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The UK Response to Terrorism: Human Rights and a Wider Perspective

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**THE UK RESPONSE TO TERRORISM:
HUMAN RIGHTS AND A WIDER PERSPECTIVE**

Christopher JS Gale¹

ABSTRACT

Human Rights Act 1998 came into force on 2 October 2000 in the UK. The contents of the Act guarantee in statutory form for the first time international norms about the liberty of the individual and a right to a fair trial. The Terrorism Act 2000 was passed at a time when breakthroughs in the peace process in Northern Ireland seemed to indicate a lessening terrorist threat in the UK. The Antiterrorism, Crime and Security Act 2001 was passed in December 2001, partially at least in response to the events of 9-11. Reform of the Act by Prevention of Terrorism Act 2005 as a result of legal challenges have brought this area into public view and discussion as have further changes proposed in the recently (October 2005) published Terrorism Bill. This paper will look at the legislative and judicial response to the world changing events of 9-11 in the UK, how it interacts with Human Rights Act 1998 and apparently fundamental democratic values such as the Rule of Law, while taking into account matters of concern in other jurisdictions worldwide such as constitutionalism.

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INTRODUCTION

Governments around the world have used the terrorist attacks on the United States of 11 September 2001 (9/11) as an opportunity to review anti-terrorism laws and security procedures. As a part of its own immediate response the United States rushed the Patriot Act 2001 through Congress. The United Kingdom followed suit with the Anti-terrorism, Crime and Security Act 2001 (ATCSA), the Prevention of Terrorism Act 2005 (PTA) and now another Terrorism Bill (TB) is presently being debated in Parliament. All have contributed (or will contribute) to a number of far-reaching infringements of civil liberties, possibly of global significance, in ultimately reinforcing the messages of international terrorism.

In an address to the UN Commission on Human Rights in 2002 Kofi Annan, United Nations (UN) Secretary General, clearly identified the duty of states to respond to the terrorist threat. However, he also warned of the danger of the imposition of excessive measures leading to violations of human rights:²

"Terrorism is one of the threats against which States must protect their citizens. They have not only the right, but also the duty to do so... [they] must also take the greatest care to ensure that counter-terrorism does not, any more than sovereignty, become an all embracing concept that is used to cloak, or justify, violations of human rights."³

The United Kingdom is, and remains in, a state of emergency that appears unlikely to end in the near future. In enacting ATCSA the UK has derogated from Article 5 of the European Convention on Human Rights (ECHR). The Act introduced indefinite detention for non-UK nationals suspected of being concerned in terrorism.⁴ Following a series of legal challenges

this has now been modified to a form of 'house arrest' contained in PTA. The right of access to evidence and reasons for detention granted to detainees remains restricted.

Until the decision of the US Supreme Court in *Rasul et al v George W Bush et al*,⁵ detainees at the Guantanamo Bay Naval Base were denied the right of habeas corpus. Similarly, a US citizen captured in Afghanistan and detained in the US was denied his due process guarantees to challenge the legality of his detention until the decision of the Supreme Court in *Hamdi v Donald Rumsfeld*,⁶ In *Hamdi* Justice Scalia, who dissented in *Rasul*, echoed the words of Lord Atkin⁷ in *Liversedge v Anderson*⁸ and seemed timely:

"Many think it is not only inevitable but entirely proper that liberty give way to security in times of national crisis - that, at the extremes of military exigency 'inter arma silent leges'. Whatever the general merits of the view that war silences law or modulates its voice, that view has no place in the interpretation and application of a constitution designed precisely to confront war, and, in a manner that accords with democratic principles, to accommodate it..."⁹

In the same case, Justice O'Connor said:

"...it is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment to the principles for which we fight abroad."¹⁰

Probably the real issues are these: does the UK (or indeed any government if the argument is globalised) have a rational policy for dealing with terrorism and, whether it does or not, do the measures enacted affect human rights adversely and if they or some of them do, is that result intended or accidental?

² His caution was soon repeated by others, not least by Mary Robinson, then UN Commissioner for Human Rights, in her Commonwealth Law Lecture in 2002.

³ United Nations Press Release SG/SM/8518. 21/11/02

⁴ S23 ACTSA

⁵ Case Nos 03-334 and 03-343, 542 US (2004)

⁶ Case No 03-6696. 542 US (2004)

⁷ 'In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace.'

⁸ [1942] AC 206 at page 244

⁹ dissenting opinion of Justice Scalia, p 21

¹⁰ opinion of Justice O'Connor pp10-12

OVERVIEW OF ANTI-TERRORISM LEGISLATION IN THE UK

The experience of the UK in dealing with political violence in Northern Ireland has played an important part in forging the current approach to combating terrorism.

"The UK has some of the most developed and sophisticated anti-terrorist legislation in the world. This is principally because of long standing experience concerning terrorism relating to the affairs of Northern Ireland."¹¹

The focus for the UK has now shifted to the global war against terror, not only as a consequence of the attacks of 9/11, but also of those in Bali, Madrid and London itself, amongst others. The strategies that have emerged in UK law to combat terrorism have been determined by international alliances and obligations.¹²

The UK has a raft of existing criminal legislation under which terrorists could, arguably, be charged without the need for creating specific anti-terrorism measures. For instance, it is often possible to prosecute under the Explosives Substances Act 1883.¹³ Where a terrorist attack results in loss of life, individuals can be charged with murder and/or a conspiracy to commit explosions, depending on the nature of the attack. The perceived need for specific legislation may arguably be nothing more than a knee-jerk reaction to public panic in a manner echoing the introduction of Official Secrets Act 1911¹⁴ and the

Public Order Act 1936.¹⁵ One of the major problems with such legislation is that it often continues beyond its original intended shelf-life. The Criminal Law and Procedure (Ireland) Act 1887, originally introduced to curtail the activities of the Land League in Ireland,¹⁶ prohibited 'unlawful associations.'¹⁷ This continued as 'proscribed organisations' under the Prevention of Terrorism Act (Temporary Provisions) 1974 and in current anti-terrorism legislation.

Modern anti-terrorist legislation probably originates in the Civil Authorities (Special Powers) Act (Northern Ireland) 1922 (SPA) and Regulations. SPA was re-enacted and made permanent in 1933, providing a number of powers. These included stop and search, arrest and detention, unlawful associations and assemblies and promotion of their aims. Most notably, detention without trial was introduced.¹⁸

Internment has been used regularly since the introduction of SPA, but it was not until 1971 that it provided a catalyst for conflict. Internment received widespread criticism, as those interned often had no connection with any proscribed organisation.¹⁹ Consequently, Westminster was forced to introduce limited procedural safeguards "which provided a measure of judicial oversight."²⁰ This was completed by the introduction of the Detention of Terrorist (Northern Ireland) Order 1972 enabling the Secretary of State for Northern Ireland to order the detention, without trial, for 28 days of "a person suspected of having been

¹¹ Counter-terrorism Powers: Reconciling Security and Liberty in an Open Society: a Discussion Paper, Cm.6147 (February 2004)

¹² Terrorism, Human Rights and the Rule of Law: 120 Years of the UK's Legal Response to Terrorism, Brandon.

