Defying Intervention

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This article seeks to validate the necessity of an independent judicial system within the United Kingdom. With reference to statute, case law and academic publications, there is a consensus amongst legal scholars that non-judicial interests, despite their alleged benefit to society, are capable of infringing on the rights and freedoms of the citizens they intend to protect. Therefore, in order to uphold the democratic value of the United Kingdom, judges should refrain from devising verdicts based on interests which exist outside of the law, ensuring impartiality and equity.

The purpose of this article is to determine whether the judiciary should either be defiant or deferential to the interests of non-judicial agencies when rendering decisions pertaining to cases of national security. The concepts of defiance and deference should be understood as judicial response to competing legal interests supported by non-judicial parties. Put simply, defiance represents the absolute rejection of non-judicial interests, while deference represents the judiciary allowing for them to permeate into the common law.

Despite the socio-political sensitivity associated with the securitisation of the United Kingdom, the judiciary should not purposely suppress its institutional role as a legal arbiter in order to appease the concerns of Westminster, and of civil society. As a source of checks and balances, judges should be defiant, rather than deferential, regardless of the context. Agents of the state, as well as ordinary citizens, should be subjected to judicial review if their actions have been found to contradict the rule of law.

In order to affirm the argument supporting judicial defiance, the duration of this article will be separated into three sections. The first section will briefly discuss the concept of judicial deference and how it embedded, as a concept, amongst cases of national security. The second section will introduce several compelling arguments that support the claim of judicial defiance, focusing specifically on how the Human Rights Act 1998 had challenged the deferential paradigm associated with parliamentary hegemony. The final section will conclude this article with a brief discussion relating to the arguments of advocates of defiance, made in response to the claims outlined in the first section by critics of the United Kingdom's judiciary.

The argument for judicial deference

The concept of judicial deference can be described as a process of self-imposed restraint in which a court of law will purposely surrender its role of imposing judgment to a non-judicial party, which are often agents of Westminster. As a result of the United Kingdom's partially codified constitution, there are no legal provisions which dictate that judges cannot collude with institutions outside of the judiciary when rendering decisions on legal issues.[1] Indeed, it is important to notice the term 'collusion', because the process of deference is not absolute. Although judges do have the ability to fully defer judgment, they can also retain their role as arbiters, use non-judicial parties as a source of insight, and deliver rulings based on the information they were given.[2]

Aileen Kavanagh, a constitutional law scholar, argues that there is a common factor within cases involving judicial deference: the balancing of individual human rights with the collective security interests of the United Kingdom.[3] Kavanagh's claim is supported by Lucia Zedner, who suggests that there are three critiques of the judiciary which have influenced judges to defer judgement when presiding over cases involving balancing

[1] Tiziana Scaramuzza, 'Judicial Deference versus Effective Control: the English Courts and the Protection of Human Rights in the Context of Terrorism' (2006) 11(2) *Coventry Law Journal* 3.

[2] Aileen Kavanagh, 'Judging the Judges under the Human Rights Act: Deference, Disillusionment and the "War on Terror" (2009) *Public Law* 302.

[3] ibid.

national security and human rights: expertise, legitimacy and competency.[4]

In the context of national security, expertise relates to the judiciary's limited understanding of public interests and the weight that it should be given when deliberating legal matters. In the case of *Secretary of State v Rehman*, which concerned the appeal of a deportation order by the respondent, Lord Slynn makes it apparent that the decision by the appellant to deport the respondent was made based on the appeasement of the greater good rather than the interests of a single individual.[5] Lord Hoffman supports Slynn's claim, stating that agents of Westminster are more observant of public interest when rendering decisions in comparison to the judiciary, which is why there are often deferred to for judgment during debates over the implication of security policy.[6] As arbiters, judges are only trained to assess and rule based on the legality of procedure rather than the substantive interest which conceptualised the law in question. As a result of this analytical oversight, judges are considered incapable of rendering effective judgements when presiding over issues pertaining to national security.

The critique relating to legitimacy focuses more on the structure of the judiciary rather than the actions of its members. Unlike politicians, judges in the United Kingdom are selected, rather than elected by the people.[7] The significance of this process is derived from the fact that judges are not accountable to the public and therefore do not need to consider the public's' interests or values when contemplating rulings. Furthermore, unlike Parliament, the judiciary is not reactive, meaning that if there are ever events of questionable security within the United Kingdom, the judiciary would be reluctant to issue any judgements which might assist in the immediate re-securitisation of the state. This was confirmed by Lords Slynn and Hoffman in the previous critique, who argued that judicial decisions are not formulated based on the needs of the public.[8] As they are not held accountable for their rulings, through the processes of selection and deliberation, the judiciary as an institution can be considered by the standards of the democratic model to be illegitimate.

