BIRKENHEAD LECTURE

14 NOVEMBER 2022

NATIONAL SECURITY AND THE LAW

David Anderson

(Lord Anderson of Ipswich KBE KC)

A hundred years ago

1. It was a hundred years ago this month that the barrister and politician FE Smith became the first Earl of Birkenhead. Few understood better than he did the role of the law in protecting national security. As Solicitor General and then Attorney General during the First World War, he had prosecuted offenders for breach of regulations under the Defence of the Realm Act 1914 – regulations which, though they might look mild by the standards of the Covid years, did criminalise activities ranging from the lighting of bonfires and the purchase of binoculars to the spreading of reports likely to cause disaffection and alarm among His Majesty's forces or the civilian population. In 1916, he famously secured the conviction of Sir Roger Casement for treason.

2. Birkenhead was no internationalist. He regarded the League of Nations as idealistic nonsense, and told the students of Glasgow University in 1923:

   > "The world continues to offer glittering prizes to those who have stout hearts and sharp swords; ... it is for us ... to maintain in our own hands the adequate means for our own protection and ... to march with heads erect and bright eyes along the road of our imperial destiny."

3. But as a brilliant lawyer – albeit one whose brains, in the celebrated words of Margot Asquith, "*sometimes go to his head*", there was more to Birkenhead than that. Appointed Lord Chancellor after the Armistice at the age of just 46 – the youngest person to achieve that office in modern times, until the 40-year-old Liz Truss took it on in 2016 – he was a firm defender of the judiciary against political encroachment. While serving as Lord Chancellor he denounced the Amritsar massacre of 1919 as a breach of what he called "*the true principle laid down for centuries in our history … that the minimum force that is necessary to attain the immediate purpose must be*

employed":[1] a principle that sounds rather like what we now call proportionality. And as a Conservative Unionist who had marched with Carson but forged a surprising rapport with the IRA leader Michael Collins, he played a vital part in the negotiation of the Anglo-Irish Treaty of 1921 which created the Irish Free State and left the United Kingdom in its current form.

Fifty years ago

4. Fifty years ago, national security – and Ireland – were once again high on the agenda. 1972 was the bloodiest year of the Troubles, seeing nearly 500 deaths, more than half of them civilian. The practice of internment, described by Lord Diplock as "*imprisonment by arbitrary order of the Executive of those whom the police suspect of being a danger to the State*",[2] had been introduced the previous year under a statute dating back to 1922.[3] It proved to be not only ineffective but disastrously counter-productive. Indeed though internment was last used in 1975, the word continues even now to act as a recruiting sergeant for dissident Republicans. I have on my phone a photo taken from a police patrol car in North Armagh just a few years ago. It shows the gable end of a house stencilled with the words "END INTERNMENT NOW". It was, the officers told me, only a few weeks old.

5. The legal sequel to internment is well known to lawyers, at least as it relates to the small minority of internees who were subjected to the notorious "Five Techniques" – prolonged wall-standing, hooding, subjection to noise, deprivation of sleep and deprivation of food and drink. None of those techniques leaves a mark on the body of the detainee. Pioneered in the interrogation of Nazis during the second world war, the Five Techniques were subsequently deployed in post-war counter-insurgency operations in various parts of the Empire. They were described as torture in 1976 by the European Commission of Human Rights in the inter-state case *Ireland v UK*, also known as the Hooded Men case.[4] Though the Court of Human Rights went on to characterise them as inhuman and degrading treatment,[5] a lesser form of violation, our own Supreme Court confirmed the torture label in the *McQuillan* case

---

1 HL Deb 19 July 1920, vol 44 col 274.

2 HL Deb 7 December 1972, vol 337 col 439.

3 The Civil Authorities (Special Powers) (Northern Ireland) Act 1922.

4 *Ireland v UK,* Commission report of 25 January 1976.

5 The Court determined on 18 January 1978 that the Hooded Men's treatment constituted inhuman and degrading treatment rather than torture (1979-80 2 EHRR 25), and declined to revisit that conclusion in a further judgment of 20 March 2018 on a revision application brought by Ireland.

of 2021.[6] It is shaming for any patriot to read the evidence that these same Five Techniques, and worse, were used in our own century by the Americans at Guantanamo Bay and by American and British forces in Iraq.[7]

Two roles for the law

6. Those historical glimpses illustrate what might be thought of as two contrasting roles for the law in the face of threats to national security. As described by General Sir Frank Kitson in *Low-Intensity Operations*, the classic textbook on counter-insurgency published in 1971:

> "… the first one [is] that the Law should be used as just another weapon in the government's arsenal, and in this case it becomes little more than a propaganda cover for the disposal of unwanted members of the public … The other alternative is that the Law should remain impartial and administer the laws of the country without any direction from the government … Anyone violating the law will be treated in the same way, and the full legal procedure, complete with its safeguards for the individual, will operate on behalf of friend and foe alike."

The first alternative, though instinctively appealing to some, leads straight to the prison camps of Xinjiang. Kitson, a future Commander-in-Chief, UK Land Forces with unparalleled experience of counter-insurgency operations, opted decisively for the second. He described it as "*morally right but also expedient because it is more compatible with the government's aim of maintaining the allegiance of the population*".[8]

7. Since those words were written, we have seen two lasting trends in our national security law: judicialisation and internationalisation. The Hooded Men case taken to Strasbourg in the 1970s might be seen as the beginning of both these trends. They have persisted as long as they have, I suspect, not because the crooked timber of humanity has improved in quality but because of the happy congruence of morality and expedience to which Kitson referred. Also, perhaps, because for all the fears

---

6 *In the matter of an application for judicial review by Margaret McQuillan (Northern Ireland) no. 1* [2021] UKSC 55.

