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# **Terrorism and the control orders/TPIMs saga: a vindication of the Human Rights Act or a manifestation of ‘defensive democracy’?**

## **Abstract\***

This article argues that the interplay between human rights and preventive executive measures on the control orders model since 2005 can be viewed as a vindication of the Human Rights Act. It considers the possibility that the use of such measures in the UK for over a decade could be viewed as a manifestation of ‘defensive democracy’, in the sense used below, but comes to the conclusion that in relying on them as one method of seeking to defend the UK from anti-democratic terrorist groups human rights norms have not been abandoned. The protracted and complex interaction traced below between such measures and the ECHR under the Human Rights Act has led, it will be argued, to their amelioration and emergence in more tempered forms, via court action, Parliamentary pressure, and governmental decisions. Continued reliance on measures on the control orders model was reaffirmed by the government and accepted by Parliament at the end of 2016, until 2021, confirming their established preventive role as part of the counter-terror arsenal. Measures on this model, originating in the UK, have now spread to other EU states, as Amnesty details in a highly critical 2017 Report. Nevertheless, in the UK the constraining impact of the Human Rights Act, now more clearly apparent due to its interaction with control orders, is likely to continue, it will be argued, to affect governmental, Parliamentary and judicial decisions as to deployment of these executive measures, and to fuel reluctance as to accepting their more repressive iterations in future.

Key words: control orders, TPIMs, Articles 5 and 6 ECHR, Human Rights Act

## **Introduction**

This article sets out to consider the interplay between human rights and executive measures on the control orders model post-2005 in order to argue that it should not be viewed as a manifestation of ‘defensive democracy’, given that the early creation of more ‘empty’ forms of legality eventually gave way to a more substantive acceptance of legal constraint,<sup>1</sup> powered partly by the Human Rights Act. The term ‘defensive democracy’ is being used here, in a very specific sense, not necessarily captured by the more familiar term ‘militant democracy’,<sup>2</sup> used to refer to democracies defending themselves against internal actors seeking to use the democratic process to undermine or destroy democracy.<sup>3</sup> Rather, the term is intended to capture semi-permanent limitations of rights in a democracy entailed by adopting disproportionately preventive measures in the face of terrorism, to defend itself

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\* My thanks are due to David Anderson QC for comments on an early draft of this article, given as a paper, the anonymous referee and Dr Alex Williams, University of Durham.

<sup>1</sup> See on this point D Dyzenhaus ‘States of Emergency’ in M Rosenfeld and András Sajó *The Oxford Handbook of Comparative Constitutional Law* (2012).

<sup>2</sup> See Karl Lowenstein ‘Militant Democracy and Fundamental Rights I’ (1937) 31 *American Political Science Review* 417.

<sup>3</sup> András Sajó refers to the term as ‘commonly understood as the fight against radical movements, especially political parties, and their activities’ in ‘From Militant democracy to the preventive state’ (2006) 27 *Cardozo Law Review* 2255, at 2262.

against those seeking to subvert it by acts of violence directed or inspired by powerful external groups. As Müller points out, use of such measures may lead to what he terms the ‘democratic dilemma’, namely ‘the possibility of a democracy destroying itself in the process of defending itself’.<sup>4</sup> In 2017 Amnesty, in a blunt attack on securitisation in EU states<sup>5</sup> in the wake of a range of terrorist acts in 2015-16, accused the region of adopting disproportionate counter-terror measures which were leading it, in effect, down the path of ‘defensive democracy’, in the sense used here, given their semi-permanence.<sup>6</sup> Amnesty accused the states in question, rather than terrorist acts, of creating the threat of undermining human rights due to a preparedness to ‘abandon their own values’ in confronting such acts.<sup>7</sup> Reflecting that criticism, a section of the Report specifically attacked administrative measures recently adopted, or about to be adopted, in various EU states on the control orders model.<sup>8</sup> It will be argued, however, that while that model was first introduced in the UK, and is only recently appearing in other EU states, the experience of deploying it in the UK does not fully comport with Amnesty’s general criticisms. The position, it will be argued, is far more nuanced. Rather than indicating a manifestation of ‘defensive democracy’, it will be argued that a sustained interaction between judicial, Parliamentary and governmental input in relation to such measures has proved itself able to resist the abandonment of human rights norms.

The recently increased threat posed by terrorism to Western democracies comes largely from changing and evolving Islamic terrorist groups, and for some time has been manifesting itself mainly in the form of so-called ‘home-grown’<sup>9</sup> terrorism, but finding inspiration, direction and funding from external forces. In the UK the threat currently comes in part from nationals who have travelled abroad to fight or train with ISIS, and then returned to the UK,<sup>10</sup> although the fact of leaving to support ISIS is far from the only indicator that an ISIS-supporter poses a risk.<sup>11</sup> Given the continuing diminution of ISIS-held territory in 2015-2017,<sup>12</sup> the group has

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<sup>4</sup> Jan-Werner Müller ‘Militant Democracy’ in M Rosenfeld and András Sajó (note 1 above), at 1253.

