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## The State and Civil Liberties in the Post 9-11 World

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## Chapter 12

### The State and Civil Liberties in the Post-9/11 World

MICHAEL SAWARD

On 7 July 2005 four suicide bombers killed 52 people and injured many more on public transport in central London. There had been many warnings since the attacks on the United States on 11 September 2001 that Britain was also a prime terrorist target. The heavy involvement of the UK in the US-led invasion and occupation of Iraq in 2003 was perceived by many as increasing the chances that Britain would be targeted, though the government has maintained that the invasion of Iraq had not in itself increased this threat.

After '717', Prime Minister Tony Blair declared that 'the rules of the game have changed.' The 'war on terror' had arrived, at great human cost, on home soil. And as the rules of international conflict and security had changed, he argued, so must the government's approach to individual liberties in Britain; the government would need to change certain rules too, taking new measures in order to protect British citizens from terrorist threats. Blair often repeated his view that the most basic liberty of all was the right to life; to protect British lives, some other civil liberties may need to be curtailed.

The Government's key response to 717 was the Terrorism Bill 2005, the fourth major piece of anti-terrorism legislation since 2000. This legislation proposed to extend from 14 to 90 days the length of time that suspects could be held without charge, and created new offences of glorifying or inciting terrorism, attending a terrorist training camp or making preparations for acts of terrorism. These proposals extended and deepened challenges to traditional civil liberties in Britain, but in the context of 'changed rules'. The prime minister lost the vote in the House of Commons on the 90-days detention proposal in November 2005, though he fought for it vehemently in the face of likely defeat, arguing that 'We are not living in a police state but we are living in a country that faces a real and serious threat of terrorism' (BBC News 9 November 2005, [http://news.bbc.co.uk/1/hi/uk\\_politics/4422086.stm](http://news.bbc.co.uk/1/hi/uk_politics/4422086.stm)). After the vote, he claimed that 'the country will think parliament has behaved in a deeply

irresponsible way'; quoting a senior police officer, he said 'We are not looking for legislation to hold people for up to three months simply because it is an easy option. It is absolutely vital. To prevent further attacks we must have it' (Sunday Times 13 November 2005). In short: the people want and need protection from proven, immediate threat; the measures needed may be extraordinary, but they are also necessary.

The Blair government's anti-terrorism laws have been at the core of heated debate about security, civil liberties, and the proper understanding of (and relationships between) the two. Challenging traditional civil liberties in the face of external threats is not new in Britain, as I shall describe briefly in a moment. But varied voices accusing the Blair government of chipping away at time-honoured citizen rights and liberties have invoked more than the government's approach to the war on terror. Policies concerning, for example, the regulation of asylum seekers, the planned introduction of identity cards, action on anti-social behaviour and the challenge to the right to trial by jury have been framed by critics as evidence of a government that places too little value on basic citizen liberties. There is even speculative talk about the emergence of a new type of state, one whose regulation of the behaviour of citizens runs deeper than before in a democracy, giving rise to concerns about the 'security state', or even the emergence of a 'post-democracy'.

In democratic systems such as Britain 'democracy' is never static; it is a label as well as a thing, and there is much dispute about what institutions and attitudes that label should be applied to. Both the substance and the symbolism of British democracy shift and change in the context of these debates about civil liberties. Competing conceptions of democracy run underneath many of the debates about civil liberties and the protection of citizens. The trade-off between security and civil liberties is very much of the moment. But this is far from being the first era in which critical observers have perceived governments encroaching on basic rights and liberties. Equally, is it the first time that governments have perceived the need to take steps to curtail the liberties of those they see as posing dangers to the polity or the society? Taking the 'long view' serves to remind us that such disputes are centuries old. Momentous questions of the liberty of the subject go back to Magna Carta in 1215 at least. Habeas corpus, the right of the individual not to be subject to arbitrary arrest, has been part of English law since the late seventeenth century. These principles are part of a broad and complex historical trajectory of rendering the executive accountable to Parliament and through the latter to the people. There are many historical examples of these rights and liberties being challenged by governments. In the late eighteenth century, Prime Minister William Pitt's government arrested and charged with treason several people suspected of dangerous sympathies with the anti-republican ideals of the French

Revolution. The unsuccessful trials that followed were conducted in the name of national security. The fear of France under Napoleon, and over Irish rebellion in 1871, saw suspensions of habeas corpus and the use of detention without trial respectively.

More recently, the Defence of the Realm Act of 1914 imposed wide powers of internment and of restrictions of liberty. Shortly prior to the outbreak of World War II, the Emergency Powers (Defence) Act authorised the Home Secretary to lock people up on the basis of his belief that a person was 'of hostile origin or associations'. Those identified as sympathising with fascism, most notably Oswald Mosley, were interned during the war. The so-called 'troubles' in Northern Ireland from the 1960s to the 1990s saw the abandonment of trial by jury, the authorisation of detention without trial, the introduction of internment and the passage of the Prevention of Terrorism Act 1974, which was renewed annually. The perception that recent anti-terrorism legislation undermines civil liberties has its own reasons and style (and there are new and distinct characteristics to the threats that the government has based its justification for legislation upon), but there is a rich historical context into which all of the current debates fit (Bindman 2005).

