

Charles Dawson

Consider the zealotry of converts. In 1998 The Prime Minister championed the Human Rights Act. These days he describes Parliament's rearguard defence of Human Rights as "deeply irresponsible" and presses the need to reconsider the place of ancient rights in British law. The cause of his conversion is horribly apparent. Even as terrorists go about their murderous business they enjoy the freedoms and protections of human rights law.

Modern terrorism has brought into sharp relief an age-old tension between security and rights best articulated in Hobbes' social contract. Humans surrender certain rights in exchange for protection from the state. Simultaneously their rights must be protected from state abuse. In this view the legitimacy of the state is contingent on its ability to protect its citizens. When the demos itself is the stated target of terrorism, a democratically elected government has both a theoretical obligation and a political imperative to take action. Since human rights interfere with the state's ability to protect us from terrorists it is not surprising that our Government advocates the removal or curtailment of such rights. Should we let this happen or insist upon the maintenance of our rights in the face of the terrorist threat? Where should the line be drawn?

The Human Rights Act and European Convention on which it is based make explicit this very quandary. Convention Articles describe rights with which the state may not interfere, then qualify these rights with reference to circumstances under which it may do so. States are given discretion as to how they will strike a balance whilst the judiciary decide how far the state may go in exercising this discretion. In doing so the judges have developed a concept that, in my opinion, is the perfect candidate for helping us to draw the line between terrorism and human rights.

The concept of proportionality requires that a balance be struck “between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights”¹. The ends of the state must justify the means employed. Applied to the current question this concept is illuminating. Take for example the recent commons debate concerning the detention of terrorist suspects. It would seem that the requirement to charge any suspect detained by the police is an unacceptable obstacle in the fight against terrorism. Habeas Corpus was brushed aside whilst parliament engaged in an undignified haggling process, eventually agreeing that terrorist suspects could be detained without charge for 28 days. The stated advantage of this policy is that more terrorists will be brought to book since the police will have enough time to gather evidence that may have been encrypted or buried in a haystack of gigabytes.

Do these ends justify the means employed? More terrorist suspects may be apprehended but the cost is the removal of an ancient evidentiary burden and the delivery of enormous discretion into the hands of the police. In effect this law will institute a Kafkaesque circular logic allowing suspects to be locked up precisely because the police lack the evidence required to lock them up.

Some might argue that this is a price worth paying. A single successful suicide bomber can cause massive devastation so the prevention of such an attack is worth the high price. Ends are proportionate to means. However, this position ignores the commonsense observation that laws have unintended as well as intended consequences. The aim of the suspension of habeas corpus is not to increase the number of innocent people imprisoned without charge. Nor is it to remove public confidence in the police or give the impression that particular communities are being

¹ *Sporring and Lonnroth v Sweden*, 23 September 1982, Series A, Vol.52, 69

victimised. Nonetheless these are possible if not probable consequences of the proposed change in the law and must be taken into account. If proportionality can weigh ends and means it might also weigh cause and effect and further inform the debate on where lines should be drawn.

The examination of unintended consequence is of particular importance when terrorism is at issue. Ziauddin Sardar has written that “terrorism breeds in the swamp of injustice”. Locking up suspects without charge may capture more terrorists today but it is unjust and may breed more terrorists tomorrow. The bitter irony is that laws focussing on security at the expense of human rights may contribute to the cause of terrorism as they tackle the symptom of terrorists themselves.

In sum the need for a rational approach is immediate. Terrorism seeks to effect political change by creating a climate of fear through the use of violence. Today’s terrorists may be politically impotent but it is clear that we fear them. Many of the government’s proposals are broadly supported by a fearful public who seem willing to give up their rights in order that something be done to protect them. Our elected representatives sense the public fear and rush through Parliamentary debate as if a latter day Fawkes prepared terrorist atrocity beneath their very feet.

Of course something must be done. The line between human rights and protection from terrorism must be continuously examined but in a spirit of rationality not fear. The concept of proportionality might return this rationale to the debate. It should be promoted from its role as aid to the judiciary and advise the debate about where lines should be drawn. It should also be given a wider remit, helping us to assess whether the need for security justifies the removal of rights and whether the means employed make matters worse. Terrorists may change their rules of engagement but only we can change our laws. We should do so on our own terms and be mindful of our

government's proposals and their likely consequences. As Shadow Home Secretary Tony Blair once said *"If we cravenly accept that any action taken by the Government entitled 'prevention of terrorism' must be supported in its entirety and without question, we do not strengthen the fight against terrorism, we weaken it"*.