An Assessment of UK Anti-Terrorism Strategy and the Human Rights Implications Associated with its Implementation

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Introduction

Following 9/11, anti-terrorism legislation in the United Kingdom became more stringent, thus widening the scope of offences that qualify as terrorist acts and encroaching on the human rights and fundamental freedoms of the accused. Despite the distinction between the terms 'anti-terrorism' and 'counter-terrorism' they are often used interchangeably. Whereas counter-terrorism broadly refers to offensive measures of a preventive, deterrent and pre-emptive nature, anti-terrorism refers to the construction and use of defensive measures to reduce a terrorist threat.[1] Anti-terrorism, by definition, is therefore narrower in scope.

The varied nature of terrorist offences necessitates a range of governmental responses, which poses difficulties in evaluating the effectiveness of the UK anti-terrorism strategy by using a universal methodology.[2] Instead a comparative approach is used to identify similarities between the anti-terrorism strategy in the United Kingdom and the United States. Besides the effectiveness of a strategy in achieving its political aims, legitimacy and public confidence are equally important factors, and thus emphasis is places on such factors.[3]

Evolution of the United Kingdom Anti-terrorism Strategy

The complex nature of terrorism indicates that there is a need for a multifaceted strategy which, ideally, upholds the rule of law and liberty.[4] Since 2001, the UK anti-terrorism strategy has substantially changed as highlighted in Tony Blair's pronouncement that the 'rules of the game' were changing with his 12-point plan addressing extremism and its causes.[5] Lately Gordon Brown's statement to the House of Commons outlined the government's response to 'global international terrorism' by the introduction of new powers and terrorism-related offences.[6]

Post-2001 there has been an increased use of executive powers as an alternative strategy to prosecution. The House of Lords declared section 23 of the Anti-terrorism, Crime and Security Act 2001 (ACTSA 2001)[7] as incompatible with the European Convention on Human Rights (ECHR). Such incompatibility was based on the grounds that part 4 of the ACTSA powers were discriminating against foreign nationals. The UK governmental response was to replace part 4 of the UK act with a new system of control orders.[8]

From 2003 onwards, the UK government has been particularly active in the fight against terrorism as evident by the adoption of the two versions of the UK counter-terrorism strategy known as 'CONTEST' strategy. 'CONTEST' 1 comprises four elements: Prevention, Pursuit, Protection, and Preparedness.[9] When the strategy was announced the role of anti-terrorism legislation was described as the framework within which to 'dismantle the machinery of terrorism'.[10] The present article focuses on the 'prevent' and 'pursuit' strands of this strategy.

The 'prevent' strand includes deterrence measures to prevent those who 'facilitate terrorism' and 'encourage others'[11], with the purpose of making it more difficult for terrorists to operate.[12] The Terrorism Act 2000 (TA 2000) with its proscription provisions and the Terrorism Act 2006 (TA 2006) with offences of encouragement and glorification of terrorism and dissemination of terrorist publications fall within these deterrence measures under the 'prevent' strand.[13] As will be seen, the broad reach of the legislation is able to target individuals who are not terrorists. This carries the danger of radicalising innocent victims into becoming terrorists.

Prosecution is aimed at disrupting terrorist activity and falls within the 'pursuit' strand.[14] Since the aim of 'pursuit' is to reduce the terrorist threat both to the UK and overseas [15] this extends to include alternative measures of control such as prosecution and

[1] US Department of Defence Dictionary of Military and Associated Terms (as amended 31 October 2009) http://www.dtic.mil/doctrine/dod_dictionary/ accessed 07 March 2010.

[2] B Hoffman and J Morrison-Taw, A Strategic Framework for Countering Terrorism in F Reinares (ed), European Democracies Against Terrorism: Governmental Policies and Intergovernmental Cooperation (Aldershot Ashgate 2000), p.p. 3-7.

[3] Ibid, p.p. 8 – 19.

[4] P Heymann, Terrorism and America A Commonsense Strategy For A Democratic Society (The MIT Press, Cambridge Massachusetts 1998), p. p. 153 – 154.

[5] PM's Press Conference 5 August 2005 www.number10.gov.uk/output/Page8041.asp accessed 28 February 2010.

[6] Statement on security and counter-terrorism 20 January 2010 , www.number10.gov.uk/output/Page22206.asp accessed 28 February 2010.

[7] A v Secretary of State for the Home Department [2004] UKHL 56; [2005] 2 AC 68.

[8] 'Measures to Combat Terrorism – powers in Part 4 of the Anti-terrorism, Crime and Security Act 2001' Oral Statement by Charles Clarke, the Home Secretary, in January 2005 , http://press.homeoffice.gov.uk/Speeches/speeches-archive/st-combat-terrorism-0105 accessed 03 May 2010.

[9] HM Government, 'Countering International Terrorism: the United Kingdom's Strategy' (Cm 6888 London TSO 2006) p. 1 para. 5 and p. 5 para. 22.

[10] *H Blears, The Tools to Combat Terrorism, Speech to the Royal United Services Institute in February 2005, http://press.homeoffice.gov.uk/Speeches/speeches-archive/sp-tools-combat-terrorism-0205 accessed 01 May 2010.*

[11] Supra note 9, p. 1, para. 6.

[12] Ibid, p. 12 para. 50.

[13] Ibid, p.11, para.50.

[14] Ibid, p. 2, para. 7.

[15] Ibid, p. 16 para. 64.

deportation.[16] Prosecution in itself is recognised to have indirect effect. For example, prosecuting non-terrorist offences such as fraud can further disrupt terrorist networks.[17] Whilst the reduction of the terrorist risk is the main aim of the strategy, there is a willingness to extend the ambit of prosecution and also use executive measures as alternatives to prosecution. This raises important issues about the net-widening effect of the strategy, its legitimacy, and its adherence to human rights standards. It is clear that the strategy is not limited to prosecution since 'security measures' are to be taken where the prosecution of offences is not possible.[18] This aspect of the strategy demonstrates its flexible and invasive nature. For example, deportation is a measure under both the pursuit [19] and prevent[20] strand.

The strategy points out the results that prosecution has delivered in 'disrupting terrorist activity', as was evident in the cases of Mohammed Khan, Abu Hamza, Andrew Rowe, Saajid Badat, and Kamel Bourgass.[21] The Home Office (lead government department for counter-terrorism) data on prosecution is revealing. There have been 310 prosecutions from 2001-2008 with a 74% conviction rate[22] raising to 86% for the 29 terrorism trials in 2009.[23] However, this 'success' rate masks a difference. For example, the percentage of those 1,759 terrorism arrests since 11 September 2001 resulting in charge and conviction is 13%[24] and of-201 arrests for the year ending September 30th, 2009, 66 were charged with the majority being non terrorism related offences (42) and only 17 directly charged under the terrorism legislation.[25] This suggests emphasis on prosecuting people believed to be associated with terrorism. Indeed, since 2001, 30% of the main charges under terrorism legislation have been for possession of an article for terrorist purposes (such as documents, compact discs or computer hard drives), 14% for fundraising for illicit activity and 12% for membership of a 'proscribed organisation.'[26] This shift away from prosecuting terrorism under terrorism legislation is becoming a more prevalent strategy for countering terrorism. This is demonstrated by a similar shift in the United States towards trying suspected terrorists with non-terrorism offences.[27] Only 32% of indictments in terrorism trials contained terrorism offences [28] under the US terrorism statutes.[29] Post 9/11, the US Department of Justice increased the use of terrorism related charges[30] and non-terrorist charges[31] as a means to prevent terrorist attacks by disrupting terrorist networks. This strategy in the United States has also led to increases in non-terrorist charges such as identity theft and immigration frauds as a design to emasculate those identified in a terrorism investigation.[32] Therefore, strategies for dealing with terrorism have evolved to use a greater range of legal powers to target not simply terrorists and acts of terrorism, but activities facilitating the organisation and operation of terrorists.

Likewise, the UK strategy has taken this direction. Haubrich illustrates the comparative rarity of terrorism charges. For example there was not a single charge under ACTSA 2001 between September 2001 and 2005.[33] He also argues that the TA 2000 enables prosecutors to extend the reach of terrorism prosecution.[34] As Haubrich argues, this result in more people brought into the ambit of terrorism and criminalised as terrorists.[35] This similarity of the UK strategy to the United States strategy emphasises that the 'War on Terror' has extended its reach to people who are not terrorists and extended its reach to acts which are not necessarily acts of terrorism. Extending the reach of the UK strategy to the prosecution of anyone deemed to be associated with terrorism makes the anti-terrorism measures of a counter-terrorist nature moving towards deterrence and aggressive prosecution.

