

# Counter-Terrorism Measures: the Balance between National Security and Civil Liberties in the UK and France “Has the Pendulum Swung Too Far, To the Detriment of Civil Liberties?”

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**Abstract:** On 2 October 2001, after the attack of 11 September, Prime Minister Tony Blair stated at the Labour conference “Here in this country and in other nations around 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” [Tony Blair, speech to Labour Conference, 20 October 2001. Cited in *The Guardian*, <http://www.theguardian.com/politics/2001/oct/02/labourconference.labour6>. Accessed 28 August 2016]. The Home Secretary at the time, Jack Straw, also said that extensive measures were needed since “by its nature terrorism is designed to strike at the heart of our democratic values” [H Fenwick, *Civil liberties and human rights* (4th edn, Routledge Cavendish Taylor & Francis Group 2007) 1330]. It has been argued, however, that ‘Draconian anti-terrorist laws have a far greater impact on human rights than they ever will on crime’ [H Fenwick, *Civil liberties and human rights* (4th edn, Routledge Cavendish Taylor & Francis Group 2007)]. Both have been victims of major terrorist attacks and have responded to the threat in several ways. This paper examines current anti-terrorist measures and whether they conflict with, or present a challenge to human rights. It will explore the most effective ways in which governments can control terrorism whilst maintaining democratic freedoms. Finally, a discussion of whether current anti-terrorism laws strike the right balance between protecting individual liberty and safeguarding national security will conclude by identifying some steps that could be taken to protect individual liberty.

**Keywords:** Terrorism, Human Rights, Civil Liberties, Anti-Terrorism, National Security

## 1. Human Rights and Civil Liberties

Human rights are universal values and legal guarantees that protect individuals and groups against actions and omissions, primarily by state agents, that interfere with fundamental freedoms, entitlements and human dignity [Ohchrorg, ‘Human Rights, Terrorism and Counter-terrorism’ (Ohchrorg, December 2007). <http://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf>. Accessed 28 August 2016]. Human rights laws oblige states to do certain things and prevent them from doing others.

Civil liberties are the basic rights and freedoms granted to the citizens of a country through national and statute law and may include (but are not limited to) freedom of speech, freedom of movement, freedom from arbitrary arrest, freedom of religious worship, freedom of assembly and freedom of association.

The Magna Carta, drawn up in 1215, is cited as one of the first pieces of legislation to grant civil liberties and rights, it states that:

*‘No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send to do so, except by the lawful judgment of his equals or by the law of the land’* [British Library, ‘Learning Timelines: Sources from History’ <http://www.bl.uk/learning/timeline/item95692.html>. Accessed 14 August 2016].

In England, this was followed by the Bill of Rights in 1688 and later the *Habeas Corpus* Acts of 1640 and 1679; in France, the Declaration of Man (1789) also mentioned liberty [Rhona Smith, *Oxford Textbook on International Human Rights* (6<sup>th</sup> edn, OUP 2014) 257]. Both the UN declaration of Human Rights adopted by the General Assembly in 1948 and the European Convention on Human Rights (1953) refer to human rights and civil liberties. In addition Article 9 of the International Covenant on Civil and Political Rights provides that deprivation of liberty will only be valid if it is in accordance with procedures established by law. [International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)]

## 2. Terrorism

In ancient times terrorists were referred to by terms such as ‘assassin’ and ‘zealot’. The Zealots were an organized terrorist group who provoked and intimidated others in order to achieve their political and religious objective in Palestine [Tom White, ‘Zealots: One of the First Terrorist Organisations’ (*Perspectives of the Past*, 2007) <https://perspectivesofthepast.com/terrorism-and-insurgency-in-the-contemporary-world/zealots-one-of-the-first-terrorist-organizations/>. Accessed 14 August 2016].

The Assassins were a small Shiite Muslim sect that was active between 1090 and 1273; they were one of the most lethally effective terrorist groups the world has ever known, killing ruthlessly without fleeing afterwards, and welcoming their own death [Jefferson M. Gray, ‘Holy Terror: The Rise of the Order of Assassins’ (*Quarterly Journal of Military History*, 24 February 2010).

<http://www.historynet.com/holy-terror-the-rise-of-the-order-of-assassins.htm>. Accessed 14 August 2016].

