

An Exceptional Situation? A Comparative Assessment of Anti-Terrorism Arrest and Detention Powers in the UK and Spain and of their Compliance with the European Convention on Human Rights

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Abstract

Following the attacks of 11 September 2001, the United Kingdom (UK) Government was the only state party to introduce new anti-terrorism legislation which required a formal derogation from its obligations under the European Convention on Human Rights (ECHR). It then subsequently proposed further anti-terrorism measures. These either necessitate derogation once more or raise issues of compatibility with the ECHR. For derogation from human rights obligations, as outlined by Article 15, to be deemed justified, not only should a 'war or other public emergency threatening the life of the nation' exist but the measures taken should also be 'strictly required by the exigencies of the situation'. This article analyses whether such justification existed and the affect on the right to liberty and security of the new legislation.

Throughout, the comparative legal response taken in Spain is examined, on the basis that Spain's geographical position and experience of terrorism is analogous to that of the UK. While the European Court affords a margin of appreciation to states when assessing potential human rights abuses, this similarity affords a chance to assess whether the UK's situation was in any way unique, while also illustrating whether other options of dealing with the terrorist threat exist, which are less in conflict with the country's human rights obligations.

The measures introduced before 11 September 2001 (9/11) to deal with Basque separatism and the conflict in Northern Ireland, and then the approach taken afterwards, relating to pre-charge detention and the right to an effective defence, are scrutinized. Allowing that threats might differ in scale and immediacy, in a climate where anti-terrorism is very much at the forefront of states' priorities it is essential to ensure that human rights continue to be respected, rather than sacrificed. The question throughout this article is whether the UK's legislation is justified and proportionate, or whether certain measures stem less from the existence of an actual emergency and more from a politicised construal of risk which seeks to avoid international obligations to allay public fears. While Spain's treatment of suspected terrorists is in no way free from criticism, it is perhaps its attitude and outward dedication to full respect for internationally acknowledged human rights that forms a stark contrast to those of the UK.

1. Introduction

Human Rights law makes ample provision for strong counter-terrorism action, even in the most exceptional circumstances. But compromising human rights [...] facilitates achievement of the terrorist's objective by ceding to him the moral high ground, and provoking tensions, hatred and mistrust of government among precisely those parts of the population where he is most likely to find

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recruits. Upholding human rights is not merely compatible with a successful counter-terrorism strategy. It is an essential element in it. Kofi Annan, UN Secretary General¹

Following the attacks of 11 September 2001, the UK Government introduced new anti-terrorism legislation which required a formal derogation from its obligations under the International Covenant on Civil and Political Rights (ICCPR), and the European Convention on Human Rights (ECHR).² This legislation effectively allowed for the indefinite detention without charge of foreign nationals suspected of being 'international terrorists', if the risk of torture prohibited their deportation or extradition.³ The UK was the only state party to the European Convention to have derogated⁴ and, despite already having 'an enormous amount of legislation that can be used in the fight against terrorism',⁵ including common law and a large range of other criminal offences, it has since proposed further anti-terrorism measures. These either necessitate derogation once more,⁶ or raise issues of compatibility with the ECHR.

The existence of what is essentially a 'hierarchy' of rights within the European Convention,⁷ in conjunction with the provision permitting derogation, clearly recognises that it is sometimes necessary to limit certain human rights in order to protect others. This rationale is not without its critics, as it arguably brings into question 'the integrity of the Convention system of protection as a whole',⁸ especially given the wide margin of appreciation afforded to states by the Court.⁹ Furthermore, in recent years there has been an increasing tendency of some states to abandon principles of liberty, due process and the right to a fair trial 'where those principles are perceived to present an obstacle to fighting terrorism and prosecuting terrorist activities'.¹⁰ To what extent can this be said about the UK? Could it claim a 'public emergency threatening the life of the nation', as required by Article 15 of the ECHR? If so, were the measures taken 'strictly required'?

The purpose of this study, in essence, is to assess, in the current climate, the proportionality and justification of the UK's anti-terrorism measures, and their effect on the right to liberty and security. This right is designed to protect people from

¹ Keynote Address to the Closing Plenary of the International Summit on Democracy, Terrorism and Security, 10 Mar. 2005.

² Human Rights Act 1998 (Designated Derogation) Order 2001.

³ Anti-Terrorism, Crime and Security Act 2001, part 4.

⁴ Joint Committee on Human Rights (JCHR), 'Sixth Report, 2003-04 session', 24 Feb. 2004, para. 18, <http://www.publications.parliament.uk/pa/jt200304/jtselect/jtrights/38/38.pdf>, last accessed 1 Feb. 2007.

⁵ Ken MacDonald QC, Director of Public Prosecutions, in the transcript of evidence given to the JCHR 19 May 2004, quoted in *Liberty, Terrorism Bill: Liberty's briefing for Second Reading in the House of Lords*, November 2005, <http://www.liberty-human-rights.org.uk/pdfs/policy06/terrorism-bill-2nd-reading-lords.PDF>, last accessed 1 Feb. 2007, at 5.

⁶ Prevention of Terrorism Act 2005, Section 4 – this will be discussed in Section 4.

⁷ See Jonathan L. Black-Branch, 'The Derogation of Rights under the UK Human Rights Act; Diminishing International Standards?', *Statute Law Review May 2001*, for a discussion of this hierarchy.

⁸ Judge Makarczyk, dissenting, in *Brannigan v. United Kingdom* (1993) 1 EHRR 1.

⁹ Gross and Ni Aolain, 'From discretion to scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the ECHR', *Human Rights Quarterly*, Vol 23, No. 3 (August 2001)

¹⁰ International Helsinki Federation for Human Rights, *Anti-Terrorism Measures. Security and Human Rights: Developments in Europe, Central Asia and North America in the Aftermath of September 11*, April 2003, at 17, see http://www.ihf-hr.org/documents/doc_summary.php?sec_id=58&d_id=4082, last accessed 1 Feb. 2007.

unreasonable actions that might be taken by a government and is often concerned with freedom from arbitrary arrest or detention.¹¹ Throughout this analysis, Spanish law and its adherence to the ECHR shall be used for comparison. While the UK may argue that it is in a 'special' or unique situation, to which its Government is best suited to respond, Spain's geographical and political position, history of separatist terrorism over several decades, and the recent attack connected to Al-Qaeda - the Madrid bombing of 11 March 2004¹² - are analogous to that of the UK, which has faced years of terrorist threats over Northern Ireland, and experienced its own recent bombings, in London on 7 July 2005.¹³

Much of terrorist activity addressed globally since 9/11 is of a different nature to that relating to Northern Ireland and the Basque country. "International terrorism" can be defined as political terrorism directed at foreign targets; concerted by factions of more than one state; or aimed at influencing the policies of a foreign government.¹⁴ The 9/11 attacks showed an unprecedented degree of trans-national planning as well as execution, and the characteristics of international terrorism networks today, which have repercussions for anti-terrorism measures, include increased mobility; a decentralised nature; technological capabilities; and the preparedness to acquire and use weapons of mass destruction.¹⁵ Countering terrorism is by no means a straightforward and simple task, and may require different responses from States depending on its context and scale.¹⁶ However, human rights protection should remain an essential element of anti-terrorism strategies,¹⁷ and ideally these would be implemented without the need for exceptional measures. If not, those measures should be considered only in the most exceptional cases.

