The Role of the Courts in Imposing Terrorism Prevention and Investigation Measures: Normative Duality and Legal Realism

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This article argues that the courts, not the Home Secretary, should be empowered to issue Terrorism Prevention and Investigation Measures (TPIMs). It explains that at the heart of the debate are three questions: whether measures like TPIMs should be viewed primarily from the perspective of security or liberty; how we should conceive the executive and the courts; and the empirical question of how these two arms of government answer these questions. The non-mechanistic nature of legal reasoning means that legal reasons may be constructed to fit one's normative viewpoint on each of the first two questions. Importantly, however, the case law on judicial scrutiny of control orders consistently demonstrates that the courts themselves regard TPIMs as being primarily a restriction on liberty, which require a fair hearing before an independent court. Whilst this does provide some protection of individual rights, the nature of law as an unfinished practice means that for stable *protection of individual rights judicial independence must be promoted and nurtured in both the legal* and *political realms. The failure of the Terrorism Prevention and Investigation Measures Act 2011 to vest the power to issue TPIMs in the courts thus represents a missed opportunity to secure political endorsement of enhanced legal protection of individual liberty in cases involving national security.*

Key words: TPIMs, legal theory, human rights, legal realism, normative duality

Introduction

In the past decade political scandals have been a commonplace. In the UK recent years have seen the Leveson inquiry's examination of the relationship between politicians and the press, the parliamentary expenses scandal, the cash for influence and cash for honours scandals, the 2003 invasion of Iraq and accompanying Dodgy Dossier, the Hutton inquiry into the circumstances surrounding the death of Dr David Kelly and the use of major events like 9/11 to try and bury bad news. At a time when the word politics has come to be associated with such words as scandal, sleaze and spin civil libertarians may feel that they have particular reason to feel disillusioned. Important victories in court cases involving anti-terrorism legislation have invariably been followed by Parliamentary or executive-led counter-challenges. The House of Lords' decision that the indefinite detention of foreign terrorist suspects was unlawful[1] was followed by the introduction of control orders, which applied to nationals and non-nationals alike. The

[1] *A (& others) v Secretary of State for the Home Department* [2004] UKHL 56.

practical upshot of the House of Lords' decision that the control orders in the *JJ* case[2] had been made unlawfully and so should be quashed was that the Government reduced the curfew period in the most onerous orders from 18 to 16 hours (JCHR 2008). And the Government's response to the ruling in *AF (No 3)*[3] was similarly "passive and minimalist" and not in keeping with the spirit of the decision (JCHR 2010: 18). Unsurprisingly, those concerned to promote and protect human rights have responded by emphasising the important role played by the judiciary. Aileen Kavanagh has commented that "More than any other factor, the legislative and executive response to terrorism post-9/11 must make uncomfortable reading for those who urge us to place our faith in parliamentary politics as a sure way of protecting rights in times of crisis" (2009b: 131). Even Conor Gearty has called on civil libertarians to "swallow whatever suspicions they might have had of the judges ('right-wing'; 'reactionary'; 'illiberal' etc) and recognise that the authoritarian tendency has made such advances recently that the judges have found themselves in the front line of the defence of freedom" (2007: 115). The focus of this article is on how civil libertarians should respond to this disillusionment.

Rights are statements of political conflict (Griffith 1979; Waldron 1999; Nicol 2006). They "express the resolution within society of situations of conflict between the interests of different members of society" (Halpin 1997: 264), and their value lies in their potential to "provide us with an understanding of the way in which the interests of individuals need to be justified as entitlements as against the interests of other individuals" (266). So determining the scope or stringency of particular rights is not an abstract exercise in logic or reason; it is an essentially political task. Recognition of this fact lies at the heart of dialogic theories of the Human Rights Act. These theories tend to be based around the courts' power to issue a declaration of incompatibility (Klug 2001; Clayton 2004; Nicol 2006; cf. Sales 2011). When a court issues a declaration of incompatibility, it generates a dialogue with other governmental institutions. Parliament will consider how, if at all, to respond to the declaration, and any response will then itself be subject to further judicial scrutiny. Importantly, genuine dialogue requires that the courts do not have an "interpretative monopoly" (Nicol 2006: 742). Genuine dialogue requires that the resolution of rights conflicts is a common enterprise.

Other forms of dialogue, not involving a declaration of incompatibility, are also possible under the Human Rights Act (Hickman 2005). This article focuses on one such example: the case law and legislation surrounding the role of the courts in the imposition of Terrorism Prevention and Investigation Measures (TPIMs). The courts' role in the imposition of control orders was fiercely debated prior to the enactment of the Prevention of Terrorism Act 2005, was the subject of litigation during the control order era, and was debated once again during the Parliamentary debates on (what is now) the Terrorism Prevention and Investigation Measures Act 2011 (TPIMA). Underlying this debate were three key questions:

[2] *Secretary of State for the Home Department v JJ & others* [2007] UKHL 45.
[3] *Secretary of State for the Home Department v AF (No. 3)* [2009] UKHL 28.

i. Whether to view TPIMs from the perspective of security or the perspective of liberty;

ii. How we should conceive the executive and the courts, the two institutions which could be entrusted with the power to issue TPIMs; and

iii. The empirical question of how the competence is actually exercised by whichever institution is doing so.

The first two questions raise a problem that I will refer to as "normative duality".[4] Often it is possible to present an entity in contrasting ways, selectively emphasising or neglecting particular attributes to fit a particular purpose. A person's choice of presentation will flow from their normative position. The first of the three questions listed above is a good example. TPIMs may be presented as being primarily a security measure which has incidental effects on liberty. Alternatively, they may be presented as being primarily a restriction on liberty which is imposed for the sake of security. How one resolves this dualism will be determined by one's underlying purpose.

The second of the three questions also raises the problem of normative duality. Each institution has both positive and negative associations. Whilst the courts are associated with neutrality, consistency and reasoned elaboration of determinations, they can also be portrayed as conservative, arcane and removed from political accountability. The executive, on the other hand, is associated with democratic accountability and legitimacy, but can also be presented as subjective, irrational, populist and majoritarian tyranny. The attributes which someone chooses to emphasise will flow from their normative standpoint. Someone who believes the Home Secretary should impose TPIMs is hardly likely to present the executive as biased and arbitrary, just as someone who believes that the responsibility should be vested in the courts will not emphasise the judiciary's lack of political accountability.

The third question focuses on institutional behaviour, examining how the institutions themselves resolve these two dualities. This empirical investigation necessarily feeds back into the two previous questions. As is well-known, the UK courts have traditionally deferred to the executive in matters involving national security. Whilst the courts adopted this attitude of deference it was very difficult, if not impossible, to argue that anti-terrorism powers should be viewed primarily as liberty-restricting measures which needed close scrutiny from an independent judiciary, for the courts themselves did not regard either the powers or their own role in this way. But, as we shall see shortly, the tide is now turning.

The article examines these three questions using a legal realist framework. Employing Brian Leiter's "philosophical reconstruction of Legal Realism" (Leiter 1997: 275), it shows that legal reasoning can be deployed in support of either resolution of both the security/liberty duality and the institutional duality dilemmas. In short, legal reasoning is rationally indeterminate and an inescapably political choice has to be made between the different possible outcomes. However, the article goes on to explain that legal

[4] Whilst the term is borrowed from Edley (1991), my use and application of the term is wider than his.

realism is not reductionist. There is a distinctive mode of legal reasoning which, together with the broader extra-legal influences that operate upon judges, results in consistency and predictability. The case law on judicial scrutiny of control orders provides a good example.

