Dilemmas of terror

BY CONOR GEARTY

There are two approaches to counter-terrorism in Britain—the judicial track, emphasising evidence and due process; and the secret service track, which focuses on intelligence. How does today's terrorist threat affect the balance between the two?

In the darkest days of the Northern Ireland conflict, when British and Irish 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 group of academics, journalists and businesspeople created a parallel universe in which genuine debate was possible. Protected from the noise outside by rules of confidentiality, the British-Irish Association's annual conference in an Oxford or Cambridge college may even have helped to change the political tone in Northern Ireland.

With a new terrorism risk arising from political Islam, many of the factors which distorted debate over Northern Ireland have re-emerged. Government and civil liberties groups often speak past each other, the first declaring we are on the verge of terrorist chaos, the second that we are about to become a police state. What would happen if people on all sides of the argument got a chance to speak to each other under conditions of confidentiality? Could the British-Irish Association magic work here too?

The LSE Centre for the Study of Human Rights (with the support of the Economic and Social Research Council) decided to give it a try. The organisers fixed upon six seminars spread over two years. The participants came from the senior ranks of government, the judiciary and the media, as well as politics, law, academia and civil liberties groups.

The first central theme to emerge was the issue of trust. It is well known that belief in government's assertions on national security reached a low ebb after the failure to discover weapons of mass destruction in Iraq. Less appreciated is how damaging this has been for counterterrorism. The seminars revealed the extent to which disbelief has become the standard response not only of activists, but of many academics and journalists. In one seminar, a journalist asserted that "the deployment of tanks at Heathrow one day before the biggest march against the war in Iraq led many to suggest a link." This comment provoked an exasperated snort from a 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.

The government is to some extent paying a price for the escalatory language of its predecessors, going back more than a century. So when the home office announced in late July that we face a terrorist threat "not just quantitatively but qualitatively different from previous threats," the civil libertarian response was to brush this away in the knowledge that the same was said of the Fenians in the 1860s, the anarchists a few decades later, Carlos and Abu Nidal in the 1970s and 1980s and the IRA ever since the 1930s. The latest means of causing mass casualties in an asymmetrical conflict—whether dynamite, Semtex, the car bomb or the suicide bomber—is always described as uniquely threatening. The groups behind such attacks are invariably said to be numerous and well organised, and to be about to embark on some vast campaign of violence which requires immediate legislation. Asked in one seminar about why there was so much legislation of this sort, a former (non-Labour) cabinet minister who had direct responsibility in this area acknowledged that on some occasions, "the motivation was to be seen by the public as 'doing something' in the aftermath of

Conor Gearty is director of the Centre for the Study of Human Rights and professor of human rights law at LSE

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 Qaeda.

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.

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.

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.

Proposed counterterror bill 2007-08
Possible measures include allowing telephone intercept evidence in court; increase in pre-charge detention period to 56 days; granting police and security services extended powers in relation to suspects' DNA.

an atrocity… and that a swift response had the effect of boosting morale and restoring public confidence." Others recalled that terrorist atrocities often provided a convenient way of sneaking tough provisions through parliament, as happened in 1996 and again in 1998 (after Omagh) and 2001 (after 9/11).

The new Brown government has been praised for committing itself to various changes in national security policy, and by responding calmly to the efforts at political violence in London and Glasgow. But the wide consensus of the seminars was that this tone needed to be carried deeper into the realms of government and the security services.

Most participants agreed that when discussing terrorism threats, the police need to fortify their arguments with clear evidence. One example is recorded in a report from the parliamentary joint committee on human rights. On a visit in July to Paddington Green police station, the committee asked how many terrorist suspects had been released and then rearrested or sought for rearrest because of what had come to light after the 28 days had elapsed. The question 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, or a few general comments about the time required to examine computer hard drives; for the sins of their predecessors, ministers, police officers and counterterrorist chiefs need to do penance in the basement of empirical data. They need to be clearer about why they are calling for changes to the law that would erode personal liberty. (It is also alarming that Andy Hayman, the country's top anti-terrorism police officer, is accused by the Independent Police Complaints Commission of having misled senior officers and the media about the shooting of Jean Charles de Menezes in Stockwell: does this say something about the low priority accorded truth in the national security world?)

