

**The Legal Accountability of the UK Intelligence Services**

**by**

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A thesis submitted in partial fulfilment for the requirements for the degree of MPhil at the University of Central Lancashire

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## **ABSTRACT**

In recent years there has been a considerable amount of debate regarding the accountability of the intelligence agencies. However, much of the debate may have approached the subject from a one-sided perspective. Either the discussion has tended to be weighted in favour of the ideological values integral to the civil liberties agenda or it has been weighted in favour of potentially countervailing national security considerations. This thesis argues that neither of these perspectives, in and of itself, is fully able to reconcile the need to protect national security with the need to ensure the optimal protection of civil liberties.

The distinctive character of this thesis lies in the use of an immanent critique method to draw out the strengths and weaknesses of both the civil liberties and the national security agendas. Immanent critique involves the evaluation of the claims and self image of a legal or ideological perspective by reference to the very standards to which it must appeal in order to secure its own legitimacy. This may be achieved by identifying the major claims of any given ideology, either implied or stated, and comparing them to the reality of their procedural and institutional operation in practice. Where the research reveals internal discrepancies and contradictions within the ideology, these contradictions can be subjected to critical scrutiny. It is then possible build upon the constructive implications of these two critiques by suggesting alternative legal, constitutional and political approaches to issues of the regulation and accountability of intelligence services.

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## CHAPTER ONE: INTRODUCTION

### 1.1 General Introduction

The central impetus of this thesis is to critically analyse and assess the methods by which the British security services have been, and are being, legally regulated and held accountable. The thesis analyses the credibility and effectiveness of these provisions in the light of what is known about their practical enforcement. It pays particular attention to the actual and possible tensions that exist between the need for preserving important national security imperatives, and the seemingly competing requirement that civil liberties be safeguarded, as far as possible, in that all forms of state power should be exercised in accord with the rule of law.

In order to achieve its objectives, the thesis will review the arguments regarding accountability from the internal perspectives of both civil libertarians and those charged with protecting the UK's national security agenda. The main thrust of the thesis will be to explore the actual and potential tensions that exist between these two approaches, and to bring forward suggestions for legal and constitutional reform in the area of security service regulation, that may take into account the internal contradictions of each.

This topic is important because, whilst provisions for the accountability of the security agencies have previously been analysed in some depth, much of the research has approached the subject from a distinctly one-sided perspective. Exclusive emphasis has been placed either upon the ideological values integral to the civil liberties agenda or to countervailing national security considerations. For example, civil libertarian critics, such as Helen Fenwick,<sup>1</sup> argue that the overriding purpose of the state is to secure and protect its citizen's fundamental human rights and personal autonomy. For Fenwick, civil and political rights are universal and inalienable. Interruption to basic freedoms and liberties must be justified by showing that there is '*a clear and substantial risk*'<sup>2</sup> that exercising the right: '*will do great damage to the person or property of others.*'<sup>3</sup> A perceived threat to some abstract risk, such as moral health, or the subversion of democratic practices, may not be enough to justify the suspension of basic and individual rights. By contrast, those who adopt a national security agenda, such as Aldrich,<sup>4</sup> but also David Cameron, have tended to emphasise the perceived need for a collective approach to civil liberties that prioritises national security considerations and the economic

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<sup>1</sup> See discussion, Helen Fenwick, *Civil Rights: New Labour, Freedom and the Human Rights Act 1998*, Longman, 2000, p297-416.

<sup>2</sup> Helen Fenwick, *Civil Liberties and Human Rights*, Cavendish, 2002, p13.

<sup>3</sup> Helen Fenwick, *Civil Liberties and Human Rights*, Cavendish, 2002, p13.

<sup>4</sup> Aldrich, *The Hidden Hand: Britain, America and the Cold War Secret Intelligence*, Murray Publishers, 2001.

well-being and security of the country and its core democratic institutions. A typical argument here is that terrorism represents a gross violation of the 'right to life' and security on which all the other civil rights ultimately depend. Consequently, national security considerations are treated as if they self-evidently 'out-trump' the claim to civil and political rights asserted as absolute by civil libertarians.

This thesis argues that neither of these one-sided perspectives is able to define and successfully interpret the full range of issues that arise whenever questions of the legal accountability of intelligence services are discussed. Each may view such issues only from the limits of its own assumptions and perspectives, which inevitably means that vital dimensions of the topic may be glossed over and ignored, particularly those which are incompatible with the entrenched assumptions.

## 1.2 The Methodology of the Thesis

In order to fully understand the core assumptions of these two opposing ideologies, and to assess their individual strengths and weakness, the thesis utilises a classic 'Frankfurt School' methodology of immanent criticism of competing ideologies. However, this is deployed in the service of a social science critique of ideology rather than social philosophy.<sup>5</sup> For the 'Sheffield School', an imminent type of criticism represents an empirically focused 'methodology' of evaluation, animated with practical intent. Its particular virtue is in calling to attention discrepancies evident within the relationship between noble constitutional ideals and practical institutional realities.

The immanent critique methodology involves the assessment of legal ideologies by reference to their own standards and ideals. It is an effort to turn the normative standards that a legal ideology employs back upon the institutional procedures and actions which are supposed to embody those standards. The methodology aims to '*hold to account a given legal perspective or institutional practice by judging how it operates in the light of the very norms and ideals which it claims to embody, and from which it seeks to derive its sense of public legitimacy.*'<sup>6</sup> It determines whether an object corresponds to its indigenous principle, holding that: '*objects are true when they are that which they should be, that is, when their reality corresponds to their concept.*'<sup>7</sup> An immanent critique methodology may be

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<sup>5</sup> This is unlike Hegel and Marx, who utilised the methodology of immanent critique to break new theoretical and philosophical ground. Hegel, for example, challenged the liberal understanding of 'possessive' individualism. He argued that the concept of personhood presupposes an established political community, which is committed to the worth and will of every individual, but that individuals must recognise duties to uphold just institutions and embrace public obligations. For discussion see: Hegel, *Lectures on the Philosophy of World History, Introduction: Reason in History*, Cambridge University Press, 1975, 114f. See also: Andrew Buchwalter, *Hegel, Marx, and the Concept of Immanent Critique*, *Journal of the History of Philosophy*, 29, pp 253-79 and Michael Salter, *Hegel and Law*, Ashgate, 2003, p77-81.

<sup>6</sup> Geoff Pearson and Michael Salter, *Getting Public Law Back Into a Critical Condition: The Rule of Law as a Source for Immanent Critique*, *Social and Legal Studies*, 1999, Vol. 8(4).

<sup>7</sup> Geoff Pearson and Michael Salter, *Getting Public Law Back Into a Critical Condition: The Rule of Law as a Source for Immanent Critique*, *Social and Legal Studies*, 1999, Vol. 8(4) p 62.

usefully employed to disrupt and challenge the operation of legal ideologies by identifying some degree of ‘shortfall’ between what is being promised on the one hand, and that which is actually being practiced on the other. Harden and Lewis provide an example of the benefits of the methodology. In their book, *The Noble Lie*,<sup>8</sup> Harden and Lewis assess apparent discrepancies within the British conception of the rule of law.<sup>9</sup> They contend that, whilst there are ‘*immanent expectations of a system of open and accountable government, which may run deep in the British people, and that the rhetoric and claims made for our system of government foster such expectations,*’<sup>10</sup> these expectations often square ill with the contemporary constitutional and political scene. This, claim Harden and Lewis, is because the ‘*pragmatic development of British political and governmental institutions and practices has meant that alongside expectations of openness, democracy and public accountability, there have developed strong traditions and practices concerning the day-to-day running of the nation’s business, which live very uneasily with those expectations.*’<sup>11</sup> Consequently, claims in support of open government, democratic accountability and parliamentary scrutiny, may promise far more ideologically than they are delivering in reality.

An immanent critique methodology is defined by Harden and Lewis as one which: ‘*Seeks to identify the major claims or beliefs of a group or order, and to subject them to different degrees of scrutiny. The first stage is to examine the logical interrelationships between the various claims for control, for consistency and internal ‘fit’...If...some degree of dissonance appears then such contradictions must be addressed.*’<sup>12</sup> According to this definition, subjecting the major claims of any given ideology to scrutiny involves various stages of analysis. The first is to identify and neutralise any external value judgements, which do not form an integral part of the norms and claims, but which the ideology itself claims to embody and be orientated towards. The research must confine itself to only those goals which can be shown to be internal to the area of legal regulation in question. Hence, it is inappropriate to assess the civil libertarianism of Fenwick and others by the standards and ideals of other approaches to the legal regulation of the intelligence services.

The result of this neutralisation is that, where researchers find fault with an area of legal regulation informed by a specific ideology, it is because this area is failing to honour, in actual practice, the very standards and goals which it claims itself to be orientated towards, and from which it attempts to justify itself and appear legitimate to the public at large. This methodology gives the researcher the benefit of being able to avoid what may otherwise be an unduly positive, distorted or one-sided

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<sup>8</sup> Harden and Lewis, *The Noble Lie, The British Constitution and the Rule of Law*. Hutchinson, 1986.

<sup>9</sup> Harden and Lewis, *The Noble Lie, The British Constitution and the Rule of Law*. Hutchinson, 1986.

<sup>10</sup> Harden and Lewis, *The Noble Lie, The British Constitution and the Rule of Law*. Hutchinson, 1986, p11.

<sup>11</sup> Harden and Lewis, *The Noble Lie, The British Constitution and the Rule of Law*. Hutchinson, 1986, p11.

<sup>12</sup> Harden and Lewis, *The Noble Lie, The British Constitution and the Rule of Law*, Hutchinson, 1986, p 10.

account of the relationship between legal and constitutional values and the results of how legal regulation actually operates in practice.<sup>13</sup>

In the context of this thesis, applying the methodology of immanent critique entails developing an initially sympathetic appreciation of the values, interests and concerns of both the civil libertarian agenda and the framework of interpretations which informs the claims made by those who adopt a national security agenda. A second phase of the methodology reconstructs, from primary sources, the explicit and implicit rationale behind these two opposing ideological viewpoints on questions of the legal and constitutional accountability of the intelligence agencies, by the measures in which each defines their own purpose and justification. This ‘phenomenological’ immersion into each ideology continues until the researcher manages to uncover and understand an insider’s view of the precise meaning and justification for the particular norms which each ideology seeks to vindicate. Through a close comparison between the stated claims and objectives of each ideology on the one hand, and the nature and impact of the actual institutional practices on the other, it is possible to identify a shortfall between the ideological assumptions and values and that which is actually being delivered in practice.

The implications of these findings can be further realised by asking how, in principle, the law would have to operate if it were to fully embody and adequately represent the practical culmination and realisation of the norms of each of the two ideologies. As well as further elucidating the true meaning of the ideologies, this serves the purpose of assessing the full impact of each ideology on the activities of the security agencies, and on those persons under surveillance, should their ultimate standards ever be realised in practice. This helps to uncover additional areas of the two ideals that claim to represent solutions to the need to protect security or civil liberties, but which, in practice, fail to deliver their own promises and standards. Therefore, it is possible through the application of this methodology for an ideological viewpoint to be shown to be indefensible when evaluated by reference to the very standards and ideals that it purports to be relying upon and vindicating in practice.

However, if critical analysis remained fixed at this stage *‘then its value judgements would remain abstract and lack practical realism.’*<sup>14</sup> Hence, immanent criticism requires a further phase involving recourse to the empirical realm of actual institutional conduct. With respect to this, Harden and Lewis suggest that, in order to examine the relationship between claims and reality, it is necessary to *‘set the exposed beliefs against the empirical world....to examine the degree of ‘mesh’ or ‘disjuncture’.*<sup>15</sup> This makes it possible to describe the *‘behaviour of political and governmental institutions and make*

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<sup>13</sup> David Campbell, *The Failure of Marxism*, Dartmouth, 1996, pp 5-6, 12 and 47.

<sup>14</sup> Geoff Pearson and Michael Salter, *Getting Public Law Back Into a Critical Condition: The Rule of Law as a Source for Immanent Critique*, Social and Legal Studies, 1999, Vol. 8(4).

<sup>15</sup> Harden and Lewis, *The Noble Lie: The British Constitution and the Rule of Law*. Hutchinson, 1986, pp 10, 13.

*an attempt to analyse that behaviour against the claims of traditional doctrine.*<sup>16</sup> Achieving this involves identifying specific examples of how legal regulation is, in practice, being carried out and the impact of its enforcement, or non-enforcement, on different groups in society. This has the virtue of uncovering how legal and institutional practices appear to those who are socially located on the receiving end of legal implementation.

The conclusions of the empirical research can be utilised to bring analytical questions. These questions will explore the meaning and implications of the relevant legislative measures and what they may be saying about the protection of, for example, civil and political rights on the one hand, and the actual operation of legally empowered covert surveillance on the other. This is likely to uncover a series of disparities between that which a specific legal or constitutional ideology claims in principle to be about, and the actual nature of the project which it can be shown, empirically, to be actually carrying forward in practice.<sup>17</sup> For example, in the context of this thesis, the research has found discrepancies between rhetorical promises of enhanced accountability mechanisms to regulate the activities of the security services and their actual implementation in practice. For example, the introduction of the Regulation of Investigatory Powers Act 2000 (RIPA) was claimed provide a scheme for state surveillance that would meet the demands of the European Convention on Human Rights, which seeks to protect civil liberties and political rights. However, Helen Fenwick argues that *'the most striking feature of the RIPA is the determination evinced under it to prevent citizens invoking Convention rights in the ordinary courts,*<sup>18</sup> rather than its ability to limit state interference or provide effective oversight mechanisms.

Thus far, an immanent critique has allowed this project to explore the core principles and ideological perspectives underpinning the standpoint of certain key participants in debates over the legal accountability of intelligence services. A further stage of the immanent critique methodology requires that the research focus specifically upon their critique's practical implications for institutional reform. That is, what changes must, in practice, be both proposed and then implemented in order to resolve discrepancies at the level of lived experience between, say, political rhetoric about the accountability of the security agencies, and the concrete empirical reality. According to Harden and Lewis, immanent criticism should lead to a reform process involving the advocacy of policies which would seek to realise currently unfulfilled aspects of existing constitutional norms.<sup>19</sup> This has the virtue of allowing the critique to both update and then revise practice and doctrine in order *'to bring the*

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<sup>16</sup> Harden and Lewis, *The Noble Lie: The British Constitution and the Rule of Law*. Hutchinson, 1986, pp 10, 13.

<sup>17</sup> David Campbell, *The Failure of Marxism*, Dartmouth, 1996, pp 45, 47, 67 and 77.

<sup>18</sup> Helen Fenwick, *Civil Liberties and Human Rights*, Cavendish, 2002. p724.

<sup>19</sup> Harden and Lewis, *The Noble Lie: The British Constitution and the Rule of Law* Hutchinson, 1986, p290. See also the discussion in: Geoff Pearson and Michael Salter, *Getting Public Law Back into a Critical Condition: the Rule of Law as a Source for Immanent Critique*, *Social and Legal Studies*, 1999, Vol. 8(4). p 493.

*expectations and the reality into closer harmony.*<sup>20</sup> In the case of this research, by comparing the degree of coherence or mismatch between ‘legitimising claims’ and practical actions within the sphere of security service accountability, it should, in principle, be possible to identify the general direction that constitutional and legal reforms must take to minimise future contradictions. It is to these suggestions for reform that the PhD phase is largely devoted.

### **1.3 The Structure of the Thesis**

Aside from the introduction and conclusion, the thesis is organised into five chapters.

Chapter two is concerned with setting the scene for further analysis by outlining the current legal context within which the security agencies operate. This chapter is divided into three parts. Part one will examine the legal mechanisms that regulate the security agencies, including the implementation and effect of the Security Service Act 1989, the Intelligence Services Act 1994, and the Investigation of Regulatory Powers Act 2000. The discussion will ask how these regulations have been interpreted by the security agencies in the light of actual operational practice. It will examine security agency work in the areas of counter-terrorism, counter-proliferation, espionage, subversion, serious crime and protecting the critical national infrastructure. Part two of this chapter will assess the various techniques of covert surveillance which may be employed by the security agencies, and the mechanisms by which these techniques are legally authorised. The discussion will include an examination of the relevant provisions of the Regulation of Investigatory Powers Act 2000, including the authorisation of warrants for directed and intrusive surveillance. The final part of this chapter will examine the key methods by which the security agencies may be held to account. Part IV of the Regulation of Investigatory Powers Act 2000 provides for Commissioners, who can review the lawful authorisation of warrants and the circumstances in which investigations are conducted. This Act also adds a layer of judicial oversight in the form of the Investigatory Powers Tribunal. A further element of accountability may be provided in the form of parliamentary oversight. Parliament, and particularly the House of Commons, may affect the way in which the security agencies operate by subjecting security policy to a measure of scrutiny and influence and by creating or amending legislative provisions. There is also an added level of parliamentary accountability for the intelligence agencies in the form of the Intelligence and Security Committee, which was set up by the Intelligence Services Act 1994.

The next two chapters are concerned with comparing the two competing ideologies against their own standards and ideals. The object of these chapters is to assess whether each of the two ideologies

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<sup>20</sup> Harden and Lewis, *The Noble Lie: The British Constitution and the Rule of Law*. Hutchinson, 1986, p 290.

(liberalism and the national security agenda) can deliver, in operational practice, what it promises in institutional ideals. Chapter three will examine the strengths and weaknesses of the civil liberties and human rights agenda as seen through the perceptions of certain academics and human rights lawyers who promote the beliefs associated with liberalism. It asks how civil libertarian values, such as the primacy of individual rights, may influence the way in which liberals perceive national security. Chapter four considers the traditional state-centred approach to defining national security, which is often employed by the security agencies and the government. It asks how the preference for securing the protection of the state and its territories may affect the way in which national security is thought about and dealt with. It is important to understand the underlying perceptions of these groups because their key values can potentially have a significant effect on the way in which national security is defined and, in turn, the way in which it is thought that the security agencies should be regulated.

Chapter five seeks to further develop and elucidate the real meaning of the discussion in the previous chapters by examining how national security would be defined and protected if either of the ideologies were ever fully realised and implemented. In other words, this chapter asks, what would the outlook for national security be if liberalism were the predominant theme by which security policy was applied? In the same way, how would security policy be defined and applied if the national security agenda were the only, or sole, imperative? This chapter will highlight certain discrepancies between the promises that each ideology advances to legitimise its core principles, and the real effect of these principles, were they ever to be put into full operational practice.

Having fully reviewed the arguments regarding accountability from both the national security and the civil libertarian agendas, and illustrated these issues with respect to actual cases, chapter six will assess the degree to which current legislation has struck a proper balance between the competing perspectives. To this end, it will analyse whether the current legal position represents an optimal balance between the civil liberties agenda and national security interests. Where the previous research has identified discrepancies between the two competing ideals, the chapter will make proposals for reform that mesh the least discredited elements of the two ideologies together. Consequently, the final phase of this research will culminate in an evaluation of various recommendations for legal change and reform.

## **CHAPTER TWO: THE ROLE AND FUNCTION OF THE SECURITY AGENCIES AND THEIR LEGAL REGULATION**

### **2.1 Introduction**

This chapter focuses on the contemporary role of the intelligence agencies and on their legal regulation. Over the last two decades, the security agencies have undergone a number of changes to the way in which they are officially authorised and legally sanctioned. Many of these changes have been made in the name of transparency and greater accountability in response to the requirements of the European Convention on Human Rights and associated case law, which has now been incorporated into the UK's domestic law by the Human Rights Act 1998. The stated intention behind these reforms is to provide a fully comprehensive statutory scheme for state surveillance that will meet the requirements of this Convention. This re-thinking has resulted in the security agencies being placed on a statutory footing; MI5 by the Security Service Acts of 1989 and 1996; and MI6 and GCHQ by the Intelligence Services Act 1994. More recently, further changes were made to the agencies accountability in the form of the Regulation of Investigatory Powers Act 2000 (RIPA). The RIPA places most forms of state surveillance on a statutory basis and extends to certain forms of interception of communications which fell outside the former regime. The 2000 Act makes clear the purposes for which each of these powers may be used, which of the law enforcement agencies may use them, and the uses which may be made of the information acquired.

This chapter will begin by examining the nature and extent of the legal role of the intelligence agencies as defined by the relevant Acts. This part of the chapter will analyse the way in which the Intelligence agencies have interpreted these Acts in the light of their actual areas and methods of practice. To this end, the chapter will examine security agency activity in the areas of terrorism, counter-proliferation, espionage, serious crime, subversion and the protection of the critical national infrastructure. The second part of the chapter will review the various modes of surveillance which are employed by the security agencies and the way in which these practices are authorised and controlled by the Regulation of Investigatory Powers Act 2000. The final part of the chapter will concern itself with the mechanisms of accountability that have been established by both the Acts and by the parliamentary and constitutional systems of the UK. It will analyse the efficacy of the role of the Commissioners and the Investigatory Powers Tribunal which are now regulated by the Regulation of Investigatory Powers 2000. It will also analyse the role that debate and scrutiny in parliament has to play in setting appropriate security agendas which may affect the security agencies. In this respect the discussion will include an examination of the role of the Intelligence and Security Committee (ISC),

which was set up under the Intelligence Services Act 1994, to scrutinise certain elements of security agency work.

Only by understanding the real nature of security operations can one assess whether the current legal and political position, regarding the accountability of the security agencies, adequately reconciles the need to protect civil liberties with the requirement that the UK's national security interests be safeguarded.

## PART ONE

### 2.2 The Legal Regulation of the Security Agencies

Until 1989, the law did not regulate the security agencies. This effectively meant that they had no statutory recognition, powers, complaints or supervisory procedures. Rather, they were set up by executive decision, with functions determined by the executive, and accountable only to the executive. For example, prior to 1989, a directive issued by the Home Secretary, Sir David Maxwell-Fyfe in 1952, governed the operation of MI5.<sup>21</sup> This directive provided that, although the Security Service did not form part of the Home Office, the Director General would be responsible to the Home Secretary with a right, on appropriate occasions, of direct access to the Prime Minister. The directive stated that the Service '*is part of the defence forces of the country,*'<sup>22</sup> and that '*its task is the defence of the realm as a whole from internal and external dangers arising from attempts at espionage and sabotage, or from the actions of persons and organisations, whether directed within or without the country, which may be judged to be subversive of the state.*'<sup>23</sup> The directive made it clear that the work of the Service was to be strictly limited to what is necessary for these purposes: It was expressly required to be kept absolutely free from any political bias or influence.

MI5 was governed under the Maxwell-Fyfe Directive until the 1980's. Thus for much of their early history, the intelligence agencies may have operated with relative anonymity and impunity. Indeed the historian Christopher Andrew observed that the work of the British intelligence and security agencies may have been underpinned by two constitutional doctrines.<sup>24</sup> The first of these doctrines was that the existence of the intelligence agencies should never be officially acknowledged. In this respect,

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<sup>21</sup> A copy of the Maxwell-Fyfe Directive has been reproduced in: Nigel West, *A Matter of Trust*, Hodder and Stoughton, 1982, Appendix I.

<sup>22</sup> A copy of the Maxwell-Fyfe Directive has been reproduced in: Nigel West, *A Matter of Trust*, Hodder and Stoughton, 1982, Appendix I.

<sup>23</sup> A copy of the Maxwell-Fyfe Directive has been reproduced in: Nigel West, *A Matter of Trust*, Hodder and Stoughton, 1982, Appendix I.

<sup>24</sup> Christopher Andrew, *Defence of the Realm: The Authorised History of MI5*, Penguin Books, 2009.

Michael Howard observed, ‘so far as official government policy is concerned, enemy agents are found under gooseberry bushes, and our own intelligence is brought by storks,’<sup>25</sup> The second constitutional doctrine was that the work of the agencies would not be subject to external scrutiny or legislation. On this point, Andrew’s points out that ‘any regulation which was carried out was undertaken by the agencies themselves, and occasionally, with a very light touch by the Government.’<sup>26</sup> This was a situation, Andrew’s added, that was widely accepted by both Parliament and the public at that time.<sup>27</sup>

However, since the 1980’s, the issue of how to institute increased legal and democratic control over the security agencies has tended to steadily permeate the political agenda.<sup>28</sup> The impetus for change, it has been suggested, involved scandals regarding alleged abuses of power by the agencies.<sup>29</sup> For example, in the UK, public confidence in the ability of the Security Service to act without bias or prejudice may have been shaken by the publication of books, such as Peter Wright’s ‘*Spycatcher*’.<sup>30</sup> Wright alleged that MI5 ‘bugged and burgled its way around London,’<sup>31</sup> and that the Director-General from 1956-65 was a Soviet agent. Wright and others also claimed that the Service attempted to destabilise the Labour government of Harold Wilson.<sup>32</sup> It was alleged that MI5 viewed the Labour Party’s electoral victory of 1974 as against the national interest and instigated a plot to feed anti-Labour Party information, from MI5 files, to pro-conservative newspapers.<sup>33</sup> Wright’s accusations highlighted the danger that the considerable powers exercised by the Security Service, under cover of secrecy, may render them more capable than any other civilian agency of destroying civil rights and freedoms and even democracy itself.

These concerns, along with the need to comply with the European Convention on Human Rights,<sup>34</sup> may have been instrumental in leading to the enactment of the Security Service Act 1989. This and the later Security Service (Amendment Act) 1996, placed MI5 on a statutory footing. The Acts seek to set out the functions of MI5 and enable certain actions to be taken on the authority of warrants issued

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<sup>25</sup> Quoted in R. Godsen, *Comparing Foreign Intelligence: the US, the USSR, the UK and the Third World*, Pergamon-Brassey’s, 1988.

<sup>26</sup> Christopher Andrew, *Defence of the Realm: The Authorised History of MI5*, Penguin Books, 2009, p753.

<sup>27</sup> Christopher Andrew, *Defence of the Realm: The Authorised History of MI5*, Penguin Books, 2009, p753.

<sup>28</sup> See comments in: Peter Gill, *Democratic and Parliamentary Accountability of the Intelligence Services after September 11<sup>th</sup>*, Geneva Centre for the Democratic Control of Armed Forces, Working Paper No. 103, January 2003.

<sup>29</sup> Peter Gill, *Democratic and Parliamentary Accountability of the Intelligence Services after September 11<sup>th</sup>*, Geneva Centre for the Democratic Control of Armed Forces, Working Paper No. 103, January 2003. Gill suggests that this change is reflected worldwide and not just in the UK. In the ‘old democracies’ such as North America and Western Europe, the major reason for change has been as a result of alleged abuses of power. Elsewhere, in countries such as the former Soviet Bloc, the changes have tended to occur as a result of the democratisation of formerly authoritarian or military regimes.

<sup>30</sup> Peter Wright, *Spycatcher: The Candid Autobiography of a Senior Intelligence Officer*, Stoddart, 1987.

<sup>31</sup> Peter Wright, *Spycatcher: The Candid Autobiography of a Senior Intelligence Officer*, Stoddart, 1987.

<sup>32</sup> See also Leigh, *The Wilson Plot*, Pantheon, 1988. Harold Wilson, *The Labour Government 1964-70: A Personal Record*, Weidenfeld and Nicolson, 1971. Peter Wright, *Spycatcher: The Candid Autobiography of a Senior Intelligence Officer*, Stoddart, 1987.

<sup>33</sup> See also: Harold Wilson, *The Labour Government 1964-70: A Personal Record*, Weidenfeld and Nicolson, 1971.

<sup>34</sup> Wrights allegations also came at a time when the European Commission on Human Rights found that cases challenging MI5 surveillance were admissible. The European Court of Human Rights has consistently found that administrative discretion in matters affecting individual rights be, wherever possible, prescribed by law. See: *Harman and Hewitt v UK*. Appl. No.121175/86: (1992) 14 EHRR 657.

by the Secretary of State.<sup>35</sup> The 1989 Act also established, for the first time, a procedure for the investigation of complaints about the Service and a Commissioner charged with the task of reviewing the procedure by which the Home Secretary issues warrants. The 1989 Act was followed in 1994 by the Intelligence Services Act, which sought to regulate the activities of MI6 and GCHQ. The Act defines the functions of these services and the responsibility of its chiefs. This Act also established, for the first time, a system of parliamentary accountability for all three services.

Each security and intelligence agency has its own formal role, structure and legal remit. They also have formal and informal links with other organisations. For example, the interlocking relations between the intelligence agencies are underpinned by the Cabinet Office which, with the help of the Joint Intelligence Committee, tasks the agencies, assesses their product and determines their resource needs. In order to better understand the nature of these structures it is necessary to look at each agency in turn.

### **2.3 The Legal Regulation of the Security Service (MI5)**

The Security Service, also known as MI5, is based at Thames House in London. It is responsible for protecting the UK from covertly organised threats affecting its national security and economic well-being. The Security Service is also tasked with assisting other law enforcement agencies, such as the police, in preventing and detecting serious crime.<sup>36</sup> In order to meet these requirements the Service is involved in: investigating threats by gathering, analysing and assessing intelligence; countering specific threats by taking action; and advising both the government and other bodies on the nature of any given threat, and on the relevant protective security measures.<sup>37</sup> By gathering secret intelligence, the Security Service aims to obtain detailed knowledge of target organisations, their key personalities, infrastructure, intentions, plans and capabilities.<sup>38</sup>

The Security Service operates under the authority of the Home Secretary who may appoint the Director-General for the service.<sup>39</sup> The Director General is responsible for the operations and efficiency of the Service; for ensuring that the service only obtains and uses information in accordance with its functions; and for ensuring that the Service does nothing which might further the interests of any political party.<sup>40</sup> The Director General must also make an annual report on the work

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<sup>35</sup> Security Service Act 1989, s3. This power is now contained in Sections 5 and 6 of the Intelligence Services Act 1994.

<sup>36</sup> Much of MI5's work in the area of serious crime is now undertaken by the Serious Organised Crime Agency (SOCA). See commentary below.

<sup>37</sup> [www.mi5.gov.uk](http://www.mi5.gov.uk). Major Areas of Work. (Accessed 2011).

<sup>38</sup> [www.mi5.gov.uk](http://www.mi5.gov.uk). Major Areas of Work. (Accessed 2011).

<sup>39</sup> See: Security Service Act 1989 s2(1).

<sup>40</sup> See: Security Service Act 1989 s2(2).

of the Service to the Home Secretary and the Prime Minister, and may at any time report to either of them on any matter relating to its work.<sup>41</sup>

These reporting obligations on the Director General can potentially add a layer of parliamentary scrutiny of the Director General's exercise of power. It may effectively mean that the Director General is required to account for the lawful and efficient handling of the Service. However, problems may arise if there is too close a nexus between the Prime Minister and the agencies. In such a case, it is argued that '*it may be impossible for them to act as a course of external control and a basis of democratic oversight will be undermined*'.<sup>42</sup> The problem is that if ministers are too closely involved in day-to-day matters, the reporting obligation on the Director General may do little to increase the scrutiny of the agencies actions. Indeed, at the time that the provisions of the 1989 Act were debated in Parliament, there were calls to increase the levels of Parliamentary scrutiny.<sup>43</sup> These proposals were not heeded at the time, but were eventually implemented by the Intelligence Services Act, 1994. This Act introduced the Intelligence and Security Committee, which may now add a valuable extra level of Parliamentary scrutiny.<sup>44</sup>

Section 1 of the Security Service Act 1989 sets out the major tasks of the Security Service. It provides that: '*The function of the Service shall be the protection of national security and, in particular, its protection against threats from espionage, terrorism and sabotage, from the activities of agents of foreign powers and from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means*'.<sup>45</sup> Thus, the primary task of the Service is the protection of national security against a number of possible threats. However, whilst the Act makes it clear that the Security Service is restricted to countering only those threats that rise to the level of being a threat to national security, the precise meaning of the term 'national security' is not further clarified. This gives rise to the question, under what criteria and with what information does the Service decide when, or when there is not, a risk to national security? The Home Secretary, during the debate of the Security Service Bill, assured that the term '*can only refer...to matters relating to the survival of the nation as a whole, and not to party-political or sectional or lesser interests*'.<sup>46</sup> However, questions still persist regarding the true extent to which the security agencies may define any given risk as a national security issue.

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<sup>41</sup> See: Security Service Act 1989 s2(4).

<sup>42</sup> Hans Born and Ian Leigh, *Democratic Accountability of Intelligence Services*, Geneva Centre for the Democratic Control of Armed Forces (DCAF) Policy Paper No.19, 2007, p7.

<sup>43</sup> Hansard, HC Vol. 143, Col. 1113 and Vol. 145 Col. 217. HL Vol. 357 Col. 947.

<sup>44</sup> Discussed further below in Part 3.

<sup>45</sup> Security Service Act 1989, s1(2).

<sup>46</sup> Hansard, HC Vol. 143 Col. 1113. See also, Vol. 145 Col. 217, and HL Vol. 357 Col. 947.

A second brief given to the Service by the 1989 Act is found in Section 1(3). This section provides for the function of safeguarding the *'economic wellbeing of the UK against threats posed by the actions or intentions of persons outside the British Islands.'*<sup>47</sup> Whilst it seems that such protection is limited to countering the actions of persons outside the British Islands, the definition is far from unproblematic and there exists the potential to give a very broad interpretation of the concept. When asked to elaborate on the extent of this subsection, the Home Secretary stated that it referred to oil and other commodities on which we are dependant and to the protection of scientific and technical secrets.<sup>48</sup>

The 1989 Act was later amended by the Security Service Act 1996 to add the further function of acting *'in support of the activities of police forces and other law enforcement agencies in the prevention and detection of serious crime.'*<sup>49</sup> According to the Government, the provision would allow the Security Service to be deployed against organised criminals such as drug traffickers, money launderers and racketeers. Whilst the provision has been controversial because there is no concrete definition of 'serious crime,' and no guarantee that the work of the Service would be adequately confined, calls for a tighter definition were dismissed in Parliament on the ground that it would *'distract us from our task,'*<sup>50</sup> and could create *'loopholes that could be exploited by unscrupulous defence lawyers to challenge the legality of the Security Service's involvement in a case.'*<sup>51</sup> However, in any event, MI5's involvement in the area of serious crime was suspended in early 2006.<sup>52</sup> Much of this work is now undertaken by the Serious Organised Crime Agency (SOCA). SOCA works in partnership with other government agencies,<sup>53</sup> and private organisations, to tackle serious crime both in the UK and abroad. It is involved in the detection and prevention of people smuggling and human trafficking, major gun crime, fraud, computer crime, money laundering and class A drugs.<sup>54</sup>

Since its inception, the Act and its provisions have been criticised. One potential problem is that it may be assumed that the legislation will prompt genuine change, as opposed to artificial and bogus change. However, as Peter Gill argues, *'laws may only achieve symbolic change so that people can be reassured that problems have been dealt with.'*<sup>55</sup> According to Gill: *'if these laws are not matched by even greater effort in implementing those laws then little that is real may change.'*<sup>56</sup> The problem

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<sup>47</sup> Security Service Act, s1(3).

<sup>48</sup> H.C. Deb. 17<sup>th</sup> January 1989, Vol.145, Col 221

<sup>49</sup> Security Service Act 1996, s1.

<sup>50</sup> HL Deb, 14<sup>th</sup> May 1996, Cols. 398-9.

<sup>51</sup> HL Deb, 14<sup>th</sup> May 1996, Cols. 398-9.

<sup>52</sup> See: [www.mi5.gov.uk](http://www.mi5.gov.uk).

<sup>53</sup> For example, the UK Border Agency, HM Revenue and Customs and the Association of Chief Police Officers in the Organised Crime Partnership Board.

<sup>54</sup> See: [www.soca.gov.uk](http://www.soca.gov.uk). The Home Secretary sets SOCA's strategic priorities. At its inception, its top priorities included dealing with Class A drugs and organised immigration crime.

<sup>55</sup> Peter Gill, *Democratic and Parliamentary Accountability of the Intelligence Services after September 11<sup>th</sup>*, Geneva Centre for the Democratic Control of Armed Forces, Working Paper No. 103, January 2003, p3.

<sup>56</sup> Peter Gill, *Democratic and Parliamentary Accountability of the Intelligence Services after September 11<sup>th</sup>*, Geneva Centre for the Democratic Control of Armed Forces, Working Paper No. 103, January 2003, p3.

for Gill is that it is not unconceivable that '*beneath the surface of the new law, what the agencies actually do and how they do it might remain essentially unchanged.*'<sup>57</sup> Thus, Gill argues that '*achieving cultural change in agencies that may have long histories of complete autonomy from outside control or influence is a long term project that may require even greater political will than achieving initial legal reform.*'<sup>58</sup>

It is true that legislation will not be effective if it is merely superficial. However, under the 1989 Act the notion of accountability was, at least to some extent, given some legislative effect and the age of oversight may have been born. Indeed, the successful enactment of the 1989 Act may have been a major factor in implementing similar mechanisms in 1994 for the regulation of MI6 and GCHQ. The enactment of the Act also seems to have encouraged an atmosphere of increased openness and transparency. Since 1989 there has been a steady growth in the amount of intelligence material placed in the public domain, either by the government or the agencies themselves. For example, the heads of MI5 and MI6 have made public speeches, and the agencies have declassified numerous documents. The agencies also seem to have become much more cooperative with the media. For example, a report drafted by the Foreign Affairs Committee confirmed that there '*are now systems that allow the press to make enquiries of the Intelligence Community.*'<sup>59</sup> The Intelligence and Security Committee has also revealed that a number of accredited journalists are now able to contact the agencies with questions and, in certain circumstances, receive briefings from them.<sup>60</sup> However, on this point, whilst it seems that '*there are no specific ground rules regarding contacts between the intelligence services and journalists,*'<sup>61</sup> it is claimed that unauthorised contacts should never be permitted.<sup>62</sup> There have been some concerns that Andrew Gilligan, who alleged that a dossier supporting the UK's entry into Iraq had been 'sexed up', painted a picture of frequent contact, both official and unofficial. According to Gilligan, he had four unofficial contacts, one of which showed him a Defence Intelligence Staff paper classified '*Top Secret*', and another which showed him a Joint Intelligence Committee paper. In the opinion of the Foreign Affairs Committee, Gilligan's contacts should be thoroughly investigated, and the Government should review links between the security and the intelligence agencies, the media and Parliament, along with the rules which apply to them.<sup>63</sup> Thus, it

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<sup>57</sup> Peter Gill, *Democratic and Parliamentary Accountability of the Intelligence Services after September 11<sup>th</sup>*, Geneva Centre for the Democratic Control of Armed Forces, Working Paper No. 103, January 2003, p3.

<sup>58</sup> Peter Gill, *Democratic and Parliamentary Accountability of the Intelligence Services after September 11<sup>th</sup>*, Geneva Centre for the Democratic Control of Armed Forces, Working Paper No. 103, January 2003, p3.

<sup>59</sup> A comment by Alastair Campbell. See: House of Commons, Foreign Affairs Committee, *The Decision to go to War in Iraq*, Ninth Report of Session 2002/03.

<sup>60</sup> Intelligence and Security Committee, *Annual Report, 2004-2005*, Para 85.

<sup>61</sup> Dame Pauline Neville Jones. See: House of Commons, Foreign Affairs Committee, *The Decision to go to War in Iraq*, Ninth Report of Session 2002/03, p48.

<sup>62</sup> House of Commons, Foreign Affairs Committee, *The Decision to go to War in Iraq*, Ninth Report of Session 2002/03, p48.

<sup>63</sup> House of Commons, Foreign Affairs Committee, *The Decision to go to War in Iraq*, Ninth Report of Session 2002/03, p48.

seems that whilst the security agencies are increasingly open, considerations of national security may continue to ensure that they are unable to be transparent.

## **2.4 The Legal Regulation of the Secret Intelligence Service (MI6) and the Government Communications Headquarters (GCHQ)**

The Secret Intelligence Service, commonly known as MI6, is a Crown Service responsible for information gathering and operations outside the UK. It is MI6 operations, together with military intelligence and GCHQ, which gathers intelligence from around the world through espionage and covert action. MI6 comes under the jurisdiction of the Foreign and Commonwealth Office, and its activities are answerable to the Foreign Secretary and the Cabinet. The GCHQ was established under the Royal Prerogative as part of the Foreign and Commonwealth Office. The principle tasks of GCHQ include the security of military and official communications and the provision of signals intelligence (SIGINT) for the Government.

So far as legal regulation is concerned, both MI6 and GCHQ are now governed by the Intelligence Services Act 1994. The functions of MI6 are to: (a) *obtain and provide information relating to the actions or intentions of persons outside the British Isles,* and (b) *'to perform other tasks relating to the actions or intentions of such persons.'*<sup>64</sup> MI6, therefore, is responsible for obtaining secret information and conducting operations in support of the UK's foreign policy objectives, and to counter threats to the UK's interests worldwide. These threats, according to the Government, may include: *'the proliferation of nuclear, chemical, biological and conventional weapons, terrorism, serious crime, espionage, sabotage, and the threat to our armed forces in times of conflict.'*<sup>65</sup> Thus, MI6 is geared towards its traditional role of protecting external, rather than internal, security. This, however, does not mean that the Service will not carry out operations on UK soil. Targeted individuals may enter the UK temporarily and information relating to them may be found here.

The functions of GCHQ are defined by s3.<sup>66</sup> Its role is twofold. Firstly, it is tasked to *'monitor or interfere with electromagnetic, acoustic and other emissions and any equipment producing such emissions'* and to *'obtain and provide information derived from or relating to such emissions.'*<sup>67</sup> Secondly, GCHQ is to provide advice and assistance about language and cryptology to the Armed Services, government departments and any other organisations approved by the Prime Minister.<sup>68</sup>

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<sup>64</sup> Intelligence Services Act 1994, s1(a) and (b).

<sup>65</sup> Mr Douglas Hurd, HC Deb. 22<sup>nd</sup> February 1994, Col. 155.

<sup>66</sup> Intelligence Services Act 1994, s 3.

<sup>67</sup> Intelligence Services Act 1994, s 3 (a).

<sup>68</sup> Intelligence Services Act 1994, s 3 (b).

Whilst the functions of these two agencies, as defined in the Act, may seem rather vague, they are limited by Sections 1(2) and 3(2) of the Act, which provide that the functions of MI6 and GCHQ will be exercisable only in the interests of national security with a particular reference to the defence and foreign policies of HM Government; or in the interests of the economic wellbeing of the UK; or in support of the prevention and detection of serious crime. As in previous legislation the expression ‘national security’ is used without further definition and, as a consequence, the concerns expressed during academic and Parliamentary debates leading to the enactment of the Security Service Act 1989, were not addressed by the new Act. Indeed, the general view of Parliament, as regards a clearer definition, may have been summed up by the Prime Minister in 1988 when he said: ‘*National security is generally understood to refer to the safe-guarding of the State and the community against threats to their survival or well-being. I am not aware that any previous administration has thought it appropriate to adopt a specific definition of the term.*’<sup>69</sup>

Both the Security Service Act 1989 and the Intelligence Services Act 1994 have been criticised for their ambiguity and lack of clarity. For some academics and civil libertarians, the lack of a concrete definition of terms such as ‘national security’ and ‘serious crime’ leaves room for ‘*reasoning in a circle, in the crudest form, so that national security becomes whatever the institution concludes, in good faith, that it ought to be involved in.*’<sup>70</sup> Thus, it is argued that the Acts might afford the security agencies too much power to define the extent of their own remit. These concerns are seemingly shared, to some extent, by some in the agencies themselves. For example, the former head of the Security Service, Dame Stella Rimington, has expressed concerns that the ‘*fear of terrorism is being exploited by the government to erode civil liberties and risks creating a police state.*’<sup>71</sup> Therefore, whilst the Home Office and the security agencies have counter argued that the relevant legislation ‘*provides law enforcement agencies with the tools to protect the public as well as ensuring that the government has the ability to provide effective public services,*’<sup>72</sup> questions still persist regarding whether the Acts adequately protect the civil liberties of UK citizens. For example, it has been suggested that in the threat climate since the 9/11 attack, debates around security and intelligence issues have tended to shift away from accountability towards ‘intelligence failure’ and how future threats can be averted.<sup>73</sup> In other words, the predominant concern may have been more about how the security agencies are dealing with the alleged ‘war on terror’ at an operational level rather than how

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<sup>69</sup> In answer to a parliamentary question put by Ken Livingstone. HC Debs, Vol. 126, Col. 7 (25<sup>th</sup> January, 1998).

<sup>70</sup> Lustgarten and Leigh, *In From the Cold: National Security and Parliamentary Democracy*, Oxford University Press, 1994, p382.

<sup>71</sup> The Telegraph, *Spy Chief: We Risk a Police State*, 16<sup>th</sup> February, 2009.

<sup>72</sup> The Telegraph, *Dame Stella Rimington: Home Office Hits Back at Ex-MI5 Chief’s Police State Warning*, 17<sup>th</sup> February, 2009.

<sup>73</sup> Peter Gill, *Democratic and Parliamentary Accountability of the Intelligence Services after September 11<sup>th</sup>*, Geneva Centre for the Democratic Control of Armed Forces, Working Paper No. 103, January 2003, p2.

they are legally regulated, controlled or made accountable<sup>74</sup>. In such a case, as Gill argues, it is not inconceivable that accountability ‘*may be swept away in the naive belief that agencies ‘unhampered’ by oversight requirements might somehow be more efficient and effective,*’<sup>75</sup>

Perhaps, one way of analysing the scope of national security as outlined in the various Acts is to examine its actual interpretation by the intelligence agencies. This can be achieved by investigating the fields of operation in which these agencies are currently involved. Such an analysis may uncover the areas that the security agencies do, or do not, consider to be a national security risk. For example, much of security agency work is currently taken up by countering threats emanating from terrorism, the proliferation of weapons of mass destruction and espionage.<sup>76</sup> However, an examination of current security activity, whilst useful, will not highlight the potential for future changes in the way in which national security is perceived. The security agencies must assess and prioritise constantly changing covert threats to UK security and allocate resources accordingly. It follows, therefore, that at any one time the intelligence agencies may not be exercising in all areas of their potential remit. Therefore, the subsequent paragraphs will analyse the activities of the security agencies in the light of both their actual and potential practice. The following areas will be discussed:

1. The duty to protect national security from threats related to terrorism.
2. The work of the security agencies in frustrating procurement by proliferating countries of material, technology or expertise relating to weapons of mass destruction.
3. The duty to prevent damage to the UK emanating from foreign espionage.
4. The extent of security agency work in the prevention of serious crime.
5. Protection from actions intended to overthrow or undermine parliamentary democracy – Subversion.
6. Protection of the Critical National Infrastructure and security advice.

## **2.5 The Duty to Protect National Security from Threats Related to Terrorism**

The intelligence agencies are charged with protecting UK national security from the threat of terrorism both at home and abroad. Indeed, countering threats emanating from terrorism and terrorist activity currently constitutes a major part of the work of the intelligence agencies. For example, 88%<sup>77</sup> of MI5’s resources are currently deployed in counter-terrorist work. This is mainly divided

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<sup>74</sup> See comments in: Peter Gill, *Democratic and Parliamentary Accountability of the Intelligence Services after September 11<sup>th</sup>*, Geneva Centre for the Democratic Control of Armed Forces, Working Paper No. 103, January 2003, p2.

<sup>75</sup> Peter Gill, *Democratic and Parliamentary Accountability of the Intelligence Services after September 11<sup>th</sup>*, Geneva Centre for the Democratic Control of Armed Forces, Working Paper No. 103, January 2003, p2.

<sup>76</sup> [www.mi5.gov.uk](http://www.mi5.gov.uk).

<sup>77</sup> [www.mi5.gov.uk](http://www.mi5.gov.uk). Major Areas of Work. (Last Accessed 2013).

between international counter terrorism (73%);<sup>78</sup> terrorism related to Northern Ireland; and domestic terrorism (15%).<sup>79</sup>

The intelligence agencies are assisted in defining potential terrorist threats by the Joint Terrorism Analysis Centre (JTAC). This body, which is based at the MI5 headquarters in Thames House, was formed following the events of 11<sup>th</sup> September and has been in existence since June 2003. The JTAC analyses and assesses all intelligence relating to international terrorism, at home and overseas. It sets threat levels and issues warnings of threats and other terrorist-related subjects for customers from a wide range of government departments, including the intelligence agencies. It also produces in-depth reports on trends, terrorist networks and capabilities. According to JTAC and the intelligence agencies,<sup>80</sup> it seems the threat from terrorism has increased significantly in recent decades and particularly since the attacks in America on 11<sup>th</sup> September 2001. MI5 claim that groups such as Al Qaida present a threat '*on a scale not previously encountered,*'<sup>81</sup> and that, '*Al Qaida and its related networks seek to carry out terrorist attacks around the world, aiming to carry out 'high impact' attacks causing mass civilian casualties,*'<sup>82</sup> In addition to civilian terrorist cells, such as Al Qaida, MI5 also claim that states and their leaders have sponsored terrorism as an instrument of foreign policy. These states may shelter, arm, train and finance terrorist groups in order to use them as surrogates in attacks rather than face international retaliation by using members of their intelligence agencies.<sup>83</sup> Terrorist groups may have a wide range of aspirations, but the major causes of terrorism include: replacing governments that are regarded as insufficiently pious; reclaiming what is regarded as occupied territory; rejecting democratic institutional values in favour of a particular interpretation of Islam; and reducing the influence of Western countries in the Middle East and elsewhere.

In the light of these threats and other emerging threats, such as the potential use of biological, radiological and nuclear weapons, and from attacks on IT and other computer systems, the UK Government has introduced a raft of anti-terrorist legislation. This new legislation includes: the Terrorism Act 2000, which provides a widened definition of terrorism;<sup>84</sup> the Terrorism Act 2006, which makes it an offence to commit acts that encourage others to prepare for, or 'glorify', terrorism; and the Terrorism Prevention and Investigation Measures Act 2011, which allows the Secretary of State to impose restrictions on those he believes to be involved in terrorist activity. There are also

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<sup>78</sup> [www.mi5.gov.uk](http://www.mi5.gov.uk). Major Areas of Work. (Last Accessed 2013).

<sup>79</sup> [www.mi5.gov.uk](http://www.mi5.gov.uk). Major Areas of Work. (Last Accessed 2013).

<sup>80</sup> [www.mi5.gov.uk](http://www.mi5.gov.uk), *Threats to the UK from International Terrorism*. This page is created in close consultation with the JTAC and is subject to regular updating.

<sup>81</sup> [www.mi5.gov.uk](http://www.mi5.gov.uk). See also the Centre for the Protection of the National Infrastructure. [www.cpni.gov.uk](http://www.cpni.gov.uk).

<sup>82</sup> [www.mi5.gov.uk](http://www.mi5.gov.uk). See also the Centre for the Protection of the National Infrastructure. [www.cpni.gov.uk](http://www.cpni.gov.uk).

<sup>83</sup> [www.mi5.gov.uk](http://www.mi5.gov.uk). Major Areas of Work. (Last Accessed 2011).

<sup>84</sup> The Terrorism Act 2000 does not provide the only definition of terrorism. Section 2(2) of the Reinsurance (Acts of Terrorism) Act 1993 also contains a definition of acts of terrorism. It defines terrorism as '*Acts of persons acting on behalf of, or in connection with, any organisation which carries out activities directed towards the overthrowing or influencing, by force or violence, of Her Majesty's Government in the United Kingdom or any other government de jure or de facto*'.

Acts which allow for the proscription of terrorist organisations along with the power to freeze terrorist funds.<sup>85</sup>

Whilst, to an extent, previous anti-terrorist legislation, particularly those provisions designed to deal with paramilitary violence in Northern Ireland, has merely been adopted and made permanent in the new Acts, many new offences have been created. This has meant that there has been a significant increase in police and security agency powers to combat terrorism. Indeed, it has been argued that the extent to which law enforcers and prosecuting agencies, can and now do, operate has been widened in such a way as to fundamentally alter the relationship between the citizen and the state, and may have had a major impact on civil liberties.<sup>86</sup> For example, the Terrorism Act 2000 includes a re-working of the statutory definition of terrorism that may broaden the interpretation of terrorism to include so called 'domestic terrorist' groups. These groups have been described as dissident single issue factions that may be prepared to engage in violence to further their concerns.<sup>87</sup> They may include: animal rights extremists,<sup>88</sup> environmental rights activists; and potential new groups espousing other causes, for example, militant anti-abortion groups.<sup>89</sup> Since, those defined as terrorists are more likely to be subjected to covert investigation by the security agencies, it is necessary to examine this definition in more detail.

The Terrorism Act 2000 was brought into force in response to a Consultation Paper.<sup>90</sup> The Act received the Royal Assent on 20th July 2000 and came into force on 19th February 2001.<sup>91</sup> It repeals and replaces the Prevention of Terrorism Act 1989, and the Northern Ireland (Emergency Provisions) Act, which described terrorism as: '*The use of violence for political ends [including] any use of violence for the purpose of putting the public, or any section of the public, in fear.*'<sup>92</sup>

The definition of terrorism has been widened by the 2000 Act, Thus terrorism is now defined as:

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<sup>85</sup> See for example, Terrorism Act 2000, Terrorism Act 2006 and the Anti Terrorism, Crime and Security Act 2001. In February 2007, the financial challenge to crime and terrorism launched jointly by the Home Office, the Foreign and Commonwealth Office and the Serious Organised Crime Agency, set out for the first time how the public and private sector would come together to deter and disrupt terrorist finance. In 2007 the Government implemented the European Union Third Money Laundering Directive which tightened controls on the regulated financial sectors. In October 2007, HM Treasury set up a dedicated Asset Freezing Unit. By the end of September 2008, a total of 252 accounts used by suspected terrorists and containing more than £670,000, were frozen in the UK.

<sup>86</sup> See, for example, Paul Mobbs, *New Terrorism Legislation: How New Terrorism Legislation may Criminalise the Work of Protest Groups*, GreenNet, Civil Society Internet Rights Project, April 2003.

<sup>87</sup> See, Lord Lloyd, *Inquiry into Legislation Against Terrorism*, 1996, Cm 3420. See also: Northern Ireland Office/Home Office, *Legislation Against Terrorism*, A Consultation Document, Cm 4178.

<sup>88</sup> Such groups have, in the past, sent letter bombs to the leaders of major political parties; attacked Bristol University's Senate House with a high explosive bomb and targeted a veterinary surgeon and a psychologist with car bombs.

<sup>89</sup> Such groups are already operating in the USA. Clinics, nursing staff and doctors have been attacked and, in some cases, killed.

<sup>90</sup> Northern Ireland Office/Home Office, *Legislation Against Terrorism*, 1998, Cm 4178.

<sup>91</sup> Terrorism Act 2000, (Commencement No.3), Order 2001, S.I. 2001, No 421.

<sup>92</sup> The Prevention of Terrorism Act 1989 (s20).

*'The use or threat of action designed to influence government, an international governmental organisation,<sup>93</sup> or to intimidate the public, or a section of the public,<sup>94</sup> and is made for the purpose of advancing a political, religious or ideological cause<sup>95</sup> and it involves or causes either:*

- *Serious violence against a person;<sup>96</sup>*
- *Serious damage to property;<sup>97</sup>*
- *A threat to a person's life;<sup>98</sup>*
- *A serious risk to the health and safety of the public; or<sup>99</sup>*
- *Serious interference with or disruption to an electronic system.<sup>100</sup>*

Much of the legal argument surrounding this Act has focused on this definition because it leaves a number of areas open to interpretation. For example: what constitutes a threat? What is an ideological cause? What is meant by 'serious' as opposed to any other variety of violence? What is meant by the terms 'to influence government' or to 'intimidate the public'? How explicit do such intentions have to be? For example, it has been noted that the threat of action is not limited to public protection. According to the Act the use or threat of action *'must be designed to influence government or intimidate the public.'* The use of the word 'or' in the Act, rather than the words 'by' or 'through the means of', means that the two elements of the clause are logically separated. Therefore, it has been argued that even where the possible action involves no threat, violence or intimidation of the public, but seeks to influence government, the threat or action may still qualify as terrorism.<sup>101</sup> It is true that intimidating the public in order to influence government is a traditional tactic of terrorism, but the ability for protest groups to undertake action designed to influence government may also be the guarantee of a democratic society. The problem is that, as phrased, it is conceivable that terrorism can now encompass, in pure legal terms at least, those forms of direct action or protest sometimes engaged in by, for example, environmental and animal rights groups and by trade unions, where such activities might have an impact on public health or safety, whether or not they are violent.

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<sup>93</sup> The definition of terrorism under the 2000 Act has been amended, under the Terrorism Act 2006, to include specific types of actions against international governmental organisations, such as the UN. Terrorism Act 2006, Section 34.

<sup>94</sup> Terrorism Act 2000, s1(b).

<sup>95</sup> Terrorism Act 2000, s1(c).

<sup>96</sup> Terrorism Act 2000, s2(a).

<sup>97</sup> Terrorism Act 2000, s2(b).

<sup>98</sup> Terrorism Act 2000, s2(c).

<sup>99</sup> Terrorism Act 2000, s2(d).

<sup>100</sup> Terrorism Act 2000, s2(e). If firearms or explosives are utilised in the commission of the five actions listed in s2 (a-e), the action may amount to terrorism whether or not it is designed to influence government or intimidate the public.

<sup>101</sup> See, for example, Paul Mobbs, *New Terrorism Legislation: How New Terrorism Legislation may Criminalise the Work of Protest Groups*, GreenNet, Civil Society Internet Rights Project, April 2003.

In Lord Lloyd's *'Inquiry into Legislation against Terrorism'*,<sup>102</sup> this extension to the legal definition of terrorism is upheld. Lord Lloyd claimed that: *'There is no difference in principle...between domestic and international terrorism given that the perpetrators use many of the same methods and inspire the same fear in those caught up in, or affected by, their activities.'*<sup>103</sup> However, whilst it may be true that some of the methods employed by militant domestic groups may seem similar to terrorists, it is noteworthy that the Government,<sup>104</sup> and the Security Service, acknowledge that the organisation and methods of these groups is less well developed than that of international and Irish terrorist groups. Indeed, opponents of the new definition pointed out that *'at the time the consultation paper was elaborated, the UK was enjoying a period of decreasing violence and relative calm.'*<sup>105</sup> Thus, it was argued that *'the extension was based upon a rather speculative prediction of future risks,'*<sup>106</sup> rather than being a response to actual and real threats.

At the time the Act was passed, the Home Secretary offered some reassurance to those who expressed concerns, saying: *'The new definition will not catch the vast majority of so called domestic activist groups which exist in this country today,'*<sup>107</sup> because the main focus of official effort against such groups *'will continue to be a problem for the police rather than an issue for the Security Service.'*<sup>108</sup> However, when he was challenged to include the most militant animal rights organisations within MI5's counter-terrorism efforts, the Home Secretary acknowledged that *'there is a thin dividing line'*, saying that *'there are people who claim to be in favour of so called animal liberation who have engaged in acts which have...resulted in the most serious of violence to individuals.'*<sup>109</sup>

Since the inception of the Act, some of its provisions have been successfully challenged in the courts. In *Gillan and Quinton v UK*,<sup>110</sup> the use of stop and search powers, introduced under Section 44 of the Terrorism Act 2000, were found to breach Article 8 of the European Convention on Human rights. The Court found that these stop and search powers were a clear interference with the privacy of the person. The Court concluded that the interference was not 'in accordance with law' finding that the 'wide discretion' provided by the legislation had not been limited by adequate legal safeguards to prevent abuse of the process. Indeed, the Court indicated that the *'public nature of the search, with the discomfort of having personal information exposed to public view, might even in certain cases*

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<sup>102</sup> Lord Lloyd, *Inquiry into Legislation Against Terrorism*, 1996, Cm3420. See also *Legislation against Terrorism*, A Consultation Document. 1998. Cm 4178.

<sup>103</sup> Lord Lloyd, *Inquiry into Legislation Against Terrorism*, 1996, Cm3420. See also *Legislation against Terrorism*, A Consultation Document. 1998. Cm 4178. Para 3.5 – 3.13.

<sup>104</sup> *Legislation Against Terrorism: A Consultation Document*, 1998, Cm 4178, para. 3.11.

<sup>105</sup> Liberty, *Guide to Anti-Terrorism Legislation in the UK*. <http://www.liberty-human-rights.org.uk>. p4.

<sup>106</sup> Liberty, *Guide to Anti-Terrorism Legislation in the UK*. <http://www.liberty-human-rights.org.uk>. p4.

<sup>107</sup> Trevor Mason (Parliamentary Editor), *Terror Law, No Threat to Peaceful Protest*, PA News, Tuesday 14<sup>th</sup> December, 1999.

<sup>108</sup> Guardian Unlimited, *New Legal Powers to Trap Animal Rights Militants*. Alan Travis, 28<sup>th</sup> July 2004.

<sup>109</sup> Trevor Mason (Parliamentary Editor), *Terror Law, No Threat to Peaceful Protest*, PA News, Tuesday 14<sup>th</sup> December, 1999.

<sup>110</sup> *Gillan and Quinton v UK*, Application No. 4158/05.

*compound the seriousness of the interference because of an element of humiliation and embarrassment.*' The outcome in this case, along with widespread concern regarding the alleged misuse of Section 44 powers, may have been instrumental in encouraging the Government to introduce new legislation. Under the Protection of Freedoms Act 2012, these 'stop and search' powers have been repealed and replaced. The Act provides for the creation of a code of practice in relation to the use of the new, more limited, powers.<sup>111</sup>

According to the Government, the Terrorism Act 2000 was designed as a consolidating provision, drawing together previous anti-terror laws into a single code that would not require renewal or re-enactment.<sup>112</sup> However, since the passage of the Act, it is claimed that *'the consequences of terrorism have been dramatically highlighted in the West by the attacks of 11<sup>th</sup> September 2001, the Madrid bombings, the 7/7 bombings in London and a host of failed domestic and international plots'*.<sup>113</sup> There have been 59 terrorism related deaths in Great Britain since 2001.<sup>114</sup> Thus, the Government claims that the threat should not be underestimated because *'the authorities have been able to prevent a series of plots, and atrocities have been avoided through the incompetence of the terrorists themselves.'*<sup>115</sup>

The need to deal with these potential terrorist attacks has meant that the provisions in the 2000 Act have been heavily amended by subsequent Terrorism Acts. Some of the provisions of these Acts are claimed to have further undermined the liberties of the person.<sup>116</sup> Indeed a number of measures, most notably the imposition of control orders, and the power to indefinitely detain certain suspected terrorists, have been the subject of successful legal challenges. The subsequent paragraphs will explore some these provisions and the legal cases that have arisen from them in more detail. They will begin by exploring certain detention measures, which were introduced under the Anti-Terrorism, Crime and Security Act 2001, and which were eventually declared to be incompatible with the Human Rights Act 1998. The discussion will then analyse the cases that arose under the subsequent control order regime and the new provisions that have been introduced by the Terrorism Prevention and Investigation Measures Act 2011.

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<sup>111</sup> Protection of Freedoms Act 2012, s59 and s62.

<sup>112</sup> See: *Reviewing Counter-Terrorism Legislation*, Publications and Records, [www.parliament.uk](http://www.parliament.uk) (last accessed 17<sup>th</sup> November 2011)

<sup>113</sup> *Reviewing Counter-Terrorism Legislation*, Publications and Records, [www.parliament.uk](http://www.parliament.uk) (last accessed 17<sup>th</sup> November 2011).

<sup>114</sup> *Reviewing Counter-Terrorism Legislation*, Publications and Records, [www.parliament.uk](http://www.parliament.uk) (last accessed 17<sup>th</sup> November 2011).

<sup>115</sup> *Reviewing Counter-Terrorism Legislation*, Publications and Records, [www.parliament.uk](http://www.parliament.uk) (last accessed 17<sup>th</sup> November 2011).

<sup>116</sup> See for example: Clive Walker, *Keeping Control of Terrorists Without Losing Control of Constitutionalism*, (2007) Stanford Law Review, 1365-1463. See also: Liberty, *Countering-Terrorism*, [www.liberty.org.uk](http://www.liberty.org.uk). (Last accessed December 2011). Liberty, *From War to Law: Liberty's Response to the Government's Review of Counter-Terrorism and Security Powers*, [www.liberty.org.uk](http://www.liberty.org.uk). 2010. (Last accessed December 2011).

### **2.5.1 *The Anti-Terrorism, Crime and Security Act 2001***

The Anti-Terrorism, Crime and Security Act 2001, was formally introduced into Parliament on 19th November 2001 in response to the terrorist attacks on New York on 11th September. It received the Royal Assent and came into force on 14th December 2001. One of the most notable provisions in this Act was that it allowed the Home Secretary to certify any non-British citizen whom he suspected to be a terrorist and to detain them indefinitely pending deportation.<sup>117</sup> The Government claimed that the provision was necessary because, whilst The Immigration Act 1971 allows for the deportation of those who are a threat to national security in cases where there is insufficient admissible evidence for prosecution, a ruling by the European Court of Human Rights in *Chahal v United Kingdom* in 1996,<sup>118</sup> had prevented the deportation of persons to another country where there are substantial grounds for believing that the person would be subjected to torture, degrading or inhumane treatment.<sup>119</sup> However, the detentions were potentially an infringement of the right to liberty, which is protected by Article 5 of the European Convention on Human Rights. This potential infringement necessitated the inclusion of Section 30 of the Act, which provided for a derogation from Convention rights. Such derogations are possible under Article 15 of the European Convention on Human Rights where there is a 'state of emergency threatening the life of the nation.'<sup>120</sup>

Between 2001 and 2003 sixteen foreign nationals were detained and held using these powers at HM Prison Belmarsh.<sup>121</sup> Whilst the Act did provide a process for appealing to a judicial tribunal against the Home Secretary's decision to detain in each case,<sup>122</sup> the Government had argued that a special appellate process was needed to deal with these appeals. This, the Government claimed, was necessary because of the possibility that much of the evidence or information, upon which the Home Secretary's suspicions may be based, was likely to be sensitive information of a confidential nature whose release to the person detained, or the public, might compromise intelligence methods, operatives, and other persons. Thus, the process established by the Anti-Terrorism, Crime and

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<sup>117</sup> Anti-Terrorism, Crime and Security Act 2001, Part 4, Section 21. This provides that 'the Secretary of State may issue a certificate under this section in respect of a person if the Secretary of State reasonably (a) believes that the person's presence in the United Kingdom is a risk to national security, and (b) suspects that the person is a terrorist.'

<sup>118</sup> *Chahal v United Kingdom* (1997) 23 EHRR 413.

<sup>119</sup> Contrary to Article 3 of the European Convention on Human Rights.

<sup>120</sup> Article 15 of the European Convention on Human Rights provides that: 'In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.'

