# JUDICIAL REVIEW OF THE STATE'S ANTI-TERRORISM ACTIVITIES: THE POST 9/11 EXPERIENCE AND NORMATIVE JUSTIFICATIONS FOR JUDICIAL REVIEW

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## I. Introduction

Although terrorism was hardly invented with 9/11, the years since those terrorist attacks have seen unprecedented global efforts to combat the evil of terrorism. The United Nations has called on nations throughout the world to enact new anti-terrorism laws and to take steps to co-operate with other nations in various counter-terrorism measures.[1] The legislative and especially the executive arms of many governments have been very active. They have enacted many new anti-terrorism laws and created new departments of government.[2] In the months following 9/11, many would have predicted that the judiciary would be deferential and acquiesce to many of these anti-terrorism efforts.[3]

A month after 9/11, the House of Lords released its decision in *Secretary of State v. Rehman.*[4] It unanimously upheld the decision of the Secretary of State to deport a Pakistani-born Imam because the Security Service alleged that he was involved in terrorist activities in the Indian sub-continent. The Court held that the specialized commission, which had reviewed the secret evidence of the Security Service and found no threat to national security, had not been deferential enough to the Secretary of State's opinion and it had too narrowly interpreted the United Kingdom's national security and foreign policy interests. Lord Hoffmann wrote an (in)famous postscript stating:

> "I wrote this speech some three months before the recent events in New York and Washington. They are a reminder that in matters of national

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[1] U.N. Security Council Resolution 1373.

[2] See generally, V. Ramraj, M. Hor and K. Roach, (eds.), *Global Anti-Terrorism Law and Policy,* (2005).

[3] For an approving survey of the United States Supreme Court's deference towards the executive and legislature in times of war see William Rehnquist, *All the Laws But One,* (1998). See also A.W, Brian Simpson, *In the Highest Degree Odious Detention without Trial in Wartime Britain,* (1994).

[4] [2001] UKHL 47.

> security, the cost of failure can be high. This seems to me to underline the need for the judicial arm of government to respect the decisions of ministers of the Crown on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security. It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy, which can be conferred only by entrusting them to persons responsible to the community through the democratic process. If the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove."[5]

Lord Hoffmann concluded that judicial deference to the executive was in order because the executive had secret information and expertise in matters of national security and a democratic legitimacy that the judiciary did not.

*Rehman* suggested that courts in the post 9/11 environment would defer to executive action taken in the name of fighting terrorism. Although *Rehman* did not deal with a challenge to legislation, Lord Hoffmann's remarks suggest that courts would also be deferential to new anti-terrorism laws because of the democratic legitimacy of elected legislatures. The decision in *Rehman* provided support for the idea that once reminded of the horrors of terrorism, judges would allow the executive and the legislature to take responsibility for protecting their citizens.

Although the *Rehman* vision of judicial deference to anti-terrorism efforts has it defenders,[6] it has not captured the imagination of the judiciary in many countries in the years since 9/11. Many courts have engaged in judicial activism[7] in the sense that they

[5] *Ibid* at para 62.

[6] Eric Posner and Adrian Vermeule, *Terror in the Balance Security, Liberty and the Courts*, (2007); Richard Posner, *Not a Suicide Pact The Constitution in a Time of National Emergency*, (2006).

[7] Judicial activism has been a notoriously difficult term to define. Richard Posner has defined it as revolving around the "court's power over other government institutions." Richard Posner, *The Federal Courts*, (1996) at 314. 318. Other commentators, however, have defined judicial activism more in terms of a eagerness on the part of the judiciary to decide constitutional questions. Cass Sunstein, *One Case at a Time*, (1999). For my own attempts to define judicial activism as including both the effect of judicial decisions on the legislature and the executive and the manner in which judges are eager to make new law through constitutional decisions see Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue*, (2001), ch.6.

have invalidated executive and even legislative action taken by the state in the name of combating terrorism. To be sure, many of the decisions have been made on grounds that have left the legislature room to respond[8], but decisions in a number of countries have affected major aspects of the anti-terrorism policies pursued by elected governments.

The House of Lords retreated from *Rehman*, most notably in its 2004 decision holding that Parliament's 2001 derogation from the European Convention on Human Rights to allow for the indeterminate detention of suspected terrorists who could not be deported because of a substantial risk of torture was incompatible with the *Human Rights Act, 1998*.[9] The United States Supreme Court has rejected claims by both the Bush Administration and Congress that the detention of suspected terrorists at Guantanamo Bay, Cuba should not be subject to judicial review or basic standards of adjudicative fairness. The Supreme Court of Canada has placed some restraints on anti-terrorism efforts taken by the Canadian Parliament.

This article will examine the judicial role with respect to the state's anti-terrorism activities. It will suggest that with some exceptions, including the Supreme Court of India's decision upholding the *Prevention of Terrorism Act (POTA)*[10], that courts in common law countries have been surprisingly active with respect to review of the state's anti-terrorism activities. Once this descriptive point have been established, this article will argue that judicial activism in reviewing state anti-terrorism activities for respect for human rights can be justified.

An important factor in the normative justification is that modern understandings of judicial review and proportionality allow the state considerable room to pursue its anti-terrorism efforts even in the face of judicial decisions enforcing human rights. In other words, even active judicial decisions allow the state to pursue more proportionate

[8] Following Bickel, a court can make decisions that give the legislature an opportunity to respond to its rulings. In the United States, such rulings are generally made on sub-constitutional grounds often relying on canons of statutory interpretation. See Bickel, *The Least Dangerous Branch*, (1986), ch. 4; Kent Roach, "Constitutional and Common Dialogues Between the Supreme Court and Canadian Legislatures," (2001) 80 Can. Bar Rev. 481. See also Elner Elhauge, *Statutory Default Rules*, (2008), ch 9, discussing canons of construction that favour the politically powerless. In countries that contemplate explicit legislative limits or override on rights, even constitutional rulings by courts may give the legislature an opportunity to respond to the ruling. See *infra* discussion note 11 and *infra* "the role of dialogue between courts and legislatures" for further discussion.

[9] *A. v. Secretary of State*, 2004 UKHL 56.

[10] *People's Union for Civil Liberties v. Union of India*, (2004) 9 SCC 580.

responses to combating terrorism and give the legislature a role in what has been described as a continued dialogue[11] between courts and society about the necessity of anti-terrorism measures. In addition, claims of executive and legislative expertise in combating terrorism can easily be exaggerated in the wake of a sorry string of state failures to prevent terrorism. The legislature has an incentive to exaggerate the effectiveness of its anti-terrorism measures and to claim that its measures are necessary to protect the rights of the victims and potential victims of terrorism. The legislature also has an incentive to reflect the fears and hostilities of majorities by violating the rights of unpopular minorities. The executive has an incentive to avoid accountability by overusing secrecy. It is even possible that judicial intervention in the name of human rights could encourage the state to take actions that may be more rational and more effective in preventing terrorism.

## II. The Role of Courts In Reviewing the State's Anti-Terrorism Activities

Writing in response to Lord Hoffmann's comments in the *Rehman* case, Keith Ewing argued in 2003 that the apprehended sense of emergency created by the terrorist attacks of 9/11 underlined what he called "the futility" of the Human Rights Act in the United Kingdom and presumably of Bills of Rights in other democracies. He predicted that the judicial deference demonstrated in *Rehman* would continue. [12] In this section, some major national security decisions since 9/11 by apex courts in four democracies, the United States, Canada, the United Kingdom and India, will be surveyed. Although some

[11] For judicial discussion of dialogue between courts and legislatures see *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *R. v. Mills*, [1999] 3 S.C.R. 668; *Sauve v. Canada*, [2002] 3 S.C.R. 519. See also Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue*, (2001); Richard Clayton, "Judicial Deference and 'Democratic Dialogue': The Legitimacy of Judicial Intervention Under The Human Rights Act 1998", [2004] PL 33; Baroness Hale "Human Rights in the Age of Terrorism: The Democratic Dialogue in Action", (2008) Georgetown Journal of International Law 383.

