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How To Use the Law to Break the Law. The Political Rhetoric to Curtail Freedoms

UK's Covert Human Intelligence Sources (Criminal Conduct) Bill

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"With wrongs yet legal, curse a future age!
Still spread, fair Liberty! thy heav'nly wings,
Breath plenty on the fields, and fragrance on the springs."
Windsor Forest, Alexander Pope, 1713

The UK government has introduced a parliamentary Bill that seeks to give the police and a host of other organisations a power to authorise informants to participate in criminal conduct. The government claims that the Covert Human Intelligence Sources (Criminal Conduct) Bill [1] will create a legal way to break the law – in other words, **to use the law to break the law.**

The Bill is the government's response to the legal challenge from Privacy International, Reprieve, the Committee on the Administration of Justice and the Pat Finucan Centre, who challenged the existing policy of authorising criminal conduct by officials and agents of the security services [2].

The government has also published a handy Home Office European Convention on Human Rights Memorandum [3] that explains how and why they believe that such law breaking is compatible with the Human Rights Convention. The memorandum says:

> "A criminal conduct authorisation may only be granted where that conduct is believed to be necessary and proportionate in the interests of national security, for the purpose of preventing or detecting crime or disorder, or in the interests of the economic well-being of the UK for certain statutory purposes and where it is proportionate to what is sought to be achieved by that conduct."

At first glance it may seem as if there might be some safeguards buried in such an obtuse statement. In fact the Home Office are using the language of war, language that comes from international law, that has come to dominate modern political discourse and is being used to facilitate the introduction of totalitarian measures. It may seem like our system is suddenly falling apart. In fact the building (or rather destruction) blocks were put in place quite some time ago.

To get an understanding of how this situation has come about and of the above quoted memorandum we need to look at the language used in the laws of war and see how it has made its way into the language of freedoms via the bait and switch of the language of

"rights". And to do this first we must address the murky heritage of two words at the heart of modern discourse on freedoms and police actions – "proportionate" and "necessary".

The Caroline Incident

Back in 1837 Canada was made up of two British colonies (Upper and Lower Canada) run by an oligarchy of wealthy men. In December of that year a Scotsman, **William Lyon Mackenzie** planned a revolt in Upper Canada to try and institute political reforms [4]. Mackenzie and his men took over Navy Island in the Niagara river and proclaimed the Republic of Canada there. The rebels had a few stolen cannons which they used to fire at mainland Canada. The British were none too happy and asked the United States Government to stop the rebels, who were allegedly amassing weapons and new recruits in the US.

The rebels had hired a steamboat, the Caroline, to transport men and supplies from New York to Navy Island. On the evening of 29th December 1837, whilst the Caroline was docked at Schlosser in New York, a Royal Navy boat with 60 men rowed across the Niagra river and attacked the steamboat. The Caroline was seized, towed to Niagra Falls and set ablaze, killing two members of the crew.

The Caroline was a United States boat moored in the United States and so this act was seen as an unprovoked attack on a neutral state. The US Secretary of State John Forsyth wrote a letter to Henry Fox, the British minister in Washington stating that the incident would be made "the subject of a demand for redress." Fox replied that Britain had acted under "the necessity of self-defence and self-preservation". Through an exchange of letters between Forsyth, his successor Daniel Webster, Fox and Lord Ashburton, **a political excuse was transformed into a legal doctrine- the Caroline doctrine [5] – the legacy of which would have far reaching consequences.**

The key elements of the doctrine as penned by Webster are:

> i) "It will be for [the British] government to show a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation."
>
> ii) "It will be for [the British government] to show, also, that… [it] did nothing unreasonable or excessive; since the act, justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it." [6]

International Law

In the years following the Caroline incident there were calls for the creation of an organisation to act as an arbitrator for disputes between nations, a role that interestingly had been undertaken by the Pope [7]. These calls would eventually lead to the formation of the League of Nations and the United Nations. In the meantime a number of law societies formed, such as the Association for the Reform and Codification of the Law of Nations (1873) [8} concerning themselves with the new and controversial area of law, "international law" as it came to be known. In 1888 the British Prime Minister Lord Salisbury said of this new "international law" that it "has not any existence in the sense in which the term 'law' is usually understood" [9] – but they didn't let a small thing like that hold them back.

From the Caroline doctrine then came the core concepts in international law relating to the self-defence of states – "necessity" and "proportionality". These concepts recur frequently in international treaties and in the ongoing work of the United Nations' International Law Commission (ILC) [10] to codify international law.

