


POLITICAL REFLECTION

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Reflections on the Turkey Syria Conundrum

by Assoc. Prof. Mark Meirowitz

**The Era of Coercive
Diplomacy in Iranian
Nuclear Deal**
by Rahimullah Kakar

**International Solidarity
and Burden-Sharing:
The Case of Syrian Refugees**
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**Shall the Court Subject
Counter-Terrorism Law
to Judicial Review?
National Security vs
Human Rights**
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**The Twilight Zone of
Political Transition:
Between Revolution
and Democratic Change**
by Dr Marco Marsili

**Rural Afghan Women
as Agents for Change
and the Failure of
Liberal Peacebuilding**
by Sarah Edgcumbe



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World News

By Furkan Sahin

Turkey Launched a Military Operation into Northern Syria



Succinctly articulated by Turkey, security threats coming from the PKK's Syria branch, PYD/YPG caused military operation by Turkey, supported by the Syrian National Army, which consists of Turkey-backed Free Syrian Army. It has been expected but how it would happen was not certain until President Trump decided to withdraw US ground forces protecting PYD/YPG control centres. That has been an unexpected move by the US, and PYD/YPG was left unprotected. Most of the countries condemn Turkey for her assault to the Northern Syria because it is thought that there would be humanitarian and migration crisis together with the possibility of re-emergence of the ISIS. More than ten thousand ISIS terrorists have been held in custody in the region, and the international community is wondering what would happen to them. Turkey agreed to take responsibility but still nothing is definite until the operation is finished.

On the one hand, the international community reports Turkey's Peace Spring Operation as if it was against Kurdish people as they mostly equate PYD/YPG with all Kurds. On the other hand, Turkey refuses the idea and claims fighting against PKK's Syrian branch, as such terrorists. Additionally, international community argues that there would be migration and humanitarian crisis, but Turkey opposes it and suggests it would establish new settlement areas for facilitating Syrian migrants to return, including more than three million Syrian migrants in Turkey.

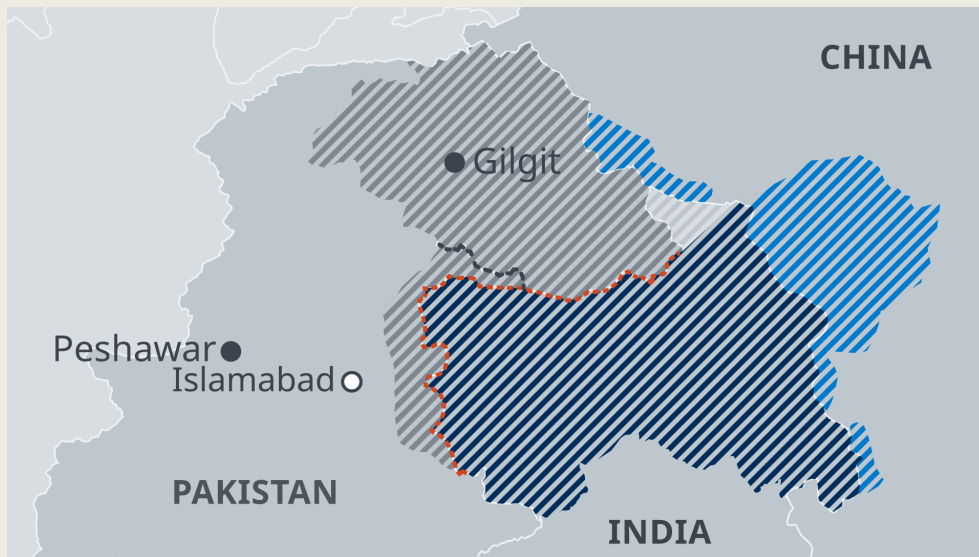
Oil Tanker Crisis between Saudi Arabia and Iran



On 14 September 2019, the world's largest oil refinery, owned by Saudi Arabia oil company, Aramco, was hit with a drone attack by Houthi militants in Yemen. It is known that Iran has supported them and thus most think that it an indirect attack from Iran to Saudi Arabia. On 11 October 2019, almost a month later, an Iranian oil tanker, called Sabiti, was hit twice by something, which is mostly believed to be missiles. Iran implies that Saudi Arabia operated the attack because it was navigating in the Red Sea, offshore of Saudi Arabia.

It is just the tip of the iceberg. Saudi's close engagement with the US and Israel against Iran does not seem to end soon. These two regional actors consider each other sectarian rivals and so have been in the struggle in Syria, Iraq, and Yemen. Therefore, the oil tanker crisis would enlarge gradually until their struggles reach equilibrium to detent.

India Raised a Military Control in Kashmir



India changed the status of Kashmir from autonomous to fully controlled, with a Presidential Decreed on 5 August 2019. By amending the constitutional article recognising Kashmir as autonomy, Indian President, Narendra Modi, has sent additional troops and took control of all infrastructure including telecommunication facilities. Since the detachment between India and Pakistan, the region has stayed as a disputed area, both actors, India and Pakistan, claim sovereignty over the Kashmir. As Imran Kahn, Pakistan's Prime Minister emphasised that international community has not yet appropriately responded due to the protest in Hong Kong. However, historical experience suggests that unilaterally changed status of Kashmir would not be forgotten until it worsens relations between India and Pakistan. Therefore, a new Middle East-like conflict seems possible unless proper precautions are not taken by the international community.

US-China Trade War is Far from Ending



Chinese Vice Premier, Liu He met with President Trump to continue trade talks between China and the US. International media reports that two giant powers are close to penning a new comprehensive trade agreement. However, Trump's unstable stance on issues and China's responses are still significant factors creating possible uncertainties on the issue. It is expected to be completed by the end of 2019; a new trade deal would stable the international economic order if it is signed. Due to the fact that China and the US do not economically challenge each other, but their struggle ranges from Iran related issues to international corporations, it does not seem that signing a trade agreement between them would be easily completed.

Reflections on the Turkey Syria Conundrum

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As a result of President Trump's announcement that he would withdraw US troops from Northern Syria, and Turkey's entering Syria in an operation Turkey calls "Operation Peace Spring", to confront the Syrian Kurds who comprise the YPG (People's Protection Units), the dam has burst and the criticism in the US of President Trump's Syria policy, and Turkey's incursion into Syria, has been constant, with the bipartisan American consensus, as reported in the media, being that Turkey is attacking a US ally, the Syrian Kurds.

Across the US political spectrum, from the right to the left, Trump is accused of abandoning America's Kurdish friends, the YPG, who have fought with the US military against ISIS in Syria. Pat Robertson, an evangelical Christian leader, has said that he was "appalled" by Trump's decision to withdraw US troops from Northern Syria stating that "the President of the United States is in great danger of losing the mandate of Heaven if he permits this to happen" and that Trump is allowing the "Christians and the Kurds to be massacred by the Turks".

Senator Lindsey Graham (R-South Carolina) said on Twitter that "there is strong bipartisan support for "sanctions" against Turkey, "and it is imperative that we do not allow Turkey's aggression to lead to the destruction of a valuable ally – the Kurds - and the reemergence of ISIS". Senate Majority Leader Mitch McConnell (R-Kentucky) also opposed Trump's Syria policy.

Pat Robertson is "appalled" by Trump's decision to withdraw U.S. troops from northern Syria: "The President of the United States is in great danger of losing the mandate of Heaven if he permits this to happen." Pat Robertson is

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"appalled" by Trump's decision to withdraw U.S. troops from northern Syria: "The President of the United States is in great danger of losing the mandate of Heaven if he permits this to happen." Seemingly completely forgotten or overlooked is the fact that the YPG is affiliated with the Kurdistan Workers Party (PKK), a Marxist-Leninist oriented Kurdish group that is identified as a terrorist organization by the US State Department - and acknowledged by US officials, including Dan Coats, when he was Director of National Intelligence, as being a terrorist organization. The PKK has been responsible for thousands of deaths in Turkey and is perceived by the vast majority of the Turkish population as an existential threat against the Turkish state.

In a recent State Department press briefing, a State Department official indicated that America's partner in Syria to fight ISIS has been the "SDF, a major component of which has been the YPG, which is the Syrian offshoot of the PKK...Turkey...has been suffering horrific terrorist attacks from the PKK for 35 years since 1984". (US Department of State Briefing, October 10, 2019, www.state.gov).

The press accounts gloss over this connection; for example the Wall Street Journal (a Republican/right-oriented publication), surprisingly describes the claim by Turkey that the YPG has ties to the PKK as "exaggerated" (Editorial, "With Friends Like the U.S.", Wall Street Journal, October 8, 2019, p. A16).

How did we get to the point where the US relied on an affiliate of a terrorist organization to work with US military to fight ISIS? According to Michael Doran, a senior fellow at the Hudson Institute, "[i]n fact, the close relationship with the YPG was a quick fix that bequeathed to Trump profound strategic dilemmas. Trump inherited from Obama a dysfunctional strategy for countering ISIS, one that ensured ever-greater turmoil in the region and placed American forces in an impossible position." (Michael Doran, "How Obama's Team Set Up Trump's Syrian Dilemma, New York Post, October 8, 2019). Says Doran, "rather than work with Turkey, the U.S. chose to support the Syrian wing of the PKK, which the Turkish people hold responsible for decades of warfare and tens of thousands of deaths" (Michael Doran and Michael A Reynolds, "Turkey Has Legitimate Grievances Against the U.S.", Wall Street Journal, October 8, 2019, p. A17).

The Kurds have, since time immemorial, never achieved their goal achieving an independent Kurdish state. As Graham Fuller stated in his prescient Spring 1993 Foreign Affairs article "The Fate of the Kurds," giving the Kurds a State of their own was not "convenient". Following the failure to achieve a Kurdish State through the Treaties of Sevres and Lausanne in the 1920's, none of the

States with Kurdish populations, Syria, Iran, Iraq and Turkey, were willing to give up sovereignty to create a Kurdish State. Note that when the Iraqi Kurds declared Independence via a referendum in 2017, their action was squelched immediately by Iraq. The only Kurdish “de facto” entity (not a State) is Iraqi Kurdistan, which is closely connected politically to Turkey. At this juncture, in Syria, the Syrian Kurds, through the YPG and its political affiliate, the PYD, have been seeking to develop what is in effect a ‘statelet’ on the border with Turkey, which Turkey has deemed to be a threat to Turkey, based on the YPG’s affiliation with the PKK. All in all, an utterly complex scenario.

Trump is in a tough position. Given the domestic pressures of his Presidency - he faces an impeachment inquiry in the House, and if actually impeached by the House, the President’s ultimate fate resides in the Senate (with its Republican majority) where a 2/3’s majority is required to “convict” the President of “high crimes and misdemeanors”. Accordingly, Trump must listen carefully to the Republicans in the Senate who oppose his Syria policy – among them, Senator Lindsey Graham and Senate Majority Leader Mitch McConnell – who are the caretakers of the future of his presidency – and to the evangelicals who have previously been staunch supporters of the Trump Presidency. Trump says in his tweets (and indicated the same approach in his recent speech to the 74th Session of the UN General Assembly) that “endless wars must end” and that he wants to get out of foreign commitments, but his actions contradict his statements - he didn’t withdraw US troops from Afghanistan after a major pushback, and it is unlikely the US will actually withdraw troops from Syria.

The supreme irony is that after Trump said in a tweet that if Turkey takes “off limits” actions in Syria, he would “totally destroy and obliterate” the Turkish economy, and after Treasury Secretary Mnuchin announced that sanctions were being prepared (but not yet in effect) against Turkey, the US vetoed a UN Security Council resolution condemning Turkey for its incursion into Syria, and President Trump invited Pres Erdogan to the White House in November. Confusing signals to be sure.

Trump also tweeted that there are three future options – “send in thousands of troops and win militarily; hit Turkey very hard financially and with sanctions; or mediate a deal between Turkey and the Kurds”. However, it would seem that none of these options is realistic at the present time.

Creating more confusion is while Trump says he wants out of foreign commitments, the US is sending 1,800 troops to Saudi Arabia and providing two fighter squadrons, two Patriot missile batteries, an advanced air defense

system, or THAAD, and an aviation headquarters unit. Is this Vietnam Redux? Vietnam started the same way with a limited involvement by the US. Countering Iran is essential of course but where is the US headed? - and what actually is US foreign policy? - engagement and support of our allies, or disengagement, as per Trump's tweets? Turkey's incursion into Syria is also fraught with risk given the strong opposition to its actions by US leadership.

Big developments are in the offing and with Trump's inconsistent foreign policy and unpredictability we are in for a rough roller coaster ride — without a top-notch foreign policy adviser like General H.R. McMaster or John Bolton - who would have provided contrarian views (and much needed direction) to Trump's erratic foreign policy, we will see a great deal of chaos and confusion going forward.

And as the impeachment process marches forward Trump (like Nixon before him) will likely become even more distracted from pursuing a coherent foreign policy by the pressure of the possibility of impeachment.

Trump's predictable unpredictability will certainly create a difficult future ahead for the region and the world.

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Rural Afghan Women as Agents for Change and the Failure of Liberal Peacebuilding

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This article will critique the liberal peacebuilding agenda and argue for an alternative, post-liberal approach to peacebuilding and conflict research by drawing upon James Scott's theory of everyday resistance in conjunction with my own recent research with rural women in the Hirat and Balkh provinces of Afghanistan. The objective of this article is to amplify the narratives and experiences of rural Afghan women in order to acknowledge their agency and ability, and in recognition of the potential they possess in terms of contribution to effective, sustainable peacebuilding processes. The potential of rural communities is largely neglected by liberal peacebuilding processes in Afghanistan, reflecting the problematic nature of the liberal peacebuilding agenda in general; namely that it is uniformly applied in a top-down approach.

