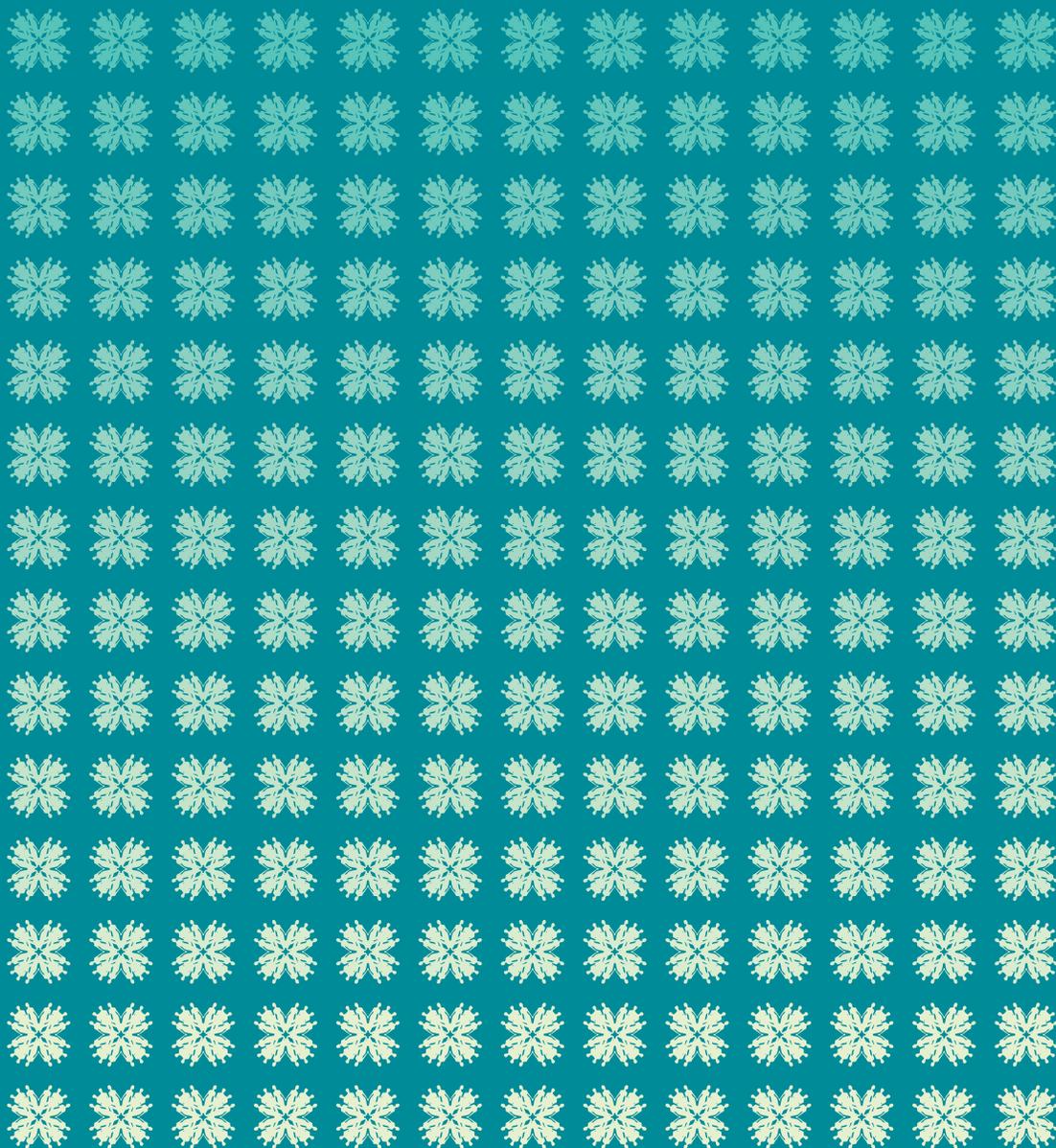


Human rights, civil society and the challenge of terrorism

A Centre for the Study of Human Rights
report by Conor Gearty



‘The drawback of a closed seminar is that often remarkable contributions to contemporary thinking never get beyond the four walls of the room. This write-up, while respecting contributors’ anonymity, records an important discussion among knowledgeable contributors on a topic of central importance to our society.’

Lord Justice Stephen Sedley

Centre for the Study of
Human Rights



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POLITICAL SCIENCE ■



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Human rights, civil society and the challenge of terrorism

A report by the Centre for the Study of Human Rights, LSE

Introduction

Between March 2005 and June 2007 the LSE Centre for the Study of Human Rights brought together leading figures from academe, government and civil service, law and the judiciary, media and civil society in a series of six seminars. In October 2007 the Centre invited many of these contributors to participate in a full day conference. This report is a reflection on those proceedings and a comment on the inter-relationship between terrorism law and human rights.

The aim of the seminar series was to consider the proper role, if any, of non-governmental personnel in the handling of national security issues within the state. The objective was to develop a dialogue between government and non-governmental actors on the management of issues related to national security. Our purpose was to facilitate the forging of an approach to the subject which achieves the right balance between officials and others on the one hand, and between principles (relating to security and to democratic and legal accountability for example) on the other.

With the exception of the final seminar, each focused on the relationship with government of one of the particular professional communities. Participants at each of the seminars were sent a background reading and a briefing to provide shape and direction for the discussion. The discussion was then summed up by a designated rapporteur.

The sixth and final seminar was dedicated to discussion of the place of the Human Rights Act 1998. This was in recognition of the role the HRA had begun to play in relation to the creation and assessment of new terrorism laws.

The success of this format in this context prompted us to devise a further event devoted to structured thinking and highly-focused discussion on the challenge posed to human rights by terrorism and by counter-terrorism law. 'Human rights and counter-terrorism: re-framing the debate' was a full day conference held on 5 October 2007. The participants were in many cases the same people involved in the seminar series – senior politicians, members of the judiciary and civil service, leading campaigners and lobbyists, journalists, commentators, academic and legal specialists. The idea behind the conference, as it had been behind the seminar series, was to break through the divides that lie between the various actors engaged in the field of terrorism and human rights and thereby fruitfully to address the issues of concern to each in a frank and confidential environment.

