DENNING SOCIETY LECTURE, LINCOLN'S INN
27 NOVEMBER 2024

NATIONAL SECURITY AND HUMAN RIGHTS

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1. My main theme tonight will be the impact of European human rights law on our national security over the past half century or so. I shall venture some conclusions at the end about whether our national security has benefited from a human rights framework and, which is not quite the same thing, whether it is likely to benefit from continued adherence to the European Convention of Human Rights. But I start by establishing a baseline: the limited influence of law on national security as it stood in the heyday of Lord Denning, in whose honour we meet and who was described by Lord Bingham, at his memorial service in 1999, as "*the best-known and best-loved judge in the whole of our history*".

LORD DENNING AND NATIONAL SECURITY

2. Shortly after midnight on 26 September 1963, Her Majesty's Stationery Office bookshop in London opened its doors to a long queue of people. They had been awaiting publication of Lord Denning's report of his inquiry into the Profumo Affair. 4,000 copies were sold in the first hour, and 100,000 over the next few days. Denning had been asked "*to consider any evidence there may be for believing that national security has been, or may be, endangered*". This was a reference to the fact that the 19-year-old Christine Keeler was believed to have been conducting sexual relationships at the same time with John Profumo, Secretary of State for War, and the Russian intelligence officer Captain Ivanov.

3. Denning's report was the first official document to reveal the existence of MI5, otherwise known as the Security Service. Describing it as "*a relatively small professional organisation charged with the task of countering espionage, subversion and sabotage*", he noted that the Service had no basis in statute or in common law. There was an obscure mandate known as the Maxwell Fyfe Directive, which required MI5 to communicate to the Home Secretary any suspicions that a public figure such as

a senior Minister was a security risk. This requirement was intended to ensure its political accountability. But MI5 had made no such communication – even when it learned that Christine Keeler had been asked to obtain information from Profumo about the delivery of atomic secrets to West Germany.

4. In his report, Denning declined to censure the Service for what others have characterised as a breach of its mandate.[1] He deftly wrapped his defence of MI5 in the language of human rights, or in the terminology of the day, civil liberties. Emphasising the intimate background to MI5's information rather than its security implications, he wrote:

> "We are, I suggest rightly, so anxious that neither the police nor the Security Service should pry into private lives, that there is no machinery for reporting the private lives of Ministers. … It is perhaps better thus, than that we should have a 'police state'."[2]

The Security Service, he concluded, had not exceeded the terms of its mandate and indeed had taken "*all reasonable steps to see that the interests of the country were defended".*

5. A protective approach to the apparatus of state security, carefully framed in the language of civil liberties, was seen also in Lord Denning's best-known judgment on an issue of national security: the *Hosenball* case of 1977.[3] Mark Hosenball, an American journalist who was to become known in this century for helping expose the network of CIA black sites in Eastern Europe, was at the time working for the magazine Time Out in London. With the British investigative journalist Duncan Campbell, he had written an article called "The Eavesdroppers" about the government's secret signals intelligence agency, GCHQ. The Home Secretary, Merlyn Rees, ordered his deportation. Rees had consulted with a three-person advisory panel, but Hosenball was given no details of how he was said to threaten national security. He complained that his right to a fair process had been denied.

6. Lord Denning, presiding over the Court of Appeal, agreed that Hosenball "*was not given sufficient information of the charges against him so as to be able effectively to*

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1 See K. Ewing, J. Mahoney and A. Moretta, MI5, the Cold War and the Rule of Law, OUP 2020, ch 14.

2 Report, National Archives ref. BS 28/84 p. 174 para 283.

3 R v Secretary of State for the Home Department ex p Hosenball [1976] 1 WLR 766.

deal with them or answer them." That, he accepted, was a denial of natural justice that would be sufficient to annul any ordinary decision.

7. But, he went on, this was no ordinary case. He said:

> "There is a conflict here between the interests of national security on the one hand and the freedom of the individual on the other. The balance between these two is not for a court of law. It is for the Home Secretary. … He is answerable to Parliament as to the way in which he did it and not to the courts here."

Modern judges accord great respect to ministerial decisions on issues of national security, a point recently underlined by the Supreme Court in the case arising out of the decision of a later Home Secretary, Sajid Javid, to refuse Shamima Begum leave to enter the United Kingdom.[4] But the *Hosenball* judgment went further still, and effectively abdicated judicial accountability altogether.

8. Lord Denning's comment that the Home Secretary remained answerable to Parliament is less reassuring than it may sound, for Parliament had no access to the classified information which had prompted the decision to deport. So it was in no position to hold the Home Secretary meaningfully to account for this or any other decision based on secret intelligence.

9. Anticipating that objection, Denning had a stirring response:

> "In some parts of the world, national security has on occasions been used as an excuse for all sorts of infringements of individual liberty. But not in England. Both during the wars and after them, successive ministers have discharged their duties to the complete satisfaction of the people at large. … They have never interfered with the liberty or the freedom of movement of any individual except where it is absolutely necessary for the safety of the state."

Lord Denning's pride in the nation that he had defended on the First World War battlefields of northern France thus found expression in a very high degree of trust in unaccountable authority, and in British (or English) exceptionalism. The heart may be sympathetic, but the head can hardly agree.