[12] K.D. Ewing "The Futility of the Human Rights Act" [2004] Public Law 829 at 850, 852, In subsequent work, Professor Ewing argues that "the courts are an irritant rather than an obstacle" to the state's anti-terrorism measures. K.D. Ewing and Joo-Cheong Tham "The Continuing Futility of the Human Rights Act" [2008] Public Law 668 at 691 This argument seems to assume that anything less than judicial supremacy will only enforce an impoverished understanding of the rule of law. Professor Ewing dismisses the idea of dialogue between courts and legislatures as "fantasy" ibid at 691 based on the misguided notion that dialogue could only be achieved by improper ex parte communications between the government and the judiciary as opposed to an alternative in which courts discharge their anti-majoritarian and rights enforcing role, albeit subject to explicit legislative limits and derogations on rights as interpreted by the courts.

of these decisions demonstrate the judicial deference to the legislature and the executive that is shown in *Rehman* and predicted by Professor Ewing, it will be seen that many other decisions demonstrate relatively active judicial intervention with respect to both executive and legislative action taken in the name of preventing terrorism.

### A. The United States of America

Few would have predicted that the United States Supreme Court would have emerged as an active presence in the American response to 9/11. The Supreme Court's 2000 decision in *Bush v. Gore*[13] was seen by many as a symbol of a conservative court that would instinctively, albeit with some dissents, side with the Bush administration.[14] Many of the precedents of the more liberal and activist Warren Court were under siege and it was not unreasonable to think that the horrific events of 9/11 would hasten the trend of judicial deference to state crime control efforts. In addition, the idea that the United States was at war with terrorism supported the relevancy of World War II precedents that stressed judicial deference to the executive.[15]

The first major post 9/11 cases to reach the Court took until 2004 to decide. This may have allowed the judges some time to recover from the shock of 9/11 and also to appreciate how the Bush Administration's idea that Guantanamo Bay was a law free zone was attracting global criticism. In its 2004 decision in *Rasul v. Bush*[16], the United States Supreme Court reversed lower courts that held they had no jurisdiction to review the detention of non-citizens held by the United States in the military camp in Cuba. Justice Stevens for the majority distinguished wartime precedents on the basis that the petitioners, nationals of Kuwait and Australia, were not from countries at war with the United States.[17] Justice Kennedy stressed that they were subject to indeterminate detention.[18] The Court emphasized American control over the prisoners and that the applicable statute did not differentiate between citizens and non-citizens. Justice Scalia

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[13] 531 U.S. 98 (2000).
[14] For essays very critical of the decision in *Bush v. Gore,* see Bruce Ackerman, (ed.), *Bush v. Gore: The Question of Legitimacy*, (2002).
[15] *Korematsu v. United States*, 323 U.S. 214 (1944); *Ex parte Quirin*, 317 U.S. 11 (1942); *Johnson v. Eisentrager*, 339 U.S. 763 (1950).
[16] 542 U.S. 466; 124 S.Ct. 2686 (2004).
[17] *Ibid* at 475-479.
[18] *Id* at 487-488.

with two other judges issued a vigorous dissent. He argued that, the Court "springs a trap on the Executive, subjecting Guantanamo Bay to the oversight of the federal courts even though it has never before been thought to be within their jurisdiction- and this making it a foolish place to have housed alien wartime detainees".[19]

Congress responded to this decision as well as to international outrage at abuse of prisoners at Guantanamo Bay and Abu Ghraib with the *Detainee Treatment Act, 2005*[20] which prohibited cruel, inhumane and degrading treatment of detainees, but also stripped federal courts of jurisdiction to consider the habeas corpus claims of detainees at Guantanamo. In a case brought by Hamdan, an alleged associate of Bin Laden, the Supreme Court held in *Hamdan v. Rumsfeld*[21] that the habeas stripping provisions of this statute would not apply retroactively. It also held that the military commission convened to try the petitioner was without jurisdiction because it violated the Uniform Code of Military Justice and Common Article 3 of the Geneva Convention, which requires detainees to be tried by "a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized people".[22] Justice Scalia and two other judges again found themselves in dissent. They argued that the clear intent of Congress's 2005 Act was to deprive federal courts of habeas corpus jurisdiction and that the military commissions were consistent with human rights.[23]

In response to *Hamdan v. Rumsfeld*, Congress enacted the *Military Commissions Act (MCA), 2006,*[24] which clearly stripped the federal courts of habeas jurisdiction over the Guantanamo Bay detainees. A year later in *Boumediene v. Bush,*[25] the Supreme Court held that the MCA did not satisfy the requirements of the Constitution, which only allows habeas corpus to be suspended "when in cases of Rebellion or Invasion the public Safety may require it".[26] The Court also held that the MCA did not provide an adequate substitute for habeas corpus especially with respect to the ability of the detainee to

[19] *Id* at 497-498.
[20] 119 Stat 2739
[21] 548 U.S. 557; 126 S.Ct. 2749 (2006).
[22] *Ibid* at 630.
[23] *Ibid* at 665.
[24] 28 U.S.C.A. s 2241(e).
[25] 128 S.Ct. 2229.
[26] at 2296 .

present newly discovered evidence.[27] A majority of the Court was prepared to intervene in Guantanamo even when Congress supported the Bush Administration's actions. The unelected Court rejected anti-terrorism policies that represented the combined will of the executive and the legislature.

Four judges led by the newly appointed Chief Justice Roberts dissented in *Boumediene*. They concluded that habeas corpus should not apply to aliens detained by the military outside of the United States.[28] Chief Justice Roberts also argued in dissent that the MCA provided an adequate substitute for habeas corpus in large because it was based on *Hamdi v. Rumsfeld*[29]. In *Hamdi*, a plurality of the Court had applied a general balancing test with respect to the detention of an American citizen captured in Afghanistan.[30] This test allowed departures from ordinary trial procedures including the use of evidence that would be inadmissible under ordinary rules and a presumption in favour of the government's evidence.[31]

The United States Supreme Court issued serious rebukes to first, the Bush Administration's[32]and then Congress's attempts[33] to preclude habeas corpus review of the detentions in Guantanamo Bay, Cuba. The Court has been more sensitive than the elected branches of the American government to the international criticisms of the attempt to create law free zones in Guantanamo. It has also held that the military commission process at Guantanamo does not satisfy basic standards of adjudicative fairness or create a substitute for habeas corpus.[34] The Court has determined that the circumstances for derogating from the right of habeas corpus have not been satisfied.[35] Finally the Court has refused to approve military detention of either citizens or aliens in the United States.[36]

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[27] Ibid at 2267-2274.
[28] *Boumediene v. Bush*, 128 S.Ct. 2229 at 2294 per Scalia J.
[29] 542 U.S. 507; 124 S. Ct. 2633. .
[30] Ibid at 529 per O'Connor J.
[31] For criticism that the standards in *Hamdi v. Rumsfeld* could contribute to miscarriages of justice where the wrong people were detained, see Kent Roach and Gary Trotter, "Miscarriages of Justice in the War Against Terror", (2005) 109 Penn. State L.Rev. 967 at 1014-1032.
[32] *Rasul v. Bush*, 542 U.S. 466 (2004).
[33] *Boumediene v. Bush*, 128 S.Ct. 2229.
[34] *Ibid.*
[35] *Id.*
[36] *Al-Marri v. Spagone*, Order List 555 US 08-368 (O8A755), March 6, 2009, vacating 4th Circuit decision upholding military detention of alien suspected of terrorism and held in the United States; and *Padilla v.*

What explains the Court's resistance to Guantanamo? The Court reacted negatively to blatant attempts to preclude judicial review. Another factor is that the judicial decisions have focused on issues of procedure that are well within the expertise of the judiciary. Although the Court was divided in *Hamdan* on whether the military commissions accorded with basic standards of adjudicative fairness, few doubted the competence of a court to determine basic standards of adjudicative fairness.

The Court may also have been active because of its awareness that it was engaged in a dialogue with the elected branches of government and that its decisions would not be the final word in the dialogue. Justice Kennedy explained that the Court deliberately avoided the constitutional issue in its 2006 *Hamdan* decision in order to facilitate "a dialogue between Congress and the Court" so that Congress "could make an informed legislative choice either to amend the statute or to retain its existing text".[37] He recognized that Congress in its legislative reply to *Hamdan* had clearly affirmed its commitment to denial of habeas corpus. In light of that decision, the Court had to proceed "to its own independent judgment on the constitutional question".[38] The majority of the Court then did not defer to Congress's judgment that the Constitution allowed it to deny *habeas corpus*, a practice of co-ordinate construction that has been defended by some prominent American constitutional scholars.[39] At the same time, the Court engaged in a form of constitutional minimalism by delegating to the lower courts the ultimate issue of whether there were valid legal grounds for detention. No one was released as a result of the Court's decision.