¹³ The Act was a result of Fenian and anarchist bombing in London in the 1870s.

¹⁴ An Act passed to deal with a supposed influx of German spies in the years before World War I. Any British subject behaving in a way liable to prosecution under the Act could probably have been prosecuted for treason, and any alien could have been prosecuted for a number of pre-existing offences under the ordinary criminal law. Once the 'German threat' had passed, the Act remained substantially in force until 1989.

¹⁵ An Act passed in response to activities of Oswald Moseley and his supporters in the British Union of Fascists. Again, they could have been prosecuted under statutes forbidding criminal damage, violence against the person, or common law offences such as conspiracy as well as the catch all 'breach of the peace'. The statute remained until 1986 when the situation was made even more restrictive by Public Order Act 1986.

¹⁶ Established in 1879 to improve the rights of tenant farmers in Ireland

¹⁷ See s7: "... the Lord Lieutenant in Council, may from time to time, by order to be published in the prescribed manner, prohibit or suppress in any district specified in the order any association named or described in such special proclamation, or any association which appears to the Lord Lieutenant to be a dangerous association...From and after the date of such an order, and ensuring the continuance thereof, every assembly or meeting of such association, or of the members of it as such members in the specified district shall be an unlawful assembly, and the association itself shall be an unlawful association..."

¹⁸ "The civil authority may by order require every person within any area specified in the order to remain within doors between such hours as may be specified in the order, and in such case, if any person within that area is or remains out between such hours without a permit in writing from the civil authority or some person duly authorised by him, he shall be guilty of an offence against these regulations"

¹⁹ Report of the Commission to Consider Legal Procedures to Deal with Terrorist Activities in Northern Ireland, Cmnd.518 (1972). Chairman: Lord Diplock. See p. 15: "it is now recognised by those responsible for collecting and collating this kind of information that when internment was re-introduced in August 1971, the scale of the operation led to the arrest and detention of a number of persons against whom suspicion was founded on inadequate and inaccurate information."

²⁰ *Terrorism, Human Rights and the Rule of Law: 120 Years of the UK's Legal Response to Terrorism*, Brandon, *Crim LR* 2004

concerned in the commission or attempted commission of any act of terrorism, or in the direction, organisation or training of persons for the purpose of terrorism."²¹

In December 1995, Lord Lloyd of Berwick carried out an inquiry

*"to consider the future need for specific counter-terrorism legislation in the United Kingdom if the cessation of terrorism connected with the affairs of Northern Ireland leads to a lasting peace, taking into account the continuing threat from other kinds of terrorism and the United Kingdoms obligations under international law; and to make recommendations."*²²

It was predicted that the threat to mainland UK would recede following the initiation of the peace process in Northern Ireland but, with ominous prescience, that the threat from global terrorism would increase and demanded a response.

TERRORISM AND TERRORISTS

An exploration of the definition of terrorism is useful in understanding the purpose of such attacks. Terrorism is a type of violence that is equally available to governments²³ and subversive groups. For many terrorist groups it is a form of communication. The contemporary non-legal definition conveys the deliberate or reckless killing of civilians, the causing of extensive damage to property, thus communicating a political message of some sort to a third party²⁴. The definition of what constitutes a 'terrorist' is difficult to determine without reference to moral and ethical opinion.

It is important to assert that terrorism refers to a type of violence rather than to a type of person.²⁵

It is a technique that is capable of being used by any individual, and describes their actions. The use of terror is a tactic, and terrorism a description of that tactic. Walter Laqueur states "political terrorism is the weapon of the weak."²⁶ It has, nonetheless, been a dominant form of terrorism for many years. Such terror has not been limited to dictatorships. The carpet bombing of Dresden and the two atomic bombs dropped on Hiroshima and Nagasaki in 1945 were, arguably, acts of political terror. Other examples arguably include the Israeli attacks on the Palestinians on the West Bank and Gaza Strip and the actions of the former administration in Iraq in dealing with Kurdish disquiet. Acts of terror committed by Governments are often more effective than subversive terror because there is generally a better means of achieving the terror goals.²⁷

Gearty states that subversive terrorism is ineffective for three reasons. Firstly, it becomes impossible for the world to see past the brutality of the acts. Secondly, such a massive State reaction is provoked that this results in the destruction or at least the disruption of the terrorist group itself. This has undoubtedly been the case following the attacks of 9/11. Finally terrorism of this kind also destroys its own goals making any peaceful agitation to promote the cause impossible.²⁸

Exponents of subversive terror (still referred to for ease as 'terrorists' despite the above) are no longer viewed as 'ambitious revolutionaries' thriving to make a change, or challenging the power of the ruling elite.²⁹ Rather, the attacks of and subsequent to 9/11 suggest that they are groups who, in their determination to induce a reaction in the civilian population, and hence, the target Government(s), care little for loss of life, even amongst their own members.

²¹ Detention of Terrorists (Northern Ireland) Order 1972, s.4 (SI 1972/1632) (N.I.15)

²² Inquiry into Legislation against Terrorism by the Rt Honourable Lord Lloyd of Berwick, Cm.3420 (1996), p.v.

²³ Robert Mugabe's ZANU-PF has been in power since 1980 and has often used terror to achieve his political ambitions, for example, seizing white-owned farmland in Zimbabwe. For further information see: http://en.wikipedia.org/wiki/Robert_Mugabe

²⁴ This does not necessarily have to be the Government. Although the message is not political, many individuals would class domestic violence and child abuse as terrorism. See Terrorism and Morality by Conor Gearty. European Human Rights Law Review.

²⁵ The idea of the "terrorist" as a type of person rather than a technique of violence grew out of the concept of the "urban guerrilla" which in turn was a kind of revolutionary - mainly based in South America - who sought in the 1960s to bring Castro's and Che Guevara's insights about rural guerrilla subversion to the cities. See

²⁶ W. Laqueur (1987). *The Age of Terrorism*. Boston: Little, Brown and Company.

²⁷ Such as intelligent weapons and money.

²⁸ Prof. C. Gearty. 2003. *Terrorism and Morality* http://www.lse.ac.uk/Depts/human-rights/Documents/20.01.03_CAG.pdf. Accessed 21.05.05

²⁹ Fighters engaged in a restrained military campaign against an undemocratic, racist or those active in genocide type of Government, are still "terrorists", with the Government forces that oppose them being the "counter-terrorists". Mugabe See Note and literature.

