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Counter-Terrorist Judicial Review as Regulatory Constitutionalism

Fiona de Londras

As the other contributions in this volume attest, since 9/11 courts, inquiries,¹ politics² and independent reviewers³ have been working to try to maintain and enforce constitutionalist principles in the face of counter-terrorist powers. Experience has shown that politics has struggled to resolve the challenges these powers pose to constitutionalism⁴—broadly understood here as a rule of law based commitment to limited, accountable and transparent power—so that courts have become central to resolving these tensions. In large part, courts have been asked to deal with counter-terrorist policies and laws directly imposed on litigants by respondent states, in relation to which some commentators have claimed courts are being less deferential than might have been expected.⁵ Adjacent to these kinds of cases, however, is the complex situation of the suspected terrorist with some kind of relational connection to one state who is either detained abroad by another state or by his own state, which intends to transfer him into the custody of another. These cases are truly acute; they bring into question not only the fine lines of rights protection and security activity, but also complex and vital questions of institutional competence heightened by the ‘foreign affairs’ context. Their acute nature allows for them to be an especially stern test for any claims that courts are in fact engaging in muscular counter-terrorist judicial review. Thus, in this chapter, I explore such cases across three jurisdictions in an attempt to explore what it is that courts are doing.

Through an analysis of three cases from Canada, the United States (US) and the United Kingdom (UK), I argue that courts are quite carefully carving these kinds of cases into conceptual pieces—which I classify as internal and external questions—to engage in what I term regulatory constitutionalism. Here internal questions speak to the relationship between the suspected terrorist and the respondent state, whereas external questions concern the relationship between the respondent and third party states as it relates to the suspected terrorist. When dealing with internal questions, I argue courts are muscular notwithstanding the broader ‘external’ context in which they are considered, but when it comes to external questions a substantial amount of deference is apparent. This begs the question of whether such internal muscularity is worthwhile if external deference remains, however I argue that understanding counter-terrorist judicial review as a mechanism of regulatory constitutionalism provides at least some reassurance to constitutionalists.

This argument rests to a large extent on a starting position that considers judicial review (construed broadly) to be an important manifestation of regulatory constitutionalism. I define regulatory constitutionalism as a process through which information about governmental

¹See Chapter 9 in this volume, K. Roach, “Public Inquiries as an Attempt to Fill Accountability Gaps Left by Judicial and Legislative Review”.

² See Chapter 7 in this volume, F. Davis, “The Politics of Counter-Terrorism Judicial Review: Creating Effective Parliamentary Scrutiny”.

³ See Chapter 8 in this volume J. Blackburn, “Independent Reviewers as Alternative: An Empirical Study from Australia and the UK”.

⁴ F. Davis, “The Politics of Counter-Terrorism Judicial Review: Creating Effective Parliamentary Scrutiny” and Chapter 12 in this volume, G. Phillipson “Deference and Dialogue in the Real-World Counter-Terror Context”.

⁵ F. de Londras, *Detention in the ‘War on Terror’: Can Human Rights Fight Back?* (2011; Cambridge University Press), Chapter 6; 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; J. Ip, “The Supreme Court and the House of Lords in the War on Terror: Inter Armes Silent Leges?” (2010) 19 *Michigan State Journal of International Law* 1.

behaviour can be gathered, standards outlining the appropriate parameters of governmental authority outlined by reference to constitutionalist principles of limited and accountable power, and governmental behaviour ultimately modified to align more clearly with the constitutionalist ideal outlined in these standards. This builds on an understanding of regulation as involving information gathering, standard setting and behaviour modification⁶ as well as David Feldman's characterisation of judicial review as having directing, limiting, and structuring effects on government,⁷ to which—following the Human Rights Act 1998—Harlow & Rawlings have added 'vindicating'.⁸ This view of the role of judicial review is not by any means universally held, and certainly not in the United Kingdom where the superior courts have not traditionally had an 'apex' review role of this nature in spite of the increasingly constitutionalist approach to judicial review that has been developing over the past few decades in that jurisdiction.⁹ If we understand the constitution as more than *merely* political and in fact as an *autonomously* limiting instrument, such a development is relatively undisturbing (if not, perhaps, welcome) and a comparison along these lines with the traditionally 'apex' US Supreme Court and increasingly 'apex' Canadian Supreme Court can be usefully constructed. Although not a universally held view of the function and legitimacy of judicial review, this is my starting point in this chapter.

I. The Cases

The three cases that are considered here, from Canada, the United States and the United Kingdom, raise difficult questions for courts, which are asked to make orders protecting the rights of suspected terrorists held abroad; orders which, if granted, would have implications not only for claims of security imperatives but also for comity between states.

a. *Khadr*

Omar Khadr was fifteen when he was detained by the US in Afghanistan after allegedly throwing a grenade that resulted in the death of a US soldier. Having been moved to Guantánamo Bay, Khadr was charged with war crimes in 2004. He was interrogated by agents of the Canadian Security Intelligence Service (in 2003) and the Foreign Intelligence Division of the Department of Foreign Affairs and International Trade (in 2003 and 2004). The transcripts of these interviews were shared with the US, and the 2004 interview proceeded in spite of the fact that the Canadian personnel knew that Khadr had been subjected to sleep deprivation techniques for three weeks.

Before this case, Khadr had already obtained orders from the Canadian courts prohibiting any further interviews by Canadian agents¹⁰ and compelling the disclosure of interview transcripts to him,¹¹ in both of which cases a violation of s. 7 of the Charter was found. In contrast, *Canada (Prime Minister) v Khadr*¹² was decidedly 'external', with Khadr seeking an order compelling the government to make representations to the US seeking his repatriation.

