BINGHAM CENTRE FOR THE RULE OF LAW

# Terrorist Offenders (Restriction of Early Release) Bill
# A Rule of Law Analysis

BICL
British Institute of International and Comparative Law

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## About the Bingham Centre for the Rule of Law

The Bingham Centre is an independent, non-partisan organisation that exists to advance the Rule of Law worldwide. Established in 2010 as part of the British Institute of International and Comparative Law (BIICL), the Centre was brought into being to pursue Tom Bingham's inspiring vision: a world in which every society is governed by the Rule of Law "in the interests of good government and peace at home and in the world at large." The Rt Hon Lord Bingham of Cornhill KG was the pre-eminent UK judge of his generation, who crowned his judicial career by leaving us arguably the best account of what the Rule of Law means in practice and why it is so important in any civilised society - too important to remain the exclusive preserve of courts and lawyers. One of our strategic aims is to increase discussion about the meaning and importance of the Rule of Law in the political process.

- We carry out independent, rigorous and high quality research and analysis of the most significant Rule of Law issues of the day, both in the UK and internationally, including highlighting threats to the Rule of Law.
- We make strategic, impartial contributions to policy-making, law making or decision-making in order to defend and advance the Rule of Law, making practical recommendations and proposals based on our research.
- We hold events such as lectures, conferences, roundtables, seminars and webinars, to stimulate, inform and shape debate about the Rule of Law as a practical concept amongst law makers, policy makers, decision-makers and the wider public.
- We build Rule of Law capacity in a variety of ways, including by providing training, guidance, expert technical assistance, and cultivating Rule of Law leadership.
- We contribute to the building and sustaining of a Rule of Law community, both in the UK and internationally.

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# Executive Summary

This Report sets out the Bingham Centre's Rule of Law analysis of the **Terrorist Offenders (Restriction of Early Release) Bill**, to inform the House of Commons' consideration of the Bill on **Wednesday 12th February**. The Bill has been introduced as "fast-track legislation" (ie. an emergency Bill) and will complete all its Commons stages in a single day.

The Bill is the Government's response to the recent terrorist attacks at Fishmongers' Hall and in Streatham, both committed by individuals recently released from prison under the current law on automatic early release, following their conviction for terrorism offences. The purpose of the Bill is to ensure that terrorist offenders are not automatically released before the end of their custodial term without the Parole Board's agreement. The Bill also changes the release point for such offenders from the halfway point and refers them to the Parole Board at the two-thirds point of their sentence. **These changes will apply to offenders who are currently serving a custodial sentence but have not yet been released.**

The Report analyses the Bill from the perspective of Rule of Law principles, as recognised at common law and in relevant international standards which are in part based on the UK's common law tradition and by which the UK has chosen to be bound. It identifies the most significant Rule of Law issues raised by the Bill and analyses those issues in the light of the relevant Rule of Law standards.

The Rule of Law requires adequate legal protection of fundamental rights, including where threats to those rights come not from the State but from other individuals such as people plotting terrorist attacks. In the wake of two terrorism-inspired knife attacks by recently released offenders, the Government is therefore right to have considered the adequacy of the current legal framework protecting the life and safety of members of the public from individuals who are known to pose a terrorist threat, and to bring forward legislation to improve that legal protection to the extent that it is found wanting. That legislation must itself be compatible with the Rule of Law.

### (1) Retrospectivity

Ending automatic early release at the halfway point for **future offenders** convicted of a terrorist offence, and introducing a requirement of Parole Board review for such future offenders prior to release, does not raise any Rule of Law issues. However, the application of the changes to **serving offenders**, who have already been sentenced under the current law, does raise a significant Rule of Law issue**: is it consistent with the long established general principle against the retrospectivity of criminal laws and, specifically, the prohibition on imposing a heavier penalty than the one applicable at the time the offence was committed?**

The answer to this question is not straightforward. The Report considers the legal arguments both for and against. On the one hand, the Government is correct that there is an established body of case-law, both in the UK and Strasbourg, to the effect that changes to early release provisions concern the "administration" of a sentence and do not amount to an additional penalty, or an increase of the scope of the penalty, for the purposes of Article 7 ECHR. On the other hand, there is a significant decision of the European Court of Human Rights, *Del Rio Prada v Spain*, in which the Court found a breach of Article 7(1) because new rules for calculating remission were considered to affect the scope of the penalty, not merely its administration. Central to the Court's reasoning was the reasonable foreseeability of the change in the sentencing regime, and the legitimate expectation of the offender. These are also strong considerations in the context of the current Bill. The Government in its ECHR Memorandum acknowledges that the changes introduced by the Bill will interfere with expectations relating to release, and that these will be particularly strong in serving offenders close to release, but the Memorandum does not seek to explain why the *Del Rio Prada* reasoning does not apply.

The reasoning of the Court in *Del Rio Prada* suggests that moving the release date for serving offenders from half to two thirds of the way through their sentence is arguably a

retrospective increase in penalty. This could be considered incompatible with the principle against retrospective criminal laws, because it results in a direct increase in time spent in custody for a whole class of offenders, contrary to the reasonable expectation each of them will have held since the date of their sentence. It is also a blanket and automatic increase for all affected offenders, regardless of whether they are dangerous to the public. By effectively overturning judicial decisions about sentencing the Bill also comes uncomfortably close to legislative interference with the judicial function.

Introducing a requirement of Parole Board review for serving offenders, however, is more in the nature of a change in the way the sentence is administered, rather than a change in the scope of the penalty. Such a change could also be considered to be reasonably foreseeable to offenders at the time they were sentenced. It allows for individuated consideration of risk to the public. It is therefore not inconsistent with the prohibition on retrospectivity.