The ILC tweaked the "necessity of self-defence" by adding a requirement for an "essential interest", so that states cannot invoke necessity with regards to an act unless the act:

> is the only means for the State to safeguard an essential interest against a grave and imminent peril [11]

Article 51 of the United Nations Charter acknowledges a State's right to self defence when it states that: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations" [12].

The inclusion of this clause in the Charter acknowledges and codifies what was used as a legal excuse into the law of war.

In the nineteenth century, whilst this new language was being created for international law, domestically in England the same words were being used very differently.

1878 Royal Commission to consider the Laws Relating to Indictable Offences

In 1878 a Royal Commission was appointed in England to scrutinise the Criminal Code (Indictable Offences) Bill, an attempt by barrister and civil servant James Fitzjames Stephen to convert the unwritten English criminal law into statute law (i.e. codifying it). In their report the commission described what most people would probably understand as a definition of self-defence:

> "We take one great principle of the common law to be, that though it sanctions the defence of a man's person, liberty, and property against illegal violence, and permits the use of force to prevent crimes, to preserve the public peace, and to bring offenders to justice, yet all this is subject to the restriction that the force used is necessary ; that is, that the mischief sought to be prevented, could not be prevented by less violent means; and that the mischief done by, or which might reasonably be anticipated from the force used is not disproportioned to the injury or mischief which it is intended to prevent." [13]

So although the words "necessary" and "proportionate" were not considered by many to be features of the English legal system, the words were used in the language of individual self-defence.

Just to add a little more confusion to the issue, the British jurist A.V.Dicey, commenting on the above quoted section of the 1879 report, referred to this definition of self-defence as "the doctrine of the legitimacy of necessary and reasonable force" [14]. This introduces the English legal principle of "reasonableness" which was the primary tool used in judicial review cases (cases that challenge government decisions). In the English legal system the terms "reasonable" and "proportionate" have meant the same thing [15]. And the idea of reasonableness relates to the view of an ordinary and reasonable person generally known as the man on the Clapham omnibus.

Dicey noted that the use of the word “necessary” in the 1879 report is “somewhat peculiar, since it includes the idea both of necessity and of reasonableness”. This peculiarity of circular definitions would become a recurring feature of the reframed “necessary” and “proportionate” in the modern era.

More recently the doctrine of individual self-defence has been codified in English statute law (the Criminal Justice and Immigration Act2008) where the definition rather unhelpfully uses both reasonableness and proportionality [16].

Crucially the use of “necessity” can be tracked back even further and I’ll return to this later.

Human Rights and the language of war

So how does all of this relate to freedoms and police actions? The answer lies in the European Convention on Human Rights, which was drafted in the aftermath of the second world war. At a series of meetings from 1947, the Movement for European Unity discussed the idea of a Charter of Human Rights [17]. The stated aim was that countries in Europe would sign up to a set of broad minimum principles of human rights and if a country fell into totalitarianism, as had Nazi Germany in the 1930s, then they could be challenged in an international court under a breach of the Charter.

The Charter was drafted in Strasbourg by representatives of eleven different countries [18]. As the proposal progressed a right of individual petition was also added to the Charter, as an optional clause, allowing individuals as well as governments to take cases to the court.

The Charter proposed a right to life, prohibition of torture, prohibition of slavery, a right to liberty and security, right to a fair trial, a requirement for no punishment without breach of a law, a right to respect for private and family life, a right to freedom of thought, conscience and religion, a right to freedom of expression, a right to freedom of assembly and a right to marry.

The original privacy right (respect for private and family life) read as follows:

> freedom from all arbitrary interferences in private and family life, home and correspondence, in accordance with Article 12 of the United Nations Declaration. [19]

According to British cabinet papers, the UK did not see any need for a privacy right, but as other delegates did, the UK delegation did all they could to limit it and so drafted a number of permitted restrictions . This meant that the original privacy article of the Charter, after having “hurriedly to find a better text”, became:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.

And was then restricted or “qualified” by an additional paragraph:

> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the

> economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

This qualification paragraph, which was also used in other rights, takes some unpicking but the key point to understand is the use of a necessity clause, that of the so-called "democratic necessity" buried in the phrase "necessary in a democratic society". Also note the list of essential interests detailed under "democratic necessity". Compare this with the language used in the necessity clause of the war-time 1939 Emergency Powers Act [20]:

> Subject to the provisions of this section, His Majesty may by Order in Council make such Regulations (in this Act referred to as "Defence Regulations ") as appear to him to be necessary or expedient for securing the public safety, the defence of the realm, the maintenance of public order and the efficient prosecution of any war in which His Majesty may be engaged, and for maintaining supplies and services essential to the life of the community.

