

The Terrorism Act 2000: an analysis

by Dr C Chatterjee

The Terrorism Act 2000 completely reforms the law concerning prevention of terrorism in the United Kingdom, albeit with some exceptions; furthermore, it applies to any terrorist activity in the United Kingdom and abroad. It is interesting to note that the legislation decided to adopt the term 'terrorism', signifying that an 'ism' about terror is now identifiable. The Act does not refer to terrorist activities as such; instead it refers to acts of terrorism.

The *Terrorism Act 2000* came into force on 20 July 2000, and consists of eight Parts:

- Part 1 – Introductory
- Part 2 – Proscribed Organisations
- Part 3 – Terrorist Property
- Part 4 – Terrorist Investigations
- Part 5 – Counter-Terrorism Powers
- Part 6 – Miscellaneous
- Part 7 – Northern Ireland
- Part 8 – General

In addition to these Parts, the Act has 16 Schedules. It is the purpose of this article to identify and discuss the most important aspects of this Act; human rights issues are not discussed in this work.

A BRIEF LEGISLATIVE HISTORY

Legislation with regard to terrorist activities is not novel in the United Kingdom; in 1974 the *Prevention of Terrorism (Temporary Provisions) Act* was passed, the primary purpose of which was to proscribe the IRA and to make it an offence to signify support for the IRA in the United Kingdom. The Act was subject to renewal every six months by Parliament in order to ensure whether the use of special powers would be needed and if so how they should be monitored. In 1976 the *Prevention of Terrorism (Temporary Provisions) Act* was passed, and it was renewed until 1984 when it was re-enacted with certain amendments. Both pieces of legislation were primarily directed at the terrorist activities by the IRA in Northern Ireland. In 1995 Lord Lloyd of Berwick was invited by the government to carry out an Inquiry to consider the future need for specific counter-terrorism legislation in the United Kingdom if the cessation of terrorism in the

affairs of Northern Ireland led to a lasting peace in Northern Ireland (Cm 4178, December 1998). This Inquiry was published in two volumes; the second volume primarily discussed the current and future trends to the United Kingdom from international and domestic terrorism (other than that connected with the affairs of Northern Ireland); the first volume simply contained the background to the Report. The current Act is based on the proposals in the Government's Consultation document entitled *Legislation Against Terrorism*, which was a response to Lord Lloyd's Paper entitled *Inquiry into Legislation Against Terrorism*, (Cm 3420, October 1998).

It is the issue of counter-terrorism that led the government to enact the current legislation; all previous legislation was concerned with terrorist activities or terrorism. Current legislation places emphasis on counter-terrorism in the United Kingdom.

INNOVATIVE ASPECTS OF THE LEGISLATION

The following are some of the innovative aspects of the current legislation:

- (a) the definition of 'terrorism' (s. 1);
- (b) terrorism in the context of the Act is connected not only with the affairs of Northern Ireland and the international arena but also with terrorism by or on behalf of domestic groups in the United Kingdom;
- (c) the concept of proscription is extended to all types of terrorism including terrorism connected with the affairs of Northern Ireland;
- (d) section 5 of the Act established a Proscribed Organisation Appeal Commission to hear appeals in cases of applications to de-proscribe;
- (e) seizure of cash at borders and forfeiting on an order of a court;

- (f) identification of money accounts by financial institutions in relation to terrorist investigations (Schedule 6); and
- (g) in respect of applications for extension of detention of persons under section 141 (*Arrest without Warrant*) the decision is to be taken by a judicial officer and not by the Secretary of State. In other words, matters of detention will henceforth be decided by judicial authorities rather than by political authorities.

With the passing of this Act, however, the *Northern Ireland (Emergency Provisions) Act 1996* generally ceases to have effect (save a few provisions which are still applicable to Northern Ireland). In so far as the *Prevention of Terrorism (Temporary Provisions) Act 1989* and the *Criminal Justice (Terrorism and Conspiracy) Act 1989* are concerned, they will continue in force for a period of 12 months from the passing of the Act of 2000.