<sup>121</sup> Eight were detained in December 2001, one in February 2002, two in April 2002, one in October 2002, one in November 2002, two in January 2003 and one in October 2003. One further individual was certified but detained under other powers. Of the total detained, two voluntarily left the United Kingdom. The other fourteen remained in detention as of 18th November 2000. The Council of Europe reported in a document dated 23/07/2004 that according to information supplied to their delegation by the authorities, in March 2004, there were fourteen persons certified as suspected international terrorists and deprived of their liberty in the United Kingdom. Twelve of them were being detained exclusively under Part 4 of the Anti-Terrorism, Crime and Security Act 2001.

<sup>122</sup> Part 4, Section 25(1) Anti-Terrorism, Crime and Security Act 2001.

Security Act 2001, involved appeal to the Special Immigration Appeals Commission (SIAC). The SIAC, which is still in operation, adjudicates using special rules of evidence which, most notably, permit the exclusion of the detainees and their legal representatives from proceedings. In an attempt to ensure that their rights are safeguarded at these times, security-vetted 'special advocates' are appointed in the place of their legal representatives.

In spite of these limitations to the normative due process of law, some of the provisions of the Anti-Terrorism, Crime and Security Act were successfully challenged in the courts. In *A and Others v Secretary of State for the Home Department*,<sup>123</sup> the Law Lords ruled that the powers of detention conferred by Part 4 of Act were incompatible with the UK's obligations under the European Convention on Human Rights.<sup>124</sup> The Court ruled by a majority of 8–1 that the purported derogation was not authorized by Article 15 of the European Convention on Human Rights since the measures taken could not rationally be held to be 'strictly required by the exigencies of the situation.' This, the court stated, was because there was no observable state of emergency threatening the life of the nation and because no other European country, which had experienced far more severe crises, had declared such a state of emergency over such a long time period. The Lords also held that the law was unjustifiably discriminatory because if a British citizen was suspected of terrorism, there was no power to detain them indefinitely without trial and that no detention pending deportation had lasted for more than seven days, let alone three years.

However, a declaration of incompatibility by the courts does not deprive the legislation of legal effect under British law. Parliament may, if it wishes, decline to repeal or amend any provision declared to be incompatible by the courts. Nevertheless, a declaration of incompatibility carries strong moral force, and may create considerable political pressure to address the incompatibility. This, and the fact that the Act was also subject to a sunset clause,<sup>125</sup> may have been instrumental in prompting the government to amend the Act. Thus, Part 4 of the Anti-Terrorism, Crime and Security Act 2001 was replaced by the Prevention of Terrorism Act 2005 in March 2005, and later by the Terrorism Prevention and Investigation Measures Act 2011. The 2005 Act replaced detention in prison with 'control orders' which allowed for the imposition of an extensive and non-exhaustive set of conditions on the movements and activities of the suspected person. Even at the time of its enactment there was considerable debate as to the compatibility of this Act's provisions with domestic and international human rights laws. Thus, the provisions have attracted a high volume of litigation. Control orders have now been replaced by Terrorism Prevention and Investigation Measures (TPIM's).

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<sup>123</sup> In *A and Others v Secretary of State for the Home Department*, [2004] UKHL 56.

<sup>124</sup> The power for the courts to make declarations of incompatibility is contained in Section 4 of the Human Rights Act 1998.

<sup>125</sup> Part 4, Section 29(2), Anti-Terrorism, Crime and Security Act 2001 is concerned with the duration of the provisions in Part 4. Compliance with the section requires the Secretary of State to either repeal the provisions or revive them at the end of a 15 month period. The provision, however, can be re-enacted by Parliament.

### ***2.5.2 Control Orders and Terrorism Prevention and Investigation Measures***

The Prevention of Terrorism Act 2005 introduced the concept of control orders. A control order was an order made by the Home Secretary of the United Kingdom to restrict an individual's liberty for the purpose of 'protecting members of the public from a risk of terrorism.' It could place restrictions on choices such as, what the person could use or possess; his place of work; his place of residence; to whom he spoke; and where he could travel. The targeted individual could also be ordered to surrender his passport; let the police visit his home at any time; report to officials at a specific time and place; and allow himself to be electronically tagged so his movements could be tracked.<sup>126</sup> The Secretary of State or a court could impose control orders on people who were suspected of involvement in terrorism where it was '*necessary for purposes connected with preventing or restricting involvement by that individual in terrorism-related activity.*'<sup>127</sup> The vague wording of the clause may have meant that the criteria to be satisfied were very wide. Under UK law, 'involvement' in terrorist activity can be defined very loosely and can potentially include conduct which gives encouragement to the commission, preparation or instigation of such acts [of terrorism] or is intended to do so.<sup>128</sup>

The Act established two types of control order – derogating<sup>129</sup> and non-derogating.<sup>130</sup> Derogating control orders are those that may infringe the right to liberty, protected by Article 5 of the European Convention on Human Rights, in that they deprive liberty rather than merely restrict it. In these circumstances, therefore, the Home Secretary must first opt out (derogate) from Article 5 under Article 15 of the European Convention on Human Rights. This provides that a derogation can be allowed when there is a 'war or other public emergency threatening the life of the nation'. The Home Secretary must apply to a court for the authority to grant such an order.<sup>131</sup> A derogating control order was never sought or used under the Act. Indeed, in his annual review of the operation of control orders, Lord Carlile, stated that '*given the restrictive nature of non-derogating orders, and the reverberations that a derogation would cause, I hold as strongly as before to my often expressed hope that no derogating orders will ever be required.*'<sup>132</sup>

Non-derogating control orders, are those that the Government does not think require it to opt out of, or risk, breaching Article 5 of the European Convention on Human Rights. These were made by the

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<sup>126</sup> Section 1(4), Prevention of Terrorism Act 2005 provides a list of potential restrictions.

<sup>127</sup> Section 1(3), Prevention of Terrorism Act 2005.

<sup>128</sup> For an understanding of the governmental position on encouraging terrorist acts, see for example, the provisions of the Terrorism Act 2006.

<sup>129</sup> Section 1(4), Prevention of Terrorism Act 2005.

<sup>130</sup> Section 1(2), Prevention of Terrorism Act 2005.

<sup>131</sup> Section 4, Prevention of Terrorism Act 2005.

<sup>132</sup> Lord Carlile of Berriew Q.C. *Sixth Report of the Independent Reviewer Pursuant to Section 13(3) of the Prevention of Terrorism Act 2005*, 3<sup>rd</sup> February 2011, Para. 11.

Home Secretary; they lasted for 12 months,<sup>133</sup> and could be renewed each year, or revoked or modified by the Home Secretary at any time.<sup>134</sup> A system of law for the supervision by the court of non-derogating control orders was provided by Section 3 of the Act.<sup>135</sup> In every case there was to be an application to the court for permission, in non-urgent cases to make the control order, and in urgent cases for the confirmation of the order.<sup>136</sup>

The language of the Act made it clear that the order would subsist unless the decision was ‘obviously flawed’.<sup>137</sup> Since this provision is retained in the new Terrorism Prevention and Investigation Measures Act 2011, it is worth considering how the courts have dealt with it in regards to control orders. In each case the Administrative Court must undertake a full judicial review, which will hear all the evidence and consider whether the decision to make the control order was flawed.<sup>138</sup> Following the Court of Appeal judgment in *Secretary of State for the Home Department v MB*,<sup>139</sup> in order to review the decision of the Secretary of State, the Court is required itself to decide whether the acts relied upon by the Secretary of State amounts to reasonable grounds for suspecting that the subject of the control order is, or has been, involved in terrorism-related activity.<sup>140</sup> Whilst paying a degree of deference to the Secretary of State’s decisions, the Court must give intense scrutiny<sup>141</sup> to the necessity for each of the obligations imposed on an individual. For example, where the original decision was not flawed, the Court is additionally required to consider whether or not the control order continues to be necessary at the time of the hearing. Thus, the determination on whether the Secretary of State’s decision was, or was not, flawed will be decided at the Court, rather than at the time the order was made.<sup>142</sup> Under the 2005 Act, the Court had the power, pursuant to Section 3(12), to quash the order, to quash one or more obligations imposed by the order, or to give directions to the Secretary of State for the revocation of the order or for the modification of the obligations imposed by the order.<sup>143</sup>

After its inception, the control order regime received considerable judicial scrutiny. The case law has addressed, in particular, the manner in which orders are made, particularly regarding the admission of ‘closed’ evidence;<sup>144</sup> the Home Secretary’s requirement to give sufficient consideration to the

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<sup>133</sup> Section 2(4), Prevention of Terrorism Act 2005.

<sup>134</sup> Section 2(6), Prevention of Terrorism Act 2005.

<sup>135</sup> The 2008 Act amended section 3(7) and added a new section 3(7A). This clarifies the arrangements for the controlee to make representations to the court.

<sup>136</sup> Section 3, Prevention of Terrorism Act 2005.

<sup>137</sup> Section 3(3), Prevention of Terrorism Act 2005.

<sup>138</sup> Under section 3(10), Prevention of Terrorism Act 2005.

<sup>139</sup> *Secretary of State for the Home Department v MB* (2006) EWCA Civ 1140.

<sup>140</sup> *Secretary of State for the Home Department v MB* (2006) EWCA Civ 1140.

<sup>141</sup> *Secretary of State for the Home Department v MB* (2006) EWCA Civ 1140.

<sup>142</sup> See: *Secretary of State for the Home Department v AN* [2010] EWHC 511, in which it was held that the order was not necessary at the time that it was made because AN was in custody, and if released on bail, appropriate bail conditions to protect the public could have been imposed.

<sup>143</sup> Section 1(2), Prevention of Terrorism Act 2005.

<sup>144</sup> *Secretary of State for the Home Department v MB* (2006) EWCA Civ 1140.

possibility of a criminal prosecution before resorting to a control order;<sup>145</sup> and the actual restrictions imposed in individual cases, such as the length of curfews.<sup>146</sup> In some cases, aspects of the control order regime were heavily criticised by the courts. For example, in April 2006, in the case of *Re MB*,<sup>147</sup> Mr Justice Sullivan made a declaration under Section 4 of the Human Rights Act 1998 that Section 3 of the Prevention of Terrorism Act 2005 was incompatible with the right to fair proceedings under Article 6 of the European Convention on Human Rights. In his judgment, Mr Justice Sullivan stated: *'To say that the Act does not give the respondent in this case, against whom a non-derogating control order has been made...a fair hearing in the determination of his rights under Article 6 of the Convention would be an understatement. The Court would be failing in its duty under the 1998 Act...if it did not say, loud and clear, that the procedure under the Act whereby the Court merely reviews the lawfulness of the Secretary of State's decision to make the order upon the basis of the material available to him at that earlier stage, is conspicuously unfair. The thin veneer of legality which is sought to be applied by Section 3 of the Act cannot disguise the reality. That controlees' rights under the Convention are being determined, not by an independent court in compliance with Article 6.1, but by executive decision-making, untrammelled by any prospect of effective judicial supervision.'*<sup>148</sup>

In response to these cases, along with widespread concern about the general erosion of civil liberties under the various terrorism Acts, the Government announced a revision of key counter-terrorism and security powers. One of the legislative changes emanating from this review came in the form of the Terrorism Prevention and Investigation Measures Act 2011, which replaces the control order regime. Home Secretary, Theresa May claimed that *'that the new system would be less prohibitive and intrusive, and would be complemented by increased funding for police surveillance of suspects.'*<sup>149</sup> Thus, the new measures may have a significant effect on the operations of the police and security services. Indeed, these bodies are expected to receive an extra £80 million over four years to keep track of terror suspects once control orders are relaxed.<sup>150</sup> A Home Office spokesman has claimed that *'extra funding for covert surveillance will help to manage the risk that such individuals pose and to maximise the opportunities to put them on criminal trial in open court.'*<sup>151</sup>

Terrorism Prevention and Investigation Measures (TPIM's) are imposed on individuals by a TPIM notice. Their primary intention, it is claimed, is to protect the public from the risk posed by persons

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<sup>145</sup> Secretary of State for the Home Department v AN [2010] EWHC 511.

<sup>146</sup> The courts have ruled that an 18 hour curfew is a deprivation of liberty. See: Secretary of State for the Home Department v JJ [2007]] UKHL 45, but 12 and 14 hours may be acceptable. See: Secretary of State for the Home Department v E and Another [2007]] UKHL 47, and Secretary of State for the Home Department v MB [2007]] UKHL 46.

<sup>147</sup> Secretary of State for the Home Department v MB (2006) EWCA Civ 1140.

<sup>148</sup> Secretary of State for the Home Department v MB (2006) EWCA Civ 1140. In the event, the Home Secretary appealed against the ruling and won in the Court of Appeal on 1<sup>st</sup> August 2006. However, whilst the Court of Appeal reversed the earlier judgment in respect of Article 6 (the right to a fair hearing), they agreed that MB's Article 5 rights had been breached.

<sup>149</sup> Theresa May, *Control Orders are to be Replaced*. BBC News, 26 January 2011.

<sup>150</sup> The Times, *£80m for 'Rebranded' Control Orders*, 27<sup>th</sup> January 2011.

<sup>151</sup> See comments in: The Telegraph, *Control Order Replacement could Strengthen Terror Resolve*, 26<sup>th</sup> March 2012.

whom the Home Secretary believes to have engaged in terrorism-related activity, but whom it is feasible neither to prosecute nor to deport.<sup>152</sup> Ten TPIM notices were in force at the end of 2012, nine of them on British citizens and all of them on men believed to have participated in Al-Qaida related terrorist activity.<sup>153</sup>

Under the new Act, in order to impose a notice (TPIM) on an individual, the Secretary of State must hold a reasonable belief that the individual is, or has been, involved in terrorism-related activity.<sup>154</sup> This, according to the Government, is a higher threshold than the one which was in place for control orders which only required ‘reasonable suspicion’.<sup>155</sup> Unlike control orders, there is a two year time limit on measures imposed under a TPIM notice.<sup>156</sup> Further measures can only be imposed if an individual has re-engaged in terrorism.<sup>157</sup> Thus, TPIM’s cannot normally be renewed year-on-year as control orders were. The new Act also requires the Secretary of State to seek the court’s permission before imposing the measure, except in urgent cases where the notice must be referred immediately to the court for confirmation.<sup>158</sup> The court is required to review the Secretary of State’s decision that the relevant conditions were met in relation to imposing the measures.<sup>159</sup> However, as under the previous Act, the order will remain unless the court finds that the decision was ‘obviously flawed’.

Under the Act, the Secretary of State must also consult the Chief Officer of the appropriate police force on the prospects of prosecuting the individual subject.<sup>160</sup> The chief officer must report back with details of the ongoing review.<sup>161</sup> In this sense alternatives to imposing a TPIM are explored. However, the notice can stand whether or not any investigation leads to a criminal prosecution. Thus, it is argued that TPIM’s, just like control orders, can operate outside the criminal law and this may effectively mean that persons may be punished without charge or trial. For these critics, ‘*unless the purpose of monitoring and restricting a person is to gather evidence in order to put him on trial in open court, the measures are counter-productive and legally problematic.*’<sup>162</sup>

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<sup>152</sup> The judgment of the European Court of Human Rights in *Chahal v UK* (1996) 23 EHRR 413, established that foreign nationals could not be deported to countries where there was a real risk that they would be tortured or mistreated.

<sup>153</sup> David Anderson QC, *First Report of the Independent Reviewer on the Operation of the Terrorism Prevention and Investigation Measures Act 2011*, Presented to Parliament. March 2013.

<sup>154</sup> Terrorism Prevention and Investigation Measures Act 2011, s3(1-6), Conditions a-e and Section 4.

<sup>155</sup> See comments in: David Anderson QC, *First Report of the Independent Reviewer on the Operation of the Terrorism Prevention and Investigation Measures Act 2011*, Presented to Parliament. March 2013.

<sup>156</sup> Terrorism Prevention and Investigation Measures Act 2011, s5 (1- 2).

<sup>157</sup> Terrorism Prevention and Investigation Measures Act 2011, s5(3).

<sup>158</sup> Terrorism Prevention and Investigation Measures Act 2011, s6(1-10).

<sup>159</sup> Terrorism Prevention and Investigation Measures Act 2011, s6(3).

<sup>160</sup> Terrorism Prevention and Investigation Measures Act 2011, s10(1and 4).

<sup>161</sup> Terrorism Prevention and Investigation Measures Act 2011, s10(5-10).

<sup>162</sup> The Guardian, *Control Orders have been Rebranded. Big Problems Remain*, 28<sup>th</sup> January 2011.

Overall, there has been widespread concern that, once in effect, a TPIM will be little different to a control order.<sup>163</sup> For example, there is still provision for curfews, electronic tagging, and restrictions on freedoms of association, employment and movement. Indeed, the first report of the Independent Reviewer on the operation of the Act, states that *'TPIM's resemble control orders in most respects.'*<sup>164</sup> Thus, it is argued that all of the most controversial aspects of control orders will be carried over, in some form, to the new regime.<sup>165</sup> Therefore, it is possible that the controversy surrounding control orders may not be curbed by the provisions of the new Act.

### **2.5.3 The Terrorism Act 2006**

This Act, which is largely concerned with preventing the encouragement of terrorism, was drafted in the aftermath of the 7<sup>th</sup> July Bombings on public transport in London. The government claimed that the Act was a necessary response to an unparalleled terrorist threat. However, the Act has encountered a good deal of opposition from those who feel that it is an undue imposition on civil liberties, and could even increase the terrorism risk.<sup>166</sup>

Part 1 of the Act creates a series of new criminal offences intended to assist the police in tackling terrorism. Sections 1 and 2 of the Act are concerned with the encouragement and dissemination of material that may incite terrorism. Section 1 prohibits the publishing of a *'statement that is likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism or Convention offences.'* Indirect encouragement, it seems, includes any *'statement which glorifies the commission or preparation (whether in the past, in the future or generally) of such acts or offences; and is a statement from which those members of the public could reasonably be expected to infer that what is being glorified is conduct that should be emulated by them in existing circumstances.'* Similarly, Section 2 prohibits the dissemination of a publication which is either (a) likely to be understood as directly or indirectly encouraging terrorism, or (b) includes information which is likely to be understood as being useful in the commission or preparation of an act of terrorism. With regard to the remaining sections in Part one, Sections 5, 6 and 8 prohibit anyone from engaging in any conduct in preparation for an intended act of terrorism;<sup>167</sup> or from the giving or

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<sup>163</sup> See for example, Max Rowlands, *Review of Counter-Terrorism Powers Fails to Deliver Definitive Changes*, [www.statewatch.org](http://www.statewatch.org).

<sup>164</sup> David Anderson QC, *First Report of the Independent Reviewer on the Operation of the Terrorism Prevention and Investigation Measures Act 2011*, Presented to Parliament. March 2013

<sup>165</sup> See for example, Max Rowlands, *Review of Counter-Terrorism Powers Fails to Deliver Definitive Changes*, [www.statewatch.org](http://www.statewatch.org).

<sup>166</sup> See, for example, Liberty, *Alarm as Terrorism Bill is Rushed through Parliament*, Press Release, 2005.

<sup>167</sup> Terrorism Act 2006, s5.

receiving of training for terrorist activities,<sup>168</sup> or from attendance at a place used for terrorist training.<sup>169</sup> Sections 9, 10, 11 and 12, prohibit the production,<sup>170</sup> misuse<sup>171</sup> or possession<sup>172</sup> of radioactive devices or materials<sup>173</sup> and trespassing on nuclear sites.<sup>174</sup> Such devices may be used in a terrorist attack.

In regard to the provisions of this Act, Liberty claims that *'new speech offences including the 'encouragement of terrorism,' which encompasses making statements that glorify terrorist acts, have the potential to seriously infringe free speech rights, criminalising careless talk and having a chilling effect on free speech surrounding, for example, foreign policy.'*<sup>175</sup> For Liberty, *'the banning of non-violent political organisations effectively amounts to state censorship of political views, which has the potential to drive debate underground.'*<sup>176</sup>

Thus, the provisions of both this Act and the other Terrorism Acts have been subjected to extensive criticism. For example, Liberty has extended concerns that the definition of terrorism in the 2000 Act is 'dangerously broad.' It claims that since *'many offences are linked to this definition of terrorism, large numbers of people are potentially criminalised.'*<sup>177</sup> Indeed, as noted above, such has been the unease regarding recent counter-terrorism Acts, both amongst the public and civil rights groups, the Government has been prompted to review the current legislative framework.<sup>178</sup> Thus, under the Protection of Freedoms Act 2012, the length of time a terrorist suspect can be detained before charge has now been reduced to 14 days; the use of the Regulation of Investigatory Powers Act 2000 (RIPA) by local authorities along with access to communications data is now subject to authorisation by a magistrate; and the alleged *'indiscriminate use'*<sup>179</sup> of Section 44 stop and search powers has been limited.

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<sup>168</sup> Terrorism Act 2006, s6.

<sup>169</sup> Terrorism Act 2006, s8.

<sup>170</sup> Terrorism Act 2006, s9.

<sup>171</sup> Terrorism Act 2006, s10.

<sup>172</sup> Terrorism Act 2006, s9.

<sup>173</sup> Terrorism Act 2006, ss 9, 10 and 11.

<sup>174</sup> Terrorism Act 2006, s12.

<sup>175</sup> Liberty, *Countering-Terrorism*, [www.liberty.org.uk](http://www.liberty.org.uk). (Last accessed December 2011). See also Liberty, *From War to Law, Liberty's Response to the Government's Review of Counter-Terrorism and Security Powers*, [www.liberty.org.uk](http://www.liberty.org.uk). 2010. (Last accessed December 2011).

<sup>176</sup> Liberty, *Countering-Terrorism*, [www.liberty.org.uk](http://www.liberty.org.uk). (Last accessed December 2011). See also Liberty, *From War to Law, Liberty's Response to the Government's Review of Counter-Terrorism and Security Powers*, [www.liberty.org.uk](http://www.liberty.org.uk) 2010. (Last accessed December 2011).

<sup>177</sup> Liberty, *Countering-Terrorism*, [www.liberty.org.uk](http://www.liberty.org.uk). (Last accessed December 2011). See also Liberty, *From War to Law, Liberty's Response to the Government's Review of Counter-Terrorism and Security Powers*, [www.liberty.org.uk](http://www.liberty.org.uk) 2010. (Last accessed December 2011).

<sup>178</sup> HMSO, *Review of Counter-Terrorism and Security Powers: Review Findings and Recommendations*, Cm 8005, January 2011. See: Introduction. See also HMSO, *Review of Counter-Terrorism and Security Powers: Summary of Responses to the Consultation*, Cm 8005, January 2011.

<sup>179</sup> HMSO, *Review of Counter-Terrorism and Security Powers: Review Findings and Recommendations*, Cm 8005, January 2011. See: Introduction: Findings. See also HMSO, *Review of Counter-Terrorism and Security Powers: Summary of Responses to the Consultation*, Cm 8005, January 2011.

## 2.6 The Work of the Security Agencies in Frustrating Procurement by Proliferating Countries of Material, Technology or Expertise Relating to Weapons of Mass Destruction (WMD)

During the last two decades, the government has publicly named the proliferation of Weapons of Mass Destruction (WMD) as one of the issues that is at the very top of the government international security agenda. For example, in March 2003, Tony Blair claimed that: *'There are several countries – mostly dictatorships with highly repressive regimes – desperately trying to acquire chemical weapons,<sup>180</sup> biological weapons,<sup>181</sup> or in particular, nuclear weapons capability. Some of these countries are now a short time away from having a serviceable nuclear weapon.'*<sup>182</sup> More recently, the Security Service has claimed that: *'much of the material, technology and expertise required for WMD programmes can be found in the UK and that many of those seeking to develop WMD try to acquire these here.'*<sup>183</sup>

The security agencies co-operate with other government departments, such as the Joint Intelligence Committee (JIC),<sup>184</sup> to investigate and disrupt attempts by countries to acquire UK materials, technology or expertise that could be relevant to a weapons of mass destruction programme. In past years, the intelligence bodies have claimed a number of successes in the counter-proliferation field. For example, in 2004, MI5 claimed to have contributed to the disruption of 30 proven or suspected attempts by countries of concern to acquire WMD related goods or expertise from the UK.<sup>185</sup> The

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<sup>180</sup> These are toxic chemicals designed to cause death, harm, temporary incapacitation or sensory irritation to man, animals or plants. Chemical Warfare agents include:

- (a) Choking agents, such as chlorine and phosgene that can be dispersed as a gas and absorbed through the lungs.
- (b) Blister agents which affect the skin causing wounds resembling burns and blisters.
- (c) Blood agents which may affect the ability of blood cells to utilise oxygen, eventually starving and stopping the heart.
- (d) Nerve agents which can affect the nervous system by inhibiting the enzyme that aids the transmission of nerve impulses. It has been claimed that nerve agents can be manufactured using relatively simple chemical techniques and can be easily dispersed. One drop absorbed through the skin can cause death.

Foreign and Commonwealth Office, UK priorities, Terrorism and Security: Chemical Weapons. 2004.

<sup>181</sup> A Biological weapon is a living micro-organism or a toxin combined with a means of dispersing it. Delivery systems range from cluster bombs and missile warheads to a variety of simple spray devices which may be mounted on aircraft. Many biological agents are easily manufactured, for example, a single 100 litre fermenter can produce ten thousand million infectious doses of anthrax bacteria in one week.

<sup>182</sup> Foreign and Commonwealth Office, UK priorities, Terrorism and Security.

<sup>183</sup> [www.mi5.gov.uk](http://www.mi5.gov.uk). 2009.

<sup>184</sup> One of the functions of the Joint Intelligence Committee is to monitor and give early warning to the development of foreign threats to British interests, whether political, military or economic. It also keeps under review the organisation and working of British intelligence activity in order to ensure efficiency, economy and prompt adaptation to changing requirements for the approval of ministers.

<sup>185</sup> [www.mi5.gov.uk](http://www.mi5.gov.uk). 2009.

Foreign Office has also claimed significant breakthroughs in countering the proliferation of weapons of mass destruction. For example, the Foreign Secretary stated that; '*the UK has worked effectively with the United States in the case of Libya's programmes and in countering AQ Khans network,*'<sup>186</sup> and that '*the UK has played a leading role, with France and Germany, on the issue of Iran's nuclear programme.*'<sup>187</sup> It is also claimed that '*the UK has been active on a proliferation security initiative designed to interdict the passage of cargoes intended for use in WMD programmes.*'<sup>188</sup>

There are a number of ways in which the intelligence agencies may ensure that the proliferation of WMD may be stopped, slowed, or at least made more difficult and expensive.<sup>189</sup> Firstly, the collected intelligence may be useful in assisting the military, who can use the information to make improvements to overall military potential and create relevant offsetting capabilities to reduce vulnerabilities. Such planning requires an understanding of the proliferant's strategic culture, doctrine and perceptions along with the knowledge of the potential proliferant's weapon types, production, storage, dispersal and launch sites. Secondly, diplomatic action might be taken, based on secret information, to dissuade proliferants, or to dissuade their suppliers. This may be particularly useful where the proliferants are unwilling and unwitting. Governments may be quite genuinely unaware of how questionable export contracts, even by state owned firms, can be. Thirdly, intelligence may contribute towards maintaining and updating export control regimes by both re-framing and developing the multi-national export restrictions and by refocusing the attention of export licensing officials. Finally, in addition to identifying those who are of proliferation concern, the information gathered in intelligence operations may also have the equally important benefit of proving a negative as well as a positive confirmation. For example, information on a state or group may suggest that it does not, in fact, have specific WMD of concern, and that finance or technical resources; strategic doctrine and/or ideology, make it unlikely that it will obtain them, at least in a given time scale.<sup>190</sup>

However, in order to receive any of the benefits discussed above and others, the intelligence gathered must be reasoned, well assessed, accurate and from reliable sources. It must be evaluated by an independent body and used in an appropriate manner. This task is assigned to the Joint Intelligence Committee (JIC). The function of the Joint Intelligence Committee is to monitor the development of foreign threats to British interests, whether political, military or economic. It also keeps under review the organisation and working of British intelligence activity in order to ensure efficiency, economy and prompt adaptation to changing requirements for the approval of Ministers. The JIC is intended to

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<sup>186</sup> Foreign Secretary's Statement on WMD, 25 February 2004. [www.fco.gov.uk](http://www.fco.gov.uk).

<sup>187</sup> Foreign Secretary's Statement on WMD, 25 February 2004. [www.fco.gov.uk](http://www.fco.gov.uk).

<sup>188</sup> Foreign Secretary's Statement on WMD, 25 February 2004. [www.fco.gov.uk](http://www.fco.gov.uk).

<sup>189</sup> See Paul Schulte, *Intelligence and Weapons Proliferation in a Changing World*. Essay in: *Intelligence Services in the 21<sup>st</sup> Century: Agents for Change*, Edited by Harold Shukman, St Ermin's Press, 2001.

<sup>190</sup> An interesting account of the usefulness of intelligence agency work in the area of disrupting proliferation can be found in: Paul Schulte, *Intelligence and Weapons Proliferation in a Changing World*. Essay in: *Intelligence Services in the 21<sup>st</sup> Century: Agents for Change*, Edited by Harold Shukman, St Ermin's Press, 2001.

operate in close cooperation with, but independently of, both the intelligence agencies and politicians. The importance of this distinction was highlighted by Jack Straw.<sup>191</sup> He claimed that: *'The reason why we have a Joint Intelligence Committee which is separate from the intelligence agencies is precisely so that those who are obtaining the intelligence are not then directly making the assessment on it. That is one of the very important strengths of our system compared with most other systems around the world.'*<sup>192</sup> Others have agreed with this view. For example, the Foreign Affairs Select Committee found that there would be cause for grave concern if the JIC were *'to be used by Ministers, or their advisers, for political purposes, for example, by the application of pressure to change the content or emphasis of an assessment.'*<sup>193</sup> Indeed, the JIC itself is aware that their assessments should not be politicised.<sup>194</sup> For example, their former Chairman, Sir Percy Cradock, wrote in his book *'Know Your Enemy'*<sup>195</sup> that *'ideally, intelligence and policy should be close but distinct. Too distinct and assessments become an in-growing, self-regarding activity, producing little or no work of interest to the decision-makers: Too close a link and policy begins to play back on estimates, producing the answers the policy-makers would like - The analysts become courtiers, whereas their proper function is to report their findings without fear or favour. The best arrangement is intelligence and policy in separate but adjoining rooms, with communicating doors and thin partition walls.'*<sup>196</sup>

However, it has been claimed that *'such partitions can easily break down,'*<sup>197</sup> and that the JIC, which is part of the Cabinet Office, has become too close to Number 10.<sup>198</sup> In this respect, the JIC came under heavy criticism, from the media and public, when it decided to include certain claims in a dossier which was used by the Government to support the UK's entry into the conflict in Iraq. The dossier, which was published by 10 Downing St, described Saddam Hussein's WMD programme as being *'active, detailed and growing.'*<sup>199</sup> It claimed that Iraq was five years from producing a nuclear weapon on its own – or only one or two years away if it managed to obtain weapons grade material abroad – and that Iraq had continued to produce chemical and biological agents and had military plans for their use. The report also claimed that some weapons are deployable within 45 minutes of an order to use them.<sup>200</sup>

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<sup>191</sup> Foreign Secretary.

<sup>192</sup> HMSO, Foreign Affairs – *Ninth Report, Foreign Affairs Committee*, 3 July 2003, paragraph 153.

<sup>193</sup> HMSO, Foreign Affairs – *Ninth Report, Foreign Affairs Committee*, 3 July 2003, paragraph 156.

<sup>194</sup> Also see, for example: The comments of Dame Pauline Neville Jones, Foreign Affairs – *Ninth Report, Foreign Affairs Committee*, 3 July 2003, paragraph 154.

<sup>195</sup> Sir Percy Cradock, *Know Your Enemy – How the Joint Intelligence Committee saw the World*, John Murray, 2002.

<sup>196</sup> Sir Percy Cradock, *Know Your Enemy – How the Joint Intelligence Committee saw the World*, John Murray, 2002, p296.

<sup>197</sup> See, for example: The Guardian Unlimited, *Hijacked by that Mob at No. 10*, 8<sup>th</sup> June, 2003.

<sup>198</sup> See, for example: The Guardian Unlimited, *Hijacked by that Mob at No. 10*, 8<sup>th</sup> June, 2003.

<sup>199</sup> 10 Downing Street. *Iraq's Weapons of Mass Destruction: The Assessment of the British Government*, 24<sup>th</sup> September 2002. [www.number10.gov.uk](http://www.number10.gov.uk)

<sup>200</sup> 10 Downing Street. *Iraq's Weapons of Mass Destruction: The Assessment of the British Government*, 24<sup>th</sup> September 2002. [www.number10.gov.uk](http://www.number10.gov.uk)

This claim went to the heart of the Government's case to support UK entry into the conflict in Iraq. For example, in his forward to the 24<sup>th</sup> September dossier, the Prime Minister stated: *'In recent months, I have been increasingly alarmed by the evidence from inside Iraq that despite sanctions, despite the damage done to his capability in the past, and despite the UNSCR's expressly outlawing it, Saddam Hussein is continuing to develop WMD, and with them, the ability to inflict real damage upon the region and the stability of the world....I am in no doubt that the threat is serious, and current; that he has made progress on WMD and that he has to be stopped.'*<sup>201</sup> Therefore, the professed reason for the war on which the government had based its legal case, both in the UK and in the UN, was that the war had to be started quickly, because Iraq possessed WMD which posed an urgent threat. The subsequent failure to discover any WMD, after the allied victory in Iraq, led to a widespread concern that Parliament and the public had been deceived by the contents of the dossier and that the evidence contained in it had been 'doctored' by No 10.<sup>202</sup>

Some of these concerns were addressed by Lord Butler, who led the inquiry into British handling of Iraqi intelligence. The Butler committee was tasked to investigate the intelligence coverage available in respect of WMD programmes in countries of concern, taking into account what was known about these programmes. As part of this work it was to investigate the accuracy of intelligence on Iraqi WMD up to March 2003. To this end, it was tasked to examine any discrepancies between the intelligence gathered before the conflict and what has been discovered, by the Iraq survey group, since the end of the conflict. The key findings of the report, published on the 14<sup>th</sup> July 2004, were that, whilst there was no evidence of deliberate distortion of the intelligence material, or of culpable negligence, some of the human intelligence about Iraq's weapons of mass destruction was 'seriously flawed' and 'open to doubt'. Lord Butler stated that *'the intelligence couldn't stand up to the weight put upon it. For example, the 45 minute claim should not have been put in as the intelligence supporting it was not good enough.'*<sup>203</sup> The Butler report also found that the language of the Government's dossier may have left the reader with the impression that there was a 'fuller and firmer' intelligence behind its judgments than was the case.<sup>204</sup>

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<sup>201</sup> 10 Downing Street. *Iraq's Weapons of Mass Destruction – The Assessment of the British Government*, 24<sup>th</sup> September 2002. [www.number10.gov.uk](http://www.number10.gov.uk)

<sup>202</sup> See: Andrew Gilligan, BBC Radio 4, *Today*, 2003. On 29<sup>th</sup> May, Andrew Gilligan, the Defence Correspondent of the BBC's morning radio show, 'Today', claimed 'I have spoken to a British Official who was involved in the preparation of the dossier: He said that it (The Dossier) was transformed in the week before it was published to make it 'sexier.' See also: Lord Hutton, *Report of the Inquiry into the Circumstances Surrounding the Death of Dr David Kelly*, C.M.G. 28<sup>th</sup> January 2004.

<sup>203</sup> Report of a Committee of Privy Councillors, *Review of Intelligence on Weapons of Mass Destruction*, 14<sup>th</sup> July 2004. <http://www.butlerreview.org.uk/report/>.

<sup>204</sup> Also see the contrasting findings of the Hutton report: Lord Hutton, *Report of the Inquiry into the Circumstances Surrounding the Death of Dr David Kelly*, 28<sup>th</sup> January 2004.

Another inquiry, conducted by Lord Hutton, considered some allegations made by Andrew Gilligan that the dossier was 'sexed up' by the Government.<sup>205</sup> In the event, Lord Hutton found that the Prime Minister's desire to have as compelling a dossier as possible may have subconsciously influenced the JIC to make the language stronger than they would otherwise have done, but that the JIC, and its Chairman, were concerned to ensure that the contents of the dossier were consistent with the intelligence available to the JIC. Thus, Hutton found that the dossier could only be said to be 'sexed up' if this term was taken to mean that it was drafted to make the case against Saddam as strong as possible. However, Mr Gilligan's claims were unfounded, because the term 'sexed up' could be understood to mean that the dossier was embellished with items of intelligence known, or believed to have been, false and unreliable. Hutton concluded that the dossier was, in fact, based on a report received by the intelligence services that they believed to be reliable. Therefore, Gilligan's report had incorrectly made a grave allegation that attacked the integrity of the Government and the JIC.

After Hutton's inquiry, the Prime Minister was almost completely exonerated, and the only question mark to be raised over the JIC was that the drawing up of the dossier could have been 'subconsciously influenced' by the Prime Minister's desire to have a strongly worded dossier. However, the Hutton Inquiry was widely regarded as a 'whitewash.' Lord Hutton was '*thought by many to have been too kind to the Government and too harsh on the media.*'<sup>206</sup> There was a popular perception that his conclusions were '*not findings in law, but were opinions on the conduct of public office and on media practice.*'<sup>207</sup> The consequence of this was that '*people felt able to disagree and many did.*'<sup>208</sup> As William Rees-Mogg put it, '*public opinion has overturned Lord Hutton on appeal.*'<sup>209</sup>

This episode certainly highlights the necessity for intelligence input that is objective, cautious and well grounded in order to avoid acrimonious suspicions of threat inflation and deliberate justification of policy intentions. Whilst it is imperative that intelligence is collected that may help to reduce and delay the scale of WMD around the world and lessen its consequences in peace and war, the credibility of intelligence and its international usefulness may be undermined where it is inaccurate and even policy dominated. As Paul Shulte states '*crying wolf, or hyping up 'rent-a-threats', is the worst way for the intelligence organisations to oppose proliferation.*'<sup>210</sup> The problem is that manipulating intelligence information to support government policy aspirations may undermine the

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<sup>205</sup> Report of a Committee of Privy Councillors, *Review of Intelligence on Weapons of Mass Destruction*, 14<sup>th</sup> July 2004 <http://www.butlerreview.org.uk/report/>.

<sup>206</sup> Louis Blom-Cooper and Colin Munro, *The Hutton Inquiry*, 472 PL 2004.

<sup>207</sup> Louis Blom-Cooper and Colin Munro, *The Hutton Inquiry*, 472 PL 2004.

<sup>208</sup> Louis Blom-Cooper and Colin Munro, *The Hutton Inquiry*, 472 PL 2004.

<sup>209</sup> The Times, 2 February, 2004.

<sup>210</sup> Paul Schulte, *Intelligence and Weapons Proliferation in a Changing World*. Essay in: *Intelligence Services in the 21<sup>st</sup> Century*., *Agents for Change*, Edited by Harold Shukman, St Ermin's Press, 2001.

ability of the public and Parliament to correctly assess the nature of the enemy. This, in turn, may lead to abuses of power and a general lack of trust between the government and the citizen.

## **2.7 The Duty to Prevent Damage to the UK Emanating from Foreign Espionage**

Espionage can be defined as the practice of obtaining information about an organisation or a society, which is considered secret or confidential, without the permission of the holder of the information. It has been described by the Home Office as: ‘*Covert or illegal attempts to acquire information and materials in order to assist a foreign power.*’<sup>211</sup>

According to Michael Smith, the art of espionage can be divided into three separate categories. These are:

1. Strategic intelligence,
2. Counterintelligence,
3. And, tactical intelligence.<sup>212</sup>

### **2.7.1 Strategic Intelligence**

Strategic intelligence concerns the collection of the sort of information which keeps political and military leaders, and their advisors, well informed of the situation in target countries and allows them a better chance of predicting how those countries will react in the future. Such information will include: assessments of a given political situation; the leaders and their potential successors; economic and sociological factors that might influence policy; and the details of the target’s economic activities and scientific and technological capabilities. The main British agencies for gathering strategic intelligence are GCHQ and MI6. GCHQ monitors the communications of Britain’s enemies and friends from a number of remote sites around the world, providing the British government with intelligence that will help it to formulate its security, foreign, defence and economic policies. MI6 collects exactly the same type of information as GCHQ, but by acquiring it through a variety of other

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<sup>211</sup> Lustgarten and Leigh, *In From the Cold: National Security and Parliamentary Democracy*, Oxford University Press, 1994, p386.

<sup>212</sup> Michael Smith, *The Spying Game: The Secret History of British Espionage*, Politico’s, 2003, p10.

sources, including both human intelligence and by liaison with a wide range of foreign intelligence and security services.<sup>213</sup>

### 2.7.2 Counterintelligence

Counterintelligence work concerns keeping national secrets secure against the schemes of foreign spies or hostile enemy forces. The loss of sensitive information may result in damage to the nation's economic well-being or national security. MI5 are tasked to undertake counterintelligence work on behalf of the UK. MI5 seek to discover, investigate and disrupt the activities of foreign intelligence officers, who may attempt to steal commercial secrets, or secret information, concerning the UK's foreign policy, defence information and other government matters. MI5 estimate that at least 20 foreign services are operating against the UK. Consequently, they claim that: *'The UK is a high priority espionage target and a range of countries are actively seeking British information and material to advance their own military, technological, political and economic programmes.'*<sup>214</sup> According to MI5, even after the collapse of communism in 1991, and the consequent disintegration of the Soviet Union, the number of Russian intelligence officers in London has not fallen significantly.<sup>215</sup> MI5 claim that countries such as Russia and China may want to acquire both classified material and technology for exploitation by their own industry. For example, Russia is said to task its intelligence services to gather information *'to promote...economic development, scientific-technical progress and military-technical backup.'*<sup>216</sup> Thus, the information required will include new communications technologies, IT, genetics, aviation, lasers, optics, electronics and other fields,<sup>217</sup> as well as political and military secrets.

Whilst the nature of espionage has remained the same throughout the years, the motives and rationale behind it may, to some extent, have changed. In the past, espionage activity was typically directed towards obtaining political and military intelligence. According to MI5, whilst this remains the case, economic espionage has also been defined as an important and growing problem confronting the Western states. It has been claimed that *'some governments in Asia, Europe, the Middle East and ... Latin America, as well as some former communist countries, ... are involved in intelligence activities that are detrimental to our economic interests at some level.'*<sup>218</sup> For example, a document produced

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<sup>213</sup> See discussion: Michael Smith, *The Spying Game: The Secret History of British Espionage*, Politico's, 2003, p10.

<sup>214</sup> [www.mi5.gov.uk](http://www.mi5.gov.uk).

<sup>215</sup> [www.mi5.gov.uk](http://www.mi5.gov.uk).

<sup>216</sup> [www.mi5.gov.uk](http://www.mi5.gov.uk).

<sup>217</sup> [www.mi5.gov.uk](http://www.mi5.gov.uk).

<sup>218</sup> Bob Gates speaking in 1993. See: James Adams, *The New Spies: Exploring the Frontiers of Espionage*, Pimlico, 1995, p130.

by MI5 to provide security advice for visitors to China, gives some indication of the risks. The document claims that the Chinese Intelligence Service is involved in cultivating ‘friendships’ with British businessmen with the intention of using the relationship to obtain information which is not legally or commercially available to China, and which may promote China’s interests. The information required can range from comment and analysis on Western political and economic trends, to Western Security and defence matters, commercial practices, negotiating positions and industrial developments.<sup>219</sup>

### ***2.7.3 Tactical Intelligence***

Tactical intelligence concerns the type of information that would be useful to military commanders in the field. For example, it includes: working out the precise order of battle of the enemy’s armed forces; tracking the deployments of individual units; and monitoring and examining their peacetime training exercises in order to determine the type of tactics they will employ in war and how those tactics can be best countered. Tactical intelligence information is collected, in the main, by the military intelligence agencies, whose activities are co-ordinated by the Defence Intelligence Staff.

### ***2.7.4 Current Security Agency Activity in Espionage***

In the light of the high risks described above, it would seem appropriate to direct a significant proportion of the security agency budget towards ensuring that the UK’s national and global interests are adequately protected. However, the Intelligence and Security Committee has, in recent years, expressed its concern that, ‘*because of the necessary additional effort allocated to counter-terrorism by the Security Service, significant risks are inevitably being taken in the area of counter-espionage*’.<sup>220</sup> The Committee noted that in the period 1999-2002 just over 20%<sup>221</sup> of the Security Service’s work was directed against hostile activity by foreign intelligence agencies. Following the terrorist attacks on the USA in September 2001, this was reduced to 16%,<sup>222</sup> and by 2004 the figure was only 11%.<sup>223</sup> Consequently, the Committee has warned that the focus on international terrorism is potentially undermining the ability of the intelligence agencies to deal with the threats emanating

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<sup>219</sup> British Security Service, *Security Advice for Visitors to China*, Discussed in: James Adams, *The New Spies: Exploring the Frontiers of Espionage*, Pimlico, 1995, pp 131 – 134.

<sup>220</sup> Intelligence and Security Committee, *Annual Report, 2003-2004*, Cm 6240.

<sup>221</sup> Intelligence and Security Committee, *Annual Report, 1999-2000*, Cm 4897. See also: Intelligence and Security Committee, *Annual Report, 2003-2004*, Cm 6240.

<sup>222</sup> Intelligence and Security Committee, *Annual Report, 1999-2000*, Cm 4897. See also: Intelligence and Security Committee, *Annual Report, 2003-2004*, Cm 6240.

<sup>223</sup> Intelligence and Security Committee, *Annual Report, 2003-2004*, Cm 6240.

from countries such as Russia and China. However, the downward trend in the resources allocated to counter-espionage has continued - The current figure is a mere 3%.<sup>224</sup>

## 2.8 The Extent of Security Agency Work in the Prevention of Serious Crime

It is currently claimed that the Global economy, European integration and the end of the Cold War have presented national crime gangs with new business opportunities.<sup>225</sup> On an international level, the influence of organised crime is claimed to *'corrupt government and law agencies in many states world-wide, which desperately need good and honest government as a foundation for economic prosperity.'*<sup>226</sup> Some crime groups are thought to be so powerful that they can control many of the social, economic and political processes, particularly in young and emerging democracies.<sup>227</sup> Within UK borders, it is claimed that organised crime can *'blight our most vulnerable communities, driving out innocent residents and legitimate businesses.'*<sup>228</sup> Organised crime groups may operate across police basic command units (BCU's) or force boundaries, often at national or international level. Some organised criminal groups may resort to extreme violence, intimidation and corruption in order to achieve their objectives.<sup>229</sup> They may display detailed awareness of law enforcement methods and use effective counter-measures, including sophisticated counter-surveillance techniques and elaborate money laundering arrangements. It is further alleged that organised crime groups share many characteristics with terrorists, including tight-knit structures and the preparedness to use ruthless measures to achieve their objectives. Since many terrorists use the techniques of organised crime to fund their activities, it is claimed that *'a successful approach to organised crime is...inseparable from our wider effort against threats to our national security.'*<sup>230</sup>

All three agencies are tasked, under the relevant Acts, to act in support of the prevention and detection of serious crime: MI5, through the Security Service Act 1996, and the Secret Intelligence Service along with GCHQ, by the Intelligence Services Act 1994. Whilst, the precise meaning of the term 'serious crime' is not clearly described in either of the Acts, it is generally accepted that it may be widely defined. According to a recent Government paper entitled *'One Step Ahead: A 21<sup>st</sup> Century Strategy to Defeat Organised Crime,'*<sup>231</sup> serious and organised crime may include drug trafficking,

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<sup>224</sup> [www.mi5.gov.uk](http://www.mi5.gov.uk). Major Areas of Work. (Last accessed 2011).

<sup>225</sup> [www.fco.gov.uk](http://www.fco.gov.uk). *International Organised Crime: Non-Drugs Issues*. June 2006.

<sup>226</sup> Home Office, *One Step Ahead: A 21<sup>st</sup> Century Strategy to Defeat Organised Crime*, March 2004, Cm 6167.

<sup>227</sup> [www.fco.gov.uk](http://www.fco.gov.uk). *International Organised Crime: Non-Drugs Issues*. June 2006.

<sup>228</sup> Home Office, *One Step Ahead: A 21<sup>st</sup> Century Strategy to Defeat Organised Crime*, March 2004, Cm 6167.

<sup>229</sup> Home Office, *One Step Ahead: A 21<sup>st</sup> Century Strategy to Defeat Organised Crime*, March 2004, Cm 6167.

<sup>230</sup> Home Office, *One Step Ahead: A 21<sup>st</sup> Century Strategy to Defeat Organised Crime*, March 2004, Cm 6167.

<sup>231</sup> Home Office, *One Step Ahead: A 21<sup>st</sup> Century Strategy to Defeat Organised Crime*, March 2004, Cm 6167.

money laundering, immigration crime, counterfeiting, financial and business fraud, intellectual property theft and tax evasion.

The Security Service has, in the past, claimed to have deployed its '*full range of skills and resources, used traditionally against the terrorist and espionage targets, to combat the threat from serious crime.*'<sup>232</sup> However, the Security Service suspended work in the area of serious crime in April 2006, following the launch of the Serious Organised Crime Agency (SOCA) and the need to redeploy Service resources towards combating the increased threat to the UK from international terrorism.

The SOCA will co-operate closely with the intelligence agencies and other bodies such as the Assets Recovery Agency, HM Revenue and Customs, and the Foreign Office. SOCA officers are empowered to perform a number of surveillance roles traditionally associated with British intelligence services such as MI5. However, unlike MI5 officers, some designated SOCA officers enjoy powers of arrest. SOCA's officers are not required to take the traditional Police Oath and the SOCA is exempt from the provisions of the Freedom of Information Act 2000. The SOCA is led by a Board which consists of 11 members. On its inception the Board decided that around 40% of its effort should be devoted to combating drug trafficking; 25% to tackling organised immigration crime; around 10% to fraud; 15% on other organised crime; and the remaining 10% on supporting other law enforcement agencies.

## **2.9 Protection from Actions Intended to Overthrow or Undermine Parliamentary Democracy – Subversion**

The term 'subversion', according to the Oxford Dictionary, includes the notion of an overthrow, overturning or visible ruin, particularly of Government. Many may think of subversion in terms of dissident individuals or groups that secretly indulge in, or plan, insurrectionary, underground or otherwise seditious or treasonous activity in order to cause the pillars of state to collapse or be undermined. Leigh and Lustgarten liken the concept to either, '*a beetle, eating away unseen at the timbers of society, or a mole steadily and secretly tunnelling under the pillars of state so as to cause them to collapse without warning.*'<sup>233</sup>

With regard to an official and legal definition of subversion, it is currently taken to concern protection '*from actions intended to overthrow or undermine parliamentary democracy by political, industrial or*

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<sup>232</sup> [www.mi5.gov.uk](http://www.mi5.gov.uk).

<sup>233</sup> Lustgarten and Leigh, *In From the Cold: National Security and Parliamentary Democracy*, Oxford University Press, 1994, p396

*violent means*.<sup>234</sup> The potential elasticity and flexibility by which several key terms in this definition may be interpreted has brought criticism and debate. For example, there can be no categorically correct understanding of which actions may, or may not, ‘*undermine parliamentary democracy*’. One may believe that parliamentary democracy is safe when the constitutional machinery is intact and unthreatened. For another, democracy is safe where there is the promotion of political toleration. The problem is that, as phrased, it is conceivable that peaceful demonstrations against such things as the imposition of new taxes or anti-war demonstrations could be interpreted as civil disobedience, and consequently, as subversive behaviour. Indeed, it is noteworthy that there is no requirement in this definition that the subversive act should be tied to illegal conduct. On the contrary, Leon Brittan once claimed that ‘*tactics which are not in themselves unlawful could be used with the aim of subverting our democratic system of government*’.<sup>235</sup> Indeed, during the 70’s and 80’s, two now senior politicians, Patricia Hewitt and Harriet Harman, were put under MI5 surveillance as ‘communist sympathisers’ whilst working for human rights organisations.<sup>236</sup> This led to a legal action in which the European Commission found that secret surveillance, conducted by MI5 on Hewitt and Harman, had infringed Article 8(1) of the European Convention on Human Rights.<sup>237</sup>

Since the end of the Cold War the threat to British parliamentary democracy emanating from subversion has diminished and is now assessed as negligible.<sup>238</sup> Therefore, MI5 are not presently engaging in counter-subversion work.<sup>239</sup> However, whilst this may lead some to hold the opinion that the surveillance of subversives is a thing of the past, Lustgarten and Leigh argue that: ‘*The issues, intellectual and political, have not vanished with the changed climate of international relations after the Cold War. Subversion remains part of the legal armoury of the Security Service, and the definition of ‘subversion’ has never been limited to organised communism*’.<sup>240</sup> The point is that the legal obligation to protect national security from subversion has never been repealed. It remains possible that certain political groups and movements may still be at risk from investigation and possible interference by the security agencies. Indeed, Lustgarten and Leigh suggest that: ‘*one example, which has potentially explosive implications, is the British Muslim community, whose outlook is already crudely misinterpreted in the press and popular discussion as a primitive ‘fundamentalism’*’.<sup>241</sup> They argue that ‘*this cultural stereotype could make it virtually impossible for security and intelligence officials, working in an area of which they have little knowledge or training,*

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<sup>234</sup> Security Service Act 1989, s1(2).

<sup>235</sup> HC Debs. Vol. 163, Col. 483w. (10 July 1984).

<sup>236</sup> See *Harman and Hewitt v UK*. Appl. No. 121175/86; (1992) 14 EHRR 657.

<sup>237</sup> *Harman and Hewitt v UK*. Appl. No. 121175/86; (1992) 14 EHRR 657.

<sup>238</sup> See [www.mi5.gov.uk](http://www.mi5.gov.uk).

<sup>239</sup> See [www.mi5.gov.uk](http://www.mi5.gov.uk).

<sup>240</sup> Lustgarten and Leigh, *In From the Cold: National Security and Parliamentary Democracy*, Oxford University Press, 1994, p395.

<sup>241</sup> Lustgarten and Leigh, *In From the Cold: National Security and Parliamentary Democracy*, Oxford University Press, 1994, p395.

to distinguish between the rhetoric of outrage and the serious intention to carry out political violence.<sup>242</sup> It is further noteworthy that many groups, which may have once been investigated as subversive, may now fall under the power of the security agencies to investigate cases of alleged ‘domestic terrorism’ under the Terrorism Act 2000.

## **2.10 Protection of the Critical National Infrastructure and Security Advice**

The critical national infrastructure is defined as: ‘*The underlying framework of facilities, systems, sites and networks necessary for the functioning of the country and the delivery of the essential services which we rely on in every aspect of our daily life.*’<sup>243</sup> Examples of essential services include the supply of water, energy and food, transport, telecommunications, government and public services, emergency services, health and finance. ‘*The failure of this infrastructure, and loss of the services it delivers, could include severe economic or social damage and/or large scale loss of life.*’<sup>244</sup>

Attacks on the critical national infrastructure may come in the form of physical attacks such as bombs, either delivered by vehicle, by post or in person. Attacks may also be electronic. The growth of networking and telecommunications technologies, particularly on the internet, leads to vulnerabilities being discovered which allow criminals, terrorists and others to hack into computers, either to gain vital information or to destroy or manipulate its contents. Attackers may be external to an organization or they may rely on the co-operation of an insider member of staff. There are some attacks that can only be committed by insiders, such as the unauthorised release of proprietary information, or the sabotage of assets that only employees can access.

Protecting the critical national infrastructure mostly involves providing protective security advice to potentially vulnerable businesses and organisations. Much of this work is currently undertaken by the Centre for the Protection of the National Infrastructure, which operates under the Security Service Act 1989, and is accountable to the Director General of the Security Service. However, the work of protecting the national infrastructure may also include guarding installations of particular vulnerability, such as nuclear power stations and facilities. This responsibility is tasked to the Civil Nuclear Constabulary, who guard all nuclear power stations and other nuclear installations. The 800 strong force also protects nuclear material, when it is moved around the country, and investigates any attempt to steal or smuggle atomic material. Its officers are routinely armed and it has 17 regional headquarters, mainly at nuclear plants around the UK.

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<sup>242</sup> Lustgarten and Leigh, *In From the Cold: National Security and Parliamentary Democracy*, Oxford University Press, 1994, p395.

<sup>243</sup> The Centre for the Protection of the National Infrastructure. [www.cpni.gov.uk](http://www.cpni.gov.uk).

<sup>244</sup> The Centre for the Protection of the National Infrastructure. [www.cpni.gov.uk](http://www.cpni.gov.uk).

## PART TWO

### 2.11 Covert Surveillance Operations and their Legal Authorisation

Having explored the threat environment in which the security agencies carry out their tasks, it is now possible to examine the covert practices that the security agencies use to achieve these objectives. Covert surveillance, operated by the security agencies and other bodies, is for the most part given legal effect under the Regulation of Investigatory Powers Act 2000. This Act describes the types of surveillance that may be used and lays down the legal criteria for its authorisation. This part of the chapter will begin with a brief account of the methods of surveillance. It will then assess these methods in the light of the legal provisions contained in the relevant Acts. Where it is applicable, the provisions will be discussed in the light of the Human Rights Act 1998. This will make it possible, in Part Three of the chapter, to discuss the mechanisms of accountability and oversight which may provide some control and limitation to the powers granted to the security agencies.

### 2.12 The Methods of Surveillance

According to the Security Service, its role is firstly, to investigate target individuals and organisations in order to obtain, collate, analyse and assess secret intelligence about potential security threats. Secondly, it is to act to counter the sources of these threats, including compiling evidence that enables the security agencies to bring suspects to justice. Thirdly, it is to advise government and others as appropriate, by both keeping them informed of the threats, and by advising on appropriate responses to those threats, including protective security measures. Finally, it is to provide assistance to other agencies, organisations and departments in combating threats to national security.<sup>245</sup> Thus, the gathering and collection of intelligence is at the heart of security agency work. By gathering secret intelligence, the security agencies seek to obtain detailed information about target organisations, their key personalities, infrastructure, plans and capabilities.<sup>246</sup> Intelligence gathering involves the observation, recording and categorisation of information about people, processes and institutions. It calls for the collection of information, its storage, examination and, quite often, its transmission.<sup>247</sup> Principally, the methods employed by the security agencies include techniques such as the use of covert human intelligence sources; the use of directed surveillance, which involves following and

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<sup>245</sup> [www.mi5.gov.uk](http://www.mi5.gov.uk).

<sup>246</sup> [www.mi5.gov.uk](http://www.mi5.gov.uk).

<sup>247</sup> Kirstie Ball and Frank Webster, *The Intensification of Surveillance, Crime, Terrorism and Warfare in the Information Age*, Pluto Press, 2003, p3

observing targets;<sup>248</sup> the interception of communications such as telephone tapping; and intrusive surveillance methods,<sup>249</sup> which may include, for example, eavesdropping in someone's home or car.<sup>250</sup>

The use of covert surveillance is now governed by the Regulation of Investigatory Powers Act 2000. The major aims of this Act are to make provision for the interception of communications;<sup>251</sup> the acquisition and disclosure of data relating to communications;<sup>252</sup> the carrying out of surveillance; the use of covert human intelligence sources<sup>253</sup> and the means by which electronic data, protected by encryption or passwords, may be accessed.<sup>254</sup> The Act also provides mechanisms which may strengthen the accountability of those authorities operating under the Act. In this respect, the Act provides for Commissioners and a Tribunal with functions and jurisdiction in relation to entries on, and interferences with, property or with wireless telegraphy, and to the carrying out of functions by MI5, MI6 and GCHQ.<sup>255</sup>

The principle reason for the introduction of the RIPA 2000 was to regulate the use of surveillance measures within the legal parameters set down by European Convention on Human Rights.<sup>256</sup> Under Article 8 of this Convention, the state has an obligation to respect the citizen's private and family life, home and correspondence. In relation to the security agencies, observing the requirements of Article 8 entails controlling the activities of decision-makers and agents who may be collecting personal and private information, and ensuring that any surveillance is justified under Article 8(2) of the Convention.<sup>257</sup> This provides that covert surveillance will only take place in the interests of 'national security, public safety or the economic well-being of the country; for the prevention of disorder or crime; for the protection of health or morals; or for the protection of the rights and freedoms of

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<sup>248</sup> Under the RIPA, all covert surveillance is directed surveillance if it is not intrusive surveillance, and it is undertaken 'otherwise by way of an immediate response to events or circumstances, the nature of which is such that it would not be practicable for an authorisation to be sought' and for the purposes of a 'specific investigation...or operation.' See s26(2) Regulation of Investigatory Powers Act 2000

<sup>249</sup> Intrusive surveillance is defined under Section 26(3) of the Act. Intrusive surveillance occurs when a surveillance device, or an individual undertaking surveillance, is actually present on residential premises, or in a private vehicle, or it is carried out by such a device in relation to such premises or vehicle without being present on the premises or the vehicle. Part II. Regulation of Investigatory Powers Act 2000.

<sup>250</sup> [www.mi5.gov.uk](http://www.mi5.gov.uk).

<sup>251</sup> With regard to communications, the RIPA covers any system 'which exists (whether wholly or partly in the UK or elsewhere) for the purpose of facilitating the transmission of communications by any means involving the use of electrical or electro-magnetic energy.' This includes all systems which provide or offer a telecommunications service to the public. The Act also covers, in part, private telecommunications systems. For example, those confined to a particular company or body. However, the Act's coverage of private systems is limited to those that are attached to the public system either directly or indirectly. Thus, the wording of the Act appears to include most forms of communications currently available, apart from entirely self-standing private communications. Section 2(1) Regulation of Investigatory Powers Act 2000.

<sup>252</sup> Part I, The Regulation of Investigatory Powers Act 2000.

<sup>253</sup> Part II, The Regulation of Investigatory Powers Act 2000.

<sup>254</sup> Part III, The Regulation of Investigatory Powers Act 2000.

<sup>255</sup> Part IV, The Regulation of Investigatory Powers Act 2000.

<sup>256</sup> Another reason for the inception of the Act was the need to update the law to take account of technological changes such as the growth of the internet. The RIPA also put some types of investigative techniques on a statutory footing for the very first time.

<sup>257</sup> See, for discussion: D. Harris, K. O'Boyle and C. Warbrick, *Law of the European Convention on Human Rights*, Oxford 1995, p310

others.<sup>258</sup> European Convention jurisprudence has interpreted Article 8(2) to mean that, regardless of the end to be achieved, no right guaranteed by the Convention should be interfered with unless a citizen knows the basis for the interference through an ascertainable national law.<sup>259</sup> In other words, the surveillance activity must have some basis in domestic law.<sup>260</sup> This law should be accessible to the person concerned, who must, moreover, be able to foresee its consequences.<sup>261</sup> Thus, in *Kruslin v France*<sup>262</sup>, a case concerning surveillance techniques, the European Court commented, '*it is essential to have clear, detailed rules on the subject, especially as the technology available for use is continually becoming more sophisticated.*' Indeed, the Court has expressed the view that the interception of communications, such as phone tapping, represents a more 'serious' interference with private life, so the law must be 'particularly' precise.<sup>263</sup> In addition to these imperatives, state interference with Article 8 guarantees, must be carried out for a legitimate objective; be necessary in a democratic society and be applied in a non-discriminatory fashion.<sup>264</sup> Necessity is essentially a test of proportionality. The authorising authority must show that any interference with a Convention right is both necessary to fulfil a pressing social need and is a proportionate response to that need. The importance of the legitimate aim and the actual situation through which the aim is being secured are factors to be taken into account,<sup>265</sup> and action taken for the prevention of terrorism or serious crimes may not be the same as action for a relatively minor offence.<sup>266</sup> Overall then, in order to comply with the essence of the Convention, the surveillance operation must be compatible with the rule of law.<sup>267</sup>

### **2.13 Surveillance Under the Regulation of Investigatory Powers Act 2000**

The RIPA regulates the manner in which the security agencies, and certain other public bodies, may conduct surveillance and access a person's communications. The Act regulates 5 broad types of surveillance which are defined in Part II. These are:

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<sup>258</sup> Human Rights Act 1998. Schedule 1, The Articles. Article 8(2). For the obligations of public authorities, see the provisions in Section 6. Human Rights Act 1998

<sup>259</sup> See *Malone v UK* (1984) 7 EHRR 14, *Leander v Sweden* (1987) 9 EHRR 433, *Kruslin v France* (1990) 12 EHRR 546.

<sup>260</sup> *Harman and Hewitt v UK*. Appl No 121175/86; (1992) 14 EHRR 657.

<sup>261</sup> See, for example, *Huvig v France* (1990) 12 EHRR 528, para. 26.

<sup>262</sup> *Kruslin v France* (1990) 12 EHRR 546.

<sup>263</sup> *Kopp v Switzerland* (1999) 27 EHRR 91.

<sup>264</sup> Human Rights Act 1998. Schedule 1, The Articles. Article 14: Prohibition of Discrimination. The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

<sup>265</sup> *Silver v UK* (1983) 5 EHRR 347.

<sup>266</sup> See: Home Office, *Covert Surveillance and Property Interference, Revised Code of Practice Pursuant to Section 71 of the Regulation of Investigatory Powers Act 2000*.

<sup>267</sup> See, for example, *Kruslin v France* (1990) 12 EHRR 547, para. 27.

- The interception of communications, such as intercepting a person's telephone or accessing the content of a person's private e-mails or correspondence.<sup>268</sup>
- Intrusive surveillance, such as eavesdropping in a target's home or vehicle.<sup>269</sup>
- Directed surveillance. These operations involve the covert monitoring of a target's movements, conversations and other activities. This work is carried out by surveillance officers who may work in vehicles, on foot or from fixed observation posts.<sup>270</sup>
- Covert human intelligence sources. A person is defined as a covert human intelligence source if he maintains a relationship with a person for the covert purpose of obtaining information, or providing access to any information to another person, or covertly discloses information obtained by the use of such a relationship, or as a consequence of the existence of the relationship.<sup>271</sup>
- Communications data. This brand of data contains the record of a communication, such as a telephone call, e-mail or website visited, but not the content of the communication.<sup>272</sup>

## 2.14 Directed and Intrusive Surveillance

The Part II provisions for the regulation of directed and intrusive surveillance have been amongst the most controversial because the distinction between them is seemingly ambiguous. Directed surveillance is surveillance that is covert and undertaken for the purposes of a specific investigation; is likely to result in the obtaining of private information about a person; and is not an immediate response to circumstances or events.<sup>273</sup> According to the Covert Surveillance and Property Interference Code of Practice, private information should be taken generally to include any aspect of a person's private or personal relationship with others, including family and professional or business relationships.<sup>274</sup> Where directed surveillance would not be likely to result in the obtaining of any private information about a person, no interference with Article 8 rights occurs and an authorisation under the 2000 Act is, therefore, not necessary or appropriate.<sup>275</sup> Intrusive surveillance, on the other

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<sup>268</sup> Communications - The Regulation of Investigatory Powers Act 2000, Sections 1-20.