This so-called "necessity of state" looks remarkably similar to the "democratic necessity" of the European Charter and the reason for this similarity becomes clearer when the origins of necessity clauses is explored.

The use of necessity can be tracked back to canon law in medieval times and the Latin phrase "necessitas legem non habet" – necessity knows no law [21]. Its original use related to a way of individuals being excused from the harshness of religious law when acting out of good faith e.g eating someone else's food to ward off hunger. So it was an individual's self defence against religious law.

Over time however states began using necessity for their own ends, switching its application to justify the state doing whatever it felt was required for self-preservation – "necessity of state". Thus it became a self defence for states and became a legal concept used to switch off the law to protect some "essential interest" of the state. The state of emergency or state of exception used to justify war time powers is the prime example of the use of this "necessity of state". International law has been built on the foundations of the self defence of states and this has been achieved by re-working the language used to describe individual self-defence.

Therein lies the problem when these words are used in the language of rights. When an individual's right is interfered with by the state it would seem that the state is the attacker and the individual whose rights are being interfered with is the injured party. But international law has been constructed by states to protect the interests of the state, and so the state is afforded the legal concepts related to self-defence. This means that the individual and the rights of the individual are seen as the attacker and the state and the interests of the state are seen as the defender. So the state can use necessity as a defence for its attack on an individual's right and can use proportionality (explored more below) to defend the severity of the attack.

This topsy-turvy use of self-defence is key to understanding the rigged legal casino of international law and the Human Rights agenda that has been attached to it. Once this construct has been unpicked it becomes clearer why the allied powers immediately after World War Two were so keen to introduce international human rights treaties and why those

treaties were constructed by committees of politicians and bureaucrats rather than the real people who were supposedly going to be the beneficiaries. In the hands of state actors the language of rights became the language of war and the individual became the enemy.

When World War Two ended in 1945 the UK government was not keen to restore the freedoms restricted under the 1939 Emergency Powers Act. In fact the Act was not repealed until 1959. Similarly the 1939 National Registration Act that introduced compulsory ID cards was not repealed until 1952 [22]. It now becomes clear that the 1950 European Rights Charter was constructed to embody the same spirit of restricting freedoms to safeguard state interests.

The right to privacy and other rights in the European Charter were restricted at the outset via the "democratic necessity" clause. This was not formally defined in the Charter but over time proceedings of the international court fleshed out some details, such as the requirement for a "pressing social need" when using democratic necessity as a defence for restricting rights, akin to the "essential interest" requirement in the laws of war.

Attaching a necessity clause to the right as a qualification in this way meant that the right itself defines large areas where it can be removed. This is a perverse turn of events particularly for a common law country like England, where the custom was that people are free to do anything not explicitly restricted. Traditionally rights were described more clearly as "residual rights" that emerge in the gaps between restrictions created by the state. With the European Charter of Human Rights, English statesmen were instrumental in the drafting of a charter that restricted freedoms in the name of granting rights.

Ratification of the European Convention

The Charter was agreed to and opened for signature in 1950. The United Kingdom was the first country to ratify it in 1951 [23].

In 1966 the UK government agreed to allow individuals to petition the European Court of Human Rights in Strasbourg and by the late '60s there were calls to incorporate the European Convention into UK law so that individuals could bring cases in the UK courts rather than having to go to Strasbourg.

In 1977 a select committee of the House of Lords conducted an inquiry into enacting a Bill of Rights incorporating the European Convention rights.

By this time the European Court in Strasbourg had heard a number of cases and several doctrines or principles used in their deliberations had become established. One such doctrine was the "margin of appreciation". Stay with me.

The margin of appreciation

This doctrine basically amounts to a very generous benefit of the doubt or discretionary authority – a way of strengthening the "self-defence" necessity clause used by states. The logic used by the Court to explain this benefit of the doubt was that as the Convention applies to a number of countries with varying cultures and social attitudes, the Court should allow for these cultural differences by only applying minimum standards [24].

Lawyer and then Governor of the British Institute of Human Rights, Cedric Thornberry expressed to the 1977 House of Lords Committee the dangers of incorporating the European

Convention into UK domestic law:

> I can, of course, see many reasons why the Government should prefer the enactment of the European Convention; it would probably be the principal beneficiary. A much wider area of administrative discretion than it presently enjoys would be legitimised by such enactment. But the law of human rights is not about the protection of persecuted governments. And in the attainment of such human rights there are no easy ways forward and certainly no easy answers. To paraphrase Pericles:—the attainment of human rights requires both courage and virtue [25].

