

# Reconfiguring security

## Conor Gearty

The appointment of Gordon Brown as prime minister marks a major and possibly once-off opportunity for the Labour government to reconfigure its approach to security, in a way that promises to be better both for the Party's internal sense of itself and for the safety of the country as a whole. The signs are that such a change is possible, though it will require not only a shift in attitudes at the top but also more open-mindedness about government across civil society as a whole. More on the first of these later, but the second (less often remarked on or noticed) needs attention as well.

First there is the need to resist easy, Blair-based abuse. The former prime minister lost the country's trust when he was found to have been (at best) reckless with the truth about the underlying basis for the invasion of Iraq. This mistrust was then compounded by his later persistent characterisation of the threat of terrorism in the apocalyptic terms of American neo-conservatism. Branding Brown with the 'war on terror' rhetoric and Iraq debacles simply because he was in government at the time might suit those who have long seen Labour as irredeemably authoritarian but for supporters of the Party it is an unnecessary and cheap shot which writes off the new regime before it gets properly underway.

Second, the fact of a threat of large-scale criminal violence from a small group of highly committed and politicised elements within the Moslem faith community cannot be denied. This is not a threat to civilisation as we know it, but nor is it no threat at all. The important issues relate to the scale of the danger, and the best/least counter-productive ways of addressing it. I happen to believe that the state, led I would guess by the security services and police intelligence – but led on as well by an unquestioning, over-excitabile political class – has allowed official estimates of the danger of such violence to be pushed upwards, to the point where there is disproportionate anxiety about its likelihood. But this is not a different way of saying that the authorities have made it all up, a temptation to which civil libertarians and other critiques of anti-terrorism laws sometimes appear to succumb. Once they do, they lose all audiences outside their own narrow circle.

Third, if the civil libertarians are to win the argument with Brown's administration, the public debate on security and civil liberties needs to ratchet down its rhetoric several notches. Close to the end of Blair's premiership, we had almost reached the point where assertions that the then prime minister had destroyed British freedom or that the country was now close to being a police state were allowed to go almost without question. Certainly there have been illiberal laws, and these have been illiberally interpreted from time to time. Some such laws, such as the stop and search powers under the Terrorism Act 2000, are being routinely over-deployed by the police and should be repealed. But the

other side of the ledger contains important legislation such as the Human Rights Act and the Freedom of Information Act. It also reveals a police service that has striven under law officer pressure to deploy the criminal law in a fair-minded and non-prejudicial way. The judicial branch likewise has been remarkably vigilant (by its historically authoritarian standards) on behalf of political freedom and its pronouncements have been routinely accepted by successive Home Secretaries. We have not had the miscarriage of justice, the media bans, or the police violence that were part and parcel of the periods we are now telling ourselves were 'golden ages' in comparison with today. Nor is parliament the poodle that so many civil libertarians assume it to be: the ninety day detention proposal was defeated; the control orders were greatly altered; and the stop and search proposals of the then Home Secretary Dr John Reid did not even make it into the legislative agenda so sure were its promoters of their inability to get it through. If civil libertarians don't acknowledge any of this, the only people they will reach with their claims about a 'police state' and 'the destruction of freedom' will be themselves.

With the ground cleared, the rhetoric and spin discarded, and the civil libertarians in a new, humbler and more thoughtful mode, it could turn out that not only is there plenty to say (as there usually is) but that people outside one's immediate circle might actually be listening (a harder trick to pull off). In 1995 I attended a brainstorming session at King's College London led by the then newly-elected leader of the opposition, Tony Blair. I remember clearly his call for left-inclined academics to put him under the same kind of pressure from the progressive side as the Right managed to do from their reactionary positions. The point is relevant to the debate we are about to have on the future of the terrorism legislation. Too often a discussion like this is only about adding to these laws, increasing this police power or restricting that element of judicial review. A classic ploy of this sort was the sudden emergence of an argument for indefinite detention/internment at the start of the summer – in comparison with which (and this was surely the point) ninety day detention will seem like a liberal victory. Progressives are always on the defensive, sometimes seeing off a proposal, sometimes giving ground but never managing themselves to set an agenda for change. Under the new regime, there is a window of opportunity to achieve this.

