

# Prosecuting terrorism: the Old Bailey versus Belmarsh

by Clive Walker

Consistent with his “war on terror” paradigm, President George W Bush asserted that “it is not enough to serve our enemies with legal papers” (State of the Union Address, January 20, 2004). In resonance with this view, the prime legal focus in the immediate aftermath of 9/11 was more upon Belmarsh rather than the Old Bailey – in other words, upon detention without trial and latterly on control orders rather than prosecutions. However, this era of executive action is fading in United Kingdom domestic law. The first part of this paper will examine the foundations for the reinvigoration of criminal justice. The second part will explore the present and future implications for criminal justice.

## THE PRIMACY OF CRIMINAL PROSECUTION

The British Government might assert that the primacy of criminal prosecution has been assured ever since the Diplock Report (Report of the Commission to consider legal procedures to deal with terrorist activities in Northern Ireland (Cmnd 5185, London, 1972)) plotted a path out of internment without trial and military predominance in Northern Ireland. But what happened between 2001 and 2005 appeared to be a swing away from prosecution. Detention without trial re-appeared under the Anti-terrorism, Crime and Security Act 2001, succeeded by control orders under the Prevention of Terrorism Act 2005. The London bombings of July 7, 2005, aggravated this hostility to criminal justice, and Tony Blair’s warning that “the rules of the game are changing” certainly attained some traction against foreign suspects (see Walker, C, “The treatment of foreign terror suspects”, (2007) 70 *Modern Law Review* 427). However, the paradoxical development on the domestic front, which has grown in importance because of the trend of “neighbour terrorism” (Walker, C, “‘Know thine enemy as thyself’: Discerning friend from foe under anti-terrorism laws” (2008) 32 *Melbourne Law Review* 275) – the recognition that most terrorists are British citizen neighbours not aliens – is a reversion to criminal prosecution.

This domestic trend may be evidenced by three indicators. One is that both recent pieces of anti-terrorism legislation have avoided reliance upon executive measures (see Walker, C, *The Anti-Terrorism Legislation* (2nd ed, Oxford University Press, Oxford, 2009). The break can be seen starkly in the Terrorism Act 2006, which concentrates on the delivery of new offences, such as incitement of

terrorism, or new police powers to investigate potential crimes, notably, 28 day detention. Within the Counter-Terrorism Act 2008, its administrative innovations of notification and foreign travel restriction in Part IV are dependent upon criminal convictions, while Part III enhances sentencing powers.

The second indicator is the paucity of executive orders. Despite the apocalyptic analysis in 2007 of Jonathan Evans, the Director of the Security Service, that 2,000 suspects pose a threat to national security, there were just 15 control orders in force at the end of 2008. This absence of custom is not for a want of customers but because these executive measures are neither cost effective nor legally certain compared to criminal prosecution.

The third indicator is a statistical re-gathering of pace for criminal prosecution (Source: Home Office, Statistics on Terrorism Arrests and Outcomes Great Britain September 11, 2001 to March 31, 2008 (04/09, Home Office, London, 2009).

In summary, criminal prosecution seems to have been given a boost after 2005. But is criminal prosecution preferable to executive measures? From a normative standpoint, criminal prosecution prizes individual responsibility through the notion of *mens rea* whereas risk to public or state security predominates in executive measures. The individuation of crime might thus be esteemed as an affirmation of the value of human autonomy and equality. There are also gains for system legality. There is affirmation in more open fashion than is possible for executive measures of public accountability and due process.

Yet, there are downsides, the most basic of which is the inability to incapacitate before a terrorism event. As the

Date	Arrest	Charges				Convictions			Other action
		Arrest – total	Release without charge	Terror offence	Other crimes	Total (% of arrest)	Terror offence	Other crime	
2001/2	108	58	22	16	38 (35%)	6	6	12 (32%)	13 (12%)
2002/3	275	141	64	30	94 (34%)	9	25	34 (36%)	39 (14%)
2003/4	191	81	52	38	90 (47%)	6	15	21 (23%)	21 (11%)
2004/5	168	109	35	12	47 (28%)	2	16	18 (38%)	13 (8%)
2005/6	285	193	50	25	75 (26%)	24	14	38 (51%)	16 (6%)
2006/7	213	101	81	22	103 (48%)	33	12	45 (44%)	10 (5%)
2007/8	231	136	55	19	74 (32%)	22	6	28 (38%)	19 (8%)
Total	1471	819	359	162	521 (35%)	102	94	196 (38%)	131 (9%)

