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# ARTICLES OF TERROR

Laws have been so widely drafted that we no longer know what is permissible, writes **Imran Khan**

*From left to right: Dominic Grieve, Joshua Rozenberg, John Burton*
*Credit: Julian Lass*

In *The Social Contract*, Rousseau wrote:

> At Genoa, the word Liberty may be read over the front of the prisons and on the chains of the galley slaves. This application of the device is good and just. It is indeed only malefactors of all estates who prevent the citizen from being free. In the country in which all such men were in the galleys, the most perfect liberty would be enjoyed.

It is this line of thought that has led a good many people over the last few centuries to argue that the freedom any society enjoys depends on the application of the law. As one commentator, Steven Poole, put it in his book *Unspeak*: 'The law demands that in exercising your freedom, you do not unduly reduce that of others.' John Locke made the point in an even punchier way: 'Where there is no law, there is no freedom.'

It is argued that England has observed this philosophy, until recently, by a set of rules which forbade certain actions. We cannot kill each other, or

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steal, or do any number of other things which harm other members of society. A balance is struck so that as long as we do not engage in such actions there will be no limitation of our freedom by the state. I say recently, because, until the introduction of the Human Rights Act in October 2000, the law did not recognise an individual citizen's assertion of a positive set of rights. So, now, not only are we proscribed from committing certain acts, but we can point to specific and positive rights that we are entitled to. Regrettably, however, a number of these rights, including the right to freedom of thought and the right to freedom of expression enshrined in Articles 9 and 10 of the European Covention on Human Rights have been seriously attacked and undermined in the government's so-called 'war on terror', and at the same time, the state can now interfere with our freedom on a much wider basis than restrictions of actions which potentially harm others.

Commentators have suggested that the government's pyrrhic victory in the House of Commons last Wednesday [11 June] over the detention of terrorist suspects for 42 days was a 'bad day for both liberty and democracy'. I don't agree with the significance that some have afforded the latest act. My own view is that if ever there was a bad day in the history of the English legal system, it was when the latest batch of anti-terror legislation was passed. Legislation aimed against terrorism has been well established in the UK for over 20 years, but what we have had over the last seven years is the steady and pernicious erosion of what many saw as the underlying principles of English law. Such has been the departure from the established tenets of our legal system that we have practically lost the word 'reasonable' from our lexicon. It is no longer necessary, for example, under Section 44 of the Terrorism Act for a police officer to have reasonable grounds to suspect that a person might be committing an offence in order to stop and search them on the streets. Even more alarmingly, under Schedule 7 of the Terrorism Act an 'examining officer' can stop, search *and* question any person at a port in order to determine whether they are a terrorist. The person is not arrested for any offence and there does not have to be any reasonable suspicion of them in this regard. However, if they refuse to co-operate with the procedure they are committing an offence for which they can be imprisoned for up to three months. One police officer involved in this process described it thus: the individual concerned is not arrested and is free to leave; but if they should do so they would be arrested.

The fact is that the anti-terror legislation is so widely drafted that not only does it involve interfering in the lives of innocent people going about their ordinary business, but it deliberately fails to tell us precisely

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what we can and cannot do. As we all know, the criminal law is meant to regulate behaviour. If we transgress the parameters set by the law then the citizen is punished. Ordinarily, most people know what is and what is not permissible in society. Given that loss of liberty is at stake, the need for clarity and certainty is obvious. There is something extraordinary about laws which are drafted so widely that we are unable to determine what we should not do in order to prevent arrest, prosecution and conviction.

Until two recent cases which went to the Court of Appeal, this was precisely the position with two anti-terror provisions. In the case of *R v Zafar and Others*, which was the more publicised of the two decisions, defence lawyers appealed the convictions of five young men who had been prosecuted for an offence under Section 57 of the Terrorism Act 2000 which states:

> A person commits an offence if he possesses an article in circumstances which give rise to a reasonable suspicion that his possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism.

The prosecution case at trial was that these young men intended to travel to Pakistan, train and then fight coalition forces in Afghanistan. Proof of this allegation, and an offence in itself, was that the young men had on them extremist material to inspire and sustain this intention. The young men in question were a schoolboy and teenage students. The schoolboy, Irfan Raja, lived in Ilford and ran away from home leaving a martyrdom song and a note saying that he had gone to take part in conventional warfare abroad. His family, naturally concerned for his welfare, contacted the police who discovered what was considered to be extremist material on his home computer. Instead of going abroad, Raja had in fact gone to Bradford where he met up with the others over a weekend in February 2006. The others were students at Bradford University and owned computers on which, it was later found, there was much radical Islamic material. Raja did not travel to Afghanistan but returned home to Ilford and was thereafter taken by his family and a solicitor to Paddington police station where he explained where he had been that weekend and why such material was stored on his computer. The other students – Zafar, Iqbal, Malik and Butt – were all subsequently arrested and all five were eventually charged under Section 57 of the Act.