Rather than adopting a case-by-case contextualised approach to peacebuilding based upon comprehensive research and inclusive, community-based consultations, the liberal peace agenda revolves around core pillars which are applied in a formulaic manner regardless of socio-political context and diversity on the ground. These core pillars are: state-building characterized by the establishment of liberal institutions and centralized governance, the implementation of neoliberal policies which seek to establish the free market economy through privatization of services and resources, the prioritization of security over development, an emphasis on the importance of individualistic civil and political rights over socio-economic and community-based rights, and finally, a top-down approach to peacebuilding which is exclusionary in nature due to its exclusive incorporation of the nation's elite. In short, liberal peacebuilding can be viewed as a project of cultural imperialism in which dominant states seek to mould non-liberal and fragile states in their own image. It is what Sophie Richter-Devroe calls, 'the peace of the powerful' (Richter-Devroe, 2018: 15).

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The central aspect of liberal peacebuilding this article will focus upon is the problematic and tension-laden relationship between grassroots knowledge and agency on the one hand, and liberal institutions on the other. David Lewis, in his 2017 article on discourse, knowledge and authoritarian peace (Lewis, 2017: 21) elaborates upon how denial of local agency is an expression of power within the liberal peacebuilding paradigm, by pointing to his observation that ‘local conditions and local social fields are clearly subordinate to the dominant discourse of the liberal peace’ (Lewis, 2017: 41). Local knowledge which conforms to the liberal peacebuilding paradigm is incorporated, whereas knowledge that contradicts this paradigm is either reinterpreted and manipulated or discarded as invalid. According to Lewis, it is this neglect of local knowledge combined with the reification of expressions of agency which fail to conform to liberal norms as backwards, which results in alternative peace-building paradigms remaining under-researched and lacking in recognition as viable alternatives to liberal peace.

Afghanistan provides a lucid demonstration of the failure of the liberal peacebuilding agenda, despite attempts by the international community to sensitise it by employing a “light footprint” through capacity building measures (Hirst, 2011: 12). The reason for this failure, is largely due to the imposition and implementation of policies and strategies, which marginalise local knowledge and priorities, and instead, reflect external rather than internal concerns. For example, not only did the international community spend approximately \$100 million per day on security compared to just \$7 million per day on development during the first seven years of American-led occupation (Hirst, 2011: 18), it has also sought to frame Afghan women solely as victims of Afghan men, incorrectly heralding the 2001 invasion as a project in women’s liberation (Abu-Lughod, 2002: 784). Since 2001, the liberal state-building enterprise has continuously been presented as the most effective means of protecting and empowering women. This political discourse and corresponding imposition of externally-influenced policies, privileges the voices of external actors and male elites over the perspectives of rural Afghan women (Bond, 2019). The effect of this elite-centric approach to peacebuilding, is a discourse which emphasizes civil and political rights as the most effective vehicle through which to deliver women’s liberation, by way of detracting attention from the structural violence inherent within neoliberalism and exclusionary, centralized state-building.

Two Afghan strategies often presented as evidence of the improved conditions for Afghan women are the 2007 National Action Plan for the Women of Afghanistan, and Afghanistan’s 2015 National Action Plan on United Nations Security Council Resolution 1325. These documents include measures for increased protection of women, as well as greater representation of women in politics, security and the peace process. However, neither of these instruments includes any mechanism or framework through which to ensure inclusion of, or consultation with, rural women. Rather, rural women are assumed to be represented by the institutionalized “femocrats” and “peacewomen” (Richter-Devroe, 2018: 9)

so beloved of liberal peacebuilding policies. It is therefore problematic that these elite women do not represent rural women's values and concerns: The life experiences of wealthy, educated, urban women do not reflect those of illiterate peasant women who are engaged in a daily battle with extreme poverty, and who, as my research indicates, are supportive of patriarchal structures of authority, and sometimes also supportive of the Taliban. These rural women are primary carers for entire families and are keenly aware of the immediate problems facing their families and communities at a localized level. Despite their valuable experiences and perspectives however, they are rarely, if ever, provided with the opportunity to voice their concerns or suggestions regarding peacebuilding.

My own research in Afghanistan sought, in a small way, to address the neglect of rural women's voices, and was conducted in such a way as to gain an insight into their experiences, values, perspectives and objectives. Despite the apparent assumption within liberal peacebuilding mechanisms that rural women are devoid of knowledge and agency, my research, which incorporated stratified samples (age, ethnicity, marital status, female and non-female headed households, internally displaced women and non-displaced women) comprising 130 rural women through eleven focus groups across Balkh and Hirat provinces, found that in fact, rural women actively engage in everyday resistance on a daily basis. My research utilised the theoretical framework of James Scott, scholar of anarchism, resistance and peasant politics, who developed the theory of *everyday resistance*, which examines the interplay between the powerful and the subordinate. Scott defines everyday resistance as 'the ordinary weapons of relatively powerless groups: [such as] foot dragging, dissimulation, [or] false compliance...They require little or no coordination or planning; they often represent an individual form of self-help; and they typically avoid any direct symbolic confrontation with authority or with elite norms' (Scott, 1985: 29). Importantly in the case of Afghan women, Scott later built upon this initial understanding of everyday resistance by developing his concept of 'hidden transcripts'; a 'risk-averse use of language by the powerless' (Scott, 1990: 30), most notably taking the form of gossip, song, grumbling, storytelling and what many Afghan women refer to as "backbiting." The more threatening the dominant manifestation of power, the more hidden acts of everyday resistance will be.

All but one of the rural women who participated in my research acknowledged regularly employing acts of everyday resistance. The most common resistance practices employed by the women were backbiting to each other about their husbands, maintaining a veneer of false deference, and subversive childrearing. Domestic violence, oppression (such as rigid gender norms and restrictions on their freedom of movement) and unfair demands within the domestic sphere were the foremost targets of resistance. Overall, the rural women who participated in my research supported a patriarchal

structure of governance, provided that it was organic, benevolent, and conformed to their interpretation of Islam.

All of the rural women who participated in this research were beneficiaries of women's empowerment programmes implemented by a small, predominantly Pashtun-staffed NGO; most were participating in vocational skills-based training which would enable them to generate an income for their family. Interestingly, the family home was the women's most volatile site of resistance. Once they had secured permission from their husbands, fathers or brothers to leave the home, they ceased to express an intention to resist, instead acting in such a way as to support and reproduce patriarchal authority on the basis that patriarchal governance best complies with their interpretation of Islam, with Islam being of utmost importance to them.

The research participants' motivation for seeking employment or income-generation was not driven by defiance or a desire to confront patriarchal systems, but simply to provide for their families in a context of extreme poverty, in which husbands are often unemployed. The participants viewed women working as acceptable within Islam but did not wish to be the recipients of development opportunities at the expense of their men, whom they also wished to see generating an income. Significantly, they did not necessarily wish for equal political opportunities, viewing men as being biologically predisposed to make better decisions on behalf of the community. The women's encroachment upon public space and the labour market has, however, resulted in unintentional consequences; namely the transformation of patriarchal authority in such a way as to accommodate for the expanded gender roles of women. This shift in norms has taken place so subtly, and so organically that these newly expanded gender roles align comfortably with males retaining ultimate authority within the community. Meanwhile, the lack of confrontation inherent within this transformation has resulted in the expansion of women's presence being accommodated by, and often supported by men.

Just as rural women are gradually and discreetly affecting social change within their communities in a way which complies with religious and cultural norms, so too are they working to reduce conflict within their communities, through everyday resistance practices which target both conflict and extreme manifestations of patriarchy. Focus group participants from Injil and Balkh districts both described their childrearing practices in such a way as to demonstrate that they are weaponising existing rigid gender roles, which position the mother as sole carer for children, utilising them in order to deploy their sons as agents for positive change. Saba Mahmood makes an observation which is poignant here, in explaining that 'what may appear to be a case of deplorable passivity and docility from a progressivist point of view, may actually be a form of agency – but one that can be understood only from within the discourses and structures of subordination that create the conditions of this enactment. In this sense, the capacity for agency is entailed not only in acts that resist norms but also in the multiple ways in which one inhabits norms' (Mahmood, 2006: 42).

This recognition of the inherent transformative potential located within the interaction between cultural and social norms, local knowledge and agency are completely overlooked by top-down liberal peacebuilding processes, often resulting in policies being experienced as destructive or irrelevant at the local level.

In this case, the women deploy childrearing practices against conflict and extreme patriarchy by placing two distinct demands upon their younger sons. The first is that boys must be kind and respectful to girls and treat them as their equals. The second is an attempt to counteract the normalisation of violence and forbids their sons from hitting girls, but also from hitting their brothers, friends, or other boys within the community. This form of subversive childrearing has the potential to be the catalyst for gradual, but effective change in social norms among communities, as when general violence is dramatically reduced, a man hitting a woman will be amplified. Teaching their sons not to hit or argue with other children in the community is a proactive attempt by these women to ensure continued unity within the community, in turn contributing to increased conflict resilience. Moreover, the women also justify this approach to childrearing in terms of ensuring that their sons grow up to be good Muslims, contrary to many men in their community, whom the women view as exercising violence and coercion which is incompatible with Islam.

Despite the women intentionally employing childrearing practices which subvert existing social norms, many of the research participants were ambivalent towards the possibility of women obtaining positions of political authority within the community, while others were opposed to the idea, viewing politics as the domain of men. Rather, the women advocated for and raised their children in preparation for, a more benign system of patriarchal governance more sympathetic towards women. A research group in a particularly embattled village in Balkh district largely justified their support for patriarchal governance by pointing to the fact that despite violent conflict surrounding their community, and despite the presence of career criminals, their village had remained united and strong, through familial and communal bonds. This resilience persevered under patriarchal community rule, and so the women viewed this power dynamic as successful, regardless of the domestic violence they faced within the private sphere.

As has been illustrated throughout this paper, rural women are very much aware of the priorities they and their communities face. Importantly, they are keenly aware of those values and norms which the community views as non-negotiable and those which can be quietly, and subtly transformed, provided this action takes place in a non-confrontational manner. Thus, these women are extremely valuable bodies of knowledge and agency in terms of peacebuilding. To ignore them because their knowledge and perspectives do not always conform to liberal norms is to condemn rural Afghan communities to continued marginalisation, poverty and conflict. To

unconditionally favour liberal peacebuilding, is also to neglect the potential applicability of other forms of peacebuilding.

Time and effort are required to adequately research the experiences, perspectives, values, and priorities of rural communities, but these insights are crucial for building a contextually specific framework which will result in sustainable peace. The Everyday Peace Indicators¹ framework developed by Pamina Firchow and Roger Mac Ginty is an inclusive, bottom-up approach to conflict and peace research which could be utilised in order to inform the creation of truly effective peacebuilding policies. This framework has already been applied to research in rural communities across two provinces of Afghanistan with significant success by the United States Institute for Peace.² Such a framework could underpin what David Roberts calls “popular peace”,³ which ‘derives from local priorities serviced through able institutions, sustained, where they are lacking, through external cooperation.’⁴ Indeed, popular peacebuilding measures would necessarily employ a bottom-up approach which would incorporate the currently marginalised voices of rural women and challenge the prevailing structural violence inherent within liberal peacebuilding mechanisms, which at worst achieve only a short-term cessation of conflict, and at best, result in long-term negative peace.

The overriding aspect of peacebuilding, which should be the foremost concern in conflict-based research and policy development is the fact that peace is not uniformly understood or homogenously experienced. For this reason, a consultative, participatory approach to understanding local conceptions of peace is crucial for formulating comprehensive policies to achieve sustainable peace in such a way that enables local communities to take ownership of, and responsibility for, their success. The current liberal peacebuilding paradigm is irrelevant and abstract to many people living in rural communities, who often feel disenfranchised by processes which exclusively incorporate and benefit the urban elite.

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¹ <https://everydaypeaceindicators.org/>

² <https://www.usip.org/index.php/publications/2018/03/measuring-peace-and-violent-extremism>

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The Twilight Zone of Political Transition: Between Revolution and Democratic Change

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O'Donnell, Schmitter and Whitehead define transition broadly as "the interval between one political regime and another" (O'Donnell, Schmitter, and Whitehead, 1986: 6). Plattner concludes that "they emphasise a particular path to democratic transition – one that is neither violent nor revolutionary but proceeds from negotiation between an outgoing authoritarian regime and its democratic opposition and often relies upon formal pacts that provide security guarantees to both sides" (Diamond et al., 2014: 87). I wonder whether there is a common and clear pattern to democratic transition, or if rather exists a "twilight zone" in which violence is still permitted as the "vestige" of the vanishing authoritarian regime. In this brief article, I explore the connections between revolution and democracy in political changes

The Right to Change

A revolution is an illegal act that overthrows the established legal regime, most of the times accompanied by violence. Revolution is not a "slow" transition to democracy; it is a rapid and sudden change from an authoritarian regime that often enjoys popular support because it is considered "fair". Some authors believe that violence and revolution are two sides of the same coin (Marsavelski, 2013: 394). I do not agree; not all revolutions rely on violence. To name just two that succeeded without violence: The Glorious Revolution, also called the Bloodless Revolution or Revolution of 1688, which overthrew King James II of England (James VII of Scotland) and ushered in the reign of William III and Mary II; the Carnation Revolution, a military coup in Lisbon, Portugal, on 25 April 1974, supported by massive popular participation, which ended the authoritarian regime of the Estado Novo. Revolutions gave birth to many of today's Western democracies (see: American Revolution of 1775-1783; French Revolution of 1789; and European revolutions of 1848).