7 "The Baha Mousa Public Inquiry Report", HC 1452 2011-12: https://www.gov.uk/government/publications/the-baha-mousa-public-inquiry-report; Ian Cobain, *Cruel Britannia* (Portobello, 2012).

8 F. Kitson, *Low Intensity Operations: subversion, insurgency and peacekeeping* (Faber & Faber, 1971), p. 69.

evoked by nuclear weapons and by Islamist terrorism, we have seen nothing in the past 70 years so *immediately* threatening to our national life as the prospects of invasion and civil war that we saw in the World Wars and in the Troubles.

8. In every national security case and in every national security Bill, judges and parliamentarians continue to wrestle with difficult questions. The principles of fair and open justice are the acknowledged starting point. But how far, if at all, can they be constrained by the special features of national security, whether the unique nature of the threat, or the dangers of disclosing how that threat is countered? And in the hard-nosed political environment of recent years, it is even becoming legitimate to ask what is to be gained by continuing to follow the international norms to whose evolution this country has made such a pre-eminent contribution over the past 75 years.

9. These are debates I would like to touch on this evening. But before we come to that, we need to examine what we mean when we refer to national security.

What is National Security?

10. National Security has never been defined either in statute or, despite its appearance in the European Convention, in the case law of the European Court of Human Rights. While Lord Hoffmann did say in the case of *Rehman* that "*there is no difficulty about what national security means*", his explanation – "*It is the security of the United Kingdom and its people*" – did not put much flesh on the bones.[9]

11. At its broadest, national security means simply the well-being of the state. Sir David Omand, a former Director of GCHQ and architect of the UK's much-imitated CONTEST counter-terrorism strategy, came up with a definition along these lines in 2010, at the outset of his book "Securing the State":

> "[a] state of *trust on the part of the citizen* that the risks of everyday life, *whether from man-made threats or impersonal hazards,* are being adequately managed to the extent that there is confidence that normal life can continue".[10]

12. That broad definition offers two valuable insights. First, that security or otherwise is a function not simply of statistical risk, but a question of how people *perceive* risk –

9 *Secretary of State for the Home Department ex p Rehman* [2001] UKHL 47 at [50].
10 David Omand, *Securing the State* (Hurst, 2010), p.9.

and ultimately, therefore, of how they feel. Around 100 people have been killed by terrorists in Great Britain since the start of this century: a rate of about five per year, comparable to the numbers killed by the stings of bees, wasps and hornets. But as Brian Jenkins famously observed as long ago as 1975, terrorists want "*a lot of people watching, not a lot of people dead*". The fear and over-reaction that they seek can be generated without massive loss of life, if their actions are sufficiently brutal, if their narrative is sufficiently threatening, and if politicians, media, even counter-terrorism professionals, are incautious enough to assist them, by intemperate words, in their objective of generating terror.

13. The second valuable insight provided by Omand's definition is that national security is threatened not only by man-made threats (such as war, terrorism and cyber-attack) but by what he called "*impersonal hazards*" such as climate change and pandemic. Other definitions go broader still: for example the government's own National Security Strategy, which in its 2015 iteration, subtitled "*A secure and prosperous United Kingdom*", describes the government's *national security objectives* as the protection of the UK and its people, the projection of its global influence, and the promotion of its prosperity – including by investing in innovation and skills.[11]

14. There is logic to such a broad definition – but it hardly represents what most of us think of as national security. And one would search in vain for a distinct body of statutory or common law rules governing such a wide range of subject-matter. To arrive at a tighter definition, we might look at the activities of our Security and Intelligence Agencies, which I shall call the Agencies.

15. The website of MI5 describes its national security mission as protecting against four core threats: *terrorism, espionage, cyber* and *proliferation*.[12] MI6 and GCHQ, more foreign-focused organisations, are allowed by their governing statute to advance or promote the interest of national security even in the absence of a direct threat to the United Kingdom.[13] Their functions therefore extend to overseas espionage and – as coyly acknowledged on GCHQ's website and briefly reported on in the annual

---

[11] National Security Strategy and Strategic Defence and Security Review, Cm 9161, November 2015, 4.1: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/478933/52309_Cm_9161_NSS_SD_Review_web_only.pdf.

[12] https://www.mi5.gov.uk/, "What we do"; cf. Security Service Act 1989 s1(2). In addition to its national security function, MI5 is charged with protecting the economic well-being of the UK against foreign threats and supporting law enforcement in the prevention and detection of serious crime: *ibid*., ss1(3)-(4).

[13] Robert Ward and Rupert Jones, "National Security: Law, Procedure and Practice" (OUP, 2021), 3.13-3.19.

reports of the Intelligence and Security Committee – to offensive cyber activity as well as to defence against cyber threats.

16. These sources allow us to formulate an informal working definition if not of national security itself, then at least of the core activities that are required to protect it. It might look something like this:

> "collecting, analysing and acting on intelligence in order to defend the United Kingdom, its institutions and its people against terrorism, hostile state activity, nuclear proliferation and cyber-threat; to advance its military and foreign policy interests; and to locate hostile actors and bring them to justice".