The purpose of counter-terrorism is to defeat terrorism, regardless of the means used. Ironically, the acts of war between sovereign nations (the counter-terrorists), and those who seek change for whatever reason (the terrorists) provides an explanation of how government has managed to secure power.³⁰ It is government that bears responsibility for the categorisation of individuals. Those that wear the legitimate uniform of the state are 'counter-terrorists'. Alternatively, those who have no army, no uniform³¹ and no government allegiance, will be identified as indiscriminate murderers for political ends and classified as terrorists.

HUMAN RIGHTS AND TERRORISM

The Terrorism Act 2000 (TA) passed, obviously before 9/11 and as a 'clean up' operation to re-enact the law on terrorism in the light of the reduced Irish threat and along the lines of the thinking of Lord Lloyd's report³² has almost inevitably given rise to breaches of Articles of the ECHR. This does not arise out of a general incompatibility of the Act with Convention Articles, but because the facts of individual cases may produce specific violations. The powers granted by the TA may contravene a number of rights. The powers include:

- exercise of stop and detain and arrest powers³³
- a burden of proof on the defendant in a

criminal case³⁴

- questioning and search powers³⁵
- disclosure of information³⁶
- proscription³⁷

One of the problems is that the law in this area is not precise. This lack of precision militates against due process of law. The cases of *Steel and others v United Kingdom*³⁸ and *Hashman and Harrup v United Kingdom*³⁹ have confirmed that domestic law should be precise and foreseeable. Whilst this is undoubtedly a desirable feature of law generally, it can be argued that because of the nature and characteristics of terrorism, anti-terrorism legislation should be regarded in a special way. Thus, the interference with a right or freedom may be more willingly justified in the case of terrorism.

This issue was considered in the case of *R v DPP, ex parte Kebilene*,⁴⁰ where the House of Lords considered the provisions of the Prevention of Terrorism (Temporary Provisions) Act 1989, which created the offence of possession of articles for the purposes of terrorism.⁴¹

The defendants claimed that the reversal of the burden of proof was a breach of Article 6 ECHR. Lord Cooke suggested that one might 'read down'⁴² s16(a) by reference to the words 'according to law' in Article 6, and that one might

³⁰ Oliver Cromwell.

³¹ Note: Terrorist groups such as the IRA, will often declare themselves to be an 'army' and choose to wear a 'uniform'

³² Supra - footnote 22

³³ ss42-47 potential for breach of Article 5 rights

³⁴ Article 6

³⁵ ss40-43 potential for breach of Article 8 rights

³⁶ s20 potential for breach of Article 10 rights

³⁷ s3 potential for breach of Article 10 and 11 rights

³⁸ (1999) 28 E.H.R.R. 603. At para. 54; "The Court recalls that the expressions "lawful" and "in accordance with a procedure prescribed by law" in Article 5(1) stipulate not only full compliance with the procedural and substantive rules of national law, but also that any deprivation of liberty be consistent with the purpose of Article 5 and not arbitrary. In addition, given the importance of personal liberty, it is essential that the applicable national law meets the standard of "lawfulness" set by the Convention, which requires that all law, whether written or unwritten, be sufficiently precise to allow the citizen - if need be, with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail."

³⁹ (2000) 30 E.H.R.R. 241. At para. 31; "The Court recalls that one of the requirements flowing from the expression "prescribed by law" is foreseeability. A norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct. At the same time, while certainty in the law is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. The level of precision required of domestic legislation - which cannot in any case provide for every eventuality - depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed."

⁴⁰ [1999] 3 W.L.R. 972.

⁴¹ Section 16a of the Prevention of Terrorism (Temporary Provisions) Act 1989. "A person is guilty of an offence if he has any article in his possession in circumstances giving rise to a reasonable suspicion that the article is in his possession for a purpose connected with the commission, preparation or instigation of acts of terrorism to which this section applies".

⁴² [1999] 3 W.L.R. 972.

⁴³ Section 16a of the Prevention of Terrorism (Temporary Provisions) Act 1989. "A person is guilty of an offence if he has any article in his possession in circumstances giving rise to a reasonable suspicion that the article is in his possession for a purpose
42 Reading down in this instance means either reading the section in the Act according to a quality of law which does not put a high burden on the defendant, so that there is no violation of the presumption of innocence; or alternatively reading it

treat terrorism as a special subject, suggesting that it might not be disproportionate to place the burden of proof on the defendant in cases of terrorism.

In *McVeigh and others v United Kingdom*,⁴³ the applicants claimed that there had been violations of Articles 5 and 8 ECHR. The Commission held that the applicants had been detained 'in order to secure the fulfilment of an obligation' within the meaning of the word, 'obligation', in Article 5(1)(b).⁴⁴

In instances involving a potential breach of Convention rights it will be important for the Court to consider whether the power exercised has been lawful and proportionate. The test is whether the interference is necessary in a democratic society and whether it is "proportionate to the legitimate aim pursued."⁴⁵ As Wadham and Mountfield confirm, the fact that a violation of a Convention right occurs as the result of the pursuit of a legitimate aim of social policy, such as the prevention of terrorism, will not in itself provide justification if the means used are regarded as excessive.⁴⁶

Human rights have been under State attack as a result of 9/11. This is more apparent in the United States where debates have concerned the appropriate use of torture issued by judicial warrant.⁴⁷ However, in the UK, despite approval (for the period August 2004 to December 2005) of the use in proceedings of evidence obtained abroad by torture in *A and others v Secretary of State for the Home Department*,⁴⁸ there has been no general attempt to derogate from Article 3 of the Convention, which is, of course, an absolute right. Consequently, as a means of controlling

those facing allegations of involvement in terrorist activity the UK has resorted to indefinite detention without trial.⁴⁹ Although this action is not as physically brutal as torture, it must be highlighted that with regard to individuals detained under ATCSA and, presumably also PTA, the authorities did or do not have sufficient evidence to bring criminal charges against them.

SECTION 1 TERRORISM ACT 2000

The difficulty in defining or accurately describing 'terrorists' or 'terrorism' in lat language as discussed above, translates to statute. Whilst most people would recognise acts they consider to be 'terrorism' a true definition remains elusive. The US State Department defines terrorism as:

*"premeditated, politically motivated violence perpetrated against non-combatant targets by sub national groups or clandestine agents, usually intended to influence an audience."*⁵⁰

In another useful attempt to produce a definition, Paul Pillar, a former deputy chief of the CIA's Counter terrorist Centre, argues that there are four key elements of terrorism:

1. *"It is premeditated-planned in advance, rather than an impulsive act of rage.*
2. *It is political-not criminal, like the violence that groups such as the mafia use to get money, but designed to change the existing political order.*
3. *It is aimed at civilians-not at military targets or combat-ready troops.*
4. *It is carried out by sub national groups-not by the army of a country."*⁵¹

according to a proportionate law, which must take account of present terrorism and the danger to the state, so the section is not disproportionate in the circumstances, and so not in violation of Article 6.