#### Policies in question

Fears about the undermining of civil liberties under the Blair government have centred mostly upon anti-terrorism legislation. But those fears, and accusations, are often expressed with respect to other policies of the government, notably around asylum seekers and identity cards. Asylum seeking and immigration (legal and illegal) have become hot political issues around the world, not least across the European Union (EU), in recent years. In the past 20 years, asylum applications to EU states have grown enormously. The peak was in 1992, where the number of applications was over 684,000 (up from 50,000 in 1983). The number in 2002 was 381,600 (Loescher 2005). Over this period, Germany was the largest recipient of asylum applications in Europe, though Britain took that mantle from 2000. In each of the years from 1998 to 2001, Britain received over 90,000 asylum applications and over 110,000 in 2002.

Under the Blair government, there have been a range of measures, legislative and administrative, designed to limit the number of asylum applications. Border-control measures at points of entry into the country have been increased. Detention of those whose claims have been refused has risen in prominence. Detention, in centres such as the UK's largest, Yarl's Wood in Bedfordshire, has been controversial. Accusations of racist abuse by staff, the lack of educational provision for children in detention,

and a lack of safety for women and children in detention have been prominent (Guardian 27 July 2005). Benefits have also been an issue; the 1999 Immigration and Asylum Act took asylum seekers out of the UK benefits system and introduced shopping vouchers for refugees. This was seen as a way to make asylum seeking a less attractive option to those considering entering the country. Under the Asylum and Immigration Act 2004, benefits in some parts of Britain could be withdrawn from asylum seekers whose applications had failed, giving rise to fears that families could become homeless and face the prospect that their children might be taken into care (Guardian 10 August 2005). From the government's point of view, controlling the numbers of asylum seekers was a question of the integrity of borders and internal security. Its actions were variously heckled and supported by often sensationalist tabloid newspaper headlines likening the numbers of refugees coming (or potentially coming) to the UK as a 'flood', and linking asylum seekers to criminal activity and terrorist threats (Huysmans 2005).

Concerns about the treatment of asylum seekers centred upon the withdrawal of benefit rights and the undesirable conditions in which they were detained or maintained. These were matters of civil rights, along with concerns about the deportation of failed asylum seekers to countries where they may face danger. A very different issue that nevertheless sometimes became linked to asylum seeking (and indeed anti-terrorism legislation) was the government's proposal to introduce identity cards for UK citizens. The Identity Cards Bill of 2005 was seen by the government as a means to combat illegal immigration, fraud, terrorism, organized crime and theft of identity. Critics raised concerns about what the information on the identity cards (which would include biometric data on individuals) could be used for, and worried that their introduction could lead to the criminalisation of many who refused to carry them. Many critics have viewed identity cards as potentially undermining the liberties of UK citizens.

Issues of asylum and identity cards have in recent years increasingly been linked to anti-terrorism measures. Often ill-informed commentary linked refugees to the import of the terrorist threat into Britain; and debates around identity cards have regularly included disputes about whether their introduction would or would not assist authorities in protecting citizens against terrorist threats on UK soil. But it is on antiterrorism legislation itself that the most prominent debates about civil liberties have taken place.

There are four pieces of legislation which have defined the Blair government's response to what it perceives as an immediate threat from terrorism.

First, the Terrorism Act 2000 built on prior laws arising from the longstanding situation in Ireland, offered broad definitions of terrorism and

associated offences, and gave power to proscribe organisations deemed to pose terrorist threats to the UK. It also enhanced powers to seize terrorist property and disrupt terrorist financial activity; granted police powers with regard to terrorist investigations (such as stop-and-search powers); created several offences specific to terrorism, such as fund raising, dealing with proscribed groups in various ways, and training terrorists; and required an annual report on the operation of the Act to Parliament.

Second, the Anti-Terrorism Crime and Security Act (ATCSA) 2001 was passed in the wake of September 11 and amounted to the first major response by the British government to those attacks. The main provision of ATCSA concerned detention without trial of foreign nationals suspected of involvement in terrorism. The government saw extended detention as necessary, partly because international law prohibited the deportation of suspects where their lives may be in danger. At the same time, the government maintained that although law enforcement agencies may have strong grounds for suspecting involvement in terrorism, little of the evidence would be admissible in a criminal court or would be impossible to reveal in Court without exposing sensitive capabilities or endangering sources of information. Further powers under the Act involved the creation of offences related to hoaxes involving dangerous substances and further tools to combat the financing of suspected terrorist activities. The Act also gave the police more powers to hold and question suspects. ATCSA was targeted by many for its overturning of long-standing British judicial principles, particularly in its legitimising of indefinite imprisonment of suspects without charge or trial. Detainees could not see the evidence against them or have it tested before a court in the usual way. There was a special secure court without a jury, the Special Immigration Appeals Commission (SIAC), to which a limited number of lawyers were allowed access, which could hear appeals by detainees. Eleven men were detained under the Act and held in Belmarsh prison in South London, without charge. Nine appealed to the highest court in the country, the House of Lords, in the latter half of 2004. The detainees' lawyers argued that the relevant measures in the ATCSA 'were an affront to democracy and the internationally accepted notion of justice' (Independent 5 October 2004).