What about reviving, dusting down and putting to contemporary use an idea that was once strongly supported by Labour but which has fallen away during the Blair leadership, namely the repeal of all terrorism laws? This may have been politically impossible when the IRA was engaged in its armed struggle but the intellectual case has always been strong, and with the phantom war on terror threatening to become embedded in our consciousness to the long-term detriment of our freedom, the time has surely come to take on received opinion on this point, and by doing so to help shape a new common sense in this important field of public discourse.

It has long been accepted that on the whole we have a wide range of ordinary laws available to cope with real terrorism. By 'ordinary' laws, I mean crimes like murder, manslaughter, criminal damage and the like but also the inchoate offences, those based on attempting a crime, or inciting or soliciting a person or conspiring with others to

commit one. By 'real' terrorism I mean not the *recherché* breadth of the legislative definition of the term but the sorts of things that come into people's heads when they think of terrorism – that is, the very conduct that is clearly already covered by this range of orthodox crimes. To assist in the prevention and detection of such serious offences, moreover, the police have a wide range of orthodox powers available to them: their stop and search, arrest, and detention capacities are already wider than many believe they should be, and have been added to markedly in recent years.

Proponents of the terrorism laws claim that there are gaps in this framework, that people who are about to commit serious crimes but who have not yet attempted them, or agreed to do them with others, or asked someone to do it for them, are in some way or another availing of a 'loophole in the law' which means they can get away unpunished. But what have they done that is so heinous? They have committed no crime, nor progressed very far along the road that might lead to its commission. What the terrorism experts call a 'loophole' the rest of us call freedom. Crimes such as those of belonging to a terrorism organisation or directing terrorism or possessing material connected to terrorism or directly or indirectly encouraging terrorism are so broad (especially given the immensely wide definition of the term in UK law) as to be little more than legislative devices with which to equip the authorities to hector those about whom they have suspicions but against whom nothing substantive can yet be established. Expanding the frontiers of the criminal law in this way creates a momentum towards pre-emptive action by the police which if left unattended could over time grow into a serious threat to liberty.

The fallback argument in favour of preserving the terrorism laws is that while it is conceded the crimes are already in place to deal with terrorism properly defined, the mechanics of the criminal process are such that convictions cannot be guaranteed so that the system is for that reason not to be relied upon. While it is perfectly true that the interposition of a jury and the requirement for proof beyond reasonable doubt do mean that an official suspicion of guilt does not automatically equate to guilt in law (and some might see this as evidence of 'unreliability'), there is a point here about the possible need for reform of the criminal process that civil libertarians need to take seriously. As a result of recent judicial decisions, there is a far wider acceptance of the need for witness and jury protection than there once was, even if it comes at some cost to the transparency of the criminal trial. There may be other procedural points that should be looked at – this is the sort of area that in past times could have lent itself to careful scrutiny by a Royal Commission, something about which proponents of change here should not be anxious. One matter that cries out for immediate attention is the inability of the Crown to lead intercept evidence at criminal prosecutions, thereby starving themselves of the very evidence through which they could secure the convictions the public needs. Lord Lloyd of Berwick saw the case for this when he reviewed the terrorism laws over ten years ago and its unanswerability has become more obvious over time. An apologist for the status quo once let slip that the problem was that such evidence might be ruled unreliable in a court of law – as though 'reliability' were some fusty legal technicality from the distant past. But if it is 'unreliable' in this way, why do we allow reliance on such evidence for

administrative decisions on such things as expulsion, the imposition of control orders and (possibly quite soon) ninety day detention (or longer) without charge?

