CASE COMMENT

THE QUEST FOR A SATISFACTORY DEFINITION OF TERRORISM: *R* V *GUL* [2013] UKSC 64

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ABSTRACT

The UK Supreme Court judgment in *R v Gul* [2013] UKSC 64 presented a unique opportunity for a judicial appraisal of the definition of terrorism contained in section 1 of the Terrorism Act 2000. While the applicant was ultimately unsuccessful in their challenge the Supreme Court's rejection of the state's argument that reliance on prosecutorial discretion could mitigate certain absurd applications of the section 1 definition of terrorism, e.g. the labelling of acts of UK or other military forces as terrorist, has potentially wide-raging implications for the UK's counter-terrorism measures. In addition, the powerful *obiter dictum* arguing in favour of a reform of this definition and a 'root-and-branch' review of counter-terrorism legislation is a strong rebuke of recent high profile misapplications of such powers.

This article summarises the judgment in *Gul* and critically assesses the potential implications that may derive from it. It is argued that *Gul* questions the current 'one size fits all' approach to defining terrorism as section 1 of the 2000 Act. It follows that the discretion of various decision makers empowered under section 1 of the 2000 Act ought to be curtailed by more restrictive legislative provisions. The difficulty, however, is how to refine this definition without hampering the apparent 'operational necessity' for a broad malleable definition which section 1 now provides.

This paper therefore suggests that if the UK is to continue to treat terrorism as an objective phenomenon distinct from other crimes, multiple definitions of terrorism of various malleability, ought to be provided for in order to ensure this counter-terrorist response complies with rule of law standards. Furthermore, *R* v *Gul* may provide an additional string to the bows of those who question the existence of terrorism as a tangible phenomenon.

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A. INTRODUCTION

The recent Supreme Court decision in *R* v *Gul*[1] presented a unique opportunity for the definition of terrorism contained in section 1 of the Terrorism Act 2000 (2000 Act) to be analysed by the UK courts. The appellant had not himself perpetrated a terrorist attack, but had circulated videos portraying and lauding such alleged terrorist attacks. Therefore, whether the accused's actions constituted a terrorist offence was necessarily dependent upon whether another person's actions – in this instance the subject matter contained in the videos the accused disseminated – amounted to terrorism under section 1 of the 2000 Act. The case highlights legitimate concerns regarding the broad nature of this definition and some of the questionable conclusions that can flow from this definition. The Court's powerful *obiter dictum* arguing in favour of a reform of this definition and a 'root-and-branch' review of counter-terrorism legislation is laudable; however in attempting an adequate and universal definition in law, *R* v *Gul* throws up more fundamental questions about the concept of terrorism in general.

A. FACTS AND ISSUES RAISED BY *GUL*

The appellant, Mohammed Gul – born in Libya but who lived most of his life in the UK and was a British citizen – was convicted under section 2 of the Terrorism Act 2006 (2006 Act) for dissemination of terrorist publications and sentenced to a term of five years imprisonment. What amounts to 'terrorist publications' in section 2 is, however, dependent upon the definition of terrorism in section 1 of the 2000 Act; Gul's case therefore presented the

[1] [2013] UKSC 64.

Supreme Court with an opportunity to clarify the scope of the 'very wide' definition in section 1.[2]

Specifically, Gul had uploaded onto YouTube and a number of other websites videos that showed:

> (i) attacks by members of Al-Qaeda, the Taliban, and other proscribed groups on military targets in Chechnya, and on the Coalition forces in Iraq and in Afghanistan, (ii) the use of improvised explosive devices ("IEDS") against Coalition forces, (iii) excerpts from "martyrdom videos", and (iv) clips of attacks on civilians, including the 9/11 attack on New York. These videos were accompanied by commentaries praising the bravery, and martyrdom, of those carrying out the attacks, and encouraging others to emulate them.[3]

The issue to be decided was whether the conduct shown in these videos amounted to terrorist acts and, therefore, whether Gul had disseminated (albeit by proxy) 'terrorist publications' contrary to section 2 of the 2006 Act, ie 'Does the definition of terrorism in section 1 of the Terrorism Act 2000 operate so as to include within its scope any or all military attacks by a non-state armed group against any or all state or intergovernmental organisation armed forces in the context of a non-international armed conflict?'[4]

It is useful at this stage to set out section 1 of the 2000 Act in its entirety:

> 1. (1) In this Act "terrorism" means the use or threat of action where –
>
> (a) the action falls within subsection (2) [outlined below]

[2] *ibid* at [26].

[3] *ibid* at [2].

[4] *ibid* at [8].

(b) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and

(c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.

(2) Action falls within this subsection if it –

(a) involves serious violence against a person,

(b) involves serious damage to property,

(c) endangers a person's life, other than that of the person committing the action,

(d) creates a serious risk to the health or safety of the public or a section of the public, or

(e) is designed seriously to interfere with or seriously disrupt an electronic system.

