Anti-Terrorism Law and Human Rights in the United Kingdom post September 11
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Introduction

The response of the United Kingdom to the events of September 11 has taken a number of forms. It has offered significant military support to the United States actions in Afghanistan. With its European partners it has been engaged in diplomatic activities designed to reduce support for terrorist groups and deny them access to funding and weapons. Domestically it has introduced significant new anti-terrorist legislation and given the prevention of terrorism a higher priority in the work of its police and intelligence agencies. This national legislation draws on new instruments at the European level and has significant similarities with developments in the United States, notably the USA PATRIOT Act, although important differences remain.

It is on the legal aspects of the response to terrorism that this article will focus. After looking at the state of anti-terrorist law in the United Kingdom prior to September 11 we examine the new laws in Britain and Europe and how they have been enforced. Our emphasis will be on examining the extent to which these developments are in conformity with human rights standards, notably with the standards found in both United Kingdom law and the international human rights instruments to which the United Kingdom is a party. Although both domestic and international human rights law recognizes that certain human rights may be limited to prevent terrorism and prosecute those involved in terrorist actions it also provides that some fundamental rights may not be limited and that any restrictions on other rights should be proportionate to the threat posed. In other words that states should seek to minimize the restriction of rights involved in anti-terrorist law and should demonstrate that the measures taken are necessary to prevent terrorism or apprehend those involved in it. The burden is on the state to show that there is not another way in which it could have dealt with terrorism, one which involved less serious restriction of the rights of all. Our argument is that the United Kingdom government and Parliament has not met that burden in that several of the legal measures adopted are either wholly unnecessary or exceptionally broad. Through they involve significant restrictions on the rights of individuals, especially of the rights of aliens residing in the United Kingdom, it is unclear to what extent such measures are necessary to reduce the terrorist threat. Moreover courts in the United Kingdom have begun to express criticism of these measures and have cast doubt on whether the government can sustain its present strategy if it is to act in conformity with the rule of law.

Anti-Terrorist Law in the United Kingdom Prior to September 11

Over the past thirty years the United Kingdom has had significant experience of terrorism and of formulating a legal response to it. Most of this was devised in response to political violence relating to the status of Northern Ireland as part of the United Kingdom from the late 1960s onwards, which has claimed over 3000 lives. Successive British governments took the view that campaigns of bombing and shooting both by Republican organizations such as the IRA and INLA, who want Northern Ireland to leave the United Kingdom and join with the rest of Ireland, and Loyalist organizations such as the UVF and UDA, who wish it to remain a part of the United Kingdom, placed the normal criminal justice system under severe stress and required specific legal and security measures. In addition to committing significant numbers of soldiers to patrol the streets and fields of Northern Ireland the United Kingdom parliament also passed a number of anti-terrorist laws. The most significant of these was the Northern Ireland (Emergency Provisions) Act (EPA). First passed in 1973 this was regularly reviewed over the next 25 years, the last
version being passed in 1996. The most significant impact of the EPA was to remove the right to trial by jury for a number of serious criminal offences, including murder, causing explosions and armed robbery. People charged with such offences in Northern Ireland were to be tried by a single judge, unless the prosecution indicated it had no objection to a jury trial. In addition the EPA gave broad powers for the police and army to arrest people suspected of being terrorists, where terrorism was defined as “the use of violence for political ends” and to search premises for terrorist materials without a warrant. It produced changes in the law governing the admissibility of statements made in police custody and the access of those arrested to legal representation. Membership of certain terrorist organizations, such as those named above, also became a criminal offence. All these measures were accepted, even by government officials, to be draconian in character, but were claimed to be justified on the grounds that the actions of terrorist groups left the ordinary criminal justice system unable to function, largely because people were too hostile or too scared to co-operate with the authorities.

