

Pre-trial Detention in 20th and 21st Century
Common Law and Civil Law Systems

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Edited by

Marion Charret-Del Bove and Fabrice Murlon

**CAMBRIDGE
SCHOLARS**

P U B L I S H I N G

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TABLE OF CONTENTS

Introduction	1
The Politics of Pre-trial Detention in the United Kingdom since 2000 Kenneth O. Morgan	13
Preventative Interventions and the Right to Protest..... Neil Jarman	25
<i>Habeas, Hamdan</i> and History: Separation of Powers and Pretrial Detention in Guantanamo Bay	47
Roy Carpenter	
Crime and Punishment in the 20th Century Brazilian War Navy: The Punishment of Rebellious and Insubordinate Seamen (the 1910 Revolt and the 1964 Rebellion).....	69
Sivila Capanema	
The Right to a Lawyer: The First of the Europeanisation of Procedural Guarantees in Pre-trial Detention	93
Marie Marty	
Police Custody in England and France: A Lawful Deprivation of Liberty?	117
Elizabeth Gibson-Morgan	
The Pre-trial Detention in the French and English Criminal Justice Systems: Towards a Balance between Security and Liberty.....	135
Akila Taleb	
The Functional Ambiguities of Pre-Trial Detention in France	151
Sacha Raoult	
Detention on Remand and the Presumption of Innocence Principle: The French Pattern of a Tricky Conciliation	165
Céline Chassang	

Detention Centres in France and the United Kingdom and the Criminalisation of Migrants: The Reality of Access to Justice?	181
Géraldine Gadbin-George	
Immigration Detention in the UK: The Role of Oversight Mechanisms and Constricting Rules to Raise Standards	207
Catherine Puzzo	
Translating Laws of Exception: The Case of Control Orders.....	227
Georges Fournier	
Contributors	245

INTRODUCTION

*Now limbo will be
A cold glitter of souls
Through some far briny zone.*
—Seamus Heaney, *Limbo*

Although written to describe the state of limbo in which the population of Northern Ireland were in during the conflict and the failure by the Catholic Church to acknowledge its illegitimate children, the extract of the poem by Seamus Heaney reminds us of the conditions and special legislation under which individuals or groups are detained. The floating legality that hinders their freedom might often be seen to be a “far briny zone” to which our attention should be drawn.

Since the last quarter of the 20th century detention centres keeping alleged terrorists or immigrants have caught the public eye through large media coverage and NGO’s scrutiny. With increasing flows of immigrants leaving their country for economic or political reasons, whose mobility has been eased by globalisation; with the changing nature of terrorism and the rise of inter-ethnic and intra-state conflicts, governments have used detention centres as a way to contain these phenomena.

On 13 and 14 December 2012, the *Centre de Recherches Interculturelles sur les Domaines Anglophones et Francophones* (CRIDAF), a research centre at the University of Paris 13 organised a symposium to debate these issues focusing on principles and modalities of pre-trial detention in common law and civil law countries in the 20th and 21st centuries. The international and interdisciplinary approach was one of the main features of the centre. This approach has been prolonged since then by the integration of the centre into a larger research unit, *Pléiade*, gathering specialists from other disciplines including history, literature and linguistics. One of the core values and *raison d’être* of the new unit is to consider and analyse research objects through a multi-faceted and multi-disciplinary prism, making the symposium on pre-trial detention a timely event.

This book contains a selection of papers derived from presentations made at the conference by academics specialized in law and comparative criminal procedure, political science, history sociology, linguistics, and

legal translation offering a comparative analysis of countries with differing legal traditions. Its aim is to make a contribution to the newly-researched topic of pre-trial detention from a theoretical and empirical point of view. Papers alternatively consider various issues: they analyse the philosophical principles and policies underlying pre-trial detention and look at the different forms it takes according to several countries; on a more technical and pragmatic level they raise the question of the use of an appropriate terminology and the problem of translation that may arise from the differences between the studied legal systems. Finally, they consider the checks and balances mechanisms put in place to limit the negative effects of the measures restricting liberty.

Detention is commonly regarded as a form of punishment resulting from a criminal act and often means the deprivation of a person's liberty after judgment. The history of imprisonment as a sanction for criminal offences has been well documented. This form of punishment became widely used at the end of the 18th century to put an end to public sanctions and acts of torture and was also spurred by the abolitionist movement initiated by Cesare Beccaria in *On Crimes and Punishments*. Penal reformers such as John Howard and Jeremy Bentham organised the prison system which in the 19th century served either as a deterrent to criminal offences or as a place deemed to rehabilitate convicts.

However, incarceration as a sentence after trial overlooks other forms of detention. The legal definition of the term implies "the action to hold a person against his will" (Cornu 304) which as a result infringes upon his/her freedom to come and go. This broader meaning covers a large array of legislation and places pending trial, which have attracted growing interest among academics, NGOs and International Organisations. In recent years, the Guantanamo Bay Detention Camp has come to epitomize such pre-trial places and legal arrangements with principles often tainted with being arbitrary. In the mid-1980s, the United Nations Commission on Human Rights acknowledged the need to address the expanding phenomenon of arbitrary detention, leading to the setting up of the Working Group on Arbitrary Detention in 1991.