**The Report therefore recommends that, to avoid the risk of Parliament legislating in breach of Rule of Law principles, the Bill should be amended so that the provisions extending from halfway to two thirds the period in custody before an offender is eligible for release do not apply to serving offenders.** This prospective approach was the approach recently taken in a Statutory Instrument amending the automatic release point from half-way to two-thirds of the sentence for those convicted of a relevant violent or sexual offence and sentenced to a standard determinate sentence of 7 years or more. The Report sees no reason in principle why the approach should be prospective in one context and retrospective in the other.

**The new Parole Board requirement for serving offenders can remain, which in any event is sufficient to serve the Government's purpose of protecting the public against known terrorist threats**.

### (2) Justification for fast-track legislation

The other significant Rule of Law issue considered by the Report is **whether the Government has demonstrated sufficient justification for fast-tracking this legislation**. This is a Rule of Law matter because the quality of democratic law-making procedures ultimately determine whether Parliament is supreme over the Executive, as the Rule of Law requires, or vice versa.

The Government asserts that the legislation is needed urgently to put appropriate safeguards in place before further terrorist offenders are released from prison. Parliament will wish to test the Government's assertion by probing the claim that the risk to public safety is so great that it could not be managed for the length of time it would take for a prioritised Bill to complete its passage on a timetable which provides a proper opportunity for meaningful parliamentary scrutiny and debate.

The need for such an opportunity is all the more important at a time when none of the relevant parliamentary committees that would normally scrutinise the Bill (the Joint Committee on Human Rights, the Home Affairs Committee, the Justice Committee and the Intelligence Security Committee) have yet been set up in the new Parliament.

# Introduction

## Background

The Terrorist Offenders (Restriction of Early Release) Bill, which ends the automatic early release of terrorist offenders, was introduced in the House of Commons as an emergency Bill on 11 February 2020.[1]

The factual background is well known. In separate incidents, at Streatham and Fishmongers' Hall, there were serious terrorist attacks on the public. It subsequently transpired that the perpetrators had been convicted of terrorist offences and sentenced to prison. They were automatically released after half their sentence. The attacks were perpetrated shortly after their automatic early release.

The Bill is the Government's response to these terrorist attacks.

The Lord Chancellor and Secretary of State for Justice, Rt Hon Robert Buckland QC MP, announced in the House of Commons on 3 February 2020 that the Government would be introducing emergency legislation to make several changes to the law concerning the release from prison of persons convicted of terrorist offences.[2]

> We will therefore introduce emergency legislation to ensure an end to terrorist offenders being released automatically, having served half their sentence, with no check or review. The underlying principle has to be that offenders will no longer be released early automatically and that any release before the end of their sentence will be dependent on risk assessment by the Parole Board … The earliest point at which these offenders will now be considered for release will be once they have served two-thirds of their sentence and, crucially, we will introduce a requirement that no terrorist offender will be released before the end of the full custodial term unless the Parole Board agrees.

The Lord Chancellor also made clear that the Government intended its new law to apply to serving prisoners:

> We face an unprecedented situation of severe gravity and, as such, it demands that the Government response immediately, and that this legislation will therefore also apply to serving prisoners. The earliest point at which these offenders will now be considered for release will be once they have served two thirds of their sentence, and crucially, we will introduce a requirement that no terrorist offender will be released before the end of their full custodial term unless the Parole Board agrees.

## The Bill

The Bill works by establishing a new legal category of prisoner "terrorist prisoners".[3] A terrorist prisoner is a person who has been convicted of one of a long list of terrorist offences, all of which are set out in the Bill.

A terrorist prisoner must be referred to the Parole Board after they have served the "requisite custodial period". The requisite custodial period is essentially two-thirds of the term imposed by the judge.

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[1] HC Bill 88.
[2] HC Deb 3 Feb 2020. The Lord Chancellor's statement was repeated in the House of Lords by Lord Keen, Hansard Vol. 801 3 February 2020 col 1685.
[3] In England and Wales by amending the Criminal Justice Act 2003 (clauses 1 and 2 of the Bill); in Scotland by amending the Prisoners and Criminal Proceedings (Scotland) Act 1993 (clauses 3 and 4 of the Bill).

The Board has the power to direct that the prisoner should be released if it "is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined".[4] If the Board gives this direction, then the Secretary of State must release the prisoner.[5]

## The effect of the Bill

The Bill will end the current automatic halfway release of terrorist offenders who receive standard determinate sentences for offences such as training for terrorism, membership of a proscribed organisation and the dissemination of terrorist publications. Instead, they will be forced to spend two-thirds of their sentence in prison before being referred to the Parole Board for review. The purpose of the Bill is to ensure that terrorist offenders are not automatically released before the end of their custodial term without the Parole Board's agreement. The Bill also changes the release point for such offenders from the halfway point and refers them to the Parole Board at the two-thirds point of their sentence. These changes will apply to offenders who are currently serving a custodial sentence but have not yet been released.

According to the Government, the Bill means that around 50 terrorist prisoners already serving affected sentences will see their automatic release halted.[6]

The proposed change is therefore:

- Old law: Automatic release after 1/2 sentence
- New law: Possible release, after 2/3 sentence, subject to decision of Parole Board.

## The Relevance of the Rule of Law

### The Bill's Rule of Law Purpose

Although the Government does not say so in terms, its Bill has a clear Rule of Law purpose.

