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Surveillance and International Terrorism Intelligence Exchange: Balancing the Interests of National Security and Individual Liberty

Abstract

Using the revelations Edward Snowden passed over to the press regarding the actions of the US' National Security Agency and the UK's GCHQ and their use of the Prism project, this article examines the law surrounding intelligence gathering in the US and UK.

Underpinning the analysis is the legal principle of proportionality as applied to balancing the interests of national security and individual liberties. After examining intelligence exchange procedures, which for the UK is through negotiated agreements between national security agencies and through the European Union's policing agency, Europol. The main part of the article discusses legal challenges that have been made regarding surveillance and the use of anti-terror laws on citizens and the rationale behind the judicial decisions made in both the US and UK jurisdictions. The argument forwarded is that there is a requirement for wide preventative powers being granted to counter-terrorism agencies and that as the interests of national security and individual liberty are inclusive and, as shown by the cases covered in this article, we should rely on the judiciary to perform their function in applying proportionality to each case on its own merits.

Introduction

Former US National Security Agency (NSA) employee, Edward Snowden's passing onto media sources classified documents relating to the practices of the NSA and the UK's GCHQ, in particular the PRISM project resulted in condemnation of wide surveillance practices carried out by counter-terrorism agencies underpinned by concern of how respective states' anti-terror legislation has widened those agencies powers to an extent it is effectively suffocating individuals' liberty and widens the scope of criminalisation. This article examines the legislation governing surveillance related to terrorism in the US and the UK along with an analysis of the judicial scrutiny of state agencies practices in cases related to the legislation both pre and post the Snowden revelations. This leads to an explanation of why agencies like

the NSA and GCHQ require wide surveillance powers and the impact the revelation of stolen classified documents such as those passed on by Snowden to UK's *The Guardian* newspaper can have on national security. The argument presented here is that in balancing the interests of national security and individual liberty the two are inclusive as the state has a responsibility to protect an individual's personal liberty, but equally important the state must also protect its population from terrorist attacks. Therefore such powers are needed to keep people safe from indiscriminate terrorist attacks even if on occasions it infringes slightly on personal liberty

Surveillance Powers Used in Terrorism Investigations

In gathering intelligence on terrorist related activity, statutory powers allowing covert surveillance is a vital investigatory tool. In doing so it is important state agencies work within the rule of law. It not only ensures their practices are legally proportionate, but by working within the rule of law it allows for transparency of those agencies' operations revealing operational methods along with a transparency of accountability regarding decision making on granting authorities and misuse of powers by state officials.¹

US Powers

There are two significant statutes authorising electronic surveillance in the US. Section 2516(1) Title 18 United States Code allows for covert surveillance to obtain intelligence on terrorist related activity when the Attorney-General authorises a Federal judge to grant a Federal agency an order to intercept of wire or oral or electronic communications. The second statute granting authority for electronic surveillance is the Foreign Intelligence Surveillance Act 1978 (FISA) where with Attorney-General approval a Federal agency

applies to a Foreign Intelligence Surveillance Court² for an authority to conduct electronic surveillance on ‘agents of foreign powers’ including persons suspected to be engaged in international terrorism.³

Following the 2008 Foreign Intelligence Surveillance Amendment Act (FISAA) brought about important changes on the FSA’s electronic surveillance powers including that the focus of the order is purely on the communications endpoint with no requirement of targets being specified. If the covert surveillance involves the likes of hidden microphones then there is a reasonable expectation of privacy by a citizen and the warrant must specify the target.⁴ One impact of the FISAA amendments is by authorising surveillance on non-US citizens outside US territory, those citizens’ personal data now comes under the range of US jurisdiction.⁵ While surveillance orders on US citizens located in the US has to have cognisance of the rights to privacy under the fourth amendment, no such right is applicable to foreign citizens.

UK Powers

Section 28(3) Regulation of Investigatory Powers Act 2000 (RIPA) allows a court to grant when necessary in the interests of national security, or in preventing or detecting crime or disorder an authorisation to specified agencies including the police⁶ and UK intelligence services⁷ to conduct covert surveillance. Although RIPA provides an extensive range of circumstances how the surveillance can be conducted, the surveillance is limited to the UK. A RIPA authorisation must be compatible with the provisions of the European Convention on Human Rights (ECHR).

Intelligence Exchange between the US and the UK: the Role of Europol

Since 9/11 the international sharing of intelligence between counter-terrorism policing and national security agencies has increased. Between the USA and the UK this has invariably been carried out through the European Union's (EU) policing agency, Europol. With a mandate to collect, store, process, analyse and exchange intelligence⁸ the 2009 Treaty of Lisbon (ToL) states Europol's mission:

'...is to support and strengthen action by Member States police authorities and other law enforcement agencies through mutual co-operation in preventing serious crime affecting two or more Member States, terrorism and forms of crime which affect interest by EU Policy.'⁹

Following 9/11 the EU prioritised the fight against terrorism and within ten days of the attack the EU's Justice and Home Affairs Commission (JHA) adopted an action plan in the fight against terrorism resulting in acceleration in the development and implementation of measures to counter the threat international terrorism posed.¹⁰ Having the authority to sign international agreements, the agreement between Europol and the USA signed in 2001 is the most advanced. Intelligence is shared between the EU's Member States' policing agencies and specified US agencies¹¹ that include the FBI, US Secret Service, the Drug Enforcement Administration and the US postal Inspection.¹²