The Law Lords, the highest court in the UK, ruled, in December 2004, that detention without trial as expressed under the Act contravened the European Convention on Human Rights as it allowed detentions 'in a way that discriminates on the ground of nationality or immigration status' by justifying detention without trial for foreign suspects, but not Britons. Britain has 'derogated' (opted out) from the European

Convention with respect to detention without trial. The Convention allows such derogation under circumstances amounting to an emergency situation in face of imminent threat to the country. But the Law Lords were scathing in declaring this unlawful. Lord Hoffmann argued that 'The real threat to the life of the nation ... comes not from terrorism but from laws such as these' (quoted in Observer 19 December 2004).

Third, the Prevention of Terrorism Act 2005, passed by Parliament after heated debate in April 2005, was effectively the government's response to the House of Lords ruling on ATCSA. The Lords declared the sections of ATCSA which dealt with detention of foreign terrorist suspects incompatible with European human rights law on two basic grounds: it was discriminatory in that it singled out non-British citizens, and that it was a disproportionate response that did not justify Britain opting out of the relevant European human rights laws. The Prevention of Terrorism Act essentially replaces detention of suspects by a process of 'control orders'. These control orders could take a variety of forms, the most stringent and controversial of which was 'house arrest' -a phrase commonly used in debates on the Bill but avoided by the Home Secretary, Charles Clarke, and his government colleagues. Unlike the detention provisions in the ATCSA, these control orders could be applied equally to British nationals and foreign suspects. As under ATCSA, there would be limited and restricted types of judicial involvement, but at the end of the day the Prevention of Terrorism Act grants power to the Secretary of State, acting under advice from the security services, to impose various restrictions on the liberty of individuals who could not be deported and who, if their cases were brought before the courts in the conventional manner, would be unlikely to receive sentences commensurate with the Home Secretary's view of the extent of the threat that their activities posed. With regard to the latter, the sensitive nature of the intelligence upon which these judgments would be made in the first place, and the inadmissibility of phonetap evidence in the courts, also in the government's view made use of the conventional court procedures inappropriate. After the Lords ruling on ATSCA, the Belmarsh detainees were released, but the majority of these men became subject to control orders under the new legislation.

Fourth, the Terrorism Bill 2005, the most recent anti-terrorism measure, was put together in the wake of the attacks in London in July and was working its way through Parliament at the time of writing. Its central elements were heightened government powers to deport people from the UK who are considered to be promoting terrorism; the extension of powers to detain suspects for up to 90 days without charges being laid before a court; and a new offence of 'glorifying, exalting or celebrating' terrorism. The proposed legislation also targeted incitement of terrorism and the dissemination of material perceived to promote terrorism.

Political opponents of the government, and civil-liberties groups, expressed concern in particular about the increased detention provisions -a further challenge to basic principles of not being detained without due legal process, from their point of view -and about the ambiguity of 'glorifying' terrorism, which they feared might result in much wider restrictions on freedom of speech. Some critics asked whether open support for Nelson Mandela prior to the dismantling of apartheid in South Africa would have amounted to an offence under the proposed laws. The Blair government was defeated on one key proposal in the Terrorism Bill in November 2005 when the House of Commons rejected detention without trial for 90 days in favour of a lower period of 28 days. Initial media coverage focused on the whether this defeat, the first time the Labour government had lost a Commons vote, represented the beginning of the end of Blair's prime ministership.

### Political rhetoric and underlying ideals

How do present debates surrounding such controversial measures as the effective policing of terrorism invoke different visions or conceptions of democracy? For example, political actors, in making principled and practical objections to government actions, offer their own implicit or explicit criteria against which to judge the government's or system's performance. Particular political actors tend to be the 'carriers' or 'purveyors' of competing models of democracy as can be glimpsed when we trace some key threads in the debates surrounding the 2001 and 2005 antiterrorism legislation in particular.

Debates around anti-terror legislation are replete with key words and signifiers which carry powerful but ambiguous resonances. 'Freedom' is deployed on the side of those proposing restrictions on certain classes of people in the name of 'security'. The idea of the state as a provider of 'protection' for citizens in a democracy has played a key part too. The very survival of democratic systems and practices in the face of the 'threat' posed by international terrorism is invoked by the UK government. The value, renewal and survival of democracy, the role of the state in protecting basic democratic rights and freedoms, are precisely the sorts of issues that go to the heart of what democracy is, and what it ought to be. A range of principles have been invoked .and expounded in the debates around anti-terrorism legislation. In addition to concerned and interested citizens, a range of actors were involved:

- the government;
- opposition parties and their parliamentary spokespersons;

- opponents outside Parliament such as civil-liberties groups;
- the judiciary; and, not least
- media figures.

A range of factors were also in play in these tussles:

- the manner and speed with which legislation was passed;
  - the public debate as played out in the news media;
  - concern for the proper role of the judiciary within a democracy;
  - the deep historical character of the liberties of the individual which some perceived to be under threat (either by terrorism, or by the legislation designed to protect against it);
  - the proper nature of the relative power of the executive in a democracy;
- and
- how one might judge the extent of a 'threat' and therefore what might be a proportionate response.