(3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.

The appellant's argument can essentially be summarised as proposing that section 1 should be accorded a narrower definition than 'ordinary language' would suggest. In making this argument, the appellant's position was based on three separate strands:

i. The 2000 Act, like the 2006 Act, was intended, at least in part, to give effect to the UK's international treaty obligations and therefore the concept of terrorism in the 2000 Act should accord with the concept of terrorism in international law and this does not extend to military acts by a non-state armed group against a state or IGO [Inter-governmental Organisation].[5]

ii. That it would be wrong to read the 2000 and 2006 Acts as criminalising in the UK an act abroad, unless that act would be regarded as criminal by international law.[6]

iii. As a matter of domestic law, as distinct from international law, some qualifications must be read into the very wide words of section 1 of the 2000 Act.[7]

[5] *ibid* at [24].

[6] *ibid*.

Arguments (i) and (ii) were therefore based on international law, with argument (iii) grounded in domestic law. It is interesting to note at this juncture that no arguments were advanced that relied upon the European Convention of Human Rights (ECHR) and the Human Rights Act 1998 (HRA).[8] Indeed, no such arguments were made in the Court of Appeal either.[9]

A. Decision of the Supreme Court

The Supreme Court unanimously upheld the appellant's conviction and rejected the arguments for a narrower definition of terrorism. The *per curiam* judgment – delivered by Lord Neuberger – takes the above three strands of the appellant's argument and deals with them under two distinct headings: the appellant's arguments based on domestic law and international law respectively.

B. Domestic law

The Supreme Court stressed the remarkable breadth of the definition of terrorism in section 1 of the 2000 Act, stating that:

> As a matter of ordinary language, the definition would seem to cover any violence or damage to property if it is carried out with a view to influencing a government or IGO in order to

[7] *ibid*.

[8] *ibid* at [39].

[9] [2012] EWCA Crim 280; [2012] 1 WLR 3432. In *R* v *F* [2007] EWCA Crim 243; [2007] QB 960 an argument was advanced by the defendant in that case to interpret s 1 in a narrower manner in accordance with HRA 1998, s 3. This argument was based on interpreting the meaning of the word 'government' in s 1 to apply only to a democratic government that respected human rights principles similar to those laid out in the ECHR. The Court of Appeal ultimately, however, rejected this interpretation. This case is discussed below at text to n 25 and it will be shown that the material issues in *R* v *F* did not arise in *R* v *Gul*.

> advance a very wide range of causes. Thus, it would appear to extend to military or quasi-military activity aimed at bringing down a foreign government, even where that activity is approved (officially or unofficially) by the UK government.[10]

The Supreme Court, however, expressly declined to say whether the section 1 definition actually went this far.[11]

Attempting to justify the broad definition contained in section 1, the Crown contended that this expansiveness was operationally tempered by the requirement (in section 117 of the 2000 Act) for the consent of the Director of Public Prosecutions (DPP) or if the actions occurred abroad the Attorney General before any prosecution could be launched. This discretion, according to the Crown, operated as a filtering mechanism that prevented the problematic result of labelling certain actions such as British military operations overseas as terrorism.[12] The Supreme Court, however, considered such a reliance on prosecutorial discretion problematic. First, it risks undermining the rule of law as it is effectively saying that the legislature has delegated to an appointee of the executive the decision whether or not to classify certain activity as terroristic, and therefore criminal: such decisions, although made by an independent lawyer, are neither transparent nor made by democratic representatives. This leaves individuals unclear as to whether or not their actions may be classified as criminal.[13] Secondly, the Supreme Court considered that constructing section 1 so as to be read in accordance with section 117 would have 'two further undesirable consequences': it would make the challenging of any executive acts very rare indeed; and irrespective of

[10] *ibid* at [28].

[11] Although see below at p 000 the discussion of the case of *R* v *F*.

[12] n 1 above at [30].

[13] *ibid* at [37].

whether a prosecution arises, as a matter of law an act ought to be identifiable as terroristic and therefore criminal at the time it is committed.[14] Reliance upon prosecutorial discretion on this matter was therefore considered to be conceptually problematic given the temporal difference between the act occurring and the contemplation of prosecution.[15] As a result, the Supreme Court rejected reliance on prosecutorial discretion, stating that: 'It may well be that any concern which Parliament had about the width of the definition of terrorism in section 1(1) was mitigated by the existence of the statutory prosecutorial discretion but… we do not regard it as an appropriate reason for giving "terrorism" a wide meaning.'[16]

The Supreme Court concluded that 'it is difficult to see how the natural, very wide, meaning of the definition can properly be cut down by this Court' as it was 'indeed intended [by Parliament] to be very wide'.[17] Consequently, notwithstanding their reservations, the Supreme Court justices held that on the arguments based on domestic law, the Court could not alter the meaning of section 1 so as to interpret it more narrowly than the natural meaning. It also follows that the Supreme Court's rejection of prosecutorial discretion under section 117 tempering the breadth of section 1 had no material impact on the outcome of *Gul*. Nevertheless, as will be discussed below, this finding affects other powers contained in the 2000 Act which rely on the discretion of decision-makers to temper the application of the section 1 definition of terrorism, eg stop and search powers under section 44, and detention powers at UK borders and ports under Schedule 7.

