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**Individual Terrorist Suspects as the New Folk
Devil: New Labour, Rights Tokenism and
Security Compulsions**

Dr. Romyana van Ark (née Grozdanova)

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Abstract

On a certain May morning of 1997, a new dawn had broken over Britain. A triumphant Tony Blair was celebrating Labour's long-awaited victory at the polls. By October of the same year, his government was already working on fulfilling their pledge to modernise British politics and deliver on its commitment for a comprehensive programme of constitutional reform. A key component of this agenda was increasing individual rights by introducing legislation to incorporate the European Convention on Human Rights (ECHR) into domestic law. Yet, by early 2002, the United Kingdom (UK) was the only Council of Europe member state to have derogated from the ECHR under the provisions of Article 15 as a response to the events of 9/11. The derogation allowed for the adoption of certain extended powers of arrest and detention under the Anti-Terrorism, Crime and Security Act 2001 (ATCSA) – an Act was once described as “the most draconian legislation Parliament has passed in peacetime in over a century”. The comprehensive and highly restrictive nature of the provisions and counter-terrorism measures contained within ATCSA set the stage for New Labour's post-2001 approach towards human rights and national security: a perfunctory or token respect for individual rights in comparison to the exhaustive commitment to counter-terrorism measures and policies. If New Labour's legislative and policy record on security matters post 9/11 is to be summarised, it would be thus: when faced with a choice between a prompt legislative response to close perceived legal and policy gaps or first exhausting the wide range of legal powers already available within the statute books, the government chose the former. Furthermore, rather than demonstrating a deep commitment to human rights, the legislation and policies adopted from the year 2000 and onwards were more reflective of the following two interrelated considerations: how much interference with various human rights could be proportionate and acceptable to allow for pre-emption of acts of terrorism as early as feasible? Concomitantly, how restrictive can the measures immobilising a terrorist suspect be before they are seen as unpalatable and/or found to be disproportionate? This tokenism has arguably led to the hollowing out of a number of individual rights such as the right to fair trial.

Keywords

counter-terrorism, human rights, New Labour, terrorist suspect, closed material procedure

Individual Terrorist Suspects as the New Folk Devil: New Labour, Rights Tokenism and Security Compulsions

Dr. Rumyana van Ark (née Grozdanova) *

On a certain May morning of 1997, a new dawn had broken over Britain.¹ A triumphant Tony Blair was celebrating Labour's long-awaited victory at the polls. By October of the same year, his government was already working on fulfilling their pledge to modernise British politics and deliver on its commitment for a comprehensive programme of constitutional reform.² A key component of this agenda was increasing individual rights by introducing legislation to incorporate the European Convention on Human Rights (ECHR) into domestic law. The rationale behind the proposed Human Rights Bill was two-fold: enhance national awareness of human rights and place the promotion of human rights at the forefront of foreign policy.³ The Human Rights Act 1998 (HRA) came into force with much fanfare on 2 October 2000.⁴ Yet, by early 2002, the United Kingdom (UK) was the only Council of Europe member state to have derogated from the ECHR under the provisions of Article 15 as a response to the events of 9/11.⁵ The derogation allowed for the adoption of certain extended powers of arrest and detention under the Anti-Terrorism, Crime and Security Act 2001 (ATCSA), which would have otherwise been in breach of Article 5 of the ECHR. Only a year before Parliament had introduced the Terrorism Act 2000 (TA),⁶ a wide-ranging piece of legislation, which created a

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¹ *The Guardian*, 11 April 2017.

² “*Rights Brought Home: The Human Rights Bill*”, preface and full text available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/263526/rights.pdf.

³ *Ibid.*, Preface.

⁴ *The Independent*, 4 February 2003.

⁵ Declaration contained in a Note Verbale from the Permanent Representation of the United Kingdom, dated 18 December 2001, registered by the Secretariat General on 18 December 2001.

⁶ The 2000 Act was introduced in order to supersede and replace the Prevention of Terrorism (Temporary Provisions) Act 1989 and Northern Ireland (Emergency Provisions) Act 2006 (as amended by the Northern Ireland (Emergency Provisions) Act 1998). For more detailed explanation of the rationale behind the 2000 Act, for example the 1998 Consultation Paper on a Legislation Against Terrorism.

permanent UK-wide counter-terrorism legislative framework.⁷ Nevertheless, ATCSA was described as essential in order to “strengthen legislation in a number of areas to ensure that the Government, in the light of the new situation arising from the September 11 terrorist attacks ..., have the necessary powers to counter the increased threat to the UK.”⁸ Some such measures included the now abolished provisions under Part 4 of ATCSA allowing for indefinite detention of non-nationals who had been certified by the Home Secretary as terrorists.⁹ With reference to these and other powers, the Act was once described as “the most draconian legislation Parliament has passed in peacetime in over a century”.¹⁰

The comprehensive and highly restrictive nature of the provisions and counter-terrorism measures contained within ATCSA set the stage for New Labour’s post-2001 approach towards human rights and national security: a perfunctory or token respect for individual rights in comparison to the exhaustive commitment to counter-terrorism measures and policies. By early 2003, Tony Blair expressly stated that he was prepared to “reconsider our obligations under the Convention on Human Rights” as the “rising tide of asylum-seekers, combined with the renewed terrorist threat was unacceptable”.¹¹ At the same time, the government was privately developing a long-term counter-terrorism strategy, known as CONTEST, which aimed to reduce the risk from international terrorism.¹² The strategy was made publicly available in late 2006; the focus of the strategy was a deepening of the counter-terrorism effort and strengthening of the powers needed to tackle those who facilitate and promote terrorism. In March of 2008, the government adopted the first National Security Strategy, which outlined proposals to address and manage the security challenges facing Britain and their underlying drivers.¹³ The consideration afforded to human rights as part of the set of core values, which grounded both strategies, was limited.

⁷ This permanent footing of many of the provisions and powers contained in the ‘temporary’ emergency legislation aimed at ‘The Troubles’ is ironic in the context of statements made in 1974 by the then Home Secretary Roy Jenkins. He stated as follows: “I do not think that anyone would wish these exceptional powers to remain in force a moment longer than is necessary.” Official Report, 25 November 1974; Vol. 882, c. 642.

⁸ Anti-Terrorism, Crime and Security Bill Explanatory Notes, full text available here <https://publications.parliament.uk/pa/cm200102/cmbills/049/en/02049x--.htm>.

⁹ See Sections 21 – 30 of ATCSA 2001 in particular.

¹⁰ A. Tomkins, “Legislating against Terror: The Anti-Terrorism, Crime and Security Act 2001” (2002) 2 *Public Law* 205.

¹¹ *The Independent*, 4 February 2003.

¹² For more details on the substance and rationale of the strategy, see the full text which is available here https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/272320/6888.pdf.

¹³ *The National Security Strategy of the United Kingdom: Security in an Interdependent World*, full text available here

If New Labour's legislative and policy record on security matters post 9/11 is to be summarised, it would be thus: when faced with a choice between a prompt legislative response to close perceived legal and policy gaps¹⁴ or first exhausting the wide range of legal powers already available within the statute books, the government chose the former. Furthermore, rather than demonstrating a deep commitment to human rights, the legislation and policies adopted from the year 2000 and onwards were more reflective of the following two interrelated considerations: how much interference with various human rights could be proportionate and acceptable to allow for pre-emption of acts of terrorism as early as feasible? Concomitantly, how restrictive can the measures immobilising a terrorist suspect be before they are seen as unpalatable and/or found to be disproportionate?

