

State Security v Human Rights: Finding a Proportionate Balance

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EMILY OWEN, AUG 28 2010

It is important to understand the seriousness of the current terrorist threat the United Kingdom faces, specifically since the catastrophic events of September 11th 2001 (9/11)[1] in New York and July 7th 2005 (7/7)[2] in London. The threat has moved through various levels of severe, critical and substantial. MI5 and the Joint Terrorism Analysis Centre have officially set the current threat to the UK as severe[3] which means that a terrorist attack is highly likely. It is, therefore, imperative that the Government maintains a heightened readiness to respond to imminent attacks and construct legislation in a credible attempt to both prevent acts of terrorism and fairly sanction suspects in order to protect the state. It has been identified, however, that the concept of terrorism itself is difficult to define, providing one of the many obstacles in the way of achieving these objectives.

This paper will critically analyse the UK Government's anti-terrorism strategy to determine whether it has succeeded in balancing its dual objective of protecting the state and upholding, to a fair degree, the human rights of individuals who fall within anti-terrorism legislation and are subject to its sanctions. The two objectives are not mutually exclusive, but interdependent, which makes the balancing exercise extremely complex, requiring very careful construction. It will be argued, however, that the importance of state security carries greater weight than regard to individual rights and, therefore, state security should be the paramount factor when considering an anti-terrorism strategy. The "watering down" of the Government's anti-terrorism policies by the judiciary is not proportionate. The courts placed too much emphasis on the rights of those individuals who are subject to the control of the Government, and failed to see the wider picture and realise the severity of the imminent threat the UK faces.

The Definition of Terrorism

Defining terrorism is not an easy task and although there is currently a definition in the statute book it has been heavily criticised for lack of clarity. This leads the discussion as to whether a formal definition is in fact essential for an anti-terrorism plan. The definition of terrorism was debated at length in Parliament during the legislative process of the Terrorism Act 2000, which now forms the present definition of terrorism, as amended[4], in the UK.

Section 1 of the Terrorism Act 2000 redrafted previous interpretations of terrorism to include more specific categories such as a threat designed to influence the government or intimidate the public[5] and for the purpose of advancing political, religious or ideological cause.[6] It also categorised terrorist actions as those involving serious violence,[7] serious damage to property[8] and serious risk to the health or safety of the public.[9] Additionally it confirmed that "action" would include actions outside the UK.[10] Tony McNulty, former Minister of State at Home Office, welcomed this definition which narrowed the categories of terrorist actions making it clearer and more effective.[11] By contrast, Blick, Choudhury and Weir have condemned the statutory definition for being too wide stating that it "leaves room for political bias and could be used to prosecute people active in legitimate social or political movements who are simply exercising their rights." [12] For example, extreme animal rights activists who cause nuisance and sometimes serious damage in an attempt to influence government agenda and policies. Whilst these sorts of actions evidently need to be subject to sanctions in some way, perhaps it would be better to isolate them from terrorist activity and regulate them in ordinary criminal law as opposed to encompassing them in anti-terrorism legislation.

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It must be stressed that all anti-terrorism laws will inevitably infringe human rights to a certain extent because that is the essence of their sanctioning, but the objective here is to do so in a proportionate way. A clear definition will therefore be needed in order to ascertain what constitutes terrorism so as to both allow the government to undertake measures to prevent future attacks, and also ensure that authorities do not abuse their power by sanctioning innocent people.

Anti-Terrorism Legislation

The rights and freedoms of the European Convention on Human Rights[13] was given further effect by the Human Rights Act when it came into force in the UK in 2000. The Act requires the UK legislature to ensure that anti-terrorism legislation is compatible with convention rights. If it is deemed not to be, the court can use section 3[14] to interpret statutes in order to make them compatible with convention rights where possible. If not possible, the court can issue a declaration of incompatibility under section 4[15] which forces the government to review its legislation and amend it to make it compatible. In regards to anti-terrorism legislation, Articles 5 and 6 ECHR are the provisions most relied on by suspects. These state that everyone has the right to liberty and security of person and a right to a fair trial respectively. However, article 15 can be used to override Articles 5 and 6 in certain circumstances which means articles can conflict at times requiring the government to engage in a balancing exercise when creating an anti-terrorism plan, to make it both effective in terms of security and not unduly restrictive on human rights.