[14] *ibid*.

[15] See the discussion of inchoate offences below at p 000 for a possible example of this issue arising before the courts.

[16] *ibid* at [40].

[17] *ibid* at [38].

B. International law

The arguments relying on international law were based on a number of grounds. The appellant argued that, given the lack of international agreement as to whether acts of insurgence or freedom fighters in non-international armed conflicts are classified as terrorist, and indeed the general understanding that they are not, section 1 of the 2000 Act should be interpreted accordingly so as to exclude them. This argument was, however, rejected by the Supreme Court finding that any support for this idea 'falls far short of amounting to a general understanding which could be properly invoked as an aid to statutory interpretation'.[18]

Furthermore, the Court held that it was incorrect to argue that the section 1 definition of terrorism should be interpreted narrowly in accordance with international law on the basis that the 2000 and 2006 Acts were enacted to give effect to international law obligations, as the Court found that there was no internationally agreed definition of terrorism and therefore no need to address this issue.[19] The appellant's second argument based on international law – that as the 2000 and 2006 Acts label as terrorist and therefore criminalise behaviour outside of the UK, the meaning of terrorism should not be wider than the accepted international norm – was also defeated by this lack of an internationally agreed definition of terrorism.[20]

The Supreme Court also stated that in any event there was no rule that precluded the UK from going further than what is required by international law.[21] Thus, if a broad definition of terrorism, when applied in line with a specific provision, results in a breach of international

[18] *ibid* at [45].

[19] *ibid* at [57].

[20] *ibid* at [55]-[57].

[21] *ibid* at [53].

law, eg the Geneva Conventions, then the Supreme Court considered that the definition would be interpreted more narrowly, but even then only in relation to the specific provision in question not its general application.[22]

Accordingly, the Supreme Court answered the question – whether the definition of terrorism in section 1 of the Terrorism Act 2000 operates so as to include within its scope any or all military attacks by a non-state armed group against any or all state or intergovernmental organisation armed forces in the context of a non-international armed conflict – in the affirmative, and Gul's conviction was upheld. However, the Supreme Court's judgment also concludes with a strongly worded *obiter dictum* stressing the need for reform of section 1 of the 2000 Act and signalling dissatisfaction with the current UK definition of terrorism.

A. ANALYSIS: *GUL* AND REVIEWING THE UK'S DEFINITION OF TERRORISM

B. The status of non-state combatants in non-international armed conflicts

The principal result of *R* v *Gul* is that the section 1 definition of terrorism can 'criminalise certain activities carried out overseas that constitute lawful hostilities under international humanitarian law'.[23] In addition, this label potentially applies to groups which the UK Government supports. Although the Supreme Court in *Gul* expressly refused to comment on this conclusion,[24] the judgment of the Court of Appeal in *R* v *F* would suggest that this is the case.[25] In *R* v *F* the Court of Appeal upheld the appellant's conviction under section 58 of the 2000 Act for possession of a document or record containing information of a kind likely to be useful to a person committing or preparing an act of terrorism. The appellant's argument –

[22] *ibid*.

[23] *ibid* at [33] quoting D Anderson, 'The Terrorism Acts in 2011: Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006' (London: The Stationery Office, 2012) at [3.2].

[24] *ibid* at [28]-[29].

[25] n 9 above.

that the definition of terrorism in section 1 didn't extend to attacks on non-democratic governments (ie Libya) – was grounded in an interpretation of the ECHR, and attempted to correlate 'government' in section 1 of the 2000 Act with a government that respected the principles of the ECHR. The Court of Appeal, however, rejected this argument and found that there could be no ambiguity in the meaning of 'government' in section 1, as evidenced by the phrase 'a country other than the United Kingdom'.[26] Consequently, even if an individual's target is a state considered as unfriendly by the UK, or a government in possession of sovereignty but lacking democratic legitimacy, *Gul* when read in conjunction with *R* v *F* suggests that such an individual's conduct would come under the section 1 definition of terrorism. *R* v *F* is a decision of the Court of Appeal and therefore not binding on the Supreme Court; however, notwithstanding this caveat, it would appear that whether directed at the Government of the United Kingdom or that of Syria, whether an unprovoked attack on innocent civilians or a reaction to extrajudicial murder by the state, these relevant threats and activities constitute terrorism under section 1.[27] This is somewhat ironic given that counter-terrorist responses that conflate terrorists with combatants and therefore apply a war paradigm – such as the approach taken by the US – were criticised by numerous commentators who instead lauded the UK's approach of treating terrorists as criminals, therefore showing their faith in the resilience of the criminal justice system.[28] Thoughts of the opposite results of applying a criminal justice paradigm seem to have been overlooked in the literature. This is not to be taken as a criticism of applying a criminal justice paradigm to terrorism but instead as a criticism of the broad nature of the current definition of terrorism under section 1. The normative value of the criminal justice paradigm is necessarily dependent upon an appropriate definition of terrorism.

