The Oxford Council on Good Governance

OCGG Law Section

Advice Program
EU Justice Policy

Governance Area
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EU Citizen Rights

The UK Assault on Liberty and Democracy

Recommendation to

the UK Parliament

the UK Courts

the European Union

by Joseph Mitchell *

Tony Blair and Gordon Brown have used New Labour's years in government to radically undermine good governance at both international and national levels.

Their complicity in gross breaches of human rights and grave violations of international law through participation in the war on terror and the war on Iraq is well known.

Less attention has been given to how they in parallel have pursued an authoritarian project that has dangerously jeopardized the rule of law and democracy in the UK.

They have on the one hand introduced a host of measures that undermine, restrict, and abolish civil liberties. Some have come under the heading war on terror,

MAIN POINTS

Blair and Brown have not only violated international law and breached human rights abroad. They have also struck at the foundations of rule of law and democracy at home. A host of authoritarian laws introduced by New Labour critically endanger civil liberties and checks and balances in the UK.

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others have come with no heading at all. Their effect has been to strip ordinary citizens of their human rights, fundamental freedoms, and political power.

They have at the same time introduced other measures that erode, circumvent, and eliminate checks and balances. One came under a national security flag, another under a cutting red tape banner, and a third under a cost-saving caption. Their effect has been to emasculate the parliament.

The chilling picture that emerges is one where citizens, the courts, and the parliament are fatally weakened while power is concentrated in the government. This is a subversion of the constitution that amounts to a dramatic repudiation of the fundamental social contract.

It is now urgent and critical that the British people, the courts, and the parliament reassert their rights and powers against the silent takeover orchestrated by Blair and Brown. The European Union should monitor developments vigilantly.

"WAR ON TERROR" VS CIVIL LIBERTIES

The Financial Times last summer published an editorial that brilliantly sums up the threat the war on terror poses to our societies, civilization, and humanity. Commenting on European complicity in American kidnappings, transports, detentions, and torture, it denounced these "lawless practices" as "a moral capitulation by liberal societies and a surrender of the rule of law" that "are spreading like a lethal virus" and "in no way [are] disguised by recourse to Orwellian legalisms such as 'rendition'".

It quoted Craig Murray, the UK ambassador fired for condemning British use of CIA information from Uzbek prisons, lamenting "we are selling our souls for dross" and Sandra Day O'Connor, the former US Supreme Court justice, advising "[we] must not wield the tools of tyrants even to resist an assault by the forces of tyranny". (Financial Times, 8 June 2006.) In the UK however this is exactly what Blair and Brown have done.

CONTROL ORDERS

The Prevention of Terrorism Act 2005 introduced control orders following a House of Lords ruling that the practice of

detaining foreigners without trial under the Anti-terrorism, Crime and Security Act 2001 was incompatible with Article 5 (the right to liberty) of the European Convention on Human Rights (ECHR).

Control orders can include any obligations the Home Secretary feels necessary to prevent involvement in 'terrorist-related activity' if there are 'reasonable grounds for suspecting that the individual is or has been involved in terrorism' (section 2(1)(a)).

Typical obligations are listed in section 1(4) and remove various degrees of liberty. Collectively the obligations can easily amount to house arrest. The Home Secretary makes these orders at his discretion but must refer an order to a court hearing immediately. The 'controlee' however has no right of legal representation or access to the court hearing. The court moreover can only reject the order if the Secretary's decision is 'obviously flawed' (section 2(a)). Appeal powers are given in sections 10 and 11 but the same rules apply.

Assessment

Lord Carlile QC, the independent reviewer of terrorism legislation, has complained that the police has not given sufficient reasons why suspects currently held under control orders cannot be prosecuted. The argument that evidence such as wire taps and informers cannot be used in court is not sufficient. One may suspect there simply is not enough evidence of a crime in which case they should not be held at all.

In April 2006, Justice Sullivan in the High Court declared a control order incompatible with Article 6 of the ECHR due to the lack of adequate supervision by the court under the provision that the court only can reject the order if 'obviously flawed'. Control orders, he claimed, were given only 'a thin veneer of legality'.