<sup>269</sup> Intrusive Surveillance - The Regulation of Investigatory Powers Act 2000, Part II, s.26(1)(b).

<sup>270</sup> Directed Surveillance - The Regulation of Investigatory Powers Act 2000, Part II, s.26(1)(a).

<sup>271</sup> Covert Human Intelligence Sources - The Regulation of Investigatory Powers Act 2000, Part II, s. 26(1)(c). Covert agents and informants are placed on a statutory footing for the first time in Section 26(7). Authorisation for the conduct or use of covert human intelligence sources is on the same grounds as for directed surveillance, and the persons entitled to grant authorisation are defined as for directed surveillance in Section 30.

<sup>272</sup> Communications Data - The Regulation of Investigatory Powers Act 2000, s.21.

<sup>273</sup> The Regulation of Investigatory Powers Act 2000, Part II, s.26(2).

<sup>274</sup> Home Office, *Covert Surveillance and Property Interference, Revised Code of Practice Pursuant to Section 71 of the Regulation of Investigatory Powers Act 2000*. Chapter 2.4. See also Section 26(10) of the Regulation of Investigatory Powers Act 2000

<sup>275</sup> Covert surveillance that is likely to reveal private information about a person, but is carried out by way of an immediate response to events such that it is not reasonably practicable to obtain an authorisation under the 2000 Act, would not require a directed surveillance authorisation. This is because The 2000 Act is not intended to prevent law enforcement officers fulfilling their legislative functions. See: Regulation of Investigatory Powers Act 2000, section 26(2)(c).

hand, is covert surveillance which is carried out by an individual on residential premises,<sup>276</sup> or in any private vehicle,<sup>277</sup> or is carried out by a surveillance device in relation to anything taking place on residential premises or in a private vehicle.<sup>278</sup> Thus, the definition of surveillance as intrusive relates to the location of the surveillance, and not any other consideration of the nature of the information that is expected to be obtained. Thus, the Act fails to recognise that surveillance that is intrusive may occur outside of these places through, for example, prolonged surveillance, or in a place in which the target would legitimately expect to enjoy privacy, such as in business or professional relationships. This is significant because the distinction between directed and intrusive surveillance has consequences for the level of authorisation required, with the former being much easier to achieve.

## **2.15 Authorisation and Warrants**

The level of authorisation required to conduct investigations which may intrude into the personal and private lives of targeted individuals will vary with the method of surveillance used. However, with such a fine distinction between, say, intrusive and directed surveillance, it can be legitimately argued there would appear to be no reason why the regulation of directed surveillance should be of a lower level than that required for intrusive surveillance because, as noted above, the only real difference is where it occurs. However, authorisation for directed surveillance may be significantly easier to acquire.

### ***2.15.1 The Authorisation of Directed Surveillance***

The authorisation of ‘directed’<sup>279</sup> surveillance is outlined in Section 28 and requires only internal authorisation, which can be granted by a designated person if he believes that it ‘is proportionate to

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<sup>276</sup> The Regulation of Investigatory Powers Act 2000, Part II, s.26 (3, 4 and 5). See also: Home Office, *Covert Surveillance and Property Interference, Revised Code of Practice Pursuant to Section 71 of the Regulation of Investigatory Powers Act 2000*.

<sup>277</sup> The Regulation of Investigatory Powers Act 2000, Part II, s.26 (3, 4 and 5). A private vehicle is defined in the 2000 Act as any vehicle, including vessels, aircraft or hovercraft, which is used primarily for the private purposes of the person who owns it or a person otherwise having the right to use it. This would include, for example, a company car, owned by a leasing company and used for business and pleasure by the employee of a company. See comments in: Home Office, *Covert Surveillance and Property Interference, Revised Code of Practice Pursuant to Section 71 of the Regulation of Investigatory Powers Act 2000*. Chapter 2.17.

<sup>278</sup> With respect to the use of surveillance devices, Section 26(5) adds that if the device is not actually present on the premises or in the vehicle, the surveillance will not be regarded as intrusive ‘unless the device is such that it consistently provides information of the same quality and detail as might be expected to be obtained from a device actually present on the premises or in the vehicle’. Regulation of Investigatory Powers Act 2000, s.26(5)(b).

<sup>279</sup> Please also note that authorisation for the conduct or use of covert human intelligence sources is on the same grounds as for directed surveillance.

what is sought to be achieved' and is 'necessary.'<sup>280</sup> Designated persons are defined in Section 30 as 'individuals holding such offices, ranks or positions with relevant public authorities as are prescribed for the purposes of this subsection by an order made by the Secretary of State and can include the Secretary of State himself.'<sup>281</sup> Relevant public authorities include the intelligence and security services, the police, Customs and Excise, the Armed Forces and any other authority designated by an order from the Secretary of State.<sup>282</sup> It is noteworthy, therefore, that in some organisations this may lead to authorising officers authorising surveillance activities in operations in which they are directly involved. In *Kopp v Switzerland*,<sup>283</sup> the practice of internal authorisation was severely criticised. It is arguable that this level of authorisation may not, in the final analysis, be enough to satisfy the European Court of Human Rights.

With regards to the requirement that the authorisation be proportionate and necessary,<sup>284</sup> the Covert Surveillance Code of Practice<sup>285</sup> suggests that the following elements be considered:

- Balancing the size and scope of the proposed activity against the gravity and extent of the perceived crime or offence;
- Explaining how and why the methods to be adopted will cause the least possible intrusion to the subject and others;
- Considering whether the activity is an appropriate use of the legislation and a reasonable way, having considered all reasonable alternatives, of obtaining the necessary result;
- Evidencing, as far as reasonably practicable, what other methods have been considered and why they were not implemented.<sup>286</sup>

The Code of Practice also notes that, before authorising applications for directed or intrusive surveillance, *'the authorising officer should also take into account the risk of obtaining private information about persons who are not subjects of the surveillance or property interference*

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<sup>280</sup> In the interests of national security; preventing or detecting crime or of preventing disorder; in the interests of the economic well-being of the United Kingdom; in the interests of public safety; for the purpose of protecting public health; for the purpose of assessing or collecting any tax, duty or levy payable to a government department; or for any purpose not mentioned above which is specified by an order made by the Secretary of State. Regulation of Investigatory Powers Act, (Prescription of Offices, Ranks and Positions) Order 2000 SI no. 2417.

<sup>281</sup> The Regulation of Investigatory Powers Act 2000, Part II, s.30(1).

<sup>282</sup> The public authorities that are entitled to authorise directed surveillance are listed in Schedule 1 of the Act.

<sup>283</sup> *Kopp v Switzerland*, App. No 23224/94, 1998-II.

<sup>284</sup> The Regulation of Investigatory Powers Act 2000, Part II, s.28(2). For a similar requirement in regards to intrusive surveillance, see s.32(2).

<sup>285</sup> Home Office, *Covert Surveillance and Property Interference, Revised Code of Practice Pursuant to Section 71 of the Regulation of Investigatory Powers Act 2000*.

<sup>286</sup> Home Office, *Covert Surveillance and Property Interference, Revised Code of Practice Pursuant to Section 71 of the Regulation of Investigatory Powers Act 2000*. Chapter 3.6. Several other Codes, also introduced under the RIPA, contain similar provisions: See: Home Office, *Interception of Communications, Code of Practice Pursuant to Section 71 of the Regulation of Investigatory Powers Act 2000*; Home Office, *Acquisition and Disclosure of Communications Data, Code of Practice Pursuant to Section 71 of the Regulation of Investigatory Powers Act 2000*; Home Office, *Covert Human Intelligence Sources, Code of Practice Pursuant to Section 71 of the Regulation of Investigatory Powers Act 2000*.

activity.<sup>287</sup> In other words, measures should be taken, wherever practicable, to avoid or minimise unnecessary intrusion into the privacy of those who are not the intended subjects of the surveillance activity. However, the Code of Practice makes it clear that where such collateral intrusion is unavoidable, the activities may still be authorised, provided this intrusion is considered proportionate to what is sought to be achieved. In this regard, the same proportionality tests apply to the likelihood of collateral intrusion as to intrusion into the privacy of the intended subject of the surveillance.<sup>288</sup>

### **2.15.2 The Authorisation of Intrusive Surveillance**

The authorisation of intrusive surveillance is more narrowly defined. The Secretary of State and senior authorising officers have the power to grant authorisation for intrusive surveillance.<sup>289</sup> As with directed surveillance, the issue of proportionality should be addressed (could the information reasonably be obtained by other means), alongside a consideration of whether the authorisation is necessary; in the interests of national security; for the purpose of preventing or detecting serious crime; or in the interests of the economic well-being of the United Kingdom.<sup>290</sup> With regard to authorisation by senior authorising officers, when authorisation is given or cancelled for intrusive surveillance, notification must be given to the Surveillance Commissioner.<sup>291</sup> The Surveillance Commissioner must decide whether or not to approve the authorisation.<sup>292</sup> If the Surveillance Commissioner is not satisfied that the grounds (such as proportionality) for authorisation have been met, he may cancel the authorisation, or cancel it from the time when the relevant grounds ceased to exist to his satisfaction.<sup>293</sup> As a result of exercising his power to cancel, he may also order the destruction of any records relating to information obtained by the authorised operation.<sup>294</sup> However, the exercise of this power is discretionary. The Commissioner is not compelled to cancel any given authorisation and a senior authorising officer may appeal to the Chief Surveillance Commissioner against either an order to destroy records; a refusal to approve an authorisation; or a decision to quash or cancel an authorisation.

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<sup>287</sup> Home Office, *Covert Surveillance and Property Interference, Revised Code of Practice Pursuant to Section 71 of the Regulation of Investigatory Powers Act 2000*. Chapter 3.8.

<sup>288</sup> Home Office, *Covert Surveillance and Property Interference, Revised Code of Practice Pursuant to Section 71 of the Regulation of Investigatory Powers Act 2000*. Chapter 3.8 – 3.10.

<sup>289</sup> The Regulation of Investigatory Powers Act 2000, Part II, s.32.

<sup>290</sup> The Regulation of Investigatory Powers Act 2000, Part II, s.32(2).

<sup>291</sup> The Regulation of Investigatory Powers Act 2000, s.35.

<sup>292</sup> The Regulation of Investigatory Powers Act 2000, s.35(4).

<sup>293</sup> The Regulation of Investigatory Powers Act 2000, s.37 (2 and 3).

<sup>294</sup> The Regulation of Investigatory Powers Act 2000, s.37 (5).

## 2.16 Criticisms of Surveillance Practices under Part II of the RIPA

In summary, Part II of the Act provides an element of legal accountability in relation to the authorisation of many surveillance operations in that it provides a legal framework designed to ensure that surveillance activities are ‘in accordance with law’ and ‘proportionate’ as required by the Human Rights Act and associated case law. The Government justification for the enactment of the Act was that it was essential to allow law enforcement agencies to catch up technologically with the increasingly sophisticated tools used by terrorists, drug smugglers and organised criminal gangs. The Government also claimed that it was necessary to put the Bill through Parliament, before the Human Rights Act became law in October 2000, in order to ensure that law agencies had a framework for covert surveillance that was compliant with the European Convention on Human Rights. However, whilst Jack Straw, the then Home Secretary, claimed the Bill merely ‘*formalised existing powers*,’<sup>295</sup> and that ‘*what was new is that, for the first time, the use of these techniques will be properly regulated by law*,’<sup>296</sup> civil libertarian groups have claimed that the Act fails to provide adequate safeguards to protect individual privacy and offers no way for an individual to obtain effective redress if the powers are abused. For example, James Welch, the Legal Director of Liberty, has argued that when the Act was passed in 2000 only nine organisations, including the police and security agencies, were allowed access to communications records. However, Welch notes that the number of public authorities that have access to the information has been significantly expanded since the inception of the Act.<sup>297</sup> Indeed, in 2007 there were 519,260<sup>298</sup> requisitions of communications data from telephone companies and ISPs, potentially from a wide range of public authorities, including Local Authorities, The Gaming Board and Jobcentres.<sup>299</sup> Thus, Welch has argued that ‘*it is one thing to use covert surveillance in operations investigating terrorism and other serious crimes, but it has come to a pretty pass when this kind of intrusive activity is used to police school catchment areas*.’<sup>300</sup> For Welch ‘*this is a ridiculously disproportionate use of the RIPA and will undermine public trust in necessary and lawful surveillance*.’<sup>301</sup> The problem is that ‘*privacy is an increasing concern to people, who do not wish to feel that they are unprotected, or inadequately protected, from the prying eyes of state officials, but find that new technologies give ever greater ability and commercial temptation to gather data*.’<sup>302</sup>

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<sup>295</sup> See for example, [theguardian.co.uk](http://theguardian.co.uk), *Regulation of Investigatory Powers Act 2000*, Monday 19<sup>th</sup> January 2009.

<sup>296</sup> See for example, [theguardian.co.uk](http://theguardian.co.uk), *Regulation of Investigatory Powers Act 2000*, Monday 19<sup>th</sup> January 2009.

<sup>297</sup> The public authorities that are able to utilise all or some of the provisions of the Act are listed in Schedule 1. The Secretary of State may add new public authorities by way of delegated legislation. Thus over the years, the number of public authorities with access to the provisions of the Act has grown. See for example: Statutory Instrument 2000. No. 2471 granting additional bodies access to telecoms data, The National Archives, 7<sup>th</sup> September 2000.

<sup>298</sup> Guy Herbert, *Zero Privacy*, [theguardian.co.uk](http://theguardian.co.uk), Wednesday 13<sup>th</sup> August, 2008.

<sup>299</sup> See for example, [theguardian.co.uk](http://theguardian.co.uk), *Regulation of Investigatory Powers Act 2000*, Monday 19<sup>th</sup> January 2009.

<sup>300</sup> See for example, [theguardian.co.uk](http://theguardian.co.uk), *Regulation of Investigatory Powers Act 2000*, Monday 19<sup>th</sup> January 2009.

<sup>301</sup> See for example, [theguardian.co.uk](http://theguardian.co.uk), *Regulation of Investigatory Powers Act 2000*, Monday 19<sup>th</sup> January 2009.

<sup>302</sup> Jim Killock, RIPA, *Consultation Response from Open Rights Group*, [www.openrights.org.uk](http://www.openrights.org.uk). (Last accessed October 2011).

## PART THREE

### 2.17 The Mechanisms of Oversight and Accountability

There are several broad ways in which the security agencies can be held accountable for their activities. Firstly, the security agencies can be held to account through statutory measures. The relevant statutory mechanisms are found in Part IV of the RIPA entitled ‘Scrutiny of Investigatory Powers and of the Functions of the Intelligence Services’.<sup>303</sup> Part IV provides for three Commissioners and a Tribunal. Secondly, there is an element of accountability provided in the form of Parliamentary oversight. Parliament, and particularly the House of Commons, may affect the way in which security is thought about and dealt with in two major ways. It may formally give assent to security related legislative measures, enabling them to be designated Acts of Parliament, and it may subject measures of security policy to scrutiny and influence. With regard to the security agencies, there is also an added layer of Parliamentary accountability in the form of the Intelligence and Security Committee, which was set up by the Intelligence Services Act 1994.

### 2.18 Statutory Oversight under the RIPA: The Commissioners and the Tribunal

The RIPA provides for the appointment of two Commissioners to oversee certain aspects of the work of the intelligence agencies,<sup>304</sup> namely The Interception of Communications Commissioner and the Intelligence Services Commissioner.<sup>305</sup> The Commissioners, who are appointed by the Prime Minister, must hold, or have held, high judicial office. The thinking behind this, it is claimed, is that *‘the holder of high judicial office is independent of government and likely to form his own disinterested judgement and...by virtue of his judicial position, he may be seen to carry authority.’*<sup>306</sup> The Interception of Communications Commissioner oversees the arrangements for access to communications data under Part 1, Chapter II of the RIPA. The Intelligence Services Commissioner is responsible for reviewing the internally authorized use of directed surveillance and of covert human intelligence sources, such as agents, to check that they are acting in accordance with the requirements of the law. Both Commissioners are charged with reviewing warrant applications and visiting the

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<sup>303</sup> Part IV, Sections 57–72. Regulation of Investigatory Powers Act 2000.

<sup>304</sup> Sections 57 and 59.

<sup>305</sup> The Chief Surveillance Commissioner, appointed under part III of the Police Act 1997, must also now, under s.62 of the RIPA, take on the review of Part II authorisations, and part III activity other than by the Secretary of State and any other areas of RIPA not covered elsewhere.

<sup>306</sup> Sir Peter Gibson (Intelligence Services Commissioner), *Oversight Arrangements in the UK and the Role of the Intelligence Services Commissioner*, 6<sup>th</sup> Conference of the Parliamentary Committees for the Oversight of Intelligence and Security Services of the European Member States, Brussels, 30<sup>th</sup> September –1<sup>st</sup> October 2010.

security agencies to discuss any case which they wish to examine in more detail.<sup>307</sup> They must, by law, be given access to whatever documents and information they require.<sup>308</sup> The Commissioners must also submit a report to the Prime Minister, at the end of each reporting year, which is subsequently laid before Parliament and published.<sup>309</sup> However, these reports are not uncensored. The Prime Minister decides how much of the report should be excluded from publication on the grounds that it is prejudicial to national security; or to the prevention or detection of serious crime; or to the economic well-being of the United Kingdom; or to the continued discharge of the functions of public bodies subject to the Commissioners' review.<sup>310</sup> In practice, the Commissioners have adopted the custom of writing their report in two parts, with a confidential annex containing matters which in their view should not be published.<sup>311</sup> In addition to these duties, the Government has occasionally asked the Commissioners to take on other tasks outside their normal remit. These, it seems, have typically required '*an ongoing role in monitoring compliance with new policies or an intensive health check on a particular work area.*'<sup>312</sup>

The appointment of the Commissioners has ensured that there is some, albeit limited, oversight of the use of covert surveillance measures, their lawful authorisation, and the circumstances in which investigations are conducted. As such, it is claimed that the Commissioners may provide assurance and challenge to Ministers and Heads of Agencies on the legality and proper performance of the activities of the Agencies. For example, they may advise on how the Agencies can enhance their compliance with statutory obligations and ensure that new and existing capabilities are developed and used lawfully, proportionately and only where necessary.<sup>313</sup> However, it has been claimed that the measures, whilst useful, are inadequate. Firstly, The Foundation for Information Policy Research has argued that it does not '*believe that one centralised office, (of the Interception Commissioner) can provide proper oversight of more than one million requests per year.*'<sup>314</sup> The Foundation notes that '*even when properly resourced, the office will only be able to examine a tiny fraction of the total requests made.*'<sup>315</sup> In the view of this group, the Interception Commissioner should continue to oversee the system, but he should publish far more detailed statistics on its operation. This, it is

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<sup>307</sup> The Practice of the Commissioners is to make twice yearly visits to the departments and agencies concerned to select a number of warrants (mainly at random) for close inspection. In the course of these visits, the Commissioner seeks to satisfy himself that the warrants fully meet the requirements of the RIPA; that proper procedures have been followed; and that the relevant safeguards and codes of practice have been followed. See HC 883 (2003-2004); SE 2004/113.

<sup>308</sup> The Regulation of Investigatory Powers Act 2000, s.60(1).

<sup>309</sup> The Regulation of Investigatory Powers Act 2000, s.60(2).

<sup>310</sup> The Regulation of Investigatory Powers Act 2000, s.60(3-5).

<sup>311</sup> See comments in: HM Government, *Justice and Security Green Paper*, Cm 8194, October 2011, Chapter Three, pp 39-47.

<sup>312</sup> HM Government, *Justice and Security Green Paper*, October 2011, Cm 8194, Chapter Three, pp 39-47.

<sup>313</sup> HM Government, *Justice and Security Green Paper*, October 2011, Cm 8194, Chapter Three, pp 39-47.

<sup>314</sup> Foundation for Information Policy Research, *Communications Surveillance Briefing*, [www.fipr.org](http://www.fipr.org).

<sup>315</sup> Foundation for Information Policy Research, *Communications Surveillance Briefing*, [www.fipr.org](http://www.fipr.org).

argued, would better provide the material necessary to enable outsiders to make an informed appreciation of the justifiability of the use of invasive powers.<sup>316</sup>

A second criticism relates to the lack of mandatory judicial supervision. It has been noted that the UK has opted for a system where Parliament has not required any judicial involvement prior to the warrant or decision and that, as such, the Commissioners only have the function of retrospective review. The argument is that, at best, the current provisions only marginally satisfy the criteria for authorisation laid down in *Klass v Germany*,<sup>317</sup> which views supervision by the judiciary as desirable though other independent safeguards might suffice.<sup>318</sup> However, in the event, these concerns have not been dispelled by the European Court of Human Rights. In the recent case of *Kennedy v UK*, the ECHR found that *'having regard to the safeguards against abuse in the procedure, as well as the more general safeguards offered by the supervision of the Commissioner and the review of the Investigatory Powers Tribunal, the impugned surveillance measures, insofar as they may have been applied to the applicant in the circumstances outlined in the present case, are justified under Article 8.2.'*<sup>319</sup> Thus, in the view of the Court, the oversight mechanisms, such as the provision of Commissioners and the Investigatory Powers Tribunal provided adequate safeguards.

A third criticism is that the structure of the current provisions remains complex. There are several different Commissioners covering activities which may in fact be part of the same operation. Indeed, the Government has recently acknowledged that the UK regime differs from that found in other jurisdictions,<sup>320</sup> for example, Australia, where non-Parliamentary independent oversight of security and intelligence agencies is undertaken by one single body. These bodies, it is further noted, tend to have a more public-facing role, and are often explicitly tasked to explain what they do and how they hold the Agencies to account. In this way they are able to provide public assurance that the activities of the Agencies are at all times reasonable, proportionate, necessary and compliant with all legal obligations. However, according to the Justice and Security Green Paper, having these functions carried out by one body carries the risk that the oversight person or body can develop a more political relationship with the Government and thus potentially seem to provide less independent advice than, for example, the Commissioners do currently. However, it is accepted that this problem can be mitigated by employing a rigorous and open appointments process.<sup>321</sup>

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<sup>316</sup> Foundation for Information Policy Research, *Communications Surveillance Briefing*, [www.fipr.org](http://www.fipr.org).

<sup>317</sup> *Klass v Germany* (1978) 2 EHRR 214.

<sup>318</sup> See Yaman Akdeniz, Nick Taylor and Clive Walker, *State Surveillance in an Age of Information and Rights*, [2001] Criminal Law Review. (February) pp 73-90.

<sup>319</sup> *Kennedy v UK* (2011) 52 EHRR 4, para 169.

<sup>320</sup> HM Government, *Justice and Security Green Paper*, October 2011, Cm 8194, Chapter Three, pp 39-47.

<sup>321</sup> HM Government, *Justice and Security Green Paper*, October 2011, Cm 8194, Chapter Three, pp 39-47.

The Government is currently inviting consultation with regards to whether the benefits of a major change to the current role of the Commissioners would outweigh the costs.<sup>322</sup> In this respect it claims that there are a number of different approaches that could be taken. One approach would be to appoint an Inspector-General who would be responsible for the oversight of all the covert investigative techniques undertaken by the various intelligence agencies. This would effectively subsume, into one body, the current roles of the Intelligence Services Commissioner and of the Interception of Communications Commissioner as they relate to the Agencies. Potentially, other functions not currently undertaken by either Commissioner could also be added to the remit, for example, the ability to oversee the operational work of the Agencies.<sup>323</sup> However, unless the Inspector-General was also to have responsibility for oversight of the non-agency bodies,<sup>324</sup> a consequence of this approach would be to have two overseeing bodies. One whose remit includes responsibility for Agency activity and another which would oversee non-agency activity. This approach brings the risk that the two bodies would take different approaches to the oversight of interception and interpretation of the law, in a context of complex and rapidly evolving communications technology, and so the standards and practices of interception relating to the Agencies and Non-Agency bodies could diverge.

### ***2.18.1 The Investigatory Powers Tribunal***

A further mechanism of accountability is found in Section 65 of the RIPA, which establishes the Investigatory Powers Tribunal.<sup>325</sup> The Tribunal has jurisdiction to consider complaints about the use of surveillance by any organisation with powers under the RIPA. Indeed, it is the only judicial body with the power to investigate the conduct of the various intelligence agencies. The Tribunal, which is independent of government, has full powers to investigate and decide any case within its jurisdiction.<sup>326</sup> Thus, the organisations under the Tribunal's jurisdiction must provide details to the Tribunal of any activity that is being complained about. The Tribunal has a duty to investigate allegations against the security agencies, and to hear and determine any proceedings brought. The Tribunal is not under any obligation to hear or determine any case which is frivolous or vexatious.<sup>327</sup> Complaints must be brought within one year after the alleged conduct to which it relates, but the Tribunal may, if it is equitable to do so, extend the time.<sup>328</sup> The Tribunal has the power to make an

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<sup>322</sup> HM Government, *Justice and Security Green Paper*, October 2011, Cm 8194, Chapter Three, pp 39-47.

<sup>323</sup> HM Government, *Justice and Security Green Paper*, October 2011, Cm 8194, Chapter Three, pp 39-47.

<sup>324</sup> HM Government, *Justice and Security Green Paper*, October 2011, Cm 8194, Chapter Three, pp 39-47.

<sup>325</sup> Regulation of Investigatory Powers Act 2000, s65.

<sup>326</sup> Regulation of Investigatory Powers Act 2000, s67.

<sup>327</sup> Regulation of Investigatory Powers Act 2000, s67(4).

<sup>328</sup> Regulation of Investigatory Powers Act 2000, s67(5).

award of compensation. It may also order the quashing or cancelling of any warrant or authorisation and/or the destruction of information.<sup>329</sup>

The Tribunal, as a ‘public authority’ within Section 6 (1) of the Human Rights Act 1998, must conduct the proceedings compatibly with the rights protected by the European Convention on Human Rights. This includes, of course, Article 6 (the right to a fair trial). However, whilst Article 6 requires that the hearing should normally be heard in public, an exception<sup>330</sup> is permitted to the Tribunal on grounds of national security, as long as there are sufficient procedural safeguards.<sup>331</sup> When hearing a claim involving human rights, the adjudicators must interpret legislation using the methods set out in the Human Rights Act 1998. Under Section 2 of this Act, the Tribunal must take into account any judgement, decision, declaration or opinion of the European Court of Human Rights.<sup>332</sup> Further, Section 3(1) of the Act effectively means that, so far as it is possible to do so, the Tribunal must interpret the RIPA and the rules compatibly with Convention rights.<sup>333</sup> Any incompatible provisions are ultra vires to the extent that they cannot be read and given effect compatibly with the requirements laid down by the Convention and associated case law.<sup>334</sup>

It has been accepted that the Tribunal will have *‘immense significance as the central mechanism for protecting citizens against the abuse of state surveillance powers.’*<sup>335</sup> For example, in *Kennedy v UK*,<sup>336</sup> the ECHR found that the *‘restrictions on the applicant’s rights in the context of the proceedings before the IPT were both necessary and proportionate and did not impair the applicant’s Article 6 rights.’*<sup>337</sup> Indeed, the Court emphasized the *‘breadth of access to the Investigatory Powers Tribunal enjoyed by those complaining about interception within the United Kingdom and the absence of any evidential burden to be overcome in order to lodge an application with the Investigatory Powers Tribunal.’*<sup>338</sup>

However, the Tribunal has been criticised for a number of reasons. Firstly, it can merely report its conclusions: It cannot report the reason for a decision.<sup>339</sup> This means, for example, that if the Tribunal finds that no warrant or authorisation exists and that, apparently, no surveillance or interception is occurring, or that proper authorisation occurs, it will merely inform the claimant that the complaint has not been upheld. The claimant is then left not knowing whether in fact surveillance or interception is occurring. The problem is that the Tribunal will only decide whether any

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<sup>329</sup> Regulation of Investigatory Powers Act 2000, s67(7).

<sup>330</sup> See, for example, CPR Rule 39.2(3)(b).

<sup>331</sup> *Kennedy v UK* (2011) 52 EHRR 4, para 190.

<sup>332</sup> Human Rights Act 1998, s2(b).

<sup>333</sup> Human Rights Act 1998, s3(1).

<sup>334</sup> See Human Rights Act 1998, Sections 2-4.

<sup>335</sup> Helen Fenwick, *Civil Liberties and Human Rights*, Cavendish, 2002, p 677.

<sup>336</sup> *Kennedy v UK* (2011) 52 EHRR 4, para 190.

<sup>337</sup> *Kennedy v UK* (2011) 52 EHRR 4, para 190.

<sup>338</sup> *Kennedy v UK* (2011) 52 EHRR 4, para 190.

<sup>339</sup> See: Section 68, Regulation of Investigatory Powers Act 2000.

surveillance that is being carried out is lawful - that it has been appropriately authorised and is being conducted in accordance with the applicable rules. If it investigates a complaint and finds that surveillance is being carried out but is lawful, it will not confirm to the complainant that they are under surveillance, but merely state that their complaint has not been upheld.

The second weakness of the Tribunal's jurisdiction concerns the absence of any appeal, and the prohibition against questioning the Tribunal and Commissioners before any court of law. It has been argued that the exclusion of any form of judicial scrutiny of the Commissioners' and Tribunal's findings creates a danger that the rights of the individual will not ultimately be upheld. This lack of an appeals system is significant because, in practice, very few complaints have ever been upheld by the Tribunal, either before or after the inception of the RIPA. Indeed in 1998, Lord Nolan pointed out that '*not a single case had succeeded*'<sup>340</sup> and that '*this had led to a measure of suspicion about the effectiveness of the Tribunal's work*'.<sup>341</sup> More recent statistics concerning complaints dealt with by the Tribunal are published in the Annual Reports of the Interception of Communications Commissioner. In the period 2000 to 2009, only five out of 956 complaints made, have been upheld.

Given these two weaknesses and the fact that the interception is never revealed at any later time to the subject, the chances of any court action being initiated, or abuse uncovered by the Tribunal, may be substantially reduced at every stage of the procedure. Thus, it can be argued that retrospective review by the Tribunal and the Commissioner is less than adequate and that, under the present regime, it is less likely to spot, or indeed be alerted to, errors than would be desirable. Thus, the RIPA may fall short of providing an effective oversight system. The law does not offer a single regulatory system, even though one was promised by the Home Office.<sup>342</sup> Furthermore, though the impetus for the legislation was the need to comply with the European Convention on Human Rights, it has been argued that '*the Acts appear to represent an attempt to head off future adverse rulings from Strasbourg rather than being a meaningful attempt to respect the private life of the individual*'.<sup>343</sup> For example, whilst Article 8 reflects a minimum standard to be achieved, the RIPA may reflect a minimalist attempt to achieve it. Perhaps the statements by the then Home Secretary, Jack Straw, that under the Human Rights Act, the RIPA is Convention compatible and that '*it is a significant step forward for the protection of human rights in this country*',<sup>344</sup> may eventually be proven to be more the rhetoric of a politician than the judgment of a lawyer.

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<sup>340</sup> Report of the Interception Commissioner. Cm 4001, 1998, para 31.

<sup>341</sup> Report of the Interception Commissioner. Cm 4001, 1998, para 31.

<sup>342</sup> Home office, *Interception of Communications in the United Kingdom*, Cm.4368,1999, para 4.1.

<sup>343</sup> Nick Taylor, *State Surveillance and the Right to Privacy*, Surveillance and Society, 2002.

<sup>344</sup> HC Debs, Vol. 345 col. 767, 6<sup>th</sup> March 2000, Jack Straw.

## 2.19 Parliamentary Oversight

A further way in which the security agencies may be held accountable for their activities is by the means of Parliament. It may seem natural, in a democratic nation such as the UK, to look to Parliament, and especially the House of Commons, to take on the task of ultimate decision-maker and arbiter in setting appropriate security agendas.<sup>345</sup> Politicians may be the people best placed to address the security concerns of the nation because their power is subject to the popular will, as expressed in regular and free elections, and because they may be called to account for their actions and policies on a continuing basis.

Members of Parliament are required to scrutinise the executive by subjecting the entire conduct of government to a continuous process of rigorous and critical inquiry. Such scrutiny has four main functions. The first is the education of both the government and the electorate through the publicising effects of debate in Parliament. In other words, the electorate will become aware of the issues surrounding a particular policy, whilst the reaction of newspapers, commentators and the public to debates on proposed legislation will help keep the Government informed of the drift of public opinion. The second is the influence on the pre-legislative processes which both backbenchers and opposition MP's may have. The third is the limited amount of improvement and amendment which may be made to proposed legislation. The fourth is the clarification as to the meaning and operation of a given piece of legislation, which may take place during debate.

When MP's use the Parliamentary sounding board effectively, the House of Commons may legitimately claim to be both a practical democratic safeguard against the abuse of government power and an essential vehicle for conveying to the electorate the necessary material to make an informed judgement on the Government's competence and fitness to continue in office. For example, Parliamentary and public disquiet may have been a major factor in prompting the Government to announce its intention '*to review the most sensitive and controversial counter-terrorism and security powers,*' and where possible, '*to provide a correction in favour of liberty.*'<sup>346</sup> In terms of the working life of Parliament, scrutiny and influence certainly constitute its most demanding function. It is also the function that attracts the most debate and criticism. At best, debate prevents a Government from remaining mute. Ministers are forced to explain and justify particular governmental positions. They may, arguably, want to reveal as little as possible but '*the Government cannot afford to hold too much*

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<sup>345</sup> Notwithstanding that they may take advice from various other bodies such as the military, the Joint Intelligence Committee and other bodies tasked with protecting UK security.

<sup>346</sup> HMSO, *Review of Counter-Terrorism and Security Powers: Review Findings and Recommendations*, Cm 8050, January 2011. See: Introduction.

*back for fear of letting the opposition appear to have the better argument.*<sup>347</sup> At worst, the duty to scrutinise the executive may be fulfilled in the most superficial of ways, providing no real check on executive power. MP's may place their loyalty to their political party above their rather abstract duty, as members of the legislature, to hold the executive to account

How effectively then are debates in which national security, or related issues, dealt with in Parliament. Lustgarten and Leigh make the following observation: *'Far too often, the cry of 'security' functions in the political world as a sort of intellectual curare, inducing instant paralysis of thought. It is such a potent, yet indefinite, symbol that those in positions of power are able to curb criticism and shut off debate by conjuring it up and claiming to possess vital knowledge – which of course cannot be safely revealed – to support their actions or policies.'*<sup>348</sup> Thus, instead of receiving fully reasoned explanations of national security policy, the public may receive only inconclusive justifications which they may be expected to take on trust.

This apparent 'paralysis of thought', if it indeed exists, may in part, be explained by two major factors. Firstly, criticisms may be curbed where there is a perceived need for secrecy. Whilst it is generally accepted that every government has areas of operation in which it has a legitimate need for secrecy, and that the disclosure of certain information could endanger state defence and national security, too much reliance on secrecy will inhibit openness and transparency. Secondly, criticism in Parliament may be curbed where there is a general cross-party consensus of opinion or a bipartisan approach is taken. This may lead to a lack of determined opposition against the Government's security policies or legislative proposals, and this tends to stifle debate. Since these two factors will have a significant effect on both security related legislative provisions and on security policy, it is necessary to discuss them in more detail.

## **2.20 The Potential Effects of Excessive Secrecy on National Security**

It has often been claimed that the UK is more obsessed with keeping government information secret than any other Western democracy.<sup>349</sup> A possible justification for maintaining a climate of secrecy is that the public interest in gaining access to information may, in certain circumstances, outweigh their right to know. It is claimed that free access to all information held by the government may impede

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<sup>347</sup> P. Norton, *The Commons in Perspective*, Blackwell, 1981, p119.

<sup>348</sup> Lustgarten and Leigh, *In From the Cold: National Security and Parliamentary Democracy*, Oxford University Press, p20.

<sup>349</sup> See, for example, G. Robertson, *Freedom, the Individual and the Law*, Penguin, 1989, pp 129-131 Lustgarten and Leigh, *In From the Cold: National Security and Parliamentary Democracy*, Oxford University Press, 1994. P. Birkinshaw, *Freedom of Information, The Law, the Practice and the Ideal*, 2nd Edition, Butterworths, 1996, Ch 3. John Wadham and Kavita Modi, *National Security and Open Government in the United Kingdom*, Campbell Public Affairs Institute, New York, 2003.

effective decision-making and policy formulation. For example, discussions in Cabinet may not be uninhibited and honest were they open to public display. Further, The UK's international standing and reputation may also be damaged by revelations which are politically sensitive or where negotiations and relations with other countries are involved. The argument most commonly put forward as a legitimate reason for withholding information from the public domain concerns national security. It has been accepted that imperatives such as: operations by security and intelligence services;<sup>350</sup> matters concerning the movements of the Armed Forces;<sup>351</sup> war itself;<sup>352</sup> details of nuclear weapons;<sup>353</sup> and, the general defence of the country,<sup>354</sup> fall within the ambit of the term 'national security'.

One example of the consequences of too much reliance on secrecy is that parliamentary committees, and other bodies that deal with the security agencies, may be prevented from disseminating their findings, or even collecting all the necessary information to make informed judgements. Thus, for instance, whilst The Intelligence Services Act 1994 added an extra layer of Parliamentary oversight in the form of the Intelligence and Security Committee (ISC),<sup>355</sup> there have been suggestions that this body is hampered by demands that its discussions will remain undisclosed.<sup>356</sup>

### ***2.20.1 The Intelligence and Security Committee***

The Intelligence and Security Committee (ISC) is an independent body which is tasked with the role of examining the policy, administration and expenditure of all three intelligence agencies (MI5, MI6 and GCHQ).<sup>357</sup> The ISC does not, unlike similar bodies in the USA, provide oversight of actual intelligence operations.<sup>358</sup> Under current legislation,<sup>359</sup> the Committee produces both annual and special reports on issues of particular concern, either on its own initiative or at the request of government ministers. To this end, the Committee holds evidence sessions with government ministers and senior officials (for example, the head of the Security Service). It also considers written evidence

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<sup>350</sup> Attorney General v Guardian Newspapers (No 2) [1988] 3 All ER 545, at 852.

<sup>351</sup> Chandler v DPP [1964] AC 763.

<sup>352</sup> The Zamora [1916] 2 AC 77.

<sup>353</sup> Secretary of State for Defence v Guardian Newspapers [1984] 3 All ER 601.

<sup>354</sup> The Zamora [1916] 2 AC 77.

<sup>355</sup> Section 10. Intelligence Services Act 1994

<sup>356</sup> See, for example, Bochel, Defty and Dunn, *Scrutinising the Secret State: Parliamentary Oversight of the Intelligence and Security Agencies*, Policy and Politics, July 2010, p483-487; Gill, *Evaluating Intelligence Oversight Committees: The UK Intelligence and Security Committee and the 'War on Terror'*. Intelligence and National Security 22.1: Robertson, *Recent Reform of Intelligence in the United Kingdom*, Intelligence and National Security, 1998.

<sup>357</sup> The Committee also examines: the work of the Joint Intelligence Committee (JIC); the Assessments Staff and the intelligence-related work of the Cabinet Office; and the Defence Intelligence Staff (DIS) in the Ministry of Defence.

<sup>358</sup> In the USA, Congressional intelligence oversight bodies must be notified of certain intelligence operations. See comments in Hans Born and Ian Leigh, *Democratic Accountability of the Intelligence Services*, Geneva Centre for the Democratic Control of Armed Forces (DCAF) Policy Paper – No. 19, 2007, p11.

<sup>359</sup> The ISC is currently the subject of Parliamentary debate in the Justice and Security Bill. A crucial part of this Bill concerns extending and clarifying the ISC remit to oversee operational matters in the future. Justice and Security Bill 2012-2013.

from the intelligence and security agencies and other relevant government departments. The Committee may ask the chiefs of any of the intelligence agencies to disclose information.<sup>360</sup> The relevant documents or information must then be either made available, or the Committee must be informed that it cannot be disclosed because it is ‘sensitive’ or because the Secretary of State has vetoed disclosure.<sup>361</sup> The Secretary of State may veto disclosure, on the grounds of national security, if *‘the information appears to him to be of such a nature that, if he were requested to produce it before a Departmental Select Committee, he would not think it proper to do so.’*<sup>362</sup>

That certain information can be withheld from the Committee, by agency heads and by the Secretary of State, has been the subject of some controversy. Indeed, in this respect, Yvette Cooper, a member of ISC,<sup>363</sup> has reported that: *‘In my experience, the ISC has insufficient access to information to hold the secret agencies fully to account. Although we are privy to secrets, it is at the discretion of the agency chiefs.’*<sup>364</sup> For Cooper *‘that creates a paradox: how can you have effective oversight if the people you are supposed to be overseeing are the ones who decide how much information you get?’*<sup>365</sup> Whilst, according to Cooper *‘none of this means that the agencies are doing anything wrong,’*<sup>366</sup> it does mean that ISC members *‘cannot put our hands on our hearts and tell the public, and the Prime Minister, that all is well - even if we believe it to be the case - because we are not in a position to know.’*<sup>367</sup> The importance of this, according to Cooper, is that: *‘Credibility depends on knowledge, and knowledge depends on having the power to investigate and verify.’*<sup>368</sup> Cooper’s concerns may have been reinforced by reports, in 2009, that when reviewing intelligence on the London 7/7 attack, the ISC claimed that there may have been a lack of candour of the part of Ministers.<sup>369</sup> It also cited a number of cases in which the Committee found it necessary to revisit earlier inquiries to take account of material that was not made available to them at the time of the original investigations.<sup>370</sup>

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<sup>360</sup> Intelligence Services Act 1994, schedule 3, paragraph 3.

<sup>361</sup> However, ‘sensitive’ information will still be disclosed if the chief of the agency considers it safe to do so, or if the Secretary of State considers it desirable in the public interest. See: Intelligence Services Act 1994, schedule 3, paragraphs 3(2) and (3).

<sup>362</sup> Intelligence Services Act 1994, schedule 3, paragraph 3(4).

<sup>363</sup> Yvette Cooper, *Getting a Peek*, Guardian, 22<sup>nd</sup> October 1998.

<sup>364</sup> See comments by Yvette Cooper in: Sally Almandras, *Intelligence and Security Committee*, House of Commons Library, Standard Note SN/HA/2178, Section: Home Affairs, 21<sup>st</sup> April 2009.

<sup>365</sup> See comments by Yvette Cooper in: Sally Almandras, *Intelligence and Security Committee*, House of Commons Library, Standard Note SN/HA/2178, Section: Home Affairs, 21<sup>st</sup> April 2009.

<sup>366</sup> Yvette Cooper, *Getting a Peek*, Guardian, 22<sup>nd</sup> October 1998.

<sup>367</sup> Yvette Cooper, *Getting a Peek*, Guardian, 22<sup>nd</sup> October 1998.

<sup>368</sup> See comments by Yvette Cooper in: Sally Almandras, *Intelligence and Security Committee*, House of Commons Library, Standard Note SN/HA/2178, Section: Home Affairs, 21<sup>st</sup> April 2009.

<sup>369</sup> The ISC, *Could 7/7 Have Been Prevented? Review of the Intelligence on the London Terrorist Attacks of 7 July 2005*, The Stationery Office, 2009. Also see: *ISC Alleged Complicity of the UK Intelligence and Security Agencies in Torture or Cruel, Inhuman or Degrading Treatment*, Press Release, 17<sup>th</sup> March 2009, [www.cabinetoffice.gov.uk](http://www.cabinetoffice.gov.uk).

<sup>370</sup> The ISC, *Could 7/7 Have Been Prevented? Review of the Intelligence on the London Terrorist Attacks of 7 July 2005*, The Stationery Office 2009. Also see: *ISC Alleged Complicity of the UK Intelligence and Security Agencies in Torture or Cruel, Inhuman or Degrading Treatment*, Press Release, 17<sup>th</sup> March 2009, [www.cabinetoffice.gov.uk](http://www.cabinetoffice.gov.uk).

The ISC is unique inasmuch as it is not a Committee of Parliament. Rather its members include nine cross-party parliamentarians appointed by, and reporting directly to, the Prime Minister.<sup>371</sup> Whilst in this capacity, it may have greater powers than a select committee of Parliament in that it is able to demand papers from former governments and official advice to ministers<sup>372</sup> (both of which are forbidden to select committees), it has been criticized because much of the work of the Committee is conducted in secret.<sup>373</sup> Indeed, the members of the Committee are notified under the Official Secrets Act 1989. This effectively means that they will commit a criminal offence if they disclose any information, or document, that they obtained as a result of their work, even if the disclosure revealed a serious abuse of power or the information was already in the public domain.<sup>374</sup>

This secrecy may be significant because it has been argued that the existence of the ISC has been used by the government to prevent the scrutiny of intelligence issues by parliamentary select committees which may have had a legitimate interest in doing so.<sup>375</sup> Select committee interest in scrutinising the intelligence agencies predates the establishment of the ISC. Following the passage of the Security Service Act 1989, the Home Affairs Committee persuaded the then Director-General of the Security Service, Stella Rimington, to meet the Committee. This was an act, which according to Rimington, represented the first formal direct contact between an intelligence agency and Parliament.<sup>376</sup> However, such access is by no means automatic: There been a number of occasions when both the Foreign Affairs Committee and other Committees, most notably the Joint Committee on Human Rights,<sup>377</sup> have been denied access to intelligence material which they claimed was necessary for the conduct of their investigations. In these cases, both government ministers and the heads of the agencies claimed that '*Parliamentary scrutiny of the agencies is the job of the ISC*,<sup>378</sup> or that the subject that they were interested in '*had already been investigated by the ISC*.'<sup>379</sup>

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<sup>371</sup> Intelligence Services Act 1994, s10(2).

<sup>372</sup> However, it is noteworthy that in its 2006-2007 Annual Report, the ISC expressed concern at a refusal by the Government to provide it with documents relating to an unspecified matter. The power to refuse access to information is contained in the: Intelligence Services Act 1994, schedule 3, paragraphs 3(2) and (3). Intelligence and Security Committee, *Annual Report, 2006-2007*, Cm 7299.

<sup>373</sup> See for example, Liberty, *The Intelligence Services Bill: A Briefing from Liberty*, December 1993, p7.

<sup>374</sup> Official Secrets Act 1989, s1(1).

<sup>375</sup> Bochel, Defy and Dunn, *Scrutinising the Secret State: Parliamentary Oversight of the Intelligence and Security Agencies*, Policy and Politics, July 2010, p 483-487. See also: Foreign Affairs Committee, *The Decision to go to War in Iraq*, Ninth Report of Session 2002/03, p 48-50. Foreign Affairs Committee, *The Implications for the Work of the House and its Committees of the Government's Lack of Cooperation with the Foreign Affairs Committee's Inquiry into the Decision to go to War in Iraq*, 2004.

<sup>376</sup> Stella Rimington, *Open Secret*, Hutchinson, 2001 pp 158-159. Since then, The Foreign Affairs Committee has been permitted, on occasions, to enjoy access to intelligence material or to the agencies themselves.

<sup>377</sup> Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention*, 2006, p43.

<sup>378</sup> House of Commons, Foreign Affairs Committee, *The Decision to go to War in Iraq*, Ninth Report of Session 2002/03, p48.

<sup>379</sup> This was the claim when the Joint Committee on Human Rights asked for information as part of its ongoing scrutiny of counter-terrorism policy. Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention*, 2006, p43.

The Joint Committee on Human Rights and the Foreign Affairs Committee were highly critical of this response. The Joint Committee claimed that ‘*we do not have any desire to obtain access to state secrets, but we do consider it to be a matter of some importance that the head of the Security Service be prepared to answer questions from the Parliamentary Committee with responsibility for human rights*’.<sup>380</sup> The Foreign Affairs Committee wrote a separate report on the implications of the Government’s lack of cooperation with its Inquiry.<sup>381</sup> In this report the Foreign Affairs Committee urged Parliament to reconsider the status of the ISC and whether it should become a select committee of the House.<sup>382</sup> A number of scholars, along with the Joint Committee of Human Rights, have also concluded that there may be a need for ‘*new mechanisms of independent accountability including direct parliamentary accountability*’,<sup>383</sup> and that this may be best provided by a select committee.<sup>384</sup>

This debate, to some extent, has been addressed by Justice and Security Bill.<sup>385</sup> The Bill proposes that the ISC’s status as a Committee of Parliament is clarified. This change has included proposals to re-name it the Intelligence Committee of Parliament.<sup>386</sup> Whilst this may seem a minor change, it raised issues of secrecy that needed to be addressed during debate on the Bill. For example, as a Committee of Parliament, it is arguable that the ISC should be subject to the Freedom of Information Act 2000 as, for instance, joint committees are.<sup>387</sup> In order to avoid this, it was proposed that an amendment would be added to Schedule 1 of the Freedom of Information Act 2000 to make it clear that its provisions do not apply to information held by the ISC, now or in the future.<sup>388</sup> Thus, the secrecy of ISC operations can be maintained.

The requirement for secrecy is offset, to some extent, because the Committee is required by law to produce a minimum of one annual report to Parliament, which must be submitted to the Prime Minister.<sup>389</sup> However, the Prime Minister may delete text or passages from the report.<sup>390</sup> He may also decide about the timing of the report’s publication: A power which it is argued, ‘*may permit him or*

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<sup>380</sup> Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention*, 2006, p43.

<sup>381</sup> Foreign Affairs Committee, *The Implications for the Work of the House and its Committees of the Government’s Lack of Cooperation with the Foreign Affairs Committee’s Inquiry into the Decision to go to War in Iraq*, 2004.

<sup>382</sup> Foreign Affairs Committee, *The Implications for the Work of the House and its Committees of the Government’s Lack of Cooperation with the Foreign Affairs Committee’s Inquiry into the Decision to go to War in Iraq*, 2004.

<sup>383</sup> Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention*, 2006, p80.

<sup>384</sup> See comments in: Phythian, *The British Experience with Intelligence Accountability*, Intelligence and National Security, 22(1), pp 75-79. Defty, *Parliamentary Scrutiny of the British Intelligence and Security Services: An Examination of the Case for a Parliamentary Select Committee*, Parliament and Legislatures Specialist Group, University of Southampton, July 2007.

<sup>385</sup> Justice and Security Bill 2012-2013. See also: HMSO, Justice and Security Green Paper, October 2011, Cm. 8194.

<sup>386</sup> See comments in Justice and Security Bill, Hansard, HL, col. 1109, 26<sup>th</sup> March 2013.

<sup>387</sup> See comments in Justice and Security Bill, Hansard, HL, col. 1109, 26<sup>th</sup> March 2013.

<sup>388</sup> In addition, an amendment will also need to be made to Section 23 of the Freedom of Information Act to add it to the list of bodies that are exempt under the Act.

<sup>389</sup> Intelligence Services Act 1994, s10(5).

<sup>390</sup> The ISC’s annual reports have contained many such deleted passages, although none, to date, have been deleted without consultation. See comments in Hans Born and Ian Leigh, *Democratic Accountability of the Intelligence Services*, Geneva Centre for the Democratic Control of Armed Forces (DCAF) Policy Paper – No. 19, 2007, p12.

her to dampen its impact by delaying release until public interest in the relevant events has waned, or to synchronise the date of publication with the Government's prepared response.<sup>391</sup>

The production of these reports may potentially be a significant step forward in the development of suitable methods of parliamentary accountability. It has been noted, for example, that they can provide an increased number of opportunities for Parliamentarians to debate intelligence related matters on the floor of the House.<sup>392</sup> Indeed, ISC reports are now the subject of an annual debate in both the House of Commons and the House of Lords. This debate, along with select committee involvement has, to some extent, been accepted as evidence that there is some growth in Parliamentary interest in intelligence.<sup>393</sup>

Perhaps another benefit of the existence of the ISC is that there has been an increase in the number of Parliamentarians with in-depth knowledge of the work of the security agencies. Indeed, it has been argued that this may have a constructive impact on the work of the ISC in that access to information is, in part, dependant on the ability to know which questions to ask.<sup>394</sup> A number of current and former ISC members are now in the House of Commons,<sup>395</sup> and members of the ISC tend to be senior ranking - 10 now sit in the House of Lords,<sup>396</sup> along with former government ministers and individuals from senior ranks in the Armed Forces. These persons have the advantage of direct experience of handling intelligence material. Recent appointments, most notably Pauline Neville-Jones, the former chair of the Joint Intelligence Committee, and Eliza Manningham-Buller, the former Director General of MI5, may have brought a wealth of expertise to the Upper House.

However, observers both in Parliament and beyond have identified limitations in the Committee's ability to provide effective scrutiny of the intelligence agencies<sup>397</sup> For example, a number of scholars have criticised the tone of the reports that the ISC produces.<sup>398</sup> Robertson, for example, was critical of the 'anodyne language and style' of an early ISC report, which he claimed was clearly designed for

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<sup>391</sup> Hans Born and Ian Leigh, *Democratic Accountability of the Intelligence Services*, Geneva Centre for the Democratic Control of Armed Forces (DCAF) Policy Paper – No. 19, 2007, p12.

<sup>392</sup> See for example: Bochel, Defty and Dunn, *Scrutinising the Secret State: Parliamentary Oversight of the Intelligence and Security Agencies*, Policy and Politics, July 2010, pp 483-487; Gill, *Evaluating Intelligence Oversight Committees: The UK Intelligence and Security Committee and the 'War on Terror'*. Intelligence and National Security 22(1).

<sup>393</sup> Gill, *Evaluating Intelligence Oversight Committees: The UK Intelligence and Security Committee and the 'War on Terror'*. Intelligence and National Security, 22(1), pp 214-237.

<sup>394</sup> Bochel, Defty and Dunn, *Scrutinising the Secret State: Parliamentary Oversight of the Intelligence and Security Agencies*, Policy and Politics, July 2010, pp 483-487.

<sup>395</sup> Gill, *Evaluating Intelligence Oversight Committees: The UK Intelligence and Security Committee and the 'War on Terror'*. Intelligence and National Security, 22(1), pp 214-237.

<sup>396</sup> Gill, *Evaluating Intelligence Oversight Committees: The UK Intelligence and Security Committee and the 'War on Terror'*. Intelligence and National Security, 22(1), pp 214-237.

<sup>397</sup> Bochel, Defty and Dunn, *Scrutinising the Secret State: Parliamentary Oversight of the Intelligence and Security Agencies*, Policy and Politics, July 2010, pp 483-487; Gill, *Evaluating Intelligence Oversight Committees: The UK Intelligence and Security Committee and the 'War on Terror'*. Intelligence and National Security, 22(1).

<sup>398</sup> Robertson, *Recent Reform of Intelligence in the United Kingdom*, Intelligence and National Security, 1998, p151.

consumption by government and was unlikely to be easily digested by those beyond Westminster.<sup>399</sup> Gill has asserted that the style of reports has '*not improved over time*'<sup>400</sup> and that there is an '*urgent need to make the work of the ISC more accessible*.'<sup>401</sup> Gill also makes a potentially more serious criticism of ISC reports, claiming that the Committee may '*see itself more as part of the Whitehall machine for the management of the security and intelligence community rather than its overseer*.'<sup>402</sup> The consequence of this, Gill argues, is that '*ISC reports read more like those from management consultants than parliamentary critics*.'<sup>403</sup>

Overall then, whilst the ISC does not provide parliamentary oversight as it is generally understood, its establishment may have some distinctive benefits.<sup>404</sup> For example, it has been accepted that, in spite of some of its shortcomings, the establishment of the ISC represents a positive move forward in the development of the parliamentary oversight of the British intelligence and security agencies.<sup>405</sup> However, concerns that parliamentarians do not debate intelligence issues with enough rigour continue to prevail.<sup>406</sup> Thus it is argued that, with very few votes or debates, and consequently little opportunity for personal recognition or political advantage, there is little incentive for parliamentarians to take an interest in matters relating to intelligence.<sup>407</sup> Moreover, since the ISC operates in a ring of secrecy, it is still very difficult to assess whether or not it serves to make the intelligence agencies more accountable. Whilst few may argue that the government has areas of operation in which it has a legitimate need for secrecy, unwarranted secrecy may hamper the goals of transparency and openness in government. Information is vital if MP's in Parliament are to preserve democratic accountability and ensure public involvement in the democratic process.

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<sup>399</sup> Gill, *Evaluating Intelligence Oversight Committees: The UK Intelligence and Security Committee and the 'War on Terror'*. Intelligence and National Security, 22(1), pp 214-237. Robertson, *Recent Reform of Intelligence in the United Kingdom*, Intelligence and National Security, 1998, p151.

<sup>400</sup> Gill, *Evaluating Intelligence Oversight Committees: The UK Intelligence and Security Committee and the 'War on Terror'*. Intelligence and National Security, 22(1), pp 214-237.

<sup>401</sup> Gill, *Evaluating Intelligence Oversight Committees: The UK Intelligence and Security Committee and the 'War on Terror'*. Intelligence and National Security, 22(1), pp 214-237.

<sup>402</sup> Gill, *Evaluating Intelligence Oversight Committees: The UK Intelligence and Security Committee and the 'War on Terror'*. Intelligence and National Security, 22(1), pp 214-237.

<sup>403</sup> Gill, *Evaluating Intelligence Oversight Committees: The UK Intelligence and Security Committee and the 'War on Terror'*. Intelligence and National Security, 22(1), pp 214-237.

<sup>404</sup> Bochel, Defty and Dunn, *Scrutinising the Secret State: Parliamentary Oversight of the Intelligence and Security Agencies*, Policy and Politics, July 2010, pp 483-487. Gill, *Evaluating Intelligence Oversight Committees: The UK Intelligence and Security Committee and the 'War on Terror'*. Intelligence and National Security, 22(1), pp 214-237.

<sup>405</sup> Bochel, Defty and Dunn, *Scrutinising the Secret State: Parliamentary Oversight of the Intelligence and Security Agencies*, Policy and Politics, July 2010, pp 483-487

<sup>406</sup> See comments in Phythian, *The British Experience with Intelligence Accountability*, Intelligence and National Security, 22(1), pp 75-79. Defty, *Parliamentary Scrutiny of the British Intelligence and Security Services: An Examination of the Case for a Parliamentary Select Committee*, Parliament and Legislatures Specialist Group, University of Southampton, July 2007. Gill, *Evaluating Intelligence Oversight Committees: The UK Intelligence and Security Committee and the 'War on Terror'*. Intelligence and National Security, 22(1), pp 214-237.

<sup>407</sup> Bochel, Defty and Dunn, *Scrutinising the Secret State: Parliamentary Oversight of the Intelligence and Security Agencies*, Policy and Politics, July 2010, pp 483-487.

## 2.21 The Wider Issue of Secrecy

The issue of secrecy is not unique to the debates concerning the ISC. Rather, it may be symptomatic of parliamentary scrutiny on a general level. For example, Birkinshaw argues that the ability to scrutinise the actions of ministers and create a check on government, during Parliamentary debates, has been hindered by an excessive reliance on traditions of secrecy.<sup>408</sup> Others have agreed, claiming that: *'There is a culture of secrecy in the United Kingdom which is unlike that in most other democratic nations,*<sup>409</sup> and that: *'it surpasses the level of discretion necessary to safeguard national security, or other vital interests, to become a default position: An unthinking reliance on secrecy.'*<sup>410</sup> Lustgarten and Leigh comment that: *'Information about the government's activities, and the basis of its decisions, is thought to be, literally and metaphorically, the property of the government itself to be distributed to the wider public as and when it thinks proper or necessary.'*<sup>411</sup>

The problem with operating within too tight a ring of secrecy is that it may run the risk of *'encouraging or providing cover for illegally or ethically dubious practices on the part of the agencies involved.'*<sup>412</sup> Perhaps nowhere has this been truer than in the case of Binyam Mohamed. In this case, critical passages were originally removed from a High Court Judgment,<sup>413</sup> which was examining claims that the UK intelligence agencies were complicit in the torture, degrading and inhumane treatment of Binyam Mohamed, who was held incommunicado from April 2002 and was interviewed by US interrogators.

Binyam Mohamed alleged that charges of terrorist offences in the United States were based on confessions that he made whilst detained as an enemy combatant. Mohamed alleged that he had been subjected to torture whilst in US custody, consisting of genital mutilation, deprivation of sleep and food, being held in stress positions for days at a time, and being forced to listen to loud music and screams from other prisoners.<sup>414</sup>

In May 2008, in order to assist his defence against terrorism charges in the US, Mohamed made an application to the High Court requesting the UK Government to disclose 42 documents provided to it

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<sup>408</sup> P Birkinshaw, *Freedom of Information, The Law, the Practice and the Ideal*, 2nd Edition, Butterworths, 1996, Ch 3.

<sup>409</sup> John Wadham and Kavita Modi, *National Security and Open Government in the United Kingdom*, Campbell Public Affairs Institute, New York, 2003, p76.

<sup>410</sup> John Wadham and Kavita Modi, *National Security and Open Government in the United Kingdom*, Campbell Public Affairs Institute, New York, 2003, p76.

<sup>411</sup> Lustgarten and Leigh, *In From the Cold: National Security and Parliamentary Democracy*, Oxford University Press, 1994, p221.

<sup>412</sup> Hans Born and Ian Leigh, *Democratic Accountability of the Intelligence Services*, Geneva Centre for the Democratic Control of Armed Forces (DCAF) Policy Paper – No. 19, 2007, p5.

<sup>413</sup> Secretary of State for Foreign and Commonwealth Affairs (Mohamed 2009): [2009] EWHC 152, [2010] EWCA (Civ) 65, [2010] W.L.R. 554.

<sup>414</sup> BBC, Profile: Binyam Mohamed, BBC news, February 2009. <http://news.bbc.co.uk>. See also: Liberty, *Binyam Mohamed*, [www.liberty-human-rights.org.uk](http://www.liberty-human-rights.org.uk).

by the US Government.<sup>415</sup> These documents included details of his treatment by US authorities. The High Court ruled that Mohamed was entitled to the documents because they concerned wrongdoing by a third party with which the UK Government had been involved. However, The UK Government issued a Public Interest Immunity certificate claiming that disclosure of the documents, along with seven paragraphs of the High Court's judgment which summarised them, would not be in the public interest. The Foreign Secretary identified a potential risk of serious harm to the national security of the UK on the grounds that disclosure may breach the Control Principle.<sup>416</sup> This principle is concerned with a diplomatic rule that intelligence provided by one government to another should not be disclosed without the consent of the government which provided it.<sup>417</sup> On these grounds, the Foreign Secretary warned that the US might review its intelligence relationship with the UK and that, as a consequence, any compromise in confidentiality could result in severe disadvantage to the UK's intelligence operations.

Mohamed subsequently obtained the documents from the US authorities and charges against him in the US were dropped. Nevertheless, the UK Government continued to resist publication of the seven paragraphs of the High Court's judgment.<sup>418</sup> However, the Court of Appeal decided, on 10<sup>th</sup> February 2010, that the seven paragraphs should be published. The Court reasoned that to withhold the redacted paragraphs would ensure that *'the parties to this litigation would not be treated equally.'*<sup>419</sup> In response to this judgment the Government's counsel made a request to the Master of the Rolls to delete one paragraph of this judgment. After receiving further submissions on the issue, the Master of the Rolls rejected the Government's request and published the disputed paragraphs with only minor alterations. The passages included the comment that *'at least some SyS (Security Service, MI5) officials appear to have a dubious record when it comes to human rights and coercive techniques, and indeed when it comes to frankness about the UK's involvement with the mistreatment of Mr Mohamed by US officials.'*

In reaching its determinations in these cases, the Court took several factors into account. Firstly, the Court considered the balancing test laid down in *R v Chief Constable of the West Midlands, Ex parte Wiley*.<sup>420</sup> This case determined that a claim to Public Interest Immunity can only be justified if the public interest in preserving the confidentiality of the document outweighs the public interest in securing justice. Thus, the Court considered both the need to bring information into the public

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<sup>415</sup> Secretary of State for Foreign and Commonwealth Affairs (Mohamed 2009): [2009] EWHC 152, [2010] EWCA (Civ) 65, [2010] W.L.R. 554.

<sup>416</sup> Secretary of State for Foreign and Commonwealth Affairs (Mohamed 2009): [2009] EWHC 152, para. 6.

<sup>417</sup> For an explanation of the Control Principle see: HMSO, *Justice and Security Green Paper*, October 2011, Cm 8194, p9.

<sup>418</sup> Secretary of State for Foreign and Commonwealth Affairs (Mohamed 2009): [2009] EWHC 152, [2010] EWCA (Civ) 65, [2010] W.L.R. 554.

<sup>419</sup> Secretary of State for Foreign and Commonwealth Affairs (Mohamed 2009): [2009] EWHC 152, [2010] EWCA (Civ) 65, [2010] W.L.R. 554.

<sup>420</sup> *R v Chief Constable of the West Midlands, Ex parte Wiley*. (1995) 1 AC 274.

domain through open judgments and the potentially conflicting need to protect state interests in confidentiality.<sup>421</sup> A second factor in the Court's analysis of Public Interest Immunity concerned the principles established in the *Norwich Pharmacal Co v Customs and Excise Commissioners*.<sup>422</sup> This case imposes a duty to right a wrong on a person who knowingly or unknowingly facilitated its perpetration.<sup>423</sup> In this respect the Court of Appeal found an obligation to disclose information under this principle according to the participation of the British Government in the alleged wrongdoing in this case.<sup>424</sup> Finally, the analysis in the case was also heavily influenced by the Control Principle. The Court concluded that it is '*integral to intelligence sharing agreements that intelligence provided by one country to another remains confidential and that it will never be disclosed without the permission of the provider of the information.*' However, the Court of Appeal held that the Control Principle was not absolute, and restored the seven paragraphs in open judgment with an acknowledgment of the potential consequences to the intelligence relationship with the US.<sup>425</sup>

In the event, the final draft of the contested passage included a comment that '*the record of security service officials, regrettably, but inevitably, must raise questions of whether any statement in the certificates or on an issue concerning such treatment can be relied on. ...Not only is there an obvious reason for distrusting any UK Government assurance based on SyS (security service) advice and information...but the Foreign Office and the SyS have an interest in the suppression of such information.*' Thus the judges took the unprecedented step of waiving confidentiality and reading out previously unpublished remarks about the conduct of MI5.

On release, the Foreign Secretary, David Miliband, rejected suggestions that MI5 had misled Parliament over the torture allegations.<sup>426</sup> The Home Secretary, Alan Johnson, said: '*We totally reject any suggestion that the security services have a systemic problem in respecting human rights. We wholly reject too that they have any interest in suppressing or withholding information from ministers or the courts.*'<sup>427</sup> The Prime Minister also claimed that '*it is in the nature of the work of the intelligence services that they cannot defend themselves against many of the allegations that have been made. But I can, and I have, every confidence that their work does not undermine the principles and values that are the best guarantee of our future security.*'<sup>428</sup>

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<sup>421</sup> Secretary of State for Foreign and Commonwealth Affairs (Mohamed 2010), [2010] EWCA (Civ) 65.