The purpose of comparing the legislation of these two countries, then, is both to address their different legal responses to the threat of terrorism, and also the context in which these responses are formed. It is not to suggest that aspects of one country's legal system can simply be imported into another's,¹⁸ but rather that a comparison of

¹¹ Human rights standards enumerate a number of important safeguards to prevent arbitrary detention including, among others, the right to be brought promptly before a judge and challenge the lawfulness of the detention, and access to a fair trial. See, for example, Art. 5 of the ECHR and Art. 9 of the ICCPR.

¹² See http://news.bbc.co.uk/1/hi/in_depth/europe/2004/madrid_train_attacks/default.stm, last accessed 1 Feb. 2007.

¹³ See http://news.bbc.co.uk/1/hi/in_depth/uk/2005/london_explosions/default.stm, last accessed 1 Feb. 2007.

¹⁴ Paul Wilkinson, *Terrorism and the Liberal State* (London, Macmillan, 1986), at 182.

¹⁵ Kevin Boyle, 'Terrorism, States of Emergency and Human Rights', in Wolfgang Benedek and Alice Yotopoulos-Marangopoulos (eds.), *Anti-Terrorist Measure and Human Rights* (Leiden: Koninklijke Brill, 2004), at 97.

¹⁶ *Ibid.* at 97.

¹⁷ The United Nations Global Counter-Terrorism Strategy, adopted by member states on 8 Sept. 2006 in the form of a Resolution and annexed Plan of Action, outlines 'Measures to ensure respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism'. See <http://www.un.org/terrorism/strategy/>, last accessed 1 Feb. 2007.

¹⁸ For example, the role of examining magistrates in such civil law jurisdictions as France is vastly different to that in common law countries such as the UK. In particular the role of the examining magistrate is not merely to provide an independent check upon criminal investigation by the police but to actively direct that investigation. This indicates a degree of judicial control over criminal investigations far in excess of that found in any common law jurisdiction based on an adversarial - rather than inquisitorial- system of justice. Caution should be exercised when 'seeking to import feature from other systems of law without first understanding the very different distribution of checks and balances in those systems'. See Memorandum submitted by JUSTICE, House of Commons Home Affairs Committee, *Terrorism Detention Powers Fourth*

legislation may be revealing in terms of indicating where alternatives might lie, and also serve to illuminate differences in attitude. Citing its experience with fighting Basque separatist violence, Spain sees itself as 'a leader in the effort to combine effective counter-terrorism measures with full respect for internationally recognised human rights'.¹⁹ If this is true, can Spain's approach be used as a yardstick by which to analyse the approach of the UK?

2. Counter-terrorism measures employed before 9/11

2.1 United Kingdom

The majority of the UK's legal responses to terrorism have been in the context of the Northern Ireland conflict, which witnessed bombing and shooting campaigns from the late 1960s onwards. Republican organisations, such as the Irish Republican Army (IRA) and the Irish National Liberation Army (INLA), demanded that Northern Ireland be separated from the UK and united with the rest of Ireland, while Loyalist groups, such as the Ulster Volunteer Force (UVF) and the Ulster Defence Association (UDA), wished to preserve the existing union.²⁰ While committing significant numbers of patrol soldiers, the UK Parliament also introduced various anti-terrorism measures, the most significant being those contained in the Northern Ireland (Emergency Provisions) Act (EPA), first passed in 1973 and regularly reviewed over the next twenty-five years. *Inter alia*, it included removal of the right of trial by jury for a number of serious criminal offences, with the establishment of 'Diplock Courts' consisting of a single judge.²¹ It also gave broad powers of arrest and search to the police and army, on the premise that the actions of terrorist groups left the ordinary criminal justice system unable to function.²²

Increasing IRA activity in the rest of the UK, notably beginning with a major bombing in Birmingham in 1974, prompted the Prevention of Terrorism Act (PTA), passed in 1974 and frequently renewed. Among its most important powers, the PTA gave the police authority to detain someone suspected of involvement in terrorism for up to seven days without judicial approval (as opposed to forty-eight hours under normal criminal procedure). Although the PTA was also used against 'international terrorists' operating in Britain, and was extended in 1984 to cover the increasingly international threat, the focus in England before 2000 was predominantly concerned with Irish

Report of Session 2005-2006, Volume II, Oral and Written evidence, 20 June 2006, para 26, see <http://www.publications.parliament.uk/pa/cm200506/cmselect/cmhaff/910/910ii.pdf>, last accessed 1 Feb. 2007. This is also addressed in section 5.2

¹⁹ Judith Sunderland, *Setting an Example? Counter-terrorism measures in Spain*, (New York: Human Rights Watch, Jan. 2005) Human Rights Watch Report, Vol. 17, No. 1(D), at 2, see <http://hrw.org/reports/2005/spain0105/>, last accessed 1 Feb. 2007.

²⁰ See David Bonner, 'The United Kingdom's Response to Terrorism' in Fernando Reinares (ed.), *European Democracies Against Terrorism: Governmental policies and intergovernmental cooperation*, (Aldershot: Onati International Series in Law and Society, Ashgate, 2000), at 33-40 for more detail on the terrorist threat and responses.

²¹ These courts were an attempt to overcome widespread jury intimidation associated with the conflict in Northern Ireland. Until recently they only tried republican or loyalist paramilitaries. The first case in which a person not associated with 'the Troubles' was tried and convicted occurred in 2005, when Abbas Boutrab, a suspected Al-Qaeda sympathiser, was found guilty of having information that could assist in the bombing of an airliner. See BBC News, 20 Dec. 2005, http://news.bbc.co.uk/2/hi/uk_news/northern_ireland/4467640.stm, last accessed 1 Feb. 2007. In August 2006 the Northern Ireland Office announced that Diplock courts were to be abolished in July 2007.

²² Susan Breau, Stephen Livingstone and Rory O'Connell, *Anti-terrorism law and Human Rights in the United Kingdom post September 11*, Human Rights Centre, Queens University Belfast (2002), at 2, see <http://www.britishcouncil.org/china-society-publications-911.pdf>, last accessed 1 Feb. 2007.

groups.²³ The European Court acknowledged that the extent of terrorist violence in Northern Ireland for much of the period 1970-2000 did reflect a ‘situation of public emergency threatening the life of the nation’.²⁴

In 1996, following a commissioned study by the senior judge Lord Lloyd into the need for anti-terrorist laws if the problem of terrorism relating to Northern Ireland were to diminish,²⁵ the incoming Labour government and Parliament enacted the Terrorism Act 2000 (TA 2000). This repealed both the PTA, re-enacting those of its provisions which ‘remain[ed] necessary’, and the EPA, although Part VII of the Act provided additional temporary measures for Northern Ireland.²⁶ For the first time it provided a permanent anti-terrorist law in Britain. Thus, even before 9/11, the UK already had significant anti-terrorism provisions in place.