⁶ C. Hood, H. Rothstein & R. Baldwin, *The Government of Risk: Understanding Risk Regulation Regimes* (2001; Oxford University Press), 23.

⁷ D. Feldman, "Judicial Review: A Way of Controlling Government? (1988) 66 *Public Administration* 21.

⁸ C. Harlow & R. Rawlings, *Law and Administration*, 3rd ed., (2009; Cambridge University Press), 728.

⁹ M. Elliot, *The Constitutional Foundations of Judicial Review* (2001, Portland; Hart Publishing). See also Chapter 10 in this volume, R. Masterman "Rebalancing the Unbalanced Constitution: Juridification and National Security in the United Kingdom".

¹⁰ *Khadr v Canada* [2006] 2 FCR 505

¹¹ *Canada (Justice) v Khadr* [2008] 2 SCR 125

¹² [2010] 1 SCR 44.

This forced the Supreme Court of Canada to reconcile its own already established position that Khadr's Charter rights had been violated, with strong executive-based arguments for non-interference with the conduct of foreign affairs.

The Court reiterated its earlier view that Canadian agents' involvement in Khadr's detention breached Canada's international legal obligations and fundamental rights norms and, thus, this case fell into the exceptional situations when the Charter could be applied to extra-territorial activity.¹³ The Court held that Canada's involvement contributed to the continuing deprivation of Khadr's liberty because of the use of information elicited through an interview by Canadian agents. Thus, an internal question was established and constructed: was there a breach of s. 7 of the Charter? The Court found that there was a "sufficient causal connection"¹⁴ between Canada's activity and Khadr's detention to apply the Charter and find a breach of s. 7.

Once a breach of s. 7 was established as regards the internal question, the Court had to decide what remedy would be appropriate. Khadr sought a mandatory order requiring the Canadian government to make diplomatic representations to the US for repatriation. Within Canadian constitutional jurisprudence it is well established that breaches of Charter rights must be answered with an appropriate and just order "that meaningfully vindicates the rights and freedoms of the claimant[]".¹⁵ Furthermore, the remedy must "employ means that are legitimate within the framework of our constitutional democracy"¹⁶ and "invoke[e] the functions and powers of a court".¹⁷ Although the exercise of foreign affairs powers in the context of making representations to another government was within the prerogative power of the executive, the Court held that this did not exempt such exercise from constitutional scrutiny.¹⁸ However, the strictness of that scrutiny and, in particular, the forcefulness of any remedy ordered in relation to same, would—it quickly became clear—be limited by pragmatic concerns of institutional competence and comity. Thus, while the *possibility* of remedy was an internal question, the *nature* of the remedy was clearly impacted by the external question. Paragraph 37 of the judgment reads:

The limited power of the courts to review exercises of the prerogative power for constitutionality reflects the fact that in a constitutional democracy, all government power must be exercised in accordance with the Constitution. This said, judicial review of the exercise of the prerogative power for constitutionality remains sensitive to the fact that the executive branch of government is responsible for decisions under this power, and that the executive is better placed to make such decisions within a range of constitutional options....[I]t is for the courts to determine the legal and constitutional limits within which such decisions are to be taken. It follows that in the case of refusal by a government to abide by constitutional constraints, courts are empowered to make orders ensuring that the government's foreign affairs prerogative is exercised in accordance with the constitution.

¹³ Drawing on *R v Hape* [2007] 2 SCR 292

¹⁴ *Suresh v Canada (Minister for Citizenship and Immigration)* [2002] 1 SCR 3, para 54.

¹⁵ *Doucet-Boudreau v Nova Scotia (Minister for Education)* [2003] 3 SCR 3, para 55.

¹⁶ *Ibid*, para 56.

¹⁷ *Ibid*, para 57.

¹⁸ [2010] 1 SCR 44, para 36.

The Court went on to hold that where one is under the control of another state, sufficient weight must be given to the executive's foreign affairs role and the complex and ever-changing needs of the national interest. Taking all of this into account, and considering the fact that Khadr was detained by the United States, that a governmental representation requesting repatriation would not necessarily succeed, and that the Court was not fully appraised of the nature of the diplomatic exchanges between the two governments in this case, no such mandatory order would be granted. Instead the Court found that declaratory relief (by means of declaring the breach of Khadr's Charter rights) was the appropriate remedy.¹⁹

b. Munaf

Munaf concerned the detention of two American citizens by the Multinational Force-Iraq (MNF-I) in Iraq. Shaqi Omar was a US/Jordanian citizen detained in 2004 and suspected of granting aid to Abu al-Zarqawi while he was the head of Al Qaeda in Iraq. Omar was given a military tribunal, deemed a 'security internee' and 'enemy combatant' and referred to the Central Criminal Court for Iraq for investigation. He remained in the custody of the MNF-I at Camp Cropper—a camp under the full operational control of the American military—as at an earlier stage he had succeeded in securing an order prohibiting his transfer to Iraqi custody, his handover to Iraq for investigation or prosecution, and the sharing of any information relating to his release with the Iraqi government. Mohammed Munaf was a US/Iraqi citizen who had gone to Iraq as a translator for some Romanian journalists. Those journalists were subsequently kidnapped by Al Qaeda, as was Munaf, and upon their release Munaf was arrested by the MNF-I on suspicion of having orchestrated the kidnap. As with Omar, Munaf was given a military tribunal and deemed a 'security internee'. His case was also referred to the Central Criminal Court for Iraq where he was prosecuted and convicted for kidnapping. During his trial Munaf confessed in writing and on camera to having orchestrated the kidnap but this confession was recanted while the trial was still in process. Munaf was convicted of kidnapping, but his conviction was vacated by the Iraqi Court of Cassation, which remanded him in custody for further investigation. Munaf was also detained by the MNF-I in Camp Cropper and had failed in his attempt to secure an injunction against transfer or release on the basis of a lack of jurisdiction.