⁴³ (1981) 5 E.H.R.R. 71. The applicants were arrested by police in 1977 when they arrived at Liverpool from Ireland. They were detained for 45 hours for "examination" under the PTA, searched, questioned, photographed, and fingerprinted; but no charges were preferred.

⁴⁴ "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law...(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law."

⁴⁵ *Handyside v UK* (1976) 1 EHRR 737

⁴⁶ J. Wadham & H. Mountfield. (1999). *Blackstone's Guide to the Human Rights Act 1998*. London. Blackstone Press Ltd. p14

⁴⁷ Alan Dershowitz, Professor of Law at Harvard University, has controversially proposed calls for the use of judicially sanctioned torture to force a terrorist suspect to reveal information that would prevent an imminent terrorist attack. For further information see Dershowitz, A. (2002) *Why Terrorism Works*, New Haven and London, Yale University Press.

⁴⁸ [2004] EWCA CIV 1123, [2004] All ER (D) 62 (Aug), (Approved judgment) saw this decision made by the Court of Appeal. It was overturned by the House of Lords on 8 December 2005.

⁴⁹ See later discussion on ATCSA and PTA.

⁵⁰ Section 2656f(d) of Title 22 of the United States Code

⁵¹ Council on Foreign Relations. *Terrorism: Questions and Answers* <http://cfrterrorism.org/terrorism/introduction.html> Accessed 16.05.05

The FBI divides terrorist-related activity into three categories:

1. *"A terrorist incident is a violent act or an act dangerous to human life, in violation of the criminal laws of the United States or of any state, to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives.*
2. *A suspected terrorist incident is a potential act of terrorism in which responsibility for the act cannot be attributed at the time to a known or suspected terrorist group or individual.*
3. *Terrorism prevention is a documented instance in which a violent act by a known or suspected terrorist group or individual with the means and a proven propensity for violence is successfully interdicted through investigative activity.⁵²*

Thus the term 'terrorist' becomes difficult to define without reference to moral and ethical criteria. The UK Parliament has given a very broad definition of 'terrorism' and one that is not subject to territorial restrictions. Consequently, groups supporting struggles against repressive regimes, protestors and even unions on strike may fall within the category.

Whilst the Act does not create a specific offence of terrorism, the wide definition contained within s1 applies to terrorism of any kind, whether national or international, and applies wherever the term is used in the Act in relation to the prevention, detection, and investigation of terrorism, and the interception of terrorist funds and property. S1 of the Act provides:

- (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 to 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.*

(4) *In this section-*

- (a) *"action" includes action outside the United Kingdom,*
- (b) *a reference to any person or to property is a reference to any person, or to property, wherever situated,*
- (c) *a reference to the public includes a reference to the public of a country other than the United Kingdom, and*
- (d) *"the government" means the government of the United Kingdom, of a Part of the United Kingdom or of a country other than the United Kingdom.*

Therefore, in order to establish a case, proof is required of three elements;

1. *any action falling within s1(2)*
2. *an intention to influence government or intimidate, and a political, religious, or ideological cause.*
3. *By virtue of section 1(4) of the Act, any activity may amount to terrorism if committed outside the United Kingdom or may be referable to persons and events outside the United Kingdom.*

It is therefore possible that activity otherwise considered lawful may fall within the ambit of the definition:

"It is important that the definitions in the Bill should not catch actions in connection with industrial disputes, large demonstrations or even politically motivated mass boycotts of major oil companies... to suggest, for instance, that the nurses' dispute could be a terrorist act is wrong. It would not cause a serious risk, nor would it be driven by a political, religious or ideological cause. It would be a trade dispute, which is not a political, religious or ideological cause."⁵³

This has been reinforced by Lord Bassam of Brighton:

"We have also made it clear on many occasions that our definition of terrorism is not intended to catch lawfully organised industrial action in connection with a legitimate trade dispute. It is worth putting

⁵² US Counter-Terrorism Threat and Warning Unit. Counter-Terrorism Division. *Thirty Years of Terrorism: Terrorism in the United States 1999* <http://www.fbi.gov/publications/terror/terror99.pdf> Accessed 16.05.05

⁵³ H.C. Deb. S.C.D., col. 31. Mr Charles Clarke M.P

*that on record. I do not believe it likely that the courts would stretch the definition of a political cause as some have suggested.*⁵⁴

Clause 33 TB proposes alterations to the definition of terrorism, underlining the theory that whatever it may be is a movable feast depending on current Governmental feeling.

POLICE POWERS

The Terrorism Act 2000 has effectively increased police powers in relation to stop and search. Section 44 permits senior police officers to authorise extended stop and search powers within specified areas. The authorisation is only to be granted where the Senior Officer considers it 'expedient' for preventing acts of terrorism.⁵⁵ This extended power entitles police officers in uniform to stop and search persons and vehicles⁵⁶ and remove items that they reasonably suspect may be used for terrorism.⁵⁷ Failure to stop when requested to do so may be punishable under s47 as a criminal offence. There are limits to the use of such powers, and authorisation can only be given for a period of 28 days and is subject to confirmation by the Home Secretary within 48 hours of being made.⁵⁸ There are clearly arguments here relating to the infringement of individual liberty, as demonstrated in *R (on the application of Gillan & Another) v Commissioner of Police for the Metropolis & Another*.⁵⁹ The case challenged the lawfulness of two stop and searches that were carried out.

The facts of the case are as follows: On the 13th August 2003 a section 44 authorisation was made and confirmed by the Home Secretary on the 11th September 2003. On the 9th September 2003, one of the applicants was stopped and searched on his way to an arms fair. The search lasted 20 minutes. The items seized were nothing to do with terrorism. The other applicant, a photographer was also stopped and searched.⁶⁰ The applicants sought a judicial review of the lawfulness of the police action. The Administrative Court dismissed the applications, but granted permission to appeal on the basis that the case

raised important issues in relation to national security and the liberty of individuals.⁶¹

The Court of Appeal considered the issues upon which the grounds were based. These included the interpretation of the Terrorism Act 2000, the decision by the Assistant Commissioner to grant a section 44 authorisation, the Home Secretary's decision to confirm the authorisation, the actions of the Commander on the day, and the actions of officers exercising the powers.