National Security Strategy in the United Kingdom

Terrorism is one of a number of security challenges that can be included within an overarching strategy. There is now an identifiable change of approach where the anti-terrorism strategy, as one of a number of security challenges (also transnational crime, global instability, civil emergencies, foreign states, nuclear weapons), is brought within a composite strategy. The

[16] Ibid, p. 17 para. 69.
[17] Ibid, p. 17 para. 70.
[18] Ibid, p. 18 para. 72.
[19] Ibid, p. 18 para. 73.
[20] Ibid, p. 12.
[21] Ibid, p. 18 para. 71.
[22] Home Office, 'Operation of Police Powers under the Terrorism Act 2000 and subsequent legislation: Arrests, outcomes and stops & searches Quarterly update to September 2009 Great Britain' (Home Office Statistical Bulletin 04/10 25 February 2010) Table 1.4 p. 10 http://www.homeoffice.gov.uk/rds/pdfs10/hosb0410.pdf accessed 11 March 2010.
[23] Ibid, Table 1.5 p. 11.
[24] Ibid, Table 1.5, p.5.
[25] Ibid, Table 1.2 p. 8.
[26] Ibid.
[27] J Grossman (ed), Terrorist Trial Report Card: September 11, 2001 – September 11, 2009 (The Center on Law and Security, New York University School of Law 2010) executive summary (ii) 'the evolving record' http://www.lawandsecurity.org/publications/TTRCFinalJan14.pdf accessed 03 May 2010.
[28] Ibid, p. 4.
[29] Ibid, p. 5. The primary terrorism statutes are listed as: 18 U.S.C. 2332 (Terrorism); 18 U.S.C. 2339A (Material Support to Terrorists); 18 U.S.C. 2339B (Material Support to a Foreign Terrorist Organization); 50 U.S.C. 1705 (Financial Support to a Foreign Terrorist Organization) http://www.lawandsecurity.org/publications/TTRCComplete.pdf accessed 11 March 2010.
[30] K Wainstein, Terrorism Prosecution and the Primacy of Prevention Since 9/11 in J Grossman (ed) Terrorist Trial Report Card: September 11, 2001 – September 11, 2009 (The Center on Law and Security, New York University School of Law 2010) page 21 http://www.lawandsecurity.org/publications/TTRCFinalJan14.pdf accessed 03 May 2010.
[31] Ibid.
[32] Supra note 27, p. 22.
[33] D Haubrich, Anti-Terrorism Laws And Slippery Slopes: A Reply To Waddington (2006) Policing and Society 16 (4) 405, p. 408.
[34] Ibid, p. 409.
[35] Ibid, p. 411.

2008 National Security Strategy[36], which conceptualises national security in the UK, has elevated terrorism from a threat to state security to a concept encompassing threats to the population[37] and an attack on values.[38] The shift is from legislative response to public engagement[39] whilst the government targets international extremism.[40] A new concept is 'interdependence' whereby the transnational and international aspects of terrorism intersect [41] so there is a universal response addressing all threats to security. [42] For example, the strengthening of borders and the National Identity Scheme tackles both terrorism and transnational crime.[43] The new face of terrorism as embodied by Al Qaeda is the diffusion of a common ideology resulting in a loose 'network of affiliated groups'[44] and includes autonomous groups.[45] Making such terrorism threats part of a national security strategy shows that a separate anti-terrorism strategy is no longer tenable. However, the problem with this national security approach is finding a right balance between security and liberty.[46]

The United States has a centralised Department of Homeland Security, whereas the UK relies on the 'lead government department' model for domestic security issues.[47] In other words the department with expertise responds to the current crisis.[48] Some argue that the UK strategy can work without a 'homeland security' department;[49] however, the absence of such a department makes it difficult to react to domestic security issues.[50]

Whatever the merits of either model, it is recognised that the terrorist threat no longer neatly divides into national and international problems.[51] However, the difficulty is combining the two particularly in the case of a 'homeland security' model.[52] A generic problem is the role of the public in domestic security. [53] It is this generic problem combined with the issue of moral legitimacy which raises questions about the efficacy of the UK strategy. The UK NSS has been criticised as not describing a meaningful strategy in terms of how its aims and values[54] will be delivered.[55] Although the UK is considered to have acknowledged the challenges brought about by the increase in transnational and international terrorism, the National Security Strategy does not set out a strategy to deal with these challenges.[56] Although recognised that the terrorist threat no longer divides into national and international and requires a national security approach,[57] the NSS has been criticised as being unclear as to how its aims will be delivered.[58] That the terrorist threat is considered by the UK government to not amount to a strategic threat to the UK[59] is at odds with the 'War on Terror'[60] doctrine according to which terrorism threat should be perceived as a strategic threat to the UK. This reflects the difficulty with attempting to combine national and international strategy.[61] Reducing the terrorist threat to one which does not affect the UK strategically, raises questions as to whether it is legitimate for the UK to apply the 'War on Terror' approach to the national prosecution of international terrorism.

Changes to the National Security in the United Kingdom Post 9/11

The revised CONTEST strategy echoes the NSS with the emphasis now on public participation. Thus, the anti-terrorism strategy can be seen to be no longer purely a legislative response. Public participation is now emphasised as central to successful delivery of the strategy, with responsibility for rejecting extremism being made the responsibility of everyone.[62] Also the 'prevent' strand has expanded[63] to prevent terrorism at an earlier stage with the aim to stop people from joining the terrorist cause.[64] The concept of a working partnership has been developed in which communities are empowered to assist in the fight against terrorism.[65] The key difference is the wholesale revision of the 'prevent' strand[66] to prevent individuals becoming terrorists and stop people from supporting violent extremism.[67] Despite commitments made by the UK

[36] Cabinet Office, 'The National Security Strategy of the United Kingdom – Security in an interdependent world' (Cm 7291 London TSO 2008).
[37] Ibid, p. 3 para.1.5.
[38] Ibid, p. 28 para.4.14.
[39] Ibid, p. 26 para. 4.8 – 4.9.
[40] Ibid, p. 27 para. 4.10.
[41] Ibid, p. p 23 -24 para. 3.53 and para. 3.54.
[42] Ibid, p. 24 paragraph 3.57.
[43] ibid p.p. 56 – 57 para. 4.109 and para. 4.110.
[44] A Zelinsky and M Shubik, Research Note: Terrorist Groups as Business Firms: A New Typological Framework, (2009) 21 Terrorism and Political Violence, p. 327 .
[45] A Kirby, The London Bombers as "Self-Starters: A Case Study in Indigenous Radicalization and the Emergence of Autonomous Cliques, (2007) 30 Studies in Conflict and Terrorism 415, p. 426.
[46] J Baker, In The Common Defense National Security Law For Perilous Times (Cambridge University Press 2007), p. 11.
[47] F Gregory, National governance structures to manage the response to terrorist threats and attacks in P Wilkinson (ed), Homeland Security in the UK (Routledge 2007), p.p. 117 – 119.
[48] Ibid, p. 119.
[49] Ibid, p. 135.
[50] Ibid, p.p.132 – 133 and p. 136.
[51] Supra note 46, p. 251.
[52] Ibid, p.p.. 252 – 253.
[53] Supra note 47, p. 123.
[54] J Gow, The United Kingdom National Security Strategy: the Need for New Bearings in Security Policy, (2009) 80 (1) The Political Quarterly 126, p. 131.
[55] Ibid, p.p. 127 – 128.
[56] Ibid, p.129.
[57] Supra note 46, p. 251.
[58] Supra note 54, p.p. 127 – 128.
[59] Cabinet Office, 'The National Security Strategy of the United Kingdom – Security in an interdependent world' (Cm 7291 London TSO 2008), p. 11 para. 3.9.
[60] Supra note 54, p. 129.
[61] Supra note 46, p.p. 252 – 253.
[62] HM Government, 'The United Kingdom's Strategy for Countering International Terrorism' (Cm 7547 London TSO 2009) p. 57 and p. 87.
[63] Ibid, p. 58 para.7.11.
[64] Ibid, p. 87.
[65] Ibid, p. 84 para. 9.12 and para. 9.13.
[66] Ibid, p. 58 para. 7.11.
[67] Ibid, p. 87.

government to the protection of human rights, its anti-terrorism strategy fails to 'preserve and protect' the freedom of assembly and association, and freedom of thought, conscience and religion as provided for within Articles 10, 11 and 9 (respectively) in the ECHR. The UK Government does, however, acknowledge that the right to 'thought and speech' will not be criminalised.[68]