<sup>422</sup> *Norwich Pharmacal Co v Customs and Excise Commissioners* (1974) AC 133.

<sup>423</sup> For discussion on the Norwich Pharmacal principle, see: HMSO, *Justice and Security Green paper*, October 2011, Cm 8194, p15.

<sup>424</sup> Secretary of State for Foreign and Commonwealth Affairs (Mohamed 2010): [2010] EWCA (Civ) 65.

<sup>425</sup> Secretary of State for Foreign and Commonwealth Affairs (Mohamed 2009): [2010] EWCA (Civ) 65, [2010] W.L.R. 554

<sup>426</sup> See: The Guardian, *Torture Ruling Passages Critical of MI5 are Restored*, Friday 26<sup>th</sup> February 2010.

<sup>427</sup> The Guardian, *Torture Ruling Passages Critical of MI5 are Restored*, Friday 26<sup>th</sup> February 2010.

<sup>428</sup> The Guardian, *Torture Ruling Passages Critical of MI5 are Restored*, Friday 26<sup>th</sup> February 2010.

However, the case raises questions regarding whether the UK Government is applying Public Interest Immunity 'in a manner in line with its creation, or if it has been used merely to deny wrongdoing on behalf of the state.'<sup>429</sup> Thus, whilst it has been argued that the state interest in preventing future terrorist attacks is necessarily strong, the use of the Control Principle must be questioned in a case where an equally involved court system reasons that 'a democratically elected and accountable Government should have no rational objection to the release of the information at issue.'<sup>430</sup>

The findings in this case underline the argument that a culture of secrecy may make it possible for the Government to withhold information about security agency activities or procedures that are legitimate matters of debate. Thus, it is claimed that there is an, albeit delicate, balance to be drawn between ensuring proper democratic control of the intelligence and security sector and the distortion of intelligence findings which may support an expedient political option.<sup>431</sup>

In the final analysis, therefore, perhaps oversight or scrutiny of the intelligence agencies cannot remain the preserve of the Government alone without inviting potential abuse. Aside from their role in setting the legal framework, it is commonplace for parliaments to scrutinise all areas of state activity, including the security and intelligence agencies. Parliamentary involvement gives legitimacy and democratic accountability. It may also help to ensure that intelligence organisations are serving the state as a whole and protecting constitutional ideals, rather than narrower political or sectional interests.

## **2.22 The Potential Effects of a Lack of Determined Opposition in Parliament**

The principle responsibility for laying bare the flaws in government policy lies with the parties in opposition. A well-led and organised opposition may do much within the existing system to insist on government accountability for its actions to the elected chamber. For example, effective use may be made of Question Time, which is a regular occasion upon which the government is formally and constitutionally required and obliged to account to Parliament for its management of the nation's affairs. However, dissenting MP's in a government's own party may also affect the decisions of ministers. Divisions in the ruling party make the government's management of the House much more difficult and the signs of disunity may affect its reputation in the country. As a consequence of these

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<sup>429</sup> Laura Mehalko, *Hooded: Binyam Mohamed and the State Secrets Privilege*, Boston College International and Comparative Law Review, 2011, Vol. 34.

<sup>430</sup> Secretary of State for Foreign and Commonwealth Affairs (Mohamed 2009): [2010] EWCA (Civ) 65, [2010] W.L.R. 554. See also comments in: Laura Mehalko, *Hooded: Binyam Mohamed and the State Secrets Privilege*, Boston College International and Comparative Law Review, 2011, Vol. 34.

<sup>431</sup> See comments: Hans Born and Ian Leigh, *Democratic Accountability of the Intelligence Services*, Geneva Centre for the Democratic Control of Armed Forces (DCAF) Policy Paper – No. 19, 2007, p9.

combined forces, ministers may be influenced by comments made in debate. For example, a minister faced with a baying opposition and little support from his own party ‘*may be unnerved and realise that he is not carrying members on either side with him.*’<sup>432</sup> This may cause him to moderate his approach or, in extreme cases, to reverse his position. On such an occasion ‘*the debate-vote relationship may become important; the fear of defeat concentrating the minds of ministers.*’<sup>433</sup> The ruling party may wish to avoid defeats in the House, particularly where this would incur extensive publicity and adversely affect their standing in the eyes of the electorate.

These mechanisms for effective parliamentary scrutiny rely on the notion that there is distinct and decisive opposition to any given measure. However, where measures are taken in the name of national security, there is often a cross-party consensus of opinion. The problem here is that the result of a lack of resolute opposition means that Parliament has quite frequently shown a ‘*readiness to accept a number of proposed statutory measures,*’<sup>434</sup> and that such measures, ‘*did not in general encounter any determined criticism from the opposition.*’<sup>435</sup> It has been argued, for example, that the Anti-Terrorism, Crime and Security Bill, passed through Parliament relatively unhindered despite concerns that parts of it were likely to represent a major infringement of civil liberties.<sup>436</sup> This Bill allowed for the indefinite detention, without trial, of suspected international terrorists. In its original state, it also included measures that may not have been specifically terrorism related, such as proposals to create a new offence of incitement to religious hatred and new provisions for the police to compulsorily photograph criminal suspects – not just suspected terrorists. The Bill was a lengthy one – 126 clauses and eight lengthy schedules. It took the Government two months to prepare. Nevertheless, it has been claimed that it was ‘*rushed through Parliament with almost indecent haste.*’<sup>437</sup> MP’s accepted a timetable of only 16 hours in which to scrutinise the Bill, and then they did not impose a single defeat on the Government. The Common’s alleged ‘*spineless performance*’<sup>438</sup> in relation to this Bill caused one commentator to remark: ‘*In a long record of shaming fealty to whips, never have so many MP’s showed such utter negligence towards so impressive a list of*

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<sup>432</sup> P. Norton, *The Commons in Perspective*, Blackwell, 1981, p119.

<sup>433</sup> P. Norton, *The Commons in Perspective*, Blackwell, 1981, p119.

<sup>434</sup> Helen Fenwick, *The Anti-Terrorism, Crime and Security Act 2001: A Proportionate Response to 11 September*, *The Modern Law Review*, Sep 2002, Vol. 65, Issue 5, p724-762.

Helen Fenwick, *Civil Liberties and Human Rights*, Cavendish, 2002, p96.

<sup>435</sup> Helen Fenwick, *The Anti-Terrorism, Crime and Security Act 2001: A Proportionate Response to 11 September*, *The Modern Law Review*, Sep 2002, Vol. 65, Issue 5, p724-762.

Helen Fenwick, *Civil Liberties and Human Rights*, Cavendish, 2002, p96

<sup>436</sup> Helen Fenwick, *The Anti-Terrorism, Crime and Security Act 2001: A Proportionate Response to 11 September*, *The Modern Law Review*, Sep 2002, Vol. 65, Issue 5, p724-762.

Helen Fenwick, *Public Law and Human Rights*, Cavendish 2003, p270.

<sup>437</sup> Helen Fenwick, *The Anti-Terrorism, Crime and Security Act 2001, A Proportionate Response to 11 September*, *The Modern Law Review*, Sep 2002, Vol. 65, Issue 5, p724-762. Helen Fenwick, *Public Law and Human Rights*, Cavendish 2003, p270.

<sup>438</sup> Helen Fenwick, *The Anti-Terrorism, Crime and Security Act 2001: A Proportionate Response to 11 September*, *The Modern Law Review*, Sep 2002, Vol. 65, Issue 5, p724-762. Helen Fenwick, *Public Law and Human Rights*, Cavendish 2003, p270.

*fundamental principles.*<sup>439</sup> Indeed, in the event, it was the House of Lords (the political and the judicial wing), which finally challenged the proposals. During its passage through Parliament, the Lords made 70 amendments to the Bill, several of which represented significant defeats for the Government. Although most of these amendments were reversed when the Commons considered them, some last minute compromises were made. For example, the original intention of the Government to extend Section 17 of Part III of the Public Order Act, which prohibits incitement to racial hatred, to include religious groups, was not included in the final Act of Parliament.<sup>440</sup> With regard to judicial intervention, a later challenge to the Part 4 provisions which allowed the Secretary of State to detain, indefinitely and without trial, certain suspected foreign terrorists, was declared to be incompatible with the Human rights Act. This was in spite of the fact that Parliament had declared these same provisions to be compatible with the Human Rights Act under Section 19, with very little opposition or debate.

The reluctance of MP's to challenge such legislation may be explained by the expectation that, in times of emergency, they should prefer the interests of the nation rather than more sectional causes. Events, such as the terror attack in the U.S. on 11th September 2001, or the London bombings of 7th July 2005, may be interpreted as a national crisis in which, '*central values are perceived to be at stake; that time is short; and that extraordinary measures are justified.*'<sup>441</sup> In these circumstances there may be an unwillingness of opposition parties to seem 'soft' on national security issues or disloyal to the UK's best interests. Whilst the Government of the day may wish to be perceived as acting quickly and decisively in the face of a perceived national crisis, members of the opposition parties, mindful of their popularity, may not wish to oppose measures adopted in the name of security. Indeed, Leigh and Lustgarten note that critics opposing a particular measure involving national security may be placed at a deep disadvantage and can easily be either branded as unpatriotic or as actuated by hidden motives.<sup>442</sup>

The obvious disadvantage of inter-party co-operation is that effective debate tends to be shut off and suitable legislative or policy alternatives may not be adequately considered. Un-debated national security legislation, and policy, may confer considerable leverage to the ruling party in Parliament, allowing them to cultivate hostile images at home and abroad in order to justify actions which may otherwise be more vigorously contested. For example, Buzan notes that the call of national security may offer scope for power maximising strategies, such as a shift in resources to the military or

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<sup>439</sup> Hugo Young, *Once Lost, These Freedoms will be Impossible to Restore*, The Guardian, 11<sup>th</sup> December 2001.

<sup>440</sup> The criminal offence of incitement to religious hatred was also later dropped from the Serious Organised Crime and Police Bill (2004-5). Provisions concerning racial and religious hatred were finally introduced under the Racial and Religious Hatred Act 2006.

<sup>441</sup> Johan Eriksson and Erik Noreen, *Setting the Agenda of Threats: An Explanatory Mode*, Department for Peace and Conflict Research, Uppsala University, Sweden, 2004.

<sup>442</sup> Lustgarten and Leigh, *In From the Cold: National Security and Parliamentary Democracy*, Oxford University Press, 1994, p22.

intensified political surveillance, which could have deep implications for the conduct of domestic political life.<sup>443</sup> However, the debate on security matters has been recently re-opened. The Government is considering possible amendments to six key counter-terrorism and security powers. These amendments include: reducing the length of time that a terrorist suspect can be detained before charge to 14 days; preventing the alleged ‘indiscriminate use’<sup>444</sup> of Section 44 stop and search powers; and limiting the use of the Regulation of Investigatory Powers Act 2000 by Local Authorities by requiring that investigations be approved by a Magistrate. However, not all the proposals reflect a genuine commitment to liberties. The Government also intends to extend the use of the controversial ‘Deportation with Assurances’, which allegedly guarantee that deportees will not suffer inhumane treatment contrary to Art 3 of the European Convention on Human rights, by ‘*actively pursuing deportation arrangement with more countries.*’<sup>445</sup>

## 2.23 Conclusion

The functions of the security agencies are now based in statute. Under the Security Service Act 1989,<sup>446</sup> and the Intelligence Services Act 1994, the security agencies are tasked to protect the UK’s national security and foreign policy from threats emanating from espionage, terrorism, sabotage, subversion, serious criminal activity and the proliferation of WMD. The security agencies are also charged with protecting the UK’s economic well-being from potential or actual damage. The Regulation of Investigatory Powers Act 2000 has defined the different types of surveillance and the authorisation procedures that govern them. These Acts were enacted in response to the growth in technological capabilities, and the need to comply with the European Convention on Human Rights. They were also intended to alleviate public alarm that the security agencies were not adequately regulated in the wake of Peter Wright’s allegations that MI5 had ‘*bugged and burgled its way around London.*’<sup>447</sup>

Defining and regulating the security agencies may serve two important functions. Firstly, it sets boundaries that define when the security agencies may legitimately collect information and the measures that they may take to deter or neutralise threats to security. Since, no investigation or surveillance may be undertaken in relation to those who do not fall under the remit of the legal mandate, it follows that the narrower the mandate, the more limited the circumstances in which

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<sup>443</sup> See discussion: Buzan, *People, States and Fear: An Agenda for International Security Studies in the Post Cold-War Era*, Second Edition, Boulder C: Lynne Rienner, London, 1983, p11.

<sup>444</sup> HMSO, *Review of Counter-Terrorism and Security Powers Review: Findings and Recommendations*, Cm 8005, January 2011, See: Introduction: Findings

<sup>445</sup> HMSO, *Review of Counter-Terrorism and Security Powers Review: Findings and Recommendations*, Cm 8005, January 2011, See: Deportation of Foreign Nationals Engaged in Terrorism, para 17.

<sup>446</sup> As amended by the Security Service Act 1996.

<sup>447</sup> Peter Wright, *Spycatcher: The Candid Autobiography of a Senior Intelligence Officer*, Stoddart, 1987.

individuals or groups may come under investigation. However, it has been argued that neither the Security Service Act 1989, the Intelligence Services Act 1994, or the Regulation of Investigatory Powers Act 2000, provide clear principles for the operation of the security agencies. Rather, it has been claimed that Britain has adopted a standpoint that has attempted to keep the legal mandate as unrestricted as possible.<sup>448</sup> The result of a wide and ambiguous remit may be to leave the interpretation of the legal mandate to the security agencies, with little or no oversight into how decisions are made or investigations conducted. This may give rise to the potential for officials to define their own power and could lead to abuses.

The second important element of a suitably constricted legal framework is that it may provide some protection for the agencies themselves. They may use the legal restrictions as a shield when pressured by others, particularly Ministers, to operate improperly. However, there have been concerns that intelligence emanating from bodies, such as the JIC, may have become overly politicised. This possibility has been compounded by the way in which the Government used the JIC dossier to help inform domestic and international understanding of the need for stronger action in Iraq. It is certainly worth noting that the JIC had never previously produced a public document, and no Government case for any international action had previously been made to the British public through explicitly drawing on a JIC publication. For example, Michael Herman recalls the public profile on the last action to divide public opinion so sharply: The Suez Expedition of 1956. Herman reports that *'it never occurred to anyone...to quote the JIC in defence of policy or for critics to enquire what its threat assessment had been.'*<sup>449</sup> Of course, the antidote to this might be that the JIC operates within a much tighter ring of secrecy that prevents its material from being publicly utilised. However, many would claim that democracy is better served where citizens understand the government process, as fully as possible, so that they can assess government decisions in the light of all the available facts.

It seems, on the whole, that these two benefits are only real where the legal remit is clear in its objectives and scope so that it effectively defines the extent of security agency power. In this respect, it does seem that a number of key terms in the relevant Acts can be interpreted very widely. However, the security agency justification for a widely defined remit is that they face their tasks in an environment of constantly changing threats. They also face them in an era where new technologies have vastly increased the capacity for the collection of information in many forms. The intelligence services are expected to provide timely information on all threats to national and international security. When they do not, they are accused of failure, and are often subjected to intense public scrutiny. In the light of this, amendments that were proposed during the transition of the Acts through

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<sup>448</sup> Lustgarten and Leigh, *In From the Cold, National Security and Parliamentary Democracy*, Oxford University Press, 1994, p379.

<sup>449</sup> Michael Herman, *Intelligence's Future: Learning from the Past*, *The Journal of Intelligence History*, Vol. 3, Winter 2003, p3.

Parliament, which were designed to pin down a more definitive definition, may have been justifiably resisted. As the Home Secretary, Douglas Hurd, claimed, *‘The definition has to be comprehensive. The House of Commons would not want to establish a description of functions that did not cover all areas in which the Security Service might, now or in the future, have to become involved. If the House did that, it could create an intolerable position where the Security Service would be powerless to defend us or where there might be great pressure, and therefore, strains on the way the legislation was interpreted and understood.’*<sup>450</sup>

However, whilst it may necessary to define security in such a way as to provide a purposeful response to genuine threats to the nation’s security, opponents of these Acts have claimed that the mechanisms of accountability, which may limit the power of the security agencies, are inadequate. For most of these critics, the problem is that covert surveillance operations, conducted by the security agencies, may undermine key civil liberties and human rights, such as the right to privacy. For these thinkers, the security of the citizen is only fully protected where there are suitable constitutional and legal safeguards in place that can ensure that the security agencies are prevented from abusing their powers. Indeed, it is claimed that without these safeguards: *‘Public trust in law enforcement, and in government more generally, will be eroded.’*<sup>451</sup>

Overall then, it appears that the question of whether these Acts are beneficial to the security of UK citizens may depend largely on the underpinning ideologies of those expressing a view on it. For some, the Acts afford the security agencies an extensive and important remit, to protect the UK from genuine threats to its national security. For others, the Acts may legalise arbitrary, and sometimes unnecessary, incursions into the lives and choices of individual citizens without suitable oversight mechanisms. The following chapters will consider these underpinning ideologies in more detail in order to better understand the ideals that drive and shape the security discourse in the UK. The chapters will argue that neither of these one-sided perspectives takes full account the threats that face UK citizens.

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<sup>450</sup> HC Debs. Vol. 145, Col. 214 (17<sup>th</sup> January 1989).

<sup>451</sup> Foundation for Information Policy Research, *Communications Surveillance Briefing*, [www.fipr.org](http://www.fipr.org).

## CHAPTER THREE: LIBERAL APPROACHES TO DEFINING NATIONAL SECURITY

### 3.1 Introduction

This chapter will seek to analyse the strengths and weaknesses of the civil liberties and human rights agenda as seen through the eyes of certain academic and human rights lawyers who promote the beliefs associated with classic liberalism. It is important to understand the perceptions of these writers. In just the same way that politicians, the security agencies and their associated bodies, may be accused of being over-zealous in their ambition to protect the security interests of the UK, so may those who are passionate about liberal values, such as the protection of liberty and choice, be guilty of allowing their views to prejudice their outlook. The point is that, when debating the perceived need to make the security agencies accountable for covert activity, those promoting the civil liberties agenda may tend to carry into their writings certain pre-determined assumptions and perceptions. The consequence of this is that all subsequent information may be filtered and processed through these assumptions and the resultant belief is likely to reflect this strongly.

In order to fully understand the ideologies of many civil libertarian thinkers, it is first necessary to examine and understand their core and overlapping value system. This chapter will examine the key principles that may underpin typical forms of liberal thinking, and more particularly, those principles which may influence, or be influenced by, the operations of the intelligence agencies. However, it is worth noting from the outset that liberalism is not one simple, undifferentiated doctrine. As with other doctrines and ideologies, there are many varieties of liberalism. For example, although liberals tend to agree on certain fundamental principles, such as the primacy of individual freedom and individual choice, the application of that idea has not remained fixed or immovable over the years. As liberals have perceived new and different challenges to their notions of liberty, so they have tended to change their perspective and emphasis. Initially liberals concentrated on securing the liberty of the person and basic legal rights,<sup>452</sup> moving later to freedom of speech, freedom of conscience and freedom of association. The latter part of the nineteenth century saw the emergence of the so called 'new liberalism.' Some liberals began to see a perceived need to promote the cause of liberty in the area of social and material conditions and to work for freedom from poverty, disease and poor physical surroundings.<sup>453</sup> Most recently, the enactment of the Human Rights Act 1998, which

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<sup>452</sup> It is difficult to know how far back in history the true origins of the liberal tradition lie. The Middle Ages saw the establishment of the Magna Carta, which protected citizens against arbitrary rule; the championship of representative government under Simon de Montfort; the institution of the common law, with its insistence on the impartial administration of justice; and the presumption that a man is innocent until proved guilty.

<sup>453</sup> T. H. Green, *Lecture on Liberal Legislation and Freedom of Contract*, Works, Vol. 3, Longmans, 1911.

incorporates the European Convention on Human Rights into domestic law, may have ensured that liberal concepts of freedom are undergoing a period of major change and expansion in the UK.

Since liberalism has been expressed in a variety of ways over the years, it is necessary that this chapter confines itself to the areas of liberal thought that are affected by the formation and expression of the security agenda. To this end, whilst the chapter will begin with an analysis of the general liberal principle of free choice, the remainder of the chapter will concentrate on liberal perceptions regarding the nature of the relationship between the individual and the institutions of state, such as the security agencies. The chapter will analyse the twin concepts of negative and positive liberty. It will also describe the constitutional guarantees, such as adherence to the rule of law, which liberals perceive as being essential for the exercise of good governance.

### 3.2 Liberalism and the Individual

Perhaps, the core for classical liberalism is a belief in individual freedom as the most effective means of catering for the social, economic, cultural and political health of a country and especially its citizens. Liberalism, therefore, tends to embody a viewpoint which assigns supreme importance to personal liberty and individual choice and responsibility. This, it seems, includes the rights of individuals to choose how to live their lives; to exercise personal autonomy; and to follow their own conceptions of the greatest good. For example, Mill in his essay '*On Liberty*',<sup>454</sup> develops and defends the ideal which he describes as that of '*the free development of individuality*'.<sup>455</sup> Mill was particularly concerned with the freedom of the individual to make personal choices. In making choices the distinctively human faculties of perception, judgement, discriminative feeling, mental activity and moral preference are exercised. Mill asserted that: '*He who chooses his plan for himself employs all his faculties. He must use observation to see, reasoning and judgement to foresee, activity to gather materials for decision, discrimination to decide, and when he has decided, firmness and self control to hold to his deliberate decision*'.<sup>456</sup> Men who make choices develop what Mill calls a 'character': their desires and feelings are the products of their own conscious choices and are not the passively generated products of external factors.<sup>457</sup> For Mill, those who are unable, or who refuse to exercise their human capacity for choice have lost or surrendered that which is distinctively human. Mill compares such people with apes, cattle, with sheep, and with steam engines.

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<sup>454</sup> John Mill, *On Liberty*, Chapter III, 1859, in *John Stuart Mill: On Liberty and other Essays*, Oxford University Press, 1998.

<sup>455</sup> John Mill, *On Liberty*, Chapter III, 1859, in *John Stuart Mill: On Liberty and other Essays*, Oxford University Press, 1998.

<sup>456</sup> John Mill, *On Liberty*, Chapter III, 1859, in *John Stuart Mill: On Liberty and other Essays*, Oxford University Press, 1998, p65.

<sup>457</sup> See, John Mill, *On Liberty*, Chapter III, 1859, in *John Stuart Mill: On Liberty and other Essays*, Oxford University Press, 1998, p65.

Mill's concept of individuality is opposed to the blind submission of oneself to the customs and traditions of one's society. The right choice for each individual depends upon the sort of person he is, and hence it may vary from individual to individual. Thus, Mill asserts, '*The individual is not accountable to society for his actions, insofar as these concern the interests of no person but himself.*'<sup>458</sup> In this way, liberalism claims to accord pluralistic and non-judgemental tolerance of any lifestyle or group preferences. It tends to be strongly opposed to a determinist view of life. Rather, it holds that men and women are morally free and are able to influence events for good or ill through their freely held ideas. As Jo Grimond puts it, liberalism '*must start from the position that only the actions and states of mind of individuals voluntarily arrived at can have value.*'<sup>459</sup> Liberty then, is a condition of self-rule in which thought and behaviour are supposedly governed by reason and conscience rather than by blind obedience to externally imposed authorities or slavish obedience to habit prejudice or custom.

### 3.3 Liberal Individualism and its Effect on Security Measures

In a liberal climate of individual free choice, attempts by Government, its agencies or by society to suppress the opinions of others, no matter how odious or repugnant, may be considered undesirable where they do not result in harm or injury to others.<sup>460</sup> Thus, it is typically argued that it is not for the security agencies or politicians to impose their political and moral will upon the citizen.<sup>461</sup> The rights of individuals to choose how to live their lives and exercise personal autonomy should be essential considerations within the security policy and decision making context.<sup>462</sup> Liberals tend to resist all attempts by the state or society to impose supposedly higher standards that are in the 'best interests' of individuals that may contradict their own preferences.<sup>463</sup> Instead, liberals encourage argument and

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<sup>458</sup> John Mill, *On Liberty*, Chapter V, 1859, in *John Stuart Mill: On Liberty and other Essays*, Oxford University Press, 1998, p104.

<sup>459</sup> J. Grimond, *The Future of Liberalism*, (Lecture delivered to the Eighty Club in the National Liberal Club), October 1880. See also the discussion in Ian Bradley, *The Strange Rebirth of Liberal Britain*, Hogarth Press, 1985, p14.

<sup>460</sup> John Mill, *On Liberty*, Chapter III, 1859, in *John Stuart Mill: On Liberty and other Essays*, Oxford University Press, 1998.

<sup>461</sup> See for example, Lustgarten and Leigh, *In From the Cold: National Security and Parliamentary Democracy*, Oxford University Press, 1994. See also: Liberty, *The Human Rights Act*, [www.liberty-human-rights.org.uk](http://www.liberty-human-rights.org.uk). Helen Fenwick, *The Anti-Terrorism, Crime and Security Act 2001: A Proportionate Response to 11 September*, *The Modern Law Review*, Sep 2002, Vol. 65, Issue 5, pp 724-762. Berlin, *Two Concepts of Liberty: An Inaugural Lecture Delivered Before the University of Oxford on 31<sup>st</sup> October 1958*, Clarendon, 1958.

<sup>462</sup> See for example: Helen Fenwick, *The Anti-Terrorism, Crime and Security Act 2001: A Proportionate Response to 11 September*, *The Modern Law Review*, Sep 2002, Vol. 65, Issue 5, pp 724-762.

<sup>463</sup> For example, Locke, in his paper, *A Letter Concerning Toleration*, 1689, argued that since the proper function of Government is to protect life, liberty and property, it had no right to meddle in the care of men's souls. See also, comments in Berlin, *Two Concepts of Liberty: An Inaugural Lecture Delivered Before the University of Oxford on 31<sup>st</sup> October 1958*, Clarendon, 1958.

The full text can be found in: Michael Sandel, *Liberalism and its Critics*, Blackwell, 1992.

debate in order to seek the widest possible dissemination of ideas and opinions. There is a conviction that out of free debate each person will find his own personal truth.<sup>464</sup>

In practice, the drive towards free debate means that liberals may be much less inclined than the security agencies or politicians to perceive non-violent political activity, for example, subversion or public protest, as a potential threat to security.<sup>465</sup> For liberals, supposed subversives may merely be seeking to bring forward their own aspirations for political and social change and should not be subject to state interference.<sup>466</sup> As Leigh and Lustgarten suggest, however bizarre and unusual the vision of certain domestic groups may be, they are ultimately concerned with what is good for their fellow citizens, and therefore, '*All forms of domestic political activity, free of violence, should be kept firmly outside the remit of the security institutions.*'<sup>467</sup> This outlook suggests that even political campaigning, which may be widely interpreted by the public or governmental bodies in terms of civil disobedience, is unlikely to be seen in this way by libertarian thinkers. For example, libertarian groups, such as Liberty, claim that a '*person does not give up their fundamental rights even by committing a crime that warrants a custodial sentence.*'<sup>468</sup> Whilst Liberty accepts that crime may necessitate forfeiture of the right to liberty, other rights including the right to a fair trial, and the prohibition on cruel, inhumane and degrading treatment, are thought to be absolute and should be upheld without bias by decision-makers.<sup>469</sup> For liberals, the government should be both bound by the rule of law and limited in scope.<sup>470</sup> Its role is merely that of an '*umpire,*'<sup>471</sup> which upholds an impartial framework of law and order within which individuals may safely pursue their private concerns.<sup>472</sup>

Concerns regarding the impartiality of decision-making procedures within the security agencies rose to the surface in the 1980's. These concerns may have come in response to a series of revelations about MI5 activity that suggested that the Service was contravening the Maxwell-Fyfe order to be 'absolutely free from political bias', and that its choice of targets included individuals and groups that

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<sup>464</sup> For example, liberals have traditionally encouraged the freedom of the press to publish in the public interest. See, for example, John Mill, *On Liberty*, Chapter II, 1859, in *John Stuart Mill: On Liberty and other Essays*, Oxford University Press, 1998, p20. See also, Ian Bradley, *The Strange Rebirth of Liberal Britain*, Hogarth Press, 1985, p14.

<sup>465</sup> See for example, Lustgarten and Leigh, *In From the Cold: National Security and Parliamentary Democracy*, Oxford University Press, 1994.

<sup>466</sup> Lustgarten and Leigh, *In From the Cold: National Security and Parliamentary Democracy*, Oxford University Press, 1994, p6. See also: Liberty, *The Human Rights Act*, [www.liberty-human-rights.org.uk](http://www.liberty-human-rights.org.uk).

<sup>467</sup> Lustgarten and Leigh, *In From the Cold: National Security and Parliamentary Democracy*, Oxford University Press, 1994, p6.

<sup>468</sup> Liberty, *The Human Rights Act*, [www.liberty-human-rights.org.uk](http://www.liberty-human-rights.org.uk).

<sup>469</sup> Liberty, *The Human Rights Act*, [www.liberty-human-rights.org.uk](http://www.liberty-human-rights.org.uk).

<sup>470</sup> A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, Eighth Edition, Macmillan, 1927. Originally published 1885.

<sup>471</sup> John Locke, *Two Treatises of Government*, 1690.

<sup>472</sup> Joseph Raz, *The Rule of Law and its Virtue*, 1977, *The Law Quarterly Review*, Vol. 93, p195.

were merely opposed to government policy.<sup>473</sup> Whilst much of the controversy surrounded Peter Wright's allegations that MI5 '*bugged and bugged its way around London*,<sup>474</sup> it is noteworthy that others in the Service were also making similar claims. In April 1984, Michael Bettaney, a young officer in the counter-espionage branch, was found guilty of attempting to pass secrets to the Russians. Following his conviction, Bettaney used a prepared statement which, amongst other things, alleged that MI5 cynically manipulated the definition of subversion so as to investigate and interfere with the provisions of legitimate political parties, the Trade Union Movement and other progressive organisations.<sup>475</sup> Whilst the statement, which was full of pseudo-soviet rhetoric, was widely discounted as an attempt by Bettaney to justify his attempted treachery, the debate led two of Bettaney's former colleagues to complain that he was not alone. One of these was Cathy Massiter, who claimed to have left MI5 '*after becoming increasingly at odds with myself over the nature of the work and its justification*.<sup>476</sup> Massiter alleged that she and other MI5 officers had been violating the rules against political bias in the Service in an operation against the Campaign for Nuclear Disarmament (CND). It transpired that in March 1983, Michael Heseltine, the Defence Secretary, had set up an organisation called Defence Secretariat 19 (DS19), to counter CND unilateralist propaganda. The unit approached MI5 for information on CND activists, and Massiter was ordered to help it. Massiter claimed that it began to seem like '*what the Security Service was being asked to do was to provide information on a party political issue*.<sup>477</sup> The Labour Party had, at that time, adopted unilateral disarmament as a policy, and a general election was due. In addition to these allegations, Massiter also described how any union taking strike action would routinely be subjected to MI5 surveillance. She further claimed that two prominent members of the National Council for Civil Liberties, Harriet Harman and Patricia Hewitt, who both later became leading Labour politicians, had been subject to an MI5 investigation.

For many civil libertarian thinkers, surveillance measures should not be used to secure political goals.<sup>478</sup> Rather, liberals may argue that legislation and policy, even that which may be considered to be imperative for security reasons, should ensure that the law and the manner in which it is enforced is in keeping with the tenets of the rule of law.<sup>479</sup> The problem, they claim, is that whenever the security agencies initiate covert investigations, then certain fundamental political freedoms, such as the right to peaceful protest and freedom of speech, may be violated along with the right to privacy.<sup>480</sup> In the eyes

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<sup>473</sup> A copy of the Maxwell-Fyfe Directive has been reproduced in: Nigel West, *A Matter of Trust*, Hodder and Stoughton, 1982, Appendix I.

<sup>474</sup> Peter Wright, *Spycatcher: The Candid Autobiography of a Senior Intelligence Officer*, Stoddart, 1987. See also the claims made in: Leigh, *The Wilson Plot*, Pantheon, 1988.

<sup>475</sup> See discussion: Michael Smith, *The Spying Game: The Secret History of British Espionage*, Politico's Publishing, 1996, p113-14.

<sup>476</sup> Michael Smith, *The Spying Game: The Secret History of British Espionage*, Politico's Publishing, 1996, p114.

<sup>477</sup> Michael Smith, *The Spying Game: The Secret History of British Espionage*, Politico's Publishing, 1996, p115.

<sup>478</sup> See Discussion in: Andrew Heywood, *Political Ideas and Concepts*, Macmillan, 1994.

<sup>479</sup> See Discussion in: Andrew Heywood, *Political Ideas and Concepts*, Macmillan, 1994, p108.

<sup>480</sup> See discussion in: Helen Fenwick, *Civil Rights: New Labour, Freedom and the Human Rights Act*, 1998, Longman, 2000.

of these thinkers, such rights are generally considered to be absolute and should not be undermined by government, particularly for party political reasons, rather than for investigating crime or violence.<sup>481</sup>

The result of this thinking is that legislative and operative measures introduced in the name of security have sometimes been criticised by civil libertarians on several grounds. Firstly, civil libertarians may claim that the measure does not contain sufficient safeguards and mechanisms of accountability. For example, measures allowing for an increase in special police powers, such as surveillance measures or extended detention powers, are often claimed to have a detrimental effect on judicial safeguards such as the presumption of innocence; the right to a defence; and the right to be tried by an independent and impartial tribunal.<sup>482</sup> With regard to surveillance measures, civil libertarians may argue that the legislative or operational method used should be proportionate to the gravity of the threat posed, and the probability of its occurrence. This effectively means that the necessity of the planned action should be weighed against possible damage to civil liberties, including the right to political dissent, and the extent of the proposed action should be kept to a minimum.<sup>483</sup> Even where surveillance action is genuinely appropriate, it should fully comply with the rule of law. Therefore only the least intrusive technique should be adopted - the more intrusive the surveillance technique, the higher the authority that should be able to approve its use.<sup>484</sup>

Secondly, civil libertarian thinkers may argue that legislative measures are drafted too widely. They may claim that it is crucial that any enabling legislation should be precise and clearly framed since those defined as a security risk may be subject to a raft of control and surveillance measures.<sup>485</sup> Helen Fenwick, for example, has noted that the recent widening of the definition of terrorism, under the Terrorism Act 2000, may mean that law enforcers have gained increased powers to target certain forms of lawful dissent and protest for investigation.<sup>486</sup> The 2000 Act provides that terrorism means the use or threat of action 'for the purpose of advancing a political, religious or ideological cause' or action 'designed to influence a government or to intimidate the public or a section of the public.'<sup>487</sup> For Fenwick, political, religious or ideological causes may arise in the context of a wide range of

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<sup>481</sup> See discussion in: Lustgarten and Leigh, *In From the Cold: National Security and Parliamentary Democracy*, Oxford University Press, 1994.

<sup>482</sup> See: Anti-Terrorism, Crime and Security Act 2001, which allowed for the indefinite detention, without trial, of suspected foreign terrorists. Also see the Counter-Terrorism Bill, Parliamentary Session 2007-2008, which proposed an extension to pre-charge detention from 28 to 42 days.

<sup>483</sup> See, for example, Peter Gill, *Intelligence and Human Rights: Illuminating the Heart of Darkness*, *Intelligence and National Security*, Feb 2009, Vol. 24, Issue 1, pp 78-102.

<sup>484</sup> Peter Gill, *Intelligence and Human Rights: Illuminating the Heart of Darkness*, *Intelligence and National Security*, Feb 2009, Vol. 24, Issue 1, pp 78-102.

<sup>485</sup> Helen Fenwick, *The Anti-Terrorism, Crime and Security Act 2001: A Proportionate Response to 11 September*, *The Modern Law Review*, Sep 2002, Vol. 65, Issue 5, p724-762.

<sup>486</sup> Helen Fenwick, *The Anti-Terrorism, Crime and Security Act 2001: A Proportionate Response to 11 September*, *The Modern Law Review*, Sep 2002, Vol. 65, Issue 5, p724-762.

<sup>487</sup> Terrorism Act 2000, Section 1

demonstrations and other forms of legitimate protest, such as industrial action.<sup>488</sup> Moreover, since the definition expressly covers threats of serious disruption or damage to, for example, computer installations or public utilities, there is no specific necessity that the action is violent, or even that it is a threat only to the public. Thus, Fenwick claims that control and surveillance can potentially be directed against dissenting individuals who merely pose a threat to the election chances of the government of the day.<sup>489</sup>

Overall, the problem for these thinkers is that an expanse of security related legislation, along with an unclear definition of, for example, terrorism or subversion, may leave too much to the discretion of the security agencies and other law enforcers.<sup>490</sup> It may be claimed that where the security agency remit is too broad, there exists the potential for abuse, either by parliamentarians seeking to apply pressure to the security agencies or by the security agencies themselves. They argue that as legal definitions of the types of activity which may prompt a covert investigation become wider, the range of targets may tend to grow correspondingly.<sup>491</sup> It is fair to say that such claims may not be without foundation. There have been occasions where surveillance measures may have been introduced with seemingly little consideration of any safeguard to prevent their misuse.

Since it is claimed that the current legislative programme for preventing terrorism and violence does not always provide adequate safeguards against government abuses of power, civil libertarians may call for an increased resort to traditional liberal principles. These principles may require that the security agencies adhere to the rule of law and effect adequate control and oversight mechanisms. For liberals, constitutional principles such as the rule of law are fundamental tenets of a just society.<sup>492</sup> The point is that, in the liberal ideal, legislation should be drafted in a manner which is clear, ascertainable and prospective and the power of the state should be limited.<sup>493</sup>

The remainder of this chapter will explore liberal perceptions of the state. The discussion will include an examination of the liberal concept of negative liberty, in which the state's role in the lives of individual citizens is to be kept to a minimum. It will also examine the relationship between liberalism and democracy and the rule of law.

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<sup>488</sup> Helen Fenwick, *The Anti-Terrorism, Crime and Security Act 2001: A Proportionate Response to 11 September*, *The Modern Law Review*, Sep 2002, Vol. 65, Issue 5, p724-762.

<sup>489</sup> Helen Fenwick, *The Anti-Terrorism, Crime and Security Act 2001: A Proportionate Response to 11 September*, *The Modern Law Review*, Sep 2002, Vol. 65, Issue 5, p724-762.

<sup>490</sup> See discussion in: Lustgarten and Leigh, *In From the Cold: National Security and Parliamentary Democracy*, Oxford University Press, 1994.

<sup>491</sup> See discussion in: Foundation for Information Policy Research, *Communications Surveillance Briefing*, [www.fipr.org](http://www.fipr.org).

<sup>492</sup> A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, Eighth Edition, Macmillan, 1927. Originally published 1885.

<sup>493</sup> Joseph Raz, *The Rule of Law and its Virtue*, 1977, *The Law Quarterly Review*, Vol. 93, p195.

### 3.4 Liberalism and the Limits of the State

Many political thinkers, including liberals, regard the state and some form of government as a worthwhile or necessary association. They have, however, profoundly disagreed about the exact role that the state should play in society. For liberals, whilst civil society may embrace those areas of life in which individuals are free to exercise choice and make their own decisions, the state may necessarily reflect sovereign, compulsory and coercive behaviour.<sup>494</sup> Thus, liberalism has historically been a continuous protest against restrictions on the self determined actions of individuals, in which the state's proper role is restricted to the maintenance of domestic order, the enforcement of contracts, and the protection of society against external attack.<sup>495</sup> It has been characterised by an insistence on the rights of the individual against attempts by government to interfere with religious, moral, cultural, economic or political choices and actions, provided that those actions were performed within an agreed framework of rules, which applied impartially to all and which, though they guaranteed procedures, were neutral as to substance or ends.<sup>496</sup>

Liberals have tended to justify this challenge to excessive government power by appealing to universal principles. Individuals are claimed to come into the world with certain inalienable and natural rights in that they are endowed with an innate capacity to manage their economic, religious and other affairs. John Locke, for example, claimed that human beings are born '*in a state of perfect freedom, to order their actions and dispose of their possessions, as they see fit.*'<sup>497</sup> Liberals have traditionally emphasised that human beings are essentially self-interested and largely self-sufficient and, therefore, as far as possible, should be responsible for their own lives and circumstances.<sup>498</sup> Rights such as freedom of speech, religious worship and assembly, constitute a 'private sphere' which should be untouched, particularly by government.<sup>499</sup> Thus, actions, such as covert surveillance operated by the security agencies, which may impinge of this 'private sphere', may be viewed with suspicion by some liberals.<sup>500</sup> Rather, in order to prevent unnecessary interference, the liberal doctrine tends to favour a system of minimal intervention into the lives and choices of individuals and one in which liberty is understood in terms of negative freedoms.

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<sup>494</sup> See for example: John Mill, *On liberty*, Chapter III, 1859, in *John Stuart Mill: On Liberty and other Essays*, Oxford University Press, 1998. Berlin, *Two Concepts of Liberty: An Inaugural Lecture Delivered Before the University of Oxford on 31<sup>st</sup> October 1958*, Clarendon, 1958.

<sup>495</sup> See Comments in: David Miller, *Liberty*, Oxford University Press, 1991, p10. Andrew Heywood, *Political Ideas and Concepts*, Macmillan, 1994, p10. See also: Andrew Heywood, *Political Ideas and Concepts*, Macmillan, 1994.

<sup>496</sup> John Locke, *Two Treatises of Government*, 1690.

<sup>497</sup> John Locke, *Two Treatises of Government*, 1690.

<sup>498</sup> See, for example, John Mill, *On Liberty*, Chapter I, 1859, in *John Stuart Mill: On Liberty and other Essays*, Oxford University Press, 1998.

<sup>499</sup> See for example: Berlin, *Two Concepts of Liberty: An Inaugural lecture delivered before the University of Oxford on 31<sup>st</sup> October 1958*, Clarendon, 1958. John Mill, *On liberty*, Chapter III, 1859, in *John Stuart Mill: On Liberty and other Essays*, Oxford University Press, 1998.

<sup>500</sup> For example, Helen Fenwick. *Civil Liberties and Human Rights*, Cavendish, 2002.

### 3.5 Negative Liberty

Hobbes may have been the first to present an unequivocally negative concept of freedom. Hobbes defined liberty as the absence of external impediments to motion,<sup>501</sup> and as 'a silence of the laws.'<sup>502</sup> However, the classic formulation of the doctrine may be found in Berlin's 'Two Concepts of Liberty'.<sup>503</sup> Berlin defined negative freedom as 'an area within which a man can act unobstructed by others.'<sup>504</sup> In Berlin's words 'Liberty in the negative sense involves an answer to the question: What is the area in which the subject – a person or groups of persons – should be left to do or be what he is able to do or be?'<sup>505</sup> For Berlin, the answer to this question is that there should be a private zone that is marked out or set aside in which a person can exercise personal liberty and individual autonomy. The individual is to be left alone to exercise his own desires and choices without external coercion. Thus, in Berlin's conception, freedom is a property of individuals and consists of a realm of unimpeded action. A person is free to the extent that he is able to do things as he wishes – speak, worship, travel, marry – without these activities being blocked by other people. For Berlin, an individual is unfree if he 'is prevented by others from doing what he would otherwise do.'<sup>506</sup>

One major justification for minimising intervention into the lives of individuals, for liberals, may be a fear of a possible 'tyranny of the majority',<sup>507</sup> including a majority religious or moral view.<sup>508</sup> Mill, for example, was conscious of the damage that could be done by an over mighty state. Public power, for Mill, had to be limited by absolute natural rights, which pre-dated any particular consensus or majority view. Here, rights may be defined as a 'protective buffer or shield', that operates between the private zone of individualism and free choice, and the public zone of state intervention, which is often seen as a source of intrusive, arbitrary and bureaucratic action.

In his essay 'On Liberty', Mill listed three major objections to government intervention. Firstly, that generally speaking, those people personally interested in any business were the best people to manage

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<sup>501</sup> See the discussion in: David Miller, *Liberty*, Oxford University Press, 1991, p15.

<sup>502</sup> See the discussion in: Hobbes, *Leviathan, of the First and Second Natural laws, and of Contracts*, Chapter 14. 1651. David Miller, *Liberty*, Oxford University Press, 1991, p10. Andrew Heywood, *Political Ideas and Concepts*, Macmillan, 1994, p201.

<sup>503</sup> Berlin, *Two Concepts of Liberty: An Inaugural Lecture Delivered Before the University of Oxford on 31<sup>st</sup> October 1958*, Clarendon, 1958. The full text can be found in: Michael Sandel, *Liberalism and its Critics*, Blackwell, 1992.

<sup>504</sup> Berlin, *Two Concepts of Liberty: An Inaugural Lecture Delivered Before the University of Oxford on 31<sup>st</sup> October 1958*, Clarendon, 1958. The full text can be found in: Michael Sandel, *Liberalism and its Critics*, Blackwell, 1992, p16

<sup>505</sup> Berlin, *Two Concepts of Liberty: An Inaugural Lecture Delivered Before the University of Oxford on 31<sup>st</sup> October 1958*, Clarendon, 1958. The full text can be found in: Michael Sandel, *Liberalism and its Critics*, Blackwell, 1992.

<sup>506</sup> Berlin, *Two Concepts of Liberty: An Inaugural Lecture Delivered Before the University of Oxford on 31<sup>st</sup> October 1958*, Clarendon, 1958. The full text can be found in: in Michael Sandel, *Liberalism and its critics*, Blackwell, 1992, p16.

<sup>507</sup> See, John Mill, *On Liberty*, Chapter I, 1859, in *John Stuart Mill: On Liberty and other Essays*, Oxford University Press, 1998, p8.

<sup>508</sup> Much of Mill's work in *On Liberty* was concerned with threats to liberty posed by society rather than by the Government and its institutions.

it. Secondly, that even where something could not be handled better by individuals than by the government, it was preferable that it should be done by the individual, as a means to their own mental education. And thirdly, that ‘*every function superadded to those already exercised by the government causes its influence over hopes and fears to be more widely diffused, and converts the active and ambitious part of the public into hangers-on of the government.*’<sup>509</sup> For Mill, therefore, the state should not impose on its citizens a preferred way of life, even for their own good, because doing so will reduce the sum of human happiness.

Mill’s arguments suggest that the case for minimal intervention is based very firmly upon faith in the human individual and, in particular, in human rationality. Free from interference, coercion and even guidance, individuals are more able to make their own decisions and fashion their own lives.<sup>510</sup> The result of this may be, as Bentham argues, the greatest happiness for the greatest number, simply because individuals are the only people who can be trusted to identify their own interests.<sup>511</sup> Any form of paternalism, however well intentioned, may rob the individual of responsibility for his or her own life and so may infringe upon liberty. This is not to argue that left to their own devices individuals will not make mistakes, both intellectual and moral, but simply to say that if they are in a position to learn from their mistakes, they have a better opportunity to develop and grow as human beings.<sup>512</sup> In short, morality can never be taught or imposed: it can only arise through voluntary action. Indeed, where moral principles are enforced over personal desires, Berlin describes the individual as potentially coerced or even enslaved.<sup>513</sup>

Coercion in a citizen's life or liberty may come from individuals or groups wishing to force (rather than persuade) other free individuals to adopt a particular dogma or viewpoint. It may also come from the state and its institutions, including the security and intelligence agencies. These agencies employ various devices and techniques of covert surveillance that may necessitate intrusion into the personal and private lives of individuals. Whilst liberals may accept that the state has a duty to preserve national security and to prevent and detect serious crime, they may argue that respect for the value of individual privacy is a central principle in a democratic society.<sup>514</sup> For liberals, a private sphere of life may allow the individual the ability and space to make rational choices free from state encroachment.<sup>515</sup> For example, the internal affairs of ideological protest movements, business, unions

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<sup>509</sup> John Mill, *Three Essays*, Edited by R. Wollheim, Oxford, 1975, pp133-135. Alternatively, see: John Mill, *On liberty*, Chapter I, 1859, in *John Stuart Mill: On Liberty and other Essays*, Oxford University Press, 1998, pp 121-128.

<sup>510</sup> John Mill, *Three Essays*, Edited by R. Wollheim, Oxford, 1975, pp 133-135.

<sup>511</sup> Jeremy Bentham. *An Introduction to the Principles of Morals and Legislation*, 1789.

<sup>512</sup> John Mill, *On liberty*, Chapter I, 1859, in *John Stuart Mill: On Liberty and other Essays*, Oxford University Press, 1998.

<sup>513</sup> Berlin stressed that coercion implies the deliberate interference of other human beings. Mere incapacity or inability to attain a certain goal cannot be described as coercion. See: Berlin, *Two Concepts of Liberty: An Inaugural Lecture Delivered Before the University of Oxford on 31<sup>st</sup> October 1958*, Clarendon, 1958.

<sup>514</sup> See comments in: Michael Sandel, *Liberalism and its Critics*, Blackwell, 1992 p16.

<sup>515</sup> See comments in: Michael Sandel, *Liberalism and its Critics*, Blackwell, 1992 p16.

and a variety of other groups and movements may require privacy to protect their organisational life.<sup>516</sup> Unless such groups have wide scope to formulate and test their ideas without intrusive surveillance by the government, the police and the security agencies, an essential precondition for effective democratic society may be destroyed. The point is that when individuals fear that their personal space may be invaded by the state, it may provoke an atmosphere in which people practice self-censorship. For example, Leigh and Lustgarten maintain that *'the knowledge, or even widespread belief, that one's words will be heard by someone else other than those to whom one wishes to speak is stultifying and may create a society of timid, furtive creatures.'*<sup>517</sup> Such interference raises the spectre of the 'big brother' state and as Leigh and Lustgarten argue: *'No more odious a society can be imagined than one in which no one dares to speak his or her true thoughts, even in private, for fear that state officials will learn of them.'*<sup>518</sup>

Whilst liberals may agree that a 'big brother' state should be avoided, the traditional ideal of minimal intervention has been criticised by some modern liberals who advocate a 'positive' model of rights protection.<sup>519</sup> Those advocating positive freedom have argued that, when individuals are simply 'left alone', they may fall prey to economic misfortune or to the arbitrary justice of the market. This would leave them in no position to make rational and informed choices. Lack of material resources may amount to the 'freedom to starve'. For some modern liberal thinkers this has provided a justification for social welfare. The welfare state may be seen as enlarging freedom by empowering individuals, and freeing them from the social evils that blight their lives - unemployment, homelessness, poverty, ignorance, disease and so forth. Amongst the first to adopt this view was T.H. Green. He defined freedom as the ability of people *'to make the most and the best of themselves.'*<sup>520</sup> This freedom consists not only in being left alone but in having the effective power to act. Such a conception shifts the attention towards the opportunities available to each individual, and is more concerned with the distribution of material and economic resources that are linked to welfarism and state intervention.

However, the positive conception of freedom may be diametrically opposed to the liberal strategy of non-interference because the guarantee social and economic safety valves may necessitate the forfeiture of certain rights of free choice and privacy. For the state to administer welfare objectives effectively, it needs to collect information about its citizens with which to facilitate some of its functions, and this may impinge upon the right to privacy. Whilst liberals may accept that there is a public interest in the fair and accurate recording of information that would protect the efficient

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<sup>516</sup> See comments in: Lustgarten and Leigh, *In From the Cold: National Security and Parliamentary Democracy*, Oxford University Press, 1994. pp 39-41.

<sup>517</sup> Lustgarten and Leigh, *In From the Cold: National Security and Parliamentary Democracy*, Oxford University Press, 1994. pp 39-41.

<sup>518</sup> Lustgarten and Leigh, *In From the Cold: National Security and Parliamentary Democracy*, Oxford University Press, 1994. pp 39-41.

<sup>519</sup> Such as: T.H. Green, *Lecture on Liberal Legislation and Freedom of Contract*, Works, Vol. 3, Longmans, 1911, p371.

<sup>520</sup> T. H. Green, *Lecture on Liberal Legislation and Freedom of Contract*, Works, Vol. 3, Longmans, 1911, p371.

running of public services, such as the NHS, they may be less enthusiastic about the creation and storage of files held by the security agencies, or the introduction of ID cards.<sup>521</sup> Some indication of the number of active files operated by the security agencies is found in the annual reports produced by the Intelligence Services Commissioner. According to the Commissioner, a total of 2032 warrants and authorisations were approved across the intelligence agencies and the Ministry of Defence in 2014.<sup>522</sup> It is also noteworthy that the number of other personal files, used for general law enforcement purposes, has grown significantly in recent years. For example, in 2013, the police held the profiles of 5,716,085 individuals on the National DNA database.<sup>523</sup> Many of these profiles have been obtained from citizens with no criminal record.<sup>524</sup> The contents of such files and databases may potentially be used against the individual's interest. For example, the information could be used to affect career choices. In the past, files held by the security agencies have played a significant role in certain security vetting procedures which may affect a wide range of jobs in the UK. Security vetting applies to senior staff in a range of government departments and to some private sector employees working on government contracts.<sup>525</sup>

For these reasons and others, some liberal academics<sup>526</sup> and politicians<sup>527</sup> may reject the 'positive' conception of rights protection, preferring individuals to make their own decisions and to expand the realm of personal responsibility.<sup>528</sup> For others, state intervention tends to be viewed as only necessary when it 'helps individuals to help themselves.' Once social disadvantage and hardship are abolished, citizens should be left alone to take responsibility for their own lives. In this way welfarism can be embraced, whilst the liberal preference for negative liberty, secured by minimal intervention, still stands.<sup>529</sup>

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<sup>521</sup> The decision to introduce a National Identity Scheme was formally announced in the Queen's Speech on 17<sup>th</sup> May 2005. The scheme has since been dropped.

<sup>522</sup> Intelligence Services Commissioner, *Report of the Intelligence Services Commissioner for 2014*, 25<sup>th</sup> June 2015, p11

<sup>523</sup> Home Office, *National DNA Database Strategy Board, Annual Report 2012-13*, December 2014, p7. The UK's Database may have been the largest of any country. In 2005, it was estimated that 5.2% of the UK population was on the Database compared with 0.5% in the USA. However, in 2013 a number of profiles (592,777) were deleted from the Database in preparation for new provisions under the Protection of Freedoms Act 2013.

<sup>524</sup> The Protection of Freedoms Act 2013 has limited the period that DNA samples can be retained, for those persons not convicted, to 3 years in most circumstances.

<sup>525</sup> The Defence Business Services National Security Vetting (DBS NSV) is the main UK provider of government security clearances. See also: Linn, *Application Refused, Employment Vetting by the State*, London, 1998.

<sup>526</sup> For example: Friedrich Hayek, Milton Friedman, Robert Nozick.

<sup>527</sup> For example: Margaret Thatcher.

<sup>528</sup> The emergence of the 'new right' conservatism in the 1970's, has encouraged some liberals to restate the case for a minimal state, particularly in regard to a 'free market' economy.

<sup>529</sup> Such as: L. T. Hobhouse and T. H. Green.

### 3.6 Negative Liberty and Security

Perhaps the result of limiting the state to a minimal role is that it may be confined to a ‘night watchman’ type function, whose services are only called upon when orderly existence is threatened. This leaves the state with only three important functions. Firstly, the state must maintain domestic order, in effect, protecting individual citizens from one another. Thus, states must possess some kind of machinery for upholding law and order. Secondly, it is necessary to ensure that the voluntary agreements or contracts, which private individuals enter into are respected, which requires that they can be enforced through a court system. Thirdly, there may be a need to provide protection from the possibility of external attack, necessitating some form of armed service.

To the extent of protecting these imperatives, liberals may express a preference for the continued existence of the state – the state is no longer a threat to individual rights and free choice – it is a container for security which protects its citizens from internal violence and external invasion. In other words, the state provides for the physical survival of its citizens by shielding them from what Hobbes described as a life ‘*solitary, poor, nasty, brutish and short*.’<sup>530</sup> However, in addition to protecting citizens from hostile forces, liberals may add two further elements which they allege are vital components of security for the citizen. Firstly, ‘*that the governing institutions be those of a constitutional democracy*,’<sup>531</sup> and secondly, ‘*that the basic human rights of the citizens are respected*.’<sup>532</sup> For liberals, the state and its institutions should not merely consist of ‘*any machinery capable of exercising control over the population at a particular time*,’<sup>533</sup> because that would ‘*permit government by decree and torture chamber to be included*.’<sup>534</sup> Rather, for liberals, the citizen may only enjoy personal security within the framework of life in a nation which can maintain a number of fundamental preconditions. These, it seems, must include a constitutionally limited government, which upholds civil and political rights, including free speech and privacy, along with due process rights within the legal system.<sup>535</sup> Thus, whilst liberals may accept that there is a need to meet national security imperatives, they may claim that measures taken in pursuit of these imperatives, whether legal or operational, must be compatible with established definitions of fundamental rights.<sup>536</sup>

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<sup>530</sup> Hobbes, *Leviathan, of the First and Second Natural laws, and of Contracts*, 1651.

<sup>531</sup> Lustgarten and Leigh, *In From the Cold: National Security and Parliamentary Democracy*, Oxford University Press, 1994, p7.

<sup>532</sup> Lustgarten and Leigh, *In From the Cold: National Security and Parliamentary Democracy*, Oxford University Press, 1994, p7.

<sup>533</sup> Lustgarten and Leigh, *In From the Cold: National Security and Parliamentary Democracy*, Oxford University Press, 1994, p7.

<sup>534</sup> Lustgarten and Leigh, *In From the Cold: National Security and Parliamentary Democracy*, Oxford University Press, 1994, p7.

<sup>535</sup> See discussion in: Helen Fenwick, *Civil Rights: New Labour, Freedom and the Human Rights Act 1998*, Longman, 2000.

<sup>536</sup> See, for example: Liberty, *The Human Rights Act*, [www.liberty-human-rights.org.uk](http://www.liberty-human-rights.org.uk).

For those associated with the civil liberties agenda, the human rights values and safeguards for basic liberties, which are embodied in domestic and international laws, are often claimed to possess a universal value - they are a predetermined and unchanging collection of standards that should not be subject to adaptation or modification.<sup>537</sup> On this basis, it is argued that the protection of civil liberties should not be compromised, even by those legal, administrative and institutional measures that, at a political or even civilian level, are claimed to be urgently necessary to combat threats such as terrorism.<sup>538</sup> Thus the government and the security agencies should justify and legitimise their activities and powers. For liberals, this may be better achieved where they exercise constitutional propriety, adhere to the rule of law and effect adequate control and oversight mechanisms.<sup>539</sup> Such values demand that the citizen should be able to feel confident that surveillance and interception by the state, is undertaken for appropriate ends, by proportionate means, and with respect for privacy.<sup>540</sup> Liberal appeals to the rule of law are intended to ensure that issues relating to national security are decided on the basis of objective rules that hold the government to account.

### **3.7 The Rule of Law and Security: A Liberal Conception**

The rule of law may be interpreted either as a ‘philosophy’ or a ‘political theory’, which lays down fundamental requirements for law, or as a ‘procedural device’, by which those with power rule under law. The essence of the rule of law is that of the sovereignty or supremacy of law over man. The rule of law insists that every person – irrespective of rank or status in society – be subject to the law. For the citizen the rule of law is both ‘prescriptive’ – dictating the conduct required by the law, and ‘protective’ of citizens – demanding that the government act according to law. In liberal democracies the general assumption is that adherence to the doctrine requires more than simply government according to law. The concept of the rule of law implies an acceptance that law itself represents a ‘good’: That law, and its governance, is a demonstrable asset to society. In other words, the rule of law is only meaningful in a society which exhibits the features of a democratically elected, responsible – and responsive – government, and a separation of powers that will result in a judiciary which is independent of government. From the vantage point of liberal thought, the rule of law is seen as ensuring the minimum rules in society to enable man to fulfil his life plan according to law, but with the minimum interference of law.

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<sup>537</sup> See, for example: Liberty, *The Human Rights Act*, [www.liberty-human-rights.org.uk](http://www.liberty-human-rights.org.uk).

<sup>538</sup> See, for example: Helen Fenwick, *The Anti-Terrorism, Crime and Security Act 2001: A Proportionate Response to 11 September*, *The Modern Law Review*, Sep 2002, Vol 65, Issue 5, pp 724-762.

<sup>539</sup> A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, Eighth Edition, Macmillan, 1927. Originally published 1885.

<sup>540</sup> See, for example: Jim Killock, *RIPA, Consultation Response from Open Rights Group*, [www.openrightsgroup.org.uk](http://www.openrightsgroup.org.uk). (Last accessed 2011).

A classical British conception of the rule of law may be found in Dicey's *Introduction to the Study of the Law of the Constitution*.<sup>541</sup> Dicey's view of the rule of law emphasises liberal assertions that government power should be restrained - The government should not possess discretionary power and no-one, including state officials, should be above the law. Rather, there should be legal controls, which prevent the abuse of power, including adequate redress in the courts where official discretion or legal rules have been misused or unlawfully applied. The ensuing paragraphs will illuminate the meaning Dicey's conception of the rule of law in the light of the way in which it may affect liberal conceptions of security.

### **3.8 The Absence of Discretionary Power.**

The first aspect of Dicey's conception of the rule of law is that, '*Englishmen are ruled by the law and the law alone; a man may... be punished for a breach of law, but he may be punished for nothing else*'.<sup>542</sup> In other words, penalties should only be imposed on an individual where a breach of an established legal rule has been proved in the ordinary courts of law. Achieving this, it seems, requires: '*The absolute supremacy or predominance of regular law, as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government*'.<sup>543</sup> In this conception, the government should not have any right to create secret, arbitrary or retrospective penal law, nor should public officials be allowed a wide degree of choice in terms of when and how powers should be used.<sup>544</sup>

Raz, for example, advocated that there should be clear rules and procedures for making laws.<sup>545</sup> Raz claimed that laws should also be prospective, stable and clear. In other words, laws should not be changed too frequently, because lack of awareness of the law prevents one from being guided by it. For these thinkers, governmental activities are to be confined as narrowly as possible, whilst the individual is left to pursue his or her own destiny with the minimum of regulation and interference. Excessive governmental power may represent a potential threat to the traditional personal and proprietary rights of the individual, and as John Locke claimed, '*where law ends, tyranny begins*'.<sup>546</sup>

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<sup>541</sup> A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, Eighth Edition, Macmillan, 1927. Originally published 1885.

<sup>542</sup> A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, Eighth Edition, Macmillan, 1927. Originally published 1885.

<sup>543</sup> A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, Eighth Edition, Macmillan, 1927. Originally published 1885.

<sup>544</sup> Joseph Raz, *The Rule of Law and its Virtue*, 1977, *The Law Quarterly Review*, Vol. 93, p195.

<sup>545</sup> Joseph Raz, *The Rule of Law and its Virtue*, 1977, *The Law Quarterly Review*, Vol. 93, p195.

<sup>546</sup> John Locke, *Second Treatise of Government* (1690), Chap XVIII.

Whilst it is clear that the modern state could not function efficiently without a wide range of discretionary powers, some of which may be phrased in wide subjective language, concerns remain over the extent to which such powers are subject to adequate parliamentary and judicial controls. Perhaps even those who accept a more dominant, influential, or even authoritarian role from government, may seek effective controls by which to prevent the abuse of discretion, and ways in which to ensure that official power is exercised fairly. Thus, in recent years there have been concerns that powers of surveillance and communications interception are routinely used to detect even the most trivial of offences, such as dog fouling and littering, rather than protecting the public from serious crime and terrorism. For example, Sir Paul Kennedy<sup>547</sup> reported that 122 local authorities had sought communications records to identify offenders such as rogue traders, fly tippers and fraudsters.<sup>548</sup> Kennedy has not been alone in his concern. Sir Christopher Rose, the Surveillance Commissioner, has also reported a rise in the number of public authorities using their powers of surveillance,<sup>549</sup> including trading standards and those dealing with antisocial behaviour.<sup>550</sup> Finally, John Major has expressed concerns regarding his perceived ‘*down grading of personal privacy*,<sup>551</sup> and the ease in which warrants for surveillance are issued. He reminds us that ‘*these days, a police superintendent can authorise bugging in public places. A chief constable can authorise bugging in our homes or cars. The Home Secretary can approve telephone tapping and the interception of our letters and e-mails.*<sup>552</sup>

Indeed, such has been the concern regarding the way in which the Regulation of Investigatory Powers Act 2000 may have been misused, the Government has been prompted to introduce legislative change. The Protection of Freedoms Act 2012 amends the Regulation of Investigatory Powers Act 2000, to ensure that Local Authorities seek judicial approval from a Magistrate before obtaining and disclosing communications data.<sup>553</sup> The Act also contains provisions instructing the Secretary of State to prepare a code of practice on the use of closed-circuit television.(CCTV)<sup>554</sup> This code of practice is to include guidance on a range of considerations including: the development of CCTV cameras; the means of access to, and disclosure of, the information obtained; and guidance for procedures on complaints.<sup>555</sup>

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<sup>547</sup> Interception of Communications Commissioner.

<sup>548</sup> See: The Times, Analysis by Sean O’Neill, *Every Breath You Take, Every Move You Make, a Camera Will be Watching You*. 6<sup>th</sup> February 2008.

<sup>549</sup> See: The Times, Analysis by Sean O’Neill, *Every Breath You Take, Every Move You Make, a Camera Will be Watching You*. 6<sup>th</sup> February 2008.

<sup>550</sup> See: The Times, Analysis by Sean O’Neill, *Every Breath You Take, Every Move You Make, a Camera Will be Watching You*. 6<sup>th</sup> February 2008.

<sup>551</sup> John Major, The Times, *42 Day Detention: The Threat to Our Liberty*, 6<sup>th</sup> June, 2008.

<sup>552</sup> John Major, The Times, *42 Day Detention: The Threat to Our Liberty*, 6<sup>th</sup> June, 2008.

<sup>553</sup> Protection of Freedoms Act 2012, Section 37 and 37(6).

<sup>554</sup> Protection of Freedoms Act 2012, Section 29

<sup>555</sup> Protection of Freedoms Act 2012, Section 29(3)

In response to the introduction of the measures, Liberty stated that it was '*pleased to see restrictions on the disproportionate and intrusive use of surveillance powers.*'<sup>556</sup> However, whilst liberty accepted that these developments in the law may represent a significant step forward, they have claimed that more still needs to be done to enable the Act to '*live up to its ambitious title.*'<sup>557</sup> Liberty expressed particular disappointment that the Act did not do more the remedy the use of the 'mosquito device.'<sup>558</sup> This device gives off a high-pitched noise that is designed to be uncomfortable and unpleasant. It can generally only be heard by children who are more sensitive to high pitched sounds. It seems that whilst the device was originally produced to scare off vermin, '*it is now used by some shopkeepers and councils to drive off children and teenagers.*'<sup>559</sup> For libertarian thinkers, excessive surveillance or other measures used to combat crime or public nuisance, may represent an abuse of discretionary power in that they are both disproportionate and that they may affect those that are not committing any criminal offence. For civil libertarians, such measures should be declared unlawful either by statute or by the courts.