The Supreme Court consolidated the two cases, both of which raised two significant issues: (1) whether the Court had jurisdiction to hear *habeas* petitions from the detainees, and (2) whether the Court could order the US not to transfer the petitioners into Iraqi custody or allow them to be tried by Iraqi courts by means of the preliminary (or interlocutory) injunction sought. These questions are clearly capable of being broken down into internal and external matters, the internal question being as to jurisdiction and the external question being as to the order sought.

As to jurisdiction, the Supreme Court held that it was an American unit (Task Force 134) that oversaw all detention operations and facilities in question, including Camp Cropper, and that in fact the unit was under the command of the US and answered *only* to a US chain of command. That was sufficient to satisfy the statutory jurisdiction requirement of being detained "under or by colour of the authority of the United States"²⁰ but even if this was not compelling on its own, citizenship was sufficient to establish the jurisdictional link.²¹ This

¹⁹ [2010] 1 SCR 44, para 47.

²⁰ 28 U.S.C. §2241.

²¹ *Johnson v Eisentrager* 339 U.S. 763 (1950); *Rasul v Bush* 542 U.S. 466 (2004).

reasoning suggests that the Supreme Court considered the jurisdictional question to be an internal one: a question about the relationship between the US and a US detainee (who happened to be a citizen).

In contrast, Roberts CJ writing for a unanimous Court, placed the question of relief clearly within the realm of the ‘external’. It was, he held, a question of “whether United States district courts may exercise their habeas jurisdiction to enjoin our Armed Forces from transferring individuals detained within another sovereign territory to that sovereign’s government for criminal prosecution”. With that sentence defining the issue at hand, the Court essentially stepped away from its internal construction of the jurisdiction question and reconstructed the case in an external manner, holding that when it came to remedy it must take into account the fact that this was “inevitably entangled in the conduct of our international relations”.²²

The petitioners had sought orders prohibiting both transfer *to* Iraq and release *in* Iraq itself; reliefs that the Court held “would interfere with Iraq’s sovereign right to punish offenses against its laws committed within its borders”. Given the equitable nature of *habeas* relief, the Court would proceed along what it considered to be the prudent course and, taking into account what was considered to be the extraordinary nature of the relief sought, prudence dictated that no relief be granted. Roberts CJ correctly held that “At the end of the day, what petitioners are really after is a court order requiring the United States to shelter them from the sovereign government seeking to have them answer for alleged crimes committed within that sovereign’s borders”.²³ The Court held that any order that would, in essence, “compel[] the United States to harbour fugitives from the criminal justice system of a sovereign with undoubted authority to prosecute them”²⁴ could not be granted. The Court simply would not countenance any such order, especially since “Omar and Munaf are being held by the United States Armed Forces at the behest of the Iraqi Government pending their prosecution in Iraqi courts”.

The petitioners were, thus, simultaneously held “under the color” of the US (to establish jurisdiction; the internal construction of the case) *and* by proxy for the Iraqi government (to refuse relief; the external construction of the case). Indeed, so strongly did the Court construct the external element of the case as one in which the Iraqi government was implicated that it concluded that “Any requirement that the MNF-I release a detainee would, in effect, impose a release order on the Iraqi government”.²⁵ Concerns about comity, foreign relations and the need not to interfere with executive conduct of same were equally clear in the Court’s response to the petitioners’ claim that their risk of being subjected to torture in Iraqi custody trumped any considerations already expressed in relation to granting the order sought. Questions about the likelihood or otherwise of torture were, the Court held, “a matter of serious concern” but “to be addressed by the political branches, not the judiciary”.²⁶ This is once again because of the Court’s concern with treading on executive toes in relation to foreign and diplomatic relations. For courts to make such determinations would “require

²² Citing *Romero v International Terminal Operating Company* 358 U.S. 354, 383 (1959).

²³ *Ibid*, p. 16.

²⁴ *Ibid*, p. 19.

²⁵ *Ibid*, p. 21.

²⁶ *Ibid*, p. 23.

federal courts to pass judgements on foreign justice systems and undermine the Government's ability to speak with one voice in this area".²⁷

c. *Rahmatullah*

Although *Rahmatullah*²⁸ concerns a British subject, rather than a UK citizen,²⁹ the case raises interesting and analogous issues to those arising in *Khadr* and *Munaf* and is a further example of the internal/external approach outlined above. In this case issues that were external at first blush were reconstructed as internal, by means of which reconstruction a relatively muscular approach was taken by the Court of Appeal. *Rahmatullah* is a Pakistani citizen who was captured by UK forces in Iraq in 2004 and subsequently handed over to US forces, which detained him in Bagram near Kabul, Afghanistan. He remained there since June 2004, notwithstanding a Detainee Review Board³⁰ finding in June 2010 that his continued detention was unnecessary and that he should be released to Pakistan.