Finally, the American courts were assisted in the Guantanamo cases by what Charles Epp has called a "support structure" led by advocacy groups such as the American Civil Liberties Union and the Centre for Constitutional Rights, the law schools and elite law firms providing free legal services.[40] These groups mobilized and conducted extensive litigation on behalf of the detainees at Guantanamo. The courts cannot by

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*Rumsfeld*, 542 U.S. 426 (2004). In both cases, the United States government backed away from their asserted powers and brought regular criminal prosecutions against the persons.

[37] *Boumediene v. Bush*, 128 S.Ct. 2229 at 2243.

[38] *Ibid.*

[39] Mark Tushnet, *Taking the Constitution Away from the Court*, (1999); Larry Kramer, *The People Themselves*, (2004).

[40] Charles Epp, *The Rights Revolution*, (1998), ch. 4. See also Neil Katyal, "The Legal Academy Goes to Practice", (2006) 120 Harv. L.Rev. 65.

themselves oppose legislatures and the executive, but the independence of courts do allow them to raise concerns about the rights of the unpopular that can be neglected in the majoritarian legislative process and in the often secret security activities of the executive.

## B. Canada

The Supreme Court of Canada was known for its activism before 9/11and it has, with some exceptions, continued to enforce human rights vigorously since that time. In the *Suresh v. Canada*,[41]a case decided in early 2002, the Court decided that it would generally violate the Canadian Charter of Rights and Freedoms to deport a suspected financier of terrorism if there was a substantial risk that he would be tortured. The Court, however, deliberately left open the question of whether deportation to torture could be justified in undefined "exceptional circumstances" under the Canadian Charter even while noting that such an interpretation of Canada's domestic constitution would place it in breach of Canada's international human rights obligations. This so-called *Suresh* exception has rightly attracted criticism and the European Court of Human Rights has declined to follow it.[42] Fortunately, no court in Canada has yet approved of use of the *Suresh* exception,[43] but the Government is relying on it in an attempt to deport five non-citizens suspected of involvement in terrorism to Egypt, Syria, Morocco and Algeria.

The Supreme Court's decision in *Suresh* also demonstrates a common deference to the executive in matters of immigration law. Citing Lord Hoffmann's approach in *Rehman* as supportive authority, the Court indicated that it would defer to the executive's judgment of whether a particular person was a security risk or would face a substantial risk of torture so long as the decision was reasonable and in a companion case held that a person could be deported to Iran without a substantial risk of torture.[44] The *Suresh*

[41] *Suresh v. Canada*, [2002] 1 S.C.R. 3.
[42] *Saadi v. Italy*, Grand Chamber judgment, 28 Feb. 2008.
[43] In one case involving an Egyptian national, a court has explicitly held that a case for invoking the exception had not been made out. *Re Jabbalah*, 2006 FC 1230. For my criticisms of the *Suresh* exception, see Kent Roach, "Constitutional, Remedial and International Dialogues About Rights: The Canadian Experience", (2005) 40 *Texas Journal of International Law* 537.
[44] In *Ahani v. Canada*, [2002] 1 S.C.R. 72, the Supreme Court deferred to the executive's judgment that a person could be deported to Iran without a substantial risk of torture. Courts in the United States apply a similar deferential standard to the review of expert executive action under *Chevron USA v. Natural Resources Defence Council*, 467 U.S. 837 (1984). For an interesting recent case where the United States Supreme Court did not apply this standard of deference in a case where it reversed a decision to deport a

decision combines the activism of a general rule that it would violate the Charter to deport a non-citizen to face torture with deference towards the executive's decision of whether a non-citizen faces a substantial risk of torture as well as a willingness to entertain exceptions to the general rule of no deportation to torture.

In 2007, the Supreme Court of Canada held that the use of immigration law to detain suspected terrorists violated standards of fundamental fairness under the Charter because it did not allow for any adversarial challenge of secret evidence that the government submitted to the judge.[45] The Court outlined a range of less drastic alternatives including the use of security cleared special advocates who could examine and challenge the secret evidence. The Court suspended its declaration that the law was invalid for a twelve-month period and during that time the Canadian Parliament enacted a new law providing for security cleared special advocates. As in *Bourmediene v. Bush*, the Canadian Court saw itself as engaged in a dialogue with the legislature and did not order the release of any of the detainees. The Court was convinced that there was a range of more proportionate means for the state to advance its objective of using secret information to justify the detention and deportation of suspected terrorists. The Court also practiced a form of constitutional minimalism by avoiding the issue of whether the indeterminate detention of non-citizens held under immigration law and in circumstances where they could not be deported without invoking the *Suresh* exception was constitutional.

In 2001, Canada enacted a new *Anti-Terrorism Act* in response to 9/11 and U.N. Security Council Resolution 1373. One of the most controversial features of this act was the introduction of a new procedure, an investigative hearing that would allow the police to obtain a judicial order that would compel a person to answer questions and reveal

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non-citizen on the basis that he had involuntarily engaged in racial and religious persecution is his home country see *Negusie v. Holder,* 555 U.S._(2009). In that case, the executive body was not entitled to deference because it had erred in law in holding that it did not matter if the non-citizen had engaged in the acts of persecution voluntarily or involuntarily. In other immigration cases including those in the national security context, however, American courts frequently defer to executive action and did not interfere with a post 9/11 round up of non-citizens that did not result in any terrorist prosecution. David Cole, *Enemy Aliens,* (2003).

[45] *Charkaoui v. Canada,* [2007] 1 S.C.R. 350. For further analysis of this case and new legislation enacted in reply to the decision that allows security-cleared special advocates to see and challenge intelligence that is presented to the judge but not disclosed to the detainee, see the collection of articles on this case at (2008) 42 S.C.L.R. (2d) 251-440.

documents that were relevant in a terrorism investigation. In 2004, the constitutionality of this procedure was challenged when an attempt was made to compel a reluctant witness as part of Canada's ongoing investigation of the 1985 bombing of Air India Flight 182 by Sikh-Canadian terrorists, an event that killed 329 people in the most deadly act of aviation terrorism before 9/11. The Canadian Supreme Court upheld investigative hearings, but stressed that the judge would be able to enforce all the rules of evidence at the hearings and that no evidence derived from the hearings could be used in any subsequent proceedings, including extradition and immigration proceedings, against the person compelled to provide the evidence.[46] Because investigative hearings would be judicial hearings, they would be subject to a rebuttable presumption that they be held in open court.[47] Although the Court did not strike down the novel procedure, it placed new and unanticipated restrictions on its use. No investigative hearing was held in the case and the provision was allowed to expire by Parliament in 2007, though its revival is expected in the near future.

In 2008, the Supreme Court decided two important terrorism-related cases. In one case, the Court held that the Canadian Security Intelligence Service (CSIS) had violated the Charter by destroying notes of an interview in an ongoing immigration law security certificate proceeding.[48] This case demonstrates how respect for human rights can in some circumstances improve the state's anti-terrorism efforts. The Court effectively held that CSIS had misinterpreted its enabling statute to justify its practice of destroying intelligence, including wiretaps on the prime suspect in the Air India bombing. The retention of intelligence was justified both because it could provide suspects as well as the state with the best evidence. The Court did not order all the intelligence disclosed to the detainee; the government would be allowed to justify the non-disclosure of specific items of intelligence on grounds of harms to national security.

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[46] *Re Section 83.28 of the Criminal Code*, [2004] 2 S.C.R. 248. The derivative and use immunity with respect to statements compelled at an investigative hearings was interpreted by the Court to be absolute even though Canadian and American constitutional self-incrimination standards allows the use of evidence that may be derived from compelled testimony but is obtained from an independent source. See Kent Roach, "The Consequences of Compelled Self-Incrimination in Terrorism Investigations: A Comparison of American Grand Juries and Canadian Investigative Hearings", (2008) 30 Cardozo L. Rev. 1089.
[47] *Re Vancouver Sun*, [2004] 2 S.C.R. 332.
[48] *Charkaoui v. Canada*, 2008 SCC 38.

In the second case, the Supreme Court found that CSIS was involved in another breach of the Charter when it went to Guantanamo Bay to interview Omar Khadr, a teenaged Canadian citizen who was captured by the Americans and is alleged to have killed an American soldier in hostilities in Afghanistan.[49] The Court stressed that Canadian officials violated the Charter by participating in breaches of international law, as determined by the United States Supreme Court in the *Hamdan v. Rumsfeld* case[50] discussed above. The Court held that the appropriate remedy was for the Canadian government to disclose the intelligence that it had gathered at Guantanamo and shared with the Americans to Khadr, albeit subject to the ability of the government to justify non-disclosure because of harms to national security or international relations.