For the Blair government, the 'threat' of terrorism to Britain was immediate, it constituted an emergency, and it justified the taking of whatever steps were deemed necessary to combat it. The words 'threat', 'security' and 'protection' have permeated ministerial speeches and those documents introducing or defending the measures represented in the ATCSA 2001, the Prevention of Terrorism Act 2005 and the Terrorism Bill 2005. This has not simply been one thread amongst others in the Blair government's approach to its governing tasks in recent years, but very much at the centre of its rhetoric and specific proposals. Consider the Queen's Speech of November 2004, which was described as follows:

The government's programme is overwhelmingly dominated by issues relating to crime, anti-social behaviour and, most obviously, security. It is littered with references to the threat from global terrorism and the fact that we all live in a 'changing and uncertain world'. And its tone is set by a series of measures including proposals for ID cards, an organized crime bill and a counter terrorism bill, all designed to address what Tony Blair believes is the greatest challenge of the modern world. (BBC News November 2004, [http://news.bbc.co.uk/1/hi/uk\\_politics/4034903.stm](http://news.bbc.co.uk/1/hi/uk_politics/4034903.stm))

The world is changing, the country faces grave threats, and has to act in a way adequate to these threats. The nature of the challenge is unprecedented:

in Blair's own words, 'Here in this country and in other nations round the world, laws will be changed, not to deny basic liberties but to prevent their abuse and protect the most basic liberty of all: freedom

from terror' (quoted in Huysmans 2004,325). Note too that this is very much a national agenda. Although civil liberties campaigners and others applauded the Blair government's passing of the Human Rights Act 1998, which incorporated into British law the European Convention on Human Rights (discussed below), derogation or opting out of provisions of the Act under certain specified circumstances has been a core part of the government's measures against terrorist threats (as we saw, the Law Lords' important ruling of late 2004 contradicted key grounds of such derogation). The government has been keen to see that European law does not undercut, as it sees it, efforts to protect British citizens. For example, proposed new EU rules announced in September 2005 regarding rights of appeal for failed asylum seekers and illegal immigrants, how long they can be held, and safeguards with respect to returning deportees to countries where they may face torture, raised concerns within the government that their plans to deport terrorist suspects would not be able to go ahead. Home Secretary Charles Clarke has made it clear, in such cases, that he would act where possible to circumvent European restrictions, notably by signing bilateral memorandums of understanding against torture with the governments of nations to which deportees may be sent. The general point is that the British government has assumed its right to act as it sees fit in the face of new threats in a changed world; democracy and protection are a national matter before they are questions of European or other international standards or charters.

Clearly, this is democracy in 'protective' mode. The job of government is to protect the people, and to regard as important, but secondary, qualms about marginal restrictions on people's liberties where such restrictions bolster protection. New times and new uncertainties demand protective democratic action by government. Now, of course, protective measures beyond the normal remit of the law can only be acceptable if the character and immediacy of the new threats are such that they justify such measures. The Prime Minister's (and Home Secretary Charles Clarke's) view that the rules of the game had changed after 717 meant (presumably) that further restrictions on certain civil liberties in the name of a wider security may be needed, and that the government would not hesitate to introduce them. Government underlining and reinforcing of the sense of immediate and highly dangerous threat to the British people is ubiquitous. The Home Office's own briefing paper, *International Terrorism*, provides a flavour of this case. It outlines 'the nature of the terrorist threat we face and how it differs from previous threats of this kind', noting that to 'protect' is a key part of the necessary response. Throughout, though, the aim is 'reconciling liberty and security', acting 'without compromising the openness of our society or the freedoms we value'. 'Liberty with security' is the goal. But it must be realised that the

threat amounts to an 'emergency', and 'democratic governments have long accepted that such emergencies may justify some temporary and limited curtailment of individual rights where this is essential to preserve wider freedoms and security'. The government has found such actions 'necessary', because it is dealing with 'an unprecedented challenge' (Home Office 2002a). So altering the laws so that for example forms of detention without the normal legal processes, control orders, limited judicial involvement, and new restrictions on freedom of speech, could be legal is a response to a threat that is both grave and new.

Although measures to deal with the terrorist threat are not permanent, no one should expect that they would not be needed for some time: 'we need to recognize the resilience of the terrorists. This is not a threat which can be overcome quickly or where negotiation is possible' (Home Office 2002a, 1). That fact is reinforced by ministers conveying their sense of the character of the enemy -it is not one thing, in one place, or even readily seeable or identifiable. As David Blunkett, the then Home Secretary, stated in the House of Commons in October 2002, 'al-Qaeda and its offshoots' have 'a network of cells and the loose confederation of those who are not parts of its central core but who are prepared to support and help it' (House of Commons debates 10 October 2002). In formulating laws and other measures to combat this amorphous, highly dangerous and immediate threat, Mr. Blunkett (a controversial figure, seen as a realistic progressive by supporters and an illiberal reactionary by his critics) wanted answers, not arguments which failed to recognise the threat's nature: 'All I want is that people come up with solutions, not with objections, because in the end the primary duty of Government is to protect our citizens from the undermining of their freedoms and democracy by those who know no bounds and have no understanding of the issues of punishment or prosecution when they take the lives of others through suicide bombing' (House of Commons debates 23 February 2004).