In June 2006, he declared six other control orders (there are currently only fourteen in use) incompatible with Article 5 of the ECHR on the basis that the restrictions on liberty amounted to house arrest.

Both decisions are appealed by the Home Secretary and likely to end up in the House of Lords.

Justice Sullivan's comments followed similar claims by Human Rights Watch that since control orders impose such severe limitations on freedom they "should be imposed only by a competent judicial authority in proceedings that apply the

criminal standard of proof and guarantee the presumption of innocence and the right to an effective defence" and not merely by the Home Secretary on the basis of 'reasonable suspicion'.

Recommendation

'Reasonable suspicion' is indeed not a sufficient basis for the drastic restrictions of liberty imposed by control orders. Proper prosecution in a court of law is how civilized nations enforce criminal justice. If terrorism cannot be prosecuted in normal courts, then control orders should be imposed by special courts, not the Home Secretary. These special courts could operate in camera, using special advocates, and admit special evidence. But they must respect the provisions of the ECHR and the International Covenant on Civil and Political Rights.

THE DEFINITION OF TERRORISM

The Terrorism Act 2000 contains the legislative definition of terrorism (section 1) that is used in the definition of related crimes such as supporting or raising funds for terrorism.

It states that terrorism is the use or threat of various types of action (listed in section 2) when intended to 'influence the government' or 'intimidate the public' and 'for the purpose of advancing a political, religious or ideological cause'. Section 2 includes, not surprisingly, 'serious violence against a person' and 'risk to the health or the safety of the public' but also, very alarmingly, 'serious damage to property'.

Assessment

There are strong reasons why 'serious damage to property' should not be considered terrorism. Let us illustrate by way of an example. In the Paris suburb riots of 2005 a large number of cars were set on fire. This undoubtedly caused serious damage to property and arguably with the clear intent of influencing the government to advance a political cause. In the UK this might therefore have fallen within the definition of terrorism.

This would however by any standard be wide off the mark. Causing this kind of serious damage to property is of course criminal behaviour even in the context of a political protest. But equally of course it is not in the same category as blowing up schools or high jacking planes.

The issue is particularly important since the definition of terrorism is itself used

to define a number of further crimes. Expanding the definition of terrorism therefore has a multiplier effect on the number of related potential criminal offences.

Let us continue our example. The Terrorism Act 2006 in section 1 introduces 'glorifying terrorism' as the latest addition to the growing list of terror related crimes. At the time of the Paris riots a number of commentators suggested the marginalized immigrant youths on the streets actually had a point about the failure of the government's social integration policy. In the UK this might have been construed as glorifying terrorism.

Recommendation

The extension of the label terrorism to criminal damage has the twin undesirable effects of making terrorism appear less uniquely appalling than it is and making ordinary criminal offences seem to call for more authoritarian responses than they do. In addition there is a risk that the prohibition against glorification will criminalize legitimate political opinions. 'Serious damage to property' should therefore be removed from the definition of terrorism and glorification should be removed from the list of related crimes.

THE PROSCRIPTION OF ORGANISATIONS

The Terrorism Act 2000 in section 11 empowers the Home Secretary to 'proscribe' organizations and thereby make it a crime to belong to, support (section 12), wear an item of clothing (section 13(a)) or display an item suggesting a person is a member or supporter of that organisation (section 13(b)).

There are approximately forty organizations proscribed in this way. An organisation can request deproscription (section 4) and can appeal against a decision not to 'deproscribe' to the Proscribed Organisations Appeal Committee. In 2002, three proscribed organizations chose instead to seek judicial review of the Home Secretary's decision to proscribe them but their claims failed.

Assessment

The power of proscription is one of the most worrying tools the Home Secretary has. Several proscribed organizations claim they only advocate democracy (e. g. in Iran) or minority rights (e. g. for the Kurdish people in Turkey) and that they constitute absolutely no threat to the UK. The Home Secretary's response has been that 'terrorism is terrorism' no matter

what the aims. This approach is clearly misguided however as it would have led to the proscription of organizations such as the ANC who fought against apartheid in South Africa with wide support in the international community.