At the time that *Rahmatullah* was handed over to the US, a Memorandum of Understanding (MOU) between the two countries and Australia was in effect. This MOU³¹ provided *inter alia* that it would be implemented in compliance with the Geneva Conventions and customary international law (Clause 1), that any detainees would be returned to the original transferring power "without delay upon request" (Clause 4), that release or transfer of a detainee outside of Iraq would take place only pursuant to mutual agreement between the relevant powers (Clause 5), that the transferring power had full right of access to detainees while they are in the custody of another of the signing parties (Clause 6), and that all detainees would be treated as prisoners of war in advance of a determination under Article 4 and 5 of the Third Geneva Convention (Clause 9). A second MOU was agreed in October 2008 (and signed by the UK in March 2009), which provided that all detainees transferred by one power to another would be treated "in accordance with applicable principles of international law, including humanitarian law" while in the custody of the US (Paragraph 4).³² Although not legally binding, these memoranda were clearly intended to govern the treatment of detainees captured in Iraq and to commit the parties to compliance with relevant

²⁷ *Ibid*, p. 25. Contrast this with the approach of the ECHR in *Othman*, for example, [2012] ECHR 56. See also 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".

²⁸ *Rahmatullah v Secretary of State for Foreign & Commonwealth Affairs & Anor* [2011] EWCA Civ 1540; *Rahmatullah v Secretary of State for Foreign & Commonwealth Affairs & Ors* [2012] EWCA Civ 182.

²⁹ Colin Murray has argued that subjects have extensive diplomatic rights under the doctrine of allegiance that are in at least some ways analogous to those of citizens: C. Murray, "In the Shadow of Lord Haw Haw: Guantánamo Bay, Diplomatic Protection and Allegiance" (2011) *Public Law* 115. While Christopher Trans accepts that British residents abroad may have a duty of allegiance to the Crown, he questions the extent to which this can be distilled into a duty of protection towards said residents when abroad: C. Trans, "Revisiting Allegiance and Diplomatic Protection" (2012) *Public Law* 197. For present purposes, however, it is enough to say that there is sufficient agreement to place *Rahmatullah* within the taxonomy being used in this article in order to illustrate the way in which domestic courts might deal with the difficult questions arising in such situations.

³⁰ As it stands, those detained in Bagram Airbase are said not to have any right (constitutional or otherwise) to *habeas corpus* review. Instead, the appropriateness of continued detention is now determined by Detainee Review Boards made up primarily of military personnel. For more on the operation of DRBs in Bagram at the material time see J. A. Bovarnick, "Detainee Review Boards in Afghanistan: From Strategic Liability to Legitimacy" (2010) *The Army Lawyer* 9.

³¹ An Arrangement for the Transfer of Prisoners of War, Civilian Internees, and Civilian Detainees between the Forces of the US, the UK, and Australia, 23 March 2003; see discussion in *Rahmatullah v Secretary of State for Foreign & Commonwealth Affairs & Anor* [2011] EWCA Civ 1540, [3]-[6].

³² See discussion *ibid* at [7]-[8].

international legal standards. Rahmatullah claimed that his continued detention was a violation of the Geneva Conventions and that the UK either enjoyed a sufficient level of control over him to secure his release or that there was at least a doubt about whether such control lay with the UK.³³ As a result *habeas corpus* was sought either in the normal way or in order to allow for the question of control to be determined. In response, it was argued that the UK did not exercise sufficient control for the writ to issue and that, furthermore, issuance of the writ would require the UK Government to make a request of the US which would involve the court in foreign relations.

This case was a complex one, concerning as it did three areas of real sensitivity: the conduct of hostilities, the interpretation and legal effect of MOUs, and bilateral foreign relations. The net question in legal terms was one of control: was the applicant under the control of the UK to allow the writ to issue or was there sufficient doubt as to that question to justify the issuance of the writ? Although this appears to be an essentially internal question, its handling of this case required the Court to pay significant attention to whether or not the US was in breach of its international legal obligations; a consideration with more than a hint of externality about it. The Court's treatment of this question ultimately fed into the decision as to whether or not a writ of *habeas corpus* ought to issue; it also centrally concerned Article 45 of the Fourth Geneva Convention, which includes the following provision:

If protected persons are transferred under such circumstances, responsibility for the application of the present Convention rests on the Power accepting them, while they are in its custody. Nevertheless, if that Power fails to carry out the provisions of the present Convention in any important respect, the Power by which the protected persons were transferred shall, upon being so notified by the Protecting Power, take effective measures to correct the situation or shall request the return of the protected persons. Such request must be complied with.

Based on Article 45, together with the MOUs and the fact that Rahmatullah's continued detention had been deemed unnecessary by the Detainee Review Board the Court of Appeal held that "the UK Government is, again at least strongly arguably...entitled either to demand his release or to demand his return to UK custody under Article 45".³⁴ If the failure to release Rahmatullah was a breach of the Geneva Conventions, the nexus between him and the UK would be reactivated and failure to act under Article 45 potentially engaged s. 1 of the Geneva Conventions Act 1957. According to the Court of Appeal, this possibility resulted in sufficient uncertainty as to the UK's control over the applicant to justify issuing a writ of *habeas corpus*.

Here the internal question was a complex one that involved matters of international law and may have required an oblique finding of a violation of international obligations by another state (making it *quasi-external*), but the Court ensured that it remained a fundamentally internal question in relation to which at least some muscularity could be displayed. Once this question had been dealt with, there was still the possibility that the writ would not issue, especially as the argument against issuance was essentially that any request to the US would

³³ The writ can issue where there is some doubt about whether a person is under the control of the respondent and the issuance of the writ would allow for the situation to be clarified: *Barnardo v Ford* [1892] AC 326; *R v Secretary of State for Home Affairs ex p O'Brien* [1923] 2 KB 361.