The arguments on the onerous and problematic nature of certain legislative definitions, provisions and powers adopted between 2000 and 2010 and related judicial decisions are well-rehearsed.¹⁵ Thus, rather than dwelling on them in detail, this chapter proposes to instead focus on the catalyst(s) behind New Labour's penchant to update counter-terrorism legislation annually or biennially and the longer-term impact(s) of this legislative fever. In doing so, the following discussion will first address how the individual terror suspect became one of New Labour's folk devils.¹⁶ The contemporaneous entrenchment of the 'their rights vs. our security' dichotomy, facilitated by the folk devil narrative, has resulted in tokenistic approach towards existing rights obligations. This tokenism has arguably led to the hollowing out of a number of individual rights such as the right to fair trial, which will be the focus of the latter sections. What is perhaps one of New Labour's more disconcerting legacies is that this hollowing out has been mostly achieved from within the rule of law through persistent modification of counter-terrorism legislation, including broader utilisation of bespoke judicial processes initially intended for limited use in immigration cases only.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228539/7291.pdf

¹⁴ New Labour tended to legislate as an instant response either to specific events (9/11 – ATCSA 2001) or judicial decisions (*A and Others v. the United Kingdom* [2004] UKHL 56 – Prevention of Terrorism Act 2005).

¹⁵ Ewing, K., 'The Political Constitution of Emergency Powers: A Comment' (2007) 3 *International Journal of Law in Context* 31, Ewing, K.D., *The Bonfire of Liberties* (2010, Oxford; Oxford University Press), Fenwick, H., 'The Anti-Terrorism, Crime and Security Act 2001: A Proportionate Response to 11 September?' (2002) 65 *Modern Law Review* and Ramraj V.V. *et al* (eds.), *Global Anti-Terrorism Law and Policy* (2005, Cambridge; Cambridge University Press) amongst others.

¹⁶ The concept of a 'folk devil' is magisterially discussed in Cohen, S., *Folk Devils and Moral Panics*, 3rd ed. (2002, New York; Routledge).

New Labour on Counter-Terrorism pre and post 2001 – Moral Panic and the Folk Devils

In recent years there have been many speculations over the Executive's legal interpretation and decision-making, particularly in relation to matters of national security and counter-terrorism.¹⁷ The debates on how and why the Executive arrives at a certain understanding of its legal constraints and the extent to which expansive national security and counter-terrorism measures proposed by the Executive can be adequately restrained by existing legal obligations have persevered.¹⁸ The current legal scholarship has predominantly focused on rational, political and structural arguments¹⁹ to explain Executive action. However, the diverse manner in which legal questions arise for the Executive following a moral panic such as 9/11 should also be considered.²⁰ Understanding these distinct triggers or interpretation catalysts for legal decision-making is important as they can have a significant effect on the Executive process and resulting decisions.²¹ In particular, these catalysts can have a role in driving and shaping the Executive decision-making when balancing national security and counter-terrorism considerations against existing international law and human rights obligations.²² New Labour's pre and post 9/11 approach towards national security, counter-terrorism and human rights is quite illustrative of the impact of an intense moral panic as such a catalyst and the questions it can trigger for the Executive.

¹⁷ Ingber, R., 'Human Rights, National Security, and Executive Branch Legal Decision-making', (2013) *Administrative and Regulatory Law News* 19, p. 19.

¹⁸ Ibid. See also Posner, E. A. and Vermeule, E., *Terror in the Balance: Security, Liberty, and the Courts* (2007, New York; Oxford University Press) and Kavanagh, A., 'Constitutionalism, Counter-Terrorism and the Courts: Changes in the British Constitutional Landscape' (2011) 9 *International Journal of Constitutional Law* (ICON) 172.

¹⁹ Ingber, R., 'Interpretation Catalysts and Executive Branch Legal Decision-making', (2013) 38 *The Yale Journal of International Law* 359; see also Rao, N., 'Public Choice and International Law Compliance: The Executive Branch is a They not an It' (2011) 96 *Minnesota Law Review* 194 and Magill, E. and Vermeule, A., 'Allocating Power within Agencies' (2011) 120 *Yale Law Journal* 1032 amongst others.

²⁰ Ingber, R., 'Human Rights, National Security, and Executive Branch Legal Decision-making', (2013) *Administrative and Regulatory Law News* 19, p. 19.

²¹ Ibid, p. 19 – 20.

²² Ibid.

The aplomb of New Labour's White Paper on the Human Rights Bill, stressing that the "time has come to bring rights home",²³ suggests that at that particular time this Bill was considered to be the government's flagship legislation. Yet, New Labour's penchant to emphasise and promote the importance of security is not a strictly post 9/11 occurrence. "The fight against terrorism has taken on new urgency ... terrorism should have no hiding place, no opportunity to raise funds ... there should be no let-up in our determination to bring its perpetrators to justice".²⁴ This statement made by Tony Blair on 21 September 1998 at the 53rd session of the UN General Assembly could easily be mistaken for having been delivered in the post-2001 environment. Similarly, the following comments by Jack Straw – "the wide ranging and evolving threat from terrorism will not go away. The Bill therefore sets in place an appropriate and effective range of provisions, which is proportionate to the reality of the threat that we face and of practical operational benefit"²⁵ – delivered in December 1999 during the second reading of the Terrorism Bill 2000 have been echoed since when new counter-terrorism legislation is put forward. While perhaps less prominent than subsequent statements made after 9/11, both are nevertheless revealing of New Labour's approach towards national security – the available national security toolkit will be updated if/when it is deemed necessary and appropriate to do so to counter a perceived threat. As indicated in Tony Blair's full statement to the UN General Assembly, revising and improving domestic legislation in addition to effective new measures to counter terrorism agreed at international level could "make a real difference" in the fight against terrorism.²⁶

In the context of the above statements, it is thus unsurprising that New Labour's first government sought to create permanent and UK-wide counter-terrorism legislation shortly after the introduction of the HRA. The TA 2000 was presented as necessary in order to address the "special difficulties" terrorism poses; these challenges were described as quite distinct from those caused by regular crime.²⁷ The overarching aim behind the reform and extension of the existing, area specific, counter-terrorism legislation was to ensure that all forms of domestic

²³ "*Rights Brought Home: The Human Rights Bill*", preface and full text available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/263526/rights.pdf.

²⁴ UN General Assembly 53rd Session, A/53/PV.7.

²⁵ Hansard, HC Deb (14 December 1999) vol. 341 col. 152 – 231.

²⁶ UN General Assembly 53rd Session, A/53/PV.7.

²⁷ Hansard, HC Deb (14 December 1999) vol. 341 col. 152.

and international terrorism could be effectively addressed by the proposed provisions. To put it differently, the Terrorism Bill 2000 was intended to close what were perceived as gaps in the existing laws and remove “certain anomalies”.²⁸ However, as the New Labour government had taken “great exception to particularly arbitrary aspects of the [preceding] prevention of terrorism Acts”, there were safeguards put in place to prevent the disproportionate use of powers contained within the Bill – namely the HRA and the rights protections it affords.²⁹ The Terrorism Act came into force in July 2000.