The Centre for the Study of Human Rights would like to thank all those who took part in the seminar series and conference, and our funding partners, the New Security Challenges Programme of the Economic and Social Research Council.

Human rights, civil society and the challenge of terrorism

Conor Gearty

The international context: a new precariousness

The role of human rights as the ethical lynchpin of international affairs has been undisputed for generations. Placed on its throne above politics by the Universal Declaration of Human Rights in 1948, we have all long become familiar with the idea that states need to be seen to be accommodating themselves to the imperatives of international human rights law. This global development has been mirrored at the regional and local levels, with conventions on human rights and national constitutions protecting human or civil rights embedding themselves across nations. It is true that the priorities within this multi-faceted framework of human rights have been disputed and that the departures from it have been many and frequent, but neither of these facts has caused the idea to be deprived of its privileged status. The challenges have been covert not overt, the manoeuvring around human rights evidence not of its redundancy but of its supremacy: rights have long been so much a given that they have been something to be evaded rather than simply rejected.

Things have now begun to change. An old foe has re-emerged from the age of Westphalia, to dispute not just the application but also the prescriptive power of human rights law. Paradoxically, the end of the Cold War led to a flight from rather than the rush to the global civil society that so many had predicted. National entities that had long been stifled by imperial power recovered their identities from the distant past and declined immediately to trade them in. In the jig-saw of newly independent states that jostled for space on the maps of Europe, Asia and Africa in the 1990s, the question of national security stopped being a foreigner's intrusion or an idealist's fantasy and became once again a real issue, demanding an answer: What could be done to

secure borders from external aggression? How could a state be protected from the enemy, both within and without? In the demands of a rehabilitated concept of national security, indigenous leaders found a tempting tool for the justification of conduct that would otherwise have fallen foul of the entrenched global imperatives of human rights. It was during this decade of apparent supremacy in the immediate aftermath of 1989 that the seeds for an assault on human rights were being quietly scattered about various national soils.

In the second year of the new Millennium, the elevation to the American presidency of George W Bush and the attacks by Al-Qaida on targets in the United States on 11 September 2001 became the two facts that were to give the insipient emergence of this new national security discourse a new lease of life. Already unsympathetic to international human rights law and to global human rights institutions, and indeed to the whole concept of the United Nations, the new Washington administration led the way in prioritising national security in its international, regional and national policy-making. Afghanistan was attacked with a view to the overthrow of the government there on the basis of its sympathetic hosting of the Al-Qaida organisation within its territory. The regime of Saddam Hussein was brought down, not least because of the dangers it was said to present to US security. Neither action was channelled through the usual rules of global military engagement. Instead a new framework of right conduct, rooted in security and national interest, was being hewn out of the fact of action. The place of human rights was explicitly denied: the camp at Guantanamo might have been designed as a large-scale exercise in the communication of this fact. At home, the presidency took on the characteristics of a war administration and sought on this basis to rely on war precedents to justify the inapplicability of constitutional requirements to its 'counter-terror'-related activities. Not only was international human rights law set to one side, but so also were the basic rights to be found in the US bill of rights, with both being jettisoned not as an exercise in secret lawlessness but rather as the inevitable result of a grand theory about executive power.

Where the most powerful nation has gone, many states have since followed. The role of the United States in the era of international human rights has been controversial, certainly, but it has also always been pivotal, the hinge of commitment on which the whole edifice has hung. Departing the field in this abrupt way, the US opened up – for the first time since 1948 – the whole question of the credibility of international human rights. In the years that have followed, national security has, in growing numbers of places, increasingly trumped the considerations of human dignity, legality and democracy that are the bywords of the human rights mission. The first concern is often now centred on security, with human rights fitting in the conversation only insofar as they can be seen not to detract from this prior focus. Powerful nations that have accepted human rights on sufferance see an opportunity to make their hostility explicit without fear of effective contradiction. Self-interested rulers whose weakness does not allow them to put their own interest above that of their peoples package their insipient authoritarianism as ‘necessary counter-terrorism’. While it may be to state the matter rather too baldly, with it being certainly too early to assume the demise of the human rights paradigm in its current shape, what is clear is that the present movement in international affairs is towards the taking on of this new form, one rooted in the national certainties of the past rather than the global ideals of a fast receding future. The primacy of human rights will not be evident in a framework constructed in this way; the idea will survive but in a reduced or distorted form. Can this momentum be stalled or reversed?

‘Powerful nations that have accepted human rights on sufferance see an opportunity to make their hostility explicit without fear of effective contradiction’

Managing change

On the side of the old order is the politico-legal industry of human rights: the organisations, courts, committees and functionaries whose *raison d’être* lies in the continuing prominence of the idea which employs them. The United Nations is reaching towards an accommodation between its charter commitment to human rights and the threat from terrorism that is now thought to be so grave. Various regional bodies, such as for example the Council of Europe and the European Union, are

wrestling with the challenge of preserving fundamental freedoms in light of the drift away even from such basics as the taboo against torture and the prohibition on indefinite detention without charge. Caught up in similar dilemmas as well are the nation states of the established democracies. These are places with a history of foundational political violence deep in their past, but also with a commitment to the values of dignity, democracy and legality that go back much further than the post war settlement epitomised in the Universal Declaration. There is an ongoing battle even in the United States itself between those who share the 'War on Terror' vision of the White House and others (including a significant number of supreme court justices) for whom the attacks of 11 September do not warrant a wholesale departure from tradition and the rule of law. Canada, Australia and other primarily English-speaking nations have found themselves in similar cross-institutional discussion in recent years, as have the countries that make-up what the former US Secretary of State for Defence Donald Rumsfeld once called 'Old Europe'.