A DISCUSSION OF SOME OF THE INNOVATIVE ASPECTS OF THE LEGISLATION

Definition of the Act of Terrorism

'The act of terrorism' has been defined in section 1 which states the following:

- '(1) In this Act 'terrorism' means the use or threat of action where-
 - (a) the action falls within subsection (2),
 - (b) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and
 - (c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.
- (2) Action falls within this subsection if it-
 - (a) involves serious violence against a person,
 - (b) involves serious damage to property,
 - (c) endangers a person's life, other than that of the person committing the action,
 - (d) creates a serious risk to the health or safety of the public or a section of the public, or
 - (e) is designed seriously to interfere with or seriously to disrupt an electronic system.
- (3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.
- (4) In this section-
 - (a) 'action' includes action outside the United Kingdom,
 - (b) a reference to any person or to property is a reference to any person, or to property, wherever situated,
 - (c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and

(d) 'the government' means the government of the United Kingdom, of a Part of the United Kingdom or of a country other than the United Kingdom.

- (5) In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation.'

Before the final version of section 1 was adopted different definitions of terrorism were provided by various sources. The definition adopted by Lord Lloyd was the following:

'The use of serious violence against persons or property for the threat to use such violence to intimidate or to coerce a Government, the public or any section of the public, in order to promote political, social or ideological objectives'. (See Cm 3420 at para. 523)

At the second reading of the Terrorism Bill the Home Secretary stated that:

'Terrorism involves the threat of use of serious violence for political, religious or ideological ends. It is premeditated, and aimed to create a climate of extreme fear. While the direct victims may be specific or symbolic targets, they may also be selected at random. In any event, terrorism is aimed at influencing a wider target than its immediate victims. Although all crime to some degree plainly threatens the stability of the social and political order, terrorism differs from crime motivated solely by greed, in that it is directed at undermining the foundations of Government'. (Hansard, HC, Vol. 341, col. 152)

The term 'threat' presents a legal problem in that it may be explained and justified by reference to the circumstances of each case. Section 1(1)(b) however is definitive in that the use of 'threat' must be designed to influence the government or to intimidate the public or a section of the public. According to section 1 of the Act terrorism may include the use of threat made for the purpose of advancing a political, religious or ideological cause. Under the Act an act of terrorism may be identified by the effect of the act, namely, serious violence against a person or any serious damage to property, endangering a person's life, creating a serious risk to health and safety of the public or a section of the public, or designed to seriously interfere with or seriously to disrupt an electronic system.

Under the Act 'action' includes action outside the United Kingdom, the term 'public' may include the reference to the public of a country other than the United Kingdom, and the 'government' means any government including the government of the United Kingdom.

It would be opportune to make a few comments on section 1 as this represents one of the fundamental provisions of the Act. There are no set criteria for determining what constitutes an act of terror; the Act instead refers to 'terrorism', which would stand for the use or threat

of action in regard to the items included in paragraph 2 of section 1. It is believed that the judicial authorities will define acts of terrorism in the context of each case. Anticipatory terrorism will come under the provision of section 1. Furthermore, 'action' in section 1 includes such actions which may have threatened or actually caused harm to the United Kingdom or which may jeopardise the security of the United Kingdom. The issue remains that in such cases the courts in this country will assume jurisdiction in derogation of the usual principle of international criminal law – location of the crime determines jurisdiction (see further ss. 62 and 63.) Section 64 makes amendments however, to the *Extradition Act* 1989, in order to allow the government of the United Kingdom to be governed by United Nations Conventions on Terrorism.

Proscribed Organisations

Section 3 creates what are known as 'proscribed' organisations (if listed in Schedule 2) which are all Northern Ireland-related organisations. However, the Secretary of State may, by order, add an organisation to or remove it from Schedule 2 or amend the Schedule in any way he likes. An organisation is concerned with terrorism if it:

- (a) commits or participates in acts of terrorism;
- (b) prepares for terrorism;
- (c) promotes or encourages terrorism; or
- (d) is otherwise concerned with terrorism.'