The provisions of the Act vastly expanded previous definitions of terrorism from politically motivated violence to include politically and religiously motivated serious property damage and interference with electronic systems.³⁰ The Act also outlined a proscription regime based on intelligence evidence and introduced offences relating to being a member of or identifying with a proscribed organisation.³¹ Other newly introduced offences, potentially applicable to individuals suspected of terrorist activities, appeared to push the boundaries of inchoate or pre-crime liability by criminalising the possession of articles.³² The Act further provided for broad police powers including preventative arrests on suspicion and without charge and random stop and search powers for articles, which can be used in connection with terrorism.³³ Counter-terrorism measures such as proscription, limitations on speech, administrative detention based on secret evidence, emergency based legislation, the use of immigration as an aid to counter-terrorism and derogation from rights were given a more firm basis.³⁴

Yet, by November 2001, the 2000 Act was deemed insufficient to allow the UK government to effectually engage in the ‘war with terrorism’.³⁵ The Anti-Terrorism, Crime and Security Act 2001 (ATCSA) was fast-tracked through Parliament and was in force within a month of being introduced in the House of Commons.³⁶ The Act’s perceived necessity was heavily

²⁸ Ibid, col. 159 – 162.

²⁹ Ibid, col. 160.

³⁰ Part I – Introductory, Section 1 Terrorism Interpretation of the Terrorism Act 2000.

³¹ Part II - Proscribed Organisations of the Terrorism Act 2000.

³² Roach, K., *The 9/11 Effect: Comparative Counter Terrorism* (2011, New York; Cambridge University Press), p. 241.

³³ Part V – Counter-terrorist Powers and Part VIII General of the Terrorism Act 2000.

³⁴ See for example Northern Ireland (Emergency Provisions) Act 1973; The Prevention of Terrorism (Temporary Provisions) Act 1974 and the Terrorism Act 2000 which maintained similar provisions; see also the Immigration Act 1971. See further Jackson, J., ‘Many Years on in Northern Ireland: the Diplock Legacy’, (2009) 60 *Northern Ireland Legal Quarterly* 213 and Donohue, L., ‘Terrorism and Trial by Jury: The Vices and Virtues of British and American Criminal Law’, (2007) 59 *Stanford Law Review* 1321.

³⁵ *The Guardian*, 4 October 2001 for the full text of Tony Blair’s speech to Parliament indicating incoming new legislation.

³⁶ The Act was introduced in the House of Commons on 12th November 2001 and came into force on 14th December 2001.

criticised on the basis that the TA was an already comprehensive piece of counter-terrorism legislation providing for a broad range of powers and preventive measures as well as an exhaustive definition of terrorism.³⁷ Further, as the 2000 Act had come into force only several months earlier, it was arguably still in the process of embedding. As such, any evaluation on the effectiveness of its provisions would be unlikely to adequately assess what the full impact of the adopted measures and powers has been or currently was. More tellingly – there is no indication that such an appraisal was in actuality carried out. Rather, the UK government choose to engage in a “classic example of rushed legislation which was in fact unnecessary”.³⁸ While lamentable, this approach is not surprising.

From the 9/11 Moral Panic to Indefinite Detention of Terrorism Suspects

In the immediate aftermath of a national security exigency and at the onset of a moral panic, the Executive’s positioning tends to be the initial and at times pivotal declaration of how the state will respond legally, politically and/or militarily. As such there is, by now, a fairly common pattern in the aftermath of a terrorism act – a pattern applicable both in respect of events which have occurred within and outside the relevant state’s territory. First, the questions of whether the state has the necessary means, information and powers to prevent the current level of terrorism threat tend to arise. Then, in order to be seen to respond appropriately to the immediate events as well as be able to pre-empt future attacks, governments usually seek to expand their counter-terrorism and security toolkit with more far-reaching and, at times, controversial powers.³⁹ Legislative bodies – driven by the agendas of the political parties within them – loathe to be seen by the voting public as being soft on terror or, worse, as indifferent to

³⁷ See for example Fenwick, H. and Phillipson, G., *UK Counter-Terror Laws post 9/11: Initial Acceptance of Extraordinary Measures and the Partial Return to Human Rights Norms* in Ramraj, V. V., et al, *Global Anti-Terrorism Law and Policy*, 2nd ed., (2012, Cambridge; CUP), pp. 481 – 513 amongst many others.

³⁸ House of Lords Constitutional Committee, *Fast-track Legislation: Constitutional Implications and Safeguards*, 15th Report, Session 2008 – 2009.

³⁹ The range of measures introduced as part of the Anti-Terrorism, Crime and Security Act (ATCSA) 2001 (now repealed) would fall within this category. The post 2015 French approach to counter-terrorism legislation and regular renewal of the state of emergency is similarly illustrative. Following a series of coordinated terrorist attacks in Paris on 13 November 2015, France first declared a state of emergency (renewed on several occasions) and then proceeded to implement and impose a number of new criminal and administrative measures. See further Boutin, B., 'Administrative Measures in Counter-Terrorism and the Protection of Human Rights' (2017) 27 *Security and Human Rights* 128.

terror.⁴⁰ With the stakes this high, legislators tend to consent to contentious provisions which may have a significant impact on individual rights⁴¹ – the indefinite detention of those certified as international terrorists under ATCSA 2001 being an apt example. What does however differentiate New Labour’s immediate legislative approach after 9/11 to other similarly rushed legislation is the draconian nature of the provisions, the longevity of its folk devil and the enduring impact on individual human rights.

In 2003 David Dyzenhaus observed that in the aftermath of 9/11 a number of states were gripped by a profound ‘moral panic’.⁴² While periods of moral panic are not new to societies – particularly in the context of national security emergencies – what tends to change is the episode, person or group of persons, which becomes defined as a threat to society.⁴³ The object of the panic can be quite novel; however it can also be something which has been in existence for a long time and has suddenly reappeared in the limelight.⁴⁴ The threat of terrorism and public acts of terrorism are certainly not new, yet the events of 9/11 were perceived as unique; the threat by international terrorist organisations was (and still is) persistently depicted as unprecedented.⁴⁵ One explanation behind this strong reaction could be the correlation between the volatility or intensity moral panic and the decisions taken by the relevant government or governments as a response to the event(s) triggering the panic.⁴⁶

For an event to be a moral panic, three key elements are required: a suitable enemy or folk devil,⁴⁷ a suitable victim⁴⁸ and a consensus that the actions being denounced are not insulated entities but can become integral parts of society or regular occurrences unless decisive action is taken.⁴⁹ Once blame is allocated, i.e., an individual or a group has been identified as being responsible for causing the damage, the relevant government will then assess the level of risk

⁴⁰ See for example Ewing, K., ‘The Political Constitution of Emergency Powers: A Comment’ (2007) 3 *International Journal of Law in Context* 31 and Donohue, L., *The Cost of Counter-Terrorism: Power, Politics and Liberty* (2008, Cambridge; CUP).

⁴¹ Ibid.

⁴² Dyzenhaus, D., ‘Humpty Dumpty Rules or the Rule of Law: Legal Theory and the Adjudication of National Security’ (2003) 28 *Australian Journal of Legal Philosophy* 1, p. 2.

⁴³ Cohen, S., *Folk Devils and Moral Panics*, 3rd ed. (2002, New York; Routledge), p. 1. See also Tushnet, M., ‘Defending Korematsu?: Reflections on Civil Liberties in Wartime’ (2003) *Wisconsin Law Review* 273 and Young, J., *The Vertigo of Late Modernity* (2007, London; Sage Publications).

⁴⁴ Cohen, S., *Folk Devils and Moral Panics*, 3rd ed. (2002, New York; Routledge), p. 1.

