key substantive themes can be seen to emerge.

[9] Griffith (n 2) 19.
[10] Kavanagh (n 8) 49.

(i) Political constitutionalism as a critique of legalism and the 'language' of rights

The first theme can be seen very clearly to emerge from the discussion in Chapter 2 ('Deprivation of Liberty'). In that chapter, it is argued that there are a number of compelling reasons to be sceptical about whether the various stages of the development of a modern era of 'executive detention' in the UK can be seen to represent a 'vindication' of the Human Rights Act 1998 per se, and of the contemporary human rights paradigm more generally. Rather, the most convincing reading of the role of the HRA (specifically, and human rights paradigm more broadly) in that context, it is argued, is that of its having inculcated in the process of establishing the constitutional position of (counter-terrorism) deprivation of liberty the *language* and, ultimately, the *legalism* of the human rights discourse. Thus, drawing on the now well-established 'democratic scepticism' scholarship which has grown up in this particular area of the counter-terrorism literature (especially in Keith Ewing's work), the chapter argues that the HRA/human rights law has had an *obscuring* rather than *consolidating* effect on the constitutional position of deprivation of liberty: the centrality of rights-discourse has seen the increasingly artificial, legalistic distinction between 'deprivation' and mere 'restriction' of liberty, under art. 5 of the European Convention on Human Rights, entrenched as the guiding principles by which debates surrounding the constitutional position of 'liberty' are to be settled.

Indeed, a sceptical approach to human rights is a perennial theme of political constitutionalist theory—one which, again, can be seen to resonate with the key insights of Griffith's 1978 Chorley Lecture. The contemporary salience of Griffith's insights are striking, not least in the context of counter-terrorism deprivation of liberty. For as Griffith wrote:

> In [a] political, social sense there are no over-riding human rights. No right to freedom, to trial before conviction, to representation before taxation. No right not to be tortured, not to be summarily executed. Instead there are political claims by individuals and by groups. One danger of arguing from rights is that the real issues can be evaded. What are truly questions of politics and economics are presented as questions of law.[11]

A key contribution of this thesis, therefore, is that it highlights an area of contemporary constitutional practice in which the danger that Griffith describes—crucially from the perspective of 'the political constitution'—has materialised: questions of politics—that is, the appropriate constitutional position of 'liberty'—are, in this area, presented as questions of law, with very tangible consequences. Egregious measures involving, for instance, 12-hour curfews and forced relocation (up to 200 miles from one's family and home life), subject only to very low procedural thresholds, have in effect been judicially sanctioned under the HRA, and thus allowed to take root as a permanent feature of the contemporary counter-terrorism framework, all the while purporting to 'comply' with core international human rights obligations.

[11] Griffith (n 2) 17.

(ii) The futility of the common law, and the contingency of rights-protection

A second, though related theme (to the aforementioned) is that of the futility of the common law, which is shown to emerge, in particular, in Chapters 3 and 4. As discussed in Chapter 3 ('Deprivation of Privacy'), the common law's historic, and indeed ongoing approach to the protection of privacy has been to resist the development of a negative right against interference by public authorities. The common law's inadequacy as a source of legal protection of privacy in the UK, not least in areas of counter-terrorism law and policy, which involve often far-reaching invasions of privacy, therefore means that the constitutional position/protection of privacy is above all contingent, in practice, on the operation of the HRA/ECHR. In particular, the right to private and family life under art. 8 of the Convention has done much—indeed, more than anything else—to leverage a significant level of protection of (the right to) privacy in the UK, which, plainly, without it would not exist. Though this, consequently, has perpetuated a legal approach to the protection of privacy, which is evinced both at the domestic and supranational levels, in overwhelmingly *formal* or *procedural* terms: key developments in the legal protection of privacy have focused primarily on the relevant procedural safeguards, eschewing any real engagement with the substance of privacy, and the freedom(s) that they concept ought to be taken to encompass.

A broader theme for which these issues can be seen to contribute a compelling evidence base is that of the (in)compatibility of common law constitutionalism, as a conceptual grounding for the constitutional position of privacy, with the 'legal' constitutionalism of (what might be described as the inherently '*legal*' order of) the ECHR. Indeed, the common law's abject record in the context of privacy perhaps reflects a fundamental clash between 'legal' and 'common law' constitutionalism: that the common law has neither the conceptual tools for developing, much less enforcing, a repository of 'fundamental' constitutional rights—especially any such right which might be brought to bear on the protection of privacy. Rather, this is a limitation of the domestic courts' self-proclaimed 'broad brush'[12] approach to the protection of privacy, which relies primarily on the application of first principles of the rule of law, and which very clearly sets itself apart from the ECtHR's otherwise textual and technical approach to the relevant legal safeguards required under art. 8(2). Quite how, though, if at all, the rule of law comes down on the protection of privacy, per se, is entirely unclear. As also discussed in Chapter 3, in cases involving extraordinarily wide powers of (suspicionless) stop-and-search, neither the rule of law nor the derivative principle of legality were found to have any bearing on the lawfulness of those measures in any substantive sense. And while in the *Privacy International* litigation,[13] rule-of-law principles were used to carve out a key area of substantive protection in the legal framework of surveillance powers, it fails to convince that this might properly be regarded as a victory for the protection of privacy, per se, whether in principle or, more importantly, in practice. In

[12] [2003] UKHL 53, [2004] 2 AC 406 [33].