Director of the Security Service, Dame Eliza Manningham-Buller, commented in 2005: “We may be confident that an individual or group is planning an attack but that confidence comes from the sort of intelligence I described earlier, patchy and fragmentary and uncertain, to be interpreted and assessed. All too often it falls short of evidence to support criminal charges to bring an individual before the courts, the best solution if achievable.” (<http://www.mi5.gov.uk/output/director-generals-speech-to-the-aivd-2005.html>) The next inherent problem with criminal proof arises from the disclosure of secret sources, techniques and data. The final drawbacks relate to collective rather than individual impacts. There might arise the troubling collective perception of the courts protecting the state and not victims or the appearance of judges being co-opted into the work of the executive, resulting in damage to their reputation. The danger is that minority communities, upon whom the anti-legislation unevenly impacts, will feel distrust leading to lessening cooperation (see House of Commons Home Affairs Committee, *Terrorism and Community Relations* (2003-04 HC 165)).

### THE PROBLEMS FACED IN CRIMINAL PROSECUTION

Whilst a priority for criminal prosecution is warranted, its implementation incurs attendant costs both for substantive criminal offences and for criminal process.

#### *Substantive criminal offences*

The design of criminal offences within anti-terrorism legislation evinces signs of several disturbing trends which relate to their adaptation to the precautionary dynamic described earlier. Three problems might be isolated: net-widening through definitional construction based on reliance on the term ‘terrorism’ and jurisdictional extensions to foreign activities; guilt by association through membership offences; and reverse burdens of proof in precursor criminal offences. Have these threats been overcome?

Two principal responses have been made to the problem of net-widening. The most potent is a welcome degree of

reticence on the part of the police. Of course, it is possible to encounter instances of excess, such as the detention of Walter Wolfgang at the Labour Party conference in 2005. Nevertheless, indulgence continues to be shown to the PKK, Hamas, and even to recent Tamil demonstrators. The next response has been to impose the filter of consent by a Law Officer for prosecution for many of the offences under the anti-terrorism legislation, (Terrorism Act 2000, s 117; Terrorism Act 2006, s 37; Counter-Terrorism Act 2008, s 29), though this filter does not reverse the chilling effect.

Guilt by association through membership offences under Part II of the Terrorism Act 2000 is the next problem engendered by the prosecution of terrorism. As operated in Britain at least, the main answer to the danger of guilt by association has been a very low rate of prosecutions: 55 charges between 2001 and 2007 (compared to 83 in Northern Ireland). Consequently, the membership offence serves primarily the purpose of symbolic denunciation.

The third issue which has tainted criminal law concerns the use of reverse burdens in special precursor offences. The problem is relevant to membership offences just described, but it has become acute and recurrent in connection with offences of possession contrary to sections 57 (possession of articles relevant to terrorism), and 58 (possession of records relevant to terrorism) of the Terrorism Act 2000.

The responses by the courts to these features has been complex and, for a long time, unconvincing. As regards membership, a defence is provided in section 11(2) if it can be shown that membership has lapsed since the date of proscription. In *Sheldrake v Director of Public Prosecutions; Attorney General’s Reference (No 4 of 2002)* [2004] UKHL 43, Lord Bingham set out the important parameter that “Security concerns do not absolve member states from their duty to observe basic standards of fairness.” His conclusion was that section 11(1) created a real risk that blameless conduct could be penalised, so section 11(2) should be read as involving only an “evidential burden.”

This categorisation first arose in *R v Director of Public Prosecutions, ex parte Kebilene* ([2000] 2 AC 326), where Lord Hope applied the concept to the forerunner to section 57, a finding underlined by section 118 of the Terrorism Act 2000.

