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**Deposited in DRO:**

13 March 2014

**Version of attached file:**

Accepted Version

**Peer-review status of attached file:**

Peer-reviewed

**Citation for published item:**

Davis, Fergal F. and de Londras, Fiona (2014) 'Introduction : counter-terrorist judicial review : beyond dichotomies.', in *Critical debates on counter-terrorist judicial review*. Cambridge: Cambridge University Press, pp. 1-32.

**Further information on publisher's website:**

<http://www.cambridge.org/gb/academic/subjects/law/human-rights/critical-debates-counter-terrorism-judicial-review>

**Publisher's copyright statement:**

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**Additional information:**

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## INTRODUCTION

### Counter-Terrorist Judicial Review: Beyond Dichotomies

Fergal F. Davis and Fiona de Londras

The contemporary context of terrorism and counter-terrorism is one in which the impossible has become possible. For most people the conversion of a passenger jet into a weapon that would be purposefully flown into civilian buildings at the cost of thousands of lives was unimaginable before 11 September 2001; today those era-defining images have seeped into the collective consciousness. It had been assumed that debates about the morality of torture had long since been resolved; not so it seems. An actual or perceived threat of terrorism has the capacity to greatly rupture our politics. It creates an atmosphere in which the ‘normal’ commitment of liberal democracies to constitutionalism and human rights is challenged with illiberal measures being introduced and potentially embedded. The possible impact of such measures, and the febrile politico-legal counter-terrorist atmosphere hold such significant possibilities that it is not surprising that understanding and responding to terrorism and counter-terrorism has become such an active field of legal, political, operational and scholarly endeavour. One approach to understanding and responding to (counter)terrorism is to sometimes reduce the debate to simple dichotomies: terrorist v. freedom fighter, terrorism v. counter-terrorism, vengeance v. protection, fundamentalism v. necessity, security v. liberty. However, such an approach is unhelpful; it masks the murkiness of the subject. After all this is an area in which we cannot even agree on a definition of the core subject matter; as Walter Laqueur declared ‘disputes about a detailed, comprehensive definition of terrorism will continue for a long time and will make no noticeable contribution towards the understanding of terrorism.’<sup>1</sup> The depth of this ‘murkiness’ is further reflected in debates as to the proportionality of responses to attacks or perceived threats, in disputes about the legality of new counter-terrorist mechanisms, and in political and other debates about how far a state ought to go to defend itself and its people against a seemingly uncontrollable risk of terrorist attack. In practice, this ‘murkiness’ has contributed to some extent to the design, appropriation, implementation and exercise of extensive powers of counter-terrorism, often without even a legislative basis. Even where legislation *is* used, it tends (at least relatively close to the attack in question) to be proposed by the executive and passed by a fairly compliant legislature.<sup>2</sup> All of this means that, generally speaking, counter-terrorism tends to be characterised by (at the very least, an attempt at) executive supremacy and unilateralism in introducing extremely repressive counter-terrorist measures that sit uncomfortably with constitutionalist principles of proportionality, limited power, respect for individual rights, and equal application of the law.<sup>3</sup>

This is of clear concern to many scholars, including us. In 2010 we wrote that

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<sup>1</sup> W.Laqueur, *The Age of Terrorism* (1987, Boston; Little Brown and Co.), p. 72.

<sup>2</sup> F. de Londras, *Detention in the ‘War on Terror’: Can Human Rights Fight Back?* (2011; Cambridge University Press), Chapter 1.

<sup>3</sup> Although supranational bodies involved in counter-terrorism do not generally have a clearly identifiable executive branch *per se*, Murphy outlines how an executive type power can be observed in these contexts. See Chapter 13 in this volume, C. C. Murphy, “Counter-Terrorism Law and Judicial Review: The Challenge for the Court of Justice of the European Union”.

Within a system of separated powers, there are three potential responses to the limitation of individual liberties resulting from Executive actions during the times of violent, terrorism-related emergency: (i) trust the Executive to behave responsibly and lawfully; (ii) rely on the Legislature and the popular democratic processes to force the Executive to behave responsibly and lawfully and minimize judicial intervention; or (iii) call on the Judiciary to intervene and restrict unlawful behaviour produced by the Executive, the parliament or both acting together.<sup>4</sup>

We both accepted that executive supremacy was inappropriate, agreeing that some restraint on executive power was desirable. The on-going use of closed material and a general air of secrecy in counter-terrorism give rise to an opaque environment causing us to be even more suspicious of simply trusting the executive. However, we disagreed on which of the remaining two responses would provide the most effective means of controlling executive power. Since then there has been some convergence of opinion; in some respects we are less absolute in our positions.<sup>5</sup> However, while the common ground has expanded, the end result remains the same: de Londras favours enhanced judicial review while Davis sees judicial review as both ineffective and undermining of parliamentary scrutiny. Our debate — and our disagreements — form only part of a broader set of concerns about judicial review generally, and about judicial review in the context of counter-terrorism (or, indeed, other violent emergency) more particularly. This broader debate, which takes place across legal systems and continents, has a number of branches that are reflected in this collection: institutional appropriateness, quality, sufficiency and internationalisation.

All of these elements of the debate about counter-terrorist judicial review speak to a core concern that we address later in this Introduction: what is the purpose of judicial review? Once we can ascertain that in normative terms, the secondary concern (how can that purpose best be achieved within and outside of judicial review structures?) becomes germane. The purpose of this volume is to deal in an open, although discursive, manner with that second concern. To that end, the collection brings together some of the key contributors to this debate in both scholarship and practice to engage in a dialogue, not with a view to resolving our differences but rather to exploring them.

## I. What is at Stake?

Debates about counter-terrorist judicial review are important and wide-ranging, reflecting the fact that when it comes to counter-terrorism the stakes are high. As Lord Chief Justice Coke stated in *Calvin's Case* the sovereign is bound 'to govern and protect his subjects.'<sup>6</sup> A successful act of terrorism demonstrates a failure on the part of a sovereign State to fulfil that most basic of duties. This can undermine public confidence and inspire moral panic. Indeed

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<sup>4</sup> F. de Londras and F. Davis, "Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanisms" (2010) 30 *Oxford Journal of Legal Studies* 19, p. 19.

<sup>5</sup> For example, de Londras has recently called for a more "virtuous" politics to improve counter-terrorist law and policies both before and in response to judicial intervention: "Guantánamo Bay, the Rise of Courts and the Revenge of Politics" in D. Jenkins, A. Henriksen and A. Jacobsen (eds.) *The Long Decade: How 9/11 Has Changed the Law* (2014; Oxford University Press) (forthcoming). Davis has attributed a greater role to courts in the process of dialogue. Where he previously saw them simply as raising an alarm through a simple declaration of incompatibility he now acknowledges a role for judgments to engage popular and parliamentary debate: "Parliamentary Supremacy and the Re-invigoration of Institutional Dialogue in the UK" (2013) *Parliamentary Affairs* forthcoming.

<sup>6</sup> 7 Coke Report 4 b, 77 ER p. 382

[T]errorism is an anxiety-inspiring method of repeated violent action, employed by (semi-) clandestine individual, group or state actors, for idiosyncratic, criminal or political reasons, whereby - in contrast to assassination - the direct targets of violence are not the main targets. The immediate human victims of violence are generally chosen randomly (targets of opportunity) or selectively (representative or symbolic targets) from a target population, and serve as message generators. Threat-and violence-based communication processes between terrorist (organization), (imperilled) victims, and main targets are used to manipulate the main target (audience(s)), turning it into a target of terror, a target of demands, or a target of attention, depending on whether intimidation, coercion, or propaganda is primarily sought.<sup>7</sup>

If we accept this definition, for the moment at least, it becomes apparent that manipulation of the target is central to terrorism. Given that the target is often the public, this manipulation is likely to impact upon the quality of democratic debate. It is therefore unsurprising that the state of exception arising from an act of terrorism often has a distorting effect on democracy. For example, in the US post 11 September 2001

[I]nstead of the rowdy, rhetorical deliberations appropriate to agnostic politics in a healthy pluralistic polity, the nation experienced a wave of patriotic fervor and political conformity in which the expression of dissenting opinions and the defence of civil liberties were equated with anti-Americanism.<sup>8</sup>

This distortion of democracy has an impact on the quality of political debate and meaningful engagement with political society. Where these negative impacts on democracy coincide with a general ‘security bias’ the resulting impact on liberty can be extreme. Internment without trial, extraordinary rendition, control orders, and special trial procedures such as those employed at Guantánamo Bay have all been utilised by otherwise liberal democratic states on the basis that a terror threat needed to be faced down. The illiberal nature of these provisions is, in and of itself, problematic but it also has the potential to impact on the wider legal system through normalisation, (perceived or actual) illegitimacy of state action, and the mounting of a serious challenge to the core elements of constitutionalism.

The designation of counter-terrorist law and policy as an ‘exceptional’ phenomenon, introduced in exceptional situations, is contingent upon what is known as the emergency-normalcy dichotomy.<sup>9</sup> This postulates that there are discrete and quantifiable situations of emergency that exist as aberrations from the (general) normalcy in which the state operates. This dichotomy is reflected throughout law at both domestic and international levels,<sup>10</sup> and it is designed—as Greene has written—to allow for the concept of emergency to act as both a

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<sup>7</sup> A.P. Schmid and A.J. Jongman, *Political Terrorism: a New Guide to Actors, Authors, Concepts, Data Bases, Theories, and Literature* (2005, New Jersey; Transaction Publishers), p. 28.