The anti-terrorism strategy has moved beyond confronting cause and effect to altering the conditions in which terrorism is thought to flourish.[69] Although CONTEST's approach is a robust approach aimed at removing the threat of terrorism, it is also capable of being used against all political beliefs. This is evidenced, for example, by reference to a 2008 Police Strategy where staff will work with neighbourhood policing teams to 'identify and take action against individuals' deemed to be exploiting vulnerable people.[70] If this fails then the UK Border Agency will use powers of exclusion and deportation including UK residents.[71] Moreover, the Home Secretary will invoke the power to either revoke British citizenship or exclude foreign nationals from entering the UK.[72] This illustrates that maintenance of national security comes at a price to the preservation of values of freedom of expression and freedom of movement. However, it should be noted that such preventive approach is unprecedented and due to its novelty it is too soon to evaluate it in terms of success/failure.[73] But at this stage, one can argue that the wide ranging nature of the strategy creates the real danger of seen terrorism activity wherever the authorities turn their attention to. Despite the UK government's intention to use only proportionate measures, there is a risk that the expansion of the strategy will target any ideologically motivated activity (for example riots) as well as terrorism.[74] Thus, the measures adopted may no longer be proportionate. In addition, CONTEST does not consider the negative impact the measures may have in radicalising people.[75] However, the UK strategy is not dissimilar to the European Union (EU) Counter-Terrorism Strategy based on similar four strands with an objective to stop recruitment and radicalisation.[76]

Under the 'pursue' strand executive measures are still perceived as a necessary alternative to prosecution.[77] In particular control orders continue in spite of judicial challenge[78] with an increase of 15 orders as of December 10th, 2008 to 40 as at March 10th, 2009.[79] Proscription and asset freezing remain in place and[80] and the Counter-Terrorism Act 2008 is seen to enhance asset-freezing powers in addition to increasing police investigative powers.[81] The strategy, therefore, continues the existing framework of combining legislative and executive measures. The continuous use of executive measures raises concerns as the measures may become a permanent feature of anti-terrorism strategy, even when the justification for their use has passed.

Official assessment of the system ignores the human rights implications. The UK Parliament Home Affairs Committee in reviewing the dual structure of strategic delivery by the Office for Security and Counter-Terrorism[82] and police responsibility for anti-terrorist operations[83], reported confidence in this system.[84] Reporting on CONTEST in 2010 the government, unsurprisingly, suggested that the strategy achieved its aims.[85] However, there is no mechanism to make independent evaluation of CONTEST because the Public Service Agreement assessments are classified information.[86] Moreover, the UK Parliament Home Affairs Committee did not provide any coherent evidence that it was successful in stopping extremism.[87] The strategy however, has run into problems as evidenced by negative court rulings such as the January 2010 ECHR ruling against section 44 of the Terrorism Act 2010[88] and the Supreme Court ruling against asset freezing using secondary legislation.[89] The UK government responded by saying that the ECHR ruling would be appealed and emergency legislation has restored asset freezing with further legislation to follow, in order to combat terrorism financing.[90] This further demonstrates that the strategy is unyielding.

Some argue that CONTEST has upheld liberty.[91] For example Kostakopoulou argues that the UK's post 9/11 response has been narrowly proscribed in its 'security narrative' approach and its construction displays 'a siege mode of democracy'.[92] She further argues that this replaces a rights-based model where human rights are

[68] Ibid, p. 87.
[69] Ibid, p. 56 para. 7.03.
[70] Ibid, p. 85 para. 9.16.
[71] Ibid, p. 89.
[72] Ibid, p. 66, para. 8.19 -8.22.
[73] Ibid, p. 99.
[74] Ibid, p. 56 para. 7.03.
[75] C Pantazis and S Pemberton, Policy Transfer and the UK's 'War on Terror': A Political Economy Approach, (2009) 37(3) Policy and Politics 363, p.368.
[76] The EU Counter Terrorism Strategy 14469/4/05 REV 4 Brussels 30 November 2005 paragraph 6 http://register.consilium.eu.int/pdf/en/05/st14/st14469-re04.en05.pdf accessed 21 April 2010.
[77] Supra note 75, p. 66 para.8.18
[78] Supra note 62, p. 68 para.8.33 – 8.34.
[79] Ibid, p. 68, para. 8.35.
[80] Ibid, p.68 para 8.36-8.37
[81] Ibid, p. 69 para. 8.41.
[82] http://www.security.homeoffice.gov.uk/about-us/ accessed 03 May 2010.
[83] Home Affairs Committee, 'Project CONTEST: The Government's Counter-Terrorism Strategy' Ninth Report [Session 2008-09] HC (2008-09) 212 Ev 22 Charles Farr OBE Q132 http://www.publications.parliament.uk/pa/cm200809/cmselect/cmhaff/212/212.pdf accessed 03 April 2010.
[84] Ibid, para. 15 - 16.
[85] HM Government, 'The United Kingdom's Strategy for Countering International Terrorism Annual Report March 2010' (Cm 7833 Norwich The Stationery Office 2010) p. 27.
[86] Ibid, p.26 para. 7.02 and 7.04.
[87] Ibid, p. 12 para. 3.02.
[88] Gillan and Quinton v The United Kingdom [2009] ECHR 28 12 January 2010 Application no 4158/05.
[89] A v HM Treasury and Others [2010] UKSC 2.
[90] Supra note 86, p. 9 para. 2.05 and p. 10 para. 2.12.
[91] Ibid, p. 157.
[92] D Kostakopoulou, How To Do Things With Security Post 9/11, (2008) Oxford Journal of Legal Studies 28(2) 317, p. 319.

observed and respected.[93] Further, she advocates the need to move away from the 'War on Terror' approach.[94] Perhaps the UK strategy has moved away from the 'War on Terror' approach by advocating risk management[95] and encouraging the public to become more involved. However, its basis is the anti-terrorism legislative framework, itself the legacy of threat and response. As Kostakopoulou argues, this legacy means greater potential interference to liberty because the enabling effect is to spread the strategic response to the threat outwards to all aspects of society beyond terrorism.[96]

Executive Measures of the UK's National Security Strategy Post 9/11

Perhaps the conflict between the rights of the individual and the government's duty to protect to protect the public right to life under Article 2 ECHR [97] becomes clear by reference to the imposition of 'control orders' by the UK Home Secretary. Such orders may be imposed against an individual and contain obligations on him restricting his liberty, freedom of association and use of services.[98] In *AF & Others* Lord Hoffmann commented that upholding the rule of law and safeguarding against wrong decisions may not provide adequate public protection.[99] Although public protection is the purpose of control orders, as Lord Scott points out, the duty of the courts is not to protect the public but to apply the law.[100] These contrasting duties emphasise the difficulty with reconciling Human Rights and security.

British courts have openly ruled against the imposition of control orders. In AF v Others where it was decided that the controlee has to know the substance of the allegation against him[101] two orders were revoked and then replaced with new orders containing fewer conditions.[102] The judicial decisions against control orders challenge the validity of them and trigger questions as to the continuation of the application of control orders. The opinion of Lord Carlile (independent reviewer of control orders) in reviewing such orders is that orders should be the exception[103] and only apply to substantial risk cases.[104] He is critical of the 'light touch' practice, interpreting this as being used to avoid disclosure of the evidence upon which the orders were issued.[105] Proportionality is also an issue because Lord Carlile suggested only the minimum number of obligations necessary to meet public safety is imposed.[106] His idea of limiting the categories of cases in which control orders apply was rejected in the government's reply to Lord Carlile's report.[107] The consequence of the 'light touch' orders is the control order system now contains different criteria for making orders. The government is reluctant to abandon this system, despite acknowledging that the practice of 'light touch' orders is difficult to justify.[108]

Control orders can be "non-derogating" made by the Secretary of State under section 2 of the Prevention of Terrorism Act 2005 (PTA 2005), which means that the restrictions they contain do not involve derogating from the ECHR. Or they can be "derogating" under section 4 of the PTA 2005 where the proposed restrictions involve derogating from the ECHR and are made by the court on application from the Secretary of State. Non-derogating orders should last for 12-months with renewal only if necessary for public protection.[109] Lord Carlile has questioned the UK practice of repeated renewal of non-derogating control orders.[110] The government previously rejected his proposal of a presumption against extension beyond 2 years.[111] This illustrates the difficulty with executive measures embedded in a permanent strategy and those measures taking on a permanent quality. Once a control order has been made, the police are under a duty to keep criminal prosecution as a possibility.[112] However, it follows that a control order which is effective should prevent criminal offences occurring and therefore there will be no need to prosecute the person subject to the control order. Therefore, the continuation of the order becomes justified because of its effectiveness in preventing criminal offences. Indeed, Walker has stated that 'no one subject to an order has subsequently been prosecuted as an alternative to the order'.[113]

Whilst the emphasis has been on the procedural fairness in imposing control orders, it is questionable whether the control order regime is fully compliant with ECHR rights. On the fifth renewal of the regime[114] the UK Parliament Joint Committee on Human Rights view was that the system is no longer sustainable. This is due to the fact that the system could not guarantee procedural fairness and is interfering with ECHR Article 5 right to liberty.[115] Case law raises this question of interference

