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Democracy and Security in Britain after the ‘Heathrow Plot’

The Survival of the Fittest?

Roderick Parkes

The Heathrow terrorist plot has intensified debate in Britain concerning the proper limits of Executive power in anti-terrorist efforts. Even before the plot was made public, the government had ventured to remove constraints on its scope for action, calling for ‘outdated’ human rights norms to be adapted in the face of transnational terrorism. It has also sought out international channels through which to deal with transnational terrorism; these boost its clout *vis à vis* domestic opposition. News reports and opinion polls meanwhile indicate scepticism that the government is behaving in an honest manner when presenting, and dealing with, the terrorist threat. Calls for human rights laws to be strengthened can be heard. Such a move would not, however, appear to substantially safeguard civil liberties. Upgrading parliamentary control, particularly over these international channels, is mooted as a more effective means of maintaining the legitimacy of the government’s anti-terror policy, whilst safeguarding civil liberties.

On 9 August 2006 the British Home Secretary, John Reid, delivered a speech, pointing out that the nature of terrorism has altered since the end of the Cold War, and, with a nod to the biologist Charles Darwin, argued that many of the human rights norms formulated prior to these developments would have to evolve or be stripped away. Predictably, the speech elicited criticism from activists, sections of the media and politicians.

On 10 August, British police and security services launched a high-profile operation to counter a suspected plot to bomb transatlantic flights, and the arguments made by

Dr Reid’s critics were briefly undermined. The Home Secretary had been aware of the operation, though not of the imminence of its launch.

This incident highlights two phenomena in the British response to terrorism, both of which merit closer attention:

- ▶ firstly, there are calls led by the Home Secretary and Prime Minister for a revision of human rights law on grounds of a perceived incompatibility between the provision of internal security and the current level and form of human rights protection.

- ▶ secondly, the incident highlights the *possibility* open to the government to exploit its resources—in this case, its superior knowledge of a situation—in order to promote its priorities at the expense of domestic opposition.

Although many of the issues raised by the British response to the current terrorist threat are specific to that country, they are of relevance to all liberal and parliamentary democracies seeking to safeguard individuals from terrorism. For governments faced with the practical realities of combating terrorism and the political costs of failure, the aim has often been to enhance the effectiveness of measures, and to rely on this as a source of legitimacy. Judicial and parliamentary oversight may form inconvenient blocks to this aim, in particular by limiting the secrecy and discretion which governments argue are necessary for anti-terror efforts. Yet this oversight performs a necessary role in ensuring that governments do not exploit the discretion afforded them, and that Executive priorities do not come at the expense of individual liberties. It also provides crucial legitimacy to measures adopted, precisely by closely controlling the scope for Executive action. Questions therefore arise about the most suitable ways for states to ensure the effectiveness of measures, whilst taking account of liberties and legitimacy. Key amongst these is the task of recalibrating judicial and parliamentary oversight to best meet these imperatives.

These dilemmas have been sharpened due to the increasingly transnational nature of terrorism: human rights law largely predates this transnationalisation, potentially creating an obstacle to Executive action and providing a useful tool for opponents of government policy. Transnationalisation has, however, also spawned international fora and channels through which Executives can more effectively deal with terrorism; these channels have, in turn, boosted Executives' potential to pursue their priorities at the expense of domes-

tic opposition—not least, as in the case of Dr Reid's speech, by expanding knowledge asymmetries between government and parliament.

British human rights and Executive power

Debate on human rights protection in Britain is focused on the 1998 Human Rights Act (HRA). Until 1997, when the first Blair government introduced the Human Rights Bill, codification of rights was resisted as a challenge to the principle of parliamentary sovereignty. The assumption that Parliament would use its considerable scope for action 'responsibly' had, however, been increasingly challenged by the preponderance of the Executive in the British political system. Mr Blair's Labour Party had, meanwhile, only recently ended its long period out of government.

The HRA does not give the judiciary the power to overturn primary legislation which contravenes the European Convention of Human Rights (ECHR), and thus leaves parliamentary sovereignty theoretically intact. It has, however, given individuals power to challenge primary law which they feel infringes their Convention rights. Higher courts can now make a 'statement of incompatibility', declaring the law to be contrary to the Convention and encouraging the government and Parliament to amend the law. Although in formal terms this power seems modest, in practical terms it can be great.