³⁴ *Rahmatullah v Secretary of State for Foreign & Commonwealth Affairs & Anor* [2011] EWCA Civ 1540, [34].

be futile and that an order of *habeas corpus* would involve the court in the ‘forbidden’ area of foreign relations. The Court held that it was by no means certain that the US would refuse to hand the applicant over and this, combined with the nature of *habeas corpus* within the British Constitution, pointed strongly in the direction of issuing the writ. The Court held that the argument as to foreign relations did not hold water, primarily because the argument was not made out in any real detail by the Secretaries of State. However, the Master of the Rolls also noted (albeit *obiter*) that the writ of *habeas corpus* can issue even where it might impede diplomatic relations,³⁵ and Kay LJ reiterated that the forbidden area continues to exist.³⁶ Accordingly, the writ of *habeas corpus* issued.

Rahmatullah, which could so easily have been unsuccessful if construed solely as an external case was instead constructed as an internal case, concerned with the UK’s control and capacity based on the MOUs and the Geneva Conventions. The Court studiously maintained the notion that muscularity would not be appropriate in truly external cases, but neatly ensured that this case simply did not fall into that limited field. If it had done, then it seems clear to me that the applicant would not have succeeded.³⁷ *Rahmatullah* also, however, serves as a cautionary tale, for the aftermath of the original decision demonstrates how limited domestic courts can be in handing down remedies in these cases, even where an internal question *is* constructed. The US government refused to hand *Rahmatullah* over in pursuance of the *habeas corpus* order³⁸ and there were no means, within the handover protocols between the UK and the US, through which the UK government could compel the US to do so. Following up on the issuance of the writ in February 2012, the Court of Appeal acknowledged that their writ could not secure Mr *Rahmatullah*’s appearance before the Court but nevertheless rejected any suggestion that it had been futile to issue it in the first place.³⁹ Addressing this point, Neuberger MR (as he then was) held:

That does not mean that the issue of the writ of *habeas corpus* was a pointless exercise in this case: it performed its minimum function of requiring the UK Government to account for its responsibility for the applicant's detention, and to attempt to get him released.⁴⁰

On appeal in the UK Supreme Court the decision to issue the writ was upheld and the implications that the United States was acting in violation of the Geneva Conventions reiterated.⁴¹ In the Supreme Court the government placed somewhat more weight on the claims that the issuance of the writ was inappropriate on foreign affairs grounds and in addressing this argument Kerr LJ resolutely reiterated the prior characterisation of the *habeas* question as an internal one. He absolutely rejected any contention that issuing the writ constituted an impermissible interference with foreign affairs, holding:

[T]he Court of Appeal’s decision does not amount to an “instruction” to the Government to demand Mr *Rahmatullah*’s return. Its judgment merely reflects the court’s conclusion that there were sufficient grounds for believing that the UK

³⁵ *Ibid* [47]-[50].

³⁶ *Ibid* [56].

³⁷ Here lies the apparent distinction from *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] All ER (D) 70 and *R (Al-Rawi) v Secretary of State for Foreign and Commonwealth Affairs* [2008] QB 289.

³⁸ *Rahmatullah v Secretary of State for Foreign & Commonwealth Affairs & Ors* [2012] EWCA Civ 182.

³⁹ *Ibid*.

⁴⁰ *Ibid* [17].

⁴¹ *Secretary of State for Foreign and Commonwealth Affairs v Rahmatullah* [2012] UKSC 48.

Government had the means of obtaining control over the custody of Mr Rahmatullah. ... It might well prove that the only means of establishing whether in fact it could obtain control was for the Government to ask for his return but that remained a matter for the ministers concerned.⁴²

The decision in *Rahmatullah*, and particularly Neuberger LJ's comments recalled above, lead us neatly to the core question that arises in all three of these cases: what is the point in a court taking an internally muscular and externally deferential approach in these cases? If, in the end, no (effective) order mandating a particular activity or course of action can be handed down, is this internal muscularity not simply a futile exercise leaving an unregulated and unlimited power in the context of foreign affairs, even where fundamental matters of individual liberty are at issue? The answer, I contend, depends on how one reads these cases.

II. The Judicial Technique of Internal/External Construction

Cases of this kind raise distinct and problematic issues as the applicants involved seem to ask courts to tread into the 'forbidden area' of foreign affairs⁴³ to issue orders that, while directly addressed to their own governments, could be interpreted as being effectively addressed to the governments of a third state and have clear implications for foreign and diplomatic relations. At the same time, there is a legitimate concern with ensuring that 'citizens' (a term I use very broadly here in a sociological rather than a legal sense) are not left at the mercy of foreign powers, particularly when there is good reason to believe that they are or will be treated in a manner that would not be considered acceptable should the treatment in question be meted out by the respondent state. Courts, then, find themselves in something of a quandary, which *Khadr*, *Munaf* and *Rahmatullah* suggest they can resolve by constructing the case as being divisible into internal and external questions.

On the one hand the conventional division of competence between the judicial and executive branch militates against intervention, while on the other the concern with citizen welfare suggests that something ought to be done. The weight of the first concern should not be underestimated. Indeed, it is so weighty as to be capable of overriding legal bonds of citizenship as a basis for intervention; the cases above show that *mere* citizenship was not enough to justify judicial supervision. Something more was required, such as the involvement of Canadian agents in *Khadr*. Once such a nexus can be established, the 'internal question' presents itself for consideration and courts adjudicate on it in the normal way, notwithstanding the 'emergency', 'war' or 'crisis' setting in which the question has arisen.

Once a sufficient link between the detainee and the respondent state has been identified, a second difficulty may arise. While these cases suggest that courts are willing to be relatively non-deferential towards the executive in terms of 'internal' questions,⁴⁴ 'external' questions belong to a greater degree to the 'pure' executive realm of foreign affairs into which courts are understandably reluctant to wander. In this context, the questions of comity and executive competence that arise are exacerbated by the counter-terrorist context. The 'external' question concerns the relationship between the state and the detainee as it relates to the state's

⁴² *Ibid.*, [60]

⁴³ *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] All ER (D) 70 [106(iii)]; *R (Al-Rawi) v Secretary of State for Foreign and Commonwealth Affairs* [2008] QB 289 [131] [134].