The EPA only applied in Northern Ireland. However as IRA activity also took place in England, Scotland and Wales, notably beginning with a major bombing in Birmingham in 1974, so Parliament decided there was also a need for anti-terrorist laws throughout the United Kingdom. The outcome of this was the Prevention of Terrorism Act (PTA) which was first passed in 1974 and was also frequently renewed. Among its most important powers the PTA gave the police power to detain someone suspected of involvement in terrorism for up to seven days without judicial approval (as opposed to 48 hours under normal criminal procedure). It also made membership of certain organizations an offence and gave the government power to exclude people from one part of the United Kingdom to another (for example to stop someone resident in Northern Ireland from traveling to Scotland) without the need for judicial authorization. Although the PTA was also used against “international terrorists” operating in Britain, such as those from Indian or middle eastern groups, overwhelmingly the focus of anti-terrorist police and security force work in England before 2000 was concerned with Irish groups, and in particular the IRA.

Anti-terrorist measures relating to Northern Ireland have always been controversial. Many have criticized them as completely the wrong way to deal with the problem, but in different ways depending on their political perspective. To some, mostly of a Republican persuasion, the government should have dealt with the issue politically rather than through legal measures, resulting in British withdrawal from Northern Ireland or at least a negotiated settlement. To others, mostly of a Loyalist persuasion, the need was for a military solution which would have focused more on capturing or killing those involved in terrorist organizations than seeking to convict people through the courts for terrorist offences. Even those politically neutral or sympathetic to government policy have expressed concern as to whether the measures adopted have gone too far and whether, in the name of protecting democracy and the rule of law, government has itself been involved in infringing it. Though British law, prior to the introduction of the Human Rights Act 1998, provided only limited means of challenging the consistency of anti-terrorist measures with human rights standards, people were able to make use of the United Kingdom’s membership of the European Convention on Human Rights to raise issues before the European Court in Strasbourg. Although the United Kingdom government won more cases than it lost in relation to its anti-terrorist law applying to Northern Ireland it was found to have breached some of the most fundamental aspects of the Convention, including the right to life, the right to liberty, the right to fair trial and the protection against torture, in respect of some aspects of anti-terrorist policy. In several cases the Court did not find a violation because the United Kingdom had exercised its right to derogate from aspects of the Convention on the grounds that their existed a “situation of public emergency threatening the life of the nation”. The European Court acknowledged that the extent of terrorist violence in Northern Ireland for much of the period 1970-2000 did indeed satisfy this criteria.
In the end political talks rather than security measures were to bring about a significant reduction in terrorist violence in Northern Ireland as the peace process got under way in the mid 1990s. However some, especially in the police and security services, would argue that anti-terrorist measures, including legal changes designed to limit the access of terrorist groups to finance, played an important role in creating the conditions where all were eager to reach political agreement. In the wake of these talks the British government commissioned a study by a senior judge, Lord Lloyd, into the need for anti-terrorist law if the problem of terrorism relating to Northern Ireland were to diminish. Lloyd concluded that such a need did exist, with the threat coming especially from foreign religious fundamentalists based in Britain and those prepared to resort to violence to advance environmental or animal rights causes. Lloyd was especially influenced by the Aum Shinrikyo attack on the Japanese underground in 1995 to argue that there was an increasing threat from lone fanatics. The incoming Labour government and Parliament was convinced by his concerns and enacted the Terrorism Act 2000 (TA). This repealed the PTA and much of the EPA and for the first time provided a permanent anti-terrorist law in Britain. Modeled on the PTA but deviating in important respects from it the TA allows for the banning of terrorist organizations, for the seizing of finance belonging to such organizations, creates certain specific offences such as “directing terrorism” and provides powers of arrest and detention. New features is that it allows people to be arrested in the United Kingdom for inciting terrorism abroad and it considerably broadens the definition of terrorism to include the use or threat of action, designed to influence the government or intimidate a section of the public, for a political, religious or ideological cause where this action or threat of action involves violence or damage to property or creates a serious risk to the health or safety of a section of the public.