<sup>5</sup> ‘Europe: Dangerously disproportionate: The ever-expanding national security state in Europe’, Amnesty International Report, 17 January 2017, Index number: EUR 01/5342/2017, at 6 (hereafter ‘Amnesty, 2017’).

<sup>6</sup> Ibid, p19.

<sup>7</sup> Ibid, p 8.

<sup>8</sup> Ibid, pp 48-56 (see also p19).

<sup>9</sup> The attacks in France in January 2015, the Paris attacks in November 2015 were organised and perpetrated largely by French national ISIS-supporters: see B Farmer, The Telegraph 18 March 2016: <http://www.telegraph.co.uk/news/worldnews/europe/france/11996120/Paris-attack-what-we-know-about-the-suspects.html>. The Brussels terrorist strike on 22.3.16, the deadliest act of terrorism in Belgium's history, was perpetrated by at least 3 Belgian nationals: see BBC News 9.4.16 - <http://www.bbc.co.uk/news/world-europe-35869985>. The Normandy church attack, 26.7.16, was perpetrated by French citizens, the Nice truck attack by Lahouaiej-Bouhlel on 14.7.16, who had a French residency permit. See also E MacAskill and P Johnson, The Guardian, 1.11.16 interview with Andrew Parker, current Head of MI5: ‘There will be terrorist attacks in Britain’: ‘there are about 3,000 “violent Islamic extremists in the UK, mostly British”’.

<sup>10</sup> The terrorist threat was summarised in CONTEST ‘The UK’s Strategy for Countering Terrorism: Annual Report for 2015’ Cm 93 10.7.16, which referred in para 1.4 to about 850 persons who had travelled to Syria and Iraq, of whom about half had returned.

<sup>11</sup> See T. Hegghammer and P. Nesser, ‘Assessing the Islamic State’s commitment to attacking the West’, (2015) Perspectives on Terrorism vol 9 no. 4, published by the Terrorism Research Initiative, which found that more attacks in the West had been mounted by such sympathisers than by such returnees, but that ‘the organisation’s formidable resources and verbal hints at future attacks give reason for vigilance’.

<sup>12</sup> It has diminished significantly (by about 50%) due to military action since the Caliphate was declared in June 2014 (see *Counter extremism strategy*, Cm 9148, October 2015, at 22). See B. Powell *the Independent* ‘As Isis’s caliphate crumbles, jihadi tactics are evolving’, 23.10.16.

called on followers to remain in their home countries in order to mount attacks,<sup>13</sup> while the expected eventual military destruction of the ‘caliphate’ is likely to lead to an increase in the number of returnees who have experienced weapons and explosives training (‘foreign terrorist fighters’).<sup>14</sup> While the precise nature of the terrorist threat has changed over the fifteen years since 9/11, and is not associated only with Islamic terrorist groups,<sup>15</sup> it clearly increased from 2014 onwards.<sup>16</sup> One result of this continuing but shifting threat has been the striking recent increase in the securitisation of Europe, referred to by Amnesty, whereas in the UK the counter-terror infrastructure is more established and has featured for over a decade a reliance on non-trial-based liberty-invading measures on the control orders model (hereafter ‘executive measures’). Thus it will be argued that in the UK, since the interplay between human rights norms and such measures has a longer post-9/11 history, that has led to a somewhat surprising degree of reconciliation between them.

This article will begin by arguing that in response to the search for a reconciliation between such measures and human rights law in the UK three phases can be identified as having arisen post-2005, when the control orders model was first introduced. These phases indicate, it will be argued, a certain back and forth interplay between security concerns and acceptance of adherence to human rights norms under the Human Rights Act framework in which the judiciary, government and Parliament have all played a part, but which has shown a general tendency towards control of executive power, in itself linked to self-restraint in the exercise of that power, even as the terrorist threat has increased. As a result of this lengthy process, it will be argued in the next section, a human rights tempering of the control orders model has occurred, which has seen an infusion of ECHR norms into the current iteration of this model, leading to the view – covered in the final section - that a future derogating-demanding iteration is not needed, especially as attention has turned increasingly to preventive offences. But, ironically, one result of such human rights tempering is that such measures have become a familiar part of the counter-terror infrastructure, attracting a certain complacency: the most recent iteration of measures on this model has just been renewed for another five years,<sup>17</sup> and neither the Home Office review of that iteration, in late 2016,<sup>18</sup> or the Parliamentary Committee’s scrutiny of its renewal until 2021,<sup>19</sup> considered their future abandonment or their subjection to annual Parliamentary scrutiny, emphasising their normalisation as an accepted part of the counter-terror infrastructure. While challenging that