⁴⁴ Of course, even in these cases some deference may be shown as Chan illustrates in her chapter. C. Chan, "Running Business as Usual: Deference in Counter-Terrorism Rights Review" in F. Davis and F. de Londras (eds.), *Critical Debates on Counter-Terrorist Judicial Review* (2014; Cambridge University Press), Chapter

relationship with another state and tends to implicate considerations as to remedy and, in particular, the extent to which courts can (or, perhaps more accurately, *will*) hand down orders that prescribe a certain kind of inter-state engagement. Here the cases above suggest that there is what seems to be a self-imposed limitation on judicial muscularity whereby courts are unwilling to grant such orders or, at least, to acknowledge that the orders they might grant (which are ostensibly relevant to the ‘internal’ question only) have implications for foreign relations.

In some respects at least, this self-imposed limitation is linked to considerations of judicial competence, implications for comity, and an appreciation of the nature of inter-state diplomacy as a cautious and sensitive enterprise and one in which mandatory orders may do more harm than good. That said, for those who consider the judicial role to be one of maintaining constitutionalist principles, apparent self-imposed limitations are worrying; if there really is a ‘forbidden area’ into which the courts will not tread by means of judicial review, can judicial review truly be said to be a constitutionalist exercise? In my view the cases of *Khadr*, *Munaf* and *Rahmatullah* suggest that it can be, because the forbidden area is not left entirely unregulated by domestic courts. Rather, the construction of the case as having both an internal and an external element means that legitimate judicial intervention can take place in relation to the internal question that has implications for the external question, even while the optical illusion that the court has not wandered into foreign affairs persists. In this way, domestic courts seem to maintain an appropriate degree of institutional respect for genuine concerns of comity and competence when it comes to foreign affairs, while simultaneously creating conditions where interactions with third countries may be influenced by constitutionalist concerns and principles enforced by the courts, i.e. engaging in regulatory constitutionalism.

III. Regulatory Constitutionalism and the Apparent Self-Imposed Limitation on Judicial Muscularity

There are two—not necessarily conflicting—ways of interpreting the pattern identified in these three cases. The first is to read them as a ‘constitutionalist optimist’, seeing within them considerable muscularity and a resistance to the suggestion that context (i.e. terrorism and conflict) or actor (i.e. executive) ought necessarily to usher in deference by the courts, especially when core constitutionalist principles are at issue. On the other hand, a ‘constitutionalist pessimist’ might see them as perpetuating an essentially unreviewable area of executive power. The latter reading raises important questions of legitimacy. For those, like me, who consider counter-terrorist judicial review to be (ideally) an exercise in regulatory constitutionalism, such an approach raises the question of whether it is legitimate for the courts to be muscular on the one hand but to cultivate a fertile ground of potential abuse on the other. It causes one to ask whether the maintenance of the ‘forbidden area’ severely undermines the existence of the reviewed area, and makes rights protection essentially contingent on circumstances beyond the control of the individual whose rights are jeopardised. These questions are important ones. They give rise to the possibility that in appearing to be ‘muscular’, courts are in fact flexing just enough muscle to appear relevant or maintain their own role, while leaving sufficient space for governments to do as they wish *provided* they do it in the right conceptual or geographical space.⁴⁵ If, indeed, that were the case it would undermine the constitutionalist nature of the muscularity witnessed in the

⁴⁵ This echoes concerns raised by Lobel in his contribution to this volume. J. Lobel “The Rhetoric and Reality of Judicial Review of Counterterrorism Actions: The United States Experience” in F. Davis and F. de Londras (eds.), *Critical Debates on Counter-Terrorist Judicial Review* (2014; Cambridge University Press), Chapter

‘internal’ questions. I argue, however, that in fact the maintenance and acknowledgment of the forbidden area in respect of external questions *together with* the identification and muscular adjudication of internal questions may be mutually reconcilable and appropriate judicial approaches demonstrating a commitment to regulatory constitutionalism.

This requires us to acknowledge that even while not adjudicating on the external question, courts can and do make ‘soft findings’ that have an important regulatory impact on government action.⁴⁶ In *Khadr*⁴⁷ the Canadian Supreme Court found that the conditions of Khadr’s detention and interrogation were such as to violate the Charter, thus making a clear (and pejorative) finding with political, even if not legal, consequences, about the US. Similarly, in *Rahmatullah*⁴⁸ the superior courts effectively found that the US was acting in violation of the Geneva Conventions by holding Rahmatullah in Bagram after his eligibility for release had been determined. Although no such conclusion can be clearly drawn from *Munaf* (apart from a suggestion that the conditions of trial in Iraq might not be equal to the due process guarantees under the US Constitution⁴⁹), both *Khadr* and *Rahmatullah* suggest the potential for some obtuse conclusions to be reached about the external actors or actions under consideration, even when no order can be made in relation to same. This can in turn have an important impact on government action in relation to the litigant and the particular case in question *provided* it receives political attention.⁵⁰ Through publicisation, the non-binding nature of these elements of the decision may be mitigated by infusion with regulatory capacity. In other words, it is conceivable that even though these findings may not have been ‘hardened’ into remedies or court orders, they might acquire sufficient political and popular currency to direct government action, thus obliquely regulating government behaviour.