By highlighting the nature of law as an unfinished practice, the legal realist framework opens up discussion of the two ways in which civil libertarians might respond to their disillusionment with Parliamentary politics. The first way juxtaposes the courts (as protectors of liberty) with Parliament and the executive (as those who jeopardise liberty). This approaches depicts a malevolent Parliament and executive, whose attempts to erode individual rights are frustrated only by the protective efforts of the courts. Such a depiction is not only unduly simplistic (for a start, it was Parliament that introduced the Human Rights Act) but also counterproductive, for it resigns itself to Parliament and the executive always resolving both the security/liberty and the institutional duality dilemmas in a manner that is detrimental to individual rights. Civil libertarians' second possible response is to recognise that for *stable* protection of individual rights some sort of concordance between the different arms of government is necessary. This is illustrated by TPIMA's provisions on judicial scrutiny of TPIMs. For whilst Parliament accepted that the courts should subject TPIMs to intense scrutiny, it refused to recognise this in the wording of the legislation. In terms of both the security/liberty and the institutional duality dilemmas, this represents a missed opportunity to secure political endorsement of a rights-based resolution of these dualities. This is a vivid demonstration of how important it is that those concerned to protect and promote human rights eschew a negative view of politics and engage fully with political processes and debate.

Who should impose TPIMs? Issues of normative duality

In December 2011 the control order regime was replaced with a new system of TPIMs, governed by TPIMA. The principal changes made by the new system were: the ending of forced relocation; a new two year maximum duration (save in cases where fresh evidence comes to light); and an increase in the standard of proof from reasonable suspicion to reasonable belief of involvement in terrorism-related activity. The significance of these changes is a matter of dispute. While the Independent Reviewer of Terrorism Legislation has insisted that the TPIMs system is "a new rather than a rebadged model" (Anderson 2012: 10), others have suggested that the changes constitute mere "rebranding" (Middleton 2011).

The procedure for imposing TPIMs is more or less unchanged from the procedure for imposing a control order. The Home Secretary may impose TPIMs on an individual if the five conditions listed in section 3 of TPIMA are satisfied (conditions A – E). Condition E is that the Home Secretary has received prior permission from the High Court[5] (save

[5] The first four conditions are: the Home Secretary reasonably believes that the individual is, or has been, involved in terrorism-related activity; some or all of this activity is new terrorism-related activity; the

where she reasonably considers that the urgency of the case requires TPIMs to be imposed without prior permission[6]). At the permission hearing – which may take place in the absence of the individual, without the individual having had an opportunity to make representations to the court and/or having been notified of the application (s 6(4)) – the court's function is to determine whether the Home Secretary's decision that conditions A – D are met is obviously flawed (s 6(3)(a)), applying the "principles applicable on an application for judicial review" (s 6(6)).[7] Once the TPIM notice has been served on the individual the court must hold a directions hearing, at which it will give directions for a review hearing (s 8). The review hearing must be held as soon as reasonably practicable (s 8(5)).

At the review hearing the function of the court is to review the Home Secretary's decision that conditions A – D were met and continue to be met (s 9(1)), again applying the "principles applicable on an application for judicial review" (s 9(2)). At the review hearing the court has the power to quash the TPIM notice or specified measures within it and the power to direct the Home Secretary to revoke the TPIM notice or modify specified measures within it (s 9(5)). Although the hearing may include closed sessions – during which the interests of the individual are represented by a special advocate (paragraph 10 of schedule 4) – the House of Lords held in *Secretary of State for the Home Department v AF (No. 3)* that the individual must be given "sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations". If "the open material consists purely of general assertions and the case against the controlee is based solely or to a decisive degree on closed materials the requirements of a fair trial will not be satisfied, however cogent the case based on the closed materials may be".[8] This requirement was subsequently held to apply to all control orders, including so-called light-touch orders,[9] and the Government confirmed that it would apply to TPIMs proceedings.[10]

The roles of the courts and the Home Secretary in imposing TPIMs proved contentious during the Parliamentary debates on TPIMA. Some argued quite vociferously that the Home Secretary should not be empowered to issue TPIMs, but should instead apply to the courts for TPIMs to be imposed. At the heart of the debate were four sets of issues: expertise; democratic accountability; separation of powers; and, adjudicatory fairness. The third of these raises the question whether TPIMs should be viewed from the

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Home Secretary reasonably considers that TPIMs are necessary to protect members of the public from a risk of terrorism; and, the Home Secretary reasonably considers that it is necessary to impose the specified TPIMs on the individual to prevent or restrict the individual's involvement in terrorism-related activity.

[6] In such cases the TPIM notice must include a statement of urgency, and must be referred to the court immediately after it is served: see schedule 2.

[7] If the decision that condition A, B or C is met is obviously flawed, the court may refuse permission (s 6(7)). If the decision that condition D is met is obviously flawed the court may give permission but give directions as to suitable measures (s 6(9)).

[8] [2009] UKHL 28, [59] *per* Lord Phillips.

[9] *R (on the application of Secretary of State for the Home Department) v BC* [2009] EWHC 2927 (Admin).

[10] Hansard HL Deb vol 731 col 341 19 October 2011 (Lord Henley).

perspective of security or liberty, whilst the other three raise the question how we should conceive the executive and the courts. Examining these four sets of issues also reveals how the courts themselves now resolve the two dilemmas of normative duality.

The first set of issues is expertise. There are a number of civil preventative orders which are not imposed by the courts (Dennis 2012). A number of these are instead imposed by an expert decision maker or tribunal who is best able to assess the future risk posed by the individual and the appropriate response to it. Examples include statutory nuisance abatement notices, noise warning notices and planning stop notices.[11] Posner and Vermeule have argued that in matters of national security the executive is not only well-intentioned (even if occasionally wrong), but also has access to the fullest information and expertise. Therefore, as a matter of institutional competence, judges (who are "amateurs playing at security policy" (31)) should defer to the executive's balancing of security and liberty during emergencies (Posner and Vermeule 2007). This certainly resonates with the UK courts' traditional deference to the executive in matters involving national security. Even in the House of Lords' landmark decision in *A v Secretary of State for the Home Department*[12] the Law Lords were alarmingly deferential on the question whether there existed a public emergency threatening the life of the nation (Tomkins 2010b).

During the Parliamentary debates on TPIMA the Government insisted that "it must always be appropriate for the Secretary of State to frame the terms of the measure, given his or her role for national security and the expertise in their Department".[13] However, there are two difficulties with this. First, the Home Secretary's claim to relevant expertise must be treated with caution. Although the executive has greater access to expert evidence, experience has shown that this is commonly interpreted through a political lens, resulting in mistaken risk assessments (Ramraj 2005). Moreover, "the fact that Ministers function primarily in the realms of politics increases the danger that irrelevant considerations will be taken into account when acting in the 'quasi-judicial' context of a politician dabbling with the rights of individuals" (Walker 2010: 14-15). Noting examples of cases in which the executive has proven to be far from well-intentioned, Walker adds that claims to expertise appear feeble given that two "recent holders of the office of Home Secretary have been disarmingly but abjectly apologetic about their fitness for office" (14). Second, in recent years the courts have "developed a particular expertise and body of knowledge in this area of national security, among a small and experienced body of judges who hear these cases".[14] Significantly, the courts

[11] See, respectively: part III of the Environmental Protection Act 1990; the Noise Act 1996; and, part VII of the Town and Country Planning Act 1991. The first two are issued by Environmental Health Officers, and the third by Planning Officers. Other examples include Remediation Notices for contaminated land (part IIA of the Environmental Protection Act 1990) and notices controlling noise on construction sites (section 60 of the Control of Pollution Act 1974).