Those activities are not the exclusive domain of the Agencies. The police are close and necessary partner of the Agencies, not least for their executive powers of search, detention and arrest and for their particular focus on converting intelligence into evidence for use in court. The Joint Terrorism Analysis Centre analyses intelligence on the terrorist threat, and the Office for Security and Counter-Terrorism in the Home Office leads many other organisations in delivering the CONTEST counter-terrorism strategy across the UK. We also rely increasingly on cooperation with international partners: not just like-minded European allies and the other members of the Five Eyes alliance – Australia, Canada, New Zealand and the USA – but many other countries too.

17. There is a case for widening my working definition to include overseas military operations in general.[14] Such operations have after all been at least partly directed, during this century, to neutralising a perceived terrorist threat to the United Kingdom. The extension of human rights norms to detention and rendition in overseas theatres has also required us to confront the application of standards designed for Europe in peacetime to conflicts in Afghanistan and Iraq. Nonetheless, a line has to be drawn somewhere, and I don't propose to cover the complex and in many ways distinct subject of the law governing military operations.

The Legal Landscape

18. If that is the sort of thing we mean when we speak of protecting national security, what do we mean when we speak of national security *law*? Some of the activities within my definition – the exercise of police, prosecutorial and judicial powers – are

[14] See Paul F. Scott, "The National Security Constitution" (Hart, 2018), chapter 3.

largely dealt with by laws of general application. But there is nonetheless an area that one might call national security law. Geographically speaking it is not an island, but a landscape with distinctive features of its own. Let us conduct a quick geospatial survey, appropriately perhaps from a high-altitude drone. That survey of the national security landscape identifies five main districts.

Counter-terrorism: summary

19. The largest and most developed of those districts is counter-terrorism law. At its centre stands the Terrorism Act 2000, presciently adopted just before 9/11 and consequently very influential on the laws of other countries. The 2000 Act still stands tall but is now flanked by a forest of lesser structures, among them at least eight counter-terrorism statutes passed since.[15]

20. These statutes have three particularly noteworthy themes:

    a. First, they create so-called *precursor offences*, criminalising activity such as disseminating terrorist material, attending a terrorist training camp and preparing a terrorist act, despite the fact that such behaviour does not meet the normal threshold for the inchoate offences of conspiracy, attempt or encouraging or assisting crime. A terrorist connection is also an aggravating factor in sentencing for ordinary offences.

    b. Secondly, they create special powers to *stop, question and search* (in particular at ports and airports, under Schedule 7 to the Terrorism Act 2000), to *arrest and to detain*.

    c. Thirdly, they create *executive powers* that, like asset-freezing orders, enable the activities of suspected terrorists to be closely controlled despite the fact that they have been convicted of no criminal offence. Though not for the most part contained in dedicated counter-terrorism statutes, the strong executive powers relating to immigration and nationality – deportation, passport removal, citizenship deprivation – are also an important part of this landscape.

[15] Anti-Terrorism Crime and Security Act 2001, Prevention of Terrorism Act 2005, Terrorism Act 2006, Counter-Terrorism Act 2008, Terrorism Prevention and Investigation Measures Act 2011, Counter-Terrorism and Security Act 2015, Counter-Terrorism and Border Security Act 2019 Counter-Terrorism and Sentencing Act 2021.

Hostile state activity: summary

21. Our high-altitude drone moves on to our second district: the law relating to hostile state activity. Here we find a construction site. Some old and some would say no longer entirely practical buildings stand there: the Official Secrets Acts 1911 to 1989. But the bulldozers are already at work in the form of the National Security Bill currently before the House of Commons. This will remove the Acts of 1911, 1920 and 1939, which deal in essence with espionage, though not the Act of 1989 which deals with unauthorised disclosure by insiders. It will replace the problematic concept of "*enemy*" with the all-embracing category of "*foreign power*". It will create a range of offences – *obtaining or disclosing protected information*, *obtaining or disclosing trade secrets*, and *assisting a foreign intelligence service*. The third of these will for the first time make it a criminal offence to spy for a foreign intelligence service in the UK. The Bill also contains new offences of *sabotage* and *foreign interference*, including in elections. It will be an offence to act in these ways for or on behalf of any foreign power, or even just with the intention to benefit a foreign power. Maximum sentences are high.

22. Recently added to the Bill, during its passage through the Commons, is provision for a Foreign Interests Registration Scheme, modelled on US and Australian precedents. This will require the registration of persons conducting "*political influence activities*" on behalf of any foreign power, and of persons conducting *any* activities on behalf of particular, high-risk countries.

Investigatory powers: summary

23. The third district revealed by our drone, spanning the border between the landscape of national security law and the neighbouring landscape of serious crime, is dominated by another enormous structure: the Investigatory Powers Act 2016. The Act provides this country for the first time with a comprehensible legal basis for the exercise by agencies, police and others of covert surveillance techniques such as the interception of calls; hacking or equipment interference; the collection and retention of call logs, location data and other forms of metadata; and the holding of bulk personal datasets. Inspired by North American examples, it also requires warrants for intrusive forms of surveillance to be approved by serving or retired judges of High Court level and above, under the leadership of the Investigatory Powers Commissioner.

24. More old-fashioned surveillance techniques, such as undercover policing, the running of covert human intelligence sources or CHIS and the bugging of properties and vehicles, are still housed in older legislative buildings.[16] But construction continues: the CHIS (Criminal Conduct) Act 2021 recently regularised the controversial practice of authorising agents to commit crimes, and post-legislative review of the 2016 Act is under way.