The United Kingdom has not been exempt from the challenge of resolving this growing tension between human rights and the demands of counter-terrorism. Indeed Britain has some particular characteristics which make the way in which it conducts itself in this field of exceptional importance. First, as the widely accepted original home of democracy and the rule of law (in the shape that these two terms have taken in the modern era), the influence of the United Kingdom in this sphere is out of all proportion to its size and to its economic power. The contemporary term is 'soft power,' and the state that counts Magna Carta's Runnymede and 'the mother of parliaments' among its possessions has a moral head-start in any discussion about how to balance freedom and security. Second, the United Kingdom has new laws in force especially designed to support and protect human rights. The Human Rights Act 1998 took effect (on 2 October 2000) at exactly the moment when the foundations of its subject matter were about to be subjected to intense, post 11 September critical scrutiny. Third, and reflected in the successful enactment of legislation designed to support human rights, the United Kingdom has long had a vibrant civil society that has been particularly

concerned with issues of freedom and human rights. London is the home of, or at least a key base for, many international NGOs devoted to the protection of international human rights. Indigenous groups like Liberty and JUSTICE focus on the domestic environment but from a similar perspective as their international counterparts. New human rights commissions are gradually coming on stream, each with terms of reference that require them explicitly to engage in human rights work across the public and private sectors. And fourthly, thanks to the problem of Northern Ireland, the UK has long form in the field of counter-terrorism. Since as early as 1968, when subversive and other forms of political violence first began to appear in Belfast and across the Province, the authorities in Britain have had to connect their commitment to human rights (rhetorical but also diplomatic and legal even before the 1998 Act) with the exigencies of a struggle against 'terrorism' that has often seemed to demand movement in the opposite direction.

If the new perspectives on security and human rights accelerated into prominence by the attacks of 11 September 2001 were not novel to the British authorities, the nature of the potential harm to which the country was now said to be vulnerable was perceived by those in responsible positions to be far more serious than in the past, and to be accompanied by levels of (high) probability of occurrence that demanded strong legislative action. Many in civil society, and particularly those in civil libertarian and human rights organisations, have refused to accept the government's assessment of risk or (if they have accepted it) to concede that it warrants the statutory proposals that it has produced. Senior judges have from time to time expressed a similar point of view through the cases they have had to decide under the Human Rights Act, as have parliamentarians, the latter often in sufficient numbers to force the government to scale back its counter-terrorism plans. The result has been an ongoing trilateral ping-pong match between the branches of the state, with the government proposing, then amending after a parliamentary revolt, and then revisiting in light of this or that legal challenge, powers that it

claimed at the start were essential to the security of the state, with all of this being played out in the full glare of a lively and engaged civil society. Language has become heated. Alarmist talk has become routine. Positions have been adopted from which it has been hard to resile. In short, the parties to the discussion have become used to regarding each other as further apart than they in fact are.

Predictions of mutual estrangement, however, have a habit of become self-fulfilling; trapped by extreme language on all sides, the trust essential to rational discussion drains away with the various participants drifting from the mainstream of dialogue into the cul-de-sac of non-negotiable but mutually exclusive truths.

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Searching for common ground

This report is the final outcome of a process that began four years ago and which was initiated and then fuelled by a single overriding idea: that the challenge of terrorism to human rights is too important, and Britain’s place within that discourse too central, to allow discussion of it to wander off into irrelevance, and that therefore a way had to be found to bring the principal actors on all sides together for a proper interchange, unclogged by the public positioning and the mistrust that had begun to suffocate debate. Fortunately a happy precedent was to hand. In the darkest days of the Northern Ireland conflict, when British and Irish government officials barely spoke to each other and politicians in the Province paraded their enmity to the world as part of their vote-catching appeal, a small group of academics, senior journalists and business p’ople created a parallel universe in which dialogue was nurtured and genuine debate and discussion assiduously fostered between these various opposites. Protected from the noise outside by rules of confidentiality and the shared commitment of its invited participants, the British-Irish Association’s annual conference in an Oxford or Cambridge college managed to see out the Troubles as a hidden fixture of sane debate in a calendar too often marked by calamity. Its covert conversations between public antagonists may even have played some part in changing the political atmosphere in

Northern Ireland. Certainly resolution of the precise issue that the Association particularly addressed – how to speak honestly in a political discourse pockmarked by violence – was critical to delivery of the Good Friday Agreement and the various political resolutions that have followed that remarkable document.

With the support of the Economic and Social Research Council, the LSE Centre for the Study of Human Rights decided to apply the Irish model to the contemporary field of terrorism and human rights. Instead of a residential conference, the organisers fixed upon six seminars spread over two years, focusing on the role of various elements of civil society in the protection of national security, with a larger conference at the conclusion of the seminar series drawing together all the threads. The participants, never more than thirty at each seminar (though rather more at the final conference) and invariably a differently composed group at each meeting, came from the senior ranks of government, the judiciary and the media as well as politics, law, academe and the civil liberties and human rights groups. And they did all come, on the whole: the Centre had never been involved in anything before with such a high rate of affirmative replies. Neither the conference nor any of the six seminars, five held at LSE and the sixth (specifically on the Human Rights Act) in Parliament, ever produced a single leaked story to any media.

¹ The seminars and final conference also made a remarkably good fist of getting away from the surface news and delving deeply into the exact nature of the challenge that contemporary forms of political violence pose for the democratic state.

‘These seminars brought together people from a range of different perspectives in an environment which fostered the kind of debate these questions need and deserve’

Matt Cavanagh, Office of the Prime Minister

Trust

The first central theme to emerge was familiar and expected. It is well known that after the invasion of Iraq was found to have been largely based on a false prospectus – the non-existent weapons of mass destruction –, belief in what the authorities assert on questions of national security has reached a very low ebb. Less appreciated has been how damaging this has been for counter-terrorism in particular, deepening a scepticism that was

¹ A general account of each seminar is to be found at www.lse.ac.uk/collections/humanRights/research/ESRC_Seminar_Series.htm

already prevalent in civil society. The seminars revealed the extent to which disbelief (rather than mere doubt) has become the standard response not only of many activists but also a substantial number of those in university and the media. A particularly dramatic moment was when a journalist asserted that ‘the deployment of tanks [at Heathrow] came one day before the biggest march against the war in Iraq leading many to suggest a link’, the comment provoking first an exasperated snort from a very senior official who had been intimately involved in the deployment, and then a brief but impassioned discourse on what in his view had really happened (definitely no conspiracy).