[12] [2004] UKHL 56.

[13] Hansard HC Deb Public Bill Committee Terrorism Prevention and Investigation Measures Bill Seventh Sitting col 221 30 June 2011 (James Brokenshire).

[14] Hansard HL Deb vol 731 col 346 19 October 2011 (Lord Henley).

themselves have come to recognize this expertise. The Supreme Court has stated that the nominated judges who heard control order cases are "properly to be regarded as expert tribunals in this difficult and sensitive field".[15] As the courts have developed this expertise they have subjected claims made in the name of national security to increasing levels of scrutiny, a trend which has been described as the "judicialisation of intelligence" (Walker 2011).

The second issue is democratic accountability. When former Home Secretary Charles Clarke first proposed the creation of the control order in 2005, democratic accountability was one of the principal justifications given for vesting the power to issue orders in the executive. He insisted that "Decisions in this area are properly for the executive, who are fully accountable to Parliament for their actions".[16] Six years later this same reasoning was deployed in the Parliamentary debates on TPIMA. "[The decision to impose TPIMs] should be made by a Minister responsible for national security, accountable to Parliament and the electorate, and open to challenge in the media"[17] claimed one peer, who continued:

> "Such a decision is subject to scrutiny by and in the courts but it is the Secretary of State who should make the decision. The Government, not the courts, will be held accountable for the top priority of protecting the public from terrorism. Governments, not judges, pay the price for failing to protect the nation from terrorism, and people look to their Government, not the courts, to protect them from acts of terrorism"[18]

However, this argument is double-edged. Whilst it is possible to emphasise the democratic legitimacy that emanates from political accountability, it is equally possible to emphasise the risk of subjectivity, irrationality, populism and majoritarian tyranny. Indeed, when the control order was first proposed the Joint Committee on Human Rights noted that both Charles Clarke and Tony Blair had been candid in admitting that they did not "want it to be possible for them to be accused of not doing more to protect the public in the event of a terrorist attack succeeding" (JCHR 2005: 6-7). Far from providing a reason why someone should be empowered to impose control orders (or TPIMs), the Committee suggested that this attitude, known colloquially within US government as CYA – cover your ass (Lustik 2006) – is in fact a good reason why the Home Secretary should not be the one to decide whether an order should be imposed.

Furthermore, it is hard to see why entrusting the courts with the power to issue TPIMs would negate the Home Secretary's democratic accountability. The Home Secretary

[15] *Secretary of State for the Home Department v AP* [2010] UKSC 24, [5] (*per* Lord Brown). See also the comments of Carnwath LJ in *AP v Secretary of State for the Home Department* [2009] EWCA Civ 731, [60].
[16] Hansard HC Deb vol 431 col 154 22 February 2005.
[17] Hansard HL Deb vol 731 col 308 19 October 2011 (Lord Rosser).
[18] Hansard HL Deb vol 731 col 309 19 October 2011 (Lord Rosser).

would retain the responsibility to apply for a TPIMs notice in cases where one is necessary to protect the public from a risk of terrorism, and would be responsible for ensuring that the application is sufficiently well-prepared to withstand the independent scrutiny of the courts. Should she fail in either of these duties, the electorate and the media would no doubt call her to account.

Third are a set of issues surrounding the nature of the decision to impose TPIMs and the separation of powers. Decisions as to whether something is or is not in the interests of national security have traditionally been regarded as a matter of policy, to be decided not by judges but by the executive.[19] The Coalition Government's counter-terrorism review concluded that imposing TPIMs is an executive action relating to national security (Home Office 2011), a view echoed by the former Independent Reviewer of Terrorism Legislation, Lord Carlile:

> "It seems to me that there is some confusion here among my noble friends and other noble Lords in their analysis of the roles of different parts of the state apparatus in the conduct of state business. In my judgment, for what little it is worth, the act of making a TPIM or a control order has exactly the character of ministerial responsibility that successive Home Secretaries … are able to carry out. What follows has exactly the character of judicial scrutiny which judges are extremely well able to carry out and are experienced in carrying out. It seems to me to be a clear part of our constitutional settlement and to fit within it very clearly"[20]

Others focussed instead on the effect TPIMs have on individual liberty. The Joint Committee on Human Rights argued strongly that since TPIMs interfere severely with individuals' liberty they should require prior judicial authorisation (2011). Lord Lloyd tabled an amendment to this effect at the Lords Committee stage, stating that "It is wrong in principle for punitive restrictions of the kind set out [in TPIMA] to be imposed on a British subject by a member of the Executive in time of peace. It is as simple as that".[21] But, in spite of some impassioned speeches in support of the amendment, it was withdrawn.

So here we encounter the security/liberty duality dilemma. While for some the decision to issue TPIMs is a national security decision best suited to the executive, for others it is a grave incursion on individual liberty most suitable for judicial determination. Similarly, when critics drew parallels with other civil orders which are imposed by the courts – such as anti-social behaviour orders, serious crime prevention orders, gang injunctions

[19] See, for example, *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153.
[20] Hansard HL Deb vol 731 col 301 19 October 2011 (Lord Carlile).
[21] Hansard HL Deb vol 731 col 291 19 October 2011 (Lord Lloyd).

and risk of sexual harm orders[22] – the Government pointed instead to other national security measures such as deportation, terrorist asset-freezing and financial restrictions which are imposed by the Home Secretary. The choice of analogy tended to follow the normative position, not the other way around.

One's normative position can also determine how one construes the demands of the separation of powers. In *Thomas v Mowbray*[23] the High Court of Australia considered in detail whether the power to impose a control order is properly regarded as a judicial power, in order to decide whether the control order regime infringed the constitutional separation of powers. In contrast to the UK Government, the Australian Government defended the constitutional validity of the regime by arguing that the power to issue control orders is, by its nature, judicial power. The Court accepted this argument by a majority of five to two. It explained that there are other examples of judicial power which create new rights and obligations (as opposed to adjudicating existing ones), and that there is no rigid rule that restrictions of liberty (falling short of a deprivation of liberty) may only be imposed by judicial order following an adjudication of criminal guilt. The Court then went on to hold that the legislation does not require the Australian courts to exercise judicial power in a manner that is inconsistent with the nature of judicial power. Here the majority emphasised that the criteria for making an order are not inherently too vague, since judges are familiar with such concepts as "reasonably necessary", and stressed that confirmation hearings take place in open court, applying the rules of evidence, with an opportunity for cross-examination and the burden of proof resting on the applicant.[24]

In the UK critics of control orders/TPIMs have called for greater judicial involvement, urging that imposing these measures is a "normal judicial function" (Fenwick and Phillipson 2011: 894). In Australia, on the other hand, critics of control orders lamented the High Court's decision that the power to issue control orders is judicial in nature. In their eyes, whether a control order should be imposed in a particular case is a question of policy. Requiring judges to decide such questions brings executive functions under the judicial umbrella, which in the longer term will cause (real or perceived) damage to judicial independence (Fairall and Lacey 2007). In response to such concerns, Gleeson CJ stated at the end of his judgment:

> "[T]he argument for the plaintiff is that the power involved in making anti-terrorist control orders is exclusively non-judicial and, in its nature, antithetical

[22] See, respectively: Crime and Disorder Act 1998; Serious Crime Act 2007; Police and Crime Act 2009; and, Sexual Offences Act 2003.