[13] *R (on the application of Privacy International) v Investigatory Powers Tribunal & Others* [2019] UKSC 22, [2019] 2 WLR 1219.

both contexts, the general truth of the common law's failure to protect privacy in and of itself holds true.

As noted above, the futility of the common law also links thematically to the discussion in Chapter 4 ('Deprivation of Property'). That chapter has shown that key tensions in and of the domestic and international law and politics of asset-freezing arise at their point of intersection in the domestic constitution in various, significant ways. And yet, several examples are highlighted which all point, fundamentally, to the incapacity of the rules, principles and standards of review developed in the common law to adequately resolve those tensions. In particular, Parliament's response to the decision in *HM Treasury v Ahmed*,[14] essentially involving a reversal of a judicial decision by a political institution, can perhaps be read as a stark example of the 'end-point' of legal/common law constitutionalism. Indeed, judicial demands for clear(er) legislative authority may, in principle, be read as having some justificatory value, perhaps even—as is so often reiterated by the courts—as a means of buttressing (rather than undermining) the democratic credentials of the parliamentary political process.[15] And yet, given that such demands have not only consistently been met, but that Parliament has invariably provided for a domestic legal basis which far exceeds, both in nature and scope, that which came before, there is plainly little, if any, role for the common law to play beyond this point.

3. Challenges for (the Development of) Political Constitutionalism

There are thus many compelling insights to be gleaned from the theory of political constitutionalism, not least when it is applied to particular circumstances as a distinctive explanatory lens. Though, equally, and crucially, it is also a key argument of this thesis that practice—specifically, in this case, counter-terrorism law and policy—can be seen to throw up key challenges for the theory. And so whilst political constitutionalism has value as a distinctive lens through which to explore contemporary constitutional developments, when tested in hard contexts such as those explored in this thesis, the limitations of an approach which typically espouses the virtues of democratic governance, seldom its vices, are very clearly exposed. Two key challenges which emerge across a number of chapters necessitate particular inquiry: the continuing value of political constitutionalism depends on the extent to which it responds to, and thus potentially resolves, these challenges.

(i) The role/status of international law and politics in the domestic constitution

The first challenge for political constitutionalism concerns its approach to key tensions in the intersection of international and domestic law and politics, and the implications of those tensions for, and within the specific context of, domestic constitutional arrangements. Indeed, these tensions feature as a distinctive issue particularly in Chapters 4 and 5. In relation to the former, as noted above, it is the incapacity of the rules, principles and standards of review developed in the common law to adequately resolve these tensions which emerges as a key

[14] [2010] UKSC 2, [2010] 2 AC 534.
[15] See, eg, ibid [157] (Lord Phillips).

issue in and of the complex constitutional position of asset-freezing. A key example is that, far from vindicating the UK Supreme Court's principled stance in *Ahmed*, it was, in reality, *international* law/politics which forced Parliament to overturn the decision in that case, there being a legal obligation (within the UN Charter regime) for the UK to comply with the asset-freezing mandates under UNSCRs 1267 and 1373. Thus, whatever 'victory' might be claimed by or for the common law, here—in its forcing a further intervention from Parliament (that is, to provide the requisite legal authority)—the key point is that any such 'victory' ultimately achieved nothing to diminish the basic constitutional reality of the UK's dualist approach to international law: that executive action at the international (UN) level extends to the deprivation of 'fundamental' rights in ways that are untouched, *in practice*, by domestic legal arrangements. There is in the international arena, after all, an effective inversion of the (legal and political) hierarchy between Parliament and the executive which the principle of legality is liable to obscure: ultimately, it is the executive which 'speaks' for the UK on the international stage, not Parliament.