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When can a revolution be deemed "fair"? Castrén argues that if an insurgency takes on a big size, its rebels should not be treated as common criminals (Johannes and Castrén, 1966: 96-97). Walzer believes that anti-insurgents fighting against a resistance movement or a violent uprising that enjoys popular support are fighting an unjust war against the guerrilla forces (Walzer, 1977: 187). Meisels, however, doubts that popular, democratic support for an insurgency should automatically render its opposition unjust or confer legitimacy to irregular combatants (Meisels, 2006: 42). The Bolsheviks probably had the consent of the majority of the population when they overthrew the Tsar in 1917 and established a terror regime. The plebiscite held in Austria on 10 April 1938 that decided the Anschluss (unification) with Nazi Germany was a democratic exercise. Although there is no doubt that the plebiscite result was manipulated and that was held with the presence of the German troops, there was unquestionably much genuine support for an Anschluss (Kershaw, 2001: 83; Stackelberg, 2009: 170).

Violence and revolution constitute a frequent binomial. Man has rights until s/he is able to defend them. Marsavelski encompasses the right of revolution (*jus resistendi*) within the right to self-determination against alien occupation and racist regimes (2013: 247) but acknowledges that it is not an absolute right and has its limits as *sui generis* right (Marsavelski, 2013: 290). Maybe assassination is not a common means of democratisation but is an ancient method to put an end to tyranny. *Sic semper tyrannis* ("thus always to tyrants"): this phrase, said to have originated with Roman Marcus Junius Brutus during the assassination of Julius Caesar on 15 March 44 BC, was repeated two thousand years later by John Wilkes Booth after shooting to death President Lincoln.

Natural law theory provides the basis for challenging the sovereign power and to establishing positive law and government – and thus legal rights – as a derivation of the social contract. Conversely, natural rights are invoked by opponents to challenge the legitimacy of all such establishments. Grotius, who has a view of international law as natural law, rejects the possibility of justifiable use of force against the sovereign (Grotius and Barbeyrac, 1738). Hobbes thinks that the sovereign prevails over natural law, as the sovereign's decisions need not be grounded in morality. Vattel, however, thinks that the legitimate use of revolution, evolved from the natural right of self-defence, is premised under the principle of proportionality when no other remedy can be applied to the evil (Vattel and Chitty, 1835: 20-22). Marsavelski gathers that under natural law the recognition of the right to self-defence leads to the recognition of the law of necessity (2013: 285).

In Book I of his masterpiece, *The Rights of War and Peace*, Grotius advances his concept of war and natural justice, arguing that there are some circumstances in which war is justifiable. In Book II, he determines three "just causes" for war: self-defence, reparation of injury and punishment. Although Grotius considers it legitimate for a nation to invade

another one to overthrow a tyrant, he does not recognise the right of the oppressed to revolt.

The right to resist is also allowed by Locke. In *Two Treatises of Government*, the English philosopher argues that, according to the theory of social contract, people have the right to overthrow the unjust government, and to change it with one that serves the interests of citizens (§ 222 et seq.). He believes that under natural law, the people have the right to self-defence when their liberty is threatened by the local government or by a foreign nation. According to Locke, the right of revolution is a safeguard against tyranny. His contributions to liberal theory are reflected in the United States Declaration of Independence of 1776 (Becker, 1922: 27), which in its preamble proclaims the right of the people to alter or to abolish a government whenever it becomes destructive, and to replace it with a new one. The US has always recognised the right of revolution (Hackworth, 1940: 177), thus making an essential contribution to establish it in international law (Marsavelski, 2013: 271). By applying this right, US courts uphold the principle of proportionality in the use of revolutionary force, considering violence the ultimate means to overthrow the government (Dennis v. United States, 1951: 501).

The right of revolution is incorporated in the preamble of the French Constitution of the Fifth Republic (1958), which recalls the Declaration of the Rights of Man and of the Citizen of 1789. Art. 2 of the Declaration of human and civic rights states as imprescriptible the right of man to resist oppression. The preamble to the Algerian Constitution, issued after the war against France (1954-1962) that led the African country to independence, justifies the Revolution. In the First Article, the Constitution of Iran glorifies the Islamic Revolution of 1979. The right of the use of force by people to resistas ultima ratio, if no other remedy is available, is enshrined in Art. 20(4) of the Basic Law for the Federal Republic of Germany.

The preamble to the Universal Declaration of Human Rights (UDHR) speaks about the rebellion against tyranny and oppression as a last resort recourse to protect human rights. The right of colonised or oppressed peoples to free themselves is also enshrined in Art. 20(2) of the African (Banjul) Charter on Human and Peoples' Rights (ACHP), adopted by the Organisation of African Unity (OAU) in 1981, a human rights instrument, similar to the European Convention on Human Rights (ECHR) and to the Arab Charter on Human Rights (ACHR). The ACHR is a charter adopted by the League of Arab States that affirms the principles contained in the UDHR, in the Cairo Declaration on Human Rights in Islam (CDHRI), and in the international covenants on human rights; the CDHRI is the "Islamic response" to the UDHR and was adopted by the Organisation of the Islamic Conference in 1990. The text of the CDHRI enshrines the right to the peoples oppressed or suffering from colonialism and from all forms of

(What? A word is missing) and occupation have the full right to freedom and self-determination (Art. 11).

Modern constitutions refer to the sovereignty that resides/emanates from the people as the principle of democracy. Marsavelski gathers that the right to revolution is a general principle of law which exists in both international law and international customary law, even if he recognises that is not mentioned in any treaty (2013: 276-277).

Addressing the right of revolution under legal philosophy, we must consider that natural rights (*ius naturale*), among which is the right of revolution, intersect natural law theory, which justifies the supremacy of the strongest. According to the natural law theory (*lex naturalis*), certain rights are inherent by virtue of human nature endowed by nature, God, or a transcendent source, and are universal (Strauss, 1968). These binding rules of moral behaviour originate from nature's or God's creation of reality and mankind. For some philosophers, jurists and scholars the term natural law is equivalent to natural rights, or natural justice (Shellens, 1959), while others differentiate between natural law and natural right (Strauss, 1968).

In *Leviathan*, Hobbes defines natural law as "a precept, or general rule, found out by reason, by which a man is forbidden to do that which is destructive of his life, or takes away the means of preserving the same; and to omit that by which he thinks it may best be preserved" (Hobbes, 1651: 100). He believes that in the state of nature, nothing can be considered just or unjust, and every man must be considered to have a right to all things (Hobbes, 1651: XIII-13). According to the British philosopher there are nineteen Laws of nature; the first two are expounded in chapter XIV of *Leviathan* ("of the first and second natural laws; and contracts"), the others in chapter XV ("of other laws of nature"). The first law of nature provides states that every man may seek and use all helps and advantages of war (Hobbes, 1651: 86). The second law gives a man the right to self-defence (p. 87). The third law of nature provides the motivation to rebel against the authority: "when a covenant is made, then to break it is unjust, and the definition of injustice is no other than the not performance of covenant. Moreover, whatsoever is not unjust is just" (p. 97). The Catholic Church holds the view of natural law introduced by medieval Catholic philosophers such as Albertus Magnus (AKA Saint Albert the Great) and Thomas Aquinas. The Catholic jurisprudence draws the foundations of natural law in the Bible.

Conclusions

The foundations of the right to revolution, as a fair path to democratic change, lean on morals and ethics, as relies on controversial sources. These sources sanction, but at the same time justify, the use of violence. The concept of what is just or unjust rests on the same moral categories, which are not sufficient to justify or condemn an act, such as a revolution, as lawful or unlawful. On the other side, a strictly legal approach proves

inadequate due to the unlawful nature of revolution. An act can be unjust, but not unlawful, and can be just, although unlawful.

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International Solidarity and Burden-Sharing: The Case of Syrian Refugees

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Syrian Refugee Crisis

The world is currently witnessing a period of unprecedented human movement, which represents one of the most significant problems worldwide in recent times. According to a report by the United Nations (2019), the upsurge of international migrants worldwide has been phenomenal; exceeding 250 million currently, thus, having recorded over 45 million displaced persons in a decade between the years 2000 to 2010. In recent years, refugee crises have been increasing in many countries. Syria, Rohingya, South Sudan, Democratic Republic of Congo and Venezuela are the most refugee-giving countries (Global Trends- UNHCR, 2019).

Additionally, The Syrian Refugee Crisis is one of the most heart-breaking turmoil in human history. The onset of war and unrest in Syria has resulted in over: 6 million people internally displaced; sadly, it has been estimated that slightly over 6 million escaped the war and are now refugees in Syria's neighbouring countries like Turkey, Lebanon, Jordan and Iraq (UNHCR, 2019). Observers believe that the high death toll is a consequence of the bombings by the government in a bid to control the frequent protests by the civilian population in the nation. The rate of deaths and the number of displaced individuals are reported to have increased at the time foreign powers or the outside parties decided to engage in the protracted crisis situation. The Syrian refugee crisis, however, has a closer relationship with countries and international organisations. The crisis as well influences the level of the international cooperation, and the policies put in place to share the burdens resulting from the situation of the war at the moment. Therefore, the Syrian Civil War that began in 2011 came at an enormous human cost.

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It has been about eight years since the war broke out in Syria, and Turkey continues to host the largest number of refugees worldwide since that date. More than three and a half million Syrians have fled their country and sought refuge in Turkey since spring 2011 (UNHCR, 2019; Refugees and Asylum Seekers in Turkey, 2019). Syrians have come to Turkey for asylum; as an emergency measure due to the civil war in their country. Turkey, on the other hand, has taken the necessary emergency measures for this temporary situation, which in the first place is expected to be short-term, and these people have been described as “guests” at first hand in Turkey. However, Syrians in Turkey cannot be identified as refugees, asylum seekers, migrants or guests under asylum law. Syrians in Turkey can be described as a new concept of “temporary protection” status (Refugees and Asylum Seekers in Turkey, 2019). The temporary protection regime has three main elements for those people: an open-door policy for all Syrians; no forced returns to Syria; unlimited duration of stay in Turkey.

International Cooperation and Burden Sharing

Managing such a massive humanitarian problem is complicated; the hosting country governments are trying to mitigate the problems by cooperating with the branches of government. However, new bodies are needed, and in this context, national and international non-governmental organisations (NGOs) have played a significant role in the crisis. The financial support of international institutions on this issue is deficient. It is also clear that there is a need to improve cooperation, which is as important as a financial contribution. In this context, the role and cooperation of local governments and national and international organisations ought to be taken seriously. There are three main goals to attain while addressing the tools of international responsibility-sharing (Martin et al., 2018); to prevent the situations that cause people to be displaced; to maintain adequate protection for refugees and displaced persons while addressing undue costs for host countries and communities; and to promote solutions, including local integration, return, and resettlement. Hence, international cooperation stakeholders in this area aim to accommodate refugees on their territory, as well as to provide a more rational distribution of responsibilities among states involving costs and disadvantages.

The Syrian refugee crisis has not just affected Turkey and the Middle East: it has also affected the UN, EU and other countries. The number of refugees is increasing every day in the world, and the burden of hosting countries and supporting refugees needs to be shared more equitably. Countries that receive and host refugees make an immense contribution from their limited resources for the collective good, and indeed to the cause of humanity (Global Compact on Refugees, 2018). To address burden-sharing and provide better response to the changing and growing needs of people on the move, the United National General Assembly (UNGA) has unanimously adopted the New York Declaration for Refugees and Migrants

on 19 September 2016 (Global Compact on Refugees, 2018). In the New York Declaration, 193 States committed to a more equitable sharing of the burden and responsibility for hosting and supporting the world's refugees.

The 1951 Convention to which the Republic of Turkey is a party including the 1967 Protocol, relating to the Status of Refugees recognises that a satisfactory solution to refugee situation cannot be achieved without international cooperation, as the grant of asylum may place heavy burdens on specific countries unduly (Global Compact on Refugees, 2018). Responsibility sharing is a fundamental principle of international responses to refugee crises. Burden-sharing contributions could take many forms like the provision of materials, technical or financial aid as well as physical relocation of people through humanitarian evacuation or resettlement (Ineli-Ciger, 2019). The United Nations has taken a primary role in providing and coordinating support for refugees through UNHCR and other humanitarian agencies. Nonetheless, it can be said that the United Nations support has been inadequate in this regard and that the necessary steps have been delayed until today.

On the other hand, this issue has created a huge and significant problem within the European Union. The migration of the people from the Aegean Sea to Europe poses a big problem for them. The European Union has displayed inadequate commitment in this regard from the very beginning; resorting to rhetoric rather than needed action. Approximately 850 thousand refugees crossed the Mediterranean from Turkey to Greece, and some have sought asylum from EU countries (Data2.unhcr.org, 2019).