The Secretary of State has discretion to designate an organisation as a proscribed one as he has discretion to de-proscribe an organisation. The de-proscription process can be initiated when an application is made by an organisation concerned or by a person who has been affected by virtue of the organisation being proscribed. The Secretary of State will be acting in accordance with the Regulations proscribed for this purpose but it is for the applicant to justify the grounds on which an application for de-proscription is being made.

The basic ground for proscribing an organisation is if the Secretary of State believes that it is concerned with terrorism and it is hoped that such discretionary power will be justifiably exercised by the Secretary of State. Lord Lester raised the issue of human rights in the proscription process when the Bill was being considered, and this issue has been discussed in a separate section. There is however an appeals procedure whereby in the event of an application for de-proscription being refused by the Secretary of State, the applicant may appeal to the Proscribed Organisation Appeal Commission which will decide the Appeal according to the principles of judicial review. A further appeal is available to the Court of Appeal. The primary reasons for adopting these systems of proscription were stated as:

- (a) that it has remained as a powerful deterrent to people becoming engaged in terrorist activity;

- (b) related offences were considered to be a method of tackling some of the lower level support for terrorist organisations; and
- (c) 'that proscription acts as a powerful signal of rejection by the government and the society as a whole.' (See further statement made by Mr Charles Clarke, *Hansard*, SCD, col. 56)

The powers and functions of the Proscribed Organisation Appeals Commission appear in Schedule 3 to the Act.

Offences

The following are categorically regarded as offences under the Act:

- (a) membership of proscribed organisations;
- (b) commitment of an offence in a public place while wearing an item of clothing or carrying or displaying an article belonging to a proscribed organisation;
- (c) fundraising and receipt of money and property for the purposes of terrorism;
- (d) possession of money and/or property with the intention of using it for the purpose of terrorism;
- (e) entering into or becoming concerned in an arrangement as a result of which money or other property is made available or to be made available to the other knowing or having reasonable cause to suspect it will or may be used for the purpose of terrorism;
- (f) money laundering, that is, if a person enters into or becomes concerned with 'an arrangement which facilitates retention or control by or on behalf of another person of terrorist property – by concealment, by removal from the jurisdiction, by transfer to nominees or in any other way'(s. 18);
- (g) failure to stop a vehicle when required to do so by a constable in the exercise of his powers generally under s. 44 (*Power to Stop and Search*);
- (h) parking of a vehicle in contravention of a prohibition or restriction imposed by s. 48 (*Authorisations*);
- (i) providing instructions or training for the purposes of committing terrorist offences, or even by making an invitation to receive instruction or training whether generally or addressed to one or more specific persons (s. 54 or by directing the activities of a terrorist organisation – s. 56);
- (j) possessing an article in circumstances 'which give rise to reasonable suspicion that its possession is for the purpose connected with the commission, preparation or instigation of an act of terrorism' (s. 57);
- (k) collecting or making a record of information of a kind which is likely to be useful to a person

committing or preparing an act of terrorism or possessing a document or record containing information of that kind (s. 58); 'record' in this context would include a photographic or electronic record;

- (l) inciting terrorism overseas or within England and Wales, Northern Ireland and Scotland.

Scheduled Offences

In addition to certain other provisions addressed to Northern Ireland, (for example, section 60), the entire Part VII of the Act has been exclusively devoted to certain Scheduled offences which apply to Northern Ireland, and which have been listed in Parts I and II of Schedule 9. Offences under Part II of this Schedule (Inchoate and Related Offences) shall have effect in respect of offences related to those specified in Part I, which lists substantive offences, namely common law offences; and offences under various acts, namely:

