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# The Impact and Consequences of Terrorist Legislation in the United Kingdom Since 2001

## *A Review*

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This chapter is designed to provide a historical and current political context for established and developing counter-terrorism law in the United Kingdom. It focuses principally on events since the attack on the World Trade Center in New York on 11 September 2001. Since that time every step in counter-terrorism law has been the subject of intense debate in the UK Parliament, a feature exemplified, as we shall examine, by the debates in both the House of Commons and the House of Lords on the Justice and Security Act 2013. This was legislation dealing with two important but limited areas of national security law and policy: first, the objective and empirical scrutiny of national security activity by a committee made up of parliamentarians and, secondly, the protection or disclosure of national security information in civil proceedings brought against the state by claimants alleging unlawful activity by the state in the name of national security.

The legislation illustrates an increasing tension. On the one hand, the state has to be able to take appropriate action founded on the best available methods to disrupt, prevent, detect and discourage terrorist activity. State actors may find the intervention of the law and the courts to be an inhibiting irritant in this difficult task, especially as the extent of action by the security agencies and the expectation of accountability have expanded since the early 2000s. On the other hand, the protection of the rule of law is seen as the essential protection against arbitrary action by the state even when there is a veneer of statutory or common law justification. The overarching question is the extent to which the action of the state to keep its citizens safe has been subject to 'juridification' (see also Walker, 2011).

Other very recent factual examples can be given. The detention of David Miranda at London Heathrow Airport on 18 August 2013 gave rise to a deeply contentious

discussion about the freedom of the media to disclose questioned intelligence activity which may directly or indirectly disclose national security information (see *R (Miranda) v. Secretary of State for the Home Department and others*, 2013, and Blair, 2013). This is exactly the kind of dispute likely to attract intense scrutiny of the provisions and effectiveness of the Justice and Security Act.

Another example is the parliamentary debate and ubiquitous media comment on action falling short of war against Syria, following the use of chemical weapons against the civilian population in August 2013. The focus on legality in the parliamentary debates of 29 August 2013 exceeded that in the parliamentary settings of France and the United States on the same issue. As the Chilcot Inquiry into the war in Iraq (set up in July 2009 but still to report at the time of writing) has shown in its proceedings, the role of the Attorney General has for the time being become of paramount importance (as well as politically exposed for the individual concerned), in his or her capacity as legal adviser to Her Majesty's Government, and therefore indirectly to Parliament.<sup>1</sup>

As a result of the situation in Northern Ireland, the statute book in the UK thickened. There were seven material Acts of Parliament between 1974 and 2001, and 62 statutory instruments (secondary legislation that allow the provisions of an Act to come into force or be revised without the need to pass another Act). Between 2001 and the end of 2013 there were an additional nine terrorist-related Acts and an astonishing 67 statutory instruments. The post-2000 legislation, after the enactment of the Terrorism Act 2000, has been mainly a reaction to 9/11 and the onset of violent extremism linked to al-Qaeda. Though it has existed as a movement since 1988 and carried out terrorist attacks well before 2001, al-Qaeda became deeply ingrained in the British consciousness after 9/11. As with all legislation enacted in haste or fear, or both, counter-terrorism legislation has been inadequately debated and scrutinized in Parliament.

The frequent and profound political controversy and argument about the legislation has been supported by representatives of the legal professions. Accusations have been levelled at the British government that, in pursuing policies designed to simplify the detection of terrorism, they have sought to diminish the rule of law by breaching the rights of the individual, thereby increasing the risk that innocent people, especially associates of genuine terrorism suspects, will be unjustly affected. It is noteworthy that these accusations have now been levelled at each major political party in the UK (Gearty, 2013).

The political debates and clashes surrounding the proliferation of legislative action represent the UK's struggle to balance the aims of protecting the public from terrorism while protecting the individual's rights. There has been no declaration of 'war on terror', as in the United States, which depicted terrorism suspects as 'enemy combatants', thereby circumventing the norms of criminal justice. Here, the battle has been a very British one, informed by difficult lessons learned during the Northern Ireland conflict.



Lord Macdonald, QC, a past Director of Public Prosecutions and now a Liberal Democrat member of the House of Lords, pointedly opposed the rhetoric of the ‘war on terror’ by characterizing the issue in the following terms:

the fight against terrorism on the streets of Britain is not a war. It is the prevention of crime ... a culture of legislative restraint in the area of terrorist crime is central to the existence of an efficient and human rights compatible process. (Macdonald, 2007)

Challenges on both sides have pushed boundaries, provoked thought and divided opinion, generally depicted simplistically as a difference between those charged with the protection of the nation’s security and those protecting the rights of the individual. Without the robust legal challenges mounted by and on behalf of some of these individuals, the rule of law would most certainly have been eroded significantly.

Whether the rule of law has prevailed is a matter of opinion. However, a conclusion which these authors draw is that almost all state agencies have recognized the importance of keeping within the rule of law, albeit with subjective elasticity sometimes being applied to that phrase.