The Court of Appeal adopted a literal approach to interpretation, giving the wording of the Act its ordinary meaning.⁶² The Court noted that the power was wide but subject to a number of safeguards, including the need to obtain authorisation that, in turn, also needed to be confirmed by the Home Secretary. In addition limits to the authorisation exist. Due to the scale of the threat of terrorist activity at the time the Court determined the decisions to grant and confirm the authorisation were lawful. The Commander needed to ensure that officers were given proper instruction on the use and exercise of the powers, and the Court advised the police to 'review very carefully' the exercise of the powers.

The case has raised cause for concern because of the wide coercive powers of stop and search. The Court of Appeal stated that the power was "not to be used arbitrarily or capriciously" , and that the police were obliged to take extra care not to infringe the rights of the individual.

The authorisations and confirmations are subject to judicial review. However, the Court is limited to considering the proportionality issue. Lord Woolf stated that:

"The disadvantage of the intrusion and restraint imposed on even a large number of individuals by being stopped and searched cannot possibly match the advantage that accrues from the possibility of a terrorist attack being foiled or deterred by the use of the power."

⁵⁴ H.L. Deb. Vol. 614, col. 1449.

⁵⁵ Section 44(3) TA 2000

⁵⁶ Section 45(1)(a)

⁵⁷ Section 45(3)

⁵⁸ Section 46(4)

⁵⁹ [2004] EWCA Civ 1067

⁶⁰ Blunkett queries arms fair arrests: Liberty goes to court over use of anti-terror legislation *Rebecca Allison*. The Guardian. Manchester (UK): Sep 11, 2003. p. 9

⁶¹ [2003] EWHC 2545

⁶² 'expedient' meant advantageous

However, the existence of safeguards within the legislation does not provide failsafe protection of individual freedoms. The authorisations and confirmations can be renewed *ad infinitum* effectively undermining their efficacy. It is also arguable that the potential interpretation of 'articles of a kind which could be used in connection with terrorism' is wide and of limited effect as a safeguard. However, even though the Court of Appeal criticised the use of these powers in respect of the first applicant who had no such articles in his possession it was nonetheless satisfied that the powers were compatible with the European Convention on Human Rights, and that Article 5 had not been breached.

The case illustrates the difficulty the courts face. There is clearly a need for some discretionary power when dealing with suspected terrorists. The problem lies in their extent and controls over their use. The courts have a constitutional role as a check on the Executive but the area of national security has been one in which they have traditionally been fearful of treading.

The use of the stop and search powers may be necessary, but there may be a danger of a 'rolling programme', in the sense that such 'special' powers may become the norm.⁶³ This may eventually extend to other areas of the criminal justice system and lead to authoritarian policing subject to fewer challenges.

The ability to undertake action designed to influence government is the guarantee of a democratic society. However, it appears that any action that seeks to influence government, but involves no threat, violence or intimidation against the public has the potential to fall within the definition of terrorism.⁶⁴

DIRECT RESPONSE TO 9/11 IN THE UK

The UK government responded to the terrorist attacks of 9/11 by declaring a state of emergency and, by 14 December 2001, enacting the Anti-Terrorism, Crime and Security Act 2001 (ATCSA).

The provisions of Part IV of the Act, which permitted unlimited detention of non-nationals suspected of terrorism, without charge, where it is not possible to deport them⁶⁵ forced a derogation from Convention rights less than two years after they had been given direct applicability in UK law by the Human Rights Act 1998.⁶⁶

As Fenwick confirms⁶⁷ the Government was only able to declare the Act compatible with Convention rights under s19 HRA⁶⁸ by entering a derogation to Article 5(1) as provided for under s14(1) of the HRA. The result even at that stage was arguably the most draconian anti-terrorist legislation of any advanced nation. The legislation was introduced hurriedly as a knee-jerk response to outraged public opinion. As a result, the Bill largely by-passed usually stringent Parliamentary scrutiny procedures. This is by no means a new phenomenon. The Official Secrets Act 1911 was forced through Parliament in a single day in response to a spy scare. The wide-ranging s2⁶⁹ prohibited disclosure of any official information, however trivial, and remained in force for 78 years. The Public Order Act 1936, aimed at controlling the activities of the Fascist movement in the UK, gave the Home secretary the power to ban marches in the London area and to give authority to Chief Constables to do so elsewhere and was used in a way that far exceeded its original purpose. The Prevention of Terrorism Bill was enacted in only four days as a direct response to the Birmingham pub bombings of 1974. The problem with legislation introduced in this way is that it often, as detailed above, remains in force long beyond the existence of the 'emergency' it was enacted to deal with and often has implications that are far more wide ranging than the original intention.

THE ANTI-TERRORISM CRIME AND SECURITY ACT 2001

The object of ATCSA was to ensure the Government had adequate powers to counter the perceived increased threat of terrorism. Given the extent of existing criminal law, including the

⁶³ see I. Sim and P.A. Thomas, *The Prevention of Terrorism Act: Normalising the Politics of Repression* (1983) 10 *Journal of Law and Society* 71).

⁶⁴ Such would be the case with fox-hunting. For further information, refer to section 1 of the Terrorism Act 2000.

⁶⁵ S22(1)

⁶⁶ Which came into force on 2 October 2000

⁶⁷ H Fenwick, *The Anti Terrorism, Crime and Security Act 2001: A proportionate response to 11 September?* *MLR* September 2002. Vol 65 (5) p724 at 727

⁶⁸ s19(1) provides that a minister of the Crown (in either House) must, prior to the second reading of the Bill, make a statement either (a) to the effect that the provisions of the Bill are compatible with Convention rights or (b) make a statement to the effect that he is unable to make a statement of compatibility but that the government nonetheless wishes to continue with the Bill

⁶⁹ s2 received no Parliamentary consideration whatsoever

Terrorism Act 2000 enacted only a little over a year earlier, it is more than possible that the Government was simply pandering to popular opinion and needed to be seen to respond. In doing so, it may have been tempted to ask Parliament (and receive!) powers it would never have dared to do in a more ordered Act passed at a more reflective speed.

ATCSA contained a number of wide ranging provisions including:

- measures against terrorist funds⁷⁰
- provisions for the disclosure of information by public authorities for the purpose of facilitating the work of the intelligence services⁷¹
- power for the Home Secretary to certify a non-UK national as a 'suspected international terrorist' and to order his removal from the UK, or if this is prevented, his detention indefinitely without charge if the Home Secretary reasonably believes his presence is a threat to national security⁷²
- provisions extending police powers, including the taking and indefinite retention of fingerprint records for the purposes of terrorist investigation and the removal of items believed to be worn for concealing identity⁷³
- re-introduction of the offence of general failure to disclose information about terrorism⁷⁴
- measures for the implementation of the third pillar of the European Union so that the EU wide anti-terrorist measures on policing, extradition and sentencing can be given effect if necessary.⁷⁵

The effect of this last measure is being strengthened by the new criminal co-operation agreements between the EU and the US. Since 9/11, the Europol-US negotiations on mutual legal assistance and extradition conventions have progressed and closer co-operation between Eurojust, a co-ordination body composed of magistrates, prosecutors and police authorities and relevant US authorities is being progressed.

