

Commentary

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International Law on Terrorism: Moving Forward or Backward?¹

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Abstract

This research will be specifically focusing on implemented legislations for eliminating terrorism. There is no need to mention exclusively again that it began many years ago but after the 9/11 and London bombing, it raised mostly. Among all the most controversial issue would be the “Control Order” measure implemented by the Western World specifically implemented by the UK Government. Here, in this research it will mostly, be focused on whether this so called “effective measures” against preventing terrorism really working or just making it going back to Barbarian times by opting out some core human rights and simply penalizing the innocents. It will also be scrutinized that, whether major legislations on terrorism like “prevention of terrorism act 2005”, also “counter-terrorism act 2008” and many more relevant provisions are compatible with ECHR, UDHR ICCPR or not. Finally there will be some exploring of what the experts opinion regarding this worldwide.

Keywords: United Kingdom, Terrorism, Anti-Terrorism Provision, Human Rights, ISIS

1. Difference between anti-terrorism legislation and counter-terrorism legislation

Quite often it is misunderstood by these two terms as “same” but they are quite different in some extent. Anti-terrorism legislation designs all types of laws passed in the purported aim of fighting terrorism. They usually, if not always, follow specific bombings or assassinations. Anti-terrorism legislation usually includes specific amendments allowing the state to bypass its own legislation when fighting terrorism-related crimes, under the grounds of necessity.

Because of this suspension of regular procedure, such legislation is sometimes criticized as a form of lois scélérates² which may unjustly repress all kinds of popular protests. Critics often allege that anti-terrorism legislation endangers democracy by creating a state of exception that allows authoritarian style of government. Governments often state that they are necessary temporary measures that will be dispelled when the danger finally vanish.³

¹ This commentary reflects the author’s research and opinions.

² The lois scélérates (“villainous laws”) is the pejorative name for a set of French laws restricting the 1881 freedom of the press laws passed under the Third Republic (1870-1940), after several bombings and assassination attempts carried out by anarchist proponents of “propaganda of the deed”.

³ Virginia possible Bombing attack, 2006.

However, most anti-terrorist legislation remains in activity even after the initial target of it has been eliminated. Measures which may be included by anti-terrorism legislation include preventive detention (that is, detention without trial), control orders in the UK⁴ and Australia⁵, warrant less searches in the United States⁶.

On the other hand, Counter-terrorism is the practices, tactics, techniques, and strategies that governments, militaries, police departments and corporations adopt in response to terrorist threats and/or acts, both real and imputed⁷.

The tactic of terrorism is available to insurgents and governments. Not all insurgents use terror as a tactic, and some choose not to use it because other tactics work better for them in a particular context. Individuals, such as Timothy McVeigh⁸, may also engage in terrorist acts such as the Oklahoma City bombing⁹.

If the terrorism is part of a broader insurgency, counter-terrorism may also form a part of a counter-insurgency doctrine, but political, economic, and other measures may focus more on the insurgency than the specific acts of terror¹⁰. Foreign internal defence (FID)¹¹ is a term used by several countries for programs either to stifle insurgency, or reduce the conditions under which insurgency could develop. Counter-terrorism includes both the detection of potential acts and the response to related events.

2. Background (control order)

A brief background is required, although there were provisions available in to act against terrorism, such as Terrorism Act 2000, but after the 9/11 and London bombing tension, some

⁴ Prevention of Terrorism Act, 2005

⁵ <http://www.aph.gov.au/library/pubs/rp/2007-08/08rp28.pdf>

⁶ USA PATRIOT Act 2001

⁷ security.homeoffice.gov.uk/counter-terrorism-strategy

⁸ Timothy James McVeigh (April 23, 1968 – June 11, 2001) was a United States Army veteran and security guard who was convicted of bombing the Alfred P. Murrah Building in Oklahoma City on April 19, 1995, the second anniversary of the Waco Siege, as revenge for, or to inspire a revolt against what he considered a tyrannical federal government. The bombing killed 168 people and was the deadliest act of terrorism within the United States prior to the September 11, 2001 attacks. He was convicted of 11 federal offenses, sentenced to death and executed on June 11, 2001.