The current government is to some extent paying a price for the escalatory language of its predecessors in office. So when it was announced by the Home Office (on 25 July 2007), for example, that we face a ‘real and severe’ threat of terrorism which is ‘not just quantitatively different but qualitatively different from previous threats’, the kind of people who set the tone of the civil libertarian response know that the same was said of the Fenians in the 1860s, the anarchists a few decades later, Carlos and Abu Nidhal in the 1970s and 1980s and the IRA pretty well all the time since the late 1960s. They are also aware that the latest way of causing mass casualties in an asymmetrical conflict – whether it be dynamite, Semtex, the car bomb, a remote controlled explosions or the suicide bomber – is always described at the time of its occurrence as uniquely threatening and dangerous. The groups behind such attacks are invariably said to be numerous, well organised and desperate, and to be about to embark on some vast campaign of violence which requires immediate legislative action. The Home Secretary of 1939 Sir Samuel Hoare got draconian legislation through Parliament in the Summer of 1939 by exciting MPs about the IRA’s special ‘S-Plan’ of devastation. In 1996, legislation was suddenly essential to prevent an imminent IRA campaign of violence to commemorate Easter 1916 which never materialised. Asked in one of the seminars about why there was so much legislation of this sort, a former Cabinet minister who had had direct responsibility in the area (not Labour)

‘Professor Gearty managed to assemble a near unique mix of central protagonists in Britain’s security debate. The resulting discussions were both rigorous and reflective. Few opinions, no matter how developed or polarised can have been completely unaffected by the high quality of discussion.’

Shami Chakrabarti, Director of Liberty

acknowledged that on some occasions ‘the motivation was to be seen by the public as ‘doing something’ in the aftermath of an atrocity, [and] that a swift response had the effect of boosting morale and restoring public confidence’. Others recalled that it is also a convenient way of sneaking unpalatable provisions through parliament, as happened in 1996 and again in 1998 (after Omagh) and 2001 (after the 11 September attacks). If counter-terrorism rhetoric were a currency, it would by now have lost all its value through inflation.

It is difficult but not impossible for government to counter these levels of scepticism, both about its diagnosis of the terrorism threat and concerning the correct legislative response. The Brown government has made a good start by committing itself to various changes in the development of national security policy (in the Governance of Britain, July 2007) and by then responding with calculated, unfrenzied intelligence to the serious efforts at political violence in London and Glasgow with which militants sought to mark the change from Blair to Brown. But the lesson of the seminars is that this tone needs to be carried deeper and more consistently into the realms of government, with fewer generalised Domsday interviews of the sort with which Lord West of Spithead marked his appointment as Home Office minister with special responsibility for security (on the BBC Radio 4 Today programme on 16 July 2007). It is also alarming that the country’s then top anti-terrorism police officer should stand accused by the official oversight body of having deliberately mislead the Metropolitan Police Commissioner about the Stockwell shooting of Brazilian Jean Charles de Menezes in July 2005: if he can deceive his boss about such a matter what on earth does he feel he can say to us? Taking their cue from senior ranks, the police need to set aside the idea that incantation of the phrase ‘counter-terrorism’ allows them to do what they want, whether it be demanding new laws, overusing special powers, jumping to conclusions about ‘terrorist’ suspects or even shooting them down in the street.

When discussing terrorism threats the police need also to be less alarmist, less willing to take short-

‘the motivation was to be seen by the public as ‘doing something’ in the aftermath of an atrocity’

cuts with the facts and more focused on the need to fortify their arguments with a clear evidential base. One excellent example of this is recorded in a report from the Joint Committee on Human Rights which came out at the end of July 2007 ('Counter-terrorism Policy and 28 Days, Intercept and Post-charge Questioning') On a visit to Paddington Green police station and after being given the usual line about why longer periods of pre-charge detention are needed, the argument about the time taken to examine hard drives of computers seized from terrorist suspects, the committee asked for figures or at least 'a rough indication' of how many suspects had been released and then been re-arrested or sought for re-arrest because of what had come to light in just such an examination after the 28 days had elapsed. The question obviously caused some puzzlement. Members were told in response that 'one officer could think of one such situation, but that 'no data [was] kept to capture this set of circumstances.'" Trust cannot be rebuilt on such a vague basis; for the sins of their predecessors, ministers, police officers and 'counter-terrorist supremos' of various sorts need to do penance in the basement of empirical data if they are to be once again taken on trust not only by the kind of people who came to these LSE seminars but by the general public as well. It is because this is now so widely realised that the commitment of the Brown administration to a forty day plus detention before charge policy is exciting so much animosity across the political parties and in civil society as well.

'the police need to set aside the idea that incantation of the phrase 'counter-terrorism' allows them to do what they want'

'The discussion that came out of the seminar was extremely interesting, and provided a valuable opportunity to hear the views of people from very different perspectives'

Tazeen Said, British Muslim Human Rights Centre.

Assessing the threat

A second major theme thrown up by the series concerned the exact nature of the threat posed by contemporary terrorism. Interestingly given the seminars were all held with Mr Blair still in No 10, participants generally agreed that there was no great clash of civilisations fuelling some kind of existentially necessary 'war on terror': in this regard most speakers anticipated the rather more restrained vocabulary (so far) of Blair's successor. Indeed even fairly restricted efforts to identify Britishness as a basis for a more focused human rights law foundered, with a multiple of interventions from non-Brits when the point came

up in one session, thereby proving not only the cosmopolitanism of the United Kingdom but also the difficulty the government is likely to encounter if it drives forward its ideas about national identity. True a number of Muslim participants saw things differently, and in doing so made some disturbing (albeit rather generalised) claims about the estrangement of Muslim communities: one seminar was told that there were areas where Muslim and Asian inhabitants are 'absolutely terrified' of the police and there was a 'terror factor' at work in these places. In a particularly gripping exchange, a sociologist well-known for his work on the Irish in Britain in the 1970s drew parallels with the plight of Muslims today. But on the whole participants shared the view of the authorities that things are different how: 'we are trying to learn and be more sensitive' was how one senior official put it, while a police speaker pointed to the statistics on the use of police power as revealing a far different story than that of the 1970s, while also conceding that some things had gone wrong (eg the expulsion of Walter Wolfgang from the Labour party conference hall in 2005: entirely 'cock-up' and not conspiracy).

It was clear that some of the differences in perception flowed from language. Leading representatives from both the print and broadcasting media agreed on the tendentious reach of the term 'terrorist' when used to describe someone in advance of their conviction for a crime: this is a phrase carrying a strong sense of obloquy within itself with which no one nowadays (unlike in the 19th century) wants to be associated.