[23] (2007) 233 CLR 307. The High Court also had to decide whether the Australian control order regime is supported by one or more express or implied heads of legislative power under the Australian Constitution. For discussion of this point, see: Lynch (2008); Roos (2008); and, Saul (2008).

[24] Gleeson CJ also referred to the provision of documents ([30]). The joint judgment of Gummow and Crennan JJ was more circumspect on this point, given the possibility of withholding documents in the interests of national security ([122]-[125]).

> to the judicial function ... The corollary appears to be that it can only be exercised by the executive branch of government. The advantages, in terms of protecting human rights, of such a conclusion are not self-evident" ([17])

Whilst this passage appears to be at odds with the tenor of the rest of Gleeson CJ's judgment, and with some of the other majority judges' criticisms of the celebrated decision in the *Communist Party* case,[25] it does resonate with rights-based criticisms of TPIMs in the UK. As we shall see below, in this country the courts made it clear that Article 6(1) ECHR applied to all control order review hearings, including light-touch orders, since control orders invariably imposed restrictions on an individual's civil rights and obligations.[26] To meet the demands of Article 6(1) the courts subjected government decisions to intense scrutiny, even where they concerned national security. Turning the traditional view of the separation of powers on its head, they insisted that "If national security has to come to court, it follows not that the courts have to give way to claims made in the name of national security, but that claims made in the name of national security have to give way if they cannot satisfy the court" (Tomkins 2010a: 567). However the courts might once have resolved the security/liberty dualism dilemma, today it seems clear that courts in TPIMs review hearings regard the measures as primarily a restriction on liberty, imposed for the sake of security.

The fourth and final issue is adjudicatory fairness. Being unelected, judges enjoy an independence that the Home Secretary does not. Normative duality means that it is possible to present judicial decision-making in a negative light, as conservative, arcane and removed from political accountability. Conversely, it has been suggested that entrusting the courts with the power to issue TPIMs would in fact have some important benefits:

> "It is in constitutional principle correct for courts to handle the individual imposition of national security requirements. The judges also enjoy the advantages of forensic training and political independence which may result in improved decision-making and public confidence compared to the attributes of politicians" (Walker and Horne 2012: 432)

These concerns are particularly pertinent when considering a regime like TPIMs. Not only will TPIMs often be highly restrictive of individuals' liberty, but experience tells us that in practice they are likely to be used almost exclusively against members of Muslim communities (Simcox 2010). The legitimacy of the process for imposing TPIMs in the

[25] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1. See in particular the judgment of Callinan J at [530]-[533], [582]-[585], [589].
[26] *R (on the application of Secretary of State for the Home Department) v BC* [2009] EWHC 2927 (Admin).

eyes of these communities is important in avoiding alienation and resentment, both of which would be counter-productive.

So there are contrasting resolutions of the security/liberty and institutional duality dilemmas. On the one hand the power to impose TPIMs may be presented as a matter of national security, best suited to the expertise of the Home Secretary who – unlike the judiciary – is democratically accountable. On the other hand it may be presented as a grave incursion on individual liberty, best suited to the independent scrutiny of those judges with expertise in this area. Which of these perspectives should we embrace? Answering this question is a political task. The liberal-legalist suggestion "that we ought to be able to find the answer to all political disputes in law" (Tomkins 2002: 172) has rightly been debunked. As the following two sections explain, even legal decisions on this issue have an inescapably political dimension.

Rational indeterminacy and the *MB* jurisprudence

Legal realism is often wrongly presented as the antithesis of legal formalism (Tamanaha 2009). It is popularly understood as suggesting that judges decide cases according to their personal preferences and then construct legal reasoning to justify their chosen outcome. An influential example is chapter VII of Hart's *The Concept of Law*, entitled "Formalism and Rule-Scepticism," which rendered legal realism "a philosophical joke in the English-speaking world" (Leiter 1997: 270). In this chapter Hart examined "the claim that talk of rules is a myth, cloaking the truth that law consists simply of the decisions of courts and the prediction of them" (Hart 1961: 133). This claim was easily refuted by Hart, since it misses something important about our concept of law. When judges must render a decision, they set out to discover the relevant law. If the claim were correct, then setting out to discover the relevant law would mean no more than the judge asking herself what she thinks she will do. This is "manifestly ridiculous" (Leiter 2007: 70).[27]

Leiter has explained that Hart's chapter identifies two forms of rule-scepticism: conceptual rule-scepticism; and, empirical rule-scepticism (Leiter 2007). The rule-scepticism described in the previous paragraph is conceptual rule-scepticism, for it denies that rules previously enacted by legislatures or articulated by courts are law. Leiter also distinguishes two branches of legal realism: the sociological wing and the idiosyncratic wing (Leiter 1997). Only the idiosyncratic wing – exemplified by Jerome Frank – embraces conceptual rule-scepticism. Frank claimed that prediction of judicial decisions is largely impossible. A judge's response to the facts of a particular case is determined by idiosyncratic facts about the personality or psychology of the particular judge. This was summed up by his formula: "the *Stimuli* affecting the judge x the *Personality of the judge* = *Decisions*" (Frank 1931: 242, emphasis original). Although Frank's view was a minority one, even amongst realists (as Frank himself recognised), it

[27] The claim is also unable to account for the fact that sometimes we want to say that a court has made a mistake as to the law. If law is just a prediction of what a court will hold, there is no conceptual space left to question whether the court misunderstood the law (Leiter 2007: 70).

is often taken as the essence of realism (Leiter 1997). This "Frankification" of legal realism does not do justice to the majority of legal realists, for it misleadingly saddles the sociological wing of realism with claims of judicial volition and judicial idiosyncrasy (Leiter 1997: 269).

Hart himself recognised that legal rules cannot be fully determinate. However smoothly particular precedents or statutes work in the majority of cases, they "will, at some point where their application is in question, prove indeterminate; they will have what has been termed an *open texture*" (Hart 1961: 124, emphasis original). Termed empirical rule-scepticism by Leiter, Hart explains that it "amounts to the contention that, so far as the courts are concerned, there is nothing to circumscribe the area of open texture: so that it is false, if not senseless, to regard judges as themselves subject to rules or 'bound' to decide cases as they do" (Hart 1961: 135). According to Hart, such indeterminacy plays a relatively minor role in judicial decision-making and operates only "at the margin" (Hart 1961: 132). By contrast, the realists' claims of the indeterminacy of law were based not on the limits of language but on the existence of different, potentially conflicting, methods of interpreting sources of law. There might be differing views on the specificity of the *ratio decidendi* of a particular precedent. There might be differing views on which approach to take to interpreting a statute – contrast the literal, mischief and golden rules – with the different approaches yielding different results. And, in today's Human Rights Act era, there might be differing views on whether a statute can be read down in order to render it compliant with Convention rights or whether it is necessary to issue a declaration of incompatibility. The realists thus give us "an *additional* reason (beyond Hart's) to expect indeterminacy in law" (Leiter 2007: 75-76, emphasis original). Leiter accordingly concludes that the disagreement between Hart and the realists is a "disagreement as to *degree*" (Leiter 2007: 78, emphasis original). At the same time, however, he stresses that the realists' view was "not that *all* primary rules are indeterminate" (Leiter 2007: 79, emphasis original). The realists' focus was appellate litigation, which comprises only a small proportion of the total number of instantiations of any rule. Their central claim was that, at the stage of appellate review, legal rules are not the determining factor in a large number of cases.