The possibility that this would happen is outside of courts’ control, but is not precluded by doctrinal respect for the notion of a forbidden area. The importance of this kind of impact is clearest when one analyses judicial effectiveness through the prism of regulatory constitutionalism proposed above. Seen thus, judicial review is one part of a broader cultural commitment to the rule of law and accountability that includes legal, political, popular, external and internal elements. In this context, judicial decisions that appear to carry inappropriate or inadequate remedies (or, indeed, no traditional remedy at all) might still play an important role by catalysing a broader constitutionalist demand for accountability with the potential to make clear the standards expected of government from a normative perspective and to bring about changes in behaviour accordingly. Viewed thus, they seem less disappointing to the constitutionalist.

The second factor suggesting that maintaining the ‘forbidden area’ in respect of external questions while identifying and displaying muscularity in relation to internal questions are mutually reconcilable and appropriate judicial approaches is that the principles laid down and enforced through the muscular handling of the internal question may ‘leak’ into external affairs and have knock-on constitutionalist effects in a typically regulatory fashion. Such effects might, of course, be either negative or positive; both formal and informal responses to

⁴⁶ See C. Murray, “The Ripple Effect: Guantánamo Bay in the United Kingdom’s Courts” (2010) *Pace International Law Review* (OC) 15.

⁴⁷ *Canada (Prime Minister) v Khadr* [2010] 1 SCR 44.

⁴⁸ *Rahmatullah v Secretary of State for Foreign & Commonwealth Affairs & Anor* [2011] EWCA Civ 1540.

⁴⁹ *Munaf v Geren* 553 U.S. 674 (2008).

⁵⁰ On the importance of popular pressure to follow through on judicial decisions see Chapter 5 in this volume, J. Lobel “The Rhetoric and Reality of Judicial Review of Counterterrorism Actions: The United States Experience”.

judicial review are possible and, indeed, negative reactions (such as ouster clauses or the effective limitation of the availability of judicial review⁵¹) are a distinct possibility that I do not mean here to discount. It is important to recall that in handing down a decision in any case of judicial review, courts can be sure only of what they themselves will do; the reaction of the other branches of government is beyond their direct control, however where there is a clear culture of respect for decisions of the courts we can be relatively sure that even decisions unfavourable to the government will not simply be ignored. Negative reactions to judicial review may not be the ideal reaction when seen from the perspective of the ‘outcome’ narrowly construed, but they too reflect the nature of judicial review as regulatory constitutionalism bringing about changed behaviours. The most worrying outcome from a constitutionalist perspective would be for the state to simply ignore a decision of a Court, undermining the delicate arrangement whereby political branches give effect to the decisions of the ‘weakest’ branch of government.

Taking that into account, we can explore further some of the positive reactions that decisions such as *Munaf*, *Khadr* and *Rahmatullah* might help to bring about. The first is that the respondent government might modify its interactions with other states using the finding as a basis. One can easily imagine that in a subsequent interaction relating to the handing of a British subject over to the US in Iraq or Afghanistan, for example, the UK authorities might stress to the US authorities the importance of ensuring compliance with the Geneva Conventions and having in place an *effective* mechanism of recovering the individual if required based on wanting to avoid a repeat of the criticism levied in *Rahmatullah*. Indeed, the UK might even become more reluctant to hand detainees over in such circumstances at all. In this way the fact that the findings relating to the external question did not ‘harden’ into mandatory orders does not necessarily mean that there is no impact on the external actor (the detaining state) in this and similar cases. Of course, there is no guarantee that this actually will happen; political considerations such as relative geopolitical power positions, desirability of outcome, government priorities and perceived necessity are likely to impact on the extent to which such a direct ‘leak’ into external relations would take place. However, the possibility of such leakage reminds us that even if an area is formally ‘forbidden’ to the courts in terms of adjudication, their findings can impact on it in terms of action.

Furthermore, findings as to the external question might impact on external relations as a result of their reflexive capacity. Reflexivity here represents a middle-way between detailed, ‘command and control’ regulation and absolute deregulation (at least in public regulatory terms).⁵² Reflexive regulation (sometimes also termed ‘reflexive law’ or ‘reflexive governance’) is concerned with stimulating self-regulation in a manner that ensures that social policies are fulfilled.⁵³ While usually applied to industry sectors,⁵⁴ the concept of

⁵¹ Arguably the reaction to Guantánamo Bay litigation, where Congress attempted to expressly strip jurisdiction from the courts, reflects such a negative reaction. See F. de Londras, “Guantánamo Bay: Towards Legality?” (2008) 71 *Modern Law Review* 36.

⁵² For a meditation on regulation generally, including reflexive regulation’s place within the field, see e.g. S. Picciotto, “Introduction: Reconceptualizing Regulation in the Era of Globalization” (2002) 29 *Journal of Law and Society* 1.

⁵³ See generally M. Aalders and T. Wilthagen, “Moving Beyond Command-and-Control: Reflexivity in the Regulation of Occupational Safety and Health and the Environment” (1997) 19 *Law and Policy* 415, and E. Brousseau, T. Dedeurwaerdere and B. Siebenhuner (eds), *Reflexive Governance for Public Goods* (2012, Boston; MIT Press).

⁵⁴ See eg E. W. Orts, “A Reflexive Model of Environmental Regulation” (1995) 5 *Business Ethics Quarterly* 779; R. Rogowski and T. Wilthagen, *Reflexive Labour Law: Studies in Industrial Relations and Employment Regulation* (1994, Wien; Springer); C. Scott, “Reflexive Governance, Meta-Regulation and Corporate Social

reflexive regulation also has potential in an area such as foreign affairs (especially in wartime) when too strong a judicial hand is considered institutionally inappropriate. Reflexive governance is essentially governance by design, whereby certain institutions allow for the marrying of legal principles with the structural contexts in which they are to be applied. In the context of external relations, we might say that the bridging institution here would be the public service within the relevant government department (most likely departments or ministries of defence and foreign relations), possibly including the diplomatic service and the military.