The Treaty of Lisbon

The EU tightened up its Member States' co-operation with Europol through articles 84-88 of the ToL. With the ToL being a primary source of EU law the legal principle of supremacy of EU law over Member States' national law¹³ applies resulting in the Member States being legally obligated to the ToL's articles. Article 84 ToL allows for the more potent EU legal instrument of directives being issued requiring Member States to co-operate with Europol.¹⁴ As EU directives come under the jurisdiction of the EU's court, the European Court of Justice (ECJ), under the principle of the supremacy of EU law it allows the ECJ to

ensure compliance among the Member States.¹⁵ This is supported by Article 87 of the ToL that states Member States will adhere to police co-operation and this co-operation will include *all* national agencies involved in counter-terrorism and investigating organised crime with the agencies including customs agencies and other ‘specialised law enforcement agencies’. Perhaps the most significant development is article 88 that changed Europol’s role from simply supporting, facilitating and requesting action by national police agencies to now being in a clear and implicit partnership with the Member States’ agencies. To ensure genuine partnership exists between the Member States and the EU, article 88 ToL states another EU legal instrument, regulations, will be introduced to ensure compliance among the Member States.¹⁶

These changes bolstering Europol’s role are important for two reasons that centre on accountability. Firstly, through the hierarchy of agencies associated with the JHA, Europol has a vertical legal legitimacy that is identifiable when compared the horizontal role of agencies made under the multi-lateral agreements.¹⁷ This is important regarding the second reason concerning accountability as by bringing Europol under the jurisdiction and scrutiny of the ECJ and the EU Parliament, under the ToL provisions, Europol’s actions come under the of rule of law where:

‘The constitutive role of the rule of law relates to the means by which the community is governed: through law. The law regulates social relationships and therefore effective enforcement of the law is constitutive for the rule of law’¹⁸

In its desire to ensure it can be an effective international actor, the EU’s counter-terrorism measures have led to an increased divergence of Member States’ law that can be achieved by replacing the framework decisions with the more effective regulations and directives.¹⁹ As well as enhancing the reputation and reliability of Europol’s role as an international actor

with Member States and third countries, the rationale behind the ToL changes is because the volume of EU criminal law and counter-terrorism measures are set to increase in the coming years²⁰ requiring a stricter adherence to mutual co-operation between the Members States and Europol. In turn this will impact on the UK's legal position in exchanging intelligence with third countries, including the US. An issue that may act as a brake to this improvement is what Argomaniz terms as the 'Brusselsisation' of terrorism that has produced a plethora of committees, expert groups agencies and bodies. He sees this as having led to inefficiencies in EU counterterrorism measures because of overlapping between structures within and outside the EU Framework,²¹ which has resulted in a degree of inter-institutional friction.²² That said, the ToL is the best opportunity the EU currently has to address these problems and weaknesses.²³

The Snowden Affair, National Security Interests and Protecting Individual Rights

In June 2013 the UK newspaper *The Guardian* and the US newspaper *The Washington Post* broke with the news story regarding the NSA and the Prism programme that gave US Federal agencies direct access to servers in the biggest web firms including Google, Microsoft, Facebook, Yahoo, Skype and Apple.²⁴ Snowden released top secret documents to a *Guardian* journalist, Glenn Greenwald who, in the first of a number of reports, revealed the NSA was collecting telephone records of millions of US customers under a top secret order issued in April 2013 adding that, '...the communication records of millions of US citizens are being collected indiscriminately and in bulk regardless of whether they are suspected of any wrongdoing'.²⁵ Adding the NSA's mission had transformed from being exclusively devoted to foreign intelligence gathering Greenwald said it now focused on domestic communications.

As the revelations from the documents Snowden passed on regarding the FSA's activities increased, *The Guardian* reported that GCHQ also gained access to the network of cables carrying the world's phone calls and Internet traffic and processed vast streams of sensitive personal information, sharing this with the NSA.²⁶ This followed on from earlier reports that GCHQ accessed the FSA's Prism programme to secretly gather intelligence, where between May 2012 –April 2013, 197 Prism intelligence reports were passed onto the UK's security agencies, MI5, MI6 and Special Branch's Counter-Terrorism Unit.²⁷ GCHQ's actions led to the German Justice Minister writing to British ministers regarding an allegation of mass surveillance by British intelligence asking for reassurance the actions were legal and if they were targeting German citizens.²⁸ With reports from *The Guardian* that FSA actions were posing a threat to the privacy of EU citizens, this was a cause of concern for the EU's Justice and Home Affairs (JHA) resulting in EU's Justice Commissioner Viviane Reding stating:

'The European Commission is concerned about the possible consequences on EU citizens' privacy. The Commission has raised this systematically in its dialogue with the US authorities, especially in the context of the negotiations of the EU-US data protection agreement in the field of police and judicial co-operation...'²⁹

During this dialogue the difference in legal culture between the EU and the US raised its head regarding individual's rights in the respective jurisdictions with the EU's focus being the dignity of citizens. In protecting fundamental human rights under the aegis of the rule of law the EU requires a system of protection of an individual citizen's data privacy.³⁰ There is no such explicit protection to a general right to privacy under the US Bill of Rights rather it is inferred in the First, Fourth, Fifth and Ninth Amendments.³¹ This is important as Snowden's revelations had the potential to damage not only diplomatic relations between the US and EU Member States, but also affect the terrorism intelligence sharing between European counter-

terrorism agencies via Europol and US federal agencies. To prevent US/UK diplomatic relations with the rest of the EU Member States deteriorating further, senior US and UK politicians were forced to speak openly and defend the actions of the FSA and GCHQ. The UK's Foreign minister, William Hague said that both nations, '...operated under the rule of law', with GCHQ being, '...scrupulous in complying with the law' and used the intelligence to protect citizens' freedoms.³²