<sup>8</sup> R.L. Ivie, “Rhetorical Deliberation and Democratic Politics in the Here and Now” (2002) 5(2) *Rhetoric and Public Affairs* 277, p. 281.

<sup>9</sup> See generally O. Gross and F. Ni Aolain, *Law In Times Of Crisis: Emergency Powers In Theory and Practice* (2006; Cambridge University Press), Chapter 4.

<sup>10</sup> *Ibid*, Chapters 5 and 6.

shield and a sword.<sup>11</sup> As a shield it is intended to protect the populace from generally repressive laws by holding the state to strict limits in the normal course of events; as a sword it is intended to give states the latitude they are thought to require to take firm and (we are to hope) decisive action against terroristic threats.<sup>12</sup> However, as is so often the case, law and life are mismatched. The emergency in which exceptional laws and policies are tolerated has tended to extend far beyond the aberrational; it has tended to become entrenched (either generally or in particular regards) domestically and now risks doing so internationally. The risk of entrenchment is the normalisation of emergency measures; their continued application, their widening scope, their recalibrating potential. A core concern in any debate about limiting counter-terrorist activity by judicial review or otherwise has to be the maintenance of a division between the exceptional and the normal and, moreover, the quarantining of repressive powers in terms of time and scope.

A belief in the likelihood of a return to normalcy at the end of a period of exception is dependent on a number of factors. Firstly, it seems likely that the capacity of the various arms of government to ‘reclaim their status and functions once the danger has passed’ will be dependent on the strength of democratic culture in the state.<sup>13</sup> More fundamentally a return to normalcy rests on the ability to define the end of the state of exception. The decade since 11 September 2001 has caused many to question whether the response to terrorism can genuinely be seen as ‘exceptional’ in the sense of it being temporary.<sup>14</sup> As a result any measures adopted are likely to have an on-going effect. Furthermore, it can be demonstrated that repealing and unpicking complex counterterrorism measures is often problematic. For example, although the UK Conservative/Liberal Democrat Coalition government expressed a desire to repeal the worst excesses of the Labour Government’s counterterrorism measures, their Terrorism Prevention and Investigation Measures Act 2011 and Freedom Bill had only limited success if measured against civil liberties yardsticks that would be applied in a period of ‘normalcy’. So too is such unpicking dependent on the maintenance of our understandings of the content of rights during the crisis itself. As the contributions from Chan, Jenkins and Fenwick in this collection make clear,<sup>15</sup> that which is exceptional must be named as exceptional; its particularity must be clearly identified *even if* it is to be accepted as necessary and justifiable given the circumstances in which it occurs. To do otherwise is to both potentially apply the emergency power to *everyone* (not just ‘the threat’) and to ratchet down the starting point of civil liberties and empty out to some degree our understanding of constitutionalism creating a diminished rights culture after the present crisis (and at the commencement of the next one).<sup>16</sup>

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<sup>11</sup> A. Greene “Shielding the State of Emergency: Organised Crime in Ireland and the State’s Response” (2011) 62(3) *Northern Ireland Legal Quarterly* 15.

<sup>12</sup> *Ibid.*

<sup>13</sup> A. Lynch, “Legislating anti-terrorism: observations on form and process” in V.V. Ramraj, M. Hor, K. Roach and G. Williams (eds.) *Global Anti-Terrorism Law and Policy* (2 ed.) (2012; Cambridge University Press), p. 151.

<sup>14</sup> *Ibid.*; but *cf* the decision of the European Court of Human Rights in *A v. United Kingdom* [2009] ECHR 301 (19 February 2009) holding that temporariness is not a requirement of emergency for the purposes of Article 15 of the ECHR.

<sup>15</sup> See Chapters 4, 11 and 14 in this volume, D. Jenkins, “When Good Cases Go Bad: Unintended Consequences of Rights-Friendly Judgments”; C. Chan, “Running Business as Usual: Deference in Counter-Terrorism Rights Review”; and H. Fenwick, “Post 9/11 UK Counter-Terrorism Cases in the European Court of Human Rights: A ‘Dialogic’ Approach to Rights Protection or Appeasement of National Authorities.

<sup>16</sup> An important contribution to the debate on control mechanisms has been the extra-legal measures model proposed by Oren Gross, which is fundamentally concerned with attempting to prevent this kind of ratcheting down. Under this model, state actors would make an assessment about whether something was necessary whether or not it was lawful, undertake the action if they considered it necessary, and make a full *ex post facto*

If one thought that emergencies were really containable, and that politics were not opportunistic when it comes to making the most out of a ‘good crisis’,<sup>17</sup> one might argue that none of this matters *too much* for the short period of time that the emergency or crisis persists. However, history and experience tell us that this is not so, and that counter-terrorism without the counterweight of constitutionalism has significant repercussions for civil liberties. In this respect, counter-terrorism is an iterative and cumulative process. This is well illustrated by the journey from detention without trial to control order ‘lite’ in the United Kingdom (UK). The Anti-Terrorism, Crime and Security Act 2001 provided for indefinite detention of foreign nationals suspected of terrorism.<sup>18</sup> The Control Order regime replaced this with a system of virtual house arrest that was repeatedly criticised by the Courts<sup>19</sup> and the Joint Committee on Human Rights,<sup>20</sup> and that in turn was replaced by the restrictive Terrorism Prevention and Investigation Measures, now operating, that still allow for extensive restrictions on personal liberty.<sup>21</sup> Although this represents a movement towards less repressive measures, it has also resulted in a shift in judicial and political approaches to accept that being confined to one’s home for up to 14 hours a day and then limited in activity and interaction outside of that time does not qualify as detention and therefore is not attached with all of the safeguards that the law provides for detainees.<sup>22</sup> The imminent introduction of ‘Enhanced’ TPIMs also calls into some question how substantive that shift has truly been.<sup>23</sup>

Furthermore, even the most entrenched and normatively accepted constitutionalist standards have been honoured more in the breach than the observance over the past ten years, calling into question their capacity to retain their absolute nature. The prohibition on torture is the clearest example of this.<sup>24</sup> States have used the cover of ‘counter-terrorism’ to justify the torture of suspected terrorists (themselves, by ‘partners’, through the collusion of third states

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disclosure allowing for the risk of censure or of endorsement. In this model — crucially — laws allowing for the previously disallowed are not introduced; rather the positive law retains its integrity. The model is critiqued, particularly in its apparent distinction of the positive law from the politico-legal culture in which it operates. The model does not feature prominently in this collection. See O. Gross, “Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?” (2003) 112 *Yale Law Journal* 1011; D. Dyzenhaus, “The Compulsion of Legality” in V.V. Ramraj (ed.) *Emergencies and the Limits of Legality* (2008; Cambridge University Press), p. 33; O. Gross, “Extra-legality and the Ethic of Political Responsibility” in V.V. Ramraj (ed.) *Emergencies and the Limits of Legality* (2008; Cambridge University Press), p. 60.

<sup>17</sup> While White House Chief of Staff, Rahm Emmanuel famously said ‘You never want a serious crisis to go to waste. And what I mean by that is an opportunity to do things you think you could not do before.’ The video clip of him making this statement is available here [http://www.youtube.com/watch?v=1yeA\\_kHHLow](http://www.youtube.com/watch?v=1yeA_kHHLow)

<sup>18</sup> Section 23, Anti-Terrorism, Crime and Security Act 2001.

<sup>19</sup> *Secretary of State for the Home Department v. JJ* [2006] EWHC 1623 (Admin); *Secretary of State for the Home Department v. E* [2008] 1 AC 499; *Secretary of State for the Home Department v MB and AF* [2008] 1 AC 440; *Secretary of State for the Home Department v. AF (No 3)* [2010] 2 AC 269.

<sup>20</sup> See for example Joint Committee on Human Rights, Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010 (calling for the control orders scheme to be discontinued).

<sup>21</sup> F. Davis, “The Human Rights Act and Juridification: Saving Democracy from Law” (2010) 30(2) *Politics* 91, p. 93; K. Ewing and J. Tham, “The Continuing Futility of the Human Rights Act” [2008] *Public Law* 668; H. Fenwick and G. Phillipson, “Covert Derogations and Judicial Deference: Redefining Liberty and Due process Rights in Counterterrorism” (2011) 56(4) *McGill Law Journal* 863, p. 865 - 918.

<sup>22</sup> See especially L. Zedner, “Preventive Justice or Pre-Punishment? The Case of Control Orders” (2007) 60 *Current Legal Problems* 174.

<sup>23</sup> See H. Fenwick, “Designing ETPIMS around ECHR Review or Normalisation of “Preventive” Non-Trial-Based Executive Measures?” (2013) 76(5) *Modern Law Review* 877.

<sup>24</sup> The use of torture and coercive interrogation in the ‘War on Terrorism’ has attracted substantial amounts of literature. For an excellent collection of essays reflecting on torture in the ‘War on Terrorism’ see S. Levinson (ed.) *Torture: A Collection* (2004; Oxford University Press).

and by the involvement of private entities<sup>25</sup>). Indeed, torture has undergone a *quasi* rehabilitation following the assassination of Osama Bin Laden, located, it seems, at least partly as a result of information gleaned from Khalid Sheikh Mohammed under ‘coercive interrogation’ while held incommunicado in a secret prison. The Kafkaesque nature of this kind of scenario can hardly go unnoticed, but there now exists a culture, politics and even a scholarship around torture that was almost unimaginable a decade ago. Such a situation not only has implications for the immediate period of the emergency or crisis but also for the future shape of criminal justice, which can be affected by the ‘creeping consequentialism’<sup>26</sup> of counter-terrorist measures.