⁹ The Oklahoma City bombing occurred on April 19, 1995 when American militia movement sympathizer Timothy McVeigh, with the assistance of Terry Nichols, destroyed the Alfred P. Murrah Federal Building in downtown Oklahoma City. It was the most significant act of terrorism on American soil until the September 11 attacks in 2001, claiming the lives of 168 victims and injuring more than 680. The blast destroyed or damaged 324 buildings within a sixteen-block radius, destroyed or burned 86 cars, and shattered glass in 258 nearby buildings. The bomb was estimated to have caused at least \$652 million worth of damage.

Motivated by the federal government's handling of the Waco Siege (1993) and the Ruby Ridge incident (1992), McVeigh's attack was timed to coincide with the second anniversary of the Waco Siege. Within 90 minutes of the explosion McVeigh was stopped by Oklahoma State Trooper Charlie Hanger for driving without a license plate, and arrested for unlawfully carrying a weapon. Forensic evidence quickly linked McVeigh and Nichols to the attack, and within days they were arrested and charged; Michael and Lori Fortier were later identified as accomplices. Extensive rescue efforts were undertaken by local, state, federal, and worldwide agencies in the wake of the bombing, and substantial donations were received from across the country. The Federal Emergency Management Agency (FEMA) activated eleven of its Urban Search and Rescue Task Forces, consisting of 665 rescue workers who assisted in rescue and recovery operations.

¹⁰ security.homeoffice.gov.uk/counter-terrorism-strategy

¹¹ Foreign internal defense (FID) is used by a number of Western militaries, including the United States, France and the United Kingdom, to describe an approach to combating actual or threatened insurgency in a foreign state called the Host Nation (HN). The term counter-insurgency is more commonly used worldwide than FID. The United States, and even NATO, cannot control all insurgencies, however regional powers such as Nigeria and Brazil, as well as organizations such as the African Union (AU) and the Association of Southeast Asian Nations (ASEAN), have shown an increased willingness to take some responsibility for containing turmoil in their regions

provisions were specifically designed to prevent modern terrorism (Islamic Extremism). So the most controversial issue; control order' which had followed precedent from Australia¹² and warrant less search order issued by USA government¹³ simply by detaining and opting most core human and legal rights.

The power to make control orders was voted through Parliament on the evening of 11 March 2005 after a famously long session of Parliamentary ping-pong¹⁴. This is neither a civil or criminal aspect grown on the basis of the crisis; clearly it falls in "no mans land".¹⁵ The ten detainees of the Part 4 of the Anti-terrorism, Crime and Security Act 2001 were released from Belmarsh and were immediately subject to control orders¹⁶ On March 24 2005, one of the men, Abu Rideh, gave a newspaper interview where he denied having any connection with terrorism, and was able to outline the contents of his order.¹⁷ 3 points were made out-

- He is not allowed to make arrangements to meet anybody, but he can meet them if he does so unannounced
- He cannot attend any pre-arranged meetings or gatherings, but was present at the anti-war demonstration at Hyde Park last Saturday. He says he stumbled across it while playing football in the park with his children;
- He is banned from having visitors to his home unless they are vetted in advance, but he is allowed to arrange to attend group prayers at a mosque;

On April 16 2005, it was reported that all 10 control orders had been printed with the same reason, connecting individuals with the Wood Green "ricin plot"¹⁸. It was highly blamed on a "clerical error"¹⁹.

¹² Australian Anti-Terrorism Act 2005.