As a result of handing the secret documents to journalists the US Justice Department filing criminal charges against Snowden for espionage and theft of government documents and a provisional arrest warrant was issued by a federal court in the Eastern District of Virginia.³³ To evade prosecution Snowden left the USA where he was granted temporary asylum by the Russian Government, causing further friction in the political relations between the US and Russia.³⁴ Referring to 'top secret' documents Snowden passed on to them, *The Guardian* reported that from 2010-2013 the US government paid GCHQ £100 million to secure access and influence over the UK's intelligence gathering programmes.³⁵ As these revelations were claiming to come from the secret documents Snowden passed on to Greenwald, it triggered the security services to act to retrieve the documentation at the earliest opportunity.

The Importance of the Snowden Documents to UK Authorities

Hopkins and Ackermann reported the UK was useful to the US regarding gathering and storing intelligence as the legal framework in the UK is more flexible than the legal framework the FSA works under.³⁶ To understand Hopkins and Ackerman's point the two main pieces of UK legislation governing GCHQ surveillance are the Intelligence Services Act 1994 (ISA) and RIPA. The function of a secret intelligence service is to obtain and provide information relating to the actions or intentions of persons outside the British islands

and to perform tasks relating to the actions or intentions of such persons³⁷ adding this function is only exercisable when:

1. It is in the interests of national security, in particular regarding the defence and UK foreign policy; or
2. It is in the interests of the economic well-being of the UK; or
3. It is in support of the prevention or detection of serious crime.³⁸

We can see the influence of the article 8 ECHR qualifications in the wording of section 1 ISA as these qualifications to allow interference with citizens' rights are virtually verbatim. In the UK section 1(2) of the Security Services Act 1989, provides a definition of national security stating:

'The function of the [security service] shall be the protection of national security and, in particular, its protection against threats from espionage, terrorism and sabotage, from the activities of agents of foreign powers and from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means.'

It is the latter part of the definition that includes action not conforming to submissive behaviour that is sufficiently wide for the state to monitor UK citizens as well as foreign nationals, thereby allowing security agencies a wide leverage to interfere with citizens' liberties.

When in the interests of national security or the economic well-being of the UK or to support the prevention of crime or disorder, GCHQ's function is to monitor or interfere with electronic or acoustic communications and provide assistance to UK government agencies and its armed forces.³⁹ To carry out these functions GCHQ require a warrant issued by the Home Secretary.⁴⁰ GCHQ also can utilise the powers of communication interception under RIPA⁴¹ which again, providing interception is proportionate to what is sought to be achieved where a warrant to intercept is issued under the provisions of any international mutual assistance agreement,⁴² which would apply to agreements between the NSA and GCHQ. From this agreement *The Guardian* reported that 36% of all the raw information GCHQ

obtained was passed onto the FSA giving the FSA access to *all* the sifted and refined intelligence GCHQ obtained.⁴³ When breaking down these sections of the relevant UK statutes, one can see why the media came to the conclusion that by having wide and flexible powers the UK has a place at the top table of intelligence agencies.⁴⁴

With Hopkins and Ackerman revealing they saw documentation on how and why GCHQ searched for material, including intelligence on the political intentions of foreign governments, political postures of foreign governments, terrorism, international trafficking and fraud, it caused a high degree of disquiet among UK government officials, the UK national security agencies (in particular GCHQ) and the UK's Special Branch Counter-Terrorism Units. One of the main concerns for the security agencies appeared to be what the documents Snowden passed on revealed regarding the methods of surveillance and technical capability the agencies' surveillance equipment and the identity of Her Majesty's Government personnel working in the area of national security, which, if it fell into the hands of those preparing or in the commission of acts of terrorism, such intelligence would be useful.⁴⁵ It is estimated that at least 58,000 UK documents classified as top secret and secret information were stolen by Snowden from GCHQ⁴⁶ that contained information on personnel and details of surveillance methods that could put the general public's lives at risk.⁴⁷

Balancing the Interests of National Security with Individual Rights: Democracies, neo-Democracies and the Legal Principle of Proportionality

Since 9/11 a significant, if not the majority of criminological and legal writing on the impact terrorism has had on democratic states and individual rights has focused on how recent terrorist acts have legitimised states' illiberal legislative and policy responses to the terrorist threat they face resulting in a rights-based democracy being replaced by a 'siege mode of democracy'.⁴⁸ Referring to this transformation as 'dressing the window' Gearty's

concern is that the fear of terrorism is a facilitator to neo-democracies (including the UK and the US) where on its surface liberty, security and fundamental freedoms present themselves but in reality are only available to the few.⁴⁹ If left uncontrolled, Gearty argues that by using the remit of terrorism, states can extend the core element of terrorism from being an indiscriminate assault on civilians to cover all sorts of conduct that when looked at closely is removed from what most people's perception of terrorism is.⁵⁰ This can result in the introduction of what he labels quasi-criminal law provisions that may have the appearance of freedom but in reality has no substance.⁵¹ Fenwick's examination of post 9/11 UK anti-terror legislation found a significant rise in the adoption of authoritarian powers to policing agencies to curtail the liberty of persons who may be a terrorist threat in order to prevent terrorist activity before it occurs that places a strain on individuals' rights.⁵² In the post 9/11 era these powers include widening electronic surveillance on targets that includes subgroups as well as individuals, even communities who are perceived to be a threat and consequently the 'enemy within'.⁵³