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4 *R (Begum) v Secretary of State for the Home Department* [2021] UKSC 7.

10. A darker illustration of the same attitude was seen in the *McIlkenny* judgment of 1980, in which Denning struck out a civil action that had been brought against the police by convicted pub bombers, the Birmingham Six. He commented that if the convictions of those Northern Irishmen turned out to be erroneous:

> "… the Home Secretary would have either to recommend that they be pardoned or he would have to remit the case to the Court of Appeal … This is such an appalling vista that every sensible person would say, 'It cannot be right that these actions should go any further.'"[5]

Denning's faith in the police turned out to be unfortunately misplaced. The murder convictions of the Birmingham Six were later shown to have been miscarriages of justice, caused by police misconduct. Similar disastrous errors were found in other terrorism-related convictions of the mid-1970s – the Guildford Four, Judith Ward and the Maguire Seven. It is thanks to the influence of later legislation, the Police and Criminal Evidence Act 1984 and the disclosure provisions of the Criminal Procedures and Investigations Act 1996, that 21st century terrorism trials have not been similarly disgraced by miscarriages of justice.

THE IMPACT OF HUMAN RIGHTS

11. I come now to my main theme: the impact of human rights law on national security over the past fifty years.

Excesses and Oversight

12. Lord Denning's deference to the government and the police on national security issues was of its time: but that time was coming to an end. Already by the end of the 1970s, any post-war tendency to rest unqualified trust in those charged with protecting national security was diminishing across the English-speaking world – and with some reason.

13. The best-known abuses of intelligence-gathering on the western side of the Cold War were in the United States. In 1974, the journalist Seymour Hersh published information linking the CIA to the assassination of foreign leaders, to the

[5] *McIlkenny v Chief Constable of the West Midlands* [1980] QB 283, 323C-D.

illegal surveillance of thousands of U.S. citizens and to the human experimentation programme MK Ultra, whose unconsenting targets included mental patients, prisoners and drug addicts, together with military personnel, doctors and members of the public.

14. Under one particularly colourful operation, running in the 1950s and 60s and known evocatively as MIDNIGHT CLIMAX, female sex workers were paid to lure men to safehouses where they were served cocktails laced with LSD and fed subliminal messages. After fulfilling the purpose of their visit, the men were questioned by the women, who had been trained for the purpose by the CIA, in order to test their susceptibility to betraying secrets. It seems to have been assumed that the men would be too ashamed, or perhaps too contented, to make any complaint. The overseer of this operation, George H. White, later wrote of his intelligence career:

> "I toiled wholeheartedly in the vineyards because it was fun, fun, fun. Where else could a red-blooded American boy lie, kill and cheat, steal, deceive, rape and pillage with the sanction and blessing of the All-Highest? Pretty good stuff, brudder."[6]

I wonder what Lord Denning would have made of that. Nor did the CIA limit itself to countering the threat from communism. The search for possible foreign influence on domestic protest movements caused it to engage in surveillance of Martin Luther King and his family, anti-Vietnam protestors such as Jane Fonda, and even the women's liberation movement.

15. The investigation into these abuses by the Church Committee in 1975 led to major and lasting improvements: in particular, the establishment of the powerful Senate Committee on Intelligence, which still oversees the US Intelligence Community, and the FISA Court which issues judicial warrants for surveillance operations within the United States.

16. British intelligence work was less flamboyant in its excesses – though George H. White's words find an echo in those of Peter Wright, MI5's scientific officer during the same period, who described in his notorious memoir, Spycatcher, how

[6] Letter of 1971 to Sidney Gottlieb, quoted in Troy Hooper, "Operation Midnight Climax: How the CIA Dosed SF Citizens with LSD", SF Weekly, 14 March 2012.

> "we bugged and burgled our way across London at the state's behest, while pompous, bowler-hatted civil servants looked the other way".

The high reputation enjoyed by British intelligence work during the Second World War, together with the acute demands of the ongoing conflict in Northern Ireland, meant that moves towards stricter oversight were slower than in the United States. By the end of Lord Denning's judicial career in 1982, neither MI5, MI6 nor GCHQ was even recognised in law. Until the creation of the Intelligence and Security Committee in 1994 allowed privileged access to some MPs and peers, parliamentary scrutiny of the secret world was informed only by occasional reports of judges and of other trusted proxies such as the Independent Reviewers of Terrorism Legislation and their predecessors.[7]

The European Human Rights System

17. Since then much has changed; and the European Convention of Human Rights has played a significant role.

18. Strongly influenced by the UN's Universal Declaration of Human Rights of 1948, the Convention – in force since 1953 – protects what is by modern standards a rather conservative list of civil and political rights. A few are absolute, notably the Article 3 right not to be subjected to torture or to inhuman or degrading treatment. Most are qualified, including the right to liberty, the right to respect for private and family life, and the freedoms of expression and assembly. Restrictions on those freedoms may be justified if they are both founded in law and a proportionate way of protecting national security or achieving some other important policy objective.