- *Malicious Damage Act 1861*;
- *Offences against the Persons Act 1861*;
- *Explosive Substances Act 1883*;
- *Prison Act (Northern Ireland) 1953*;
- *Theft Act (Northern Ireland) 1969*;
- *Protection of the Person and Property Act (Northern Ireland) 1969*;
- hijacking under section 1 of the *Aviation Security Act 1982*;
- offences in Northern Ireland under section 2 of the *Criminal Jurisdiction Act 1975 (Vehicles and Ships)*;
- *Criminal Damage (Northern Ireland) Order 1977*;
- *Criminal Law (Amendment) (Northern Ireland) Order 1977*;
- *Firearms (Northern Ireland) Order 1981*;
- *Taking of Hostages Act 1982*;
- *Nuclear Material (Offences) Act 1982*;
- *Computer Misuse Act 1990*;
- *Aviation and Maritime Security Act 1990*;
- *Channel Tunnel (Security) Order 1994*; and
- offences under sections 11, 12, 13, 15-19, 54 and paragraph 37 of Schedule 4 (Forfeiture Orders); Schedule 5 (Terrorist Investigations: Information); paragraph 10 of Schedule 10 (Munitions and Transmitters: Search and Seizure); and paragraphs 2 and 3 of Schedules 13 (Private Security Services) unless by way of exception any of these Scheduled offences have been designated as non-scheduled offences by the Attorney-General for Northern Ireland.

In designating an offence as a Schedule offence, the nature of the offences usually committed by the various terrorist groups have been taken into consideration. Of course, the Secretary of State may, by order, add to or remove from the list of Schedule offences any offence or

amend Parts I or II in some other way. The following may be applicable to scheduled offences: longer periods of remand; different rules for committal proceedings; stricter rules for bail; non-jury trial; lower threshold for the admission in evidence of confession or more severe sentencing.

Sections 81-95 deal with powers of arrest, search and similar security measures in Northern Ireland. A constable in Northern Ireland may enter and search premises on the grounds of a reasonable suspicion of the presence of a terrorist on the premises, without a warrant. In this connection it should be reiterated that under the current Act, the definition of the 'terrorist' act includes the commission, preparation or instigation of acts of terrorism. A constable may use reasonable force, if necessary, in carrying out his duties (sections 95 and 114). Similar powers have been conferred on members of Her Majesty's forces on duty. If a member of such forces suspects that a person is in the process of committing or has committed an offence, he may arrest the person without a warrant and detain him for a period not exceeding four hours, but such a person making an arrest under section 83 must state the ground of arrest. Members of Her Majesty's forces may enter and search any premises where the suspect is or may be. Arrest and detention under section 83 must be in conformity with the *Human Rights Act 1998*.

Furthermore, under the common law the person making an arrest is required to inform the arrested person of a reason for the arrest (*Christie v Leachinsky* [1974] AC 573).

The right to enter and search premises for the purposes of ascertaining whether any explosive unlawfully exists on the premises is also allowed to explosion inspectors. Section 85 also gives the authority to seize any explosives found in the course of the search unless he is satisfied that they have been or will be used only for a lawful purpose. In this section 'explosive inspector' would mean an inspector appointed under section 53 of the *Explosives Act 1875*.

It is interesting to note that the inspector need not have any cause of suspicion prior to his carrying out a search on any premises. This provision is primarily intended for use by those who provide security for court buildings.

Under section 86 of the Act a police constable or a member of the armed forces is authorised to enter any premises for the purposes of ascertaining, based on his reasonable belief, whether a person is unlawfully detained whereby his life would be in danger. The power of a police constable and a member of the armed forces is extended to include examination of documents in order to ascertain whether any document contains any information of the nature mentioned in section 58(1)(a), that is, information useful for a person committing or preparing an act of terrorism, or under section 103(1)(a) whereby a person collects, makes a record of, publishes, communicates or

attempts to elicit information against a person, which information is likely to be useful to a person committing or preparing an act of terrorism. Examination of documents under section 87 of the Act is subject to legal privilege within the meaning of the *Police and Criminal Evidence (Northern Ireland) Order 1989*. Section 88 details the procedure as to how to examine the documents. The power of a police constable or a member of the armed forces in Northern Ireland to stop and question any person even without reasonable suspicion is wide. This power is not conditional upon the happening of any recent violent incident and a police constable or a member of Her Majesty's armed forces may stop a passer-by simply by asking him/her for their identification and an account of their movements. For the purpose of preserving the peace or the maintenance of order the Secretary of State may authorise a person to take possession of land or other property or to take steps to place buildings in a state of defence or destroy property or cause it to be destroyed or moved or to carry out works on land or to take any other action which interferes with public right or the private right of property (section 91).