The word 'terrorism' came into use during the years leading up to the French Revolution. The word 'terrorism' was first used to refer to Robespierre's policy of terror. The term originally referred to a legitimate system of government based on terror [Lulu Rumsey, 'Terrorism: A Historical Context' (*History Today*, 8 September 2011) <http://www.historytoday.com/blog/2011/09/terrorism-historical-context>. Accessed 15 August 2016], which inspired a reaction by Royalists, who employed terrorist tactics such as assassinations and intimidation to resist Revolutionary agents. The reign of terror began as a way of strengthening a fragile government and threatening all who might deny its legitimacy. Robespierre famously stated:

*"Terror is only justice: prompt, severe and inflexible; it is then an emanation of virtue; it is less a distinct principle than a natural consequence of the general principle of democracy, applied to the most pressing wants of the country"* [Liberty, Equality, Fraternity, 'Robespierre on Political Morality' (Exploring the French Revolution) <https://chnm.gmu.edu/revolution/d/413/>. Accessed 16 August 2016].

He was expressing the idea that use of terror during the Revolutionary period was a transitional measure aimed at eradicating counter-Revolutionary forces. Terror was virtuous and would impose justice and some kind of order upon citizens at the time of the Revolution. Once Robespierre's government had achieved its purpose, it would start to build a new society in which justice and peace would reign.

In the early 1900s violence was used as a strategy by both governments and demonstrators who believed that robust action would lead to some kind of redress. In 1937 the League of Nations was set up and Article 1 of its Constitution defined acts of terrorism as:

*"Criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons or a group of persons or the general public"* [Council on Foreign Relations, 'Convention for the prevention and Punishment of Terrorism' (1937). <http://www.cfr.org/terrorism-and-the-law/league-nations-convention-prevention-punishment-terrorism/p24778>. Accessed 16 August 2016].

Traditionally the term 'terrorism' has been applied to the acts of groups of violent activists and or a dominant state [DJ Whittaker, *Terrorists and Terrorism – In the Contemporary World* (Routledge Taylor and Francis Group 2004)9]. Nowadays it is applied to acts of violence that target civilians in the pursuit of political or an ideological aim. There are very strong political connotations to definitions of who is and is not a terrorist. Terrorism seems to be used as a means of pursuing political change or

as a justification for political decisions. There is still no international legal definition of 'terrorism' [B Lee, 'France Civil Liberties: After Paris Terror Attacks, Will New Security Measures Divide Or Conquer?' (*International Business Times*, 16 November 2015). <http://www.ibtimes.com/france-civil-liberties-after-paris-terror-attacks-will-new-security-measures-divide-2186841>. Accessed 28 August 2016], which means that individual states can apply their own definitions; this has allowed some governments to apply their laws selectively.

### 3. Terrorism and the impact on human rights

Terrorism impacts upon human rights as it has devastating consequences for victims' enjoyment of the right to life, liberty and physical integrity. Furthermore, terrorism also destabilises governments and threatens national security. In recent years, it has been argued that the counter-terrorism measures adopted by States have often presented a serious threat to human rights and the rule of law. States have an obligation to promote and protect human rights whilst countering terrorism and this duty is integral to the fight against terrorism. In a democratic society the state may, however, limit the exercising of certain rights as long as law prescribes them to, in pursuit of one or more specific, legitimate aims, if it is necessary to do so.

In a public emergency states may temporarily derogate from certain human rights provisions. Such derogation must be exceptional and temporary. The derogation must also be a proportionate response [Anver Emon, Mark Ellis and Benjamin Glahn, *Islamic Law and International Human Rights Law: Searching for Common Ground*, (OUP 2012) 29]. Some human rights cannot be suspended even in a state of emergency, for instance Article 4(2) of the International Covenant on Civil and Political Rights lists these non-derogatory rights: the right to life and the right to freedom from torture or cruel, inhuman or degrading treatment or punishment.

Human rights laws protect individuals against unlawful or arbitrary interference with their liberty in the context of criminal proceedings. A state can lawfully detain terrorist suspects, just as it can detain individual suspected of other crimes, but their detention must be lawful and subject to judicial authority.

The 9/11 attacks, the Madrid and 7/7 London bombings and the more recent attacks in France and the UK have all raised various challenges and issues for European Union (EU) member states. The rise of international terrorism has made it extremely difficult for governments to protect their citizens. The security challenge is amplified by the willingness of today's terrorists to murder innocent civilians on a vast scale, using whatever weapons they can get their hands on and their willingness to kill themselves in the process [Balancing freedom and security - a modern British Bill of Rights' (*The Guardian*, 26 June 2006). <http://www.theguardian.com/politics/2006/jun/26/conservatives.constitution>. Accessed 28 August 2016]. The Internet, 'lone rangers', the ease of international travel and various other factors also raise important issues for governments trying to secure the safety of their nationals.