The contours of the current British Human Rights debate

Two strands of the human rights debate are discernible in Britain: the first concerns the specific tensions between human rights law and the current anti-terrorist agenda of the British government, focussing on the *content* of human rights law. The second is rather more polemic and less precise, based on a perceived general incompatibility between the provision of internal security and the

respect for human rights; it focuses on the *form* of human rights protection in Britain.

The crux of the current debate on the content of human rights law arises from incompatibilities between the Human Rights Act and the measures proposed or adopted under a twelve point plan that the Prime Minister set out on 5 August 2005 in response to the July 2005 bomb attacks in London. Reflecting the transnational nature of the terrorist threat, this plan was largely concerned with the question of how to deport undesirable non-nationals from Britain.

The plan suggested that 'memoranda of understanding' signed with third countries, and implementing diplomatic assurances that individuals deported from Britain would not be subject to torture, could form a means of reconciling deportation activities with the government's obligations under the Human Rights Act. Risking accusations of interference with the independence of the judiciary, the Prime Minister has been engaged in an open struggle with the courts, intimating that he will curb their powers if they continue to find against government deportation measures. The Special Immigration Appeals Commission confirmed that memoranda of understanding were permissible in a judgment delivered on 24 August, thus allaying the pressure for judicial change.

At least one point remains outstanding in the government's security agenda which has proved particularly problematic from a human rights perspective. This too is related to the problems of deportation: in 2001 a measure was introduced permitting indefinite detention without charge for non-national terror suspects who could not be deported. It was, however, found to be incompatible with the ECHR. As a result, the Prevention of Terrorism Act (2005) introduced 'control orders', which included the tagging and house arrest of terrorist suspects. At the beginning of August 2006, the Court of Appeal upheld an earlier High Court decision finding these control orders incompatible with Article 5 ECHR. Whether

the recent finding that deportation following the receipt of a memorandum of understanding is legally permissible will diminish the importance of control orders, and thus this point of tension between the HRA and security legislation, is unclear.

As indicated by the Prime Minister's threat to reduce the power of the courts if they blocked deportation decisions, the more fundamental debate concerning the overall *form* of human rights protection in Britain is partly reflexive to the debate on the content of human rights law. In May 2006, a leaked memo from Mr Blair to Dr Reid suggested a revision of the HRA to oblige judges to balance individuals' human rights against the community's right to public safety, and to grant the government the power to annul adverse rulings.

An alternative suggestion for the recalibration of human rights protection in Britain came from the new leader of the Conservative Party, David Cameron, in June 2006. Specifically to facilitate the deportation of non-nationals, he proposed the formulation of a US-style Bill of Rights, which would incorporate traditional British freedoms and duties. The HRA would be repealed. Britain would not, however, withdraw from the ECHR, nor would individuals lose their right of individual petition to the European Court of Human Rights (ECtHR). Mr Cameron contested, rather controversially, that the ECtHR would find in favour of deportations due to rules on 'the margin of appreciation' encouraging it to respect national differences of interpretation.

Beyond these suggestions for adjusting the form of human rights legislation, even more radical, and often misleading, attacks have been made by sections of the government and the Conservative Party on human rights legislation, portraying a fundamental incompatibility between it and the provision of law, order, and security. The debate on the form of protection has become increasingly detached from the particularities of the current anti-terrorist agenda, and has been conflated into a

general human rights vs. security dichotomy.

For their part, the Liberal Democratic Party and rights-based NGOs have principally sought to show that human rights legislation does not substantially interfere with the government's anti-terror efforts, calling for current levels of protection to be maintained in order to prevent the elaboration of overly 'authoritarian legislation' and to safeguard the rights of non-nationals. Nevertheless, some actors have called for an upgrading of human rights protection on the grounds that it provides the best means to counter what they see as an overweening emphasis on anti-terror control at the expense of civil liberties.

Human rights and the Heathrow plot

The British government has not yet elaborated a legislative response to the Heathrow plot or indeed stated whether changes are under way; however, even before the operation had taken place, further anti-terror laws were expected to be proposed for the autumn, so that a legislative response is likely. Should proposals be seen to restrict civil liberties, the human rights vs. internal security debate is likely to be revisited.