The jurisprudence on the courts' role in imposing control orders illustrates the realists' claim that legal reasons are often insufficient to justify a unique outcome. In one of the first High Court cases under the control order regime, *Re MB*,[28] Sullivan J concluded that review hearings violated the Article 6(1) ECHR right to a fair hearing. Importantly, he interpreted the Prevention of Terrorism Act 2005 as only requiring the court to review whether the Home Secretary's decision that the statutory conditions were met was flawed *at the time of the decision*, and not also at the time of the review hearing. This meant the court's supervisory role was very limited. Control orders were made by the executive, not the court, and although prior permission was required the order could be made without notice to or consultation with the individual concerned. Since the court had to judge the Home Secretary's decision by reference to the information that was

[28] [2006] EWHC 1000 (Admin).

available at the time of the decision, it could not have regard to any subsequent information or explanation from the individual or special advocate. Add to this the low standard of proof and the possibility of closed sessions, and the result according to Sullivan J was a "procedure which is uniquely unfair" ([85]). Issuing a declaration of incompatibility, he stated:

> "The court would be failing in its duty under the 1998 [Human Rights] Act, a duty imposed upon the court by Parliament, if it did not say, loud and clear, that the procedure under the Act whereby the court merely reviews the lawfulness of the Secretary of State's decision to make the order upon the basis of the material available to him at that earlier stage are conspicuously unfair. The thin veneer of legality which is sought to be applied by section 3 of the [Prevention of Terrorism] Act cannot disguise the reality. That controlees' rights under the Convention are being determined not by an independent court in compliance with Article 6.1, but by executive decision-making, untrammelled by any prospect of effective judicial supervision" ([103])

When the case subsequently reached the Court of Appeal, in *Secretary of State for the Home Department v MB*,[29] the Home Secretary challenged this declaration of incompatibility. The submissions made by counsel for the Home Secretary and MB in this case reflected the contrasting perspectives set out in the previous section. Counsel for the Home Secretary submitted that imposing a control order is primarily a measure taken to safeguard national security. Any impact on individual liberty is incidental. Decisions taken to safeguard national security are within the province of the executive, not the courts, and whilst they may be reviewed by the courts they are not an appropriate subject for a full appeal on the merits. By contrast, counsel for MB argued that national security considerations cannot displace the Article 6(1) right to a fair hearing. Judicial review is insufficient to satisfy the dictates of Article 6(1); the court must be empowered to make its own decision whether an order should be imposed.

Faced with these submissions, Lord Phillips CJ reached a quite different conclusion to Sullivan J. He explained that, notwithstanding the "natural meaning of the [statutory] wording", there were "cogent reasons" for interpreting the Prevention of Terrorism Act differently ([42]). Stressing the Court's duty to interpret legislation, so far as possible, in a manner which is compatible with Convention rights, he adopted a "purposive approach" ([44]). Such an approach requires "the court to consider whether the continuing decision of the Secretary of State to keep the order in force is flawed" ([44]). At a review hearing the court must therefore consider both whether the Home Secretary's decision was flawed at the time of the decision and whether it is flawed at the time of the hearing.[30]

[29] [2006] EWCA Civ 1140.
[30] Confirmed in *BM v Secretary of State for the Home Department* [2011] EWCA Civ 366.

Turning to the statutory conditions for the imposition of a control order, Lord Phillips CJ distinguished between a finding of fact (which Article 6 may require to be carried out by a judicial officer) and a decision based on policy or expediency (where the court's role may be limited to reviewing the fairness and legality of the decision) ([56]). Looking first at the requirement that there must have been reasonable grounds for suspecting that the individual had been involved in terrorism-related activity he concluded that this is an "objective question of fact" ([60]), adding that it is hard to see how a court could review the Home Secretary's decision without forming its own view of whether there were reasonable grounds for suspicion. He therefore accepted that the court must make "its own independent assessment" ([54]) of whether this condition was satisfied. As for the next condition – that a control order was necessary to protect the public from a risk of terrorism – Lord Phillips CJ conceded that a degree of deference must be paid to the decision of the Home Secretary, but nonetheless concluded that "there will be scope for the court to give intense scrutiny to the necessity for each of the obligations imposed on an individual under a control order, and it must do so" ([65]). In addition, where an individual obligation is particularly onerous or intrusive, the court should explore alternative means of achieving the same result.

So when faced with the security/liberty duality dilemma in *MB*, neither Sullivan J nor Lord Phillips CJ accepted counsel for the Home Secretary's argument that issuing a control order was primarily a national security matter within the discretion of the executive. Although national security was regarded as a matter for the executive, with very limited judicial oversight, throughout the twentieth century, the starting point for both Sullivan J and Lord Phillips CJ was that review hearings must comply with Article 6 since control orders interfere with an individual's civil rights. The European Court of Human Rights has held that, where an adjudicatory body determining a dispute over civil rights and obligations does not comply with Article 6(1) in some respect, there will be no violation of the Convention if the proceedings before that body are subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6(1).[31] So although the initial decision to impose a control order involves a *prima facie* violation of Article 6(1) – since the Home Secretary is not an independent and impartial tribunal – this can be cured by the subsequent review hearing, provided that the reviewing court has full jurisdiction.

Having identified the demands of Article 6(1), the next question was whether to issue a declaration of incompatibility or, alternatively, to invoke the interpretative obligation set out in the Human Rights Act, effectively rewrite the legislation and hold that the courts should "treat the review as an appeal on the merits of the case".[32] In contrast to the more literal approach of Sullivan J – who emphasised the wording of section 3(10) of the 2005 Act and gave these words their natural meaning – Lord Phillips CJ opted to "read down" the provisions of the 2005 Act ([46]). There is no doubt that this was "not

[31] *Bryan v United Kingdom* (1995) 21 EHRR 342.
[32] Hansard HL Deb vol 731 col 297 19 October 2011 (Lord Pannick).

what Parliament intended when it passed the 2005 Act" (Tomkins 2010a: 555).[33] Admittedly the obligation to interpret legislation, so far as possible, in a way which is compatible with Convention rights was placed on the courts by Parliament when it passed the Human Rights Act. Subsequent case law has established that the courts may, in the exercise of this interpretative obligation, modify the effect of statutory provisions, go against parliamentary intent, and read in and read down if this would render legislation ECHR-compatible (Kavanagh 2009a). There comes a point, however, where a choice must be made between a bold use of the interpretative obligation and a declaration of incompatibility. The degree of departure from the statutory wording is an important consideration here, but has not always proved determinative.[34] The declaration of incompatibility issued by Sullivan J would have left Parliament to decide whether or not to increase the level of judicial scrutiny in order to achieve Article 6 compliance. The Court of Appeal chose instead to utilise the courts' interpretative obligation and make the decision itself.