EU member states have reacted in various ways to the security threat, which illustrates how difficult it would be to put in place a common European response to the challenge. The European Commission is reluctant to take a leading role. Nevertheless it is the individual member states that have intelligence services and can assess the actual security threat [Germany set to pass 'one of the harshest' anti-terror laws in Europe' (*EurActiv.com*, 5 February 2015). <https://www.euractiv.com/section/justice-home-affairs/news/germany-set-to-pass-one-of-the-harshest-anti-terror-laws-in-europe/>. Accessed 28 August 2016]. Emon, Ellis and Glahn (2015) argued that concepts such as terrorism and the war on terror have no fixed meaning in international law [Anver Emon, Mark Ellis and Benjamin Glahn, *Islamic Law and International Human Rights Law: Searching for Common Ground* (OUP 2012) 29] whilst Zelman (2001) described the post 9/11 landscape as an 'anti terrorist legislative wildfire'. [Joshua D Zelman, recent developments in international law: anti terrorism legislation Part one: An overview *J Transnational Law and Policy* 2001: 11(2); 1-17] Thus, it can be argued that with the inadequate legal definition of terrorism and the legitimacy of the use of force, the legality of controversial investigation procedures hinder the rule of law [Anver Emon, Mark Ellis and Benjamin Glahn, *Islamic Law and International Human Rights Law: Searching for Common Ground* (OUP 2012) 112].

#### 4. The overlap and potential infringement of human rights and civil liberties by anti terrorism measures

Today terrorism is seen as a global threat. Some scholars argue that a globalized response is needed [J Whittaker, *Terrorists and Terrorism – In the Contemporary World* (Routledge Taylor and Francis Group 2004) 134]. A prominent issue in the political and academic discourse on counter-terrorism law and policy has been whether and to what extent, it was and is necessary to curtail civil liberties and human rights in order to combat terrorism [C Michaelson, 'Balancing civil liberties against national security a critique of counter terrorism rhetoric' *University of South Wales Law Journal* 2006: 29(2)]. The most necessary, basic right of every citizen is the right to feel safe from domestic and foreign threats and hence we must be willing to sacrifice the rights of the individual to protect the many [Jsaorg, 'Resolved, that national security is more important than protecting individual liberties' (Jsaorg, 14 April 2011). <http://archives.jsa.org/2011/04/resolved-that-national-security-is-more-important-than-protecting-individual-liberties/>. Accessed 28 August 2016]. Those defending counter-terrorism measures argue that liberal democracy itself is the target and this unprecedented threat to our way of life warrants the imposition of restrictions on civil liberties and human rights. It is argued that civil liberties and human rights are political conveniences that can only be enjoyed in times of peace [R Posner, 'The Law: Security versus Civil Liberties' *Atlantic Monthly* 2001: 288;546-547]. Tsoukala (2006) stated that 'most liberal democratic governments presume that they cannot be effective against the threat unless they sacrifice

some of their democratic substance' [L Jarvis and M Lister, *Anti-terrorism, citizenship and security* (Manchester University Press 2015)]. Some argue that the temporary suspension of civil liberties and human rights during previous terrorist emergencies actually strengthened liberal democracy and contributed significantly to a reduction in terrorism [J Horchem, 'The lost revolution of west Germany's terrorists' *Terrorism and Political Violence* 1989:1(3); 353-360]. The opposing argument is that in times of crisis the liberal democratic state must adhere strictly to its defining principles [J Dempsey and D Cole, *Terrorism and the Constitution: Sacrificing civil liberties in the name of national security* (2nd edn, New Press 2002)]. Dworkin (2003) argued that depriving citizens of their individual rights and freedoms to maintain security would put a state on the same moral plane as the terrorists [R Dworkin, 'Terror and the attack on civil liberties' *New York Review of Books* 2003: 50; 17]. Others argue that repressive, counter-terrorism measures often lead to an escalation of conflict, and concomitant adverse effects on civil liberties and human rights [C Michaelson, 'Balancing civil liberties against national security a critique of counter terrorism rhetoric' *University of South Wales Law Journal* 2006: 29(2)]. The majority of academics and theorists argue that in order to "save liberal democracy from the scourge of international terrorism a balance must be struck between security and liberty [Ibid].