There are a number of other disputes about the fairness of sections 57 and 58. One concerns the boundaries (as distinct from who bears the burden of proof) of innocent or reasonable possession which is a defence under section 57(2) and 58(3). This point was examined regarding foreign policy in *R v F* [2007] EWCA Crim 243, where the fact that the terrorism material was possessed with a view to action against an odious foreign government (Libya) was not a reasonable excuse. In *R v G* [2009] UKHL 13, the House of Lords emphasised that the excuse must be reasonable under section 58, based on the intrinsic nature of the information. Though this prevents prosecutions based on speculation about the possession of an A-Z of London (an example given in *K v R* [2008] EWCA Crim 185, it also handicaps the defence by excluding consideration of wider circumstances or purposes or even mental illness. Under section 57(2), the focus is the purpose of the defendant without reference to its reasonableness. However, the courts have stopped a trend whereby sections 57 and 58 were becoming akin to offences of the possession of terrorism fantasy pornography. According to *R v Zafar* [2008] EWCA Crim 184, there must be proven “a direct connection between the objects possessed and the acts of terrorism. The section should be interpreted as if it reads ... he intends it to be used for the purpose ...” The same point was underlined in *R v Samina Malik* [2008] EWCA Crim 1450, where the “Lyrical Terrorist” was initially convicted under section 58, not for her crass poetry such as “How to Behead”, but for her possession of propagandist and military documents. She was acquitted on appeal on the grounds that the judge’s summing up had failed to isolate those documents capable of founding a conviction under section 58 by satisfying the test of inherent practical utility.

In summary, when the prosecution can assert without ridicule that the London A-Z is a terrorist document, it is indeed time to slam on the judicial brakes. The brakes have been duly applied in some respects, but the offences are far from ‘almost redundant’ (Tadros, V, “Crime and security”, (2008) 71 *Modern Law Review* 940 at p 968) and remain top of the list for charges (32% of terrorist offences charges are under s 57).

Given the manifold expansions of the criminal law by the Terrorism Acts 2000 and 2006, meagre scope remains for a general offence of terrorism. The only conceivable uses it could serve are jurisdictional – for example, to prosecute the attackers of the hotels in Mumbai or on the Sri Lankan cricket team in Pakistan, assuming some of the foreign perpetrators are ever found within the United Kingdom jurisdictions. Yet, a universal offence of terrorism lacks justification in international law, which might hamper

cooperation and create conflicting jurisdictions. In addition, the costs of criminal process and imprisonment come into play when the role of world prosecutor is assumed.

### **Criminal process**

The enduring pressures of coping with terrorism upon traditional criminal justice process are illustrated by the juryless Diplock courts in Northern Ireland, which have been accorded a new lease of life by the Justice and Security (Northern Ireland) Act 2007. Juries largely survive in Britain, aside from the isolated case of the special non-jury Scottish trial (in the Netherlands) of those accused of the Lockerbie bombing, and with the exception in place for jury tampering under the Criminal Justice Act 2003. Further incursions into jury trial have been mooted for coroners’ inquests, an idea which pointedly first appeared in the Counter-Terrorism Bill 2007-08, Part VI, but was then finally defeated in the context of the Coroners and Justice Bill 2008-09, clause 11.

Some changes to criminal justice processes have occurred. Section 16 of the Terrorism Act 2006 ensures that preparatory hearings are mandatory in terrorism cases. The objective is to ensure that there is in every case enhanced judicial management of terrorism indictments. This change has been followed up with tighter management of terrorist cases through the Protocol on the Management of Terrorism Cases issued by the President of the Queen’s Bench Division (2<sup>nd</sup> ed, Courts Service, London, 2007). The Protocol ensures that all indictable only ‘terrorism case’ will be managed via the ‘terrorism cases list’ by the Presiding Judges of the South Eastern Circuit and other nominated judges of the High Court and tried by a nominated judge of the High Court. This attention to detail and the imposition of senior judicial active involvement is generally to be welcomed. But it potentially dilutes the principle of trial by peers and could threaten further if concerns about cost and delay become overweening, as was alleged in *R v Khyam* [2008] EWCA Crim 1612, where judges appeared so concerned about delays and costs that they were asked to recuse themselves. It could also be perceived as creating too cosy a relationship between judges and prosecutors, an accusation levelled against the 14th Section of the Paris Court System.