Court powers: summary

25. Our drone hovers, fourthly, over the court district: the special laws, rules and systems that try to reconcile the requirement for secrecy in national security cases with the requirement that legal proceedings be open and fair. The most distinctive feature of this district is the closed material procedure, devised – initially in the immigration context[17] – to resolve disputes in which the interests of national security make it impossible for an appellant to be given full reasons for the decision that he or she wishes to challenge. Security-cleared special advocates are given access to the full national security case against the appellant, and can interrogate it on the appellant's behalf in the closed part of any hearing. But the appellant is given at best only a gist of the closed material,[18] and can play no role in the closed part of the hearing. This procedure was extended, gradually at first and then to civil proceedings more generally by the Justice and Security Act 2013.

26. The court district is also the home of the common law and, alongside it, the case law of the European Court of Human Rights. In areas ranging from the approval of surveillance warrants to the operation of closed material proceedings and the judicial review of executive decisions, government, Parliament and the courts have been preoccupied by the issue of whether judges can be trusted to strike the requisite balance, and if so what degree of deference or respect they should show to the government's assessment of what the interests of national security require. The leading case on this arose out of Shamima Begum's appeal against her deprivation of British citizenship. Reversing the Court of Appeal, the Supreme Court last year affirmed previous rulings advocating a deferential approach to assessments by the Secretary of State of the interests of national security. This was on the twin basis, also advanced by Lord Hoffmann in *Rehman*, that the government had particular

---

[16] Notably, the Police Act 1997 and the remaining parts of the Regulation of Investigatory Powers Act 2000 (RIPA) and its Scottish equivalent, RIP(S)A.

[17] Special Immigration Appeals Commission Act 1997, introduced in response to *Chahal v UK* (ECtHR, 15 November 1996).

[18] First required in relation to control order reviews by *A v UK* (20090) EHRR 625 at [220]; see *SSHD v AF (No. 3)* [2009] UKHL 28, [2010] 2 AC 269, per Lord Phillips at [59].

national security expertise that the courts did not, and that Ministers are democratically accountable for the national security decisions that they make.[19]

Oversight: summary

27. Lastly, our drone dips to observe the low-rise but centrally-located district that one might call oversight. There is or at least was a long tradition of involving judges in the formulation of counter-terrorism law, from the Diplock Report of 1972[20] to Lord Lloyd's enquiry of 1996 which set out the lines of what became the Terrorism Act 2000. Judges have also been asked to conduct one-off reviews, notably Sir Peter Gibson's Detainee Enquiry, which was never concluded by him but whose interim report of 2013 posed 27 questions including whether the UK had "*a deliberate or agreed policy*" of turning a blind eye to the mistreatment of prisoners and whether the Agencies were willing to "*condone, encourage or take advantage of rendition operations*" mounted by others.

28. Oversight of investigatory powers has also traditionally been led by judges, and this remains the case: the Investigatory Powers Commissioner's Office took over the functions of three distinct judicial commissioners in 2017 and oversees the use of covert investigatory powers by Agencies, police and others, as well as deciding whether to approve the issue of warrants authorised by a Secretary of State.

29. But oversight is not, and should not be, only in the hands of judges. The post of Independent Reviewer of Terrorism Legislation has its origins in 1977, with the introduction to Parliament of the first Prevention of Terrorism (Temporary Provisions) Act. Lord Shackleton, son of the Antarctic explorer and a former leader of the House of Lords who commanded the trust of Parliament, was commissioned to assess and report on the operation of the Act "*with particular regard to the effectiveness of the legislation, and its effect on the liberties of the subject*". He was succeeded in that task by Lord Jellicoe, son of the First World War Admiral and himself a former head of the Special Boat Service. What I think of as the heroic age of independent review is over. Given statutory recognition in the main counter-terrorism statutes, the post has during this century passed into the hands of lawyers – notably my predecessor in the post Lord Carlile, who brought the post an unprecedented degree of recognition in the years after 9/11 when the threat from al-Qaida inspired terrorism was at its height.

---

[19] *R (Begum) v Special Immigration Appeals Commission* [2021] UKSC 7.

[20] *Report of the Commission to consider legal procedures to deal with terrorism in Northern Ireland*, December 1972, Cmnd 5185.

30. I have written of the post of Independent Reviewer that it is:

> "an unusual but durable source of scrutiny … peculiarly appropriate for an area in which potential conflicts between state power and civil liberties are acute, but information is tightly rationed".[21]

The conclusions of Independent Reviewers have often proved influential in their own right, particularly when they have been solicited by government on specific issues of controversy or concern. In other cases, they have contributed to the work of Parliament and, if their reports are taken up and cited by counsel, to that of the courts.[22]

31. Then there is the Intelligence and Security Committee of Parliament, originally established under the Intelligence Services Act 1994, which with the help of a small team of analysts and investigators oversees the policy, expenditure, administration and operations of the UK's intelligence community. It sets its own agenda, which is a varied one: having recently published a report on Extreme Right-Wing Terrorism, it is currently conducting inquiries into national security issues relating to China and Iran, international partnerships and cloud technologies.

Areas for closer attention

32. We can bring the drone down now, its survey work done. In the time that remains, I shall attempt a little more analysis in each of the five districts I have identified.[23]

    a. In relation to counter-terrorism, hostile state activity and investigatory powers, I shall focus on the *reach* of the law: whether it is adequate to the threat, and whether its respects its proper boundaries.

    b. I shall make a few observations on the role of the *courts*, and how successful have they been in enforcing the law, and in reconciling our safety with our rights and freedoms.