EU-Turkey proposed a Joint Action Plan (JAP) to assist Turkey in the management of the migration crisis (European Union, 2015). The JAP identifies measures to be implemented by the EU and Turkey with the aim of (a) providing support to the Syrians under temporary protection and their Turkish hosting communities and (b) improving cooperation to prevent irregular migration flows to the EU. On 18 March 2016, the European Council and Turkey reached an agreement aimed at stopping the flow of irregular migration via Turkey to Europe.

Here is a summary of the salient decisions that have been made regarding this agreement (Bauböck, 2017; European Union, 2015; European Parliament, 2016).

- All new irregular migrants crossing from Turkey to the Greek islands as of 20 March 2016 will be returned to Turkey;
- For every Syrian being returned to Turkey from the Greek islands, another Syrian will be resettled to the EU;
- Turkey will take any necessary measures to prevent new sea or land routes for irregular migration opening from Turkey to the EU;

- The fulfilment of the visa liberalisation roadmap will be accelerated to lift the visa requirements for Turkish citizens at the latest by the end of June 2016. Turkey will take all the necessary steps to fulfil the remaining requirements;
- The EU will, in close cooperation with Turkey, further speed up the disbursement of the initially allocated €3 billion under the Facility for Refugees in Turkey.

Turkey has threatened several times to terminate the agreement, because, firstly, the EU has not paid the projected amount and secondly, the EU has not implemented visa freedom, provided under the agreement, to citizens of Turkey. Under the agreement, Turkey was promised €6 billion in financial aid to be used by the Turkish government to fund projects for Syrian refugees. According to the EU Commission, 3 billion euros have flowed into Turkey to cover the costs of raising half a million Syrian children, whereas Turkey has spent more than \$40 billion (Anadolu Agency, 2019). Moreover, Turkey has been classified as the most generous country in the world once again 2019 with 8.4 billion of humanitarian aid (Development Initiatives, 2019).

Even if Turkey seems to have established good communication, which is insufficient in this regard, with the United Nations, it is challenging to say the same things for the European Union. Most of these initial tenets of the agreement have not been implemented. Although Turkey has blocked the flow of refugees to Europe, the fulfilment of the requirements of this agreement is a big question mark for the European Union because neither visa liberalisation nor most of the other promised benefits have been fulfilled since the agreement took place.

Challenges to Comprehensive Refugee Response

The UN, host countries, other humanitarian agencies and the rest of the world ought to take a primary role in delivering and coordinating support for refugees. In doing so, the world needs to act in unity and solidarity. International sharing of responsibility may promote protection for persons whose rights have been violated or infringed by states that cannot ensure their safety. Thus, organisations and states must deal with the challenges and difficulties to provide better service for those vulnerable people.

The first challenge is state sovereignty sharing (Martin et al., 2018). Almost all states want their rules to be enforced within their borders. Therefore, the government-controlled process is implemented in many scenarios. However, to respond effectively to this kind of crisis, states must go through an entirely different process of government control and forge a better partnership with UN agencies, other countries and NGOs. Sovereignty prevents governments from giving more space to other allied entities to broaden their help and services to those people.

The second challenge is the lack of having a dynamic international refugee policy (Boswell, 2003). It is tough to try to solve these kinds of crisis with old strategies and wait for it to yield results. Under the leadership of the United Nations, a platform must be established within the countries that host most refugees. Because finding effective policies to address the causes and solutions of displacement requires the participation of international organisations and national foreign ministries. In order to be more effective in the face of such an unexpected tragedy, the existing policies should be reviewed, and new steps and policies must be implemented.

Funding and other forms of support are other challenges for the international community (Türk and Garlick, 2016). Countries that host most migrants cannot be expected to be left to their own destinies, financially and morally. When it comes to a show of concern, unfortunately, everyone gets in queue well and tries to share their good wishes for those people, but when the time approaches for the action, very little is often achieved. The lack of financial resources has always been the bane of the host countries. Unfortunately, host countries are left alone in this regard by many organisations and countries.

Conclusion

The government of Turkey has provided basic needs of Syrians such as shelter, education, healthcare, food and hygiene. Despite the praiseworthy efforts of the host countries and the UN, as well as other international and local humanitarian agencies, the support does not meet the humanitarian standards set by these governments or organisations, and the situation of Syrian refugees remains unsolved and their future in limbo. In almost all host countries, there are particularly serious concerns about legal protection, integration and participation in economic activities, access to education, access to health care and livelihood opportunities.

Responsibility sharing is one of the fundamental principles of international responses to refugee crises. Often, however, it plays a significant role in responding collectively and cooperatively to large-scale movements of refugees and displaced persons. Burden-sharing is a key to the protection of refugees and the resolution of the refugee problem. The problem of heavy burdens on certain countries cannot, therefore, be achieved without international cooperation, solidarity and burden-sharing. Burden-sharing would help governments and NGOs to mitigate circumstances of refugees economically, socially, politically or environmentally, in addition, it would help governments make these people feel comfortable and safe. However, unfortunately, it has failed against the current crises. Therefore, this is a complex multidimensional problem with social and political ramifications shaking the entire region.

Wealthy and developed countries are generally silent on such incidents, not doing enough to share the cost of protecting people who have left

everything behind. Efforts should be made to reduce the negative impact of refugees on host countries. Lessons should be learned from the past; also, a similar crisis in the future ought to be prevented from being loaded into a single country. Even though the world has failed again, the greater global cooperation and responsibility-sharing for refugees is needed in a new global plan based on the rights of refugees, which requires a more predictable governance structure to manage responses to significant displacement challenges.

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The Era of Coercive Diplomacy in Iranian Nuclear Deal

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The Iranian nuclear programme started with the help of the US in the early 1960s-70s called “Atom for Peace program”. Iran, under the leadership of Shah, was a close US ally. The then Iranian government leadership anticipated that their oil reserves are insufficient to meet the population’s demand and to support economic development. Given this narrative, the University of Stanford Research Institute predicted that Iran needs almost 20,000 MW nuclear energy by 1990 to suffice their needs. The Shah planned to build 20 nuclear power reactors and joined the Nuclear Non-Proliferation Treaty (NPT) in 1968, and following two years, in 1970, they ratified the treaty (Hussain, 2015). In 1974, Iran signed the agreement with the International Atomic Energy Agency (IAEA) to give IAEA complete monitoring and inspection access. To build the Shah’s planned nuclear reactors the construction of the nuclear reactor was started with the help of American and European contractors. To make it happen in 1974 Iran extended \$1 billion loans to the European nuclear manufacturer Eurodif, “in return for the supply of 10% of the company’s fuel production” (Reardon, 2012: 11). However, the bitterness in U.S-Iran relation started when the Islamic Revolution began under the leadership of Ayatollah Khomeini, toppled down the Shah, countered and deterred US involvement. The bilateral relations further aggravated following by US support to Iraq in the Iran-Iraq war in 1980-1988. All these ended up with Khomeini’s tough stance “neither East nor West” and objurgated “prevailing bipolar global politics” (Hussain, 2015: 31). Given Ayatollah Khomeini’s view, he regarded the Iranian nuclear programme against the Islamic principles and a western phenomenon.

The nuclear program was suspended, and numerous engineers and nuclear scientist were lost as a result of the revolution. Following the death of Ayatollah Khomeini in 1989, the nuclear program restarted and the continued seeking new suppliers of nuclear technology. Russia and China extended their hands of cooperation. In early 1995, Atomic Energy Organization of Iran (AEOI) signed a contract worth \$1 billion with Russian firm Zarubezhatomenergostroi aimed to complete the Buser power plant. This contract was aimed to construct the plant that could provide a 900

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Germany.

MWe Light Water Reactor (LWR) (Reardon, 2012). This was the very initial start of a chapter of Iranian-Russian nuclear cooperation. Meanwhile, China was also a significant supplier of Tehran. In the wake of 1990s, China facilitated Tehran with “research reactor, laser enrichment equipment” and also Iran signed a contract to obtain 3200 MWe LWR and as well a research reactor capable of producing plutonium for a nuclear (Reardon, 2012: 13). This era was marked by the US diplomatic pressure on Iran and their suppliers. The US found that Russia was providing Iran with “plutonium reprocessing and uranium enrichment facilities” (Reardon, 2012).

The EU and US-Iran political clash over the nuclear program can be traced back to this era. Given the P5+1 global leading states persistent efforts to curtail Iranian nuclear but the eventual result of the deal depends on the actual threat followed by actual time pressure will work. However, this will be possible with a threatening country’s reputation in regards to making threat vis-à-vis the opponent. Both the EU and the US jointly took many initiatives to succeed in curtailing the Iranian nuclear program. However, the question arises what makes the eventual result successful, merely threatening or taking further initiatives that support the demand of the EU and the US successful? The current American president Donald Trump known for a tough stance on bilateral and multilateral treaties and agreements has withdrawn from the JCPOA. Trump threatens imposing more sanctions and measures to curtail the Iranian nuclear program. Looking to Trump’s tough stance in regards to the US-Canada, and Mexico North American Free Trade Agreement (NAFTA), and his tough stance to withdraw from the international climate agreement known as the Paris accord indicated his decisiveness. Given this case, the credibility of the US, in particular, Trump, depends on what he could extract as an eventual result from his recent economic threatening of Iran in regards to sanctions.

The EU and the US Efforts vis-à-vis Iranian Nuclear Deal

The EU-Iran negotiations in regards to the nuclear programme suspension started in 2002. Iranian nuclear programme enrichment was made public when an Iranian opposition movement, National Council of Resistance, publicised nuclear enrichment which the western intelligence agencies have already obtained access to that information. The fact of this information was confirmed when the IAEA visited Tehran and confirmed the nuclear enrichment programme. After a few rounds of negotiation, it paved the way to agree on EU-3, (Germany, France, and the UK) and Iran on meeting in October 2003. The then foreign ministers of respective countries met and agreed to suspend the programme but has not complied on the given demand. The EU efforts were continued until they succeeded to bring Russia and China on the same page to abstain using their veto against an IAEA resolution, shows that Iran was violating the IAEA statute (Sauer, 2007: 620). However, during a couple of years IAEA’s few rounds of monitoring they found the Iranian government did not comply with its

IAEA principles. Following these violations, the IAEA sent the file to the UN Security Council for further sanctions to be imposed on Iran.

After years of disagreement, the world-leading powers P5+1 (China, Russia, France, United Kingdom, United States of America and Germany) and Iran reached an agreement on 14 July 2015, called Joint Comprehensive Plan of Action (JCPOA) a detailed 159-pages agreement. The agreement is aimed that Iran will comply with the conditions and principles outlined in the agreement. Hence, the mentioned principle in the agreement will also be verified by the IAEA agency (Davenport 2018). As Russia and China already since the beginning of the Iranian nuclear clashes have been in cordial relations. EU leading countries as France, Germany, and Italy also due to its trade with Iran make them flexible and pursue cautious steps in regards to the nuclear deal. Iran produces 4.2 million barrels oil a day (out of 84 million worldwide). The regional country, China, imports 14 per cent of oil from Iran, following by Italy 9 per cent and France 6 per cent. Hence, Austria, Germany except for the USA also have substantial non-energy relations. These countries will, either way, be hurt by a sanctioned Iran. Not surprisingly, they will hesitate to back more economic sanctions (Sauer, 2007). Because the sanctioned Iran will, one way or another, hurt their imports and particularly the oil imports. On the one hand, China and Russia had vetoed sanctions on Iran. Further sanctions will be compensated by these two regional states. The US will remain either alone or with less support.

Iran gravitated on the right track that was agreed upon by P5+1. The EU and the US Administration under President Obama, following the deal, continued to lift partial sanctions on Iran. However, the deal once again falls under the hardliner President Trump administration. Surprisingly, the US Administration withdrawal announcement not only shocked Iran but also the EU and partners of the JCPOA. During the first few months of President Trump's administration, in early May 2017, he announced that the JCPOA neither serve the interest of America nor of its allies, hence, the deals merely provided the opportunity for Iran to seek nuclear weapon at a later date (Balakrishnan, 2018). The question arises, how does the U.S sanction hurt the Iranian economy and what alternatives does Iran have to compensate it? Given the JCPOA and Iran deal under the IAEA monitoring that will gradually and systematically lead to the agreement agreed as during the deal. However, The US hard stance at such time will not leave any reason for Washington to impose sanctions. Because strong regional countries, Russia and China, including the EU are on the same track to make Iran compel to comply by the principles enshrined in the last deal. The EU soft and flexible negotiations may work better than the US However, given the intensity of the US threat that somehow looks more credible. However, all those threats by the US come in a non-conductive way which even the allies do not seem to agree with the hard stance of Trump's unexpected withdrawal.

The US withdrawal from the Accord and its Repercussion

As previously illustrated, the 2015 nuclear deal among the world-leading powers in regards to Iranian flexibility to limit their nuclear program and allow the IAEA to monitor and inspect their activities. Given that deal, including the US, UN and EU relieved economic sanctions on Iran. The IAEA also assured that Iran exhibits compliance with the deal. However, the current US administration under Trump has announced their withdrawal and termed the deal “one of the worst deals” ever negotiated (Davenport, 2017: 30). Davenport (2017: 25) argues that the US withdrawal from the accord not only “jolts” the US-Iran relations but will also affect relations with Russia, China, allied powers in Europe. Despite all green signals from Iran to abide the accord, and optimism among the states who are part of the deal, Trump’s immediate decision made them surprised. This is going to give Iran an upper hand that is bound by the obligations and would pretend that the problem lays with Washington. Absence of evidence of Iran’s failure to comply would give Iran a reason to justify the US contravene and restart the nuclear activities (Davenport, 2017: 25). The US will be faced with two likely repercussions; frosty relations with the members of JCPOA, and will give Iran another reason to continue advancing their nuclear program. However, Iran is yet hoping the US to renegotiate over the deal. Iran’s historical flexibility exhibits giving up on their deal and willingness to abide by the accord sincerely. Davenport says, following Trump decision of withdrawal, Iranian officials demonstrate a willingness to implement the deal even in the absence of the US. Despite Trump’s hard stance and unknown demand what else he expects. However, his rival, President Hassan Rouhani, says that Iran “will return to a much more advanced situation” (ibid: 27). This also indicates that Iran is determined to give further time for the US to convince them and return back to a negotiation table.