The exceptional arrangements that are more or less detrimental to human rights have appeared in times of crisis, conflict or facing particularly serious offences. Systems of administrative detentions have had several avatars. For instance, Great Britain and Northern Ireland introduced Prevention of Terrorism Acts in the early 1970s to tackle the rise in political violence, continuing a long tradition of measures aimed at curbing Irish rebellions since the 19th century. (See Paddy Hillyard) Other examples can be drawn from Latin America dictatorships in the 1970s,

from France during the Algerian war, or more recently with the provisions of anti-terrorist legislation in the United Kingdom and the United States—*Terrorism Act 2000*, *Patriot Act 2001*. Immigration Detention Camps have been a feature of contemporary states, i.e. the migrant camps of Calais in France, the reinforcement of such places in the US in 1981 onwards (see Daniel Wilsher) or the Immigration Removal Centres in the UK (Home Office, UK Border Agency) and its Immigration Detention Centres representing one of the largest estates in Europe. (The Migration Observatory)

Pre-trial detention is also an arrangement belonging to general schemes of the legal system. Michel Foucault, in *Discipline and Punish: The Birth of the Prison*, argued that if surveillance is usually meant to prevent crime, it also lies at the heart of the punitive scheme, and is used by political power as a way of controlling individuals through the prison system. Pre-trial detention appears to be at the crossroads of these principles. It is both part and parcel of the legal proceedings of the criminal investigation and aims at striking a fragile balance between protecting the State and respecting individual freedoms. Pre-charge detention corresponds to the period when a person, after being arrested is detained so as to determine the nature of the offences and the characterization of the charges. We are not short of examples to illustrate the variety of pre-trial detention modalities in common law and civil law traditions: the duration of custody, custody rights, right to silence, right to the presence of a lawyer, modalities and control of pre-trial detention, procedures in case of wrongful detention.

The present collection of papers starts with an invaluable contribution by Kenneth O. Morgan who is both a distinguished scholar and a member of the House of Lords. In “The Politics of Pre-trial Detention in the United Kingdom since 2000” he analyses how the ideal of liberty in a country celebrated as the “mother of the free” since Magna Carta has come under severe attack since the 2001 Anti-Terrorism Act. The terrorist threats to British citizens since the 9/11 attacks, the fear of immigration, the rise in Euro-scepticism and Europhobia and the erosion of the libertarian tradition within the Labour party have contributed to the passing of a series of laws concerning pre-trial detention that have curtailed the civil liberties of non-British and then British citizens. This system of detention relies on control orders, thus providing the executive with extensive powers over the normal judicial process, which is reminiscent of legislation passed for Northern Ireland in the 1970s. However, as Kenneth O. Morgan points out, the House of Lords besides pressure groups and a few legal and political figures, has played a significant role in upholding civil liberties issues and

challenging the various anti-terrorism legislation until the present day. According to him, the role of Parliament should be re-affirmed in the re-examination of pre-trial detention legal arrangements.

Restrictions of people's rights and freedoms by the State are further explored in the context of public protests. In "Preventive Interventions and the Right to Protest," Neil Jarman argues that governments and police in Europe and North America are increasingly using preventive interventions as a way to prevent individuals and groups from exercising their right to protest, which major human rights instruments guarantee as a form of peaceful assembly. Although the State may impose restrictions on such rights, it should not undermine the essence of the fundamental right to assemble, nor should it prevent the assembly from achieving its aim. However, the author points out that governments are more and more concerned about security, order and control over protests and have used their police force to arrest and detain individuals or groups on the suspicion that they may commit an offence or an act of violence. Three main forms of preventive interventions are considered: preventing people from reaching the protest; containing people in a defined area and mass detentions or arrests of protesters; finally preventive detention of targeted individuals. Although these new instruments of State repression are being challenged in courts and by international organisations' recommendations, Neil Jarman maintains that preventive interventions should be monitored and questioned to ensure that citizens have the right to voice their opinions.

Striking a balance between concerns for collective security and individual rights is addressed by Roy Carpenter in his paper on the specific context of pre-trial detention in Guantamo Bay: "Habeas, Hamdan and History: Separation of Powers and Pre-trial Detention in Guantanamo Bay." Sometimes referred to as a "legal black hole," this detention facility and the rights of its detainees are also part of a long tradition of policy influenced by political institutions in the US, namely the separation of powers. The author contends that constants can be identified in the history of the country in wartime and exceptional situations. The executive takes action in response to a national security crisis and individuals identified as the enemy are taken into custody and denied their basic legal rights; then the judiciary questions the validity of such decisions; finally the executive seeks legislative approval, which is usually granted. The detainee has the right to call into question the legitimacy of his/her detention before a neutral judge — *habeas corpus*. Assessing these mechanisms in the case of Guantamo Bay and in the light of other historical developments, Roy Carpenter shows that the doctrine of the separation of powers has been

beneficial in the pre-trial detention policy since it has enabled procedures to be publicly debated through institutional challenges.

In her paper “Crime and punishment in the 20th Century Brazilian War Navy: the punishment of rebellious and insubordinate seamen,” Silvia Capanema relates the story of two rebellions organised by seamen in 1910 and 1964 in Brazil. She explains the specificity of judgement and punishment in the Brazilian War Navy which accounts for the subsequent revolts. The life experience of João Cândido (the leader of the 1910 uprising) while he was detained without trial for two years is analysed through his memoirs written and artefacts made during his imprisonment. The second uprising (1964) is considered in relation to the memorial references to the 1910 revolt. João Cândido’s figure, which became part of the collective memory, was used by the new group of rebellious seamen who were acting in a highly politicized context leading to a dictatorship. The comparative study of these two revolts help understand the relationships between power and law in a military context between ordinary seamen and their hierarchy as well as the response of the State in different political regimes.