---

[21] D. Anderson, "The Independent Reviewer of Terrorism Laws" [2014] P.L. 403-421, p. 421.

[22] *Ibid.*, see also D. Anderson, "Shades of Independent Review", published in G. Lennon, C. King and C. McCartney eds., *Counter-Terrorism, Constitutionalism and Miscarriages of Justice*, Festschrift for Professor Clive Walker, Bloomsbury 2018. Both are available here: https://www.daqc.co.uk/2017/12/06/shades-independent-review/.

[23] For a much more detailed analysis see Robert Ward and Rupert Jones, eds., "National Security: Law Procedure and Practice" (Oxford, 2021).

c. Then finally, and with oversight in mind, I shall say a few words about popular *legitimacy*: given the secrecy that attends much of what they do, can the elements of the state entrusted with national security be said to have earned what has been described as "*a democratic licence to operate*"?[24]

The Reach of National Security Law

Counter-terrorism law: reach

33. Counter-terrorism laws, like our counter-terrorism apparatus, were designed for a bigger threat to our country than has in fact been realised over the past 20 years. The Terrorism Act 2000 was first supplemented in late 2001, under the shadow of the 3,000 deaths on 9/11 – almost equivalent to the death toll over 30 years of the Troubles in Northern Ireland. A further shock came when it was realised that despite the perception of Islamist terrorism as "international", many of its perpetrators were home-grown: a fact forced into the public consciousness by the London public transport suicide bombings of July 2005. One of the bombers, 22-year-old Shehzad Tanweer, even worked in a fish and chip shop, and had played cricket in Leeds on the evening before the attacks. In December of the following year the Metropolitan Police Commissioner, Sir Ian Blair publicly described the threat of another terrorist attempt, in December of 2006, as "*a far graver threat in terms of civilians than either the Cold War or the Second World War*"[25] – aware no doubt that more than 40,000 civilians were killed by Luftwaffe bombing during the Second World War.

34. Against that background, it would not be surprising if counter-terrorism law contained some elements which seem excessive, viewed against a threat which though still serious has proved much less so than was feared 15 or 20 years ago. The basic stocks in trade of the terrorist – firearms, explosives and threats to kill and destroy – are dealt with by the ordinary criminal law. The controversy comes around the edges, where special police powers, procedures and additional criminal offences were designed for an age of complex and highly ambitious terrorist plots.

35. There certainly seemed plenty to question when I started to review the operation of the counter-terrorism laws in 2011: the breadth of some of the precursor offences, the operation of the regime for proscribing terrorist organisations, the ease with

---

[24] RUSI, "A Democratic Licence to Operate: Report of the Independent Surveillance Review", 2015.

[25] "Met chief warns of Christmas terror threat", The Independent, 23 December 2006: https://www.independent.co.uk/news/uk/crime/met-chief-warns-of-christmas-terror-threat-429633.html.

which people could be stopped and questioned, even without the need for suspicion, and the extensive use of nationality and immigration powers for the purposes of counter-terrorism.

36. As terrorism comes more and more to resemble ordinary crime, at least in terms of its scale and modus operandi, it is right to question whether all the powers and offences are still needed. But as I concluded in my last report as Independent Reviewer, in 2016:

> "… based on my own observations over six years, the hostile narrative of power-hungry security services, police insensitivity to community concerns and laws constantly being ratcheted up to new levels of oppression is, quite simply, false."

37. Why that positive assessment? Well I might, of course, have been brainwashed by my proximity to the secret state – though I have never understood why one should be more readily brainwashed by securocrats, highly able though most of them are, than by the many other delightful people from universities, campaigning groups and local communities that it was my pleasure to meet when doing that job.

38. The better explanation, I suggest, is that our system has proved impressively receptive to criticism, and has been prepared to adjust. Under the Coalition Government between 2010 and 2014, we saw a number of cautiously liberalising measures including, to give just two examples:

    a. A reduction in the maximum time allowed for pre-charge detention from 28 days to 14 days, if the courts so permit in the individual case: this in the context of attempts under the Blair and Brown premierships to *extend* the period to 90 and then 42 days; and

    b. The replacement of potentially indefinite control orders by time-limited and less onerous TPIMs: Terrorism Prevention and Investigation Measures.

    It is significant that neither of these changes was prompted by litigation, still less by Europe, but rather by a General Election which brought to power two parties which agreed on what they described as "*a correction in favour of liberty*".

39. The Courts, too, have been prepared to intervene where they thought powers were unlawfully broad. Here are three examples, which could easily be multiplied:

a. In 2004, in a judgment that has been described as the high-water mark of domestic judicial interventionism in relation to counter-terrorism,[26] the House of Lords declared an immigration detention power introduced just weeks after 9/11 to be incompatible with the European Convention on Human Rights.

b. In 2010, the European Court of Human Rights declared the no-suspicion stop and search power in section 44 of the Terrorism Act 2000 to be "*neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse*".[27] The power had been used around a million times in the 10 years of its operation, without a single terrorism conviction resulting. I don't think I ever found a senior police officer who lamented its passing.

c. In 2016 – in a challenge to the use of counter-terrorism powers for important but at first sight unrelated purposes – the Court of Appeal re-interpreted the definition of terrorism in section 1 of the 2000 Act so as to remove some of its more absurd consequences, such as its potential application to groups such as religiously-motivated anti-vaxxers.[28]

40. The police too must be given some credit for exercising their powers in a more proportionate way. No-suspicion stops at ports and airports under Schedule 7 to the Terrorism Act 2000 numbered more than 85,000 in 2010, but fell year on year to the point where there were fewer than 10,000 in the last pre-Covid year of 2019 –and fewer still, of course, since then. The better targeting of these stops[29] has reduced their salience as a grievance among communities who used to feel victimised by them.