In addition, the adoption of exceptional counter-terrorism regimes can undermine the perception of the legal system’s legitimacy. Legitimacy is, of course, a contested concept in law but in constitutional democracies it contains at the very least adherence to democratic principles of deliberation, equality before the law, and inter-institutional respect within separated powers.<sup>27</sup> The past decade of counter-terrorism has called into serious question the legitimacy of a system of law that can allow for what seems to be the outright rejection of these core principles. The detention centre at Guantánamo Bay and the protracted attempts at prosecuting Khalid Sheik Mohammed illustrate this point. Detainees were sent to Guantánamo Bay so that they could be interrogated – not with a view to building a case for criminal prosecution but rather as an intelligence-gathering exercise.<sup>28</sup> The existence of an extra-legal regime at Guantánamo makes it difficult to bring those detainees back within the ‘ordinary’ legal order. Roach has argued that Guantánamo Bay became a ‘symbolic rejection of criminal justice norms’.<sup>29</sup> The reality of that rejection becomes all the more stark when we consider the successful record of the US federal courts in prosecuting hundreds of terrorist suspects since 11 September 2001.<sup>30</sup> It is difficult to maintain a perception of legitimacy around the prosecution of Khalid Sheik Mohammed and his co-accused when they are being tried by a tribunal whose legitimacy they reject on the basis of information that would be excluded for illegality in an ordinary trial, where their previous attempts at pleading guilty were ignored, and when the ordinary courts have provided a sound basis for conducting other terror trials.<sup>31</sup>

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<sup>25</sup> F. de Londras, “Privatised Sovereign Performance: Regulating in the ‘Gap’ between Security and Rights?” (2011) 38 *Journal of Law and Society* 96.

<sup>26</sup> A. Ashworth, “Crime, Community and Creeping Consequentialism” [1996] *Criminal Law Review* 220; See also L. Donohue, *The Cost of Counter Terrorism: Power, Politics and Liberty* (2008; Cambridge University Press), Chapter 1 and p. 71. The use of Control Orders against Australia’s ‘Bikie Gangs’, for example, demonstrates a seepage of repressive counterterrorism measures into the ordinary criminal law: A. Loughnan, “The Legislation We Had to Have?: The Crimes (Criminal Organisations Control) Act 2009 (NSW)” (2009) 20(3) *Current Issues in Criminal Justice* 457 .

<sup>27</sup> F. de Londras, “Can Counter-Terrorist Detention ever be Legitimate?” (2011) 33(3) *Human Rights Quarterly* 592, p. 597 - 604.

<sup>28</sup> M. Davis, “Historical Perspectives on Guantánamo Bay: The Arrival of the High Value Detainees” (2009) 42 *Case Western Reserve Journal of International Law* 115.

<sup>29</sup> K. Roach, “The Criminal Law and its Less Restrained Alternatives” in V.V. Ramraj, M. Hor, K. Roach and G. Williams (eds.) *Global Anti-Terrorism Law and Policy* (2 ed.) (2012; Cambridge University Press), p. 91, 108.

<sup>30</sup> E. Holder, “Statement of the Attorney General on the Prosecution of the 9/11 Conspirators” 4 April 2011 <http://www.justice.gov/iso/opa/ag/speeches/2011/ag-speech-110404.html>

<sup>31</sup> K. Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (2011; Cambridge University Press), p. 213; E. Pilkington, “9/11 Families Angered Over Behaviour of Alleged Plotters at Guantánamo Bay” *The Guardian* (6 May 2012) <http://www.guardian.co.uk/world/2012/may/06/9-11-families-angered-guantanamo-trial?INTCMP=SRCH>

The use of counter-terrorist regimes in a manner that (at least seems) discriminatory further undermines the legitimacy of the legal system. Muslim communities have become ‘suspect communities’<sup>32</sup> and elements of religious practice important to many (although not all) Muslims have come under what to many seems like Islamophobic attack; laws have been crafted in expressly discriminatory terms (such as the section 23 power of detention under the Anti-Terrorism, Crime and Security Act 2001 in the UK) or applied in what seems like a discriminatory manner even when neutrally worded.<sup>33</sup> Suspected terrorists detained in Guantánamo Bay and accused of inchoate offences have their capacity to even see a lawyer severely curtailed before being tried (if at all) in military commissions without full capacity to build a defence, while people who perpetrate vicious gun attacks in the mainland USA killing dozens of people get full and fair trials. It is not difficult to see why at least some people at the sharp end of these measures lose their faith in the law, the state and the international community with potentially devastating effects in the future.

## II. Counter-Terrorist Judicial Review

All of this shows clearly that when it comes to counter-terrorism the stakes are high, not just from a security perspective but also for law, the legal system, and the normative integrity of the state. The question with which this collection is fundamentally concerned is whether what we term ‘counter-terrorist judicial review’ can help to protect the state from the corrosive impact of counter-terrorism and ‘the people’ from its more invidious effects. In this respect, and for the purposes of placing parameters on the debate undertaken and engaged with in this book, we can define counter-terrorist judicial review as the use of judicialised processes to challenge state behaviours that fall into the broad category of ‘counter-terrorism’.<sup>34</sup> Thus, ‘traditional’ or administrative judicial review can be counter-terrorist judicial review, but so too can other judicialised processes such as challenges to the constitutionality or human rights compliance of counter-terrorist measures either in unique proceedings (usually constitutional challenge) or as part of broader proceedings (such as *habeas corpus* petitions or defences to criminal charges).

At a conceptual level, judicial review is traditionally understood somewhat differently in different constitutional systems. As a result, at least a short meditation on the phenomenon is appropriate at this juncture. In systems of constitutional supremacy, judicial review has tended to have two different guises: judicial review *per se* as part of administrative law, and *constitutional* judicial review as part of constitutional law. The former is and was concerned with the fairly straightforward question of whether or not a particular action taken by the state (or some public body amenable to judicial review) was within the authority of the body concerned and taken in accordance with appropriate processes. The question, here, has tended to be one of process rather than outcome. Constitutional judicial review generally addresses

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<sup>32</sup> On the concept of the suspect community see P. Hillyard, *Suspect Community: People’s Experience of the Prevention of Terrorism Acts in Britain* (1993, London; Pluto Press); for the Muslim community’s experience see, for example, T. Choudhury and H. Fenwick, *The Impact of Counter-Terrorism Measures on Muslim Communities*, Equality and Human Rights Commission Research Report 72 (2011).

<sup>33</sup> See for example the operation of Schedule 7 of the Terrorism Act 2000 in the UK (the port search provision), which is perceived as having a disproportionate impact on Muslim communities. (See T. Choudhury and H. Fenwick, *The Impact of Counter-Terrorism Measures on Muslim Communities*, Equality and Human Rights Commission Research Report 72 (2011)).

<sup>34</sup> Although we refer to ‘state’ here, this can also encompass judicialised challenges to counter-terrorism measures undertaken by supra-national bodies such as the EU. This is discussed in Chapter 13 in this volume, C.C. Murphy, “Counter-Terrorism Law and Judicial Review: The Challenge for the Court of Justice of the European Union”.

the fundamental question of whether a particular law, measure, action or decision was in compliance with a constitution, the violation of which will normally invalidate the impugned law, measure or action. It would be overly simplistic to categorise administrative and constitutional judicial review as entirely separate phenomena; an administrative judicial review proceeding can (and frequently does) involve a question of constitutional compliance. However, administrative judicial review is possible without a constitutional question arising. Constitutional judicial review, of course, is fundamentally concerned with constitutionality.

In a system of parliamentary supremacy, on the other hand, judicial review has traditionally been administrative and organised around the core concept of *ultra vires*.<sup>35</sup> Under such judicial review, questions about executive measures concerned with a prerogative power (in which space many questions relating to security and counter-terrorism would reside) were generally considered to be beyond the reach of judicial review.<sup>36</sup> The growth of a human rights culture, and — in states such as the UK in particular — the creation of written bills of rights by means of statute (such as the Human Rights Act 1998) has led to an expansion in judicial review to include something that looks far more like constitutional judicial review (albeit without the strike down powers associated with a system of constitutional supremacy).<sup>37</sup> Mark Elliott has noted that this expansion has never been satisfactorily explained as a matter of doctrine, but is clearly connected with a normative belief that as much as possible the exercise of public power ought to be capable of being subjected to judicial scrutiny.<sup>38</sup>

That core normative proposition is key to any debate about counter-terrorist judicial review and reflects the inherently constitutionalist nature of the questions it raises. If, at its heart, the debate is (as we think is almost always the case) about *how* rather than *whether* to ensure that counter-terrorist powers and measures do not constitute excessive exercises of power, then two important questions arise. The first relates to how those limits might be identified; the second to how we will assess whether counter-terrorist measures have exceeded those limits or not.