19. Article 15 permits contracting States to derogate from most of the rights, to the extent that is strictly required, in time of war or other public emergency threatening the life of the nation. The UK exercised this option during the Troubles in Northern Ireland, and in response to the danger from al-Qaeda after the attacks of 9/11 – when it was the only Council of Europe state to do so.[8]

20. The European Court of Human Rights in Strasbourg issues judgments by which the 46 contracting states – all the countries of Europe except for Belarus, and Russia which was expelled in 2022 – have agreed to be bound. One Judge is elected on behalf of

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7 D. Anderson, "The Independent Review of Terrorism Laws" [2014] Public Law 403-421.

8 *A and others v UK*, Grand Chamber, 19 February 2009, para 180.

each State by the 306 national parliamentarians who sit on the Parliamentary Assembly of the Council of Europe. Quality control is assured by national procedures charged with producing a list of three suitable candidates, who are then vetted by an Advisory Panel of Experts and examined prior to the decisive vote by the Assembly's Committee on the Election of Judges. (As an aside, for anyone who might be interested in succeeding the outgoing UK Judge, Tim Eicke of Lincoln's Inn, our own national procedure is about to re-open: applications will be accepted by the Judicial Appointments Commission from Monday of next week.)

21. In each of the past three years, the UK has had the smallest number of Strasbourg cases brought against it, per head of population, of all the 46 contracting States. Only one judgment was given against the UK last year.[9] At the end of 2023, just 12 judgments against the UK remained to be complied with: the same number as Germany, around a third as many as France and Spain, a tenth of the Polish figure and a twentieth of the total for Italy.[10]

22. Judgments of the Court are enforced by the Committee of Ministers, in which ambassadors from each State meet every three months to monitor the implementation of judgments, and issue decisions or resolutions when more needs to be done. One has only to attend these meetings, as I often do, to see that the States are not generally inclined to give each other an easy ride. Though there is a serious problem of non-compliance with judgments, it is concentrated on a few States: Ukraine, Turkey, Romania, Bulgaria, Italy, Azerbaijan and Hungary are responsible for 70% of the cases under "*enhanced supervision*" – the most urgent, important or complex cases.[11]

23. With almost 700 million people eligible to make applications, the Strasbourg Court does not have the capacity to be a tribunal of first instance. National courts are required to afford effective remedies of their own. Here, the Human Rights Act 1998 of course allows our courts to apply the Convention for themselves, and to quash the rulings of decision-makers if necessary.

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9 European Court of Human Rights, Annual Report 2023, 2024, pp. 111-112.

10 Council of Europe Committee of Ministers, Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights, 2023, April 2024, p.111.

11 Council of Europe Committee of Ministers, Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights, 2023, April 2024, Chart C.7 and p.165.

24. Nothing in the Human Rights Act displaces the sovereignty of Parliament to legislate as it thinks fit. But where Convention rights are in issue, the Act does allow our courts to interrogate the exercise of that sovereignty. By section 3, which would have been removed by Dominic Raab's recent Bill of Rights Bill, they can strive to read statute consistently with the Convention. If that is impossible, judges of the High Court and above may make a declaration of incompatibility under section 4. That does not block the application of the contested provision, in the case at hand or any other case, but serves as an invitation to bring it into line with the Convention. It is for the government, and ultimately for Parliament, to decide whether to do so.

The Impact of Human Rights on National Security

25. What impact has this body of human rights law had on the law and practice of national security in the United Kingdom?

26. The great majority of human rights judgments, both in Strasbourg and in our own courts, give the United Kingdom government a clean bill of health. Challenges to the breadth of terrorism offences, to police procedures and to far-reaching executive powers are often brought but usually fail. Such judgments do not simply represent disaster averted: they can be positively helpful to the authorities in the battle for public opinion. Take the recent ruling of the European Court, based on meticulous study of the evidence, that the bulk interception of cross-border communications, for example by GCHQ's interception of trans-oceanic cables, is "*of vital importance to Contracting States in identifying threats to their national security*".[12] This took wind from the sails of those who believed this practice to be both sinister and pointless, and helped shift the terms of the debate.

27. Yet human rights have had a significant impact: not in preventing the use of valuable capabilities or powers, but in ensuring that their use is appropriately safeguarded. That impact is constitutional in nature. By requiring the State and its agencies to account to Parliament and to the courts, human rights law has ended the tradition of total executive control and transformed the national security landscape as it was understood in Lord Denning's day.

[12] *Big Brother Watch v UK*, Application no 58170/13 and others, Grand Chamber, 25 May 2021, paras 338, 347, 424.