#### **4.9 Equality Before the Law**

The second element of Dicey's analysis of the rule of law concerns the notion of 'equality before the law', and '*the equal subjection of all classes to the ordinary law of the land as administered by the ordinary law courts.*'<sup>560</sup> As Thomas Paine puts it: '*the law is king*'.<sup>561</sup> For these writers, the rule of law has universal application. There should be no one to whom the law does not apply, or who can ignore its constraints. All should be bound by the law, and held rigorously to account in accordance with the law, when they do not uphold it. This emphasises the notion that everyone, irrespective of rank, whether official or individual, is to be subject to the law and to the same courts. This suggests, of course, that the government itself is bound by the ordinary law and that the courts should not unduly favour the government over the citizen.

However, it may not be true to say, either then or now, that English law treats those in government in exactly the same way as private citizens. The idea of equality before the law, irrespective of status, is subject to many exceptions. Thus, so far as equal powers are concerned, liberals may recognise that the government and its organs, including the security agencies, have legal authority to exercise powers over and above the citizen. This will include instigating covert surveillance methods and

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<sup>556</sup> Liberty, *The Protection of Freedoms Bill, Rolling Back Unnecessary Power*, [www.liberty-humanrights.org.uk](http://www.liberty-humanrights.org.uk).

<sup>557</sup> Liberty, *The Protection of Freedoms Bill, Rolling Back Unnecessary Power*, [www.liberty-humanrights.org.uk](http://www.liberty-humanrights.org.uk).

<sup>558</sup> Liberty, *The Protection of Freedoms Bill, Rolling Back Unnecessary Power*, [www.liberty-humanrights.org.uk](http://www.liberty-humanrights.org.uk).

<sup>559</sup> Liberty, *The Mosquito*, [www.liberty-humanrights.org.uk](http://www.liberty-humanrights.org.uk).

<sup>560</sup> A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, Eighth Edition, Macmillan, 1927. Originally published 1885

<sup>561</sup> Thomas Paine, *Common Sense*, 1776

accessing personal data files that would not be available to the ordinary citizen. In addition, the Crown enjoys immunities under the law, and the Government acting in the name of the Crown, may exercise prerogative powers which may defeat the rights of individuals.<sup>562</sup> Perhaps then, what a constitutional guarantee of equality before the law may achieve is to enable legislation to be invalidated, or changed, if it distinguishes between citizens on grounds which are considered irrelevant, unacceptable or offensive. For example, improper discrimination on the grounds of race, sex, origin or colour. However, Dicey had no such jurisdiction in mind. The specific meaning that he attached to equality before the law is that all citizens (including government officials) were subject to the jurisdiction of the ordinary courts should they transgress the law which applied to them, and that there should be no separate administrative court.

However, Dicey's conception of the rule of law has been the subject of a number of criticisms. Perhaps, the problem is that Dicey's understanding of the rule of law is distinctive to the British system of government and it has been argued that Britain offers a particularly poor example of the rule of law. Firstly, as noted above, parliamentary supremacy, which is a core principle of Britain's un-codified constitution, may violate the very idea of the rule of law. It is difficult to suggest that the law 'rules' if the legislature itself is not bound by external constraints. Secondly, the absence of a Bill of Rights also means that individual liberties may not enjoy the protection afforded to citizens in countries where there is a written constitution. Finally, an unclear separation of powers, and a seeming growth of executive power, may mean that state officials have more choice about when, and on what terms, powers are used. The UK's constitutional arrangements affect the way in which security related legislation is dealt with by Parliament and the security agencies. Therefore, this topic needs to be analysed in more detail. The discussion will trace some typical liberal thoughts regarding the nature of parliamentary power. It will then be possible to examine some of the modern ramifications of the supremacy doctrine, particularly where it affects civil liberties and security related legislation.

### ***3.9.1 Parliamentary Supremacy***

Dicey claimed that Parliament has the power to make or unmake any law whatsoever; that Parliament cannot be bound by its predecessors, nor can it bind its successors, and that there is no court which can question the validity of an Act of Parliament.<sup>563</sup> Thus, it is claimed that Parliament enjoys a

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<sup>562</sup> See: *Malone v Metropolitan Police Commissioner* (1979) 2 All ER 620.

<sup>563</sup> A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, Eighth Edition, Macmillan, 1927. Originally published 1885

*'comprehensive and exclusive power of lawmaking'<sup>564</sup> and that 'its laws are not to be changed or unmade.'<sup>565</sup>*

Dicey, argued that the power of Parliament is justified because its supreme power to create law is *'firmly embedded within a conception of self-correcting majoritarian democracy.'*<sup>566</sup> Dicey believed that, whilst Parliament is the legal sovereign, political sovereignty rests with the electorate, who may dispense with a ruling party that fails to implement popular law and policy. Thus, whilst Parliament has supreme law making capacity, it is not truly unlimited. Firstly, new 'power giving' legislation must be passed through Parliament where it can be subjected to scrutiny, debate and possible amendment. Secondly, Parliament is to be equal before the law – it must subject itself to the law that it has created, at least to the extent that it has not enacted changes or repeals. Thirdly, Parliament must also subject itself to a system of democratic accountability in the form of elections.<sup>567</sup>

However, it has been argued that Dicey's views were premised upon certain assumptions concerning representative democracy, which were misconceived and which failed to take account of important political developments occurring, even at the time he was writing.<sup>568</sup> Whilst Dicey's principle of government according to law stresses the importance of legal authority and form for the acts of government, the British system is one in which, as Dicey himself put it, Parliament can *'make or unmake any law whatsoever.'*<sup>569</sup> Since a valid Act of Parliament may not be questioned by the Judiciary, seemingly unconstitutional legislation cannot be over-turned in the courts. In the absence of constitutional guarantees for individual rights, the need for legal authority does not necessarily protect individual rights from legislative invasion. As Jennings asserts, *'in England, the administration has powers limited by legislation, but the powers of the legislature are not limited at all. There is still, it may be argued, a rule of law, but the law is that the law may at any moment be changed.'*<sup>570</sup>

This ability of Parliament to enact or repeal *'any law whatsoever'*<sup>571</sup> may have been exacerbated by the dominance of the executive in Parliament. Indeed, in this respect, it has been suggested that the UK Parliamentary system is akin to an elected dictatorship. The term 'elective dictatorship' was

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<sup>564</sup> Pavlos Eleftheriadis, *Parliamentary Sovereignty and the Constitution*, 22 Canadian Journal of Law and Jurisprudence, 2009, p267

<sup>565</sup> Pavlos Eleftheriadis, *Parliamentary Sovereignty and the Constitution*, 22 Canadian Journal of Law and Jurisprudence, 2009, p267

<sup>566</sup> See discussion in Craig, *Dicey: Unitary, Self Correcting Democracy and Public Law*, (1990) 106 LQR 105

<sup>567</sup> See discussion in Craig, *Dicey: Unitary, Self Correcting Democracy and Public Law*, (1990) 106 LQR 105

<sup>568</sup> See discussion in Craig, *Dicey: Unitary, Self Correcting Democracy and Public Law*, (1990) 106 LQR 105

<sup>569</sup> A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, Eighth Edition, Macmillan, 1927. Originally published 1885.

<sup>570</sup> See: Sir Ivor Jennings, *The Law and the Constitution*, (5<sup>th</sup> Edition), 1959, pp 54-58

<sup>571</sup> A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, Eighth Edition, Macmillan, 1927. Originally published 1885.

made famous by Lord Hailsham<sup>572</sup> in the Richard Dimbleby Lecture in 1976.<sup>573</sup> The term refers to the fact that the legislative programme of Parliament is determined by the Government, and Government Bills virtually always pass the House of Commons because of the nature of the majoritarian ‘first past the post’ electoral system, which almost always produces a strong Government. This executive dominance, claimed Hailsham, is compounded by the Parliament Acts<sup>574</sup> and Salisbury Convention<sup>575</sup> which can circumscribe the House of Lords and their ability to block Government initiatives. Thus, the absence of a codified constitution and the imposition of party discipline, which often ensures a loyal vote for the ruling party in Parliament, may mean that Government initiated policy or legislation is rarely adequately challenged, and Parliament is dominated by the executive.

The point is that, the rule of law may have less value if the Government is able to obtain the requisite power to ‘do as it pleases’ from a compliant legislature. Indeed, in recent years, the Government has introduced a sizeable amount of legislation into Parliament that may, arguably, undermine liberties which are considered to be universal and non-negotiable by liberals. For example, Terrorism Prevention and Investigation Measures, which were introduced in 2011 to replace ‘Control Orders’, may still impinge upon freedom of association, movement and speech; the proscription of organisations and the restriction of financial flows to terrorist groups may undermine property rights; and measures allowing for an increase in special police powers, such as extended detention powers, may affect judicial safeguards, including the presumption of innocence, the right to a defence, and the right to be tried by an independent and impartial tribunal.<sup>576</sup> Indeed, measures such as these have led many liberals to argue that the doctrine of parliamentary supremacy does not always provide adequate safeguards against government abuses of power. For some liberals, this has led to calls for an entrenched Bill of Rights.

### ***3.9.2 A Bill of Rights: The Rule of Law and National Security***

A Bill of Rights is a document which provides a summary of fundamental rights that are considered to be essential to the nation, and which must be protected against infringement by public authorities. In

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<sup>572</sup> The Phrase was first used a century earlier – see: *The Rule of the Monk*, The Times, 5<sup>th</sup> May, 1870, p4.

<sup>573</sup> Lord Hailsham, *The Richard Dimbleby Lecture: Elective Dictatorship*, BBC One, 14<sup>th</sup> October 1976, currently available at [www.bbc.co.uk](http://www.bbc.co.uk). (Last accessed May 2012)

<sup>574</sup> See the Parliament Acts 1911 and 1949. These Acts are to be construed as one - See s.2(2) of the Parliament Act 1949. The 1911 Act limits the legislation blocking powers of the House of Lords. Provided the provisions of the Act are met, legislation can be passed without the approval of the House of Lords. The 1949 Act further limited the Power of the House of Lords by reducing the time that they could delay Bills.

<sup>575</sup> The Salisbury Convention (also called the Salisbury Doctrine), is a constitutional convention of the UK under which the House of Lords will not oppose the second or third reading of any Government legislation promised in its election manifesto – see [www.parliament.uk](http://www.parliament.uk) – the Salisbury Doctrine. (Last accessed May 2012).

<sup>576</sup> See: Anti-Terrorism, Crime and Security Act 2001, which allowed for the indefinite detention without trial of suspected foreign terrorists. Also see: Justice and Security Act, which legalises closed material procedures and is due to receive the Royal Assent in May 2013.

most liberal democratic jurisdictions, an official Bill of Rights holds more authority than the legislative bodies alone. Therefore, Acts passed by the legislature may be invalidated if they are deemed to be unconstitutional. However, in the UK, fundamental rights are not entrenched in law; rather they are contained in ordinary Acts of Parliament, which, at least on a technical level, can be amended, or even repealed. The effect that a lack of an entrenched Bill of Rights has on the rule of law is that, arguably, the safeguards against government abuses of power are less comprehensive and, perhaps less effective. Thus, Dicey's argument that the rule of law is upheld because, '*the right to personal liberty is ... the result of judicial decisions*' may be out-dated and, in fact, the rule of law occupies a much more precarious status in the UK.

In recent years, the issues raised by the lack of a Bill of Rights have been overcome, to some extent, by the enactment of the Human Rights Act 1998. This Act incorporates the European Convention on Human Rights into UK law. The concept of the rule of law is infused into the Convention. It is described in the preamble of the Convention as part of the 'common heritage', which the signatories share, and is one of the fundamental principles of a democratic society. A national rule will not constitute a law for Convention purposes unless it has appropriate qualities to make it compatible with the rule of law.<sup>577</sup> States may limit citizens' liberties or curtail their freedoms, but such measures must be proportionate to the legitimate aim pursued. Legitimate aims include restrictions in the interests of national security, public safety and the prevention of disorder and crime. In assessing proportionality in relation to the aim of national security, the Court has allowed a very wide margin of appreciation to the State.<sup>578</sup> Thus, the security agencies may be afforded more extensive powers under the Convention than other public authorities. However, a legitimate aim and a proportionate response alone are insufficient to justify limiting a right. In Convention jurisprudence, limitations must also have an ascertainable legal basis. They must be 'prescribed by law', or 'in accordance with the law'.<sup>579</sup> To be 'prescribed by law' for Convention purposes, the starting point is that there must be a basis for what is done in national law. This embodies the notion that a norm cannot be classified a law unless it is accessible and also foreseeable, to a reasonable degree, in its application and consequences. In other words, the law must be available to the people likely to be affected by it, and they must be able, at least with the help of a lawyer, to ascertain its likely application to the circumstances of a given case. The object which underlies these principles is that it ensures that there is one rule for all, that power is not exercised arbitrarily or for an improper purpose, and that minimum safeguards exist against the abuse of power.

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<sup>577</sup> See *Kopp v Switzerland* (1999) 27 EHRR 91, paras. 55 and 64.

<sup>578</sup> *Leander v Sweden* (1987) 9 EHRR 433.

<sup>579</sup> See, for example: *Kopp v Switzerland* (1999) 27 EHRR 91.

Convention principles have now been incorporated into UK domestic law by virtue of the Human Rights Act 1998. This Act makes it unlawful for any public body to act in a way which is incompatible with the rights protected by the Convention,<sup>580</sup> unless the wording of an Act of Parliament means they have no other choice.<sup>581</sup> The Act also makes available in the UK courts a remedy for breach of a Convention right, without the need to go to the European Court of Human Rights in Strasbourg. Sections 2 and 3 of the Act require UK judges to take account of the decisions of the Strasbourg Court,<sup>582</sup> and to interpret legislation, as far as possible, in a way which is compatible with the rights protected by the Convention.<sup>583</sup> If it is not possible to interpret an Act of Parliament so as to make it compatible with the Convention, the judges may issue a declaration of incompatibility.<sup>584</sup> Whilst this declaration does not affect the validity of the Act of Parliament, in the sense that the Act is overridden, the Act contains mechanisms that will allow Parliament to change offending Acts.<sup>585</sup> The Act does not prevent an individual from taking his case to the Strasbourg court as a last resort.

Whilst the enactment of the Human Rights Act may have produced a major expansion in the way that rights are understood and protected in the UK, it has been argued by liberal thinkers that it has not gone far enough. For example, Helen Fenwick argues that certain statutory regulations, such as the Regulation of Investigatory Powers Act 2000 (RIPA), which were introduced to provide a scheme for state surveillance that would meet the demands of the Convention, are more concerned with the form than the substance of the law. Helen Fenwick claims that the striking feature of the RIPA is the '*determination evinced under it to prevent citizens invoking Convention rights in the ordinary courts,*'<sup>586</sup> rather than its ability to limit state interference or to provide effective oversight mechanisms. For Fenwick, covert surveillance is only made legitimate where the security agencies are subjected to stringent legal controls and oversight mechanisms that will ensure that warrants for surveillance operations comply with established liberties and freedoms. For Fenwick, the power of government executives to interfere with the lives and choices of individuals should be constrained, or at least prescribed by law. Fenwick, like Dicey, opposes excessive government discretion or the introduction of arbitrary, secret or retrospective legislation. When wide discretionary powers are conferred on the executive – whether they be in the form of granting power to a Minister of the Crown to 'act as he thinks fit', or on civil servants such as the security agencies - it may be more difficult for the individual to know what rights he or she has, or to challenge discretionary decisions before a court of law or tribunal.

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<sup>580</sup> S6(1) Human Rights Act 1998 (Acts of Public Authorities) .

<sup>581</sup> S6(2) Human Rights Act 1998 (Acts of Public Authorities) .

<sup>582</sup> S2 Human Rights Act 1998 (Interpretation of Convention Rights).

<sup>583</sup> S3(1) Human Rights Act 1998 (Interpretation of Legislation).

<sup>584</sup> S4(2) Human Rights Act 1998 (Declaration of Incompatibility).

<sup>585</sup> S10 Human Rights Act 1998 (Remedial Action).

<sup>586</sup> Helen Fenwick, *Civil Liberties and Human Rights*, Cavendish, 2002, p 724.

### 3.10 The Rule of Law and the Right to an Independent Fair Hearing

The third and final limb of Dicey's conception was that the general principles of the constitution (For example, the right to personal liberty or the right of public meeting), are the result of judicial decisions determining the rights of private persons in particular cases brought before the courts.<sup>587</sup> In Dicey's view, civil liberties need not, as in many other countries, derive from a constitutional document. They are, in effect, fundamentally social traditions, which have been recognised by the judiciary and given protection by the common law. The rights and liberties of the individual are to be embodied in the 'ordinary law' of the land so that, where individual rights are violated, citizens can seek redress through the courts. This of course necessitates courts which, as Raz claims, are accessible so that no man is denied justice.<sup>588</sup>

This conception of the rule of law necessitates courts that are impartial and accessible to all. A major aspect of the liberal conception of the rule of law is an insistence upon the guarantee of an independent judiciary, whose political independence is intended to act as a safeguard against arbitrary rulings in individual cases. Thus, the rule of law includes concepts such as the presumption of innocence, no double jeopardy, and habeas corpus. An independent judiciary may act as a guard against despotism, and as the body that may enforce limitations on the power of government. Indeed, the right to petition for a writ of habeas corpus has long been celebrated as the most efficient safeguard of the liberty of the subject. For example, Dicey wrote that the Habeas Corpus Acts '*declare no principle and define no rights, but they are for practical purposes worth a hundred constitutional articles guaranteeing individual liberty.*'<sup>589</sup>

The right to a fair hearing is now enshrined in Article 6 of the European Convention on Human Rights. Article 6 reads provides that '*In the determination of his civil rights and obligations, or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly.*'<sup>590</sup> In the case of criminal proceedings, additional layers of protection are provided.

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<sup>587</sup> A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, Eighth Edition, Macmillan, 1927. Originally published 1885.

<sup>588</sup> Joseph Raz, *The Rule of Law and Its Virtue*, 1977, *The Law Quarterly Review*, Vol. 93, p195.

<sup>589</sup> A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, Eighth Edition, Macmillan, 1927. Originally published 1885.

<sup>590</sup> Human Rights Act 1998. Schedule 1, Article 6, Section 1.

These are that:

- (a) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law;<sup>591</sup>
- (b) he will be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;<sup>592</sup>
- (c) he will have adequate time and facilities for the preparation of his defence;<sup>593</sup>
- (d) he will be allowed to defend himself in person or through legal assistance of his own choosing, or if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;<sup>594</sup>
- (e) he will be able to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;<sup>595</sup>
- (f) he will have the free assistance of an interpreter if he cannot understand or speak the language used in court.<sup>596</sup>

These legal provisions enshrine into law the principle that there must be real and effective access to the court and that the court or tribunal must be impartial, independent, fair and established by law. Indeed, the conception that the judiciary is separate from, and independent of, the government is a core constitutional principle for liberals and, as such, is claimed: *'to be fundamental to the rule of law and to democracy itself.'*<sup>597</sup> For liberal thinkers, such rights are *'absolute and should not be limited'*<sup>598</sup> in all but the most exceptional of circumstances, such as where the *'lives or safety of identifiable individuals would be put at risk.'*<sup>599</sup> For groups such as Amnesty International: *'The principles of open and natural justice form a fundamental part of the UK's common law and have traditionally helped to ensure that UK civil proceedings meet or exceed international fair trial standards.'*<sup>600</sup>

However, in most countries, the right to a fair hearing can be suspended in times of national emergency, and in the aftermath of the terrorist attacks of 9/11 in the USA, is currently being tested in

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<sup>591</sup> Human Rights Act 1998. Schedule 1, Article 6, Section 2.

<sup>592</sup> Human Rights Act 1998. Schedule 1, Article 6, Section 3 (a).

<sup>593</sup> Human Rights Act 1998. Schedule 1, Article 6, Section 3 (b).

<sup>594</sup> Human Rights Act 1998. Schedule 1, Article 6, Section 3 (c).

<sup>595</sup> Human Rights Act 1998. Schedule 1, Article 6, Section 3 (d).

<sup>596</sup> Human Rights Act 1998. Schedule 1, Article 6, Section 3 (e).

<sup>597</sup> See, for example, Liberty, *Article 6, Right to a Fair Hearing*, [www.liberty-human-rights.org.uk](http://www.liberty-human-rights.org.uk). (Last accessed June 2012).

<sup>598</sup> See, for example, Liberty, *Article 6, Right to a Fair Hearing*, [www.liberty-human-rights.org.uk](http://www.liberty-human-rights.org.uk) (Last accessed June 2012).

<sup>599</sup> Amnesty International, *Submission to the Joint Committee on Human Rights*, The Justice and Security Green Paper, 2012. [www.amnesty.org.uk](http://www.amnesty.org.uk) . (last accessed June 2012).

<sup>600</sup> Amnesty International, *Submission to the Joint Committee on Human Rights*, The Justice and Security Green Paper, 2012. [www.amnesty.org.uk](http://www.amnesty.org.uk) . (last accessed June 2012).

the UK. For example, The Anti-Terrorism, Crime and security Act 2001, made it possible for the Secretary of State to certify certain suspected foreign terrorists, and to detain them indefinitely without a trial. Whilst this provision would deprive the detained person of the protection of a criminal trial, the Government claimed that since *'there was an emergency threatening the life of the nation,'* the measures were justified.<sup>601</sup> The problem for the Government was that although the Immigration Act 1971 allows for the deportation of those who are a threat to national security in cases where there is insufficient admissible evidence for a criminal trial, a ruling by the European Court of Human Rights in the case of *Chahal v UK* in 1996,<sup>602</sup> ruled that deportation was not allowed if there were substantial grounds for believing that the person would be subjected to torture. The Act also contained an ouster clause<sup>603</sup> aimed at excluding recourse to judicial review and habeas corpus.<sup>604</sup> This made it difficult for those who were certified under the powers to challenge the Secretary of State's decision in the ordinary courts. Instead there was a right of appeal to the Special Immigration Appeals Commission (SIAC). The process of appealing to this Commission involved the exclusion of detainees, and their legal representatives, from seeing evidence which might compromise intelligence methods and operations, or was otherwise sensitive in that it may detriment national security. In an attempt to ensure that Article 6 rights were safeguarded at these times, special security advocates were appointed in place of the detainee's legal representatives.

For civil libertarians, the provisions of the Act did not meet the requirements of due process under Article 6 of the Human Rights Act 1998, which guarantees the right to a fair trial. John Wadham, for example, argued that the system of detention without trial may have effectively established an informal criminal justice system, without the safeguards of the formal system. People could be deemed a threat to national security, and imprisoned, on the basis of evidence inadmissible in a trial, and on a significantly lower standard of proof. For Wadham: *'Arrests under these powers stamped all over basic principles of British justice.'*<sup>605</sup> Indeed it was claimed that the Act contained some of *'the most draconian legislation Parliament has passed in peacetime in over a century.'*<sup>606</sup>

In the event, 11 detainees appealed to the SIAC seeking to quash a Derogation Order on which these measures relied. In response, the SIAC ruled, on 30<sup>th</sup> July 2002, that the Act unjustifiably

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<sup>601</sup> These provisions, which are contained in Part 4 of the Act, required the government to derogate from the bounds of Article 5 of the European Convention on Human Rights, which is concerned with the right to liberty.

<sup>602</sup> *Chahal v UK*, 23 EHRR 413 (1996).

<sup>603</sup> See the Anti-Terrorism, Crime and security Act, s30(2)

<sup>604</sup> The courts treatment of such legislative attempts in the past is that, whilst adopting considerable deference to Parliamentary intention in terms of which is the most appropriate jurisdictional route for the challenge of administrative decisions, the courts have not accepted ouster provisions that attempt to prohibit all judicial scrutiny.

<sup>605</sup> John Wadham, [www.liberty-human-rights.org.uk](http://www.liberty-human-rights.org.uk), 19<sup>th</sup> December 2001. See also, John Wadham, *Indefinite Detention Without Trial*, *New Law Journal*, 26<sup>th</sup> October 2001

<sup>606</sup> Tomkins, *Legislating Against Terror: The Anti-Terrorism, Crime and Security Act 2001*, 2002, Public Law, pp 205-220.

discriminated against foreign nationals, as British people could not be held in the same way.<sup>607</sup> The Court of Appeal later overturned the decision, but the House of Lords ruled, by an eight to one majority, in favour of appeals by nine detainees. In his ruling, Lord Nicholls said: ‘*Indefinite imprisonment, without charge or trial, is anathema in any country which observes the rule of law.*’<sup>608</sup>

The Government responded to the Court’s declaration of incompatibility, under Section 4 of the Human Rights Act 1998, by introducing the concept of ‘Control Orders’,<sup>609</sup> under the Prevention of Terrorism Act 2005. With respect to the right to a fair hearing, what is noteworthy is that a number of Control Orders have been made on the basis of closed material. This effectively means that the person subjected to the Control Order has never been given the chance to see the case against them. Whilst there are a number of limited but well-recognised exceptions to the open justice principle,<sup>610</sup> these closed material procedures, and the use of the common law principle of Public Interest Immunity, have been the subject of a considerable amount of controversy in recent years. It is, therefore, necessary to examine their introduction and development in more detail.

### ***3.10.1 Public Interest Immunity and Closed Material Procedures.***

The traditional common law tool to withhold information from the parties to a court case is Public Interest Immunity (PII). PII is a principle of English common law under which the courts can grant a court order allowing one litigant to refrain from disclosing evidence to the other litigants where disclosure would be damaging to the public interest. The areas of public interest that may be protected by PII include: national security, international relations and the prevention and detection of crime. The categories of PII are not fixed,<sup>611</sup> but the courts will not recognise new categories without clear and compelling evidence.<sup>612</sup> An order that PII applies would usually be sought by the British Government to protect official secrets. However, the heads of the intelligence agencies are under a statutory duty to ensure that there are arrangements in place to ensure that no information is disclosed

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<sup>607</sup> *A and Others v Secretary of State for the Home Department* (2004) ECWA Civ. 1123. *A v Secretary of State for the Home Department* (2004) UKHL 56.

<sup>608</sup> *A and Others v Secretary of State for the Home Department* (2004) ECWA Civ. 1123. *A v Secretary of State for the Home Department* (2004) UKHL 56.

<sup>609</sup> Control Orders can be used to place restrictions on the suspect’s freedom to communicate, associate and travel.

<sup>610</sup> For example, see the provisions set out in the Civil Procedure Rules. A hearing, or any part of a hearing, may be in private in certain circumstances, for example, where the court considers it necessary in the interests of justice or national security. CPR Rule 39. Statutes also provide for the use of a Closed Material Procedure. These procedures are available to the Proscribed Organisations Appeal Commission; proceedings in the Employment Tribunal concerning national security (subject to recent case law); Control Order cases under the Prevention of Terrorism Act 2005; financial restrictions proceedings under the Counter-Terrorism Act 2008; and the Sentence Review Commission and Parole Commission in Northern Ireland.

<sup>611</sup> *D v NSPCC* (1978) AC 171. Lord Hailsham stated that ‘*the categories of public interest are not closed and must alter from time to time, whether by restriction or extension, as social conditions and social legislation develop.*’

<sup>612</sup> *R v Chief Constable, West Midlands Ex parte Wiley* (1995) 1 AC 274.

by the agencies except so far as it is provided for in statute.<sup>613</sup> Whilst it is for the government or the security agencies to raise a claim for PII, in *Conway v Rimmer*,<sup>614</sup> the House of Lords held that the courts retained the final decision of whether a PII disclosure should be upheld. Ultimately then, whilst under Article 6 of the European Convention on Human Rights, relevant evidence should generally be disclosed to the parties, even in civil proceedings,<sup>615</sup> this right is not absolute and limits on disclosure may be justified, for example, in the interests of justice or of national security in order to protect the public from harm.<sup>616</sup>

The use of PII has been problematic in that, a claim in which evidence is excluded may be prevented from proceeding. For example, in *Carnduff v Rock*,<sup>617</sup> a majority of the Court of Appeal found that the case could not be litigated consistently with the public interest. The determination of the claim would have required the disclosure of sensitive information such as the operational methods used by the police and how they made use of informer information. In order to investigate and adjudicate upon the claim, the Court would have required this information, thus, the case was struck out. In order to resolve this problem, Parliament has made statutory provision for a mechanism through which sensitive material can be handled by the courts. This mechanism is known as the Closed Material Procedure (CMP), and was first established to facilitate the hearing of national security sensitive deportation cases through the SIAC.

The CMP was introduced under the Special Immigration Appeals Act 1997. The CMP was first used in the context of immigration and deportation decisions, following the case of *Chahal v United Kingdom*,<sup>618</sup> in which the European Court of Human Rights acknowledged that reliance on confidential information might be unavoidable where national security was at stake. In this case, the court cited with approval a system used in Canada, which suggested that there could be a procedure, which would both accommodate legitimate security concerns about the nature and sources of intelligence information, and yet still accord the individual a substantial measure of procedural justice. A CMP will allow the court to examine material which may otherwise be struck out by a successful PII application. The system involves the use of Special Advocates,<sup>619</sup> who may ensure that closed material is subject to independent scrutiny and adversarial challenge. A CMP will have both ‘open’

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<sup>613</sup> The Security Service Act 1989, Section 2(2). Intelligence Services Act 1994, Section 4(2).

<sup>614</sup> *Conway v Rimmer* (1968) AC 910.

<sup>615</sup> See for example: *Martinie v France*. App. No 58675/00, Judgment of 12<sup>th</sup> April 2006, at 45-50. *Hudakova v Slovakia*. App. No 23083/05, Judgment of 27 April 2010, at 25-32.

<sup>616</sup> See for example: *Jasper v UK* (2000) 30 EHRR 441; *A and Others v UK* (2009) 49 EHRR 29; *Kennedy v UK* (2011) 52 EHRR 4

<sup>617</sup> *Carnduff v Rock and Another* (2001) EWCA Civ. 680. See also *Carnduff v UK* (app. No. 18905/02 10<sup>th</sup> February 2004, in which the claimant complained to the European Court of Human Rights, alleging a breach of Art 6. His complaint was rejected as unfounded.

<sup>618</sup> *Chahal v UK* (1996) 23 EHRR 413.

<sup>619</sup> A Special Advocate is a security cleared barrister/advocate in independent practice. Special Advocates are appointed by the Attorney General. They receive specialised training for their role.

and ‘closed’ elements. All the material on which the government is relying - whether open or closed – is laid before the Court and the Special Advocate. The litigant and his legal representatives can be present at the open hearings, and see all the open material used in those hearings. However, the litigant cannot be present at the closed part of the proceedings, or see the closed material. The Special Advocate attends all parts of the proceedings and sees all the material, including the closed material not disclosed to the litigant. He can take instructions from the litigant before he reads the closed material, and written instructions after he has seen the closed material. The Special Advocate may communicate with the litigant after he has seen the material, provided that he has the permission of the court.

Whilst, in certain cases, a CMP will allow the court to proceed in a case that would have been halted due to the use of a successful PII application, the Government has noted that the CMP is not always available.<sup>620</sup> For example, in the case of *Al Rawi v Security Service*,<sup>621</sup> the Supreme Court was asked to consider whether the courts had the power to order a CMP for the whole or part of a civil claim for damages brought by former detainees of Guantanamo Bay. The litigants alleged that the UK government was complicit in their detention and ill treatment by foreign authorities. In their defence, the defendants wished to rely on material, the disclosure of which would cause harm to the public interest, and asked the Court to determine the preliminary issue of whether a court could adopt a CMP in such a claim. A successful claim of PII would have led to its exclusion but this would have made the progression of the case more difficult. The defendants argued that they should be able to defend themselves by relying on important evidence in a CMP. The majority of the Supreme Court held that, in the absence of statutory authority, it was not open to the Court to adopt a CMP in such a claim. A number of the judgments took the view that provision of a CMP is a matter for Parliament and not the courts. The result of this case is that the Government has introduced proposals to extend the use of the CMP.

One major Government justification for the use of the CMP is that the disclosure of sensitive information would breach the ‘Control Principle’. This principle concerns the use of secret intelligence which has been shared with the UK by foreign governments on a strictly confidential basis. The Government maintains that *‘in all intelligence exchanges, it is essential that the originator of the material remains in control of its handling and dissemination.’*<sup>622</sup> This, the Government claims, is because *‘only the originator can fully understand the sensitivities around the sourcing of the material and the potential for the sources, techniques and capabilities to be compromised by*

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<sup>620</sup> See for example: HMSO, *Justice and Security Green Paper*, October 2011, Cm 8194.

<sup>621</sup> *Al Rawi v Security Service* (2011) UKSC 34. See also: *Tariq v Home Office* [2011] UKSC 35. The key outcome in these cases was that the Supreme Court did not have the power to introduce closed material procedures in ordinary civil litigation without statutory authority.

<sup>622</sup> HMSO, *Justice and Security Green Paper*, October 2011, Cm 8194, p9.

*injudicious handling*.<sup>623</sup> Since the use of shared intelligence represents a significant proportion of all the information that the UK gathers on terrorists, organised criminals and others seeking to harm the national security, this information may be necessary to help in constructing a full and detailed picture of potential threats. Thus, the Government claims that any non-consensual disclosure of confidential information could potentially lead to a reduction in the quality or quantity of intelligence that overseas partners are willing to share with the UK. This, the Government claims, could materially impede the intelligence community's ability to do what is asked of it in protecting the security interests of the UK.<sup>624</sup>

However, when it comes to CMP's, civil libertarian groups have tended to claim that the primary response of the UK Government should be to ensure that the actions of UK authorities always comply with the highest human rights standards. This, it seems, includes '*ensuring effective, impartial, thorough and independent investigations into all credible allegations of UK involvement in serious human rights violations*'.<sup>625</sup> These investigations, it is argued, should '*provide the victims with key findings and access to the facts about their claims, along with other forms of redress and guarantees of non-repetition*'.<sup>626</sup> In the perception of these groups, the use of secret evidence in the UK courts may undermine justice because '*it is unreliable, unfair, is damaging to the integrity of the courts and, in any event, it weakens, rather than strengthens security*'.<sup>627</sup> It is claimed to be unreliable because it may be unchallenged in that the material produced by the intelligence agencies is not necessarily the product of a criminal investigation, which would normally be conducted employing appropriate safeguards regarding the production of evidence of criminality. These groups note that intelligence material comes from a variety of sources including second and third hand hearsay; information from unidentified informants; information received from intelligence sharing partners; data mining; and intercepted communications. The use of this information could potentially mean that some of the evidence is based on the hypothesis and conjecture of the intelligence agencies and this would not ordinarily be admissible in court. Secret evidence is claimed to be '*damaging to the integrity of the courts*' because such integrity may depend on the public perception that our judges have adopted a fair and independent process to reach their conclusions. Thus, whilst it may be possible to have a fair hearing behind closed doors, it is argued that all the parties should have an equal opportunity to make their case.<sup>628</sup> It is claimed that the use of closed material may weaken security because any public

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<sup>623</sup> HMSO, *Justice and Security Green Paper*, October 2011, Cm 8194, p9.

<sup>624</sup> HMSO, *Justice and Security Green Paper*, October 2011, Cm 8194, p9.

<sup>625</sup> Amnesty International, *Submission to the Joint Committee on Human Rights: The Justice and Security Green Paper*, 2012, [www.amnesty.org.uk](http://www.amnesty.org.uk), (last accessed June 2012).

<sup>626</sup> Amnesty International, *Submission to the Joint Committee on Human Rights: The Justice and Security Green Paper*, 2012, [www.amnesty.org.uk](http://www.amnesty.org.uk), (last accessed June 2012).

<sup>627</sup> See, for example, Justice, *Consultation Response to the Justice and Security Green Paper*, January 2012. See also: Justice, *The Justice and Security Bill (Part Two): Closed Material Procedures*, House of Commons Report Stage Briefing, March 2013.

<sup>628</sup> See – Justice, *Consultation Response to the Justice ad Security Green Paper*, January 2012. See also: Justice, *The Justice and Security Bill (Part Two): Closed Material Procedures*, House of Commons Report Stage Briefing, March 2013.

perception that people are being unfairly treated by the courts may breed resentment and this could undermine the sources of intelligence. Finally, it is argued that inaccurate conclusions in cases which allege serious wrongdoing may allow unlawful, and perhaps dangerous behaviour, to go unchecked. In the case of investigations involving allegations of terrorism, this could mean that offenders go unpunished. In the case of civil claims involving allegations against government agencies, it may allow the cover-up of serious wrong-doing and misconduct by officials and agents.<sup>629</sup>

Overall then, for civil libertarians, the rule of law embodies the notion that there should be ‘due process of law’: It imposes significant constraints upon how the law is made and how it adjudicates. For example, it suggests that all laws should be ‘general’ in that they apply to all citizens and do not select particular individuals or groups for special treatment, good or bad. The principle of the rule of law effectively means that laws should be precisely framed and accessible to the public. Thus, the law is not to be seen as a constraint upon the individual, but as an essential guarantee of his liberty. The supreme virtue of the rule of law, for liberals such as Dicey, therefore, is said to be that it serves to protect the citizen from the state in that it ‘ensures a government of laws and not of men.’<sup>630</sup>

### **3.11 Conclusion**

We have seen in this chapter that liberalism refers to a broad array of related ideas and theories of government that tend to consider individual liberty and equality of opportunity to be amongst the most important political goals. Different forms of liberalism may promote very different policies, but liberals are generally united by their support for a number of principles. These principles include: freedom of conscience and speech; limitations on the power of government; adherence to the rule of law; the free exchange of ideas and a transparent system of government. In the liberal perception, it is the individual citizen that truly represents the basis of law and society and therefore public institutions should exist to further the ends of individuals, without showing favour to those in higher social ranks. Thus, from a political standpoint, liberalism tends to stress the social contract ideal under which citizens make the laws and agree to abide by those laws. This ideal tends to be underpinned by a belief in minimal interference by the state. Liberals typically argue that the only purpose for which power can be rightly exercised over a member of a civilised community, against his will, is to prevent harm to others. In the ideology of liberalism, individuals know what is best for them. Unnecessary governmental limitations on civil rights, even when introduced to protect the moral health of the citizen, do not necessarily justify government interference into the lives and properties of individuals.

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<sup>629</sup> See – Justice, *Consultation Response to the Justice ad Security Green Paper*, January 2012. See also: Justice, *The Justice and Security Bill (Part Two): Closed Material Procedures*, House of Commons Report Stage Briefing, March 2013.

<sup>630</sup> See Discussion, Andrew Heywood, *Political Ideas and Concepts*, Macmillan, 1994, p108.

The impact of liberalism on the modern world has been profound. The ideal of individual liberties; the transparency of government; limitations on government power; popular sovereignty; national self-determination; the rule of law; and fundamental equality, are some of the benefits that are often accepted as essential policy goals by many Western governments and citizens. Indeed, the concept of the liberal democracy, in its typical form of multi-party political pluralism, has spread to much of the world to become the standard constitutional and democratic composition of many nations, even if there is a wide gap between statements and reality.

However, whilst the liberal justification for civil rights tends to be centred on the conviction that matters of moral choice should be left to the individual, this view has been criticised because it may rest on an overly optimistic view of human nature. Liberals may presuppose that most people are, at least potentially if not actually, influenced more by reason and argument than by prejudice and convention. It is argued that the danger of a position in which diversity is not adequately restricted, is that it could potentially create a society devoid of moral structure and incapable of restraining greed or egoism. Individuals may end up knowing only their rights and may not acknowledge any duties or responsibilities. Indeed, a wide range of political thinkers - socialists, conservatives, nationalists and fascists have, at different times, styled themselves as anti-individualists. In many cases, anti-individualism is based upon a commitment to the importance of the community and the belief that self-help and individual responsibility could be a threat to social solidarity. Conservative critics, for example, argue that individuals seek the security and stability which only a community identity can provide. For these theorists, if individualism promotes a philosophy of 'each to his own', it could simply lead to 'atomism' and produce a society of vulnerable and isolated individuals. Consequently, some conservative thinkers are reluctant to leave moral questions to the individual. They tend to prefer a system in which society protects itself by upholding a set of shared beliefs and values, and where both public order and moral principles are defended, by force of law if necessary.

## CHAPTER FOUR: NATIONALIST AND CONSERVATIVE APPROACHES TO DEFINING THE CONCEPT OF NATIONAL SECURITY

### 4.1 Introduction

This chapter seeks to develop a critique of the core assumptions that underpin academic and political debate in the area of protecting national security.

The chapter will argue that the view of security which is often taken by politicians and the security agencies, may reject, or at least impose limits, upon the liberal assertion of individual liberty as an absolute and universal right. Rather, from an ideological standpoint, security agenda setting in the UK tends to be dominated by a conception of 'nationalism' and 'one nation conservatism' that prioritises the preservation of the existing social and political order over and above the individual desires of citizens. The effect of this is that there may be a more conservative emphasis on the interests of collective security and defence from perceived common threats. In this conception of security, the individual tends to be seen as part of an organic whole, which cannot be understood except through the whole organism. Political rights and civil liberties, such as the right to privacy, may not be viewed in the same way as those of liberal individualism. For example, although the right to privacy may be seen as fundamental, it is not an absolute right, which is located in the individual, rather, it is a right that may be acknowledged and conceded by the wider political community.<sup>631</sup> Freedom, therefore, may not be regarded as an abstract liberal freedom – the right to engage in unconstrained or uncoerced action.<sup>632</sup> Freedom tends to be regarded as a legal right which operates within the parameters of a specific cultural tradition and is premised on an established institutional life which may, or may not, value the rule of law. Freedom in this context is seen as being relative to the ends of the community as a whole. Incessant liberation from the way of life and values of a specific cultural tradition may be seen as undermining the fabric of the social order.<sup>633</sup>

However, it is worth noting that whilst both nationalist and conservative thinking may dominate the national security agenda, neither of these ideologies offer a clear, systematic body of doctrine that can be transplanted and reapplied wholesale from one context to another. For example, by its very nature, the claims of nationalist ideology vary according to the location in which it is found. Nationalism, which has been thought about and practised in many different places, is not so clearly based around core themes and propositions as some other political theories. It is a political doctrine which is sufficiently broad to be incorporated into diametrically opposed ideologies and has attracted the

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<sup>631</sup> See discussion: Andrew Vincent, *Modern Political Ideologies*, Second Edition, Blackwell, 2003, p77.

<sup>632</sup> See discussion: Scruton, *The Meaning of Conservatism*, Harmondsworth/Penguin, 1980, pp 72-73.

<sup>633</sup> See discussion, Alan Finlayson, *Nationalism*, Political Ideologies, Routledge, 2003, p110.

attention of many of the leading political thinkers, including liberals, conservatives, socialists, communists and fascists. Similarly, there is no universal definition of the concept of security. Indeed Roland Paris views security '*as in the eye of the beholder*'.<sup>634</sup> National security, whether at an international or domestic level, may not primarily depend upon particular beliefs about man and society. What define it are less its intellectual qualities than its instincts, habits and feelings. Nevertheless, strong recurrent themes can be detected in security thinking at governmental level in the UK. These themes include an underlying consistency in the aim to protect the nation state from hostile aggressors and to protect the existing social and political structures.

This chapter seeks to develop a conceptual framework to facilitate an understanding and explanation of the national security discourse as it is experienced in the UK. The chapter will begin by briefly exploring the theoretical underpinnings of nationalism. However, the main thrust of this chapter is to explore how the concept of nationalism plays out in the national security arena. This is achieved by first examining the nature of the security threats facing the UK. It will then be possible to analyse the justifications for prioritising risks to the state and its political order over and above the desire to promote individualism and civil liberties.

## **4.2 Nationalism: The Supremacy of the Nation State**

If nationalism is to be reduced to a straightforward doctrine, Elie Kedourie's definition may provide a useful starting point for examination. According to Kedourie, the doctrine '*holds that humanity is naturally divided into nations, that nations are known by certain characteristics which can be ascertained, and that the only legitimate type of government is national self-government*'.<sup>635</sup> Kedourie's definition embodies two distinctive but often related concepts; the 'nation' and the 'state'. The doctrine of nationalism can be better understood if these concepts are clearly defined and distinguished.

### **4.2.1 The Nation**

A nation is a cultural entity, a collection of people bound together by shared values and traditions, for example, a common language, religion and history and usually occupying the same geographical area. J.S Mill offers an analytical definition of a nation based partly on natural sympathies: '*A portion of mankind may be said to constitute a nationality if they are united among themselves by common*

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<sup>634</sup> Roland Paris, *Still and Inscrutable Concept*, Security Dialogue, Vol. 35, 2004, pp 370-372.

<sup>635</sup> Elie Kedourie, *Nationalism*, London: Hutchinson, 1960, p12.

*sympathies, which do not exist between themselves and any others – which make them co-operate with each other more willingly than with other people.*<sup>636</sup> The effective driving force of Mill's conception is the sense of belonging to, and serving, a perceived national community. It embodies the notion that the carriers of this ideology attribute to their nation a distinctive cultural identity which may set it apart from other nations and gives it a special place in the historical process. This community may be identified by a unique set of characteristics allegedly deriving from constitutional, historical, geographical, religious, linguistic, ethnic or genetic similarities.

From a security perspective, where a group of people regard themselves as a natural cultural community which is distinguished by shared loyalty, perhaps in the form of patriotism, there can be distinctive security benefits. Public spirit has a valid purpose – it gives the citizens of a nation a common purpose and rallies them to support the government in times of crisis.<sup>637</sup> For example, in specific situations, especially where nations come close to war in either literal or metaphorical forms, national identities are often able to organise other competing identities around themselves in order to defend the nation from a perceived common enemy. This was certainly the case during World War II. The German invasion of Poland in 1939 and the subsequent declarations of war on Germany by the British Empire,<sup>638</sup> the Commonwealth and France, led to a widespread willingness to fight, and even to die, in the service of the nation.

However, patriotism is not without its dangers. For example, some groups may reject patriotic loyalty and pride in the nation state and see less reason than other citizens to be proud of it.<sup>639</sup> Rather, they may feel more closely affiliated to alternative political ideologies, such as pacifism or to minority religious traditions, such as Buddhism or Islam. In certain circumstances, these groups may feel less inclined to demonstrate the unquestioned loyalty to the state that is often demanded of citizens in the face of perceived external and internal threats to the nation's security. Problems may occur because any lack of support for perceived national values may lead members of the patriotic majority to make accusations that the dissenting group is a threat to social cohesion, national identity and even to national security. For example, when it comes to immigration and integration some nationalists have, in the past, expressed strong, and even xenophobic, reactions to ethnic minority communities.<sup>640</sup> These nationalists may claim that since stable and successful societies are based upon shared values

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<sup>636</sup> J.S. Mill, *Considerations on Representative Government*, Oxford University Press, 1912, p380.

<sup>637</sup> See: for example, Ole Waever, Barry Buzan, Morten Kelstrup, Pierre Lemaitre, *Identity, Migration and the New Security Agenda in Europe*, Centre for Peace and Conflict Research, Copenhagen, Printer Publishers, 1993, Chapter One.

<sup>638</sup> Most countries.

<sup>639</sup> For a general discussion of the interplay between politics, culture and nationalism see: See: Richard Handler, *Nationalism and the Politics of Culture in Quebec: New Directions in Anthropological Writing*, The University of Wisconsin Press, 1998, particularly pp 6-8. See Also Barry Buzan, *People States and Fear: An Agenda for International Security Studies in the Post Cold-War Era*, Second Edition, Boulder/ Lynne Rienner, 1991

<sup>640</sup> An extremist view may be taken by, for example, the British National Party (BNP). The BNP is a far-right political party formed as a splinter group from the National Front by John Tyndall in 1982.

and a common culture, multiculturalism leads to instability and conflict. Thus, some nationalists may argue that immigrants should assimilate the traditions and values of the host nation if they are to obtain the acceptance, citizenship rights and membership of the national community. In such cases, a tyranny of the majority could be practiced in which the patriotic nationalism of a dominant majority may lead to a denial of the fundamental rights of the minority. For example, ethnic minority groups may be excluded from citizenship, or if they are formally citizens, they may be treated by the indigenous majority as 'second class' citizens and not full members of the national and political community.<sup>641</sup>

However, in the UK, campaigns favouring multiculturalism, in which diversity is valued, may have created a tolerant societal environment in which cultural and religious assertiveness is only rarely received as a direct attack on the British identity and way of life. Furthermore, foreign workers form a very small proportion of post-war immigrants to Britain. The majority of people belonging to the ethnic-minority communities are native-born British citizens who have adopted many of the cultural values of the country.

#### **4.2.2 The State**

The second limb of nationalism is concerned with the self determination of the state. A state, in contrast to a nation, may be described as a political association, which enjoys sovereignty, supreme or unrestricted power within defined territorial borders. This tends to occur when nationhood is accompanied by the desire for self-government in which, '*sovereignty is exercised by its elected or self-appointed representatives within territorial boundaries recognised by the international political community.*'<sup>642</sup> John Stuart Mill suggested that: '*Nationalism is, therefore, both a political principle and a form of political organisation. The principle is the right of national self-determination, which is realised in the ideal form of political organisation, the nation state. Each sovereign state should encompass a single nation.*'<sup>643</sup> In other words, political nationalism embodies the belief that the nation is the only right and proper unit of government and that the boundaries of government should coincide, in the main, with those of nationality. Consequently, nationalism may represent the idea of popular self government; the idea that government is either carried out by the people or for the people in accordance with the 'national interest'. It may be said, therefore, that much of nationalist thinking

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<sup>641</sup> Barry Buzan, *People States and Fear: An Agenda for International Security Studies in the Post Cold-War Era*, Second Edition, Boulder/Lynne Rienner, 1991, p44.

<sup>642</sup> Roger Eatwell and Anthony Wright, *Contemporary Political Ideologies*, Second Edition, Containing essay by Roger Griffin, *Nationalism*, Continuum, 1999, p154 .

<sup>643</sup> J.S. Mill, *Considerations on Representative Government*, Oxford University Press, 1912, p380.

is closely linked with democratic sentiments, and with the idea that *'the people should have some say in their own government.'*<sup>644</sup>

From a security perspective, where there are effective democratic and political mechanisms for linking citizens with their governments, the state may become a container for security, ensuring the safety of the people within its borders. Security for individuals is guaranteed by their citizenship – as long as the state itself is secure its citizens are secure.<sup>645</sup> Therefore, the state as a cultural, social and political institution, can be worthy of protection from potential security threats because of its purported necessity for the individual and collective well-being of its population or nationals.<sup>646</sup>

However, Buzan claims that the assumption that citizenship confers security is problematic. He argues that *'the individual citizen faces many threats which emanate directly or indirectly from the state; the state can be a threat to its citizens as well as their protector.'*<sup>647</sup> Firstly, not all residents in a state are citizens, and those who are not may be much less secure than the citizens – they can, for instance, be expelled. Secondly, the need to protect social or national security may be advanced by the government as a reason to justify the suppression of certain civil rights, or to withhold sensitive information, with significant implications for the protection of political and democratic rights.<sup>648</sup> For example, the Terrorism Act 2000<sup>649</sup> can affect property rights by making it a criminal offence to support, financially or otherwise, a proscribed organisation.<sup>650</sup> Similarly, the Prevention of Terrorism Act 2005 provided for the creation of 'Control Orders' which could be used to impose a range of obligations on targeted citizens, including requiring them to reside in particular places and to provide advance notice of proposed movements and activities. The point is that some types of nationalism may potentially abandon normal liberal democratic principles. Rather, instead of promoting individual freedom and choice, some nationalists may promote tight national cohesion and security to the rank of an absolute value on which there can be no compromise.<sup>651</sup> In other words, the politics of nationalism can potentially involve the idea that civil liberties and political rights should be sacrificed for the national good because the nation is the supreme political unit to which all else must be subordinate.<sup>652</sup>

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<sup>644</sup> Alan Finlayson, *Nationalism*, Political Ideologies, Routledge, 2003, p112.

<sup>645</sup> Thomas Hobbes, *Leviathan*, Harmondsworth/Penguin, 1968.

<sup>646</sup> See: for example, Ole Waever, Barry Buzan, Morten Kelstrup, Pierre Lemaitre, *Identity, Migration and the New Security Agenda in Europe*, Centre for Peace and Conflict Research, Copenhagen, Printer Publishers, 1993.

<sup>647</sup> Barry Buzan, *People States and Fear: An Agenda for International Security Studies in the Post Cold-War Era*, Second Edition, Boulder/ Lynne Rienner, 1991, p44.

<sup>648</sup> See the discussion on the state as a threat to the citizen in Lustgarten and Leigh, *In From the Cold: National Security and Parliamentary Democracy*, Oxford University Press, 1994, pp 20-23.

<sup>649</sup> The Terrorism Act 2000 governs proscribed organisations listed under Schedule 2. See also. Part II of the Terrorism Act 2006, which amends the 2000 Act to cover organisations which promote or encourage terrorism.

<sup>650</sup> The Terrorism Act 2000, s16, for example, makes involvement in funding arrangements, with knowledge or reasonable cause to suspect that it will be used for terrorist purposes, an offence.

<sup>651</sup> For a discussion see: John Schwarzmantel, *The State in Contemporary Society*, Harvester/Wheatsheaf, 1994, p33.

<sup>652</sup> See, for example, Thomas Hobbes, *Leviathan*, Harmondsworth/Penguin, 1968.

### 4.2.3 *The Nation and the State Brought Together*

Traditionally, the ultimate goal of the doctrine of nationalism is that the nation and the state should, as far as possible, coincide; each nation should possess a political voice and exercise the right of self-determination.<sup>653</sup> It embodies the concept of nation building and the foundation of nation-states. Nationalists perceive the nation-state to be the highest and most desirable form of political organisation.<sup>654</sup> They regard the nation as a genuine or organic community, rejecting any notion that it may be an artificial creation of the political leaders or ruling classes.<sup>655</sup> Humanity, in the conception of a nationalist, is thought to be naturally divided into a collection of nations, each possessing a separate identity.<sup>656</sup> This implies that ties of nationality are stronger and politically more significant than any rival social cleavage, such as social class, race or religion, which may cut across national borders.<sup>657</sup> The nation-state, therefore, is often considered to be the only stable and cohesive form of political organisation because citizens are bound together by a sense of both political and cultural unity.<sup>658</sup>

It has been argued that nationalism ‘*offers answers to the big questions of social and political life. It makes claim to the basis of human sociality and relationships. It gives reasons why we should (or shouldn’t) feel obliged to others. It advances a case for what makes the best form of legitimate government and suggests something about citizens’ relationship to the state.*’<sup>659</sup> Indeed, the appeal to nationalism may be useful in maintaining national unity by fostering loyalty and pride in one’s country. These sentiments may be attractive in that they seemingly uphold established customs and practices which individuals can recognise and which they may find familiar and reassuring.<sup>660</sup> A sense of identity and ‘rootedness’ may be promoted as individuals are able to acknowledge, and even venerate, the traditional, social and political values of their own nation and state. The nation may be portrayed as emerging naturally as an organic community to which we all owe allegiance and which collectively desires that human beings should live with others who possess the same views and habits as themselves.<sup>661</sup>

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<sup>653</sup> Andrew Heywood, *Political Ideologies*, Macmillan, 1992, Alan Finlayson, *Nationalism*, Political Ideologies, Routledge, 2003.

<sup>654</sup> Andrew Heywood, *Political Ideologies*, Macmillan, 1992, 149.

<sup>655</sup> See, for example: Edmund Burke, *Reflections on the Revolution in France, 1790*.

<sup>656</sup> J.S. Mill, *Considerations on Representative Government*, Oxford University Press, 1912.

<sup>657</sup> Alan Finlayson, *Nationalism*, Political Ideologies, Routledge, 2003.

<sup>658</sup> Andrew Heywood, *Political Ideologies*, Macmillan, 1992.

<sup>659</sup> Alan Finlayson, *Nationalism*, Political Ideologies, Routledge, 2003, p112

<sup>660</sup> See, for example, Allison, *Right Principles: A Conservative Philosophy of Politics*, Oxford/Blackwell, 1984.

<sup>661</sup> For a discussion of a conception of nationalism which encompasses, for example, shared values, see Ernest Renan, *Qu’est-ve qu’une nation?* Conference Faite En Sorbonne, 11<sup>th</sup> March 1882. English Translation: Ernest Renan, *What is a Nation?* Oxford University Press, 1996, pp 52-54.

### 4.3 The Effect of Nationalism on National Security

The impact of nationalism on the security agenda is that the nation-state is often claimed to be the primary object of security. Where security thinking is focused on preserving the nation-state, this may have a significant impact on the way in which security is defined and dealt with. For example, with regard to potential threats emanating from the activities of other states or external aggressors, military threats may be privileged as the principal source of insecurity, and military preparation tends to become the primary means of achieving security.<sup>662</sup> In addition, security decision-makers may also attach importance to the preservation of the nation's economic interests worldwide.<sup>663</sup> Indeed, since the early 1990's, a number of scholars have argued that the world is entering an age in which the economic aspects of security will increasingly dominate the traditional political and military aspects of security.<sup>664</sup>

The following paragraphs will explore how nationalism may affect the security discourse in the UK. Firstly it will examine the nature of the current threat environment in which the UK intelligence agencies, and other security decision-makers, claim they must operate. To this end, the discussion will examine how security thinkers may tend to view military, economic and political security. Secondly, the discussion will analyse the legitimising factors for a nationalist view of security. On this point, the chapter argues that the security discourse in the UK may be heavily influenced by an inherent lean towards preserving the existing social and political structure and hierarchy of society. This, it is argued, may effectively mean that, whilst the rights of individual citizens are considered to be important, some nationalists may claim that such rights can and should be waived where foreign, or even domestic aggressors, are seen as threatening the nation or as undermining the fabric of society.

### 4.4 Military Security

Military security concerns the two-level interplay of the armed offensive and defensive capabilities of states and their perceptions of each other's intentions.

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<sup>662</sup> See, for example, Terriff, Croft, James and Morgan, *Security Studies Today*. Polity, 1999.

<sup>663</sup> For examples of these arguments, see: HM Government, *A Strong Britain in an Age of Uncertainty: The National Security Strategy*, 2010, Cm 7953.

<sup>664</sup> See, for example, Edward Luttwak, *From Geopolitics to Geo-Economics*, *The National Interest*, No. 20, Summer 1990, pp 17-23; Robert D. Hormats, *The Roots of American Power*, *Foreign Affairs*, 70(3), Summer 1992, pp 74-90. Lustgarten and Leigh, *In From the Cold: National Security and Parliamentary Democracy*, Oxford University Press, 1994.

For nationalists, the theoretical starting point of this understanding of security is that nation-states exist and interact in an international system that can be described as anarchic.<sup>665</sup> Anarchy, in this sense, means that each state is autonomous and exercises sovereign authority over its own affairs. However, states are not free from the influence of others: The actions of one state may conflict with the objectives of another. A state may negotiate solutions to possible conflicts but there remains the possibility that any state may, at any time, use force to achieve its ends. The possibility of wars makes the anarchic international system, as Hobbes put it, ‘*a war of all against all*’.<sup>666</sup> In these circumstances the primary responsibility of a state is to both ensure the survival of the state and its people and to further the national interest. Machiavelli, who is said to have laid the foundations of military strategy, saw politics as a struggle for survival between growing and expanding organisms in which wars were natural and necessary.<sup>667</sup> He concluded that the existence of such an organism depended on its capacity for war and that political institutions must be organised in such a way as to create favourable preconditions for the functioning of the military.<sup>668</sup>

Military preparation has certainly had an impact on security thinking in Western nations. In recent years, the dominant perspective on security matters held by the majority of politicians, academics, and defence planners may have been largely interpreted by what Michael Klare has labelled the ‘Rogue Doctrine’.<sup>669</sup> This concerns the characterisation of hostile, or seemingly hostile, Third World states with large military forces and nascent WMD capabilities as ‘rogue states’ or ‘nuclear outlaws’ bent on sabotaging the prevailing world order.<sup>670</sup> Such regimes are often constructed as harbouring hostile intentions towards their neighbours and the United States; as opposing democracy, human rights and the rule of law; and as violating global norms regarding nuclear, biological and chemical weapons proliferation. In short, rogue states are represented as posing a ‘clear and present danger’ to the United States and its allies, including the UK. In recent years the Government has also highlighted a growth in asymmetric warfare in which actors with weaker military resources resort to ‘*economics, cyber and proxy actions instead of direct military confrontation*’.<sup>671</sup> As a result, the Government notes that the differences between state-on-state warfare and irregular conflict are dramatically reducing.<sup>672</sup>

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<sup>665</sup> See, for example, John Mearsheimer, *The False Promise of International Institutions*, International Security, Vol. 19, No. 3, pp 5-49.

<sup>666</sup> Thomas Hobbes, *Leviathan*, Harmondsworth: Penguin, 1968, p188.

<sup>667</sup> Machiavelli, *The Literary Works of Machiavelli*, Translated by J.R. Hale, Oxford, 1961.

<sup>668</sup> D. K. Palit, *War in the Deterrent Age*, London, 1966, p34. See also the discussion in the essay by Mohan Malik, *The Evolution of Strategic Thought*, in *Contemporary Security and Strategy*, Edited by Craig A. Snyder, Macmillan Press, 1997, p16.

<sup>669</sup> See: Michael Klare, *Rogue States and Nuclear Outlaws: America’s Search for a New Foreign Policy*, New York, 1995.

<sup>670</sup> Michael Klare, *Rogue States and Nuclear Outlaws: America’s Search for a New Foreign Policy*, New York, 1995, p26.

<sup>671</sup> HM Government, *Securing Britain in an Age of Uncertainty*, Oct. 2010, Cm 7948, p16

<sup>672</sup> HM Government, *Securing Britain in an Age of Uncertainty*, Oct. 2010, Cm 7948, p16

The security agencies are instrumental in obtaining secret intelligence that may be critical to military security issues. In this respect the intelligence community works closely with Defence Intelligence (which is part of the Ministry of Defence). According to MI6, its role is to *'provide early indications and warnings of the intentions of hostile, or potentially hostile, state and non-state actors.'*<sup>673</sup> Its role is also to *'focus on intelligence collection providing strategic insight and understanding, to inform policy and decision-making.'*<sup>674</sup> Intelligence operatives are instrumental in gathering intelligence concerned with arms sales, countering the proliferation of weapons of mass destruction and gathering intelligence that would be useful to the Armed Forces.<sup>675</sup>

Sir Michael Quinlan has highlighted a number of reasons why intelligence gathering may be useful in the international and military arena. Quinlan claims that *'the central consideration is that we often want information about matters in which our interests may diverge from those of others; and such divergence inescapably creates an incentive to those others to withhold from us, temporarily or permanently, information that we might use in order to advance our interests at the expense to some degree of theirs.'*<sup>676</sup> Thus, whilst large amounts of policy-relevant material may be available in the public domain, it would not be realistic to assume that all the information that is needed will be readily available. Rather, as Quinlan claims, *'some of the countries, or other actors, with whom we are dealing, or may one day need to deal, may have no...habit of providing information openly on matters relevant to our concerns; some indeed may have no dependable or adequate systems for providing it systematically even to themselves or their own leaderships.'*<sup>677</sup> Interestingly, Quinlan notes that this situation can apply *'even in respect of countries whose general character and policies are congenial to us – we cannot automatically take at face value everything they may tell us.'*<sup>678</sup>

Whatever the usefulness of intelligence, it seems fair to argue that for these thinkers, the primary object of security is the nation-state, which is to be protected from the intentions of hostile foreign actors, or from internal aggressors, who may interrupt damage or attack the UK's economic or governmental systems. Where the object of security is the protection of the existing hierarchy of state, then those activities that are a threat to this order may be the most likely to be defined as security threats by the intelligence agencies. Thus, when it comes to defining the object of security,

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<sup>673</sup> Secret Intelligence Service, *What We Do - Instability and Conflict Overseas*, www.sis.gov.uk. (last accessed March 2015).

<sup>674</sup> Secret Intelligence Service, *What We Do - Instability and Conflict Overseas*, www.sis.gov.uk. (last accessed March 2015).

<sup>675</sup> Secret Intelligence Service, *What We Do - Instability and Conflict Overseas*, www.sis.gov.uk. (last accessed March 2015).

<sup>676</sup> Sir Michael Quinlan, *The Future of Covert Intelligence in Agents for Change – Intelligence Services in the 21<sup>st</sup> Century*, Edited by Harold Shukman, St Ermin's Press, 2001, p62.

<sup>677</sup> Sir Michael Quinlan, *The Future of Covert Intelligence in Agents for Change – Intelligence Services in the 21<sup>st</sup> Century*, Edited by Harold Shukman, St Ermin's Press, 2001, p62.

<sup>678</sup> Sir Michael Quinlan, *The Future of Covert Intelligence in Agents for Change – Intelligence Services in the 21<sup>st</sup> Century*, Edited by Harold Shukman, St Ermin's Press, 2001, p62.

decision-makers may naturally lean towards a conservative bias which favours the preservation of the existing social and political order over the desires of individual citizens. The consequence of this is that, those persons who are perceived to be a threat to the existence of the state; the maintenance of its territorial integrity; its economic well-being; or who threaten the survival of its governing regime, are more likely be targeted by security agencies, whether or not they are violent or threaten the safety of the public.

#### 4.5 Economic Security

Very closely linked, even inseparable from, military and political security is economic security. Economic security concerns access to the resources, finance and markets necessary to sustain acceptable levels of welfare and state power. At the state level of analysis, there are three broad categories of links between security and economics. Firstly, a strong economy may be a measure of power in the international system. The greater a state's economic potential the greater is its military potential. The economy may provide the material and financial means for the military capability to protect national security. For example, the Government has claimed that *'we cannot have effective foreign policy or strong defence without a sound economy and a sound fiscal position to support them.'*<sup>679</sup> Therefore, it is claimed that a state's economic interest remains vital to its security interests, and military force may still be used.<sup>680</sup> This may have occurred during the Gulf War where the US and the UK deployed forces to defend Kuwait and Saudi Arabia, arguably, to ensure continued access to the oil on which so many Western economies depend.<sup>681</sup>

The second link between economic well-being and security concerns the inter-reliance of transnational economics and transactions. It is possible for states to use such transactions to manipulate or change the attitudes and behaviour of others in the international field. States may use economic instruments to reward, punish, induce or coerce another state to behave in particular ways. Among the most common of these tools are: raising or lowering tariffs on imported goods; currency manipulations to alter terms of trade; granting loans or extending credit; and the manipulation of foreign aid.<sup>682</sup> Such economic pressures can be a means of exerting state power to achieve political ends, just like force. The more powerful a state's economy, the better able it may be to exercise influence on others and to resist efforts by others to influence it. States with strong economies tend to

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<sup>679</sup> HM Government, *A Strong Britain in an Age of Uncertainty: The National Security Strategy*, 2010. Cm 7953, Para. 1.9.