The matter of identifying limits is not a simple one. It brings into the equation a number of complex questions: should limits be sourced only in domestic law, or does international law have a role here? How do relatively nebulous but normatively important concepts such as ‘the rule of law’, natural justice, and the principle of limited power get taken into account? Might it be that extra-legal concepts such as necessity or expertise ought to dictate where the limits lie or should they, at least, play some role in limit-identification? Certainly, constitutions are relevant sources, but the content of a constitution is not necessarily uncontested. Neither is

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<sup>35</sup> M. Elliott, *The Constitutional Foundations of Judicial Review* (2001, Oregon; Hart Publishing).

<sup>36</sup> Whether or not something falls within the prerogative power has long been subject to judicial review in the UK, but the exercise of that power traditionally was not. The conventional position was summarised by Fraser LJ in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at [398] as ‘the courts will inquire into whether a particular prerogative power exists or not, and, if it does exist, into its extent. But once the existence and extent of a power are established...the courts cannot...inquire into the propriety of its exercise.’ The courts have, however, gradually moved away from this position to subject prerogative power to some judicial review; see M. Elliott, *The Constitutional Foundations of Judicial Review* (2001, Oregon; Hart Publishing), p. 178 - 182 and Chapter 10 in this volume, R. Masterman, “Rebalancing the Unbalanced Constitution: Juridification and National Security in the United Kingdom”.

<sup>37</sup> Under the Human Rights Act 1998 the UK Courts can declare a measure to be incompatible with the Human Rights Act but this does not impact on the operation, validity or continuation in force of that measure: section 4, Human Rights Act 1998.

<sup>38</sup> M. Elliott, *The Constitutional Foundations of Judicial Review* (2001, Oregon; Hart Publishing), p. 5-10.

the question of whether any particular constitution might leave the design, implementation and governance of counter-terrorism and other security measures to the executive with little or no application of ‘normal’ constitutional principles. In some constitutions — such as the Irish Constitution — one can find a clear and unambiguous statement of emergency power that is, on its face at least, expressly unlimited by the remainder of the constitution.<sup>39</sup> In others, such as the US Constitution, ‘war powers’ management is institutionally allocated to the executive with some congressional involvement by means, especially, of the power of the purse but without much clarity as to whether the judiciary has a role or what other elements of the Constitution might apply to limit (especially) extra-territorial counter-terrorist activities or the activities of covert agencies. Thus, to say that ‘the constitution’ acts as a source of limits is to slightly obscure the complexity of that proposition. Furthermore, in at least some constitutional systems, legislation that has a constitutionalist nature can play a constitution-type role in terms of identifying limits, but raises questions as to whether a parliamentary instrument can be (or should be) used to restrain parliament and the executive by means of judicial intervention.

Similarly, questions of scope, limit and applicability arise with international law. Depending on the intensity of the measures deployed an armed conflict of sufficient intensity to engage (at least some) of international humanitarian law might exist. If international humanitarian law is engaged, international human rights law continues to apply *but* through the prism of international humanitarian law.<sup>40</sup> Furthermore, the exact requirements of international humanitarian law are contested, especially in relation to non-state actors. So too are the disputes as to what role international law *per se* plays in extra-territorial activity, what account (if any) can (or should) be taken of it in domestic judicial review, and sometimes whether it even governs contemporary terrorism at all. The relationship between different international legal regimes is also a source of complexity here, particularly given the internationalised nature of some counter-terrorism measures that might originate through a UN Security Council Resolution, be applied in a unified way by the European Union (EU) through Directives and Regulations, and then implemented nationally through primary or secondary legislation.<sup>41</sup> How do general international law (such as UN Security Council resolutions), EU law, European Convention of Human Rights (ECHR) law and general international human rights law—all of which apply to the states in question—interact, first with one another and then with the domestic legal system? Furthermore, to what extent might international institutions (such as the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR)) be able to understand that interaction and identify applicable limits by means of such understanding?<sup>42</sup>

Once limits have been identified, we confront the question of how to ensure that they are adhered to. We ought to make it clear that in the ideal situation self-regulation would operate

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<sup>39</sup> Article 28.3.3, *Bunreacht na hÉireann*. For analysis see A. Greene, “The Historical Evolution of Article 28.3.3 of the Irish Constitution” (2012) *Irish Jurist* 117.

<sup>40</sup> *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* [1996] I.C.J. Report 226; *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Territory* 43 I.L.M. 1009 (2004); *Case Concerning Armed Activities on the Territory of the Congo (DRC v Uganda)* 2005 I.C.J. 116 (19 December 2005).

<sup>41</sup> The prime example is the freezing of suspected terrorists’ assets in the EU based on EU-measures introduced to give effect to Security Council resolutions and black listing decisions of the (Security Council) Counter-Terrorist Committee. For an overview of how this works see, for example, C. Murphy, *EU Counter-Terrorism Law: Pre-Emption and the Rule of Law* (2012, Oregon; Hart Publishing), Chapter 5.

<sup>42</sup> See Chapter 13 in this volume, C.C. Murphy, “Counter-Terrorism Law and Judicial Review: The Challenge for the Court of Justice of the European Union”.

to ensure compliance. Thus, government departments, the public service, coalition partners (where applicable), the public, and parliament together with the executive itself would create a regulatory mass that would ensure compliance, and laws, measures, plans, regimes and activities that overstepped the agreed-upon limits would simply not make it to the implementation phase. History, however, tells us that — by any standard — this does not happen. Any account of historical, or indeed contemporary, counter-terrorist measures by states and regional and international institutions will include an analysis of measures that were variously found to be unconstitutional, incompatible with constitutionalist legislation such as statutory bills of rights, in contravention of international human rights law, non-compliant with international humanitarian law, ineffective from an operational perspective, unnecessary from a risk-assessment perspective and fundamentally counter-productive. All of this makes it difficult to accept the proposition — still made<sup>43</sup> — that extreme deference should be shown to the executive in the context of counter-terrorism based on the fact that they know what they are doing and respect the realistic limits inherent in the exercise of public power. It is on this second question that substantial clashes in opinion tend to arise.

### III. Competing Perspectives

Broadly speaking there are four topics across which opinion is divided in relation to counter-terrorist judicial review, all of which are addressed throughout this volume, but in relation to which an initial reflection is appropriate. These are institutional appropriateness, extra-constitutionalism and institutional dialogue, judicial muscularity, and internationalism.

#### *a. Institutional Appropriateness*

Questions of institutional appropriateness ask not only whether the judiciary is best (or even ‘well’) placed to determine whether a particular element of counter-terrorism has overstepped the line, but also whether international institutions have any appropriate or legitimate role in asking similar questions. In the main, scholars contrast the capacity of the judiciary and the legislature to play a limiting role, bringing into the debate the inherent tensions between constitutionalism on the one hand and representative democracy on the other.<sup>44</sup> A pure system of representative democracy would suggest that it is ‘the People’ who should ultimately decide the principles and policies to be pursued by means of their elected representatives. In this model there are no limits *beyond* the will of the People. However, constitutionalism gives us just such an exogenous limitation. As Tushnet puts it:

Today, constitutionalism requires that a nation be committed to the proposition that a nation’s people should determine the policies under which they will live by, by some form of democratic governance. Yet, constitutionalism also requires that there be some limits on the policy choices the people can make democratically.<sup>45</sup>

The question then becomes whether such constitutionalist limitations are desirable in a situation of exigency such as a terrorist threat and, if so, who ought to determine where those

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<sup>43</sup> E.A. Posner and A. Vermeule, *Terror in the Balance: Security, Liberty and the Courts* (2007; Oxford University Press).

<sup>44</sup> See Chapter 12 in this volume, G. Phillipson, “Deference and Dialogue in the Real-World Counter-Terror Context” .

<sup>45</sup> M. Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (2008; Princeton University Press) p. 19.

limitations lie. That controversy goes to the heart of this collection and is the core issue when viewed from the institutional appropriateness perspective.

Political theorist Carl Schmitt directly addressed the tension within constitutionalism between people setting limits and there being limits on that process itself. In *Constitutional Theory*, he articulated the difference between the constitution (*verfassung*) as a substantive and integral source of legitimacy for the state and *verfassungsgesetze*, the individual positive constitutional laws, which set out procedures and subsidiary norms for state action. The *verfassung* are derived from an original act of constituent power: that is, from a ‘conscious decision’ of a historically unified nation concerning its fundamental political form.<sup>46</sup> The substantive constitution should be considered the innermost existential expression of the constituent body (the People). He thus concluded that the constitution, standing above all secondary laws, needed to be viewed as an original source of supra-legality.<sup>47</sup> Implicit in this theory is a hierarchical concept of legitimacy: the constitution as an expression of constituent power has the highest legitimacy, and in order to protect this substantive constitution other laws might be suspended or temporarily set aside. This would be particularly true in a state of exception where, he claimed, constitutional laws could legitimately be ‘suspended’, whereas the constitution itself could not be subject to suspension and had to be considered ‘inviolable’.<sup>48</sup> It is apparent that within his scheme the only restraint upon the executive is the potential power of the people to exercise their constituent power. The legitimacy of this relatively unfettered executive is dependent on temporal limitation, although Roman history demonstrates the difficulty in ensuring Commissarial rather than Sovereign Dictatorship.<sup>49</sup>

While rejecting the executive supremacy of Schmitt, many advocates of popular sovereignty still derive the legitimacy of constitutional norms from the constituent power of the people.<sup>50</sup> This brings us back to the original contradiction: a commitment to constitutionalism limits the choices available to the People. Parliamentary supremacists argue that the legislature – possessing as it does a democratic mandate – is best placed to represent the general will of the People. Thus the representative organ of the state ought to act as a check on executive power in the state of exception. This check may be deferential but it should also be robust. In other words, parliament may choose to accommodate the executive in light of some perceived threat to national security but it must be willing to interrogate whether an emergency exists and whether the measures proposed or actions taken are proportionate. This approach treats rights-enforcement as inherently a matter for politics. The role of parliament is to engage in the debate; if the people dislike the actions of the executive and feel that parliament is failing in its duty to restrain the executive they ought to exercise their power as a constitutional actor (most clearly by protesting and using their electoral power). Such an outlook can spawn many alternate responses ranging from a belief in institutional dialogue perhaps permitting a weak form judicial review, through to a Diceyan commitment to the unfettered supremacy of parliament.