The issue was the staggering implications of the construction of the legislation at the heart of the case. On the face of it, anyone – whether a professor of Islamic literature, a student at a university or anyone with a curious mind – could fall foul of the provision if they had any extremist material in their possession because, by its very nature in and of itself, it was for a purpose *connected* with terrorism. Even more worryingly, if prosecuted under Section 58 of the same act, both the professor and the student could be prosecuted for *any* document or record if it was likely to be useful to someone, anyone, involved in terrorism, whether the document itself was innocuous or not.

Section 58 of the Terrorism Act states:

A person commits an offence if –

(a) he collects or makes a record of information of a kind likely to be useful to a person committing or preparing an act of terrorism, or
(b) he possesses a document or record containing information of that kind.

## Anyone could fall foul of the provision if they had extremist material in their possession

In theory these were not entirely new concepts in law. Similar provisions were in existence at the time of the troubles in Northern Ireland, when the rationale for such provisions was the need for people to account for what might be called 'commonplace items in normal circumstances' which were well known to be used in making bombs. But the legislation was applied to mean exactly that – things which could readily and unmistakably be seen as being used for the purposes of terrorism. At no time did the measures go so far as to include propagandist, ideological, theological or any other such material as it would mean the introduction of 'thought crimes'. And certainly, there would never have been any possibility that someone in possession of an item as innocent as an A–Z map could be prosecuted under anti-terror laws.

The Court of Appeal was troubled by this new fact, that the leap from an article, any article, to terrorism was such a short one – the thought that the

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first had simply to be 'connected with' the second to make out the offence. Using the example of the travel plans by the young men to Pakistan, the Court was invited by the prosecution to agree that just possessing an air ticket for travel to Pakistan would be enough to meet the ingredients of the offence. What then, the Court asked, of the chequebook that was used to pay for the air ticket? Clearly, such a proposition takes the argument to an absurd level and, therefore, the Court decided to read Section 57 in terms which now mean that an offence is only committed if the possession of the article is intended to be used for terrorism. This plainly must be the right approach. Any other construction leads to the uncertainty of where to draw the line between lawful and criminal. The court went further in the second judgment of *R v K* by stating that a document or record under the provisions of Section 58 would only fall foul of the law if it could be of 'practical assistance' to someone involved in terrorism.

The fact is that many have been arrested in similar situations where the nexus between article or document and terrorism is so loose as to be almost non-existent, in circumstances in which senior counter-terrorism officers have made it plain that they wish to police our thoughts. Take the case of Rizwaan Sabir, a 22-year-old masters student at the University of Nottingham. He, along with Hicham Yezza, a clerical member of staff, was arrested in May of this year under the Terrorism Act, on suspicion of possessing extremist material. As preparation for a PhD on radical Islamic groups, Sabir had downloaded a freely available, edited version of the al-Qaeda handbook from a US government website. He then sent the 1,500-page document to a staff member for printing purposes, the member of staff having free access to a printer. Both were arrested and detained for six days. They were subsequently released without charge.

Despite the fact that his tutors were aware of his research, it took six days to decide whether the publicly accessible information downloaded for the purpose of legitimate research was useful for terrorism or not.

Whilst Sabir was fortunate in only having to spend six days in detention, others may not be so fortunate. Convictions are bound to follow such arrests, leading to the charge that the state is using its power in such a discretionary and draconian way that it fuels resentment and suspicion.

The government has stated that it believes that there are thousands of young men who are being radicalised by propaganda and the suggestion is

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undoubtedly that arresting them at an early stage will prevent acts of atrocity. In fact, such a measure does not, as we have just seen, easily distinguish between the young student legitimately exploring the world around him/her and a potential terrorist. Our laws should be such so that all of us – of whatever opinion, outlook or persuasion – do not have to look over our shoulders every time we read a book, download an article, listen to some music or carry a map because that act alone may lead to a loss of liberty. The enactment of increasingly widely drafted anti-terror laws means that the balance between legitimate security interests and fundamental human rights is not met, and freedom of thought and expression continue as casualties in this age of terror. ❐


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**Imran Khan** is probably best known for his work representing the family of Stephen Lawrence, who was murdered in a racist attack in 1993. A leading human rights and criminal lawyer, he has represented defendants in a number of notable terrorism trials