[93] ibid, p. 322.
[94] Ibid, p. 341.
[95] Ibid, p. 322.
[96] Ibid, p. 334.
[97] AF & Others [2009] UKHL 28 per Lord Hope paragraph 76, Osman v UK Application No 23452/94 28 October 1998 (2000) 29 EHRR 245.
[98] Section 1(1) and 1 (4) Prevention of Terrorism Act 2005.
[99] AF & Others [2009] UKHL 28 per Lord Hoffman paragraph 70 – 74.
[100] AF & Others [2009] UKHL 28 per Lord Scott paragraph 91.
[101] AF & Others [2009] UKHL 28 per Lord Philips paragraph 57 – 69.
[102] Home Office, 'The Government Reply To The Report By Lord Carlile' (Cm 7855 London The Stationery Office 2010) p. 8.
[103] Lord Carlile, 'Fifth Report Of The Independent Reviewer Pursuant To Section 14 (3) Of The Prevention Of Terrorism Act 2005' (London The Stationery Office 2010) p. 1 and p. 34 para. 96.
[104] Ibid, p. 31 para. 85.
[105] Ibid, p. 30 paragraph 84.
[106] Ibid, p. 12 para. 21, p. 30 para. 84, p. p. 41 – 42 para. 118.
[107] Home Office, 'The Government Reply To The Report By Lord Carlile' (Cm 7855 London The Stationery Office 2010), p. 1.
[108] Ibid, p. 8.
[109] Section 2 (6) Prevention of Terrorism Act 2005.
[110] Supra note 104, p.p. 43 – 44, para. 121.
[111] Ibid, p. 45 para. 124.
[112] Section 8 (4) Prevention of Terrorism Act 2005.
[113] C Walker, The Threat of Terrorism and the Fate of Control Orders, (2010) Public Law Jan 4, p. 6.
[114] Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2010.
[115] Joint Committee on Human Rights, 'Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010 [9th Report Session 2009-10] HL

and proportionality. With restrictions of curfew on the time a controlled person can be out of his house, the point at which this becomes a deprivation of liberty is arbitrary when *Secretary of State for the Home Department v JJ & Others* [116] is considered. Whilst reaching the conclusion that 18- hour curfews breached Article 5, Lord Brown was of the view that 12-14 hours did not constitute a breach of Article 5 and regarded 16 hours as the acceptable limit.[117] It is difficult to see what makes 16 hours the acceptable limit where 18 hours is regarded as a loss of liberty.[118] On the other hand Lord Bingham took the view there was no dividing line[119] in deciding that curfew conditions amounted to solitary confinement.[120] The Joint Committee voiced concerns about this impact of control orders on lives.[121] Thus, the ECHR Article 8 right of respect for private and family life is also engaged.[122] In giving evidence before the Committee, human rights lawyer Gareth Peirce pointed out that although the orders may only affect a small number of individuals, the wider impact was a sense of injustice.[123] This argument is based on the fact that control orders operate outside the criminal justice system and challenge principles such as the presumption of innocence and the right of a fair trial. Therefore, legitimacy is in question. Indeed the Joint Committee was critical of the increased practice of relocating individuals to other areas of the country as part of 'light touch' orders.[124]

There is now a serious issue about the compatibility of control orders with ECHR rights. This follows the recent ruling of the UK Supreme Court recently in *R (on the application of AP) v Secretary of State for the Home* Department.[125] The relocation of *AP* from London to the Midlands with the purpose of removing him from associating with Islamist extremists in London meant that those restrictions to his ECHR Article 8 right was a factor relevant to the issue of whether the control order breached ECHR Article 5 right to liberty. Therefore, ECHR Article 8 rights could be a decisive factor in tipping the balance in respect of ECHR Article 5.[126] Judge Lord Brown also found that in considering whether a control order amounts to the deprivation of liberty subjective factors and person specific factors – such as the difficulty of family visits – could be taken into account.[127] In spite of this, Lord Brown continues to hold the view that other conditions 'would have to be unusually destructive of the life' of the controlee for a control order to amount to a deprivation of liberty as opposed to merely a restriction on liberty.[128] Yet in acknowledging the interaction of ECHR rights and acknowledging that factors specific to the individual could be taken into account, the argument about the proportionality of control orders becomes difficult to sustain. If the balance can be tipped by the restriction to the ECHR Article 8 right to family life, then to hold this as only a deprivation of liberty if 'unusually destructive' of the life of the controlee is to fail to acknowledge the terms of ECHR Article 5.

Where control orders are concerned, the deprivation of liberty under ECHR Article 5(1) (c) is permitted where the measure 'is reasonably considered necessary to prevent his committing an offence'. In the European Court of Human Rights case of *Guzzardi v Italy*[129] this phrase was considered to be limited to giving States a means to prevent 'a concrete and specified offence'.[130] Neither does the ECHR Article 5 (1) (b) exception of detention 'to secure the fulfilment of any obligation prescribed by law' apply where general obligations are imposed by the legislative measures.[131]

The debate on the use of executive measures highlights that-there is no middle ground between security and liberty. The anti-terrorism strategy is skewed towards executive control founded on intelligence.[132] The one-sided choice between prosecution and executive control is a consequence of managing the terrorist threat.[133] The limitation is that this reduces the protection of individual liberties. Having considered the question of alternatives to control orders, many academics such as Walker suggested the use of surveillance.[134]

The use of banning named terrorist organisations ('proscription') is another executive measure which raises Human Rights issues. The 2010 CONTEST Report states that such measures help to make the UK 'a more hostile environment for terrorism'.[135] However, when proscription was part of the former Prevention of Terrorism (Temporary Provisions) Act 1989 the efficacy of such measures was doubted. Walker described proscription as a measure which was purely symbolic intended to put terrorist organisations out of public sight.[136] The difference now is that by Section 1 (4) of the TA 2000, proscription is extended to international

64 HC 395, p. 34 para. 111 – 112. http://www.publications.parliament.uk/pa/jt200910/jtselect/jtrights/64/64.pdf accessed 11 April 2010.

[116] [2007] UKHL 45.

[117] [2007] UKHL 45 at para. 105.

[118] [2007] UKHL 45 per Lord Brown at para. 108.

[119] [2007] UKHL 45 at para. 17.

[120] [2007] UKHL 45 at para. 24.

[121] Supra note 116, p. 16 para. 44.

[122] [2007] UKHL 45 per Lord Hoffmann at paragraph 34.

[123] Supra note 122.

[124] Ibid, p. 5 para. 41.

[125] [2010] UKSC 24; [\2010] 3 WLR 51.

[126] R (on the application of AP) v Secretary of State for the Home Department [2010] UKSC 24; [2010] 3 WLR 51 per Lord Brown at para 12.

[127] Ibid, para 15 and para. 19.

[128] R (on the application of AP) v Secretary of State for the Home Department [2010] UKSC 24; [2010] 3 WLR 51 per Lord Brown at para 4.

[129] (1981) 3 EHRR 333.

[130] Guzzardi v Italy (1981) 3 EHRR 333 at para 102.

[131] Ibid, para 101.

[132] C Walker, Intelligence and Anti-terrorism legislation in the United Kingdom, (2005) 44 Crime Law and Social Change 387, p.p. 387 – 390 and p. 413.

[133] D Bonner, Executive Measures, Terrorism and National Security (Ashgate 2007) p.p. 214 – 216.

134 Supra note 132

[135] HM Government, 'The United Kingdom's Strategy for Countering International Terrorism Annual Report March 2010' (Cm 7833 Norwich The Stationery Office 2010) p. 10 para. 2.10.

[136] C Walker, The Prevention of Terrorism in British Law (2nd edn Manchester University Press 1992) p. 64.

organisations.[137] Walker considers that proscription had limited value on the grounds this can drive an organisation underground.[138] In his latest report on the operation of the TA 2000, Lord Carlile echoes the doubt about the value of proscription, reporting that proscription does little to protect the public other than to label dangerous organisations and provide grounds to prosecute 'lower level activity'.[139] Similar doubts have been raised by various scholars.[140] Proscription is considered by the government to be essential to addressing militant radicalisation, as evidenced by the recent proscription of Al Muhajiroun.[141] It remains to be seen what effect this will have on preventing radicalisation. Out of 80 convictions under the TA 2000 since September 11th, 2001, 15 were for sections 11 to 13 offences of membership and support of proscribed organisations and the wearing of uniform in public. There were no convictions in 2003 to 2005 or in 2008 to 2009.[142] Yet the list of proscribed international organisations grew to 45 at the end of 2008.[143] This growth in the number of international organisations suggests proscription has had limited deterrence.