Part 4 of the Anti-Terrorism, Crime and Security Act 2001 was highly controversial and profoundly criticised for being one of the most draconian pieces of anti-terrorism legislation because it allowed indefinite detention[16] of suspected international terrorists. It was argued that indefinite detention was a violation of civil liberties and the right to a fair trial, which provoked a further debate as to whether the provision would justify derogation under Article 15. Talbot asserted that:

“The [ATCSA] frequently fails to strike any sort of balance between [protecting civil liberties and ensuring the state has effective counter-terrorism measures] and it repeatedly sacrifices civil liberties on the altar of anti-terrorism priorities.”[17]

This emphasises the difficulty of the balancing act the Government must take between upholding individual rights and protecting national security both in order to create an effective anti-terrorism strategy and to ensure measures are lawful and justified.

The indefinite detention provision is no longer the law as it was repealed by the Prevention of Terrorism Act 2005 following the *Belmarsh*[18] case. This shows the importance of the internal workings of the British legal system and the influence of judicial decisions to anti-terrorism laws. The provisions were replaced by giving the Secretary of State the power to issue control orders to monitor suspected terrorists which include prohibitions and restrictions on things such as possessions, facilities, communications, movement, residence and in most cases, the suspects will remain electronically tagged throughout the duration of their order. One of the most important issues in regards to this piece of legislation is whether it is less draconian than indefinite detention. As will be seen upon analysis of the case law in the following section, a typical suspect under a control order will be confined in a specific place of residence for up to 16 hours a day with no communication, no visitors without prior permission and very restricted freedom of movement. Their quality of life and their privacy is severely affected and in most cases they are not provided with evidence or reasons for such harsh sanctions.

Analysis of Case Law

The *Belmarsh* case concerned nine appellants who were subject to indefinite detention without trial pursuant to s.23 ATCSA 2001, a piece of anti-terrorism legislation which was rushed through Parliament in the wake of 9/11. All were non-UK nationals and crucially, had not been subject to any criminal charge. They appealed against the sanction arguing that indefinite detention was a breach of their right to liberty under article 5 ECHR. The House of Lords granted a declaration under s.4 HRA which gave them the power to rule the provision was incompatible with Article 5 and 14 of the Convention. Their basis was that the policy was disproportionate to the terrorist threat and not “strictly

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required by the exigencies of the situation”[19] to be justified as a derogation order. It was also ruled that it discriminated against the appellants on grounds of nationality[20] since the provision only applied to non-UK nationals despite there also being British suspected terrorists.

The judgment was a landmark decision which highlights that the government does not have free reign to enforce harsh measures on terror suspects. It was also important in showing the judiciary acting in direct conflict with legislative provisions as they “rode a coach and horses”[21] through the Government’s policy.

This case marks the beginning of a specific trend which shows the judiciary are keen to protect human rights and avoid imposing heavy sanctions without proper grounds. From the judicial perspective, therefore, it seems the balance between protection of the state and protection of human rights should be tipped in favour of the latter.

The case of *JJ and Others*[22] is important in showing the judicial approach to the method of control orders to sanction terror suspects. The respondents were non-UK nationals suspected of terrorism related activity[23] but had not been charged with any criminal offence. They were subject to control orders which included provisions of 18 hours of confinement in a specified residence, geographical restrictions outside curfew hours, restrictions on forms of communication, monitoring of visitors by the Home Office and they were electronically tagged. They appealed against the orders and it was ruled that the provisions were a breach of their right to liberty. Lord Brown qualified that

“18 hour curfews are too long to be consistent with the retention of physical liberty...they breach Article 5...however, 12 or 14 hours curfews are consistent with physical liberty...I would regard the acceptable limit as 16 hours.”[24]

This outcome is of extreme importance 16 hours is the limit against which the control order sanctions are measured in order to determine whether or not they are lawful. This case however, must not be confused with providing a water tight example of what amounts to deprivation of liberty. Although it provides some indication, the Lords continued to recognise that:

