"Section 4 of the Counter-Terrorism and Border Security Act 2019 [CTBSA 2019] introduces a new offence of 'entering or remaining in a designated area' outside the United Kingdom. The provision is intended to protect the public from the risk of terrorism. However, it is not retrospective. Should it have been?

> "Few things would provide a more gratifying victory to the terrorist than for this country to undermine its traditional freedoms, in the very process of countering the enemies of those freedoms".[1]

As another wave of terror washes over London following the London Bridge and Streatham knife attacks, protecting our democratic rights has never been more crucial. Terrorist attacks so often trigger a belt-and-braces approach to security measures, as demonstrated by the government's recent pledge to implement emergency legislation to block the automatic early release of convicted terror offenders.[2] It can be argued that the civil liberties of suspected terrorists ought to be curtailed for the sake of protecting the wider public. However, as Geoffrey Robertson warns: 'terrorism succeeds if it tempts us to abandon the core values of democratic society'.[3] The Terrorism Act 2000 has been heavily criticised for being too vague; any further attempt at a 'catch-all' model of terrorism legislation with retrospective effect would breach Article 7 of the ECHR and would further undermine the UK's reputation as a stable democracy.[4]

"The Constitution is not a suicide pact"

So declared Justice Robert Jackson in the US Supreme Court in 1949.[5] The rule of law protects the rights of those in legal straits, but should it tie the government's hands when protecting the general public from the threat of terrorism? Unlike most other crimes, terrorism affects everyone, every day. Anyone who travels on the underground will have been a victim of terror

[1] Roy Jenkins, reported in *Hansard*, HC Vol. 882, col. 634 (November 1974).
[2] BBC News, 'Emergency law aims to stop next terror release', 6 February 2020, [bbc.co.uk/news/uk-51394602], date accessed 9 February 2020.
[3] Geoffrey Robertson, 'Fair Trials for Terrorists?' in Richard Wilson, *Human Rights in the 'War on Terror'* (New York: Cambridge University Press, 2005), page 170.
[4] Article 7(1) ECHR: no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed.
[5] *Terminiello v City of Chicago*, 337 U. S. 1 (1949)

when they worry someone is behaving suspiciously. The victims of the London Bridge knife attack in November 2019 were Cambridge University graduates. For the educated and middle classes whose lives were largely untouched by crime and for those who thought 'that would never happen to people like us', the risk of terrorism has become an immediate threat.

To make section 4 CTBSA 2019 retrospective would minimise the risk of terrorism; anyone who had visited a designated area at a relevant time could be investigated, prosecuted and hopefully prevented from doing anything more dangerous. Put very bluntly, one could argue that without retrospective legislation, the State is powerless until it is too late. A compelling example is the Manchester Arena attack; this week an Old Bailey jury heard how Salman Abedi, a British citizen, travelled to Libya in between preparing the bombs he would later use to kill himself and 22 others.[6]

Richard Goldstone suggests the horror of the Holocaust was a watershed for citizens' rights becoming an international issue.[7] The first symptom of a legal global conscience was the London Agreement, which set out the basis upon which the Nuremberg Trials were to be conducted. The rationale for the trials was that egregious crimes such as mass genocide offended not only people who were directly affected by them, but were crimes committed against the whole of mankind.[8] Consequently, the defendants at Nuremberg were prosecuted for and convicted of a crime against humanity, a product of retrospective legislation. It can be argued that the effects of terrorism are just as far-reaching as those of the Holocaust. By its very definition 'terrorism' is an attack on civil society.[9] The question must be asked: is a terrorist entitled to the same legal rights as everyone else when the effect of their crime is to deprive others of those rights?

Parliament has rarely seen fit to introduce retrospective legislation. One example is Part 10 of the Criminal Justice Act 2003 [CJA 2003] which permits retrials in respect of serious offences where new and compelling evidence has come to light. Section 75(6) provides that Part 10 applies whether the acquittal was before or after the passing of the Act. This made way for the

[6] I heard part of R v Hashem Abedi at the Central Criminal Court on 21 February 2020.
[7] Richard Goldstone, 'The Tension between Combatting Terrorism and Protecting Civil Liberties', in Richard Wilson, *Human Rights in the 'War on Terror'* (New York: Cambridge University Press, 2005), page 158.
[8] ibid.
[9] 'Terrorism' is defined in section 1 of the Terrorism Act 2000 as the use or threat of action designed to influence any international government organisation or to intimidate the public; it must also be for the purpose of advancing a political, religious, racial or ideological cause.

re-trial of the two defendants originally acquitted of murdering Stephen Lawrence in 1993. Gary Dobson and David Norris' conviction for Lawrence's murder was a welcome result of the retrospective effect of the CJA 2003; but can the same be said for all situations where people have been previously acquitted of serious offences?