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<sup>46</sup> C. Schmitt, *Verfassungslehre* (1928, Berlin; Duncker und Humblot), p. 21.

<sup>47</sup> *Ibid*, p. 22. For excellent comment in agreement with this reading see A. Kalyvas, *Democracy and the Politics of the Extraordinary: Max Weber, Carl Schmitt, and Hannah Arendt* (2008; Cambridge University Press), p. 131.

<sup>48</sup> C. Schmitt, *Verfassungslehre* (1928, Berlin; Duncker und Humblot), p. 26.

<sup>49</sup> C. Nicolet, “Dictatorship in Rome” in P. Baehr and M. Richter (eds.) *Dictatorship in History and Theory: Bonapartism, Caesarism, and Totalitarianism* (2004; Cambridge University Press), p. 263.

<sup>50</sup> For example: F. Davis, “Extra-Constitutionalism, the Human Rights Act and the ‘Labour Rebels’: Applying Prof Tushnet’s Theories in the UK” (2006) 4 *Web Journal of Current Legal Issues* <http://webjcli.ncl.ac.uk/2006/issue4/davis4.html> citing correspondence with M. Tushnet.

Of course, there are those who argue that the constituent power of the People is neither capable nor willing to restrain the executive in the context of counter-terrorism.<sup>51</sup> But, for some, an apparent process of social learning observable in US counter-terrorism illustrates just such a potential. Writing elsewhere, Mark Tushnet has claimed that the United States (US) has in fact ratcheted down its response to each successive emergency going from a wholesale suspension of *habeas corpus* during the civil war, to the internment of citizens and non-citizens (primarily of Japanese descent) in World War II, to the detention of non-citizens in Guantánamo Bay.<sup>52</sup> While hardly a commendable record it might be argued that this at least demonstrates movement in the right direction, although seen in the round (beyond merely the detention context) the counter-terrorist regime operated by the US since 2001 may speak against such an optimistic reading.<sup>53</sup> Even if such a historicist analysis is accurate it can be argued that it fails to provide any protection against an atavistic response reversing this slow but progressive trend. Furthermore, it does nothing to alleviate the situation for current victims of rights abuse; the inmates in Guantánamo Bay will hardly rejoice at playing an unwilling part of an on-going process of social improvement, nor have they experienced the ‘Hope’ promised by President Obama.

Others argue that in fact the conduct of global counter-terrorism since the attacks of 11 September 2001 (9/11) shows that the impulse towards excessive repression has not waned.<sup>54</sup> It may be the case that the most intrusive and repressive measures have been taken against non-citizens and undertaken primarily abroad, but there are two important points to be borne in mind here. The first is that the particular targeting of non-citizens does not necessarily mitigate the measures taken in the eyes of anyone *apart from* the (seemingly) untargeted citizen. For the targeted non-citizen, extreme measures have been applied including detention without trial for up to ten years (to date), irregular trial processes in military commissions, extraordinary rendition, and torture. By any measure these are grave intrusions on personal liberties and the fact that they are limited to non-citizens does not make them less concerning. The second point to bear in mind here is that in fact counter-terrorism measures are being imposed on both citizens and non-citizens, sometimes openly and sometimes more covertly. These measures might not be as extreme as those imposed exclusively on non-citizens, but they are nevertheless significant. Surveillance — both overt and covert — is a hugely significant trend in the past ten years,<sup>55</sup> as is the use of technology to both survey and govern our behaviours. The unimagined extent of such covert surveillance was laid bare by the Snowden leaks regarding the US National Security Agency PRISM surveillance programme.<sup>56</sup> However, many of these mechanisms of ‘universal counter-terrorism’ are either considered to be ‘worth it’ for the purposes of ‘security’ or are so pervasive and overt as to be more or less unnoticed. Thus, the use by state apparatus of private corporations that we engage with on a daily basis (transaction tracking mechanisms, internet search engines, and airlines for example) may simply be unknown to ‘the People’. Even if these kinds of mechanisms seem initially to be relatively harmless, or at least to be proportionate

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<sup>51</sup> F. de Londras, *Detention in the ‘War on Terror’: Can Human Rights Fight Back?* (2011; Cambridge University Press), Chapter 1.

<sup>52</sup> M. Tushnet, “Civil Liberties in a Time of Terror: Defending Korematsu?: Reflections on Civil Liberties in Wartime” (2003) *Wisconsin Law Review* 273, p. 283 - 294.

<sup>53</sup> See Chapter 4 in this volume, D. Jenkins, “When Good Cases Go Bad: Unintended Consequences of Rights-Friendly Judgments”.

<sup>54</sup> K. Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (2011; Cambridge University Press).

<sup>55</sup> See generally: F. Davis, N. McGarity and G. Williams (eds.), *Surveillance, Counter-Terrorism and Comparative Constitutionalism* (2013; Routledge) (forthcoming)

<sup>56</sup> M. Gidda, “Edward Snowden and the NSA files – Timeline” *The Guardian* (26 July 2013). <http://www.theguardian.com/world/2013/jun/23/edward-snowden-nsa-files-timeline>.

infringements, we ought to remember that the information and profiles built through this kind of everyday counter-terrorist governance can be used to identify individuals who then find themselves subjected to more extreme kinds of counter-terrorism such as asset freezing, inclusion on no fly lists, and maybe even extraordinary rendition.

A further concern is that there is a real possibility — if not a probability — that ‘the People’ may simply be unmoved by the plight of those who find themselves at the sharp end of the counter-terrorist apparatus of the state. There are a number of reasons for this. The first is the real and genuinely felt fear and panic — described by de Londras as ‘popular panic’<sup>57</sup> — that a massive attack brings about in the populace. There is a danger that ‘we’ (analysts, academics, specialists — people divided from the reality of the risk) might become detached or even jaded, forgetting that terrorism and the risk of terrorism are experienced as real and frightening phenomena. For some theorists it is difficult to accept that we might realistically ask ‘the People’ to fight against these understandable and genuinely felt emotions to demand that their representatives would respect some kind of nebulous conceptualisation of constitutionalism and resist the introduction of measures that are unlikely to be imposed in their most extreme forms on them or people with whom they associate.<sup>58</sup> The second concern about relying on representative democracy is that it might simply fail; supporting extreme measures might well be the politically astute thing to do, not only because of popular demands for repressive counter-terrorist measures, but also in some systems because the structures and dynamics of parliamentary systems reward compliance and punish opposition.<sup>59</sup> Taking these kinds of views into account, some kind of ‘weak judicial review’ might be welcome, but absolute deference to ‘the political branches’ would be considered unwise.

Thus, one of the core arguments in the debate about counter-terrorist judicial review relates, not only to whether or not representative democracy is capable of ensuring that constitutionalist limits are imposed to prevent these kinds of excesses but also to whether it is institutionally appropriate for any other institution of the state to undertake this function.

Another element of the debate around counter-terrorist judicial review is the need to explore whether there really are only two alternatives to executive dominance: parliamentary oversight and judicial review. Increasingly, alternative mechanisms of accountability are being designed and implemented. Thus, Blackbourn examines the potential for independent reviewers to undertake significant roles in keeping counter-terrorist measures under a rolling review and, in particular, in challenging the underlying claims of necessity that the executive tends to make to justify the introduction or maintenance of certain repressive counter-terrorist regimes.<sup>60</sup> On a less systematic, more *ad hoc* basis, commissions of inquiry have the capacity to at least expose executive excesses and create — or create momentum towards — some kind of accountability for them. The role of such *ad hoc* reviews is set out by Roach, using the examples of the Commission of Inquiry into the case of Maher Arar and the Gibson

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<sup>57</sup> F. de Londras, *Detention in the ‘War on Terror’: Can Human Rights Fight Back?* (2011; Cambridge University Press), Chapter 1.

<sup>58</sup> *Ibid*; D. Dyzenhaus, “The Compulsion of Legality” in V.V. Ramraj (ed.), *Emergencies and the Limits of Legality* (2008; Cambridge University Press), p. 33

<sup>59</sup> F. de Londras and F. Davis, “Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanisms” (2010) 30(1) *Oxford Journal of Legal Studies* 19

<sup>60</sup> See Chapter 8 in this volume, J. Blackbourn, “Independent Reviewers as Alternative: An Empirical Study from Australia and the UK”.