Extensive EU co-operation is based on the principle of mutual recognition, which in turn rests on the presumption of equivalent systems of criminal justice by virtue of the fact that all EU member states have ratified the ECHR. The USA however does not seem to have comparable protection and has not ratified the equivalent Inter-American Convention on Human Rights.

By the time the Bill was enacted on 14 December 2001, despite it being just one month after its publication, it had suffered a total of 12 report stage defeats some of its most was commented in *The Independent* commented that it "was improved by the compromises agreed at the last minute, but it remains a deeply offensive, illiberal and unnecessary set of measures".⁷⁶

Compromises (not withdrawals) introduced included a right of appeal to the Special Immigration Appeals Commission (SIAC)⁷⁷ and an amendment to s1 of the Special Immigration Appeals Commission Act 1997 to enable challenges to orders of the Home Secretary against non UK nationals suspected of being 'international terrorists', with a right of appeal to the Court of Appeal on a point of law.

Although supportive of some measures including those relating to terrorist funds, human rights bodies were vociferous in condemning controversial issues on the grounds that many of the measures in the Act were not 'necessary', were unlikely to avert or deter terrorists and were liable to be counter-productive. It has to be asked why the UK, alone amongst signatories to the ECHR and soon after the passing of the Human Rights Act, felt it necessary to derogate one of the basic provisions of the ECHR in order to fight terrorism. The issue seems to be that there was no way of testing whether the actions of the relevant authorities were proportionate having regard to the secrecy surrounding them. Gareth Pierce, a prominent human rights lawyer, commented on the inability of the police and intelligence services to understand the distinction between resistance to oppression and support for terrorism, which recalls a similar comment on the debates in the

⁷⁰ Part 1 s1-3 and Part 2 s4-8

⁷¹ Part 3 s17-20

⁷² Part 4 s21-32

⁷³ Part 10 s89-95

⁷⁴ Part 13 s117

⁷⁵ Part 13 s111 & 112

⁷⁶ *The Independent*, 15 December 2001

⁷⁷ under s30(2) of the Act

House of Lords on the attitude which would have been adopted towards those who fought against apartheid, the so-called *Nelson Mandela Point*.

In support of the legislation, the UK government cited the recognised threat to international peace and security proclaimed in *UN Resolutions 1368 and 1373* and the requirement in *Resolution 1373* that all States 'take action', including denying refuge to those who finance, plan, support or commit terrorist acts. They said there existed a state of emergency threatening the nation by virtue of

"foreign nationals present in the UK who are suspected of being concerned in the commission, preparation or instigation of acts of international terrorism...and who are a threat to its national security"

The ECHR has allowed a wide margin of appreciation on this issue:

*"[It] will give appropriate weight to such relevant factors as the nature of the rights affected by the derogation, the circumstances leading to, and the duration of the emergency situation."*⁷⁸

THE 2004 POSITION

Following the introduction of ATCSA, 14 foreign nationals were arrested. Two chose to leave the UK and the remaining 12 were detained at Belmarsh and Woodhill high security prisons and one at Broadmoor Hospital under the provisions of the Act. They immediately began an appeals process before SIAC.

It is important, at this stage, to understand the criteria under which SIAC was initially established and under which it continues to function. SIAC was established as the UK's response to the adverse ruling of the European Court of Human Rights (ECHR) in *Chahal v United Kingdom*.⁷⁹ The case related to C, an Indian national who had been granted indefinite leave to remain in the UK, having entered illegally in 1974. He returned on a visit to the Punjab in 1984, where, following his involvement in the organisation of passive resistance in support of a Sikh homeland, he was detained and tortured by the authorities. In 1990

he was ordered to be deported from the UK in the interests of national security and the prevention of terrorism. He was held in custody from where he applied for political asylum. This was refused and due to the involvement of issues of national security he was denied a right of appeal. However, in 1991, an advisory panel was appointed to examine the case, though C was allowed no access to representation, or to any of the evidence against him. His application for judicial review was refused as in the absence of any evidence of the risk posed to national security the court would be unable to assess whether the Secretary of State's decision was irrational or not. An application was made to the ECtHR who decided, in line with the previous decision in *Soering v UK*⁸⁰ that:

1. Any attempt to deport C would amount to a breach of Article 3.
2. The refusal to allow C access to domestic appeals procedures amounted to a breach of Article 5(4) on the basis that it must be possible to find a way of allowing access to the court system without compromising national security.
3. That C's rights under Article 13 had also been breached

The response of the UK in respect of the breach of Article 5 rights was to enact the Special Immigration Appeals Commission Act 1997 to provide appellants in similar circumstances with access to security-vetted lawyers, known as 'Special Advocates' operating outside of their own legal team⁸¹. The Special Advocates have access to secure information and in this way are supposedly able to test the evidence on behalf of the appellant. However, even though they are acting to safeguard the appellant's interests and ensure that Article 5 rights are not breached they are unable to discuss the evidence with the appellant or his defence team. Indeed, once they have seen the evidence they are allowed no further direct contact with the appellant or his lawyers. It is questionable as to whether this meets the obligations imposed under Article 5(4) ECHR.

The 12 Belmarsh detainees held under the provisions ATCSA appealed to SIAC in accordance with s2 of the Act.⁸² However their appeals

⁷⁸ *Brannigan and McBride v UK* (1994) 17 E.H.R.R. 539

⁷⁹ (1997) 23 E.H.R.R. 413

⁸⁰ [1989] 11 E.H.R.R. 439

⁸¹ s6

⁸² *A v Secretary of State for the Home Department*, [2002] H.R.L.R. 45; [2002] A.C.D. 98 (Sp Imm App. Comm)

against their certification by the Secretary of State for the Home Department as 'suspected international terrorists and security risks' were rejected. The appeals took place in both open and closed session and, according to Amnesty,⁸³ fell far short of international fair trial standards on a number of counts, not least on the reliance on secret evidence alleged to have been adduced by torture. As one detainee commented:

This sort of court reminds me exactly what my country did with the detainees in Libya - exactly the same - I believe I'm an innocent man and I did nothing against this country" (Released suspect "M")⁸⁴

The detainees appealed to the Court of Appeal⁸⁵ on four grounds:

1. SIAC had not sufficiently scrutinised the Secretary of State's case
2. that there had been too wide an interpretation of the scope of the derogation from Article 5
3. that evidence obtained from a third party in breach of Article 3 should have been regarded as inadmissible
4. that jurisdiction in respect of deported applicants should not have been declined

The appeal was rejected in respect of points 1 and 2, but it was determined that the Commission should have accepted jurisdiction in respect of the deported appellants and that no fair trial could result where evidence had been obtained against the party bringing the appeal by means of torture.