Yet, various reviews—including a recent effort by Dr Reid to examine the effective functioning of the criminal justice system—have found that the constraints of human rights legislation on law and order measures are by no means as large as portrayed in public debate. The debate on the *content* of human rights legislation suggests that it is principally (though, given the possible development of anti-terror laws affecting individuals' freedom of speech, their privacy and the mode by which they are tried, by no means entirely) the question of deportation which is proving problematic.

Commentators argue that the human rights/internal security debate in Britain is drawing attention away from the question

of whether the government's anti-terror activities are measured, effective and necessary. They contend that human rights legislation, whilst important in such efforts, needs to be part of a much broader strategy to prevent an erosion of civil liberties through anti-terror measures that are unnecessary or ineffective. In all but the more extreme cases, an *upgrading* of the laws would probably allow for legally permissible but unnecessary or inappropriate measures. More seriously, they argue that *downgrading* the general level of human rights protection because of a perceived clash with internal security would not appear to substantially increase the government's capacity to provide security, whilst it could facilitate broader restrictions on civil liberties—in turn, potentially giving rise to new security threats.

Transnational terror and international anti-terrorist cooperation

Just as transnational terrorism has created new problems for human rights protection, so too it has spawned international fora in which various levels and sections of government cooperate to combat it. These modes of cooperation exist on an operational, idea-exchange and more formal policy-making level. Sections of the British government are active in a complex web of bi- and multi-lateral relations with their counterparts in other states. Of greatest importance—outside the legal EU-framework and those existing at an infra-EU level like the G6 meetings between France, Germany, Italy, Poland, Spain and the United Kingdom—are relations with the United States and with 'terrorist producing' countries like Pakistan. Although necessary for dealing with transnational terrorism, these new forms of cooperation have considerably increased the opportunities for the British government to promote its priorities at the expense of domestic scrutiny and opposition.

It has long been recognised that formal home affairs policy-making at the European

level can ‘procedurally’ favour the priorities of control-oriented sections of the national Executive at the expense of national parliamentary or intra-governmental opposition:

- ▶ by uploading terrorist-related questions to the European level, Executives have gained agenda-setting and legislative powers under foreign policy procedures which they would not enjoy if anti-terrorism was treated as a purely domestic theme.
- ▶ home affairs policy-making at the EU-level brings together various sections and levels of government with like-minded counterparts in other countries, and sidelines certain actors (parliaments, the judiciary, NGOs, national ministries with rival priorities). Officials and ministers have sometimes found that they have more in common with their counterparts in other states than with actors at the national level, encountering new allies not present in a domestic setting.
- ▶ this sectoral, as opposed to national, mode of policy-making has facilitated the formulation of agreements which can then be downloaded to the national level. When formal agreements have been concluded, Parliament’s power to force changes under ratification procedures is relatively small.

With the increased parliamentarisation of EU justice and home affairs policy-making, and the recent accession of ten new member states, the scope for using the EU level in this way has narrowed. Yet, less formal modes of cooperation have proliferated both inside and outside the European Union. Not only do these offer some of the procedural advantages of formal cooperation, but governments may also gain ‘cognitive’ opportunities to mould the domestic debate on what anti-terror measures are necessary and effective:

- ▶ idea exchange between governments has been facilitated. Governments can diffuse responsibility for policy ideas when presenting them at the national level, and disguise their own vested interests. They can also lend normative acceptance

to a measure. Furthermore, governments can allow themselves to be ‘pushed’ into accepting a proposal that they secretly favour, by strategically citing the international pressure to which they are subject.

- ▶ some forms of cooperation (e.g. European integration, transatlantic cooperation) are underpinned by ideological justifications. Controversial policy ideas picked up by governments via international cooperation can be legitimated, not by reference to their substantive content, but rather due to their desirability for maintaining cooperation.
- ▶ information exchange between governments has been improved. Informational asymmetries between governments and parliaments have thus increased. Governments can make selective use of the information they gain—it can be released or withheld, depending on whether it will mobilise opposition or support. Collation of information transmitted to governments has also occurred under foreign jurisdiction, meaning that parliaments have little idea of, or control over, its reliability or its mode of collection.