⁴⁵ See the public comments of Tony Blair, George W. Bush, Theresa May and Francois Holland amongst others who at various times since 9/11 have described the threat of terrorism countries as “unprecedented” and requiring more commensurate and contemporary means to combat terrorism. The immediate public statements by NATO and the UN Security Council took a similar approach.

⁴⁶ Cohen, S., *Folk Devils and Moral Panics*, 3rd ed. (2002, New York; Routledge), p. xxxii.

⁴⁷ Described as soft and easily denounced target with little power.

⁴⁸ Someone with whom individuals could easily identify with.

⁴⁹ Cohen, S., *Folk Devils and Moral Panics*, 3rd ed. (2002, New York; Routledge), p. xii.

and by proxy the measures required to both apprehend those responsible and to pre-empt further occurrences of the violence.⁵⁰ Aside from the potential longevity of the measures adopted as a response, the volatility or intensity of the particular moral panic could also result in an expansive and assertive immediate reaction targeting everyone deemed responsible for the events triggering the panic.⁵¹

The events of 9/11 – the scale of destruction, the callousness of the attack and the number of casualties – arguably touched a chord within numerous states in a manner previous terrorist attacks had not.⁵² The immediate multi-faceted and multi-front response led by the US and strongly supported (and operationalised) by the UK amongst many other European and non-European countries is illustrative of how much the events of that day impacted on the international community.⁵³ The intensity of the post 9/11 moral panic and the lingering fear of whether/when another attack might occur, challenged the ability of states to provide and guarantee security.⁵⁴ Thus, governments had to be seen to respond forcefully, nationally and transnationally, through legislation and all other means deemed necessary.⁵⁵

The ensuing domestic legislative fever, particularly in the UK, has resulted in severe and lengthy restrictions of the rights and liberties of individual terrorist suspects; restrictions which have perhaps permanently recalibrated⁵⁶ the relationship between such suspects and the state. The disproportionate and discriminatory nature of measures such as the indefinite detention of those certified as international terrorists,⁵⁷ the control orders regime which replaced the indefinite detentions⁵⁸ and the stop and search powers⁵⁹ under Section 44 of the TA 2000 have been widely dissected within academia as well as domestic and regional court rooms.⁶⁰ In 2004, the House of Lords (now the Supreme Court), found that the indefinite detention powers under Part 4 of ATCSA 2001 were incompatible with Articles 5 and 14 of the European Convention

⁵⁰ Ibid, p. xxxii.

⁵¹ Ibid, p. xix.

⁵² Jenkins, D., et al (eds.), *The Long Decade: How 9/11 Changed the Law* (2014, New York; OUP), p. 5.

⁵³ Otherwise known as the infamous ‘War on Terror’ and including counter-terrorism measures such as the ‘High Value Detainee’ programme and extraordinary renditions.

⁵⁴ Jenkins, D., et al (eds.), *The Long Decade: How 9/11 Changed the Law* (2014, New York; OUP), p. 9

⁵⁵ Ibid.

⁵⁶ The concept of ‘downward recalibration’ of rights has been discussed in detail in De Londras, F., *Detention in the ‘War on Terror’: Can Human Rights Fight Back?* (2011, Cambridge; CUP) and Fenwick, H., ‘Recalibrating ECHR Rights and the Role of the HRA post 9/11: Reasserting International Human Rights Norms in the ‘War on Terror’?’ (2010) 63 (1) *Current Legal Problems* 153.

⁵⁷ Please refer to findings in *A and Others v the United Kingdom* [2004] UKHL 56.

⁵⁸ See the Prevention of Terrorism Act 2005 and the Explanatory Notes attached to it.

⁵⁹ *Gillan and Quinton v the United Kingdom* [2010] ECHR 28.

⁶⁰ A particularly thorough account provided here – Ewing, K.D., *The Bonfire of Liberties* (2010, Oxford; OUP).

of Human Rights.⁶¹ The powers were found to be disproportionate and to allow for the detention of suspected international terrorists in a manner that discriminates on the ground of nationality or immigration status. Of particular interest are the comments made by Lord Hoffman on both the existence of a state of emergency and the impact of the legislation in question.⁶² He first noted that “terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community.”⁶³ Thus, he felt that the Special Immigration Appeals Commission had made an error of law on the question of whether there was an emergency threatening the life of the nation. On this point he discernibly differed from many of his colleagues. He then strongly criticised the use of indefinite detention in any form as incompatible with the United Kingdom’s constitution. (again – noticeably diverging from other Law Lords). He famously concluded his judgment as follows: “the real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these”.

The problematic nature of these provisions does not thus require detailed elaboration other than to note that while New Labour may initially have been an advocate for human rights, induced by the post 9/11 moral panic, they ultimately became champions for counter-terrorism and over-securitisation. The prevention of terrorism crept into the pre-criminal/pre-terrorism spaces where an individual who may be influenced to support terrorism-related activities also became a folk devil. Thus, within this environment, the downward recalibration of rights captured not only individuals (suspected of) engaging in acts of terrorism but gradually also those who were yet to engage in any terrorism-related activities but may potentially be influenced to do so in the future as the subsequent discussion will illustrate.⁶⁴

Immobilising the Folk Devil

Lurking behind the utilisation of the powers under Part 4 of ATCSA 2001, the subsequent imposition of control orders and the exclusion of individuals from the UK on national security

⁶¹ *A and Others v the United Kingdom* [2004] UKHL 56, [73].

⁶² *Ibid.*, [96].

⁶³ *Ibid.*, [96].

⁶⁴ See for example Duffy, H., *The ‘War on Terror’ ad the Framework of International Law*, 2nd ed. (2015, Cambridge; CUP); Donohue, L., *The Cost of Counter-Terrorism: Power, Politics and Liberty* (2008, Cambridge; CUP); Ramraj, V. V., *et al*, *Global Anti-Terrorism Law and Policy*, 2nd ed., (2012, Cambridge; CUP) and Masferrer, A. and Walker, C. (eds.), *Counter-Terrorism, Human Rights and the Rule of Law* (2013, Gloucester; Edward Elgar). See also UK Counter Extremism and Safeguarding Bill 2016 and the UK Investigatory Powers Act 2016.

grounds,⁶⁵ was the reliance on a procedure first employed strictly within the Special Immigration Appeals Commission (SIAC). Section 5 (3) of the SIAC Act of 1997 introduced to the UK's legislative and judicial framework the use of both secret evidence and closed proceedings – within immigration cases only.⁶⁶ Under a closed material procedure (CMP), secret intelligence evidence can be considered by a judicial body without the defendant or his legal team being given the access to hear the evidence. A Special Advocate (SA) is tasked with representing the interests of the excluded party in closed hearings and subjecting the sensitive material to scrutiny, thereby promoting the fairness of the proceedings.⁶⁷ Upon introduction, the CMPs were perceived as a legal abnormality and, thus, were heavily criticised on human rights grounds.⁶⁸ Nevertheless, they have gradually become a more permanent fixture within the UK judicial framework.

The founding of a specialised tribunal accommodating the use of secret evidence could be viewed as a rather serendipitous pre 9/11 occurrence, the utility of which was more fully appreciated and exploited in the post 9/11 environment. It should be noted however that SIAC and its procedures were established as a direct response to the findings in *Chahal v the United Kingdom* case in respect of Article 5 of the ECHR.⁶⁹ The 1997 Act sought to directly address the European Court of Human Rights (ECtHR) decision and ensure that there continues to be a specialised tribunal with bespoke procedure, which accommodates the use of closed evidence in immigration matters where national security considerations are engaged.