“The borderline between deprivation of liberty and restriction upon liberty remains indistinct and around it decisions necessarily remain a matter of pure opinion.”[25]

The current law still allows for the use of control orders to be imposed on terror suspects but in a modified form due to the relaxation of the provisions as a result of judicial interpretation. Whilst this may have occurred due to a desire to re-balance the rights of suspects against harsh legislative sanctions, the way it has been achieved lends itself to a wider constitutional question: who should decide the correct balance between state security and human rights – the legislature or the judiciary? This question is important in addressing the overall question of balance because it one could argue that the modification of anti-terrorism legislation, due to statutory interpretation, is unwelcome as it threatens the doctrine of parliamentary sovereignty and therefore may not be justified. This constitutional question will be debated in the following section.

The Tension Between the Government and the Judiciary

As will have been noticed when analysing case law in light of government anti-terrorism legislation, a common theme has emerged. It seems that judicial decisions are not always in accord with the aims of the legislative and they view some of the statutory provisions of anti-terrorism legislation as too harsh[26]. Consequently, they have increasingly used s.3 or s.4 of the HRA in order to “water down” some of the provisions in an attempt to protect the human rights of the individual suspects. From this, an era of judicial activism (judicial law making) is identified which arguably conflicts with the rule of law and the doctrine of parliamentary sovereignty. This section will consider the wider constitutional issue of the tension between the government and the judiciary and whether the judiciary is justified in attacking, amending and reducing the effectiveness of the Government’s anti-terrorism strategy.

One could argue that, specifically in sensitive contexts like anti-terrorism legislation and human rights, an elevated use of scrutiny may be essential to prevent abuse from the Government in applying unjustifiably harsh measures against suspected terrorists without proper grounds for suspicion. The correctness of the decision was graphically

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demonstrated on July 7 and 21 2005, when most if not all of the suicide bombers and attempted suicide bombers in London appear to have been UK nationals.[27] By contrast, opponents of judicial activism rely on the lack of democratic legitimacy the judicial body has to condemn the decisions they have made. Unlike the Government, which can fall if there is a vote of no confidence, there is no redress for citizens who are deeply unimpressed by key decisions made by the judiciary. Essentially, matters of policy are not for the court to decide but for the legislature. Judges should not be allowed to use the HRA as a cloak to impose their own views and change the law according to their own perception. This would lead to government by judiciary not by the people through their representatives.[28]

How to Assess an Anti-Terrorism Strategy

Having already looked at the responses from the Government and the judiciary to the terrorist threat, it is necessary to assess whether the legal and political process has delivered in achieving its dual aim of protecting the state against terrorism whilst upholding fundamental individual rights. Former President of The Supreme Court of Israel, Aharon Barak[29], suggests a balance test, which contains an element of proportionality, is the best way to assess the circumstances in which the state will be justified in restricting human rights in favour of state security. To determine the weight of the variables on each side of the scale – state security versus human rights – Barak uses the notion of “relative social importance” (RSI). He stresses that the role of proportionality is not about determining the scope of the rights, but rather, about providing a justification for its limitation. It must, however, be noted that RSI “is neither scientific, nor precise.”[30] The task of assessing RSI is arduous, but Barak has produced two clarifications in an attempt to reduce the magnitude of the problem:

- 1.) The comparison is not between the advantage of the goal and the damage to the right. It is not between security and liberty. It is between marginal benefit to security and marginal damage to liberty caused by the adoption of the law. The comparison is concerned with the marginal and incremental.
- 2.) Policy makers must take into consideration the existence of a proportionate alternative which achieves only part of the goal and effects only part of the right.[31]

Rather than focussing on the detrimental effect of anti-terrorism legislation on the rights of individuals, people should look at the wider picture of what the state is trying to achieve – greater security. Although it has been recognised that the government is now concerned with a dual aim of protection of the state and protection of human rights, one could argue that their main initial aim, specifically following 9/11, was only to increase security, and that human rights were relegated to secondary importance. Of course, this is not to say that individual human rights should be disregarded without good reason, but perhaps it can be carefully asserted that the protection of the state is paramount to human rights. The rationale of anti-terrorism legislation is fundamentally to secure the country, not to gratuitously abuse individual human rights. Barak’s implementation of the principle of proportionality strengthens the balance test and seems the only logical solution to the constant difficulty of weighing the confusing notion that security and liberty are both conflicting variables, but also inextricably linked. Rather than viewing the two objectives as having equal weight, he recognises the imbalance in their relative importance, and this can justify and explain departures from rights in certain circumstances.