One can also see in the government's approach the effort to instill a sense of common purpose in the face of the 'threat'. As Charles Clarke, Blunkett's successor as Home Secretary, said in the House of Commons in 2005 in the debate about the Prevention of Terrorism Act: '[a ]l-Qaeda and its associates have a strategy to destroy the central themes of our democratic society, and this House must decide how best we can address that threat. In so doing, we must seek to analyse and understand the threat that we face, which we have done -we have laid the results before this House and are trying directly to assess the threat ... [W]e must acknowledge that British citizens as well as non-British citizens are focused on the target of seeking to destroy through terrorist activity the society that we seek to represent' (House of Commons debates 28 February 2005).

There are four threads in the government's style and rhetoric that are worth noting at this point:

Firstly, its approach implies that it is acting as the defender of basic rights and liberties. Most often, the government expresses this view in terms of its defence of the most basic liberty, that of freedom from terror, or of the most basic right, that to life. In the words of Tony Blair, the government has sought to 'protect the most basic civil liberty of all, which is the right to life on behalf of our citizens' (Guardian 16 September 2005).

Secondly, it asserts strongly its right as a national government to protect its citizens as it sees fit, within its European and international obligations where essential but by taking a separate legal or administrative path where it perceives that as necessary and feasible.

Thirdly, the government is fond in these debates of the discourse of 'balance'. The relationship between civil liberties and security in the changed world carries key questions of striking the 'right balance' between the two. It is careful not to deny the importance of fundamental civil liberties, but talk of balance is quite explicit in its aim to revisit, and if necessary to curb with reluctance and limitations, some cherished civil liberties.

Fourthly, it sees the balance between the executive and the judiciary in the UK shifting somewhat in this context. It is careful not to speak of undermining the traditional role of the courts in the UK system, least of all the judiciary's right to review the legality of legislation. But its antiterrorism measures have been seen by many in the judiciary (as we shall see briefly below) as challenging age-old patterns of balance between the executive and judicial branches of government in the UK. The government's interpretation of 'balance' does not, on the whole, sit comfortably with other notions of constitutional balance between these separate arms of the British state.

The rhetorical justifications built around the terms 'protection' and 'security' carry particular interpretations of what and who needs protection and security. It is very much the British people, and its way of life, that needs protection and security. That sounds perfectly uncontroversial, and in one sense it is. But, as we shall see, it is not the only interpretation. Interestingly, talk of striking a new 'balance' between protecting Britons from terrorism and civil liberties also received support from other sections of the executive branch of the UK government. The head of Britain's internal security service, MIS, Dame Eliza Manningham-Buller, spoke in September 2005 of the difficulties of protecting citizens within the law when unclear intelligence leads authorities to believe that a terrorist attack is being planned, but where there is insufficient evidence to lead to charges being laid successfully. She defended the importance of civil liberties and 'hard-fought-for' rights, but noted that 'the world has

changed and there needs to be a debate on whether some erosion of what we all value may be necessary to improve the chances of our citizens not being blown apart as they go about their daily lives' (BBC News 10 September 2005, <http://news.bbc.co.uk/1/hi/uk/4232012.stm>).

Other actors saw this 'balance' differently. Opinion in the judiciary was not uniform by any means, but there were many strong judicial criticisms of the key features of the legislation discussed here. The importance of the rule of law in a democracy was an important theme in judicial criticism. One of the Law Lords who ruled that the ATCSA provisions on detention without trial were unlawful, Lord Nicholls, said in his ruling that 'Indefinite imprisonment without charge or trial is anathema in any country which observes the rule of law' (BBC News 16 December 2004, <http://news.bbc.co.uk/1/hi/uk/4100481.stm>). One High or Appeal Court judge, speaking anonymously, expressed great concern about the Prevention of Terrorism Act's 'control orders' in a similar concern for the basic rule of law in a democracy: 'It has to be pointed out to the public that these quite draconian measures apply to them -not just to bad people but to everybody. They may think that the government will only apply them to bad people but there is a risk that they will be applied to cases where they're not justified' (Guardian 26 April 2005). Another High Court judge added: 'I think the executive takes too much power in relation to terrorism and in relation to shutting people up without trial' (ibid.).

Tony Blair warned in 2005 that he would have 'a lot of battles' with the courts if they acted to block the deportation of extremists, talking of renouncing part of the European Convention on Human Rights (Independent 11 August 2005). In return, senior judges have told the government that they would fight 'root and branch' any moves to undermine the independence of the judiciary. High-level invocation of democracy has been a key part of judicial warning shots aimed at the government's rhetoric over its anti-terrorism measures. A deputy High Court judge, Lord Carlile, said that 'If the Government undermines the judiciary, then the judiciary might be tempted to undermine the Government ... If we get into that state of affairs we undermine democracy. That is something the judiciary won't do, and the Government would be foolish to do it' (Independent 11 August 2005). A former Law Lord, Lord Clyde, said that 'The importance of the independence of the judiciary ... is beyond question. The function of the judiciary is to uphold the constitution. If a judge ... considers the constitution and the Human Rights Convention is in peril, he must act accordingly. This is vital for democracy' (ibid.). Here we can see that questions of 'balance' from the government's point of view are interpreted as an imbalance, a challenge or potential challenge to the basic principle of judicial independence.