The Supreme Court of Canada's post 9/11 performance in anti-terrorism matters has been somewhat mixed and does not reflect what Charles Epp observed in 1998 was the "dramatic rights revolution"[51] that followed from the Charter. To be sure, a number of interveners supported rights claims made on behalf of the accused and non-citizens in the major cases and they enjoyed some measure of success. That said, however, Canada's rights revolution has been tempered both by cutbacks in legal aid funding and by a political reaction to what some argued was an excessive exercise of power by the courts and civil society groups who were prepared to engage in litigation.[52] This critique of judicial activism has not been completely successful, but it has probably tempered the Court's activism to some extent.[53]

In the end, the Supreme Court of Canada has taken a firm but cautious approach to enforcing the rights of suspected terrorists. It has affirmed the importance of human rights by holding that suspected terrorists should not be deported to torture, but has undermined the legal and moral force of its holding by indicating that there might be

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[49] *Khadr v. Canada*, 2008 SCC 28. See *Khadr v. Canada*, 2008 FC 807, for a subsequent judgment holding that some of the information should not be disclosed because of harms to national security and international relations and *Khadr v. Canada* 2009 FC 405 for a judgment holding that Canada's refusal to ask the United States for Omar Khadr's repatriation to Canada violated his Charter rights to have his youth recognized when resolving claims that he had committed a crime. The government has appealed this latter ruling.

[50] 548 U.S. 557 at 630 (2006).

[51] Charles Epp, *The Rights Revolution*, (1998) at 171.

[52] For an example of this critique see Rainer Knopff and F.L. Morton, *The Charter Revolution and the Court Party*, (2000).

[53] See Kent Roach, "Judicial Activism in the Supreme Court of Canada", in Brice Dickson, (ed.), *Judicial Activism in Common Law Supreme Courts*, (2007).

exceptional circumstances to justify departures from this rule. It has also stated that it will generally defer to the executive's judgment about whether a person constitutes a security threat or whether a non-citizen faces a risk of torture if deported. It has upheld a new procedure that allows judges to require people to assist in terrorism investigations, but has stressed that no evidence derived from such compulsion can be used against the person so compelled and that there should be a presumption that investigative hearings be held in open court. The Court has invalidated a central platform of immigration law security certificates, but only because it was convinced that the government could protect secret intelligence in a manner that was fairer to the detainee. The Court has also held that Canada's security intelligence agency has violated the Charter by destroying intelligence and by participating in interrogations at Guantanamo. The Court has not simply deferred to either legislative or executive action taken to prevent terrorism, but it has also been sensitive to the state's interests in investigating and preventing terrorism.

### C. United Kingdom

In *A. v. Secretary of State*[54], the House of Lords considered Part IV of the *Anti-Terrorism, Crime and Security Act,*[55] which provided for the indefinite detention of non-citizens involved in terrorism who could not be deported because of the substantial risk of torture. To achieve this end, the law derogated from Article 5 of the European Convention on the basis that there was a public emergency in relation to international terrorism. The House of Lords upheld the validity of the emergency reasoning that it involved "political judgment"[56]. This holding follows the rationale for judicial deference in *Rehman*. Surprisingly, Lord Hoffmann dissented on the basis that no other country in Europe had declared an emergency and the dangers of overreaction to acts of terrorism were greater than terrorism.[57] Lord Hoffmann effectively changed from complete

[54] 2004 UKHL 56.
[55] C.24
[56] *Ibid* at para 29.
[57] *Id* at para 96.

deference in *Rehman* to a form of activism that left little if any room for the state to justify to the court that there was an emergency.[58]

Although the majority of the House of Lords was deferential to the executive on the question of whether there was an emergency, it was decidedly non-deferential with respect to the indeterminate detention scheme. It declared that the scheme was disproportionate to the emergency and discriminated against non-citizens. A common theme in the judgments was that Parliament had singled out non-citizens for indeterminate detention whereas the terrorist threat was not limited to citizens. Under the Human Rights Act, 1998, the House of Lords could only declare the legislation to be incompatible with rights and did not have the power to strike the law down. The Blair government responded by repealing the law and introducing new legislation that allowed control orders to be imposed on suspected terrorists, citizen and non-citizen alike.[59] This case represented the effective invalidation of a major plank of post 9/11 legislations. It also represented a rigourous application by the judiciary of the principles of proportionality and non-discrimination. It will be suggested in the second half of this article that the principles of proportionality and non-discrimination are two of the most important principles justifying judicial scrutiny of the anti-terrorism efforts of the legislature and the executive.

The detainees in the *Belmarsh* case took their case to the European Court of Human Rights where the Grand Chamber held that their detention was not degrading or

[58] David Dyzenhaus, *The Constitution of Law*, (2006) at 182. Lord Hoffmann subsequently was drawn back to judicial deference in concluding that the right to liberty was not infringed by restrictive control orders and that the availability of special advocates would provide sufficient fairness guarantees in the administration of control orders. *Secretary of State for the Home Department v. JJ* [2007] UKHL 45 at para 45 and *Secretary of State for the Home Department v. MB and AF* [2007] UKHL 46 at para 54.

[59] *The Prevention of Terrorism Act, 2005*, c.2. The House of Lords subequently held 3:2 that an 18 hour curfew under a control order infringed the right to liberty under Article 5 of the European Convention on Human Rights, but that a 12 hour curfew did not. See *Secretary of State for the Home Department v. JJ* [2007] UKHL 45; *Secretary of State for the Home Department v E* [2007] UKHL 47. For a criticism of these decisions for not declaring that the whole control order regime was incompatible with rights and an argument that this illustrates "the continuing futility of the Human Rights Act" see K.D. Ewing and Joo-Cheong Tham "The Continuing Futility of the Human Rights Act" [2008] Public Law 668. For a critique of this position see Aileen Kavanagh "Judging the Judges Under the Human Rights Act: Deference, Disillusionment and the 'War on Terror' " [2009] Public Law 287.

inhumane and they had not been denied a right to a remedy. [60] The Grand Chamber did, however, hold that the detention of many of the applicants violated Article 5 of the European Convention of Human Rights because they were not detained with a view to deportation given the fact that they would face a substantial risk of torture if returned to their countries of citizenship.[61] On the question of derogation, the Grand Chamber accepted the decision of the House of Lords that there was an emergency threatening the life of the nation, but also followed the Lords' in holding that the derogation was not a proportionate response to such an emergency and that it discriminated between citizens and non-citizens. The Grand Chamber also held that some of the detainees were denied a fair hearing to test the legality of their detention because they did not know the specific allegations against them and thus could not assist a security cleared special advocate in assisting in their defence.[62] This last decision suggests that there are limits to the use of security cleared special advocates to resolve the tensions between fairness and secrecy.

In the *Belmarsh* case at least, the role of the courts in the United Kingdom exceeds what Charles Epp argued in 1998 was only a "modest rights revolution".[63] The important role of the courts, however, can perhaps be attributed to a growth of a support structure that Epp maintains is essential for judicial activism. For example, there are chambers of barristers in London that specialize in human rights issues both domestically and in the European courts. Two civil society groups, Liberty and Justice, appeared as interveners before the European Court of Human Rights supporting the detainees in the Belmarsh case. Although the Grand Chamber awarded the successful applicants only very modest damages, they were awarded more generous cost awards.

## D. India

The Supreme Court of India upheld the constitutionality of the *Prevention of Terrorism Act (POTA)* from a facial challenge by the Peoples Union for Civil Liberties.[64]

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[60] *A and others v. United Kingdom* at para 224, decision of European Court of Human Rights Grand Chamber February 19, 2009.
[61] *Ibid.*
[62] *Id.*
[63] Charles Epp, *The Rights Revolution*, (1998) at132.
[64] *People's Union for Civil Liberties v, Union of India*, (2004) 9 SCC 580

The law was held to be within the competence of the central government because terrorism was a transnational problem that went beyond public order matters under the jurisdiction of the states. This ruling followed the Court's earlier decisions upholding the *Terrorist Activities Disruption Act (TADA)*[65], but was also consistent with a subsequent Australia High Court decision that upheld control orders enacted by the central government under the foreign powers head of jurisdiction.[66]

An important tension in laws directed at international terrorism is where they are situated in the spectrum of state responses from criminal law to foreign and defence policy. At one extreme, terrorism can be seen as a crime like any other while at the other it can be seen as an act of war. . The Indian Supreme Court deftly negotiated these tensions. [67] On the one hand, the Court ruled that terrorism in India was much more than a public order problem that could be left to the states. On the other hand, the Court also stressed that traditional criminal law concepts, including the presumption of subjective *mens rea* on matters such as abetting crimes and possessing firearms, should be applied to POTA. The Court was aware that terrorism has foreign and defence policy dimensions that justify a strong role for the central government. Nevertheless, it also held that some basic restraints of the criminal law designed to ensure that only the guilty are punished should be applied to anti-terrorism laws.