This is not a new response by states to threats to their national security. Bunyan chronicles how since its inception in 1880's the UK's Special Branch has conducted surveillance on individuals and communities ranging from a variety of political activists who have been seen as a threat that included telephone tapping and mail interception.⁵⁴ Gill provides a similar chronology of state agencies conducting surveillance from the early 20th century in the UK and the US⁵⁵ and Donohue's work shows how not only in the UK where prior to 1985 both the national security services and the police conducted widespread surveillance using telephone taps and mail interception⁵⁶ but also how the US has been imbued with a surveillance culture, especially since the 1920's during the Hoover/FBI period.⁵⁷ What today is termed electronic surveillance carried out by state agencies on individuals and groups considered as subversive or a threat to security through programmes

like PRISM should not come as a surprise as in democratic states this activity has taken place for many years. The issue to be concerned with is in relation to ownership of the electronic data, the authority the surveillance is conducted under and the legal provisions to protect citizens' privacy.⁵⁸

Legal Challenges to US Surveillance Laws

Court Decisions Pre-Snowden

Balancing the provisions of state surveillance and individuals' liberty under the Fourth Amendment was established by the US Supreme Court in *Katz v United States*⁵⁹ who held the test for privacy is only dependant where one would have a reasonable expectation of privacy. Justice Harlan stated the expectation of privacy is one society is prepared to recognise as 'reasonable' but when one exposes their activities with others then privacy is not protected by the Fourth Amendment.⁶⁰ In *Katz* the Court emphasised the Fourth Amendment was introduced to protect people not places.⁶¹

In balancing the rights of citizens to protecting national security Pious comments there should be the best combination of guarantees within the due process of law that protects citizens' privacy that can run alongside:

'...strong government action that protects national security and our personal security as we travel on buses, trains, and airplanes.'⁶²

The rationale for adhering to due process of law is that it not only protects the accused, but it also helps guard against the prosecutorial zeal that sends false signals about who is a terrorist and what terrorists might be doing.⁶³ An example of the US protecting individuals' safety by focusing on liberty rather than the dignity of the individual is seen in the surveillance powers granted to US federal agencies where the Patriot Act 2001 amended the FISA provisions by changing the wording regarding the aim of intelligence gathering under the original FISA

from a ‘primary’ purpose to a ‘significant’ purpose.⁶⁴ This allowed intelligence to be obtained from a wider range of potential sources,⁶⁵ as these amendments bypass the US Constitution’s Fourth Amendment regarding citizens’ right to be secure in their persons, houses, paper and effects against unreasonable actions by government and police actions.

The United States Foreign Intelligence Surveillance Court of Review considered the implications of this subtle change *In Re Sealed Case* N.02-0001.⁶⁶ The Court held the shift from ‘primary’ to ‘significant’ purpose is a relaxation of the requirement of government to show its primary purpose was other than criminal prosecution saying:

‘...In many cases, surveillance will have two key goals – the gathering of foreign intelligence, and the gathering of evidence for a criminal prosecution. Determining which purpose is the ‘primary’ purpose of the investigation can be difficult, and will only become more so as we coordinate our intelligence and law enforcement efforts in the war against terror. Rather than forcing law enforcement to decide which purpose is primary – law enforcement or foreign intelligence gathering, this bill strikes a new balance. It will now require that a ‘significant’ purpose of the investigation must be foreign intelligence gathering to proceed with surveillance under FISA. The effect of this provision will be to make it easier for law enforcement to obtain FISA search or surveillance warrant for these cases where the subject of the surveillance is both a potential source of valuable intelligence and the potential target of a criminal prosecution.’

As a result of the Court’s decision, the FBI can now help local law enforcement agencies bypass the Fourth Amendment requirements in gathering evidence in matters related to foreign intelligence even where it might not be for wholly related ordinary crimes.⁶⁷

Another example of how national security and safeguarding a person’s safety can override individual’s liberty provisions in US anti-terrorism law is seen in *Clapper (Director of Notional Intelligence et al) v Amnesty International*.⁶⁸ The US Supreme Court was asked to examine the FISAA amendments to section 702 FISA and the warrantless wire-tapping power. The respondents (who were lawyers, and, human rights and media organisations) claimed that the state in by-passing their Fourth Amendment rights this section was unconstitutional. The foundation of their claim was they were regularly engaging in sensitive international communications with individuals likely to be targets of surveillance and being

US citizens they stated their Fourth Amendment rights were breached by the surveillance orders. By a 5-4 majority, the US Supreme Court dismissed the respondents' claim as purely speculative. In delivering the judgement, Justice Alito said:

‘...respondents have no actual knowledge of the Government’s targeting practices. Instead, respondent’s *merely speculate and make assumptions* about whether their communications with their foreign contacts will be acquired under s.702’⁶⁹ [my emphasis]

This decision was subject to much criticism from US human rights and lawyer groups. The American Bar Association argued that the US President does have a constitutional obligation to authorise all surveillance.⁷⁰ Opinions are summed up by legal advocates claiming the *Clapper* decision handed the US government a ‘get out of jail free’ card for national security statutes).⁷¹ With no judicial supervision on the wire-tapping powers and, even if it was a speculative assumption, the fact there was the opportunity for the state to interfere, if this had gone before a European Court there is the likelihood that Court would have found for the respondents. This is supported by the four dissenting judges where Justice Breyer said the US Constitution does not require concrete proof only something where there is a ‘reasonable probability’ or a ‘high probability’.⁷²