2.2 Spain

Similarly, Spain has a long history of internal political violence, the *Euzkadi Ta Askatasuna* (Basque Fatherland and Liberty – ETA) having waged a violent campaign to establish a separate Basque state since the 1960s.²⁷ After thirty nine years of authoritarian rule under General Franco, the larger Basque drama ‘followed the Spanish democracy from the beginning, and its ramifications have loomed large in Spain’s fortunes’.²⁸ Since 1984, ETA has killed 831 individuals, injured 2392 and abducted 77,²⁹ while carrying out targeted assassinations as well as indiscriminate attacks. In 1998 it declared an unlimited ceasefire to try to promote a political solution, but in late 1999 resumed the campaign of violence.³⁰

Since 1975, the Spanish state has adopted a variety of strategies to fight the constant threat of Basque separatist violence. Attempts were witnessed in the early 1980s to counter terrorism through an illegal, violent campaign against suspected members of the ETA by the *Grupos Antiterroristas de Liberación* (Anti-terrorist Liberation Groups). Between 1983 and 1987 these groups, funded by *fondos reservados* (secret state funds) from the Ministry of the Interior, murdered twenty-seven people, at least nine of whom had no links to ETA.³¹ This became a source of embarrassment for the government and a public scandal only in the 1990s,³² but provided a valuable insight into how counter-

²³ Ibid., at 2.

²⁴ *Brannigan and McBride v. UK*, Judgment of 26 May 1993, ser. A No. 258-B, (1994) 17 EHRR 539 para. 47, at 570.

²⁵ Lord Lloyd of Berwick, *Report on the Inquiry into Legislation against Terrorism* (Cm. 3420, Oct. 1996). This recognises the need for permanent anti-terrorism legislation, even when lasting peace is established in Northern Ireland (para 5.15).

²⁶ Explanatory notes to the Terrorism Act 2000, Summary, parts 6 and 7, see www.opsi.gov.uk/Acts/en2000/2000en11.htm, last accessed 1 Feb. 2007.

²⁷ HRW Report Jan. 2005, n. 19 above, at 14.

²⁸ Victor Perez-Diaz, *Spain at the Crossroads: Civil Society, Politics, and the Rule of Law* (Cambridge: Harvard University Press, 1999) at 78.

²⁹ UN Special Rapporteur on Torture, 2004 Report to Spain, 6 Feb. 2004, E/CN.4/2004/56/Add.2, para 77.

³⁰ At time of writing ETA had just declared a ceasefire. See BBC News 22 Mar. 2006, <http://news.bbc.co.uk/1/hi/world/europe/4832672.stm>, last accessed 1 Feb. 2007.

³¹ Paddy Woodworth, ‘Using terror against terrorists: The Spanish experience’, in Sebastian Balfour (ed.) *The Politics of Contemporary Spain*. (Oxford: Routledge, 2005), at 63.

³² Victor Perez-Diaz, n. 28 above, at 37-8.

terrorism, as much as terrorism, can undermine democracy.³³ Since then, the fight against terrorism has been ostensibly carried out within the boundaries of the ‘Rule of Law’,³⁴ in agreement with publicly disclosed laws adopted in accordance with established procedure decided by the Government.

3. Counter-terrorism measures introduced since 11 September 2001

3.1 United Kingdom

Despite having in its TA2000 what the Commissioner for Human Rights of the Council of Europe described, in 2004, as ‘amongst the toughest and most comprehensive anti-terror legislation in Europe’,³⁵ the UK introduced the Anti-Terrorism, Crime and Security Act (ATCSA) in the aftermath of 9/11.³⁶ This essentially reintroduced internment without trial for foreign nationals suspected of terrorist activity who the UK government would have deported to their home countries but for the risk that they would be tortured if sent there.³⁷ The justification for the delay in charge or trial was that evidence against these individuals was inadmissible in court, or unusable openly due to security concerns. With the passing of the ATCSA the UK was obliged to formally derogate from article 5(1)(f),³⁸ which protects against deprivation of liberty except for purposes of deportation or extradition, which it did on 18 December 2001.

On 30 July 2002, the judicial body which heard appeals from those detained under ATCSA, the Special Immigration Appeals Commission (SIAC), ruled that Section 4 of the Act, was ‘not only discriminatory and so unlawful [...] but also [...] disproportionate’.³⁹ While the Home Secretary’s appeal against this was allowed,⁴⁰ in December 2004 the Law Lords ruled eight to one in favour of overturning the Court of Appeal Ruling.⁴¹

³³ Woodworth, n. 31 above, at 68.

³⁴ Ibid., at 68.

³⁵ Report by Mr Alvaro Gil-Robles, Commissioner for Human Rights, on his visit to the United Kingdom, 4-12 Nov. 2004, CommDH (2005) 6, 8 June 2005, at 7, see <https://wcd.coe.int/ViewDoc.jsp?id=865235&BackColorInternet=99B5AD&BackColorIntranet=FABF45&BackColorLogged=FFC679>, last accessed 1 Feb. 2007.

³⁶ The Anti-Terrorism Crime and Security Act 2001 (ATCSA) received Royal Assent on 14 Dec. 2001, see <http://www.opsi.gov.uk/ACTS/acts2001/20010024.htm>, last accessed 1 Feb. 2007.

³⁷ Anti-Terrorism, Crime and Security Act 2001, part 4. Unlike the due process guarantees suspended by the UK, the prohibition on torture cannot be derogated from under any circumstances. Art. 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The absolute nature of Art. 3 ECHR includes protection from being returned to a place where one will be subject to torture, and cruel, inhuman and degrading treatment or punishment (*non-refoulement*). *Soering v. UK* (1989) 11 EHRR 439, para. 91. Art. 3.1 of the UN Convention against Torture to which the United Kingdom is a state party, contains an explicit protection against *refoulement*.

³⁸ This provision requires active steps to be taken, and ‘[i]f such proceedings are not pursued with due diligence, the detention will cease to be permissible’. See *Chahal v. UK* (1996) 23 EHRR 413, para 113.

³⁹ Liberty, ‘Press Release: Internment of “terrorist suspects” is discriminatory, breaches Human Rights Convention – SIAC judgement today’, 30 July 2002, see <http://www.liberty-human-rights.org.uk/impress133.html>, last accessed 1 Feb. 2007.

⁴⁰ *A, X and Y and others v. Secretary of State for the Home Department* [2002] EWCA Civ 1502, 25 Oct. 2002.

⁴¹ *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)*, [2004] UKHL 56.

Subsequently, the Prevention of Terrorism Act (PTA 2005), given Royal Assent on 11 March 2005, sought instead to impose a system of ‘control orders’, allowing both British and foreign terror suspects to be subjected to house arrest on the ‘say-so’ of the Home Secretary, plus options of curfew, tagging and prohibited access to cellular communications or the internet. Finally, in the aftermath of the London bombing of 7 July 2005, the Terrorism Bill was introduced, one of its most controversial provisions relating to detention of terrorist suspects for questioning.⁴²

3.2 Spain

It has been argued that Spain’s response to terrorist threat ‘[reflects] positively on the political maturity of Spanish society, its long experience in the fight against terrorism, and the influence of historical elements, such as a long dictatorship and a civil war’.⁴³ Spain has anti-terrorist legislation that has not been substantially altered in the wake of 9/11 or the 11 March 2004 attacks,⁴⁴ as it is considered sufficiently advanced to guarantee adequate police and legal procedures. The debate as to the need for exceptional measures to extend the powers of the Executive, or to weaken the separation of powers or democratic guarantees, as witnessed in the USA and the United Kingdom among others, has not been raised.⁴⁵ The fight against terrorism is seen as walking hand in hand with democratic development, while ‘at the international level the fight against terrorism is at the same level as the fight against ETA in Spain twenty years ago: illegal detentions, torture...’, problems which it is claimed no longer exist in Spain due to an antiterrorism approach ‘based on respect for the rule of law’.⁴⁶

