

Balancing Secrecy and Individual Rights in Britain

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How Should the British Government Balance the Need for Secrecy Against the Rights of the Individual?

A balance has long been sought between the rights of the individual and the secrecy and authority of the state; balance continues to be coveted today as technology progresses and so too do the threats that face the country and international community. Security is no longer limited to the state, and with the threats to peace being largely terrorist activities the need for secrecy is growing. The word secrecy encompasses all covert activity, “the entire realm of state secrecy – the intelligence services, classified information or diplomatic discretion” (Horn 2011: 104). The rights of the individual or civil liberties are found where it is ensured that when “the state regulates public or private life it will respect individual freedoms” (Zucca 2009: 237); these are different from human rights, which detail “intuitively how people should be treated” (Zucca 2009: 237). This essay will argue therefore that the British government should predominantly consider the human rights of its citizens in the balance between the rights of the individual and the need for secrecy, without disregarding civil liberties, but should place the preservation of national security above individual freedoms. It is “generally accepted that some degree of secrecy is appropriate” (Chesterman 2011: 9), the government “must have some lee-way as only it has the benefit of intelligence” (Zucca 2009: 239) and therefore as it seems that secrecy will not disappear, it is essential to attempt to balance it against the rights of the individual.

The third article in the United Nations Universal Declaration of Human Rights states that “everybody has the right to life, liberty and security of person” (United Nations 2012). This has been agreed by the United Nations to be a universal human right, yet it could also be deemed to cross into a matter of civil liberty. The right to security of person can only be achieved if the security services are able to do all they can to ensure national security, and thus there is a need to balance the rights of the individual with the need for secrecy to ensure that human rights as well as civil liberties are maintained.

John Stuart Mill wrote in his book *On Liberty* that he hoped to examine

“the limits of the power which society can legitimately exercise over the individual...the sole end for which this power might rightfully be exercised is the protection of society” (Radcliff 1966: 7).

The task of balancing the need for secrecy against the rights of the individual is a difficult one:

“balancing tests are based on the ability of the decision makers to identify correctly competing interests, to assign each of them appropriate weight, and to compare the respective weights of the relevant interests” (Gross 2009: 734).

However, the very nature of secrecy, implying an aspect of the covert, means that the decision maker (even if this is the government) is not fully aware of all of the information.

Considering the balance between secrecy and the rights of the individual, one has to consider how far the population trust their decision makers. Even in positions of high authority, there are very few people who are aware of all the necessary intelligence and security risks to adequately assess the risks to the country and therefore decide the balance. The government regularly limits freedoms on the basis of information “that can never be scrutinised in a courtroom” (Zucca 2009: 239), thus the government has, according to Zucca, “acted beyond its powers and should

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be held responsible" (Zucca 2009: 239). Given the power of security services to "intrude into every household in the country and listen in on any telephone conversation" (Norton-Taylor 1990: 4), it is essential that parliamentary oversight exists to "ensure that the security and intelligence services are accountable for their activities to the same degree as the other public bodies" (Mendel and Cravitz 2001: 41). Accountability is key to the degree we trust our government leaders and intelligence services, and it is only when we trust their judgement that the public will allow them to be the ones to dictate the balance between secrecy and civil liberties. Chesterman argues that it is "the media, which historically played a vital role in checking the excesses of intelligence services" (Chesterman 2010: 42), but for Mendel and Cravitz, ultimately the government "should subject the security and intelligence services to greater parliamentary scrutiny than currently exists" (Mendel and Cravitz 2001: 43), allowing for intelligence services in which the public can have more faith.

Recent tensions within Britain prove how current the issue is and how a balance between individual rights and the need for secrecy is still being sought. The government has been seeking to introduce increased rights of secret court sessions or Closed Material Procedure. Secret Court sessions would occur when an open court case would "risk exposing information that the public expects it to keep secret in the name of national security" (Casciani 28th November 2012). This extension of the occasions when a secret court case would take place is opposed by civil libertarians who argue that it breaches the universal human right to a "fair and public hearing" (United Nations 2012), as the individual accused of wrongdoing would not be present for the proceedings (Casciani 28th November 2012). Whilst this balancing act continues today, Mill argued "the struggle between Liberty and Authority is the most conspicuous feature in the politics of history with which we are earliest familiar" (Mill 1912: 5).

Mill believed civil liberties to be "instrumental in the achievement of the greatest happiness for the greatest number" (Radcliff 1966: 8) and therefore even if "in certain circumstances national security does trump human rights and civil liberties" (Zucca 2009: 238), they are still essential to the welfare of citizens. Here Zucca argues that national security should take precedence over both civil liberties and human rights, yet as human rights are understood to be "fundamental rights...necessary for a life with human dignity" (Forsythe 2012: 3), it might be said that perceived threats to national security should not overrule fundamental human rights. National security is generally understood to refer to "the safeguarding of the state and the community against threats to their survival and well-being" (Norton-Taylor 1990: 33) and thus the British government needs to protect the rights of the individual as far as possible to ensure a content society.