SIAC heard only three cases in a CMP prior to 2001.⁷⁰ In all three cases, the UK was seeking to deport the individuals in question as they were considered to pose a threat to national security due to (suspected) terrorism related activity.⁷¹ The limited number of cases and SIAC's strict purview strongly suggest that pre 9/11 the reliance on CMPs was exceptional. Nevertheless,

⁶⁵ See the cases of C-300/11, *Z.Z. v the Secretary of State for the Home Department*, Judgment of 4 June 2013 and *I.R. and G.T. v. the United Kingdom*, Application nos. 14876/12 and 63339/12, Judgment of 28 January 2014.

⁶⁶ The Act also established SIAC to have purview over appeals of deportation, detention or exclusion decisions due to national security considerations; SIAC has the same powers as a High Court. See further the SIAC Act 1997 and SIAC (Procedure) Rules 2003 No. 1034 in force since April 2015.

⁶⁷ The role of Special Advocate was also introduced by Section 6 of the SIAC Act 1997.

⁶⁸ Nanopoulos, E., 'European Human Rights Law and the Normalisation of the 'Closed Material Procedure': Limit or Source?' (2015) 78 *Modern Law Review* 913, p. 913.

⁶⁹ Application No. 22414/93, Judgment 15 November 1996. The Advisory Panel procedure, the predecessor of SIAC, fully reviewed the evidence relating to the national security threat Mr Chahal was deemed to pose and agreed with the determination that Mr Chahal ought to be deported. While there was no violation of Article 5(1), neither the proceedings for *habeas corpus* and the judicial review of the detention decision nor the Advisory Panel procedure complied with the requirements of Article 5(4).

⁷⁰ All three were heard between 1999 – 2000 i.e. during New Labour's first government.

⁷¹ *Secretary of State for the Home Department v. Shaftiq Ur Rehman* [2000] EWCA Civ 168, *Mukhtiar Singh and Paramjit Singh v. Secretary of State for the Home Department* (Special Immigration Appeals Commission, 31 July 2000).

and albeit only 3, these cases opened up the possibility that the government could rely on secret evidence when seeking to deport a certain category of individuals. As this specialised procedure was deemed to be of benefit in a post 9/11 environment, New Labour's legislative fever gradually expanded its operation to a number of other preventative counter-terrorism measures eventually resulting in the CMPs' entrenchment within the UK judicial structures. Part 4 of ATCSA 2001, now repealed, was devoted to targeting those suspected of international terrorism, their certification, removal and/or detention. What should be highlighted, aside from their controversial and highly restrictive nature, is that the operation of these measures was grounded in immigration and asylum law. Under Section 21 (9) ATCSA 2001, an action of the Home Secretary taken wholly or partly in reliance on a certificate could only be questioned in legal proceedings involving SIAC i.e. proceedings within which, if necessary, a CMP could be relied on. As SIAC has purview over deportations, any immigration removal proceedings and/or related appeals under Section 22 of ATCSA would thus involve SIAC and again potentially a CMP. While awaiting departure or removal from the UK, an individual certified as a suspected international terrorist could be detained either temporarily or indefinitely under Section 23. Further, under Section 30 of the Act, SIAC had exclusive jurisdiction over derogation matters as pertaining to ATCSA 2001.

What Part 4 of ATCSA thus appeared to do is transform SIAC from a bespoke immigration tribunal to one specialising in counter-terrorism cases within the on-going state of emergency. As a result, once certified under Section 21, and therefore transformed into a folk devil, an individual either faced the prospect of indefinite detention or alternatively, challenging closed evidence, which neither he nor his core legal team had any access to. If an individual was to contest the (dis)proportionality of the measures imposed by disputing the existence of the state of emergency, which accommodated certain derogations, under Section 30 they again faced the possibility of a CMP. The history of counter-terrorism cases suggests that, once depicted as a folk devil within an emergency, an individual tends to encounter significant legal difficulties in challenging the imposition of restrictive or preventative security measures.⁷² Yet, the measures contained within Part 4 of ATCSA 2001 were particularly onerous and disproportionate. They were therefore unsurprisingly found to be in breach of existing rights

⁷² See for example Tushnet, M., "Defending *Korematsu*?: Reflections on Civil Liberties in Wartime" (2003) *Wisconsin Law Review* 273, Jackson, J., 'Many Years on in Northern Ireland: the Diplock Legacy', (2009) 60 *Northern Ireland Legal Quarterly* 213 and English, R., *Terrorism: How to Respond* (2009, Oxford; OUP).

obligations by the House of Lords in 2004.⁷³ While the Law Lords made references to the use of closed materials within the proceedings in SIAC, they felt that the impact of these materials did not go further than to substantiate and strengthen the openly available evidence.⁷⁴ Thus, they found that SIAC had made no error in law in reaching the conclusion that a public emergency threatening the life of the nation existed.⁷⁵ Following the House of Lords' decision, the government replaced Part 4 of ATCSA 2001 with the provisions of new counter-terrorism legislation. The reliance on CMPs, closed evidence and SAs in the context of preventative counter-terrorism measures continued unabated.

Before the decision in the *A and Others* case, SIAC could consider three possible outcomes when deliberating on immigration appeals: exclusion or removal from the UK, detention under Part 4 of ATCSA 2001 and removal of citizenship.⁷⁶ Following the decision, New Labour acted swiftly to ensure that SIAC's now defunct detention function is replaced by another regime capable of similarly immobilising terror suspects. The Prevention of Terrorism Bill 2005, introduced to the House of Commons on 25 February 2005, proposed a new system of control orders under which an individual may be subjected to various obligations deemed necessary to prevent or restrict further involvement in terrorism-related activity.⁷⁷ The Bill was specifically designed to address the imminent release of ten of the foreign nationals detained under Part 4 of ATCSA 2001 following the ruling in the *A and Others* case.

The obligations imposed could include restrictions on movement to or within certain areas, restrictions on communications and associations, and requirements as to place of residence amongst others. Each control order was envisioned as being tailored to the particular risk posed by the individual in question. A control order could be imposed against any individual engaged in terrorism-related activity, irrespective of nationality or terrorist cause thus arguably addressing the problem with Part 4 of ATCSA 2001. Judicial scrutiny over the imposition, renewal or modification of a control order was entrusted with the High Court; control order proceedings could involve the hearing of evidence in both open and closed sessions.⁷⁸ Within

⁷³ *A and Others v the United Kingdom* [2004] UKHL 56. In its decision, the House of Lords approached the issue of whether there was a state of emergency as a primarily political question i.e. one that needs to be addressed and resolved by the government (para. 29). Section 23 of ATCSA 2001 was however found to be incompatible with Articles 5 and 14 of the ECHR. A Declaration of Incompatibility under Section 4 HRA 1998 was thus issued.

⁷⁴ *Ibid.*, [27].

⁷⁵ *Ibid.*, [166].

⁷⁶ House of Commons Constitutional Affairs Committee, *The Operation of the Special Immigration Appeals Commission (SIAC) and the Use of Special Advocates*, 7th Report of Session 2004 – 05 HC 323-I.

⁷⁷ Prevention of Terrorism Bill 2005 Explanatory Notes, Session 2004 – 05.

⁷⁸ *Ibid.* Prevention of Terrorism Act 2005 (now repealed).