Marie Marty’s paper “The right to a lawyer: the first of the Europeanisation of procedural guarantees in pre-trial detention” examines the influence of European institutions on guaranteeing access to a lawyer for suspects during police custody, which can be regarded as a form of pre-trial detention. The author takes the example of two European countries, France and Belgium as they have similar definitions of police custody and have the same inquisitorial tradition in their legal systems. Although both countries are parties to the European Convention on Human Rights which ensures the protection of defence rights including the right to access to a lawyer, they did not comply with those rights until the *Salduz* decision that led to major reforms. The European influence on these two legal systems is a starting point to consider whether the pre-trial detention regime could be harmonised throughout all Member States. After analysing the already existing mechanisms of judicial cooperation between States, Marie Marty contends that the strengthening of fundamental rights in the pre-trial phase is a way forward towards harmonisation. She then explains how legal instruments emanating from various European institutions have had a limited impact on national legislation. In turn, Member States have been reluctant in implementing the right to access to a lawyer as national legislations are still incomplete in this matter and as abuse of process can be used to circumvent legislation itself. The author concludes that even if her analysis of the convergence of national legislations is limited to two Member States, the impact of the *Salduz* jurisprudence in other States is a

sign towards the building up of harmonisation in the EU.

Elizabeth Gibson-Morgan's paper "Police Custody in England and France: a Lawful Deprivation of Liberty?" constitutes another major contribution to comparative legal studies. It focuses on the evolution of police custody in England and France while comparing the legal rules applied during the few hours or days spent by a person taken into police custody on suspicion of his/ her having committed an offence. The analysis of this evolution underscores the past and present flaws of both police custody regimes. Firstly, the most striking feature of the English situation is the absence of proportionality of the custodial measure. As a matter of fact, since 1 January, 2006, the notion of arrestable offence has been abolished, thus making the decision to take someone into custody possible whatever the seriousness of the allegedly committed offence. On the opposite, the 2011 French police custody reform introduced an enhancement of suspects' rights, as the author has it. It aims at preserving the principle of proportionality by linking the custodial measure to the seriousness of the alleged offence and extending the right to legal counsel. Indeed, French lawyers are now allowed to be present from the outset of the police custody even during police interviews even if they still have no access to the file itself. The author raises the tricky issue of the respect of the rule of the law during this crucial investigating period. Due to recent cuts in legal aid in England and the poor legal aid funding in France, there is an urgent need in both countries for clear and accessible rules regarding police custody to achieve "legal security."

Common law and civil law systems have traditionally been opposed. Alike Taleb, in her paper "The Pre-trial detention in the French and the English Criminal Justice Systems: towards a balance between Security and Liberty," convincingly demonstrates how English and French justice systems are based on different legal cultures. Nevertheless, what is striking, according to Mrs Taleb, is the process of convergence between French and English justice systems regarding police custody rules. The author examines two topical issues from a comparative point of view: the question of the effective legal assistance when defence counsel has limited access to the case file; on the other hand, the controversial issue of the lack of independence of the French public prosecutor. Mrs Taleb even considers a possible conviction of France should the French current legislation be reviewed by the European Court of Human Rights (EctHR) for non-compliance with the European Convention on Human Rights. Indeed, she analyses the case *Moulin v. France* that dealt with the ambiguous status of the French prosecutor connected both to the executive and judicial powers. For the author, the decision highlighted the flaws in

the French prosecuting system: the prosecutor as he stands is not considered as an independent judicial authority from case parties. As a conclusion, the paper focuses on two possible solutions to solve this tricky matter: either greater autonomy of the French prosecutor from the executive, or the removal of all detention powers from this function.

Thanks to Celine Chassang's contribution, "Detention on remand and the presumption of innocence principle: the French pattern of a tricky conciliation," another aspect of pre-trial detention is thoroughly examined: detention on remand or *detention provisoire* in French. Mrs. Chassang highlights the apparent contradiction that lies between the deprivation of liberty of someone detained pending trial and his/her right to be presumed innocent until proven guilty. The analysis of the legal modalities of this form of pre-trial detention lays the emphasis on the exceptional nature of the measure—it is sometimes replaced by judicial supervision or house arrest—that needs to be duly justified. However, the justifications of detention on remand set out in Article 144 of the French Code of Criminal Procedure (CCP) do not fully respect of the presumption of innocence, the author argues. Indeed, they designate the person charged with an offence as already guilty, thus re-enforcing the pre-judgment of the suspect. The contribution is all the more relevant as it points to a double-checking principle embodied by the French liberty and custody judge, who, according to the Mrs. Chassang, is not necessarily the best person to assess if detention on remand is useful or not. Furthermore, an absence of conciliation between the presumption of innocence and detention on remand is even more obvious when the person is actually detained pending trial. First of all, the possible length of such a detention is far too excessive. Second of all, it constitutes a burdensome measure that imposes rigorous detention conditions, even more rigorous than for prison detention. Eventually, to attenuate the ambiguous position prisoners on remand are, Mrs. Chassang, along with other colleagues, advocates the creation of separate facilities especially designed for persons remanded in custody as a way to reach the tricky conciliation between detention on remand and the presumption of innocence.

To take the matter one step further, Sacha Raoult, in "The Functional Ambiguities of Pre-Trial Detention in France," presents the three ambiguous social functions fulfilled by pre-trial detention : governing social marginality, punishing guilt after the fact and presenting a bargaining tool to the defendant while hoping to get a confession. Firstly, the author recalls the traditional differences between punishment and pre-trial detention but to challenge this over-simplified opposition. In order to emphasize the ambiguously disturbing similarities between pre-trial

detention and post-sentence detention, Mr. Raoult dwells on the practical modalities of the two forms of detention. Safety and guilt are in fact involved in the detention decision. The author efficiently demonstrates how pre and post-trial detention in fact overlap. The originality of the paper lies in the exploratory empirical research conducted into pre-trial detention decisions collected from judges and lawyers. By way of conclusion, Mr. Raoult concludes that pre-trial detention, as it is currently used in France, is a punitive practice, an emergency judgment revised ex post, revealing the multi-functional ambiguity of detention on remand.