The Socialist and Democratic groups in the European Parliament have recently called for greater respect to be shown for human rights in the fight against terrorism. Antonio Panzeri MEP argued that terrorism constitutes a serious threat to human rights and democracy:

*"While action by states is necessary to prevent terrorist acts and to ensure the security of our citizens, this cannot mean a carte blanche for law enforcement agencies. Actions taken by government as part of the fight against terrorism must remain legitimate and proportionate to their aim. Intelligence services must act to restore faith in how they work, by complying with the highest standards of ethics and democratic accountability. In the long term measures will only be effective if they comply with international obligations on human rights and with international law. To ensure this we need to have clear democratic scrutiny of security measures. Terrorists feed on fear. They attempt to make us choose between security and freedom. It is a false dilemma: democratic states must oppose terrorism whilst refusing to weaken the rule of law. Any other position means a victory for the terrorists"* [Socialistsanddemocratseu. 'We cannot counter terrorism if we disregard human rights, say S&D MEPs' (*Socialistsanddemocratseu*, 2 March 2016). <http://www.socialistsanddemocrats.eu/newsroom/we-cannot-counter-terrorism-if-we-disregard-human-rights-say-sd-meeps>. Accessed 28 August 2016].

Morten Kjaerum, director for the Raoul Wallenberg Institute:

“After a terrorist attack, it is common that we see human rights protections eroded. That may also be part of the purpose of the attack. In times like these, where terrorism is on the European agenda, it’s important to discuss how we can fight terrorism while respecting and protecting human rights — security and human rights are two sides of the same coin,” [Rwiluse, 'Counter-terrorism, Surveillance, and Human Rights in Europe After the Paris Attacks' (Rwiluse, 12 January 2016). <http://rwi.lu.se/2016/01/counter-terrorism-surveillance-and-human-rights-in-europe-after-the-paris-attacks/> Accessed 28 August 2016].

Most European states do not have specific laws dealing with terrorism and deal with terrorist offences under criminal law. The European Parliament in Brussels and the EU Court in Strasbourg talk of a homogenous judicial area for instance a European arrest warrant would prevent terrorist from taking advantage of varying European legal systems [DJ Whittaker, *Terrorists and Terrorism – In the Contemporary World* (Routledge Taylor and Francis Group 2004) 137].

Generations of activists and scholars have concerned themselves with violations of human rights by governments, the failings of the courts and the lack of response from legislatures. For instance Ewing [AW Bradley and KD Ewing, *Constitutional & Administrative Law* (15th edn, Pearson Education Limited 2011) 9] argued that violations of human rights depend on the capacities of political institutions such as parliaments and political parties. Ewing argued that an alternative, more democratic mechanism for defending human rights needs to be established. Tomkins [C. Turpin and A. Tomkins, *British government and the constitution* (6<sup>th</sup> edn, Cambridge University Press 2007) 756-762] also argued that there is a consistent record of failure to enforce the rule of law across a series of wartime and peacetime decisions. A large body of case law illustrates this, for example *Rv. Halliday* [R v. Halliday, ex p Zadig [1917] AC 260], *Liversidge v. Anderson* [Liversidge v. Anderson [1942] AC 206], *Hosenball* [R v. Secretary of State for Home Affairs, ex p Hosenball [1977] 1 WLR 766], *Cheblak* [R v. Secretary of State for the Home Department, ex p Cheblak [1991] 1 WLR 890], *Rehman* [Secretary of State for the Home Department v. Rehman [2001] UKHL 47, [2003] 1 AC 153], *Belmarsh* [A v. Secretary of State for the Home Department [2004] UKHL 56, [2005] 2 AC 68] *JJ* [Secretary of State for the Home department v. JJ and others (FC) (Respondents) [2007] UKHL 45], *E* [Secretary of State for the Home department v. E [2007] UKHL 47], *AP* [Secretary of State for the Home department v. AP [2010] 3 WLR 51] and many others.

Under the UK Constitution, Acts of Parliament are the highest form of domestic law and the decisions of judges constitute Common Law. [H Barnett, *Understanding Public Law* (1st edn, Routledge Cavendish 2010)] It has been argued [AW Bradley and KD Ewing, *Constitutional & Administrative Law* (15th edn, Pearson Education Limited 2011) 53] that the courts have a duty to apply Acts of Parliament and that they cannot hold any such Act void or unconstitutional. This position was stated by Lord Reid in

the case of *Madzimbamuto v. Lardner-Burke* [Madzimbamuto v. Lardner- Burke [1969] 1 AC 645]:

“It is often said that it would be unconstitutional for the United Kingdom Parliament to do certain things, meaning that the moral, political and other reasons against doing them are so strong that most people would regard it as highly improper if Parliament did these things. But that does not mean that it is beyond the power of Parliament to do such things. If Parliament were to do any of them, the courts could not hold the Act of Parliament invalid” [Ibid 45 [723] (Lord Reid)].