(1) Democratic licence to operate

28. I start with the requirement of parliamentary authorisation – what has been described as a democratic licence to operate.[13] This requirement derives from the fact that powers which intrude on human rights can be justified under the Convention in the interests of national security, but only if they are exercised "*in accordance with the law*".[14]

29. This does not mean that techniques of spycraft, still less the details of secret operations, must be made public. It does mean that the bodies exercising those powers must be lawfully established. As the historian Michael Howard explained in 1985, this was not traditionally the case in Britain:

> "In Britain the intelligence and security services have always been regarded in much the same way as intra-marital sex. Everyone knows that it goes on and is quite content that it should, but to speak, write or ask questions about it is regarded as extremely bad form. So far as official government policy is concerned, the British security and intelligence services do not exist. Enemy agents are found under gooseberry bushes and intelligence is brought by the storks."[15]

The CIA had been a creature of statute since 1947; but it was not until the late 1980s and 1990s, that our own intelligence agencies followed suit. MI5 had long desired this outcome, which its Director General Sir Antony Duff thought would resolve uncertainties about the legal status of various capabilities and assist in recruitment.[16] But faced with resistance from Mrs Thatcher, it was a case brought in Strasbourg by Harriet Harman and Patricia Hewitt that proved decisive. They had been subject to surveillance because of a past connection with the National Council of Civil Liberties, now known as Liberty. They argued that their MI5 files were held by an organisation that was neither legally constituted nor democratically accountable, and Strasbourg agreed.[17] There followed the Security Service Act 1989, with its ingeniously-worded

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13 RUSI, A Democratic Licence to Operate, July 2015.

14 See also e.g. Article 5 "*in accordance with a procedure prescribed by law*"; Article 10 "*prescribed by law*".

15 Quoted in Christopher Andrew, The Defence of the Realm – The Authorized History of MI5 (2009), p.753.

16 *Ibid.*, pp. 753-768.

17 *Harman and Hewitt v UK*, Application 12175/86, Commission Report of 9 May 1989.

provision that "*there shall continue to be*" a Security Service. In 1994, MI6 and GCHQ were placed on a similar statutory basis.[18]

30. A democratic licence to operate applies not only to *institutions* but to *powers*. Where there is intrusion into individual rights, the European Convention requires the law to indicate with reasonable clarity the scope of the governing power and the manner in which it can be exercised.

31. This is not something that, without being able to apply the Convention, our own judges felt able to say. Mr Malone, an antique-dealer in Dorking, discovered that his confidential telephone conversations had been monitored by the Post Office as part of a criminal investigation. The High Court decided in 1979 that his phone had been lawfully tapped, despite the fact that there was no clear basis for the practice, and no adequate and effective safeguards against abuse. Vice-Chancellor Megarry did say that these things would be highly desirable. But in the meantime, he said, phone-tapping by the State can be lawfully be done, "*simply because there is nothing to make it unlawful*". As *individuals*, we are indeed proudly free to do anything that the law does not prohibit. But it took the European Court[19] to remind us of a truth later underlined by our own judges:[20] that *public bodies* are in the opposite position, unable to act without clear legal authority, particularly when their actions intrude upon individual rights.

32. The continuing significance of that principle is seen in the Investigatory Powers Act 2016, with which I had some involvement.[21] State powers that had never previously been avowed – for example, to hack into servers and mobile phones – were publicly admitted in the run-up to the Bill, in the knowledge that they were liable otherwise to be declared unlawful as lacking the necessary clear legal authority.

33. The results of this openness have been overwhelmingly positive. As I wrote at the time, recalling the leaking by Edward Snowden of highly classified intelligence material and the furore that it caused around the world:

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18 Security Service Act 1989, s1(1); Intelligence Services Act 1984, ss1(1), 3(1).

19 *Malone v UK* [1984] ECHR 10.

20 *R v Somerset CC ex p Fewings* [1995] 1 WLR 1037.

21 In particular through my reports A Question of Trust (2015) and Report of Bulk Powers Review (2016); see further my Independent Review of the Investigatory Powers Act 2016, 2023.

> ‘The post-Snowden environment was characterised by mutual mistrust between the privacy and security lobbies, often expressed in emotional accusations: of deceit, snooping and scorn for democracy on one side, disloyalty and lack of patriotism on the other. At the root of this discord was an absence of reliable public knowledge about the true nature of intrusive capabilities that were exercised under vague and dated laws. The extensive disclosure that accompanied the draft Bill brought a measure of enlightenment to the debate. Those well-worn epithets, Orwellian and Kafkaesque, are still wheeled out from time to time, but serious commentators have moved on to serious questions: where is the operational case for this power; why should there not be further safeguards on that one.”[22]

34. Obscure or inadequate laws corrode democracy because neither the public to whom they apply, nor even the legislators who debate and amend them, fully understand what they mean.[23] Transparency, or translucency as it is sometimes called in this context, gives covert powers the legitimacy that they require if they are to retain the assent of Parliament and of the public in the long term.

35. The contrary instinct towards secrecy still survives, and no doubt always will. It has been described by Ciaran Martin, the former Director of the National Cyber-Security Centre at GCHQ, as the “*Ronan Keating doctrine*” – a reference to a line from Keating’s haunting (though to my mind slightly sinister) number one hit, “You say it best when you say nothing at all”.[24] But as Martin himself has said, to take refuge in the Ronan Keating doctrine

> “ignores the lessons the Five Eyes alliance learned painfully from the Edward Snowden leaks: that when a crisis comes, it helps if there is some general understanding in political and media circles about the sorts of activities digital spies undertake, and why”.[25]

36. The comprehensive and comprehensible legal regime that now governs investigatory powers was crafted to meet the constraints imposed by the European Convention. It has been praised as world-leading by a UN Special Rapporteur on the Right to Privacy[26]

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[22] D. Anderson, “Shades of Independent Review” in Counter-terrorism, Constitutionalism and Miscarriages of Justice: A Festschrift for Professor Clive Walker (eds. G. Lennon, C. King and C. McCartney, Bloomsbury, 2018).