Spain’s general approach has been to treat terrorism as an aggravated form of crime, setting out terrorist-related offences in the Penal Code (*Código Penal*, CP) and procedural provisions in the Law of the Criminal Procedure (*Ley de Enjuiciamiento Criminal*, LEC). In terrorist and organised crime cases there are also a number of adaptations of normal procedures. All cases are heard at the *Audiencia Nacional*⁴⁷ (National Court) and the investigating magistrate is an officer of that Court. The High Court has special security features, and the Court has developed detailed jurisprudence, particularly on ETA cases. In ordinary criminal cases, police may arrest and hold suspects for a maximum of seventy-two hours, before either releasing them on their own authority or under orders from a judge or bringing them before the examining magistrate. Article 55(2) of the Constitution, however, allows for measures which involve

⁴² Terrorism Bill, Sections 23 and 24, see <http://www.publications.parliament.uk/pa/cm200506/cmbills/055/2006055.pdf>, last accessed 1 Feb. 2007.

⁴³ Centro de investigación para la paz (CIP-FUHEM), *Terrorism and Democracy. Spain and the Terrorist Attacks of March 11* (Madrid, 2005), <http://www.cip.fuhem.es>, last accessed 1 Feb. 2007, at 4.

⁴⁴ After the 11 March 2004 attacks, legislative changes largely focused on greater controls on the use and transportation of explosives – see Foreign and Commonwealth Office, *Counter-Terrorism Legislation and Practice: A survey of selected countries*, (October 2005), at 25, <http://www.fco.gov.uk/Files/kfile/QS%20Draft%2010%20FINAL1.pdf>, last accessed 1 Feb. 2007.

⁴⁵ CIP-FUHEM report, n. 43 above.

⁴⁶ The Attorney General, Candido Conde Pumpido, to Human Rights Watch, reported in HRW Report January 2005, n. 19 above, at 16.

⁴⁷ Organic Law 4/1988, reforming the Code of Criminal Procedure.

the suspension of rights of terrorists with respect to length of detention, home inviolability and privacy of communications in cases involving terrorism.⁴⁸

4. Derogation under the European Convention and UK Law

Article 15 of the ECHR allows a government to derogate from certain Convention obligations during ‘war or other public emergency threatening the life of the nation’. Such derogation can only be to the extent strictly required by the exigencies of the situation, and the central object is to enable the derogating state to return to ‘normality’ as soon as possible.⁴⁹ The Human Rights Committee, regarding derogation as provided for by Article 4 of the ICCPR, has outlined the need to provide careful justification for the measures taken and to show that the threat could not have been dealt with by alternative and less restrictive methods.⁵⁰

The threshold for the existence of war or a ‘public emergency’ is high, requiring ‘an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the State is composed’.⁵¹ The Court has insisted that general references to terrorism will not be sufficient evidence that a derogation is strictly required,⁵² while Article 15(2) specifies the Convention provisions from which no derogation is permitted. It is possible that in the future the European Court may extend the list of non-derogable rights by accepting the notion of ‘consequential non-derogability’.⁵³ For example, in *Aksoy v. Turkey*⁵⁴ the Court observed that prompt judicial intervention (Article 5(3)) can lead to the detection of any custodial ill treatment or degrading treatment, the prohibition of which is non-derogable (Article 3).⁵⁵

In its 2003/4 Review of Counter-Terrorism Powers, the Joint Committee on Human Rights emphasised that the proportionality of any measures taken by the UK ‘can only be properly assessed in the light of a proper appraisal of the nature and level of the threat’.⁵⁶ However, in 2001, the government’s decision to derogate was not based on the existence of a specific threat, but rather a general *fear* of terrorist attack. In a

⁴⁸ Art. 55(2) of Spanish Constitution: ‘An organic law may determine the manner and the cases in which, in an individual manner and with the necessary judicial intervention and adequate parliamentary control, the rights recognized in Article 17 (2) and 18 (2) and (3) may be suspended for certain persons with respect to investigations having to do with the activities of armed bands or terrorist elements’, see <http://www.oefre.unibe.ch/law/icl/sp00000.html#A055>, last accessed 1 Feb. 2007. Cited in Foreign and Commonwealth Office Survey, n. 44 above.

⁴⁹ For a detailed discussion on Art. 15, see Clare Ovey and Robin White, *Jacobs and White: European Convention on Human Rights*, 3rd ed. (Oxford: OUP, 2000), ch. 21.

⁵⁰ Human Rights Committee General Comment 29: States of Emergency (Article 4), CCPR/C/21/Rev.1/Add.11, 31 Aug. 2000.

⁵¹ *Lawless v. Ireland* (1979-80) 1 EHRR 15, para. 28.

⁵² *Demir v. Turkey* (2001) 33 EHRR 43.

⁵³ J. Wadham, H. Mountfield and A. Edmundson, *Blackstone’s Guide to The Human Rights Act 1998* (Oxford: Oxford University Press, 2003), at 187.

⁵⁴ Judgment of 18 December (1996), 23 EHRR 553.

⁵⁵ Regarding Spain, the UN Special Rapporteur on Torture has expressed concerns regarding incommunicado detention, and its facilitation of abuses or torture. See the 2004 Report, n. 29 above.

⁵⁶ Joint Committee on Human Rights *Review of Counter-Terrorism Powers: Eighteenth Report of Session 2003-04* (21 July 2004), at 9, see <http://www.publications.parliament.uk/pa/jt200304/jtselect/jtrights/158/15802.htm>, last accessed 1 Feb. 2007.

statement to parliament on 15 October 2001, the Home Secretary, David Blunkett, asserted that '[t]here is no immediate intelligence pointing to a specific threat to the United Kingdom'.⁵⁷ The next month the Minister then reassured the public that 'the declaration was a legal technicality'.⁵⁸ While there is little doubt about the *nature* of the terrorist threat, as 'the record of Al-Qaeda, in terms of methodology, speaks for itself',⁵⁹ this is insufficient to assess proportionality. Nor did the government convincingly demonstrate why ordinary criminal law measures and existing counter-terrorism legislation were insufficient.⁶⁰ In December 2001, Council of Europe Human Rights Commissioner Alvaro Gil-Robles went further, arguing that '[e]ven assuming the existence of a public emergency, it is questionable whether the measures enacted by the United Kingdom are strictly required by the exigencies of the situation'.⁶¹

Other European nations are faced with individuals who would fall within the group targeted by Part 4 of the ACTSA, yet other countries, for example France and Sweden, adopted far less 'draconian' approaches, relying on surveillance rather than detention without trial. Furthermore, no other European country has sought to claim a state of emergency in this context – Spain being the illustrative example, given its aforementioned similarities in history and experience.

The PTA 2005 allows Parliament contingency powers to grant derogating control orders⁶² which will lead to a deprivation of liberty, as opposed to mere restriction, other than on one of the grounds permitted by Article 5(1)(a) to (f) of EHCR, and would therefore require derogation on national emergency grounds. This has effectively reserved the power to revert to the old 'Belmarsh Scenario',⁶³ albeit that in future the powers will be framed in non-nationality-based terms.⁶⁴ Again this would raise issues regarding the existence of a state of emergency to warrant derogation.