As Lord Bingham's account of the concept makes clear, the Rule of Law requires adequate legal protection of fundamental rights.[7] Adequate legal protection is required even where threats to those rights come not from the State but from other individuals such as people plotting terrorist attacks. As the House of Lords pointed out in 2004, the right to life in Article 2 of the European Convention on Human Rights has been interpreted as imposing "a substantive obligation to establish a framework of laws, precautions, procedures and means of enforcement which will, to the greatest extent reasonably practicable, protect life."[8]

In the wake of two terrorism-inspired knife attacks by recently released offenders, the Government is therefore right, from a Rule of Law perspective, to have considered the adequacy of the current legal framework protecting the life and safety of members of the public from individuals who are known to pose a terrorist threat. It is also, arguably, under an obligation to bring forward legislation to improve that legal protection to the extent that the current legal framework protecting life and limb is found wanting.

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[44] New s. 247A(5)(b) Criminal Justice Act 2003, as inserted by clause 1(2) of the Bill).
[5] New s. 247A(4) Criminal Justice Act 2003.
[6] https://www.gov.uk/government/news/end-to-automatic-early-release-of-terrorists
[7] See Lord Bingham's Principle (5) in his account of the Rule of Law: "The law must afford adequate protection of fundamental human rights", *The Rule of Law*, Penguin Books (2010), chapter 7, pp. 66-84.
[8] Lord Bingham, ibid., p. 69, citing the House of Lords in *R (Middleton) v West Somerset Coroner* [2004] UKHL 10, [2004] 2 AC 182, para. 2.

The Bill's Rule of Law purpose is clear from the test that the Parole Board must apply before directing the release of a terrorist prisoner – "no longer necessary for the protection of the public that the prisoner should be confined".[9]

### Counter-terrorism law and the Rule of Law

Even counter-terrorism laws must themselves comply with the Rule of Law. The Lord Chancellor, who is under a statutory duty to uphold the Rule of Law,[10] explicitly recognised this when announcing the proposed measures in the Commons last week:[11]

> It is important to remember that we in this country stand for the rule of law and due process. That is what marks us out as different from those who rely on the bullet and the bomb—those who use indiscriminate and arbitrary means and methods to impose their will on us. If we stand for nothing else, we have to stand for the rule of law. That makes us better than them, it makes us different and it means that we have something worth defending.

It is an important part of Parliament's constitutional role to scrutinise legislation to ensure that the Lord Chancellor's noble aspiration, to pass laws that not only vindicate but are themselves consistent with the Rule of Law, is fulfilled in practice. This Report is intended to assist Parliament to perform that important constitutional function.

## The Rule of Law issues raised by the Bill

There are two significant Rule of Law issues raised by the Bill:

(1) Does the Bill infringe the prohibition on retrospective increases in sentences?

(2) Has the Government justified its use of the fast-track procedure for this proposed legislation?

## Our Report

The Report has been drafted by Dr. Ronan Cormacain, Consultant Legislative Counsel and Senior Research Fellow in Rule of Law Monitoring of Legislation at the Bingham Centre, with input from Murray Hunt, Director of the Bingham Centre.

Dr. Cormacain is leading a new project at the Bingham Centre, the Rule of Law Monitoring of Legislation Project, which aims to systematically scrutinise Government Bills from the perspective of the Rule of Law, and to report on Bills which have significant Rule of Law implications, to assist both Houses of Parliament with its Rule of Law scrutiny of legislation. This Report is the second report of the Project. The first was on the EU (Withdrawal Agreement) Bill.[12]

[9] S. 247A(5)(b) of the Criminal Justice Act 2003, as inserted by clause 1 of the Bill.
[10] Constitutional Reform Act 2005.
[11] HC Deb 3 Feb 2020.
[12] https://binghamcentre.biicl.org/publications/the-european-union-withdrawal-agreement-bill-and-the-rule-of-law

# Retrospectivity

## The Rule of Law issue

The first Rule of Law issue raised by the Bill is its retrospectivity: is the Bill consistent with the long established general principle against the retrospectivity of criminal laws and, specifically, the prohibition on imposing a heavier penalty than the one applicable at the time the offence was committed?

Law is "retrospective" if it applies to things which took place before the law came into force. So if X was lawful yesterday, a retrospective law passed today would go back in time to say that X was actually unlawful yesterday.

The Government accepted when it announced its plans to legislate that 'there will be a retrospective element in the proposed legislation'.[13] The language of the Bill is admirably clear in this respect: the changes apply to terrorist prisoners serving a fixed term sentence imposed "whether before or after this section comes into force."[14]

The issue is whether this degree of retrospectivity is compatible with the Rule of Law standards to which the UK is proud to adhere.

### Example of Retroactive Legislation

A person committed an offence under the Firearms Act (Northern Ireland) 1969. When it came to sentencing, that legislation had been repealed and replaced by the Firearms (Amendment) (Northern Ireland) Order 1976. The 1976 Order allowed for a higher maximum penalty and the person was sentenced under that Order. The Northern Ireland Court of Criminal Appeal held that this was contrary to law and the penalty would be reduced to the maximum prevailing at the time the offence was committed.