There is moreover inadequate parliamentary scrutiny of the proscription process. The Liberal Democrat leader, Sir Menzies Campbell, has for example complained that Parliament has not been given enough time and discretion when reviewing the lists of organizations to be proscribed. On the first list Parliament was presented with twenty-one organisations one of which was al-Qaeda and the choice was limited to simply accepting or rejecting the entire list. Clearly Parliament was not given a real say.

Once listed, organisations automatically come within the range of a number of extremely stringent criminal offences. Let us illustrate by way of another example. Hamas is one of the proscribed organisations. It then follows that wearing a badge supporting the democratically elected government of the West Bank and Gaza Strip may be an offence. Even the EU's cut of funding to Hamas could theoretically be illegal if construed as inviting fundraising which is prohibited under section 15(a). And if so we would of course have to report the EU's support for terrorism since under section 19 we can be arrested, fined and imprisoned for not doing so.

Recommendation

This above example seems far-fetched but the point to note is that these unchecked and wide ranging powers legally exist. The Home Secretary should not have this amount of discretion. The parliament and the courts should have a clear and strong role in the process.

STOP AND SEARCH

The Terrorism Act 2000 in section 44 allows police to stop and search anyone in a designated area. There is no need for any suspicion that a person is a terrorist. Those stopped can be held for considerable periods of time.

Assessment

This power has been extensively used and clearly abused. Most notoriously 82 year old Labour party member Walter Wolfgang after heckling Jack Straw was ejected from a conference hall and held under this act. Other legitimate protesters have also been stopped under the act.

Recommendation

The section 44 powers to stop and search anybody undermine our freedoms while adding nothing to our security. They are too far reaching and too open to abuse. They are also redundant since if there is a suspicion that a person is a terrorist the police in any case have powers of arrest without warrants under section 41. They should therefore be abolished.

OTHER CURBS ON CIVIL LIBERTIES

Blair and Brown's onslaught on civil liberties has been spearheaded by the host of war on terror measures just reviewed but has now taken on a life on its own spreading to ever greater parts of society and politics. They do not seem to bother coming up with even a pro forma justification anymore. Authority has become its own cause, logic, and effect.

RESTRICTIONS ON PROTEST

The Serious Organised Crime and Police Act 2005 in section 132 establishes a criminal offence for organising or taking part in a protest in a designated area around Parliament without first gaining authorization from the Metropolitan Police Commissioner.

The Commissioner may under section 134 impose various restrictions in his 'reasonable opinion' necessary to prevent security risks. These restrictions can include conditions on the number of people and placards and the time and place of protest (section 134(5)). The Commissioner's decisions are amenable to judicial review but this is an expensive and sometimes lengthy process.

The act has been used to scale-down one man's long term anti-war protest in Parliament Square, to arrest a woman reading names of dead Iraqis from the Cenotaph, and even against a group of young people making a subtle protest against the act by picnicking in the square without permission.

Assessment

Freedom of expression and assembly are the most fundamental civil rights underpinning democracy. They cannot legitimately be restricted under any circumstances.

And if there is one place in a democracy where people not only should be allowed but indeed should be encouraged to voice

their opinions it is in front of their parliament and government. To restrict that is a gross violation of civil liberties and a perverted attempt to undermine democracy.

The act is particularly incredible given that it was primarily introduced to prevent one man's protest against the Iraq war. Even Tony Blair, commenting on an Iraq protest, once said: 'I may not like what they call me, but I thank God they can'.

Recommendation

This law is not legitimate so people should not feel under any obligation to comply with it. On the contrary people ought to engage in large scale civil disobedience through unauthorized protests in Parliament Square against the act. It is a threat to democracy and should as soon as possible be abolished by parliament or struck down by the courts.

SURVEILLANCE OF PEOPLE

Amongst the western democracies, the UK is arguably the country subject to the most involuntary mass surveillance.