[26] [2007] QB 967 at [26].

[27] D. Anderson, 'Shielding the Compass' (2013) 3 EHRLR 233, 244.

[28] T. Bingham, *The Rule of Law* (London: Penguin Books, 2010) 137; D. Cole, 'The Brits do it Better' [2008] *New York Review of Books* (12 June) 68; K. Roach, 'The Case for defining Terrorism with Restraint and without Reference to Political or Religious Motive' in A. Lynch, E. MacDonald and G. Williams (eds), *Law and Liberty in the War on Terror* (New South Wales: Federation Press, 2007) 42-44. Roach does, however, stress the importance of defining terrorism with restraint.

At the same time, praise for a criminal justice approach to terrorism is not universal. When such a criminal justice model is applied in an over-politicised manner – as facilitated by a broad definition of terrorism – its normative value is substantially diminished. The UK's experience of applying a criminal justice model to Northern Ireland during the 'Troubles', for example, stands as an example of where the arbitrary and inconsistent labelling or targeting of individuals as terrorists resulted in damaging consequences for both the state and its citizens. The erosion of procedural rights, the broad use of arrest powers for information gathering purposes and the discriminatory use of powers such as internment almost exclusively against Catholics polarised community relations further and damaged the police's legitimacy in the eyes of the oppressed community.[29] Northern Ireland also illustrates the dangers of incorporating exceptional powers into the ordinary criminal justice system arising from the propensity of such measures to become permanent, even when measures such as sunset clauses are included to insure their temporariness.[30] 'Normalising the exception'

[29] B. Dickson, *The European Convention on Human Rights and the Conflict in Northern Ireland* (Oxford: Oxford University Press, 2010) 53-61; F.F. Davis, 'Internment Without Trial; The Lessons from the United States, Northern Ireland & Israel' (August 2004) 15-16 at http://ssrn.com/abstract=575481(last visited 31 January 2014). See also F.N. Aoláin, 'The fortification of an Emergency Regime' (1995-96) 59 Albany LR 1353; F.N. Aoláín, *The Politics of Force: Conflict Management and State Violence in Northern Ireland* (Belfast: Blackstaff Press, 2000) 41.

[30] eg the Northern Ireland (Emergency Provisions) Act 1973 (EPA 1973) which introduced a new model of processing internment and trying those for certain scheduled terrorist offences (Diplock Courts) was amended in 1978, 1987, 1991 and 1996 before being replaced by the 2000 Act. The 2000 Act re-enacted many provisions of the EPA 1973 under Part VII, subject to annual renewal. It could not, however, be renewed after five years (an effective sunset clause on the renewal clause). Part VII lapsed on 31 July 2007, ending the 34 year life of the so called 'emergency provisions'. Relatedly, the Prevention of Terrorism (Temporary Provisions) Act 1974 which, amongst other measures, introduced the offence of being a member of an illegal organisation was initially subject to a sunset clause. It was renewed every five years including amendments in 1976, 1984 and 1989.

therefore may be just as damaging as 'exceptionalising the normal' and a poorly formulated definition of what amounts to terrorism may end up doing both.

B. Amending section 1: a narrower definition?

The definition of terrorism in section 1 'permeates the entire legislative structure'[31] of the state's counter-terrorist machine. The definition goes beyond the 2000 Act and even the 2006 Act to affect other acts such as the Crime (International Co-operation) Act 2003, the Anti-Terrorism Crime and Security Act 2001 and the Civil Contingencies Act 2004, to name but a few. Section 1 has also influenced other states in their respective attempts to legislate to confront terrorism.[32] Given the various different scenarios, offences and powers to which section 1 applies to, it is foreseeable that this definition of terrorism would have to be substantial in its breadth.

Both the Supreme Court in *Gul* and the Independent Reviewer of Terrorism Legislation David Anderson QC suggest that the justification for a legal definition of terrorism in the first

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Following the collapse of the IRA ceasefire and the bombing of Canary Wharf in 1996, the Prevention of Terrorism (Additional Powers) Act 1996 (PTA 1996) was enacted which gave the authorities the power to declare areas 'special zones'. Within these 'special zones' persons could be subject to body searches even in the absence of suspicion. It too was replaced by the Terrorism Act 2000, which applies the provisions therein to the whole of the UK, not just Northern Ireland. See Dickson, *ibid* 161-165.

[31] *R* v *F*, n 25 above at [13].