Therefore even before September 11 therefore the United Kingdom already had in place significant anti-terrorist provisions. However the scale of the events of that day and of the international threat that it appeared to disclose led government to feel that more action was required. One manifestation of this was new anti-terrorist legislation in Britain, another was greater European and international co-operation against terrorism.

The 2001 Anti-Terrorism, Crime and Security Act

This lengthy and diverse measure, containing some very extreme powers (most notably the power to intern suspects without trial) was rushed through Parliament and enacted in December 2001. As with all good anti-terrorist statutes, the 2001 Act was adopted very speedily. While the Government took some two months to draft it, the lower chamber of Parliament approved it after 16 hours of debate; the upper chamber took a little over a week.

The haste with which the Act was adopted is particularly serious given the diverse and complex matters it contains, and indeed its very size. The Act includes no fewer than 129 sections and eight schedules. The matters covered include: seizure of terrorist property; regulation, disclosure and retention of information; offences relating to racial and religious hatred; offences relating to weapons of mass destruction; security of nuclear and aviation institutions; new police powers; executive law making powers in respect of European security cooperation, and the detention of suspected international terrorists.

Some of the powers in the Act involve serious restrictions on rights such as privacy and liberty. Despite the alleged justification for the statute, some of its provisions seem to cover a great deal more than the specific threat of international terrorism. The Act for instance allows for the Treasury Department to prevent monies being given to a person where it believes that person may take action detrimental to the national economy, or threatening the life or property of a UK
national or resident. No doubt this is a useful power for the Treasury, but it is not limited to any September 11th related threat.

The Act provides for more extensive disclosure of officially held information where this is for the purpose of any criminal prosecution, investigation, or even a decision as to whether to investigate. The Act allows for the retention of the fingerprints of certain categories of foreigners. The Act expands police powers to take steps in order to identify persons in custody (though stopping short of intimate searches). Other police powers are also expanded. None of these provisions are limited to cases involving terrorism.

The Act contains new measures dealing with the sensitive area of racially and religiously motivated crimes. The penalty for racial hatred crimes is increased from two to seven years. The Act specifies that a criminal sentence may be increased if there was religious motivation for the crime. Whilst bearing some connection to international terrorism (though the Act’s terms are not so limited), such measures are controversial and hardly appropriate in emergency legislation.

Where national security is affected, the Act authorises the executive to give directions to communications providers as to the retention of unspecified communications data. The Information Commissioner has noted that this power may interact with earlier legislation to create at best an ambiguous regulation of privacy, and may allow for disclosure of private information for purposes other than combating international terrorism.

The statute reintroduces internment without trial into UK law, despite earlier unhappy experiences with this power. The Home Secretary is authorised to designate a non-national as a “suspected international terrorist” where he reasonably believes the person to be a terrorist who poses a threat to national security. The Home Secretary may order the person’s removal from the country, but if this would violate an international treaty obligation (e.g. the suspect would be tortured in his or her own country), or if some practical consideration intrudes, then the suspect may be detained without trial. As detention without trial violates Article 5 of the European Convention on Human Rights, the UK had to derogate under Article 15 of the Convention.

The detention cannot be challenged in the ordinary courts, but only before a special body called the Special Immigration Appeals Commission, which can reverse the Secretary’s decision if it finds there were no reasonable grounds for the decision. The Commission also reviews detentions which are not appealed. The Commission does not operate under ordinary court rules – for instance the Commission may hear secret evidence in the absence of the detainee and his or her legal representative (in which case a special representative must be appointed to represent the detainee). There is however an appeal to the Court of Appeal.