Inquiry in the UK.<sup>61</sup> In his contribution, Davis questions the utility in disaggregating our conception of parliament and judiciary to some extent, arguing that specialised parliamentary oversight committees or judicial enquiries might bring to bear the particular attributes of the different institutions (majoritarian democracy and independence, respectively) without their perceived institutional disadvantages (majoritarian populism and democratic illegitimacy).<sup>62</sup> In his contribution, Phillipson argues for a collaborative approach to oversight between courts and parliament in the context of counter-terrorism and rejects the general absolutism of judicial review scepticism and enthusiasm. Rather, he argues, ‘the legislature can only protect the individual through inserting judicial safeguards; and the judiciary must then police those safeguards rigorously, realising that to do otherwise is not to pay respect to the elected branches, but simply to betray the trust of the legislature and frustrate the joint enterprise of providing a serious, inter-locking constitutional check upon the national security executive.’<sup>63</sup> Thus, simply constructing the debate about counter-terrorist judicial review as one between parliamentary and judicial control *simpliciter* arguably excludes consideration of alternatives and ought to be avoided where possible. Indeed, Tushnet suggests in his contribution that any such debate can be avoided and an arguably more effective oversight regime introduced by treating counter-terrorism as, to all intents and purposes, another regulatory regime within the state and subjecting it to the normal rigours of administrative law.<sup>64</sup> Whether this would, however, resolve some of the tensions that currently manifest in these contexts is questioned by Chan. In her chapter she argues that claims for deference (which would inevitably arise within an administrative law framework) tend to be accompanied by an implicit or explicit demand for substantial amounts of deference where the context is security so that merely folding this into general administrative law may not be unproblematic.<sup>65</sup>

### *b. Extra-constitutionalism and institutional dialogue*

As already noted, considerations of institutional appropriateness do not necessarily require us to decide definitively between one option and the other; between judicial or parliamentary supremacy.<sup>66</sup> Although legislative supremacy – in the traditional Diceyan sense – is somewhat rare, the Australian Human Rights (Parliamentary Scrutiny) Act (Cth) 2011 exemplifies the model. Australia does not possess a federal bill of rights, but legislation has established a Joint Committee on Human Rights that is tasked with assessing the compliance of all legislation with certain human rights norms. As under the, UK Human Rights Act, 1998 the proposer of a Bill must make a statement of human rights compliance, but unlike the UK model there is no mechanism for judicial or any other oversight. The only oversight mechanism is parliamentary. This will be dealt with in greater detail in the chapter by Fergal Davis. Notwithstanding this example, the general political and constitutional reality is such that in fact the supremacy of one institution over the other is unlikely to arise in any situation, not to mention in a situation of extreme tension and political disruption. Taking this into account, scholars attempting to resolve the contradiction between constitutionalism and

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<sup>61</sup> See Chapter 9 in this volume, K. Roach, “Public Inquiries as an Attempt to Fill Accountability Gaps Left by Judicial and Legislative Review”.

<sup>62</sup> See Chapter 7 in this volume, F. Davis, “The Politics of Counter-Terrorism Judicial Review: Creating Effective Parliamentary Scrutiny”.

<sup>63</sup> See Chapter 12 in this volume, G. Phillipson, “Deference and Dialogue in the Real-World Counter-Terror Context”.

<sup>64</sup> See Chapter 6 in this volume, M. Tushnet, “Emergency Law as Administrative Law”.

<sup>65</sup> See Chapter 11 in this volume, C. Chan, “Running Business as Usual: Deference in Counter-Terrorism Rights Review”.

<sup>66</sup> See Chapter 12 in this volume, G. Phillipson, “Deference and Dialogue in the Real-World Counter-Terror Context”.

representative democracy have identified a new commonwealth, or dialogic, model of review.<sup>67</sup> Examples of new commonwealth review include the ‘notwithstanding clause’ contained in section 33 of the Canadian Charter of Rights 1982,<sup>68</sup> the UK Human Rights Act 1998, and the Australian State of Victoria’s Charter of Human Rights and Responsibilities Act 2006 (Vic). The approaches are operationally different but at their core each new commonwealth model acknowledges that there can be ‘competing reasonable interpretations of constitutional provisions’;<sup>69</sup> they enable the judiciary to express their interpretation but ensure that, in the end, only the legislature’s interpretation is legally effective. The attractiveness of such an approach is that it seeks to emphasise the strengths and weaknesses of each institution. Directly elected legislatures are thought to be ‘less likely than courts to be attentive to the limits constitutionalism places on democratic self-governance’<sup>70</sup> but unelected courts are accused of lacking democratic legitimacy. By allowing courts to declare that acts of parliament are inconsistent (or incompatible) with human rights norms we empower the judiciary to sound the alarm.<sup>71</sup> Once the issue has been brought to the legislature’s attention, we can then advance the value of democratic self-governance by leaving the final decision to the legislature.<sup>72</sup> Theoretically, this dialogic approach permits courts to robustly defend rights while deferring to ‘legislative sequels that evidence clear and considered disagreement with their rulings.’<sup>73</sup> Such a dialogic approach, however, does require courts to engage in a meaningful review of measures and to approach with some caution claims made by the executive. In their contributions to this volume, Roger Masterman and Helen Fenwick emphasise not only that this is necessary, but also that it is sometimes lacking even in contexts where courts generally engage in stricter review. Considering counter-terrorist judicial review in the UK, Masterman compellingly traces the residual caution of courts to scrutinise claims as to security and counter-terrorism in judicial review even while the scope and nature of judicial review in that jurisdiction has been expanding.<sup>74</sup> Considering the European Court of Human Rights since 9/11, Fenwick argues that rather than dialogue with the UK government there has been appeasement influenced, to at least some extent, by the broader tensions between the UK and the Court.<sup>75</sup> These two contributions emphasise that claims of dialogue are sustainable only inasmuch as the court takes a robust approach to scrutiny in the first place.

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<sup>67</sup> S. Gardbaum *The New Commonwealth Model of Constitutionalism: Theory and Practice* (2012; Cambridge University Press); S. Gardbaum, “Reassessing the New Commonwealth Model of Constitutionalism” (2010) 8 *I.CON* 167.

<sup>68</sup> Section 33 of the Canadian Charter permits the federal parliament and provincial legislatures of Canada to pass legislation ‘notwithstanding the possibility (or certainty) that the legislation might be understood by some, including the courts, as inconsistent with one of a significant number of rights contained in the charter’. Thus the legislatures can anticipate a judicial objection to the legislation and determine that the legislation should remain valid notwithstanding that judicial objection (Tushnet, 2008: 205-6); <http://www.efc.ca/pages/law/charter/charter.text.html>

<sup>69</sup> M. Tushnet, “The Hartman Hotz Lecture: Dialogic Judicial Review” (2008) 61 *Arkansas Law Review* 205, p. 209.

<sup>70</sup> *Ibid*, p. 212.

<sup>71</sup> F. de Londras and F. Davis, “Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanisms” (2010) 30(1) *Oxford Journal of Legal Studies* 19, p. 25.

<sup>72</sup> M. Tushnet, “The Hartman Hotz Lecture: Dialogic Judicial Review” (2008) 61 *Arkansas Law Review* 205, p. 212.

<sup>73</sup> R. Dixon, “Creating Dialogue about Socioeconomic Rights: Strong-form versus Weak-form Judicial Review Revisited” (2007) 5(3) *I.CON* 391, p. 393.

<sup>74</sup> See Chapter 4 in this volume, R. Masterman, “Rebalancing the Unbalanced Constitution: Juridification and National Security in the United Kingdom”.

<sup>75</sup> See Chapter 14 in this volume, H. Fenwick, “Post 9/11 UK Counter-Terrorism Cases in the European Court of Human Rights: A ‘Dialogic’ Approach to Rights Protection or Appeasement of National Authorities?”.

Extra-constitutionalism can be seen as a subset of dialogic review, which has been proposed in the US context. Rather than declaring an executive act or piece of legislation to be constitutional or unconstitutional the courts can declare it to be extra-constitutional. That is, beyond the scope of responses anticipated by the constitution. The mechanism would operate as follows:

[T]he government introduces legislation that is inherently suspect from the prospective of the rule of law, but avoids ... provisions that seem in flagrant violation of rule of law principles. The dirty work is done by those charged with implementing the law and the government expects that judges who hear challenges to the validity of particular acts will put aside their role as guardians of the rule of law because in issue is the security of the state.<sup>76</sup>

Extra-constitutionalism enables the courts to acknowledge the exceptional nature of the proposed acts and leaves it to the other constitutional actors to determine if such exceptional measures are justified. In that respect extra-constitutionalism is similar to other forms of institutional dialogue. Crucially, such approaches avoid the need for courts to justify abhorrent acts as somehow constitutional or to boldly strike down executive measures in the face of genuine concerns that such measures might actually be necessary. As Justice Jackson noted in *Korematsu*:

[O]nce a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated ... [a] principle [that] lies about like a loaded weapon ready for the hand of any authority that bring forward a plausible claim of urgent need.<sup>77</sup>

As a result, extra-constitutionalists argue that ‘it is better to have emergency powers exercised in an extra-constitutional way, so that everyone understands that the actions are extraordinary, than to have the actions rationalised away as consistent with the constitution and thereby normalised’.<sup>78</sup> Extra-constitutionalism forms part of an institutional dialogue because the courts are placing the other actors on alert that the actions complained of are not within the category of actions that can be deemed constitutional. That places the responsibility on those other actors to determine if they are satisfied that such exceptional actions are justified.