## **The Changing Legal Landscape**

Al-Qaeda is described by the British Security Service (MI5) on their website in the following terms:

an ideology that unites a variety of grievances ... into a ‘single narrative’ of a global conspiracy against the Muslim world ... Al Qaida’s members adopt an extreme interpretation of Islamic teaching which they believe places an obligation on believers to fight and kill to achieve their aims. Most Muslims and the world’s leading Islamic scholars reject this position. (MI5, n.d.)

The emergence of al-Qaeda and terrorism linked with Islamic extremism created a new dimension to terrorism in the UK. No longer were terrorist attacks preceded by advance warning to minimize civilian casualties; in fact, suicide bombers were deployed in order to maximize the same. The threat from this type of attack has created a need for the executive to find means to intervene early enough to disrupt such plots. Terrorists seeking to harm British interests include foreign nationals and British citizens alike, and therefore greater coordination between intelligence and enforcement agencies has been required to deal with these threats. According to the former head of MI5, the main terrorism threat to the UK comes from (1) the tribal areas of Pakistan, where the senior al-Qaeda leadership is based; (2) Somalia; (3) Yemen; (4) home-grown terrorists; (5) Syria (Evans, 2007). The legislature has responded with a stream of controversial legal measures.



The foundations for the major piece of legislation the Terrorism Act 2000 (the 2000 Act) originate from a report into counter-terrorism legislation produced for the then government in 1996 by Lord Lloyd of Berwick with Sir John Kerr, although it is to be noted that the legislation in a number of respects did not follow all or with precision the recommendations made in the Lloyd report (Lloyd & Kerr, 1996).

The legal landscape may be examined from the perspective of: (1) changes to the criminal justice system to prosecute terrorism as crime; (2) the expansion of executive powers to deal with suspected terrorists who may not be prosecuted because of difficulties of evidence and disclosure; and (3) procedural constraints (intelligence sharing, disclosure, closed hearings and torture). Each has struggled to find the balancing point between protection of the public from terrorist attacks and protection of the individual's rights.

### **Criminal Justice System: Prosecuting Terrorism**

Successive governments have asserted that prosecution is the preferred approach when dealing with suspected terrorists. Consistent with this policy, many offences charged against terrorists are provided for in counter-terrorism legislation, but many charges have been of non-specialty offences such as homicide, offences against the person and offences under the Explosive Substances Act 1883. A lesson from the experience of Northern Ireland is that the use of 'normal' criminal legislation is generally to be preferred to specialty legislation.

What follows is a short review of the terrorist specialty legislation as it affects the criminal jurisdiction.

#### **The Terrorism Act 2000**

An offence of terrorism as such does not exist. But several offences related to terrorism are created by this Act, including membership of, support for and the wearing of the uniform of a proscribed organization; fund-raising and offences related to money laundering. The Act also created offences of omission (where certain individuals fail to report their suspicions) relating to terrorist financing, training for terrorism, directing terrorism, possession of items for terrorist purposes and collecting information for terrorist-related purposes. The last two are the most commonly used.

The above offences are directed to protect the public, the government would say, without any irrationality or oppressiveness attached to them and as such are within the rule of law.

#### **Stop and search powers**

Sections 41 and 44 of the 2000 Act have created sufficient interest to warrant separate treatment. They provided the stop and search powers of people and vehicles within

zones permitted by the Home Secretary on application by the police, and without the otherwise normal requirement of reasonable suspicion.

Section 44 ran foul of the truism that terrorism-related powers should be used only for terrorism-related purposes, otherwise their credibility is severely damaged, and the damage to community relations if they are used incorrectly can be considerable. Its purpose and deployment were poorly understood and examples of poor or unnecessary use of section 44 have abounded (Carlile, 2007). For example, the authors are aware of numerous uses against individuals who could not conceivably be seen to be potential terrorists, including a retired military chief and a middle-aged and highly regarded solicitor travelling in his large car who happens to be Asian.

Guidance on stop and search in relation to terrorism, created on behalf of the Association of Chief Police Officers (ACPO), failed to produce the necessary effect. In the year 2008, 250,000 individual section 44 searches were made in Great Britain; in 2009 this figure reduced significantly, but was still very high – 148,798. Of the 43 territorial police forces in England and Wales, only a minority ever used section 44. Only a single territorial force in Scotland used it, in very limited and special circumstances. The Metropolitan Police and the British Transport Police accounted for 96.4 per cent of all section 44 stop and searches during that year; 16 per cent of those stopped in 2009 were Asian or Asian British (Home Office, 2012a).

In March 2010 the Home Office published the findings of an Occasional Paper it had commissioned into public perceptions of the impact of counter-terrorism legislation (Home Office, 2010). Its conclusions showed a mixed reaction from the public but it is clear that there are perceptions that

- the process was discriminatory;
- it was based on stereotypes and racial profiling and,
- importantly, the difficulties were not necessarily linked to the measure itself, but to the way it was implemented.

The report was careful to accept that there were significant limitations to the surveys conducted and relied on in the paper. It remains, however, the most comprehensive compilation of studies and provides some community insights of value.