Assessment

The UK is the world leader in the deployment of Closed Circuit Tele Vision (CCTV) technology, with over four million CCTV cameras in operation today. Additionally, in the City of Westminster, microphones fitted next to CCTV cameras also capture an audio stream. However, there is no legislative framework for the surveillance through CCTV cameras and the use of street microphones. The Regulation of Investigatory Powers Act 2000 does not even address the issue of CCTV surveillance.

In addition, the Regulation of Investigatory Powers Act conferred upon at least 28 government department the right to browse citizens' web, email, phone and fax records, without a warrant and without the individual's knowledge. In 2005 and 2006, British security and law enforcement agencies made 439,000 requests to obtain details of the contacts made by phone and internet users.

The national DNA database was set up in April 1995 and now carries the profiles of over 3.4 million people. The Criminal Justice and Police Act 2001 allowed DNA to be taken and stored from suspects charged with an offence, even if they were subsequently acquitted. Since the Criminal Justice Act 2003 came into force in April 2004, anyone arrested in England and Wales on suspicion of involvement in a recordable offence has their

DNA sample taken and retained in the database, regardless of whether they are subsequently charged or convicted.

Recommendation

The governement should establish a clear legal framework for the use of CCTV cameras. In a judgment delivered at Strasbourg on 12 May 2000 in the case of Sultan Khan vs the United Kingdom the European Court of Human Rights held unanimously that the use of covert surveillance equipment by the police may violate Article 8 of the ECHR (the right to respect for private and family life). Accordingly, the unrestricted use of CCTV surveillance cameras by police forces and local authorities may also breach Article 8 ECHR.

In relation to accessing the citizens' electronic communication, the government should adopt procedures by which judicial warrants would replace executive authority. Essentially, judicial authorisation would increase the level of scrutiny and give the separation of powers its due.

With regard to the national DNA database, the authorities should be obliged to discard DNA samples of persons that were not subsequently charged or convicted.

ABOLISHING CHECKS AND BALANCES

Blair and Brown's authoritarian project has caused substantial damage to civil liberties but does not stop at that. It has also significantly weakened checks and balances. This is of particular concern since the UK already was the democracy in the world with the highest degree of concentration of power in the executive.

GOVERNMENT SEIZING POWERS

The Civil Contingencies Act 2004 allows emergency powers to be used in the event of a threat of serious damage to human welfare, which includes property, the environment, or the security of the UK. It can be expanded to include anything else a minister thinks necessary (section 19(4)).

Provisions implemented 'can be of any kind that could be made by an Act of Parliament or Royal Prerogative'. This includes conferral of power to give orders on 'any specified person', the destruction of property, the use of the armed forces, and the prohibition on people's movement and assembly (all section 22).

These provisions can last thirty days without parliamentary approval (section 26(1)(a)) unless parliament passes a resolution that the emergency powers shall cease to exist (section 27(2)). Even if Parliament does so, section 27(4) gives the minister the power to make new regulations immediately.

Section 22(5) states that the person making emergency regulations must 'have regard to the importance' of ensuring that the parliament and the courts are able to conduct proceedings in connection with the regulations and section 23(5) states that the act cannot be used to alter the Human Rights Act 1998.

Assessment

The Civil Contingencies Act is a remarkable and perhaps the most dangerous piece of legislation in the UK. No other act, in a time of emergency, could grant a minister so much power. Parliament would not be able to stand up to abuse of this act; only the courts might be able to prevent it perhaps through the Human Rights Act or a reference to the unwritten constitution.

Even then, the government could argue that in accordance with the principle of parliamentary sovereignty the will of parliament in adopting the act must be upheld by the courts. And if that failed the government could simply use the act to appoint new judges and change the court system.

In fact the government could even use the act to change voting procedures, prevent the movement of opposition MPs, and take control of the media, before calling an election, appointing a new upper house, and using the armed forces to prevent protest.