¹³ USA PATRIOT Act 2001

¹⁴ Parliamentary ping-pong is a phrase used to describe a phenomenon in the Parliament of the United Kingdom, in which legislation appears to rapidly bounce back and forth between the two chambers like a ping-pong ball bounces between the players in a game of table tennis

¹⁵ Research Method LLM 2010, Susan Edwards, Dean, University of Buckingham

¹⁶ Charles Clarke Written Ministerial Statement, 13 March 2006 col. 88WS Control Order Powers (11 December 2005-10 March 2006)

¹⁷ Charles Clarke Written Ministerial Statement, 24 April 2006 col. 32WS Control Order Judgment

¹⁸ The Wood Green ricin plot refers to a 2002 bioterrorism alleged plot on the London Underground railway system, in which ricin poison would have been manufactured and used for an attack. It was believed the attack had connections with Al-Qaeda. Police arrested seven suspects on 5 January 2003.

Within two days, the Biological Weapon Identification Group, at the Porton down Defence Science and Technology Laboratory, were sure that there was no trace of ricin on any of the articles that were found. This fact was initially misreported to other government departments as well as to the public, who only became aware of this in 2005. Reporting restrictions were in place before the public's perceptions could be corrected.

The only subsequent conviction was of **Kamel Bourgass**, sentenced to 17 years for conspiring "together with other persons unknown to commit public nuisance by the use of poisons and/or explosives to cause disruption, fear or injury" on the basis of five pages of his hand-written notes on how to make ricin, cyanide and botulinum. He was already sentenced to life in prison for the murder of DC Stephen Oake, whom he stabbed to death during his arrest in Manchester. Bourgass also stabbed three other police officers at the same time; they all survived. All other suspects were either released without charge, acquitted, or had their trials abandoned.

¹⁹ John Reid Written Ministerial Statement, 12 June 2006 col. 48WS Control Order Powers (11 March 2006-19 June 2006)

3. Recent controversy

After implementing this 'control order', According to the most up to date figures for January 2010, there are 12 control orders in force - three fewer than a year before. Some 45 people have been subject to the controls since the system was created. Six of the foreign nationals held under the restrictions have been deported.²⁰ What this measure did by coming into force; is set up a new template of restrictions which are listed below-

- Electronic tagging
- No passport
- Live at one address
- Curfews
- Restrictions on visitors
- No internet
- Attend only one mosque
- Daily reporting to the police
- Daily monitoring by phone

The other legislation counter terrorism 2008 put more restrictions they are also listed below

- Removal of the prohibition on post-charge questioning.
- Longer terrorism sentences.
- A register and monitoring for those convicted of terrorism related offences, similar to the Violent and Sex Offender Register.
- Changes to some of the rules surrounding the use of "intercept evidence".
- Powers to seize the assets of convicted terrorists.
- Police will be able to remove documents from a property search to decide whether or not they need to be legally seized as part of an investigation.
- Greater use of DNA samples, and powers to allow the police to take fingerprints or DNA from those subject to a control order (these orders are civil restraints, not criminal offences).

In 2009 when the ban on taking photograph of certain class of security forces came into force; it created a massive chaos. Section 76 of the act suggests it is an offence to elicit, attempt to elicit, or publish information of a kind likely to be useful to a person committing or preparing an act of terrorism²¹ about:

- a member of Her Majesty's Armed Forces,
- a constable,

²⁰ BBC.CO.UK

²¹ Section: 75 (1) CTA 2008

- the Security Service,
- the Secret Intelligence Service, or
Government Communications Headquarters.

Any person found guilty faces 10 years imprisonment and an unlimited fine. It is a defence for a person charged with this offence to prove that they had a reasonable excuse for their action. Although there are exemptions for communications service providers, web caches and web hosting services²²

There was a mass protest outside Scotland Yard in February 2009.²³ Gordon Brown reaffirmed that the police have a legal right to restrict photography in public places, and stated "the law applies to photographers as it does to anybody else in a public place"²⁴ The act however does not lay out restrictions for the photography of Community Support Officers as they do not hold the office of Constable.²⁵

The Parliamentary debate on this law was limited owing to the fact that in earlier versions of the Bill the offence of eliciting or publishing information "likely to be useful to a person committing or preparing an act of terrorism" only applied to people who were or had been members of Her Majesty's Forces, and not to the police²⁶. This was also the case throughout the debate in the Standing Committee. But some demand made by the opposition, to change the phrase; the minister interfered by addressing current case law (*R v K*²⁷) and also said there is no necessity for that because that would only restated earlier laws.²⁸