There is another aspect of detention that requires further examination: the detention of illegal immigrants. Géraldine Gadbin-George analyses immigration policies and detention centres in France and the UK in her contribution “Detention Centres in France and the United Kingdom and the Criminalisation of Migrants: the Reality of Access to Justice?” The author provides us with a brief reminder of both countries' respective immigration policies, highlighting the periods when immigration was either encouraged or discouraged because of economic factors. She starts by defining who an illegal migrant is: any person who entered the territory without prior authorisation. To detain such people is a purely administrative decision which should not be assimilated to a prison sentence. When arrested, unauthorised migrants are invited to return to their countries. In case of refusal, Mrs Gadbin-George explains, they are detained or placed under house arrest. Illegal migrants are momentarily deprived of their freedom of movement in French *Centres de Retention Administrative* or English Immigration Removal Centres. And yet, they are not deprived of their rights to access legal services if necessary. As a matter of fact, the comparative description of the detention process in both countries helps us understand the context in which non-European migrants are detained. Detention procedures are complex enough to make legal assistance necessary, which is the reason why France and the UK seem to provide adequate ways of accessing law, Mrs. Gadbin-George argues. Nevertheless, the author does not forget to mention the phenomenon of “cimmigration” (Stumpf) through which migrants, whether authorised or not, are sometimes treated as criminals.

Detention of illegal migrants can also be used as a technique of migration and border control, as argued by Catherine Puzzo in “Immigration Detention in the UK: the Role of Oversight Mechanisms and Constricting Rules to Raise Standards.” Her contribution presents the recent evolution of immigration detention and how it has gradually criminalized migrants. For instance, the Nationality, Immigration and Asylum Act 2000 leaves the onus to make a bail application on the representative of the migrant detainee.

Mrs Puzzo questions the proportionality of the use and continuation of detention measures justified by the government for the sake of public protection. Her analysis of current detention practices raises controversial questions such as how the State seems more concerned with the maintenance of controls than with the psychological costs of detainees and the financial costs of the government. Nevertheless, Mrs Puzzo also points to the efforts made to improve and guarantee optimal detention conditions in face of problems of mismanagement of Immigration Removal Centres by private providers. In her article, she examines the gradual implementation of standard regulations and their effectiveness thanks to the role of field charities and institutional watchdogs. They have been closely monitoring detention centres to detect and prevent abuses as well as to promote better practices more respectful of migrants' rights. Even though migrants' detaining conditions have been improved over the past 15 years, some progress still has to be made particularly regarding the way migrants are sometimes (mis)considered.

Last, but not least, this book addresses the tricky question of legal translation thanks to Georges Fournier's paper which tackles the general topic of the translation of laws of exception, and more particularly specific counter-terrorism measures of arrest and detention of alleged terrorists such as Control Orders in Great Britain. The author adopts a diachronic approach justified by the extended period covered by the counter-terrorism legislation under consideration, between the Prevention of Terrorism Act 2005 and the Terrorism Prevention and Investigation Measure Act 2011. He first points out the controversial nature of these measures, especially the preventive and indefinite detention of supposed terrorists (nationals or foreigners) without prior appearance before a judge or any legal representative. By way of illustration, Mr. Fournier uses Peter Kosminsky's film *Blitz*, a well-documented fiction film on the jihad in Great Britain. The paper starts with a comparative linguistic analysis of the 2005 and 2011 Acts of Parliament, highlighting an increased inflation in words and a sharp decrease in the repetition of Control Order. Then, the author turns to possible ways of translating laws of exception and the multiple pitfalls the translator may fall into. For instance, one major obstacle is the "uncertainty as to whether the terminology applies to the judicial or administrative domain, keeping in mind that, under normal circumstances, measures designed to restrict freedom result from a judiciary and not an administrative decision." The article lays the emphasis on the use of equivalences and calques. The former is used "to avoid coining words and phrases which would be meaningless in the target language" while the latter is resorted to by translators to "underline [...] the foreign dimension

of laws which require to be explained from a different perspective.” Mr. Fournier takes great care to explain how the impossibility to find exact equivalences between different legal systems leads to the choice of hyperonyms, explanatory statements or even periphrastic structures designed to avoid mistakes. He examines several possible translations of Control Order from English into French using equivalences, calques or even neologism such as *contrôle judiciaire*, *mesures de police*, *détention préventive*, *détention provisoire*, *rétenion* or *assignation à résidence*, *tutelle pénale*, *mesure de sûreté*, *ordre de contrôle*, *ordonnance de contrôle*. As a conclusion, Mr. Fournier presents two translating solutions, *contrôle judiciaire* for linguists and legal experts, *ordonnance de contrôle* for the general public, bearing in mind that translating legal measures evolving over a period of several years requires to take into account the period at which a text is issued.

All things considered, whatever the legal system under scrutiny—common law or civil law—the different authors convincingly demonstrated throughout their contributions that pre-trial detention is a legal reality that challenges several fundamental issues: the balance between individual rights (right to legal counsel, right to legal assistance....) and the protection of public order and security; the proportionality of custodial measures for persons suspected of an offence, or detention measures for unauthorized migrants; the preservation of the presumption of innocence as well as the difficulties in translating legal terminologies specific to common law or civil law. This proves how legal and linguistic matters are constantly intertwined and need to be examined in an interdisciplinary way.