Although the Supreme Court recognized the importance of respecting human rights in combating counter-terrorism, it generally relied on the importance of preventing terrorism and the severity of the terrorism problem in India to justify the impugned law. As will be suggested below, the Court did not conduct a full analysis of whether the law was proportionate to the objective, especially with respect to the question of whether less rights invasive approaches could be as effective in preventing terrorism. Such proportionality analysis was a key feature of the House of Lords' decision in *A v. Secretary of State* and the Supreme Court of Canada's decision in *Charkaoui*.

Some of the Court's decisions not to invalidate parts of POTA on a facial challenge seem appropriate. For example, the Court upheld the process of listing terrorist groups, concluding that the availability of judicial review after listing was sufficient. This

[65] *Kartar Singh v. State of Punjab*, (1994) 3 SCC 569: AIR 1995 SC 1726.
[66] *Thomas v. Mowbray*, 2007 HCA 33.
[67] *People's Union for Civil Liberties v, Union of India*, (2004) 9 SCC 580.

follows the approach taken in many other democracies. Similarly the Court upheld various terrorism financing and forfeiture provisions that are also common features of anti-terrorism laws, albeit ones that may not be effective in preventing low cost or state sponsored acts of terrorism.

The Court upheld s.14 of POTA making it an offence not to provide information when required to do so by a police officer not below the rank of Inspector.[68] The Court stressed the important purpose of preventing terrorism, but did not examine the adequacy of less rights invasive alternatives such as requiring a person to co-operate with a magistrate as opposed to a police officer. The Court also upheld s.32 providing for the admissibility of confessions to police officers provided they are made in an atmosphere free from threat or inducement.[69] The Court noted but did not really explain why the alternative advocated by the petitioner, namely the recording of confessions before a magistrate, would not satisfactorily advance the objectives of the law. As will be examined below, a central component of proportionality analysis is the determination of whether alternatives that infringe rights less nevertheless can be equally as effective in advancing the objectives of the law. The Court did, however, indicate that judges would remain free under the law to exclude confessions that were forcibly extracted even though this settled principle was not included in the law.[70]

The Court also upheld s.30 of POTA that authorized a variety of measures for the protection of the safety of witnesses in terrorism cases including the use of anonymous testimony.[71] The Court stressed the need for witness protection and the requirement in s.30(2) that the witness's life would be in danger.[72] Although the Court noted that the particular measures that were justified would depend on the facts of the particular case, it did not examine limits that should be imposed on anonymous testimony in order to protect the accused's rights to a fair trial. For example, it did not examine whether it would be permissible for an anonymous witness to have a decisive weight in supporting a conviction in a terrorism case.

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[68] *Ibid at para 38.*
[69] *Id. at para 63.*
[70] *Id.*
[71] A very similar provision is now included in s.17 of the National Investigation Agency Bill 75 of 2008.
[72] *People's Union for Civil Liberties v, Union of India,* (2004) 9 SCC 580 at para 57.

The Supreme Court of India's approach was influenced by the nature of the global and facial challenge to the law. Both the constitutional challenge and the decision were sweeping. At the same time, the decision left open the ability of courts in subsequent cases to fashion remedies for particular abuses of laws. In contrast, the major decisions of the other high courts examined above all were generally limited by specific adjudicative facts. Constitutionalism minimalism[73], where the court decides cases on narrow grounds, does not seem to be attractive or perhaps possible in India. This approach can perhaps be justified by access to justice concerns. Charles Epp has suggested that the weak support structure for constitutional litigation in India explains why issues involving the rights of the accused are not well supported in Indian constitutional litigation. Interestingly he points to the Supreme Court's docket during the Emergency Rule of the mid-1970's as an exception to this quiescence in large part on the basis that dissenters with more resources were able to litigate the legality of preventive detention at that time.[74] The lack of access to justice for individual accused in India may mean that reliance must be placed on global and facial challenges to anti-terrorism laws as in *Peoples Union for Civil Liberties v. Union of India*.[75]

Although it has refused to strike major pieces of anti-terrorism legislation down, the Indian Supreme Court has been careful to leave some issues undecided and to allow lower courts room to fashion remedies for abuses in specific cases. For example, the Court did not approve all witness protection measures so that courts in subsequent cases may find that some uses of anonymous testimony are unconstitutional. In addition, the Court's refusal to strike down provisions that give police officers the ability to take confessions does not necessarily mean that all such confessions will be admissible, especially if they are obtained involuntarily. It would be wrong to interpret the decision as a constitutional green light; there were some areas where the Court signaled that the state must proceed with caution.

The Supreme Court's decision upholding POTA was, of course, not the final word because the legislature repealed the legislation even though it had been approved as

[73] Cass Sunstein, *One Case at a Time*, (1999).
[74] Charles Epp, *The Rights Revolution*, (1998) at 104.
[75] (2004) 9 SCC 580.

constitutional.[76] A similar phenomenon occurred in Canada where investigative hearings were allowed by Parliament to expire in 2007 despite having been upheld as constitutional by the Supreme Court.[77] These legislative repeals affirm the fundamental distinction recognized in both countries that courts only assess the constitutionality and not the wisdom or necessity of legislation. In both countries, however, parts of the repealed legislation may be re-enacted and defended in part on the basis that the Supreme Court has already found the legislation to be constitutional.

## III. Normative Justifications for Judicial Review of Anti-Terrorism Activities

The last section has suggested that with some exceptions, the courts of a number of democracies have played a more active role in scrutinizing anti-terrorism efforts than might have been predicted by cases such as *Rehman* that stressed judicial deference in national security matters. The question, which remains is whether vigourous judicial review of anti-terrorism efforts can be justified. In what follows, it will be suggested that full judicial review can be justified given the importance of respecting human and minority rights when combating terrorism and given the nature of modern judicial review which often allows the state a continued opportunity to enact less rights invasive but equally as effective measures to combat terrorism. Judicial review can also be justified on the basis that respect for human rights including principles of non-discrimination can help democracies maintain the moral high ground in their struggles with terrorists who are prepared to violate human rights and kill innocent people because of their race or religion or nationality.

### A. The Role of Courts in Protecting Human Rights

Courts are increasingly aware that the need to respect human rights is an important part of democratic approaches to counter-terrorism. The Supreme Court of

[76] POTA unlike the Canadian legislation was repealed shortly before it was set to expire. V. Vijayakumar, "Legal and Institutional Responses to Terrorism in India", in Ramraj, *et al*, *Global Anti-Terrorism Law and Policy*, (2005) at 366.

[77] Investigative hearings under the Criminal Law were held to be constitutional in *Re Section 83.28 of the Criminal Code*, [2004] 2 S.C.R. 248, but were not renewed by Parliament in 2007 and expired subject to a legislative sunset. See generally Kent Roach, "The Role and Capacities of Courts and Legislatures in Reviewing Canada's Anti-Terrorism Law", (2008) 24 Windsor Review of Legal and Social Issues 5-56.

Canada has adopted the idea articulated by Aharon Barak that a democracy must fight terrorism "with one hand tied behind its back. Nonetheless, it has the upper hand."[78] In another example of courts being influenced by each other,[79] the House of Lords in *A v. Secretary of State* relied on ideas of proportionality developed by the Supreme Court of Canada.

The United States Supreme Court in *Boumediene*[80] has explained how the suspension of habeas corpus has been subject to "cyclical abuses" during times of war and civil unrest. It has sought to preserve the writ as a means of preventing such abuses and protecting the innocent. The Supreme Court of India has recognized that "[i]f human rights are violated in the process of combating terrorism, it will be self-defeating. Terrorism often thrives where human rights are violated…"[81]. Judges have been aware that punishing the innocent is a thuggish tactic that should be left to terrorists. It is not worthy of a democratic state.