The appellants were given leave to appeal to the House of Lords on three grounds:

1. that no 'public emergency threatening the life of the nation' within the meaning of Article 15 existed and that as such the test for reliance had not been satisfied
2. that the detentions were disproportionate to the objective which could be achieved by less draconian measures
3. that s23 was discriminatory in allowing for the detention of foreign nationals suspected of terrorism but not allowing for the detention UK nationals similarly suspected.

It was held that the Government was entitled to conclude that a state of emergency existed (Lord Hoffman dissented on this point). It was further held that the detentions were disproportionate as they failed to address rationally the threat to security posed by foreign nationals because they did not address the threat posed by UK nationals and that they permitted foreign nationals to continue their activities abroad. In addition it was held that if the threat to UK national security posed by UK nationals could be addressed without infringements to personal liberty then it should be possible to do so with regard to the threat posed by foreign nationals. Therefore the measures were not 'strictly required' by the exigencies of the situation within Article 15. Article 14 was also breached. Any decision to retain one group of individuals based on nationality or immigration alone is clearly discriminatory. The House firmly declared under s4 of the HRA that s23 of ATCSA was incompatible with Articles 5 and 14 of Sch.1 Part 1 of that Act.

THE IMPACT OF THE HOUSE OF LORDS' DECISION

Whilst, prima facie, the decision of the Lords' in *A v SoS* for the Home Department is a clear demonstration of the willingness of the judiciary to exercise the powers allocated to them under the HRA and to make declarations of incompatibility⁸⁶ where justice demands that they do so, the response of the UK government has been disappointing. The Home Secretary, Charles Clarke, issued a response to the ruling on the 26th January 2005. Whilst the statement accepted declaration of incompatibility and also that any new legislative measures must apply equally to nationals as well as non-nationals, the steps taken to rectify the situation are the minimum necessary to ensure equality and to avoid the need for high-security detention in such circumstances.

Control orders (see below) replaced Part IV orders allowing the indefinite detention of foreign nationals certified as terrorism suspects on 13 March 2005. Parliament passed the legislation after a marathon day-and-night sitting, during which the House of Lords sent the bill back to the House of Commons four times. The new controls orders, now enacted as the Prevention of Terrorism Act 2005, apply equally to nationals and non-

⁸³ <http://web.amnesty.org/library/index/ENGEUR450292003> Accessed 23.05.05

⁸⁴ <http://news.bbc.co.uk/1/hi/uk/3652141.stm> Accessed 23.05.00

⁸⁵ *A (and others) v Secretary of State for the Home Department* [2004] EWCA Civ 1123

⁸⁶ s4

nationals and to all forms of terrorism, both national and international. The control orders enable the authorities to impose conditions ranging from prohibitions on access to specific items or services, and restrictions on association with named individuals, to the imposition of restrictions on movement or curfews. Control orders are made for a period of 12 months and appear to be infinitely renewable⁸⁷. Any breach of a control order will be subject to punishment by the criminal law.

THE 2005 LEGISLATION

Whereas the ATCSA had allowed the indefinite imprisonment of foreign terror suspects without trial, the PTA introduced as mentioned above, 'control orders'. Any change that followed such a ruling from the Law Lords as that in *A v SoS for the Home Department* surely should have represented a renewed government commitment to human rights from the very administration responsible for the enactment of the Human Rights Act less than seven years earlier.

Unfortunately, that seemed to be far from the case. In June 2005, both the Council of Europe's Committee for the Prevention of Torture and the Commissioner for Human Rights, Alvaro Gil-Robles, criticised the UK's treatment of terrorist suspects as violating basic rights. Those reports joined sustained criticism mounted by organisations including Amnesty International and Liberty, and disquiet amongst peers and MPs, Conservatives, Liberal Democrats and Labour backbenchers alike.

Under a control order, suspects can have indefinite restrictions placed upon their movements, from tagging to effective house arrest, as well as upon their associations and work. They can be prohibited from using communications services, or be forced to surrender their passports⁸⁸. Failure to adhere to such restrictions can result in a fine or imprisonment. The possible implications are wide-ranging, with many clearly violating domestic and international human rights legislation. Indeed, such orders are acknowledged to breach Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, being specifically denoted as 'derogating control orders'.

The initial PTB raised serious concerns, as it gave the executive what many considered unprecedented and improper power and restricted the right to be brought before a judge or other officer authorised by law to exercise judicial power. It was proposed that politicians, rather than judges, would impose control orders. This was condemned by some as the greatest threat mounted against civil freedoms in the UK in over 300 years and a death knell to the principle of the separation of powers. The government eventually capitulated over this matter, and the PTA states that judges should have the last word on the imposition of control orders⁸⁹. Despite this concession, however, it can be maintained that the real travesty of justice remains. The reality for a suspect who suffers violations of his or her basic rights is unchanged.

Furthermore, even the principle of upholding proper judicial authority remains ill-served. Mr Gil-Robles asserts that in practice, the issuing of control orders involves only weak judicial involvement, not comparable to that exercised in criminal proceedings. Since a suspect's response is not considered in a judge's assessment of the veracity or relevance of evidence, for Mr Gil-Robles the review procedure is 'inherently one-sided'.

This one-sidedness arises from the fact that suspects are deprived of the right to be given prompt and detailed information regarding accusations, and consequently the right to mount a defence and seek self-chosen legal assistance, if desired. Three main reasons are offered for withholding evidence from public scrutiny, consequently delaying charge and trial of the suspect. Firstly, certain methods of procurement, such as bugging, currently render evidence inadmissible in court. Secondly, the revelation of some intelligence may compromise national security. Lastly, evidence is often of an insufficient quality to uphold criminal conviction. Furthermore, UK authorities are not obliged to disclose to judges evidence which may exculpate the suspect, nor whether evidence has been obtained under torture or similarly unlawful circumstances, if no UK agent is directly implicated.

On top of this bias against suspects, such practices not being sanctioned in criminal trial proceedings, a judge need only have 'reasonable suspicion'⁹⁰ that someone is involved in terrorism

⁸⁷ Prevention of Terrorism Act 2005 s2(4)(a) & (b)

⁸⁸ S1 PTA

⁸⁹ Ss 3 and 4 PTA

⁹⁰ S4 PTA

for a control order to be imposed. As such, not only is the integrity of judges' decisions being undermined, but suspects lose the right, otherwise accorded by the criminal justice system, to be presumed innocent until guilt is proven 'beyond reasonable doubt'. As far as the right to have criminal charges brought by an independent and impartial tribunal is upheld, Mr Gil-Robles concludes that 'the review proceedings described can only be considered fair, independent and impartial with some difficulty'.