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THE POLITICS OF PRE-TRIAL DETENTION IN THE UNITED KINGDOM SINCE 2000

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As every French schoolboy knows, the three great ideals of modern France are liberty, equality and fraternity. In Great Britain, political argument in the last hundred years has been largely over the last two, equality above all. Liberty has not seemed to be a contentious issue in a country where the patriotic song “Land of Hope and Glory” celebrates the land as “mother of the free.” Civil and political liberty has apparently been enshrined in Great Britain for many centuries. Back in 1215, King John was forced to accept *Magna Carta*, embodying personal liberty and freedom from arbitrary arrest by the forces of the state. There has also been since the Middle Ages the great principle of open liberty endorsed in the legal doctrine of *Habeas Corpus*, given statutory force in the Habeas Corpus Act of 1679, while the seventeenth-century civil war resulted in the victory of Parliament and the common law over arbitrary rule and royalist tyranny. In the twentieth century there were few great political arguments over issues of liberty after the end of the second world war in 1945. Nor was there any detention before charge or trial other than in the tragic exception of Northern Ireland in the 1970s which somehow seemed to be quite distinct in its political experience from the rest of the British Isles. Detention or custody by the police was carefully defined in the 1984 Police and Criminal Evidence Act, with pre-trial detention in custody limited to just 48 hours at most.

Personal liberty seemed even more entrenched after 1997 with a series of New Labour legal and constitutional reforms enacted by the Blair government—the Human Rights Act of 1998 incorporating the European Convention of Human Rights into British law, followed by devolution for Scotland and Wales, the establishment of a new Supreme Court and a reinforced separation of the executive and the judiciary with the changed role of the Lord Chancellor who had previously straddled legislative,

executive and the judiciary. No longer would this constitutional anomaly occur. The new view of the uncodified British constitution was that it was rights-based, with a clear and fair balance apparently struck between considerations of national security and the protection of citizens from outside threat, and the underpinning of personal liberty. There appeared to be no political problem.

Yet in fact the new century was to produce a series of major political conflicts over liberty issues. A steady series of invasions of personal liberty by the government was now to follow. It began with the 2001 Anti-Terrorism Act, which was whisked through the House of Commons after a mere 16 hours of debate. It applied only to non-British residents in the first instance. A process of pre-trial internment of much personal harshness was conducted in detention centres, of which Belmarsh prison became the most notorious. As we shall see, particularly significant arguments were to build up over a growing tendency to pre-trial custody. High Court judges became more and more outspoken, seeing it as disproportionate and discriminatory, notably Lord Hoffman who condemned the process and declared parts of the Act of 2001 to be illegal. As Anti-Terrorism Acts mounted up, political conflict and tension built up also. So why should this change in the atmosphere in public discussions of liberty be now occurring?

A primary reason, of course, was that the Anti-Terrorist measures were a result of a clear and visible terrorist threat to British citizens, a factor often under-estimated by critics of recent British legal processes. The attack on the twin towers in New York in 2001 on 9/11 had a massive impact on Britain. After all, it was a major tragedy for British as well as American citizens, with 67 British people killed, the worst such atrocity to befall Britain since 1945. On home soil, on 7 July 2005 a series of terrorist attacks on public transport in London killed 56 people (four of them bombers) and maimed or injured another 700. Four Muslim men were convicted and sentenced to 40 years' imprisonment. Another two potentially very serious terrorist attacks in London and Glasgow were narrowly averted in June 2007. Britain seemed under threat as never before, and a whole raft of new security measures were undertaken to protect citizens and buildings from attack. The government was under pressure from press and public to use wider coercive powers. This point was absorbed especially by the Home Office which recalled the techniques against terrorism, real or alleged, used in Northern Ireland in the 1970s such as the Diplock courts and detention without trial. The bureaucratic memory was a long one, and Northern Ireland became a template for future procedures in Great Britain generally.

Secondly, a background issue was widespread fear of immigration into Britain, as a threat not only to social services and provision but perhaps to national security. At least a million and a half people entered Britain, many of them from Eastern Europe and the Middle East between 1997 and 2007. The 2011 population census showed that the British population contained seven and a half million people born outside the United Kingdom, 13% of the total population, and a radical shift since the 2001 census. This fanned some popular concern—not necessarily racial since the older post-1960 immigration from the black and brown population had been absorbed into the community, while many of the new immigrants were white, from Eastern Europe, Poles above all, the second largest group of new migrants identified in the 2011 census.

A third, subsidiary issue was the linking of security issues with some animus towards Europe. Euro-scepticism or Europhobia, never far from the surface in England especially, was stirred up when the European court at Strasbourg appeared to be overruling British common law by making contentious calls for the free rights of entry for immigrants and asylum-seekers. Here, it seemed, was another threat to domestic safety, coming from an alien court overseas. There were calls in return for a British Bill of Rights to be framed to discriminate in favour of the native-born.

Finally, in the political aspects, it was noticeable that New Labour under Tony Blair, in its zeal to occupy the centre ground and reject the frequent anti-police attitudes of socialist militants in the 1980s, was far less libertarian than its Labour predecessors. “Toughness on crime” as well as on the causes of crime was now paramount, with much talk of “zero tolerance.” Labour, with a series of hard-line Home Secretaries such as David Blunkett, Charles Clarke and John Reid, seemed to have forgotten its old zeal for personal freedom. Major Labour figures like Clement Attlee, Stafford Cripps, Aneurin Bevan and Harold Laski had been prominent in the founding of the National Council of Civil Liberties under Ronald Kidd in 1934. In the 1950s, Hugh Gaitskell and Aneurin Bevan, greatly at odds on foreign and defence issues, stood shoulder to shoulder in defence of civil liberties, but those libertarian traditions seemed in the era of New Labour, so-called, to be set aside.