41. The pendulum swung back in a stricter direction during what one might describe as the Syrian phase of the war against terror, after 2014. But even then, while some journalistic reactions to carefully staged "*medieval*" atrocities were understandably strong, legislators were on the whole fairly measured.

a. TPIMs were toughened in 2015, on my recommendation, and Temporary Exclusion Orders to manage the return of foreign fighters and others, were introduced.

---

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

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

28 *R (Miranda) v SSHD* [2016] EWCA 6; [2016] 1 WLR 1505.

29 See Jonathan Hall KC, "The Terrorism Acts in 2020", April 2022, chapter 6.

b. To make it easier to prosecute foreign fighters, a new criminal offence was introduced of being in a designated area without a recognised reason – though no designations have been made as yet.

c. And recent changes are likely to result in longer sentences for some, and longer periods of post-release supervision for most[30] - despite the remarkably low recidivism rates for convicted terrorists that have been observed here and in other western countries.

42. But calls to re-introduce large-scale internment after the atrocities in France and Belgium never achieved serious traction; the numbers of TPIMs and Temporary Exclusion Orders in force at any given time rarely get even into double figures; and even after the major attacks of 2017 in London and in Manchester, the focus of government and of the Agencies – quite correctly, in my view – was on improving the handling of intelligence rather than on legislating for new powers.

43. So domestic counter-terrorism law will always be a contested area: but while rough edges remain, we have learned from the experience of many decades and from the intense focus on this area over the past 20 years.

Hostile state activity law: reach

44. To the extent that the law on hostile state activity has been debated over the past 20 years, the question has been not so much whether its reach is excessive but whether it is sufficient. The Official Secrets Acts were, after all, mainly drafted to deal with the threat posed by Germany in the early 20th century, and their replacement has been under pretty constant consideration for seven years, since the Law Commission was first asked to have a look. Reform of the Official Secrets Act 1989 has been ducked. But by modern standards the National Security Bill is unusually well-prepared, and its greater reach is properly responsive to new types of threat.

45. A port stop power inspired by Schedule 7, and executive measures of restraint inspired by TPIMs, have both been launched in recent years, with safeguards, for use against those suspected of hostile state activity.[31] These have not been controversial in view of their established place in the counter-terrorism armoury. Other aspects of

30 Counter-Terrorism and Border Security Act 2019; Counter-Terrorism and Sentencing Act 2021.
31 Counter-Terrorism and Border Security Act 2019, Schedule 3; National Security Bill, Part 2.

the Bill may prove problematic in the House of Lords. The broad principle of the Bill will be accepted but frequently changing Ministers, many late additions, undebated amendments, and some controversial clauses for example on immunity and civil legal aid seem likely to give us plenty to do.

Investigatory powers law: reach

46. If the past 20 years have at times seen too much counter-terrorism law and too little law against hostile state activity, it is tempting to conclude that in relation to investigatory powers we have arrived in Goldilocks territory: just about right.

47. The most controversial issue of principle has always been the exercise of "*bulk powers*": the power to collect and retain – whether from undersea cables or from domestic use of phones – large quantities of data, a significant portion of which is not associated with current targets. In my Bulk Powers Review of 2016 I presented 60 case studies, extracted from the Agencies and analysed by my team, demonstrating the utility of these capabilities for cyber-defence, counter-terrorism and counter-espionage. Parliament decided the powers were proportionate, and the European Court of Human Rights has not controverted it[32] – though some adjustments have been required, and a broad-ranging appeal by Liberty from a High Court judgment of 2019 will be heard in the Court of Appeal next May.

48. Even the UN's Special Rapporteur on Privacy, Professor Joe Cannataci, swallowed his initial scepticism when after inspecting the operation of our system in 2018, he issued a press release under the almost Johnsonian heading: "*UK jointly leads Europe and world on privacy after big improvements, says UN rights expert*". He said:

> "The UK is now co-leading with that tiny minority of EU states which have made a successful effort to update their legislative and oversight frameworks dealing with surveillance",

before adding that this was, of course, still work in progress.

49. The Court of Justice of the EU has taken a more hostile and doctrinaire line on bulk powers, condemning for example in one recent Irish case (in which I declare an interest as a witness for the prosecution) a law requiring a mobile phone provider to retain location data that was used more than a year later to track down the sadistic murderer Graham Dwyer.[33] This has exposed a rare difference of approach between

[32] Application 58170/13 *Big Brother Watch v UK*, 25 May 2021 (Grand Chamber).

[33] Case C-140/20 *GD v Commissioner of the Garda Siochana* ECLI:EU:C:2022:258.

the two European Courts, remarked upon judicially in both Strasbourg[34] and Luxembourg[35] – but has not, so far at least, deprived the UK of the data adequacy determination granted to it by the European Commission.

50. This is not to say that other controversial issues are not raised by the Investigatory Powers Act. One such issue is the government's declared ambition for a direction to require back-door access even into services that, like WhatsApp, are end-to-end encrypted so that the platform operators themselves cannot read them. The benefits to law enforcement are hardly in doubt: but outside government circles the practicality of what is proposed is viewed, to put it mildly, with a degree of scepticism. We have yet to see this debate come to a head.