This then raises the issue of proscription interfering with ECHR Article 10 freedom of expression and ECHR Article 11 freedom of assembly and association. In *Attorney General's Reference (No 4 of 2002)*, it was considered that Section 11 (1) TA 2000 interfered with the right to freedom of expression but was necessary and proportionate.[144] In proscribing an organisation under Section 3(4) of TA 2000 the Secretary of State may only exercise his power against named organisations if he believes the organisation is involved in terrorist activities. By Section 3 (5) of TA 2000 an organisation is not only concerned in terrorism by acts of terrorism it commits or participates in, or where it promotes or encourages terrorism, but also where it is 'otherwise concerned in terrorism'. The case of *Secretary of State for the Home Department v Lord Alton of Liverpool*[145] considered the extent to which an organisation can be said to be 'otherwise concerned in terrorism' under section 3(5)(d) of TA 2000 for the purposes of proscription.[146] The Home Secretary proscribed the People's Mojahadeen Organisation of Iran in spite of no evidence of the organisation presenting a specific threat.[147] Proscription has also been applied to support the international community in the 'War on Terror', as evidenced with the recent proscription of al-Shabaab.[148] In this case the government's argument that Section 3(5)(d) TA 2000 continued to apply to an inactive organisation with a history of activity[149] was rejected on the grounds that merely an intention to take up arms in the future is not 'otherwise concerned in terrorism'.[150] The limit of the legislation therefore is that proscription cannot apply to those organisations without military capability and not taking active steps to engage in terrorist acts.[151] This questions the extent to which the government can justifiably interfere with the rights of free speech, assembly and association.[152] The aforementioned affirmation that proscription requires a nexus between an organisation and terrorism and expressing an intention is insufficient, calls into question recent proscription and its proportionality.

Freezing of financial assets also raises the question of the proportionate use of executive power. This was evident in *A v HM Treasury and Others*[153] where in dispute were Orders[154] made under section 1 of the United Nations Act 1946 as appeared 'necessary or expedient' to give effect to Security Council Resolutions 1373 and 1452. The justification for making the orders was to prevent and suppress the financing of terrorist acts and take measures against Al-Qaida. Her Majesty's Treasury used section 1 of the United Nations Act 1946 to make the appellants subject to directions freezing financial assets and criminalising any financial transaction.[155] The UK Supreme Court noted that this system supplanted the existing scheme under Part 2 of ACTSA 2001 with a more draconian system.[156] The UK Supreme Court held this to be an affront to basic rights,[157] because the words 'necessary or expedient' do not permit disproportionate interference with individual rights.[158] There is no parallel with other jurisdictions to this use of executive measures via secondary legislation

[137] N Rasiah, Reviewing Proscription Under The Terrorism Act 2000, (2008) 13 (3) Judicial Review p. 187, para. 2.
[138] C Walker, Blackstone's Guide to The Anti-Terrorism Legislation (2nd edn Oxford University Press 2009) p. 53 para. 2.43.
[139] Lord Carlile, 'Report on the Operation in 2008 of the Terrorism Act 2000 and of Part 1 of the Terrorism Act 2006' (London The Stationery Office 2009) p. 12 para. 50 – 51 http://security.homeoffice.gov.uk/news-publications/publication-search/legislation/terrorism-act-2000/independent-review-responses/Lord-Carlile-report-09?view=Binary accessed 03 May 2010.
[140] B Dickson, Law versus terrorism: can law win?, (2005) 1 European Human Rights Law Review 11 p.p.16 – 17.
[141] SI 2010 No. 34; Hansard 20 January 2010 Security and Counterterrorism 999 – 1000 Lord Strathclyde http://www.publications.parliament.uk/pa/ld200910/ldhansrd/text/100120-0002.htm#10012064000394 accessed 03 May 2010.
[142] Supra note 22, Table 1.10 (a).
[143] Lord Carlile, 'Fifth Report Of The Independent Reviewer Pursuant To Section 14 (3) Of The Prevention Of Terrorism Act 2005' (London The Stationery Office 2010) p. 12.
[144] 2005] 1 Cr App R 28 paragraph 54.
[145] [2008] EWCA Civ 443.
[146] N Rasiah, Reviewing Proscription Under The Terrorism Act 2000, (2008) 13 (3) Judicial Review p. 190 para. 21.
[147] Secretary of State for the Home Department v Lord Alton of Liverpool [2008] EWCA Civ 443 para. 12.
[148] SI 2010 No. 611. House of Commons Hansard Debates for 04 March 2010 David Hanson Column 1035 and 1036 http://www.publications.parliament.uk/pa/cm200910/cmhansrd/chan50.pdf accessed 03 May 2010.
[149] Secretary of State for the Home Department v Lord Alton of Liverpool [2008] EWCA Civ 443 para. 29.
[150] Ibid, para. 127 – 128.
[151] Ibid, para. 37 – 39.
[152] Supra note 147, p. 190, para. 18.
[153] [2010] UKSC 2.
[154] Terrorism (United Nations Measures) Order 2006 SI 2006/2657, Al-Qaida and Taliban (United Nations Measures) Order 2006 SI 2006/2952.
[155] [2010] UKSC 2 at paragraph 38.
[156] [2010] UKSC 2 at paragraph 5 per Lord Hope.
[157] [2010] UKSC 2, para. 45.
[158] Ibid, para. 47.

to target terrorism.[159] The restoration of the domestic asset freezing regime by subsequent emergency legislation [160] and the publication of the draft Terrorist Asset-Freezing Bill which by clause 2 replicates the Treasury power to designate on a reasonable suspicion test and repeats the previous rationale of giving the Treasury power to implement international obligations[161] shows that the UK strategy is entrenched. The justification for this is worded in the CONTEST 2010 annual report as a commitment to the maintenance of 'an effective and proportionate asset regime'.[162] Yet the Supreme Court not only commented on the proportionality of using section 1 (1) of the 1946 Act, but also on the directions under the invalid Orders.

The use of executive measures has become an ingrained practice which is beginning to be challenged in the UK courts on the grounds of proportionality. The Human Rights implications of the implementation of the UK strategy are broader than the question of how proportionate measures are. Proscription becomes difficult to justify where there are no active steps by an organisation to engage in terrorist acts. Nonetheless proscription has been used against organisations on the periphery of terrorist activity and this is a potential threat to free speech, assembly, and association. The use of secondary legislation to freeze financial assets is without precedent and yet the curbing of this by the UK Supreme Court led to emergency legislation designed to reinstate the power.

Legislative Measures of the National Security Strategy

Detention of terrorist suspects before charge illustrates the difficulty of balancing human rights and the requirement of the executive for the greatest power available in the event of an emergency. After the House of Lords rejected the proposed 42-day period for detention without charge in the counter-terrorism bill, the government produced a draft emergency bill[163] with the idea that this could become law in the event of emergency.[164] The UK Parliament Joint Committee on Human Rights urged the government to withdraw this bill on the grounds that legislation rushed through in an emergency receives less scrutiny and enactment could breach ECHR Article 5 rights.[165] On the existing 28-day detention power, concern was repeated about the adequacy of procedural safeguards for authorisation of extended detention.[166] The continued debate is illuminating. In discussing the alternative to pre-charge detention the Joint Committee pointed out that with the increased range of terrorism offences those on the periphery are being arrested.[167] As this implies, the label 'terrorist suspect' makes the anti-terrorism strategy inflexible.[168]

The underlying purpose of pre-charge detention becomes apparent when considering the government case for a 90-day period. The evidence before the Home Affairs Committee was that the purpose of early arrest is to disrupt conspiracies in the interests of public safety.[169] Labelled 'preventative detention' this is the real driver for extended detention.[170] This may explain why arguments for alternatives such as bail, charging on a threshold test of reasonable suspicion of a criminal offence having been committed, and the use of intercept evidence, has not changed the government's insistence on the need for extended powers of detention without charge. An audit of rights commented on an emerging 'shadow system of criminal justice' controlled by the executive.[171]

'Operation Pathway' reported on by Lord Carlile demonstrates the shortcomings of the argument for 'preventative detention'.[172] Although the initial applications for warrants of further detention were granted[173], the UK High Court said further application would have to show a "real prospect of evidence".[174] The finding that nothing of value was obtained during detention is not an isolated case.[175] In the 'airline liquid

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[159] Ibid, para. 50 – 53.

[160] The Terrorist Asset-Freezing (Temporary Provisions) Act 2010 In Force 10 February 2010 – 31 December 2010.

[161] 'Publication in draft of the Terrorist Asset-Freezing Bill' Cm 7806 February 2010 Explanatory notes paragraph 8, http://www.hm-treasury.gov.uk/d/finsanc_assetfreezingbill_draft_050210.pdf accessed 14 April 2010.

[162] Supra note 62, p. 10 para. 2.12.