*R v Deery* [1977] Crim LR 550

## The Relevant Rule of Law standards

The UK courts have for centuries resisted retroactive legislation as it is 'contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law'.[15]

This objection stretches back into antiquity.[16] The objection is strongest when it comes to retroactive criminal law and the UK has two long standing principles against it. It is perhaps a mark of their longevity that they were originally coined in Latin. These are *nullem crimen sine lege* (no crime without law) and *nulla poena sine lege* (no punishment without law). Underpinned, by these principles, the UK courts have developed presumptions against retroactive operation of statutes.[17]

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[13] Hansard Vol. 801 3 February 2020 col 1688.
[14] New s. 247A(1)(a) of the Criminal Justice Act 2003.
[15] *Phillips v Eyre* (1870) LR 6 QB 1, 23.
[16] Aly Mokhtar 'Nullem Crimen, Nulla Poena Sine Lege' (2005) 26 Statute Law Review 41
[17] See Bailey and Norbury *Bennion on Statutory Interpretation* (7th edition, LexisNexis 2017), in particular page 188.

In the context of this Bill, the *nulla poena* principle is most relevant. This means that no-one may be given a heavier punishment for a crime than the punishment that existed when they committed that crime.

Tom Bingham, in his magisterial account of The Rule of Law, said that law must be, so far as possible, predictable.[18] He took this to mean that laws must, in general, apply in the future.[19] In particular, criminal law must not be applied retrospectively.

The UK common law's longstanding and strong principle against retrospective criminal laws has in turn informed the relevant international standards. Article 7(1) of the European Convention on Human Rights enshrines into that human rights treaty both common law principles that there shall be no crime and no punishment without law.

## Article 7(1) ECHR

**No punishment without law**

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

The fundamental importance of the principle of non-retrospectivity, including of sentences, is reflected by the fact that even when there is a public emergency threatening the life of the nation, derogations from the principle are not possible under Article 15 ECHR: along with the absolute rights, the right to life, the prohibition of torture and inhuman or degrading treatment or punishment, and of slavery, there can be no derogation from Article 7.

## Article 15 ECHR

**Derogation in time of emergency**

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
2. No derogation from Article 2, … or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

The same principle is contained in Article 15 of the International Covenant on Civil and Political Rights.

The principle of non-retroactivity is also recognised in the Venice Commission's Rule of Law Checklist.[20] It states that retroactive criminal law ought to be prohibited, and that retroactive law, in other fields, ought to be avoided as a general rule. The principles of no

[18] Tom Bingham, *The Rule of Law*, Penguin Books (2010), page 37.
[19] Bingham, page 8
[20] European Commission for Democracy Through Law (Venice Commission) *Rule of Law Checklist* (2016).

crime and no penalty without law are explained by the Checklist as being underpinned by the principle of foreseeability: people must be informed in advance of the consequences of their behaviour. These are all manifestations of the general principle of legal certainty, which also finds expression in the principle of legitimate expectations: that those who act in good faith on the basis of the law as it is, or on the basis of other promises or conduct by public authorities, should not have their legitimate expectations frustrated.

## Analysis

How does the Bill measure up when assessed against these Rule of Law standards against retrospectivity?

The Government accepts that clauses 1 to 4 of the Bill have retrospective effect, because the provisions will apply to serving offenders already sentenced. However, in its view they do not engage (Explanatory Notes)/do not breach (ECHR Memorandum) Article 7 ECHR because the effect of the Bill is not to increase the penalty imposed by the court. The provisions in the Bill, the Government argues, do not retrospectively alter a serving offender's sentence. Release arrangements it considers to be part of the administration of a sentence, which can change without breaching an offender's human rights.[21]

The proposal in the Bill will apply to three classes of offender:

- (1) Offenders who commit a terrorist offence after the date the new law commences.
- (2) Offenders who commit the offence before that date but have not yet been sentenced
- (3) Offenders convicted and sentenced before that date but not yet released under the current law.

The Bill does not apply to persons who have already been released before that date, but who only served 1/2 of their sentence prior to their release.

We consider each class of offender in turn.

### Class (1) – Offence committed after new law comes into force

This class covers persons who commit a terrorist offence after the proposed law commences. Suppose the new law comes into force on receiving Royal Assent on 27 February 2020. Offenders who commit relevant terrorism offences from that date on are covered by the new law.

The changes are entirely prospective for this class of offenders as they apply from this point in time forward. There is no retroactive aspect. Such prospective effect raises no Rule of Law issues.

### Class (2) – Offence committed before date of proposed law, but offender not yet sentenced

This class covers offenders who committed a terrorist offence before the date the Bill comes into effect, but who have not yet been convicted and sentenced for that offence. For example, an offender who committed a terrorist offence in 2019, when the current law was in force, but who is not convicted and sentenced until March 2020 when the new law has taken effect. The language of the Bill again makes the intention very clear: An offence is within this subsection (whether or not it was committed before or after this subsection comes into force).[22]

[21] Explanatory Notes, Bill 88-EN, para. 70.
[22] Clause 1, and the inserted s. 247A(2) of the Criminal Justice Act 2003.

For this class of offenders, there is a retroactive element which requires consideration against the Rule of Law standards identified above. The question is: would such an offender sentenced under the new law be subjected to the imposition of a heavier penalty than was prevailing at the time the offence was committed?

Both the UK courts and the European Court of Human Rights have considered this precise question, and the answer is very clear: in these circumstances, there is no breach of the Rule of Law principle against retrospectivity.

This was the conclusion that the House of Lords reached in the *Uttley* case in 2004, which concerned this class of affected person (see Box below).[23] After the defendant had committed the offences, but before he had been charged and then convicted and sentenced, the sentencing regime changed. If the person had been convicted under the old sentencing regime, he would have been out of prison after 2/3 of his sentence. But, because he was sentenced under the new regime, after release, he had to spend a further year on licence, and had the possibility of being returned to prison for breach of licence conditions. Crucially, the sentence imposed on him under the new law was within the range of sentences which could have been imposed upon him when he committed his crimes. Lord Philips stated that

> Article 7(1) will only be infringed if a sentence is imposed on a defendant which constitutes a heavier penalty than that which *could* have been imposed on the defendant under the law in force at the time that his offence was committed.[24]

The approach of the House of Lords in *Uttley* was upheld by the European Court of Human Rights which declared the application inadmissible.