His argument is clear: Parliament can make any law it wishes regardless of whether it would infringe individual liberty. The judiciary thus faces a challenge if it seeks to protect individual liberties.

## 5. Examples of some measures taken by the United Kingdom and France

### United Kingdom

It has been suggested that the UK has promulgated ‘some of the toughest anti-terrorism laws in the region [and]... has needlessly sacrificed concerns for human rights in the name of state security.’ [James Beckman, *Comparative Legal Approaches to Homeland Security and Anti-Terrorism* (Routledge 2007), 51] On the other hand, it is notable that UK anti-terror laws have been subject to successful challenge. For example, in *A. v. Secretary of State for the Home Department* [A v. Secretary of State for the Home Department [2004] UKHL 56] the House of Lords declared that the indefinite detention without trial of foreign prisoners under the Anti-terrorism, Crime and Security Act 2001, [The Anti-Terrorism, Crime and Security Act 2001, s. 23] was incompatible with EU human rights law, leading to the repeal of the offending provisions by Parliament.

The UK has adopted various measures to counter terrorism. It has been argued that the Labour government’s counter-terrorism legislation had much more severe implications than those prior to the enactment of the Human Rights Act 1998. The Terrorism Act 2000 is the main piece of counter-terrorism legislation, but following the events of September 11 2001 the government introduced further legislation as it considered the provisions of the Terrorism Act 2000 (TA 2000) inadequate for dealing with the threats facing the country after the vents of September 11, 2001.

Since the September 11, 2001 attacks in the United States the following anti-terrorism legislation has come into force in the UK: Anti terrorism Crime and Security Act 2001 (ATCSA), The Prevention of Terrorism Act 2005 (PTA), Terrorism Act 2006 (TA 2006), the Counter Terrorism Act 2008 (CTA), The Terrorist Asset-Freezing (Temporary Provisions) Act 2010 and more recently the Counter-Terrorism and Security Act 2015. Human rights activist groups such as Liberty have argued that such laws have increased the tension between security and human rights [Liberty, 2016. 'Countering terrorism'. <https://www.liberty-human-rights.org.uk/human-rights/countering-terrorism>. Accessed 28 August 2016].

On 2 October, 2001 Tony Blair told the Labour Conference “Here in this country and in other nations around 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” [Tony Blair, Speech to Labour Conference, 20 October 2001, cited in *The Guardian*].

<http://www.theguardian.com/politics/2001/oct/02/labourconference.labour6>. Accessed 28 August 2016]. Jack Straw, who was Home Secretary at the time, argued that extensive measures were needed since “by its nature terrorism is designed to strike at the heart of our democratic values” [H Fenwick, *Civil liberties and human rights* (4th edn, Routledge Cavendish Taylor & Francis Group 2007) 1330]. However some would argue that ‘Draconian anti-terrorist laws have a far greater impact on human rights than they ever will on crime’ [H Fenwick, *Civil liberties and human rights* (4th edn, Routledge Cavendish Taylor & Francis Group 2007)].

More recently laws have been passed in the UK that allow officials to revoke the citizenship of those convicted of terrorist acts, even if it makes them stateless. Some have argued that this risks exposing British citizens to torture [Liberty, 2016. ‘Countering terrorism’. <https://www.liberty-human-rights.org.uk/human-rights/countering-terrorism>. Accessed 28 August 2016]. Further proposals to grant state security officials new surveillance powers, such as the power to monitor Internet records without any kind of judicial permission, are under consideration.

### France

After the Paris attacks the French Prime Minister put forward proposal that would allow the state to revoke the citizenship of naturalised convicted terrorists who hold dual citizenship. This measure potentially infringes human rights and threatens to exacerbate, not reduce, the threat of violent extremism. Human Rights Watch (HRW) reported that France has carried out abusive and discriminatory raids against Muslims and imposed house arrests under its sweeping new state of emergency laws and it has been argued that ‘This abuse has traumatized families and tarnished reputations, leaving targets feeling like second-class citizens’ [Human Rights Watch, ‘France. ‘Abuses Under State of Emergency Halt Warrantless Search and House Arrest’ (3 February 2016). <https://www.hrw.org/news/2016/02/03/france-abuses-under-state-emergency>. Accessed 28 August 2016]. Amnesty International also reported that several Muslims were subjected to house searches or house arrest on the basis of vague criteria [Amnesty International, 23 February 2016. *Amnesty International Report 2015/16: The State of the World’s Human Rights*. <https://www.amnesty.org/en/documents/pol10/2552/2016/en/> Accessed 28 August 2016].