Recent events in different parts of the world have underlined how both terrorism and human rights transcend domestic boundaries. The abuse of human rights, especially the torture of terrorist suspects in other countries, has constrained the ability of many countries to use deportation as an instrument to counter terrorism. The need for better global co-operation in the struggle against terrorism and the need to protect human rights go hand in hand. Democracies will find it easier to co-operate with countries that take steps to improve the protection of human rights and in particular to respect the absolute right against torture.

### B. The Role of Courts in Protecting the Rights of Unpopular Minorities

One of the most eloquent defenders of the need for respect for equality in anti-terrorism efforts has been Ronald Dworkin. Both before and after 9/11, Professor Dworkin has stressed the centrality of the right to equal concern and respect. He has

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[78] *Re Section 83.28 of the Criminal Code*, [2004] 2 S.C.R. 248 at para 7 quoting H.C. 5100/94, *Public Committee Against Torture in Israel v. Israel*, 53(4) P.D. 817, at p. 845 and Barak, "Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy", (2002), 116 *Harv. L. Rev.* 16, at pp. 150-51.

[79] Ran Hirshl, "The Rise of Comparative Constitutional Law", (2008) 3 Indian J.of Constitutional Law 11; Ian Cram "Resort to Foreign Constitutional Norms in Domestic Human Rights Jurisprudence with Reference to Terrorism Cases" (2009) 68 Cambridge L.J. 118.

[80] *Boumediene v. Bush*, 128 S.Ct. 2229 at 2247.

[81] *People's Union for Civil Liberties v. Union of India*, (2004) 9 SCC 580.

effectively interrogated the wide-spread idea that 9/11 required a new balance between liberty and security by arguing that the liberty of Muslim minority was being exchanged in exchange for the security of the non-Muslim majority.[82]

Many courts have recognized that some anti-terrorism efforts have the effect of violating the rights of unpopular minorities. The House of Lords in *A v. Secretary of State* concluded that indeterminate detention of non-citizens suspected of terrorism was not rationally connected to preventing terrorism given that the terrorist threat also came from British citizens. The 2005 London bombings proved that the House of Lords' insight was correct. Subsequent British anti-terrorism measures, including control orders and new terrorism offences, have applied to both citizens and non-citizens and thus has respected the values of formal equality. That said, the House of Lords has been less sensitive to equality values by appearing to approve profiling of those with appearances associated with Muslims in designated areas.[83] Profiling practices, however, can cause considerable grievance among those targeted for discriminatory treatment. At the same time, they may not be effective because they encourage terrorist groups to use those who do not fit the profile. They are a crude substitute for more precise intelligence and for co-operation within the community.

The United States Supreme Court has vindicated equality values to the extent that it has refused, albeit by a slim margin, to restrict habeas corpus review to American citizens.[84] The Supreme Court of Canada has unfortunately been less sensitive to equality concerns. It dismissed an equality challenge to security certificates under immigration law that, unlike Canadian criminal law, allows the use of secret evidence. The Court based its reasoning on the idea that non-citizens unlike citizens do not have a right to remain in Canada.[85] Such reasoning, however, does not address the necessity for exposing non-citizens to lower standards of adjudicative fairness.

A lower Canadian court has struck down the requirement that the prosecutor must establish a religious or political motivation for a terrorist act as an unjustified violation of

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[82] Ronald Dworkin, "The Threat to Patriotism", New York Review of Books, Feb. 28, 2002. Dworkin's theory of judicial review has been criticized for giving unelected judges too much power. See for example Jeremy Waldron, "The Core of the Case Against Judicial Review", (2006) 115 Yale L.J. 1346.
[83] *R (Gillan) v. Commissioner of Police*, [2006] UKHL 12, at paras 68, 81.
[84] *Boumediene v. Bush*, 128 S.Ct. 2229 (2008).
[85] *Charkaoui v. Canada*, [2007] 1 S.C.R. 350.

freedom of religion and freedom of speech. The judge held that such requirements could facilitate the targeting of certain religious and political groups. The motive requirement could not be justified as a proportionate limitation because it was possible to distinguish terrorism from ordinary crime without burdening fundamental freedoms.[86] Political and religious motive requirements are common in much Commonwealth anti-terrorism legislation[87], but not in Indian legislation. This may reflect sensitivity to equality values, but also recognition that motive requirements constitute another element of a terrorism offence that must be proven beyond a reasonable doubt.

Racial or religious discrimination in enforcing anti-terrorism laws offends equality values, but it may also be counterproductive in producing feelings of ill will among different classes of the populace. Reliance on racial or religious stereotypes will produce many false negatives where innocent people are subject to investigation, but also false positives that ignore terrorists who do not fit the profile or stereotype.

### C. The Role of Proportionality

Much judicial supervision of anti-terrorism activity has been driven by the requirement that states justify the proportionality of measures that restrict rights. Such ideas are implicit in most bills of rights that provide for justification of reasonable limits on rights. Drawing on Canadian law, the House of Lords in *A v. Secretary of State* described the requirements of proportionality in the following terms:

> "[W]hether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."[88]

The first question in proportionality is whether the objectives of laws that infringe rights are important enough to justify limits on rights. Courts are often quite deferential at

[86] *R. v. Khawaja,* (2006) 214 C.C.C.(3d) 349. See Kent Roach, "Terrorism Offences and the Charter: A Comment on *R v. Khawaja*", (2007) 11 Can.Crim.L.Rev. 271.
[87] Kent Roach, "The Post 9/11 Migration of Britain's Terrorism Act, 2000", in Sujit Choudhry, (ed.), *The Migration of Constitutional Ideas,* (2005).
[88] *A. v. Secretary of State,* 2004 UKHL 56 at para 30.

this preliminary stage.[89] It is thus not surprising that they have accepted objectives such as the prevention of terrorism and the protection of secret intelligence from disclosure as objectives that could justify limits on rights.

The second question in proportionality analysis is whether a law or activity that limits rights is rationally connected to the objective. This analysis is generally designed to weed out irrational laws including those blinded by prejudice or stereotype against unpopular minorities. The House of Lords in *A v. Secretary of State* concluded that the law was not rationally connected to the objective of preventing terrorism because it was limited to non-citizens and the terrorist threat was not limited to non-citizens. The Indian Supreme Court used a form of rational connection analysis when it held that provisions for special courts under TADA did not violate equality rights. Ratnavel Pandian J. held that "the limit of valid classification must not be arbitrary but scientific and rational. It must always rest upon some real and substantial distinction bearing reasonable and just relation to the needs in respect of which the classification is made."[90] The presence of a rational basis was held to be conclusive in establishing no equality violation with respect to the use of special courts. As will be seen, however, full proportionality analysis requires consideration of whether the state's objective could be achieved without violating the right in question.

The critical question in proportionality analysis will often be whether the state's legitimate objectives can be achieved in a manner that restricts rights less. The Supreme Court of Canada frequently emphasizes this aspect of proportionality when striking down laws. This was true in *Charkaoui* when it held that the state's legitimate objective in protecting intelligence from disclosure could be achieved with a less drastic infringement of the detainees rights by allowing a security cleared special advocate to challenge secret evidence that was put before a judge. The Court was essentially saying that the state could achieve its objective just as well while infringing rights less.

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[89] David Beatty, *The Ultimate Rule of Law*, (2005); Kent Roach, "Must We Trade Rights for Security?", (2006) 27 Cardozo L.Rev. 2151.

[90] *Kartar Singh v. State of Punjab*, (1994) 3 SCC 569: AIR 1995 SC 1726 at para 219. He concluded that those tried under TADA were "a distinct class of persons and the procedure prescribed for trying them for the aggravated and incensed nature of offences are under different classification distinguishable from the ordinary criminals and procedures." *Ibid* at para 222.

The Supreme Court of India's decision upholding POTA particularly in relation to police questioning and the taking of confessions can be criticized for its tendency to focus on the importance of the objective of preventing terrorism without fully exploring whether this objective could be accomplished in a less rights invasive manner by requiring confessions and other information to be made to magistrates as opposed to the police. This criticism of the ruling does not necessarily imply that the additional police powers in POTA could not be justified as a necessary response to terrorism. It merely notes that the Court did not thoroughly examine the adequacy or inadequacy of less rights invasive alternatives. If, for example, Indian courts were to address the question of anonymous testimony in the future, they should pay attention to restrictions that other courts including the European Court of Human Rights and the House of Lords have placed on the use of anonymous testimony particularly in cases where the testimony has decisive weight in the case.[91] Within a proportionality analysis, however, it would still be open for a court to conclude that less rights invasive alternative policies would not be as effective in the conditions faced in a particular country to fulfill the legislature's objectives. Proportionality analysis does not require a mechanical and unthinking preference for any real or imagined alternative that restricts rights less; it does require a justification about why alternatives that would violate rights less will not work.