The executive responded to calls for change. The Home Secretary, the Right Honourable Teresa May, MP, responded to the European Court of Human Rights' judgment in the case of *Gillan and Quinton v. The United Kingdom* (2010) in a statement to Parliament in July 2010:

This judgment found that the stop and search powers granted under section 44 of the Terrorism Act 2000 amount to the violation of the right to a private life ... I am introducing a new suspicion threshold. Officers will no longer be able to search individuals using section 44 powers; instead, they will have to rely on section 43 powers, which require officers to reasonably suspect the person to be a terrorist. And officers will only be able to use section 44 in relation to searches of vehicles. I will only confirm these authorisations where they are considered to be necessary and officers will only be able to use them when they have 'reasonable suspicion'. (May, 2010)

This view has gained traction, not just in relation to counter-terrorism measures but also in respect of non-terrorism-related powers of stop and search under section 60 of the Police and Criminal Evidence Act (PACE) 1984. Sir Bernard Hogan-Howe, Metropolitan Police Commissioner, announced in January 2012, shortly after the verdicts in the third Stephen Lawrence trial, his intention to halve the number of stop and searches being conducted by his officers in recognition of the damaging effect that random and unfair searches of members of certain communities had on community relations (Hughes, 2012).

The issue was followed up in the government's 2010–2011 counter-terrorism review, which advocated the repeal of the stop and search provisions under the 2000 Act (Macdonald, 2011). The Protection of Freedoms Act 2012 (the 2012 Act) at sections 59–62 amended the grounds for stop and search of persons and vehicles based on the new 'reasonable suspicion' test and, furthermore, a code of practice was created in 2012 (Home Office, 2012b).

The authors suggest that the section 44 powers were the product of an honest mistake, in that ministers did not estimate accurately the extensive and sometimes inappropriate use the police would make of them, and were shown by successive reviews to be disproportionate and of no clear use against Islamist terrorism. It may have been thought that their effective use in Northern Ireland could be transferred across to Great Britain: however, the circumstances were barely comparable.

### Pre-charge detention

The second significant aspect meriting special mention relates to the period of detention between arrest and charge or release. In his seminal 1996 report on terrorism legislation Lord Lloyd of Berwick considered that the pre-emptive power of arrest under the then existing legislation was useful because it enabled the police to intervene before a terrorist act was committed. If the police had to rely on their general powers of arrest, he argued, they would be obliged to hold back until they had sufficient information to link a particular individual with a particular offence, and in some cases this would be too late to prevent the prospective crime. However, Lord Lloyd expressed concern that the power contravened a fundamental principle that a person should be liable to arrest only when he or she was suspected of having committed, or being about to commit, a specific crime (Lloyd & Kerr, 1996, ch. 8). He was particularly mindful of the reference to 'an offence' (meaning a specific offence) in Article 5(1)(c) of the European Convention on Human Rights (ECHR), on the right to liberty and security. The amendment to section 41 of the 2000 Act was the government's response to the concerns expressed by Lord Lloyd and others.

Detention under section 41 and under Schedule 7 (port detention) of the 2000 Act was subject to codes of practice issued pursuant to Schedule 8 of the Act. By section 306 of the Criminal Justice Act 2003, Schedule 8 of the 2000 Act was amended to

allow up to 14 days' detention for the purposes of questioning and associated investigation. This was extended to 28 days by sections 23–24 of the Terrorism Act 2006 (the 2006 Act) and could have been increased had Tony Blair's tabled extension of pre-charge detention up to 90 days not been defeated in Parliament. Senior circuit judges supervised the 14- to 28-day period of detentions, pursuant to the 2006 Act. Of the 106 relevant people arrested in 2009, 21 were released after 8 days had passed. None were held for more than 14 days. The use of these provisions must be seen in the context of the shock felt after the events in London on 7 and 21 July 2005: in the first of the incidents 52 people were killed by suicide bombers in three underground stations and on a bus in London.

Arguments in support of detaining suspects for longer than 14 days related to the nature of the evidence seized during the initial arrest phase, which often requires lengthy analysis of digital media. By extending the period of detention without charge, the police are provided with more time to analyse seized devices, which requires the assistance of technical experts. Given the international nature of terrorism offences, the police may need to undertake overseas enquiries and may have to liaise with security and intelligence services. Such enquiries may be complex and take a long time to yield results.

Following political debate in both Houses of Parliament, in particular differences between the coalition partners, and intense scrutiny by lawyers in the House of Lords, the coalition government enacted section 57 of the 2012 Act, which reduces the maximum period of detention from 28 days to 14 days, with an unusual power, arguably tautologous with normal parliamentary procedure, to bring in emergency legislation for exigencies. In other words, in the wake of a major terrorist attack in the UK, the police would not be able to detain suspects for longer than 14 days, notwithstanding that the number of suspects might be very large and the evidence complicated, unless Parliament intervened and allowed for an extension of detention.

Home Office statistics reveal that, between 25 July 2006 and 25 January 2011 (when the maximum period of pre-charge detention was 28 days), six individuals were held for more than 27 days (in 2006–2007), of whom three were charged and three were released without charge. Of those charged, two were convicted and the remaining individual was not proceeded against (Home Office, 2012a). It is clear that, when it was available, the police sometimes made good use of the extended pre-charge period available to them, by gathering evidence and intelligence from abroad, translating material found and penetrating electronic protections.