Next, there are pressures on the equality of arms through a lack of defence resources, for example, to be funded for, and be able to find, experts to match those of the police. In addition, the high security conditions imposed upon the defendants may also affect their ability to give effective instructions. The defence also face the danger of media prejudice, which is encouraged by extravagant talk from police and politicians.

One might predict further criminal justice proliferation of special advocates, 50 of whom who perform a role

which is depicted as a key safeguard for the controlled person under paragraph 7 of the Schedule to the Prevention of Terrorism Act 2005. Lord Carlile has expressed approbation even to the extent of requiring them to override expressed wishes of the suspect. By contrast, Lord Steyn in *R v Roberts* said that ‘the special advocate procedure undermines the very essence of elementary justice’ [2005] UKHL 45 (at para 88). Their ability to serve the interests of justice certainly requires further support.

Moving from mode of trial and trial processes to evidential features, the rules of evidence have not been altered substantially in recent British terrorism prosecutions, in contrast to past experience in Northern Ireland. Critics might argue that the damage has already been done and that changes to the right to silence and hearsay have been sustained in ‘normal’ law. Problems with admission and disclosure have, however, arisen. The suppression of evidence through public interest immunity claims have been handled tolerably well, with the exception that it is envisaged that the future admissibility of intercept data as evidence pursuant to the Chilcot Report requires special rules to nullify any “quixotic” judge who creates a “material risk” to security (Privy Council Review of intercept as evidence: report to the Prime Minister and the Home Secretary (Cm 7324, London, 2008)). There remain dire warnings about the expense and practicability of the process, even though intercept data is often crucial evidence in terrorism prosecutions elsewhere. May be a leaf could be taken out of the Classified Information Procedures Act of 1980 in the USA, which managed to answer a variety of serious challenges in *US v Moussaoui* (382 F.3d 453 (2004, cert den 161 L. Ed. 2d 496, 2005)) consistent with Sixth Amendment rights.

The other aspect of evidence which causes discomfort in terrorism cases concerns the admissibility of evidence obtained from torture. The rejection of such evidence was firm enough in *A v Secretary of State for the Home Department (No 2)* [2005] UKHL 71. But the judgment can rightly be condemned as insufficiently demanding of state authorities and too demanding of the appellant. Its emphasis upon torture belies an indulgence towards inhuman and degrading treatment, thereby ignoring the evil design of regimes such as Guantánamo. The issue of torture has been encountered in two recent terrorist trials in England (Salahuddin Amin in *R v Khyam* [2008] EWCA Crim 1612 and Rangzieb Ahmed in 2008). They illustrate that the court are ready to reject as an abuse of process any evidence which can be said to be a direct product of torture. However, the courts should more carefully test whether a continuum can be established in joint operations with foreign states (notably Pakistan) and whether collaboration has arisen from briefings or even regular relations with disreputably regimes.

Another source of evidence which has historically proven problematic in terrorism cases concerns agents and

informants. Recent examples have included O’Farrell, Rafferty and McDonald, who were convicted in May 2002 of attempting to acquire weaponry for the Real IRA after being lured into a meeting in Slovakia with British Security Service agents, pretending to represent the Iraqi government ([2005] EWCA Crim 1945, [2005] EWCA Crim 1970). Next, FBI agent David Rupert was prominent in the infiltration of the Real IRA in Ireland (*Breslin v McKenna* [2005] NIQB 18; *DPP v McKevitt* [2009] IESC 29). A third example concerns Hermant Lakhani who attempted to purchase weapons in New Jersey (480 F.3d 171 (2007)). Aside from public revelations of this kind, several inquiries into the past running of agents in Northern Ireland have found multiple abuses amounting to collusion in paramilitary murders (such as in the case of Raymond McCord Jr). Hopefully, the Regulation of Investigatory Powers Act 2000 will avoid some of the excesses of the past, but the absence of independent oversight for covert human intelligence sources offers little confidence for this outcome.

Finally, an unwelcome trend is the secrecy of judgments. Parts of the judgment in *R v Khyam* were redacted, and virtually all of the judgment in the acquittal on appeal of Danny Morrison has been suppressed ([2009] NICA 1).