The impact of judicial review on public servants and institutions has been well studied. Sunkin, Calvo and Platt have found that judicial review has significant impact in the local authority context, not least because of the bedded down public service ethos to be found there. In this respect they found that a mere challenge (whether successful or not) can have some (limited) impact on the quality of local authority services. Furthermore, if a challenge reaches the level of a judgment of a court there is a clear impact on the respondent particularly, but not exclusively, where the court finds against the local authority. Third, a decision against Local Authority A can have an impact on the behaviour of Local Authority B which can now be clear on what is required of it and modify its behaviour to act accordingly partly to avoid being subjected to judicial review itself, and partly because of an ethos that compliance with the law is simply what public authorities ought to do.⁵⁵ Even taking into account the differences between local and national authorities, an understanding of judicial review as an exercise of regulatory constitutionalism shows that it at least has the potential for similar impacts at national level. Added to this we ought to take into account the growth of ‘accountability culture’ in public authorities and its capacity to influence the extent to which challenges—whether successful in remedies terms or not—may impact on individual public servant behaviour and contribute to broader behavioural change when understood in a reflexive manner.⁵⁶ Furthermore, the statutory obligation now placed on public authorities in some jurisdictions—including the UK⁵⁷—to undertake its activities in a manner compliant with the state’s obligations under the European Convention on Human Rights, may further catalyse reflexive responsiveness even to ‘soft’ and oblique findings relating to the treatment of citizens or subjects held by another state but with sufficient nexus to the respondent state. If we assume (and it may, to be fair, be an assumption too far in some cases of extremity) that compliance with international law, respect for human rights, and the maintenance of good diplomatic relations are all social policies to which the state is committed, and that the relevant elements of the public service are already acculturated to taking judicial pronouncements on board and cognisant of the potential fall-out from further ‘external’ findings that obliquely criticise strategic partners as well as identifying possible complicity in violations of international law, it is not unreasonable to expect that such pronouncements may have a reflexive impact in the design and implementation—at departmental and government level—of approaches to particular, ‘high-risk’ inter-state engagement concerning citizens (or subjects) detained abroad.

Responsibility: the ‘Heineken effect’” in N. Boeger, R. Murray and C. Villiers, *Perspectives on Corporate Social Responsibility* (2008, Cheltenham; Edward Elgar).

⁵⁵ See, L. Platt, M. Sunkin & K. Calvo, “Judicial Review Litigation as an Incentive to Change in Local Authority Public Services in England and Wales” (2010) 20 *Journal of Public Administration Research and Theory* 243.

⁵⁶ B. Romzek, “Dynamics of Public Sector Accountability in an Era of Reform” (2000) 66 *International Review of Administrative Sciences* 21.

⁵⁷ s. 6, Human Rights Act 1998. An analogous responsibility lies on “organs of the state” in Ireland as a result of s. 3, European Convention on Human Rights Act 2003.

Conclusion

It is no doubt frustrating for litigants, their families, scholars and commentators when courts hand down decisions that appear to find wrongdoing while ‘doing nothing’ about it. There are plentiful examples of scholars arguing that courts being relatively non-deferential while the litigants continue to linger in detention is a sheer exposition of the futility of the language and principles of human rights as a matter of law, or illustrates something akin to duplicity or connivance.⁵⁸ These critiques of course have their merits, especially when applied to the cases of individuals whose names and stories have become synonymous with great constitutionalist ‘victories’ but who remain in deplorable conditions of liberty deprivation. However, when it comes to citizens (or subjects) detained abroad real questions of legitimate limitations on judicial muscularity arise that exacerbate the usual challenges of judicial review in situations of emergency or crisis. Not only does a court have to think about whether it is appropriate to intervene in what the government is directly engaged in, but it must also take into consideration a wide range of broader considerations about comity, institutional capacities, and diplomatic relations. Doing this does not undermine judicial review when it is seen as an exercise of regulatory constitutionalism in a context where judicial pronouncements have both an autonomous and a contextual force.

A court could quite conceivably apply the kinds of weighty considerations that arise in cases of this kind in order to avoid meaningful adjudication. Less likely, but nevertheless conceivable, is a court disregarding these considerations in order to take a stringent approach to assessing the foreign affairs elements of such cases. Realistically speaking, neither of these approaches would be particularly wise. In both cases, the individual in question would most likely find himself precisely where he always was and some fundamental relationship (either between judiciary and the executive, or between the respondent and the detaining state) would be seriously wounded. The three cases considered here suggest that courts are, in fact, finding a middle ground between these two extreme situations. By carving the issues up into ‘internal’ and ‘external’ questions the courts have identified a space of muscularity and a space of self-restraint, but the self-restraint need not equate to abandonment by the courts when the regulatory capacity of the external findings is taken into account. This may not be ideal, and it may not secure the liberty or the welfare of the detainee, but it at least reinforces core constitutional principles and holds some potential to influence states’ behaviour in such cases. Whether one is a judicial review sceptic or enthusiast, it is difficult to imagine what more a domestic court could do.

⁵⁸ The strongest critique perhaps comes from Keith Ewing. K. Ewing, “The Futility of the Human Rights Act” (2004) *Public Law* 829; K. Ewing, *Bonfire of the Liberties: New Labour, Human Rights and the Rule of Law* (2010; Oxford University Press).