Time will tell whether this dilution of detention powers will affect investigations. The likelihood is that terrorism plots will be allowed by the authorities to run closer to fruition, to ensure that they have evidence capable of securing convictions. The more counter-terrorism investigations are equated with other investigations of organized and serious crime, the easier it will be to demonstrate that normal rule of law standards are being fulfilled.



## Civil Jurisdiction: Expansion of Executive Powers

### The Anti-Terrorism, Crime and Security Act 2001: Indefinite detention without trial

Shortly after 9/11, the government introduced the Anti-Terrorism, Crime and Security Act 2001 (the 2001 Act), which provided for the certification of 'terrorist suspects' based on evidence from secret national security sources and the detention in prison of 'foreign terrorism suspects' pending deportation for an indefinite period. These are often referred to as the 'Belmarsh Provisions'. The bill attracted little scrutiny in either the House of Commons or House of Lords. It was treated as emergency legislation and received royal assent in under four weeks, having passed through all legislative stages in both Houses. Legislation in emergency runs the risk of serious flaws and consequent difficulty in the higher courts: this was no exception. The government, in passing the 2001 Act, became the first European state to derogate from Article 5 of the ECHR (the right to liberty and security) in order to detain foreign suspects indefinitely without trial. (For an erudite analysis of legal issues arising in relation to counter-terrorism legislation across the world, see Arden, 2006.) Civil liberties campaigners were outraged by these proposals, likening the provisions to the policy of 'internment' (detention without charge) exercised by the government during both the First and the Second World Wars, and challenged them in the courts on the basis that such extreme measures undermined the rule of law.

The 2001 Act conferred rights of appeal in lieu of the right to apply for habeas corpus. The Secretary of State issued certificates in respect of a number of foreign nationals he considered to be suspected terrorists. These certificates were subject to an appeal to the Special Immigration Appeals Commission (SIAC) which upheld the Belmarsh Case appeal on the ground that the order was discriminatory and contrary to Article 14, which prohibits discrimination. The Secretary of State appealed to the Court of Appeal, which allowed the appeal, holding that the discrimination was justified because the detainees had no right to be in this country and were free to leave if they wished to.

This reasoning did not withstand a further appeal to the House of Lords. In their decision given on 16 December 2004, the system of detention was struck down by the House of Lords (*A v. Secretary of State for the Home Department*, 2004). Lord Hoffman, in a characteristically robust critique of the 2001 Act, stated:

86 ... This is one of the most important cases which the House has had to decide in recent years. It calls into question the very existence of an ancient liberty of which this country has until now been very proud: freedom from arbitrary arrest and detention. The power which the Home Secretary seeks to uphold is a power to detain people indefinitely without charge or trial. Nothing could be more antithetical to the instincts and traditions of the people of the United Kingdom ...



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97 ... The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for Parliament to decide whether to give the terrorists such a victory.

Eight out of the nine Law Lords held that the derogation was justified, holding that the question involved a political judgement with which they should not interfere. On the main question, seven Law Lords held that Part 4 was incompatible with the UK's obligations under the ECHR. They ruled that the measure did not rationally address the threat to security, was not a proportionate response, was not required by the exigencies of the situation and unjustifiably discriminated against foreign nationals on grounds of their nationality.

This landmark decision posed a choice to Parliament: to repeal Part 4 of the 2001 Act and institute an alternative regime or to sit tight and hope they would not be defeated in Strasbourg. Parliament elected to repeal and further legislate. This was enacted as the Prevention of Terrorism Act 2005 (the 2005 Act) and created the control order regime, enabling closed hearings with the use of special advocates. Arguably, the speed with which the control order regime was created resulted in one flawed system being replaced with another ill-thought-out scheme. The disclosure regime applied under the control order system suffered much challenge and ultimately radical change, and the system itself was abolished in 2012 when a system of far 'lighter' measures was imposed, as we shall discuss.

*The Prevention of Terrorism Act 2005*

The Prevention of Terrorism Act 2005 (the 2005 Act) was enacted to replace the Belmarsh Provisions with control orders. It was a type of executive order which imposed strict obligations on the controlled person for an indefinite term, so long as there was reasonable suspicion that they had been engaged in terrorism-related activity, and the order and the obligations remained necessary and proportionate.

The 2005 Act came into force on 11 March 2005, only three months after the earlier critical decision of the House of Lords. The enactment of the 2005 Act occurred before the fatal London suicide bombings of 7 July 2005 and the unsuccessful bombing attempts of 21 July 2005. The control order system was the object of fierce and continuous controversy, derided by civil liberty campaigners but supported by the public at large and by independent review. Detractors characterized the regime as a wholly disproportionate encroachment on civil liberties by the executive powers. For example, Liberty (2013) has consistently opposed control orders, and ran a campaign for their repeal. Parliament, on the other hand, sought to tackle a deepening problem of home-grown Islamist extremism against which the criminal law failed to provide the necessary protection.