As the following table summarises, in *MB* distinctively legal reasons were advanced in support of four different outcomes:

		Role of the courts	
		Supervisory jurisdiction	Merits appeal (or equivalent)
Position under Human Rights Act	Declaration of incompatibility	High Court (Sullivan J)	Counsel for MB (in Court of Appeal)
	ECHR compliant (using interpretative obligation if necessary)	Counsel for Home Secretary (in Court of Appeal)	Court of Appeal (Leading judgment: Lord Phillips CJ)

[33] Similar statements have also been made by the Joint Committee on Human Rights (2011) and by the courts themselves. In *R (on the application of Secretary of State for the Home Department) v BC* [2009] EWHC 2927 (Admin), Collins J stated candidly that section 3(10) of the 2005 Act "does not mean what Parliament intended it to mean" ([72]).

[34] See, for example, *R v A* [2002] 1 AC 45 and *R (Hammond) v Secretary of State for the Home Department* [2005] UKHL 69.

In cases like this, where the law is rationally indeterminate, politics plays an important part. Legal reasoning alone did not *require* the Court of Appeal to utilise the courts' interpretative obligation instead of issuing a declaration of incompatibility. Similarly, legal reasons could have been used to justify a different resolution of the security/liberty duality dilemma. Both decisions had an inescapably political dimension.

Avoiding reductionism: the post-*MB* case law

Having recognised that legal reasoning from legal materials alone is often rationally indeterminate, it is important to avoid the opposite extreme and allow law to be subsumed by politics. Properly understood, legal realism is not reductionist. The sociological wing of realism – exemplified by the writings of Llewellyn, Oliphant and Moore – did not claim that judicial decisions are based on the idiosyncrasies of individual judges. In contrast to the extreme, Frankified form of legal realism which depicts judicial decisions as utterly unpredictable, one of the most familiar themes in the sociological wing (the predominant wing) was the interest in predicting judicial decisions (Leiter 2007: 25). The thesis of the sociological wing was that social forces operate upon judges, leading them to respond to facts in similar, and predictable, ways. To predict judicial decisions it is necessary to identify the psycho-socio facts about judges which cause their decisions to fall into predictable patterns (Leiter 2003). Much of the emerging empirical work on judicial behaviour may accordingly be understood "as a new generation of legal realism" (Miles and Sunstein 2008: 834). It follows that realists from the sociological wing cannot have been conceptual rule-sceptics. The claim that the class of legal reasons is rationally indeterminate presupposes the existence of distinctively legal (as opposed to non-legal) reasons. The realist arguments for indeterminacy which focus on the potentially conflicting, but equally legitimate, ways lawyers have of interpreting statutes and precedents presupposes a distinctive form of legal reasoning. So, far from being reductionist, the sociological wing of realism was based on a non-sceptical account of the concept of law – one with "distinct affinities to that developed by the Legal Positivists!" (Leiter 2007: 72).

Support for the thesis of the sociological wing can be found in the post-*MB* case law on judicial scrutiny of control orders. As the following examples illustrate, there is a consistency and regularity which runs throughout this case law.[35] This has had a significant impact in practice, and in turn forms part of a broader trend within the lower courts to "insist that, in proceedings before them, government decisions should be robustly reviewed even where they concern national security" (Tomkins 2010a: 567).

In *Secretary of State for the Home Department v GG; Secretary of State for the Home Department v NN*[36] Collins J stated that he was "not persuaded that [NN's] involvement

[35] In addition to the cases discussed in the main text, see: *Secretary of State for the Home Department v Bullivant* [2008] EWHC 337 (Admin); *Secretary of State for the Home Department v AT and AW* [2009] EWHC 512 (Admin); and, *BM v Secretary of State for the Home Department* [2011] EWCA Civ 366.
[36] [2009] EWHC 142 (Admin).

in any activities extended beyond a relatively short time in the summer and autumn of 2005" ([21]). So, three years on, there was "nothing to support" the claim that there was a continuing need to maintain a control order ([23]), and the order was quashed. As for GG's control order, although this was upheld Collins J allowed GG's appeal against a modification to his order which had forced him to relocate to Chesterfield. GG's situation had changed – he had married – and his wife and stepchildren had a home in Derby. Collins J said that the time had come to allow him to live with his wife, subject to restrictions on visitors and on visiting mosques.

In *Secretary of State for the Home Department v AV*[37] Mitting J ordered that a control order be revoked. Concluding that there was no real risk that AV would re-launch a terrorist campaign in Libya whilst negotiations between the Libyan Government and the leadership of the Libyan Islamic Fighting Group were ongoing, he held that there was no reasonable basis for the decision that it was necessary to continue to impose a control order on AV.

In *Secretary of State for the Home Department v Al Saadi*[38] Wilkie J held that there were reasonable grounds for suspecting AS had attended a terrorist training camp in Afghanistan, and for suspecting that he had been involved with an extremist group in Italy. He nonetheless concluded that although AS "remains disaffected from the state and mainstream UK society and may well adhere to a view of Islam with which many would feel uncomfortable, this does not of itself justify the degree of intrusion involved in a control order indefinitely" ([185]). He recognised that he was not accepting the Security Service's and Home Secretary's assessment of risk, and that he was reaching a different conclusion to the one the Special Immigration Appeals Commission had reached two-and-a-half years earlier. Instead, he noted that during the intervening period there had been no activity of AS which was evidence of terrorism-related activity or of a willingness to re-engage in such and ruled that the order was no longer necessary and should be revoked.

Lastly, *CA v Secretary of State for the Home Department*.[39] CA's control order had been modified to force him to relocate from Crawley to Ipswich. His wife and two children attempted to live with him in Ipswich, but the relocation "imposed an unendurable strain upon [his wife] and risk[ed] the permanent breakdown of the marriage" ([3]). Mitting J stated:

> "I believe that, unless CA can resume family life with his wife and children in Crawley, there is at least a substantial risk that this otherwise strong marriage will fail. Even viewed from the proper, but focussed, viewpoint of minimising the risk to the public from terrorism-related activity by CA, that is not a risk which should be run. If his marriage fails, he may well become embittered against

[37] [2009] EWHC 902 (Admin).
[38] [2009] EWHC 3390 (Admin).
[39] [2010] EWHC 2278 (Admin).

> British authorities and revert to extremist views and actions. What is, in my judgment, the most significant constraint upon him doing so would disappear" ([7])

He accordingly allowed CA's appeal against the modification to his control order and allowed him to return to Crawley subject to stringent conditions.

Admittedly, there are some cases in which the courts have appeared more deferential.[40] But even these cases "exhibit a more robust review of the Secretary of State's decision-making than would ever have been countenanced [in twentieth century case law]. Thus, even the weakest of the control orders cases exemplify a change in the law" (Tomkins 2010a: 559). In other words, the decisions in cases like *MB*, *GG & NN*, *AV*, *Al Saadi* and *CA* are not simply the result of particular judges' idiosyncrasies. They are the product of broader social forces, in particular the courts' changing perspective on the security/liberty and institutional duality dilemmas.