To sum up, the US unilateral action withdrawing from the deal and re-imposing economic sanctions and pursuing coercive measure will not only step back Iran from enriching their uranium but will also make Iran pave the North Korean fast-track attainment of nuclear weapons. Perhaps, helps put more hard-line Iranian in power instead of Rouhani. Russia and China will continue their economic relations and could easily be compensated. The strategic US ally, EU, and the agency responsible for monitoring, IAEA, also do not seem to be in line with the Trump decision. A diplomatic and soft version of negotiation will culminate with the win-win situation both for P5+1 and Iran.

Concluding Remarks

Iran’s nuclear clash with the US and EU dates back to 1980s. The zigzag relations from a good friend to a worse foe started in 1979s and yet continued towards an uncertain trend. The Iranian nuclear program started with the cooperation of the EU and the US and ended up with the worst animosity. The trust deficit began with the fall of the Shah in Iran. The US and EU relations with the consequent regimes in Iran following the Shah have been marred with détente to antagonism. Iranian flexibility will pave

the way for a rapprochement and resumption of relations but will take more time until the trust is gradually resumed among these actors. The EU, in particular, actors as part of the JCPOA; Germany, France, and the UK, are taking cautious measures in regards to the Iranian nuclear programme. The EU-model of coercive diplomacy compared to the US coercive diplomacy would be much more of a win-win situation. Because Iran is exhibiting flexibility, and the IAEA assessed the Iranian effort positively, which means Tehran is complying by the principles as agreed upon. The US coercive diplomacy will lead to compelling Iran to pursue a North Korean fast-track nuclear attainment. To make the deal successful the US shall unify and harmonise their efforts with the partners of JCPOA, and the principles agreed upon by all sides. Given the role of Russia and China as regional actors and their long-time trade partnership with Iran, their influence as veto powers backed by the EU flexible diplomatic pursuit will likely lead to a peaceful curtailment of the Iranian nuclear programme.

To sum up, two likely possibilities can help to stop Iran enriching uranium. First, the EU model of coercive diplomacy and second, creating a common ground with Russia and China to abstain from helping Iran in regards to sanctioning compensation and helping in the nuclear programme. Once common ground is created with China and Russia, the EU would easily convince Iran to abstain developing its nuclear programme for military purposes. The long-lasting stalemate would wrap up with peaceful means and will lead to a win-win situation.

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Shall the Court Subject Counter-Terrorism Law to Judicial Review? National Security *vs* Human Rights

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Introduction

‘Terrorist emergencies justify extensive and far reaching security measures that may legitimately restrict the enjoyment of the fundamental rights: to expect the [...] courts to adopt a restrictive approach to such emergency measures is to emphasise concern for abstract ideals over common sense.’¹

The article’s quotation goes into the heart of the British constitution (and those of the most European countries) requiring an answer as to what is the function of each of the three powers, particularly the executive and the court, at times of emergency. Constitutionally, it is the executive with the requisite expertise and competence that is ‘legitimately’ responsible for making policies and decisions to deal with national security. The judges, on the other hand, are neither elected nor possess the necessary expertise and competence in issues of national security. If they do not defer to the executive’s decisions in the field of national security and uphold human rights or civil liberties against the government, they would act foolishly and illegitimately, that is, they would give priority to ‘abstract ideals’ (the human rights and civil liberties of a few terrorists) over ‘common sense’ (national security or the protection of the whole nation).

However, the introduction of the Human Rights Act 1998 (HRA), which incorporated the European Convention of Human Rights (ECHR), complicates the constitutional authority of the judiciary and the executive. Art 15 of ECHR is of particular relevance here since it provides that certain conditions have to be met before human rights can be suspended.

The question is: Have the European Court of Human Rights (ECtHR) and the UK (and some European) courts interpreted the conditions strictly to

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defend human rights against national security? Four sections are dedicated to answer the question. Section one deals with cases before the introduction of the HRA to provide an understating of what was the constitutional position of the court and the executive. Section two deals with the ECtHR's approach towards derogations made by member states, particularly the UK.

Section three analyses the justification of 'constitutional legitimacy' and studies whether the judges in the HRA era had legitimate and constitutional justifications to adopt a strict approach towards security measures. Section four, in addition to dealing with the justification of 'competence and expertise', studies how the UK courts interpreted Art 15 conditions post HRA-era. The article ends with some concluding remarks.

The article is relevant to both Law and International Relations Courses. Because of the close connectivity of the two subjects, more and more universities in the UK now offer a joint degree in Law and International Relations.

Strictly speaking, however, the article is relevant to IR for the following reasons. Firstly, human rights play an important part in foreign policy decision making; consideration for civil liberties, for example, strongly factored in the George W. Bush Administration's decision to intervene in Afghanistan.² Secondly, both human rights and national security are crucial concepts in IR. The article shows how different branches of a state balance the human rights of the terrorists against the concept of national security. Incidentally, while the focus, in most parts, is on the UK, the article is relevant internationally. As sections two and three suggest, the balancing acts/conflicting views by different branches of the state are found in all member states (even in the United States of America), as every single European country struggles to find the right balance between civil liberties and the security of the realm when fighting international terrorism.

Penultimately, it shows how tougher law as part of a response to international terrorism can prove to be counterproductive. Democracies do not see all means as acceptable, especially those used by terrorist groups. It further explains how unlimited powers in the hands of the executive are dangerous, as time and gain we have witnessed that. Finally, the analysis is also relevant to non-Europeans (both within and outside of Europe), as some are under the impression that Western authorities, to put it mildly, are not as attentive to the rights of non-nationals as they are to the rights of the nationals. The article, however, brings to light how the three branches of the government struggle to find the right response. Furthermore, it likewise indicates how the ECtHR struggled with the notion of whether to defend the civil liberties of the nationals or the restriction of human rights by governments.

Constitutional Position of the Courts and the Executive before the Introduction of the HRA

For Fascist legal theorist Carl Schmitt, the executive (not the parliament or the judiciary) is the sovereign as it alone decides both a state of emergency and who the enemy is. Schmitt's claim might have been true in fascist Germany but not in the UK, since in the latter it is the parliament that is the sovereign, and the executive is subject to the control of law 'by judges'. Lord James Atkin's famous dicta in *Liversidge [1942] A. C. 206* suggests that 'in this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace.'³

However, the case law since WWII until the introduction of the HRA shows the opposite to what Lord Atkin had said. In *Liversidge* itself the majority held it could not ask the executive for details of the grounds upon which the decision was made in order to assess the validity of the government's decision despite the phrase 'reasonable cause' being substituted for a more subjective one, that is, 'if satisfied that.' Viscount Maugham, the leading judge for the majority, refused *Liversidge's* argument that if a statute restricted the liberty of a subject, the statute 'must be construed, if possible, in favour of the subject and against the Crown.' Following *R v Halliday [1917] A.C 270*, this rule of interpretation did not apply against the government when 'national security was in issue.' Lord Atkin criticised his colleagues for acting like the court in the old days of Star Chamber where the executive's say was enough to detain a national. For his lordship, the court failed to do its duty by standing 'between the subject and any attempted encroachments onto his liberty by the executive, alert to see that any coercive action is justified in law.'⁴

In *Halliday*, Lord Shaw dissented, too, arguing when the law was 'not the same for all...[it was] poison to the commonwealth.' For Lord Shaw, only those statutes were legitimate which did not breach fundamental common law principles, and the judges were to interpret statutes in accordance with those principles. Further, approving Blackstone, Lord Shaw said that the right to *habeas corpus* (which prohibits interference with an individual's liberty unless it is justified before the court) was of such fundamental importance that the judges should not allow it to be violated by a statute unless the statute says otherwise with express and unambiguous wording.⁵

However, as Brian Simpson claims, it was the majority's decisions in both cases that were a true reflection of reality as the House was very reluctant to interfere with the executive's task of national security. Lord Atkin agreed with this constitutionally allocated function of the executive, but added the court was entitled to test the basis for the secretary of state's belief as to why he had 'reasonable cause to believe.'⁶ Simpson claims that Lord Atkin's dissent was unconvincing since how possibly the court could supervise the decisions of the secretary of state when the latter could withhold confidential information on the basis of privilege. Outside the national security, he claims, a huge amount of law has been developed for which the court had 'an important role to play [in] controlling... the exercise of power'; subject to parliament, the judges state their role 'and the principles they then formulate to express this role are called the law.' But this law, as

the cases demonstrated above, does not apply to security decisions made by the government since the government make those decisions on the basis of secret information, and secrecy would always win over the rule of law. Simpson further claims Atkin was concerned more about *role* than *liberty* as the executive was arrogantly disregarding the judges.⁷

David Dyzenhaus disagrees, claiming that Atkin was concerned more about the issues of privilege and confidentiality than role, and particularly he wanted to know the grounds on which the person was detained to be conveyed to the detainee. He was puzzled, and rightly so, that the secretary of state could convey those grounds to the detainee at the committee (where the detainee can go to object to his detention) but not to them in the court. It might be because grounds given to *Liversidge* in the committee were irrelevant and barely offensive and his detention could be described as 'very close to being an example of an order made in bad faith.' If the grounds were conveyed in the court and became subject to the judicial review, as was the case in *Ben Greene*⁸ in which Lord Atkin was satisfied, then it would have been in accordance to the common law procedure.

In *Ben Greene* the issue of confidentiality was present but the grounds for detention were still presented to the court. Lord Atkin wanted to subject to judicial review both the necessity of the measures and the standard the secretary of state adopted to decide whether the detainee met the test for detention. Lord Maugham, too, agreed that decisions by the secretary of state could be reviewed but by a 'special tribunal with power to inquire privately into all the reasons for the secretary's action, and without any obligation to communicate them to the person detained.' Therefore, both Lords Atkin and Maugham agreed on the secretary of state's decisions to be reviewed, but they differed as to who to review it. For Atkin, it is the court by applying the common law procedure to ensure liberty is protected rather than restricted by legislation, but Maugham disagreed as the secretary of state could withhold confidential information from the court on the ground of privilege, so it would be 'futile' to try to impose a general requirement on the secretary of state to justify the order to the court.⁹

Lord Denning in *Hosenball*,¹⁰ approving *Liversidge* and *Halliday*, said the balance between an individual's liberty and national security is something to be decided by the Home Secretary. He referred to *Liversidge* and *Halliday*, saying that those cases were decided in war time, but his judgement also applied to times of peace since it too had its dangers. Dyzenhaus submits that the judges would prefer the Atkin dissent when the case does not concern national security. If it did, then the majority in *Liversidge* would either be explicitly or implicitly preferred. Lord Atkin was only cited when it made no difference to the outcome of the decision, just for the judiciary to remind us of their role.¹¹

Those cases suggested John Lock was preferred than Blackstone. The former argued that, in terms of constitutionalism, the judges should not apply the rule of law to the executive's decisions based on national security

because the protection of society required the executive to have the ‘power of doing public good without a rule.’¹² Those measures should be subjected to political accountability rather than judicial scrutiny. Consequently, fundamental common law principles as well as civil liberties became abstract ideals for the politicians because they would give priority to common sense (national security). Lord Denning’s reasoning, which describes the constitutional functions of both the executive and the court in the pre-HRA era, would best conclude this section: ‘our history shows that, when the state itself is endangered, our cherished freedoms may have to take second place. Even natural justice itself may suffer a setback. Time after time parliament has so enacted and the courts have loyally followed.’¹³

Has the ECtHR’s Given Priority to Human Rights or National Security?

Three conditions under Art 15 of ECHR must be met by the government in order for a derogation to be justified from derogable rights: there must be ‘a war or other public emergencies threatening the life of the nation’; the derogation shall be ‘strictly required by the exigencies of the situations’; and it must be consistent with the state’s ‘other international obligations’.