Recommendation

The act should be amended to require (i) a 4/5 parliamentary vote that an 'emergency' is occurring for the purposes of section 1, (ii) an immediate court review of any use of powers under the act, (iii) any emergency power used to lapse after 3 days (not 7), (iv) the person making emergency regulations to not merely 'have regard to the importance of' but fully ensure that the parliament and the courts are able to conduct proceedings relating to the emergency powers, and (v) full compliance with the International Covenant on Civil and Political Rights especially concerning the fundamental rights that can never be derogated from even if the life of a nation is under threat.

GOVERNMENT BYPASSING PARLIAMENT

The Legislative and Regulatory Reform Bill 2006 was designed to cut 'red tape' and remove unnecessary regulations in a quick way by bypassing normal parliamentary procedures.

The bill passed through the House of Commons extremely quickly but the House of Lords introduced significant amendments providing procedural safeguards that were finally accepted by the Commons.

Assessment

While cutting red-tape may be a worthy aim, rushing through dangerous legislation is not the way to do it. If the government did not have an evil intent with the originally proposed bill, then it was astonishingly poorly drafted. When first presented in the Commons it caused serious concern among political commentators. Six professors of law at Cambridge University pointed out that it could be used to abolish Habeas Corpus and indeed almost anything the government liked. Daniel Finkelstein, in The Times, memorably termed it 'the Bill to end all Bills'.

The initial few and weak safeguards in the bill meant the parliament could demand further scrutiny of an order (clauses 13 and 15-17) but the 30 days allowed for consideration would in reality not give it enough time to properly consider large numbers of orders. The amendments introduced by the Lords have by and large removed the causes for concern about the bill.

Recommendation

The Lords Constitutional Committee said about the initial bill that the government wais "badly wrong" and that its failure to recognize the constitutional implications of the bill did not 'inspire confidence that they would not use delegated powers to introduce constitutional change in the future, without even realizing what they were doing'.

Whether reckless or sinister, the government's attempt to bypass parliament posed a serious risk to the constitution and calls for great vigilance against any similar future initiatives.

GOVERNMENT RESTRICTING INFORMATION

The Freedom of Information Act 2000 creates a general right of access, on re-

quest, to information held by public authorities.

Assessment

The Freedom of Information Act confers to the citizens an invaluable basic democratic right. However, there are certain exceptions to the general "right to know". First of all, the authorities retain the right to decline access to certain information if they find that the public interest in keeping the relevant information confidential outweighs the public interest in disclosing it. Moreover, current government proposals to reform the Freedom of Information Act include that applicants should only be entitled to make a maximum of £600-worth of requests (£450 for local government) over a 60-day period. According to the government's figures that would reduce by some 20,000 the 120,000 requests made a year, cutting almost £12m off the £35m cost.

Recommendation

The access to official information is essential to a proper and informed debate of the government's actions. Restricting openness by imposing a ceiling on requests would curtail this basic democratic right. The government's plans will obstruct the act, preventing new precedents for disclosure being set, while limiting citizens to one request every two months. The government should immediately abandon these plans.

TIME TO ACT

The government's standard defence of new legislation that threatens civil liberties is to first invoke security or efficiency and then add the classical 'trust me' argument that it will not abuse the new powers. Quite obviously, this is not good enough. There is a strong case that the current government already has abused many of its new powers. And even if that were not the case nobody can predict what future governments might do. The problem is that these powers exist at all.

The problem is exacerbated by the excessive amount, complexity, and intransparency of legislation. There have been three terrorism acts in the last six years with the latter two amending various sections of the first yet on the Home Office website there is no updated comprehensive version. In addition, these acts can be extremely long. The Terrorism Act has 131 sections and sixteen schedules and the Serious Organised Crime and Police Act has 179 sections and seventeen schedules (with the remarkable Parliament Square protest ban squirreled away at section

132). This increases the risk that the government can get away with abuse of its powers.

The most serious concern however is that in the event of serious abuse of power concrete safeguards do not exist. It is relatively easy for the government to bypass parliament. Our trust must therefore lie in the judiciary and its commitment to defend civil liberties and uphold checks and balances. In recent years however judges have shown a disturbing degree of deference to the government. In the view of this, it is now time for the UK to adopt a written constitution that guarantees the separation of powers and safeguards the civil liberties.