TPIMs and the role of the courts

During the Parliamentary passage of TPIMA the Government explained that the case law on judicial scrutiny of control orders should apply to TPIMs review hearings: "It is absolutely the case that the Government intend for the same intense level of scrutiny to be applied in court reviews of TPIM notices under Clause 9".[41] The guidance notes which accompanied the Bill confirmed this, stating that "the enhanced level of scrutiny provided by case law, should apply to the replacement system" (15). Yet, in spite of the fact that the control orders case law "accommodates significantly more intensive scrutiny than is commonly found in practice in judicial review" (House of Lords Select Committee on the Constitution 2011: 6), section 9(2) of TPIMA retains the 2005 Act's insistence that the court "must apply the principles applicable on an application for judicial review". This proved contentious during the Parliamentary debates. The House of Lords Select Committee on the Constitution asserted that "The TPIMs Bill should be clear on its face that in cases concerning TPIM notices the function of the court is not limited to ordinary judicial review" (6). The Committee pointed out that a year earlier it had made a similar observation in respect of the Terrorist Asset-Freezing etc Bill, following which the Bill was amended. As a result section 26 of that Act now clearly states that challenges to a designation order constitute a merits appeal. When a similar amendment to TPIMA was moved at Lords Committee Stage, however, it was resisted by the Government. The Joint Committee on Human Rights stated:

[40] See: *Secretary of State for the Home Department v AM* [2009] EWHC 572 (Admin); *AR v Secretary of State for the Home Department* [2009] EWHC 1736 (Admin); and *CD v Secretary of State for the Home Department* [2011] EWHC 1273 (Admin).
[41] Hansard HL Deb vol 731 col 313 19 October 2011 (Lord Henley).

> "We are astounded that the Government is asking Parliament to re-enact in this Bill legislative language to which the courts have given a meaning which is not what Parliament originally intended. It is not clear whether Parliament is to be assumed by courts to have reasserted its original intention about that language by re-enacting it, or is to be assumed to know that the language it is using does not mean what it says. Either way, this is not a satisfactory way to legislate to ensure human rights compatibility" (2011: 7)

The likelihood of Parliament being taken as having reasserted its original intention appears remote. The Government stated clearly, both in Parliament and in the explanatory notes, that the previous case law on judicial scrutiny of control orders would continue to apply. In any event, the Court of Appeal in *MB* held that the statutory wording should be read down to ensure Article 6 compatibility regardless of legislative intent. And the early indications from the courts are that they will continue to apply the pre-TPIMA case law, with Collins J stating in *Secretary of State for the Home Department v BM*[42] that judicial scrutiny at TPIMs review hearings must be "particularly intense" ([30]).

To produce legislation which says one thing but everyone agrees means something else is unsatisfactory. What may be attractive about this disparity between the statutory wording and the reality of TPIMs review hearings is that it allows the depiction of existing arrangements to be adapted to fit the desired purpose. Formally, TPIMs are issued by the Home Secretary with the courts exercising a supervisory role applying the principles of judicial review. The decision to impose TPIMs may thus be said to lie in the hands of the executive, the branch of government which is responsible for national security and which, unlike unelected judges, is democratically accountable. But in practice the courts treat the review hearing as a merits appeal. This protects individual liberty and ensures a fair hearing before an independent tribunal, avoiding the risk of populism and irrationality. The Home Secretary can thus claim responsibility for imposing TPIMs, whilst knowing that the procedure complies with Article 6(1) ECHR. Meanwhile, the courts can subject her decisions to intense scrutiny without being accused of acting undemocratically. The statutory wording appeases those who believe the Home Secretary should impose TPIMs by acting almost as a fig leaf, concealing the perceivedly offensive reality that lies beneath. Whilst this may be politically expedient, it lacks intellectual honesty. Having endorsed the decision in *MB*, Parliament should have taken this to its logical conclusion and vested the power to issue TPIMs in the courts.

Conclusion

The premise of much legal scholarship is that law is capable of achieving determinacy over controversy:

[42] [2012] EWHC 714 (Admin).

> "Whether we consider the emotive devotion to the Common Law of a lawyer like Pollock, or the Herculean intellectual effort to harness the law's resources suggested by Dworkin, or the positivist concern illustrated by Raz to detach the pronouncements of the law from moral or political conflict, or even the uncritiqued support from the law for a dominant ideology presumed by the heterodox scholars – in all these cases the law is regarded as making it possible to put forward a view of how society should be organised that has become insulated from controversy" (Halpin 2006: 161)

Advancing a legal realist framework, this article has used the case law and legislation governing the role of the courts in issuing control orders/TPIMs to challenge this assumption. The debate over whether the power to issue TPIMs should be vested in the Home Secretary or the courts raised two questions involving normative duality: whether TPIMs are primarily a national security measure which have incidental effects on liberty or a restriction on liberty imposed for the sake of national security; and how the Home Secretary and the courts should be conceived in this context. As we have seen, it is possible to construct legal reasoning in support of quite different resolutions of these two questions. But whilst the choice between these outcomes/lines of reasoning has an inescapably political dimension, the choice is not simply an idiosyncratic one. Decision-making can be constrained by social, political and institutional constraints, as well as legal ones (Hawkins 1992). When legal reasoning is rationally indeterminate, extra-legal influences operate upon judges causing their decisions to fall into predictable patterns. The decision in *MB* and the subsequent judicial scrutiny of control orders displays a consistent response to the security/liberty and institutional duality dilemmas: TPIMs are a grace incursion on individual liberty which must be scrutinised closely in a fair hearing before an independent court. This is in keeping with the growing judicialisation of intelligence within the lower courts catalysed by the demands of Article 6(1) ECHR.

Judicial independence is not immune to political climate (Shetreet and Forsyth 2011). Commenting on the then Prime Minister Tony Blair's well-known claim that "the rules of the game are changing", David Bonner has argued that in fact the only rule of the game that is changing is the UK courts' willingness, since the enactment of the Human Rights Act 1998, to apply an enhanced level of scrutiny in the area of national security (Bonner 2007). But whilst there has been progress in the legal realm since the Human Rights Act, this is far from being universal. In contrast to the decisions of the lower courts on judicial scrutiny of control orders, there have been numerous decisions of the House of Lords since its landmark decision in the *Belmarsh Detainees* case[43] which are "at worst dismal, at best ambiguous" in terms of their commitment to the protection of individual rights (Dyzenhaus 2006: 17; see also Tomkins 2010a). Nor is the progress secure. For whilst a legal determination may dull political argument it will not necessarily curtail it.

[43] *A (& others) v Secretary of State for the Home Department* [2004] UKHL 56.

Not only could there be further statutory intervention, as in the case of TPIMs, but competing political perspectives could also give rise to further legal challenges which attempt to erode the scope the first determination (e.g., the Labour Government's attempt to argue that the *AF (No. 3)* principle did not apply to light-touch control orders[44]) or which mount an outright challenge to its precedential status (e.g., the U.K.'s attempt in *Saadi v Italy* to overturn the *Chahal* principle[45]).

In the political realm the enhanced level of judicial scrutiny in cases involving national security has repeatedly come under attack, with some suggestions that the UK should even consider pulling-out of the ECHR. Yet the nature of law as an unfinished practice means that for *stable* protection of individual rights some concordance is required between the different arms of government. So for a culture of judicial independence to become engrained in cases involving national security it must be promoted and nurtured in both the legal and political realms. It is for this reason that the failure to vest the power to issue TPIMs in the courts is one of the most regrettable features of TPIMA. This failure represents a missed opportunity to secure political endorsement of enhanced legal protection of individual liberty.

References

Anderson, D. (2012). *Control Orders in 2011: Final Report of the Independent Reviewer on the Prevention of Terrorism Act 2005*. London: The Stationery Office.

Bonner, D. (2007). *Executive Measures, Terrorism and National Security: Have the Rules of the Game Changed?* Aldershot: Ashgate.

Clayton, R. (2004). Judicial Deference and "Democratic Dialogue": the Legitimacy of Judicial Intervention under the Human Rights Act 1998. *Public Law*. Spring, 33-47.