Also problematic is the further question of the kind of 'terrorism' that is being discussed. In Northern Ireland, IRA (or at a stretch Republican) violence eventually became a useful way of describing this brand of political violence, far better than the early (and alienating) 'Irish' and/or 'Catholic' labels. Perhaps 'Jihadist' or 'Islamicist' will eventually fill this descriptive gap today: it is hard to see 'Al-Qaida' working as an accurate preface and 'Muslim' or 'Islamic' terrorism are both over-broad and because of this insulting to the large, law-abiding majority in these faith groups. However denial of the origins of this violence altogether seemed to some to be an eccentric and artificial over-reaction.

'This report is a hugely important and novel contribution to one of the most challenging issues of our times. It draws on the insights and experience of a range of participants who have directly grappled with the vexed issue of terrorism and human rights.'

Francesca Klug OBE, Equality and Human Rights Commission and Centre for the Study of Human Rights

Constraining anti-terrorism inclinations

A third theme addressed the related issues of why we have had so many terrorism laws since 2001 and what their real impact has been on traditional civil liberties and (to use the modern term) human rights. What emerged very clearly from the seminars is that counter-terrorism legislation is often the product of a combination of factors that come together to create a strong momentum for action that leads to new laws even in situations where action is not necessarily required. This is not only about the enactment of laws for presentational purposes. A conservative risk assessment by security advisers combines with the politician's awareness of the political danger that flows from ignoring such advice to produce an agenda for change which is difficult to resist. The violent group said to be the cause of the threat can be relied upon to add to its own importance (through videos, interviews, or the web for example) by corroborating official descriptions of itself and grandly warning of horrors that are just around the corner. Time and again in the seminars we were reminded of the 'enormous' pressure on ministers, rooted in a fear that some catastrophic event might occur for which their inaction is held to be causative and of their awareness as well that, generally speaking, the public would go much further than they would so far as stringent anti-terrorism laws are concerned.

This last point was brought home starkly by a British Social Attitudes Survey published in January 2007 (and conducted once again by the Centre for the Study of Human Rights with ESRC support, this time in partnership with the National Centre for Social Research ²): there has over the past twenty years or so been a significant drop in the number of people in Britain who adopt civil libertarian attitudes, and that even this group declines still further when the threat of a terrorist attack is added to the mix. It takes rare political courage for

Terrorism Act 2000

Created new offences of inciting terrorism and seeking or providing terrorist training. Enhanced police powers, including stop and search. Outlawed terrorist groups, including Al-Qaida.

'These fascinating events achieved something quite rare: completely frank exchanges between actors of influence from every sector. Invaluable.'

Sir Ken Macdonald QC, Director of Public Prosecutions

² Mark Johnson and Conor Gearty 'Civil Liberties and the Challenge of Terrorism' in A Park, J Curtice, K Thomson, M Phillips and M Johnson (eds), *British Social Attitudes. The 23rd report* (London, Sage Publications) pp 143–173.

a politician to emerge from the scene of an atrocity and declare there is no need for any new laws or that they were right not to have 'improved' the old law despite this attack; and as all politicians know (but few academics and journalists and civil society activists appreciate) courage is uncomfortably close to political suicide on every democratic landscape.

Whatever their rationale, to be enacted and then to work effectively, anti-terrorism laws in Britain need to negotiate their way effectively through a triple lock of restraints that work together to inhibit their repressive potential. A fascinating aspect of the seminars was the chance they gave to explore exactly how these constraints operated in practice: behind closed doors there were few if any claims by our participants that we in Britain are at the moment living in a police state or that – to quote a senior clerical intervention some months ago that drew a response from Downing Street – we suffer in the same way as Ugandans had done under the presidency of Idi Amin. The first lock is constitutionalism, the commitment of those who exercise power within the system that there are certain things you *do not do even if you have the power to do them*. The Brown administration has perhaps shown a grasp of this. Its inclination to legislate for pre-charge detention for up to 42 days on suspicion of terrorism is rightly controversial but critics need also to note what is not being suggested: not indefinite detention or even 90 days; no repeal of the Human Rights Act or amendment of any of its provisions; no suggestion that European Court of Human Rights decisions be disregarded, even where their effect is to stop the deportation of suspected terrorists from the United Kingdom; no proposal to move the human rights law onto an emergency basis which would allow for derogation from key rights; and none of the wide stop and questions powers that were floated by Dr John Reid as Home Secretary as recently as May 2007.

The issue of the admissibility of evidence obtained as a result of torture, which was a big concern in the first couple of our seminars, has receded from the front-line of debate, and no one suggests that arguments for such a pernicious practice should be revived.

'over the past twenty years or so been a significant drop in the number of people in Britain who adopt civil libertarian attitudes, and this group declines still further when the threat of a terrorist attack is added to the mix.'

All of these omissions represent real civil libertarian progress, the operation in practice of unwritten constitutional assumptions in favour of respect for human rights and the rule of law. While it is true that Mr Blair does not appear to have felt constrained in quite this way, he did respect the second and third locks that stand between executive desire on the one hand and realised, enforceable law on the other. These involve the legislative and judicial branches of the state, and it has been the game of counter-terrorism ping-pong already mentioned that these branches have been playing with the executive that has been responsible for so many of the laws enacted since the attacks of 11 September 2001. But this is democracy in action, not the defiance of democracy that so many of Mr Blair's critics (focusing only on his high-blown language and not on what was actually happening) managed at the time to convince themselves was the case.

The controversial Part IV of the Anti-terrorism, Crime and Security Act 2001, which allowed for the detention of 'suspected international terrorists' without charge, was as much a result of human rights law as the attacks of 11 September. Case-law at the European Court of Human Rights (which the United Kingdom is bound as a matter of international law to respect) was clear that a state could not forcibly remove non-nationals from their territory if the only place to which they were able to go was to a country where they would be at risk of being seriously ill-treated.³ Not being able to get rid of people whom the security services were (presumably) saying were likely terrorist activists or sympathisers, but without sufficient admissible evidence to be able to bring criminal charges against them, the then Home Secretary David Blunkett decided to ask parliament for the power to lock them up. Even though foreigners rather than citizens were involved, parliament only agreed to this after adding various safeguards to the measure,

Anti-terrorism, Crime and Security Act 2001

Extended executive powers over assets and bank accounts of suspected terrorist individuals and organisations. Granted home secretary powers to detain indefinitely without charge foreign nationals suspected of terrorist activities.