Thornberry went on to warn that enacting the Convention "could not but set back the cause of human rights in this country, considered overall". But alas Thornberry's warnings were not heeded and in 1998 the European Convention was incorporated into UK law via the Human Rights Act.

So a rights charter, written by a committee of bureaucrats, severely restricted by the insertion of a "necessity" clause along with a wide area of administrative discretion, became the defence for British freedoms.

Not great, but things were about to get even worse.

The decisions of the European Court had introduced that familiar sounding doctrine, or more precisely two doctrines of "proportionality" and "necessity", which are the reason for this meander through history in search of the heritage of the words "proportionate" and "necessary". Hang in there, we're getting closer.

So, we have explored the foundations of necessity, now let's look at the Strasbourg court's definition and then look at what proportionality is.

The European Court in Strasbourg defined the word "necessary" as applied in the "democratic necessity" test in a 1976 case relating to an Obscene Publications Act prosecution in the UK as follows:

> whilst the adjective "necessary" [..] is not synonymous with "indispensable" [..], neither has it the flexibility of such expressions as "admissible", "ordinary" [..], "useful" [..], "reasonable"[..] or "desirable". Nevertheless, it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of "necessity" in this context [26].

That's cleared "necessity" up then! The Court then pointed out that the restricting/qualifying paragraph in Charter rights leaves a "margin of appreciation" to the domestic legislator and domestic bodies called upon to interpret laws in force in the Contracting State.

Proportionality

Meanwhile "proportionality" is a legal concept used in various courts around the world as a tool of weighing and balancing competing interests and seeing which side wins. This has been a tool used in German administrative law following World War Two [27]. The German administrative formulation of proportionality is a 3 stage test made up of a suitability test (the measure used must be suitable for the achievement of the aim), a necessity test (no

other milder means could have been used to achieve the aim) and a proportionality/appropriateness bit (the benefit at large must outweigh the injury to the implicated individual).

In 1960 a United States Supreme Court Judge warned that this type of balancing was another tool that would favour state power over individual rights:

> "The great danger of the judiciary balancing process is that in times of emergency and stress it gives Government the power to do what it thinks necessary to protect itself, regardless of the rights of individuals. If the need is great, the right of Government can always be said to outweigh the rights of the individual." [28]

The European Court of Human Rights has often exacerbated this problem by applying proportionality as a single stage test, made up of just the final balancing bit of the German version above.

In the UK public bodies such as the police have very much plumped for the single stage proportionality test that allows them to apply a simple balancing test. A 2011 report [29] on the police's interpretation of the Human Rights Act found that:

> Proportionality was commonly described by officers as posing a very specific question: 'Am I using a sledgehammer to crack a nut?'

Furthermore police officers felt that the restricting/qualifying paragraph in rights such as the Right to Privacy was useful for facilitating their actions:

> "one officer drew attention to the 'exceptions' in the HRA (by which he meant the qualifications) as 'sufficient to give the police the powers that they need to do their job' "

And the police also saw the compliance with the Human Rights Act as little more than a box ticking exercise:

> "A lot of my job involves impinging on people's private lives and I have to be justifying this all of the time in terms of legality, necessity and proportionality. I am always signing forms saying 'I have considered human rights' but I'm not sure we understand what we are signing off."

Proportionality and Facial Recognition Cameras

A September 2019 High Court case into the Police use of facial recognition cameras illustrates how proportionality is used to protect "essential interests" of the state. The high court judgment used a proportionality test known as the 'Bank Mellat test', which added a fourth prong to the three pronged proportionality test and that fourth prong gifted the police with a greater margin of appreciation. I won't go into all of the gory details here but I have written about this case elsewhere, and it is a good example of the sleight of hand used to attack individual freedoms [30].

As Stavros Tsakyrakis puts it:

> "The problem with the rhetoric of balancing in the context of proportionality is that it obscures the moral considerations that are at the heart of human rights issues and thus deprives society of a moral discourse that is indispensable." [31]

The Covert Human Intelligence Sources (Criminal Conduct) Bill

Which brings us back to the Covert Human Intelligence Sources (Criminal Conduct) Bill and the granting of criminal conduct authorisations only if that conduct is believed to be "necessary and proportionate in the interests of national security, for the purpose of preventing or detecting crime or disorder, or in the interests of the economic well-being of the UK for certain statutory purposes and where it is proportionate to what is sought to be achieved by that conduct."

We are now in a position to see what this statement means – that the state may protect its "essential interests" and when it is acting to protect these interests, it (the state) can rely on the law of self-defence as it attacks anyone it sees fit to attack to defend said interests. The government is favouring the person attacking the freedoms, the informant, the state's proxy, who is afforded discretion, margin of appreciation and the benefit of the doubt – because under the Human Rights construct it is the state that is seen as the party who should benefit from the principles of self-defence and it is the individual's rights that are seen as the attacker that can be repelled when the state or its proxy decides it is "necessary" and "proportionate".