At first, in the period from 2001 to 2004, the emphasis was on detaining suspected aliens, immigrants and asylum seekers. Belmarsh was used widely and controversially: it was compared by human rights lawyers to the illegalities of American practices in Guantanamo Bay. Pressure built up relentlessly now to extending the legal period of pre-trial detention. In 2001 it was raised to seven days, in 2003 it went up to 14 days, and in 2005 Tony Blair proposed raising the limit to no less than 90 days. As

detention centres came to be followed by control orders drastically limiting the personal freedom of movement and communication of the people involved, a South African High Court judge, Lord Steyn, compared the situation in Britain as comparable to house arrest in South Africa during the era of apartheid. The suspension of Article 5 of the European Convention on Human Rights so that “people can be locked up without trial when there is no evidence on which they could be prosecuted” was not justified. The British government, citing a state of national emergency in the face of terrorist threats, was derogating from the European Convention on Human Rights and in effect from its own Human Rights Act of 1998. Finally in 2004, on somewhat restricted grounds, the Law Lords declared the Anti-Terrorist Act of 2001 to be illegal as being incompatible with the European Convention of Human Rights.

The arguments had been marked by vigorous campaigning by libertarian pressure-groups such as Liberty, Justice and Amnesty International. Shami Chakrabarti, the able young Indian woman lawyer appointed director of Liberty in 2003, became something of a celebrity on the media. The Bar Council, under the chairmanship of a progressive barrister, Matt Kelly, became outspoken in denouncing the illegal features of pre-trial procedures. There was much political protest from the Liberal Democrats and also from a number of Labour legal figures such as Helena Kennedy, a Labour peer. Lady Manningham-Buller, former Director-General of MI5 and Stella Rimmington, her predecessor, were also remarkably critical of the coercive measures used. They pointed out that the recent legislation was actually damaging to acquiring information about terrorists since its counter-productive effect was to alienate young Muslims and discourage them from providing useful evidence. Another, more surprising, critic came from within the police service: he was Andy Hayman, the former Assistant Commissioner for Special Operations at Scotland Yard. There was a call for more use of intercept evidence in open court as occurred in France and other countries. The House of Lords Constitution Committee was also very vocal along these lines. The Bill, it said, risked “conflating the roles of Parliament and the judiciary which would be quite inappropriate.”

Politically, a striking feature was the growing involvement of the House of Lords on civil liberties issues. Under the British constitutional system, and in contrast to the role of the Supreme Court in the United States, only Parliament could strike down legislation, and this gave authority to the non-elected House which was nevertheless freer from control of the party whips and more guided by a sense of independence of judgement. Traditionally, since the passage of the 1911 Parliament Act, the

House of Lords had been chary of challenging government and Commons over legislation. But civil liberties proved to be something of an exception, especially with many distinguished lawyers, including former Law Lords like Lords Woolf and Lloyd of Berwick, active in the upper House. The Lords, therefore, with Liberal Democrat lawyers to the fore, began to take the lead after 2000 in the debate over detention issues, and offered a series of searching and fundamental criticisms.

First, it was argued that a system of detention where the key decisions rested not with the law but with the executive was inherently unconstitutional and indeed unfair. Fundamental liberties were being curtailed not by the police or the courts, but by the state without formulation of any legal charge. Here was a British version of the *raison d'état* France had experienced before 1789. Further it was based on subjective belief not on evidential proof. There was also grave doubt that existed about the predictive accuracy of charges made against detainees, who had committed no offence and were innocent in the eyes of the law. In 2011 the terms of the law were changed from being defined as a basis of "reasonable suspicion" to "reasonable belief" but this was a semantic distinction without a difference. The state, therefore, was acting in a coercive fashion. It was quite contrary to what had been laid down by Churchill, prime minister during the supreme security emergency of the second world war, when he declared that confining or incarcerating people who had committed no offence for an indefinite period in detention was "in the highest degree odious." It was also at variance with the famous wartime libertarian judgement in the case of *Liversidge v. Anderson* in 1942 delivered by Lord Atkin of Aberdyfi, "In times of war, the laws are not silent."

Secondly, the courts proved to have only limited control over the actions of the executive. The system of detention or control orders, after all, lay outside the normal judicial process. Hearing could be held private without the suspect not being present. The process in practice had become a rubber-stamp for the decisions of the minister. The Home Secretary was being elevated above the law, in defiance of the famous dictum of Sir Edward Coke in the seventeenth century "Be you ever so mighty, the law is above you." There was also serious accompanying doubt as to whether the process of pre-trial detention was intended to be preventive or punitive.

Thirdly, individuals were unable to find out in detail the case against them. They could not discover the whole range of evidence that would be deployed by the government and could not communicate freely on these matters with the Special Advocates appointed to give them legal guidance.

The Courts were thus able to accept evidence normally inadmissible. Individuals charged with no offence did not, therefore, have the same rights as criminal defendants who had defending lawyers to act in their interests whom they could freely instruct, and were told all the details of the evidence to be used against them. There was an air of secrecy involved, under which detainees, many of them of humble background or from ethnic minorities with language difficulties perhaps, did not have access to a lawyer in the normal way.

Fourthly, the restrictions imposed on detainees under control orders were exceptionally severe and punitive. They could lead nothing like a normal life before trial—if, indeed, they were to be tried at all, since most of them were not. Their freedom of movement was greatly curtailed, as if they were under curfew, and their social and private life made virtually impossible in every respect. The European Court of Human Rights condemned the misleading re-labelling of detention under the guise of control orders, and involving processes that were imprisonment in every respect save the name. These detainees were treated like common criminals. Yet they had had no trial and had been charged with no offence. Most commonly, no prosecutions would ultimately follow. It was a clear abuse of legal processes, the rule of law and the doctrine of human rights and the European Court was vocal in its response.

