Have the rules of the game changed?

David Bonner argues the rules of counter-terrorism powers have not changed since 9/11 but judges in the human rights act era have begun to afford such powers enhanced scrutiny.

A recurrent theme in discourse on terrorism and counter-terrorism after the "watershed" of 9/11 is one of changed and increased threat. The threat from Islamist terrorism is different from and greater than previous threats. The danger to civil liberties from unduly repressive powers is greater than ever before. A historical perspective suggests that neither proposition is accurate. The nature and scale of the very real threat faced by the United Kingdom is not qualitatively different from previous threats posed by irredentist, nationalist terrorism connected with the Irish and latterly Northern Ireland questions. Although then Prime Minister Blair in his news conference a month or so after 7/7 asserted that "the rules of the game are changing", a historical perspective suggests that in terms of the security measures themselves, the rules of the game have not changed. It is a case of more of the same medicine to treat a very similar problem of armed threats to the State and its inhabitants. The only 'rule of the game' that clearly has changed is the traditional one that United Kingdom courts faced with the exercise of executive powers in the 'security' sphere are there merely to legitimate whatever action the executive considers necessary to deal with the threat. In this era of the Human Rights Act 1998 (HRA), United Kingdom courts have started to apply an enhanced level of scrutiny in an area they once characterized as too sensitive for judicial involvement and in which they exercised undue restraint despite the marked impact on the rights and freedoms of individuals.

The nature and level of terrorist threat

Clearly there is a threat to people and property in the United Kingdom from acts of terrorism. This was accepted by the Special Immigration Appeals Commission (SIAC) (which saw the material seen by the Home Secretary) in the case of the Belmarsh detainees, and is more than confirmed by the events in London of 7/7 and 21/7 and the Glasgow airport terrorism attempt in July 2007. Although Lord Hoffman's approach to the applicable test has great merit, it is accepted here that in the light of ECHR jurisprudence setting a lower threshold, the threat is such as to constitute a "public emergency threatening the life of the nation" (Art. 15 ECHR). Prime Minister Blair's press conference statement ("the circumstances of our national security have self evidently changed") suggests that the nature of the threat is different and is greater than in the past. Both propositions are debatable. Others have claimed the threat to be unparalleled since the Second World War or the Cold War. Such claims raise concern about governmental use of the politics of fear as a lever to obtain new powers or extend the range of existing ones. Lack of an historical perspective or the deployment of a distorted one is damaging. Claims that the threat is unparalleled, greater than that of the IRA or even the Cold War, do not allay public fear. They prevent the realization that it can successfully be contained using the same methods as have in the past contained IRA and other terrorism. Such hyperbole, like the Iraq "weapons of mass destruction" debacle, corrodes trust in government. Characterization as a 'war on terrorism' lends terrorists a false status, fostering a climate of fear which assists them (Rowntree, 2006: 11, 13). It can be contrasted with approaches to terrorism connected with the Irish and Northern Ireland questions and with the withdrawal from colonial empire, where government was all too keen to avoid characterizing them as war for fear of according insurgents the status of prisoners of war under international conventions or (as regards Malaya) because of concerns with respect to the insurance market (Bonner, 2007, chaps. 3, 5). This rhetoric of war is 'misleading and disproportionate' and 'has encouraged an overreaction in which human rights and the rule of law are among the more obvious casualties' (Rowntree, 2006: 13; Richardson, 2006: 215). It is therefore to be welcomed that United Kingdom officialdom now refrains from using the phrase.

The view that the threat is the greatest since the Second World War is clearly contestable. It will rightly raise eyebrows among those who lived through or were victims of the IRA's bombing campaign from 1969 to 1999. Many will remember the carnage caused by bombs in Bishopsgate and Docklands in London; those in Brighton (targeting the Conservative Prime Minister, Mrs Thatcher and her governmental team); those that devastated the Manchester shopping centre; and the Birmingham pub bombings in 1974, that decade's equivalent of 7/7. Those who lived through the nuclear threat during the Cold War may also question that view. The parallel with the Fenian Clerkenwell explosion (1867) and its aftermath is uncanny. There are differences in the mode of delivery of death and destruction, but the changing technology of terrorism has always been a disturbing feature. The phenomenon of the suicide bomber poses problems in terms of lack of prior

10.1080/09627250802276902

warning and in that those willing to sacrifice their lives will not be deterred by harsh laws or penalties. But the prospect of execution did not deter previous generations of those willing to use death and destruction to further their political cause.