These legal arguments may appear abstract but are fundamentally important. What must not be obscured is what human rights legislation essentially seeks to protect: the well-being of individuals. In January 2005, the Royal College of Psychiatrists stated that 'indeterminate detention, lack of normal due legal process and the resultant sense of powerlessness, are likely to cause significant deterioration in detainees' mental health'. These claims are substantiated by a visit to Belmarsh prison by the Council of Europe's Committee for the Prevention of Torture that found prisoners held under the ATCSA to be in a physical and mental state so poor as to reflect 'inhuman and degrading treatment'. Simply deinstitutionalising this detention, by moving detainees from prisons to their homes, will do little to alleviate any psychological strain.

Ultimately, this all amounts to the inescapable fact that under the PTA, individuals can be stripped of many rights concerning their liberty, the receipt of a fair trial and equality before the law, and in the damning words of Mr Gil-Robles, 'control orders are intended to substitute the ordinary criminal justice system with a parallel system run by the executive'.

The UK authorities point to the continued existence of a 'public emergency threatening the life of the nation' making such measures necessary. However, great the threat of terrorism may be, it remains and cannot simply be legislated away. Ostensibly an attempt to do so, the PTA is described by Professor Paul Wilkinson, chairman of the Centre for the Study of Terrorism and Political Violence at St Andrew's University, as 'dangerously counter-productive ... draconian ... a recruiting sergeant for terrorist organisations'.

Cherie Booth QC warned that 'it is all too easy for us to respond to ... terror in a way which undermines our commitment to our most deeply held values and convictions and which cheapens our right to call ourselves a civilised nation'. There

lies the contradiction at the heart of this whole matter. Whilst Tony Blair vows his refusal to 'give an inch to terrorism', which robs innocent victims of their most fundamental right to life, the government is establishing law which, in surrendering other basic rights of its citizens, gives far more than an inch.

Dick Oosting of Amnesty International maintains: 'Respect for human rights is often portrayed as hampering efforts to defeat terrorism but ... genuine security is undermined if basic human rights and the rule of law are not respected'. Such an apparently scant regard for human rights as demonstrated by this government cannot be tolerated.

There is hope yet that the trend for hurried anti-terrorist legislation will eventually be reversed. Indeed, Mark Oaten, Liberal Democrats home affairs spokesman, believes that Mr Gil-Robles' report signalled 'the beginning of the end' for control orders. The new TB has been brought forward in response to the London bombings on 7th July and attempted bombings a fortnight after, but more controversial aspects, including control orders, are to be left until January 2006 for further consideration. Although, with Mr Blair suggesting that human rights legislation may be amended in order to facilitate his fight against terrorism in the UK, is there more cause for fear that, in the wake of the atrocities in New York on 11th September 2001, human rights are increasingly becoming a mere, easily breached inconvenience for politicians?

Cl 23 of TB contains the recently debated provisions about extending the period of detention for terrorist suspects, without need for charge or trial, to three months. This resulted in a Government defeat in the House of Commons but it still seems keen to try to force the measure through, citing 'police requirements' as the main requirement for this draconian provision. The original detention period in s 41 TA was seven days and was increased to fourteen days by s 306 (4) Criminal Justice Act 2003. The TB's Parts and Schedules are as follows:

Part 1 (Offences) provides for new offences, amendments to existing offences, and makes incidental provisions about terrorism offences. Part 1 creates offences relating to the encouragement of acts of terrorism, and to the dissemination of terrorist publications. Part 1 makes specific provision about how these two new offences are to apply to those providing and

using the internet and other electronic services. It also creates offences relating to the preparation of terrorist acts and terrorist training; the making, possession or use of radioactive devices and materials; the making of terrorist threats relating to radioactive devices, materials, or nuclear facilities; and trespass on nuclear sites. The Bill increases penalties for possession for terrorist purposes; offences relating to nuclear material; and offences relating to the contravention of a notice relating to encrypted information. Part 1 also sets out new procedures to be followed in the preparation of terrorist cases for trial. Schedule 1 sets out a list of "Convention offences" that are referred to in Part 1. These represent the parallel offences in UK law to those offences mentioned in the Council of Europe Convention on the Prevention of Terrorism.

Part 2 (Miscellaneous provisions) includes an amendment to the grounds on which the Secretary of State is empowered to proscribe organisations, a process through which a proscribed organisation may be identified by another name, and amendments to police and investigatory powers. These changes affect:

- Powers to detain terrorist suspects under the TA, and the grounds on which such detention may be authorised
- Powers to search premises, and seize material under Schedule 5 to the TA
- Powers to seize, and seek forfeiture of, terrorist publications
- Powers to search at ports under Schedule 7 TA, and to issue authorisations to stop and search under Section 44 TA
- Powers to issue authorisations or warrants to carry out acts under the Intelligence Services Act 1994
- Powers to issue, and amend the schedules of intercept warrants
- Powers to seek disclosure notices under the Serious Organised Crime and Police Act 2005
- The definition of terrorism, as set out in the TA
- The process under which terrorist cash-seizure hearings are heard under the TA

Schedule 2 sets out the method by which forfeiture proceedings should be carried out, following a seizure of terrorist publications.

Part 3 (Supplemental provisions) provides for the oversight of the operation of Part 1 of the Bill

and the TACT through an independent annual review to Parliament. It also contains a specific provision which provides that clause 23 (extension of period of detention of terrorist suspects) will expire one year after its commencement unless continued in force by an order made by the Secretary of State. Finally, it includes a number of consequential amendments and repeals.

CONCLUSION

It seems that, again and again, legislation is enacted hastily in response to a new and urgent situation. Whilst in many circumstances this would be laudable there seems to have been little questioning of the principles underpinning this issue; Why for instance has the fundamental matter of charging terrorists with specific offences not been addressed? Clearly there is an issue that, because of their secretive and covert nature, allegations of involvement in terrorism are difficult to investigate, but to subject individuals to such indeterminate restraints of liberty, albeit the least worst option, seems to fly in the face of due process and continue to militate against those basic rights set out in a multitude of International Charters on Human Rights. There is always a balancing act to be performed, the rights of citizens to live in peace and security set against the rights of individuals who may seek to threaten this. However, our criminal justice systems are founded on a presumption of innocence and we should be exploring ways in which that presumption can be preserved, investigations expedited and individuals charged or released. The suggestion that somehow TB is better thought through as it is not being enacted in such haste is something about which we wait to see.

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