The law against eliciting or publishing information "likely to be useful to a person committing or preparing an act of terrorism" was extended to encompass police constables in a raft of unscrutinised amendments²⁹ that passed into the Bill at the end of the debate when the Parliamentary timetable (which had been voted on earlier in the day) expired³⁰. When this clause was scrutinized in the House of Lords,³¹ and in all subsequent debates, no reference was made to the extension of the law to include police constables.³²

4. Control order

A control order is an order made by the Home Secretary of the United Kingdom to restrict an individual's liberty for the purpose of "protecting members of the public from a risk of terrorism"³³. Its definition and power were provided by Parliament in the Prevention of Terrorism Act 2005.

²² section: 74-76,CTA-2008

²³ "Is it a crime to take pictures?" BBC News. 16 February 2009

²³. www.bjp-online.com/public/showPage

²⁵ "Is it a crime to take pictures?" BBC News. 16 February 2009

²⁶ Section 69, CTA 2008

²⁷ *R v K* (2008) EWCA 185 47 (Appeal Court)]. 13 February 2008

²⁸ "Public Bill Committee - Counter-Terrorism Bill - 13th Sitting". 15 May 2008

²⁹ "Clause 71 - offences relating to information about members of armed forces". 10 June 2008

³⁰ "Counter-Terrorism Bill - Timetable". The Public Whip. 10 June 2008. <http://www.publicwhip.org.uk/>

³¹ Baroness Faulkner of Margravine (21 October 2008). "Counter-Terrorism Bill - Committee 4th sitting".

³² Baroness Falkner of Margravine (21 October 2008). "Counter-Terrorism Bill - Committee 4th sitting".

³³ Section 1 (1) PTA 2005

The home secretary has the power to make two different types of control order. The first type lasts for a year and includes strict conditions such as home curfews and bans on who a suspect can meet (non-derogating). The other form is opting-out of some human rights laws to severely restrict the movements of an individual in a public emergency situation (derogating).³⁴

The control orders section of the Prevention of Terrorism Act 2005 provides for extremely limited rights of appeal and the absence of double jeopardy restrictions³⁵. This has led to many court rulings highly critical of the orders.³⁶

The list of possible restrictions and obligations that can be included in a control order is long. It can place restrictions on what the person can use or possess his place of work, place of residence, whom he speaks to, and where he can travel. Furthermore, the person can be ordered to surrender his passport, let the police visit his home at any time, report to officials at a specific time and place, and allow him to be electronically tagged so his movements can be tracked³⁷.

In short, it provides for a graduated scale of technological "prisons without bars" that are intended to work within the European Convention on Human Rights.³⁸

When the control order crosses the line and "deprives liberty", rather than "restricts liberty", it is called a derogating control order because it infringes Article 5 of the ECHR.³⁹ This can only happen if there is derogation according to Article 15, and the Home Secretary must apply to a court for the authority. Derogation is only allowed when there is a "war or other public emergency threatening the life of the nation"⁴⁰.

The ECHR states that the government cannot deprive any person of their liberty without due process of law. This process must include informing the person of the accusation against him, giving him access to legal assistance to prepare his defence, and giving him the right to have his case heard and decided in public before a competent court.⁴¹

5. Has the law developed?

The Law Lords (now the Supreme Court) issued a string of important judgements on the future of the regime. The judges have limited the time that someone can be forced to stay in their own home to 16 hours. In 2007, the Law Lords rejected a claim that control orders amounted to a criminal punishment without a fair trial.⁴²

Then in 2009, the Lords set out new rules for the use of intelligence material after a judgement on secret evidence from the European Court of Human Rights. The judges said that some control orders action had been denied a fair hearing because they did not even know the gist of the case against them they deserved, the Lords ruled, to know an "irreducible minimum" of the