By example, the London Olympics in 2012 were seen as an "attractive target for terrorist attacks, protests, strikes and cyber and local crime" and thus "British security services remained at a heightened state of vigilance" (Stratfor 2012). Given the importance of civil liberties, it could be argued that they should only be challenged on the grounds of national security, yet during the Games new legislation was created to give police and security services more power. Police were able to "enter land or premises in order to tear down advertisements, announcements or notices of any kind" (Houlihan and Giulianotti 2012: 713), and have since been criticised for jeopardising civil liberties. Given the perceived increased risks during the Games, the public were more willing to place national security above temporary restrictions in their civil liberty. However, measures of these types are

"usually presented as 'temporary' and justified by exceptional circumstances, such as the hosting of the Olympics. However 'temporary' restrictions often prove long-lasting, justified either by new threats or by continuing existing threats, leading to a permanent state of exception in which citizens are complicit in the erosion of their civil liberties" (Houlihan and Giulianotti 2012: 716).

Gross explains that civil liberties are often overlooked due to a combination of a crisis mentality and group thinking, as decision makers and the public at large under-evaluate the importance of liberty and over-evaluate the importance of security (Gross 2009: 734). It is perhaps only the security services themselves that are sufficiently removed from human panic and crisis and can thus rationally balance the need for secrecy with the rights of the individual. Gross considers the role of crises in the task of balancing, saying that the public's understanding of

"normalcy shifts and expands to include measures and powers that had previously been considered exceptional, the boundaries of new exceptions are pushed further" (Gross 2009: 736).

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Technological advances in both terrorist activity and general deviance need to be mirrored in secrecy and surveillance. Chesterman argues that technological advances can reduce the risk of human bias in intelligence and police work:

“rather than targeting a specific group for closer examination, it may be possible to gather information on the entire population in such depth that human intervention, with the subjectivity...that this brings, is significantly reduced” (Chesterman 2010: 40).

However, this is not yet the case. An investigation in 2010 by The Guardian discovered that covert CCTV cameras were erected in predominantly Muslim areas of Birmingham in an attempt to monitor extremists. The cameras had been requested and funded by the counterterrorism unit; “the message is, if you live in a predominantly Muslim area, you’re a suspected terrorist” (Lewis 2010). The covert nature of this surveillance fails to consider that “liberty may in fact contribute to security” (Chesterman 2010: 40). Racial and geographical profiling are “clearly part of the investigative method currently used by police and intelligence officers” (Chesterman 2010: 39). However, in the case of profiling,

“pre-selecting all young Muslim men...may contribute to the problem that it is intended to solve...and undermine identification with the larger community and encourage radicalisation” (Chesterman 2010: 40).

Here it can be seen that it is not merely a balance to decide whether liberty or secrecy deserve more strength but that the balance is far more nuanced: liberty is essential for security and security is essential for liberty.

DNA databases have been another contentious issue surrounding civil liberties and the protection that degrees of secrecy can give the public. In 2001, the Criminal Justice and Police Act permitted DNA details taken during police investigations in England and Wales to be stored, while in Scotland they are discarded if there is no conviction (Ashley 2008: 136-137). This difference in policy across the country reflects how current and controversial the topic of civil liberty is today and within the UK the issue is not united. The UK today holds “samples of DNA of around a tenth of the population...samples from individuals arrested but never charged” (Chesterman 2010: 40). Civil Libertarians have disputed this legislation arguing it jeopardises individual rights, however since 2001 it has helped solve over a hundred previously unsolved murders and rapes (Ashley 2008: 136-137).

In Britain, surveys have revealed that in general the public support measures such as DNA databases and CCTV “if they improve personal safety and security” (Ashley 2008: 137), but they need to be convinced that infringements on civil liberties will be justified through an evident increase in national safety and security. National identity card legislation was a major issue in the 2010 election, yet in comparison there has been little discussion over the country’s expanding number of CCTV cameras or extensive DNA database (Chesterman 2011: 55). Britain had a comprehensive identity card system during the Second World War, which was dismantled at the end of the war “to the dismay of many in law-enforcement circles” (Chesterman 2010: 37). This shows that the British public is able to further its aims of civil liberties and return from a state of crisis to a state of normalcy.

Scotland Yard CCTV expert Mike Neville announced in 2008 that only “three per cent of street robberies had been solved by using CCTV images” (Hempel and Töpfer 2009: 158) and at least one study has concluded that “improved street-lighting could have a more significant preventative impact on crimes recorded than CCTV” (Calfa et al. 2010: 43). Consequently, perhaps in the future there will be more public concern about CCTV expansion without proof of its benefits. Chesterman crucially distinguishes between “non-intrusive surveillance that restricts privacy and intrusive interrogation or detention that affects liberty” (Chesterman 2011: 55). Minow questions what sort of society we want to live in and argues that it is essential not to sacrifice liberties that we have spent decades securing, asking “what should we refuse to sacrifice even if survival is on the line?” (Minow 2005: 2136). It is here that the British government needs to focus on drawing the correct balance between individual liberty and secrecy, sacrificing privacy and some civil liberties but not human rights.