Formulating the British response to the Heathrow plot

In the process of dealing with the implications of the Heathrow plot, the British government is currently making use of international modes of cooperation with ‘terrorist-producing’ states, its EU partners, and the United States. Through these channels, the British government is moulding the debate upon what measures are effective and necessary to combat the terrorist threat.

Cooperation with ‘terrorist-producing’ states

In its assessment of the terrorist threat to the United Kingdom, and the appropriate response, the British government is relying

in part upon intelligence transmitted to it by the Pakistani authorities. A British citizen, Rashid Rauf, has been held by Pakistani authorities, and Pakistani officials state that he has given useful evidence about the nature of the projected attacks and the plotters' links to al-Qaeda. Questions have, however, been raised about the reliability of the evidence and its mode of collection: it is right to wonder whether the Pakistani government's recent efforts to appear 'tough on terrorism' to the US and British governments do not offer it an incentive to inflate the evidence which it has gathered. Media reports meanwhile cited the Human Rights Commission of Pakistan, which contended that Mr Rauf had been tortured.

Reports also indicate that, according to Mr Rauf, no threat was imminent—some of the alleged perpetrators did not even have passports. An imminent 'dry run' of the attacks was, however, said to have been planned. These reports suggest that the decision to place Britain on a high state of alert (usually merited by an immediate threat) was based on the selective release of information; the fact that no attack was imminent was withheld in order to mobilise domestic support for political purposes.

Cooperation within the European Union

The Home Secretary, John Reid, met on 16 August with ministers representing the current Finnish EU-Presidency as well as France, Germany, Portugal and Slovenia, which will hold the Presidency in 2007 and 2008. Also present was the EU Commissioner for Justice and Home Affairs, Franco Frattini. Following this meeting between like-minded counterparts, British officials reported support for Dr Reid's emergency measures, particularly from the French and German Interior Ministers. Yet, it can be argued that this mobilisation of support from partners outside the domestic setting has drawn attention away from the need to debate whether the emergency measures

introduced by the British government—notably the hand luggage regulations—are a necessary or effective response to the problem it faces.

Amongst the more controversial proposals discussed by European Ministers—principally at the edges of the meeting—were those concerning the profiling of passengers on domestic and international flights (see table 2, p. 10). The term 'positive profiling' emerged from the meeting, and was later taken up by the European Commission. Although it was not made clear exactly what it *did* entail, it was clarified by both Dr Reid and Mr Frattini's spokesman that such profiling would not be carried out along ethnic or racial lines—a particularly controversial issue in Britain. At the same time, the British newspapers cited suggestions made by British officials that EU states—including France and Germany—had supported the idea of racial profiling. Whilst it is unclear what kind of tacit support exists for 'racial profiling' within the British government, such developments could conform to a pattern whereby responsibility for a controversial proposal is diffused, normative acceptance is lent to a measure, and international pressure is cited to legitimate policy ideas at the domestic level. The intimations were criticised as such by NGOs and politicians.

Responding to US pressure

The level of agreement between Britain and its EU partners, as well as the US's relative marginality in the public debate about the appropriate response to the Heathrow plot, have been a matter for surprise. The British government has previously cited both US pressure and the ideological underpinnings of Britain's transatlantic relations in order to legitimate controversial security measures. In this case, however, US pressure on Britain appears to have been of a critical nature, and has not chimed with the British government's own priorities: the operational practices of the British authorities have apparently been criticised as too

risky by their US counterparts for seeking to delay the Heathrow operation for as long as possible. This delaying tactic, which is designed to maximise the levels of surveillance intelligence gathered, is seen to be facilitated by the British laws allowing suspects to be held without charge for 28 days—a time period which the government is seeking to extend. It is interesting to note, though, that the US Secretary of Homeland Security, Michael Chertoff, suggested the introduction in his own country of powers modelled on those enjoyed by British investigators, shortly after the plot was made public. As justification he pointed to the success of, rather than the strategy behind, the British operation.

Scepticism in Britain

Precisely because of the lack of publicly available information, many of these news reports and public debates, particularly those concerning the reliability and use of the evidence collated by Pakistani authorities, are themselves lacking in substance. In some cases, they are a more accurate indication of scepticism amongst the media and NGOs towards the government's anti-terrorist activities in national and international fora than of any manipulative behaviour on the part of the government.