The main conclusions of the 2011 report of the independent reviewer of terrorism legislation noted that:

The control orders system, or an alternative system providing equivalent and proportionate public protection, remains necessary, but only for a small number of cases where evidence is available to the effect that the individual in question presents a considerable risk to national security, and conventional prosecution is not realistic.

The control order system continued to function reasonably well in 2010, despite some challenging Court decisions and unremitting political controversy. (Carlile, 2011, p. 1)

In parliamentary debates, concern was expressed about judges becoming involved in what was really an executive activity; this could affect their independence and breach the principle of the separation of powers. There was judicial discomfort. The former Lord Chief Justice, Lord Phillips, questioned whether the 2005 Act was compatible with ECHR obligations, and further queried whether the restrictions might amount to a deprivation of liberty contrary to Article 5 and whether the provisions for review by the court satisfied the requirements of a fair trial, under Article 6. In a lecture at the University of Hertfordshire he commented:

The proceedings fall some way short of guaranteeing the equality of arms, in so far as they include in camera hearings, the use of secret evidence and special advocates, unable subsequently to discuss proceedings with the suspect ... Quite apart from the obvious flouting of the presumption of innocence, the review proceedings described can only be considered to be fair, independent and impartial with some difficulty. Substituting 'obligation' for 'penalty' and 'controlled person' for 'suspect' only thinly disguises the fact that control orders are intended to substitute the ordinary criminal justice system with a parallel system run by the executive. (Phillips, 2006)

The activities intended to be disrupted as a result of control orders have included the planning of mass casualty attacks in the UK; providing financial, material or other logistical support for terrorism-related activity; travelling overseas to attack British or allied military forces; and travelling to attend a terrorist training camp. A range of obligations that were considered necessary and proportionate could have been imposed on the controlees according to the exigencies of the case.

There were two distinct potential species of control orders – derogating and non-derogating. A *derogating* order contained obligations incompatible with the right to liberty under Article 5 of the ECHR. In reality, there was only a remote possibility of derogating control orders and none were ever made: a very serious series of events would have been required to trigger derogation. *Non-derogating* control orders imposed conditions intended to be short of a deprivation of liberty under Article 5.

Critics of the regime argue that the system was far from successful. The first batch of control orders imposed by the Home Secretary required the controlees to stay in their homes, in some cases for 18 hours a day, and placed restrictions on where they

could go and whom they could see in the remaining six hours. These orders were challenged and, where terrorist suspects were subject to such stringent conditions, it was found to amount to a deprivation of liberty (see *Secretary of State for the Home Department v. JJ and others*, 2007). However, as the system responded to legal challenge and matured, it could be argued the regime enjoyed a measure of success in that fewer appeals against control orders were upheld.

## Disclosure

The use of closed evidence given in control order proceedings was highly controversial. The government sought to limit disclosure to terrorist suspects so that they were not even given the gist of the allegations they faced and to apply a 'what difference' test to disclosure, namely, assessing how any failure in disclosure would have affected the suspect's ability to contest the factual basis for the control order (see *Secretary of State for the Home Department v. MB*, 2007). The system itself was challenged domestically in a series of decisions that culminated in the legal test for disclosure being redefined by the leading House of Lords decision of *Secretary of State for the Home Department v. AF* (2009, also referred to as 'AF (No. 3)').

In *AF* (No. 3), Lord Philips, at paragraph 59, set out the legal test for disclosure to be satisfied: 'the controlee must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations'. It was inadequate for full information merely to be provided to the special advocate representing the controlee's interests during the closed sessions.

Control orders caused legal challenge in numerous areas, with mixed results. In the two years between 2009 and 2011 it was held that it was not an abuse of the court's power to impose a control order where a criminal prosecution had failed (*Secretary of State for the Home Department v. AY*, 2010); it was lawful to relocate individuals away from their homes to another city with which they had no connection (*Secretary of State for the Home Department v. BX*, 2010; *Secretary of State for the Home Department v. CD*, 2011), and there were findings that a control order remained necessary even though the alleged terrorism-related activity had occurred some years earlier (*Secretary of State for the Home Department v. AM*, 2009; *Secretary of State for the Home Department v. AY*, 2010).

Anonymity was usually granted to controlees, which was of advantage both to the controlee and to the government. In particular, for the controlee it avoided publicity that might have led to harassment of the individual and his or her family in the community, or it might have prejudiced a fair trial if criminal charges were later brought.

The nexus between control orders and their replacement, Terrorism Prevention and Investigation Measures (TPIMs), reflected considerable movement by both of the governing parties forming the coalition government of the UK. To a greater or lesser extent, they had both been opposed to the orders in any form. One can assume that the material they were shown after entering government changed their views.

The coalition sought to change the previous system which, according to their view, involved oppressive prohibitions, and instead preferred to impose measures that could facilitate further investigation as well as prevent terrorist activities. Additional investigatory resources were provided to complement the new regime of lighter-touch prohibitive measures. It was accepted, by the nature of the two strands of measures (prohibitive and investigatory) sought, that covert investigative techniques, including surveillance, cannot themselves control terrorist suspects, but can help to do so and may produce evidence for use in a prosecution. This was used as justification for the new system.