The Covert Human Intelligence Sources Bill is an odious piece of legislation but the defeat of the Bill will not be enough to restore freedoms. The whole rhetoric of the rights agenda and the use of international law needs to be challenged. The current regulations surrounding house arrests ("lockdowns") in the UK stem from International Law, namely the WHO (ie the UN), as enacted by the International Health Regulations 2005 [32] that were inserted into the Public Health (Control of Disease) Act 1984 [33] via the 2008 Health and Social Care Act [34]. We constantly hear politicians say that the introduction of draconian measures is "proportionate" to what they seek to achieve. That their actions are proportionate and necessary, necessary and proportionate, necessary and proportionate, proportionate and necessary, necessary and proportionate… You get the point.

Or do you?

These words are not neutral. This is the language of war, a war in which we the people are viewed as the enemy.

> "There is nothing proportionate between the armed and the unarmed"
> – Machiavelli, 'The Prince' 1532

> "Necessity is the plea for every infringement of human freedom. It is the argument of tyrants; it is the creed of slaves."
> – William Pitt the Younger, House of Commons 18 November, 1783

Understanding the true meaning of the words at the heart of modern political rhetoric is a

crucial step in reclaiming our freedoms.

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Notes

[1] Covert Human Intelligence Sources (Criminal Conduct) Bill
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[2] https://www.ipt-uk.com/judgments.asp?id=53
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[3]
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http://www.acsanz.org.au/archives/acs29-1-2-2011.pdf

[5] 'Here, There, and Everywhere: Assessing the Proportionality Doctrine and U.S. Uses of Force in Response to Terrorism after the September 11 Attacks', Michael C. Bonafede, Cornell Law Review 2002
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[9] 'International Arbitration', House of Lords, 25 July 1887 vol 317 cc1830-4
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[11] Article 25, Necessity, 'Draft articles on Responsibility of States for Internationally Wrongful Acts', 2001
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[13] p11, Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences (1879) (C. 2345)
http://www.lareau-legal.ca/EnglishDraftCodeONE.pdf

[14] 1889 Dicey, Introduction to the law of the constitution, 3rd edition, p406-408
https://archive.org/details/introductiontos04dicegoog/page/n424

[15] 'Beyond Wednesbury: Substantive Principles of Administrative Law', Jeffrey Jowell and Anthony Lester, Administrative Law' (1988) 14 Commw L Bull 858
https://heinonline.org/HOL/LandingPage?handle=hein.journals/commwlb14&div=32

[16] Criminal Justice and Immigration Act 2008, section 76 'Reasonable force for purposes of self-defence etc'
https://www.legislation.gov.uk/ukpga/2008/4/contents

[17] The establishment of the European Movement
https://www.cvce.eu/recherche/unit-content/-/unit/en/04bfa990-86bc-402f-a633-11f39c9247c4/272166ae-84b2– 466b-9cfa-4df511389208

[18] See A. W. Brian Simpson, Human Rights and the End of Empire: Britain and the Genesis of the European Convention (Oxford: Oxford University Press, 2001)

[19] UK Cabinet Papers, CP. (50) 2 11, 20th September, 1950
http://discovery.nationalarchives.gov.uk/details/r/D7656043

[20] 1939 Emergency Powers (Defence) Act
Text of the Bill, From The Times, Friday, August 25, 1939
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[22] 'The origins of Emergency Powers Acts in the UK', Statewatch 2012
https://www.statewatch.org/news/2003/june/statewatch-news-online-the-origins-of-emergency-powers-acts-in-the– uk/

[23] See A. W. Brian Simpson, Human Rights and the End of Empire: Britain and the Genesis of the European Convention (Oxford: Oxford University Press, 2001), Chapter 16

[24] However, as always happens, the UK has applied these minimum standards as a maximum and has thus used the Convention to lower the rights and freedoms of people in the UK (see for instance the increased powers of arrest contained in the Serious Organised Crime and Police Act 2005 (SOCPA)
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[25] Memorandum of evidence by Cedric Thornberry, Governor of the British Institute of Human Rights, paragraph 21,Minutes of evidence taken before the Select Committee on a Bill of Rights (p224-239), HMSO 1977

[26] Paragraph 48, Case of Handyside v The United Kingdom, 7th December 1976
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[33] Public Health (Control of Disease) Act 1984
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[34] Health and Social Care Act 2008
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