³⁴ PTA 2005 sec 2 and 4

³⁵ (if a recipient managed to win an appeal in the Court of Appeal or other tribunal - the home office could simply re-apply the same order again) R v K (2008) EWCA 185 47 (Appeal Court)", 13 February 2008

³⁶ A v Secretary of State for the Home Department [2004] EWCA Civ 1123

³⁷ A v Secretary of State for the Home Department [2005] EWCA Civ 1123; M v Secretary of State for the Home Department [2005] EWCA Civ 1123

³⁸ Judge's reject government control order appeal, A v Secretary of State for the Home Department [2004] EWCA Civ 1123

³⁹ A v Secretary of State for the Home Department [2005] 3 UKHL 56; a declaration was made that s 23 of the ACS act 2001 was incompatible with art 5 and 14 of ECHR.

⁴⁰ Are we under attack? bbc.co.uk. 7 April 2008

⁴¹ Art 6 (3)(a-e) "Right to a fair trial"

⁴² R v F, court of appeal (criminal division) February 16th (2007) EWCA Crim 243 (2007) 2 ALL ER 193

allegations.⁴³ There will be no shortage of examples for prospecting the weaker nature of the provision.⁴⁴

It is obviously quite clear that this ‘control order’ propaganda from PTA 2005 is full with fundamental errors otherwise it could not be disrespected by the honourable judges. It may be wise enough to say that the law has not developed but has started slight progress.⁴⁵

6. Future development?

It all comes down to what material the home secretary, on the advice of his security officials, was prepared to put in the public domain. A great deal of the material totalled against control order suspects is information gathered by MI5.⁴⁶

It may include telephone taps, transcripts of audio bugs, tip-offs from important informants or information from other intelligence agencies around the world - in fact anything that could be classed as useful information.⁴⁷

Officers then make an assessment about what the information means - and this helps them to target the people they think are the most dangerous. So, needless to say the above lines of actions are standing on the vicinity of abuse of basic human rights and all these provisions are supreme candidates of incompatibility with ECHR provision and according to case they hold a high claim of it⁴⁸. So it would be interesting to make a contrast and compare with West Algeria and France incident, which is considered easily one of the most brutal occupations of the history, where all sorts of possible injustice happened with the rebels. And the present provision is also criminalising the suspects (considered as terrorist in the battle of West Algeria) in the almost same way the only difference is the passing of time.⁴⁹

It also might create a damaging reputation of more than 1000 years old and supreme role model to every other country in the world for the “Rule of Law”. Already this measure received numerous hatred and bad faith all over the world with also a question for proper democracy in UK.⁵⁰ There is definite justification to fight and eliminate against terror but with proper preparation not just following blindly USA, Israel and Australia.⁵¹ If a glance could be made on one of the control suspects feeling about it might get clearer AE⁵²(it is not permitted to use the real name) said on an interview in BBC "Where's the evidence?" he says. "It's all closed material. I can't defend myself - I'm in the dark, I'm in this nightmare."⁵³

⁴³ Secretary of State for the Home Department v E; [2008] EWHC 585 (Admin); [2008] A.C.D. 73; (2008) 158 N.L.J. 520

⁴⁴ Secretary of State for the Home Department v AF; [2008] EWCA Civ 117; [2008] 1 W.L.R. 2528; [2008] A.C.D. 55

⁴⁵ Secretary of State for the Home Department v MB ; [2006] EWCA Civ 1140; [2007] Q.B. 415

⁴⁶ A v Secretary of State for the Home Department [2005] EWCA Civ 1123; M v Secretary of State for the Home Department [2005] EWCA Civ 1123

⁴⁷ PTA 2005 sec 6-9

⁴⁸ Secretary of State for the Home Department v F [2008] EWCA Civ 1148; [2009] 2 W.L.R. 423; E v Secretary of State for the Home Department [2009] 2 All E.R. 602; secretary of State for the Home Department v N; U.K.H.R.R. 176; [2009] A.C.D.