A second theme of the seminars concerned the exact nature of the threat posed by today's terrorist organisations. Views differed as to how much capacity such groups have to cause catastrophic harm. The question is to some extent tied up with the issue of trust and expertise. So too is the debate about the alleged alienating effect of terrorism laws. A number of Muslim participants made some disturbing (albeit very general) claims about the estrangement of Muslim communities. A sociologist 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 saw the increased level of danger posed by today's political violence as warranting the exercise of stronger police powers. A police speaker produced data on the use of those powers showing a very different story from the 1970s, while conceding that some things had gone wrong.

A third theme brought us back to terror legislation; why we have had so many laws since 2000 (see box, above), and what their impact has been on civil liberties and human rights. There is clearly a strong institutional bias for legal activism. On top of their fears that some catastrophic event might occur for which their inaction is held to be a cause, ministers are aware that the public would usually go further in legislative terms than they would. (In January, the British Social Attitudes survey showed that over the past 20 years, there has been a significant drop in the number of people in Britain who adopt civil libertarian attitudes, and that this group declines still further when the threat of a terrorist attack is added to the mix.) Meanwhile, violent groups can be relied on to add to the pressure by issuing public warnings of

Politicians, counterterrorist officials and the police need to provide clearer evidence for why we need changes to the law that would erode personal liberty

horrors around the corner. Few journalists or activists appreciate that it takes rare courage for a politician to emerge from the scene of an atrocity and declare there is no need for any new laws.

Nonetheless, few if any of our participants argued that we were heading towards a police state. Whatever their rationale, anti-terrorism laws in Britain need to negotiate their way through a triple lock of restraints. The first lock is constitutionalism, the commitment of those who exercise power that there are certain things you do not do even if you have the power to do them. The Brown administration has shown a clear grasp of this. Its inclination to legislate for pre-charge detention for up to 56 days on suspicion of terrorism is rightly controversial, but critics need to note what is *not* being suggested: not indefinite detention, or even 90 days; no repeal of the Human Rights Act or amendment 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 Britain; no proposal to move the Human Rights Act on to an emergency basis, which would allow for derogation from key rights; and none of the stop-and-question powers that were floated by John Reid in May 2007. This is progress compared with the darker days of the Northern Ireland conflict, when abuses of power were a regular occurrence. What we may be seeing is the operation of unwritten constitutional assumptions in favour of respect for human rights and the rule of law.

While it is true that Tony 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 many of the laws enacted since 9/11 have emerged from the game of counterterrorism ping-pong that these branches have been playing with the executive. This is democracy in action, not the defiance of democracy that so many of Blair's critics claimed.

The controversial part IV of the Anti-terrorism, Crime and Security Act 2001, which preceded the "control orders" controversy and allowed for the detention of suspected foreign terrorists without charge, was as much a result of human rights law as of the attacks of 9/11. Case law at the European court of human rights (which Britain is bound by) has established that a state cannot forcibly remove non-nationals from its territory and deposit them in a country where they might face ill-treatment. So in autumn 2001, the then home secretary, David Blunkett, asked parliament for the power to lock up various foreigners whom the security services were (presumably) saying were likely terrorist activists, but against whom there was insufficient evidence to bring criminal charges. Parliament agreed to this only after adding various safeguards. One of these was the requirement for a review of the power by a committee of privy counsellors, and in December 2003, this committee issued a hostile report. This was followed in late 2004 by the law lords's decision that the detention without charge and the discrimination against foreigners inherent in the 2001 act contravened the 1998 Human Rights Act.

This judicial decision was widely read as evidence of how far the Blair regime had drifted from its early commitment to human rights. It is true that the speeches of the law lords were a brilliant exposition of the importance of rationality in decision-making: no government advocate could explain why it was thought right to indefinitely detain foreign terrorist suspects while refusing to take similarly drastic action against their British equivalents. The Human Rights Act (HRA), with its solicitude for individuals wherever they might be from, did not allow for the simple answer that one group was British, the other not. But the 2001 act had been enacted *within* the framework of human rights law, not, as with the Patriot Act, its equivalent in the US, in defiance of it.

The government still had a choice. It could have toughed out the political flak and stuck with 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" in legislation that, after a huge quarrel with parliament, was finally enacted as the Prevention of Terrorism Act 2005. Control orders allow for severe encroachments on the liberty of terror suspects, including curfews and denial of use of telephones and computers, without the need to establish criminal wrongdoing in a court of law. Though civil libertarians found them extreme, the act was not the law Charles Clarke (successor to Blunkett) had wanted. As enacted, it had many safeguards for human rights and contained far stronger judicial oversight than he had originally desired. As a result, there have been a number of negative rulings from the courts on particular control orders, quashing them on account of their disproportionate impact on human rights. Moreover, there have only been a handful of control orders—17 at the time of

writing—and none have sought 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. (The validity of the entire system has recently been before the law lords; judgement is expected some time in the autumn.)