As for condition one, the studies of some of the cases—including *Lawless, Ireland v UK, McBride* and *Aksoy*¹⁴—show that, despite calling the decision of executive is reviewable in *Lawless*, despite repeating that a strict standard of review was needed in *McBride*, the ECtHR has generally afforded a wide margin of appreciation to the national state.¹⁵

In *McBride* it was claimed that the ‘semi-permanent’ emergency declared by the UK should not qualify as an emergency within the convention terms because it was a long emergency to which the government did not have to respond urgently. The usual standard was argued to be applied. Although the ECtHR was not persuaded by those arguments, it said, however, that the Court, in exercising its supervision of the domestic decisions, would take into consideration ‘the nature of the rights affected by the derogation, the circumstances leading to and duration of the emergency situation.’¹⁶

But the Court in practice neither assessed the circumstances leading to the emergency nor its duration. Oren Gross argues the UK derogated in 1988 in Northern Ireland, and Turkey did in 1990 in South East of Turkey (both derogations were still in effect at the time of her writing, 1998) but the ECtHR ignored their long durations and did not independently assess the existence of the emergency in *McBride* or *Aksoy*.¹⁷

In the latter the ECtHR ruled that the member state had the responsibility for protracting the life of its nation so it is for the member state to determine whether that life is threatened by a public emergency, and if so, it is again for the member state to decide ‘how far it is necessary to go in attempting to overcome the emergency.’¹⁸

Thus in both Northern Ireland and Turkey the emergency was not exceptional but ‘an entrenched feature of everyday life’; in the latter country ‘human rights violations’, as was argued, took place on daily basis but the ECtHR still accepted the Turkish assessment of emergency threatening the life of the nation, and failed to consider the nature of the rights violated.¹⁹

However, it is argued that the longer the emergency, the narrower the margin of appreciation should be applied. The ECtHR is urged to take a look at the Israeli court, which has adopted the doctrine of ‘prolonged occupation’, which means the longer the occupation the more weight the court would attach to civil considerations than security. The Commission itself makes it clear that emergency is only justified if it is: temporal and exceptional; the threat is imminent and affects the organised way of the life of the whole nation; other exceptions in the convention should be ineffective since the danger is exceptional. But these were all rhetoric as none of the conditions were arguably satisfied in *Lawless* but still an emergency existed. For the majority, though, the conditions were satisfied due to: a) the existence of the military organisation (the IRA) within the Irish Republic, who wanted to achieve its objectives through violence, b) the adverse impact this group’s operations had had on the republic’s foreign relations, c) and, the increase in the group’s terrorist activities between 1956 and 1957. The 3-4 July attack was given as an example to demonstrate the scope of those terrorist attacks.²⁰

But the dissenting judge said there was not an emergency required by Art 15 because i) the terrorist activities were local and only affected the life of certain parts of the population, not the whole nation which was required by Art 15, ii) the threat, at most, was serious enough to support limiting rights not suspending them, iii) the threat was shown to be potential not imminent as Art 15 required. Gross further argued that the IRA was not posing a risk to the life of the Irish people, as most of its activities were carried out in Northern Ireland, which is not part of the Irish Republic’s territory nor under its control and thus did not affect its day-to-day lives of its citizens. Furthermore, none of the conditions laid down in *Greek case* could be met. Gross, therefore, concludes that decisions of the ECtHR show a discrepancy between theory and practice and between ‘judicial rhetoric and judicial decisions in the area of emergency law.’²¹

The conditions for the existence of emergency laid down in *Greek case* (explained above) were argued in *A and others*,²² but it was not surprising the House deferred to the executive by claiming if in *Lawless* the ECtHR accepted the Ireland’s declaration of emergency, it would most likely accept the UK’s declaration of emergency.

The International Law Association believes the court should be making its own objective assessment as to whether there is an emergency, and if yes, whether the measures adopted were strictly necessary to avert it; but it has not done so yet. In *Ireland v UK*, the court independently assessed the extrajudicial deprivation of liberty, but placed a great deal of emphasis on

the margin of appreciation, concluding the UK was justified by the circumstances. Marks says the ECtHR has been inconsistent in terms of what they require from the government to substantiate an emergency exists. He recommends the government must show it has acted reasonably in the circumstance (or at least not unreasonably) in order to discharge the burden.²³

In *Landinelli Silva v Uruguay*,²⁴ the Human Rights Committee refused to afford to the state a wide margin of appreciation, claiming, although the state's sovereign right to declare emergencies had not been questioned yet, the state party was under a duty to give proper detailed account of why it had derogated under art 4 (1). It is hoped that the ECtHR, too, starts to require a detailed account of grounds upon which the member state relies to derogate.

The second precondition is there to enable the court to check abuse or excessive use of power does not take place. In *McBride* the applicant, pointing the ECtHR to the Inter-American Advisory Opinion,²⁵ argued the government's measures were not strictly required because it was not necessary to exclude the judiciary from its role of controlling the detention. The government excluded the judiciary because it was doing the latter favour as it did not want the judges to be seen to be involved in the investigation and prosecution process. This would undermine the public confidence in the judiciary and damage their independence because those decisions administrative (involving detention that required risk assessments) not judicial. The ECtHR accepted this argument as well as the argument that secret information would not be protected if the judiciary were to decide the detention. The second condition was satisfied. Judge Walsh dissented, claiming: 'one would think that such a role [controlling detention] was one which the public would expect the judges to have. As for secret evidence, domestically there were procedures whereby the information can be protected, e.g. proceeding in private. For example, Part 76.26 of the Civil Procedure Rules provides for secret evidence, or 76.22 provides for private hearing of cases dealing with control orders.'²⁶

The ECtHR considered the derogation was necessary; it did not strictly consider the other two elements of condition two, namely proportionality and duration. It did not apply the strict test of indispensability (strictly required) needed by the second condition, as it previously held in *Handyside v UK*.²⁷ In both *McBride* and *Lawless*, as well as in *Ireland v UK*, the ECtHR lowered the test to proportionality: even this test was not strictly applied. In *McBride*, the decision of *Ireland v UK* was recent, in which the UK government relied on derogation and the Court accepted the UK's assessment of both the issue of the presence of emergency threatening the life of the nation and on the need for the derogation to combat the emergency.

As for the third precondition, in *McBride*, it was argued that the government was not in compliance with its obligation under International

Covenant on Civil and Political Rights (ICCPR), as Art 4 ICCPR provides for the same exceptions but also adds one more, namely the public emergency must be officially proclaimed. The official proclamation requirement is to ensure that the derogation is not spurious, or is not invoked retrospectively. Also, it makes the people of the state aware that the normal law does not apply. But the ECtHR disregarded the argument, despite the Commission having said in *Cyprus v Turkey* 4EHRR (1982) 482 that it too required some sort of an official proclamation by the state to show normal law no longer applies otherwise Art 15 would not apply. The ECtHR believes that in those cases that concern national security it is constitutionally appropriate to afford a wide margin of appreciation because (in addition to the arguments of ‘competence and expertise’) the government can denounce the Convention under Art 65 of ECHR if its interests are at stake as a result of an adverse decision (something that Greece did in 1969), or can refuse to recognise the ECtHR’s jurisdiction or the Commission’s capacity to receive complains under Art 64 of ECHR. Thus the state sovereignty could be another reason, because a sovereign state, such as the UK, does not want to be interfered with by a regional body when making decisions to protect its public.²⁸

While the ECtHR is extra careful not to lose state support, it was not in relation to the *Greek case* in which it refused to accept there was an emergency threatening the life of the nation. But this case should be confined to its exceptional circumstances, that is, Greece was controlled by a non-democratic regime of whom the ECtHR did not approve of because the Greek regime itself was the cause of creating the emergency, and there was no political support for Greece from other member states. A decision against it did not make a political difference. For those reasons, the *Greek case* would not make a member state think twice before derogating.²⁹

Affording a wide margin of appreciation to the member state’s determination of the existence of an emergency has enabled the executive to kill two birds with one stone: on the one hand, it suspends the convention rights, and on the other, makes them present as convention-compliant by relying on the derogations.³⁰

However, it does not mean the ECtHR has been ineffective in protecting fundamental human rights at times of emergency. It has been helpful in three ways: firstly, although the ECtHR’s decisions did not hold derogation unlawful, they, at least, set the tone for future ‘dealings with governmental invocation of the power to derogate.’³¹ *Lawless* is an example of those decisions, as this is the authority which established the grounds relied upon the executive should be subjected to judicial review; rejecting the executive’s reasoning that emergency was a sole discretion of the executive. The House in *A and Others*, as is studied in sections three and four, has certainly followed the rhetoric in *Lawless*; secondly, the impact of the decision in *Chahal*³² (studied in section four) is relevant; thirdly, the ECtHR’s approach has been strict in cases when there was no derogation by the member state including in *Brogan*.³³

In *Brogan* the power to arrest a terrorist suspect without charge and detain him for up to 7 days without having to bring him before a judge was found to be incompatible with Art 5 (3), which required a detained person must be promptly brought before a judge. Further since there was no provision in the Act for compensation, a breach of Art 5 (5) was also found.³⁴

In *Ireland v UK*, the ECtHR held certain methods used during the interrogation periods, including sleep deprivation and hooding of prisoners, constituted inhuman and degrading treatment contrary to Art 3 of the convention.³⁵ This decision, together with *McCann v UK*³⁶ and *Brogan v UK*, have partly facilitated for the UK's change of approach from using special power to adopting a 'criminalisation strategy' in Northern Ireland. Campbell and Connolly suggested that the executive's move to ordinary criminal law as opposed to excessive use of special power helped to calm the conflict in Northern Ireland.³⁷

Is the Constitutional Legitimacy a Justifiable Defence to Violate Civil Liberties?

According to the former UK Prime Minister Tony Blair, the nation should know that 'no greater civil liberty [exists than to] live free from terrorist attacks.'³⁸ Human rights are for the protection of individuals, but when individuals threaten the nation, something must give. According to Art 17 of ECHR, those who do not respect HR, such as the Al Qaeda or ISIL members, their rights could be legitimately restricted. But the scope of terrorist legislation (some of which have become permanent, such as the TA 2000 Act) is not confined to Al Qaeda or ISIL only. Measures passed by the government—including the Terrorism Act 2000 (the TA 2000), the Anti-terrorism Crime and Security Act 2001 (the 2001 Act) and the Prevention of Terrorism Act 2005 (the 2005 Act)—are both over-inclusive and over-serve in impact, that is, they target more suspects than necessary and have the potential to violate many fundamental rights.³⁹ For example, section 2 (1) of the 2001 Act defines a terrorist as someone who is concerned in the commission and preparation of acts of international terrorism, or has links with terrorist groups. This could include Tamil Tiger or the Kurd fighters (PKK). The definition of terrorism is referred to the TA 2000, which equally defines it very broadly, as it spells out terrorism as serious violence against any person or serious damage to property (nationally or internationally), which will endanger the life of the person, or create a serious risk to the health and safety of the public or section of the public, or seriously disrupt the electronic system.⁴⁰ So both Acts must be read together. The combination of those two Acts made the discretion of the secretary of state *unlimited* since it could include, for example, any person who is *concerned* or has *links* with acts targeted against a *property* not only in the UK but also *abroad*.

History has shown that with the application of such unlimited power things would go wrong. The Forest Gate raid and the 'ricin' case can be given as examples. In the former, the police shot and wounded a man only to say

later that they could not bring any evidence to charge the wounded man or other arrestees. In the latter, most of the accused were acquitted due to the lack of real evidence. In the Northern Ireland conflict the interviews of some of the respondents said that the oppression (e.g. house search and the abuse of family members, particularly the mother; the power to stop and search) had led them to commit terrorist activities. Equally, there is plenty of evidence to suggest many Afghans joined the Taliban when they felt their rights were violated by the state.⁴¹

The application of this unlimited power could easily violate convention rights and run counter to British common law traditions if they are not subject to judicial review. Judicial review or the rule of law could dampen the adverse impact of those Acts. This would in turn help the statute to become more legitimate and less oppressive and would dissuade the targeted community to use violence. This would encourage a move towards a criminalisation approach rather than repression. A move towards a criminalisation approach helped to calm down the Northern Irish conflict after the mid-1980s.⁴²

But the government does not seem to be interested in those arguments, and when the court (or civil liberty groups) uphold human rights and civil liberties against the government they, according to the executive, act 'foolishly, illegitimately, or both.'⁴³ It is the government, argues the executive, which is constitutionally responsible for the protection of its people not the judges or civil liberty groups, and in the event of inaction, it is the government alone that gets the blame.⁴⁴ It is the government that sees the intelligence and has to act upon it: neither the judiciary nor the civil liberty groups are in such a position.

A public body such as the government is legitimate on one or all of the following three: representativeness, democratic accountability and tradition. The House of Common, for example, is legitimate because its members are chosen by the people, and the government is legitimate because it has a majority in the House of Common and is indirectly accountable to the people through the two Houses of parliament. The judiciary lacks all of the above three. But the judges, as Feldman claims, derive the legitimacy from their decisions formed on the basis of rational and objective arguments backed not only by their opinions but a variety of legal authorities. Further, the fact the judges are independent from the executive ensures they objectively assess the legality of the Act or a decision made by the executive. Their unaccountability and impartiality, particularly, come to play a part at times of war and terrorism when public opinions are likely to be supporting the executive. At such a time, as the Israeli Court ruled: 'judges must hold to fundamental principles and values; [judges] must embrace [their] supreme responsibility to protect democracy and the constitution.' Feldman, of course, agrees with the constitutional function of the government's policy-making in relation to national security and its constitutional accountability to the parliament; the latter could scrutinise the policies and their implementation of the former.

The judges are not answerable to the parliament or to the executive, and therefore must be slow to hold unlawful the executive's decisions regarding national security.⁴⁵ But what if the policy 'collides with the law [?]'⁴⁶ The judges cannot ignore *their* constitutionally allocated job to assess the unlawfulness of the policy. Lord Hoffmann considered this in *Rehman*⁴⁷ by saying that the court is the ultimate body responsible for deciding the law unless parliament passed legislation expressly giving the task to another body.⁴⁸

Thus it is not only *legitimate* but also *democratic* for the court to subject anti-terrorist legislation to the rule of law because 'the judges charged to interpret and apply the law are universally recognised as a cardinal feature of the modern democratic state.' Further, since the coming into effect of the HRA, it is a matter for the court to protect human rights by the virtue of the HRA if the latter are violated by policies or decisions of the executive. Lord Bingham, the leading judge for the majority in *A and Others*, strongly rejected the government's claim that the doctrine of judicial deference precluded the court from reviewing the consistency and proportionality of Part 4 of the Act with the convention rights.⁴⁹ Lord Bingham had legitimate justification under the HRA for his claim.