Despite the haste with which the Act went through Parliament, the Joint Committee on Human Rights managed to provide important reports on the Bill, and some on these extensive powers were included. Thus for instance the detention powers must be reviewed after 14 months, and they powers lapse after 15 months (though they can be revived). Plans to criminalise incitement to religious hatred were shelved. Parliament managed to limit an effort by the Government to expand the power of the executive to make general rules concerning European Union cooperation in areas of national security. The entire Act must be subject to a review after two years.
The Role of the United Kingdom in international anti-terrorist developments including the European Union

The United Kingdom has taken a leading role in the fight against terrorism. On the international front, Sir Jeremy Greenstock the Permanent Representative for Britain in the United Nations is the Chairperson of the Security Council Committee on Counter-Terrorism. This committee was established in Security Council Resolution 1373 on the 28th day of September. The Security Council resolution directed all States under Chapter VII of the Charter of the United Nations amongst other measures; to prevent and suppress the financing of terrorist acts, to deny safe haven to those who commit terrorist acts, and refrain from providing any form of support to entities or persons involved in terrorist acts. The committee has been mandated to receive reports from all member states on the steps they have taken to combat terrorism. The United Kingdom submitted their report on December 19, 2001 on the measures they had taken including the Anti-Terrorism, Crime and Security Act which received the Royal Assent on December 14, 2001.

On the European front., a special European Council of the EU met on September 21 and 22 and adopted an EU Action Plan to help members fight against global terrorism and improve co-operation amongst member States. On the 16th day of October 2001, the US President George W. Bush wrote to Mr. Romano Prodi the President of the European Commission with a length list of more than 40 demands to the European Union for cooperation on anti-terrorism measures. Included among these demands were “explore alternatives to extradition including expulsion and deportation, where legally available and more efficient.”

The European Union adopted a Framework Decision on combating terrorism which did not include detention or expulsion of asylum seekers or any alternation in human rights instruments. On December 27, 2001 the European Union adopted a common position which in articles 16-17, specifically dealt with asylum seekers. The articles stated:

16. Appropriate measures shall be taken in accordance with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not planned, facilitated or participated in the commission of terrorist acts…
17. Steps shall be taken in accordance with international law to ensure that refugee status is not abused by the perpetrators, organisers or facilitators of terrorist acts and that claims of political motivation are not recognised as grounds for refusing requests for extradition of alleged terrorists.

These articles do not contain the detention without trial of asylum seekers who are suspected of being terrorists and deportation to a third country measures of the British Anti-Terrorism, Crime and Security Act. The United Kingdom stands alone in Europe in filing a derogation from Article 5(1) of the European Convention on Human Rights.

The action of the British government in derogating from the European Convention on Human Rights has been unpopular with the two other major European institutions the Council of Europe and the OSCE. On December 21, 2001, the Secretary General of the Council of Europe noted the Note Verbale received from the British Government informing the Council of its derogation on the grounds of a public emergency. The Secretary General Walter Schwimmer responded that all legal measures against terrorism should be proportional and balanced and that “we should not fall into the trap which terrorism presents for democracy and rule of law”.

On November 20, 2001 there was a joint meeting between the European Union and the Council of Europe in which the European Union agreed to participate in the Council of Europe’s multidisciplinary Group on International Action against Terrorism. Unlike the British response the European endeavour chose to emphasise the need to “uphold respect for human rights and the
rule of law." Secretary General Schwimmer stated that the “anti-terrorism fight is aimed to protect basic human rights and democracy, not to undermine them.”

The Council of Europe has a Convention on the Suppression of Terrorism dating from 1977 which includes enforcing economic and other measures against countries offering safe havens to terrorists, identifying and seizing funds used for terrorist purposes and providing access to bank accounts for investigators and extending the European Union arrest warrant to all 43 Council of Europe states and it has been ratified by almost all 43 states including the United Kingdom. At a meeting of European Justice Ministers after September 11 they agreed to update the convention and they also called on Council of Europe members to become parties to the 1999 International Convention for the Suppression of the Financing of Terrorism and the Statute of the International Criminal Court and to take an active part in drafting a UN comprehensive convention on International Terrorism.