[32] Kent Roach traces the influence of the definition of terrorism in the 2000 Act on states such as Australia, Canada, Hong Kong, Indonesia, and South Africa amongst others: K. Roach, 'The Post-9/11 Migration of Britain's Terrorism Act 2000' in S. Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge: Cambridge University Press, 2006) 374.

instance is for operational matters.[33] In particular, David Anderson rejects arguments based on emotional or political condemnation of terroristic acts, or the status of terrorism as a unique threat facing citizens and the state as a whole, as reasons for enacting a legal definition of terrorism and introducing additional terrorist offences and special powers to confront terrorism. Anderson argues that the operational reasons that justify defining terrorism are (i) to 'defend further up the field'[34] and (ii) the reliance on evidence that cannot be disclosed that is particularly relevant in counter-terrorist operations.[35]

Despite this apparent 'operational necessity' for a broad definition of terrorism, the reliance of the Government on prosecutorial discretion in justifying this breadth and tempering its implications was explicitly rejected in *Gul*.[36] It would follow from *Gul* that the discretion afforded to other decision-makers when applying the definition of terrorism in section 1 can also not be taken into account when justifying the breadth of this definition, eg the discretion of police officers utilising stop and search powers under section 44 of the 2000 Act or detention powers at UK borders and ports under Schedule 7 to the 2000 Act. The Court's *obiter dictum* in *Gul* again alludes to this: 'the wide definition of "terrorism" does not only give rise to concerns in relation to the very broad prosecutorial discretion bestowed by the 2000 and 2006 Acts…The two acts also grant substantial intrusive powers to the police and

[33] D. Anderson, 'The Terrorism Acts in 2012: Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006' (London: The Stationery Office, 2013) at [4.4].

[34] Anderson describes as 'defending further up the field' preventative measures that seek to detect and interfere with the committal of terrorist attacks earlier than previously possible due to the dangers of allowing such a 'plot to run': n 23 above, 243.

[35] *ibid*.

[36] Text to n 16 above.

to immigration offices including stop and search, which depend upon what appears to be a very broad discretion on their part.'[37]

The Supreme Court's *obiter* rejection of police discretion operating as a buffer to justify stop and search powers under section 44 of the 2000 Act complements the European Court of Human Rights' (ECtHR) approach in *Gillan* v *United Kingdom*.[38] In *Gillan* the ECtHR sitting in Chamber formation held that 'stop and search' powers under section 44 of the 2000 Act breached Article 8 of the ECHR (right to respect for privacy) as they were not defined with sufficient clarity nor subject to appropriate legal safeguards so as to be considered to be 'in accordance with the law.'[39] In particular, the ECtHR noted the operation of discretion by the Home Secretary and senior police officers empowered to authorise such searches, and the officers actually conducting the searches.[40] Thus although *Gillan* was not expressly mentioned in *Gul* the Supreme Court's approach in this instance can be seen as in line with the ECtHR's reasoning in *Gillan*.

Like the 'stop and search' powers considered in *Gillan*, powers exercised by port and airport authorities under Schedule 7 to the 2000 Act are also tempered by the effective discretion of decision-makers. The Supreme Court in *Gul* expressly flagged Schedule 7 powers for

[37] n 1 above at [63].

[38] *Gillan and Quinton* v *United Kingdom* App no 4158/05, Fourth Section Chamber judgment of 12 January 2010.

[39] *ibid* at [87].

[40] *ibid* 41-44. John Ip terms these two types of discretion as 'front-end' and 'back-end' discretion respectively: see J. Ip, 'The Reform of Counterterrorism Stop and Search after *Gillan v United Kingdom*' [2013] HRLR, advanced Access at http://hrlr.oxfordjournals.org/content/early/2013/10/23/hrlr.ngt028.full.pdf+html(last visited 15 November 2013).

attention. Such powers are, according to the Supreme Court, 'not subject to any controls. Indeed, the Officer is not even required to have grounds for suspecting that the person concerned falls within section 40(1) of the 2000 Act (i.e. that he has "committed an offence", or he "is or has been concerned in the commission, preparation or instigation of acts of terrorism")'.[41]

High profile instances of the controversial use of these operational powers in cases where such discretion was applied in a questionable manner are worrying illustrations of the danger an overly broad definition of terrorism can pose to the human rights of everybody. The detention of David Miranda – the partner of The Guardian newspaper journalist Glenn Greenwald who was involved in the publication of information leaked by the whistle-blower Edward Snowden – at Heathrow Airport by police under powers contained in Schedule 7 to the 2000 Act stands as a tangible example of how this broad definition of terrorism has the potential to be abused. Miranda subsequently sought judicial review of his detention with arguments based on domestic law (improper purpose regarding the use of Schedule 7) and Article 10 of the ECHR (freedom of expression).[42] Indeed, the Supreme Court's reference to Schedule 7 in its *obiter dictum* in *Gul* is arguably a thinly veiled criticism of the manner in

[41] *ibid* at [64].