Those 'abstract ideals' have become part of the UK legal system by the HRA 1998, which came into force in 2000. They could be claimed to be of such a constitutionally higher status that could only be repealed expressly by parliament, as this is evident in the fact that the HRA not only bind legislation passed before it but also those passed *after*.

The court is *now* empowered by section 3 of the HRA to achieve a convention compliance result, if possible, as was the matter in the joint cases of *Sheldrake v DPP; Attorney General's Reference (NO 4 of 2002)*,⁵⁰ in which the domestic provision was interpreted compatibly with Art 6 (2). If impossible, the court could declare the provision incompatible under section 4 of the HRA, as it did in *A and Others*. Those two joint decisions suggest the impact of the HRA on the anti-terrorist legislation and also those two decisions together with the decision of *A and Others*, as shall be seen below, outraged the government. But the government must understand that parliament has *obliged* the court, as a public authority, to act compatibly with convention rights under section 6 of the HRA; otherwise a person could bring proceeding against the court under section 7 of the HRA if it does not act compatibly.

The court is further empowered by section 2 (1) of the HRA to take into consideration the ECtHR jurisprudence when dealing when domestic cases concerning a convention right. Using section 2 (1) in many cases including *JJ* (below), the UK courts were quick to bring in the ECtHR's test of proportionality to bring about a convention compliant result which had been achieved in parliament at the time of passing through section 19 (1) (a) of the HRA.

Parliament, therefore, has given the judiciary a great deal of the power of review to enable them to become more 'selective'⁵¹ in applying the doctrine of deference: if national security has not been genuinely at stake, the court has been less prepared to be deferential, e.g. *A and Others*.

Does this mean that the HRA changed the balance in the three powers of the UK constitution? It certainly has favoured the judiciary, as the decision in *A and others* is an example of strengthening the court's function of applying the rule of law.⁵² Before the introduction of the HRA, the judges kept deferring to the executive's assessment of risk, e.g. in *Liversidge* and *Hosenball*. But post-HRA, they determine the *proportionality* of the executive measures: this is a huge development in the British constitution. As seen in chapter one, that is something Lord Atkin wanted to be subject to judicial review, but most of the cases showed that the judges were reluctant to do so since the law would place too a great restriction on the powers of the secretary of state to combat the terrorist threats. The law after the HRA seems to be not as silent as it was before the Act.

The UK Courts' Response Post-HRA

A foreign national not charged with any crime could not be detained because of Art 5 (1) of the Convention (charges should be brought against a person and s/he should be brought to justice as soon as possible) even if he was a threat to the national security. Nor he could be deported to his country of origin since Art 3 imposed an absolute obligation on the member state not to deport him (even if he poses a risk to national security) where he was at risk of Art 3 treatment in the receiving country.⁵³

A month after the attacks of 9/11, the 2001 Act was hastily rushed through parliament. Since there is no derogation permissible from Art 3 under Art 15, the only option the government was left with in *A and Others* and *JJ*⁵⁴ was to derogate from Art 5 (as well as Art 9 of ICCPR). The government thus derogated from Art 5 for Part 4 of the 2001 Act, the most controversial part, which provided for 'detention without trial' of any of the foreign suspects who could not be deported because of the decision in *Chahal*.

The House was to consider whether the government's derogation satisfied Art 15 conditions and whether Part 4 was discriminatory. As far as condition one under Art 15 was concerned, the House accepted the government's assessment of emergency. The government invoked *Lawless*, and the House reasoned that if in *Lawless* a threat to national security existed, the ECtHR would most likely accept the UK's assessment of the threat in *A and others*, since the situation was much more serious in the UK compared to the one in the Irish Republic.⁵⁵ Further, the Home Secretary was in a better position to decide 'pre-eminently political judgement compared'⁵⁶ to the judiciary. Thus the majority agreed that it was a political judgement and better be made by a competent body: the executive.

Feldman does not agree with the argument of ‘competence and expertise’ made by both the ECtHR and the domestic courts to justify the doctrine of deference. He believes the executive or parliament was not more competent than the court. For him, the executive institutions, including the security services and the police, tend to exaggerate the risk and overreact to it, as Blair himself admitted this; albeit the former Prime Minister only referred generally to public bodies. These executive bodies concentrate on the *consequence* of the risk rather than the *likelihood* in order to get more powers and resources and, by being more defensive, to reduce the chances of public condemnation and legal liabilities. The government is provided with a risk assessment by those bodies, who tend to overestimate the risk. The government does not seem to examine the accuracy of their assessments, as Labour MP John Denham criticised the government for having failed to check the police’s grounds upon which it had decided the 90 days pre-charge detention was needed. Parliament is not even provided with the actual report of a risk assessment, but only with the conclusion that there exists such and such a risk to national security and measures are required to avert it. Parliament, therefore, is unable to check the accuracy of the risk assessment. Thus it is incorrect of the majority in *A and Others* (or generally in any case) to say that government and parliament in particular, are better equipped than the judiciary to make those assessments.⁵⁷

On the contrary, the court might have more access to intelligence information than parliament. That is, the High Court, as explained above, for example, could hear cases concerning control orders in private and see materials that parliament would not be able to see. It is true that parliament is the only *constitutional* body to determine the validity of the statute, and the government is only accountable to parliament when it comes to those political decisions such as national security. But the problem with this assumption is that parliament would pass terrorist legislation with the best intention, but it has got no effective parliamentary procedure to check whether those Acts have been applied correctly in practice.⁵⁸ Further, the way that legislation is drafted, it makes it easier to confer a great deal of power to a public authority such as the police. This makes it difficult for the government and the two Houses to assess the proportionality of the need for power. The body or its minister upon whom the power is conferred would argue parliament should not worry since if s/he acted disproportionately to the Convention, it would be unlawful. The question is who determines the unlawfulness? The answer would be: the court. However, the House was not prepared to second guess the emergency declared by the government in *A and Others*.

However, Lord Hoffmann dissented (and he is of the same opinion even after the terrorist atrocities of 7/7 as he made it clear in *JJ [2007] UKHL 45* at [44]), arguing the power to derogate at peacetime is narrower since violence based on political or religious motivations, even threatening serious loss of life, would not necessarily threaten the life of the nation within the meaning of the Convention because the ‘liberty of the subject

and the right to habeas corpus are too precious' to be sacrificed for any reason other than to safeguard the survival of the state.⁵⁹

Gearty claims that, at times of emergency, politicians would not lose seats if they restrict human rights and civil liberties. Conversely, they could be praised by the public for being tough on terrorism. The public is more likely to see the civil liberty groups, particularly since 9/11, as the protectors of the rights of terrorists and criminals, something the public could consider anti-patriotic.⁶⁰ The police and security services, knowing the public is on their side, would not consider the less oppressive option when they make a policy that engages human rights. To the contrary, their 'challenge is to decide how extensive interference with rights can be justified in order to combat the risk.'⁶¹

Here the second test under Art 15 comes to play a part, as the court (the only body that is independent) would decide whether the measure in question is strictly required by the exigency of the situation. In *A and Others* it was argued that the measures were not strictly required since there were already other measures that can be used against terrorism, and also no other EC member derogated from Art 5. Further, part 4 'went beyond what was strictly required by the exigencies of situations in covering a wide range of international terrorist.' The House adopted a strict proportionality test holding measures under Art 15 went no further than required by the exigencies of the situation, but sections 21 and 23 of Part 4 did not rationally address the threat to the UK security since i) they did not deal with the threat posed by the UK nationals, ii) they allowed the non-nationals suspected of terrorist activities to continue their behaviour abroad once deported, iii) and the provisions allowed to detain those who could not pose a threat to the security of the UK. Further, if the UK nationals could be dealt with without the infringement of their right to liberty, why the same could not be applied to non-nationals? Hence such 'a paradoxical conclusion was hard to reconcile with the strict exigencies of the situation.' By a majority of 8 out of 9, it was held that the government did not objectively justify why it only singled out non-national for detention, and consequently Part 4 power was not within the scope of derogation. It was held to be incompatible with Arts 14 and 5. Art 14 was breached because the government had not derogated from it, or from Art 26 of ICCPR.⁶²

Art 14 is dependent on other Arts, but in *Abdulaziz v UK*⁶³ the ECtHR said even if there was no violation of other articles, it did not mean there was no violation of Art 14. The decision of *A and Others* was a huge blow to the government. The article's quotation could be a reaction to *A and Others* or to a case with a similar outcome. *A and others* was not only a victory for the human rights activists but was also for the court. It changed the balance of powers between the executive and the court in favour of the latter, as Hoffmann in *Rehman* said before the HRA the court could not question the validity of a statute and therefore could not decide whether the threat to the nation was sufficient to justify the suspension of *habeas corpus*. But now

the HRA has enabled the court to declare the statute incompatible, sending a signal to the parliament that the 'law does not accord with our constitutional traditions.'⁶⁴

The outcome of the case was met with mixed reactions. In Tierney's opinion, it was not constitutionally appropriate for Hoffmann in *A and Others* to claim the determination of emergency was a question for the court. Tierney argues that the House was right to defer to the executive's decision. It was right from both perspectives: the constitution and the Convention. In terms of the constitution, it is the executive's task to make decisions on national security as the executive has access to intelligence and the judges do not. Further, the executive is accountable to the parliament not to the judiciary. It was, therefore, not surprising that the majority deferred to the executive on the basis of 'capacity or expertise argument.' From the ECtHR's perspective, the House was right because it followed the ECtHR's approach adopted in *Lawless* and *McBride*, where the ECtHR had left the decision of the existence of an emergency to be determined by the internal organs such as the government or parliament. Although he admits that parliament did not meet the standard of review required from a national body by the ECtHR in 2001 when it passed the 2001 Act and the judgement on the proportionality of the measures was hence unsurprising.⁶⁵

Hickman, on the contrary, applauds Hoffmann's dissent, claiming a derogation allows the government to operate outside the human rights remit, but its actions still remain to be subject to the rule of law. For him, the court should apply a strictly robust approach in order to eliminate unnecessary derogations. Hickman is disappointed in the House in *A and Others* interpreting the pre-conditions under Art 15 so widely to hold there was an emergency in existence. This would persuade the government not to show evidence to parliament and to the court to establish there existed an emergency within the convention terms. Hickman is also disappointed by Lord Bingham's application of the test of proportionality, as in derogation cases, following *Handyside v UK* (1976) 1 EHRR 737 at Para 48, the ECtHR would apply the test of indispensability, which demands that the measure to be 'strictly required.' Many of their lordships, including Lord Hope, however, applied it, holding the measures were not strictly required. This test would ask the government to prove it had looked at the alternatives and the measure in question was the less intrusive option. Hickman states that Bingham came to the same conclusion, but it would not always be the case.⁶⁶

The government argued that the decision shackled the government's 'hands'. It called for some unspecified modification of the way the Convention rights were applied in the UK under the HRA.⁶⁷

Apparently, the government, using the minority in *Chahal* and some passages from *Soering* as the authority, intended to amend the HRA to enable the court to balance the potential risk of torture in the receiving country against national security. The UK government intervened in

Ramzy v Netherlands in which the Dutch government wanted to deport a detainee to Algeria in order to weaken the ruling in *Chahal*. But the government's attempts were failed since the ECtHR had clearly stated that the prohibition against torture was not only prohibited but had achieved the *ius cogens* status.⁶⁸

However, the government, particularly former Prime Minister Blair, believed the judiciary and the civil liberty groups underestimated the nature of the threat. Blair disagreed with both Lord Hoffman's opinion in *A and Others* and with the assertion that the right to traditional civil liberties came first, arguing that it was a dangerous misjudgement as the extremism that posed the risk today was very different than before and hence the government needed to use every means it possessed, including tougher law, to confront it; tougher law was a signal to show to the extremists that they are not welcomed in Great Britain. If the government was to apply the ECtHR's standard of constraining, it would utterly endanger the 'defence of the realm',⁶⁹ hence the rules of the game needed to change.

There were two reasons for a strict approach: the nature of the problem has changed and; secondly, and therefore, there should be a shift from putting a lot of emphasis on the right of the suspect (a few terrorists) towards convicting the guilty: a shift from freedom to security. Feldman disagrees with both reasons. As for the nature of the problem, the government argued that the investigation was far more complex since, among others, they had to chase suspects abroad, computer checks that needed to be made; people had to be arrested at an early stage, all of which meant the police would not have the time to gather enough evidence before the arrest. One of the first rules the government pushed for, unsuccessfully, was the 90 days pre-charge detention in order to give the police more time to overcome the above difficulties. But Feldman argues that in other crimes, including drug trafficking or corporate fraud, the investigating teams would face the same problems but they have never asked for a pre-charge detention period. Thus, for him, today's problem is not *different* than before. Feldman, as mentioned above, also disagrees with the claim that times of emergency require a shift from freedom to security since lessons should be learned from Israel, where the Supreme Court held that to use torture to combat terrorism was unlawful. Of course, the Supreme Court knew its decision was not going to help the fight against terrorism, but '[t]his is the destiny of democracy—it does not see all means as acceptable, and the ways of its enemies are not always open before it ...The rule of law and the liberty of an individual constitute important components in its understanding of security.'⁷⁰ The UK courts, however, preferred security over freedom in *A and Others* and in *Rehman*.