[163] Counter-Terrorism(Temporary Provisions)Bill, www.parliament.uk/deposits/depositedpapers/2008/DEP2008-2775.pdf accessed 15 April 2010.

[164] http://www.telegraph.co.uk/news/newstopics/politics/lawandorder/3192152/Jacqui-Smith-creates-emergency-bill-after-42-day-detention-defeat.html accessed 15 April 2010.

[165] Joint Committee on Human Rights, 'Counter-Terrorism Policy and Human Rights (Seventeenth Report): Bringing Human Rights Back In [16th Report Session 2009-10] HL 86 HC 111, p. 29 para. 82 – 83 http://www.publications.parliament.uk/pa/jt200910/jtselect/jtrights/86/86.pdf accessed 15 April 2010.

[166] Ibid, p. 26, para. 69 – 70.

[167] Joint Committee on Human Rights, 'Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010 [9th Report Session 2009-10] HL 64 HC 395. http://www.publications.parliament.uk/pa/jt200910/jtselect/jtrights/64/64.pdf accessed 11 April 2010.p. 30 , para. 88.

[168] S Greer, Human Rights and the Struggle Against Terrorism in the United Kingdom, (2008) 2 European Human Rights Law Review 163, p. 169.

[169] Home Affairs Committee, 'Terrorism Detention Powers' Fourth Report [Session 2005- 06] HC (2006) 910-1 p. 30 para. 91 – 93, http://www.publications.parliament.uk/pa/cm200506/cmselect/cmhaff/910/910i.pdf accessed 16 April 2010.

[170] Ibid, p.p. 30 – 31 para. 94 – 95.

[171] A Blick and T Choudhury and S Weir, The Rules of the Game Terrorism Community and Human Rights, (The Joseph Rowntree Reform Trust 2006) , p. 48 http://www.jrrt.org.uk/uploads/Terrorism_final.pdf accessed 16 April 2010.

[172] Lord Carlile, Operation Pathway Report Following Review (October 2009) http://security.homeoffice.gov.uk/news-publications/publication-search/legislation/terrorism-act-2000/operation-pathway-report?view=Binary accessed 16 April 2010.

[173] Lord Carlile, 'Fifth Report Of The Independent Reviewer Pursuant To Section 14 (3) Of The Prevention Of Terrorism Act 2005' (London The Stationery Office 2010) paragraph 79.

[174] Ibid, para. 80.

[175] Ibid, para. 88.

bomb case' the main protagonists were charged within 14 days of detention whilst those detained up to the 28-day limit were either not charged or were subsequently acquitted. The implication was that pre-charge detention operates unfairly against those on the periphery.[176] This exposes a Human Rights deficit in the anti-terrorism strategy. As distinct from non-terrorist investigations early arrest will be on a threshold basis of reasonable suspicion of terrorism offences, where for example the full extent of a conspiracy is unknown and the full evidence is yet to emerge. As Lord Carlile points out a Section 41 TA 2000, arrest is unique in terms being a terrorist is not a criminal offence.[177] As compliance with ECHR Article 5 is by judicial scrutiny in each case of whether there is justification for further detention the argument for extended detention for a preventative purpose cannot be justified.[178]

The use of legislative measures for a preventative purpose and intervention at an earlier stage in terrorist plots is shown by the UK development of anticipatory offences. Sections 1 to 3 of the TA 2006 are part of the preventive strategy against the expression of terrorism, the intention being to create a permanent legislative framework for 'addressing terrorism' as opposed to responding to it.[179]

It is acknowledged that section 1 TA 2006 encouragement of terrorism offence is controversial.[180] However, Lord Carlile's view was that section 1 did not criminalise 'mere preaching'.[181] As developments now show, criminalising encouragement of terrorism facilitates suppression of extremist views without prosecution for criminal offences. Where material published on the internet relates to encouragement of terrorism or dissemination, Section 3 TA 2006 applies to give police the power to either require the removal of internet material or modification of its content.[182] On February 1st, 2010 the Home Office launched an online scheme for the public to report terrorist material to a police team investigating extremist sites with the intention police will use these powers.[183] This is a strategy to prevent people becoming influenced by terrorism. Indeed, when the 2006 Act was in its draft stage and was put to the Home Secretary his response was that the purpose was to make it more difficult for people susceptible to preaching to 'transition' to undertaking terrorist acts.[184] This illustrates anti-terrorist legislation has a counter-terrorist purpose.

Arguably, the encouragement offence can criminalise 'mere preaching'. The offence includes not only encouragement but 'other inducement' and therefore applies not only to express or implied statements of encouragement.[185] As section 1 (5) TA 2006 makes it irrelevant whether encouragement relates to either particular acts or particular Convention offences and whether anyone was induced or encouraged, and includes past and future glorification[186], the offence is capable of including any expression construed as the encouragement of terrorism.[187] Furthermore, the definition of 'acts of terrorism' which are encouraged by section 20 TA 2006 includes anything within the meaning of section 1 (5) of TA 2000. Section 1(5) defines an act of terrorism as an act or 'threat of action' with the purpose of not only to influence the government but also to intimidate a section of the public for the advancement of a political, religious or ideological cause.[188] Because of this the encouragement offence can be argued to catch all forms of protest at the detriment to freedom of expression.[189] Since the Counter-Terrorism Act 2008 widened the definition of terrorist purpose to include racial[190] – thereby widening the encouragement offence – this shows the implementation of anti-terrorism strategy targeting all extremism can be readily achieved by amending the definition of terrorism.[191] The role of the legal definition of terrorism in expanding offences is part of the early interventionist strategy.[192] This challenges legal certainty and leaves scope for confusion as to when views sympathetic to terrorism amount to encouragement.[193]

Criminalising the dissemination of terrorist publications is equally wide as this includes the possession of a publication with a view to dissemination [194] and recklessness will suffice.[195] In *Bilal Mohammed* his reckless sale of material amounting to a terrorist publication drew the distinction between his case and that of a dedicated extremist seeking to encourage

[176] A N Bajwa and B O'Reilly, Public/Human Rights: Terrorising the Innocent, (2010) 160 New Law Journal, p. 481.

[177] Lord Carlile, 'Fifth Report Of The Independent Reviewer Pursuant To Section 14 (3) Of The Prevention Of Terrorism Act 2005' (London The Stationery Office 2010) , para. 60.

[178] R (on the application of I) v Westminster Magistrates Court [2008] EWHC 2146 (Admin) at para. 21 – 23.

[179] Hansard Commons Draft Terrorism Bill Minutes of Evidence HC 515-i 11 October 2005 Q2 Rt Hon Charles Clark MP http://www.publications.parliament.uk/pa/cm200506/cmselect/cmhaff/515/5101102.htm accessed 18 April 2010.

[180] Lord Carlile, 'The Definition of Terrorism' (Cm 7052 Norwich The Stationery Office March 2007) , p. 38 para. 68.

[181] Ibid, p.p.40 – 41 para. 72.

[182] Section 3 (3) Terrorism Act 2006.

[183] Press Release, 'Public reporting mechanism for terrorist material on the internet' 01 February 2010 http://press.homeoffice.gov.uk/press-releases/public-reporting-terrorist accessed 17 April 2010.

[184] Hansard Commons Draft Terrorism Bill Minutes of Evidence HC 515-i 11 October 2005 Q3 Rt Hon Charles Clark MP http://www.publications.parliament.uk/pa/cm200506/cmselect/cmhaff/515/5101102.htm accessed 18 April 2010.

[185] Section 1 (1) Terrorism Act 2006.

[186] Section 1 (3) Terrorism Act 2006.

[187] A Hunt, Criminal Prohibitions on Direct and Indirect Encouragement of Terrorism, (2007) Crim LR (6) 441, p. 448 and I Ward, God, Terror and Law, (2008) 28 (4) Oxford Journal of Legal Studies 783, p. 788.

[188] Section 1 (1) (a) (b) (c) Terrorism Act 2000.

[189] D McKeever, The Human Rights Act and Anti-terrorism in the UK: One Great Leap Forward By Parliament, But Are The Courts Able To Slow The Steady Retreat That Has Followed?, (2010) Jan Public Law 110, p. 128.

[190] Section 75 (1) (2) (a) Counter-Terrorism Act 2008.

[191] Supra note 190, p. 116.

[192] C Walker, Blackstone's Guide to The Anti-Terrorism Legislation (2nd edn Oxford University Press 2009) p. 8 para. 1.24.

[193] Supra note 188, p.p. 449 – 450.

[194] Terrorism Act 2006 section 2 (2) (f).