Non-derogating control orders seek to confer the power upon the Secretary of State to restrict 'pretty well every significant civil or social liberty recognised, so long as the package of restriction falls short of what might be defined as *de facto* deprivation of

⁵⁷ House of Commons Hansard, volume 372, 15 Oct. 2001, Col. 925, see <http://www.parliament.the-stationery-office.co.uk/pa/cm200102/cmhansrd/vo011015/debindx/11015-x.htm>, last accessed 1 Feb. 2007.

⁵⁸ Quoted in Human Rights Watch, *Commentary on the Anti-Terrorism, Crime and Security Bill 2001*, 16 Nov. 2001, see <http://www.hrw.org/backgrounder/eca/Ukleg1106.htm>, last accessed 1 Feb. 2007.

⁵⁹ Joint Committee on Human Rights, *Eighteenth Report*, n. 56 above, at 9.

⁶⁰ Joint Committee on Human Rights, *Second Report, 2001-02 session*, 16 Nov. 2001, para. 30, see <http://www.publications.parliament.uk/pa/jt200102/jtselect/jtrights/037/3702.htm>, last accessed 1 Feb. 2007.

⁶¹ Council of Europe, 'Opinion 1/2002 of the Commissioner for Human Rights, Mr. Alvaro Gil-Robles, on certain aspects of the United Kingdom derogation from Article 5 para. 1 of the European Convention on Human Rights [CommDH (2002)7]', 28 Aug. 2002.

⁶²Section 1(10) Prevention of Terrorism Act, 2005, see <http://www.opsi.gov.uk/ACTS/acts2005/20050002.htm>, last accessed 1 Feb. 2007.

⁶³ Belmarsh being the prison where foreign suspects were held for up to three years without charge or trial under the ATCSA. The Belmarsh detention case concerned the power to hold non-nationals in indefinite detention without trial. Once pushed through, some seventeen suspects were placed within this regime of detention. It has been described by campaigners as 'Britain's Guantanamo Bay' - see BBC Report, 4 Apr. 2004, 'Protest over Belmarsh detentions', http://news.bbc.co.uk/2/hi/uk_news/3596779.stm, last accessed 1 Feb. 2007.

⁶⁴ Thomas de la Mare, 'Control Orders and Restrictions on Liberty', JUSTICE/Sweet & Maxwell Conference on Counter-Terrorism and Human Rights (28 June 2005), para 22 .

liberty'.⁶⁵ The distinction between derogating and non-derogating orders is primarily based upon a conception of liberty under Article 5 as 'physical liberty', though it could be argued that control orders involve the 'deprivation of much of normal life'.⁶⁶ Given that imprisonment serves to punish by cutting the individual off from his or her ordinary life of family, friends, work, entertainment, social activity, and personal autonomy,⁶⁷ the life of somebody under perpetual house arrest is to a large extent as bad as that of a detainee,⁶⁸ and marginal physical freedom can be considered liberty 'in only the most formalistic sense'.⁶⁹

ECHR case law under Article 5(1) ECHR is increasingly recognising the dividing line between Article 5(1) (the *deprivation* of liberty) and Article 2 of Protocol No. 4 (*restriction* of liberty). Restrictions short of house arrest may still amount, cumulatively, to a deprivation of liberty contrary to Article 5 ECHR.⁷⁰ As the House of Lords noted in *R(Gillan) v. Commissioner of Police for the Metropolis*,⁷¹ discussing the judgment of the European Court of Human Rights in *Guzzardi v. Italy*,⁷² the 'distinction between "deprivation of liberty" and "deprivation of liberty of movement" can prove very difficult to make'.

Although all control orders made since the Act came into force have been non-derogating orders,⁷³ the restrictions imposed have nonetheless been sweeping: 'they have not been found to amount to the triggering of derogation, indeed there has been no challenge so far on that basis – but the cusp is narrow'.⁷⁴ It would appear, though, that currently there is little evidence to suggest a 'state of emergency' exists in the UK. If it did, it would still remain to be proven that current judicial measures such as arrest and trial are insufficient.⁷⁵

5. The right to be brought 'promptly' before a judicial authority (Article 5(3))

⁶⁵ *Ibid.*, para 2.

⁶⁶ Lord Carlile of Berriew QC, *First report of the Independent Reviewer pursuant to section 14(3) of the Prevention of Terrorism Act 2005* (2 February 2006) para 49, see <http://security.homeoffice.gov.uk/news-and-publications1/publication-search/independent-reviews/laws-against-terror.pdf?view=Binary>, last accessed 1 Feb. 2007.

⁶⁷ Thomas de la Mare, n. 64 above, para. 24.

⁶⁸ Gearty, Conor, 'Internment and House Arrest: Recent Development', *The Tablet*, Feb. 2005, at 3, see [http://www.lse.ac.uk/Depts/human-rights/Documents/Internment house arrest.pdf](http://www.lse.ac.uk/Depts/human-rights/Documents/Internment%20house%20arrest.pdf), last accessed 1 Feb. 2007.

⁶⁹ Thomas de la Mare, n. 64 above, para 24.

⁷⁰ Lord Carlisle observed that '[t]hey fall not very far short of house arrest, and certainly inhibit normal life considerably'. Lord Carlisle of Berriew QC, *First Report of the Independent Reviewer pursuant to section 14(3) of the Prevention of Terrorism Act 2005* (2 Feb. 2006), no. 66 above, para. 42.

⁷¹ [2006] UKHL 12, para 24.

⁷² 7367/76 [1980] ECHR 5 (6 Nov. 1980), para 93.

⁷³ Lord Carlile of Berriew QC, 66n. 66 above, para. 18: a total of 18 control orders have been made since March 2005, of which 9 subsist.

⁷⁴ *Ibid.*, para 42.

⁷⁵ *Aksoy v. Turkey* 21987/93 [1996] ECHR 68 (18 Dec. 1996), para. 78.

Article 5(3) obliges States unconditionally to bring an arrested person automatically and promptly before a judge or other officer authorised by law to exercise judicial power.⁷⁶

The Court has emphasised that

judicial control of interferences by the executive with the individual's right to liberty is an essential feature of the guarantee... which is intended to minimise the risk of arbitrariness and may also lead to the detection and prevention of violations of Articles 2 and 3.⁷⁷

The conditions of the article are only satisfied if the arrest or detention is aimed at bringing the accused before a competent judicial authority.⁷⁸

While the inclusion of *promptly* limits the length of detention, a 'margin of appreciation' is also allowed for compliance. Both the European Court and European Commission⁷⁹ have found periods of four days and six hours,⁸⁰ and five days to be incompatible with the requirement.⁸¹ Most recently two judgments from the Court concerning counter-terrorist investigations in South-Eastern Turkey⁸² found that detention of more than six days in custody without being brought before a judge was a breach of Article 5(3) ECHR 'notwithstanding...the special features and difficulties of investigating terrorist offences'.⁸³ However, the European Court has refrained from developing a minimum standard, holding that whether or not the requirement is satisfied must be assessed in each case according to its special features.