Under the Act a police constable or a member of Her Majesty's armed forces have the usual powers of road closure on suspicion in order to ensure that access to a place by suspected terrorists is prohibited; the same power applies to courts and ports.

Section 98 of the Act provides for Independent Assessor and Military Complaints Procedures. The Secretary of State may appoint a person to be known as an Independent Assessor for this purpose, whose primary functions would be to keep under review the procedures adopted by the General Officer Commanding Northern Ireland for receiving, instigating and responding to complaints and who, amongst other things, shall review a particular case or class of cases, to consider whether the procedures have operated inadequately or to make recommendations against inadequacies in those procedures to the General Officer Commanding Northern Ireland, including inadequacies in the way in which they operate pertaining to a particular complaint or class of complaints (section 98).

Under the Act the Secretary of State is required to develop a code of practice in connection with the exercise by police officers of any power conferred by this Act and this code of practice shall equally apply to Her Majesty's forces in exercising their powers under the Act. The Secretary of State shall also develop a code of practice in regard to the silent video-recording of interviews.

Preparation of an act of terrorism including recording, publishing, communicating or attempting to elicit information about a person or possession of a document containing information on terrorism is an offence and is defined as 'terrorist information'.

The Act has made significant provisions under Schedule 13 in regard to private security services. Such services

must be offered on the basis of a licence, otherwise they will be regarded as illegal services. This provision primarily applies to ensure that no institution works as an unlicensed organisation.

General Police Powers

Part VIII of the Act deals with the general powers of the police. These powers are additional to powers, which any individual has at common law or by virtue of any other legislation. Powers under section 114 shall not affect the usual powers of police constables. Under section 114(2) a constable may, if necessary, use reasonable force for the purpose of exercising power conferred on him by virtue of this Act, save for paragraphs 2 and 3 of Schedule 7 (Port and Border Controls). Under this Act a police constable may retain anything seized as long as is necessary in the circumstances of the case. More detail of enforcement officers' powers may be found in Schedule 14 of this Act. In general, section 116 authorises police constables to stop and search, including the power to stop a vehicle for the purpose of searching it. In other words, this power of the Act gives police constables very wide powers in the name of security of the state.

Terrorist Investigations

Part IV of the Act makes detailed provisions for terrorist investigations. In this Act 'terrorist investigation' means an investigation of the following:

- (a) *the commission, preparation or instigation of acts of terrorism,*
- (b) *an act which appears to have been done for the purposes of terrorism,*
- (c) *the resources of a proscribed organisation,*
- (d) *the possibility of making an order under s.3 (3), or*
- (e) *the commission, preparation or instigation of an offence under this Act.'*

(section 32)

To put it simply 'terrorist investigation' covers investigation into offences, and investigations into an act, which might lead to an act of terror. In order to prevent an act of terror, a police constable has been allowed two types of power: the power to prevent by physical means, namely cordon-off an area by declaring it a 'designated area'; and the other power, that is, the power to carry out investigation. These powers have been detailed in Schedule 5 (Terrorist Investigation Information) and Schedule 6 (Financial Information). Schedule 5 is divided into two Parts: the first Part extends to England and Wales and Northern Ireland, and Part Two is to be applied to Scotland. Proceedings for an offence under this Schedule will require the consent of the DPP or the DPP for Northern Ireland. A police constable has the power to obtain information and evidence by entering and searching