It has proved very difficult, without sufficient officers from the relevant communities, to penetrate Islamist terrorist groups. It may have been easier to penetrate Irish Republican groups in the past. Resolution through negotiations, a feature of withdrawal from empire and the Irish questions, is problematic. But attempts at conflict resolution in the Middle East and governmental approach to the Arab and Muslim world surely have a role to play in reducing the radicalization which brings recruits to terrorism in a similar way to the 'hearts and minds' and 'constitutional' dimensions of the earlier threats. And a former Blair "chief of staff" in promoting his book on the Northern Ireland peace process (Powell, 2008) has recently raised the prospect of ultimately talking to Al Qaeda.

The nature of the powers

While presented by politicians as 'new', the current approach is very much a case of old wine in new bottles. Counter-terrorism powers in the United Kingdom and deployed in its colonial empire have long been a varying mixture of a modified criminal prosecution approach (enhanced powers of arrest and extended detention coupled with radically wider criminal offences) and a 'security' response in terms of executive measures such as national security deportations of foreign national terrorist suspects, restrictions on movement, and detention without trial. The catalytic expansion of executive power is rightly traced to the First World War, but detention without trial featured in Elizabethan dealings with the then 'enemy within' (Catholics) and it and immigration control measures were used during the Napoleonic Wars. The historical perspective reveals marked similarity rather than difference (Bonner, 2007, Part II).

While presented by politicians as 'new', the current approach is very much a case of old wine in new bottles.

Enhanced judicial scrutiny: the rules of the game are changing

The only 'rule of the game' that clearly has changed (one that Blair would rather had not) is the traditional one that United Kingdom courts, faced with the exercise of executive powers in the 'security' sphere, give the executive a free hand. In this era of the HRA, United Kingdom courts have started to apply an enhanced level of scrutiny in the security area as regards deprivation of liberty in the ECHR sense. Lord Atkin's claim in *Liversidge* v *Anderson* at the height of the Second World War that "amidst the clash of arms the laws are not silent" was a dissenting voice. More common judicial utterance was that "the flame of individual right and justice" burns less bright in wartime.

The HRA era has witnessed a more empowered and less deferential judiciary – witnessed most markedly by the approach of the House of Lords in the *A and Others* cases (both on detention and the inadmissibility in review proceedings of material obtained through torture) and more recently on deprivation of liberty with respect to control orders.

Such enhanced judicial scrutiny has attracted misplaced criticism. Government frustration has produced headline-seeking calls (fortunately not acted on) for repeal or amendment of the HRA and even withdrawal from the ECHR. Faced with grave danger and the prospect of "blame" should terrorist acts occur, it is tempting to be prepared to countenance illegality or tear down long-standing legal or constitutional safeguards blocking the way to "effective action". But if our response to any significant threat to our security or safety is without proof of a criminal offence to lock away or seriously disrupt the lives of those merely thought to be a threat, this represents a grave danger to the nature of our liberal society. It is constitutionally proper that there be tensions between organs of government, that government and judges disagree, that they are not necessarily on the 'same side' (Steyn, 2006: 248). It is the job of the courts in terms of human rights and threats to the nation to be willing to speak truth to power, regardless of popularity. Fortunately, even in this "security" sphere, they are beginning to do so. ■

David Bonner is Professor of Law, University of Leicester and a long-time student of counter-terrorism measures. This article encapsulates the central arguments developed in his book *Executive Measures, Terrorism and National Security: Have the Rules of the Game Changed?* (Andover: Ashgate, 2007)

References

Bonner, D. (2007), *Executive Measures, Terrorism and National Security: Have the Rules of the Game Changed?*, Andover, Ashgate.

Richardson L. (2006), *What Terrorists Want: Understanding the Terrorist Threat*, London: John Murray.

Blick, A., Choudury, T. and Weir, S. (2006), *The Rules of the Game: Terrorism, Community and Human Rights*, York. Joseph Rowntree Reform Trust.

Powell, J. (2008), *Great Hatred, Little Room: Making Peace in Northern Ireland*, London. Bodley Head.

Steyn, Lord (2006), 'Democracy, the rule of law and the role of judges', *European Human Rights Law Review* 3, p. 243.