[23] *R v Secretary of State for the Home Department ex parte Uttley* [2004] UKHL 38.
[24] *Uttley*, paragraph 21, emphasis contained in the original.

## The Uttley Case

This case concerned a prisoner who had committed serious sexual offences. It was heard by the House of Lords in 2004.

Prior to 1983: defendant committed several serious sexual crimes

- Maximum penalty at that time: life imprisonment.
- Normal time spent in prison: 2/3 of sentence imposed

1992 change in law

- No change in maximum penalty
- Change to sentencing regime: after release, additional licence conditions imposed

1995: defendant convicted and sentenced to 12 years in prison.

Defendant argued the penalty was heavier than it would have been under the pre-1992 changes to the law.

House of Lords ruled it was within the range of applicable penalties that could have been imposed. No breach of Article 7(1) of the Convention.

*R v Uttley* [2004] UKHL 38

European Court of Human Rights dismissed application as inadmissible: application of changes to early release law did not increase penalty imposed on applicant, but was part of general regime applicable to all prisoners.

*Uttley v UK*, App no. 36946/03 (29 November 2005)

The legal position in relation to this category of offender is therefore clear. There is no change to the maximum penalty which may be imposed for the offence. Within the range of penalties that may be imposed, there are some changes to how long the custodial element of the sentence may be (up from half to two-thirds). But these changes do not take the penalty outside the range of what was applicable when the offence was committed. If a person commits an offence for which the maximum penalty is 9 years, then they have an expectation that they could be prisoned for up to 9 years. The actual penalty imposed may be affected by various factors: mitigating circumstances, remorse of the offender, severity of the offence, protection of the public etc. They may have an expectation that they will be released halfway through the period of imprisonment imposed by the judge, but they cannot say with certainty how long precisely they will be in prison for. The actual time the person spends in prison will remain within the limits set out at the time the offence was committed.

Therefore, there are no Rule of Law concerns in relation to this category of offender.

### Class (3) – Offenders convicted and sentenced before new law comes into force

This class covers persons currently in prison for terrorist offences, and who were sentenced to a period of imprisonment based upon the current law of automatic release after 1/2 of their sentence. These are the offenders for whom the emergency Bill has primarily been designed.

The legal position in relation to this category of offenders is not straightforward. The most difficult arguments about retrospectivity arise in relation to a change in the sentencing regime of prisoners ***after*** they have been sentenced. If the sentencing rules, rules on remission, rules on early release etc. change before an offender is convicted and sentenced, the offender has no legitimate expectation that he or she will be treated other than in accordance with the sentence imposed on them. However, if new sentencing rules are

introduced ***after*** a prisoner is sentenced, those rules may have a retrospective effect upon the sentence that the court has previously imposed and therefore affect the offender's reasonable expectations about how long they will be kept in prison. To be specific, if the court imposed a sentence of X years, and, as a result of changes to the rules, the prisoner may now spend Y years in prison, then there is at least an argument that this is unfair as it retrospectively overturns the original sentence that the offender reasonably expected to serve, without the chance of the prisoner arguing against it.

This situation directly engages the rules on retrospectivity, the *nulla poena* rule in Article 7(1) of the Convention. Because compliance with that requirement will determine the legality of continued detention, It also potentially engages the right to liberty set out in Article 5(1) of the Convention. Article 5(1) prohibits a person from being deprived of liberty except following conviction by a court following a procedure prescribed by law.

The reason the legal position in relation to this category of affected offender is not straightforward, is a decision of the European Court of Human Rights in the case of *Del Rio Prada v Spain*. In that case (see box below), the Court developed principles which would apply in these circumstances.[25] The Court recognised that it was perfectly acceptable for the state to make changes to sentencing schemes, prison regimes, early release schemes etc, which had an impact upon those already serving their sentences. Equally, the state couldn't simply unilaterally change a sentence which a court had already imposed, as this would infringe Article 7(1) of the Convention. A measure which affected the execution or administration of a penalty was acceptable. A measure which changed the scope of the penalty, however, was not. The Court stated:

> where the nature and purpose of a measure relate to the remission of a sentence or a change in a regime for early release, this does not form part of the "penalty" within the meaning of Article 7.[26]

It also stated:

> However, the Court has also acknowledged that in practice the distinction between a measure that constitutes a "penalty" and a measure that concerns the "execution" or "enforcement" of the "penalty" may not always be clear-cut.[27]

This distinction between a change in the scope of a penalty and a change merely in its execution is not always easy to draw. The test set out by the Court was as follows:

> In order to determine whether a measure taken during the execution of a sentence concerns only the manner of execution of the sentence or, on the contrary, affects its scope, the Court must examine in each case what the "penalty" imposed actually entailed under the domestic law in force at the material time or, in other words, what its intrinsic nature was. In doing so it must have regard to the domestic law as a whole and the way it was applied at the material time.[28]

Applying those principles to the facts of Del Rio Prada, the court held that there had been a breach of Article 7 and Article 5(1) of the Convention. The changes to the sentencing regime meant that the way remission was calculated changed. The changes meant that the original release date of 2008 was retrospectively changed to 2017. These changes were not reasonably foreseeable to the prisoner at the date of the original sentencing. Accordingly, there was a breach of both Article 7(1) and Article 5(1) of the Convention.