The introduction of retrials for serious offences sparked outrage; the thought that someone could fight a trial and be unanimously acquitted by a jury, only to face the possibility of a retrial however many years later is surely unjust, no matter how serious the indictment. Relatively speaking, it would therefore be wholly unreasonable for an offence as minor as entering a designated area to be prosecuted retrospectively.

Exceptions such as Dobson and Norris' retrial aside, a human rights 'tit for tat' debases our democratic justice system. To create legal exceptions for terrorist offences is a slippery slope; where would we draw the line? The law must be black and white and predictable in order to be fair. No matter how morally reprehensible we may find a terrorist, to deprive him of basic rights is deeply unattractive, as exemplified by Vice President Cheney when talking about combatants captured in Afghanistan in 2001: 'they don't deserve to be treated as prisoners of war, they don't deserve the same safeguards as a normal American citizen going through the justice process'.[10]

Democracy or security?

It is difficult to discuss this apparent dichotomy without considering the mechanics of politics. In the current climate, politicians who take a stricter approach to terrorism are likely to be more popular than those who seek to preserve esoteric values such as democratic rights for all. Writing in the wake of the 9/11 attacks, Goldstone noted how politicians became more popular with their electorate: "In that context [9/11], it is deemed to be preferable to take inappropriate or excessive action rather than none at all".[11] According to this logic, electorally popular action cannot always be legally sound, and vice versa.

[10] Robertson, 'Fair Trials for Terrorists?', page 174.
[11] Goldstone, 'The Tension between Combatting Terrorism and Protecting Civil Liberties', page 166.

Over the years and at present, governments would appear to operate on the following basis: only underprivileged people who are involved in crime will be affected by the curtailing of basic legal rights and those people do not tend to vote. The well-educated, voting middle classes rarely consider whether their rights are being violated because they rarely exercise those rights. David Luban writes with refreshing candour: "psychologically, it is very difficult to weigh the importance of rights and civil liberties without assuming, consciously or not, that rights I and my loved ones are unlikely to need are less important than my physical security".[12]

However, Luban goes on to illustrate how rights are a form of security with a mundane example: his credit card was frozen several times because his bank's theft-detection software flagged up what seemed to be suspicious purchasing. They were in fact purchases made by him; but he was unable to use his card on several occasions. He asks:

> "is the government's terrorist-detection software likely to be less error-prone than my bank's theft-detection software? If anything, the opposite is likely to be true, because the stakes of a false negative are so much higher that analysts will likely err on the side of suspicion".[13]

Of course, the difference is that whereas Luban was unable to exercise his right to purchase petrol and clothing, the 'terrorist' suspected of entering a designated area will be unable to exercise his right to be treated fairly under the law.

When torture was declared unlawful in Israel in 1999, the President of the Supreme Court, Aharon Barak declared that, even if its use might save lives by preventing acts of terrorism, "sometimes, a democracy must fight with one hand tied behind its back. Nonetheless, it has the upper hand. Preserving the rule of law and recognition of individual liberties constitute an important component of its understanding of security".[14] If the government fails to act within the law, its democratic legitimacy is undermined and any respect for the criminal justice system is damaged.

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[12] David Luban, 'Eight Fallacies About Liberty and Security' in Richard Wilson, *Human Rights in the 'War on Terror'* (New York: Cambridge University Press, 2005), page 244.
[13] ibid., page 246.
[14] Goldstone, 'The Tension between Combatting Terrorism and Protecting Civil Liberties, page 164.