The last question in proportionality analysis is in some respects the most difficult to determine because it involves the overall balance as measured by the ability of the law in question to achieve the state's objective compared to the law's adverse effects on those whose rights are violated. Courts may be able to determine the severity of the rights violation for the litigant before them, but they may have a more difficult time in determining how effective the rights violation is in achieving the state's goals. Counter-terrorism successes may be kept secret for fear of alerting terrorists and courts may not be able to appreciate fully the role that an impugned law or practice plays in the state's overall security strategy. As will be discussed below, however, governments have the

[91] *Doorson v. The Netherlands,* (1996) 22 EHRR 330; *R. v. Davies,* [2008] UKHL 36. But see now *Criminal Evidence (Witness Anonymity) Act, 2008,* c.15 authorizing and restricting the use of anonymous testimony.

ability to present confidential information to the court when it is relevant to determining whether certain security measures are justified.

Some laws can be rejected as disproportionate because they are not rationally connected to the objective of preventing terrorism or the least rights invasive means of achieving that goal. In such cases, the court is simply telling the government that they can pursue their important objective of preventing or investigating terrorism just as well in a manner that infringes rights less. The most difficult issue for courts will be to assess the overall balance between harms to rights and the need to limit rights to prevent terrorism. This is, however, only the final stage of proportionality analysis and should only apply in cases where courts find that the limit on rights is both rationally connected and necessary to pursue the state's objective in preventing terrorism.

### D. The Role of Dialogue Between Courts and Legislatures

The idea that judicial review does not necessarily result in judicial supremacy and that it allows the legislature to engage in a dialogue with the judiciary by enacting reply legislation is closely connected to proportionality analysis described above. In many cases, a court that decides that a law is a disproportionate restriction on the rights of terrorist suspect can safely contemplate that the legislature can formulate a better-tailored law to advance the legislative objective. The possibility of a dialogic reply by the legislature is most obvious when the court strikes down an anti-terrorism law on the ground that it is not the least restrictive manner to advance its objective. The Court may rehearse a variety of alternative laws that will advance the objective just as well while violating rights less.

The idea that courts can engage in a dialogue with the legislature is also useful when courts review executive action. If the executive action is not specifically authorized by the legislature, the court can declare the action invalid, especially in cases where the action may invade rights. Such judicial activism affirms the rule of law. It provides the legislature with an opportunity to assume responsibility for the executive action by

explicitly authorizing it.[92] The courts may then have to decide whether the new legislation is a proportionate restriction on rights.

The courts can also use remedies as a dialogic device. The Supreme Court of Canada in *Charkaoui* suspended the declaration that the existing law that allowed no adversarial challenge to secret evidence was invalid. This meant no immediate remedy for the detainees, but it provided Parliament a year to devise a better law. The House of Lords' remedy in *A v. Secretary of State* was a non-enforceable declaration that the law was incompatible with rights. The Blair government could have ignored the decision because courts under the *Human Rights Act, 1998* are powerless to strike down primary legislation.

Courts may be prepared to be more active when relieved of the burden of finality and judicial supremacy. Indeed one of the differences between the deferential *Rehman* decision and the more active *Belmarsh* decision was that the House of Lords had the final word about whether Rehman would be deported whereas in *Belmarsh* it knew that no one would necessarily be released as a result of its decision and that the legislature could reply in a variety of ways including simply ignoring the decision.

In its Guantanamo decisions, the United States Supreme Court has stayed well clear of remedies that would release the detainees. The result has been that Congress has enacted a variety of laws in response to the Court's decisions. In accordance with the insights of Alexander Bickel[93], the United States Supreme Court has made some of these decisions on sub-constitutional statutory grounds in order to give legislatures an opportunity to respond before the court has to declare what the constitution requires. Judicial decisions that require explicit legislative authorization for questionable executive counter-terrorism actions can be defended as democratic because they require the legislature to take responsibility for the executive action. Although most debates about the appropriate judicial role pit the unelected judiciary against the elected legislature, in

[92] In a case where a court strikes down executive action such as racial or religious profiling that singles out a person for enhanced investigation because of their perceived race or religion, the legislature will then have an opportunity to decide whether it wishes explicitly to sanction such discrimination. Elner Elhauge, *Statutory Default Rules*, (2008), ch 9. For arguments that legislatures in most democracies would be reluctant explicitly to authorize racial or religious profiling see Sujit Choudhry and Kent Roach, "Racial and Ethnic Profiling: Statutory Discretion, Democratic Accountability and Constitutional Remedies", (2003) 41 Osgoode Hall L.J. 1.

[93] Alexander Bickel, *The Least Dangerous Branch*, (1986).

the national security context, the most frequent contest is between unelected judges and unelected members of the executive.

It can be argued that the idea that courts interact in a dialogue with legislatures and society proves too much. The ability of the legislature to justify limits and even to derogate from rights creates a danger of legitimizing repressive measures. Although the House of Lords decision in *A* led to the repeal of a law that authorized indeterminate detention, it also led to the creation of problematic control orders. The special advocate regime introduced in Canada in response to *Charkaoui* has also been criticized for the restrictions it places on the ability of special advocates to consult with detainees. Finally, it took the election of the new Obama Administration as opposed to litigation to obtain a commitment to close Guantanamo and even that commitment has subsequently encountered resistance in Congress. The courts have been characterized as mere "irritants" rather than "obstacles" to state anti-terrorism efforts. [94]

Such criticisms of dialogue, however, only underline that courts have not assumed a position of judicial supremacy in the post 9/11 environment and under modern bills of rights that provide for legislative limitations and derogations from rights. Rather, courts have left room for elected government to continue to make choices about anti-terrorism policy. Nevertheless, judicial decisions have helped publicize the often secret security activities of the state. In addition, judicial review continues to be used to raise awareness about and to challenge controversial policies such as control orders and special advocates that were enacted as a response to judicial decisions. The dialogue between courts and legislatures about the necessity of anti-terrorism measures continues.

## E. The Implications Of A Right To Security And Life That Is Violated By Terrorism

A number of commentators have argued that courts should evaluate anti-terrorism measures with a focus on the rights of actual and potential victims of terrorism and not only with a focus on the rights of those accused of terrorism. Irwin Cotler, a noted Canadian human rights lawyer and law professor, has argued that anti-terrorism

[94] K.D. Ewing and Joo-Cheong Tham "The Continuing Futility of the Human Rights Act" [2008] Public Law 668 at 691.

legislation should not be evaluated exclusively "from the juridical optic of the domestic criminal law/due process model" but rather should be seen as "'human security' legislation".[95] In India, Soli Sorabjee, another noted human rights lawyer, has argued that the right against terror is part of the right to life in Article 21 of the Indian constitution and places a positive obligation on the state to take counter-terrorism measures.[96] Such arguments are stronger in jurisdictions which recognize a range of positive rights including basic socio-economic rights. Nevertheless, they cut against the traditional liberal idea that constitutional rights are designed to protect individuals from the state as opposed to violence by non-state actors such as terrorists. Although governments can and should be held politically accountable for failures to prevent acts of terrorism, victims of terrorism cannot generally claim that the state has violated their rights by failing to prevent all acts of terrorism. Indeed, imposing a legal duty or a positive obligation on the state to prevent all acts of terrorism would be quite unrealistic. It would also beg the question of why victims do not have not an enforceable right to be protected from all crime.

Even if contrary to the above argument, it is accepted that victims and potential victims of terrorism have a right to life or security that is violated by terrorism, such rights cannot be used as an excuse to avoid respecting the rights of those suspected or accused of terrorism. At the highest, one is left with a clash of rights. In a case dealing with the competing rights of the accused to full answer and defence and the rights of complainants in sexual cases not to have their private therapeutic records disclosed to the accused, the Supreme Court of Canada has suggested that the appropriate response to a clash of rights is to define the competing rights in a manner that minimizes the conflict between the rights.[97] A problem with this approach, however, is that it allows rights to be limited without full attention to the principles of proportionality discussed above. There is a particular danger that definitional limits might be imposed on the rights of the

[95] Irwin Cotler, "Thinking Outside the Box: Foundational Principles for a Counter-Terrorism Law and Policy", in R. Daniels, *et al*, *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill*, (2001), at 112.