Issues of national security are considered to be highly sensitive matters. This suggests that judges are not capable of coming to decisions on such matters without the assistance of an expert panel. The critique of competency does not argue judges are incapable as arbiters, but rather that there are some matters of law which cannot be resolved without extrajudicial support. As stated, deference is subjective in terms of its effect. This means that judges do not have to fully surrender their institutional purpose in order to incorporate the assistance of non-judicial organisations.[9]

The arguments for judicial defiance

As the opposing stance to deference, proponents of the defiance position argue that the English courts should not be pressured by the interests of non-judicial agencies to abandon their institutional responsibilities during debates relating to highly sensitive legal issues, in this context national security.

The position of judicial defiance has always been an important value to uphold in relation to preserving the consolidation of a democratic regime. At face value, the ideology of democracy only represents a process of selection in which political representatives are chosen based on the level of support by the citizens of the state. It should be understood, however, that democracy, as a legal ideology, represents the protection of individual rights from the collective interests of the state government. In a democratic regime, the judiciary is considered to be a vanguard, responsible for ensuring that the actions of the government, in this case Westminster, do not illegally infringe upon the rights and freedoms of the British citizenry.[10] This interpretation of judicial responsibility is especially significant considering that in 1998 Westminster enacted the Human Rights Act which enabled judges to bring to light, through a Section 4 declaration of incompatibility, the illegitimate aspects of certain statutes and agency decisions. This was done, on the basis of their tentative inconsistencies with the provisions of the European Convention of Human Rights.[11]

In the context of national security, defiance is imperative to the democratic regime due to the considerable pressures placed on the judiciary to defer cases relating to the securitisation of the United Kingdom to the executive. There is no doubt that the bombing of the London Underground on the 7th of July 2005 incited a political discourse which sought to promote national security within the United Kingdom at the cost of civil liberties.[12] Anti-terrorism legislation was enacted which enabled the government to purposely discriminate against residents who were suspected of being affiliated with enemies of the state.[13] It is important to note the term resident, as it demonstrates the prejudice existing within the government, based on its treatment of non-citizens. This is best illustrated with an analysis of *A v Secretary of State for the Home Department*, commonly known as the *Belmarsh Prison* case.[14]

The facts of the case concerned the detention of several foreign nationals HM Prison Belmarsh. The detainees were held by the government and threatened with deportation under the authority of section 23 of the Anti-Terrorism, Crime and Security Act 2001. In accordance with this particular legislative provision, the respondent had been sanctioned with the ability to detain foreign nationals, who were suspected of either being

[4] Lucia Zedner, "Securing Liberty in the Face of Terror: Reflections from Criminal Justice" (2005) 32(4) *Journal of Law and Society* 526.
[5] *Secretary of State for the Home Department v. Rehman* [2001] UKHL 47 [1].
[6] ibid, s 15.
[7] Kavanagh (n 2) 303.
[8] *Secretary of State for the Home Department v. Rehman* [2001] UKHL 47 [50].
[9] Kavanagh (n 2) 288.
[10] Scaramuzza (n 1) 3.
[11] Human Rights Act 1998, s 4.
[12] Zedner (n 4) 507.
[13] Daniel Moeckli, 'Discriminatory Profiles: Law Enforcement after 9/11 and 7/7' (2005) 5 European Human Rights Law Review 519.
[14] [2004] UKHL 56.

affiliated with, or plotting to engage in terrorist activities without having to go through the criminal justice system. In turn, the detainees were held by the state under suspicion, without being charged or convicted of an actual criminal offence.[15] In the House of Lords (now the Supreme Court), the appellants had submitted to the Law Lords that their detention violated the principles espoused within the European Convention of Human Rights, in particular Article 5(1). Under this provision, individuals who reside within Member States have the right to security, including the prevention of detention without charge.[16]

When issuing their judgement, the Law Lords had arrived at two separate rulings. The first was that it is the responsibility of the state government to determine whether there was a potential threat to the United Kingdom. Despite the deference in assessing securitisation, the Lords held that in regard to the suppression of rights, it was the role of the judiciary exclusively to determine if the limitations made by the act coincide with the Convention. In accordance with section 23 of the act, it was concluded that detention without formal charge was a gross violation of Articles 5(1) and 14 of the European Convention, a landmark decision, which was issued through a section 4 HRA declaration.[17] Lords, Bingham and Hoffman issued similar statements, arguing that if the government cannot find the evidence necessary to issue a formal charge against any individual suspected of plotting terrorist activities, detention cannot be considered a lawful action.[18]

One of the most compelling statements made during the *Belmarsh* decision was by Lord Bingham, who stated:

> The duty of the courts is to check that legislation and ministerial decisions do not overlook the human rights of persons adversely affected. In enacting legislation and reaching decisions Parliament and ministers must give due weight to fundamental rights and freedoms. For their part, when carrying out their assigned task the courts will accord to Parliament and ministers, as the primary decision-makers, an appropriate degree of latitude.[19]

Bingham's opinion on the role of the judiciary reflects the central argument pertaining to the concept of judicial defiance. Contrary to the deference model, judges do not owe a duty to Westminster when rendering a decision. Even in times of national crisis, such as the 7/7 bombings, the courts of the United Kingdom do not have to surrender their powers, in order to appease the reactionary interests of the political elite. Legislation such as the Anti-Terrorism, Crime and Security Act demonstrate the capabilities of Westminster, and the undemocratic lengths they will go to in order to promote a sense of national security within the United Kingdom.