In Chapter 5 ('Deprivation of Life'), the international/domestic dynamic plays out in the context of the War Powers Convention, and the role that these arrangements appear to have carved out for international law as an ostensibly self-standing legitimating factor in uses of force where, crucially, domestic legal authority (for such a course of action) is itself ambiguous. This theme creates scope for a key critique of political constitutionalism itself—that is, of how that framework conceives the *status* of international law in the domestic constitution. This is a key area in which the development of the theory of political constitutionalism might potentially generate new insights, not least insofar as the theory principally frames the inter-relation of law and politics exclusively in *domestic* terms. Moreover, there is a fundamental conceptual point to contend with, here: that of political constitutionalism's distinctive conception of law as denoting politics simply 'by some other means'. Thus, when contrasted with 'legal' constitutionalism, which would naturally perceive international law—inasmuch as domestic law—as a discrete source of legal authority for the actions of domestic institutional actors, a political constitutionalist approach to the role of international law, as effectively denoting *international politics* 'by some other means', raises a number of questions as to the democratic credentials of those politics, not least where they can be seen to penetrate domestic sites of political deliberation. The way in which the UK Government frames the issue of targeted killing of terrorist suspects ultimately as an *international* legal issue, as discussed in Chapter 5, thus potentially exposes the weakness of political constitutionalism as a lens through which to explore these dynamics. Rather, domestic political accountability mechanisms are shown to have very little, if any, impact in terms of counteracting the Government's effective "outsourcing" of the legal basis for targeted killing. And so not only does this reveal that very dubious assumptions as to the constitutionality of such action are being made on the basis of its (purported) legality; it shows that very important questions about the authority structures within which these powers exist are being radically suppressed.

A number of questions are thus raised as to how these issues could be (re-)accommodated within the domestic constitution, and how this process would or could be conceptualised from a political constitutionalist perspective. For instance, one political constitutionalist response has been to call, simply, for 'better' designed (political) schemes of accountability—the

ongoing debate as to the capacity of the War Powers Convention to organise domestic use-of-force-authorisation arrangements presenting as one key example in this respect.[16] Perhaps there is scope to reinvigorate Parliament's scrutiny role under the Convention, for instance by limiting the circumstances in which the seemingly ever-expanding 'emergency' exception can be used to justify the bypassing of ex ante parliamentary debate on the use of drones. Alternatively, perhaps an Act of Parliament—a 'War Powers Act'—conferring on the UK Government an explicit legal power to engage in targeted killing operations, or alternatively prohibiting such action altogether, is the only means to truly democratise the exercise of state power in this context. Whatever the answer, it is clear that the current state of affairs is deeply unsatisfactory from a democratic perspective. If, indeed, it should continue, a radical reimagining of the theory of political constitutionalism, recognising the constitutional impact of such novel, if increasingly unconventional modes of political contestation, is required.

(ii) The 'empowering' dimensions of the constitution

In foregrounding democracy as an empowering/legitimating force in the UK constitution, political constitutionalism has been shown to offer a vital corrective to liberal-legalist constitutional analyses which unduly focus on the constitution's capacity to *limit* or *constrain* the exercise of state power. Yet, the theme of empowerment highlights another, potentially important, challenge for political constitutionalism itself. That is, there is scope to critique the various ways in which the constitution, or a particular constitutional arrangement, can be seen to empower state actors, even, if perhaps especially, in ways which might be considered *undesirable* from a democratic perspective. For instance, it is plainly a matter of fundamental democratic import that there exists within the UK constitution a legal power sourced in the royal prerogative, which can be, and is, used to target and kill British terrorist suspects, *without* domestic legal or political oversight. The inter-relation between the relevant law and politics in these circumstances are such as to empower the state in this way. And yet, there are a range of factors in this single example of very dubious (if any) democratic legitimacy: the fact that the domestic legal power derives from an anachronistic source of monarchical power; the absence of political oversight; the bare fact that it involves the arbitrary deprivation of life by the state, contrary to all manner of core international human rights standards. Each of these factors raise important questions as to how any of this might (if at all) be reconciled by/with political constitutionalism, which typically eulogises the constitutional—and constitution*alising*—role of democratic politics.

Indeed, these questions perhaps speak more broadly to a fundamental tension underpinning an approach to the study of the constitution which recognises as 'constitutional' that which simply 'happens'—and indeed that the same must be true, equally, where 'nothing happens'. Whilst, in other words, this might be a valuable approach to understanding how the constitution *actually* 'works', there is perhaps no way of distinguishing, from this perspective, between 'a failed process or mechanism of political accountability and one which has operated as it should'.[17] Political constitutionalism provides a necessary reminder

[16] See, eg, Veronika Fikfak and Hayley J Hooper, *Parliament's Secret War* (Hart Publishing 2018).
[17] Paul F Scott, *The National Security Constitution* (Hart Publishing 2018) 148-49.

that in a constitutional democracy political power is not only constituted but continuously *re*-constituted, and sustained by a broader, ongoing and unpredictable political discourse. A key question facing those who would seek to develop the theory, therefore, is whether there is very much to be gained from (over-)theorising the 'politics' of political constitutionalism in increasingly abstract terms. Before any such further stage in the development of the theory is explored, there should be a pause to (re-)consider the legitimating role of democratic politics within the practice of the political constitution. For as this thesis has shown, there is in fact a murky, deeply unedifying side to democratic politics, which is liable to legitimate uses and potential abuses of power, and which deserves critical attention as a result.

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