### Terrorism Prevention and Investigation Measures Act 2011

The Terrorism Prevention and Investigation Measures Act 2011 (the 2011 Act) represents a major shift in approach by the executive, giving prominence to the rights of the individual suspected of involvement in terrorism-related activity. In accordance with the coalition's stated intentions, the 2005 Act was repealed on 15 December 2011 and replaced by a system of TPIMs. Transitional provisions were contained in Schedule 8. Control orders, in force immediately before commencement, were to remain in force until 42 days after commencement (Schedule 8, paras. 1 and 9). Thus no control order could be made or renewed after 15 December 2011 or continued after 26 January 2012, other than in respect of hearings relating to pre-existing reviews, appeals and damages claims (Schedule 8, para. 3).

In order for a TPIM to be imposed, the higher test of 'reasonable belief' by the Secretary of State, and the court on a review, must be satisfied that the individual is or has been involved in terrorism-related activity. This higher threshold test was imposed following its recommendation by Lord Macdonald of River Glaven, QC, in his review of counter-terrorism and security powers (Macdonald, 2011).

The TPIM notice itself and the associated measures must be both proportionate and necessary (replicating the test that applied to control orders). The disclosure process and appeal procedure were also similar to that which went before and, as before, criminal prosecutions were to be preferred to civil proceedings.

The key differences between the two regimes are:

- The two-year limit: A TPIM notice is in force for the period of one year but may be extended by an additional year only once if certain conditions are satisfied, for example, the suspect is or has been involved in terrorism-related activity (condition A); a TPIM is necessary (condition C); and the measures are necessary (condition D). Subsequent TPIM notices may be imposed but only if the individual has engaged in terrorism-related activity since the imposition of the last notice. The effect has been that all TPIMs have lapsed.
- The TPIM may be extended beyond the second year if new terrorism activity is undertaken (condition B).



- Under a TPIM, there is no power to relocate the individual to an area away from those with whom he or she may engage in terrorism-related activity.
- The curfew obligation has not been replaced, although a similar measure of 'overnight residence' exists, imposing something similar to the 'doorstop' curfew familiar in criminal bail conditions. Verification of location is possible by electronic tagging with GPS.
- Exclusion zones: The boundary imposed by control orders is no longer permitted, thereby allowing greater freedom of movement.
- Communication and association: Individuals subject to a TPIM are entitled to one computer with Internet access and one mobile phone (previously neither Internet-enabled telephones nor computers were permitted).

The two-year limit creates a problem as to what to do with individuals who, after two years, have not changed their terrorist mind-set but who have not, during the TPIM, re-engaged in terrorism-related activity. It may be that they have decided to put terrorism behind them. Alternatively, it may be that they are simply biding their time and intending to re-engage in terrorism-related activity once the order has been lifted.

One practical problem is illustrated in the case of AM and AY, suspected of involvement in a transatlantic airline plot involving a conspiracy to murder hundreds of innocent travellers, for which sentences of up to 40 years were imposed. They were at liberty and free from all statutory controls by early 2014. No further measures may be imposed on them under the TPIM regime. The police may, of course, devote resources to watching them and monitoring their activities using personal and technical surveillance methods, but how effective can they really be?

It has been suggested that the extra threat may be neutralized by the provision of additional resources to the Security Service. This formed a central plank of the justification for the TPIM regime. However, taking as an example the murder of Drummer Lee Rigby in 2013, some regard it as unrealistic to expect the authorities to be capable of anticipating street-based terrorist crime, committed by individuals acting with limited direction and with little planning and preparation. The authorities have been criticized for failing to recognize that one of the suspects posed a threat to life which could have led to the imposition of a control order or TPIM on him, following the accusation by Kenyan authorities in 2010 that he led a group of youths to join the terrorist group Al Shabbab (Flood, 2013).

Nevertheless, the TPIM system enables the security services to prioritize the application of their limited resources to individuals who are perceived at any given time to pose the greatest threat. That threat in part may be neutralized by these orders. The cases of AM and AY raise interesting issues that are not legal in nature but reflect the difficulties faced in seeking to change mind-set and to prevent destructive belief systems which attract minute but disproportionately dangerous support in some communities. This is the challenge of the Prevent strand of the government's counter-terrorism policy (Home Office, 2011).



## Procedural Constraints

Pervading much legislation on counter-terrorism and connected litigation are concerns with torture, closed material proceedings, intelligence sharing and disclosure. There has been tension politically between the desire to maintain good standards of disclosure and public hearings on the one hand, and, on the other, the need to protect national security and the public purse from paying damages to claimants who were properly judged to be terrorists.

### Torture

Torture is the subject of an absolute ban under ECHR Article 3 and the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment:<sup>2</sup> it is illegal. Following the case of *A and others v. Secretary of State for the Home Department* (2005), the question arose, when determining the legality of a certificate given by the Secretary of State that a person was a suspected terrorist and could therefore be detained (pursuant to the now repealed 2001 Act), whether SIAC could rely on evidence which the appellant suspected had been obtained from overseas governments who had obtained it by torture of other persons. The House held that, while the executive would not act unlawfully if in its decision-making it took account of evidence provided by foreign states which was likely to have been obtained by the use of torture, evidence obtained by torture was inadmissible in a court of law.