Dennis, I. (2012). Security, Risk and Preventive Orders. In G. R. Sullivan & I. Dennis (Eds.), *Seeking Security: Pre-Empting the Commission of Criminal Harms* (pp. 169-191). Oxford: Hart.

Deutsch, J. D. (1968). Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science. *Stanford Law Review.* 20, 169-261.

[44] *R (on the application of Secretary of State for the Home Department) v BC* [2009] EWHC 2927 (Admin).
[45] *Saadi v Italy* (2009) 49 EHRR 30; *Chahal v UK* (1997) 23 EHRR 413.

Dyzenhaus, D. (2006). *The Constitution of Law: Legality in a Time of Emergency*. Cambridge: Cambridge University Press.

Edley Jr., C. (1991). The Governance Crisis, Legal Theory, and Political Ideology. *Duke Law Journal*. 1991, 561-606.

Fairall, P. & Lacey, W. (2007). Preventative Detention and Control Orders Under Federal Law: The Case for a Bill of Rights. *Melbourne University Law Review*. 31, 1072-1098.

Fenwick, H. & Phillipson, G. (2011). Covert Derogations and Judicial Deference: Redefining Liberty and Due Process Rights in Counterterrorism Law and Beyond. *McGill Law Journal*. 56, 863-918.

Frank, J. (1931). Are Judges Human? Part Two: As Through a Class Darkly. *University of Pennsylvania Law Review*. 80, 233-267.

Gearty, C. (2007). Rethinking Civil Liberties in a Counter-Terrorism World. *European Human Rights Law Review*. 2, 111-119.

Griffith, J. A. G. (1979). The Political Constitution. *Modern Law Review*. 42, 1-21.

Halpin, A. (1997). *Rights and Law – Analysis and Theory*. Oxford: Hart Publishing.

Halpin, A. (2006). Ideology and Law. *Journal of Political Ideologies*. 11, 153-168.

Hart, H. L. A. (1961). *The Concept of Law*. Oxford, Oxford University Press.

Hawkins, K. (1992). The Use of Legal Discretion: Perspectives from Law and Social Science. In K. Hawkins (Ed.), *The Uses of Discretion* (pp11-46). Oxford: Clarendon Press.

Hickman, T. R. (2005). Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998. *Public Law*. Summer, 306-335.

Home Office. (2011). *Review of Counter-Terrorism and Security Powers: Review Findings and Recommendations*. Cm 8004.

House of Lords Select Committee on the Constitution. (2011). *Terrorism Prevention and Investigation Measures Bill*. Nineteenth Report of Session 2010-12. HL Paper 198.

Ibbetson, D. (2004). Recklessness Restored. *Cambridge Law Journal*. 63, 13-15.

Joint Committee on Human Rights. (2005). *Prevention of Terrorism Bill*. Tenth Report of Session 2004-05. HC 334.

Joint Committee on Human Rights. (2008). *Counter-Terrorism Policy and Human Rights (Ninth Report): Annual Renewal of Control Orders Legislation 2008*. Tenth Report of Session 2007-08. HC 356.

Joint Committee on Human Rights. (2010). *Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010*. Ninth Report of Session 2009-10. HC 395.

Joint Committee on Human Rights. (2011). *Legislative Scrutiny: Terrorism Prevention and Investigation Measures Bill (Second Report)*. Twentieth Report of Session 2010-12. HC 1571.

Kavanagh, A. (2009a). *Constitutional Review under the UK Human Rights Act*. Cambridge, Cambridge University Press.

Kavanagh, A. (2009b). Constitutional Review, the Courts, and Democratic Scepticism. *Current Legal Problems*. 62, 102-135

Kimel, D. (2004). Inadvertent Recklessness in Criminal Law. *Law Quarterly Review*. 120, 548-554.

Klug, F. (2001). The Human Rights Act – a "Third Way" or "Third Wave" Bill of Rights. *European Human Rights Law Review*. 4, 361-372.

Leiter, B. (1997). Rethinking Legal Realism: Toward a Naturalized Jurisprudence. *Texas Law Review*. 76, 267-315.

Leiter, B. (2003). American Legal Realism. In W. Edmundson & M. Golding (Eds.), *The Blackwell Guide to Philosophy of Law and Legal Theory* (pp. 50-66). Oxford: Blackwell.

Leiter, B. (2007). *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy*. Oxford: Oxford University Press.

Loughlin, M. (2006). Towards a Republican Revival? *Oxford Journal of Legal Studies*. 26, 425-437.

Lustick, I. S. (2006). *Trapped in the War on Terror*. Philadelphia: University of Pennsylvania Press.

Lynch, A. (2008). Thomas v Mowbray – Australia's "War on Terror" Reaches the High Court. *Melbourne University Law Review*. 32, 1182-1211.

Middleton, B. (2011). Rebalancing, Reviewing or Rebranding the Treatment of Terrorist Suspects: the Counter-Terrorism Review. *Journal of Criminal Law*. 75, 225-248.

Miles, T. J. & Sunstein, C. R. (2008). The New Legal Realism. *The University of Chicago Law Review*. 75, 831-851.

Nicol, D. (2006). Law and Politics After the Human Rights Act. *Public Law*. Winter, 722-751.

Posner, E. A. & Vermeule, A. (2007). *Terror in the Balance: Security, Liberty, and the Courts*. New York: Oxford University Press.

Ramraj, V. V. (2005). Terrorism, Risk Perception and Judicial Review. In V. V. Ramraj, M. Hor & K. Roach (Eds.), *Global Anti-Terrorism Law and Policy* (pp.107-126). Cambridge: Cambridge University Press.

Roos, O. I. (2008). Alarmed, but not Alert in the "War on Terror"? The High Court, *Thomas v Mowbray* and the Defence Power. *James Cook University Law Review*. 15, 169-200.

Sales, P. (2011). Rights-Consistent Interpretation and the Human Rights Act 1998. *Law Quarterly Review*. 127, 217-238.

Saul, B. (2008). Terrorism as Crime or War: Militarising Crime and Disrupting the Constitutional Settlement? Comment on Thomas v Mowbray [2007] HCA 33. *Public Law Review*. 19, 20-31.

Shetreet, S. & Forsyth, C. (Eds.) (2011). *The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges*. Leiden: Brill Academic.

Simcox, R. (2010). *Control Orders: Strengthening National Security*. London: Centre for Social Cohesion.

Tamanaha, B. (2009). *Beyond the Formalist-Realist Divide: The Role of Politics in Judging*. Princeton: Princeton University Press.

Tomkins, A. (2002). In Defence of the Political Constitution. *Oxford Journal of Legal Studies*. 22, 157-175.

Tomkins, A. (2010a). National Security and the Role of the Court: a Changed Landscape? *Law Quarterly Review*. 126, 543-567.

Tomkins, A. (2010b). The Role of the Courts in the Political Constitution. *University of Toronto Law Journal*. 60, 1-22.

Waldron, J. (1999). *Law and Disagreement*. New York: Oxford University Press.

Walker, C. (2010). The Threat of Terrorism and the Fate of Control Orders. *Public Law*. January, 4-17.

Walker, C. (2011). The Judicialisation of Intelligence in Legal Process. *Public Law*. April, 235-237.

Walker, C. & Horne, A. (2012). The Terrorism Prevention and Investigation Measures Act 2011: One Thing But Not Much the Other?' *Criminal Law Review*. 6, 421-438