Court Decisions Post Snowden

In December 2013 two significant cases were heard where following the Snowden revelations the applicants claimed their Fourth Amendment rights had been violated by the NSA and the Federal Government. In *Klayman et al v Obama et al*⁷³ the US District Court for the District of Columbia heard a judicial review challenging the authorisation of intelligence gathering relating to the wholesale collection of phone record metadata of all US citizens. An authority was granted by the Foreign Intelligence Surveillance Court in April 2013 concerning the applicants where in his judgment Justice Leon held the applicants have sufficient legal standing to challenge the constitutionality of the Federal Government’s bulk

collection of phone record metadata under their Fourth Amendment claim. In his deliberations Justice Leon said that while Congress has great latitude to create statutory schemes like FISA, ‘...it may not hang a cloak of secrecy over the [US] Constitution’.⁷⁴ Distinguishing the applicants’ claim in *Klayman* from the US Supreme Court’s finding in *Clapper* Justice Leon said in *Clapper* the applicants could only speculate as to whether they were ‘surveilled’ whereas in *Klayman* there was strong evidence their telephony metadata had been collected.⁷⁵ Underlying Justice Leon’s judgement was his scepticism relating to the impact such wide surveillance practices has on identifying terrorists and thereby preventing terrorist attacks. He said:

‘I am not convinced at this point in the litigation that the NSA’s database has ever truly served the purpose of rapidly identifying terrorists in time-sensitive investigations, and so I am *certainly* not convinced that the removal of two individuals from the database will “degrade” the program in any meaningful sense’ [original emphasis]

Again concerning the NSA’s collection of phone record metadata, eleven days after the *Klayman* decision Justice Pauley III from the US District Court of Southern district of New York took an opposite view in his judgement in *American Civil Liberties Union et al v James R. Clapper et al.*⁷⁶ After commencing his judgement with pre-9/11 example of the hijacker Khalid al-Mihdhar who had seven telephone calls intercepted by the NSA but who could not capture the telephone number identifier and if they could they would have been able to pass onto the FBI that he was calling a Yemeni safe house from inside the US,⁷⁷ Justice Pauley III cites a number of NSA investigations where he justifies the effectiveness of NSA’s surveillance through bulk telephony metadata.⁷⁸ Acknowledging that if left unchecked this investigative tool can imperil citizens’ liberty along with the fact that Snowden’s ‘unauthorised disclosure’ of Foreign Intelligence Surveillance Court orders has provoked a public debate he held these orders were lawful.⁷⁹ In his summation Justice Pauley III found

there to be no evidence that the US Government had used any of the bulk telephony data for any other purpose than investigating and ‘disrupting’ terrorist attacks⁸⁰ saying:

‘The choice between liberty and security is a false one, as nothing is more apt to imperil civil liberties than the success of a terrorist attack...’⁸¹

This is important as the interests of national security and protecting individual liberties are not exclusive, they are inclusive. This is where the legal principle of proportionality plays an important part in judicial decision making. Utilitarian in nature, proportionality balances the interests of wider society with the interests of the individual.

UK Courts and the ECHR

UK Judiciary’s Clashes with the European Court of Human Rights

Regarding the minimum rights citizens are entitled to expect, the UK has to take cognisance of the provisions contained in the ECHR. ECHR rights are broken in to three main categories, absolute rights which the state cannot interfere with, limited rights where the state has limited power to interfere and qualified rights where the state can interfere with these rights provided certain provisions as listed in the respective qualified rights are met and the interference is necessary in a democratic society. The ECHR article appertaining to surveillance and intelligence sharing is the qualified article 8 (right to privacy and family life). In *Klass v Germany* the European Court of Human Rights (ECtHR) examined article 8 and while acknowledging that surveillance is a necessary evil in a democracy, held that when the state carries out covert surveillance its actions must be proportionate.⁸²

One potential problem with intelligence sharing between the EU Member States and the USA is the different focus on human rights legal culture. While the US focuses on liberty, the EU’s focus is on the dignity of the citizen.⁸³ Regarding cases brought to court related to terrorism statutory provisions and statutory provisions relating to evidence useful in counter-

terrorism investigations the UK's judicial decisions have been at odds to those made in the ECtHR. An example of this was in relation to the retention of DNA and fingerprint samples retained on a national database in England and Wales that went to the ECtHR in *S and Marper v UK*.⁸⁴ S and Marper provided samples during a police investigation and even though they were not convicted of a criminal offence, the samples were retained on national database. As result they both claimed their article 8 ECHR right to privacy had been violated. Both the High Court⁸⁵ and the House of Lords⁸⁶ appellate courts held that there was no such violation. In dismissing S and Marper's appeal Lord Steyn stated that while accepting the Court must interpret the ECHR in a way that is in line with the ECtHR's jurisprudence he held that:

‘The whole community, as well as the individuals whose sample was collected, benefits from there being as large a database as it is possible ... The benefit to the aims of accurate and efficient law enforcement is thereby enhanced.’⁸⁷

While Lord Steyn was adopting the approach that interests of the wider community overrides the interests of the individual, when the case went before the ECtHR they saw the dignity of the individual as overriding the interests of the wider community saying:

‘...have due regard to the specific context in which information at issue is recorded and retained, the nature of the records, the way in which these records are used and processed and the results that may be obtained.’⁸⁸