The lawyers for the nine foreign terror suspects detained in Belmarsh prison were, not surprisingly perhaps, more fulsome in speaking of what they saw as the larger constitutional significance of the laws they sought to oppose. They told the panel of nine Law Lords that the relevant measures in the ATCSA 'were an affront to democracy and the internationally accepted notion of justice'. Ben Emmerson QC, representing seven of the detainees, was reported as claiming that the detention provisions 'threatened the values they were designed to protect', and was quoted thus: 'We say in a democracy it is unacceptable to lock up potentially innocent people without trial or without any indication when, if ever, they are going to be released' (Independent 5 October 2004).

The government's most recent proposals such as targeting the justification or glorification of terrorism have met with judicial criticism, along with criticism from civil-liberties group Liberty, an organisation that has been prominent in these debates. Addressing earlier concerns over the government's anti-terrorism legislation, Liberty expressed its belief that 'in a democracy, the values of public protection and the rule of law are not mutually exclusive.' It defended the presumption of innocence, which the detention and control-order provisions of anti-terror legislation were seen to have undermined: 'we appreciate that the presumption of innocence is never the most fashionable idea at times of heightened fear. It is, however, a key distinguishing feature of a healthy democracy' (Liberty August 2004).

With respect to the 2005 proposals to outlaw justification or glorification, Shami Chakrabarti, director of Liberty, asks, 'What is meant by "terrorism"? What kind of behaviour constitutes "justification"? Could this cover political debate about the circumstances in which it is acceptable to take up arms against non-democratic regimes across the world?' (Guardian 24 August 2005). Elsewhere, she said that 'glorification' was so broad that it would 'make loose talk a serious political offence' (Independent 16 September 2005). Critics from the judiciary, pressure groups and the press argued that the government already had at its disposal sufficient powers to prosecute those who incite violence; further legislation was unnecessary and, it has sometimes been suggested, involves a disturbing accretion of further powers to the executive.

There are other critics of course, too numerous to mention fully here. Geoffrey Bindman reinforced basic values of a liberal democracy, stressing the damage (as he saw it) to time-honoured individual rights and freedoms in the provisions of ATCSA: 'For the first time since 1945 the executive was given power to detain indefinitely without a charge being laid, and, crucially, without the detainee having the opportunity of answering the evidence by which the detention is justified.' He went on

to argue, making the larger connection to the character of democracy, 'it is a disturbing feature of current British and American governments ... that in the guise of protecting the public they are ready to abandon principles which are the hallmark of democracy' (Bindman 2005). Journalist George Monbiot was even more forthright. Criticising provisions such as the Terrorism Act 2000 for placing restrictions on legitimate protest, he wrote: 'Democracies such as ours will come to an end not with the stamping of boots and the hoisting of flags, but through the slow accretion of a thousand dusty codicils' (Guardian 3 August 2004). Blick and Weir, writing in the context of the 2005 proposals, argue for an urgent answer to the question of how effective the government's anti-terrorism proposals might be, considering that the government's strategy and laws 'will have a profound effect on British democracy, the rule of law, criminal justice, the conduct of police and security forces, civil and political rights and the shape of community relations perhaps for generations to come' (Blick and Weir 2005).

A Labour dissenter from the government's proposals in the Prevention of Terrorism Act, former Foreign Secretary, the late Robin Cook, articulated one key plank of a liberal conception of democracy in these debates when he addressed ministers' arguments that 'the safety of the public must come before the liberty of the individual': this is fine when it is your safety and somebody else's civil liberty. But liberty is indivisible. A measure that curtails the liberty of one citizen necessarily curtails the liberty of every citizen' (Guardian 4 March 2005). Leader of the Liberal Democrats, Charles Kennedy, offered a similar appraisal in his comments on the same proposals.

Of course, critics aim at different targets, argue in diverse ways, and seek to defend a diversity of institutions and values. Nevertheless, it is not stretching things too far to suggest that there are some central threads that bring together judicial, civil liberties and other critics:

- Government opponents point out that a range of rights and liberties need to be protected at all times. To quote Chakrabarti: 'We need to focus on what unites us in the struggle against terrorism -our fundamental values. These values are human rights; the bedrock of our beliefs, not a convenience, a luxury or a pick and mix' (Refugee Council News 26 August 2005).
- Critics tend to support strongly the independence of the judiciary and the fundamental and unshifting character of the rights and liberties that the judiciary exists to defend.
- The European and international rights obligations on the government are declared to be non-negotiable, not optional according to circumstances.

- The idea of 'balance' between security and liberty is regarded as suspect; instead, especially from the point of view of judicial critics, the 'balance' within the constitutional structure of British government between the powers of the executive and the judiciary is the most crucial balance to be sustained.