But a threat is a threat whether posed by a national or non-nation: so why one is subject to the detention and the other is not? Lord Woolf's reply to this question in *A and Others* in the Court of Appeal was as follow: the measures, which was subject to derogation, were required by the exigency of the situation because they were aimed at a small number of people that

posed the threat; they were not discriminatory since ‘British nationals are not in an analogous situation to foreign nationals who currently cannot be deported because of fears for their safety’. Lord Woolf’s reasoning is hardly convincing, however, since non-nationals also did not want to be deported for fear of Art 3 treatment either, and this meant they would have remained in detention indefinitely. In practice there was *no* distinction. Helen Fenwick claims that if those schemes only aimed at Al Qaeda members or supporters regardless of their nationalities, it would have created a ‘more confined invasion’, as Al Qaeda is defined by ideology not by nationality. What Lord Woolf’s reasoning does is to strengthen Jackson’s argument that the judiciary cannot take an active role since they live in the ‘same universe of fear’ as the rest of the anxious population.⁷¹

Rehman is another example that adds credibility to the Jackson’s argument. In this case the Special Immigration Appeals Commission (SIAC) rejected the argument that the decision of what constituted a threat to national security to be decided only by the secretary of state, as ‘the definition of national security was a question of law which it had jurisdiction to decide.’ Consequently, the secretary of state was found to have interpreted national security too broadly, as *Rehman*’s activity did not threaten national security of the UK because it was not targeted at the UK, its citizens, or at any other foreign government to take reprisal against the UK. Further, the standard of proof with regards to the allegations was too low, as it did not meet ‘high civil balance of probabilities.’ The House, however, overturned (including Lord Hoffmann) the decision since the existence of emergency engaged the doctrine of separation of powers and the government was the legitimate body with the requisite expertise and competence to make such decisions. As far as the allegations were concerned, they were not unlawful unless the defendant showed they were absurd. Giving *Rehman* as an example, Dyzenhaus concludes that the court could only review those decisions of the executives which are *absurd*, even in the HRA era.⁷²

The ‘critical scholarships and Civil libertarian pessimists’ likewise doubt whether the court could really protect human rights by virtue of the HRA in times of emergency. The pessimists argue for a number of reasons (although mostly their concerns are based on the judiciary’s lack of expertise and competence in security matters): firstly, both the ECtHR and the UK courts, due to derogation and exception clauses, were unable to protect convention rights in many cases and, therefore, accepted the government’s suspensions/restrictions of human rights as legitimate (e.g. *Lawless* and *Rehman*). Once the executive justifies the conditions for a derogation, the HRA has no role to play whatsoever: the law is still silent amidst the clashes of arms. The high degree of latitude afforded to the executive by both the ECtHR and the domestic courts are because of the ‘fragility of linguistic safeguards built into the exceptions and derogations clauses.’ Those clauses, which provide for legitimate restriction of human rights, have further weakened civil liberties, since there was no such linguistic option available to the government before the language of human

rights to restrict civil liberties; secondly, the doctrine of margin of appreciation has further emboldened the government to restrict certain rights and then *domestically* rely on the ECtHR's decisions to justify the restriction. For example, the executive invoked *Lawless in A and Others* to justify the existence of an emergency. It did not matter that *Lawless* had been decided almost half a century ago when human rights were still in a fragile state, but now they are internationally established and respected. Further, the House has failed to consider that margin of appreciation is an ECtHR invention, and should not be relied upon domestically, as there is no authority at community level to say otherwise.⁷³

One of the reasons that the ECtHR affords a wide margin of appreciation, and arguably the most important one, is that the ECtHR is still an international body and does not want to put pressure on the member state for reasons of Arts 65 and 64, but this is not the case domestically. The influence of the margin of appreciation on the decisions by the ECtHR must be disentangled before it is domestically relied upon. However, as mentioned, this is usually forgotten by the UK courts, and for those two reasons the pessimists could have a strong case.

O'Connell, however, believes the HRA and the ECtHR's jurisprudence have played a 'push back' effect by reducing the adverse impact of terrorist legislation. The effect was two-fold: it restricted the UK government attempts to adopt new terrorist powers (e.g. 90 day detention), and the decision of *A and Others* made the politician and media to question the effectiveness of terrorist legislation in combating terrorist threats. This could be evident in the 2005 Bill which was subject to severe scrutiny in both Houses, and the disagreement between the Common and Lords was never seen in 'modern history'.⁷⁴

A and Others also facilitated for the lower courts to adopt a rigorous test of proportionality, especially regarding cases dealing with control orders. Control orders are preventative, which engage 'control' by the police; it is not to do with a crime that has already taken place, but it is the idea that the threat of terrorism demands an early police intervention at the preparatory stage to detect the crime. However, it is argued to be corrosive to constitutionalism because individuals' rights would be violated without proper evidence, particularly, when the standard of proof is lowered than beyond reasonable doubt since the evidence is intelligence-gathered. Thus like the detention power, the court needs to interfere to maintain the constitutionalism in control orders.⁷⁵

Relying on the HRA, the court has made some remarkable decisions, including *MB*,⁷⁶ in which Sullivan J accepted the control order was civil proceeding rather than criminal so the lower standard of procedural fairness within the convention terms were applicable. However, when decisions were taken by a body that was not independent such as the secretary of state, continued the High Court, it was crucial there was an independent review of those decisions by the court. The court found that the supervisory

role of the judiciary was very limited under section 3 (2) of the 2005 Act because the court could not apply the standard of review required under Art 6 (1), as the secretary of state had relied substantially on closed materials and had adopted a lower standard of proof. Even the special advocate procedure (a barrister acting for the defendant's lawyers but is not allowed to share evidence with them) was not enough to guarantee the power was fairly applied, and a declaration of incompatibility was made under section 4 of the HRA. But the Court of Appeal did not agree with a breach of Art 6 as the supervisory function given to the court was adequate because of section 11 (2), which provided that the court could apply the standards of the HRA. Section 11 (2) enabled the court to read down section 3 (10) to determine whether the decision of the secretary of state was flawed at the time of the court hearing, not just at the time the order was made. As for the standard of proof under section 2 (1) (a), which required 'reasonable grounds' for suspicion, the court must satisfy itself that there had been reasonable grounds to indicate the controlee was involved in terrorism. Having established this, the court should be more deferential when determining the necessity of the order under section 2 (1) (b). Art 6 was satisfied, held the Court of Appeal, since the court was able to form its own view as to whether there were reasonable grounds for the decision. The allowance of closed materials was held not to be in violation of Art 6, as ECtHR as well as the British courts had made this clear.⁷⁷

The House overturned the decision of the Court of Appeal (with Lord Hoffmann dissenting). Lord Bingham, giving the leading judgment, reasoned that the justification for the obligations imposed on MB based fully on closed materials and hence his Lordship found it difficult to accept. 'MB has enjoyed a substantial measure of procedural justice, or a fair hearing has not been impaired.'⁷⁸ Further, the presence of special advocate was not helpful since MB could not see the evidence and hence could not tell his advocate what defence he had against the charges made against him.

The court could not review the making of a non-derogating order but only review whether the government had 'reasonable ground' for making a particular order.⁷⁹ Gearty says that those orders are neither criminal nor issued by the court (unless it is a derogating order); and they are not dependent on the evidence of wrongdoing or imminent wrongdoing. Zender describes them as 'preventative justice and as departing so radically from established legal norms that the mere fact of their legal existence poses a challenge to the rule of law that demands our close attention'. The JCHR, the Council of Europe's Commissioner for Human Rights and some leading NGOs have expressed their concerns about the nature and scope of the control orders. Those voices of the NGOs, JCHR and some academics could have really played a major part in influencing the judiciary to take a restrictive approach towards those terrorist Acts, especially towards the most controversial aspect of control orders, their scope.⁸⁰

In *JJ*⁸¹ the Court of Appeal this time agreed with the decision of Sullivan J in which he had found a breach of Art 5 (1). He held that the cumulative

impact of the obligations had amounted to a breach of the respondents' rights to freedom of movement and liberty. The obligations imposed under section 1 (9) of the 2005 Act included: confined for 18 hours a day in the house and was electronically tagged; the house could be searched at any time; visitors were to provide their full details before a visit; outside the period of confinement, they could meet people only by prior arrangements. The Court of Appeal reasoned that in practice the secretary of state had made a derogating order, which he had no power to do under section 2, and hence the order was quashed.⁸²

JJ was appealed to the House and heard in July 2007, but the House dismissed it by 4-1, with Hoffmann dissenting. Lord Bingham, said that the ECtHR had given more weight to the degree and intensity of the restriction of the right to liberty, and the House had to follow suit.⁸³ Lord Alex Carlile, the independent reviewer of the legislation, also criticised the lengthy obligations, particularly the 18 hours curfew, as they were too much to qualify as a non-derogating order. The Home Office did not take this warning seriously, but the court certainly did. In *JJ*, the Court of Appeal, unlike the High Court, did not grant a stay and it was a humiliating defeat for the government as it was revealed that one of the suspects had escaped. *JJ* was another decision, like *A and Others*, that shows a 'meticulous scrutiny of the judges' that kept the executive on its toes, requiring it to modify the obligations under the control orders. This decision equally weakens the pessimist's claim.⁸⁴

The adverse effect of the control orders, as claimed by Gearty, could be 'more severe on individuals, perhaps also on their families, dependants and friends, than many criminal sanctions.'⁸⁵ This was the case in *E*,⁸⁶ as multiple rights violations were raised including Arts 3 and 8 of the wife and children of *E*.

The psychological impact of the order had caused *E* depression and his children stress. However, reasoned the court, the national security interests justified the Art 8 interference because the secretary of state put forward strong evidence to suggest *E* was a significant risk. As for Art 3, the impact of the order on the children's mental health was not sufficient enough to humiliate or degrade them and possibly break their moral resistance. As a whole, the Home Office lost the case on Art 5 (because of cumulative impact of the obligations) and on the failure to consider to bring possible prosecutions under section 8 (4). Clive Walker claims that the government gives priority to control orders rather than criminal prosecutions, as it is evident in the fact that some individuals issued with control orders had not been interviewed by the police. The reason for the priority is that control orders are more appropriate in dealing with anticipatory threat. Carlile also criticised the reasons given by the police for not bringing a prosecution against individuals issued with control orders, warning that investigation without a view to prosecution under section 8 should not be preferred.⁸⁷

The effect of these decisions, particularly *JJ*, thanks to the HRA, was that 'other control orders have been struck down or modified following the *JJ* decision, with the more rigorous burden of proof being imposed upon the government'. If a derogation is made, the impact of the orders 'would still have to be proportionate to the exigencies of the security situation under Art 15'.⁸⁸ The procedure used in control orders must be in line with Art 6 requirements, as the court must consider whether the executive made the control order on the basis of reasonable grounds for suspicion. Further, Lord Bingham at Para 16 and Lord Hoffmann at Para 34 pointed out in *JJ*⁸⁹ that if qualified rights are engaged, the government has to satisfy para 2 requirements: the interference to be proscribed by law, has to have a legitimate aim, be necessary (pressing social need) in a democratic society and should not be applied on discriminatory grounds. The interference must be further proportionate to the aim pursued. Any control order (or any proscription under Terrorism Act 2006), or its conditions that violate a convention right but could not satisfy those para 2 requirements, would be obviously flawed and the court might quash it or require the secretary of state under sections 3 and 4 of the 2005 Act to revoke it. The same applies to derogating control orders under section 4 (3), that is, Art 15 conditions must be satisfied. Now the Civil Procedure Rules have changed and the HC can have closed hearing.

Conclusion

It was seen in *Liversidge*, *Halliday* and in *Hosenball* that the judiciary was always deferential towards the executive decisions based on national security. The court was also unwilling to assess the proportionality of the measures as seen in *Liversidge*.

However, the language of the ECHR, namely Art 15, provided for conditions that must be satisfied before human rights are suspended. Such an option was not available before the ECHR or other human rights instruments. As the cases in section two demonstrated, the ECtHR has not interpreted those conditions strictly yet, but its rhetoric has been influential in terms of alerting the domestic courts to be stricter towards the government's derogations.

The House, invoking the HRA, has certainly followed the rhetoric in many cases, including *A and Others* and *JJ*. Those decisions showed the judicial awakening to the fact that even in context of national security the court has a 'responsibility to ensure that the rule of law is respected'.⁹⁰ *Rehman*, could be distinguished from *A and Others* on the basis that in the former the House was to determine the existence of an emergency, whereas in the latter the House was dealing with the necessity and proportionality of the *action of* the government.⁹¹ It is because the House, like the ECtHR, is *still* deferential when determining condition one. As for the second condition, as the decision of *A and Others* and *JJ* would suggest, the House is less deferential by applying a strict test of proportionality. This is the result of the HRA (though some might doubt this) whereby parliament has given the

power to the court through a combination of sections including 2, 3, 4 and 6 to determine the compatibility of the domestic measures with the Convention rights. Therefore, the article's quotation could represent the reality of 50 years ago in the UK, but it certainly does not stand for constitutional functions of the court in the HRA era.

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¹The article is an edited version of my Master's Degree from University Collage London. The quote belongs to the course's booklet.

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