Whether Her Majesty's Government engaged in such activity has become a matter of legal challenge in Guantánamo Bay litigation, including civil damages claims and Norwich Pharmacal disclosure cases, in which detainees have sought to challenge the UK and US governments on the basis that their detention at Guantánamo Bay was unlawful and that alleged confessions were obtained from them by torture, evidence of which is purportedly held by the British authorities (see *Mohamed, R (on the application of) v. Secretary of State for Foreign & Commonwealth Affairs*, 2010; Gardham & Rayner, 2010). A Norwich Pharmacal order is an order granted against a third party, which has been innocently caught in wrongdoing, forcing the disclosure of documents or information. By identifying individuals, the documents and information sought are disclosed in order to assist the applicant for such an order in bringing legal proceedings against individuals who are believed to have wronged the applicant.

While the UK courts do not allow evidence obtained from torture to be relied on, thereby upholding the rule of law, what is unclear is how the British authorities deal with other countries that do use torture. Put simply, and in context, how should UK authorities react to a piece of information obtained after torture by another country, but which demonstrates the possibility of a suicide bomber at a major public event? The answer under English law is probably that the authorities must use the information to protect the public, could not use the foreign intelligence as part of a





prosecution, but could use as evidence the ‘fruits of the poisoned tree’, that is, the evidence gathered by UK authorities following the receipt of the tainted intelligence.

### Justice and Security Act 2013: Disclosure and closed material procedures

The most recent and contentious issue relating to terrorism cases has involved the extension of cases where ‘secret’ hearings may take place. The term ‘secret’ to describe these hearings is a misnomer; all parties to the litigation are aware of the closed proceedings, in which evidence relating to national security is heard by the judge in the presence of the party holding the confidential material and of special advocates who represent the interests of the individual concerned. The Justice and Security Act 2013 (the 2013 Act) creates, for the first time, statutory provision for the protection of national security sensitive material in generic civil litigation where it is in the public interest.

Closed material procedures (CMPs) allow courts to hear national security evidence within a controlled environment to ensure that the tribunal hears the relevant evidence and that there is no damaging disclosure of national security information to the public at large. Their use has been extended to a restricted range of civil proceedings following the 2013 Act (see below).

Historically, closed material procedures were exercised in immigration appeals concerning foreign nationals suspected of terrorism and, with respect to British nationals, in the High Court in control order/TPIM cases. The government was keen to extend the use of CMPs. Without them, their options were limited to either seeking to strike out claims or settling them, often for large sums of money, even where they believed that the case had no merit.

The government sought to rely on CMPs in civil claim cases. The Supreme Court judgment in *Al-Rawi and others v. Security Service and others* (2011) held that there is no power at common law to impose a CMP in such cases. Al-Rawi and others claimed compensation for their alleged detention, rendition and mistreatment by foreign authorities in various locations, including Guantánamo Bay, in which, they claimed, the Security Service had been complicit. The court held there was no power at common law to replace public interest immunity (PII, whereby a judge decides whether, in the public interest, certain material should be excluded from a hearing) with a CMP (designed to allow the national security material to be included in the hearing but not to be revealed to a party to the litigation).

In response, the government enacted the 2013 Act, which introduced closed material procedures in civil trials relating to national security where it had been intended that the executive would decide when to deploy ‘secret’ hearings into all relevant civil litigation (see above). In its passage through Parliament several amendments were tabled, led by Lord Pannick, QC, among others (Pannick, 2013). Section 6 was amended, significantly, to ensure that a CMP is a procedure of last resort, imposed at the discretion of the court. The court will conduct a PII exercise, disclosing material



where possible prior to deciding whether a CMP applies to the remaining material. The background to and perceived needs for the Act can be found ubiquitously.<sup>3</sup>

Lord Pannick, QC, was strongly opposed to the introduction of CMPs to civil litigation in general as the proposals were of constitutional significance, namely, (1) it was contrary to the principle of open justice which required evidence to be given in public; and (2) it was contrary to the principle of natural justice that each of the disputing parties must have the opportunity to respond to the evidence on which the other relies.

The debate produced opposition from many quarters that included a hefty riposte from Peto and Tyrie (2013) which suggested that it risked damaging Britain's system of open justice and the reputation and effectiveness of the security agencies in the struggle against terrorism. They claimed three major areas of concern in the bill: (1) the expansion of 'secret justice' through the introduction of CMPs to civil cases, enabling the government to present its evidence in secret session in the absence of the other party or his or her lawyers, the press or the public; (2) blocking the use of the information-gathering principle known as Norwich Pharmacal in cases deemed to be 'sensitive', making it harder to uncover official wrongdoing in matters such as extraordinary rendition (the kidnapping and torture of individuals by the state); and (3) inadequate proposals to strengthen the Intelligence and Security Committee (ISC), which is supposed to oversee the intelligence services but which failed to uncover the truth about rendition.

David Anderson, QC, Independent Reviewer of Terrorism Legislation since 2011, advised that there was a case for extending the use of CMPs, although he was convinced that the decision was one for the judge to make and not, as tabled by the government, a decision for the executive.