³ *Chahal v United Kingdom* 15 November 1996

and it was one of these, the requirement for a review of the power by a committee of privy counsellors, that set in train the sequence of events that was eventually to destroy the legislation. This committee asked the kind of detailed questions about the exact need for the measure that, as we earlier saw, make the police and security specialists in the field uncomfortable: at home in the rhetoric of counter-terrorism, they proved much less persuasive on the small print. The hostile privy counsellors' report (in December 2002) was followed by the decision of the appellate committee of the House of Lords (the law lords) on 16 December 2004⁴ that the detention without charge and the discrimination against foreigners which was inherent in Part IV of the 2001 Act offended the guaranteed human rights set out in the Human Rights Act 1998.

This judicial decision was widely read as evidence of how far the Blair regime had drifted from its early commitment to human rights, with the judges heroically taking on an authoritarian regime in the name of freedom. It is true that the speeches of the law lords in the majority were a brilliant exposition of the importance of the requirement of rationality in decision-making: no government advocate could answer satisfactorily the question why it was thought right to detain indefinitely foreign suspected terrorists while ignoring all their domestic equivalents – had no suspects at all being born in Britain? But the 2001 Act had been enacted within the framework of human rights law not (as with its international law equivalent in the US) in defiance of it. The government had lodged a derogation from the European Convention's terms with the Council Of Europe (the body responsible for the European Convention on Human Rights) and had sought to do the same under the terms of the Human Rights Act itself. When this derogation was found wanting by the law lords, Ministers did not have to follow the ruling because the Human Rights Act does not allow the courts to strike down primary legislation; all the judges are permitted to do is to issue non-binding declarations of incompatibility which is what had happened here.

The government therefore had a choice: it could have toughed out the political flak and stuck with

'no government advocate could answer satisfactorily the question why it was thought right to detain indefinitely foreign suspected terrorists while ignoring all their domestic equivalents'

⁴ *A v Secretary of State for the Home Department [2004] UKHL 56.*

the legislation or it could have changed it to make it fit the judges' perception of what human rights law required. It chose the latter, introducing new anti-terrorism control orders the following Spring in legislation that, after a huge quarrel with parliament, was finally enacted as the Prevention of Terrorism Act 2005. This is not the law the then Home Secretary Charles Clarke (successor to Mr Blunkett who had been forced to resign for other reasons at the time of the lords ruling on Part IV) had wanted: it is replete with safeguards for human rights and with far stronger judicial oversight than he had originally desired. As a result of these concessions – necessary to secure passage of the legislation – there have been many negative rulings from the courts on the specifics of particular control orders, quashing them on account of their disproportionate impact on the human rights of those upon whom they have been imposed. (Quashing in this way is possible because the specific orders are made by ministers and so are not protected in the way acts of parliament themselves are protected: the scheme itself has been held to comply with the Human Rights Act.) There have been far fewer control orders than was feared at the time of enactment of the legislation and none at all that have sought consciously to derogate from the state's human rights obligations. Where the orders have been struck down there has been no suggestion from government that it will do other than obey the law.

Exactly the same pattern has been evident with the final piece of legislation promoted by the Blair government in this area. The Terrorism Act 2006, was introduced as a response to the July 2005 attacks in London, and was promoted by the prime minister in the apocalyptic terms of a man who really believed he had an existential crisis on his hands. But once again Parliament did its

Prevention of Terrorism Act 2005

Introduced 'control orders,' after law lords rule that indefinite detention of foreign terrorist suspects without charge is contrary to the Human Rights Act. Control orders allow the government to restrict the activities of individuals it suspects of involvement in terrorist activities, but for whom there is not sufficient evidence to charge.

constitutional duty, diluting initially ludicrous provisions to prohibit the celebration of past 'terrorist' events (unless they were approved terrorism like the execution of an English King or the armed rebellion abroad of a now admired political leader) and simply refusing to give the police the blank cheque that they – with the prime minister's support – had demanded on security issues (in the form of a 90 day pre-charge detention period). Blair did not reject any of this as a true authoritarian leader would: he simply but nevertheless strongly disagreed. Nor even on such an incendiary issue as the blocking by the courts of the removal of suspected terrorists was he ever as openly defiant as was, say, Kenneth Baker when as Home Secretary he ignored a court order prohibiting him from expelling a Zairean asylum seeker from the country.⁵ Of course Blair did not like these decisions, scribbled on the margins of briefings about them and generally sought to get round them: but he did not flout them.

Gordon Brown and his ministerial teams at the Home Office and the new Justice ministry are therefore not departing from the Blair substance in this field of counter-terrorism as much as is commonly believed. What is already clear, though, is that the style promises to be different. Two position papers issued on 25 July 2007, on 'Possible measures for inclusion in a future counter terrorism bill' and 'Options for pre-charge detention in terrorist cases' respectively, show a government that has a perspective but which has yet definitely to determine how best to proceed while being clearly determined not to browbeat. Having agitated so long for more involvement, Parliament will now have to share some of the national security risk: with the right to participate in decision-making comes the responsibility to do so (to use a favourite Blairism) sensibly. To describe all this as evidence that Mr Brown represents 'a far greater threat to civil liberties' than his predecessor because his attack on freedom is subtler, as a leading journalist/ commentator did in an Observer article last Summer (29 July 2007), is to demonstrate such a failure of understanding of how democracy works as to risk giving all civil libertarians a bad name.

'The Terrorism Act 2006, was introduced as a response to the July 2005 attacks in London, and was promoted by the prime minister in the apocalyptic terms of a man who really believed he had an existential crisis on his hands.'

⁵ *M v Home Office* [1994] 1 AC 377.

Lessons from abroad

The Centre sought in each of its seminars to have specialist contributions from other jurisdictions. Throughout the series, invited practitioners and academics from around the world were given an opportunity to provide their own insights on the problems which Britain faces. This comparative dimension was the centrepiece of the final conference held at LSE on 5 October 2007. Entitled ‘Human Rights and Counter-terrorism: Reframing the Debate’, the event was before an invited audience of specialists in the field (drawn from the ranks of government, academe, the civil service, the legal professions and the NGOs). In the main morning session, specialists from the US (Deborah Pearlstein), France (Antoine Garapon) and Australia (Andrew Lynch) were asked to address three issues in particular: extraordinary rendition; the use in prosecutions of intercept evidence; and the nature of emergency powers.