A good deal of these debates revolve around what actions, moral imperatives and laws are most 'basic' or 'fundamental'. In this context it is instructive to consider briefly the life and times of the Human Rights Act (HRA). After many years of debate in the UK, the HRA incorporated into UK law the European Convention on Human Rights, effectively making the Convention a codified and vital part of the British constitution. It contains provisions regarding the right to life, prohibition of torture, the right to a fair trial, rights to privacy, freedom of thought and conscience and religion, freedom of expression and assembly, and the prohibition of discrimination. The courts cannot strike down legislation on the basis of the HRA, but they can rule that legislation is incompatible with its provisions, and leave the response to that ruling to government and Parliament. The HRA has been subject to controversy and sections of the media -and the Conservative Party have highlighted how, in their view, it has benefited unworthy groups such as travellers, prisoners, illegal immigrants and terrorist suspects. With regard to anti-terrorism laws, David Blunkett, when Home Secretary, warned judges that curtailing civil liberties in the fight against terrorism was a matter for Parliament, not the courts (Guardian 25 September 2001); Tony Blair has argued that 'Should legal obstacles arise, we will legislate further, if necessary, amending the Human Rights Act in respect of the interpretation of the European Convention on Human Rights' (quoted in Guardian 31 October 2005). Opponents of this view espoused the HRA's 'fundamental' character, arguing that the government and Parliament must operate within it rather than seek to challenge or modify its provisions; defenders of the government's view stressed the 'basic' role of the government in providing 'security'. Labour's willingness to amend the Act has been surpassed by the Conservative Party's action in setting up a commission to explore the 'reform, replacement or repeal' of the legislation. The Conservative spokesperson, Shadow Home Secretary, David Davis, said that 'Once we had inherited English liberties; now we have incorporated European rights ... once, the law limited the state and enlarged the sphere in which the citizen could be free; now, it imposes obligations on the state and limits the freedom of the citizen' (quoted in Guardian 23 August 2004).

## Security and protection: two competing ideas of democracy

Different actors, then, have prioritised different principles and (as they see it) necessities in the post-9/11 political context. There is widespread agreement that contemporary democracies face huge challenges. Government and critics both would recognise that they seek a 'protective' democracy. But the focus and style of the protection concerned differs markedly. Drawing partly upon models of democracy outlined by authors such as Lijphart (1999) and Held (1996) the Government's position can be called a majoritarian protective model of democracy.

This majoritarian protective model of democracy displays a number of key features, which will be familiar from the above account in varying degrees. Although proponents of this model would agree that certain civil rights and liberties are fundamental, there is a view that the ranking of such rights can shift and change according to political and other circumstances. So, for example, in the face of a new style of terrorist threat, the right to life or the right to basic security assumes a greater relative importance than the right to free speech, the right to free movement, or the right to legal due process. Implicit within this view is an idea that rights and liberties are, albeit to some limited degree that is difficult to specify, the gift of the state and not necessarily the inviolable prior possession of the free citizen. This model respects the constitutional role of the judiciary in democracies, but nonetheless reserves the right of the democratically accountable executive to respond to the perceived fears of citizens by encroaching on established judicial principles or routines, in extraordinary circumstances. The elected executive, in other words, is first among equals when it comes to fundamental issues of protection of (assumed) most fundamental citizen rights and liberties. Its proper concern lies with the shorter-term impact of protective measures on a minority who pose dangers.

This model is unapologetically national, regarding the nation state as the primary location for the enunciation of political interest and the interpretation of the appropriate scope and application of rights and liberties. It assumes that 'protection' (and security) should be interpreted in terms of threats to citizens posed by individuals and groups who target the society -enemies, internal and external ones, are what we need protection against. It also recognises that 'balances' are important in questions about rights and liberties, and it interprets balance as being between liberty, on the one hand, and security or protection from enemies on the other. The majoritarian protective model sees within this need for 'balance' the possibility of limited but legitimate trade-offs of some measure of liberty in the name of security and protection. It sees the

state as a set of institutions which must change and adapt, often in drastic ways, to new threats and circumstances; sometimes it is necessary to change the rules. Finally, these changes are carried through in the name of most people, or all citizens, or the 'vast majority'. It is a model of democracy with a populist, majoritarian character.

In contrast, the model of the critics is best referred to as a constitutional protective model of democracy. According to this model fundamental rights and liberties are not the gift of the state but exist prior to the state and they are the inalienable possession of free citizens. It defends the strong judicial function of protecting those rights and liberties, and sees this function as fundamentally democratic even if judges are not themselves elected political actors (for theoretical accounts of the 'self-binding' character of democracy, see Elster and Slagstad 1988; Saward 1998). The primary concern of its advocates is the potential longer-term impact of measures on the rights and freedoms of all, not a minority. The constitutional protective model is more internationalist than the majoritarian protective model. It takes especially seriously international obligations and ED law, and denies that there can be a legitimate set of opt-outs from such obligations. The question of 'balance' is differently conceived; here, it is a question of constitutional balance between the executive and the judiciary. It is also highly sceptical that, in any fundamental way, the rules have changed.