Lord Phillips of Worth Matravers when contributing to the Lords debate concluded:

I am reluctantly persuaded of the need, in the interests of justice, for a closed material procedure in exceptional cases where the Government would otherwise have no alternative but to submit to a civil claim for damages because to defend it would necessarily involve putting into the public domain material that would cause disproportionate harm to national security. It is for that reason that I support the batch of amendments tabled by the noble Lord, Lord Pannick, and the other noble Lords in relation to Clauses 6 and 7 (relating to the election of CMP by the judge hearing the case and not the Executive). (Phillips, 2012)

The House of Lords voted for major amendments to the bill, seeking to introduce more discretion for judges, and not the executive, to make use of CMPs as a device of last resort. Debate raged for months on these and other related issues and finally resulted in the shift of power to elect whether a case merited the CMP process, from the executive to the judiciary, marking a significant change of direction for the government.



Following significant amendments to the bill, arguably the greatest remaining flaw in the Act relates to the limited role played by special advocates who generally may not take instructions from the claimant once they have read the sensitive material. Plainly, the CMP system would be strengthened were measures adopted to enable special advocates routinely to take instructions from the individual whose interests they protect.

Following the contentious Guantánamo Bay litigation, the 2013 Act provides a statutory regime, pursuant to section 17, prohibiting disclosure of sensitive information, thereby protecting the agreement of confidentiality between the US and the UK described as the ‘control principle’, the principle that the UK does not have permission to reveal any intelligence that the US passes on in confidence, a principle at the heart of foreign intelligence sharing.

Additionally, oversight of intelligence and security activities has been strengthened by amending the nature and role of the Intelligence and Security Committee (ISC) to increase its independence of the executive. It will now report to Parliament rather than the prime minister. The committee is further empowered to oversee the expenditure, administration, policy and (most significantly) operations (albeit not ongoing intelligence operations) of the Security Service, Secret Intelligence Service and Government Communications Headquarters.

While criticism is still made about this Act, it has benefited from a protracted and vigorous debate in both Houses of Parliament. It complies well with the rule of law as described earlier in this chapter.

## Conclusions

Conflicts have abounded as each successive measure has been taken to tackle the unique problems posed by terrorism. While the executive seeks to prevent major incidents by imposing measures to prevent attacks, the libertarian backlash against infringements of liberty have largely been played out in the courts, often after hasty legislation, rather than in lengthy debate resulting in consensual legislation. That said, in a sometimes febrile parliamentary setting, consent would be a tall order. Perhaps the 2013 Act demonstrates a maturing of terrorism legislation. It took many months of critical debate to create an Act which, while not welcomed by liberty campaigners, at least may claim some consensus, having adopted many of the amendments tabled by Lord Pannick, QC, and others, who shored up the rule of law by removing the decision to elect a CMP from the executive and putting it into the hands of the judiciary as a measure of last resort.

The post-2010 coalition government appears to have taken on board past criticism. The two-year limit to TPIMs appears to be a response to the outcry against the control order regime. The executive perhaps has come to recognize that the problem of home-grown terrorists may not be solved proportionately by containment with draconian measures.



Intense scrutiny applies to the imposition and application of terrorism legislation and is a result of the chequered history of legislation in this field. While critics of terrorism legislation in the UK still condemn various aspects, as a whole the UK's approach has gained international respect and even emulation (Roach, 2011).

It is our view that, broadly, what most objective commentators interpret as the rule of law has prevailed in this area of the law. That is to say, proportionate laws falling within accepted human rights norms have been devised and operated. There have been some failures, but it must be accepted that this is an exceptionally difficult, asymmetric and fluid area of the law and of public policy, given the changing nature of the threat.

The increased scrutiny now afforded to legislation in this field is valuable and important, scrutiny not just by the Independent Reviewer of Terrorism, but also by the intense debate in Parliament in relation to measures that seek to balance protection of the public with protection of individual freedoms and further in court by the judiciary who will have increased jurisdiction over national security matters under the extended closed material procedures.

The case law reviewed in this chapter reveals how specific cases have led to significant changes to policy and legislation. It is as if the legislators have grown up with the practitioners and judiciary in this field and, while there are diametrically opposed views as to approach, there is an increasing harmony to the law governing terrorism.

It would appear that the intense scrutiny applied by civil liberties campaigners, the courts, the media and the public is having a significant impact on the manner in which the UK legislates in this field. The democratization of terrorism laws in this way has resulted in increased legislative restraint. Such legislation is an art, not a science: the rule of law is probably the winner as matters stand at the time of writing, but the quality of legislation deserves eternal vigilance, as of course does the continuing struggle against terrorism of all kinds.

## Notes

- 1 See [www.iraqinquiry.org.uk](http://www.iraqinquiry.org.uk) (retrieved 21 May 2014).
- 2 At <http://www.hrweb.org/legal/cat.html> (retrieved 21 May 2014).
- 3 For example, HM Government, 2011; House of Lords Select Committee on the Constitution, 2012; Joint Committee on Human Rights, 2012.

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