Just recently the Council of Europe adopted the first international guidelines on human rights and anti-terrorism measures. Within those guidelines was a section on arrest and police custody that directly contradict the United Kingdom’s act. Article VII states that persons who are arrested or detained for terrorist activities must be brought promptly before a judge and they must be able to challenge the lawfulness of his or her arrest before a court. With respect to asylum article XII states that all asylum seekers must have an effective remedy against decisions to refuse asylum status. Article 15 on Possible Derogations specifies that states may never derogate from the principle of legality of sentences and of measures.

In an extraordinary statement, Mary Robinson, UN High Commissioner for Human Rights, Walter Schwimmer, Secretary General of the Council of Europe and Ambassador Gerard Stoudmann, Director of the OSCE Office for Democratic Institutions and Human Rights called on governments “to refrain from any excessive steps, which would violated fundamental freedoms and undermine legitimate dissent.” Specifically these steps should not interfere with amongst others the rights to a fair trial and the right to seek asylum. The statement also cautioned against the use of derogations and indicated that a derogation should strike “a fair balance between legitimate security concerns and fundamental freedoms” and should be limited in time and used only to the extent required by the exigencies of the situation. As the United Kingdom was the only country in Europe derogating from the ECHR, this statement seemed to be addressed to them.

The government of the United Kingdom then stands alone in its response to terrorism which seems to be contrary to the action taken by the rest of Europe in its attention to the relationship between human rights and the fight against terrorism. The final ruling will have to be left to the European Court of Human Rights when it considers the derogation.

The new Anti-Terrorist Provisions in action

The United Kingdom’s new anti-terrorist actions therefore draw upon its historical experience in dealing with terrorism related to Northern Ireland. However whereas the former was a long term problem (going back several hundred years) and involved armed groups with significant public support within the United Kingdom (although the overwhelming majority of the population were hostile to such organizations), the latter is of more recent vintage and involves groups with little public support. There is also a much broader international consensus in favour of taking vigorous action against those linked to Al-Qaeda. Therefore one might expect that the new legal measures would meet with little opposition.

However another part of the changed context is that the courts in the United Kingdom can now apply human rights standards to any challenges to the validity of anti-terrorist law. There are already some indications that they are willing to do so.
Since the statute came into force most attention has focused on the internment powers. Eleven people have been detained under the Act and nine are still held under very strict conditions (the other two volunteered to leave the state). In July 2002 the Special Immigration Appeals Commission found that the detention powers violated the European Convention – because they were discriminatory in not applying to nationals as well as foreigners.

The Commission’s decision was limited in scope, and cannot invalidate the legislative measure. The Commission accepted that there was a national emergency threatening the life of the nation, relying on secret evidence provided by the security services and media reports (themselves informed by security service material). The public evidence did not disclose any specific threat to the UK. The Commission also accepted that detention without trial was a proportionate response.

Despite the existence of this internment power, the ordinary courts have been used to deal with some suspects. It is notable that when two persons alleged to be international terrorists connected to Al Qaeda appeared in the ordinary courts (on criminal charges, or for extradition), the courts have found an absence of evidence against them. There is no way to know whether any more evidence exists against those detained under the 2001 Act. In addition human rights lawyers have also advised the government that aspects of the anti-terrorist law may infringe the right to privacy as they permit the gathering and exchange of information even where this is not necessary for security purposes. It is important to note that no derogation provision has been made in respect of the right to privacy.

The government has appealed the Special Immigration Appeals Commission decision. If the appeal is unsuccessful it may need to consider whether fresh legislation is necessary. In doing so it would be wise to draw on the experience of dealing with terrorism in Northern Ireland, experience which suggests a combination of legal, political and (rarely) military actions are perhaps the best way to bring political violence to an end, relying on one of these approaches alone is unlikely to be successful. It should also recall that if you are claiming to be upholding the cause of democracy and human rights it is crucial that you are seen to be respecting them yourself.