The case of *SW v The United Kingdom* is often evoked in arguments justifying retroactive legislation;[15] a landmark ruling where the European Court declared that the English courts' retrospective application of the law on rape was not in breach of Article 7 ECHR. The justification for that ruling was based almost wholly on the concept of foreseeability:

> *"Article 7 cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen".*[16]

This point was re-emphasised at paragraph 43:

> *"the decisions of the Court of Appeal and then the House of Lords did no more than continue a perceptible line of case-law development […] a reasonably foreseeable development of the law".*

In other words, the offence of rape was clearly intended to apply within a marital relationship. However, to make travel to a given area in the past a criminal offence is clearly *not* a foreseeable development of pre-existing terrorism legislation.

A(nother) catch-all solution?

Section 4 of the CTBSA 2019 has two functions: one is to pre-empt serious attacks by prosecuting (and imprisoning) those who have travelled to parts of the world where radicalisation is a risk. The second function is to fill the gaps left by pre-existing terrorism legislation. In other words, if there is insufficient evidence to prosecute a suspect for an act of terrorism, the authorities will be able to 'go after' said suspect for travelling to a designated area; a much easier offence to prove. This new offence was added to the Terrorism Act 2000, which has been criticised for its vagueness since coming into force. During his office as

[15] *SW v The United Kingdom*, Application no. 20166/92 [ECHR 1995].
[16] ibid., para. 36.

Independent Reviewer of Terrorism Legislation in 2013, David Anderson QC remarked on the "chilling effect" of anti-terrorism legislation on democratic rights.[17]

It is essential that the scope of any anti-terrorism legislation remains sufficiently broad for the sake of operational necessity; the law must be able to keep up with the new and inventive ways in which terrorists terrorise.[18] Clive Walker warned that any narrowing of the pre-2019 anti-terrorism legislation would fail in the face of terrorist innovation; in his words, it would "pit the legislative drafter and the unusually slow and unwieldy parliamentary process against the ingenuity of the terrorist".[19] However, any retrospective application of such legislation would be one step too far.

The Terrorism Act 2000 was heavily criticised in *R v Gul*.[20] The Justices of the Supreme Court commented on the unacceptable breadth of the legislation, quoting David Anderson in his 2013 report where he described the legal definition of terrorism as "remarkably broad – absurdly so in some cases".[21] Prosecutorial discretion seeks to curtail the breadth of the legislation,[22] but that too is inherently problematic, as observed in *R v Gul*:

> "*The Crown's reliance on prosecutorial discretion is intrinsically unattractive, as it amounts to saying that the legislature, whose primary duty is to make the law […] has in effect delegated to an appointee of the executive […] the decision whether an activity should be treated as criminal for the purposes of prosecution*".[23]

This constitutional fluidity is also a risk in section 4 CTBSA 2019. Under the new legislation, the test for designating an area is that the Home Secretary, having consulted the Foreign Secretary, is satisfied that it is necessary to restrict UK nationals and residents from travelling to or remaining in an area for the purpose of protecting the public from a risk of terrorism. This arbitrary exercise is alarming enough, without having retrospective effect.

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[17] David Anderson QC, 'The Terrorism Acts in 2013: Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006', (TSO, 2014), 4.22.
[18] Alan Greene, 'The Quest for a Satisfactory Definition of Terrorism', *The Modern Law Review*, Volume 77, Issue 5, page 793.
[19] Clive Walker, 'The Legal Definition of Terrorism in the United Kingdom Law and Beyond' [2007] *Public Law* 331, 334.
[20] *R v Gul* [2013] UKSC 64
[21] ibid., para. 62.
[22] Prosecutorial discretion is provided for by section 117 of the Terrorism Act 2000.
[23] *R v Gul*, para. 36.

Conclusion

Whilst the threat of terrorism in the UK is at an all-time high, the law must not be manipulated for short-term peace of mind. Arbitrary measures to protect the country from terror today may soon become part of a legal system where democratic rights are brushed aside in favour of security at any cost. The UN High Commissioner for Human Rights Sergio Vieira de Mello echoed Roy Jenkins in 1974 when addressing the UN Counter-Terrorism Committee in 2002: "such measures […] must take place within the framework of the law. Without that, the terrorists will ultimately win and we will ultimately lose – as we would have allowed them to destroy the very foundation of our modern human civilisation".[24]

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22 February 2020
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[24] Quoted in Goldstone, 'The Tension between Combatting Terrorism and Protecting Civil Liberties', page 166.