[195] Terrorism Act 2006 section 2 (1) (c).

terrorist activity.[196] The significance of this, as pointed out by Ramage, is that people who have no proven link to terrorism can be prosecuted on the basis that their acts create a remote risk of harm.[197] This is noted in the distinction Hunt draws between the dissemination offence and incitement, in that the possessor of a terrorist publication need have no direct involvement in encouraging terrorism.[198]

All the aforementioned measures go beyond the Council of Europe Convention on the Prevention of Terrorism (CEPT) obligations to take effective measures to prevent terrorism.[199] Under Article 5 (1) of the CEPT, public provocation requires 'intent to incite' a terrorist offence and a casual connection between publication and a danger that offences may be committed. Like the CEPT, the international obligation is also to prevent incitement and to show causal connection.[200] Whilst Article 19 of the International Covenant on Civil and Political Rights permits restriction to freedom of expression and the ECHR Article 10 right is a qualified right, the removal of the conditions of incitement and harm reduces protection.

The UK Parliament Joint Committee on Human Rights identified that section 1 of the TA 2006 was wider than Article 5 CEPT[201], risking making this incompatible with the ECHR Article 10 right.[202] The fundamental criticism of the encouragement offence was the "chilling effect" of the offence preventing people voicing their views[203] leading to disproportionate interference with free speech.[204] As reviewed by the International Commission of Jurists, States including the UK have gone beyond international obligations to prevent incitement.[205] The UK indirect encouragement provision was cited as one of the most controversial examples of this.[206] The real danger is that the use of anti-terrorism legislation is no longer perceived to be legitimate but instead victimises people for their views.[207] The UK role in the 'War on Terror' having emphasised preventative measures as a key part of the anti-terrorism strategy has created legislation capable of being used not only to prevent terrorism but suppress views. This is a threat to the ECHR Article 10 right to freedom of expression.

But this development of the UK strategy appears to be in keeping with what the Council of Europe has encouraged EU Member States to adopt. For example, the Council of Europe in 2008 modified its 2002 Framework Decision on combating terrorism, which is the basis of the counter-terrorist policy of the European Union.[208] The 2008 amendment by the Council of Europe requires EU Member States to criminalise acts linked to terrorist activities, particularly by taking action against the publication and dissemination of materials capable of inciting people to commit acts of terrorism. In turn, this is justified in accordance with international law obligations under United Nations Security Council Resolution 1624 (2005) in order to prevent incitement to commit terrorist acts.[209] The amendment to the Framework decision is considered an important step towards targeting the use of the internet to incite terrorism.[210]

Recent case law suggests freedom of expression is becoming eroded by a general approach of asking what is in the interests of national security. For example in the context of glorifying terrorism offences, Sottiaux criticised the recent ECHR decision of *Leroy v France*[211] as moving away from traditional incitement law[212] to deciding- as in this case- whether Mr Leroy's cartoon of the World Trade Centre twin towers could be interpreted as glorifying violence despite his intention to simply express Anti-Americanism.[213]

The UK Strategy goes beyond targeting the organisers of terrorist training. Whereas section 6 TA 2006 reflects Article 7 of the CEPT in criminalising training for terrorism[214], Section 8 goes further to criminalise attendance at places used for terrorist training. The UK Court of Appeal case of *R v Da Costa and Others*[215] considered the construction of the two sections. Whilst the test in Section 6 (1) (b) is that the provider knows an attendee's intention to use his training for terrorist purposes[216], for the Section 8 offence it is sufficient that the training is given for

[196] Abdul Rahman and Bilal Mohammed [2008] EWCA Crim 1465 at para. 34 – 37.
[197] S Ramage, The Little Red School Book and Other Harmful Publications, (2008) 186 Criminal Lawyer 1
[198] Supra note 188 , p. 445.
[199] Council of Europe Convention on the Prevention of Terrorism CETS No 196 http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=196&CM=1&CL=ENG accessed 03 May 2010.
[200] UN Security Council Resolution 1624 (2005) adopted 14 September 2005 UN Doc S/RES/1624 (2005).
[201] Joint Committee on Human Rights, 'The Council of Europe Convention on the Prevention of Terrorism' [1st Report Session 2006-07] HL 26 HC 247, para. 22 – 39, http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/26/26.pdf accessed 17 April 2010.
[202] Ibid, para. 29.
[203] Ibid, para. 40 – 49.
[204] Ibid, para. 47.
[205] International Commission of Jurists, 'Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights' (Geneva 2009), p.p. 127 – 128.
[206] Ibid, p.p. 129 – 130.
[207] C Walker, Clamping Down on Terrorism in the United Kingdom, (2006) 4 (5) Journal of International Criminal Justice 1137, p. 1141.
[208] 'Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism' Official Journal of the European Union L 330/21 para. (2).
[209] Ibid, .para. 7 and 8.
[210] MEMO/08/255 Amendment of the Framework Decision on combating terrorism Brussels 18 April 2008 http://www.libertysecurity.org/article2010.html accessed 21 April 2010.
[211] 36109/03 Unreported October 2 2008 ECHR.
[212] S Sottiaux, Leroy v France: Apology of Terrorism and the Malaise of the European Court of Human Rights, Free Speech Jurisprudence' (2009) 3 European Human Rights Law Review 415, p. p. 417 - 420.
[213] Supra note 211, p.p. 420 – 422.
[214] Council of Europe Convention on the Prevention of Terrorism CETS No 196 http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=196&CM=1&CL=ENG accessed 03 May 2010.
[215] [2009] EWCA Crim 482
[216] R v Da Costa and Others[2009] EWCA Crim 482 at para. 15.

terrorist purposes.[217] Since an attendee can commit an offence on a lesser test of belief or lack of reasonable belief[218] and does not need an intention to put the training to use[219] or otherwise can commit the offence without undergoing training[220], criminal liability is much wider for those that take part than for the promoters and organisers of terrorist training.

This extended reach of the legislation in the anti-terrorism strategy is illustrated by the possession offences. The UK Court of Appeal in *R v Malik*[221] observed that where material is downloaded from the internet with the intention to be used to assist acts of terrorism the section 58 TA 2000 offence of the collection of information could be committed.[222] This could be the case even if intention is subsequently abandoned and it implies that mere possession could suffice. Indeed in *R v G*[223] the UK House of Lords confirmed that as section 58 is concerned with the 'nature of the information' possessed, then the purpose for collecting information is irrelevant. Recently in *R v Muhammed (Sultan)*[224], the UK Court of Appeal held that section 58 TA 2000 is not to be narrowly interpreted so as to be only limited to furthering the actual commission or preparation of terrorist acts. It was held that it is impractical to distinguish between the stages of preparation required for a document or record to become useful to a person committing or preparing an act.[225] Absent reasonable excuse, this has wide application to those who possess material for non-terrorist purposes.

Therefore, the strategy disproportionately targets those on the periphery, fantasists as opposed to terrorists.[226] This is facilitated by the difference of protective intention tests applied to genuine terrorists and those on the periphery. By the nature of the offences they are charged with, the former are subject to less protection where specific intention and connected purpose are absent, a difference the courts have reinforced.

The UK, whilst acting in accordance with international obligations and European policy, has made the legislative measures capable of wide use against those on the periphery of terrorism. In doing so, it has not addressed the issue of how to safeguard rights. The real threat becomes that anyone in possession of material deemed to be for a terrorist purpose regardless of their intent is capable of being targeted under the anti-terrorism legislation. This shows how the implementation of the strategy again affects rights of freedom of expression, assembly and association. It is not only the promoters and organisers of terrorism the strategy is able to target. Its far reaching nature carries the implication that there has been a noticeable shift away from targeting terrorists and terrorism. This defines a new era in the 'War on Terror' where the emphasis is no longer on terrorist conflict but on using criminal justice to prevent terrorism. Pre-charge detention is used to make early arrests in the interests of disrupting terrorist activity. The implication is that the executive controls criminal justice at the expense of the ECHR Article 5 right to liberty. Anticipatory offences created under TA 2006 have created a legislative framework designed to enhance the prevention of terrorism. The ability to use this legislation to silence expression of extremist views particularly illustrates the use of anti-terrorism legislation as a mechanism of control. The problem is acute once the definition of terrorism is widened. Then any extremist view can be targeted, threatening to stifle freedom of expression.