5.1 UK Law

In 1988 the ability to hold suspects under the PTA, initially for forty-eight hours, and for up to a further five days with the Home Secretary's permission, was found to violate Article 5(3) as no judicial involvement was present.⁸⁴ Rather than comply with the judgment by introducing a judicial supervision, the UK Government chose to derogate with respect to Article 5(3) and announced that they had 'found it necessary to continue to exercise, in relation to terrorism connect with the affairs of Northern Ireland [the seven day detention power]' and were therefore derogating from the Convention 'to the extent that the exercise of [this power] may be inconsistent with the obligations imposed by the Convention'.⁸⁵ The validity of this derogation was challenged unsuccessfully in *Brannigan and McBride v. UK*, where the Court accepted that there was a public emergency threatening the life of the nation,⁸⁶ and ruled that the derogation was a genuine response

⁷⁶ *Brogan v. UK*, Judgment of 29 Nov. 1988, ser. A, No. 145-B (1989) 11 EHRR 117, para. 58, at 134.

⁷⁷ *Aksoy v. Turkey*, 21987/93 [1996] ECHR 68 (18 Dec. 1996), para. 76.

⁷⁸ The Court took this position as early as 1961 in the *Lawless Case*, and also in the *Greek Case* (Report of 5 Nov. 1969, Yearbook XII (1969), 134-5), and in *Ireland v. the United Kingdom*. (Report of 25 Jan. 1976, B.23-1(1980), p.110; judgment of 18 Jan. 1978, A.25, 74-5).

⁷⁹ The current incarnation of the court was instituted on 1 Nov. 1998, replacing the then existing enforcement mechanisms, which included the European Commission of Human Rights (created in 1954) and the previous, limited, Court of Human Rights, which was created in 1959.

⁸⁰ *Brogan v. UK*, paras 61-62, at 135-6.

⁸¹ *Koster v. The Netherlands*, 12843/87 (1991) ECHR 53 (28 Nov. 1991), at 402.

⁸² See *Sinan Tanrikulu and others v. Turkey* (application nos. 00029918/96, 00029919/96, and 00030169/96, 6 Oct. 2005); *Yasar Bazancir and others v. Turkey*, (application nos. 00056002/00 and 0007059/02, 11 Oct. 2005)

⁸³ *Tanrikulu*, *ibid.*, para 41.

⁸⁴ *Brogan v. UK*, paras 61-62, at 135-6.

⁸⁵ Statement by the Home Secretary, HC Standing Committee, B, Sixth Sitting, 22 Dec. 1988, Col. 235: Council of Europe Document DH (89) 1, App. VI, pp10-11 – also set out in Human Rights Act, Ch. 42, Schd 3. at <http://www.opsi.gov.uk/ACTS/acts1998/80042--h.htm#sch3>, last accessed 1 Feb. 2007.

⁸⁶ *Brannigan and McBride v. UK*, Judgment of 26 May 1993, ser. A No. 258-B, (1994) 17 EHRR 539, para 47, at 570.

to this.⁸⁷ Yet, controversially, the Court seemed to ignore the protective role of the judge in scrutinising proposed executive action in *ex parte* proceedings and gave insufficient weight to the fact of judicial involvement in civil law countries in Europe.⁸⁸

The TA 2000 introduced judicial oversight and consequently harmonised the provision with Article 5(3) obligations. Under Section 41, the maximum detention period is forty-eight hours, but can be extended in accordance with a special procedure contained in Schedule 8. The seven-day period set out in the TA 2000 was subsequently amended to fourteen days by section 306 of the Criminal Justice Act 2003. The Terrorism Bill 2005 has proposed that this go even further, in Clauses 23 and 24, the most controversial section along with the ‘glorification of terrorism’ provision. The Government amendment to the Bill initially proposed ninety days detention, with detentions beyond forty-eight hours reviewed every seven days by a judge sitting *in camera*, in private rather than in an open court, who would rule as to whether it was justified, though this was amended in Parliament to twenty-eight days.⁸⁹ Under ordinary legislation, the maximum period of detention without charge in cases of murder, rape and complex fraud is four days, with further thirty-six hour and twenty-four hour extensions being granted by a judicial authority after the initial thirty-six hours.⁹⁰

In light of the ‘extensive review of over three decades of UK counter-terrorism legislation’,⁹¹ and the jurisprudence from the European Court,⁹² that led up to the outlining of the seven-day period in TA 2000, any extension should be viewed with great caution. The introduction of three-month detention would be ‘equivalent to sentencing someone who is simply a suspect to a six-month jail sentence imposed on a person found guilty of a criminal offence’.⁹³ Even the reduced extension, which doubles the existing period ‘might be open to challenge under Article 5’,⁹⁴ and clearly exceeds the period of detention without charge in six similarly developed countries.⁹⁵ The question should be whether more proportionate means of dealing with the problem exist, before any extension is justified.

The reasons for extension have included difficulties relating to resources, such as interpreters, time and logistical difficulties, and technological or forensic difficulties, such as breaking encryption.⁹⁶ Yet white-collar fraud, which can be similarly complex, still has four days as the maximum period of detention.⁹⁷ Furthermore, ‘reasonable suspicion’ - Article 5(1)(c) - presupposes the existence of facts or information which would satisfy an

⁸⁷ *Ibid.*, para. 51, at 571.

⁸⁸ *Ibid.*, para 2, 59-60, at 574-575.

⁸⁹ See http://news.bbc.co.uk/1/hi/uk_politics/4422086.stm, last accessed 1 Feb. 2007.

⁹⁰ S. 42(1), Police and Criminal Evidence Act 1984, found at <http://police.homeoffice.gov.uk/operational-policing/powers-pace-codes/pace-code-intro/>, last accessed 1 Feb. 2007.

⁹¹ See e.g. Section 12 of the Prevention of Terrorism (Temporary Provisions) Act, 1984, Art. 9 Prevention of Terrorism (Supplemental Temporary Provisions) Order 1984 and Art. 10 Prevention of Terrorism (Supplementary Temporary Provisions)(Northern Ireland) Order 1984.

⁹² See e.g., *Brogan v. United Kingdom*; *Brannigan and McBride v. United Kingdom*.

⁹³ Joseph Rowntree Reform Trust, *The Rules of the Game: The Terrorism Bill 2005*, at 3, see <http://www.jrrt.org.uk>, last accessed 1 Feb. 2007.

⁹⁴ Liberty Report November 2005, n. 5 above, at 19.

⁹⁵ Foreign Office Report, n. 44 above, paras 32, 40, 54-5, 84 and 94.

⁹⁶ See Select Committee on Home Affairs Minutes of Evidence, 11 Oct. 2005, at <http://www.publications.parliament.uk/pa/cm200506/cmselect/cmhaff/515/5101108.htm> for discussion of these issues. Last accessed 1 Feb. 2007.

⁹⁷ Liberty Report Nov. 2005, 5n. 5 above, para. 35.

objective observer that the person concerned may have committed the offence.⁹⁸ Thus, unless there has been a ‘surprise’ attack, ‘arrests are likely to follow months of investigation and surveillance.’⁹⁹ Other issues, include relaxing the ban on the use of intercept evidence,¹⁰⁰ and the amendment of powers to re-question and recharge,¹⁰¹ have been proposed as alternative measures.