<sup>680</sup> HM Government, *A Strong Britain in an Age of Uncertainty: The National Security Strategy*, 2010. Cm 7953

<sup>681</sup> See the discussion in: Terriff, Croft, James and Morgan, *Security Studies Today*. Polity, 1999, p139.

<sup>682</sup> Other tools include: Quotas on imports from the target state; granting import and export licences to control the exchanges of particular types of goods; freezing or expropriation of another states assets; blacklisting of companies that conduct business with the target state; boycotts against another state's products; embargoes on goods sent to another state; and sanctions.

have a greater range of instruments of influence. States with weaker economies tend to be susceptible to these stronger states. Weak states, therefore, may be more likely to modify their behaviour in response to pressure from stronger states. The increasingly interdependent international economic system may provide states with more opportunities to use economic instruments to sway others, and a strong economy may furnish a greater capability to wield these instruments successfully.

A third line of argument broadens the nature of the relationship between economics and security in that it adds that a strong or prosperous economy is in itself a security issue. In other words, economic or material means are an essential value to be pursued and protected. This may occur where governments are concerned about providing a domestic environment in which citizens are secure from hardship and deprivation, at least to the extent of gaining election victory. In the post Cold-War era, there seems to have been an increasing desire to treat economic desires as matters of national security. It has been claimed that: *'States are now competing more for the means to create wealth within their country than for power over more territory. Where they used to compete for power as a means to wealth, they now compete for wealth as a means to power – but more for the power to maintain internal order and social cohesion than for the power to conduct foreign conquest or to defend themselves against attack.'*<sup>683</sup> This passage introduces a study limited to developing countries for whom poor and deteriorating economic conditions can seriously affect political stability and a weak economic position may result in foreign impositions on state sovereignty and action. However, Lustgarten and Leigh argue that it may also be suggestive of the policies of national governments more generally, including the UK.<sup>684</sup> Indeed, a recent government report claimed that: *'In order to protect our interests at home, we must project our influence abroad. ...We should be under no illusion that our national interest requires our continued full and active engagement in world affairs. It requires our economy to compete with the strongest and the best and our entire government effort overseas must be geared to promote our trade, the lifeblood of our economy.'*<sup>685</sup> Thus, the drive to protect the UK's economic interests abroad is claimed to be linked to our ability to project influence onto the worldwide stage. Where this is the case, it may not be inconceivable that the drive for economic success can go beyond mere national interest to become a matter of national security.

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<sup>683</sup> J Stopford and S Strange. *Rival States, Rival Firms*. Cambridge. 1991, p1.

<sup>684</sup> Lustgarten and Leigh, *In From the Cold: National Security and Parliamentary Democracy*, Oxford University Press, 1994, p27.

<sup>685</sup> HM Government, *A Strong Britain in an Age of Uncertainty: The National Security Strategy*, 2010, Cm 7953.

## 4.6 Nationalism in the UK – Its Nature and its Justifications

In political, military and economic realms, it is often argued, in varying degrees, that when it comes to security, preserving the power of state institutions should be the natural focal point of national security and the resultant decision-making. However, nationalists, and their political counterparts, may lay claim to several palpable benefits which are inherent in this thinking. A major argument is that the state – in the sense of its territorial borders and its political stability - is a container for security in which citizens can be protected from hostile foreign enemies and from domestic violence and criminality.<sup>686</sup> A further set of arguments concerns the nation as a body in which citizens enjoy a sense of belonging to a perceived national community.<sup>687</sup> Here it is claimed that the nation, in itself, has an intrinsic value because the shared sense of identity, under which citizens co-operate with one another, may promote an organic society in which the virtues of the country are extolled and patriotic values are promoted.<sup>688</sup> Taken together, these concepts may, according to some nationalist thinkers, provide the best platform on which to base security considerations such as political stability;<sup>689</sup> the means for an effective response in wartime;<sup>690</sup> a better way of correcting the problems emanating from terrorism and criminality;<sup>691</sup> the means to deal with collective financial crises;<sup>692</sup> and a means to human development, including civil rights and freedoms.<sup>693</sup>

The following paragraphs will explore these interrelated concepts and ideals in more detail. It will examine the material under the following broad headings:

Nationalist perceptions of:

- The state as an upholder of political rights and civil liberties.
- The state as a protector of law and order.
- The state as a defender of traditions, social customs and national values.
- The state as the only legitimate organisation for war and peace.

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<sup>686</sup> Thomas Hobbes, *Leviathan*, Harmondsworth/Penguin, 1968.

<sup>687</sup> J.S. Mill, *Considerations on Representative Government*, Oxford University Press, 1912. Ole Waever, Barry Buzan, Morten Kelstrup, Pierre Lemaitre, *Identity, Migration and the New Security Agenda in Europe*, Centre for Peace and Conflict Research, Copenhagen, Printer Publishers, 1993.

<sup>688</sup> See the view of societal security taken by: Ole Waever, Barry Buzan, Morten Kelstrup, Pierre Lemaitre, *Identity, Migration and the New Security Agenda in Europe*, Centre for Peace and Conflict Research, Copenhagen, Printer Publishers, 1993

<sup>689</sup> See, for example, Barry Buzan, *People States and Fear: An Agenda for International Security Studies in the Post Cold-War Era*, Second Edition, Boulder/ Lynne Rienner, 1991.

<sup>690</sup> Aijin Choi, *Democratic Synergy and Victory in War 1816-1982*, International Studies Quarterly, Volume 48, Number 3, 2004. Reiter, Allan, and Stam, *Democracy and Battlefield Military Effectiveness*, Journal of Conflict Resolution, June 1998. Kant, *Kant's Political Writings*, Cambridge University Press, 1970.

<sup>691</sup> See comments in, HM Government, *A Strong Britain in an Age of Uncertainty: The National Security Strategy*, 2010. Cm 7953. Homeland Security, *Threat Assessment by the All Party Parliamentary Group on Homeland Security*, homelandsecurity.org.uk. (Last accessed January 2013).

<sup>692</sup> See comment in, HM Government, *A Strong Britain in an Age of Uncertainty: The National Security Strategy*, 2010. Cm 7953. Homeland Security, *Threat Assessment by the All Party Parliamentary Group on Homeland Security*, homelandsecurity.org.uk. (Last accessed January 2013).

<sup>693</sup> For example, J.S. Mill, *On Liberty and other Essays*, Oxford University Press, 1999

#### 4.7 The nationalist Perception of the State as an Upholder of Political Rights and Civil Liberties

Some strands of nationalism define the nation as an association of people who identify themselves as belonging to a nation-state in which citizens have equal and shared political and civil rights.<sup>694</sup> Breuille, for example, claims that the nationalist argument is a political doctrine built on three basic assertions: (a) there exists a nation with an explicit and peculiar character; (b) the interests and values of this nation take priority over all other interests and values; (c) the nation must be as independent as possible. For Breuille, nationalism is a term used to refer to political movements that seek to exercise state power for the purpose of ensuring that the particular character of the nation is maintained. This, it is said, requires at the very least, the attainment of political sovereignty.<sup>695</sup> Therefore, security tends to be about protecting the constitutional order of the state, and its governing regime, including shared civil rights and democratic values.<sup>696</sup>

In the UK, our shared political and civil rights are usually taken as those which are in accordance with a liberal democracy. The core democratic ideal in the UK may be that of popular sovereignty – society is to be governed by rules that each person as a citizen has contributed to forming, either directly or indirectly, through the choice of representatives who rule or take decisions on behalf of the citizen.<sup>697</sup> In addition to democratic accountability, the UK tends to embrace the ideals of a liberal democracy. Liberal democratic nations are characterised by certain constitutional and legal parameters which seek to both limit the power of government and to define the relationship between the government and the citizen. The power of government is limited because the political tradition places a strong emphasis on doctrines such as the rule of law<sup>698</sup> and the separation of powers.<sup>699</sup> The

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<sup>694</sup> For a discussion of civic nationalism see: Ernest Renan, *Qu'est-ce qu'une nation?*, Conference Faite En Sorbonne, 11<sup>th</sup> March 1882. English Translation: Ernest Renan, *What is a Nation?* Oxford University Press, 1996, pp 52-54.

<sup>695</sup> John Breuille, *Nationalism and the State*, University of Chicago Press, 1985.

<sup>696</sup> The principle aim of national security, in established Western nations such as the UK, tends to be concerned with defence, rather than 'expansionist' nationalism. That is, in recent years, the UK has not generally sought to colonise weaker nations or build international empires through military conquest. Rather, it has developed a brand of nationalism which cares less about the principled nationalism of self-determination and more about the promise of social cohesion and public order that is embodied in the sentiment of national patriotism. See: Andrew Heywood, *Political Ideologies*, 3<sup>rd</sup> Edition, Palgrave/Macmillan, 2003, p173.

<sup>697</sup> This conception of democracy involves a political system that embraces universal suffrage, which grants adult citizens the right to vote and participate in free and fair elections regardless of race, gender or property ownership. Representation of the People Acts – A series of UK Acts from 1867 that extended voting rights creating universal suffrage in 1928. For a discussion on democracy see: John Schwarzmantel, *The State in Contemporary Society*, Harvester/Wheatsheaf, 1994, p33

<sup>698</sup> The rule of law ensures that governmental authority is exercised only in accordance with publicly disclosed laws which are adopted and enforced in accordance with established legal and constitutional procedure. For the traditional British view of the rule of law, see A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, Eighth Edition, Macmillan, 1927. Originally published 1885.

<sup>699</sup> The separation of powers ensures that governmental authority is not concentrated in one person or body. See for example, John Locke, *Second Treatise of Government*, 1690. Baron Montesquieu, *The Spirit of the Laws*, 1748. Montesquieu outlined a three-way division of powers in England among Parliament, the King and the courts, although such a division did not exist at the time.

relationship between the government and its citizens is defined by a constitutional framework which is built on a liberal perception that government organisations should make their preservation worthwhile by legitimising themselves through the exercise of good governance.<sup>700</sup> The essential constituents necessary for good governance ought to include respect for constitutional democracy and democratic and individual rights.<sup>701</sup> It is hoped that the citizens will accept the legitimacy of government institutions in order to create an implicit contract between the ruler and the ruled.<sup>702</sup> Thus, ultimately, it is the people who are sovereign because the authority the governing institutions is gained from Parliament who's power is derived from the 'will' of the people as expressed in both elections and in the constitutional order.

From a security perspective, protecting these core democratic and liberal ideals may concern safeguarding the organisational stability of the state; its systems of government and the ideologies that give the state its legitimacy. This has been described as: *'The whole organisation of the body of politic for civil rule and government – the whole political organisation which is the basis of civil government.'*<sup>703</sup> Therefore, political security includes the entire structure of the institutions through which society is regulated, protected and governed. It encompasses: Parliament and the law making procedures, including those of the EU and other international bodies; the system of adjudication that is upheld by the courts; the democratic procedures of state; the constitutional order; the critical national infrastructure and the means of law enforcement. In addition, protecting political security may necessarily involve safeguarding the dominant group of persons that hold power or authority within the nation. These persons have been described by Charles Mills as: *'Those political, economic and military circles which, as an intricate set of overlapping small but dominant groups, share decisions having at least national consequences.'*<sup>704</sup> In other words, it is that class of persons who either 'own' the system or 'run' the system. In the UK, this class broadly encompasses the leading politicians, judges, senior civil servants, military officials and the most influential financiers and industrialists.

Nationalists may claim that by subscribing to a set of democratic procedures and values, individuals can reconcile their right to shape their own lives with their need to belong to a community. For example, Renan argued that sharing common ideals is *'more valuable by far than frontiers'*.<sup>705</sup> For

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<sup>700</sup> See, for example, Locke, *The Second Treatise of Government*, 1690. See also, John Rawls, *Theory of Justice*, Oxford University Press, 1972.

<sup>701</sup> See, for example, Locke, *The Second Treatise of Government*, 1690. See also, John Rawls, *Theory of Justice*, Oxford University Press, 1972, p12 and pp 137-142.

<sup>702</sup> See, for example, Locke, *The Second Treatise of Government*, 1690. See also, John Rawls, *Theory of Justice*, Oxford University Press, 1972.

<sup>703</sup> *D v National Society for the Prevention of Cruelty to Children* (1978) AC 171.

<sup>704</sup> Charles Mills, *The Power Elite*, Oxford Press, p18.

<sup>705</sup> Ernest Renan, *Qu'est-ce qu'une nation?* Conference Faite En Sorbonne, 11<sup>th</sup> March 1882. English Translation: Ernest Renan, *What is a Nation?* Oxford University Press, 1996, pp 52-54.

Renan ‘*the fact of sharing, in the past, a glorious heritage and regrets, and, in the future, a shared programme to put into effect, ...are things that can be understood in spite of differences of race or language.*’<sup>706</sup> Renan’s conception of nationalism effectively means that where a nation is in possession of a rich legacy of memories, and there is present day consent to perpetuate the value of the heritage, demonstrated in the desire to live together, an essential condition for being a people has been met. Therefore, it is argued that what holds a society together is not, for example, common ethnic roots, as some may claim, but a shared heritage in which national values are extolled, including the shared ideals of democratic accountability and constitutional order. Since this character of nationalism is maintained by an appeal to democratic tradition, community and history, nationalism may become a conservative defence for traditional political institutions and a traditional way of life.

Where nationalism is based on conserving a shared ‘way of life’, it may tend to endure even when a state is not directly involved in a crisis situation. Indeed, it is claimed that nationalism in the developed Western nations is always present, but in less visible forms than, say, expansionist nationalism. Billig, for example, argues that the idea of nationhood may provide a ‘*continual background for political discourses.*’<sup>707</sup> He points out that nationalism is routinely flagged up in the media through symbols like flags and language involving phrases like ‘national interest’.<sup>708</sup> It is true that calls to common and patriotic beliefs may often be used by politicians of all parties to legitimise their policies. For example, in speeches concerning the alleged ‘war on terror’, Tony Blair frequently talked of a ‘*determination to defend national values,*’<sup>709</sup> and the things ‘*that we hold dear in this country.*’<sup>710</sup> The point is that, for nationalists, such declarations may be beneficial because they encourage the national community to treasure its national values: they may allow the nation to venerate its past and present triumphs and to re-establish a sense of its own identity. This thinking encompasses all those customs that are familiar and generate security and belonging. For nationalists, sharing cultural values and aspirations may help to break down barriers and build a sense of trust between people; it may promote a sense of social cohesion, order and stability. National values, such as political liberty or democracy may be celebrated and past national glories may be commemorated.

#### **4.8 The Nationalist Perception of the State as a Protector of Law and Order**

A second argument in favour of nationalist or conservative security objectives concerns the state as a legitimate upholder of law and order. Law and order refers to the demands for a justice system that

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<sup>706</sup> Ernest Renan, *Qu’est-ve qu’une nation?* Conference Faite En Sorbonne, 11<sup>th</sup> March 1882. English Translation: Ernest Renan, *What is a Nation?* Oxford University Press, 1996, pp 52-54.

<sup>707</sup> Michael Billig, *Banal Nationalism*, Sage Publications, 1995, p8.

<sup>708</sup> Michael Billig, *Banal Nationalism*, Sage Publications, 1995, p8.

<sup>709</sup> See, for example, *PM’s Statement on London Explosions*. 7<sup>th</sup> July 2005. [www.number-10.gov.uk](http://www.number-10.gov.uk).

<sup>710</sup> See, for example, *PM’s Statement on London Explosions*. 7<sup>th</sup> July 2005. [www.number-10.gov.uk](http://www.number-10.gov.uk).

protects individual citizens from crimes, which may be perpetrated against them or against their property. Crime prevention is a recurring theme in political ideologies in the UK, and political advocates may attempt to increase their chance of election victory by directing their policies towards crime reducing strategies and increased sanctions for those convicted of offences.<sup>711</sup> Since crime prevention tends to require the use of centrally organised enforcement mechanisms, the state may be considered the best promoter of law and order.

This thinking is not new. Hobbes, for example, argued that only a strong and authoritative government would be able to establish order and security in society.<sup>712</sup> He was prepared to invest the King with sovereign or absolute power, rather than risk a descent into what he termed, a 'state of nature'.<sup>713</sup> In effect, Hobbes placed the need for order above the desire for liberty. Hobbes' view embodies the notion that the foremost interest in security does not lie with liberal notions of the individual and his '*emancipation from those...constraints which would stop him carrying out what he would freely choose to do.*'<sup>714</sup> Instead, the interest in security lies with the protection of the hierarchical systems that protect the individual - ultimately, the focus of the interest in security is the state and its governing regime which is to be protected from foreign invasion, internal subversion and criminality. Hobbes' views are echoed in the writings of many conservative thinkers. Burke, for example, believed that liberty is only worthwhile when it is properly ordered.<sup>715</sup> Individuals should be free from obstacles to pursue their goals, but only when their goals do not threaten the social order; if they do, then individual freedom should be restricted. Therefore, Burke does not regard government as a major obstacle to freedom, and therefore, as a necessary evil. In Burke's eyes, the very fact that government prevents people from doing just anything they happen to desire is what makes ordered liberty possible. For Burke, without government restraints more people would do more things that endanger both themselves and social peace.<sup>716</sup> In other words, if humans are not restrained or controlled, they will behave in an anti-social and uncivilised fashion. Indeed, Allison argues that, hierarchy, authority and coercion are necessary if there are to be: '*Arts, letters and society.*'<sup>717</sup> Consequently, it may be necessary that government is not afraid to use the force of law to uphold the basic tenets of tradition, establishment and the wider social good.

In the context of protecting national security imperatives, protecting the 'wider social good' may lead the government to claim that the activities of certain groups could undermine the institutions that

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<sup>711</sup> Eric Hines, *A Conservative's Manifesto*, XLIBRIS, 2012.

<sup>712</sup> Thomas Hobbes, *Leviathan*, Harmondsworth/ Penguin, 1968, written 1655.

<sup>713</sup> Thomas Hobbes, *Leviathan*, Harmondsworth/Penguin, 1968, written 1655.

<sup>714</sup> Ken Booth, *Security and Emancipation*, *Review of International Studies*, Vol 17, (1991), pp 315-316.

<sup>715</sup> Edmund Burke, *Observations on the Present State of the Nation*, 1769. Edmund Burke, *Reflections on the Revolution in France*, 1790.

<sup>716</sup> Allison, *Right Principles: A Conservative Philosophy of Politics*, Oxford/Blackwell, 1984, p 32.

<sup>717</sup> Allison, *Right Principles: A Conservative Philosophy of Politics*, Oxford/Blackwell, 1984, p 32.

protect the security and well-being of law abiding citizens.<sup>718</sup> Thus, in the arena of security, there may be an emphasis on the interests of collective security and defence from perceived common threats. A typical argument here is that crime and disorder threatens the very fabric of society, its solidarity and its cohesion. For example, terrorism may represent a gross violation of the ‘right to life’ and security on which all the other civil rights ultimately depend. Thus, legislation, such as the Regulation of Investigatory Powers Act 2000, which may invade privacy by empowering the intelligence agencies to gather information by covert means, is claimed to be necessary in a democratic society in the interests of national security, public safety and the prevention and detection of serious crime. Ultimately then, in this view, the right to privacy and freedom from surveillance may be replaced by the perceived right of the public to be protected from those who may be planning, inciting or carrying out activities which may threaten the public health or national interest. The consequence of this is that freedom of association and expression becomes counterbalanced with the public’s freedom from having to suffer the consequences of acts of violence, or the incitement and the glorification of terrorism.

Up to a point, of course, it is legitimate for governments to ‘suppress’ citizens in the course of normal policing. It is a function of the state not only to provide protection against external threats, but also to protect citizens from each other by making and enforcing laws.<sup>719</sup> However, whilst government must, at least to a certain extent, constrain society and a certain amount of legal and political control may broadly reflect social consensus on an acceptable degree of self-limitation, even democratic states may find that mainstream consensus alienates minority groups. Indeed, in 2009, Stella Rimington, the former head of MI5, suggested that the government may be exploiting public fear of terrorism to restrict civil liberties.<sup>720</sup> Rimington criticised the last Labour Government’s plans to introduce ID cards and to lengthen the amount of time terror suspects can be held without charge. The International Commission of Jurists (ICJ) has also expressed concerns that a series of emergency measures have been brought into the legal framework and that some of these may be counter-productive. They argued that the legal mechanisms that broadly existed before 9/11 were ‘*sufficiently robust to meet current threats*’<sup>721</sup> Furthermore, the ICJ reported that there is some evidence that the

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<sup>718</sup> For examples of these arguments, See: HM Government, *A Strong Britain in an Age of Uncertainty: The National Security Strategy*, 2010, Cm 7953. Homeland Security, *Threat Assessment by the All Party Parliamentary Group on Homeland Security*, homelandsecurity.org.uk. (Last accessed January 2013). Also see: www.mi5.gov.uk.

<sup>719</sup> For examples of this policy see HM Government, *A Strong Britain in an Age of Uncertainty: The National Security Strategy*, 2010, Cm 7953. See Also Eliza Manningham-Buller (Director-General of the Security Service), *Countering Terrorism: An International Blueprint*, Transcript of a Conference on ‘The Oversight of Intelligence and Security’, 17 June 2003.

<sup>720</sup> Dame Stella Rimington, *Terrorist Threat Exploited to Curb Civil Liberties: Security Measures Brought in after September 11 Attacks Undermined the Rule of Law*, The Independent, 17 February.

<sup>721</sup> The International Commission of Jurists, *Investigation into the Impact of Counter-Terrorism Laws and Practices on Human Rights*, www.icj.org, 2009, (last Accessed Jan. 2013).

intelligence services may ‘effectively enjoy impunity for human rights violations’<sup>722</sup> because ‘state secrecy and public interest immunity have been used to foreclose civil suits and hence remedies to the victims of such abuses.’<sup>723</sup> It is certainly widely argued in libertarian circles that under recent terrorism legislation, a wide range of previously accepted fundamental rights have been eroded. This has, perhaps had a significant effect on public perceptions of governmental activities in the area of law and order and public trust may have been undermined.

#### **4.9 The Nationalist Perception of the State as a Defender of Traditions, Social customs and National Values.**

This understanding of state security is underpinned by the perception that the national community and its political order is valuable, in and of itself, since it is only within the natural encompassing framework of various cultural traditions that important meanings and values are produced and transmitted. The members of such communities may share special cultural proximity to each other. By speaking the same language and sharing various customs and traditions, the members of these communities may be typically closer to one another in various ways than they are to those who don’t share the culture. The community, thereby, becomes a network of morally connected agents with strong ties of obligation. Thus, it is often claimed that the national community is essential for each of its members to flourish. Given that an individual’s sense of identity depends, at least in part, on the notion that he is part of an organic community, the communal conditions which foster the development of such personal identity should be preserved and encouraged. Such thinking may be associated with the ideals of patriotism.

The definition of patriotism found in a dictionary reads ‘love of one’s country’. Whilst this captures the core meaning of the term in its ordinary use, it might well need to be fleshed out. Stephen Nathanson defines patriotism as involving: special affection for one’s own country; a sense of personal identification with the country; special concern for the well-being of the country; and willingness to sacrifice to promote the country’s good.<sup>724</sup> It seems then that patriotism involves pride in, or endorsement of, one’s country’s virtues. However, Keller has argued that the patriot’s love and loyalty are not focused on her country simply because it initiates a set of virtues.<sup>725</sup> If that were the case, and if a neighbouring country turned out to have such virtues to an even higher degree, the

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<sup>722</sup> The International Commission of Jurists, *Investigation into the Impact of Counter-Terrorism Laws and Practices on Human Rights*, www.icj.org, 2009, (last Accessed Jan. 2013).

<sup>723</sup> The international Commission of Jurists, *Investigation into the Impact of Counter-Terrorism Laws and Practices on Human Rights*, www.icj.org, 2009, (last Accessed Jan. 2013).

<sup>724</sup> Stephen Nathanson, *Patriotism, Morality and Peace*, Rowman and Littlefield, 1993.

<sup>725</sup> Simon Keller, *Patriotism as Bad Faith*, *Ethics*. Vol.115, No 3, 2005, pp 563-592.

patriot's love and loyalty would be redirected accordingly.<sup>726</sup> However, it is argued that the patriot loves that country, and only that country, because it is *her* country; hers is a love and loyalty in the first instance.<sup>727</sup> Thus, the patriot may be motivated to see her country as blessed by all manner of virtues and achievements whether the evidence, interpreted objectively, warrants this or not. Accordingly, the patriot may form beliefs about the country in ways that are different from the ways in which she forms beliefs about other countries.

One of the implications of a strong sense of national identity is that nationalism may become more prominent, and even aggressive, when the sense of national identity is felt to be threatened or in danger of being lost. Indeed, academics from the Peace and Conflict Research Centre in Copenhagen<sup>728</sup> have identified 'societal identity' as a new focus of insecurity in Europe. According to these thinkers, since the middle of the 1980's, Europe has been increasingly subject to the interplay of several enormous political forces. Majoring amongst these is an alleged '*revival of nationalism and xenophobia*,<sup>729</sup> which may be caused by both perceived threats emanating from the effects of international migration and an '*an active and growing perception in Europe of a threat from the Middle East*.<sup>730</sup> It is claimed that these forces may give rise to societal insecurity where competing identities are seen as being mutually exclusive. For example, there may be a '*strong mutual reaction of Islamic and Christian communities to each other. Islamic fundamentalists may be sensitive to the penetration of Western ideas, practices and fashions into their own culture, whilst host Western communities are often suspicious of Islamic immigrants whose strong, visible and alien culture may be seen as a defiance of integration, and therefore, as a kind of invasion*.<sup>731</sup> These differences, according to the Copenhagen School, may have allowed British right wing movements to use fears of Islamic fundamentalism to give the impression that the immigrant and ethnic community is akin to a cultural fifth column doing the bidding of foreign or domestic anti-Western forces, and that increasing numbers of immigrants and asylum seekers are a source of unacceptable competition for jobs, housing and welfare benefits.<sup>732</sup> It is further claimed that some of these threat images are exacerbated by alarmist, and possibly exaggerated, news stories portraying the Middle East as an alien, hostile and backward place. Such threatening images include: Islamic fanatics preaching hatred of the West; terrorists displaying contempt for human rights and civilised values; brutal dictators often eager to

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<sup>726</sup> Simon Keller, *Patriotism as Bad Faith*, Ethics. Vol.115, No 3, 2005, pp 563-592.

<sup>727</sup> Simon Keller, *Patriotism as Bad Faith*, Ethics. Vol.115, No 3, 2005, pp 563-592.

<sup>728</sup> Ole Waever, Barry Buzan, Morten Kelstrup, Pierre Lemaitre and others.

<sup>729</sup> Ole Waever, Barry Buzan, Morten Kelstrup, Pierre Lemaitre, *Identity, Migration and the New Security Agenda in Europe*, Centre for Peace and Conflict Research, Copenhagen, Printer Publishers, 1993, p1.

<sup>730</sup> Barry Buzan and B. A. Robertson, *Europe and the Middle East: Drifting Towards a Societal Cold War?* See: Ole Waever, Barry Buzan, Morten Kelstrup, Pierre Lemaitre, *Identity, Migration and the New Security Agenda in Europe*, Centre for Peace and Conflict Research, Copenhagen, Printer Publishers, 1993, p131.

<sup>731</sup> Ole Waever, Barry Buzan, Morten Kelstrup, Pierre Lemaitre, *Identity, Migration and the New Security Agenda in Europe*, Centre for Peace and Conflict Research, Copenhagen, Printer Publishers, 1993, p165.

<sup>732</sup> See discussion: Martin O. Heisler and Zig Layton-Henry, *Migration and the Links Between Social and Societal Security*, Chapter 8, Barry Buzan, *The Changing Security Agenda In Europe, Identity, Migration and the New Security Agenda in Europe*, Centre for Peace and Conflict Research, Copenhagen, Printer Publishers, 1993, p165.

acquire the chemical and nuclear technologies for weapons of mass destruction; and, Muslim masses or leaders keen to establish Islamic states, some of whose laws and practices may affront secular Western standards of civilisation.

The issue of societal insecurity is a novelty in the field of security studies, and on some essential points it goes against the established premises of the field. This new focus of security is not primarily on the state, nor is it a concern about military overthrow or political subversion of governments.<sup>733</sup> It is not in any conventional sense about disputed boundaries, or about power rivalries or security dilemmas between states. Rather, it represents an extension of existing security theory in that it offers an object of security that operates in addition to the traditional state-centred view. However, Buzan and his colleagues at the Copenhagen School do not suggest societal security as a new alternative theory to replace all classical security and strategic studies. Their objective is to ensure that this new agenda is carefully inserted into existing security theory as a distinctive object of security alongside other sectors, including military and state security.<sup>734</sup>

#### **4.10 Nationalist Perceptions of the State as the Most Legitimate Organisation for War and Peace**

A final argument for preserving the state and its democratic and constitutional institutions is that it may be the only legitimate organism that can provide for both war and peace. When it comes to war, security thinkers tend to claim that only a nation-state, along with its governmental systems and military capabilities, is realistically able provide an effective response in wartime, particularly when a fast and unified response is necessary.<sup>735</sup> This may be particularly true in liberal democratic nations such as the UK. Research has shown that liberal democratic nations, whilst less likely to enter wars, are more likely to win wars than non-democracies.<sup>736</sup> Of course, there may be several explanations for this phenomenon. One argument is that the tendency to be successful in wartime may be attributed primarily to *'the transparency of the politics, and the stability of their preferences.'* According to this thinking *'democracies are better able to co-operate with their partners in the*

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<sup>733</sup> Although it is accepted that 'societal security' may have threatening implications for the process of governance. See; Ole Waever, Barry Buzan, Morten Kelstrup, Pierre Lemaitre, *Identity, Migration and the New Security Agenda in Europe*, Centre for Peace and Conflict Research, Copenhagen, Printer Publishers, 1993, p2.

<sup>734</sup> Ole Waever, Barry Buzan, Morten Kelstrup and Pierre Lemaitre, *The Changing Security Agenda In Europe, Identity, Migration and the New Security Agenda in Europe*, Centre for Peace and Conflict Research, Copenhagen, Printer Publishers 1993, p27.

<sup>735</sup> Reiter, Allan, and Stam, *Democracy and Battlefield Military Effectiveness*, Journal of Conflict Resolution, June 1998.

<sup>736</sup> See, for example: Aijin Choi, *Democratic Synergy and Victory in war 1816-1982*, International Studies Quarterly, Volume 48, Number 3 2004. Reiter, Allan, and Stam, *Democracy and Battlefield Military Effectiveness*, Journal of Conflict Resolution, June 1998. Kant, *Kant's Political Writings*, Cambridge University Press, 1970.

*conduct of wars*<sup>737</sup> and *'there is a superior mobilisation of resources*<sup>738</sup> along with *'the selection of wars that the democratic states have a high chance of winning.*<sup>739</sup> Other researchers in this field note that the liberal emphasis on individuality within democratic societies means that *'their soldiers fight with greater initiative and superior leadership.*<sup>740</sup>

With regard to peace, it is often argued by nationalists that liberal democratic nations, founded on such individual rights as equality before the law, free speech, elected representation, and other civil liberties, are fundamentally against war. This argument asserts that when citizens who bear the burden of war elect their government, war becomes more difficult. It has been noted that there has been an absence of war between liberal states for almost 200 years.<sup>741</sup> It may be true to say, therefore, that the outbreak of war between two liberal democratic states, even between two adjacent ones, is a low probability event. This is attributed to a whole range of factors including the assertion that, *'when states are forced to decide on which side of an impending world war they will fight, liberal states wind up all on the same side, despite the complexity of paths that take them there,*<sup>742</sup> and that *'citizens, who are ultimately able to defeat the government in democratic elections, appreciate that the benefits of trade can be enjoyed only under conditions of peace.*<sup>743</sup> Whilst such characteristics do not prove that the peace among liberals is statistically significant, nor that liberalism is the sole valid explanation for peace, they do suggest that we consider the possibility that liberal democratic nations have indeed established a separate peace – if only amongst themselves. This, of course is not to say that liberal democratic nations do not go to war. Indeed liberal nations are often distrustful of seemingly authoritarian, totalitarian or seemingly illiberal regimes. In such cases, wars may be caused by calculations and miscalculations based on interests, misunderstandings and mutual suspicions, such as those that characterised the propaganda and arms race between the West and the Soviet Union during the Cold-War or the current troubles with Middle Eastern nations.

Thus, nationalists argue that the state is the ultimate platform under which to protect the territorial borders of the nation and its citizens. Without the state apparatus, including the military, but also the democratic institutions, there may be an increase in conflict and a decrease in conflict resolution.

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<sup>737</sup> Aijin Choi, *Democratic Synergy and Victory in war 1816-1982*, International Studies Quarterly, Volume 48, Number 3 2004, pp 663-682.

<sup>738</sup> Aijin Choi, *Democratic Synergy and Victory in war 1816-1982*, International Studies Quarterly, Volume 48, Number 3 2004, pp 663-682.

<sup>739</sup> Aijin Choi, *Democratic Synergy and Victory in war 1816-1982*, International Studies Quarterly, Volume 48, Number 3 2004, pp 663-682.

<sup>740</sup> Reiter, Allan, and Stam, *Democracy and Battlefield Military Effectiveness*, Journal of Conflict Resolution, June 1998, 42:259-277.

<sup>741</sup> Reiter, Allan, and Stam, *Democracy and Battlefield Military Effectiveness*, Journal of Conflict Resolution, June 1998, 42:259-277.

<sup>742</sup> Kant, *Kant's Political Writings*, Cambridge University Press, 1970.

<sup>743</sup> Kant, *Kant's Political Writings*, Cambridge University Press, 1970.

## 4.11 Conclusion

Benedict Anderson has written that '*nation-ness is the most universally legitimate value of our time.*'<sup>744</sup> Certainly the legitimacy of the idea of nationhood manifests itself constantly. Firstly, the actors who constitute the political world – citizens as well as politicians, bureaucrats and activists – almost always see themselves as representatives of, or affiliated to, a particular national identity. For example, politicians routinely go to the negotiating table in bodies such as the United Nations, the European Union, or the World Trade Organisation, to defend or advance their national interests. Secondly, the ruling bodies of state often seek to heighten the national consciousness or national cohesion by employing devices such as claiming that the voice of the state is also the will of the nation.<sup>745</sup> In other words, these bodies see themselves as working in 'the national interest'; the state is the institution, or the set of institutions, that defends the supreme interests of its citizens.<sup>746</sup> A third demonstration of the prevalence of nationalism, in the modern world, may be evident in the popularity of flags, national anthems, public ceremonies and national holidays.<sup>747</sup> Indeed, such is the level of acceptance of the concept of nationalism that many would say that '*it is the primary way in which the world has been conceived.*'<sup>748</sup> Thus, nationalism has become the language of mass politics and popular opinion.

Nationalism certainly creates a sense of belonging amongst its adherents. Thus, whilst the national community is not automatically, or necessarily, the only basis for society, it is clear that when employed it is an extremely powerful mode of unification which is capable of bringing otherwise competing identities together.<sup>749</sup> Perhaps this is, at least in part, because nationalism represents the idea of popular self government; the idea that government is either carried out by the people or for the people, in accordance with the 'national interest'. Much of nationalist thinking is closely linked with democratic sentiments, and with the idea that '*the people should have some say in their own government.*'<sup>750</sup> Nationalism also represents the notion that the members of a nation share common sympathies and similar outlooks.

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<sup>744</sup> Benedict Anderson, *Imagined Communities: Reflections on the Origins and Spread of Nationalism*, 2<sup>nd</sup> Edition, Verso, 1991, p3.

<sup>745</sup> HM Government, *A Strong Britain in an Age of Uncertainty: The National Security Strategy*, October 2010, Cm 7953. For a discussion on the effect of language and myth on the 'war on terror' see: Joanne Esch, *Legitimising the War on Terror: Political Myth in Official-Level Rhetoric*, *Political Psychology*, Vol. 31, No. 3, 2010.

<sup>746</sup> See for example: HM Government, *A Strong Britain in an Age of Uncertainty: The National Security Strategy*, October 2010, Cm 7953.

<sup>747</sup> See comments in: Micheal Billig, *Banal Nationalism*, Sage Publications, 1995.

<sup>748</sup> Ben Rosamond, *Politics and Governance above the Territorial State, An Introduction to Politics*, 2nd Edition, Routledge, 1997

<sup>749</sup> See comments in: Ole Waever, Barry Buzan, Morten Kelstrup, Pierre Lemaitre, *Identity, Migration and the New Security Agenda in Europe*, Centre for Peace and Conflict Research, Copenhagen, Printer Publishers, 1993

<sup>750</sup> Alan Finlayson, *Nationalism*, *Political Ideologies*, Routledge, 2003, p112.

In the security and defence arena, politicians often appeal to perceived common and patriotic beliefs by claiming their policies to be in accordance with the ‘nature’ or the ‘spirit’ of the national community and, therefore, ‘the voice of the people’.<sup>751</sup> For example, the recent Government report ‘A strong Britain in an Age of Uncertainty: The National Security Strategy’, declares that: ‘*Our national interest requires us to stand up for the values our country believes in – the rule of law, democracy, free speech, tolerance and human rights. Those are the attributes for which Britain is admired in the world and we must continue to advance them, because Britain will be safer if our values are upheld and respected in the world.*’<sup>752</sup> What is perhaps most noteworthy about such statements is that the appeal to patriotic sentiment, particularly when delivered using rhetorical language, can have significant effects on national security thinking and decision-making. For example, it could be used as a device to normalise and legitimise military preparation and emergency preparedness measures, which may otherwise encounter strong opposition from the public. Indeed, with regard to the alleged ‘war on terror,’ it has been claimed that the use of emotive phrases such as: ‘*There should be no doubt, we are at war, and it is a world war,*’<sup>753</sup> and ‘*we cannot let our enemies strike first,*’<sup>754</sup> have been employed to promote the alleged farthest reaching counter-terrorism campaign in history, and may have come to define the domestic and international political environment.<sup>755</sup> This includes a military dimension involving major wars; the expansion of the UK’s military presence overseas; the increasing use of intelligence gathering both worldwide and domestically; possible complicity in extreme means of interrogation, including allegations of torture; and the widespread use of coercion and foreign aid to enlist the support of other countries. It may also have led to an idea of security which is more concerned with prevention, rather than defence. The point is that prevention takes ‘*insecurity*’, rather than security, as the underlying value of security politics.’<sup>756</sup> Thus, ‘*whilst defence implies protection, safety and trust, prevention operates on the basis of permanent feelings of fear, anxiety and unease.*’<sup>757</sup> It is these feelings which could be harnessed by politicians to enhance their persuasiveness when introducing security or military measures which may be unpopular. Taken along with the assertion that British values are worthy of defence, it can also give the impression that the government is upholding a supposed national character or sentiment.

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<sup>751</sup> Joanne Esch, *Legitimising the War on Terror: Political Myth in Official-Level Rhetoric*, Political Psychology, Vol. 31, No. 3, 2010.

<sup>752</sup> HM Government, *A strong Britain in an Age of Uncertainty: The National Security Strategy*, October 2010, Cm 7953.

<sup>753</sup> Joanne Esch, *Legitimising the War on Terror: Political Myth in Official-Level Rhetoric*, Political Psychology, Vol. 31, No. 3, 2010.

<sup>754</sup> Joanne Esch, *Legitimising the War on Terror: Political Myth in Official-Level Rhetoric*, Political Psychology, Vol. 31, No. 3, 2010.

<sup>755</sup> For a discussion on the effect of language and myth on the ‘war on terror’ see: Joanne Esch, *Legitimising the War on Terror: Political Myth in Official-Level Rhetoric*, Political Psychology, Vol. 31, No. 3, 2010.

<sup>756</sup> See Discussion in: Rens van Munster, *Logics of Security: The Copenhagen School, Risk Management and the War on Terror*, Political Science Publications, 10/ 2005.

<sup>757</sup> Discussion in: Rens van Munster, *Logics of Security: The Copenhagen School, Risk Management and the War on Terror*, Political Science Publications, 10/ 2005.

However, in recent years, the measures adopted to maintain national security in the face of supposed threats to these values has led to ongoing debate, particularly in regard to the appropriate scale and role of authority in matters of civil and human rights. Although national security measures may be imposed to protect society as a whole, many such measures can potentially restrict the rights and freedoms of individuals in society.<sup>758</sup> Thus, some thinkers may express concerns that where the exercise of national security and power is not subject to ‘good’ governance; the rule of law and strict legal or constitutional checks and balances, there is a risk that national security may simply serve as a pretext for suppressing unfavourable political and social views.<sup>759</sup> Taken to its logical conclusion, this view contends that measures which may ostensibly serve a national security purpose, such as surveillance and law enforcement mechanisms, could ultimately lead to an Orwellian dystopia.<sup>760</sup> Thus, tension exists between the preservation of the state in the sense of maintaining political stability, self-determination and sovereignty, and the rights and freedoms of individual.

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<sup>758</sup> See comments in: Lustgarten and Leigh, *In From the Cold: National Security and Parliamentary Democracy*, Oxford University Press, 1994.

<sup>759</sup> See, for example, comments in: Barry Buzan, *People States and Fear: An Agenda for International Security Studies in the Post Cold-War Era*, Second Edition, Boulder/Lynne Reinner, 1991.

<sup>760</sup> See comments in: Lustgarten and Leigh, *In from the Cold: National Security and Parliamentary Democracy*, Oxford University Press, 1994. Barry Buzan, *People States and Fear: An Agenda for International Security Studies in the Post Cold-War Era*, Second Edition, Boulder/Lynne Reinner, 1991.

## **CHAPTER FIVE: THE CULMINATION AND REALISATION OF THE CIVIL LIBERTARIAN AND NATIONAL SECURITY AGENDAS**

### **5.1 Introduction**

The previous two chapters have been concerned with developing an understanding of the values underpinning both the liberal agenda and the framework of interpretation that informs the claims made by those who support a national security agenda. This chapter will seek to further elucidate both the benefits and disadvantages of each of these two ideologies. It will achieve this by assessing the full impact of each ideology if its standards and norms were ever comprehensively incorporated into security policy. The chapter will ask: what form would security policy take if it were totally prescribed by liberal thinkers? Similarly, how would the security agenda operate if an ideal conservative or nationalist security agenda were ever fully implemented? The objective of this chapter is to assist in better understanding any discrepancies between the ideological assumptions of these two groups and what they actually deliver in practice.

The chapter will begin by examining the key tenets of an ideal liberal security agenda. To this end, the analysis will consider the ways in which security would be interpreted if it were to fully respect the human rights and civil liberties of the individual. The second part of the chapter will depict an image of national security policy if it were totally prescribed by nationalist and conservative thinkers and, as such, was unaffected by the constitutional and legal constraints insisted upon by liberals. Both stages of the chapter will assess the criticisms that may be levelled at each of these two approaches to defining national security.

### **5.2 The Liberal Approach to National Security**

In the security arena, the liberal approach to state power may effectively mean that whilst the requirement of national security is seen as vitally important, such considerations should not lead to arbitrary actions by state officials, such as the security agencies, who may undermine the privacy rights of an individual.<sup>761</sup> Rather, in its ideal shape, the state is constructed by free individuals to uphold a framework of law within which they might pursue their own ends to the betterment of themselves and society.<sup>762</sup> Idealistically then, the state is to be characterised by a constitutional government which includes a system of checks and balances amongst major institutions, fair and

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<sup>761</sup> See discussion, Helen Fenwick, *Civil Rights: New Labour, Freedom and the Human Rights Act 1998*, Longman, 2000.

<sup>762</sup> See, for example, J.S. Mill, *On Liberty and other Essays*, Oxford University Press, 1999.

regular elections, a democratic franchise, a competitive party system and the protection of individual rights.<sup>763</sup>

With particular regard to the activities of the security agencies, such constitutional principles may embody the subsequent four major concepts. Firstly that the exercise of state power, including covert surveillance operations, should respect human and civil rights – in particular privacy rights.<sup>764</sup> Secondly, the rule of law would require that warrants for covert action by the security agencies should be subject to strict legal limits, and there should be clear legal redress for the citizen in cases where surveillance warrants have been granted unnecessarily or unlawfully.<sup>765</sup> Thirdly, that the powers conferred on institutions within a state – whether executive or judicial – should be sufficiently limited and dispersed between the various institutions of government so as to avoid the abuse of power.<sup>766</sup> And finally, that the government in formulating policy, and the legislature in legitimating that policy, are accountable to the electorate on whose trust their power is held.<sup>767</sup> The subsequent paragraphs will elaborate on these core liberal ideals.

### 5.3 The Exercise of State Power Must Respect Human and Civil rights

In the ideal liberal state, the exercise of state power should conform to the notion of respect for the individual and his or her human and civil rights. In other words, the principles that inform security policy should optimise the rights of the individual and security legislation should seek to prioritise the principle of limited government. Key civil and human rights such as privacy, freedom of religion, speech, press, assembly and free markets should be of primary importance. At its most extreme, this approach to security may effectively prioritise the liberation of the citizen over and above the traditional state-centric ideals of national security. For example, Ken Booth argues for an understanding of security that places people, rather than states, as the focus of security. For Booth, security means the emancipation of the people. He states: *‘Emancipation is the freeing of people (as individuals or groups) from those physical constraints which stop them carrying out what they would freely choose to do. War, and the threat of war, is one of those constraints, together with poverty, poor education and political oppression and so on.’*<sup>768</sup> Booth goes on to explain that: *‘Security and emancipation are two sides of the same coin. Emancipation, not power or order produces true*

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<sup>763</sup> Dov Samet and David Schmeidler, *Between Liberalism and Democracy*, Journal of Economic Theory, 2002.

<sup>764</sup> See, for example, Helen Fenwick, *Civil Liberties and Human Rights*, Cavendish, 2002.

<sup>765</sup> See, for example, discussion, Helen Fenwick, *Civil Rights: New Labour, Freedom and the Human Rights Act 1998*, Longman, 2000. Dicey, A. V. *Introduction to the Study of the Law of the Constitution*, Eighth Edition, Macmillan, 1927. Originally published 1885

<sup>766</sup> Baron Montesquieu, *The Spirit of the Laws*, 1748.

<sup>767</sup> See for example: John Locke, *Two Treatises of Government*, 1690.

<sup>768</sup> Ken Booth, *Security and Emancipation*, Review of International Studies, 1991, 17(4), 313-26.

security. *Emancipation, theoretically, is security.*<sup>769</sup> Booth's arguments focus on the individual and the security of the state is not the primary object of security.

However, whilst many liberals may support Booth's arguments that emancipation and security are concepts which should be closely linked, liberals may well accept that individuals should not be 'emancipated' from restraint where their actions cause harm or injury to others.<sup>770</sup> For many liberals, liberty does not mean licence. It does not represent the freeing of people to 'do what they like',<sup>771</sup> but rather, the enabling of them to make the best of themselves and contribute to the well-being of the community. In the words of Elliott Dodds: '*True freedom means that opportunity shall be given to every man, woman and child...to live out the best that is in them and to develop their faculties for the service of their fellows.*'<sup>772</sup> A similar point was made by Lord Acton: '*Liberty is not the power of doing what we like, but the right of doing what we ought.*'<sup>773</sup> Thus, whilst liberals may emphasise individual rights and freedom, there tends to be recognition that some conduct should be restricted. Mill's, for instance, suggested that where there is harm to others stemming from individual behaviour, there is a justification for the state and the criminal law intervening. He asserted that, '*the...consequences of his acts do not then fall upon himself, but on others; and society, as the protector of all its members, must retaliate on him.*'<sup>774</sup> However, for liberals, the danger must ultimately be a threat to some fundamental aspect of the citizen's well-being. Liberals may be unwilling to take danger to mean danger to some subjective attribute of society, such as its moral health, and may be hostile to characterising the likelihood of shocking or offending citizens as a concrete harm justifying the suppression of a right.<sup>775</sup> Thus, the ideal liberal state may be less likely to trade off civil liberties to satisfy the requirements of a national security agenda. Whilst, in certain instances, liberals may accept that violent attempts to influence a nation's political processes are not compatible with the institutions and ideals of a liberal democratic society,<sup>776</sup> they may believe that the exercise of power, even where it concerns national security, should conform to principles of accountability, proportionality and due process of law.<sup>777</sup> The security agencies must ensure that there is a basis in law for the invasion of privacy or any other intrusion into the lives of individuals.<sup>778</sup>

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<sup>769</sup> Ken Booth, *Security and Emancipation*, Review of International Studies, 1991, 17(4), 313-26.

<sup>770</sup> Ronald Dworkin, *Do Values Conflict? A Hedgehog's Approach*, Arizona Law Review, Vol. 43:2, 2000. See also: John Mill, *On Liberty*, Chapter III, 1859, in John Stuart Mill, *On Liberty and other Essays*, Oxford University Press, 1998.

<sup>771</sup> See, G.E. Fasnacht, *Acton's Political Philosophy*, Hollis, 1952, p19.

<sup>772</sup> Elliott Dodds, *Is Liberalism Dead?* London, 1920, p48.

<sup>773</sup> See, G.E. Fasnacht, *Acton's Political Philosophy*, Hollis, 1952, p19.

<sup>774</sup> John Stuart Mill *On Liberty and other Essays*, Oxford University Press, 1999.

<sup>775</sup> See, for example, Helen Fenwick, *Civil Liberties and Human Rights*, Cavendish, 2002.

<sup>776</sup> Ronald Dworkin, *Do Values Conflict? A Hedgehog's Approach*, Arizona Law Review, Vol. 43:2, 2000.

<sup>777</sup> Helen Fenwick, *The Anti-Terrorism, Crime and Security Act 2001: A Proportionate Response to 11 September*, The Modern Law Review, Sep 2002, Vol. 65, Issue 5, pp 724-762. A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, Eighth Edition, Macmillan, 1927. Originally published 1885.

<sup>778</sup> Helen Fenwick, *The Anti-Terrorism, Crime and Security Act 2001: A Proportionate Response to 11 September*, The Modern Law Review, Sep 2002, Vol. 65, Issue 5, p724-762.

These laws should be clear, publicised, stable and fair, and protect fundamental rights, including the security of persons and property.<sup>779</sup>

In this conception of the ideal state, legislation which would inhibit fundamental political rights, such as non-violent protest and free speech, could be declared unconstitutional and subjected to repeal or amendment. Liberals are unlikely, for example, to accept provisions, such as those found in the Terrorism Act 2006, which prohibit the praise or celebration of terrorism in a way that makes others think they should emulate such attacks.<sup>780</sup> For liberals, legislation such as this could potentially be used against those that resort to legitimate protest, perhaps against a repressive regime or an overly authoritarian government.<sup>781</sup> Civil libertarian pressure groups have frequently expressed concerns that law enforcers may misuse residual common law and statutory powers to intimidate protesters.<sup>782</sup> For example, there has been widespread unease about the use of stop and search powers under section 44 of the Terrorism Act 2000 and the use of powers under section 50 of the Police Reform Act 2002.<sup>783</sup> The 2002 Act makes it a criminal offence to fail to give a name and address when asked by a police constable who has reason to believe that a person has been acting in an anti-social manner. For liberals, these provisions, and others contained in the Public Order Acts, may '*turn an already blurred distinction between civil law and criminal law on its head*',<sup>784</sup> and, any misapplication to peaceful protesters may pose a threat to freedom of speech and freedom of assembly.

With regard to the security agencies, both the Regulation of Investigatory Powers Act 2000, and other Acts governing the security agencies, could be subject to extensive amendments. Firstly, certain clauses which define the role of the security agencies may need to be clarified to make them more easily ascertainable and to ensure that surveillance activity is fully prescribed by law. For example, the vague and broad terms which are currently used to describe 'subversion' and 'serious crime' in the Security Service Act 1989, may undergo extensive revision. Section 1 of the Security Service Act 1989, currently describes subversion in terms of protection '*from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means*'.<sup>785</sup> For liberals, the problem may be that, as phrased, it is possible to interpret peaceful demonstrations as subversive, and therefore, as a legitimate target of covert investigations by the security agencies or other law enforcers. To prevent this, liberals may call for the words 'political' and 'industrial' to be dropped

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<sup>779</sup> Joseph Raz, *The Rule of Law and Its Virtue*, 1977, *The Law Quarterly Review*, Vol. 93, p195.

<sup>780</sup> Terrorism Act 2006, Section 1 (Encouragement of Terrorism).

<sup>781</sup> Liberty, *Liberty's Response to the Joint Committee on Human Rights: 'Demonstrating Respect for Rights: A Human Rights Approach to Policing Protest*, ' May 2009.

<sup>782</sup> Liberty, *Liberty's Response to the Joint Committee on Human Rights: 'Demonstrating Respect for Rights: A Human Rights Approach to Policing Protest*, ' May 2009.

<sup>783</sup> Police Reform Act 2002, Section 50. (Persons acting in an anti-social manner)

<sup>784</sup> Liberty, *Liberty's Response to the Joint Committee on Human Rights: 'Demonstrating Respect for Rights: A Human Rights Approach to Policing Protest*, ' May 2009.

<sup>785</sup> Security Service Act (s1(2)) Liberty, *What is Liberty's Position on the Regulation of Investigatory Powers Act*. 2010, [www.liberty-human-rights.org.uk](http://www.liberty-human-rights.org.uk) (last accessed June 2012).

from the Act, leaving only 'violence' as a legal reason for the government to interfere with public protest.

All surveillance under the Regulation of Investigatory Powers Act could be subjected to stringent legal safeguards. This may mean that both the number of public authorities that have access to surveillance powers may be reduced to a minimum and that the purposes for which intrusive surveillance could be authorised would be restricted in scope. For liberals, in order to comply with the requirements of the rule of law, state bodies, such as the security agencies, should be accountable to those whom they purport to serve and, therefore, there should be mechanisms that provide due process of law and access to justice by competent, independent and ethical adjudicators.<sup>786</sup> The adjudicating body would be required to ensure that any authorisation for surveillance is strictly legal, necessary and proportionate to the legitimate aim pursued. In this climate, it may not be adequate, for example, to allow the Home Secretary to authorise warrants for surveillance. Liberals have traditionally rejected legislation such as that found in 5(2) of the Intelligence Services Act 1994, which provides for the Home Secretary to issue a warrant *'in respect of any property so specified or in respect of any wireless telegraphy so specified.'*<sup>787</sup> For liberals, these requirements may seem imprecise and ambiguous. Therefore, whilst the Act provides that the Secretary of State should be satisfied that *'what the action seeks to achieve cannot reasonably be achieved by other means,'*<sup>788</sup> liberals may assert that it is not possible to ascertain how far these warrants are subjected to serious scrutiny, or how far, assuming that they are taken seriously, a Home Secretary would be able to detect weaknesses in a given case.<sup>789</sup> Obviously, these matters would depend partly on the particular Home Secretary in question, but applications have very rarely been rejected and, as Lustgarten and Leigh point out, *'political considerations as well as legal ones may enter into the approval.'*<sup>790</sup>

In addition to the safeguard of an independent judicial warrant, there may also need to be mechanisms in place to ensure that, where there is any unlawful interference into the individual rights of a citizen, there is an effective remedy available in the courts. This may mean that there could be an overhaul of the way in which the Investigatory Powers Tribunal adjudicates.<sup>791</sup> This body may be required to increase its transparency during hearings, rather than adjudicating behind closed doors as is currently the practice.<sup>792</sup> It is not inconceivable that the Tribunal would be required to provide written details

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<sup>786</sup> For contemporary interpretations of this general principle, see [www.liberty.org.uk](http://www.liberty.org.uk)

<sup>787</sup> s5(2) Intelligence Services Act 1994.

<sup>788</sup> s5(2)(a) Intelligence Services Act 1994.

<sup>789</sup> Lustgarten and Leigh, *In From the Cold: National Security and Parliamentary Democracy*, Oxford University Press, 1994.

<sup>790</sup> Lustgarten and Leigh, *In From the Cold: National Security and Parliamentary Democracy*, Oxford University Press, 1994. See also, Helen Fenwick, *Civil Liberties and Human Rights*, Cavendish, 2002, p656.

<sup>791</sup> See for example comments by Liberty. Liberty, *What is Liberty's Position on the Regulation of Investigatory Powers Act*. 2010, [www.liberty-human-rights.org.uk](http://www.liberty-human-rights.org.uk) (last accessed June 2012).

<sup>792</sup> See, for example, Liberty, *Article 6, Right to a Fair Hearing*, [www.liberty-human-rights.org.uk](http://www.liberty-human-rights.org.uk) Last accessed June 2012.

of its judgments and the reasons for its final decision. Indeed, since liberals are dedicated to open, clear, and accessible justice, there may even be a case for suggesting that the target of a surveillance operation must be informed that a warrant has been issued.<sup>793</sup> Liberals may argue that this gives the citizen an additional layer of protection in that it opens the possibility for him or her to seek legal redress in the courts if covert operations have been authorised illegally or conducted improperly.

Placing people rather than states as the ultimate focal point of security would certainly lead to a rejection of much contemporary political thought on the nature of threats, and consequently, the measures taken to overcome them. The point is that, in the liberal conception, security may be adversely affected by the state – the state is a threat to citizens as well as their protector. For civil libertarian thinkers, the repeal and amendment of provisions which impede personal autonomy could ensure that the liberal preference for a minimal state was upheld and that security agency activity would be subject to the rule of law. For liberals, the benefit of the rule of law is that it may ensure that the rights of individuals are determined by legal rules and not the arbitrary behaviour of authorities.<sup>794</sup> Thus, liberals prefer systems of constitutionalism.

#### **5.4 Constitutionalism and the Liberal Ideal**

For liberals, the concept of security is often closely linked to the ideals of constitutionalism. In other words, in addition to securing the borders of state from hostile attack, the security of the citizen also depends upon their protection from an excessively authoritarian state, which may undermine civil and property rights.<sup>795</sup> Whilst constitutionalism has a variety of meanings, it is most generally thought of as a complex of ideas, attitudes and patterns of behaviour elaborating the principle that the authority of government derives from, and is limited by, a body of fundamental law.<sup>796</sup> Throughout the literature dealing with public and administrative law, the central element of the concept of constitutionalism is that, in political society, government officials should not be free to do anything they please in any manner they choose.<sup>797</sup> Rather, they are bound to observe both the limitations on power, and the procedures, which are set out in the ‘supreme’ constitutional law of the nation in which they are operating.<sup>798</sup> It may be argued, therefore, that the touchstone of constitutionalism is the concept of limited government under a higher law.<sup>799</sup>

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<sup>793</sup> See, for example, Helen Fenwick, *Civil Liberties and Human Rights*, Cavendish, 2002, pp 635-724.

<sup>794</sup> See, for example, A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, Eighth Edition, Macmillan, 1927. Originally published 1885.

<sup>795</sup> Thomas Paine, *The Rights of Man*, 1792.

<sup>796</sup> Thomas Paine, *The Rights of Man*, 1792, Ivor Jennings, *The law and the Constitution*, 1959, A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, 1885.

<sup>797</sup> A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, 1885.

<sup>798</sup> Thomas Paine, *The Rights of Man*, 1792.

<sup>799</sup> Thomas Paine, *The Rights of Man*, 1792, Ivor Jennings, *The law and the Constitution*, 1959.

For some liberals, the UK offers an unsatisfactory substitute for an ideal constitution because it is uncodified.<sup>800</sup> Thus, whilst much of the British constitution is found in written documents, such as statutes, court judgments and treaties, the constitution has other unwritten sources, including constitutional conventions and the Royal Prerogative. For liberals, the problem with conventions may be that they are not enforceable by the courts and the Royal Prerogative can be used to initiate sweeping powers that may undermine the rights of the citizens and the rule of law.<sup>801</sup> For liberals, these issues may be further created and underpinned by the principle of Parliamentary supremacy, and the particular way in which the rule of law and the separation of powers are given effect in the UK. The following paragraphs will explore the ways in which liberals may seek to change or adapt the UK constitution to better protect the security of the individual as defined by liberal ideals. The following topic areas will be explored:

- Parliamentary supremacy and the introduction of a Bill of Rights.
- Strengthening the separation of powers.
- The liberal relationship with democracy.

### ***5.1. Parliamentary Supremacy***

Parliamentary supremacy concerns the principle that Parliament may create, amend or repeal any law; that it may not be bound by its predecessors; and that, no court can question the validity of an Act of Parliament.<sup>802</sup> The doctrine effectively means that Parliament, as the democratically elected branch of government, has absolute sovereignty and is supreme over all other government institutions, including the executive and judicial bodies.

The doctrine of supremacy can mean that Parliament is able to create legislation which may eliminate, or reduce, fundamental civil and property rights which liberals may consider untouchable. Thus,

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<sup>800</sup> See for example, Thomas Paine, *The Rights of Man*, 1792; F. F. Ridley, *There is no British Constitution: A Dangerous Case of the Emperor's Clothes*, 141 Parliamentary Affairs, 1988. These author's claim that the British constitutional arrangements are so defective that, in reality, there is no constitution. However, this view can be contrasted with the writings of, for example, Ivor Jennings, who claimed that the UK employs mechanisms that serve the same purpose as a written constitutional document. Ivor Jennings, *The Law and the Constitution*, 1959. See also Dicey, A. V. *Introduction to the Study of the Law of the Constitution*, Eighth Edition, Macmillan, 1927. Originally published 1885.

<sup>801</sup> The Royal Prerogative applies to those ancient powers and immunities once exercised or influenced the Monarch and thought to be a natural attribute of the Monarch's constitutional and political pre-eminence, and which were left untouched by the conflicts and political restructuring, which occurred during the seventeenth century. The Prerogative is available for use without any grant of parliamentary approval. Historically, the medieval monarchy was both feudal lord and head of the kingdom. As such, the King had powers accounted for by the need to preserve the realm against external foes and an undefined residue of power which he might use for the public good. He could exercise the 'Royal Prerogative' and impose his will in respect of decision-making.

<sup>802</sup> See studies by, for example, A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, 1885.

some liberals may claim that in an ideal liberal state, there should be a special class of constitutional document, such as an entrenched Bill of Rights, which cannot be amended by Parliament alone. In other words, Acts such as the Human Rights Act 1998, should be embedded into UK law in a way which guarantees that the Act, or parts of it, can never be expressly or impliedly repealed.

When it comes to providing for the protection of the citizen by means of a Bill of Rights, it has been said that '*intelligence may well be the final frontier insofar as human rights are concerned.*'<sup>803</sup> Thus, whilst the Regulation of Investigatory Powers Act 2000 was allegedly enacted in order to ensure compliance with the European Convention on Human Rights, it has been argued that the RIPA did not grant any new surveillance powers to the security agencies. Rather, what it did was to legalise their use by instituting authorisation procedures in order to '*make them judge proof against human rights challenges.*'<sup>804</sup>

For liberals, in order to fully comply with the rights protected by The European Convention on Human Rights, an ideal liberal Bill of Rights would generate law that is clearer, more accessible and more certain in its scope and application. This could have a significant effect on security related legislation and on the way in which the intelligence agencies are ultimately governed. Liberals may suggest, for example, that any UK Bill of Rights contains a provision which would force a five yearly review, and an independent report to Parliament, of any legislation that potentially affects Convention rights, including that which authorises covert surveillance. This may ensure that legislation such as the RIPA, which is not subject to a sunset clause, is prevented from remaining permanent and unchanged because it would be guaranteed regular Parliamentary scrutiny.

With regards to the content of the legislation, there may be calls to limit acts of intelligence gathering by insisting that there is a more clearly defined 'threshold criteria' that may trigger intrusive action by the security agencies. Indeed, it has already been suggested that failure to make these clear distinctions can lead to '*blurred lines of accountability and to the risk that special powers are used in routine situations where there is no pre-eminent threat to the population.*'<sup>805</sup> One example of a surveillance activity that may not reach the minimum threshold is the use of data mining. The data mining technique involves analysing the information on various databases according to a number of variables such as ethnic origin, colour, sex, political opinions, philosophical and other beliefs, as well as trade union membership. For some liberals, the use of data mining may cross the boundary between permissible targeted surveillance and unnecessary mass surveillance which could potentially

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<sup>803</sup> Peter Gill, *Intelligence and Human Rights: A view from Venus*, Human Rights and Human Welfare, Vol. 8, 2008, pp 115-122

<sup>804</sup> Peter Gill, *Intelligence and Human Rights: A view from Venus*, Human Rights and Human Welfare, Vol. 8, 2008, pp 115-122

<sup>805</sup> United Nations, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, A/HRC/10/3 February 2009, para. 31

amount to an unlawful interference into the private life of the individual. Indeed, a report by the United Nations Special Rapporteur suggests that there is ‘*an inherent danger of over-inclusiveness in data mining,*’<sup>806</sup> particularly ‘*as the technical capabilities of this technique can tempt the user towards broadening the definition of what is considered suspicious.*’<sup>807</sup> For liberal thinkers, the legislation generated by an ideal Bill of Rights should prevent the security agencies from gathering information merely because it may be useful. Rather, it should insist that intelligence is only gathered for a specific and defined purpose.

In the liberal ideal, the creation of a new Bill of Rights may also make it possible for the courts to preside over a more open system of redress for those targeted for surveillance operations. As currently enacted, one problem is that the target person of a surveillance operation is unlikely to discover that covert action is taking place. Thus, it seems unlikely that anyone will discover whether there was a breach of the provisions of the Act. Furthermore, even where a person does become aware that a surveillance operation is taking place, the only form of redress is via the Tribunal of Investigatory Powers. It is arguable that the decisions of this Tribunal are less likely to be impartial and unbiased given that its deliberations and judgments are largely kept secret. Furthermore, there is no right of appeal from the Tribunal in most cases and the applicant has only 1 year to bring his complaint.<sup>808</sup>

Overall then, initiating a new Bill of Rights could be useful to some liberals as an opportunity to introduce further Parliamentary and judicial safeguards against any wrongful abrogation of rights and freedoms – it could spell out more clearly the conditions that would need to be met in order to justify any surveillance operation carried out by the security agencies.