17 days, the Prevention of Terrorism Act 2005 (PTA) was in force and all ten individuals had been placed under a control order.⁷⁹

The PTA was strongly criticised as a legislation “pushed through in Parliament...to meet an artificial deadline imposed [by the government’s] own earlier emergency legislation of 2001.”⁸⁰ The adoption process surrounding the PTA and the introduction of a control order regime based on the indefinite detention one are illustrative of the longer-term impact of emergency counter-terrorism laws. What the indefinite detention and control order regimes aimed to achieve is restrict or prevent an individual from any further involvement in terrorist-related activity by in essence immobilising them through unorthodox court proceedings. The immediate replacement of one extraordinary regime with another similar one, indicates that a vested interest in such measures had already been created. As the history of emergency counter-terrorism legislation suggests, once enacted, the relevant agencies tend to be reluctant to relinquish powers which could be used to address other threats to national security or diminish crime.⁸¹ Similarly, an Executive which has compelled the introduction of such measures, tends to do so on the basis that they perceive these measures as necessary; as such a government has an on-going vested interest to reaffirm and defend its overall security and counter-terrorism strategy. Replacing one measure with another of a similar spirit is a means to achieve the latter.

The entrenchment of Folk Devils and Over-securitisation

The manner in which the PTA was pushed through Parliament⁸² and the practical operation of the control order regime demonstrate a particular danger of adopting extraordinary counter-terrorism measures within an emergency. Once such procedures are implemented, their continued use has a normalising effect – either on the restrictiveness of the specific processes or by paving the way for similar, if marginally less onerous, measures in the future. Arguably, in a pre 9/11 environment, the control order regime might have been deemed unacceptable and never legislated for. However, in the post 9/11 moral panic and particularly after the operation of Part 4 of ATCSA 2001, while criticised prior to introduction, control orders nevertheless

⁷⁹ House of Commons Constitutional Affairs Committee, *The Operation of the Special Immigration Appeals Commission (SIAC) and the Use of Special Advocates*, 7th Report of Session 2004 – 05 HC 323-I.

⁸⁰ House of Lords Constitutional Committee, *Fast-track Legislation: Constitutional Implications and Safeguards*, 15th Report, Session 2008 – 2009.

⁸¹ Donohue, L., *The Cost of Counter-Terrorism: Power, Politics and Liberty* (2008, Cambridge; CUP), p. 15.

⁸² See for example the House of Lords Constitutional Committee, *Fast-track Legislation: Constitutional Implications and Safeguards*, 15th Report, Session 2008 – 2009 and the evidence featured within it.

became a feature in the UK counter-terrorism toolkit until 2011.⁸³ Their use, similar to the provisions of the 2001 Act, underwent several high-profile judicial challenges, some of which will be briefly outlined in the subsequent section. While the control order regime was repealed in 2011, its operation between 2005 and 2011 normalised the broader utilisation of CMPs and SAs across a range of pre-emptive counter-terrorism measures.

(Future) Folk Devils and the Courts

In 2007, the House of Lords gave its judgment in one of the first cases challenging a non-derogating control order made by the Home Secretary under Sections 2 and 3(1) (a) PTA 2005 – the cases of AF and MB.⁸⁴ The court had to decide, *inter alia*, whether the CMP and SA procedures provided for under the Act, were compatible with Article 6 of the ECHR. It should be noted that neither MB nor AF were charged with having committed any breach of the law but rather that they *might* engage in unlawful behaviour in the future. This was a particularly pertinent issue in respect of one of the appellants (AF) – the use of a CMP had resulted in the case against him being in essence entirely undisclosed, with no specific allegations of terrorism-related activity being contained in open material.⁸⁵ The court was tasked with addressing four particular issues including whether the procedures provided for by Section 3 of the PTA 2005 and the Rules of Court were compatible with Article 6 in circumstances where they have resulted in a case based in essence on entirely closed evidence.

In addressing this specific issue, Lord Bingham felt that neither AF nor MB had “enjoyed a substantial measure of procedural justice”,⁸⁶ he further noted that the very essence of the right to a fair hearing had been impaired.⁸⁷ The majority did however take the view that the cases should be remitted for reconsideration to the trial judge on the basis that issues relating to a fair trial, when a CMP is employed, can be fact specific. This conclusion was based on the view

⁸³ The PTA 2005 and the control order regime was repealed by the Terrorism Prevention and Investigation Measures Act 2011. The 2011 Act introduced the Terrorism Prevention and Investigation Measures (TPIMs); the Counter-Terrorism and Security Act 2015 made some modifications to the TPIM regime.

⁸⁴ *Secretary of State for the Home Department v. MB (FC), Secretary of State for the Home Department v. AF (FC)* [2007] UKHL 46. The PTA 2005 drew a clear distinction between a “derogating control order” defined in Section 15 (1) and “non-derogating control order” defined in Section 1(10).

⁸⁵ *Ibid*, [3].

⁸⁶ See further the findings in the *Chahal v the United Kingdom* (1996) 23 EHRR 413, para. 131.

⁸⁷ *Secretary of State for the Home Department v. MB (FC), Secretary of State for the Home Department v. AF (FC)* [2007] UKHL 46, [42]. He also relied on *R (Roberts) v Parole Board* [2005] UKHL 45 to emphasise that “the concept of fairness imports a core, irreducible minimum of procedural protection”. This 2005 case addressed the question whether the Parole Board had the power to adopt a special advocate regime i.e. employ a CMP or similar process.

that in many cases a CMP and the reliance on SAs would provide a sufficient counter-balance where the Home Secretary wished to utilise closed evidence; each case had to be considered individually and would depend on whether the controlled person had been given “a meaningful opportunity to contest the factual basis” for the order.⁸⁸

By the time the Supreme Court was delivering its judgment in the *AF (No. 3)* case,⁸⁹ the ECtHR had established that a controlee must be given sufficient information about the allegations against him to enable him to give effective instructions to challenge these allegations.⁹⁰ The Court of Appeal confirmed that non-disclosure of evidence cannot go as far as denying a party knowledge of the essence of the case against him, at least where an individual is at risk of consequences as severe as those normally imposed under a control order.⁹¹ Some of these consequences have included in essence “a form of internal exile” or severe impact on family life.⁹² The onerous nature of control orders was subject to criticism both within the courts and in Parliament until the PTA 2005 was eventually repealed. However, the reliance on closed evidence through the CMP and SA procedures has endured despite comments made by current Special Advocates that in their experience “CMPs are inherently unfair” and do not deliver real procedural fairness.⁹³

Nevertheless, aside from the aforementioned scenarios under the now repealed ATCSA 2001 and PTA 2005, CMPs have also been used in a variety of cases involving proscription as a terrorist organisation,⁹⁴ domestic asset freezing orders,⁹⁵ terrorism prevention and investigation measures (TPIMs)⁹⁶ and employment disputes,⁹⁷ which raise questions of national security. The recent cases relating to employment disputes – *Tariq* and *Kiani* – are quite illustrative of how much the counter-terrorism legislative and judicial landscape has shifted post 9/11. There

⁸⁸ *Secretary of State for the Home Department v. MB (FC), Secretary of State for the Home Department v. AF (FC)* [2007] UKHL 46, [65 – 66, 74]. Lady Hale, in the majority, did expressly note that it was unlikely that the ECtHR would hold that “every control order hearing in which the special advocate procedure had been used [...] would be sufficient to comply with Article 6.”

⁸⁹ *Secretary of State for the Home Department v AF and Another (No. 3)* [2010] 2 AC 269.

⁹⁰ *A and Others v the UK* [2009] ECHR 301.

⁹¹ [65].