A structure of dialogue is not confined to Commonwealth states, of course. Even in states with constitutional supremacy a dialogic approach to counter-terrorist judicial review is possible, with courts using judicial review to try to ‘nudge’ the political branches towards a more limited and rights-compliant approach to counter-terrorism even in the absence of striking an impugned measure down. In the United States, for example, numerous commentators have categorised the ‘to and fro’ between the US Supreme Court and the political branches in relation to Guantánamo Bay as a form of dialogue by which the Supreme Court slowly moved the detention centre there from a place where detainees had no effective review mechanism to one in which those detained there have recognised

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<sup>76</sup> M. Tushnet, “Civil Liberties in a Time of Terror: Defending *Korematsu*?: Reflections on Civil Liberties in Wartime” (2003) *Wisconsin Law Review* 273, fn 118 quoting David Dyzenhaus.

<sup>77</sup> 323 US 244, 247

<sup>78</sup> M. Tushnet, “Civil Liberties in a Time of Terror: Defending *Korematsu*?: Reflections on Civil Liberties in Wartime” (2003) *Wisconsin Law Review* 273, p. 306.

constitutional *habeas corpus* rights.<sup>79</sup> In spite of that progression — which seems at least to remove part of the legal rationale for detaining people in Guantánamo Bay<sup>80</sup> — the detention centre remains open and all attempts to close it have been blocked by Congress, either as an act of political constitutionalism (as claimed by Tushnet<sup>81</sup>) or as a result of pure quotidian politics (as claimed by de Londras<sup>82</sup>). The example of Guantánamo Bay litigation in the US suggests that muscular judicial review is not incapable of having a dialogic impact but also highlights that it does not necessarily over-judicialise politics. Although in some jurisdictions — such as the UK — there is now an established record of changing counter-terrorist measures so that they become more rights compliant than they previously were in response to judicial findings of incompatibility, this is not the inevitable outcome of such cases. Concerns about the judicialisation of politics, then, which Masterman addresses in his chapter,<sup>83</sup> must take the broader constitutional and political climate into account.

### c. *Judicial Muscularity*

In the ordinary course of events (or what we might call ‘normalcy’), we tend to rely on the judiciary to identify where the limits of allowable government action lie. This is so even in systems of parliamentary supremacy where, as considered above, the doctrine of *ultra vires* provides the key underlying principle justifying judicial review. *Ultra vires*, by means of reminder, requires that institutions of the state do not exercise power to any greater extent than expressly permitted and in this way constitutes a clear manifestation of the constitutionalist principle of limited power. In jurisdictions defined by constitutional supremacy, the power to decide on limits of allowable governmental action lies clearly within the jurisdiction of the courts. However, even in these jurisdictions there is an unedifying history of what we would call counter-terrorist judicial review. The same goes for the European Court of Human Rights (ECtHR), whose record in relation to trying to restrain repressive state practices done in the name of ‘national security’ has rarely been described as impressive.<sup>84</sup>

Historically, domestic and some international courts have been faced with two questions when it comes to counter-terrorist or other national security measures: (i) do the extant circumstances justify the imposition of *some kind* of extraordinary security measures with individual rights’ impacts beyond what we would normally consider acceptable? And (ii) if so, are the measures under direct challenge in the case at Bar within the limits of acceptability, even taking these extraordinary circumstances into account. The first of these questions — what we might call the threshold question — is one in relation to which courts have traditionally shown, and continue to show, substantial deference to the executive’s

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<sup>79</sup> F. de Londras, “Guantánamo Bay: Towards Legality?” (2008) 71 *Modern Law Review* 36.

<sup>80</sup> D. Jenkins, “The Closure of Guantánamo Bay: What Next for the Detainees?” (2010) *Public Law* 46; F. de Londras, “Closing Guantánamo Bay: The Triumph of Politics over Law?” (2012) *Public Law* 18.

<sup>81</sup> iM. Tushnet, “Legal and Political Constitutionalism, and the Response to Terrorism,” D. Jenkins, A. Jacobsen and A. Henriksen (eds.) *The “Long Decade”: How 9/11 Changed the Law* (2014; Oxford University Press).

<sup>82</sup> F. de Londras, “Guantánamo Bay, the Rise of Courts and the Revenge of Politics” , in D. Jenkins, A. Henriksen and A. Jacobsen (eds.) *The Long Decade: How 9/11 Has Changed the Law* (2014; Oxford University Press) (forthcoming)

<sup>83</sup> R. Masterman, “Rebalancing the Unbalanced Constitution: Juridification and National Security in the United Kingdom”

<sup>84</sup> F. Ní Aoláin and O. Gross, “From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights” (2001) 23 *Human Rights Quarterly* 625; A. Greene, “Separating Normalcy from Emergency: The Jurisprudence of Article 15 of the European Convention on Human Rights” (2011) 12 *German Law Journal* 1764.

determination of levels of risk.<sup>85</sup> This is one area in which, it is often argued, judicial deference is appropriate if not advisable because it is essentially an assessment of knowledge and factors that require a particular kind of expertise to understand, compute and assess. There are some scholars who argue that this threshold question should receive a closer degree of scrutiny by the courts,<sup>86</sup> but in the main the concentration in the scholarship has been on the second, substantive, question relating to the impugned counter-terrorist measures.

Here too the historical record of courts shows that a high degree of deference has been shown. The classical examples are the US Supreme Court's decision in *Korematsu*<sup>87</sup> and the UK House of Lord's decision in *Liversidge*<sup>88</sup> in both of which a substantial degree of privilege was assigned to the judgment of political and military actors as to whether or not certain (in both cases internment) measures were necessary, with necessity being used as a *quasi-equivalent* to appropriateness or acceptability. These cases are not particularly exceptional, it has to be said; other superior domestic courts have made similar decisions,<sup>89</sup> as has the ECtHR.<sup>90</sup> This record often feeds into arguments about institutional appropriateness inasmuch as it is taken as evidence of poor quality decision-making by courts with the resultant argument being that if courts are going to make such poor decisions perhaps they ought to make no decisions at all and simply leave it to the political branches to deal with national security measures.<sup>91</sup> In making decisions of this kind, it is argued, courts are simultaneously leaving the political branches' judgement undisturbed without any particular scrutiny *and* removing incentives for rigorous deliberation at the political level. Indeed, this is the core of the extra-constitutionalism thesis itself.<sup>92</sup>

However, at least some scholars have argued that the judicial record in the ten or so years since the attacks of 9/11 has been rather different to the historical one and that in fact there has been a lesser degree of judicial deference — or a greater degree of judicial muscularity — than was previously the case.<sup>93</sup> Again there are a number of *causes célèbres* that are frequently cited to support this position: the *Belmarsh* decision in the UK,<sup>94</sup> *Hamdan*<sup>95</sup> and *Boumediene*<sup>96</sup> in the US, *Saadi*<sup>97</sup> and *Othman (Abu Qatada)*<sup>98</sup> in the ECtHR. These decisions, however, also have their critics. On the one hand are those who argue — as alluded to above — that judicial adjudication of counter-terrorist measures is simply institutionally

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<sup>85</sup> *Ibid*, but *cf* the strident objection of Hoffman LJ to the emergency classification post-9/11 in the United Kingdom in (Missing Text)

<sup>86</sup> A. Greene, "Separating Normalcy from Emergency: The Jurisprudence of Article 15 of the European Convention on Human Rights" (2011) 12 *German Law Journal* 1764.

<sup>87</sup> *Korematsu v. United States* 323 US 214 (1944)

<sup>88</sup> *Liversidge v. Anderson* [1942] AC 206

<sup>89</sup> *The State (Hughes) v. Lennon and Others* [1935] IR 128 at 148.

<sup>90</sup> *Ireland v. United Kingdom* [1978] ECHR 1 (18 January 1978).

<sup>91</sup> M. Tushnet, "Controlling Executive Power in the War on Terrorism" (2005) 118 *Harvard Law Review* 2673, p. 2680; F. Davis, "The Human Rights Act and Juridification: Saving Democracy from Law" (2010) 30(2) *Politics* 91.

<sup>92</sup> F. de Londras and F. Davis, "Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanisms" (2010) 30 *Oxford Journal of Legal Studies* 19, p. 24 – 34.

<sup>93</sup> F. de Londras, *Detention in the 'War on Terror': Can Human Rights Fight Back?* (2011; Cambridge University Press); J. Ip, "The Supreme Court and the House of Lords in the War on Terror: Inter Arma Silent Leges?" (2010) 19 *Michigan State Journal of International Law* 1.

<sup>94</sup> *A and others .v. Secretary of State for the Home Department* [2004] UKHL 56

<sup>95</sup> *Hamdan v. Rumsfeld*, 548 US 557 (2006)

<sup>96</sup> *Boumediene v. Bush*, 553 US 723 (2008)

<sup>97</sup> *Saadi v. Italy* Grand Chamber (Application no. 37201/06) Judgment, Strasbourg, 28 February 2008.