#### ***5.4.2 The Separation of Powers***

An essential element of an ideal liberal state concerns the notion that the powers conferred on institutions within a state – whether executive, legislative or judicial – are sufficiently dispersed between the various institutions of government so as to avoid the abuse of power. The essence of this doctrine is that the powers vested in the principle institutions of state should not be concentrated in the hands of any one institution. For example, Montesquieu described the division of political power among an executive, a legislature, and the judiciary. He perceived a separation of powers among the

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<sup>806</sup> United Nations, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, A/HRC/10/3 February 2009. para.32

<sup>807</sup> United Nations, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, A/HRC/10/3 February 2009. para.32

<sup>808</sup> Unless the Tribunal itself considers it equitable to extend the 1 year period.

monarch, parliament, and the courts of law. Montesquieu paid much attention to the independence of the judiciary, which he claimed *'has to be real and not apparent merely.'*<sup>809</sup> Indeed, the judiciary is often seen by liberals as the most important of the three state organs. Perhaps, this is because it can provide a check on the powers of the other two branches of power – namely the legislature and the executive. The point is that the judiciary can potentially make judgments in response to the abuse of discretion, corruption, collusion or other abuses of power. Thus, it may be able to prevent the potential for tyranny which might otherwise exist.

However, the separation of these powers in the UK is much less distinct than in many nations because there is a greater overlap between the executive and the legislature. In the UK, Parliament provides the personnel of the executive in that, Ministers in charge of government departments are also members of one of the Houses of Parliament. Thus, far from the executive being separate from the legislature, they are actually drawn from its ranks. This may lead to an apparent dominance of the executive in that it is much easier to put its policies into legislative practice. Thus, it has been criticised by some liberals.

The ideal liberal state may seek to provide a constitutional framework in which the separation between the three principle organs of state is much more pronounced, at least as far as it is compatible with governmental practicability. Thus, the head of the executive (perhaps the Prime Minister) would not be able to hold a seat in Parliament, nor would he be directly answerable to it. He would need to be elected separately. In the same way, members of Parliament would be prevented from being appointed to the executive branch of government. In this way, the head of the executive would not control the business of Parliament. With regard to security, this would mean that, whilst the head of the executive may be able to recommend security related legislation to Parliament, he would not be able to ensure or enforce its enactment. This may make it much more difficult to force through legislative measures that are unpopular, or even unsavoury, in that they could lead to the misuse of power, or which may unnecessarily undermine the liberty of the citizen.

## **5.5 The Government Should be Accountable to the Electorate**

Liberals may advocate an extended franchise because it is thought that when citizens have a vote, which gives them control over their government, they will ensure that the government acts in a way

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<sup>809</sup> Montesquieu. *The Spirit of the Laws*, 1914. Online version: <http://www.constitution.org/cm/sol.htm>.

which is consistent with their interests.<sup>810</sup> This preference for democratic principles is, perhaps, best explained in Abraham Lincoln's Gettysburg Address of 1863, in which he extolled the virtues of 'government of the people, by the people and for the people.'<sup>811</sup> Thus, the ideal liberal state is not to be organised and controlled by an aristocratic elite. In the words of Thomas Paine in his *The Rights of Man*,<sup>812</sup> there are 'two modes of government which exist in the world - government by 'election and representation' and government by 'hereditary succession'. The first is known as a republic, and is based on 'reason'; the second is monarchy and aristocracy, and is based on 'ignorance.'<sup>813</sup>

The liberal conception of democracy may owe much of its historical background to the writings of John Locke.<sup>814</sup> Locke perceived a social contract between individuals and the state which involved the citizen in handing over certain powers (most importantly, a monopoly of coercive force) to the government in return for the guarantee of certain rights and protection to 'lives, liberties and estates.' Lock's conception asserted that although the government had a legitimate right to rule, and to use the law for the good of the people, the right was conditional and limited by the ultimate right of the people to overthrow a government which violated its trust. By insisting that government held its power on trust, Locke was indirectly claiming the sovereignty of the people over the government. As Locke professed: 'The legislative being only a fiduciary power to act for certain ends, there remains still in the people a supreme power to remove or alter the legislative when they find that the legislative act contrary to the trust reposed on them.... Thus, the community perpetually retains a supreme power of saving themselves from the attempts and designs of anybody, even their legislators, whenever they shall be so foolish or so wicked as to lay and carry on designs against the liberties and properties of the subject.'<sup>815</sup> Thus, Locke's conception suggests that political authority 'comes from below.' Government arises out of the agreement or consent of individuals. The state is created by individuals and for individuals: It exists to serve their needs and interests. Political authority must, therefore, be legitimate, it must be justifiable or acceptable in the eyes of those who are subject to it. Legitimate government should be rooted in the consent of those to whom its authority extends and the government ought to be accountable to those whose rights it purports to protect. This implies that citizens do not have an obligation to observe all laws or accept any form of government. Government may forsake legitimacy where it breaks the terms of the contract, in which case, the people may have a right of rebellion.<sup>816</sup> Locke thus introduced two ideas which are central to liberalism today - that the

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<sup>810</sup> See discussion in J Elster, *The Market and the Forum: Three Varieties of Political Theory*, Philosophy and Democracy, Ed. T. Christiano, Oxford: Oxford University Press. 2002, p152. See also: John Mill, *On Liberty*, Chapter I, 1859, in *John Stuart Mill on Liberty and other Essays*, Oxford University Press, 1998.

<sup>811</sup> See discussion in Andrew Heywood, *Political Ideologies*, 3<sup>rd</sup> Edition, Palgrave/Macmillan 2003, p43.

<sup>812</sup> Thomas Paine, *The Rights of Man*, London, 1791.

<sup>813</sup> Thomas Paine, *The Rights of Man*, London, 1791, p33.

<sup>814</sup> John Locke, *The Second Treatise of Government*, 1690.

<sup>815</sup> John Locke, *The Second Treatise of Government*, 1690, Bk. II, Chapter XIII, Para 149.

<sup>816</sup> This principle was used to justify the Glorious Revolution of 1688, which deposed James II and established a constitutional monarchy in Britain under William and Mary.

overriding purpose for the State is the securing and protection of its citizen's basic liberties,<sup>817</sup> and that there should be some democratic accountability.

However, the relationship between the ideals of liberalism and the ideals of democracy is not without tension.<sup>818</sup> Firstly, democracy may only respect the majority at the point of electing representatives.<sup>819</sup> After an election, the real power is held by a small representative body, who in effect therefore, are a minority. This may effectively mean that a small number of elected representatives may make decisions and policies about how a nation is governed, the laws that govern the lives of its citizens, and so on. This has led to arguments that representative democracy is merely a decoration over an oligarchy or a plutocracy.<sup>820</sup>

Secondly, since democracy, in its simplest terms, can be described as the theory of legitimate rule by the majority, it can in certain circumstances lead to the totalitarian rule of the majority who could ruthlessly violate the rights of minority groups. This concept is often referred to as the 'tyranny of the majority'.<sup>821</sup> In practice, this alleged 'tyranny' refers to the notion that the rights of the majority may take priority over the rights of a minority that holds a dissenting view, particularly if that view challenges existing political and social norms.<sup>822</sup> For example, the so called 'majority' may justify introducing some limits on certain rights to prevent anti-democratic speech, or attempts to undermine human rights, or on speech that may promote and justify terrorism. However, in each case the democratic right of the individual person may potentially be undermined by any excessive derogation from standard civil rights.

In practice then, liberal opinions may be divided on how far democracy can extend to include the enemies of democracy. For some, if relatively small numbers of people are excluded from certain freedoms for these reasons, then a country may still legitimately claim itself to be a liberal democracy. For others, majority rule is preferable to other systems and the tyranny of the majority is, in any case, preferable to the tyranny of a minority. For still others, democracy may be upheld where alleged opponents of democracy have access to due process of law in the courts and where the rule of law

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<sup>817</sup> John Locke, *Two Treatises of Government*, 1690.

<sup>818</sup> For discussion of the complexities of the relationship between liberalism and democracy see: Bobbio Norberto, *Liberalism and Democracy*, Originally published as *Liberalismo e Democrazia*, Franco Angelo Libri, 1988.

<sup>819</sup> For a discussion of self-correcting majoritarian democracy, see: Craig, *Dacey: Unitary, Self-Correcting Democracy and Public Law*, (1990) 106 LQR 105.

<sup>820</sup> See comments in: Lord Acton, *The History of Freedom in Antiquity*, An Address to the Members of the Bridgnorth Institute, 1877.

<sup>821</sup> For a discussion on the tyranny of the majority and democracy see: Lord Acton, *The History of Freedom in Antiquity*, An Address to the Members of the Bridgnorth Institute, 1877. John Stuart Mill, *On Liberty*, 185.

<sup>822</sup> The notion that, in a democracy, the greatest concern is that the majority will tyrannise and exploit diverse smaller interests has been criticized by Mancur Olson in the *Logic of Collective Action*. Olson claims that when the benefits of political action (e.g., lobbying) are spread over fewer agents, there is a stronger individual incentive to contribute to that political activity. Narrow groups, especially those who can reward active participation to their group goals, might therefore be able to dominate or distort political processes, Mancur Olson, *The Logic of Collective Action*, Harvard Economic Studies, Vo. CXXIV, 1965.

prevails. Here, it is argued that the presence of a constitutional system, which can protect the rights of citizens, may act as a safeguard where state power is misused. However, perhaps in the ideal liberal state, changes to these constitutions would require the agreement of a ‘super-majority’, for example, one which may be gained from a separate referendum, or an election in which a larger majority than is normal would be required to make the change. This means that a majority may, to some degree, legitimately coerce a minority because gaining agreement was significantly harder.

## 5.6 The Benefits and Criticisms of the Liberal Approach to Security

The practical benefits of an ideal liberal state are perhaps best summed up in a statement by A. J. P. Taylor. Taylor captures the individualist character of English life during the century before the outbreak of the First World War. He suggested that *‘Until August 1914 a sensible, law abiding Englishman could pass through life and hardly notice the existence of the state beyond the post office and the policeman. He could live where he liked and as he liked. He had no official number or identity card. He could travel abroad, or leave his country forever, without a passport or any sort of official permission. He could exchange his money for any other currency without restriction or limit. He could buy goods from any country in the world on the same terms as he bought goods at home. For that matter, a foreigner could spend his life in this country without permit and without informing the police. Unlike the countries on the European continent, the state did not require its citizens to perform military service. An Englishman could enlist, if he chose, in the regular army, the navy or the territorial’s. He could also ignore, if he chose, the demands of national defence. Substantial householders were occasionally called on for jury service. Otherwise, only those who wished to do so, helped the state. ...It left the citizen alone.’*<sup>823</sup>

Taylor’s observation embodies a key liberal ideal – that the optimal state is one in which there is minimal intervention into the affairs of individuals - the citizen is to be left alone to manage his or her own affairs.<sup>824</sup> As noted in the previous chapter, the liberal justification for this view is that individuals should be free to pursue their self-interest without control or restraint by society - individual rights should exist independently of government because they are natural, inherent and inalienable. Indeed, those advocating a minimal state often argue that the only function of state bodies should be the protection of individuals from aggression, theft, breach of contract and fraud. In other words, an ideal liberal state should consist of very few branches of government and the only legitimate governmental institutions should be the police, judicial systems, prisons and the military

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<sup>823</sup> A. J. P. Taylor, *English History 1914-1945*, Oxford University Press, 1965, p1. See also the discussion in John Gray, *Liberalism*, 2<sup>nd</sup> Edition, Open University Press, 1995, p26.

<sup>824</sup> See, for example, Berlin, *Two Concepts of Liberty*, An Inaugural Lecture Delivered before the University of Oxford on 31<sup>st</sup> October 1958, Clarendon, 1958.

For liberals, the principle of minimal government embodies two major attitudes towards the state in particular and political authority in general. Firstly, the ideal liberal state should embody the interests of all its citizens. This, according to liberals, is best achieved where the state simply leaves the individual alone to pursue his own interests.<sup>825</sup> The state should merely act as an impartial umpire when individuals or groups come into conflict with each other.<sup>826</sup> Secondly, it suggests that government is created by individuals for individuals. Government arises out of the agreement, or consent, of the governed and it exists in order to serve their needs and interests.<sup>827</sup>

Whilst nationalists may find the concepts of individual freedom and constitutionalism attractive, those thinkers advocating a state-centred national security agenda, may still reject some of the ideals of liberalism. This is because the promotion of human rights, whilst seen as desirable, tends to be seen as competing with, or even compromising, core issues of national security. In other words, upholding human rights is often seen as a luxury to be pursued when the government has the spare diplomatic capacity and national security is not being jeopardized. The result of this thinking is that, under a predominantly national security agenda, there may be a predisposition to trade off liberty and constitutionalism in favour of security concerns, such as defeating terrorism. Thus, rather than protecting the civil and democratic rights of individuals, the primary concern of the national security agenda is to ensure the survival of the nation state, its territories, its governmental institutions and its right to self determination. The remaining chapters will examine these state-centred approaches to national security in more detail

## **5.7 The Culmination and Realisation of a State-Centred Agenda for National Security**

Security – being or feeling safe from danger – is usually a condition that is widely held to be of great value. Politicians are often willing to exert considerable effort and devote considerable resources to ensuring that there is adequate protection from actual or perceived harm. Here, security tends to be broadly about the pursuit of freedom from the threats posed by, for example, the hostile intentions of other states, terrorism, espionage, crime and the sabotage of the critical national infrastructure. In short, it is about preserving the nation state and its established systems of government.

Preserving the nation state and its governing apparatus may prioritise certain elements of security over and above other interests. The predominant security concern of those advocating a national security

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<sup>825</sup> See, for example, Berlin, *Two Concepts of Liberty*, An Inaugural Lecture Delivered before the University of Oxford on 31<sup>st</sup> October 1958, Clarendon, 1958.

<sup>826</sup> See, for example, Locke, J. *Two Treatises of Government*, 1690.

<sup>827</sup> See, for example, Locke, J. *Two Treatises of Government*, 1690.

agenda may involve supporting imperatives such as: maintaining effective armed forces; marshalling economic power to facilitate or compel cooperation from other states and ensuring the resilience of the critical national infrastructure.<sup>828</sup> In addition to these factors, protecting national security also includes: implementing civil defence and emergency preparedness measures; utilising the intelligence agencies to detect and defeat potential or actual threats to external or internal security; and enacting and implementing security related legislation such as anti terrorism measures.

Thus, an ‘ideal state’, governed exclusively by the priorities of national security, may entail a strong military force designed to ensure the survival of its territories from the threat of invasion and/or annexation. There may also be an emphasis on the right of the security agencies to conduct surveillance and other covert operations, oriented towards the optimisation of state security, without the fear of redress and with limited, or even no, legal-constitutional accountability. Security related legislation could be rigorously enforced. This could include increased stop and search powers; the capacity to detain potentially hostile individuals without the need for a warrant or court appearance; the ability to freeze, and even confiscate, the funds of such individuals or groups; and the ability to limit or suspend so-called ‘basic rights’, such as free speech and association, wherever this appears to undermine security interests which are deemed to have an overriding quality.

The subsequent paragraphs will examine the ramifications of these ideals were they to be fully, or unreservedly, incorporated into national security policy. The discussion will begin by exploring the possible measures that could realise the ideals of security on a military and economic level. The discussion will then consider how a strong national security agenda could affect the measures used to uphold law and order. In this respect the chapter will explore the potential for the increased use of surveillance measures, and measures that may limit public protest, where this is seen as being against the national interest, or where it is used to prevent and detect crime. This section of the chapter will also look at the emergency preparedness measures that may be adopted to protect the critical national infrastructure from internal or external attack. Finally, the chapter will discuss how those seeking a stronger national security agenda may seek to promote and to protect the UK’s national identity both at a domestic and an international level. This entails encouraging patriotic loyalty and pride in the nation.

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<sup>828</sup> See, for example, [www.mi5.gov.uk](http://www.mi5.gov.uk). Foreign and Commonwealth Office. [www.fco.gov.uk](http://www.fco.gov.uk).

## 5.8 The Establishment of Military and Economic Power

A major aspect of security for traditionalists concerns military issues and the use of force.<sup>829</sup> In this conception of security, the international system may be seen as a '*brutal arena*'<sup>830</sup> in which '*daily life is essentially a struggle for power, where each state strives not only to be the most powerful actor in the system, but also to ensure that no other state achieves that lofty position*'.<sup>831</sup> According to Mearsheimer, this thinking is based on five assumptions which are frequently made about the international system. First, that the international system is anarchic. Second, that states inherently possess some offensive military capabilities. Third, that states can never be certain about the intention of other states. Fourth, that the most basic motive driving states is survival. And finally, that states are rational actors which think strategically.<sup>832</sup>

The assumption that '*states look for opportunities to take advantage of each other and, therefore, have little reason to trust each other*,'<sup>833</sup> may dictate the behaviour of states in the following ways - states fear each other; each state aims to guarantee its own survival; and states aim to maximize their power. Thus, the conditions in the daily life of the international system may be characterised by competition between states and the possibility of war may always be in the background. For example, during the Cold War, when security thinking centred on an idea of national security which was largely defined in military terms, the military scene was maintained by the division of the world into two poles with a rough balance of military strength between them.<sup>834</sup> Whilst, the demise of the Cold War bipolar structures may have led to new concepts of security in which not only military realities, but also the political, social and economic concerns of the post-Cold war world are taken into account,<sup>835</sup> military responses to questions of nuclear strategy and deterrence, the proliferation of weapons of mass destruction and the future nature of war, still continue to prevail.<sup>836</sup>

In the climate described above, the ideal national security state must seek to protect the nation from aggressive external forces, such as terrorism, war and the threat of war. Intelligence operations may be used to assist the military to obtain information relating to any given country, its intentions and its capabilities. In the modern era, this may not just be related to military power, but also to economic power, or to intelligence relating to specific resources such as oil, minerals and access to other

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<sup>829</sup> Barry Buzan and Jaap de Wilde, *Security: A New Framework for Analysis*, Boulder, 1997 p1.

<sup>830</sup> John Mearsheimer, *The False Promise of International Institutions*, International Security, Vol. 19, No. 3, p 5-49 p9.

<sup>831</sup> John Mearsheimer, *The False Promise of International Institutions*, International Security, Vol. 19, No. 3, p 5-49, p9.

<sup>832</sup> John Mearsheimer, *The False Promise of International Institutions*, International Security, Vol. 19, No. 3, p 5-49, p10.

<sup>833</sup> John Mearsheimer, *The False Promise of International Institutions*, International Security, Vol. 19, No. 3, p 5-49, p19.

<sup>834</sup> For further discussion, see David Mutimer, *Beyond Strategy: Critical Thinking and the New Security States*, Contemporary Security and Strategy, Edited by Craig A. Snyder, Macmillan, 1999. See also: Robert G. Patman, *Security in a Post Cold-War Context*, Macmillan Press, 1999.

<sup>835</sup> For example, see discussion: Barry Buzan, *People States and Fear: An Agenda for International Security Studies in the Post Cold-War Era*, Second Edition, Boulder/ Lynne Rienner, 1991. Craig A. Snyder, *Contemporary Security and Strategy*, Edited by Craig A. Snyder, Macmillan Press, 1997, p2.

<sup>836</sup> Cabinet Office, *A Strong Britain in an Age of Uncertainty: The National Security Strategy*, October 2010, Cm.7953.

resources. Intelligence may also be used to obtain information on a particular battle or campaign, such as the number of military units, their strengths, or the location of enemy supplies and depots. In a strong national security state, this intelligence gathering may not be hindered by constitutional or legal constraints. As we have seen in the previous chapters, in times of national emergency or war, the balance which usually exists between the rights of the individual and national security may tend to be skewed in favour of national security. Thus, the adoption of these measures could have several major ramifications for citizens. Firstly, the state may need to operate in a constant state of military preparedness in which imperatives concerning war, or the threat of war, are prioritised as core foreign policy imperatives. Secondly, there may be increased resort to legal doctrines, such as the Royal prerogative, which can allow the government to implement security measures without recourse to normative constitutional and legal mechanisms for accountability. Thirdly, and at its most extreme, law makers may employ the use of forced military service, in the form of conscription, to expand military awareness and power.

### ***5.8.1 Military Expansion***

Those promoting a stronger national security state, may assert that the civilian population is dependent upon, and should therefore be subservient too, the needs and goals of its military for continued independence, freedom and prosperity. In this conception, the maintenance of the military is not, as some may claim, a burdensome expense, but a necessary means of ensuring a secure and resilient UK, which can project its power onto the worldwide stage.

Achieving recognition on the worldwide stage may require that the UK possesses both military and economic strength, along with diplomatic power. Enhancing state power is often closely linked to the ideals of security, status, capability and prosperity. From the standpoint of security, a state may wish to protect its sovereignty or strategic interests from repeated or significant challenge. With regards to status and capability, it is often claimed that only powerful states can influence, coerce, co-operate or compete with other state actors. This is because such influence may need to be backed up with mechanisms such as the use of force, economic interaction, pressure, diplomacy and cultural exchange. Since economic interaction is an important element of security, prosperity is often claimed to be an interconnected and mutually supportive element of the national interest.<sup>837</sup> For example, the current Government claims that prosperity *'enables us to afford the skills and capabilities that are needed to advance security from training and arms, to technical and scientific expertise and*

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<sup>837</sup> Cabinet Office, *A Strong Britain in an Age of Uncertainty: The National Security Strategy*, October 2010, Cm.7953, Para 2.12 and 2.13.

equipment'.<sup>838</sup> According to the Government 'security and prosperity form a virtuous circle.'<sup>839</sup> It seems that 'without the security of our land and infrastructure and the ability of our citizens to live their lives freely, the foundations of our prosperity, trade, industry, enterprise and education, would be undermined.'<sup>840</sup>

For some persons, military intervention and economic security are also closely tied to concepts of freedom and democracy. David Blunkett, for example, argued that 'the military engagement in Afghanistan illustrates not a war of competing civilizations, but a defence of democratic states from terrorist attacks sponsored by deep oppression and brutalisation.'<sup>841</sup> In this conception, UK security should be concerned with protecting our key national values from potential foreign aggressors.<sup>842</sup> In other words, military strength may be necessary to defend democracy and the rule of law both at home and abroad. Military actions are, therefore, sometimes claimed to be justified by furthering an overseas humanitarian cause; calming political instability; preventing acts of terrorism; defending refugees and providing disaster relief. Thus, it may be argued that military action can, in some circumstances, uphold civil liberties rather than diminish them.<sup>843</sup>

In order to maintain these benefits, and to exercise influence in the international environment, security advocates may argue that the UK should operate vigilant security measures in which military and other threats to UK security interests are constantly assessed and reassessed. Other states, particularly probable enemies, may need to be evaluated with regards to their military size, their scientific and technological capabilities and their economic resources. This information, along with information about UK resources, can be used to determine ways to improve existing means of diplomatic and military activity, including principles and recommendations for the preparation and waging of military or economic operations.

It is not inconceivable that the most fervent supporters of a security state may use the need for vigilance in security planning to make calls for the intensification of the quality and quantity of military measures and the degree of legal and operational latitude that is available for their implementation. For example, on a constitutional level, those promoting a strong military state may

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<sup>838</sup> Cabinet Office, *A Strong Britain in an Age of Uncertainty: The National Security Strategy*, October 2010, Cm.7953, Para 2.12 and 2.13.

<sup>839</sup> Cabinet Office, *A Strong Britain in an Age of Uncertainty: The National Security Strategy*, October 2010, Cm.7953, Para 2.13.

<sup>840</sup> Cabinet Office, *A Strong Britain in an Age of Uncertainty: The National Security Strategy*, October 2010, Cm.7953, Para 2.13.

<sup>841</sup> David Blunkett (former Home Secretary) *Integration with Diversity: Globalisation and the Renewal of Democracy and Civil Society, Re-thinking Britishness*, Foreign Policy Centre. [www.fpc.org.uk](http://www.fpc.org.uk).

<sup>842</sup> Cabinet Office, *A Strong Britain in an Age of Uncertainty: The National Security Strategy*, October 2010, Cm.7953. National Security and British Values, p 23.

<sup>843</sup> David Blunkett (former Home Secretary) *Integration with Diversity: Globalisation and the Renewal of Democracy and Civil Society, Re-thinking Britishness*, Foreign Policy Centre. [www.fpc.org.uk](http://www.fpc.org.uk). See also: Cabinet Office, *A Strong Britain in an Age of Uncertainty: The National Security Strategy*, October 2010, Cm7953. National Security and British Values, p23.

want to make much more use of the Royal Prerogative than is currently the case. Perhaps the advantage of the Royal Prerogative, for those seeking a stronger national security agenda, is that it may potentially allow the government to instigate security measures, including declarations of war, without the need to consult Parliament.

## 5.9 Domestic Security

In addition to securing national interests in the military arena, ensuring security may also concern maintaining law and order in the domestic arena. David Blunkett, for example, stated that '*securing basic social order, and protecting people against attack is a basic function of government*'.<sup>844</sup> For Blunkett, this is a '*fact that has been recognised since Hobbes penned his famous description of life in the ungoverned state as solitary, poor, nasty, brutish and short*'.<sup>845</sup>

Domestic security refers to any governmental actions which are designed to prevent, respond to, and recover from acts of terrorism, serious crime, civil uprising and natural disasters. The targets of security protection include centers of population and the critical infrastructure, including communications, transportation, energy supply and the government itself.<sup>846</sup> In recent years, security matters concerning information and cyber security have also become a major concern. It is claimed that '*with so much of the UK infrastructure and economic activity dependent on information technology, cyber attacks have the potential to be extremely disruptive to our daily lives and cause significant and costly damage to the economy*'.<sup>847</sup> Thus, the scope of domestic security extends to matters of creating emergency preparedness measures; the use of domestic and international intelligence activities to monitor those defined as a national security risk and the enactment and enforcement of legislation, such as the Terrorism Acts, which will regulate the use of criminal and civil law enforcement mechanisms.

In the context of creating a robust national security state, the need to respond to both domestic and international crisis could be used to justify the creation of stronger legislation and control. The justifying argument tends to be that, in times of national crisis, normal legal and constitutional principles should give way to the overriding need to deal with the emergency. Indeed, in recent years the threat to national stability emanating from terrorism has been advanced as a legitimating factor in

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<sup>844</sup> David Blunkett (former Home Secretary) *Integration with Diversity: Globalisation and the Renewal of Democracy and Civil Society, Re-thinking Britishness*, Foreign Policy Centre. [www.fpc.org.uk](http://www.fpc.org.uk).

<sup>845</sup> David Blunkett (former Home Secretary) *Integration with Diversity: Globalisation and the Renewal of Democracy and Civil Society, Re-thinking Britishness*, Foreign Policy Centre. [www.fpc.org.uk](http://www.fpc.org.uk).

<sup>846</sup> See: Homeland Security, *Threat Assessment by the All Party Parliamentary Group on Homeland Security*, [homelandsecurity.org.uk](http://homelandsecurity.org.uk). (Last accessed January 2013).

<sup>847</sup> See: Homeland Security, *Threat Assessment by the All Party Parliamentary Group on Homeland Security*, [homelandsecurity.org.uk](http://homelandsecurity.org.uk). (Last accessed January 2013).

the development of permanent, as opposed to temporary, terrorism legislation,<sup>848</sup> which means that we now live in a state of ‘permanent emergency.’<sup>849</sup>

This thinking, particularly if it is taken to its practical limits, may have major ramifications for the conduct of domestic life. A ‘high threat’ climate may make it easier for those seeking a more robust model of state security to increasingly resort to emergency preparedness measures. These measures could potentially be utilised, for example, to enact temporary or permanent legislation that may deal with an alleged catastrophe, or to state surveillance operations, which could increasingly track the activities of British subjects. In turn, this would most likely lead to an enlargement of the legal mechanisms with which security measures may be enforced.

At its most extreme, the terrorist threat could even be used to legitimise a police state. The term ‘police state’ describes a state in which the government exercises rigid and repressive controls over the social, economic and political life of the population. The inhabitants of a police state may experience restrictions on their mobility, and on their freedom to express or communicate political or other views, which are subject to police monitoring or enforcement. Political control may be exerted by means of a secret police force, such as the security agencies, which may instigate covert investigations and operate outside the boundaries normally imposed by a constitutional state. Indeed, any threat to the life of the nation and its citizens may be used to legitimise measures such as the introduction mass surveillance and the introduction of biometric identity cards, which each citizen is required to carry.<sup>850</sup> Public protest may be banned or restricted to authorisation by the police,<sup>851</sup> and protest leaders, even politicians, may be arrested under conditions of secrecy.<sup>852</sup> One example of a fully realised surveillance or police state may be the one operated under the KGB in the Soviet Union. Here, the state was characterised by the presence of a large elite force acting as a watchdog of a security broadly defined as the necessity for the state to maintain an enormous vigilance and enforcement apparatus -- this apparatus was not accountable to the public and enjoyed immense power. Indeed, it has been said that ‘every facet of daily life fell into the KGB’s domain.’<sup>853</sup>

It seems unlikely that UK decision-makers, even those advocating a strong security agenda, would wish to embrace a regime that is as repressive as that which operated in the USSR. However, whilst

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<sup>848</sup> The original strategy for dealing with terrorism was legislation for fixed periods. Terrorist legislation was subject to annual renewal by Parliament.

<sup>849</sup> See comments on the permanency of terrorism legislation and other emergency preparedness legislation by Clive Walker: House of Lords Constitution Committee – *Minutes of Evidence, Fast Track Legislation: Constitutional Implications and Safeguards*. [www.parliament.uk](http://www.parliament.uk), February 2009.

<sup>850</sup> See for example, *Britain’s Surveillance Society*, BBC news, 2<sup>nd</sup> November 2006, in which Britain has been described as the ‘most surveyed country’ in the world.

<sup>851</sup> For example, protests within a half-mile radius of the Houses of Parliament have been banned unless authorised by the Metropolitan Police.

<sup>852</sup> For example, the arrest of Damian Green.

<sup>853</sup> Michael Waller, *Secret Empire: The KGB in Russia Today*, Boulder, 1994, pp 13-15.

the UK may not become a ‘police state’ within the strict meaning of this term, it may develop into a ‘policed state’, in which law enforcers experience an increase in their current powers. This may include, for example, an increase in the power of the police to stop, search, detain and question individuals along with a corresponding decrease in the right of that individual to challenge such measures. Here, for instance, the police would not be required to show that there is reasonable suspicion that an offence has been, or is being, committed, nor would they need a warrant to search the homes and vehicles of those they suspect. The rights of the detainee could be further reduced by the denial of sufficient legal support and advice and an increase in the length of time that a suspect may be held without charge.

These measures could have a significant effect on the relationship between British subjects and the government. It is therefore necessary to analyse them in more detail.

### ***5.9.1 Increased Surveillance***

A strong national security state may tend to protect security by ensuring that the activities of its subjects, particularly those of a political nature, are adequately monitored. Thus, there could be more use of surveillance, which could allow the government to track the movements of large numbers of citizens and visitors. For example, there may be increased checking of an employee’s qualifications, political associations and CV’s along with the introduction of identity documents and corresponding data bases. In the modern era, the surveillance state would tend to make the most of today’s technologies for mass surveillance. This could include the use of data bases and pattern recognition software to cross correlate information obtained by wire-tapping, including speech recognition and telecommunications traffic analysis. Surveillance can also include monitoring financial transactions and the use of automatic number plate recognition systems. Indeed, much of the wherewithal to achieve such surveillance is already in place in the UK and is being utilised. It has been argued that the UK could be considered to be the most expansive communications surveillance regime in the democratic world, with some estimating that there are more than 4.2 million CCTV cameras, the equivalent of one camera for every 14 people.<sup>854</sup> Whilst many of these CCTV cameras are privately owned and operated, it has been noted in recent years that there has been a rapid growth in the use of these covert surveillance techniques by law enforcement agencies in the UK.<sup>855</sup>

National security advocates may claim strong reasons for enhancing the role of surveillance. It has been argued that ‘*mass surveillance is an attractive tool of security because it dispenses with the need*

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<sup>854</sup> Adam Gersch, *Covert Surveillance - A Snoopers Charter*, Arch. Rev. 2012, p5, pp 5-8.

<sup>855</sup> Loftus, Goold, MacGiollabhui, *Covert Policing and the Regulation of Investigatory Powers Act 2000*, Arch. Rev, 2010, 3-9.

to set priorities in advance.<sup>856</sup> The point is that, in theory, surveillance is a preventative measure that thwarts danger before it materialises.<sup>857</sup> In practice, the use of preventative measures may effectively mean that, in the face of serious or irreversible harm, lack of full and precise certainty should not be used as a reason for inaction or postponement of cost effective measures to prevent such harms. This precautionary logic, it is claimed '*becomes a ground not merely for action, but for robust pre-emptive measures and the enactment of emergency powers in the face of the unknown*'.<sup>858</sup> Thus, when it comes to security, a preventative course of action may lead to increasing demands for governance of the unknowable. In turn, this may fuel a resultant desire for increased data collection, mass surveillance, data retention, and biometric ID cards, '*all of which may be designed to observe everyone, everywhere*'.<sup>859</sup>

The precautionary approach is already well evidenced in anti-terrorism legislation. Here, the impulse to govern at the limits of knowledge may result in several tendencies. Firstly, offences are commonly defined in broad, imprecisely defined terms that may have the potential to criminalise a very wide range of activities, some of which are very remote from the actual planning or preparation of any specific terrorist act. Secondly, the potential to commit an offence is targeted at earlier points in time. For example, it has often been suggested that the Terrorism Act 2000 contains an immensely broad and imprecise definition of terrorism along with a number of widely drafted offences of possession and of providing financial support to a terrorist association. No longer need one be identified as an actual suspect terrorist to find oneself subject to stringent security measures. Rather, some anti-terrorism legislation may override traditional limitations in respect of accomplice liability by relying on 'guilt by association'. Since this has the effect of significantly expanding the scope of liability, it can potentially be utilised to permit '*raids of premises and the stop and search of individuals where the conduct of those individuals is only suspected to be at the very furthest margins of terrorist activity*'.<sup>860</sup>

Whilst any excessive capability afforded to the state by which to monitor the lives of individual citizens may seem regrettable, those promoting strong national security measures may still claim that, in the face of terrorism, existing legislation is inadequate and more needs to be done. Indeed, in recent years there have been increasing political and public demands to intensify the tools of surveillance. On a political level, the Prime Minister stated: '*I do not want to be the Prime Minister standing at this dispatch box saying I could have done more to prevent terrorist attacks, but we did*

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<sup>856</sup> Lucia Zedner, *Security*, Routledge, 2009 p75.

<sup>857</sup> For comments on the unpredictable harms, which preventative measures seek to tackle, see: M Bothe, *Terrorism and the Legality of Pre-emptive Force*, European Journal of International Law, 2003, pp 227-40.

<sup>858</sup> Lucia Zedner, *Security*, Routledge, 2009 p75.

<sup>859</sup> Lucia Zedner, *Security*, Routledge, 2009 p75.

<sup>860</sup> V. Tadros, *Justice and Terrorism*, New Criminal Law Review, 2007,10(4), 658-89. See also V. Tadros, *Criminal Responsibility*, Oxford University Press, 2007.

*not have the courage to take difficult steps.*<sup>861</sup> The call to enhance state surveillance measures has reached European level. On the 25<sup>th</sup> March 2004, shortly after the terrorist attacks in Madrid, The European Council in its Declaration on Combating Terrorism deliberated the importance of legislative measures on traffic data retention.<sup>862</sup> On the 15<sup>th</sup> March 2006, the European Union adopted the Data Retention Directive,<sup>863</sup> The Directive requires member states to ensure that communications providers retain, for a period between 6 months and 2 years, necessary data as specified in the Directive. The retained data will show the source, destination, date, time and duration of a communication. It will also identify the communication device and the location of mobile communication forms.

By analysing the retained data, governments can identify the location of an individual, an individual's associates and the members of a group, including political opponents. The data can potentially be retained and accessed whether the activity of any given target is lawful or unlawful. The data is required to be made available to 'competent national authorities', for the purpose of the investigation, detection and prosecution of serious crime, as defined by the member state in its national law. The bodies able to access retained data in the UK are listed in the Regulation of Investigatory Powers Act 2000. They include the police, the security agencies and HM Revenue and Customs. Of worthy note, the Regulation of Investigatory Powers Act 2000 also gives the Home Secretary powers to change the list of bodies with access to retained data through secondary legislation. This is a power that has been utilised. Therefore, the list of authorised bodies has grown and now includes the Food Standards Agency, Local Authorities and the National Health Service.<sup>864</sup>

Opponents of these data retention powers have claimed that the intrusion of privacy is a disproportionate response to the threat of terrorism. However, the drive towards increased data retention initiatives is ongoing. In the Queens Speech, on the 8<sup>th</sup> May 2012, it was announced: *'My government intends to bring forward measures to maintain the ability of the law enforcement and intelligence agencies to access vital communications data under strict safeguards to protect the public.'*<sup>865</sup> According to the Home Office, it will implement key proposals for the storage and acquisition of internet and e-mail records, including introducing legislation, as necessary by the end of June 2015.<sup>866</sup> The Home Office justification for the introduction of these measures is that they are

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<sup>861</sup> Queens Speech Debate, 9<sup>th</sup> May, 2012.

<sup>862</sup> See: Europa Press Releases, *Data Retention Directive*, Memo/05/328, Brussels 21<sup>st</sup> September 2005.

<sup>863</sup> Directive 2006/24/EC.

<sup>864</sup> Statutory Instrument 2000, No. 2471, granting additional bodies access to telecoms data. The national Archives, 7<sup>th</sup> September 2000.

<sup>865</sup> [www.cabinetoffice.gov.uk/queens-speech-2012](http://www.cabinetoffice.gov.uk/queens-speech-2012).

<sup>866</sup> Home Office, *Home Office Structural Reform Plan, Monthly Implementation Update*, April 2012, para. 5.3. See also the comments in: Adam Gersch, *Covert Surveillance - A Snoopers Charter*, Arch. Rev, 2012, 5, 5-8.

necessary *'for the purpose of 'maintaining the capabilities' of the police in the interests of public safety and national security, and to keep up with terrorism and organised crime.*<sup>867</sup>

In this climate of increased surveillance capability, the security agencies and the police may be permitted to operate with reduced legal and constitutional control on their powers to mandate checks on citizens or records held concerning them. Rather, they may be encouraged to intensify the use of surveillance powers by combining the data retention provisions with other relevant enabling legislation. This legislation would include the Security Service Acts of 1989 and 1996 and the Regulation of Investigatory Powers Act 2000 (RIPA). With regards to the RIPA, there may be a significant increase in the number of public authorities that are empowered to seek warrants for surveillance under the Act and the reasons for which they may conduct this surveillance. There may also be further intensification of the measures used to collect data. In November 2012, answers to a parliamentary enquiry in the German Bundestag revealed that there may be plans in some EU countries, including the UK, to extend data retention to chats and postings on social networking sites.<sup>868</sup> Further, there have been claims that the Association of Chief Police Officers has discussed plans to collect data, in the UK, from a nationwide network of automatic number plate recognition cameras and to store the data for two years.<sup>869</sup> If such data is linked together, it may be possible to track both the movements and the activities of most British subjects, for much of the time. If it was further linked to other enabling legislation, it could be utilised to create a significant increase of the number of surveillance targets. For example, it could be used in tandem with section 1 of the Security Service Act. Section 1 still contains provisions which allow the security agencies to define supposed subversives as potential national security threats. Thus, whilst current practice means that the MI5 activity in countering subversion is assessed as negligible, the enabling Act has never been altered and such investigations could be conducted without the need for further amendment or parliamentary debate.

Overall then, the precautionary approaches described above may be utilised to underpin a raft of security measures adopted by the government through which to seek to combat terrorism and serious crime. However, these changes in the orientation, values, and organisation of crime control could so alter the means of controlling crime that they topple traditional models for analysing criminal justice. Indeed, it is argued that core criminal justice principles, not least the presumption of innocence, are already *'threatened by the pursuit of security, and institutions that are firmly within the system, such as policing and sentencing, may be reconfigured to new preventative or security orientated ends.*<sup>870</sup> Thus, whilst the justification for widespread surveillance would tend to be that it is essential for the

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<sup>867</sup> Home Office, *Home Office Structural Reform Plan, Monthly Implementation Update*, April 2012.

<sup>868</sup> Vorratsspeicherung für Facebook-Daten, FM4 Online (only available in German).

<sup>869</sup> John Lettice, *Roll-out of UK's 24/7 Vehicle Database Begins*, 2005. [www.theregister.co.uk](http://www.theregister.co.uk). (last accessed Feb 2013).

<sup>870</sup> A. Ashworth and L. Zedner, *Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure and Sanctions*, Criminal Law and Philosophy, 2008, 2:21-51.

prevention of serious crime and terrorism which may blight our communities,<sup>871</sup> the civil right of the British subject to his own private space could be significantly affected by the measures.<sup>872</sup>

### **5.10 Protecting the National Identity and Promoting Patriotic Pride in the Nation**

When it comes to protecting security, political leaders and the intelligence agencies may tend to promote the ideal of an organic society, which emphasises the interdependence of every human being, over and above individual goals and aspirations. In this conception of security, there may be more weight attached to the individual's sense of citizenship and identity within the nation-state, than on his or her rights to live freely from the constraints of society. For example, for David Blunkett, a progressive response to the challenge to terrorism and crime '*must be found in giving content and meaning to citizenship and nationality*'.<sup>873</sup> Whilst for Blunkett, this 'greater content' can be found in active and real participation in the life of the community and in local and national elections, some protagonists of security may demand that the collective identity of the nation forms a part of the citizens identity in the sense that belonging to this group must supersede all other considerations. In this conception of a collective identity, there may be an expectation that the patriotic citizen will, in a time of war or national emergency, assume great risks for the group, including the loss of his life.

Thus, the patriotism to which Blunkett may appeal is not without its dangers. Patriotism tends to demand unquestioned loyalty to the state from citizens, especially in times of war, or in the face of perceived external and internal threats to the security of the nation. Lack of support for the government and its policies, made by political opponents, can potentially be labelled as unpatriotic and against the will of the nation. Thus, it is not inconceivable that security thinkers can appeal to patriotic emotions in attacking their opponents, implicitly or explicitly accusing them of betraying the country. The danger is that any mistrust within communities may potentially be used to legitimise policy and legislative measures that would otherwise be unacceptable. For example, in the European Union, where once mass surveillance was considered unjustifiable, the impact of the Madrid and London Bombings has tended to secure its place as an essential plank of the armoury in the war on terror. The point is that, at its most extreme, the potential threat to security can be applied to a range of radical measures. It could, and has, for example, led to the reintroduction of detention orders, or in some cases, deportation.

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<sup>871</sup> Cabinet Office, *A Strong Britain in an Age of Uncertainty: The National Security Strategy*, October 2010, Cm. 7953. See also: David Blunkett (former Home Secretary) *Integration with Diversity: Globalisation and the Renewal of Democracy and Civil Society, Re-thinking Britishness*, Foreign Policy Centre. [www.fpc.org.uk](http://www.fpc.org.uk).

<sup>872</sup> M. Bothe, *Terrorism and the Legality of Pre-emptive Force*, *European Journal of International Law*, 2003. pp 227-40. See also: Lucia Zedner, *Security*, Routledge, 2009.

<sup>873</sup> David Blunkett (former Home Secretary) *Integration with Diversity: Globalisation and the Renewal of Democracy and Civil Society, Re-thinking Britishness*, Foreign Policy Centre. [www.fpc.org.uk](http://www.fpc.org.uk).

### 5.10.1 Detention and Internment in Conditions of Secrecy.

Internment concerns the imprisonment or confinement of people, usually in large groups, without trial. Perhaps the most infamous example of internment adopted by the British Government was implemented during World War II under the Emergency Powers (Defence) Act 1939.<sup>874</sup> This Act, which was passed shortly before the outbreak of the war, provided that *'if the Secretary of State has reasonable cause to believe any person to be of hostile origin or associations, or to have been recently concerned in acts prejudicial to the public safety, or the defence of the realm, or in the preparation or instigation of such acts, and that by reason thereof it is necessary to exercise control over him, he may make an order against that person directing that he be detained'*. Effectively then, this Act contained rights for the Secretary of State to suspend Habeas Corpus. There was some provision for the Secretary of State to suspend the order and subject the detainee to other conditions such as prohibiting or restricting the possession or use of any specified articles; imposing employment, business and residential restrictions; and requiring the detainee to notify his movements to such authority or person as may be so specified.<sup>875</sup> The provisions of the Act were utilised in September 1939, when the police arrested and detained a large number of Germans living in Britain. There was a general perception, in government and public circles, that these people may be Nazi spies pretending to be refugees.

The most recent example of detention without charge came under the Anti-Terrorism, Crime and Security Act 2001, which was rushed through Parliament as emergency legislation in the aftermath of the attacks of 9/11. Part 4 of the Act allowed for a suspected international terrorist to be deported, but if that wasn't possible because the person may be executed or tortured if returned to their home country, a foreign national could be indefinitely imprisoned without charge or trial.<sup>876</sup>

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<sup>874</sup> Emergency Powers (Defence) Act 1939.

<sup>875</sup> In the event the Advisory Committee, which was headed by Norman Birkett, would be presented with a statement of the reasons why detention had been proposed, which was usually drawn up by MI5. The detainee was not permitted to see this statement. The Committee could recommend continued detention, release under condition, or unconditional release. The recommendations of the Committee went to the Home Secretary, who was not bound to accept the recommendation. Indeed, it claimed that MI5 often lobbied him not to accept a recommendation for release. The most significant case brought was *Liversidge v Anderson*. *Liversidge* who was a successful Jewish businessman, brought a civil action for damages for false imprisonment. The ultimate ruling in this case was that where it is required in law that a Minister 'has reasonable cause to believe' something before acting, the court can only enquire into whether he really did believe it, and not whether the things causing the belief were true. However, not all the judges were in agreement. Lord Atkin wrote a dissenting judgment.

<sup>876</sup> In *A v Secretary of State for the Home Department* (2004) UKHL 56. These provisions were ultimately declared by the House of Lords to be incompatible with the rights protected by the European Convention on Human Rights.

Whilst these provisions were the subject of much criticism for breaching alleged fundamental human rights, such as the right to a fair trial and liberty,<sup>877</sup> those in favour of the provisions maintained that the measures were necessary. David Blunkett, for example, claimed that *'in simple terms, there is an obligation on those who have some influence over the levers of state power to be more careful to maintain democratic freedoms than there is on those who oppose those values.'*<sup>878</sup> For David Blunkett, the attack of 9/11 was not a rare and relatively isolated incident in a foreign state. Nor was it merely a threat to economic stability or to commerce and social intercourse. Rather, it was *'such an appalling, inexplicable and morally unimaginable act of terror that it appeared almost to symbolise our vulnerability itself.'*<sup>879</sup> In Blunkett's eyes, the attacks were a threat to democracy. He argued that *'it was not just simply a terrorist action, but a fundamental rejection of the values of democracy. The Al Qaida and their Taliban sponsors were motivated by doctrines that reject democratic norms, human rights, and the whole moral basis upon which our society has evolved in recent centuries.'*<sup>880</sup> Indeed, in Blunkett's final analysis, the 9/11 attacks were *'an attack on modernity itself.'*<sup>881</sup> Thus, the provisions in Part 4 of the Act were claimed to be morally defensible because they protected democracy; our traditional way of life; the right of the population, as a whole, to move freely and safely; and the overriding well-being of our nation-state.<sup>882</sup>

The point is that for those thinkers advocating a strong national security state, internment may be regarded, not as a grave infringement on civil liberty, but as a perfectly reasonable, if regrettable, response to a national emergency, particularly one which concerns an imminent threat or actual invasion by a foreign power. In the current climate, there is a strong perception that the UK is engaged in a 'war on terror'. Therefore, the extent to which the state may legitimately lock up, or otherwise impose restrictions on its nationals if it believes that they may pose a threat to public order, continues to have resonance in security thinking.

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<sup>877</sup> See, for example: John Wadham, *Indefinite Detention without Trial*, New Law Journal, 26<sup>th</sup> October 2002. See also: Tomkins, *Legislating Against Terror: The Anti-Terrorism, Crime and Security Act 2001, 2002*, Public Law, pp 205-220.

<sup>878</sup> David Blunkett (former Home Secretary) *Integration with Diversity: Globalisation and the Renewal of Democracy and Civil Society, Re-thinking Britishness*, Foreign Policy Centre. [www.fpc.org.uk](http://www.fpc.org.uk).

<sup>879</sup> David Blunkett (former Home Secretary) *Integration with Diversity: Globalisation and the Renewal of Democracy and Civil Society, Re-thinking Britishness*, Foreign Policy Centre. [www.fpc.org.uk](http://www.fpc.org.uk).

<sup>880</sup> David Blunkett (former Home Secretary) *Integration with Diversity: Globalisation and the Renewal of Democracy and Civil Society, Re-thinking Britishness*, Foreign Policy Centre. [www.fpc.org.uk](http://www.fpc.org.uk).

<sup>881</sup> David Blunkett (former Home Secretary) *Integration with Diversity: Globalisation and the Renewal of Democracy and Civil Society, Re-thinking Britishness*, Foreign Policy Centre. [www.fpc.org.uk](http://www.fpc.org.uk).

<sup>882</sup> In December 2004, the House of Lords held that the provisions were incompatible with the European Convention on Human Rights. Such provisions could only be made in an emergency to the extent that it is strictly necessary. The fact that the provision was only enforceable against foreign nationals, and not British nationals who might pose a threat to national security, demonstrated that these measures were not strictly necessary and that they were discriminatory. Thus, the court made a Declaration of Incompatibility, saying that it was not compatible with the right to liberty.

## 5.11 The Benefits and Criticisms of a Strong National Security Agenda

The discussion in the previous paragraphs has demonstrated that the ideal national security state tends to prioritise the following four areas. Firstly, it may prioritise the establishment of a military power which will defend the nation from hostile or aggressive foreign powers. This may also involve the use of the intelligence agencies to gather strategic or tactical information.<sup>883</sup> Secondly, there may be a preference for the maintenance of the existing governing regime and the established hierarchy as key goals of domestic security policy.<sup>884</sup> This may involve the creation of a strong system of legal regulation that promotes the use of emergency and other powers, which are seen as beneficial to, and required by, security imperatives. Here, security measures may include combating any subversion of the nation's established way of life by limiting civil liberties, such as the right to free speech and association, insofar as these conflict with security imperatives. The third major aim would be to promote an organic society. This could encompass values such as patriotism and a willingness to serve, fight for, and defend one's country. Finally, there may be a preference towards protecting the confidentiality and secrecy of official secrets, including the sources and methods of the intelligence services and military intelligence.

The implications of this approach to security issues can hardly be over-emphasised. If the security of the people and the national territory is regarded as supreme, then the search for security and achieving its preconditions can become the key determinant of foreign and domestic policy and international relations more generally. Indeed, the perceived threat of insecurity will tend to affect the way that policy, and thereby legislation is drafted and expressed: It may also affect the ways in which the government reacts to dissenting views and political opposition.

The theoretical justification for this view is perhaps in accord with the reasoning of writers such as Thomas Hobbes. Hobbes constructed a picture of what life had been like before government was formed, in a stateless society, or in what was termed a '*state of nature*.'<sup>885</sup> This state of nature would, it was argued, be characterised by an unending war of each against all, which in Hobbes' words, would produce a life that was '*solitary, poor, nasty, brutish and short.*'<sup>886</sup> As a result, he argued that rational individuals would enter into an agreement, or 'social contract', to establish a sovereign government, without which a stable and orderly life would be impossible. In other words, individuals would recognise that it is in their interests to set up a system of law even if that meant sacrificing a portion of their liberty. Therefore, the modern justification for the promotion of the organic view of society is that citizens and states have needs that are above and apart from the individuals that

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<sup>883</sup> See, for example: [www.mi5.gov.uk](http://www.mi5.gov.uk), and the Foreign and Commonwealth Office. [www.fco.gov.uk](http://www.fco.gov.uk)

<sup>884</sup> Hobbes, *The Leviathan*, 1651.

<sup>885</sup> Hobbes, *The Leviathan*, 1651.

<sup>886</sup> Hobbes, *The Leviathan*, 1651.

comprise it. A typical argument here is that true freedom entails co-operating with others in a way which may, for example, facilitate each party's happiness and liberty.

In terms of security, promoting an organic society may effectively mean that each person must unite with others to preserve both the group and the institutions that defend their rights. The ideal security state, therefore, may maintain social stability by increasing the control over, and support of, stronger, more authoritarian, political and social apparatus. However, this may mean that there are fewer guarantees of civil liberties and meaningful opposition to government power. For example, there may be a limit on the freedom to create and attend groups that question the decisions of the ruling powers, or which compete for power. Indeed, the activities of such groups may be seen in terms of civil disobedience which needs to be tackled by the creation of more powerful law enforcement mechanisms, which would provide security to the governmental system by controlling internal opposition and dissent. It may also mean that law enforcement bodies, such as the security agencies, may be more likely to be permitted to operate quite independently of the rule or the supervision of elected officials, or the concerns of the citizens and constituencies they purportedly serve. Indeed, such agencies would be much more likely to conduct more operations 'behind closed doors' and in secrecy. It may be thought that too much democracy and too many individual rights may threaten national security and economic development.

Liberals, whilst they tend to accept the need to protect citizens from aggressors, such as terrorists, may not approve of the extent to which the national security agenda may seek to prioritise the goal of national security. For liberals, the danger is that the call of 'national security', with its emotive connotations, can potentially allow the security agencies to operate without adequate control and accountability mechanisms. In such a case, it may not be unconceivable that the security agencies could be left to determine their own targets, objectives and mandate. Thus, liberals may be concerned that the setting of the national security agenda, in a totally state-centred scenario, could effectively be set down by unelected officials. These officials may have less cause or desire to either reflect the views of the wider public, or to seek approval of actions perpetrated in the name of national security.

## **5.12 Conclusion**

This research has now made it possible to understand one of the most fundamental of all differences between civil libertarian values and the values promoted by a state-centred view of security. Whereas for civil libertarians, political liberty is the most prized of all political values, to those promoting the national security agenda, it occupies a less elevated position. Whilst national security protagonists may pursue the goal of political liberty, they believe that it is only attained as a consequence of prior

social and political arrangements, including the preservation of existing institutions and the maintenance of social order.

Perhaps the emphasis on guarding the organs and territories of the state can be explained when one considers that national security is an immensely powerful concept. Its surface simplicity and emotional appeal is highly seductive. Indeed, it has been claimed that<sup>887</sup> *‘the welfare, prosperity and power of the group into which I happened to be born is more important than the welfare, prosperity and power, or even the lives, of the members of any or all other groups, has been upheld by most of the human race. Along with that faith is also held another – whenever we are frightened or feel threatened, the right, effective and virtuous thing to do is to increase our ability to kill other people. That was our normal method of ensuring the survival of our group in the past, but its successes depended upon the defensibility of our group or its ability to overcome the defences of other groups’*<sup>888</sup> Whatever the historical origins or theoretical justification of such thinking, it is fair to say that the state has become much more than an organizational unit of protection – a great deal by way of power and vested interest has come to be bound up in national sovereignty along with the need for identification with a particular social group.

However, whilst attempts can doubtless be made to justify these measures as being a necessary response to particular circumstances, there are concerns that many of the powers are overbroad and that security activity could be used by the government and the security agencies as a cover to take powers which bear little relationship to the public emergency which induced them. Some of these security imperatives may also contrast with liberal ideals of a constitutionally limited government, which upholds, and even defends, the civil and human rights of its citizens. Indeed, whilst liberals may accept that say, the territorial boundaries of the state must be protected from external aggressors, the ideal of liberal constitutionalism tends to add that respect for human rights; the limitation of state power; the separation of powers; and the doctrine of responsible and accountable government, should also be key determinants of security policy.

The perfect liberal state is certainly a desirable concept. Perhaps, few would argue that the principles of liberty, equality, justice and the freedom to pursue one’s own notions of happiness seem idyllic. However, without adequate protection from hostile internal and external security threats, the very values that liberals seek to uphold may be diminished, and even eradicated. Similarly, whilst a strong national security agenda may provide a defence against hostile forces, the measures imposed to provide such defence can potentially undermine the very liberty and democracy which national

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<sup>887</sup> See the discussion in Peter Mangold, *National Security and International Relations*, Routledge, 1990, p7.

<sup>888</sup> See the discussion in Peter Mangold, *National Security and International Relations*, Routledge, 1990, p7.

security protagonists often use as justification for the measures. Thus, each of these ideals tends, in practice, to defeat its own objective.

Overall, it seems that at least on some levels, the persons on both sides of these often conflicting ideals may desire similar ends. Both groups seek, in some way, to uphold the security of the citizen. However, the perceptions of liberal and security thinkers regarding how 'security' is to be achieved often differ markedly. To some extent, these competing values could potentially be better reconciled than current security policy and practice may suggest. The next chapter will explore some potential reforms to the current legal and operational control of the security agencies that may go, at least some way, towards meshing together the greater elements of these two ideologies.

## CHAPTER SIX: SOME GUIDELINE PRINCIPLES FOR POSSIBLE REGULATORY CHANGES TO THE CURRENT LEGAL STRUCTURES

### 6.1 Introduction

The previous chapters have examined two opposing ideologies and perspectives: the claims of liberals and the claims of those supporting a more state-centred view of national security. The main thrust of these chapters has been to consider, in principle at least, how the legal regulation of the intelligence agencies would need to operate in order to fully embody and adequately represent the practical culmination and realisation of the norms of each of these two competing ideologies. Thus, the chapters have examined not only which elements of security would be prioritised if liberalism was ever to become the pre-eminent factor by which our nation set its security agenda; but what would the security landscape look like if a national security agenda was the sole, or only, imperative? This line of enquiry has served two important purposes. Firstly, it has assisted in elucidating the meaning and benefits of each of the two orientations. Taking the principles of both liberalism and the national security agenda to their logical conclusion has revealed a number of their palpable and practical advantages as well as their limitations. Secondly, it has placed these potential advantages and limitations in the context of their practical application to real life contexts by exposing how each exhibits various internal inconsistencies and conflicts. This has made it possible to demonstrate that, in practice, there are various areas in which each of these contrasting ideological orientations betrays its own promises and fails to deliver upon the very ideals it relies upon to legitimate itself. This element of the research has been valuable because the ideologies have been evaluated, not by inappropriate standards that are imported from the outside, but rather by those that the ideology itself claims to embody. This chapter will contend that having unfolded the internal advantages and inconsistencies of these ideologies, it is now possible to utilise only the least discredited elements of each in order to suggest possible legal and constitutional reforms.

It may be argued that an adequate set of legal reforms is already to be found in the European Convention on Human Rights, which has recently been incorporated into UK domestic law by the Human Rights Act 1998 (HRA). It is true that the Convention has been a driving force for change, both before and after the inception of the HRA. The Convention, for example declares an absolute ban on the use of lethal force,<sup>889</sup> and torture or inhumane or degrading treatment are never permitted.<sup>890</sup> In respect of the use of covert and intrusive surveillance, the UK government has been forced, incrementally, to accept that a legal base for the invasion of privacy by state agents must be put in

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<sup>889</sup> Except as a defence to unlawful violence.

<sup>890</sup> Human Rights Act 1998, Article 3.

place. This basis is now contained in a range of statutes, which seek to satisfy Convention requirements such as Article 8, which is concerned with the right to privacy. The most recent and comprehensive of these has been the Regulation of Investigatory Powers Act 2000. However, civil libertarians have argued that the creation of a legal basis for the state invasion of privacy has not necessarily resulted in a regulatory framework in which the requirements of Article 8 have been fully met. For example, Helen Fenwick argues that: *'the principles, which in a liberal democracy should inform the law governing...invasions of privacy, have largely failed to find expression in it,...despite the fact that the central statute, the Regulation of Investigatory Powers Act 2000, was introduced specifically in order to meet the demands of the European Convention on Human Rights.'*<sup>891</sup> Indeed, Fenwick suggests that if Convention rights are to have any real impact domestically, this may be *'most likely to occur through incremental changes in procedures, rather than through the courts or other complaints mechanisms.'*<sup>892</sup>

It is just such an incremental change in procedures that this research will address in its final stages. In this respect, particular attention will be paid to the principle of proportionality. This principle, which is a key part of Convention jurisprudence, is designed to ensure that decision-makers do not take excessive action and that covert surveillance is only instigated where absolutely necessary. It will be argued that the principle of proportionality, if suitably revised to take into account relevant criticisms, may adequately reconcile the greater elements of each of the two competing ideologies. This is because, whilst the principle of proportionality fulfils the liberal demand for optimal protection of civil rights, it still allows significant incursions into privacy rights where the threat to national security is both genuine and restrictions to civil rights are necessary in the circumstances.

The chapter will begin with an introduction to the principle of proportionality, as defined under the Human Rights Act 1998, which incorporates the Convention, and to some extent its jurisprudence, into the domestic law of the UK. It will then examine certain discrepancies in the ways in which the principle of proportionality is currently being applied by public bodies, and security decision-makers. The chapter will culminate in an examination of a stricter application of the proportionality principle and its likely effect on security decision-making. In its very final stages, the chapter will include a detailed account of the likely benefits of a strictly applied proportionality test on both the national security and the liberal agendas. This will include consideration of the ways in which proportionality, if applied properly, may bring together the ideals of these two competing ideologies.

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<sup>891</sup> Helen Fenwick, *Civil Liberties and Human Rights*, Cavendish, 2002, p 635.

<sup>892</sup> Helen Fenwick, *Civil Liberties and Human Rights*, Cavendish, 2002, p 635.

## 6.2 The Legal Position under the Human Rights Act 1998

Section 6 of the Human Rights Act makes it unlawful for any public authority to act in a way which is incompatible with the rights protected by the European Convention on Human Rights. With regards to the incorporation of Article 8 under the Human Rights Act 1998, public bodies engaged in any form of interference with an individual's privacy must be able to demonstrate that the surveillance in question is authorised by law; proportionate to the purpose in question; necessary; and conducted in accordance with one of the legitimate aims set out in Article 8(2) of the ECHR. Legitimate aims include national security, public safety, the economic well being of the country and the prevention of crime. Since covert surveillance activity cannot be instigated until these checks are satisfied, the principle of proportionality is at the core of both Article 8 and the Human Rights Act. Public authorities, including the security agencies, are required to ensure that any actions taken are proportionate to the legitimate aim pursued. Thus, even where privacy rights are subject to limitations in the name of national security or the detection and prevention of serious crime, the security agencies are precluded from making disproportionate intrusions into those rights.

The concept of proportionality is well established in the jurisprudence of the European Court of Human Rights. When a state claims that a particular action represents the exercise of a lawful power to protect a legitimate public interest, the test applied by the court will be whether the action taken was proportionate to the aims pursued and whether the reasons for it given by the state were both relevant and sufficient.<sup>893</sup> Since the enactment of the Human Rights Act in 1998, the principle of proportionality has also come to the forefront of judicial reasoning in the UK Courts.<sup>894</sup> Indeed, In *R (Daly) v Home Secretary*,<sup>895</sup> Lord Steyn identified just how the intensity of review in proportionality is greater under the Human Rights Act than under the concept of reasonableness outlined in the *Wednesbury*<sup>896</sup> case. Under *Wednesbury*, the degree of unreasonableness demonstrated by the public authority needed to be particularly high. Indeed, for Lord Diplock, unreasonableness was only demonstrated where '*a decision was so outrageous in its defiance of logic, or of accepted moral standards, that no sensible person who had applied his mind to the question to be decided could have arrived at it.*'<sup>897</sup> In contrast, Steyn pointed out that the proportionality test may require the court to assess the balance which the decision-maker has struck in a particular case, not merely whether it is within a range of reasonable decisions as required by *Wednesbury*. This, asserted Steyn, may require

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<sup>893</sup> See, for example: *Bowman v UK*, *The Times*, 23<sup>rd</sup> February 1998; *Steel v UK* (1999) 28 EHRR 603.

<sup>894</sup> In pre-Human Rights Act cases, the courts had used the doctrine of proportionality but without making specific reference to it. See, for example: *R v Barnsley Metropolitan Borough Council, Ex parte Hook* [1976] 1 WLR 1052. See also Lord Diplock's explanation of the principle in *R v Goldschmidt* in which he states '*why use a steam hammer to crack a nut, if a nutcracker would do.*' *R v Goldschmidt* [1983] 1 WLR 151, 155.

<sup>895</sup> *R (Daly) v Home Secretary* [2001] 2 AC 532.

<sup>896</sup> *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1948) 1 KB 223.

<sup>897</sup> *Council of Civil Service Unions v Minister for the Civil Service* (1985) AC 374.

the court to consider and overrule the relative weight accorded to certain interests and considerations.<sup>898</sup>

At its most rigorously applied, the principle of proportionality requires a multi-stage analysis.<sup>899</sup> Firstly, the decision making body, or person, must ask whether the purpose of any rights restriction is suitable for attaining the identified purpose. This means, for example, that the surveillance or other measure under consideration is a truly effective means of countering the perceived threat. Secondly, the measure must be shown to be necessary for the attainment of the purpose in the sense that there is no less restrictive measure available. Finally, the decision-maker must establish whether the measure is proportionate in that it strikes a proper balance between the purpose and the target individual's political and human rights.<sup>900</sup> Thus, when it is applied properly, the principle of proportionality necessitates a complex assessment of the appropriateness and effectiveness of the measure in question and its potential effects on both the national security agenda and with regard to the need to safeguard individual liberty. It is not enough to simply ask the question, has the state 'struck the right balance' between various notions of security and liberty. Rather, proportionality essentially means that the need for any given investigative technique must be genuine and it must be weighed against the damage it might do to personal privacy.

This approach to security decision-making supports both the liberal and the national security objectives. It satisfies the liberal notion that the state should legitimise its power by ensuring optimal protection of its citizens liberties and individual freedoms. It also supports the national security agenda in that, even a strict application of the proportionality principle, will not prevent the state from ensuring that its borders, people, institutions, and values are kept free from attack by hostile foreign or domestic aggressors. In other words, the principle of proportionality recognises that countering risks such as international terrorism, cyber attack, international military crisis and large-scale civil emergencies,<sup>901</sup> is in the public interest. This means that some of the high-priority risks facing the UK can be adequately dealt with.

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<sup>898</sup> Steyn also pointed out that even the heightened scrutiny test will fail to provide sufficient protection for Convention rights. *R (Daly) v Home Secretary* [2001] 2 AC 532.

<sup>899</sup> For examples of a multi-stage application of proportionality see: *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Land and Housing* [1999] 1 A.C. 69. *Handyside v United Kingdom* [1976] 1 E.H.R.R. 737. *R (Daly) v Home Secretary* [2001] 2 AC 532.

<sup>900</sup> For a discussion of proportionality, see: Daniel Moeckli, *Human Rights and Non-Discrimination in the War on Terror*, Oxford Scholarship Online, 2008, pp 77-78. For a description of its interpretation in the English, German and Spanish Courts see: Benjamin Goold, Liora Lazarus and Gabriel Swiney, *Public Protection, Proportionality and the Search for Balance*, Ministry of Justice Research Series 10/07. September 2007.