⁹² Human Rights Joint Select Committee, *Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010*, Session 2009-10.

⁹³ See response by Special Advocates within the 2011 Justice and Security Green Paper, HM Government.

⁹⁴ TA 2000.

⁹⁵ Counter-Terrorism Act (CTA) 2008.

⁹⁶ Terrorism Prevention and Investigation Measures Act (TPIMA) 2011.

⁹⁷ See in particular the cases of *Home Office v Tariq* [2011] UKSC 35 and *Kiani v Secretary of State for the Home Department* [2015] EWCA Civ 776. In April of this year, the ECtHR found that even though some of the proceedings were held in a closed session, Mr. Tariq had been provided with proper safeguards for his right to fair trial including a Special Advocate. The application was declared inadmissible (*Gulamhussein and Tariq v. the United Kingdom*, Application nos. 46538/11 and 3960/12, Judgment 26 April 2018).

was no suggestion in either case that the individuals in question had engaged in terrorism-related activities. Rather, the concerns were that they *might be vulnerable* to future outside attempts or duress to have them abuse their positions as immigration officers. By 2010, the CMP and SAs procedure had been used in at least twenty-one different contexts including parole hearings.⁹⁸ Following the adoption of the 2013 Justice and Security Act (JSA), the applicability of CMPs has been extended to all civil proceedings.⁹⁹

The 2013 Act was a response to somewhat embarrassing legal proceedings stemming from a transnational strand of New Labour's counter-terrorism policies – support for the US 'War on Terror' and facilitation of the rendition programme mentioned above. Binyam Mohamed¹⁰⁰ was one of several individuals subjected to an extraordinary rendition after 9/11 who subsequently challenged various aspects of the alleged UK (in-)direct involvement in the rendition process.¹⁰¹ The contentious issue of the case was the potential public disclosure of seven paragraphs, which provided a summary of reports by the CIA on the circumstances of Mr Mohamed's detention and interrogation in Guantánamo Bay. During the parliamentary discussions around the Justice and Security Bill, yet another case threatening to cause some embarrassment for the UK government arose out of a claim for damages.¹⁰² The civil claim related to the detention of the six claimants by foreign authorities at various locations. The most recent case raising the issue of a CMP was also a highly charged rendition case – *Belhaj and Another v Director of Public Prosecutions and Others*¹⁰³ - which temporarily raised the prospect that a CMP could be utilised in proceedings *concerning* a criminal cause or matter.¹⁰⁴ This case was also settled and followed by an unreserved apology.¹⁰⁵

⁹⁸ For the full list, please refer to the *Joint Committee on Human Rights, Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010*, HL 64/HC 395, pp. 51 – 53 and *Joint Committee on Human Rights, Counter-Terrorism Policy and Human Rights (Seventeenth Report): Bringing Human Rights Back In*, HL 86/HC 111, pp. 21 – 22.

⁹⁹ Part 2, JSA 2013.

¹⁰⁰ *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 1)* [2008] EWHC 2048 (admin) and *R (Binyam Mohamed) v Secretary of State for Foreign & Commonwealth Affairs (No 2)* [2010] EWCA Civ 158. Mr Mohamed was detained in Guantánamo Bay as a suspected enemy combatant for several years.

¹⁰¹ In February 2008, the then Foreign Secretary David Miliband admitted that two US aircrafts carrying rendered suspects had landed on Diego Garcia Island in 2002. See also the Open Society Justice Initiative, *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition* (2013, New York; GHP Media, Inc) and the December 2013, 'The Report of the Detainee Inquiry' (interim report) by Sir Peter Gibson.

¹⁰² *Al Rawi and Others v The Security Service and Others* [2011] UKSC 34.

¹⁰³ [2018] UKSC 33.

¹⁰⁴ See further the 2017 Divisional Court decision in *Belhaj and Another v Director of Public Prosecutions and Others* [2017] UKSC 3. This limb of the Belhaj legal proceedings concerned a challenge to a decision by the Crown Prosecution Service. The Court decided that whilst the judicial review application could be seen as proceedings *concerning* a criminal cause or matter, it was certainly not proceedings *in* a criminal cause or matter (a CMP cannot be utilized in the latter scenario).

¹⁰⁵ "Britain apologises for 'appalling treatment' of Abdel Hakim Belhaj" *The Guardian* 10 May 2018.

Thus, since New Labour utilised this bespoke procedure within ATCSA 2001 and subsequently expanded its use beyond SIAC's proceedings, a) CMPs have become the standard governmental response when facing highly sensitive and potentially embarrassing cases relating to counter-terrorism operations (both transnational and domestic) and b) CMPs should no longer be described as exceptional or extraordinary. More significantly, post 9/11, the use of CMPs has altered the courts' approach towards the core principles of open and natural justice.¹⁰⁶ It should be noted that a CMP does have most of the trappings of an adversarial procedure: the possibility to challenge closed evidence, the presence of a security cleared and highly trained counsel, and a hearing in front of experienced justices. However, in the words of Dinah Rose QC, who has acted as a Special Advocate: "The case that an appellant thinks they are meeting may not be simply different in extent but wholly different in kind from the case they are actually meeting."¹⁰⁷ In other words, an individual is effectively placed in the quintessential Kafkaesque scenario when closed evidence is employed – one can only prevail in a trial if they can rebut all the undisclosed evidence against them. To do so successfully, however, an individual would have to prove that they are not a terrorist or engaged in terrorism related activity regardless of what might be implied by the government's closed evidence. An individual must do so without always knowing who provided the evidence or how it was obtained. Alternatively, as the aforementioned cases illustrate, the use of a CMP can either result in the imposition of onerous counter-terrorism measures or be used by the Executive to avoid some embarrassment.

New Labour's Counter-Terrorism Legacy: Entrenchment of the Exceptional

Having gradually become normalised during New Labour's counter-terrorism legislative fever, CMPs could be viewed as yet another means of recalibrating compliance with state obligations in respect of individual terror suspects. As suggested in a number of the relevant cases, these specialised proceedings are used in order to balance the need of the state to protect sensitive intelligence information, gathering techniques and the rights of the individual terror suspect. Engaging the concept of 'balancing' in this context is however misguided as it suggests that

¹⁰⁶ See the extensive judicial scrutiny and references to the importance of 'open and natural justice' in *Al Rawi and Others v The Security Service and Others* [2011] UKSC 34. Lord Dyson described the principle of open justice as a "fundamental common law principle" (para. 11). Natural justice and its various strands were discussed as core foundations of court trials (paras. 12 – 15).

¹⁰⁷ See oral evidence before the Joint Committee on Human Rights, *The Justice and Security Green Paper*, 24 January 2012, p. 13. Full uncorrected transcript available here <https://www.parliament.uk/documents/joint-committees/human-rights/JCHR%2024%20January%20transcript.pdf>.

perhaps there is an equal starting point or equilibrium between individual rights on one scale and national security on the other. It further implies that human rights are somehow an impediment on defence, security and counter-terrorism policies. The preambles and texts of the relevant regional and international human rights documents demonstrate that while individual rights should be respected at all times, the human rights framework has been designed to afford states some flexibility when they need to respond to exigent circumstances through provisions such as Article 15 ECHR. In other words, ensuring continuing respect for human rights does not impede states from seeking to restore and reassert the security of the nation during a state of emergency; rather, the required respect for human rights is intended as a guarantee that any exceptional measures are legitimate, proportionate and ultimately short-lived in line with the (ideally) temporary nature of an emergency.