The Role of the Courts

51. Let us now pass over to the court district. In criminal prosecutions, just as in civil cases, the main challenge is to combine the necessary protection of national security with the fairness of court procedures: procedures which not only require any evidence relied upon to be placed before the defendant and a jury, but which impose strict duties of disclosure on the prosecution and refuse to admit evidence that is judged to be hearsay, insufficiently reliable or unduly prejudicial.

52. A rather thin record of terrorist convictions in the years after 9/11 led the then Home Secretary, Charles Clarke, to look across the Channel and say, in evidence to a Select Committee of Parliament in 2006:

> "I think that … an investigating magistrates' regime is very superior to the system that we have in this country … I do not think that the adversarial system has been a particularly effective means of securing justice."[36]

It is true that French investigating magistrates work directly with security and intelligence officials in a way that facilitates the introduction of sensitive intelligence material into court. This strengthens the ability of the French authorities to convict

---

[34] *Big Brother Watch v UK*, 13 September 2018 (First Section), Joint Opinion of Judge Pardalos and Judge Eicke at [22]: *"… this Court's underlying approach appears to be in clear contrast to the approach taken by the CJEU …"*.

[35] Joined Cases C-793/19 and 794/19 *Spacenet* ECLI:EU:C:2022:702 at [125]: " … *the corresponding rights guaranteed by the ECHR must only be taken into account as a minimum protection standard* …".

[36] Evidence of Charles Clarke MP to Home Affairs Select Committee, *Terrorism Detention Powers: Oral and Written Evidence*, Ev 67 (Q333).

terrorist suspects but also opens up opportunities for intelligence agencies to withhold or manipulate evidence.[37]

53. We can be proud that police/Agency cooperation, combined with reforms to the law of disclosure and the impressive efforts of the Special Crime and Counter-Terrorism Division of the Crown Prosecution Service and of the courts, have allowed terrorism prosecutions to succeed without compromising the essential protections of our system. Miscarriages of justice, once familiar from terrorism cases such as the Birmingham Six, Maguire Seven, Guildford Four and Judith Ward, do not appear to have been a feature of the counter-terrorism landscape during this century.

54. It is not always easy. Three substantial trials were necessary to convict most of the suspects in Operation Overt, a credible plot in 2006 to bring down a number of transatlantic airliners using liquid bombs smuggled in soft drinks bottles, described by one of the trial judges as "*the most grave and wicked conspiracy ever proved within this jurisdiction*".[38] Though the Attorney General can permit terrorist offences to be prosecuted when committed abroad, evidence sufficient for a court is often hard to come by: of the 360 people who have returned to the UK after engaging with the Syria conflict, only some 10% are thought to have been prosecuted, and not all of them for terrorist offences.[39] That is a low figure by comparison with some of our European neighbours. But those terrorism cases which *are* prosecuted enjoy high conviction rates, currently running at around 90%. And in cases where dangerous suspects cannot be deported or prosecuted (or may even have been acquitted by a jury, as in the case of one of the Operation Overt suspects), executive orders such as TPIMs can be made on the basis of intelligence that would not be admissible in criminal proceedings. Such orders are, perhaps, a necessary price to pay for preserving the integrity of our criminal procedure.

55. On the civil side, closed material proceedings or CMPs represent a departure from normal standards of fairness – but a departure that may nonetheless be justified when the alternative is for an issue not to be triable at all. Sir Duncan Ouseley's statutory review of their operation is pending. I take comfort from the rigour with which our highest courts have confined them to cases, and issues, where they are truly required. We have also seen courts starting to order CMPs at the behest of claimants, so as to enable the adjudication of claims that security vetting was

---

[37] Frank Foley, "Countering Terrorism in Britain and France: Institutions, Norms and the Shadow of the Past", Cambridge, 2013, p. 318.

[38] Henriques J., quoted by Silber J. in Secretary of State for the Home Department v AY [2012] EWHC 2054 (Admin) at [46].

[39] Jonathan Hall KC, "The Terrorism Acts in 2020", April 2022, 2.23.

unlawfully withheld,[40] or that a port stop was unlawfully made.[41] So it is disappointing to learn from the Special Advocates' submissions to the Ouseley review that almost 10 years after the Justice and Security Act was passed, the promised closed judgments database has still not materialised, and that other significant and credible grievances remain.[42]

56. Any defensiveness on the part of government or the Agencies may be a function of the considerably greater accountability that has been achieved by legal proceedings over the past 10 years. The Investigatory Powers Tribunal, founded to give redress to those who believe they have been the victim of unlawful covert surveillance, may not disclose anything that might compromise national security but can in turn require disclosure from the agencies of anything that it requires to investigate the claims brought to it. Something of a backwater at first, it came to public attention as matters arising out of the Snowden documents formed the basis of a number of high-profile claims backed by NGOs and brought by counsel of the highest ability. Now subject to the jurisdiction of the Court of Appeal, it continues to be active: take the *Technology Environment* case, heard this July, concerning failings by MI5 to comply with statutory safeguards about retention and deletion. This was an issue which had also troubled Sir Adrian Fulford, the first Investigatory Powers Commissioner, to the extent that he had placed MI5's treatment of warranted data, as he put it, "*in effect, in special measures*".[43]

Oversight

57. This brings me, finally, to the issue of oversight. Time is almost up, so I shall supplement the drone's eye view with just three points.