Despite all these concerns, the criminal prosecution of terrorists still involves access to an independent and thorough trial of accusations to a far better degree than any executive-based disposal. Lord Diplock’s policy of criminalisation was valid in 1972 and is valid now. That approach will better secure due process for the suspect and will attain a more legitimate and convincing result as far as the public are concerned. Nevertheless, there remains extra pressure on criminal processes in terrorist cases to be quick and to produce the “right” result. Each failure to convict will bring pressures to compromise, as when the acquittals on the principal charges in Operation Overt following the first “Liquid Bomb” trial in September 2008 elicited the complaint from Peter Clarke, speaking on behalf of the police, about the jury failing to sustain convictions “despite strong evidence”, though he did also concede that there is “no need for military commissions or the juryless Diplock courts of Northern Ireland.” Not yet, pending their retrial.


Pressures are being felt to migrate to the lowest common denominator of article 6 demands so as to solve the prosecutor’s terrorism dilemma – namely, the need for intervention prior to the point when in a non-terrorist case there might have been a tipping point between bad thoughts and bad deeds. The degree of poverty of that lowest common denominator is set to be explored further within control orders where there is a system set up deliberately to exploit the boundaries between civil and criminal standards. In response, the decision in *Re MB and AF* [2007] UKHL 46 secures the importance of article 6 in executive disposals because the House of Lords refused to be sidelined by accepting non-justiciability. However, the

judgment also creates endemic uncertainty as to the standards to be observed. The result is Lord Bingham's invitation to a dance of the evidential veils, with the Home Office revealing tantalising flashes of intelligence, and then running past a judge to see if the amount of evidential flesh on show has been sufficiently agreeable. This formula keeps the government lawyers on their toes. It was important to develop in this way a jurisprudence of executive measures without convergence to a degree which makes criminal justice wholly irrelevant. Accordingly, the judgment does not make control orders unworkable, but it does provide a substantial disincentive against the proliferation of control orders. The case of *AF (No 3)* [2009] UKHL 28 now clarifies that the lowest common denominator can never mean no material disclosure whatever. But there is further work to be done in providing further impetus towards criminal justice solutions, especially by applying a time limit to the renewal of control orders (see Walker, C, "Keeping control of terrorists without losing control of constitutionalism" (2007) 59 *Stanford Law Review* 1395).

The considerable difficulties encountered by US military commissions and the injunction of President Obama to find alternatives have encouraged debates about whether "national security courts" should supplant either military commissions or normal criminal courts. The drawbacks are readily evident (see Vladeck, SI, "The case against national security courts" (2009) 45 *Willamette Law Review* 505). Problems would remain with intelligence secrecy and sensitivity. Problems would remain with the precautionary logic of intervention before traditional triggers for criminal law have been clearly satisfied. Problems would remain with the admissibility of coercive interviews. There would additionally arise the problem of choice of jurisdiction and discrimination – who would be tried before such courts and for what? If one reaches the conclusion that normal criminal courts do not measure up to the enormity of the multiple difficulties created by notorious offenders, then internationalisation rather than militarisation seems a

more promising avenue, as has been attempted from Nuremberg through to Lockerbie.

## CONCLUSIONS

The domestic resurgence after early 2005 of criminal justice in response to terrorism is a welcome trend. Nevertheless, the fundamental paradox of proof beyond doubt in a climate of precautionary logic remains troubling and encourages a slide towards minimum standards of due process. Having to some extent developed a jurisprudence of executive processes and acceptable adaptations within criminal justice, as outlined in this paper, there remains other important work to be undertaken. The agenda includes the performance of the Crown Prosecution Service Counter Terrorism Division, whose work was in many respects praised in a report in 2009 by HM Crown Prosecution Service Inspectorate. Second, the interests of victims must be more prominent within the institutional matrix for security through prosecution. Third, and most ambitious of all, remains the development of a social intervention tier to the regulatory pyramid of the control of terrorism. It would require attention not only to criminal prosecution, not only to executive control or deportation, but also to a range of social interventions for those on the threshold of political violence. Some of our "neighbour terrorists" should face prosecution, but there should exist a range of other tactics, assessment, counselling, and assimilation, to achieve a harmonious life with unruly and sometimes nasty neighbours. 

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