[42] *David Miranda* v *Secretary of State for the Home Department* [2014] EWHC 255 (admin); The Independent Reviewer of Terrorism Legislation has also sought to establish an independent inquiry regarding Miranda's detention: see D. Anderson, 'Detention of David Miranda – Announcement of Independent Review' (Independent Reviewer of Terrorism Legislation, 22 August 2013) at https://terrorismlegislationreviewer.independent.gov.uk/detention-of-david-miranda-announcement-of-independent-review/(last visited 15 November 2013).

which David Miranda was detained.[43] Ultimately, however, the High Court unanimously rejected Miranda's arguments and upheld the lawfulness of his detention under Schedule 7.[44]

Many of the current suggestions for reform of Schedule 7 contained in the Anti-Social Behaviour, Crime and Policing Bill still, however, rely upon the effective exercise of the discretion of decision-makers. Proposals such as requiring an officer empowered under Schedule 7 to be appointed by the Secretary of State[45] and the Secretary of State to issue a code of practice about the training of such empowered individuals to facilitate the effective operation of such powers[46] are attempts at improving the operative effect of this discretion by increasing the professionalisation and experiential authority of the decision-maker. *Gul* and *Gillan* would suggest that these reforms are inadequate as they are still reliant upon discretion without any clear guidance enshrined in law. The detrimental effect to the rule of law would still remain if these changes were enacted. Such reforms therefore rely upon decision-maker discretion in order to prevent abuse but do so, light of *Gul*, by still relying on a procedural buffer that does not justify the broad definition of terrorism contained in section 1. *Gul* therefore would imply that proper reform of Schedule 7 would require reform of section 1 of

[43] D. Anderson, 'Defining Terrorism: A two-tailed Scorpion' (Independent Reviewer of Terrorism Legislation, 23 October 2013) at https://terrorismlegislationreviewer.independent.gov.uk/defining-terrorism-a-two-tailed-scorpion/(last visited 15 November 2013).

[44] Lord Justice Laws distinguished Miranda's detention under Schedule 7 from section 44 stop and search powers scrutinised in *Gillan* by agreeing with the High Court's reasoning in *Beghal v DPP* [2014] 2 WLR 150 that Schedule 7 powers are limited to a small category of individuals who present themselves at UK borders. This can be contrasted with section 44 stop and search powers which could be exercised in 'authorised areas' but such authorised areas were 'not sufficiently circumscribed and lacked adequate legal safeguards'. *Miranda v Secretary of State for the Home Department*, n 42 above at [75]-[82].

[45] Anti-Social Behaviour, Crime and Policing Bill, Sched 8, para 1(2).

[46] *ibid*, Sched 8, para 1(3)(1A).

the 2000 Act itself. The Supreme Court in *Gul* appears to suggest instead that such reforms ought to require that an individual fall within section 40(1) of the 2000 Act, ie that the officer has grounds for suspecting the person in question.[47] The Supreme Court's suggested reforms therefore seek to curtail the discretion of decision-makers in a more legalistic manner than the current legislative proposals.

In light of *Gul,* the solution would surely be somehow to narrow the definition of terrorism contained in section 1. This would still be the case even if the Supreme Court's suggestions of reform of Schedule 7 were taken into account – that an officer has grounds to suspect an individual – as a poorly worded definition of terrorism is of no guidance in helping the formation of such grounds of suspicion. Such a definition therefore would have to reduce reliance on prosecutorial or other decision-maker discretion while still maintaining a necessary degree of elasticity to facilitate operational functionality. Such a refinement may even be necessary in line with human rights obligations when *Gul* is read in conjunction with *Gillan.* Of course this is easier said than done. Furthermore, as section 1 'defines the word that permeates the legislative structure'[48] of the state's counter-terrorist machine it may be that this change is almost impossible. In order to realise the rule of law principles emphasised by the Supreme Court in *Gul,* the solution may be to cease the quest for a single definition of terrorism altogether and instead provide multiple definitions of varying width according to the area of state security or the criminal justice system to which they are applicable. Whether a single domestic definition of terrorism – aside from a single international definition of terrorism – is achievable or even valuable is therefore questionable as a result of *R* v *Gul.* Indeed, as stated previously, *Gul* raises the possibility of the section 1 definition of terrorism

[47] n 1 above at [64].

[48] *R* v *F,* n 25 above at [13].

being accorded a narrower meaning in particular instances where the broader, generalist, meaning would result in a breach of international norms such as the Geneva Convention.[49] There is therefore, hypothetically, already a potential variable nature to the single definition of terrorism contained in section 1.