Fifthly and finally, pre-trial detention under control orders was manifestly becoming the norm, built into legal processes over the years as an inherent part of the legal response to terrorism. Despite sunset clauses galore, the temporary remorselessly became permanent. It seemed that it could be extended almost indefinitely. There was minimal supervision or controls by the courts, far less so than in other jurisdictions. While an independent Reviewer of the Anti-Terrorist Acts was appointed to monitor the operation of the system, there was no annual renewal. The aberration had been incorporated into the operation of the common law, one of the historic glories of England.

Politically, there were two major crises, in 2005 and 2008. Following the Law Lords' declaration that the act of 2001 was illegal, the Blair government introduced a new Prevention of Terrorism Bill in 2005. To avoid accusations of racism, it now extended powers of pre-trial detention not simply to aliens and immigrants but to British citizens as well—to every citizen. As before, the Commons offered little debate, let alone resistance, and the Bill was whisked through there. But in the House of Lords, the outcome in March 2005 was an immense political battle between the two Houses of Parliament. There was much time-pressure since previous orders might otherwise expire. There was a tense all-night

session in the Lords on 9 March with Conservative and Liberal Democrat, plus a few Labour peers, adamant in resisting the government. Significantly, for the first time, Lord Irvine, the former Lord Chancellor, voted against the government on libertarian grounds. In the end, as they invariably did, the Lords yielded to government pressure in the inter-house “ping-pong” (*lutte à la corde* in French) that followed the Lords debate, but they did gain important concessions on a sunset clause and the monitoring of the pre-trial process by ensuring that judges, rather than the Home Secretary, should decide on all categories of control orders. Tony Blair, angry with the outcome, argued against any “signal of weakness” being shown to terrorist threats. Shortly after, on 7 July, there came the terrorist outrages mentioned above, with serious loss of life and hundreds of injured, innocent victims on buses and the underground system. Obviously the security debate intensified as a result. Thus the government came forward with new legislation that autumn, with the proposal now that pre-trial detention be extended from 14 to 90 days.

This resulted in a far bigger political row. The Blair government’s majority was now smaller, since the overall majority had fallen by a hundred in the general election that June, while the prime minister’s prestige had suffered from the invasion of Iraq. On 28 November, in the most serious revolt by Labour backbenchers since the invasion of Iraq in 2003, a Labour amendment to reduce the period of 90 days to 28 days for pre-trial detention was carried with the aid of 51 Labour rebels, headed by the veteran backbencher, David Winnick. This was a notable political event—the first time that Tony Blair had been defeated in the House of Commons during ten years in office. The defeat was reinforced by caustic criticism of the legislation by the judiciary. Mr. Justice Sullivan in April 2006 attacked the whole idea of pre-trial detention as incompatible both with the right to fair proceeding under Article 6 of the European Convention and with natural justice. It was said, he declared, “conspicuously unfair,” despite the “thin veneer of legality.” The Court of Appeal, however, was to reverse this judgement that August. There now came a new, tense political phase. Gordon Brown succeeded Tony Blair as prime minister in June 2007, with a keen sense that he wished to exert himself and to show that he could win tactical victories in Parliament where Tony Blair had failed.

There followed the still greater crisis over the 2008 Counter-Terrorism Bill. This suggested raising the pre-trial detention period significantly, from 28 days to 42 days. Immense protests followed, notably from many distinguished figures in the arts world such as the designer Vivienne Westwood, the actor Colin Firth, the film producer Ken Loach, the

playwright David Hare, and the novelist John le Carre. Gordon Brown meanwhile indicated that he favoured an even longer period, up to 56 days. But now his authority as prime minister was in some decline. The period of 42 days scraped through the Commons by just 11 votes on 11 June. This was despite the fact that Brown had made several concessions to placate Labour critics thought to number at least 60, and much internal party rancour was thereby caused.

At this stage, developments in the Conservative Party took centre stage. David Davis, a prominent MP who had been a government minister and runner-up to David Cameron in the 2005 leadership election in the Conservative Party, staged his own protest by resigning his Parliamentary seat at Haltemprice and Howden and thus forcing a by-election to be fought on civil liberties issues. Davis, as he told me in an interview (November 6, 2012), feared that Brown might introduce a new Terrorism bill before the 2010 general election and that populist pressure would force Cameron to accept it. Davis thus engaged in a rare and remarkable “sacrificial gamble,” which exacerbated an already touchy relationship with his party leader. Close to Remembrance Sunday he had made a notable speech in which he reminded his audience of the traditional liberties for which British servicemen had gallantly given their lives, whereas they now being thrown away wantonly under the plea of defending national security. The by-election was a distinctly odd affair. It was contested by a variety of frivolous candidates. There were 23 Independents including Gemma Garrett, a former Miss Great Britain, who had come in third in an earlier contest for “Britain’s sexiest blonde,” a better result than she was to achieve in the Haltemprice and Howden by-election. Other candidates stood for the Church of the Militant Elvis Party and the Official Monster Raving Loony Party. Labour and the Liberal Democrats declined to contest the by-election, the Greens came second, and all candidates save Davis, who won easily with 72% of the vote, lost their deposits. On the other hand, Davis’s stand received wide cross-party backing including from Shami Chakrabarti of Liberty and the veteran socialist Tony Benn, and public attention was undeniably focused for a time on the pre-trial detention question and personal freedoms in general. There was much media commentary and a stir was caused in Conservative ranks. Davis Davis’s unusual and gallant gesture showed that the political ramifications of pre-trial detention were far from being confined to Labour.

That autumn, the Brown government’s Counter-Terrorism Bill met with a huge defeat in the House of Lords. On October 13, 2008, in a remarkably assertive gesture, the Bill was lost by 307 votes to 116.