Perhaps the real difficulty in the notion of balance lies in the inaccurate view that security and liberty have the same value and that both variables should exist in equal measure. This is why Barak’s RSI theory is so enlightening. In the anti-terrorism context, balance should not be viewed in its metaphysical sense – it does not denote equilibrium for the present purposes, because security and liberty are not of equal value on the scale but nevertheless, elements of both are essential to modern democracy. They can still exist on a scale, but they should be weighed according to Barak’s theory of relative importance and the concept of proportionality. The issue of balance is not a factual problem which can be categorically solved. It has a nature of value-based discretion, and the better view would indicate that security should be given greater weight than human rights in order to secure the state and prevent future terrorist attacks on the basis that human rights are not fixed.

Conclusion

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The modern terrorist threat highlights clearly the twin objectives that must be faced: state security and human rights. The Government must therefore construct, and seek to maintain, a delicate balance between the two. An important question, therefore, is whether the judiciary were legally justified when interpreting anti-terrorism legislation which significantly altered the effectiveness of the Government's policies, specifically by prohibiting indefinite detention and relaxing the provisions of control orders. One could argue that they overplayed the human rights argument of the Government's policies. As a result, they pushed the boundaries of interpretation with the ECHR tool and entered an unjustified realm of judicial decision making. It is easy to get caught up in the legal niceties of human rights, but the real and significant threat the UK faces from extreme terrorism should not be forgotten. Those who are subject to control orders are not picked at random. They are controlled because authorities have intelligence on them – a reason to believe they are a threat to the state. Control in this sense, therefore, is proportionate and necessary.

[1] http://news.bbc.co.uk/1/hi/english/static/in_depth/americas/2001/day_of_terror/

[2] See http://news.bbc.co.uk/1/hi/in_depth/uk/2005/london_explosions/default.stm.

[3] Security Service MI5 – <https://www.mi5.gov.uk/output/threat-levels.html>, 22.01.2010.

[4] For regularly updated version of this Act see www.statutelaw.gov.uk.

[5] S.1(1) (b).

[6] S.1 (1) (c).

[7] S.1 (2) (a).

[8] S.1 (2) (b).

[9] S.1 (2) (d).

[10] S.1 (4) (a).

[11] In a Letter to Lord Carlile 26.08.2006.

[12] Report by Democratic Audit, Human Rights Centre, University of Essex, for the Joseph Rowntree Reform Trust.

[13] Hereinafter ECHR.

[14] Hereinafter s.3.

[15] Hereinafter s.4.

[16] The legal rationale for this detention was under the Immigration Act 1971, Schedule 3 (2)(2), Schedule 3 (2)(3).

[17] Talbot, R. *"The Balancing Act: Counter-Terrorism and Civil Liberties in British Anti-Terrorism Law"* in *Law After Ground Zero*, P.133.

[18] [2004] UKHL 56.

[19] Article 15 (1) ECHR.

[20] See Judgment by Lord Bingham at para. 68.

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[21] Dickson, B. (2005) "Law Versus Terrorism: Can Law Win?" 10 *EHRLR* 11 at 19.

[22] [2007] UKHL 45

[23] See S.1 Terrorism Act 2000 for definition, as amended.

[24] *Supra* fn [22] at para.105.

[25] *Ibid.* at para. 96.

[26] For example, indefinite detention without trial.

[27] Feldman, D. (2006) "Human Rights, Terrorism and Risk: The Roles of Politicians and Judges." *PL* 364.

[28] Jowell, J. (2003) "Judicial Deference: Servility, Civility or Institutional Capacity?" *PL* 592.

[29] Barak, A. Annual Lecture in Law and Society - "*Human Rights and Their Limitations: The Role of Proportionality*" 04.06.2009. <http://www.fljs.org/section.aspx?id=2895>

[30] *Ibid.* at 7.

[31] *Ibid.* at 8.

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