<sup>901</sup> For the current government security agenda see, for example, Secret Intelligence Service, *UK National Security Strategy*, October 2010.

### 6.3 The Current Application of the Proportionality Principle in the UK Security Arena.

With regard to proportionality tests in covert investigations, various codes of conduct have been issued to those public bodies that are involved in conducting surveillance under the Regulation of Investigatory Powers Act (RIPA).<sup>902</sup> The purpose of these codes, it is claimed, is to ensure that surveillance conducted under the Act is subject to *'stringent safeguards, approved by Parliament, to ensure that investigatory powers are used in a way which is compatible with the European Convention on Human Rights.'*<sup>903</sup> Thus, the codes are intended to present extensive and detailed guidance on the determination of necessity and proportionality, and on the importance of making correct determinations for the protection of human rights.<sup>904</sup> However, whilst the codes can play an important role in guiding decision-makers, questions have been asked regarding the adequacy of the methods by which the proportionality of an action is to be assessed.<sup>905</sup> In reality, the advice given to decision-makers in these codes is rather vague and there is little explanation of how decision-makers should interpret key terms. For example, the Covert Surveillance Code of Practice explains proportionality in the simplest of terms as: *'balancing the intrusiveness of the activity on the target and others who might be affected by it against the need for the activity in operational terms.'*<sup>906</sup> The document goes on to suggest that *'the activity will not be proportionate if it is excessive in the circumstances of the case or if the information which is sought could reasonably be obtained by other less intrusive means. All such activity should be carefully managed to meet the objective in question and must not be arbitrary or unfair.'*<sup>907</sup> It is argued that, whilst this description gives the decision-maker an indication that a requirement for proportionality exists, there is little indication as to what many of its key terms really mean or how they should be interpreted. For example, how is the balancing procedure actually supposed to be implemented? What is, or is not, excessive in the circumstances? How is the need for an activity supposed to be assessed? The problem is that these questions are likely to be answered in various ways by different interpreters. It is little wonder then that the Chief Surveillance Commissioner's 2007 Annual Report claims that *'there is a serious misunderstanding of the concept of proportionality.'*<sup>908</sup> The report argues that *'it is not acceptable, for example, to judge that because directed surveillance is being conducted from a public place, this*

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<sup>902</sup> See: Home Office, *Covert Surveillance and Property Interference, Revised Code of Practice Pursuant to Section 71 of the Regulation of Investigatory Powers Act 2000*, Home Office, *Acquisition and Disclosure of Communications Data, Code of Practice Pursuant to Section 71 of the Regulation of Investigatory Powers Act 2000*, Covert Human Intelligence Sources, *Code of Practice Pursuant to Section 71 of the Regulation of Investigatory Powers Act 2000*.

<sup>903</sup> See, for example, Home Office, *Office for Security and Counter Terrorism, RIPA Safeguards*. The National Archives, [www.homeoffice.gov.uk](http://www.homeoffice.gov.uk).

<sup>904</sup> Select Committee on the Constitution, *Surveillance: Citizens and the State*, House of Lords, 21<sup>st</sup> Jan 2009, Chapter 9.

<sup>905</sup> See, for example: Select Committee on the Constitution, *Surveillance: Citizens and the State*, House of Lords, 21<sup>st</sup> Jan 2009, Chapter 4: Office of Surveillance Commissioners, *Annual Report of the Chief Surveillance Commissioner*, 2007, para. 9.2.

<sup>906</sup> Home Office, *Covert Surveillance, Code of Practice*, 2007.

<sup>907</sup> Home Office, *Covert Surveillance, Code of Practice*, 2007.

<sup>908</sup> Office of Surveillance Commissioners, *Annual Report of the Chief Surveillance Commissioner*, 2007, para. 9.2.

*automatically renders the activity overt or to assert that an activity is proportionate because it is the only way to further an investigation.*<sup>909</sup>

These criticisms are serious in that an inadequate and inconsistent application of the principle of proportionality, within organisations such as the security agencies, is likely to have detrimental effects on public trust and could lead to concern about the possibility of the state's infringing peoples legitimate expectation of privacy. For example, although tests of proportionality have been used by the UK courts when considering Article 8 privacy issues, it is claimed that the test is not consistently applied.<sup>910</sup> Thus, whilst the House of Lords applied a rigorous proportionality test in *R (Daly) v Home Secretary*,<sup>911</sup> it has been argued that in the later *Marper*<sup>912</sup> and *Gillan*<sup>913</sup> cases, the Lords judged restrictions on privacy according a proportionality standard which has been described as '*at best – perfunctory*.'<sup>914</sup> In both cases, it is argued that the Lords found the restrictions at issue to be justified with little discussion, and that the application of the principle consisted of a mere exercise in balancing competing rights rather than a thorough application of a legally defined test of proportionality. In this climate of uncertainty, liberals have argued that more should be done to ensure that the Human Rights Act provides a sufficient brake on intrusive surveillance practices and over-zealous data collection.

In response to these concerns the Select Committee on the Constitution has recommended that the Government should '*instruct government agencies and private organisations involved in surveillance and data use on how the rights contained in Article 8 of the European Convention on Human Rights are to be implemented*.'<sup>915</sup> According to the Committee, '*the Government should also provide clear and publicly available guidance as to the legal meanings of necessity and proportionality*.'<sup>916</sup> The committee further recommended that '*a complaints procedure be established by the Government and that, where appropriate, legal aid should be made available for Article 8 claims*.'<sup>917</sup> However, whilst the Committee has recommended that the principle of proportionality be revisited and clarified, there is no suggestion regarding how it is to be interpreted or applied in the future. Moreover, a further problem arises in the sense that a complaints procedure may be of little use to a target of security

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<sup>909</sup> Office of Surveillance Commissioners, *Annual Report of the Chief Surveillance Commissioner*, 2007, para. 9.2.

<sup>910</sup> Benjamin Goold, Liora Lazarus and Gabriel Swiney, *Public Protection, Proportionality and the Search for Balance*, Ministry of Justice Research Series 10/07. September 2007.

<sup>911</sup> *R (Daly) v Home Secretary* [2001] 2 AC 532.

<sup>912</sup> *Marper v UK* [2004] WLR 2196.

<sup>913</sup> *Gillan and Quinton v UK* [2006] 2 WLR 537. See also comments by Daniel Moeckli, *Human Rights and Non-Discrimination in the War on Terror*, Oxford Scholarship Online, 2009.

<sup>914</sup> Benjamin Goold, Liora Lazarus and Gabriel Swiney, *Public Protection, Proportionality and the Search for Balance*, Ministry of Justice Research Series 10/07. September 2007.

<sup>915</sup> See, Select Committee on the Constitution, *Surveillance: Citizens and the State*, House of Lords, 21<sup>st</sup> Jan 2009, Chapter 4.

<sup>916</sup> See, Select Committee on the Constitution, *Surveillance: Citizens and the State*, House of Lords, 21<sup>st</sup> Jan 2009, Chapter 4.

<sup>917</sup> See, Select Committee on the Constitution, *Surveillance: Citizens and the State*, House of Lords, 21<sup>st</sup> Jan 2009, Chapter 4.

agency surveillance since such a person would not know that they are the subject of covert activity. Thus, since in practice, measures of secret surveillance are not open to scrutiny by the individual concerned, or the public at large, it may be legitimately argued that it is contrary to the ‘rule of law’ for the legal discretion granted to decision-makers to be expressed in terms of too much unfettered power. Indeed, for liberals, the law should indicate the scope of any discretion conferred on the security agencies and the manner of its exercise with sufficient clarity, and having regard to the legitimate aim of the measure in question, in order to give the individual adequate protection against arbitrary interference.

The remainder of this chapter will examine a potential application of the proportionality principle which may maximise the protection of both national security and civil liberties. Perhaps this could be best achieved by applying a pre-determined and strictly defined procedural proportionality test. Such a test would ensure that decision-makers give appropriate and demonstrable consideration to all aspects of the proportionality principle. Indeed, the onus would be on public authorities to verify that covert action fulfilled a genuine legitimate aim; that the restriction to Article 8 privacy rights corresponds to that aim; and that it is necessary in the sense that no other less restrictive means is available. With this in mind, subsequent paragraphs will explore the answers to the following three questions which, it is suggested, the security agencies demonstrably apply each time a warrant for surveillance is issued or sought:

1. Is the purpose of the covert activity aiding a sufficiently important objective?
2. Is there a rational connection between the privacy restriction and the particular objective in question?
3. Is the measure proportionate in that it strikes a proper balance between the purpose and the target individual’s political and human rights?<sup>918</sup>

In its final stages, the chapter will seek to uncover the ways in which the principle of proportionality supports and benefits both the national security and the liberal agendas. It will then be possible to analyse the ways in which the least discredited elements of these two opposing ideologies may be built and meshed together under the principle of proportionality.

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<sup>918</sup> For examples of a multi-stage application of proportionality see: *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Land and Housing*. [1999] 1 A.C. 69. *Handyside v United Kingdom* [1976] 1 E.H.R.R. 737. *R (Daly) v Home Secretary* [2001] 2 AC 532.

#### **6.4 Is the Purpose of the Covert Activity Aiding a Sufficiently Important Objective?**

This concerns whether the need for surveillance refers to a genuine legitimate aim and whether the reasons presented by the authorities are relevant and sufficient. Whilst Article 8 offers general protection for a person's private and family life, home and correspondence, from arbitrary interference by the state, the right to respect for these aspects of privacy are qualified.<sup>919</sup> This means that interference by the state can be permissible if it satisfies certain conditions. These conditions are that the security agencies are acting in the interests of national security, public safety, the economic well being of the country, or acting to prevent disorder or serious crime.<sup>920</sup>

The current legal criterion means that, in the first instance, it is for the national authorities to make the initial assessment regarding whether any action is proportionate to the legitimate aim pursued. However, whether the interference is necessary may be subject to review by the courts. The courts will consider an interference to be 'necessary in a democratic society' for a legitimate aim if it answers a pressing social need and more particularly, as noted above, if it is proportionate to the legitimate aim pursued. It is noteworthy that the courts will allow a margin of appreciation to the competent national authorities in this assessment. This is because Convention law concedes a degree of flexibility and discretion in the way that protected rights are interpreted and applied in the national context.<sup>921</sup> What is required is that member states achieve the maximum degree of compliance with the Convention's general standards as is compatible with particular national interests, circumstances and traditions. In practice, the breadth of this margin varies and depends on a number of factors including the nature of the convention right at stake and its importance for the individual; the nature of the interference; and the object pursued by the interference. The margin will tend to be narrower where the affected right is crucial to the individual enjoyment of intimate key rights. For example, the protection of personal data is said to be of fundamental importance to the enjoyment an individual's right to respect for private and family life as guaranteed by Article 8 of the convention. Thus, the domestic law must afford appropriate safeguards to prevent the misuse of such data, particularly when it is used for police purposes. These safeguards include ensuring that the collection of data is relevant, and not excessive, in relation to the purpose for which it is stored; is preserved in a form which permits the identification of the data subjects; and for no longer than is required for the purpose for which the data is stored.

However, some critics have argued that national security objectives are still too widely drawn by the security agencies, and it may be too easy for the government to claim that the interference is in pursuit

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<sup>919</sup> Article 8:1, European Convention on Human Rights. See, Schedule 1: Part 1, Human Rights Act 1998.

<sup>920</sup> Article 8:2, European Convention on Human Rights. See, Schedule 1: Part 1, Human Rights Act 1998.

<sup>921</sup> *Handyside v United Kingdom* [1976] 1 E.H.R.R. 737.

of legitimate objectives unless its activity was for a clearly improper motive. Indeed, Buzan argues that pleas of national security may have immense functional benefits for the government. Buzan claims that: *'The appeal to national security as a justification for actions and policies, which would otherwise have to be explained, is a political tool of immense convenience for a large variety of sectional interests in all types of state.'*<sup>922</sup> Buzan goes on to note that the call of national security may confer considerable leverage over domestic affairs and it may offer scope for power maximising strategies to both political and military elites. For example, the cultivation of hostile images abroad may justify intensified political surveillance or it may justify a shift of resources to the military, with deep implications for the conduct of domestic political life.<sup>923</sup> Buzan's claims are not unfounded. In recent years, it has been argued that government claims regarding the need for a 'war on terror' are both misleading and dangerous. Kostakopoulou, for example, claims that: *'It is misleading, because terrorism...is neither a war nor an invasion to be fought by launching a military crusade. Nor does it represent a threat to the safety of the state.'*<sup>924</sup> Rather, according to Kostakopoulou, whilst terrorism can destroy buildings and cause suffering, *'it cannot destroy the state.'*<sup>925</sup> It is dangerous in that, where there is a perception that the nation's survival is at stake, fear may take hold of populations as they contemplate ways of thwarting the threat. Kostakopoulou argues that under these circumstances, it may be too easy for officials to invoke the existence of an emergency to justify current security policy, whether or not the threat is genuine. In other words, government officials may be willing to apply the national security exception to areas where, clearly, national security is not at issue. One dramatic illustration of this arose in February 2003 when, on the basis of intelligence that some Islamic terrorists would mount an attack with surface-to-air missiles on London's Heathrow airport, the Government deployed armoured tanks, a nimrod MR2 reconnaissance aircraft, and 1,500 armed police.<sup>926</sup> Although allegedly based on credible intelligence of a planned 'spectacular' attack, sceptics suggested that the decision to turn the airport in a quasi-military zone was less to do with an imminent threat and more about seeking to persuade the growing number opposed to the war with Iraq of its necessity. After all, these critics argued, tanks would be of little practical value to anyone, other than their occupants, in the event of a missile attack on the airport. The point is that, whilst 'highly visible' demonstrations of state commitment to counter feared threats may have little or no practical effect in increasing security, they will tend to satisfy public demand for reassurance; silence critics; or as in this case, legitimise military action in the face of public opposition.<sup>927</sup>

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<sup>922</sup> Buzan, *People, States and Fear: An Agenda for International Security Studies in the Post Cold-War Era*, Second Edition, Boulder/Lynne Rienner, London, 1983, p11.

<sup>923</sup> See the discussion in: Lustgarten and Leigh, *In From the Cold, National Security and Parliamentary Democracy*, Oxford University Press, 1994, p21.

<sup>924</sup> Dora Kostakopoulou, *How to do Things with Security Post 9/11*, Oxford Journal of Legal Studies (OJLS) 2008 28 (317).

<sup>925</sup> Dora Kostakopoulou, *How to do Things with Security Post 9/11*, Oxford Journal of Legal Studies (OJLS) 2008 28 (317).

<sup>926</sup> See, for example, [www.telegraph.co.uk](http://www.telegraph.co.uk), *Blair Sent in Tanks After Chilling Threat*, 8<sup>th</sup> December 2008. See also the discussion in, Lucia Zedner, *Security*, Routledge, 2009, pp 22-23.

<sup>927</sup> Lucia Zedner, *Security*, Routledge, 2009, pp 22-23.

In the light of these concerns, liberals have claimed that it is necessary *‘to distinguish between a lawful interference in an individual’s private life which is genuinely in the public interest, as opposed to an unlawful interference which has occurred because it is merely something in which the public might be interested.’*<sup>928</sup>

Perhaps, a distinction between lawful and unlawful security measures can be achieved by considering some possible limits on what is, or is not, a legitimate aim and by building a legal framework of proportionality upon which these limits are to be grounded. For example, one possible limit is that there is a *‘real and imminent threat’* requirement. This would oblige policy makers to identify and furnish evidence that, without the proposed security measure, actual harm would result. The German courts have considered the importance of the imminent threat requirement.<sup>929</sup> The Federal Court, when adjudicating on a case involving data mining<sup>930</sup> for counter-terrorism purposes, found that the threshold for intervention specified in the empowering Act,<sup>931</sup> was set at the level of a *‘present danger’*. The Court found that the term *‘present danger’* needed to be interpreted to mean *‘concrete danger’*, that is, there was a sufficient probability that the interests in question would be violated within the foreseeable future. The Court stated that this could well be a prolonged period but there needed to be grounds for believing that there were preparations for terrorist attacks, or persons ready to commit such acts, in Germany or elsewhere. Ultimately, the Court found that if understood as described in the empowering Act, the data mining operation satisfied these requirements. However, the Court found that the general state of threat from terrorism that had existed virtually ever since the 9/11 attacks did not satisfy the standard. Thus, the Court warned that if the reference point for data mining were simply the general threat of terrorism, the powers this conferred on the police would be too open-ended.

The principle of requiring a *‘real and imminent threat’* or a *‘present danger’* may circumscribe and inhibit the introduction of surveillance measures which are disproportionate in that they find their justification in sources of minor nuisance and trivial threats, rather than those that present a genuine risk. For example, a *‘real and imminent threat requirement’* would prevent covert activity, under the

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<sup>928</sup> Liberty, *The Liberty Guide to Human Rights, The Right to Respect for Private and Family Life, Home and Correspondence*. [www.yourrights.org.uk](http://www.yourrights.org.uk).

<sup>929</sup> See BVerfG, 4 April 2006, 1 BvR 518/02. In October 2001, the Düsseldorf Amtsgericht, upon application by the police, authorised a data mining operation that required the authorities responsible for the registration of residents and foreigners at educational institutions to provide information about men between certain ages. A collection of over five million records, narrowed down by data comparison, eventually yielded only eight persons who were subject to further measures. However, no criminal proceedings were initiated against any of these eight persons.

<sup>930</sup> Data mining is a special method of profiling using electronic data processing. The practice dates back to counter-terrorism operations conducted by German law-enforcement authorities to combat Red Army Faction violence in the late 1970’s. Police authorities acquire data sets related to individuals from private or public places, which are collected for completely different purposes, but which are then screened automatically for certain criteria and compared. The aim of the exercise is to detect a group of people to which a certain profile can be applied.

<sup>931</sup> The NRW Police Act which governed the federal State of North Rhine-Westphalia Police.

Regulation of Investigatory Powers Act, from being used by public authorities who are investigating less serious crimes such as underage sales, rogue traders and anti-social behaviour.<sup>932</sup> It may also go some way towards addressing whether those who resort to the rhetoric of national security do so honestly or in order to pursue some other objective. Certainly, a requirement that the threat be ‘real and immanent’ would ensure that surveillance is at least only targeted at those whose activities are criminal or cause physical harm to others. Whilst this would not prevent the security agencies from instigating surveillance measures where the legitimate aim makes it necessary, it would go some way towards satisfying a civil libertarian agenda. Civil libertarians have generally accepted that there is potential danger emanating from unrestrained conduct and that some activities must be restricted. Mill, for instance, suggested that where there is harm to others stemming from individual behaviour, there is a justification for the state and the criminal law intervening. Of course, for liberals, the danger or physical harm must ultimately be a threat to some fundamental aspect of the citizen’s well-being or health, which emanates from, for example, crime or violence. Mill stressed the need to show that the harm to individuals or their interests is real and specific, or alternatively, that the risk of damage is strong.<sup>933</sup> Thus, abstract, vague or speculative harm must, according to liberal thinkers, not be used to turn liberty into a ‘*weak background assumption*’<sup>934</sup> that is consistently out-trumped by security considerations.

## **6.5 Is There a Rational Connection Between the Privacy Restriction and the Particular Objective in Question?**

This aspect of the principle of proportionality requires that there be a reasonable relationship between a particular legitimate objective to be achieved and the means used to achieve that objective. According to the Covert Surveillance Code of Practice, this requires the decision-maker to explain how and why the methods to be adopted will cause the least possible intrusion to the subject and others and to evidence, as far as reasonably practicable, what other methods have been considered and why they were not implemented.<sup>935</sup> Thus, realising this aspect of proportionately is achieved, not by simply analysing the nature of the potential threats and whether they are legitimate, but by also asking whether a particular measure could be achieved by less restrictive means and whether the interference

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<sup>932</sup> For discussion, see: HM Government, *Review of Counter-Terrorist and Security Powers*, Cmd. 8005, January 2011. The use of the Regulation of Investigatory Powers Act 2000 (RIPA) by local authorities was considered in this Review. Some submissions, from lobby groups, argued that local authorities should not use the investigatory techniques covered by RIPA at all and that their use should be limited to tackling terrorism and serious organised crime. Local Authorities are now required to apply for a magistrates warrant to authorise surveillance. See the Protection of Freedoms Act 2012.

<sup>933</sup> J.S. Mill, *Utilitarianism and Other Essays*, Edited by H. B. Acton, Dent, 1977, p 50-51.

<sup>934</sup> See discussion in: Dora Kostakopoulou, *How to do Things with Security Post 9/11*, Oxford Journal of Legal Studies (OJLS) 2008, 28 (317).

<sup>935</sup> See, for example, Home Office, *Covert Surveillance and Property interference, Revised Code of Practice Pursuant to Section 71 of the Regulation of Investigatory Powers Act 2000*, Para 3.6. Home Office, *Acquisition and Disclosure of Communications Data, Code of Practice Pursuant to 71 of the Regulation of Investigatory Powers Act 2000*.

is being kept to a minimum. Whilst it is not possible to examine how every decision-maker has implemented this aspect of proportionality, partly because the deliberations of the security agencies are subject to secrecy, it is possible to both look at the codes of practice that govern the use of surveillance, and at instances where government bodies have considered the principle.

### 6.5.1 *The Codes of Practice*

There are several codes of practice currently in operation under the Regulation of Investigatory Powers Act 2000.<sup>936</sup> Each code concerns itself with a different aspect of covert activity, namely the interception of communications;<sup>937</sup> the acquisition and retention of data; the authorisation of covert surveillance;<sup>938</sup> the authorisation and conduct of covert human intelligence sources;<sup>939</sup> the laws relating to investigating protected electronic information; and property interference.<sup>940</sup> Each code gives advice on how to carry out covert activities in compliance with the powers granted by Parliament under the RIPA. To this end the codes identify the key points of the relevant legislation; they provide a source of instruction and give some practical examples of good and bad practice.

In recent times, some of the codes have been revised to give a fuller description and account of the principle of proportionality and the circumstances in which it is, or is not, appropriate to conduct covert surveillance. This change came, partly, in response to concerns brought forward by the Office of Surveillance Commissioners which noted that *'pubic authority employees, when completing authorisation forms, do not give enough thought to proportionality and consequently authorisations are granted where the impact on the privacy of the target is disproportionate to the seriousness of the offence,'*<sup>941</sup> Under the revised codes, for example, the Code of Practice Governing the Acquisition and Retention of Data, *'The designated person must believe that the conduct required by any authorisation or notice is necessary. He or she must also believe the conduct to be proportionate to what is sought to be achieved by obtaining the specified communication data'*<sup>942</sup> and *'that the conduct*

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<sup>936</sup> Home Office, *Interception of Communications, Code of Practice Pursuant to Section 71 of the Regulation of Investigatory Powers Act 2000*; Home Office, *Acquisition and Disclosure of Communications Data, Code of Practice Pursuant to Section 71 of the Regulation of Investigatory Powers Act 2000*; Home Office, *Covert Human Intelligence Sources, Code of Practice Pursuant to Section 71 of the Regulation of Investigatory Powers Act 2000*; Home Office, *Covert Surveillance and Property Interference, Revised Code of Practice Pursuant to Section 71 of the Regulation of Investigatory Powers Act 2000*.

<sup>937</sup> Home Office, *Interception of Communications, Code of Practice Pursuant to Section 71 of the Regulation of Investigatory Powers Act 2000*.

<sup>938</sup> Home Office, *Acquisition and Disclosure of Communications Data, Code of Practice Pursuant to Section 71 of the Regulation of Investigatory Powers Act 2000*.

<sup>939</sup> Home Office, *Covert Human Intelligence Sources, Code of Practice Pursuant to Section 71 of the Regulation of Investigatory Powers Act 2000*.

<sup>940</sup> Home Office, *Covert Surveillance and Property Interference, Revised Code of Practice Pursuant to Section 71 of the Regulation of Investigatory Powers Act 2000*.

<sup>941</sup> See for example, Office of Surveillance Commissioners, *Annual Report of the Chief Surveillance Commissioner to the Prime Minister and to Scottish Ministers for 2009/2010*, para.5:8.

<sup>942</sup> Home Office, *Acquisition and Disclosure of Communications Data, Code of Practice Pursuant to Section 71 of the Regulation of Investigatory Powers Act 2000*, para. 2.4. Similar descriptions are found in the other codes of practice issued

is no more than is required in the circumstances.<sup>943</sup> This, according to the code, ‘involves balancing the extent of the intrusiveness of the interference with an individual’s right of respect for their private life against a specific benefit to the investigation or operation being undertaken by a relevant public authority in the public interest.’<sup>944</sup> The principle of proportionality is further explained in the codes as:

- Balancing the size and scope of the proposed activity against the gravity and extent of the perceived crime or offence.
- Explaining how and why the methods to be adopted will cause the least possible intrusion on the target and others.
- Considering whether the activity is an appropriate use of the legislation and a reasonable way, having considered all reasonable alternatives, of obtaining the necessary result.
- Evidencing, as far as reasonably practicable, what other methods have been considered and why they were not implemented.
- Considering the examples given in the code of surveillance.<sup>945</sup>

From the perspective of assessing how the security agencies may approach these requirements, one very real problem is that, whilst the instructions outlined in the codes make it clear that there is a requirement to consider the necessity of any given operation, and this must be explained and evidenced, it still suggests that the decision-maker approaches the question by implementing a mere balancing act. The codes give little indication as to how this balance might be achieved and this may make it difficult for decision-makers to interpret the principle consistently. Indeed, this issue has been raised by the Chief Surveillance Commissioner. In his Annual Report of 2009/2010, the Commissioner observed that ‘greater precision in articulating why the activity is proportionate is still required in many authorisations. A failure to detail other less intrusive means considered suggests that minds are either not applied rigorously or that some tactics are considered routine.’<sup>946</sup> For example, the Commissioner pointed out that there should not be ‘over-reliance on the seriousness of the crime as an automatic justification of proportionate covert surveillance.’<sup>947</sup> Nor should ‘strategic

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under the Regulation of Investigatory Powers Act 2000. See, for example, Home Office, *Covert Surveillance and Property Interference, Revised Code of Practice Pursuant to Section 71 of the Regulation of Investigatory Powers Act 2000*, and: *Covert Human Intelligence Sources, Code of Practice Pursuant to Section 71 of the Regulation of Investigatory Powers Act 2000*.

<sup>943</sup> Home Office, *Acquisition and Disclosure of Communications Data, Code of Practice Pursuant to Section 71 of the Regulation of Investigatory Powers Act 2000*, para. 2.4.

<sup>944</sup> Home Office, *Acquisition and Disclosure of Communications Data, Code of Practice Pursuant to Section 71 of the Regulation of Investigatory Powers Act 2000*, Para. 2.4.

<sup>945</sup> Home Office, *Covert Surveillance and Property Interference, Revised Code of Practice Pursuant to Section 71 of the Regulation of Investigatory Powers Act 2000*, para. 3.6

<sup>946</sup> Office of Surveillance Commissioners, *Annual Report of the Chief Surveillance Commissioner to the Prime Minister and to Scottish Ministers for 2009/2010*.

<sup>947</sup> Office of Surveillance Commissioners, *Annual Report of the Chief Surveillance Commissioner to the Prime Minister and to Scottish Ministers for 2009/2010*.

priorities and cost-effectiveness, of themselves, provide insufficient basis for authorisation.<sup>948</sup> For the Commissioner ‘A wise authorising officer will ensure that details of his considerations are recorded; he may find them helpful if cross-examined some time later. Thus, whilst there is some reassurance in the code that, ‘any conduct that is excessive in the circumstances, or is in any way arbitrary, will not be proportionate,<sup>949</sup> and that ‘consideration must also be given to any actual or potential infringement of the privacy of individuals who are not the subject of the investigation or operation,<sup>950</sup> it is difficult, in any given circumstance, to determine the outcome of a decision-maker’s interpretation.<sup>951</sup>

Another notable problem with the codes is that most of the practical examples relate to the practice of surveillance by Local Authorities, rather than to the more serious work undertaken by the security agencies. Thus, whilst these examples make it clear that the days of Local Authorities conducting directed surveillance for minor offences, such as dog fouling and littering, may be gone for good, the examples give little indication as to how proportionality should be considered by the security agencies in relation to serious crime and terrorism. However, whilst proportionality is only described in the most cursory way in the various codes of practice, this does not necessarily mean that the principle is not given full attention at the legislative and policy formulation levels.

### **6.5.2 Policy Formulation**

Proportionality is not only a doctrine that can be applied by public authorities and law enforcers, such as the security agencies, to assess the legality of executive action, it is also a legislative doctrine which the political institutions and law creators can observe in their decision-making functions. Indeed, in this sense, the principle of proportionality may form an essential component of public policy and good governance.

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<sup>948</sup> Office of Surveillance Commissioners, *Annual Report of the Chief Surveillance Commissioner to the Prime Minister and to Scottish Ministers for 2009/2010*.

<sup>949</sup> Home Office, *Acquisition and Disclosure of Communications Data, Code of Practice Pursuant to Section 71 of the Regulation of Investigatory Powers Act 2000*, para. 2.8.

<sup>950</sup> Home Office, *Acquisition and Disclosure of Communications Data, Code of Practice Pursuant to Section 71 of the Regulation of Investigatory Powers Act 2000*, para.2.5. Provisions for the minimisation of collateral intrusion are also found in the other codes of practice issued pursuant to the Regulation of Investigatory Powers Act 2000. See, for example, Home Office, *Covert surveillance and Property Interference, Revised Code of Practice Pursuant to Section 71 of the Regulation of Investigatory Powers Act 2000*, and: *Covert Human Intelligence Sources, Code of Practice Pursuant to Section 71 of the Regulation of Investigatory Powers Act 2000*.

<sup>951</sup> Concerns regarding the way in which the principles of proportionality are interpreted and applied have been raised at governmental level. See for example, Office of Surveillance Commissioners, *Annual Report of the Chief Surveillance Commissioner to the Prime Minister and to Scottish Ministers for 2009/2010*, para. 5:8. Office of Surveillance Commissioners, *Annual Report of the Chief Surveillance Commissioner to the Prime Minister and to Scottish Ministers for 2010/2011*, para. 5:7. See also: Office of Surveillance Commissioners, *Annual Report of the Chief Surveillance Commissioner to the Prime Minister and to Scottish Ministers for 2007*.

The principles of proportionality and necessity were recently given thorough consideration as part of the Government's Review of Counter-Terrorism and Security Powers.<sup>952</sup> As part of its remit, this Review was tasked to consider the efficacy of the derogating and non-derogating Control Order regime.<sup>953</sup> In conducting an assessment of necessity and proportionality the Review examined the impact of Control Orders on both the rights of the people subject to restrictions, and on the broader public consent to the Government's approach to terrorism. With regard to potentially less intrusive alternatives to the Control Order regime, the Review considered the use of prosecution; the use of communications intercept material as evidence in court; and an increase in the use of technical and human surveillance. Overall, the Review was in favour of an increased resort to prosecution as a method of avoiding a disproportionate resort to Control Orders. However, the Review found that the need for law enforcers to intervene early, in order to pre-empt an attack and protect the public, often means that there is often insufficient evidence to sustain a prosecution.<sup>954</sup> Thus, in its search for another less intrusive method of realising the legitimate aim, the Review examined arguments that the use of communications intercept material as evidence in court would remove the need for Control Orders by making prosecution easier. However, the evidence presented to the Review did not support such arguments. For example, the Review noted that the cross-party Privy Council review, chaired by Sir John Chilcot,<sup>955</sup> had already considered a number of issues relating to intercept as evidence. In the context of that work, a study of nine, now former, control order cases by independent senior criminal counsel concluded that intercept as evidence would not have resulted in a criminal prosecution being brought in any of the cases examined. This view is further supported by Lord Carlile, who has stated that intercept as evidence would not be *'the quick and easy solution that some have assumed and asserted.'*<sup>956</sup> Finally, the Review considered claims that increased human and technical surveillance could, on their own, adequately manage the risk posed by people on Control Orders. Again, these claims have been contested. Indeed, the police and the security agencies themselves argued that surveillance does not provide control; rather, it merely monitors activities to some extent. Thus, in their opinion, whilst surveillance can be important in the evidence-gathering process, and can lead to prosecution and conviction, surveillance does not, of itself, prevent or disrupt any activities. For these reasons, the Review concluded that although increased covert investigative resources could form an important part of any arrangements replacing Control Orders, surveillance alone could not mitigate

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<sup>952</sup> Home Office, *Review of Counter-Terrorism and Security Powers: Review Findings and Recommendations*, January 2011, Cm 8004.

<sup>953</sup> Home Office, *Review of Counter-Terrorism and Security Powers: Review Findings and Recommendations*, January 2011, Cm 8004, pp 36-43.

<sup>954</sup> Home Office, *Review of Counter-Terrorism and Security Powers: Review Findings and Recommendations*, January 2011, Cm 8004, pp 36-43, para. 10. In reaching this conclusion, the Review took into account the opinion of the Crown Prosecution Service.

<sup>955</sup> Privy Council, *Review of Intercept Evidence*, January 2008, Cm 7324. Also see the discussion in - House of Commons Library, Home Affairs Section, - Alexander Horne, *The use of Intercept in Terrorism Cases*, 24<sup>th</sup> November 2011, Para 1.3.

p9.

<sup>956</sup> Home Office, *Operation Pathway: By Lord Carlile of Berriew Q.C.* October 2009.

risk to the level of a control regime. Moreover, the Review noted that the costs of surveillance exceed, by a considerable margin, the costs of Control Orders.

Ultimately then, the Review found that it may still be necessary to impose restrictions on certain terrorist suspects when they are deemed necessary and when they satisfy the legal criteria in that they have not been struck down by the courts. Indeed, the Review claimed that the restrictions imposed may facilitate further investigation as well as prevent terrorist activities. However, the Review concluded that the Control Order regime can and should be amended, and the Government should move to a system which will still protect the public but will be less intrusive; more clearly and tightly defined; and more comparable to restrictions imposed under other powers in the civil justice system.<sup>957</sup> A number of these recommendations have been implemented by Parliament in the Terrorism Prevention and Investigation Act 2011. The Review found that:

- (a) The system is neither a long term nor an adequate alternative to prosecution, which remains the priority. In respect of the duration of any given control order, the Review found that, any control order measures should be time limited to two years maximum to emphasise that they are a short term expedient not a long term solution.<sup>958</sup>
- (b) Covert investigative techniques, including surveillance, whilst they cannot themselves control, can help to do so and may actually produce evidence for use in a prosecution. Thus, since the use of surveillance is complimentary to the Control Order regime, and arguably less intrusive, the Review found that, where possible, restrictions should facilitate surveillance, although the priority of protection may be paramount.<sup>959</sup>
- (c) The Review recommended an end to the use of forced relocation and lengthy curfews that prevent individuals from leading a normal daily life.<sup>960</sup> Indeed, it found that the more restrictive obligations can have a significant impact on the individual's health, personal life and their ability

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<sup>957</sup> Home Office, *Review of Counter-Terrorism and Security Powers: Review Findings and Recommendations*, January 2011, Cm 8004, pp 36-43, Para. 23.

<sup>958</sup> This recommendation has now been included in the Terrorism Prevention and Investigation Measures Act 2011. See s5 (1- 2). See also: Home Office, *Review of Counter-Terrorism and Security Powers: Review Findings and Recommendations*, January 2011, Cm 8004, pp 36-43, Para. 2. The order may be re-imposed after two years, but only where there is new material to demonstrate that the person concerned poses a continued threat.

<sup>959</sup> Home Office, *Review of Counter-Terrorism and Security Powers: Review Findings and Recommendations*, January 2011, Cm 8004, pp 36-43, Para. 21(b).

<sup>960</sup> Under the Terrorism Prevention and Investigation Measures Act 2011, forced re-location is no longer permitted. Home Office, *Review of Counter-Terrorism and Security Powers: Review Findings and Recommendations*, January 2011, Cm 8004, pp 36-43, Para. 23.

to go about their normal lives. The Review found that lengthy curfews and relocating an individual to a different part of the country raised particularly difficult issues.<sup>961</sup>

The benefit of a thorough application of the principles of proportionality, such as the one conducted by the Review, is that it shows, for example, that the principle of necessity would not necessarily limit the types of activity that could be investigated but it could, potentially, affect the methods by which such an investigation would be conducted. It may accomplish this in two ways. Firstly, a defined test of proportionality would keep surveillance measures within the confines of necessity in the sense that the same outcome cannot be achieved by any lesser means. Here, the security agencies would not be given tasks that may be carried out with equal efficiency by other, more accountable, bodies or by other methods. However, it may also show, as in the case of seeking an adequate alternative to control orders, that in reality surveillance is, in itself, the least intrusive method of realising the legitimate aim, and may, in fact, need to be increased. Secondly, a principle of minimalism could be built into the test. For example, both liberals and security decision-makers may support the notion that, whilst there is a general threat of terrorism that may necessitate some intrusion into privacy, the surveillance must, wherever possible, be limited to conversations or correspondence which is likely to be about terrorist or criminal activity – surveillance should be broken off or curtailed where the communications range into personal territory and any remaining evidence, such as recorded conversations, should be destroyed.

Applied in this way, the principle of proportionality may benefit the national security agenda in that, whilst civil liberties would retain their importance, they would only occupy the space which is left once other important security related matters have been adequately dealt with. The appeal to liberals is that it embodies the principle of minimal government in which the state merely acts as an impartial umpire when individuals or groups come into conflict with each other, and otherwise leaves citizens alone. Indeed, minimising the use of information unrelated to national security could have a dramatic effect on the interpretation of relevant statutes and on the operational procedures used to implement them. For example, it may render unconstitutional certain applications of the provisions that allow for the retention and dissemination of evidence, regardless of whether it constitutes genuine evidence or useful intelligence information.<sup>962</sup>

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<sup>961</sup> Home Office, *Review of Counter-Terrorism and Security Powers: Review Findings and Recommendations*, January 2011, Cm 8004, pp 36-43, Para. 17.

<sup>962</sup> Matthew R. Hall, *Constitutional Regulation of National Security Investigation: Minimising the use of Unrelated Evidence*, 41 Wake Forest Law Review 61 (2006).

## **6.6 Is the Measure Proportionate in that it Strikes a Proper Balance Between the Purpose and the Target Individual's Political and Human Rights.**

This is the last stage of the proportionality test. It essentially asks whether, in the final analysis, the surveillance or other measure in question, and its implementation, retains a reasonable relationship between the means and the aim sought to be realised. In other words, it requires that the decision-maker has considered whether there is a 'fair balance' between the general and individual interests at stake (such as the right to privacy). Thus, it isn't enough that the state interferes with an individual's rights for a legitimate purpose and by employing reasonable methods; the decision-maker must also be satisfied with the restriction and consider it requisite given the circumstances.

Before progressing further with this discussion, it should be noted from the outset, that this is not a mere balancing act. Indeed, while the rhetoric of balance has featured prominently in the post-9/11 public and academic debate on security and human rights and civil liberties, it is submitted here that the mere rhetoric of balance is unsuitable for reconciling respect for civil liberties and human rights with the alleged imperatives of national security. The problem with a mere balancing act is outlined by Christopher Michaelson. He has pointed out that '*where this balance falls depends on the political colours of the respective commentator.*'<sup>963</sup> In other words, there is no avoiding the fact that deciding whether the targets of security agency activity are a real and genuine threat involves the decision-maker in making a qualitative decision regarding the merits of the relevant domestic provision and its application. Thus, whilst national security remains a value-laden term with no agreement on its composition, there will be ambiguities in its interpretation. Therefore, the way in which balance is examined here is based on a legal principle of proportionality in that it is a decision-making procedure and an analytical structure that leads to the formulation of policy implementation, rather than an attempt to merely balance competing interests. It requires an analysis of whether the measure is appropriate and strictly proportionate with reference to a rigorously applied legal test regarding the appropriateness of the measure in question.

In order to analyse this legal test of proportionality, it is useful to examine the strict way in which the question has been approached in a German case. In a case before the Federal Constitutional Court, the applicant, a Moroccan Muslim studying at the University of Duisburg, alleged that an order based on Section 31 of the Police Act of the Federal State of North Rhine Westphalia (NRW Police Act), which authorised police to employ data mining in order to identify terrorist 'sleeper-cells', violated

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<sup>963</sup> Christopher Michaelson, *The Proportionality Principle, Counter-Terrorism Laws and Human Rights: A German – Australian Comparison*, City University of Hong Kong Law Review, Volume 2:1, July 2010, p22.

his basic rights as protected by the Basic Law.<sup>964</sup> Section 31 of the NRW Police Act allowed the police to demand the personal data relating to certain groups from the files of various authorities with a view to automated comparison with other databases. This use of data was to be permitted to the extent that it was necessary to forestall a ‘present danger’ to the survival or security of the Federation or a state or to the person, life, or freedom of an individual. It was limited to data required for a specific case and not subject to professional confidentiality or official secrecy. The data was to be destroyed if the purpose of collection was attained or proved unattainable. The measure needed to be ordered by the judge of the local lower court (the so called *Amtsgericht*).

Applying its standard proportionality analysis, the Court found that Section 31(1) was proportionate. First, prevention of danger to the public or individual interests was a legitimate goal. Second, the method of data mining was generally appropriate. Third, the intrusion was necessary for the legitimate purpose and could not have been achieved by less drastic means. Fourth, the statutory power was also proportionate in the narrow sense, since the seriousness of the intrusion was not out of proportion to the seriousness of the grounds justifying it. It was necessary that the NRW Police Act specified a threshold for intervention, which it did, namely, a ‘present danger’ for the legal interest threatened. However, The Federal Constitutional Court still held that the Düsseldorf *Amtsgericht* had infringed the student’s basic right to control information about himself under Article 2(1), read in combination with Article 1(1) of the Basic Law. The problem was that, whilst the operation complied with the Basic Law in form and substance, it had been interpreted in a way that infringed upon the applicant’s basic right.

The Court’s decision in the *Data Mining* case supports the national security argument in that it demonstrates that the principle of proportionality may allow for quite severe invasions of basic rights in the event of concrete danger to the survival or security of the state and its citizens, or to the freedom of an individual. On the other hand, the civil libertarian agenda is satisfied in that the case illustrates that the proportionality principle requires a narrow interpretation of the NRW Police Act in order to remain constitutionally valid. The case is significant as it shows that the Court recognises the legislature’s wide margin of appreciation in determining the necessity and appropriateness of specific ‘security’ laws. However, when extraordinary measures are granted to the police, these need to be interpreted to comply with the principles of the superior Basic Law. In the *Data Mining* case, the Court thus set functional limits for the exercise of police powers which arguably still enable the

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<sup>964</sup> See BVerfG, 4 April 2006, 1 BvR 518/02. See also the discussion in Christopher Michaelsen, *The Proportionality Principle, Counter-Terrorism Laws and Human Rights: A German – Australian Comparison*, City University of Hong Kong Law Review, Volume 2:1, July 2010, p22. Benjamin Goold, Liora Lazarus and Gabriel Swiney, *Public Protection, Proportionality and the Search for Balance*, Ministry of Justice Research Series 10/07.

authorities to use data mining but which, on the other hand, protect the individual's basic right to control information about oneself.

## 6.7 Proportionality and its Benefits for the National Security Agenda

The requirement that covert action must be in pursuit of a legitimate aim satisfies the national security agenda in several ways. Firstly, it provides a legal basis by which to override certain civil rights when the requirements of national security warrant it. For example, in times of perceived national emergency, it can be justifiably argued that normal legal and constitutional principles should give way to the prevailing need to deal with the emergency. In Lord Pearce's words, *'the flame of individual right and justice must burn more palely when it is ringed by the more dramatic light of bombed buildings.'*<sup>965</sup> The point is that, if the UK government and citizens perceive a threat to the stability of the nation and the life its citizens, protecting the homeland may, in some circumstances, legitimately triumph over human rights protection and the government should be permitted a latitude of action which, in democratic societies at least, should not be tolerated for any other purpose.

The second benefit of limiting security service activity to the pursuit of legitimate aims is that, full compliance with current legal obligations and restraints, including adherence to the proportionality principle, may prevent state institutions from facing legal challenges to their powers of surveillance in the courts. The point is that, where it can be established that the security agencies have observed and conformed to all the relevant legal and operation safeguards, such as those found in their codes of practice, there may be less grounds for any litigant to make a successful claim. This may be of significant benefit to the government because, whilst the courts have traditionally sought to pay due deference to the intention of parliament, this does not mean that counsel for the government may merely intone the phrase 'national security' to be assured of success in the courts. Rather, the courts have adopted the stance that they must be satisfied that some evidence exists for the executive's claim. For example, in the GCHQ case, Lord Roskill made the following statement: *'The courts have long shown themselves sensitive to the assertion by the executive that considerations of national security must preclude judicial investigation of a particular individual grievance. But even in that field, the courts will not act on a mere assertion that questions of national security were involved. Evidence is required that the decision under challenge was in fact founded on those facts.'*<sup>966</sup> More recently, the UK courts have confirmed this approach. In Secretary of State for the Home Department

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<sup>965</sup> Conway v Rimmer [1968] AC 910, 982,

<sup>966</sup> Council of Civil Service Unions v Minister of the Civil Service (1985) AC 374 at 420; see also Lord Fraser of Tullybelton at 402, and Lord Scarman at 406.

v Rehman,<sup>967</sup> (a case involving deportation for alleged terrorist support and training), Lord Hoffmann cited three examples illustrative of the extent to which matters of national security would be susceptible to judicial review. Firstly, the factual basis for the executive's opinion that deportation would be in the interests of national security must be established by evidence. Secondly, the Commission would be able to overturn the decision of the Secretary of State where his decision was *Wednesbury* unreasonable; and thirdly, the Commission would be able to intervene if deportation would violate the deportee's non-derogable rights (such as the right to be free from torture as guaranteed by Art 3 of European Convention), in which situation the judgement as to what is in the interests of national security is, in Hoffmann's words, irrelevant. Thus, whilst in the actual event, both the Court of Appeal<sup>968</sup> and the House of Lords<sup>969</sup> unanimously agreed with the Government's interpretation that the promotion of terrorism in a foreign country by a resident of the UK would be contrary to the interests of national security, the case showed that the government can no longer rely on a favourable court hearing. Indeed, similar assertions to those of Roskill and Hoffmann have also been made at European level. In *Chahal v United Kingdom*,<sup>970</sup> the European Court of Human Rights encouraged the domestic courts to take a more rigorous approach when considering government claims regarding national security and not to be overly deferential to the executive in this area. Thus, in spite of government claims that a deportation was necessary on grounds of national security, the Court held that if Chahal were to be deported to India, there was a real risk of him being '*subjected to torture or to inhuman or degrading treatment*,' contrary to Art. 3 of the European Convention on Human Rights.<sup>971</sup> The court also held that there had been a violation of Art 13 of the Convention in conjunction with Art. 3 in that, effective remedies did not exist before the courts and that the UK was in breach of the Convention by failing to adopt adequate domestic judicial procedures.

In the light of these judgments, the advantage of ensuring proper operational safeguards, such as proportionality, cannot be overstated. Where the government cannot be certain of a favourable result in the courts, it becomes all the more important to improve the methods by which Ministers, the security agencies and other related bodies, understand and apply the term. This is because, ultimately, if government claims that a given measure was necessary for the objective of protecting national security is subsequently defeated in the courts, public trust may be undermined. This is especially so when one considers that '*recourse to judicial review has increased significantly in recent decades*,

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<sup>967</sup> Secretary of State for the Home Department v Rehman, (2003 1 AC 153 (HL)).

<sup>968</sup> Secretary of State for the Home Department v Rehman, (2000) 3 WLR 1240.

<sup>969</sup> Secretary of State for the Home Department v Rehman, (2003 1 AC 153 (HL)).

<sup>970</sup> *Chahal v United Kingdom* (1997) E.H.R.R. 413 (ECHR).

<sup>971</sup> *Chahal* was a case involving the deportation of a Sikh alleged to be involved in directing, planning and supplying funds for terrorist attacks, in India and elsewhere, and leading campaigns of intimidation against moderate Sikhs. On the 27<sup>th</sup> March 1991, his application for political asylum in the UK, on the ground that he would be a victim of torture and persecution if returned to India, was turned down. There was no appeal available to him under the Immigration Act 1971. A Deportation Order was signed by the Home Secretary on 25<sup>th</sup> July 1991.

from 160 applications in 1974...to 10,548 in 2010,<sup>972</sup> and it has been noted that, in the case of the security agencies, ‘the increased awareness of the importance of national security, in the years after the attacks of 11<sup>th</sup> September 2001, were drivers for this change.’<sup>973</sup> The point is that the public must be confident that security decision-makers have adopted a clear and objective standard with which to distinguish a legitimate aim from that which will merely lead to coercive and unnecessary action by state officials. Thus, civil damages claims filed by former Guantanamo detainees, and successful appeals against decisions relating to control orders and immigration decisions, along with other judicial reviews of government decisions in the national security context, do little to enhance the relationship between the security agencies and the citizen.<sup>974</sup> It is submitted, therefore, that the proportionality principle identifies a clear perspective from which decision-makers can view every case impartially and in a factual way. The result of this thinking may be that measures taken in the name of national security, including covert surveillance investigations, would be subject to a strictly legal standard of fairness and even handedness, rather than potentially imbalanced attempts to reconcile competing values. Thus, applied as a strict legal test, proportionality is beneficial to the national security agenda in that activities such as increasing surveillance are both justified and legitimated by the application of the principle.

## **6.8 Proportionality and its Benefits for the Liberal Agenda**

For liberals, proportionality essentially means that the need for any given investigative technique should be genuine and it should be weighed against the damage that it might do to personal freedom and privacy. This suggests that, the more intrusive the technique, the more difficult it should be for the security agencies to authorise and justify its use and that, except in emergencies, less intrusive techniques should be preferred to more intrusive ones.<sup>975</sup>

This approach to defining security essentially upholds a number of fundamental liberal ideals. Firstly, it supports, to some extent, the liberal notion that the state should legitimise its power by ensuring

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<sup>972</sup> HMSO, Justice and Security Green Paper, *Recent Development and the Case for Change*, October 2011, Cm 8194, Chapter 1, para. 1:15. See also Treasury Solicitor, *The Judge over Your Shoulder: A Guide to Judicial Review for UK Government Administrators*, 3<sup>rd</sup> Edition, 2000. By way of illustration, the Green Paper concludes that, in the first 90 years of the Security Service’s existence, no case impacting directly on the Service’s work reached the House of Lords. In the last ten years there have been 14 such cases in the House of Lords or the Supreme Court. In addition, all three agencies have been involved in many more cases heard in the lower courts.

<sup>973</sup> HMSO, Justice and Security Green Paper, *Recent Development and the Case for Change*, October 2011, Cm 8194, Chapter 1, para. 1:17. The Green Paper also noted that the unprecedentedly high level of threat against the UK, from both home and abroad, meant that the Agencies were required to act faster, co-operate with more international liaison partners and investigate more threats in order to protect the public.

<sup>974</sup> HMSO, Justice and Security Green Paper, *Recent Development and the Case for Change*, October 2011, Cm 8194, Chapter 1, para. 1:17.

<sup>975</sup> Second Report of the Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted police, *Freedom and Security Under Law*, Ottawa: Department of Supply and Services, 1981, para. 411

optimal protection of its citizens' liberties and individual freedoms. As we have seen in previous chapters, liberals tend to emphasise that human beings are essentially self-interested and largely self-sufficient and therefore, as far as possible, should be responsible for their own lives and circumstances.<sup>976</sup> In the liberal ideal, it is for the Government and the security agencies to justify and legitimise any activities and powers that may interfere with individual freedom. Therefore, the principles that inform security policy should optimise the rights of the individual and security legislation should seek to prioritise the principle of limited government. Under a firm application of a properly defined proportionality test, any act undertaken by the security agencies and other government officials must respect basic criteria for assessing the way they deal with the different interests and values. Thus, when security decision-makers are faced with a claim that surveillance adversely affects privacy or freedom of expression, they will be required to provide a fuller and more accurate assessment of the necessity of the security measure in question, and its suitability for achieving the legitimate aim. When it is applied properly then, the proportionality principle requires security decision-makers to measure the legitimacy each case before them by standards that are potentially more rational and balanced, rather than skewed in favour of national security imperatives.

Secondly, proportionality supports the liberal ideal of a nominal or minimal approach to government interference in that, the security agencies would not be given tasks that may be carried out, with equal efficiency, by other more accountable bodies or by other methods. Since, classical liberalism is distinguished by a belief in a 'minimal state', whose function is limited to the maintenance of domestic order and personal security, rights are often understood by liberals as prohibitions that may be imposed upon the state, which prevent state interference into the lives and choices of individuals, rather than in any state control of public morality. Thus, for liberals, the strict application of a proportionality principle may provide some guarantee that, in order to gain authorisation for surveillance, the security agencies would need to provide strong grounds showing that the same work cannot be adequately performed elsewhere or by other means. No surveillance would be instigated against an individual or group without fully comprehensive authorisation which takes into account the full range of circumstances in which the operation takes place.

Thirdly, the principle of proportionality may uphold the rule of law. A key liberal principle is that the exercise of power be within the legal limits conferred by Parliament on those with power and that those who exercise power are accountable to law. This embodies the fundamental liberal principle

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<sup>976</sup> Liberalism is fundamentally the belief that: *'discovering and pursuing one's own conception of the Good is the highest purpose of human life. Respecting individual conceptions of the Good maximizes each individual's moral autonomy. Freedom to identify one's own idea of the Good, and to develop a plan for life accordingly, should be constrained only to the extent necessary to the pursuit of any socially acceptable conception of the good life'*. John Rawls, *A Theory of Justice*. Oxford, Clarendon Press, 1999.

which insists that the law should govern and that those in power should be *'servants of the laws'*.<sup>977</sup> The benefit of the rule of law, for liberals, is that it can potentially ensure that the rights of individuals are determined by legal rules and not the arbitrary behaviour of authorities. Therefore, for liberals, in order to comply with the requirements of the rule of law, the security agencies should ensure that there is a basis in law for the invasion of privacy or any other intrusion into the lives of individuals. These laws should be stable, prospective and clear. For example, as we have seen in relation to the demands of the European Convention on Human Rights, attempted restrictions to Convention rights are only valid if they are founded on, and in full compliance with, an established form of law which is readily accessible and available to members of the general public and is phrased in sufficiently clear terms to enable the individuals affected to adjust their conduct as required. These requirements are thought to promote legal certainty in that they eliminate randomness from legal decision-making. The concept is intertwined with predictability. As such, it has much in common with the requirements of proportionality because it tends to promote the rights of an individual in the circumstances of a single case.

## 6.9 Conclusion

In recent years, liberals have claimed that *'the rights based model of a liberal democracy may have been displaced by a security agenda which is based on the perception that the UK faces an increasing threat from hostile forces, particularly terrorism.'*<sup>978</sup> These perceived threats, according to liberals, have underpinned the government's framing of both the level of the threat and the means to counter it. It is true that in response to the threat of terrorism successive UK governments have gradually constructed one of the most extensive and technologically advanced surveillance systems in the world. The development of electronic surveillance, and the collection and processing of personal information, may have become pervasive, routine, and almost taken for granted. The governmental justification for increased surveillance measures is that, in times when there is a threat of major catastrophe or war, the state has a duty to intervene in order to prevent individual or collective harm and to promote the general welfare of citizens.

However, in an attempt to preserve democracy and national values, governments may introduce measures that abrogate rights and civil liberties. Indeed, it has been argued that the terrorist attacks in America on 9/11 shattered commonly held perspectives on the ideal of a liberal democracy. For

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<sup>977</sup> Aristotle, *Politics*, Book 3, Chapter 16. – Aristotle claimed that *'it is more proper that law should govern than any one of the citizens: upon the same principle, if it is advantageous to place the supreme power in some particular persons, they should be appointed to be only guardians, and the servants of the laws.'*

<sup>978</sup> See, for example, Dora Kostakopoulou, *How to do Things with Security Post 9/11*, Oxford Journal of Legal Studies (OJLS) 2008 28 (317).

example, Dora Kostakopoulou, has claimed that, '*The soft and facilitating state, which cherished individual liberty, was replaced by a strong and intrusive state, and the categorical gap between rights-based democracies and authoritarian polities narrowed worryingly under a declared open-ended state of emergency and the so called 'war on terror'.*'<sup>979</sup>

With regard to the effect of the 'war on terror' on the activities of the security agencies, this erosion of civil liberties has also been recognised by government bodies which oversee covert surveillance investigations. For example, when commenting on the development of surveillance measures in August 2004, the Information Commissioner, Richard Thomas, warned against the possibility of the UK sleepwalking into what he referred to as a 'surveillance society'.<sup>980</sup> The Commissioner claimed that surveillance was '*traditionally associated with totalitarian regimes, but some of the risks can arise within a more democratic framework.*'<sup>981</sup> Similarly, when reporting to the House of Lords Select Committee on the Constitution, Professor Bert-Jaap Koops and others, thought that Article 8 privacy rights under the Convention were '*too easily overridden by the government's unsubstantiated assertions about the necessity of, for example, an anti-crime measure.*'<sup>982</sup> In addition, there have also been concerns regarding whether government agencies, and other public bodies, understand how the principles of necessity and proportionality operate in the context of privacy and the limitations set out in Article 8(2).<sup>983</sup> Thus, whilst the Regulation of Investigatory Powers Act 2000 requires that those engaged in surveillance must consider the necessity of an action and its proportionality to the legitimate aim pursued, bodies such as the Office of Surveillance Commissioners (OSC), have claimed that there is some confusion surrounding the meaning and nature of these key terms.

Civil libertarians have claimed, therefore, that what is needed is a '*charter for the security services containing a comprehensive treatment of the functions, powers and duties of the services.*'<sup>984</sup> With regard to their functions, it is suggested that this charter should lay down clear guidelines as to the persons that can be investigated for intelligence gathering purposes; the standards that should be met before an investigation can be instituted; the restrictions that should exist on the scope of an investigation; and the investigative techniques that may be used.<sup>985</sup>

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<sup>979</sup> Dora Kostakopoulou, *How to do Things with Security Post 9/11*, Oxford Journal of Legal Studies (OJLS) 2008 28 (317)

<sup>980</sup> Ford R, *Beware Rise of Big Brother State, Warns Data Watchdog*, The Times, 16<sup>th</sup> August 2004.

<sup>981</sup> Ford R, *Beware Rise of Big Brother State, Warns Data Watchdog*, The Times, 16<sup>th</sup> August 2004.

<sup>982</sup> Professor Bert-Jaap Koops, Professor of Law and Technology at Tilburg University Institute for Law, Technology and Society (TILT). See Select Committee on the Constitution, *Surveillance: Citizens and the State*, House of Lords, 21<sup>st</sup> Jan 2009, Chapter 6.

<sup>983</sup> See, Select Committee on the Constitution, *Surveillance: Citizens and the State*, House of Lords, 21<sup>st</sup> Jan 2009, Chapter 4.

<sup>984</sup> Michael Supperstone, *The Intelligence Services Act 1994*, 1994 PL 329.

<sup>985</sup> Michael Supperstone, *The Intelligence Services Act 1994*, 1994 PL 329.

This chapter has explored the possibility of testing the legitimacy of security service activity through the prism of proportionality. It has claimed that the security agencies should employ a strict standard of proportionality when assessing potential objects and targets of surveillance. A firm application of the principle of proportionality has the advantage of creating a framework of analysis around which a powerful theory of surveillance authorisation can be built. If it is impartially applied, proportionality permits disputes about the limits of legitimate surveillance activity to be settled on the basis of reason and rational argument. It makes it possible to compare and evaluate radically different ideologies and interests in a way which is more balanced and fair. This is because the principle of proportionality is essentially unbiased. It carries no particular ideal in itself and, as such, it can be argued that it is well positioned to satisfy the demands of civil liberties in a context in which the imperatives of national security are not compromised.

## CHAPTER SEVEN – THE CONCLUSION

Perhaps few would dispute that the ideals contained in both the civil libertarian claims and the countervailing arguments advanced by those who support the national security agenda are both central to the interests of the citizen. Without security and protection from harms, such as terrorism, the liberties and the democratic values that are essential for the personal freedom of each individual may be defeated. However, a strong defence against terrorism may be of less value to the citizen if his liberties and democratic rights are excessively overridden by legislative and defence measures taken in the name of national security. Thus, whilst the strength of the national security argument is that the public have a right to optimal protection from hostile foreign and internal enemies; its weakness is that it is sometimes ill at ease with the fundamental constitutional principles and civil rights which are integral to the demands of a liberal democracy.

In the face of these tensions, and particularly in the post September 11<sup>th</sup> era, liberal democracies have faced the question of whether, and to what extent, they should change the relationship between liberty and security. It seems that the political and legal debate on this issue has been predominantly framed in the language of balancing or rebalancing the two interests. Thus according to the dominant discourse, the key challenge for liberal democracies when fighting terrorism has seemingly been to find some kind of equilibrium between respect for human rights, as legal guarantees of individual liberty, and the protection of national security.

In order to reconcile these competing values, this thesis has attempted to create some new suggestions and possible changes to the current legal structures which regulate the security agencies. Thus, the final phase of this research has culminated in an evaluation of various recommendations for law reform and improvement in the overall regulatory framework. To this end, the thesis has argued that a strengthened application of the principle of proportionality may be both necessary and beneficial. The problem is that, as they are currently drafted and applied, the relevant Acts governing the collection and use of intelligence material provide no clear or explicitly stated principles which will fully guarantee the rights of the individual. For example, both governmental bodies and civil libertarians have expressed concerns that, although proportionality is implicit in the Human Rights Act and the Regulation of Investigatory Powers Act, the codes of practice governing their implementation may not pay enough attention to ensuring that only the most democratic options are pursued when authorising and conducting surveillance, or that surveillance is only authorised where absolutely necessary.<sup>986</sup> Thus, whilst it has been recognised that the proportionality test can be ‘a very

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<sup>986</sup> John Wadham, *The Intelligence Services Act 1994*, (1994) 57 MLR 916

*effective protection indeed,*<sup>987</sup> some have argued that, in practice, public authorities have not fully absorbed the principle into their decision-making procedures and that *'there has been a tendency, on the part of the Government and the courts, to see Article 8 as providing a minimum standard that must be attained rather than as a foundation for the development of better regulation.'*<sup>988</sup>

The thesis claims that the potential benefit of a firmer application of the principle of proportionality is that it is an impartial criterion of constitutionality by which the security agencies can base their decisions without favouring any one ideal. The point is that, if proportionality is applied as a strict legal test, rather than an attempt to balance competing rights, it is more likely to produce an unbiased result. Since the principle of proportionality, when it is applied properly, is not ideologically based, it is argued that it is well positioned to draw out the greater elements of each of the two opposing ideologies. For example, the national security agenda is facilitated in the sense that the proportionality test both assists decision-makers by demonstrating clearly how rights arguments are resolved and legitimates the decision making process by furnishing it with legal transparency. The upshot of this, in theory at least, is that intelligence officials may be less likely to face legal challenges to their powers of covert surveillance. In other words, if they have fully complied with agreed Home Office guidelines for the proportionate and formal authorisation of surveillance, there may be less grounds for a successful claim under the Human Rights Act 1998, including those made to the European Court of Human Rights. Similarly, the principle goes some way towards satisfying the liberal preference for the control of state power. The liberal approach to state power effectively means that, whilst the requirement of national security is seen as vitally important, such considerations should not lead to arbitrary or unnecessary actions by state officials such as the security agencies. Rather, the state should be characterised by a constitutional government which includes a system of checks and balances amongst major institutions, including operational safeguards such as proportionality

However, the requirement that the rules and principles of constitutional law be applied impartially is more than just a way of avoiding selective and inconsistent enforcement of security measures. Applying the principles of proportionality also entails recognising that which is 'just and proper' in regards to the particulars of each surveillance investigation. For example, tests regarding the 'suitability' of any given measure and their 'necessity' may be more likely mark out cases which, in effect, contain no legitimate reasons of any kind by which to justify the potential infringement of an individual's civil rights. In other words, laws that can't pass the necessity test, may in fact, constitute gratuitous infringements on people's constitutional rights because they are broader and more

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<sup>987</sup> Professor Feldman. See the discussion in: Select Committee on the Constitution, *Surveillance: Citizens and the State*, House of Lords, 21<sup>st</sup> Jan 2009, Chapter 4.

<sup>988</sup> Justice. See the discussion in: Select Committee on the Constitution, *Surveillance: Citizens and the State*, House of Lords, 21<sup>st</sup> Jan 2009, Chapter 4.

burdensome than they need to be. Where there is no rational reason, or legitimate interest, in pursuing a less restrictive alternative, which would accomplish the Government's objectives, both the security bodies and civil libertarians may agree that the measure should not be imposed.

A further benefit of a strict and consistent application of the principle of proportionality is that it is consistent with certain ideals integral to the rule of law, to which both the national security agenda and liberals may, in varying degrees, subscribe. For example, it supports the ideal of legal certainty. Legal certainty is a principle of jurisprudence which holds that legal rules must be clear and precise in order that citizens can understand the requirements of the law. The concept implies that legal decision-making will be predictable and that randomness or arbitrariness will be eliminated from the legal process. Rather, any act undertaken by the security agencies and other government officials must respect basic criteria for assessing the way in which they deal with the different interests and values. Thus, when security decision-makers are faced with a claim that surveillance adversely affects privacy or freedom of expression, they will be required to provide a full and accurate assessment of the necessity of the security measure in question and its suitability for the achieving the legitimate aim. When it is applied properly then, the proportionality principle requires security decision-makers to measure the legitimacy of each case before them by standards that are rational and balanced, rather than by standards that may be ideologically driven.

Overall then, this research finds that there is some sense in applying qualifications to certain civil rights and liberties where the demands of national security warrant it. The interest in national security is a strong one and many people would accept that certain circumstances – such as the maintenance of democratic integrity in the face of violent attempts to influence a nation's political processes - are not compatible with the institutions and ideals of a liberal democratic society. In these cases a defendant government may make a convincing case that a particular application of the right to free speech or privacy may significantly undermine, or put in danger, some aspect of public welfare or national security. In such cases it seems fair that a strong individual right, such as privacy, may be overridden. Indeed surveillance measures may become both necessary and even desirable. However, this must be done in relation to the demands of the European Convention on Human Rights. Attempted restrictions to Convention rights are only valid if they are founded on, and in full compliance, with an established form of law; readily accessible; available to members of the general public; and phrased in sufficiently clear terms to enable the individuals affected to adjust their conduct as required. This thesis argues that fully complying with these requirements demands that the principle of proportionality is rigorously and consistently applied.

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