Studying Anti-Terrorism and Human Rights at Queens University Belfast

Given the significant impact of terrorism and the legal measures adopted to deal with it on the life of people in Northern Ireland and, in particular, on the operation of its legal system this topic has been particularly prominent for staff and students in the School of Law at Queens University Belfast. Several of the Law School’s current staff, notably Professor Tom Hadden and Professor Stephen Livingstone have written extensively on the topic, both in respect of Northern Ireland specifically and more generally on the relationship of anti terrorist law and international human rights provisions. For several years the Law School, in association with the Civil Liberties Trust based in London, sponsored a studentship on emergency laws which supported a researcher to conduct empirical studies of the operation of anti-terrorist laws. This resulted in publications on non jury courts, the use of emergency powers of arrest and detention and the use of lethal force by the police and army among other topics.

The School, and in particular its Human Rights Centre and its Institute of Criminology and Criminal Justice, has always sought to combine examination of the law in Northern Ireland with comparison to similar measures in other parts of the world. One of its projects is the maintenance of a database on states of emergency law throughout the world, another is work on minority rights provisions as a way of dealing with entrenched conflicts. More recently research projects have
focused on some of the new human rights provisions which have arisen from the political negotiations in Northern Ireland, including the Northern Ireland Human Rights Commission and a proposed Bill of Rights for Northern Ireland. Research in the Institute of Criminology has looked at restorative justice, the reform of the prosecution system and changes in prisons. Again through maintaining a comparative perspective researchers based at the Law School are seeking to explore how well such new mechanisms work and whether they are likely to help in diffusing grievances which might otherwise lead to support for political violence. In addition to their academic work staff in the Human Rights Centre are active in both official human rights bodies, such as the Northern Ireland Human Rights Commission and the Equality Commission for Northern Ireland and in human rights NGOs. Their expertise is also sought by a broad range of international groups including the United Nations, UK Foreign Office, Council of Europe, British Council and a range of international human rights NGOs. In the past year alone QUB staff have been involved in human rights missions or conferences to a range of countries including Ghana, Lebanon, Nepal, Nigeria, South Africa and Turkey.

Issues relating to terrorism also feature prominently in some of the postgraduate masters courses which the School of Law offers, notably its LLM in Human Rights Law and its LLM in Human Rights and Criminal Justice. Two modules are devoted to the topics of Conflict Regulation and Conflict Resolution. The former focuses on legal measures to deal with prolonged social conflict, including measures to deal with terrorism and insurrection. A particular emphasis is placed on the extent to which such measures are compatible with international human rights law and international humanitarian law. The module on Conflict Resolution examines measures taken to resolve conflicts and their consequences, including truth commissions, reform of the police and criminal justice system, asylum and protections for minorities. The emphasis is on how well such measures are designed and how efficiently they operate. In both modules examples are drawn from a broad range of countries around the world. Other modules on the LLM consider topics such as the general international law of human rights, the issue of equality and legal protection against discrimination, and the rights of women and children. Students opting for the LLM in Human Rights and Criminal Justice may also take modules on criminal justice topics, including policing and restorative justice. There is also an option for students to take some modules from among those offered in the MA in Ethnic Conflict offered by the School of Politics at QUB. An increasingly diverse and international student body has been attracted to Queens to study this topic with the most recent entry class including students from Australia, Canada, Ethiopia, Ghana, India, Malaysia, Malawi, Russia, Ukraine and the USA as well as from the UK and Ireland. Many of these students are lawyers, judges and officials. Their studies, all of which are pursued through seminars, are supported by an extensive library of human rights materials and the opportunity to undertake internships with human rights organizations in Northern Ireland and further afield. As the issue of how to deal with terrorism while respecting human rights again comes to the fore throughout the world the School of Law at Queens University Belfast is uniquely well placed to provide a forum for those seeking to analyse such issues.

Information on the Human Rights research and programmes available at Queens University Belfast can be found on the Human Rights Centre’s website http://www.law.qub.ac.uk/humanrts