In truth, the security services' rearguard action to fight even being given the option of adducing intercept evidence in court points to a deeper rejection, of the criminal process as a whole. The legacy of the Cold War is a national security regime that is wedded to an intelligence-led approach to counter-subversion: the goal is to find out what people are up to and then deal with them, not through the courts but via executive action – in the old days this would often have involved deportation or expulsion but only *in extremis* criminal prosecution. The trial and conviction of wrongdoers on substantive charges of criminal malfeasance is anathema to these residuary legatees of the old order. That is why they are so keen on the bits of the terrorism laws that take the state's engagement away from the courts and in the direction of the police and the executive branch: banning organisations on the basis of ministerial suspicion; arrest and detention (for 90 days?) on reasonable suspicion not of a particular crime but of involvement with terrorism; extensive stop and search powers uncontrolled by the need for a reasonable suspicion; detention without trial; and control orders. All of these drifts in the direction of a non-crime based system of executive power over liberty are as unnecessary as they are (from a civil libertarian perspective) unprincipled.

They are also counter-productive. The lessons of Northern Ireland are there for all to see: loose deployment of wide special powers legislation lay behind a deeper alienation from the British state (and from 1969) the British army than would otherwise have occurred. The abuse of civil liberties and of human rights became the rallying cry behind which non-militant Republicans found themselves flocking to the nationalist cause. And laws rooted in words like 'emergency' and 'terrorism' pushed a policing culture already under pressure in even more dangerous directions, towards extra-legal executions and other illegal activities. We are a far cry from all this in Britain today, but the shooting of Jean Charles de Menezes in an 'Operation Kratos' police action that went wrong is a reminder of the kind of thing that can happen when law enforcement personnel find themselves caught up in the hyped world not of law enforcement but of counter-terrorism. There is a large contrast here between the outrage that was caused by the detention without charge of suspected international terrorists in Belmarsh Prison between 2001 and 2005 and the calm that greets the conviction of a suspect in a court of law. The open nature of the latter proceedings and the rational basis that is publicly seen to underpin the punishment that is meted out play their part in explaining to potentially affected communities why it has been necessary to act in any particular case. The process takes people away from concerns about suspect communities and gets them to think about suspected individual criminals. The jury is there to throw in its own dose of legitimising common sense. This is good politics as well as good law enforcement, and a sharp contrast with the secret briefs based on inadmissible evidence that are sent up to ministers – these may persuade them but in this era of mistrust their mere existence without more does not convince the general public, much less the specific communities from which those adversely affected by such decisions generally come.

The Brown team has already given clear indicators of where it wants to go, and has passed some early tests in the form of attempted attacks in London and Glasgow. The emphasis appears to be on promoting the criminal process: particularly important here is the apparent willingness of the new regime seriously to consider reform of the law on admissible evidence. It is true that 90 day detention without charge or longer would appear also to be on the table, and that this enormous extension of executive power is entirely at odds with any new emphasis on the criminal that might otherwise seem to be being encouraged. But the proposal has been defeated in Parliament already and there is no reason to believe that it is any more likely to succeed this time round. With this flagship policy of the old Cold War warriors seen off, and with their intercept evidence now being properly utilised to secure the conviction of violent men and women through ordinary criminal trials, there will be an entirely new atmosphere about counter-terrorism in the United Kingdom. The redundancy of the anti-terrorism laws is likely to be increasingly apparent as terrorism is reconfigured not as a special virus challenging the very fabric of our nation but as a serious criminal test which our system of laws needs to confront – but without changing its character as a result.

It is at exactly this point that a courageous government intent on showing its commitment to liberal and democratic values would not be afraid to raise the issue of the necessity of the terrorism laws. After all, when they were first introduced in 1974 it was for only a six month period, or so it was thought. The provisions were described as ‘temporary provisions’ until as late as 2000. The attacks on 11 September 2001 and in London in July 2005 do not change the argument against these laws: they point to the need to have a strong criminal law and sufficient police powers to catch wrongdoers; they do not without more make the case for any kind of law at all no matter how counter-productive or illiberal so long as it goes under the name of ‘counter-terrorism’. A Labour government willing to help shape rather than follow public opinion on this issue would not and should not be afraid to say this.

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