premises, to seize material, whether on the basis of a warrant or not, but which he reasonably believes to be of substantial value to a terrorist investigation. A warrant for terrorist investigations has a wider basis than that under PACE, which is issued for a 'serious arrestable offence', nor is there any requirement that the 'relevant material' should be 'evidence'. A Justice of the Peace has a very wide discretion under Schedule 5. He/she can order the issue of a warrant for non-residential premises simply on the application of a senior police officer. Issuance of warrants in such circumstances is almost inevitable. There is no similar power under PACE or PACE NI. A senior police officer is also authorised to search premises within a cordoned area. Furthermore, for the purposes of a terrorist investigation, a police constable may apply to a circuit judge for an order that a specified person be required to produce material for seizure and retention or to allow the constable access to premises. In most cases powers under Schedule 5 are much wider than those under PACE. Under an order of a circuit judge a police constable may require a person to provide explanation of material seized. In urgent cases, a police officer of the rank of superintendent may sign warrants provided he has reasonable grounds for believing that the case is one of great urgency which requires immediate action, and also provided that he notifies the Secretary of State. A superintendent seeking explanation of any material seized may exercise similar power.

Police powers under Schedule 7, which are addressed to Northern Ireland, are more extensive in nature than those under Schedule 5.

Section 38 brings into effect Schedule 6 (entitled Financial Information) which enables a police constable to apply to a judge for a customer information order, whereby a financial institution with which a suspect may maintain accounts will be required to disclose financial information with a view to establishing whether proceeds of crime or terrorist finance are being accumulated for preparation of terrorist acts and/or whether a suspect is involved in money laundering for fostering terrorism. This Schedule is modelled on Schedule 2 to the *Proceeds of Crime (Northern Ireland) Order 1996*. A financial institution may refuse to disclose information only on the grounds that the information is not in its possession or that it is not reasonably practicable for it to comply with the order.

Part V of the Act deals with counter-terrorist powers. Whereas Parts II, III and IV are predominantly designed for the prevention of terrorism, whether by investigation or by proscribing organisations, the emphasis of this Part is on individual terrorists. Section 40 defines a 'terrorist' as a person who has committed an offence under sections:

- (i) 11 (membership of a proscribed organisation);
- (ii) 12 (by supporting a proscribed organisation);
- (iii) 15-18 (by using and/or possessing a terrorist property);

- (iv) 54 (by providing weapons training); and
- (v) 56-63 (by directing terrorist organisations, or by possessing articles or by inciting terrorism overseas or a person who has been concerned in the commission of terrorism).

Powers under Part V of the Act are to be exercised upon suspected terrorists.

These powers extend to include: powers to arrest without a warrant (s. 41); to search premises (s. 42); to search persons (s. 42); to stop and search (s. 44); to prohibit or restrict parking of vehicles on a road specified in an authorisation (s. 48); to control ports and borders (s. 53). Part V gives effect to Schedule 8 to the Act. The power of a police constable to arrest an individual on the grounds of suspicion of being a terrorist, without a warrant, may cause controversy, but the power is there. In fact, there was considerable debate over whether the power of arrest on suspicion only, and not on an actual offence, would be contrary to Article 5(1) of the *European Convention on Human Rights*, which states that:

'Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

*(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence'. (See further the statement made by Lord Lloyd of Berwick, Hansard, HL, Vol. 613, col. 676; see also *Brogan v United Kingdom* (1989) 11 EHRR 177)*

It is not possible here to go into the details of all legal issues pertaining to arrest without warrant, search of premises or holding interviews with a suspect; suffice to say that a government can always derogate from its Article 5(3) obligations (whereby an arrested person must be brought before a judicial authority promptly) and on the grounds of 'public emergency' (see further *Brannigan and McBride v United Kingdom* (1994) 17 EHRR 539). Incidentally, the period for which an individual may be initially detained under section 41 is 48 hours.

Under section 44, a senior officer may give a constable an authorisation whereby the latter may stop and search vehicles and pedestrians. A constable need not have any reasonable suspicion and the authorisation may be given orally or in writing as soon as possible. A constable's power to stop and search extends to include searching a vehicle, any passenger in the vehicle, any pedestrian and anything that may be carried by him. The period of authorisation shall not exceed 28 days.