[23] D. Anderson, A Question of Trust (2015), 13.31.

[24] Paul Overstreet and Don Schlitz, “When You Say Nothing At All” (1988).

[25] Andrew Dwyer and Ciaran Martin, “A Frontier without Direction? The UK’s Latest Position on Responsible Cyber Power”, Lawfare blog, 22 August 2022.

[26] End of Mission Statement of the Special Rapporteur on the Right to Privacy at the Conclusion of his Mission to the United Kingdom of Great Britain and Northern Ireland, June 2018.

and has in all essential respects survived legal challenge.[27] But more than that, it has been an important factor in securing both our data adequacy agreement with the European Union – an essential precondition for data transfers between public and private bodies alike – and, in particular, our ground-breaking Data Access Agreement with the United States. In force since October 2022, this allows UK law enforcement to access data held in the US, including by the large tech companies over whose platforms communications increasingly travel, for the purpose of preventing, detecting, investigating and prosecuting serious crimes.

37. This highlights another, crucial advantage of the openness urged on us by Strasbourg. Because the interception of electronic traffic catches the communications of people outside our jurisdiction, and may indeed by principally intended to do so, its proper disclosure and safeguarding is a vital pre-condition for intelligence cooperation with other States. The democratic licence to operate helps keep us safe as well as free.

(2) Judicial supervision

38. The other constitutional impact of human rights law on national security concerns accountability in the courts: the application of judicial supervision to decision-making by the executive and – though much more lightly – the legislature.

39. Parliament is often asked to pass significant new laws in the aftermath of a major attack or national security scare. The Explosive Substances Act 1883, which passed through Parliament in a single day at the height of the Fenian dynamite campaign in London, has stood the test of time. Other measures have not. Very occasionally, the courts have declared that laws of this kind are not proportionate – or, in the language of the Convention, necessary in a democratic society.

40. In its *Belmarsh* judgment of 2004, described by one scholar as the high-water mark of domestic judicial interventionism in relation to counter-terrorism,[28] the Judicial Committee of the House of Lords heard a challenge to a power to detain indefinitely foreign nationals who could not be tried or deported. They declared the power to be incompatible with the right to liberty under the Convention. The law had been

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27 *R (National Council for Civil Liberties) v SSHD* [2023] EWCA 926.

28 Adam Tomkins, "National security and the role of the court: a changed landscape?" (2010) 126 LQR 543-567.

rushed through Parliament in the weeks after the 9/11 atrocities, when terrorism was chiefly associated with foreigners. It was held to be arbitrary because no equivalent provision had been made to deal with the threat from our own citizens.[29]

41. Six years later, in *Gillan and Quinton v UK*, the European Court of Human Rights went further than our own courts and declared a different provision – the no-suspicion stop and search power in section 44 of the Terrorism Act 2000 – to violate the Convention because it was "*neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse*".[30]

42. One does not need to be a starry-eyed human rights campaigner to approve both the *Belmarsh* and the stop and search rulings: they each brought practical benefits to those entrusted with defending our national security.

43. The Government chose to react to the *Belmarsh* decision by repealing the provisions declared to be incompatible and replacing them by the power to issue control orders and similar measures: severe restrictions on the movement and association of terrorist suspects which fell short of outright detention but, which, unlike the power at issue in the Belmarsh case, can be applied regardless of nationality.[31] These measures have proved their worth in a small number of serious cases, most of them involving British citizens who could never have been detained under the old Belmarsh scheme.

44. As to stop and search, the then Home Secretary Theresa May responded to the European Court's ruling by repealing section 44 in response to the European Court's ruling, and replacing it by a power that could only be used in areas where it was reasonably suspected that an act of terrorism would take place.[32] Section 44 was used around a million times in the 10 years of its operation, including 250,000 times in a single 12-month period – but without a single terrorism conviction resulting. At the start of the last decade section 44, precisely because of its wide and indiscriminate reach, was the single most controversial element of our counter-terrorism law.[33] Its value was not to law enforcement, but to those who sought to

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29 *A v SSHD* [2004] UKHL 56; see also its sequel *A v UK* (ECtHR 19 February 2009).

30 *Gillan and Quinton v UK*, ECtHR 12 January 2010.

31 Prevention of Terrorism Act 2005; Terrorism Prevention and Investigation Measures Act 2011.

32 Terrorism Act 2000, section 47A.

33 A mantle subsequently assumed by other measures of potentially wide application: Schedule 7 to the Terrorism Act 2000 and the Prevent strategy.

spin a narrative of oppression in order to radicalise British Muslim communities. After its repeal, I made a habit, when visiting senior police officers, of asking whether they missed section 44. Not one of them did so.

45. More routinely challenged in the courts are executive decisions addressed to individuals. Coercive national security powers, operating outside the criminal justice system, have multiplied since Mark Hosenball's deportation escaped judicial scrutiny. Passengers at ports and airports may be required to answer questions, on pain of prosecution.[34] Those believed by the Home Secretary to be involved in terrorism or foreign state threats may be subject to effective house arrest, sometimes far from their homes.[35] The citizenship of dual nationals may be removed, for no other reason than that the Home Secretary considers it conducive to the public good.[36] Indeed it is even possible to do this without informing them of the fact.[37] One can believe, as I do, that all those powers are necessary while seeing the equal need to subject their use to a measure of due process.