Garapon reminded the audience of how flexibly state power could be deployed in France. He was especially intent upon dissuading his listeners from coming to the opinion that Britain was somehow or other to be thought of as a ‘police state’. His exposition of continental (in particular French) law was a keen demonstration of the importance of a full understanding of context in any effort to translate the apparent virtues of one system effortlessly into another. As far as the US was concerned, Pearlstein argued that the Bush administration’s initial response to the events of 11 September was misguided in the way in which it asserted the virtues of unlimited executive discretion in counter-terrorism operations. As the failures in those efforts over the past several years have made clear – including the high international political price paid for executive operations like

‘with the right to participate in decision-making comes the responsibility to do so (to use a favourite Blairism) sensibly.’

‘The LSE conference offered high quality discussion on a rigorous intellectual template. I believe that its unprejudiced conceptual approach influenced the policy makers present’

*Lord Carlile of Berriew QC,
Independent reviewer of counter-
terrorism legislation*

Terrorism Act 2006

Drawn up after 7/7 bombings. Extended the pre-charge detention period for terrorist suspects from 14 to 28 days. Introduced a prohibition on the ‘glorification’ of terrorism, as well as new offences of preparing terrorist acts and distributing terrorist publications.

extraordinary renditions –, following the law set by Congress and interpreted by the courts is not only consistent with security, it is essential for effective counter-terrorism over the long term. In reporting on Australia, Andrew Lynch explained that despite the lack of any constitutional mechanisms through which rights could be curtailed in times of emergency in that country, the response to terrorism has been marked by repeated assertions of exceptionalism and urgency. In the absence of any formal instrument of rights protection, this rhetoric was deployed to ensure that the parliamentary process would impose very little check upon the enactment of an array of legislative initiatives which in combination notably impacted upon freedoms of movement, speech, association and privacy. Although the ability of Australian agencies and police to gather intercept and stored communications has been greatly expanded in recent years, this has yet to be a significant factor in the trial of terrorism suspects.

Chaired by Emeritus Professor Carol Harlow (LSE), the presentations, each tightly focused and limited to fifteen minutes, stimulated a discussion in which the mainly UK audience was able to reflect on domestic issues in light of the fresh learning brought to the matter under scrutiny by the comparative perspective. After a buffet lunch in LSE's Shaw Library, the entire afternoon was taken up with an address by Lord Alex Carlile (the Independent Reviewer of Terrorism Laws) followed by a question and answer session and then a free-flowing discussion of the whole area, chaired by Conor Gearty. It was at this session that the various expert engagements of the audience, stimulated by the address by Lord Carlile and the morning proceedings (involving not only the comparative presentations but also a debate between Conor Gearty and Lawrence Freedman on the utility of terrorism laws), produced a fast-flowing series of interventions which succeeded, as the organisers hoped would be the case, in getting under the skin of current discussions on terrorism and human rights and in probing deeply into the challenges the former poses for the latter in modern Britain.

Deep structures

There are two threads which are consistently present in contemporary counter-terrorism law and practice in the United Kingdom, the first running with, the second against the grain of human rights law and civil liberties protection. The two are at odds with each and it is not yet clear down which of these routes the Brown administration will travel: everything is still up for grabs. The first is the criminal process road. It reflects the origins of our terrorism law as primarily a policing matter. From this perspective, the goal of counter-terrorism law is punitive, the punishment of offenders for politically motivated harm which they have done, or are about to do, or are conspiring with or inciting others to commit. 'Harm' is defined by the criminal law, not only in its classic form (substantive offences like murder, manslaughter and criminal damage) but also in the broader shape that the particular challenge of politically motivated violence has been judged to require (offences like preparing to commit terrorist acts or directing at any level a terrorist organisation). It is central to this account that no person can be punished until they have been found guilty under a proper, human-rights-abiding criminal process, one that looks for proof beyond reasonable doubt, puts the burden of establishing this on the prosecution, and ideally has a jury on hand to give the final verdict.

The second thread in the law originates within the security services, draws its inspiration from the Cold War, and has grown in influence as counter-terrorism has come increasingly to be seen as a policy area where MI5 and specialist police officers take the lead role. Here the overriding principle is precautionary rather than punitive. The emphasis is not on what has happened but on what might happen. The people to move against are not limited to those who have done things – the very fact of such occurrences is on this analysis evidence of failure. The primary foe is the 'terrorist' of the future, the person who may look innocent, and who has done nothing tangibly wrong but who is merely biding his (or her) time, waiting to wreak havoc and destruction when the moment is right. Intelligence is what matters, much more than evidence: the latter is useful after an atrocity but the former can

stop it occurring in the first place. To do this though, intelligence needs to be capable of being acted on: suspects need to be stopped in their tracks, disrupted, constrained in their movements, locked up if possible, or kicked out of the country if they are foreign. From this perspective, what matters are not criminal prosecutions but administrative actions against suspected bad guys; with their fetishism of individual liberty and due process, human rights and civil liberties law put the country at grave risk, seem prepared to sacrifice the rights to life and security of the majority at the behest of the obnoxious few.