<sup>98</sup> *Othman (Abu Qatada) v. United Kingdom* [2012] ECHR 56

inappropriate.<sup>99</sup> So too are there those who argue that, even if courts appear to be being less deferential than was previously the case, the quality of decision-making remains questionable either because there is a misapplication of law<sup>100</sup> or because courts are giving the impression of muscularity while actually acceding too easily to executive claims and, in so doing, recalibrating downwards our previous understandings of some core concepts (such as detention and due process).<sup>101</sup> Further criticisms accuse ‘muscular’ courts of in fact engaging in a futile exercise designed to maintain the relevance of the judiciary in spite of courts’ frequent incapacity (or unwillingness) to actually secure an adequate and appropriate remedy for litigants.<sup>102</sup>

The debate on judicial muscularity, then, cuts across a number of themes: institutional appropriateness, quality and capacity in particular. Contributors to this collection address all of these. In his chapter David Jenkins critiques superior courts for abandoning a distinction between the citizen and non-citizen, claiming that such a distinction in fact maintained a higher *general* level of rights protection because, without it, *all* are subjected to more repressive laws.<sup>103</sup> For Jenkins, then, muscularity from a rights-based perspective is a double-edged sword. However, even when appearing to be muscular superior courts can sometimes be too vague in laying down principles or overly selective in what they will review. In his chapter Jules Lobel identifies these trends in the United States where, he says, the Supreme Court’s lack of clarity as to what detainees in Guantánamo Bay are actually entitled to has enabled a hollowing out of celebrated judgments such as *Boumediene*<sup>104</sup> in reality while, at the same time, the Supreme Court refuses to consider cases relating to detention in Bagram, for example, thus further narrowing its capacity to meaningfully improve rights protection.<sup>105</sup> What Jenkins and Lobel suggest when read together is that what appears to be muscularity in particular cases must actually be seen in its round before any qualitative conclusions are reached. In her contribution de Londras argues, somewhat in contrast to this, that there may be an implicit muscularity in some cases that appear, at least at first, to have been futile or unsatisfactory because courts have felt constrained in their findings as a result of concerns as to inter-state comity and foreign affairs.<sup>106</sup> Rather than see these cases as simply unsatisfactory, de Londras argues that understanding them in the context of a reflexive state built on constitutionalist principles one can see within them the potential for what she calls regulatory constitutionalism.

#### **d. Internationalism**

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<sup>99</sup> E.A. Posner and A. Vermeule, *Terror in the Balance: Security, Liberty and the Courts* (2007; Oxford University Press).

<sup>100</sup> For example Ní Aoláin identifies doctrinal difficulties in the celebrated *Hamdan* case in spite of the constitutionalist desirability of the outcome: “Hamdan and Common Article 3: Did the Supreme Court Get It Right?” (2007) 91 *Minnesota Law Review* 1525.

<sup>101</sup> H. Fenwick and G. Phillipson, “Covert Derogations and judicial Deference: Redefining Liberty and Due process Rights in Counterterrorism” (2011) 56(4) *McGill Law Journal* 863

<sup>102</sup> See the dissent of Justice Scalia in *Boumediene v. Bush* 553 US 723 (2008) for example.

<sup>103</sup> See Chapter 4 in this volume, D. Jenkins, “When Good Cases Go Bad: Unintended Consequences of Rights-Friendly Judgments.

<sup>104</sup> *Boumediene v. Bush*, 553 US 723 (2008)

<sup>105</sup> See Chapter 5 in this volume, J. Lobel, “The Rhetoric and Reality of Judicial Review of Counterterrorism Actions: The United States Experience”.

<sup>106</sup> See Chapter 2 in this volume, F. de Londras, “Counter-Terrorist Judicial Review as Regulatory Constitutionalism”.

In the current climate it is practically impossible to adequately discuss counter-terrorism and counter-terrorist judicial review without addressing internationalism to at least some extent. This is so not only because of the internationalised nature of what is perceived to be the main contemporary terrorist threat and, indeed, the internationalism of many of the responses but also because of the now clearly enmeshed nature of the national and the international and the challenge that counter-terrorist potentially poses to that.

This enmeshing is a result of various factors that have been widely considered elsewhere and need no more than a mention here: globalisation, international cooperation, the proliferation and governance capacities of international institutions, the emergence and growing importance of internationalised technologies of governance, the development of global and regional human rights regimes including enforcement mechanisms, and the creation of close regional unions sometimes with autonomous constitutional power. All of these elements are important in counter-terrorism. Globalisation both colours the risk that terrorism poses and to at least some extent dictates the response; traditions and links of international cooperation extend into (and are sometimes challenged by) counter-terrorist activity; international institutions create autonomous counter-terrorist policies and powers and (in at least the case of the EU) give effect to international obligations relating to counter-terrorism, and so on. When it comes to counter-terrorist judicial review, internationalism plays a number of roles that are significant here.

The first role relates, as already noted, to the identification of limits to which we intend to hold the state in the context of counter-terrorism. Even where domestic law and politics may become saturated in fear, panic and zealous counter-terrorism, international legal standards arguably have *some* resilience against panic that can identify them as more stable standards upon which to rely than domestic ones.<sup>107</sup> This can then act as a mechanism for courts in assessing whether or not any impugned activity was within the bounds permissible. This role extends most obviously, perhaps, to the standards found in international human rights law but can also be played by international humanitarian law. It is likely, at least in dualist states, that the extent to which what we might here describe as a rule of international law plays such a role will be determined by its domestic status (with incorporated provisions being more likely to be invoked and imposed by courts than unincorporated provisions) but incorporation has not shown itself to be definitive in this respect.<sup>108</sup> Counter-terrorist judicial review at the domestic level, then, has a potentially complex relationship with international law. On the one hand it can involve the use (or rejection) of international standards to shape judicial response; on the other hand it can either reinforce or call into question the relevance of international law and international principles in situations of risk when sovereignty arguably finds its fullest voice. In her chapter Helen Duffy outlines the ways in which international standards are being used in litigation and criminal prosecutions in the attempt to achieve accountability for repressive counter-terrorist measures.<sup>109</sup> In contrast, perhaps, to the somewhat critical approach adopted by Fenwick in this volume in the context of the ECtHR, Duffy exhibits a faith in international law's capacity to aid in laying down clear limitations that emanates from her use of these standards in practice. Her chapter also, however, makes clear that a core challenge to successful counter-terrorist judicial review has little to do with

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<sup>107</sup> F. de Londras, *Detention in the 'War on Terror': Can Human Rights Fight Back?* (2011; Cambridge University Press), Chapter 5.

<sup>108</sup> In *Hamdan*, for example, the US Supreme Court applied unincorporated elements of the Geneva Conventions in domestic law; *Hamdan v. Rumsfeld*, 548 US 557 (2006).

<sup>109</sup> See Chapter 15 in this volume, H. Duffy, "Judicial Accountability for Counter-Terrorism: Development, Challenges and Potential".

the identification of standards or institutional concerns but rather with access to information and the capacity to effectively represent one's client in an atmosphere that is saturated with secrecy. In his chapter, Rytter identifies the critical role that the standards laid down by the ECtHR have played in emboldening Danish courts — traditionally extremely deferential to executive claims of security need — to enforce constitutionalist limits in the counter-terrorist context, reiterating the role that internationalisation can play in counter-terrorist judicial review.<sup>110</sup>

Internationalism and counter-terrorist judicial review are also related inasmuch as international courts and other adjudicative mechanisms can be used to play a judicial review role when a litigant does not achieve satisfaction domestically *or* when the impugned measure originates from an international institution that has a judicial review body within it. Regional human rights courts, which generally enjoy subsidiary jurisdiction and are therefore used where domestic legal remedies have been exhausted, clearly play an important role in counter-terrorist judicial review. This is not only because they themselves can carry out judicial review against applicable standards, but also because their approach to this role has the potential to influence how domestic courts from member states are likely to handle difficult questions of — for example — deference and the content of rights in a situation of emergency in subsequent proceedings.<sup>111</sup> Where international institutions with judicial review mechanisms have themselves undertaken counter-terrorism and introduced repressive measures their own judicial review procedures come into play. The EU is the obvious example in this context and Murphy considers the potential for the judgments of its ECJ and the ECtHR to have significant impacts for the rule of law in a counter-terrorist context both within and beyond its member states, while also challenging the widely held view that, after the *Kadi* jurisprudence, the ECJ is ideally placed to protect the rule of law in the counter-terrorist context.<sup>112</sup>

## Conclusion

At its very heart, what is at stake when we debate whether and how counter-terrorism can be limited and especially the possible role of judicial review in such limiting exercises is a commitment to constitutionalism even in a situation of crisis, whether that be of a terrorist or a counter-terrorist nature. The contributors to this book share a commitment to the concept of constitutionalism, containing as it does a nebulous notion of justice inasmuch as it commits to power being openly exercised, limited, and accountable. What is at stake when we debate the appropriateness, effectiveness, quality and practice of counter-terrorist judicial review — and what is at the core of this collection, notwithstanding its internal debates and disagreements — is the maintenance of this basic constitutionalist commitment in the difficult, fractious and precarious state of counter-terrorist crisis.

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<sup>110</sup> See Chapter 3 in this volume, J. Rytter, “Counter-Terrorism Judicial Review by a Traditionally Weak Judiciary”.

<sup>111</sup> See Chapter 14 and 15 in this volume, H. Fenwick, “Post 9/11 UK Counter-Terrorism Cases in the European Court of Human Rights: A ‘Dialogic’ Approach to Rights Protection or Appeasement of National Authorities?”; H. Duffy, “Judicial Accountability for Counter-Terrorism: Development, Challenges and Potential”.

<sup>112</sup> See Chapter 13 in this volume, C. Murphy, “Counter-Terrorism Law and Judicial Review: The Challenge for the Court of Justice of the European Union”.