Constitutional protections in democracy are sacrosanct, they remain the bedrock of the rules of the system and even new and virulent threats are best combatted by deepening and defending those rules, rather than seeking to modify them. It is not the rules that change; the context changes, but the rules remain. Crucially, the constitutional protective approach highlights the need for the protection of citizens' rights and liberties against the state itself. Constitutionalists are wary of states grabbing powers, aware that powers adopted or created are rarely, if ever, given up. They are also suspicious that the targets of new, restrictive laws will not be the only targets in future -for example, restrictions on the freedom of speech and movement of a suspect minority today may in time become restrictions on a larger set of citizens, possibly even a majority, in the further future. One can see the suspicion of the over-mighty state in the efforts by some critics to promote time limits on the application of some new laws.

Some prominent theorists of democracy, including MacPherson (1977), have embraced this 'protective model'. The most important classical theorist of this 'model' is arguably the great English utilitarian theorist Jeremy Bentham. In general terms, it is no doubt a core responsibility of a democratic government to protect its citizens' lives and freedoms from external threat. But the central thread of the so-called protective model has pointed in a quite different direction. Consider the words of Bentham:

A democracy, then, has for its characteristic object and effect, the securing its members against oppression and depredation at the hands of those functionaries which it employs for its defence ... Every other species of government has necessarily, for its characteristic and primary object and effect, the keeping the people and non-functionaries in a perfectly defenceless state, against the functionaries their rulers ... (quoted in MacPherson 1977, 36)

Or, as the legal philosopher Jeremy Waldron has put it recently:

True, the events of September 11 have heightened our fear of the worst that can be done to us by individuals and groups other than the state. And an increase in the power of the state may be necessary to prevent or diminish the prospect of that horror. But the existence of a threat from terrorist attack does not diminish the threat that liberals have traditionally apprehended from the state. The former complements the latter; it does not diminish it, and it may enhance it. (Waldron 2003, 205, original emphasis)

## Conclusion

Tony Blair has argued at different points in his premiership that his government is interested in what works, not in ideologically driven policy. But even if leaders and governments do not profess ideologies, invariably there are discernible threads in their thought and actions. One such thread in a series of policies and initiatives under Blair, especially in the broad area of criminal justice policy, has been to challenge an emphasis on individual rights and liberties and to seek a rebalancing in favour of community, obligation, and the rights of victims. At times this has become explicit, as for example in Blair's 'respect agenda', around which the government created a key position of 'coordinator for respect', sometimes called a 'czar', occupied by Louise Casey. After outlining a series of policy proposals designed to tackle 'anti-social behaviour' and putting victim rights and redress at the heart of criminal justice, the prime minister stressed the broader moral agenda:

a modern civic society, underpinned by reformed public services and an active welfare state, won't emerge simply through better laws, tougher enforcement of obligations, sanctions and more police. As well as modernising the criminal justice system and tackling antisocial behaviour we also need to revive the spirit of community and social cohesion. As Martin Luther King argued in the 1960s' struggle

for civil rights, laws 'restrain the heartless; they cannot change the heart' ... Only by rebuilding cohesive communities and reforming our criminal justice system can we achieve our vision of a strong and fair society. It means abandoning the rhetoric and false choices of the past. Since 1945 our politics has too often failed to articulate a coherent response to crime and anti-social behaviour. Restoring civic responsibility is not a betrayal of social justice, but essential for its realisation. (quoted in Observer 10 November 2002)

Among the most prominent government policies within the broad range of this agenda are anti-social behaviour orders (ASBOs) which were first introduced in 1999. ASBOs can apply to anyone found to harass or alarm neighbours or neighbourhoods. A series of related measures have been enacted by the government to address the rights of victims. Blair has long made plain his belief that Britain's criminal justice system is balanced far too much in favour of the rights of the criminal at the expense of the rights of the victim (Blair 2002). In 2005 he signalled his intention to intensify this programme, through tackling binge drinking and other low-level anti-social behaviour by on-the-spot fines, seizing the property of offending families, appointing local anti-social behaviour 'sheriffs', introducing 'baby ASBOs' for under-10s. This vision of community, respect, and obligation permeates these developments accompanied by criticisms from other parties, community workers and parts of Whitehall. The anti-social behaviour and respect programmes form part of a populist vision of instilling a sense of obligation and community into citizens, indeed to mould citizens in a particular way. Protecting victims and the vulnerable is a key part of the rhetoric at least.

It is not stretching things too far to see close links between the government's anti-terrorism legislation and its broader agenda, as expressed through its respect and related programmes. Both display what I have called a majoritarian protective outlook on how democracy should be shaped and function. Likewise, critics of this agenda point to the dangers that civil rights and liberties are being placed under threat by the broader thrust of the government's criminal-justice reforms: the essence of the, position of the constitutional protective vision of democracy. The fascinating connection between these two visions, as played out in anti-terrorism debates and beyond, lies in the internal tensions in the idea of states 'protecting' citizens. Amid the bluster and argument of day-to-day politics, basic conceptions of what democracy is, whom it protects from what and why, face off against each other. For some, the rules of the game have changed. For others, changed circumstances make the old rules more relevant than ever.