Conservatives, Liberal Democrats and cross-bench peers were, of course, the main opponents, but there were also 24 Labour dissentients whose composition is of some interest. They included Lord Irvine again, Lord Falconer, another former Lord Chancellor and a one-time intimate of Tony Blair's whose flat-mate he had once been. The other Labour opponents were a few legal peers and a number of middle-class professionals, including the present writer. Revealingly, none of the trade unionist or working-class Labour peers opposed the government. For Gordon Brown, whose authority was already in question, it was manifestly a severe setback, as his bill lapsed.

The issue of civil liberties played some part in the June 2010 general election. The Liberal Democrats distinguished themselves by having a strong civil liberties platform, including reducing pre-trial detention to 14 days, ending control orders altogether and ending the production of ID cards. The Conservatives had a very brief civil liberties platform which laid some emphasis on the threat to freedom posed by the ending of fox hunting. Labour did not mention civil liberties at all in their manifesto, a significant comment on 13 years of their party's illiberalism.

After the general election, the subsequent Coalition Agreement between Conservatives and Liberal Democrats somewhat soft-pedalled the Lib-Dem manifesto commitments. It states that control orders would be "urgently reviewed" and a way found "to allow intercept evidence to be used in court." However, change of a reformist kind did follow nevertheless. The annual report in 2011 by the Independent Reviewer of Terrorist Legislation, Sir David Anderson, called for some re-balancing between security considerations and personal liberty over issues such as the proscription of organizations, the storage of personal data, and especially pre-trial detention. He followed the Parliamentary Joint Committee report which argued that the period of detention should be cut from 28 days to 14. As a result, the government's Anti-Terrorism Act of 2011 did introduce several more liberal aspects, cutting back the storage of personal data, ending ID cards, and reducing the pre-trial detention to 14 days. It did however retain, as critics in the Lords pointed out, the more objectionable features of the control process, and orders would remain. Even with the reduction to 14 days the British time-limit was excessive compared, say, with France (nominally two days, which could be extended to six) and the United States (two days, but capable of much extension under executive order). So Britain's period remained well above the norm in western countries.

Where does the issue of pre-trial detention stand in December 2012? Civil liberties remain one of the most hallowed of British values, despite

all the conflicts since 2000. The opening ceremony of the London Olympic Games in July 2012 was libertarian in tone: it laid emphasis on successful struggles for liberty in the past by such groups as the women suffragettes or the hunger-strikers of the 1930s. Amongst the political parties, Labour remained slow to shift from the outlook of the Blair years, and re-iterated its passionate support for the police; its views on immigrants and attitudes to Europe also became less favourable. On the other hand, the internal review of Labour party policy and strategy initiated by Ed Miliband as leader, with Jon Cruddas MP as its leading operator, along with the need to appeal to voters who had switched from Labour to Lib. Dem. in 2010 but were now disenchanted by the governing Coalition, could produce a significant shift of approach. Miliband called for Labour's attitude on the 2012 Justice Bill to be based on grounds of principle, apparently a banal change but a significant one. For the Conservatives, by contrast, the liberal-minded veteran Kenneth Clarke was replaced as Justice Minister by the apparently more hard-line Chris Grayling, remarkably not a lawyer himself. The Home Office's Justice and Security Bill in 2012 set up secret courts in which defendants would be subjected to much the same restriction and injustices as under the pre-trial detention regime before. In a further flurry of political conflict, the House of Lords defeated the government three times on key amendments on the processes involved, twice by over 100 votes with several Conservative peers voting against their own party. It looked immediately afterwards as if David Cameron's government were going to give way and accept, with modifications, at least some of the Lords' amendments.

There is now some poll evidence that public opinion may be swinging somewhat against pre-trial detention compared with 2008. In any case, the decline of civil liberties in Britain, while very serious, can be overdone. Some defenders of our liberties do not help their cause with exaggerated comparisons with justice in Ceausescu's Roumania or Mugabe's Zimbabwe. The United States' record has been distinctly worse. President Bush passed the intrusive Patriot Act. President Obama signed, somewhat apologetically, the National Defence Authorization Act, allowing the presidential powers of detention without trial for almost an indefinite period. Guantanamo Bay remains as an affront to humanitarian and legal principles. The American mind, it seems, remains understandably deeply permeated by the trauma of 9/11 and the new-found sense of vulnerability in the homeland not experienced since Pearl Harbour in 1941. Change here seems unlikely.

In Britain any remedy over pre-trial detention must lie in Parliament. For all its past weaknesses, only Parliament can overturn statute. Judges

have rejected any role that can be considered even remotely legislative; even liberal figures like Lord Bingham or Baroness Hale have taken this view. In Parliament, the Lords can usually only suggest revision and amendment, while the Commons has seldom been able to check a powerful executive. But it is in Parliament, as Lord Bingham has said, that the democratic solution has to lie. Parliament at the very least can articulate concern with aspects of the detention process that are disagreeably distinctive to the United Kingdom. It could declare that pre-trial detention here is a disproportionate policy and not obviously a tool of last resort. There is no recognition that detention is used when all other possible remedies have manifestly failed. Also no distinction is commonly made over the gravity of the offence, and pre-trial detention is thus the crudest and bluntest of instruments. Again, many flaws lie in the conditions under which alleged suspects are detained in custody, and legal aspects of the process such as the problems of material witnesses. These points could be taken up, and the whole rationale of pre-trial detention be subjected to fundamental re-examination as public priorities move on and the immediate threat of terrorist outrages in Britain appears to recede. Some of us will fight on determinedly over these issues in Parliament and in the press. Perhaps, it may be hoped, in 2015, when the eight hundredth anniversary of the signing of *Magna Carta* will be celebrated, opinion might tilt back to endorsing that liberty which captured the imagination of our forefathers, and to condemn and countermand recent injustices. It could make Great Britain once again, as in the olden time, “the mother of the free.”