This scepticism does not, however, appear confined to the media. One week after the revelation of the suspected terrorist plot, a *Guardian*/ICM poll reported the Labour Party's lowest support rating for nineteen years. This, in spite of the fact that a suspected plot had been successfully defused and a potential bloodbath apparently averted. Analysis apportioned blame to the public's cynicism concerning the terrorist threat. A YouGov poll carried out at the same time found that 35 per cent of those asked felt that politicians generally exaggerate the terrorist threat. The *Guardian*/ICM poll found that only 20 per cent felt that the government tells the truth about the threat.

Public scepticism and cynicism are clearly by no means at such a level that they threaten the legitimacy of the government's measures to combat terrorism—49 per cent of those interviewed by YouGov did not feel that the threat was exaggerated, whilst 12 per cent said politicians exaggerated it because they were themselves ill-informed; moreover the 20 per cent figure in the *Guardian*/ICM poll may have been so low because 51 per cent of those asked felt that the government told less about the threat than it knew—something which does not necessarily infer the self-interested manipulation of information. Nevertheless, Dr Reid is sufficiently concerned by public scepticism to describe it as a terrorist victory in itself: the terrorists “endeavour to drain our morale and resources by misrepresenting every mistake or overreaction as if it is our primary or real purpose.”

The roots of this scepticism are not difficult to locate. Sections of the Executive are seen to have a vested interest in promoting a purely control-oriented agenda: the otherwise beleaguered Home Office has stood to benefit in terms of influence and resources thanks to the renewed terrorist threat. Meanwhile, when delivering his speech, Dr Reid stood shortly before the end of the 100-day period which he had set himself for reinvigorating the Home Office. The government itself, as noted above, was said to be planning a further raft of potentially controversial anti-terrorist measures.

Moreover, there is a long list of “mistakes and overreactions” for which the government is being held responsible. New measures have been criticised as unnecessary and inappropriate (e.g. biometric identity cards). New powers are seen to have been misused for purposes of controlling public protests and immigration (e.g. powers granted under the Terrorism Act 2000). The government is felt to have relied upon international evidence obtained by questionable means, or to have used this evidence in a questionable way (e.g. the ‘ricin plot’). Civil liberties groups have accused the government of selectively

using international pressure to promote its own priorities or to waylay debate about the appropriateness of measures (biometric passports; passenger names record agreement).

Survival of the fittest?

Democracy and security in Britain

The suspicion that the government does not behave ‘responsibly’ when dealing with terrorism has increased the calls for stringent human rights legislation. However, upgrading human rights law would be a reactive solution, potentially dealing with the worst excesses of government manipulation rather than cutting down the avenues which allow for this kind of manipulation. In this way, it would not persuade the media and public that the government was being honest in its presentation and handling of the terrorist threat and the suitability of its response, thus failing fundamentally to improve the legitimacy of measures.

The solution lies in Parliament exercising its control function over the government more resolutely. This would also help refocus attention on the question of how security measures affect civil liberties generally, rather than the specific human rights enshrined in law. The potential costs to Parliament of exercising this control function too zealously are great (Parliament may be blamed for failures to prevent subsequent attacks), and parliamentarians have sometimes avoided ‘frontloading’ scrutiny, preferring to see the insertion of sunset clauses and focussing on *a posteriori* review. These costs may also persuade them that giving their control function a higher public profile—and thereby improving the legitimacy of measures—might threaten their own position. Moreover there is a necessary degree of secrecy involved in anti-terror efforts which for legitimate reasons cannot be jeopardised by parliamentary scrutiny. Nevertheless, an improvement of the control function does appear desirable.

Parliament, and its Joint Committee on Human Rights, have indeed been praised recently for playing a pro-active and (often) constructive control role in a domestic context. All the same, just as the British government must adapt to the transnational nature of the terrorist threat, so must Parliament adapt to the new international channels which the government employs to combat it. Whilst Parliament has been quite successful at exercising its control function over domestic and formal EU policy-making channels, it appears relatively slow to adapt to the proliferation of more informal modes of international cooperation.