[96] Soli Sorabjee, *Law and Justice*, (2004); Mr. Soli Sorabjee has also filed a writ petition before the Supreme Court under Article 32 of the Constitution of India, seeking to enforce the positive right to life under Article 21. He argues that it is the obligation of the state to provide an atmosphere where an individual can exercise his right to life without fear of terrorism.

[97] *R. v. Mills*, [1999] 3 S.C.R. 668 at paras 61-94.

accused even when such limits are not truly necessary to prevent terrorism and when there are less rights invasive alternatives.

Under the principles of proportionality outlined above, the state's objective in preventing and punishing terrorism is already recognized as an important governmental objective that can potentially justify limits on rights. Proportionality analysis will not be improved by describing the state's objective in preventing terrorism as including the protection of the rights of victims of terrorism. The rhetorical effect of reference to the rights of innocent victims may also prevent clear thinking about whether particular measures are necessary or will actually be effective in preventing terrorism. Finally, the idea that victims and potential victims of terrorism have an enforceable and positive right to life or security unfortunately often amounts to a false promise to those victims. The promise is especially false if the state uses victims as a justification for harsh security measures that are designed to facilitate the interests of the executive without providing adequate compensation for the terrible harm suffered by victims of terrorism and their families.[98]

## F. Exaggerated Claims of Legislative Expertise

The deference that motivated Lord Hoffmann in his 2001 *Rehman* decision was driven by the idea that the elected branches of government had a greater democratic legitimacy and expertise on matters of national security than the courts. As so many legislatures scrambled after 9/11 to enact new anti-terrorism laws, many began to realize that legislative decision-making often left much to be desired.

Legislatures often enact anti-terrorism laws very quickly for symbolic reasons and in response to traumatic events when there is not enough time or information for proper deliberation. The immediate aim of much legislation is to re-assure the public and elected bodies may have an incentive to overestimate risk and overreact to it[99] For example, there was a global rush to enact laws against the financing of terrorism after 9/11. Much of this impetus came from the United Nations, which had its own interests in promoting laws against terrorism financing despite the low cost of most acts of terrorism. Most

[98] *People's Union for Civil Liberties v. Union of India*, (2004) 9 SCC 580.
[99] Bruce Ackerman, *Before the Next Attack*, (2006); David Feldman "Human Rights, Terrorism and Risk: The Roles of Politicians" [2005] Public Law 364 at 379.

legislatures enacted new financing laws long before the 9/11 commission concluded in 2004 that the 9/11 attacks were financed in ways that could not easily have been detected by the authorities or stopped.[100] Courts should not ignore evidence that much anti-terrorism legislation is made up without full information or time for deliberation.

In *A v. Secretary of State*, the House of Lords implicitly repudiated Lord Hoffmann's idea that the elected branches of government had greater democratic legitimacy than the courts when Lord Bingham stated that he did not accept the distinction that the Attorney General "drew between democratic institutions and the courts". Although "judges in this country are not elected and are not answerable to Parliament", they do play a democratic role in enforcing the rule of law. As such, it "is wrong to stigmatize judicial decision-making as in some way undemocratic".[101] The House of Lords was acting under a jurisdiction that Parliament had provided it under the *Human Rights Act*. The broader point, however, is that courts are starting to recognize that respect for rights, including those of unpopular minorities, are one of the reasons why democracies have moral superiority in their encounters with terrorism and that courts can play an important role in curbing legislative overreactions to terrorism.

## G. Exaggerated Claims of Executive Expertise

One of the important components of Lord Hoffmann's defence of judicial deference in *Rehman* was the idea that the executive has greater knowledge and expertise in matters of national security. One of the fallouts of a range of well-publicized intelligence failures from 9/11, the Iraq Weapons of Mass Destruction debacle, the London bombings and the November 2008 attacks in Mumbai has been a growing lack of confidence in the ability of intelligence agencies to make and act upon accurate determinations of dangers. All of these well-publicized intelligence failures may persuade some judges not to be as deferential to the conclusions reached by the national security executive as the House of Lords was in *Rehman*. It is significant that in that case, the SIAC, a specialized tribunal that regularly considers secret information and that includes expertise in security intelligence, held that the Security Services had failed to establish

[100] Kent Roach, "Sources and Trends In Post 9/11 Anti-Terrorism Laws", in B. Goold and L. Lazurus, *Terrorism and Human Rights*, (2007).
[101] *A v. Secretary of State*, 2004 UKHL 56 at para 42.

their claim that Rehman was helping to bring Islamic extremists with weapons training into England. It would be difficult for a judge faced with this question now to ignore the great variety of well-publicized and officially examined intelligence failures.

Another dimension of exaggerated claims of executive expertise is the tendency of the executive to use secrecy as a weapon. The executive can claim secrecy in an attempt to avoid accountability for failure and abuses. In Canada, there has been a pattern of over claiming secrecy that has been used in unsuccessful attempts to avoid accountability for sloppy police and intelligence work that has both wrongly claimed people to be security threats and failed to identify real terrorists. Courts or other review bodies must be able to get behind these secrecy claims if there is to be effective review and accountability for the state's counter-terrorism efforts.[102] Patterns of overuse of secrecy erode claims of executive expertise in national security matters. A more disciplined and sparing use of secrecy is another measure that the judiciary can promote that will better protect human rights while at the same time arguably improving the state's response to terrorism.

Judges will confront a dilemma when faced with claims that secret information is relevant to their decisions. If they do not examine the information, they can make misinformed decisions. For example, both the majority in *A v. Secretary of State* who held that the government was justified in declaring an emergency and Lord Hoffmann who held that the government was not justified can be criticized for not considering the secret information that the government had presented on the question. If judges become privy to secret information, however, they will not be able to use that information to justify their decisions. The publicity and transparency of the judicial process is one of its distinct virtues. Judges should lean towards examining secret information so that their decisions are fully informed. They should also appoint security-cleared lawyers to provide adversarial challenge both to the government's claims of secrecy and to the content of the secret information. Judges who are exposed to secret information can still write public judgments to justify their decisions, albeit judgments that do not reveal

[102] For a Canadian judicial inquiry that found that a Maher Arar and his wife were wrongly labeled as Islamic extremists associated with Al Qaeda and that the government responded by both over claiming secrecy during the commission and leaking damaging and supposedly secret information about Arar before the inquiry. See *Commission of Inquiry into the Activities of Canadian Officials in Relation to Maher Arar, Recommendation and Analysis*, (2006).

information subject to valid secrecy claims. This experience of writing two judgments, one for the public and one for those with proper security clearances, has been used in some Canadian cases where judges have recently rejected overbroad state claims of secrecy.[103]

## IV. Conclusion

On the basis of early post 9/11 decisions such as *Rehman*, many would have predicted that courts would have deferred to executive and legislative acts taken in the name of the combating terrorism. Despite this, many courts have been quite active in the sense that they have invalidated executive and legislative anti-terrorism actions. . The United States Supreme Court has enforced the right to habeas corpus first against executive and then legislative attempts to oust that right with respect to the Guantanamo detentions. The Supreme Court of Canada and the House of Lords has held that major parts of anti-terrorism laws are incompatible with rights. Judicial decisions in this regard have been driven by a concern about the proportionality of anti-terrorism measures and a judicial confidence that it could invalidate unnecessary restrictions on rights while still not impairing the state's ability to combat terrorism by other less rights-invasive but equally as effective means.

The courts have also recognized that they do not necessarily have the last word in security matters. They are participating in an ongoing dialogue with the government with respect to the necessity and justification of anti-terrorism measures. Judicial decisions invalidating either executive or legislative actions can result in a further more refined and better tailored legislative reply to the court's decision.

Although courts should be aware of the limitations of their own institutional competence, especially with respect to secret information that they have not seen, they

[103] *Canada v. Commission of Inquiry into the Activities of Canadian Officials in Relation to Maher Arar,* 2007 FC 766. For arguments that courts are better positioned that the legislature to have access to and to evaluate secret intelligence see David Feldman "Human Rights, Terrorism and Risk: The Roles of Politicians" [2005] Public Law 364 at 380-382.

should not ignore the limits of legislative and executive competence in counter-terrorism. The legislature can be driven to overreact to horrific acts of terrorism and the executive may attempt to shelter failures and abuses by the overuse of secrecy. Although there are some dangers, courts should consider examining secret information that is relevant to their decisions. Courts should be conscious about the importance of not abusing human rights and in particular respecting the rights of unpopular minorities in order to ensure that democracies retain the high ground in their struggles against terrorism.