

The Terrorist Offenders (Restriction of Early Release) Bill: What's Wrong with Retrospectivity?

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Retrospectivity is rare in UK legislation. On average, perhaps one or two Bills a year enact a provision which goes back in time and takes effect before the Bill is made. When such provisions are used, they are generally curative, or something which is for the benefit of the individual to whom they apply.

A curative retrospective provision will often "fix" an error in legislation - perhaps some unintended consequence, or some illogical outcome. They are also used to make things better for the people affected. The classic example given by Lon Fuller is legislation which retrospectively validates marriages which, for some legal defect, turned out to be void.

When it comes to criminal law, retrospective provisions are rarer still. Only twice in the last 50 years has Parliament created a retrospective criminal offence. In both those cases (the International Criminal Court Act 2001 and the War Crimes Act 1991) this was in the context of war crimes under international law.

The reason for this is the repugnance with which retrospective law-making has long been viewed in the UK. Over the centuries, British courts have created myriad statutory presumptions against retrospectivity - British judges go out of their way to presume that Parliament couldn't possibly have intended to legislate with retrospective effect, unless it has made that intention absolutely clear in the statutory language. Pulling this British case law together in his account of the Rule of Law, Tom Bingham said that law must be certain, predictable and ought generally to be prospective. Parliament itself recognises that going back in time to change the legal effect of past events is to be avoided - hence the rarity of it passing laws with retrospective effect.

There are many rationales behind this, rooted in our constitutional tradition. British fairness demands that people ought to be able to rely upon the law as it stands. They should not be punished retrospectively for conduct that was not criminal at the time, nor should they be subjected to a penalty which is greater than that which applied at the time of their offence. One purpose of legislation is to effect social change - to change behaviour. A person can't change yesterday's behaviour in response to a law made today.

When subjected to a rigorous Rule of Law analysis, most of the [Terrorist Offenders \(Restriction of Early Release\) Bill](#) is unobjectionable. In fact, securing the protection of people against violence is a key aim of the Rule of Law, so the Government is to be praised for taking action to prevent dangerous terrorists getting back on the streets. There is only one defect, but it is an important one - the Bill retrospectively increases the amount of time that serving prisoners will spend in prison, regardless of their behaviour since sentence and even if they pose no risk to the public. It moves the date they are eligible for release from the half-way point of their sentence to two-thirds of the way through their sentence. This was the conclusion of the Bingham Centre for the Rule of Law in its [first Report on this Bill](#). The House of Lords Constitution Committee have now reached similar conclusions in [their Report](#).

Such retrospective effect offends against basic British notions of fairness. A prisoner was sentenced and clearly understood, by

reference to the law in force, that they would be released from prison after half of their sentence was served. Indeed, this was explained to them at the time of their sentence being imposed. Now, in this Bill, the Government is asking Parliament to agree to moving the goal posts for all serving offenders to whom the new Law will apply, telling them they will spend much longer in jail. This changes the rules after the event. The prisoner has no chance to modify their behaviour to take into account the new rules, the longer period in prison is simply imposed upon them. If offenders against the British sense of fair play - it will feel as if they are being punished for the actions of another. Consider a prisoner who is playing by the rules, engaging with probation services, becoming deradicalized, making preparations for release and looking forward to leaving prison. By agreeing to the Bill in its current form, Parliament would ignore the individual circumstances and demand that such a prisoner be locked up for longer.

The involvement of the Parole Board, on the other hand does not offend, against these longstanding British principles of fairness. The prisoner has a chance to do something about it. If they engage with the rehabilitation services in jail, they can persuade the Board that they are no longer a threat to society. If they fail to do so, they cannot complain when they are kept in prison for more of their sentence.

The Bingham Centre therefore proposed a simple and modest amendment of the Bill which would remove this Rule of Law defect. An [amendment](#) designed to have this effect is being proposed by a cross party group of peers which includes two former Independent Reviewers of Terrorism Legislation, a former Law Officer and a highly experienced member of the House of Lords Constitution Committee. The amendment would preserve the new Parole Board requirement for serving offenders, but give only prospective effect to the provisions extending from halfway to two-thirds the period in custody before an offender is eligible for consideration for release by the Parole Board. The amendment would leave entirely intact the Government's legitimate aim of protecting the public against known terrorist threats, but remove the unjustified retrospective effect which is not necessary to achieve that purpose. It would remove the Rule of Law defect in what is otherwise a Rule of Law enhancing Bill, and prevent it from becoming a dangerous precedent for casual departure from quintessentially British notions of fairness.

Further analysis can be found in the [Bingham Centre's latest report on the Terrorist Offenders \(Restriction of Early Release\) Bill](#)

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