As an institution which is separate from the legislature, the courts have the responsibility to act as a source of checks and balances against the actions of the government, to ensure that politicians and agents of the state do not carry out their duties with malice or intent to unjustly infringe upon the rights of individuals. This initial responsibility has become more prevalent, following the enactment of the HRA in 1998, as Westminster is obligated under section 3(1) to draft both primary and subordinate legislation so that it is compatible with Convention rights.[20]

In a post-HRA state, the members of Westminster should be as concerned with the preservation of human rights as they are with the securitisation of the United Kingdom. Although agents of the Home Office might be better suited to address threats of terror, their methods should always be carried out with regard to human dignity and abstention towards prejudice. The *Belmarsh* case depicts how the Home Office has a clear disdain towards non-nationals, and are not hesitant to subject alleged suspects to undignified treatment if left unchecked. Given this, a non-deferring judiciary is therefore necessary in order to address illegalities and improprieties of the government and ensure that issues of national security are addressed through fair procedure.

Responding to the critiques of defiance

In an earlier section of this article, Zedner's publication was mentioned which introduced critiques focusing on the deficit of expertise, legitimacy and competency within the judiciary. In order to affirm the argument supporting judicial defiance, the duration of this article will be framed as a response to these three notions of criticism, addressing any misconceptions which might have been suggested by the argument supporting deference.

As a response to the critique of expertise, it should be noted that judges are not responsible for understanding the subjective interests of either Westminster or the general public. In the case of *Liversidge v Anderson*, Lord Atkin stated that the decisions made by judges, regardless of the nature of the case, should always be based on the objective facts of the legal argument.[21] In the context of national security, the judiciary can be considered a legitimiser of government action. For instance, if a representative of the Home Office can reasonably justify the factual implications of a particular statute in front of a panel of impartial judges, then it could be assumed that the judiciary would be persuaded to deem the statute in question to be legitimate. However, as in the case of *Belmarsh*, because the Home Office were not able to justify the factual benefit of issuing detention orders to the appellants, the court was persuaded on the basis of objectivity into deeming the 2001 Act to be illegitimate.

As a response to the second critique, it should be understood that, as a non-elected institution, the judiciary's legitimacy cannot be assessed based on standards associated with the political executive.

[15] Anti-Terrorism, Crime and Security Act 2001, s 23.
[16] European Convention on Human Rights 1950, Art. 5(1).
[17] Human Rights Act 1998, s 4.
[18] *A & Ors v. Secretary of State for the Home Department* [2004] UKHL 56 [15].
[19] ibid [80].
[20] Human Rights Act 1998, s 3.
[21] *Liversidge v Anderson* [1941] UKHL 1, 284.

However, decisions relating to the interpretation and balancing of human rights can be considered an appropriate means of assessing the legitimacy of a judge.[22] In the case of *Secretary of State for the Home Department v AF and Others*, the House of Lords ruled that control orders against suspected terrorists can be considered acceptable under the European Convention, if they include certain provisions such as a reasonable curfew and providing the subjected individual with sufficient information regarding their reduced mobility rights.[23]

The balance struck between the liberties of the respondents and the securitisation interests of the appellants demonstrates a legitimate application of a rights reduction in the process of reviewing contested legislation. Although judges are not allowed to craft legislation, they are allowed to purposely limit human rights in order to assist in the fulfillment of certain legislative objectives. This proverbial nudge allows for policy makers to have room to reform outdated statutes, without grossly infringing upon the rights-based principles that are associated with the foundations of democracy.[24]

As a response to the final critique, despite the sensitivity associated with national security, judges have the legal expertise necessary to render effective judgements without having to defer for extrajudicial support. As stated in the first response, all legal cases are resolved on the basis of factual objectivity.[25] Therefore, judges need not be experts of the intricacies of security policy in order to ascertain whether contested statutes should be either be upheld or deemed illegal.

Conclusion

It is evident that a judiciary independent of external influence is necessary for the purpose of upholding the United Kingdom's adherence towards the principles of democracy, notably the preservation of human rights. As a source of governmental checks and balances, by allowing judgements to be tampered extra-judicially, decisions rendered within the courts might not serve the greater good, but rather fulfill the interests of a particular group. Indeed, it has become apparent in cases such as *Belmarsh*, that the legislative efforts made by Westminster in the pursuit of national security have the capability of threatening the fundamental rights and freedoms of certain types of individuals. If the House of Lords in that case chose to defer, foreign nationals would live within the United Kingdom as second-class citizens to this day, given that they could be detained and punished by agents of the state without cause. It is for this reason as well as the others discussed throughout this article, that deference in the judiciary cannot be justified, as it proliferates a discourse, which suggests that the political interests of the United Kingdom will always take precedence over the rule of law.

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[23] *Secretary of State for the Home Department v AF and Others* [2009] UKHL 28 [13].

[24] Murray (n 21) 94.

[25] *Liversidge v Anderson* (n 20).