In the aftermath of the attacks in Paris the Prime Minister proposed further counter-terrorism measures, including the extension of the maximum period of pre-charge detention from 24 hours to 72 hours and granting the police the power to carry out searches at any time when investigating terrorism-related offences.

In the wake of the Paris attacks France and Belgium rushed to put new security measures in place and alter their legal and constitutional structures to give governments more flexibility in dealing with terrorist threats. Both governments made it clear that for the time being they would put protecting their citizens ahead of other considerations [*New York Times*, 19 November 2015. ‘As France and Belgium Strengthen Security, a Classic Debate Arises’. [http://www.nytimes.com/2015/11/20/world/europe/as-france-and-belgium-strengthen-security-a-classic-debate-arises.html?\\_r=1](http://www.nytimes.com/2015/11/20/world/europe/as-france-and-belgium-strengthen-security-a-classic-debate-arises.html?_r=1). Accessed 28 August 2016]. It can be argued that overly draconian counter-terrorist measures on the part of the state constitute reactive terrorism [J Whittaker, *Terrorists and Terrorism – In the Contemporary World* (Routledge Taylor and Francis Group 2004) 130].

As in France, many Belgians said that whilst the new measures were drastic, they were prepared to give up some of their personal freedoms in return for security. Governments have a duty to protect their citizens’ rights to security and freedom from fear. There is no doubt that the world is currently facing a greater threat to security and that international tensions are increasing and more innocent civilian blood is being shed every day. Terrorism has become more frightening, partly because fundamentalists are ready to commit suicide. Is it even possible now to control terrorism without restricting some citizens’ rights?

## 6. Comparison

The French response to terrorism has been described as ‘invasive but effective.’ [Jytte Klausen ‘British Counter-Terrorism After 7/7: Adapting Community Policing to the Fight Against Domestic Terrorism’. *Journal of Ethnic and Migration Studies* 2009: 35(3); 403, 417] Klausen cited arrest statistics which ‘suggest increased reliance on preventative arrests to break up networks’, and reports a far greater use of procedures such as house arrest and the forced removal of suspects than is witnessed in response to similar threat in the UK. [Ibid., 418 – 19] Klausen goes on to conclude that ‘the French policies represent a greater threat to Muslims’ civil liberties than the Blair government’s confusing mix of partnership programmes, increased criminalisation and enhanced police powers.’ [Ibid., 419]

Foley offered some preliminary conclusions based on a brief review of the anti-terrorism measures described above. Foley suggested that both France and the UK have made ‘organisational changes that enable the gathering of court-admissible information at an earlier stage of terrorism investigations.’ [Frank Foley, *Countering Terrorism in Britain and France: Institutions, Norms and the Shadow of the Past* (Cambridge University Press 2013), 168], but described the two regimes as adopting very different approaches to dealing with the terrorist threat, citing the moves towards closer cooperation between the UK’s intelligence agencies and police and contrasting this with the way in which the French police and security services have jockeyed for position. Foley also noted that French courts and intelligence agencies have been brought ‘far closer together for terrorism cases than would ever be possible in the UK.’ [Ibid., 2]

There are also notable differences between the legal systems of the two countries. Foley points out that the UK has continued to try terrorism cases through the ordinary courts, but has introduced considerable and controversial powers, such as control orders, which 'allowed the authorities to exercise extensive control over terrorist suspects without bringing them to trial.' [Ibid., 2 – 3] He argued that the continuous challenges to such powers have meant that although they have been retained, their use has 'on the whole' been restricted. In contrast, Foley suggests that French authorities have been 'more draconian', establishing special courts and investigating magistrates – 'a type of judge of which there is no equivalent in the English legal system' – thus bringing closer together the judicial and executive branches of government. [Ibid., 3]

## 7. Causes and Solutions

Some would argue that the main driving force behind the adoption of overly broad anti-terrorism laws is the continuing lack of an international legal definition of 'terrorism' [B Lee, 'France Civil Liberties: After Paris Terror Attacks, Will New Security Measures Divide Or Conquer?' (*International Business Times*, 16 November 2015). <http://www.ibtimes.com/france-civil-liberties-after-paris-terror-attacks-will-new-security-measures-divide-2186841>. Accessed 28 August 2016], because this has left countries free to define it for themselves, and has meant that some have applied anti-terrorist laws selectively.

There is a lack of consensus on what constitutes terrorism, for instance Article 2(1)(b) of the International Convention for the suppression of the financing of terrorism defines it as: -

*'Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act'* [Ademola Abass, *International Law Text cases and Materials (2nd edn, OUP) 728*].