An example where a narrower or more clearly delineated definition of terrorism could operate would be the novel terrorist inchoate offences introduced into the criminal justice system.[50] With the reliance of inchoate offences in 'defending further up the field'[51] against terrorism, a particular conundrum arises that afflicts inchoate offences in general: proving intention.[52] Intention, as in all criminal cases, is inferred circumstantially; however, it is more difficult to prove in inchoate offences due to the lack of harm and therefore the more opaque or indirect conduct of the accused from which the prosecution attempts to infer the intention. In terrorist offences therefore, the label of 'terrorist' may facilitate the inference of intention. The aforementioned legal dilemma arising from the time lag between a crime being committed and a prosecution being initiated is compounded when applied to inchoate offences, and therefore the Supreme Court's rebuke about relying on prosecutorial discretion to temper the broad definition of terrorism in section 1 is of particular relevance. With regards to terrorist offences – and particularly inchoate offences – the label of 'terrorist' ought to act as a guide to the inference of this intention. It would follow that, as distinct from

[49] The Court of Appeal in *R* v *F* also alludes to this conclusion: *ibid* 969.

[50] See eg Terrorism Act 2006, s 1(2) (encouraging terrorism) and s 59 (inciting in England and Wales the commission of acts of terrorism outside the United Kingdom).

[51] n 27 above, 237.

[52] For a discussion of the difficulties of inferring intention in inchoate offences, see A. Ashworth, 'Attempts' in J. Deigh and D. Dolinko (eds), *The Oxford Handbook of Philosophy of Criminal Law* (New York: Oxford University Press, 2011) 126.

the apparent 'operational necessity' for a broader definition, a more concise definition of terrorism for such inchoate offences would be necessary or helpful to enable the detection and surveillance of terrorist suspects at stages long before the contemplation of any prosecution.

These rule of law concerns echoed in *Gul* may in turn lead to human rights concerns. The lack of clarity regarding whether one's actions could amount to an inchoate offence could in turn constitute a breach of Convention principles. As already indicated, the ECtHR has stipulated on numerous occasions that a law 'must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise'.[53] That said, where the ordinary criminal law can accommodate an offence it is generally used by the DPP, even if such an offence would come within the ambit of the definition of terrorism under section 1. Anderson gives the examples of the four would-be bombers whose bombs failed to go off two weeks after the 7 July 2005 attacks being prosecuted for conspiracy to murder.[54] Consequently, it would appear that defining terrorism is moot when it comes to prosecuting certain offences. This in turn raises the issue of the value of having a legal definition of terrorism in the first instance.

B. Terrorism: a social construct?

David Anderson states that 'to review from first principles the definition of terrorism would require a root-and-branch review of the entire edifice of anti-terrorism law, based on a clear-headed assessment of why and to what extent it is operationally necessary to supplement

[53] *Gillan* v *UK*, n 38 above, 41.

[54] Anderson, n 27 above, 237.

established criminal laws and procedures'.[55] The previous section suggested that having multiple different definitions of terrorism may be a better option than the 'one-size-fits-all' approach captured by section 1 of the 2000 Act. However, an axiomatic issue raised by attempting to define terrorism – and particularly in a legalistic manner – is that it assumes that a phenomenon of terrorism actually exists. Furthermore, it also assumes that the definition is necessary in order to construct an adequate counter-terrorist response. Indeed, multiple different definitions of terrorism would also question whether terrorism is actually a tangible construct.

If the definition of terrorism results in 'unusually wide discretions to all those concerned with the application of the counter-terrorism law'[56] then it has failed in its function of correctly demarcating its scope. Leaving the assessment of whether an act is classified as terrorism to the discretion of officials is, as stated by the Supreme Court in *Gul*, antithetical to the rule of law which values such principles as clarity and certainty. If this definition of terrorism is so broad as to essentially leave the issue wholly up to the discretion of decision-makers, then in practical terms the outcome is no different than if terrorism is not defined at all. It creates a 'legal black hole' where the discretion of the decision-maker cannot be questioned, leaving the definition of terrorism only as a facilitator of power rather than a constraint upon it.[57]

The Supreme Court's concern in *Gul* about the broad nature of the definition of terrorism in section 1 is not unique and nor are such criticisms applicable to section 1 alone. On a more conceptual level, Conor Gearty argues that terrorism is 'an uncertain term with no shared

[55] Anderson, n 33 above, 54.

[56] *ibid* 53.

[57] See N. Ben-Asher, 'Legal Holes' (2009) 5 *Unbound* 1, 3-6.

meaning'.[58] Alex Schmid agrees, arguing that terrorism is used 'promiscuously for such a wide range of manifestations… that one wonders whether it is a unitary concept.'[59] Whether terrorism is a tangible phenomenon capable of objective extrapolation and categorisation is therefore highly problematic and controversial. As is evidenced by *Gul*, the lines between terrorist and civilian, terrorist and combatant, and terrorist and criminal are blurred, both by the individual labelled as terrorist and by the individual labelling him or her. Making the distinction between friend and enemy difficult benefits the 'terrorist' in a manner similar to partisan fighters: combatants who wear no discernible uniforms or symbols in order to launch surprise attacks on soldiers then retreat into ordinary society or the geographical background.[60] The clandestine nature of these attackers facilitates the partisan's and relatedly the terrorist's evasion. The labeller, however, can also benefit from the existence of a clandestine foe. Such an enemy acts as a 'folk devil' against which society can unite. Institutions and individuals reliant upon democratic affirmation for their legitimacy can then utilise this 'folk devil' as a target of hate and, by proxy, cast themselves as the solution to such a problem, and profit electorally from this.[61]

[58] C. Gearty, 'Rethinking Civil Liberties in a Counter-Terrorist World' (2007) 2 EHRLR 111, 111.