46. A combination of prodding from Strasbourg[38] and native ingenuity has produced a home-grown system which, though not perfect, goes a long way towards achieving this. The panel of three advisers, familiar from *Hosenball*, has been replaced by a more forensic process, in the form of a "*closed material procedure*" that allows the case against a subject or proposed subject of an executive constraint to be probed by a court or tribunal that has access to all the evidence, including intelligence which must be kept secret from the subject and from the general public.[39] The subject's interests are protected by a security-cleared special advocate who has also seen the closed

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[34] Terrorism Act 2000, Schedule 7; [equivalent state threats provision].

[35] Under so-called Prevention and Investigation Measures: Terrorism Prevention and Investigation Measures Act 2011; National Security Act 2023, Part 2.

[36] British Nationality Act 1981, s40(2), as substituted by the Immigration, Asylum and Nationality Act 2006.

[37] British Nationality Act 1981, s40(5A) and Schedule 4A, as inserted by the Nationality and Borders Act 2022.

[38] Notably in the case of *Chahal v UK*, 1996, Application 22413/93. See also *A v UK* (2009) 49 EHRR 625, in which the European Court insisted that the gist of the allegations be put to the subject, notwithstanding the reservations expressed by members of the judicial House of Lords in *SSHD v AF (3)* [2009] UKHL 28. The result has been an improvement in fairness, with only a limited loss of capacity to impose control orders and TPIMs.

[39] This procedure, originally developed after *Chahal* for the Special Immigration Appeals Commission to hear challenges to deportations and deprivations of citizenship, was given more general currency by the Justice and Security Act 2013.

material – though the closed part of the hearing takes place with the subject outside the court and the special advocate unable to take instructions.[40]

47. A particularly successful innovation has been the Investigatory Powers Tribunal, which was established in 2000 to provide an effective remedy, as required by Article 13 of the Convention, to anyone who believes their human rights may have been infringed by the intelligence agencies[41] – and which in addition adjudicates on complaints of unlawful surveillance by any public authority. The vast majority of complaints are rejected, but the procedures of the IPT were endorsed by the Strasbourg Court in *Kennedy v UK*,[42] and it did much to win the confidence of civil liberties groups during the Snowden years, when it ruled that until they were disclosed during the hearing, certain aspects of GCHQ's relationship with its American equivalent, the National Security Agency, had not been "*in accordance with the law*" as required by the Convention.[43]

48. The extent to which the courts should be allowed to decide matters touching on national security remains highly contested. For example, last year the House of Lords fought off a proposal in the National Security Bill that intelligence officials should be immune from prosecution under the Serious Crime Act 2007. That proposal was doomed as soon as Baroness Manningham-Buller, the former Director General of MI5, began her speech with the magnificent words:

> "… it seems to me that it is wrong in principle for members of the security and intelligence services to have immunity from the law."[44]

On the other hand, we succumbed to an Act which provides immunity to covert human investigation sources or CHIS who are asked to commit crimes in the course of their duty.[45] Even in this highly sensitive area, however, accountability exists where there was none before: the previous legal basis asserted for this power had been challenged

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40 Some procedural improvements, and the need for more resourcing, were identified by Sir Duncan Ouseley in his Independent report on the operation of closed material procedure in the Justice and Security Act 2013, 2022.

41 Including persons abroad, as a consequence of *Wieder and Guarnieri v UK* [2023] ECHR 668.

42 *Kennedy v United Kingdom* [2011] 52 EHRR 4.

43 *Liberty/Privacy No. 2* [2015] 3 All ER 212.

44 HL Hansard 11/1/23, col 1452.

45 Covert Human Intelligence Sources (Criminal Conduct) Act 2021. See Prof Graham Zellick KC, "Licence to kill: are those who work for MI5 and MI6 empowered to commit crimes?", lecture delivered at Draper's Hall, 4 November 2024.

in the Investigatory Powers Tribunal; and significant safeguards were added to the Bill as it went through the House of Lords.

49. Battles of this nature will no doubt continue to be fought, in the courts and in Parliament. But they are fought at the margins. The requirements of a democratic licence to operate and of judicial supervision, absent fifty years ago, are no longer seriously in dispute.

THE FUTURE

(1) Has national security been assisted by human rights?

50. I ask, finally, whether the preservation of our national security has on balance been assisted by the human rights framework within which it now operates, and whether continued adherence to the European Convention is a necessary part of that framework.

51. The first of those questions I answer with an unqualified yes. Some court decisions have undoubtedly been frustrating for Home Secretaries: in 2007, John Reid demanded "*a review of human rights laws in Britain and Europe*", on the basis that we were fighting crime and terror with "*one hand tied behind our back*". [46] But for perspective, his predecessor Charles Clarke had floated the idea of ending the right to jury trial in terrorist cases, declaring that he was "*not an absolute fan of the adversarial system of British justice*".[47] Whether they are classed as human rights or ancient liberties, protections for the suspect cannot be expected to operate without constraint or inconvenience to the authorities. The terrorist threat of the past 25 years has been addressed, for the most part successfully, without surrendering either human rights or trial by jury.