⁴⁹ The Battle of Algiers” Gillo Pontecorvo 1966; F Fancon, the wretched of the Earth (LPC new edition 2001) **originally taken from Susan Edward’s sample research paper for Research Method 2010

⁵⁰ counter measures and modern daterrorism Hudson, L, Cambridge law journal, pp17-21

⁵¹ Stanley Burnton, J on Secretary of State for the Home Department v AF; [2008] 4 All E.R. 340; (2008) 158 N.L.J. 557

⁵² Secretary of State for the Home Department v AF; [2008] 4 All E.R. 340; (2008) 158 N.L.J. 557

⁵³ 'My life under a control order' By Dominic Casciani
BBC News 10:25 GMT, Wednesday, 10 June 2009 11:25 UK

Another example as E⁵⁴ - an Iraqi-Kurdish Imam in his thirties - is one of 17 current controlees, and part of the trio who have argued that they simply cannot defend themselves in court because they have never seen the evidence that led to their loss of liberty.

His story began in 2002. AE fled Iraq after being imprisoned at Abu Ghraib jail by Saddam Hussain's regime, for political activity. He says he spent 40 days in "a hole in the ground" with some 50 other suspects.

He was given the right to stay in the UK and settled into a new life as an Imam, leading prayers at a mosque near his home and performing regular sermons.⁵⁵

So most of the examples are like that and what is funny here is most of the convicted people were acquitted with compensation.

These legal instruments are enough to defend Al-Qaeda, ISIS and other Terrorist organizations? I will now discuss very briefly about something which is probably remote from my research. But I still feel the urge to discuss. The "war on terror" directed by 'Bush administration' and co ownership by Mr Blair and Lord Gold smith was for eliminating "terror" precisely. For elaboration, to opting out mainstream terrorist organisations. That was the "external" action against terror and implementing these anti and counters terrorism provisions can classified as "internal" actions. Personally it was a bold move but my straight question is how much successful they are now? Is executing Saddam Hussein enough to free the world from weapons against mass destruction? The answer has to be negative. So I am now focusing on the internal action taken, I do not want to create a debate over whether the "Iraq war was lawful or not" but my question again is implanting control order might be reasonable but can somebody ignore about the torture and injustice occurred to the suspects? Such as E⁵⁶ has gone to his normal life but is it not possible that he returns for his retaliation and join with those monstrous organisation?. So what all these provisions and precisely 'control order' done is; they all failed at the first place and successfully possibly created more hatred and danger. And that exactly what these provisions were made not for.

Last but not least, my personal view is; these provisions are complete failure and far away from their objective. The control order only created divide and hatred and nothing else. To prosecute Bin Laden's⁵⁷ colleagues in this country needs more concise and flexible with wider ranged legislation. Or otherwise there is threat of more terror and no one of them will be prosecuted and they will get more volunteers from UK who has been wrongfully prosecuted by these legislations; precisely by control order.

⁵⁴ Secretary of State for the Home Department v E; [2007] UKHL 47; [2008] 1 A.C. 499; [2007] 3 W.L.R. 720; [2008] 1 All E.R. 699; [2008] H.R.L.R. 7; [2008] U.K.H.R.R. 69; [2008] Crim. L.R. 486; (2007) 157 N.L.J. 1578; (2007) 151 S.J.L.B. 1433

⁵⁵ 10:25 GMT, Wednesday, 10 June 2009 11:25 UK

⁵⁶ Secretary of State for the Home Department v E; [2007] UKHL 47; [2008] 1 A.C. 499

⁵⁷ Osama bin Mohammed bin Awad bin born March 10, 1957) is a member of the prominent Saudi bin Laden family and the founding leader of the terrorist organization al-Qaeda, best known for the September 11 attacks on the United States and numerous other mass-casualty attacks against civilian targets. Bin Laden is on the American Federal Bureau of Investigation's list of FBI Ten Most Wanted Fugitives though he is not on the list for 9/11 nor has he been charged for these attacks. Since 2001, Osama bin Laden and his organization have been major targets of the United States' War on Terrorism

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