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[25] *Del Rio Prada v Spain* (Application No. 42750/09 – 2013).
[26] Paragraph 83.
[27] Paragraph 85.
[28] Paragraph 90.

## The ETA Terrorist case – Del Rio Prada

The European Court of Human Rights heard the case of Del Rio Prada in 2013, which related to the sentence served by a convicted ETA terrorist in Spain. The brief facts are as follows.

1982 to1987: offender committed numerous serious terrorist acts

1988 – 2000: convicted at several trials and sentenced to over 3,000 years in prison

2000: Under Spanish law, sentences combined and capped at the maximum of 30 years

2000: Release date set as 2017, which under existing rules on remission would mean release in July 2008

2006: Spanish Supreme Court establishes new rules for calculation of remission – remission applies to the individual sentences, not the combined final sentence

2008: Following new rules on remission, offender's release date recalculated to 2017

The Court held that the new rules for calculating remission affected the scope of the penalty, not merely its execution, and that the changes to the sentencing regime were not reasonably foreseeable at the time the offender was sentenced. Accordingly the detention after 2008 was unlawful and there was a breach of Article 7 and Article 5(1) of the Convention. The Spanish government were obliged to pay compensation to the prisoner for its unlawful detention of her.

In light of the Court's decision in *Del Rio Prada*, that measures taken while a sentence is being served result in a modification of the penalty imposed by the trial court and therefore fall foul of the prohibition on the retrospective application of penalties, it is in our view clearly arguable that the case of *Uttley* does not settle the question that arises here. In *Uttley*, the sentencing regime changed, and *then* the defendant was sentenced under the new regime. Under the Bill, the new regime would apply to offenders who have *already* been sentenced, and operate to increase the settled sentence already imposed by the court and reasonably expected by the offender.

The Government is correct that there is a body of case-law suggesting that changes to the release regime after the original sentence was imposed do not amount to a change to the scope of the sentence, only to its administration.[29] However, the Government has not provided Parliament with its detailed reasoning explaining why in its view those cases are consistent with the Court's decision in *Del Rio* Prada. The situation of serving prisoners under the Bill is, in our view, much closer to the situation considered by the European Court of Human Rights in the case of *Del Rio Prada*.

In order to be satisfied that it is not risking putting the UK in breach of Article 7 ECHR by passing the Bill, Parliament must therefore consider carefully whether the Bill passes the test set out by the Court in *Del Rio Prada* for whether the measures concern only the manner of execution of the sentence, as the Government asserts, or also affect the scope of the

[29] *Robinson v Secretary of State for Justice* [2010] EWCA Civ 848 and *Abedin v Secretary of State for the Home Department* [2016] EWCA Civ 296, for example. The pre- Human Rights Act legitimate expectation case, *Findlay v Home Office* (1984) took a similar approach, that the only legitimate expectation a prisoner had about early release was to be treated in accordance with whatever regime applied at the time their release fell to be considered.

penalty. That test requires consideration of what the penalty imposed actually entailed under the domestic law at the time the sentence was given.

A number of factors have a bearing upon this assessment by Parliament.

First, the intrinsic nature of the penalty imposed on terrorist offenders at the time of their sentence was, in effect, a determinate sentence of imprisonment of half of the full sentence term. The effect of the Bill is to increase that period of imprisonment from one half to two thirds of the sentence. Given that the custodial element of a sentence is the most significant part of the penalty, it seems difficult to maintain that an increase in the actual time spent in an actual prison does not amount to an increase in the scope of the penalty, but merely a change to the way in which it is administered.

Second, offenders sentenced under the current law would be immediately aware at the time of their sentence of the precise term of imprisonment which they can expect. Sentencing judges are required to explain to offenders the effect of the sentences they impose. It is therefore highly likely that most offenders whose release will be affected by the Bill were told by the sentencing judge that they would be automatically released at the half way point of their determinate sentence. All such offenders therefore have a reasonable expectation of a precise release date, an expectation held from the moment of sentence. The hypothetical scenario set out in the box below demonstrates the potential impact of the Bill on an individual prisoner's legitimate expectations.

**Hypothetical scenario as a result of the Bill**

TO1 convicted of terrorism offence on **1 September 2015** and sentenced to a standard determinate sentence of 9 years.

Told by sentencing judge that his release date will be **1 March 2020** – halfway through sentence.

TO1 engages positively in deradicalization programme during early custodial period

TO1 engages in rehabilitation and increasing family contact during 2019, preparing for release and resettlement in anticipation of 1 March 2020 release date.

No one has any concerns about TO1 being a danger to the public on release.

**27 Feb 2020** – Terrorist Offenders (Restriction of Early Release) Bill receives Royal Assent and comes into force.

28 Feb 2020 - TO1's release date of 1 March 2020 scrapped and replaced by **1 September 2021** as date on which eligible to be referred to Parole Board – two-thirds of way through sentence.

TO1 spends at least **1 and a half years' more in prison** beyond his expected release date of 1 March 2020, despite presenting no danger to the public.

Third, this is an automatic and blanket change, which applies to all serving offenders without taking into account individual circumstances. Everyone within class (3) will be kept in prison after their halfway point, regardless of what changes they have made in their lives. The government has made pledges to increase the effectiveness of anti-radicalism measures within the prison system. It may be that a particular prisoner has benefited from these, in which case they arguably should be let out after half their sentence. On the other hand, they may remain wedded to an extremist ideology, in which case release even at the 2/3 mark may be premature. The key point is that the proposed law does not allow for individual justice, just the blanket application of a rule which applies regardless of the circumstances.