‘the forces mustered in parliament and civil society seem poised to push ahead with the continued criminalisation of counter-terrorism’

The Blair and now Brown administrations have tried to keep these two contradictory positions in play. Control orders began life as a precautionary initiative but their legalisation in Parliament introduced a range of procedural, criminal-style (though not fully criminal) safeguards into their operation. The first 90 and now 42 day pre-charge detention proposal is a watered down version of the full-scale internment power that many wedded to the precautionary principle appear to want, but even this is being legalised as the various locks designed to protect liberty are being readied to be snapped into place. The debate over whether to allow intercept evidence to be admissible in criminal prosecutions – the law officers, the civil liberties groups and various senior police officers, judges and independent reviewers are in favour; the security establishment against – is important precisely because it reflects this great divide between those who would follow the criminal route and those who prefer to bypass the criminal altogether in favour of administrative controls. At the moment, the forces mustered in parliament and civil society seem poised to push ahead with the continued criminalisation of counter-terrorism, and in this they enjoy the support of many senior figures in the executive branch. It is not impossible that what we shall see in the years ahead is a falling away in use of long-term pre-charge detention (whether 28 as at present or 40 + days if Parliament votes this option through); an increase in the charging and prosecution of terrorist suspects for substantive criminal offences (boosted by the ready availability of intelligence, albeit with new judicial safeguards in place which will change the role of the

trial judge to some extent); and a continued judicialisation of administrative powers like the control orders so as to make them resemble more and more the criminal process they were designed to supersede. From the human rights/civil liberties perspective this is the optimistic scenario. But the history of terrorism both generally and specifically with regard to Northern Ireland shows that nothing can be taken for granted. The politics of the last atrocity can be expected at some point or other to rear their head. A pernicious feature of subversive political violence in a democracy lies in its ability to hijack debate and force the law in directions that may be neither necessary nor, in the long run, desirable. The new Prime Minister and Home Secretary dealt with the London and Glasgow attempted attacks with impressive calm and fortitude, but supposing these assaults had worked. Would the civil libertarian line have been as easy to hold?

Counter-terrorism Bill 2008

The Counter-terrorism Bill now before Parliament contains many features which have been the subject of discussion at the seminars.

Its centrepiece is authority for the extension of **pre-charge detention to a total of 42 days**. The power will only be available where the Director of Public Prosecutions and a chief officer of police report that they are satisfied that there are reasonable grounds for believing it to be necessary for the purpose of (i) obtaining evidence (by questioning or otherwise); or (ii) to preserve relevant evidence; or (iii) holding of the suspect pending the receipt of results of an examination or analysis of relevant evidence. When such a report is made the Secretary of State may then by order declare the power to be available. He or she must then lay a statement before Parliament explaining the action. Each House must approve the decision. With the power in place, the applications for further detention can then be made to a senior judge, and where the pre-charge incarceration extends past twenty-eight days in any specific case, parliament has to be informed. The reserve power ceases after 60 days, whereupon its operation is required to be made the subject of an independent review.

The availability of long periods of pre-charge detention does not mean that the Bill does not also deal with some of the various alternatives to detention that have been discussed in recent years. Foremost among these is the provision the Bill now makes for **post-charge questioning**, albeit in a way that is restricted to the specific terrorism offence in relation to which the charge has been brought (or concerning which an official indication has been given that a prosecution may be brought). This is a narrower remit than had been suggested by some advocates of this reform. The Bill also makes provision for the **removal of documents** (electronic and written) for examination with the outer limit for retention being four days. There are also savings for legally privileged material, but nothing else (e.g. journalists' notes). The **control order** regime, put in place as an alternative to the long-term detention envisaged in the now superseded

Anti-terrorism, Crime and Security Act 2001, is toughened up with the Bill containing various powers to take fingerprints and other samples and also a variety of extra powers in relation to their enforcement.

The Bill also contains a miscellany of other provisions, concerned with the **disclosure of information** with regard to the intelligence services, the **prosecution and punishment of terrorist and terrorist-motivated offences** (including new requirements for **notification** where such crimes have been committed) , and **asset freezing**. Among the more controversial elements in the new Bill is likely to be the new set of sections on **inquests**. The plan is for inquests to be convened before specially appointed coroners without a jury where this is said to be necessitated 'in the interests of national security' or 'in the interests of the relationship between the United Kingdom and another country' or 'otherwise in the public interest'. It is planned to allow action under these provisions immediately upon their coming into force, thereby making it possible to act with regard to inquests that are already in progress but which have not yet been completed.

Viewed overall the Bill deepens further the range of criminal law, administrative and other executive powers that can be deployed against persons judged to be a terrorist threat. The terrorism laws are now unrecognisable from the slim, temporary emergency measure introduced by Home Secretary Roy Jenkins in November 1974, in the immediate aftermath of the Birmingham pub bombings. Following on from 1974, further IRA-inspired legislation was enacted in 1976, 1984, 1989 and 1996. Since the IRA's cessation of hostilities, we have now had more general anti-terrorism statutes enacted in 2000, 2001, 2005, 2006 and now most likely once again in 2008. Will this measure be the last?

A feature of the present proposals has been the degree of consultation that there has been over the extended pre-charge detention provisions; however this has been a debate about lengths of time – 14 days, 28 days, 42 days or 56 days – all of which would have been regarded with horror even by the

most determined proponents of anti-terrorism laws in the 1970s: the seven days allowed in 1974 was regarded at the time, and until very recently, as a major invasion of civil liberties. To this extent the debate around this Bill is an indicator of quite how markedly common sense in this field has shifted in a relatively short period of time.

Admissibility of intercept evidence in Criminal trials

One of the running points of major difference in the seminars was as to the advisability of the availability of intercept evidence in criminal prosecution for terrorism and terrorism-related offences. The government has now decided to proceed with further investigations into the viability of such a change in the law, on the assumption that – as long as certain basic safeguards can be effectively implemented – then it is right in principle that such evidence should be capable of being placed before the courts. There is understandable anxiety on the part of the intelligence community that the exposure of such material to public view – albeit only in the context of a criminal trial – might have damaging consequences for their counter-terrorism operations. The view of the majority of lawyers and civil libertarians is that these concerns are capable of being effectively addressed and that the criminal law orientation of counter-terrorism law would be given a further boost by the change. The matter has now been remitted to an expert review body for further study of the logistics of the change.

Conor Gearty is Director of the Centre for the Study of Human Rights and Professor of Human Rights Law at the London School of Economics and Political Science. He has published widely on terrorism, civil liberties and human rights. He is also a barrister and was a founding member of Matrix chambers from where he continues to practice.

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Issues: Extraordinary Rendition; Intercept Evidence;

'Setting aside' rights

Speakers: Professor Deborah Pearlstein (USA);

Antoine Garapon (France); Professor Andrew Lynch (Australia)

Chair: Professor Emeritus Carol Harlow

[New directions in terrorism law](#)

Lord Carlile of Berriew QC

Chair: Professor Conor Gearty

[Plenary: terrorism law and human rights](#)

Professor Conor Gearty led a discussion of main themes of the day and the future inter-relationship of terrorism law and human rights

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