However, as aptly demonstrated by the aforementioned replacement of one extraordinary preventative regime with another, once enacted, counter-terrorism measures create an institutional interest.¹⁰⁸ This is particularly so when these powers can be used in other areas to, for example, manage immigration, reduce crime or pre-empt additional threats to national security. From this perspective, counter-terrorism law is perhaps better seen as a spiral rather than a pendulum,¹⁰⁹ which swings from side to side – one side being individual rights and the other security. The discourse on individual rights vs. security assumes that they align on a fulcrum; when there is a terrorist threat, the pendulum swings in the direction of security over human rights and dignity. However, if counter-terrorism laws are instead viewed as a spiral, this arguably offers a more apt understanding.¹¹⁰ During times of normalcy, rights and security could be seen as being affixed to their places. When a state experiences an emergency, rights begin to slide down the spiral while security keeps moving to the top creeping into numerous aspects of governmental policies in the process.¹¹¹ As emergency measures become entrenched and normalised within the legislative framework, for those immediately impacted there is no return to normalcy.

The jurisprudence, both within and beyond the UK, suggests that there is perhaps an inherent disparity in the relationship between the individual folk devil and the state within national

¹⁰⁸ Donohue, L., *The Cost of Counter-Terrorism: Power, Politics and Liberty* (2008, Cambridge; CUP), pp. 1 – 17.

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

security cases.¹¹² Within this context, the pre-emptive counter-terrorism toolkit championed by New Labour since the year 2000 onwards can be seen as formalising this inequality further by hollowing out the protections and scope of rights such as the right to liberty and the right to fair trial for example. The impact of indefinite detentions and control orders on individual dignity and liberty has been widely discussed and criticised as mentioned previously. In the particular example of the fair trial rights of individuals facing a CMP, without access to the closed judgment, it is naturally difficult to analyse how individual rights obligations are addressed. However, as the aforementioned cases and comments by the SAs suggest, while the CMP process can afford individuals a procedural measure of justice,¹¹³ it may not necessarily result in a substantive measure of justice.

In other words, as a result of New Labour's counter-terrorism over-securitisation, human rights, individually and in general, were approached in an increasingly more formalistic or empty manner resulting in the mere appearance or pretence of respect for human rights and dignity. The divergence from the standard legal processes to accommodate the imposition of onerous counter-terrorism measures is an example of where the Executive's approach to the rule of law in times of security emergencies is at its most dangerous – through various legislative processes, a legal grey hole or an exploitable space within the law can be created.¹¹⁴ In a legal grey space, while there are legal constraints on state actions, these constraints are weak enough to permit governments to operate in the manner in which it desires. Such an approach to the rule of law is highly problematic not just in itself but also in combination with what has been described by Joseph Raz as the “danger created by law itself.”¹¹⁵ Law could be uncertain, unstable or obscure and thus potentially infringe on individual rights and freedoms, however the rule of law is designed to prevent such dangers.

The argument can thus be made that the rule of law failed under New Labour. The operation, updating and impact of various counter-terrorism measures and provisions suggests through legislation, New Labour persistently sought to create and exploit legal grey spaces. While gradually the counter-terrorism legislation provided for perhaps more palatable preventative

¹¹² See for example Dickson, B., *The European Convention on Human Rights and the Conflict in Northern Ireland* (2010, Oxford; OUP), Gearty, C., *Liberty and Security* (2013, Cambridge; Polity Press), Wilson, R. A. (ed.), *Human Rights in the 'War on Terror'* (2005, Cambridge; CUP), Jenkins, D. *et al* (eds.), *The Long Decade: How 9/11 Changed the Law* (2014, Oxford; OUP) and many others.

¹¹³ *I.R. and G.T. v the United Kingdom*, Application nos. 14876/12 and 63339/12, Judgment of 28 January 2014, para. 58.

¹¹⁴ Dyzenhaus, D., *The Constitution of Law: Legality in a Time of Emergency* (2006, Cambridge; CUP).

¹¹⁵ Raz, J., *The Authority of Law: Essays on Law and Morality* (1979, Oxford; OUP).

measures,¹¹⁶ the Executive's desire to identify, capture, detain and/or immobilise individual terror suspect as early as feasible did not wane. The adoption of counter-terrorism measures such as indefinite detention and control orders and Executive's arguments to defend and justify them, has embedded a perception that anyone defined as a terrorist suspect is undeserving of the full protections afforded by law. As such, within this context, the rule of law was defeated during New Labour. However, the causes behind this defeat lie firmly within New Labour's policies. Driven by a desire to persistently address all existing and perceived security risks and to be seen to respond effectively to the threat of terrorism, New Labour substantially prioritised the adoption of stringent counter-terrorism legislation over the preservation of the rule of law and the promotion of human rights. In persistently upgrading counter-terrorism policies, measures and strategies, New Labour exploited and weaponised the law to target all those considered to be a folk devil. As such, the opposite is perhaps more apt – New Labour failed the rule of law.

Conclusion

In another by now ritualised pattern, legal scholarship tends to reflect extensively on the insinuated tensions between individual liberty and national security demands in the aftermath of a terrorist event. However, as New Labour's various domestic and transnational counter-terrorism legislative and policy measures often demonstrated it is equally appropriate to describe these tensions as due process protections versus security considerations.¹¹⁷ The indefinite detention of those certified as international terrorists, the subsequent imposition of onerous control orders, the normalised reliance on closed evidence and the indirect involvement in extraordinary renditions are particularly illustrative examples of where the post 9/11 security demands substantially eclipsed the importance of protecting human dignity. While rights might have been "brought home" by the HRA, New Labour's subsequent tokenistic approach to individual human rights, particularly in the context of counter-terrorism, left the promotion of human rights in the background rather than placing them at the forefront as promised. From an intrinsic part of the New Labour project, individual rights thus became a peripheral consideration. This is perhaps one of New Labour's most lamentable policy

¹¹⁶ The longevity of the control order regime in comparison to indefinite detention suggests that arguably the former were deemed less onerous and less objectionable.

¹¹⁷ For similar comments see Tomkins, A., "National Security and the Due Process of Law", (2011) 64 *Current Legal Problems* 215, p. 1.

failures. If a similar legislative and political effort and support had been afforded to the HRA after its adoption as was to all counter-terrorism acts enacted from 2000 onwards then perhaps the HRA would have had the constitutional impact initially pledged.

Instead, the new dawn that broke over Britain on a May morning in 1997 ushered in a legislative decade (2000 – 2010) dominated by security and counter-terrorism priorities and considerations. Yet, despite receiving disparate attention and prominence post 2000, the counter-terrorism and human rights legislative and policy strands are equally reflective of one of New Labour's most enduring legacies: New Labour's legislative innovations have become embedded and have expanded despite significant changes in the circumstances, which precipitated their development.¹¹⁸ From this perspective, certain parallels could perhaps be drawn between these distinct legislative strands – their longevity within the constitutional framework of the UK despite many criticisms and calls for reform being one such parallel. This longevity has come at a cost however. The distinct precedence afforded to counter-terrorism considerations has resulted in the entrenchment of the fallacy that a 'balance' must be struck between human rights and security to achieve effective counter-terrorism policies. This particular entrenchment – both politically and legislatively – could prove to be New Labour's longest lasting legacy.

¹¹⁸ The HRA has weathered heavy criticisms and suggestions that it should be replaced; since 2001, SIAC's bespoke and rarely used CMP process has been embedded across a variety of proceedings including civil ones.