5.2 Spanish Law

Whereas the Code of Criminal Procedure establishes that all persons arrested must be brought before a competent judge within seventy-two hours of arrest, those detained on suspicion of membership or collaboration with an armed group (including terrorist organisations) may be held for a further forty-eight hours upon the authority of the investigating magistrate.¹⁰² They may be held *incommunicado* if there are grounds to believe that knowledge of the suspect’s detention would prejudice the investigation, with the consequence that relatives may not be informed of detention, and legal assistance is provided by a duty solicitor not by a lawyer of their own choice.

If it is then decided to initiate criminal proceedings, a preventative detention order may be made, extending the *incommunicado* period by five days,¹⁰³ exceptionally followed by a final period of three days. This amounts to a potential thirteen days in total. The final extension was apparently designed to allow judges to re-impose *incommunicado* status at a later stage in the investigation,¹⁰⁴ but a literal reading of the article suggests that the three additional days may be imposed immediately.

A terrorism suspect, then, may be held *incommunicado* in police custody for five days before being brought before a judge. At any time, the judge may request information about the detainee’s condition, or conduct a personal inspection, but this is at the judge’s discretion,¹⁰⁵ and there is no obligation on him or her personally to see the detainee before the initial seventy-two hour detention period is extended by another forty-eight hours. Human Rights Watch, in its analysis of those arrested in connection with the 11 March attack, outlined that, out of the fifteen cases of which it had specific information, all detainees were held for over four days, many for five, before they had an initial hearing in court.¹⁰⁶ The European Committee for the Prevention of Torture (CPT) has stated that five days of *incommunicado* detention before gaining a hearing with a judge may not be in conformity with Spain’s international obligations, and that those held *incommunicado* should be systematically be brought before a judge, not an investigating magistrate, before a decision to extend this detention beyond seventy-two hours is made.¹⁰⁷

⁹⁸ See *Fox, Campbell and Hartley v. UK*, (nos. 12244/86 and 12245/86), Judgment of 30 Aug. 1990, A.182, at 16-18; *Murray v. UK* – 14310/88, Judgment of 28 Oct. 1994. A.300-A, at .24-9.

⁹⁹ Liberty Report, Nov. 2005, no. 5 above, para 35.

¹⁰⁰ JCHR Eighteenth Report, no. 56 above, at 18.

¹⁰¹ Liberty Report Nov. 2005, 5no. 5 above, paras 38 –39.

¹⁰² Art. 520 of Criminal Prosecution Act.

¹⁰³ Nov. 2003 reform of LEC amended art. 509; Organic Law 15/2003 of 25 Nov. 2003 reforming the Code of Criminal Procedure.

¹⁰⁴ HRW Report Jan. 2005, no. 19 above, at 27.

¹⁰⁵ LEC, art. 526(3).

¹⁰⁶ HRW Report Jan. 2005, no. 19 above, at 30.

¹⁰⁷ Report to the Spanish Government on the visit to Spain carried out by the European Committee for the Prevention of Torture and Inhuman Treatment or Punishment (CPT) from 22 to 26 July 2001. CPT/inf (2003) 22, para 24.

Thus, Spain's system of pre-charge detention is not without its own causes for concern. However, the difference to the UK has been noted, regarding concerns over 'the Home Secretary's modelling of judicial control on the French, Italian and Spanish jurisdictions'.¹⁰⁸ As in these systems the examining magistrate 'has a much more intimate role in the investigation process', to import the same procedures to the UK system would require a different style of magistrates' training. Thus, 'it would not be practical or desirable to "cherry pick" aspects of an alien legal system and transpose onto our own',¹⁰⁹ and 'the need for judicial authorisation for extending detention does not completely address concerns over extended detention'.¹¹⁰

6. The right to an effective defence/ fair trial (articles 5(4), 6(1) and 6(3))

According to the ECHR, the detainee should have available to them a remedy allowing the competent court to examine not only compliance with the procedural requirements... but also the reasonableness of the suspicion grounding the arrest and the legitimacy of the purpose pursued by the arrest and ensuing detention.¹¹¹

As restrictions under the PTA's Control Orders, have not yet been successfully challenged, 'the effectiveness of the court procedures for non-derogating orders is almost impossible to report upon at this stage',¹¹² but two aspects of the established legal process compromise the right to an effective defence: secret proceedings and limited access to legal counsel. These are echoed in Spanish legal provisions, discussed below.

6.1 UK Law

The right to legal assistance provided in Article 6(3)(c) is considered as a specific aspect of the general concept of a fair trial set forth in paragraph 1 of Article 6,¹¹³ and the power to deny access to a solicitor for forty-eight hours raises conflicts with this. In the case of *Murray v. UK*,¹¹⁴ it was accepted that Article 6 also applies at the stage of police interrogation and not just when charges are brought against the detainee. Regarding Section 41 of the Terrorism Act of 2000, the HRC has held that the provision of the UK's Terrorism Act 2000, which allows suspects to be detained for forty-eight hours without access to a lawyer, was of suspect compatibility with Articles 9 and 14.¹¹⁵

The individual made subject to a control order is not entitled to be present through the proceedings, or to know all the evidence against him, as he is represented in closed sessions by a Special Advocate assigned by the state, , who is forbidden to discuss the closed material with him. Although the Special Advocate can cross-examine witnesses on the appellant's behalf, the applicant is denied the full benefit of these rights if access to the closed evidence against him is denied. This involves serious limitations on the appellant's rights to fair proceedings, including the right to know the case against him,¹¹⁶ be present at an adversarial hearing,¹¹⁷ examine or have examined witnesses

¹⁰⁸ See response by Dr Metcalfe to Question 111, Select Committee on Home Affairs, n. 95 above.

¹⁰⁹ Liberty Report November 2005, 5n. 5 above, at 23.

¹¹⁰ *Ibid.*, at 23.

¹¹¹ *Brogan and others v. UK* (11209/84) [1988] ECHR 24 (29 Nov. 1988), para. 65.

¹¹² See Lord Carlisle of Berriew QC, n. 66 above, para. 51.

¹¹³ *Imbrioscia v. Switzerland*, Judgment of 24 Nov. 1993, ser. A No. 275, (1994) 17 EHRR 441, para 37, at 455.

¹¹⁴ *Murray v. United Kingdom* [1994] 17 EHRR 539, paras 63 and 67, at 66-7.

¹¹⁵ CCPR/CO/73/UK, para 13(2001).

¹¹⁶ ECHR, Articles 5(4) and 6(3)(a).

against him;¹¹⁸ be represented in proceedings by counsel of his own choosing;¹¹⁹ and to equality of arms.¹²⁰ Thus it is unlikely to be compatible with the right to a fair trial in Article 6(1) ECHR.

6.2 Spanish Law

In Spain the right to an effective defence may be exercised by filing a writ of *habeas corpus*.¹²¹ While the law appears to be in conformity with international standards,¹²² in cases of incommunicado detention, *habeas corpus* is seen as irrelevant, because they are situations in which the arrest and detention are under judicial supervision and therefore *a priori* legal. Spanish law also permits the use of secret legal proceedings,¹²³ (*secreto de sumario*), which severely restricts access by defence attorneys to the details of an ongoing criminal investigation under the supervision of the examining magistrate. Yet the prosecutor is entitled to access all this information, and thus its use in terrorism cases ‘is virtually guaranteed’.¹²⁴ Incommunicado detainees do not have the right to see a lawyer from the outset of detention, only when they are called to give an official police statement, which may occur after three or five days in custody. When they do, they do not have the right to confer with their lawyer in private at any time, despite the assertion of the Human Rights Committee that the right to counsel must include the right to speak privately with one’s lawyer.¹²⁵ Furthermore, the prohibition of direct, private attorney-client conference deprives the lawyer of any opportunity to collect detailed information relevant to the detainee’s case and make an effective application for provisional release. The CPT concluded in its 2001 report on Spain that existing provisions fail to provide ‘from the very outset of their custody, the fully-fledged right of access to a lawyer which the Committee has recommended’.¹²⁶ While the CPT is of course not a mechanism of the European Convention, this supports the view that these measures do not allow for ‘equality of arms’.