There is no consideration of the risks posed or rehabilitation efforts made by the individual prisoner.

Fourth, this could be seen as, in effect, an additional punishment imposed upon terrorist offenders, which isn't related to anything that they have done, but which relates to the actions of others. As Lord Beith said in the debate in the House of Lords 'That seems to be not only retrospection but punishing prisoners for what others have done while they are inside.'[30]

Fifth, the proposal, in relation to serving offenders, comes uncomfortably close to legislative interference with the quintessentially judicial function of sentencing in individual cases. The Bill would have the effect of overturning the sentencing decision of the trial judges in the cases to which the Bill applies.[31] Judges, in making sentencing decisions, will have taken into account all the relevant factors, including the period that the person will be in prison for before automatic release. They then make that judgment, so that the person will spend that amount of time in prison. Specifically, they impose a sentence knowing that the person will be automatically released at the halfway point of that sentence. The proposed law has the effect of cancelling that individual judgment, and substituting the judgment of the legislature. This arguably negates the certainty of court judgments, and retrospectively changes the sentence imposed.

Sixth and finally, from the perspective of protection of the public, the important factor is not when a person is considered eligible for release, it is that it is safe to release them at that point. So, the most important element of the Bill is ending automatic release, and making release contingent upon an assessment by the Parole Board, not increasing the point at which the offender is eligible for such assessment.

In light of the above, in our view the answer to the retrospectivity issue raised by the Bill is far from clear cut. The Bill is not manifestly in breach of Article 7 ECHR as some have asserted. But nor is the Government's assertion, that the Bill concerns only the administration of the penalty rather than it scope, clearly correct. In our view, there is a significant risk that the Bill will fall foul of the test in the *Del Rio Prada* case and be found to have retrospectively increased the sentences of serving terrorist offenders. If that were to transpire, those affected might also be entitled to claim compensation in respect of any period for which their detention was unlawfully extended.

As for the proposed review of the Parole Board before the prisoner can be released, this in our view does not carry the same risk of falling foul of the prohibition on retrospectively increasing criminal penalties. It does not automatically increase the period spent in prison by the prisoner. It is more in the nature of a change to the administration and execution of the sentence. It is reasonably foreseeable by the prisoner that if they misbehave in prison or if they remain a threat to the public, that they won't be released early. At the very least any expectation otherwise could not be regarded as reasonable. This change serves the important principle of the protection of the public. In particular, it allows for individual justice to be served in relation to an individual prisoner. It increases the chances of the unreformed prisoner staying in prison, and increases the chances of the non-dangerous prisoner being released.

**In these circumstances, we invite Parliament to consider, not whether it wishes to take this risk, but whether it is necessary to do so. In our view, the Government's legitimate aim of protecting the public from the risk of terrorist attack by offenders known to pose a threat can**

[30] Hansard Vol. 801 3 February 2020 col 1687.

[31] In the case of *Zielinski*, the French legislature introduced legislation designed to affect proceedings in a particular case before the courts. The European Court of Human Rights stated that Article 6 precludes 'any interference by the legislature – other than on compelling grounds of the general interest – with the administration of justice designed to influence the judicial determination of a dispute'.

**be achieved by a simple amendment to the Bill which would not involve the same risk of being found to be incompatible with the Rule of Law's prohibition on retrospective increases in sentences of imprisonment.**

## Recommended amendment to Bill

As explained earlier in this Report, the Rule of Law requires the Government to protect the public from known terrorists. The fact that the Streatham perpetrator was being followed by covert police officers shows the quality and reliability of the intelligence that he remained a serious risk. If the legal system automatically released him halfway through his sentence, despite this risk, it clearly failed.

In our view, the Government's legitimate Rule of Law aim of protecting the public from attack by individuals known to present a threat could be achieved by a simple amendment to the Bill. The amendment would remove the change in the review point for serving offenders, but retain the introduction of the requirement of a Parole Board review.

This would retain most of the government's proposal in the Bill, save that the increase from half to 2/3 is removed in relation to serving offenders, removing the risk of an adverse finding of a breach of the prohibition on retrospectively increasing criminal sentences. Crucially, it retains the duty of the Parole Board to make a determination, in each individual case, whether a person ought to be released, and the Bill therefore achieves the Government's aim of public protection.

**We recommend that the Bill be amended so that the provisions extending the period in custody before an offender is referred to the Parole Board for consideration for release do not apply to serving offenders. We note that this was the approach recently taken in the SI amending the automatic release point from half-way to two-thirds of the sentence for those convicted of a relevant violent or sexual offence and sentenced to a standard determinate sentence of 7 years or more.[32] We see no distinction in principle between the two categories of offender capable of justifying such a radically different approach.**

[32] Release of Prisoners (Alteration of Relevant Proportion of Sentence) Order 2020, Article 5 (making the change prospective only by disapplying the change in relation to any sentence imposed before the date on which the Order comes into force).

# Emergency legislation

## The Bill's timetable

The Government is introducing the Bill as fast-track legislation.

It asserts that the legislation is needed urgently to put appropriate safeguards in place before further terrorist offenders are released from prison.

## The Relevant Rule of Law standards

The quality of democratic law-making procedures is a Rule of Law matter because they determine the extent of the Executive's accountability to the legislature for the content of legislation and therefore whether the supremacy of the legislature over the Executive is ensured in a meaningful sense.