According to Zucca, there is a “clear transatlantic divide” (Zucca 2009: 232) on the issue of liberty and secrecy, especially post 9/11. In the United States, the public “strongly supported doing whatever was necessary” in the fight

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against terrorism, and “only thirty-three per cent were worried the government would go too far in fighting terrorism at the expense of civil liberties” (Leone and Anrig 2003: 6-7). The American public seems quite willing to let the balance shift towards secrecy, particularly in times of crisis, allowing the rights of the individual to be undermined in favour of enhanced national security – “American history reflects a similar readiness to override civil liberties when confronted by danger” (Leone and Anrig 2003: 12). Despite the transatlantic divide on the issue, within months of the attacks on the US twin towers in 2001 “not only the US, but also France, Germany and the UK relaxed various privacy protections” (Dragu 2011: 64) in order to allow intelligence services a higher degree of authority and power.

The attacks on September 11th 2001 in New York cemented the need for police and intelligence services to use secrecy and covert activities in the War on Terror. At the heart of counterterrorism,

“is an explorative activity that entails gathering and analysing data about a large number of individuals and organizations, most of whom are unlikely to pose any threat of terrorist activity” (Dragu 2011: 65).

Consequently, following 9/11 and the 2005 London bombings, the British government has been forced to reassess the threat to the country and adapt their approach to secrecy and maintaining national security accordingly, placing secrecy above the protection of civil liberties.

The statement “‘the innocent have nothing to fear’ was one of the patronizing mantra[s] of an authoritarian state” – “totalitarianism, if not fought against, could triumph anywhere” (Chesterman 2011: 12). Chesterman describes the public as “sometimes apathetic” (Chesterman 2010: 41) towards reductions in their civil liberties, and possibly too trusting of the government. The extent to which secrecy should be allowed to flourish depends on whether “the state represents the public interest – all of its citizens – or is simply a synonym for the government of the day” (Norton-Taylor 1990: 4). Germany’s proliferation of widespread CCTV surveillance was more hesitant than that of the UK and France (Hempel and Töpfer 2009: 162), “The Third Reich now offers a salutary warning of the dangers of excessive state power” (Chesterman 2011: 9). It seems Germany is remembering the lessons of the past and although Britain, since the end of the millennium, is the most surveyed country in the world, it is still possible for us to instil safeguards to prevent state secrecy getting out of hand. Norton-Taylor describes how MI5 could be covertly surveying those who belong to protest groups, those who complain to the police, those who regularly criticise the government or security services, or those who attend political meetings or demonstrations (Norton-Taylor 1990: 81). This grouping of individuals is an example of profiling and the public should remain vigilant of governments and security services who overstep civil liberties.

Thus the necessity of secrecy is not questioned and consequently some civil liberties will be overlooked. While both civil liberties and human rights are important, “only human rights are universal and absolute, while civil liberties are relative and can be regulated” (Zucca 2009: 238), civil liberties are therefore relative to each state and each population. France, like Germany, has had “significant public opposition” (Fussey 2008: 121) towards the proliferation of surveillance; however, France’s leadership has been quick to follow Britain’s, referring to the UK CCTV experience and the significance of CCTV footage in the eventual identification of the London bombers (Hempel and Töpfer 2009: 172). Zucca describes how the US put security first but that Europe’s responses to terrorist threats, due to their longer experience with terrorism, have been more preserving of civil liberties. He sees Europe’s spread of camera surveillance as relative to the threat of terror but without compromising international law or human rights (Zucca 2009: 231).

There is a concern that there might be a

“slippery slope that leads from surveillance to authoritarian government...surveillance is problematic when it increases the power of government without simultaneously increasing transparency and accountability for citizens” (Kohn 2010: 585).

Although secrecy is necessary to maintain national security, it needs to be monitored as much as possible to ensure security services are able to resist “the temptation to indulge in activities that have no place in a democracy” (Norton-Taylor 1990: 129). Without government and media oversight, secrecy can not only overpower civil liberties but can

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lead to the state having too much power. According to Manningham-Buller, the former Director General of MI5, “secret intelligence gives us one of the best chances of uncovering these unknown networks before they are able to carry out attacks” (Manningham-Buller 2007: 44). While we trust the government to act in the best interests of the public, secrecy is paramount, yet if or when we want to regain some civil liberties it may be too late. Perhaps Britain should also consider why other European nations have been so hesitant in employing such fervent measures of surveillance and secrecy as the UK. CCTV has been largely opposed in Belgium and Germany and cameras are largely forbidden in many public spaces in Denmark (Fussey 2008: 121). Horn describes the role of secrecy as “to protect and stabilize the state, but at the same time it opens a space of exception from the rule of law that breeds violence, corruption and oppression” (Horn 2011: 103). It is therefore essential that secrecy is used to protect citizens, but human rights must be upheld.

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