58. First, all branches of the state need to recognise that oversight is neither a necessary evil nor, even, something that must be tolerated through gritted teeth: it is something to be embraced in their own interest. Fearless and thorough oversight, perceived as such by the interested public, is an essential prerequisite for – in

[40] *R (Eric Kind) v Secretary of State for the Home Department* [2021] EWHC 710 (Admin).

[41] *Alzouabi v Chief Constable of Sussex*, October 2022.

[42] See Angus McCullough QC, "Secret Justice Review: The Special Advocates respond to the Government's submission", UK Human Rights Blog, 14 December 2021: https://ukhumanrightsblog.com/2021/12/14/secret-justice-review-the-special-advocates-respond-to-the-governments-submission/.

[43] Owen Bowcott, "MI5 accused of extraordinary and persistent illegality", The Guardian, 11 June 2019: https://www.theguardian.com/uk-news/2019/jun/11/mi5-in-court-accused-of-extraordinary-and-persistent-illegality.

General Kitson's words – "*maintaining the allegiance of the population*". If the price of achieving that is public criticism when things go wrong, then it is a price well worth paying. Being held to account for your failings is far less damaging, in the long run, than the accusations of deceit and concealment that make you easy prey for conspiracy theorists. So, for example, the considerable value to the Agencies and to the government of parliamentary oversight via the Intelligence and Security Committee is diminished to the extent that the Committee cannot sit, is denied access to matters within its area of competence or faces delay in the publication of its reports.[44]

59. Secondly, while oversight from within the ring of secrecy is necessary, it is not sufficient. In a world in which people don't believe things just because experts say them, it also requires an appropriate degree of public *transparency* – or as it is sometimes referred to in the national security context, *translucency*.

60. I witnessed the astonishing power of transparency in the aftermath of my reports on investigatory powers.[45] A debate that had been bitter and toxic was transformed beyond my expectations by the vast exercise in disclosure that preceded and accompanied the eventual launch of the draft Investigatory Powers Bill in 2015. Previously unacknowledged capabilities, once deemed sinister because they were secret, were avowed. As facts emerged, the emotional temperature fell. The debate shifted on to the justification or otherwise for particular powers, and the safeguards that were needed. Legislatures, courts and the tech industry listened, at home and abroad, and our public authorities ended up with the powers that they needed to keep us safe.

61. It would be nice to think that this lesson had been learned for once and for all. This may not be the case, judging from a recent article on offensive cyber in which Ciaran Martin, the first head of GCHQ's National Cyber-Security Centre, publicly regretted the re-emergence of what he catchily called the Ronan Keating doctrine – a tendency to believe that "*you say it best when you say nothing at all*" – and called in GCHQ's

[44] Joanna Dawson and Joe Tyler-Todd, "The Intelligence and Security Committee", House of Commons Library, 7 October 2022: https://researchbriefings.files.parliament.uk/documents/SN02178/SN02178.pdf.

[45] David Anderson QC, "A Question of Trust: report of the investigatory powers review", June 2015: David Anderson QC, https://www.gov.uk/government/publications/a-question-of-trust-report-of-the-investigatory-powers-review; "Investigatory Powers Bill: bulk powers review", Cm. 9326, August 2016: https://www.gov.uk/government/publications/investigatory-powers-bill-bulk-powers-review.

own interests for a return to what he referred to as the "*transformative period*" of the middle of the last decade.[46]

62. Thirdly, Lord Etherton spoke in a previous Birkenhead Lecture of the phenomenon of legal black holes: areas where because of an ouster clause, there is no legal control on a decision-maker.[47] Just as troubling, in their own way, are oversight black holes.

63. Some of these holes could be filled by Parliament, if we have the will to do so. For example, I hope we will use the National Security Bill to follow the Australian and Irish examples[48] by extending the remit of the Independent Reviewer from counter-terrorism into other aspects of national security law.

64. Other holes would require institutional reform: it seems unsatisfactory, for example, that there are aspects of military operations that cannot be considered by the Commons Defence Committee because it lacks the requisite clearance, yet cannot be considered by the Intelligence and Security Committee because they fall outside its remit.

65. Still other black holes – in particular, the oversight of actions performed jointly with other states or on the basis of intelligence from them – are a consequence of what has been described as the internationalisation of national security.[49] Both terrorism and counter-terrorism operate across boundaries, and unless oversight is permitted to do so it will soon be left behind.[50] But *international* security is another subject. It probably needs another lecture. Thank you for listening to this one.

---

[46] Andrew Dwyer and Ciaran Martin, "A Frontier without Direction? The UK's Latest Position on Responsible Cyber Power": Lawfare Blog, 1 August 2022 https://www.lawfareblog.com/frontier-without-direction-uks-latest-position-responsible-cyber-power.

[47] T. Etherton, "The Road to Tyranny – The Continuing Legal Lessons and Legacy of Nazi Germany", Birkenhead Lecture XI, 2018, [76]-[79]: https://www.graysinn.org.uk/events/lecture-birkenhead-xi/ .

[48] Independent National Security Legislation Monitor Act 2010 (Australia); General Scheme of the Policing, Security and Community Safety Bill, Head 196 (Ireland).

[49] Paul F. Scott, "The National Security Constitution", Hart. 2018, chapter 7.

[50] Some of the difficulties are exemplified, in the legal context, by *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2010] EWCA Civ 158. Similar considerations arise in relation to the oversight of operations based on intelligence supplied by intelligence partners under the control principle.