CONCLUSIONS

The current Act aims at preventing what are known as 'Irish terrorism' and 'domestic terrorism'. Counter-terrorist measures are now applicable to all forms of

terrorism: domestic, Irish and international. In this connection it would be appropriate to refer to the objectives of the Act:

'An act to make provision about terrorism, and to make temporary provision for Northern Ireland about the prosecution and punishment of certain offences, the preservation of peace and maintenance of order.'

Terrorism must be controlled, if not abolished; furthermore, the preservation of peace and maintenance of order are the paramount objectives of the government. It is in the light of these objectives that one should consider the provisions of this Act, and the relevant provisions of the *Human Rights Act 1998*. Section 4 of the *Human Rights Act* provides that if a court of the United Kingdom is satisfied that a provision of primary or subordinate legislation is incompatible with a convention right, the court may make a declaration of incompatibility. Section 6 of the same Act provides that it is unlawful for a public authority, including a judicial authority, to act in a way which is contrary to or incompatible with a convention right. Terrorism per se is not an offence; it is the act of terror, whether actual or potential, which constitutes an offence. In considering the compatibility or incompatibility of the *Terrorism Act 2000* with the *Human Rights Act 1998* and the *European Convention on Human Rights*, Lord Hope of Craighead said that:

'In this area difficult choices may have to be made by the executive or the legislature between the rights of the individual and the needs of society. In some circumstances, it will be appropriate for the courts to recognise that there is an area of judgement within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention'. (See R v DPP, ex parte Kebilene [1999] 3 WLR 972)

The issue of human rights may have to be looked at from two points of view:

- (a) that adequate judicial guidelines have already been developed by the European Court of Human Rights to confirm what constitutes a breach of Convention rights; therefore government parties to that Convention should be aware of those guidelines; and
- (b) whether a state's paramount interest in preserving the peace and maintenance of order will have an overriding effect upon any legislation.

It is inevitable for a state in certain cases to derogate from Convention provisions on the grounds of the national interest or national security. Indeed, Article 15(1) of the *European Convention on Human Rights* permits derogation by contracting states on the grounds of national security:

'In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures

derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its obligations under international law.' (Article 15(1))

It is for the state concerned to confirm for the purposes of derogation whether any 'public emergency' threatening the life of the nation exists. Any other sovereign authority or judicial authorities or institution, national or international, may not challenge this decision. The decision to derogate should be based on whether the state should compromise the rights and freedoms of the community at large in order to protect the rights and freedoms of certain individuals or organisations (see R Higgins, 'Derogations Under Human Rights Treaties' (1976-77), 48 *British Year Book of International Law* 281 at 282). According to Higgins, derogations from human rights are permissible only if event necessitate them, and '... if they are proportionate to the dangers that these events represent' (see R Higgins, op. cit., at 282-283).

Furthermore, the emergency must be nation-wide in its effects; it need not be one in which the life of the nation is threatened with extinction; a breakdown of order in the organised life of the nation for the time being will do (see J E S Fawcett, *The application of the European Convention on Human Rights*, (1969), p. 249).

'Arrest' of a person whether with or without a warrant and proscription of an organisation may be carried out on actual activities threatening the life of the nation or the activities, actual or potential, for which the State has an obligation to give protection to the nation may be based on suspicion, which need not be well-founded. In the balancing act between suspicion proved to be well-founded and suspicion proved to be unfounded, the latter is as weighty as the former, because the state has the primary responsibility for offering protection to its citizens by taking precautionary measures. A reasonable degree of suspicion will do. In fact, similar provision may be found in Article 5(1)(c) of the *European Convention on Human Rights* (see further S K Chatterjee, 'Terrorism and Certain Legal Aspects of Human Rights', *International Relations* (1980), p.749-768 at 761). Part 2 of the *Terrorism Act 2000* is in conformity with this provision. What is needed however is a balanced view of the two dimensions to the issues of 'suspicion' and 'protection', to try to ensure that neither the public authorities nor any organisations exceed their limits.

Controversies will persist as to what constitutes 'an act of terror' and in what way(s) 'freedom fighters' are to be treated. Such controversies may never be resolved to the satisfaction of all concerned. 

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