[59] A. Schmid, 'Terrorism – The Definitional Problem' (2004) 36 Case Western Reserve J of International Law 375, 380.

[60] G.L. Ulmen, 'Translator's Introduction' in C. Schmitt, *Theory of the Partisan* (New York: Telos Press Publishing, Eng tr, 2007) xvi.

[61] See S. Cohen, *Folk Devils and Moral Panic: The Creation of the Mods and Rockers* (London: Martin Robertson, 1980) 10-11; F. de Londras, *Detention in the War on Terror: Can Human Rights Fight Back?* (Cambridge: Cambridge University Press, 2011) 75-82; J. Young, *The Vertigo of Late Modernity* (London: Sage, 2007) chapter 8.

This potential to profit electorally from targeting folk devils is well documented in academic literature.[62] The independent reviewer of Terrorism Legislation David Anderson argues that the definition of terrorism is so wide as to encompass organised crime. Again, however, it is the operation of decision-maker discretion that has avoided this conflation, and this is not guaranteed. Nor, in light of *Gul*, can such discretion be a legal justification for an over-broad definition. For example, the hyperbolisation of organised crime into a threat to the state can be seen in Ireland where the jurisdiction of the Special Criminal Court – a non-jury court initially established to deal with terrorist offences related to dissident Republicans – has been extended to encompass offences related to organised crime.[63] The individuals convicted by the Special Criminal Court, by definition, present such a threat to the state that 'the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order'.[64]

The lack of international agreement around whether or not freedom fighters constitute terrorists – as alluded to by the Supreme Court in *Gul* – is illustrative of the intense political nature of such a labelling and the relevant interests at play in international attempts to construct a working definition of terrorism. Jorg Friedrichs argues that a state's stance on whether such fighters constitute terrorists stems from where their requisite vested interests

[62] *ibid*. See also generally D. Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford: Oxford University Press, 2002); J. Simon, *Governing Through Crime* (Oxford: Oxford University Press, 2007).

[63] See A. Greene, 'Shielding the State of Emergency: Organised Crime in Ireland and the State's Response' (2011) 62 NILQ 249.

[64] Article 38.3.1°, Constitution of Ireland.

lie.[65] The UK, for example, prefers that they do come within the ambit of terrorism due to their past experience of confronting the threat posed by the Irish Republican Army (IRA).[66] In contrast, Islamic states tend to reject the idea of freedom fighters as terrorists in order to avoid designating Palestinian combatants with such a delegitimising and politically loaded label.[67]

What is omnipresent, therefore, in various quests for a satisfactory definition of terrorism is the wholly subjective nature of this labelling, and consequently the intensely political nature of this decision. Introducing such a polemic term into the criminal justice system or the legal system as a whole therefore is extremely worrying from a human rights perspective.

A. CONCLUSION

In some respects, given the nature of the UK separation of powers and the Supreme Court's position relative to the sovereignty of Parliament, the outcome of *R* v *Gul* is unsurprising. This is particularly so given that, unlike in *R* v *F*, no arguments were advanced by the appellant that relied upon the ECHR and the Human Rights Act 1998.[68] However, through their forceful *obiter dictum* corroborated by opinions of the Independent Reviewer of Terrorism Legislation David Anderson QC, the Supreme Court is sending a strong signal that the definition of terrorism in section 1 of the 2000 Act is unsatisfactory. The apparent difficulty alluded to by the Court – which is now for Parliament to tangle with should it

[65] J. Friedrichs, 'Defining the International Public Enemy: The Political Struggle Behind the Legal Debate on International Terrorism' (2006) 19 Leiden J of International Law 69, 76.

[66] *ibid* 80.

[67] *ibid* 76.

[68] See n 25 above.

choose to do so – is how to refine this definition without hampering the apparent 'operational necessity' for a broad malleable definition which section 1 currently provides. Whether Parliament will actually undertake this challenge is, however, not certain as it is in the interests of the political branches to keep the definition of terrorism as vague and therefore as malleable as possible, unless such vagueness gives rise to compatibility issues with ECHR obligations. On a more metaphysical level, *R* v *Gul* may provide an additional string to the bows of those who question the existence of terrorism as a tangible phenomenon, instead considering it to be merely a 'social construct' that 'tells us more about the categoriser than the categorised'.[69]

[69] Anderson, n 27 above, 240 (Fn 10).