Arbitrary Use of Anti-Terrorism Powers in the United Kingdom

In practice there is a risk of the arbitrary use of power. On available evidence the Section 44 TA 2000, stop and search power is of questionable value beyond deterrent effect especially where the number of police searches is out of proportion to arrests.[227] Section 44 (2) TA 2000 gives a police constable in uniform authorisation to stop and search a pedestrian. The authorisation can cover an area of place and can be the whole or part of a police area. The requirement in section 44 (3) TA 2000 is that authorisation may be given by a senior officer only if considered 'expedient for the prevention of acts of terrorism'. Since 'reasonable suspicion' is not required to use Section 44 TA 2000 to stop and search people, the power can be used against anyone[228] as confirmed by the European Court of Human Rights in *Gillan and Quinton v The United Kingdom*.[229] The finding was that the use of the power amounted to a breach of ECHR Article 8 rights of respect for private life.[230] This was on the grounds that the use of the power was arbitrary because of the broad discretion police officers have in their exercise of the stop and search power once given what amounts to a blanket authority to use the power.[231] The authorisation procedure itself was considered to lack any assessment of proportionality[232] and authorisation continuously renewed on a rolling basis without any scrutiny.[233] This has the following ramification: there has to be control over the risk of arbitrary use to justify interference in ECHR rights. The evidence of the excessive use of the

[217] Section 8 (1) (c) Terrorism Act 2006.
[218] Section 8 (2) (a) (b) Terrorism Act 2006.
[219] R v Da Costa and Others [2009] EWCA Crim 482 at paragraph 21.
[220] Section 8 (3) (a) Terrorism Act 2006.
[221] [2008] EWCA Crim 1450.
[222] R v Malik [2008] EWCA Crim 1450 at paragraph 41.
[223] [2009] UKHL 13; [2010] 1 AC 43 HL.
[224] [2010] EWCA Crim 227.
[225] [2010] EWCA Crim 227 at paragraph 46.
[226] K D Ewing, Bonfire of the liberties New Labour Human Rights and the Rule of Law (Oxford University Press 2010), p. 211.
[227] D Thiel, Policing Terrorism A Review of the Evidence, (The Police Foundation 2009), p. p. 32 – 33.
[228] Ibid, p.p. 32 – 33.
[229] [2009] ECHR 28 12 January 2010 Application no 4158/05
[230] Ibid, para. 87.
[231] ibid, para. 85.
[232] Ibid, para. 80.
[233] Ibid, para. 81 – 82.

power[234] demonstrates that the UK anti-terrorism strategy is too reliant on discretion.[235]

Counter-terrorism Measures in the United Kingdom and the 'War on Terror'

Compared to the US conceptualisation of the 'War on Terror' as a military response[236], Europe takes a long-term view of addressing underlying causes[237] with the focus on investigation and prevention.[238] As seen the UK aligns to this EU model and vice versa. However, post-9/11, the UK role has interpreted international obligations to use anti-terrorism legislation[239] for deterrence purposes remodelling domestic criminal law to aggressively target terrorism as opposed to terrorists.[240] It is the pre-emptive aspect of the strategy that has created new laws targeting an ever greater range of people and activities[241] embedding national security into the criminal justice system.[242] This creates a new paradigm for the 'war on terrorism'. As seen human rights compliance is becoming questionable.

To use the terminology 'War on Terror' is to suggest action is being taken against armed conflict and therefore International Humanitarian Law (IHL) rules applying to armed conflict become applicable. As Duffy identifies, the terminology can be a pretext to use IHL to justify the detention of terrorists on the grounds of enemy combatants and whether such steps are taken the danger is the ambiguities surrounding the loose use of terminology enable States to manipulate the law.[243] But the UK anti-terrorism strategy does not justify the use of this terminology. Having taken the stance that terrorism is a threat to be managed and the risk of terrorism can be reduced by appropriate measures, the UK strategy is not prosecuting a war on terror but devising measures for controlling terrorism. This demands higher standards of legal protection to those affected by the measures. As Walker identified the UK terrorism legislation follows the criminal justice model and not a war model. This has clear implications for detention without trial and the application of control orders.[244] His argument is that extraordinary measures should be made subject to derogation and instead alternatives should be found.[245] As seen with the continued use of control orders despite the government identifying that international terrorism is not a strategic threat to the UK, the use of extraordinary measures are becoming a permanent feature of the UK anti-terrorism strategy. With the emphasis now on pre-emptive measures and the paradox of a legislative system where people committing anticipatory offences are less protected by the law (and more easily prosecuted) the implications are that liberty (whether of person or expression) is becoming reduced to the question of what is in the best interests of national security.

The counter-productive effects of this are suggested by Campbell and Connolly using Northern Ireland as an object lesson.[246] They talk of a 'grey zone' of executive power created by anti-terrorist law[247], which moves beyond law however much cloaked with legislative authority[248] creating a new species of violent opposition, thereby sustaining terrorism.[249] They cite the use of the anti-terrorist stop and search powers in the UK as evidence of indiscriminate use capable of alienating British Muslims.[250] The impact of the UK anti-terrorism legislation post 9/11 is to make all Muslims potential terrorist suspects.[251] The negative aspect of the 'war on terrorism' is this divisiveness[252] as demonstrated by for example proscription[253] and reinforced by discretionary powers within the TA 2000.[254] This results in a dual criminal justice system with an extraordinary sphere directed not at prosecution but at pre-empting terrorism.[255] It is the pre-emptive aspect of the strategy that has created new laws targeting an ever greater range of people and activities before terrorist acts have been committed[256] embedding national security into an anti-terrorism criminal justice system.[257] It remains to be seen whether this is positive or negative in the long-term. Arguably the UK contribution has been to develop the concept of pre-emption in the domestic law sphere thereby creating a new paradigm for the 'War on Terrorism'.

The implementation of the strategy therefore creates the very conditions for radicalisation the strategy seeks to avoid.[258] Whilst the strengths of the UK strategy

[234] Ibid, para. 84.
[235] R Edwards, Stop and Search, Terrorism and the Human Rights Deficit, (2008) 37 (3) Common Law World Review 211, p.p. 223 – 230.
[236] H Duffy, The 'War on Terror' and the Framework of International Law (Cambridge University Press 2005), p. 123.
[237] D Keohane, The Absent Friend: EU Foreign Policy and Counter-Terrorism, (2008) 46 (1) Journal Common Market Studies 125, p.p. 134 – 135.
[238] M Lehto, War on Terror – Armed Conflict With Al-Qaida? (2010) 78 Nordic Journal of International Law 499, p.p. 502 - 503.
[239] B Brandon, Terrorism, Human Rights and the Rule of Law: 120 Years of the UK's Legal Response to Terrorism (2004) Crim LR 981 p. 996.
[240] D Whittaker, Counter-Terrorism and Human Rights (Pearson Education Limited 2009).
[241] J McCulloch and S Pickering, Pre-Crime and Counter-Terrorism: Imagining Future Crime in the "War on Terror" (2009) 49 (5) British Journal of Criminology 628 p. 633.
[242] Ibid, p.p.634 – 640.
[243] Supra note 247, p.p. 271 – 272.
[244] Supra note 208.
[245] Ibid.
[246] C Campbell and I Connolly, Making War on Terror? Global Lessons from Northern Ireland (2006) 69 (6) Modern Law Review 935, p. 937.
[247] Ibid, p.943.
[248] Ibid, p. 944.
[249] Ibid, p.p. 954 – 956.
[250] Ibid, p.p.956 – 957.
[251] C Pantazis and S Pemberton, From the "Old to the "New" Suspect Community: Examining the Impacts of Recent UK Counter-Terrorist Legislation (2009) 49 (5) British Journal of Criminology p. 646.
[252] Ibid, p.p. 650 – 651.
[253] Ibid, p. 652.
[254] Ibid, .p. 653.
[255] Ibid, .p. 654.
[256] J McCulloch and S Pickering, Pre-Crime and Counter-Terrorism: Imagining Future Crime in the "War on Terror (2009) 49 (5) British Journal of Criminology 628, p. 633.
[257] ibid, p.p. 634 – 640.
[258] Ibid, p. 661.

lie in the security values of controlling terrorism and as such this aligns with United States and European policies, the weaknesses are the disproportionate use of anti-terrorism legislation against non-terrorists and the primacy of executive control. This undermines the legitimacy of continuing with the strategy and limits public confidence. The effect of using anti-terrorism legislation to include targeting would-be terrorists or people who express support for a terrorist cause may restrict the rights of liberty and freedom of expression. This makes those Human Rights subordinate to the interests of National Security.

Conclusion

Anti-terrorist legislation has a counter-terrorism purpose and counter-terrorist policy is driving the evolution of anti-terrorism strategy. This is reflected in the development of anticipatory offences and is clear from the expression of the strategy as an overarching counter-terrorism national security strategy. A hybridisation of the criminal justice model can be detected from the increasing use of executive power. This is reflected in control orders, proscription and the use of financial restraint. In effect there is legal ground lying between the criminal justice model and the war model. Whilst the UK does not have a 'homeland security' model comparable to the United States, the UK model can be defined as a national security model in which anti-terrorism legislation has the lead role. This has clear implications for human rights as they are in danger of becoming offset as opposed to being an equal interplay of liberty and security. The implications of the emerging imbalance are the UK long-term contribution to the 'War on Terror' could be the furtherance of extremism as an unintended consequence.