In this judgement the ECtHR emphasised that for powers to be compatible with the rule of law there must be adequate legal protection against arbitrariness and accordingly indicate with sufficient clarity the scope of discretion on the competent authorities and the manner of its exercise.⁸⁹ This decision was instrumental in forcing the UK Government to introduce

legislation that took account the ECtHR's decision that where a person is not convicted of a criminal offence their DNA and fingerprint samples are destroyed.⁹⁰

Another example where the UK appellate court decision making was in conflict with the ECtHR is seen in *Gillan and Quinton v UK*⁹¹ that resulted in section 44 of the UK's Terrorism Act 2000 being repealed. A stop and search power, section 44 allowed police officers to stop and search persons and vehicles⁹² for articles that could be used in connection with terrorism.⁹³ Authorised by a senior police officer of at least assistant chief constable rank,⁹⁴ when carrying out this search, a police officer did not require any grounds for suspecting the presence of articles that could be used in terrorism.⁹⁵ Especially following the London bombing in 2005, an unpopular side-effect in the use of this power was the majority of citizens stopped by the police were disproportionately of black or Asian ethnicity.⁹⁶ The ECtHR held that section 44 violated article 5 (right to liberty) ECHR as account must be taken of a whole range of criteria such as type of search, duration, effects on the person and the implementation of the measure⁹⁷ and article 8 ECHR where the ECtHR held:

'...the public nature of the search may, in certain cases, compound the seriousness of the interference because of an element of humiliation and embarrassment. Items such as bags, wallets, notebooks and diaries may, moreover, contain personal information which the owner may feel uncomfortable about having exposed to the view of his companions or the wider public'⁹⁸

Applying the legal principle of proportionality we see the ECtHR seeing the dignity of the individual prevailing over the interests of the wider community that is related to the needs of national security.

UK Appellate Courts Decisions that changed anti-terror laws

It is not just individual sections of UK anti-terror laws that have been required to change following human rights case decisions, large parts of statutes, even whole statutes themselves have been repealed because the protection of individual liberties took precedence

over national security. These changes were brought about as result of decisions made by UK appellate courts where they took cognisance of the ECHR. An example of this is the UK's Terrorism Prevention and Investigation Act 2011 (TPIMS). The evolution of the Act can be traced back the decision in *A and others v Secretary of State for the Home Department*⁹⁹ where in 2001 the House of Lords' decision resulted in Part IV of the Anti-Terrorism, Crime and Security Act 2001 being repealed. Under Part IV the Home Secretary could authorise the imprisonment of foreign nationals who were suspected terrorists without any judicial process. The House's concern was the lack of judicial supervision in imprisoning individuals and consequently found that Part IV of the Act violated articles 5 and article 6 (right to fair trial) ECHR.¹⁰⁰ Introducing control orders for *both* foreign and national citizens who had to wear an electronic tagging device and abide by very strict bail conditions that severely impinged on the movement of those subject to an order, the Prevention of Terrorism Act 2005 replaced the repealed Part IV. Control orders were also challenged in *Secretary of State for the Home Department v AP*.¹⁰¹ In the UK Supreme Court's decision in *AP* the dignity of the person was evident as the interests of individual liberty prevailed over national security as the Court held the 2005 Act violated articles 5 and 8 ECHR because the control order forced AP to live in a town 150 miles away from his family. A relevant point Gearty makes regarding the harshness in the conditions imposed on persons subject to control orders is none of persons were charged with criminal offences and that control orders, '...stood outside the normal law'.¹⁰² As a result the Prevention of Terrorism Act 2005 was repealed and replaced with TPIMS that introduced surveillance orders issued on specific persons with less stringent controls on their personal life.

Issues Surrounding Control Orders and Blacklists

In their various conditions these UK counter-terrorist orders have been subject to much controversy as they restrict the liberty of individuals suspected to be involved in

terrorist activity where there is insufficient evidence to charge and convict them of terrorist offences. Fenwick sees such orders as counterproductive as they were targeted mainly against members of the UK's Muslim community therefore making that community a 'suspect community' resulting in making it more likely that some Muslims may be drawn into terrorist activity.¹⁰³ In relation to the *A and others* decision Gearty is critical of the House of Lords decision to only declare Part IV of the 2001 Act as incompatible with the ECHR and not let the applicants 'go free'.¹⁰⁴ Gearty fails to mention that UK courts cannot do this in relation to statutory provisions as unlike many other states' constitutions under the principle of parliamentary supremacy the UK judiciary do not have the power to declare a statute as unconstitutional as constitutionally the UK judiciary are subordinate to Parliament. In relation to statutes, the judiciary's role is to interpret statutes giving effect to the will of Parliament.¹⁰⁵ Allowing UK appellate courts under section 3 of the Human Rights Act 1998 to declare statutory provisions as incompatible with the ECHR has been a significant move towards the judiciary in overturning Parliamentary statutes. The UK courts have utilised this measure that has to some extent kept the UK's executive in check regarding anti-terrorist related statutory measures that are disproportionate, none more so than control orders. For example UK courts have held that 18-hour curfews in control orders were seen as excessive and disproportionate therefore violating article 5 ECHR¹⁰⁶ and where following a review of evidence there was no possibility of a criminal prosecution in relation to terrorist offences a control order was flawed.¹⁰⁷ As a result of these and other cases such as *AP* the UK courts did in effect force the UK Parliament to change the law.