Saul (2006) offered a broad definition of terrorism as "premeditated, politically motivated violence perpetrated against non combatant targets by sub national groups or clandestine agents" [Ben Saul, *Defining Terrorism in International Law* (OUP, 2006)]. Others refer to terrorism as being goal-directed or intended to advance a political, religious, racial, or ideological cause [Neil Boister, *An Introduction to Transnational Criminal Law* (OUP, 2012) 62]. The task of defining terrorism is referred to as the black hole of terrorism studies [J Wilson, 'Introduction' [2012] 27(2) *Journal of Conflict Studies* 5]. Schmidt stated that 'Terrorism refers, on one hand, to a doctrine about the presumed effectiveness of a special form or tactic of fear-generating, coercive political violence and, on the other hand, to a conspiratorial practice of calculated, demonstrative, direct violent action without legal or moral restraints, targeting mainly civilians and non-combatants, performed for its propagandistic and

psychological effects on various audiences and conflict parties'[A Schmidt, 'The Revised Academic Consensus Definition of Terrorism' *Perspectives on Terrorism* 2012: 6(2) ]. According to Cronin (2002) there is agreement that all acts of violence by terrorists are politically motivated and carried out in order to precipitate political change [M Qadri, 'Terrorism a Serious Challenge to Transnational Relations and World Peace' *International Affairs and Global Strategy* 2016: 40(1) ].

Other literature in this field relates to the response from various civil organisations that have called for EU member states to respect and protect human rights and the rule of law and urged them to create a clear, practical definition of terrorism on the grounds that the absence of such a definition can lead to violations of human rights [Edriorg, 9 March 2016. 'Joint civil society statement on counter-terrorism and human rights' <https://edri.org/joint-civil-society-statement-on-counter-terrorism-and-human-rights/>. Accessed 28 August 2016].

A further issue that may be influencing anti-terrorism laws is the lack of intelligence-sharing. Since the most recent attacks it has been argued that there is a need for greater sharing of intelligence amongst EU member states. Guy Verhofstadt, chairman of the Alliance of Liberals and Democrats for Europe group in the European Parliament, has proposed new legislation making it mandatory for member states to exchange intelligence for the purposes of countering terrorism [Vit Novotny, 'A European Intelligence Agency: The Cons Outweigh The Pros' (*Vocal Europe*, 6 April 2016). <http://www.vocaleurope.eu/a-european-intelligence-agency-the-cons-outweigh-the-pros/>. Accessed 7 December 2016].

Following the attacks in Brussels the President of the European Commission, Jean-Claude Juncker, stated that there needs to be better cooperation between the secret services of member states in order to counter the terrorist threat. In 1999 the European Council laid the foundations for such cooperation and they were reaffirmed following the 9/11 attacks, but nothing has been done since. The President further emphasized that if member states had adopted the Commission's proposals the current security situation would not have arisen [Georgi Gotev, 23 March 2016. 'Juncker warms to the idea of an EU intelligence agency'. <http://www.euractiv.com/section/global-europe/news/juncker-warms-to-the-idea-of-an-eu-intelligence-agency/>. Accessed 7 December 2016].

It has been suggested that national security can no longer remain the province of individual nation states [Ibid., 265-267]. Both the EU and NATO are directly affected by the rapid and threatening changes to the international security climate due to problems on the eastern and southern borders of Europe, particularly in the Mediterranean area. NATO still has a long way to go to create and maintain effective frameworks for routine intelligence cooperation with Mediterranean countries. Such frameworks could enhance NATO's operational capacity and improve the effectiveness of EU policy in this volatile region. They might also improve regional security and encourage security cooperation amongst Mediterranean countries facing similar

security threats [Shapiro, SH, 2001. 'The Communication of Mutual Security: Frameworks for European-Mediterranean Intelligence', Department of Political Studies Bar-Ilan University, Israel].

It is further asserted that intelligence needs to be 'concentrated on the continental scale' if the European continent is to counter the increasing threat from Islamic and right-wing terrorists [Vit Novotny, 'A European Intelligence Agency: The Cons Outweigh The Pros' (*Vocal Europe*, 6 April 2016). <http://www.vocaleurope.eu/a-european-intelligence-agency-the-cons-outweigh-the-pros/>. Accessed 7 December 2016]. On the other hand it is argued that setting up a European intelligence agency would be difficult because the EU is 'notoriously 'leaky' when it comes to classified and secret information...secondly, it is not clear which body would supervise such a new agency. The European Parliament has yet to establish a sufficient record in relation to such a delicate task.' [Ibid] There is no single, unitary EU intelligence community and this clearly a problem. The Brussels-based EU intelligence centre, INT-CEN, does, however, enable the EU to benefit from contributions from agencies from member states.