Both the procedural and the cognitive advantages that accrue to the British government by operating at the international level arise in large part from informational asymmetries between government and Parliament; research suggests, for example, that ideological arguments in favour of a policy are most persuasive when information about the practical or material benefits of measures is lacking; government may equally be freer to take advantage of procedural differences if Parliament lacks information about its behaviour and preferences. Information deficits are therefore two-fold: Parliament lacks knowledge about the information gathered by government in international fora; it also lacks information about the government’s behaviour and interaction with other governments in such fora.

The recent Report of the House of Lords European Union Committee (“Behind Closed Doors: The Meeting of the G6 Interior Ministers at Heiligendamm”) indicates Parliament’s awareness of the problem. Measures discussed in this document, and in the broader debate, to increase Parliament’s control over the government’s activities in international fora include:

- ▶ making fuller use of existing powers to extract information from ministers and officials about their behaviour in international fora

- ▶ inter-parliamentary informational cooperation to offset knowledge deficits
- ▶ pressuring government to parliamentarise international fora, and render them more transparent
- ▶ pressuring government to formulate and police international standards on data collection

In order to be effective, these measures would require other parliaments, particularly in the EU-25, to follow suit. In its Heiligendamm Report, the House of Lords pointed out that its European Union Committee had, for example, only become aware of the G6 meeting after it was passed handed an English translation of the German Interior Ministry's conclusions of the meeting. In such situations, formalised inter-parliamentary cooperation could improve knowledge about a wide range of fora. It should be pointed out that it is not only the clout of the British government that can be boosted through international cooperation; this is a common phenomenon amongst all governments involved in the international fora described above.

Following the example set by the Austrian *Nationalrat* during its country's Presidency of the EU (first half of 2006), the German *Bundestag* has become increasingly aware that it can play a semi-independent, pro-active role during the German Presidency in the first half of 2007. As a complement to the broad range of European Justice and Home Affairs issues likely to be dealt with under the aegis of the German government in 2007, the task of improving inter-parliamentary cooperation offers itself as a suitable and important theme for the "parliamentary dimension" of the Presidency. This cooperation need not be confined to the EU Parliaments, and could be organised at an EU-level with the Parliaments of third countries and international organisations.

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Table 1
Britain's principal anti-terror legislation

<i>Legal act</i>	<i>Main elements</i>	<i>Comments</i>
Terrorism Act, 2000	<ul style="list-style-type: none"> ▶ New criminal offences including incitement of terrorist acts ▶ Proscription of certain terrorist groups ▶ Stop and search powers for the police ▶ Suspects held for 48 hours without charge 	
Anti-Terrorism, Crime and Security Act, 2001	<ul style="list-style-type: none"> ▶ Powers to cut off terrorist funding ▶ Streamlining of immigration law ▶ Powers to detain indefinitely non-national terror suspects who cannot be deported ▶ Data retention for purposes of national security 	Part 4 (indefinite detention) repealed under the HRA
Prevention of Terrorism Act, 2005	Introduction of 'control orders' for terrorist suspects, whether UK nationals or non-nationals, partly as a substitute for the repealed measures on indefinite detention	Control orders found to be contrary to the HRA
Terrorism Act 2006	<ul style="list-style-type: none"> ▶ New criminal offences including glorification of terrorism ▶ Wider power to proscribe organisations ▶ Suspects held for 28 days without charge ▶ Process for the review of the 2000 Terrorism Act 	

Table 2
Measures discussed in or at the edges of the EU ministerial meetings, London, 16 August 2006

<i>Theme</i>	<i>Action discussed</i>
Liquid Explosives	<ul style="list-style-type: none"> ▶ Research into liquid explosives ▶ Developing Europol's weapons and explosives database
EU Intelligence Cooperation	Improving exchange of information between EU member states
European Islam	<ul style="list-style-type: none"> ▶ Creation of a European Islam through the training of Imams ▶ Training Muslim preachers to fight radicalism ▶ Finnish Presidency to start expert meetings on religious radicalisation
Transport Security	<ul style="list-style-type: none"> ▶ Exchange of advance passenger data (possibly including iris scans and fingerprints), and passenger profiling ▶ Europe-wide implementation of Britain's rules on hand luggage
General Anti-Terror	<ul style="list-style-type: none"> ▶ Establishment of a rapid-response team of European anti-terror experts ▶ Blocking of internet sites inciting terror ▶ Risk assessment to pre-empt attacks