Focusing on terrorist related 'blacklists' Gearty cites the examples of *Nada*¹⁰⁸ and *Kadi*¹⁰⁹ whose respective liberty and freedom of movement was at risk leading him to say that 'our security' must trump their freedom as blacklists (and one could add control orders) only apply to people like them (where one presumes Gearty is referring to Muslims) and

therefore it does not affect ‘one jot’ how we experience freedom¹¹⁰ is disparaging. Two issues should be considered here. First is in their decision making the judiciary have shown their independence from their states’ executives. As discussed above both the UK and the US jurisdictions have in effect put the brakes on excesses into an individual’s liberty incurred through terrorism related legislation. A further example of this was seen in the New York State Court of Appeal’s judgement in *The People v Edgar Morales*¹¹¹ where the Court held:

‘The concept of terrorism has a unique meaning and its implications risk being trivialised if the terminology is applied loosely in situations that do not match our collective understanding of what constitutes a terrorist act’¹¹²

Secondly for every Nada there is a Lee Rigby who dies at the hands of terrorists¹¹³ and for every Kadi there is an Erika Brannock who is permanently disabled after losing a limb in an indiscriminate terrorist attack.¹¹⁴ Detention can be temporary but death or disability is permanent. Naming individuals to personalise victims of excessive state terror provisions can also be applied to victims of terrorist attacks as this shows how imperative it is to ensure proportionality is applied by the courts in balancing the interests of wider society in the name of national security with the interests of the individual and their liberty. It is the court’s duty to protect both.

PRISM, Miranda, Journalistic Material and Schedule 7 Powers

Following the Snowden revelations the UK courts were called on to perform this duty. On the 18th August 2013 while carrying materials Snowden passed onto *The Guardian* journalist Glenn Greenwald, Greenwald’s partner David Miranda was stopped under Schedule 7 Terrorism Act 2000 by Special Branch Counter-Terrorism officers at London’s Heathrow Airport when he was catching a connecting flight to Brazil. Miranda was detained for nine hours where his electronic possessions were seized and examined and he was interviewed.¹¹⁵ Miranda’s laptop, mobile phone, memory sticks and DVD’s were seized¹¹⁶

and this raised questions over what legally amounts to journalistic material, which traditionally cannot be searched by the police in a democratic state. In England, the Police and Criminal Act 1984 provides a wide definition of what amounts to journalistic material by simply stating it is material acquired and created for the purposes of journalism.¹¹⁷ *The Guardian*'s editor, Rusbridger maintained that Miranda was in possession of journalistic material saying:

‘The state is building such a formidable apparatus of surveillance it will do its best to prevent journalists from reporting on it. ... I wonder how many have truly understood the absolute threat to journalism implicit in the idea of total surveillance, when or if it comes – and, increasingly, it looks like when’.¹¹⁸

Regarding the incident one issue omitted by Rusbridger is that Miranda was not carrying the usual journalistic material, it had the potential to be stolen state secrets, which if they had been lost or acquired or shown to the wrong hands could have been damaging to state security.

Schedule 7 Powers

Schedule 7 exists to allow officers in relation to terrorist activity to collect intelligence on the movements of persons of interest to the police and the Security Service.¹¹⁹ Schedule 7 powers can only be used by police officers¹²⁰ at ports and airports in order to stop and question persons that are or may be concerned in the commission, preparation or instigation of acts of terrorism.¹²¹ No reasonable grounds to suspect a person is involved in terrorism are needed by the officer to stop and interview those detained.¹²² Under Schedule 7 persons detained have the right to consult with a lawyer in private at public expense¹²³ and it is expected the consultation with a lawyer at a port will normally be by a private telephone conversation.¹²⁴ They have no right to have a lawyer present if the request is made to frustrate the proper purpose of the schedule 7 examination¹²⁵ and they have no right to silence as they must answer all questions put to them.¹²⁶ The officers are permitted to search that person and

anything they have with them¹²⁷ and can detain that person's property for up to seven days to examine the property that person has with them.¹²⁸ The media's concern was over what appeared to be the use of arbitrary police powers, with the most vitriolic being Greenwald who wrote:

'This is obviously a rather profound escalation of their attacks on the news-gathering process and journalism. It's bad enough to prosecute and imprison sources. It's worse still to imprison journalists who report the truth. But to start detaining the family members and loved ones of journalists is simply despotic.'¹²⁹

Even though the UK Home Secretary justified the use of Schedule 7 powers on Miranda stressing that his detention of nine hours was exceptional, in their protestations *The Guardian* and other media outlets *still omitted* to point out that what Snowden passed on were stolen secret state documents, property of the US and UK governments respectively.

UK Courts' decision on Schedule 7 powers

The question the courts have to address is if Schedule 7 powers are proportionate. With coincidental timing, in August 2013 *Sylvie Beghal v Director of Public Prosecutions*¹³⁰ went before the UK's High Court where Beghal was challenging Schedule 7 powers regarding their potential violation of ECHR rights. A French national and the wife of a convicted terrorist, Beghal arrived at England's East Midlands Airport and was detained under Schedule 7. The police did not suspect her of being a terrorist, but they wanted to speak to her to establish if she may be a person concerned in the commission, preparation or instigation of terrorism.¹³¹ The police permitted her to speak to a lawyer but she was told they would not delay the questioning pending the arrival of her lawyer.