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 believed he had an existential crisis on his hands. But once again parliament did at least part of its constitutional duty, diluting provisions to prohibit the celebration of past "terrorist" events (unless they were approved terrorism, like the execution of an English king) and refusing to give the police the 90-day pre-charge detention period that they—with the prime minister's support—had demanded. Of course, Blair did not like these decisions, 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 counterterrorism as much as is commonly believed. What is already clear, though, is that the style is different. Two position papers issued in July on possible future counterterrorist legislative measures show a government that has a particular perspective but will not browbeat. To describe all this as evidence that Brown represents "a far greater threat to civil liberties" than his predecessor because his attack on freedom is subtler, as Henry Porter did recently in the *Observer*, is to demonstrate such a failure of understanding of how democracy works as to risk giving all civil libertarians a bad name.

Two threads are consistently present in counterterrorism law and practice in Britain, the first running with and the second against the grain of human rights law. The first is the criminal process thread. It reflects the origins of our terrorism law as primarily a policing matter. From this perspective, the goal of counterterrorism law is punitive: the punishment of offenders for politically motivated harm they have done or are conspiring with others to commit. It is central to this account that no person can be punished until found guilty under a proper, human rights-abiding criminal process that looks for proof beyond reasonable doubt, puts the burden of establishing it on the prosecution, and ideally has a jury on hand to give the final verdict. Where there are particular difficulties in securing convictions under the traditional process, judges are not hostile to certain changes: anonymous witnesses are allowed, for example, where

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the threat to them of giving testimony is judged to be high. The government is also considering making it possible to use intercept evidence in court, and this may require some changes to the judicial role—a qualified move in the direction of a French-style investigating magistrate, with the judge taking on a more proactive role in assessing prosecution evidence. Contrary to what many of its critics maintain, the criminal process is not indelibly wedded to a highly particular, 19th-century form of justice.

The second thread in counterterrorism law originates from within the security services, draws its inspiration from the cold war, and has grown in influence as counterterrorism has come to be seen as a policy area where MI5 and specialist police officers take the lead. Here the overriding principle is precautionary rather than punitive. The emphasis is not on what has happened, but on what might happen. The primary foe is the terrorist of the future, the person who may look innocent but who is merely biding his or her time, waiting to wreak havoc when the moment is right. Intelligence matters 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, 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, civil liberties activists put the country at grave risk, sacrificing the rights to life and security of the majority at the behest of the obnoxious few. In the past, the goal of these defenders of national security was not necessarily to secure criminal convictions at all; deportation, expulsion and secret counter-measures were their stock-in-trade—and some of this "apartness" from the policing culture persists into the present.

"Personally, I love shooting the messenger"

The Blair and now Brown administrations have tried to keep both these perspectives in play. Control orders began life as a precautionary initiative, but their legalisation in parliament introduced a range of judicial-style safeguards into their operation. The first 90 and now 56-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 snapped into place. The debate over whether to allow intercept evidence to be admissible in criminal prosecutions—law officers, civil liberties groups and various senior police officers and judges are in favour; the security establishment against—is important precisely because it reflects this great divide between those who would follow the judicial route and those who prefer to bypass it in favour of administrative controls. The policing/law people emphasise the necessity of successful prosecutions, while the security services assert that using intercept evidence in court would expose agents, and that the logistical difficulty of preparing lawyer-proof documents would be enormous. The weight you choose to give these various arguments depends on your initial view on the importance of the criminal process. At the moment, the forces mustered in parliament and civil society seem poised to push ahead with the continued judicialisation of counterterrorism, 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 or 56 days); an increase in the charging and prosecution of terrorist suspects for substantive criminal offences (boosted by the availability of intelligence, albeit with new judicial safeguards in place); and a continued judicialisation of administrative powers like control orders. From the human rights/civil liberties perspective, this is the optimistic scenario. But the history of terrorism generally shows that nothing can be taken for granted. At some point, there will be another atrocity. The new prime minister and home secretary dealt with the London and Glasgow attacks with impressive calm and fortitude, but suppose these assaults had worked. Would the civil libertarian line have been as easy to hold? ■