52. This matters. When young Englishmen behead journalists with medieval weapons, or target their bombs on innocent young concert-goers, their objective is to maximise our shock, and thus to generate strong reactions. Whether in the form of violent demonstrations or oppressive laws, these reactions can in turn be used to foment the

[46] Brendan Carlin, "John Reid calls for human rights law reform", The Telegraph, 17 September 2007.
[47] "Clarke touts terror trial change", BBC website 9 February 2005.

sense of grievance which can divide a society. So it was in Northern Ireland, where Bloody Sunday, internment and the Five Techniques enjoyed a deadly half-life as agents of radicalisation. In this century Islamist terrorism has tested the cohesion of our society – but thankfully, without breaking it. Human rights law has constrained the occasional tendency to disproportionate reaction, and demonstrated to the sceptical that we stand, however imperfectly, for principles worth defending – even if they are not always convenient to the State.

53. We live in a world of unfettered online discourse, suspicions and conspiracy theories – from which, across the Atlantic at least, even prospective government officials are not immune. The parliamentary and judicial accountability that is demanded by the European Convention both protects our liberties and helps build broader public trust in the guardians of our national security. The application of human rights has done little to hamper the fight against terrorism, and much to secure its legitimacy. It will continue to serve us well as our national security focus shifts back towards state threats and hybrid warfare, on our territory and in our minds.

(2) Is there advantage in continued adherence to the Convention?

54. The second question – whether there is advantage in continued adherence to the European Convention – is more contested, and not only on the outer fringes of politics.

55. In an article in the Spectator last year, the retired Supreme Court Judge Lord Sumption went beyond the position he had taken in his Reith Lectures of 2019 and made the case for leaving the Convention.[48] He recalled the long history in our law of similar rights to those guaranteed in the Convention, and took issue with what he saw as confused and exorbitant exercises of its jurisdiction by the Strasbourg court – in particular the Court's practice, not expressly authorised by the Convention, of issuing interim measures to state parties; the application of the Convention in foreign countries under the effective control of British forces; and what he described as "*the notorious Article 8*". "*We can have whatever rights we want*", he pointed out, "*if there is a sufficient democratic mandate for them*". The real purpose of the Convention is "*to make us accept rights which we may not want*", and we should simply withdraw from it.

[48] Jonathan Sumption, "Judgment call: the case for leaving the ECHR", The Spectator, 30 September 2023.

56. Lord Sumption's strictures on the Strasbourg case law may be open to question.

    a. The Court's practice of issuing interim measures, included in its rules from the outset and several times endorsed by the contracting States to the Convention, was designed to safeguard access to the court. The logic is that of Lord Denning, when he declared in the case of *Mareva* that whenever a right exists, the Court is able, in a proper case, to grant an injunction to protect that right.[49]

    b. The law on extraterritorial jurisdiction can be fairly criticised for its inconsistent development.[50] But there were no complaints from London when Russia was condemned for the activities of its agents who poisoned Aleksandr Litvinenko on British soil.[51] And on overseas military operations, a pragmatic approach was signalled by the Grand Chamber in *Hassan v UK*: the detention of foreign combatants was held to be compatible with Article 5 of the Convention so long as it was consistent with international humanitarian law as expressed in the Geneva Conventions.[52]

    c. As to Article 8, few would now say the Court over-stepped the mark when, in the *Smith and Grady* case of 1999, it interpreted the right to respect for private life as incompatible with the dismissal of armed forces personnel on the basis of their sexuality.[53] That, it should be noted, was a result which our own courts, prior to the entry into force of the Human Rights Act, had been unable to reach.

57. If those who propose and elect judges are ever unwise enough to stock the Strasbourg bench with those who lack the experience or the imagination to be truly impartial, the Convention system will no longer deserve our trust. That is a risk to which we should not be blind; but it is emphatically not where we are now.

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[49] [1980] 1 All ER 213. See also the Law and Disorder Podcast, "Should we leave the ECHR? With Jonathan Sumption", 19 October 2024.

[50] The UK intelligence agencies and relevant government departments said of this case law, in a meeting with the Independent Human Rights Act Review Panel on 21 September 2021, that it was "*difficult to determine its scope and how it might develop in future*" see IHRAR website.

[51] *Carter v Russia*, Application 20914/07, 21 September 2021. Ms Carter, Litvinenko's widow, was represented before the Court by a legal team led by Keir Starmer QC.

[52] *Hassan v UK*, Application 29750/09, 16 September 2014. Of interest will be the *Ukraine and Netherlands v Russia* case concerning the downing of MH17, currently pending with interventions from 26 Member States.

[53] *Smith and Grady v UK* (1999) 29 EHRR 493.