The Court found no violation of articles 5, 6 and 8 ECHR through the use of Schedule 7 saying these powers are not arbitrary,¹³² in the court's opinion they are proportionate and

permissible. The Court said that while rights protecting a defendant from prejudice are important, when applying the legal principle of proportionality what outweighs individual rights is the protection of the public in combatting terrorism.¹³³ On this point Lord Justice Gross said:

‘Inhibiting or deterring the travel of someone otherwise engaged in the commission of acts for terrorism serves, in our view, manifestly rational purpose related to port and border control. ...realistically the ability to question widely is necessary to build up a picture of the travel in question and its connection (if such there be) to acts of terrorism.’

In 2014 Miranda’s claim against his Schedule 7 stop and interview came before the UK’s High Court.¹³⁴ Miranda’s main contention is that he was unlawfully stopped as it was clear he was not a terrorist, the use of this power on him was disproportionate and that he was carrying protected journalistic material therefore rendering the search and seizure by the police of the materials he was carrying unlawful. Laws LJ made it clear that the purpose of Schedule 7 is not to determine if a traveller is a terrorist only assess if they directly or indirectly were involved in a wide range of activities that may be concerned with terrorism.¹³⁵ Regarding the proportionality Laws LJ held that the stopping of Miranda was proportionate as the material Miranda was suspected to have at the time was not media reporting on terrorism, it was to ascertain the nature of the material he was carrying and therefore fell properly with the construction of Schedule 7.¹³⁶

Regarding whether the material in Miranda’s possession was journalistic material, one fact influencing the Court’s decision this was not that case was the belief that Miranda was potentially in possession of a substantial number of the 58,000 documents stolen by Snowden.¹³⁷ The information Miranda possessed if released, even via the media where the intrinsic significance of the material was not understood was deemed by the Court to be a ‘gift to the terrorist’.¹³⁸ Even though Greenwald claimed

that journalists share with the government the responsibility of what is required by way of withholding publication for the protection of national security, this was dismissed as the Court made it clear that journalists have no constitutional responsibility.¹³⁹ This is an important point as the media cannot be held to account in law in this area the same way public bodies can. These key points were influential in the Court finding that Miranda's Schedule 7 stop and detention was not only legitimate it was also 'very pressing' and in striking a balance between public interest/press freedom and national security, the Court found in favour of national security.

Conclusion: The Balance between the Interests of National Security and Individuals' Liberty

The rationale behind pre-emptive counter-terrorism powers is they are exercised on identifying individuals who might commit crimes related to terrorism with the aim of the investigators to remove the individual's ability to carry out terrorist related activity.¹⁴⁰ The more broadly drafted legislation is, it invariably widens the powers of counter-terrorism agency officers to intrude deeper into the everyday lives of citizens. As a result it gives those officers greater ability to bring an ever widening group of citizens into their gaze and consequently into their intelligence systems. As this discussion has emphasised, the interests of national security and individual liberty are not exclusive, they are inclusive. They are not opposing poles but a seamless web of protection incumbent upon the state.¹⁴¹ While individual liberty is precious and must be protected from unnecessary state incursion by the judiciary, keeping citizens safe from terrorist attacks is equally important. As Yoo's study found this is what the majority of citizens want even if it is bordering on infringing individual liberty.¹⁴² In a poll held following revelations of NSA practices, in June 2013 nearly half of

US citizens polled approved of everyone's emails being monitored if in doing so it might avert a terrorist attack.¹⁴³

The former MI5 Director revealed in the UK between 2001-2012 43 serious terrorist plots or potential attacks were prevented, adding that the terrorist threat is real and remains with us today.¹⁴⁴ As seen with the example of control orders, the danger is what Gearty refers to as quasi-criminal law provisions such as control orders being introduced as preventative measure. As seen above, when applying the legal principle of proportionality, judicial scrutiny ensured that legal measures are kept in check. It is not the media's role to do this. The role of a free media in a democracy is through their freedom of expression to act as a watchdog by acting as a check on political and other holders of power, hence its nickname of the Fourth Estate.¹⁴⁵ It is accepted that with Snowden passing on the NSA/GCHQ documents to *The Guardian*, the newspaper was attempting to do this. However it is not the media's role to handle stolen classified document and decide what to reveal from that documentation that they perceive is in the public interest and safe to publish without jeopardising national security. The danger is journalists inadvertently releasing information that would be useful to a terrorist. Following the Snowden revelations the current MI5 Director, Andrew Parker said that making public the reach and limits of national security agencies' techniques is damaging adding:

'Such information hands the advantage to the terrorists. It is the gift they need to evade us and strike at will. Unfashionable as it might seem, that is why we must keep secrets secret, and why not doing so causes such harm.'¹⁴⁶ (Parker 2013, paragraph 59)

In adopting preventative measures both governments and their counter-terrorism agencies must assess the risk such measures present to individual's liberties balanced with a proportionate application of those measures to prevent terrorist activity.¹⁴⁷ As discussed

above, this is what the UK and US judiciary are assessing in their judgments. Palmer notes in his work that most writing in this area has been hijacked by a legal and academic elite rather than an enlightened political, legal and social order where he adds, ‘Ideology cannot address immanent [terrorist] threats’.¹⁴⁸ Adopting such a position does not denigrate the view that security and liberty interests are inclusive and the importance of ensuring individuals’ liberty is not railroaded by terrorism related legislation, but as Palmer opines, little has been written about the reality of countering terrorism, which includes the practical issues in confronting agencies tasked to protect the public from terrorist attacks.¹⁴⁹ It is hoped that by examining the judicial responses to terrorism related legislation this work goes some way to doing that.

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