In a world of complex technologies and communications, no single intelligence service can hope to achieve complete global coverage on the level required by political and security decision-makers. Herman summarised the position thus: 'There is always more information potentially available than any agency can collect by itself'. [Herman M, *Intelligence Power in War and Peace* (Cambridge University Press, 1996) 204. [Herman has had a distinguished career at GCHQ and later coordinated the activities of the UK Joint Intelligence Committee (JIC)] There is certainly a gap in the existing research.

## 8. Conclusion

Nation states have a joint obligation to promote and protect human rights whilst countering terrorism and this is an integral part of the fight against terrorism. States can limit the exercise of certain rights as long as the law prescribes them to do so, in pursuance of one or more specific legitimate purpose necessary in a democratic society. In public emergencies a state may temporarily derogate from certain human rights provisions. Such derogations must be exceptional, temporary and proportionate [Anver Emon, Mark Ellis and Benjamin Glahn, *Islamic Law and International Human Rights Law: Searching for Common Ground* (OUP 2012) 29]. Human rights laws protect individuals against unlawful or arbitrary interference with their liberty in the context of criminal proceedings. A state can lawfully detain terrorist suspects, just as it can detain those suspected of other crimes, but that detention must be subject to judicial authority. It is clear from this paper that the inadequate legal definition and the legitimacy of the use of force and the legality of controversial investigations procedures hinder the rule of law.

Furthermore, it is notable that UK anti-terror laws have been subject to successful challenge. For example in *A v. Secretary of State for the Home Department* [A v. Secretary of State for the Home Department [2004] UKHL 56] the

House of Lords declared the indefinite detention without trial of foreign prisoners under the Anti-terrorism, Crime and Security Act 2001 incompatible with the EU Convention on Human Rights, [The Anti-Terrorism, Crime and Security Act 2001, s. 23] which resulted in repeal of the offending provisions by Parliament. The UK judiciary has successfully balanced the conflicting demands for protection of civil liberties and greater state power to counter terrorist threats; it has also provided guidance to the executive to enable the executive to amend legislation to ensure its compatibility with the Convention. Although the judiciary has been largely successful in performing this balancing act, there is no room for complacency, as Liberty's concerns regarding the TPIMA 2011 demonstrate. The courts must continue to act as bulwark, protecting individuals' civil liberties from the potential excesses of an over-mighty executive. Further discussion in this paper noted that French authorities have 'been more draconian' for instance establishing special courts and investigating magistrates 'a type of judge of which there is no equivalent in the English legal system' thus bringing the judicial and executive branches of government closer together [Foley (2013), 3].

Finally, this research opens other avenues for further research into, for instance, the extent to which free speech and expression are being eroded by anti-terror laws or even whether anti-terrorism laws are fuelling home-grown jihadism. Additional research could also include rethinking the role of intelligence agencies and communication between them.

## Cases

- A v. Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68
- Ali Aarrass v. Spain*, Communication No. 2008/2010, U.N. Doc. CCPR/C/111/D/2008/2010 (2014).
- Madzimbamuto v. Lardner- Burke* [1969] 1 AC 645
- Ouabour v. Belgium* (application no. 26417/10)
- R v. Secretary of State for Home Affairs, ex p Hosenball* [1977] 1 WLR 766
- R v. Secretary of State for the Home Department, ex p Cheblak* [1991] 1 WLR 890
- Secretary of State for the Home Department v. AP* [2010] 3 WLR 51
- Secretary of State for the Home Department v. E* [2007] UKHL 47
- Secretary of State for the Home Department v. JJ and others (FC) (Respondents)* [2007] UKHL 45
- Secretary of State for the Home Department v. Rehman* [2001] UKHL 47, [2003] 1 AC 153

## Legislation

- Human Rights Act 1998
- International Covenant on Civil and Political Rights Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49
- League of Nations Convention for the Prevention and Punishment of Terrorism [1937] CE
- Terrorism Act 2006
- Anti terrorism Crime and Security Act 2001
- Counter-Terrorism and Security Act 2015

Counter Terrorism Act 2008  
Prevention of Terrorism Act 2005  
Terrorism Act 2000  
Terrorist Asset-Freezing (Temporary Provisions) Act 2010  
International Covenant on Civil and Political Rights  
(adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)

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