The Spanish inquisitorial, as opposed to adversarial, system involves closed proceedings similar to procedure under SIAC and so, in dealing with sensitive material, it encounters the same problems as experienced in the UK. It could be argued that the introduction of an inquisitorial regime in the UK would only further delay the criminal process, not least because a new system would rely on concepts and procedures that are

¹¹⁷ ECHR, Article 6(1).

¹¹⁸ ECHR, Articles 6(1) and 6(3)(d).

¹¹⁹ Article 6(1) and 6(3)(d) ECHR, see e.g. *Pakelli v. Germany* judgment (1983), Series A no. 64, 6 EHRR 1, at 15, para 31. This is not absolute but the general rule is that the appellant’s choice should be respected.

¹²⁰ With regard to Art. 5(4), the ECHR has held that ‘[e]quality of arms is not ensured if counsel is denied access to those documents in the investigation file which are essential in order effectively to challenge the lawfulness of his client’s detention.’ *Nikolova v. Bulgaria* (31195/96) [1999] ECHR 16 (25 Mar. 1999), para. 58.

¹²¹ Organic Law 6/1984, Regulation of the Procedure for Habeas Corpus. 1984.

¹²² HRW Report Jan. 2005, n. 19 above, at 36.

¹²³ Article 302 of LEC

¹²⁴ HRW Report Jan. 2005, n. 19 above, at 41.

¹²⁵ See Report to the Spanish Government on the visit to Spain carried out by the European Committee for the Prevention of Torture and Inhuman Treatment or Punishment (CPT) from 1 to 12 April 1991, para. 52; UN Human Rights Committee General Comment No. 20, para. 67.

¹²⁶ Report to the Spanish Government on the visit to Spain carried out by the European Committee for the Prevention of Torture and Inhuman Treatment or Punishment (CPT) from 22 to 26 July 2001. CPT/inf (2003) 22, para. 10.

not currently part of English law.¹²⁷ The question remains, then, whether the special exigencies of the current security situation could justify the exceptions to traditional English principles of due process and what appears to be a *de facto* derogation from Articles 5(4) and 6(1) ECHR. What is the appropriate forum and what procedure is able to balance the rights of detained persons to know the case against them with the need for the Government not to compromise the sources and methods of its intelligence gathering?¹²⁸

7. The exception becomes the norm

A further danger, as regards control orders, is that, as they become more familiar with time, ‘government lawyers will be emboldened to seek more and more stringent conditions’ and the problem will become more acute.¹²⁹ Perhaps this is one of the key factors to remember in assessing counter-terrorism measures, the danger that exceptional measures undertaken during an emergency may gradually become the norm. To put it another way, the erosion of rights will be ongoing, and the minimum level of rights protection will be ‘indefinitely lowered’.¹³⁰ The placing of terrorist suspects outside the protection of the legal system, both through legislation and action, further enables this erosion. That the Prevention of Terrorism Bill 2005 contains no measures to facilitate the prosecution of terrorism suspects arguably underscores ‘the Government’s inclination to privilege extraordinary powers over proper use of the criminal justice system’.¹³¹

On a practical note, to refer back to the quotation that opened this essay, ‘in provoking tensions, hatred and mistrust of government’, certain measures can facilitate the growth of terrorism. In a comparative report, looking at both past UK legislation and that of other countries, Liberty wrote that:

the lessons from Ireland are clear. Widespread violation of human rights in the ‘War on Terror’ is counterproductive. It erodes democracy by undermining the very principles on which social order is based, and alienates the communities from whom the authorities need support in dealing with political violence.¹³²

This ‘hearts and minds’ argument of course still applies today with minority groups in the UK, and both the potential community impact and all alternative solutions should be investigated.

8. Conclusion

The UK’s confused and overlapping terrorism legislation requires much more in-depth analysis, and the difficulties in ‘transplanting’ legal systems has been acknowledged. Indeed, Spanish law does not offer an ideal by any means, and in some cases Spain has adopted similar methods to the UK. However, perhaps the difference in the *attitude* towards legislation of a state whose experience of terrorism is so strikingly similar serves to undermine arguments that the UK is in a situation exceptional to itself. The Special

¹²⁷ Liberty, *Reconciling Security and Liberty in an Open Society*, at 32, see <http://www.liberty-human-rights.org.uk/resources/policy-papers/2004/liberty-and-security.pdf>, last accessed 1 Feb. 2007.

¹²⁸ *Ibid.*, at 29.

¹²⁹ Control Orders and Restrictions on Liberty, Thomas de la Mare, n. 64 above, para. 30.

¹³⁰ International Helsinki Federation for Human Rights report, April 2003, n. 10 above.

¹³¹ Human Rights Watch ‘UK: Terrorism Bill Undermines Human Rights’, at <http://www.hrw.org/english/docs/2005/03/02/uk10241.htm>, last accessed 1 Feb. 2007.

¹³² Liberty, *Reconciling Security and Liberty in an Open Society*, n. 127 above, at 18.

Rapporteur on Torture noted that ‘high Spanish political office-holders were unequivocal in their assertion that all measures to combat terrorism must remain within the confines of legality.’¹³³ They seek to recognise that terrorists are criminals and that it is preferable to treat them as such, as far as is possible,¹³⁴ rather than potentially glorifying their cause by making them subject to special legislation. Although the concerns of the Committee against Torture regarding incommunicado detention and evidence of lengthy periods of pre-charge detention could suggest that this ‘commitment’ is disingenuous if nothing else, it at least might provide a better foundation from which to ensure the protection of, and respect for, human rights. In rather romantic language, Lord Hoffmann summarised it thus:

Whether we would survive Hitler hung in the balance, but there is no doubt that we shall survive Al-Qaeda. The Spanish people have not said that what happened in Madrid, hideous crime as it was, threatened the life of their nation. Their legendary pride would not allow it. Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community.¹³⁵

Certainly the Spanish response to the Madrid bombings is a vastly different one to that seen in the UK and US,¹³⁶ supporting the argument that the rule of law is not compromised by emergencies *per se*, but by politicised construal of risk to justify emergency measures that might not actually be necessary to meet the threat at hand.

¹³³ Special Rapporteur Report, n. 29 above, para. 57 – although the Spanish Government’s response to this might suggest otherwise.

¹³⁴ M. Bedri Eryilmaz, *Arrest and Detention Powers in English and Turkish Law and Practice in the Light of the European Convention on Human Rights*, (Leiden: Martinus Nijhoff, 1999), at 1.

¹³⁵ *A (FC) and others (FC) (Appellants) v Secretary of State for the Home Department (Respondent)*, [2004] UKHL 56, para 96.

¹³⁶ See CIP-FUHEM Report, n. 43 above, for an in-depth discussion of the Spanish response.