Emergency legislation which is rushed through Parliament with little opportunity for meaningful scrutiny is problematic from a Rule of Law perspective because the more compressed the timetable for legislative scrutiny the closer the legislation is to unaccountable executive law-making. Emergency procedures for making law should only be resorted to in cases of genuine urgency when there is an overriding imperative that the legislation be enacted at the earliest opportunity.

This dimension of the Rule of Law is recognized by the Venice Commission Rule of Law Checklist which states that the process for enacting law ought to be transparent, accountable, inclusive and democratic.[33] The Venice Commission goes on to accept that there may be exceptions in emergency situations, but that there should be parliamentary control and judicial scrutiny of these exceptions.[34]

The House of Lords Constitution Committee carried out a very detailed investigation into fast-track legislation and published its report in 2009.[35] Most of the analysis in this section follows the framework that the Constitution Committee laid out.

Fast-track legislation (the term preferred by the Committee) simply means that a Bill has expedited passage through Parliament – it will travel through all the stages, but will do so quickly. The period between each stage of the Bill will be considerably shortened.

The Committee identified 5 constitutional principles

i. The need to ensure that effective parliamentary scrutiny is maintained in all situations. Can effective scrutiny still be undertaken when the progress of bills is fast-tracked, even to the extent of taking multiple stages in one day?
ii. The need to maintain "good law"—i.e. to ensure that the technical quality of all legislation is maintained and improved. Is there any evidence that the fast-tracking of legislation has led to "bad law"?
iii. The importance of providing interested bodies and affected organisations with the opportunity to influence the legislative process. Is Parliament able to take account of the work of campaigners in its scrutiny work when a bill completes its parliamentary passage so quickly?
iv. The need to ensure that legislation is a proportionate, justified and appropriate response to the matter in hand and that fundamental constitutional rights and principles are not jeopardised.

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[33] Benchmark A5.
[34] Benchmark A6.
[35] House of Lords, Select Committee on the Constitution *Fast-track legislation: Constitutional Implications and Safeguards* (15th Report of Session 2008-09)

v. The need to maintain transparency. To what extent are the transparency of the policy-making process within government and the parliamentary legislative process compromised when bills are fast-tracked?

The Committee identified concerns that fast-track procedures should not be used for something that was predictable or had been flagged at some point, or that it was introduced primarily in response to a public outcry.[36] In particular, it pointed to the risk of rushed legislation being produced in response to a terrorist atrocity.[37]

If a Bill is to be fast-tracked, the Committee made a number of recommendations. The key one is that the Minister responsible for the Bill should make an oral statement to the House of Lords outlining the case for fast-tracking.[38] This Ministerial Statement should address the following principles:[39]

a) Why is fast-tracking necessary?
b) What is the justification for fast-tracking each element of the bill?
c) What efforts have been made to ensure the amount of time made available for parliamentary scrutiny has been maximised?
d) To what extent have interested parties and outside groups been given an opportunity to influence the policy proposal?
e) Does the bill include a sunset clause (as well as any appropriate renewal procedure)? If not, why do the Government judge that their inclusion is not appropriate?
f) Are mechanisms for effective post-legislative scrutiny and review in place? If not, why do the Government judge that their inclusion is not appropriate?
g) Has an assessment been made as to whether existing legislation is sufficient to deal with any or all of the issues in question?
h) Have relevant parliamentary committees been given the opportunity to scrutinise the legislation?

More recently, the Constitution Committee stated:

> We welcome the fact that the Cabinet Office's *Guide to Making Legislation* now requires the justification for fast-tracking to be included in a bill's explanatory notes. We note that the Government has observed it in respect of most recent bills that have been fast-tracked.[40]

## The Government's justification for emergency legislation

The Government offers a single reason for fast-tracking the Bill: the need to put appropriate safeguards in place before further terrorist offenders are released from prison at the end of February.[41] There are said to be prisoners due for release before that date "who fall into this cohort of terrorist offenders who present a particular risk to the public." No more specific details are given of the number of such offenders due to be released, nor of the precise risk they pose to the public.

Parliament will wish to test the Government's assertion by probing the claim that the risk to public safety is so great that it could not be managed for the length of time it would take for a prioritised Bill to complete its passage on a timetable which provides a proper opportunity for meaningful parliamentary scrutiny and debate.

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[36] Paragraph 24 of the Report.
[37] See paragraph 66 and following paragraphs.
[38] Paragraph 185 of the Report.
[39] Paragraph 186 of the Report.
[40] House of Lords, Select Committee on the Constitution *The Legislative Process: The Passage of Bills through Parliament* (24th Report of Session 2017 to 2019).
[41] Explanatory Notes paras 9-18.

The Minister could usefully be asked to address the following points when being asked about the Government's justification for using fast-track legislation:

i. Why is this an emergency now, when it wasn't thought to be sufficiently urgent to warrant emergency legislation following the attack at Fishmongers' Hall?
ii. Why is there a pressing need to introduce this legislation in advance of the comprehensive reform which will be contained in the new counter-terrorism (sentencing and release) Bill which the government is also proposing?
iii. How many terrorist prisoners have been automatically released at the halfway point in their sentence since the original Fishmongers' Hall attack,
iv. Of those, how many have committed terrorist offences between the release point and the release point if they had been released 2/3 of the way through their sentence?
v. How many will be released automatically at the halfway point if this Bill were to follow ordinary legislative procedure rather than a fast-track procedure?

The need for a full opportunity for parliamentary scrutiny and debate is all the more important at a time when none of the relevant parliamentary committees that would normally scrutinise the Bill (the Joint Committee on Human Rights, the Home Affairs Committee, the Justice Committee and the Intelligence Security Committee) have yet been set up in the new Parliament.

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