

TERRORISM V HUMAN RIGHTS: WHERE DO YOU DRAW THE LINE?

The rules of Tony Blair's political game may have changed but, as Lord Steyn has insisted, the 'maintenance of the rule of law is not a game'. The counter-terrorism agenda in our human rights culture characterises a seemingly irresolvable conundrum. Yet a credible, effective strategy in the fight against terrorism requires a principled approach. By examining the problems of 'legislating against terrorism', which serve to highlight the conflicting and inter-dependent spheres of law and politics, it will be argued that a principled approach to 'drawing the line' can in fact be extracted from human rights jurisprudence.

Terrorism is undoubtedly a threat: effective national security and anti-terrorism laws are essential. However, any trade-off between individual liberty and national security must not render us both less free and less secure. We should be wary of unsavoury measures presented as 'necessary in a democratic society', since this becomes an easily abused instrument of justification; utility is ranked above human dignity and limited evils inevitably give way to greater ones. "The rage we feel at terrorist attacks must not remove our ability to reason," stated Kofi Annan. "If we are to defeat terrorism, it is our duty, and indeed our interest...carefully to examine what works, and what does not, in fighting it".

This must be borne in mind while considering UK counter-terrorism legislation brought in since 2000. The first difficulty is defining 'terrorism' - a highly politicised concept. The definition in s.1 Terrorism Act 2000 is wide, though not oppressive: inappropriate prosecutions have been minimal. Definition, however, is relevant not only to prosecutions. It justifies 'stop, search and arrest' powers under s.44 which, though designed as temporary, have been authorised on a rolling basis for over two years. Further, arrests under the UK's comprehensive anti-terrorism statutes result in very few charges and even fewer convictions. It is this splintering of terrorism from ordinary criminal justice that facilitates human rights abuses such as indefinite pre-charge detention. With regard to internment, whatever the determined length of authorised detention, we must hope that history does not repeat itself. Internment practised in Ireland between 1971-5 resulted in the British state being portrayed as authoritarian and unprincipled, and the IRA increasing its membership. New measures may well appeal when presented as temporal exceptions, but assumptions that normalcy and emergency can be clearly separated are often untenable.

The current Terrorism Bill has potentially serious implications for freedom of association and freedom of expression (through 'encouragement of terrorism' offences, that lack the fundamental notion of intent). Some argue that curtailing freedom of expression merits enforcement if it saves just one life, but this fails to consider the long term effect of 'clamping down' - exacerbated resentment and perpetuated threat of terrorism. Restrictive control orders and the issue of evidence obtained by torture further emphasise the corrosive effects of compromising human rights for national security purposes.

Legislation should never be used to express political revulsion at terrorist acts. It is insufficient that passing new legislation has symbolic value or reassures us in some way. Each proposed interference with democratic rights and freedoms must be carefully balanced against purported benefits. Council of Europe guidance provides that the 'fight against terrorism implies long-term measures with a view to preventing the causes of terrorism by promoting, in particular, cohesion in our societies and a multicultural and inter-religious dialogue'. Some argue for special status to be given to terrorists, but different treatment is only justified to help effective prosecution. We must guard against making martyrs of terrorists and, equally, against stigmatising Muslims and Arabs, who may be targeted in the current climate. We must not alienate through discrimination (as has Germany's ID card policy, condemned by the UN) the very communities whose cooperation with the police is vital in counter-terrorist investigations.

It is submitted that a principled approach can be found to 'drawing the line'. The launch pad is 'A' v SSH D (2004). Never has a UK court dealt such a blow to legislation conferring powers on the executive to meet a national security threat. Permeating all the judgments is the question of deference to the executive or legislature on matters of national security relied on to justify restricted human rights. 'A' is a powerful statement by their Lordships of what it means to live in a society where the executive is subject to the rule of law, even in dangerous times. Previously, in the Gillan case, Lord Woolf CJ had stated that "although terrorism necessarily changes the context in which the rule of law must operate, it does not call for the abdication of law". Courts instead ensure that authorities use their power according to the principles of necessity and proportionality. Thus, it is established that human rights are only to be curtailed if the restriction is *necessary* in the interests of national security and *proportionate* to the end sought. The second limb is important since, as President Barak (Israeli Supreme Court) has stated, it is the fate of democracy that not all means are acceptable to it and not all methods employed by its enemies are

always open before it: “Sometimes, democracy must fight with one hand tied behind its back. Nonetheless, it has the upper hand”.

Terrorism is, of course, an international phenomenon. UN Security Council Resolution 1456 obliged states to ensure any counter-terrorism measures were adopted ‘in accordance with international law, in particular international human rights, refugee and humanitarian law’. The UK must therefore act responsibly if it intends to promote human rights internationally. Moreover, argues Professor Gearty, ‘without an overarching human rights dimension, counter-terrorism law is not only immoral and subversive of the values which it purports to defend, but it is also certain to fail’.

In balancing competing claims of counter-terrorism and human rights, the ‘line’ must be drawn at the point at which terrorism starts to achieve its own long term goal – the destabilisation of our system through the spreading of fear, as manifested in curtailment of human rights and civil liberties. Certain rules may need to be changed in the modern era of terrorism, but nothing must affect the ultimate rule - that of the rule of law.

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