58. Lord Sumption echoes views expressed by the Labour Lord Chancellor William Jowitt, who told Attlee's Cabinet in 1950 that adherence to the Convention would jeopardise our whole system of law "*in favour of some half-baked scheme administered by some unknown court*", and "*seriously compromise the sovereignty of Parliament*". Sir Hartley Shawcross, Attorney General at the time, similarly dismissed the right of individual petition – which the United Kingdom did not accept until 1966 – as "*wholly opposed to the theory of responsible government*".[54]

59. Our adherence to the Convention is no doubt secure under the current Prime Minister, an experienced human rights advocate and respected writer on the subject. But each of his five Conservative predecessors expressed at least scepticism about our membership,[55] and the issue of withdrawal will no doubt come back at some stage. So let me offer four reasons why our national interest favours continued participation in the Convention system.

60. First, I am less convinced than Sumption that the rights of minorities can be adequately safeguarded by a Parliament which is both unconstrained by any code of constitutional rights and tightly controlled by the Executive. A democratic Parliament expresses the will of the majority – but electoral majorities under our system may be drawn from a small proportion of the population. As Lord Sumption has himself pointed out, we saw during the Covid pandemic how easy it was for the government to control almost every aspect of our public and private lives by regulations which could not even be debated before they were brought into force.[56] Due regard for minority rights depends on government being composed, in Peter Hennessy's phrase, of "*good chaps*":[57] not a reliable assumption in all possible futures.

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[54] See, generally, Anthony Lester in [1984] Public Law 46, 51-54. Lord Denning himself, opposing Lord Wade's proposed Bill of Rights in a House of Lords debate of 1976, remarked that the Convention "*uses high-sounding phrases and generalities, such as is common when the European countries legislate*", and warned that "*they can be brought into play by individuals who … may tend to disrupt and embarrass our society*", though in the same speech he reiterated his position, taken judicially in *Bhajan Singh* [1976] QB 198, that the Convention should be taken into account by our judges: HL Deb 25 March 1976, vol 369 cols 798f. See further Neil Papworth, "Lord Denning and the ECHR", NLJ 17 May 2024.

[55] See e.g. Nick Watt, "David Cameron prepared to break with Europe on human rights", The Guardian, 2 June 2015; Anushka Asthana and Rowena Mason, "UK must leave European convention on human rights, says Theresa May", The Guardian, 25 April 2016; Gordon Rayner, "Boris Johnson: UK needs referendum on ECHR", The Telegraph 3 October 2024; Adam Forrest, "Liz Truss 'prepared to withdraw' UK from European Convention of Human Rights", The Independent, 13 July 2022; "Sunak threatens to withdraw UK from ECHR if re-elected", Scottish Legal News, 12 June 2024.

[56] The resistance of the 2017-2019 hung Parliament to the government's wishes over Brexit was a highly exceptional episode: the previous executive domination has now been restored.

[57] See, e.g., Andrew Blick and Peter Hennessy, The Bonfire of the Decencies: Repairing and Restoring the British Constitution, 2023.

61. Secondly, our judges remain, as Francis Bacon characterised them in 1625, "*lions, but lions under the throne*". They have no power to override Parliament, and few would wish them to have it. But the rulings of the Strasbourg court bind us in international law; and our own judges can call Parliament out when that law is violated. A determined government could still ignore them: but without the friction provided by the Convention system, the subtle balance between political power and judicial influence would be upset, and not to our advantage.

62. Thirdly, continued adherence to the European Convention is a central part of our devolution settlement, particularly as regards Northern Ireland,[58] and of our Trade and Cooperation Agreement with the European Union. Part Three of the TCA governs EU-UK security cooperation, including access to DNA, passenger, vehicle and criminal records databases, extradition and participation in Europol and Eurojust. Those provisions may be immediately terminated on the day either party leaves the Convention or denounces its principles.[59] In the recent Conservative leadership campaign, Robert Jenrick urged withdrawal from the European Convention on Human Rights to "*protect the public and secure our borders*". But cooperation with our nearest neighbours is essential to both those objectives: to follow Jenrick's advice would prompt the removal of protections which a House of Lords Committee has described as "*vital for the protection of UK citizens*".[60]

63. My fourth and last reason is the most important of all. The Convention mechanism is valuable not just for its effects in the United Kingdom, but for its geopolitical significance.

64. The European Convention was forged in the aftermath of war, by governments who expressed in its preamble their "*profound belief in those fundamental freedoms which are the foundation of justice and peace in the world*". As despotism and illiberalism strengthen around the globe and a new war rages on the edge of our own continent, the world is engaged in a battle for hearts and minds – a battle which our national

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[58] See e.g. the Belfast Good Friday Agreement, Strand One section 5: "There will be safeguards to ensure that all sections of the community can participate and work together successfully in the operation of these institutions and that all sections of the community are protected, including … (b) the European Convention on Human Rights (ECHR) and any Bill of Rights for Northern Ireland supplementing it, which neither the Assembly nor public bodies can infringe, together with a Human Rights Commission …".

[59] TCA, Article 692.

[60] House of Lords European Union Committee, "Beyond Brexit: policing, law enforcement and security", HL Paper 250, March 2021, para 79.

security depends on winning. The Convention embodies what we fought for, what we still stand for, and the values that we have helped more than perhaps any other country to project across a once divided continent. To abandon it now would be to cast aside our compass in treacherous terrain, and to signal to newer democracies than ours that no compass is needed. That would be an act, I suggest, of the purest folly.

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