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<sup>13</sup> On this point, David Anderson QC, the current independent reviewer of terrorism legislation, has noted: ‘The volume and accessibility of extremist propaganda...has increased. UK-based extremists are able to talk directly to ISIL fighters...in web forums and on social media...to inspire individuals to undertake attacks without ever travelling to Syria or Iraq...[inspiring] the increase in unsophisticated but potentially deadly attack methodologies...seen recently in Australia, France, Canada, Denmark and the USA’: ‘The Terrorism Acts in 2014’, Sept 2015, para 2.11.

<sup>14</sup> See B. Powell, note 12 above.

<sup>15</sup> See David Anderson: ‘Islamist terrorism is now practised by a diverse range of groups, many of which have no current connection with al-Qaida and some of which are actively opposed to it’, (note 13), para 1.13. See also paras 2.4-2.9 as to the threat from non-Islamic terrorism.

<sup>16</sup> The threat level of ‘severe’, the second highest level possible, was raised in August 2014 from ‘substantial’: CONTEST: Annual Report for 2014, Cm 9048, (March 2015).

<sup>17</sup> An Order (the Terrorism Prevention and Investigation Act 2011 (Continuation) Order 2016) was made under s21 TPIMA, to extend the Secretary of State’s TPIM powers under the Act, due to expire on 14.12.16, for a further five years, until 13.12.21.

<sup>18</sup> Memorandum to the Home Affairs Committee: Post-Legislative Scrutiny of the Terrorism Prevention and Investigation Measures Act 2011, October 2016, Cm 9348.

<sup>19</sup> The Order was considered (briefly) by the Third Delegated Legislation Committee on 26.10.16. Labour and the SNP supported it.

normalisation, this article nevertheless contends that the control orders/TPIMs saga described here provides a degree of vindication of the Human Rights Act.

### **Three phases in the control order/TPIMs saga**

The first – which may be termed ‘the minimising rights phase’ - began in 2005 with deployment of a repressive iteration of the control orders model, unaccompanied by a derogation, in effect necessitating a down-grading recalibration of rights to accommodate it, albeit combined with a degree of executive self-restraint in deploying it. However, from around 2007 onwards the courts, relying on the Human Rights Act, resisted such recalibration, to an extent, and thereby asserted a control over the obligations that could be imposed via the orders which was missing from them in their first iteration. That second phase - of judicial activism, from 2007-2011 - also saw control orders falling further into disuse,<sup>20</sup> which appeared to be attributable in part to the extensive litigation they had generated. The Liberal-Democrat influence on the Coalition government and Parliament can be credited with the abandonment of control orders in 2011 and introduction of ‘control orders-lite’ (TPIMs) in the third phase, reflecting governmental acceptance of human rights norms, given that the design of TPIMs was influenced more heavily by such norms than control orders had been via court action. Governmental decisions thereafter, as to deployment of measures on this model then exhibited, it will be argued, a certain restraint which is arguably attributable to the shock of the *A* decision in 2004,<sup>21</sup> and to the control orders litigation, conducted under the HRA framework. Such restraint, it will be argued, has persisted until the present day: while a ‘heavy touch’ version of TPIMs was introduced (ETPIMs, almost indistinguishable from control orders), it has still not been triggered. The perceived lack of practical utility of TPIMs and increased security concerns were deemed to demand the reintroduction in 2015 of a somewhat more repressive iteration of the control orders model, which nevertheless did not return it to the original, more repressive form that emerged in 2005.

#### **Phase 1 - the control orders scheme: impliedly minimising rights**

In the UK control orders emerged under the Prevention of Terrorism Act 2005 (PTA) as a response to the failed attempt at a reconciliation between reliance on indefinite detention without trial for non-citizens (under the Anti-Terrorism, Crime and Security Act 2001, Part 4 (ACTSA)) and human rights law via use of a derogation under Article 15, from the right to liberty under Article 5 ECHR. The then Labour government had in effect by derogation post-9/11 attempted to introduce a state of exception<sup>22</sup> whereby the right to liberty was disapplied to the extent demanded by the measures. A majority of the House of Lords resisted the attempt, finding in the seminal *A* case<sup>23</sup> that while the executive was entitled to decide when a state of emergency arose, less deference would be shown in considering the extent of the exceptional measures then imposed, finding that the measure taken failed to satisfy the demands of proportionality under Article 15(2). The decision, it is argued, supports the notion

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<sup>20</sup> See note 39.

<sup>21</sup> *A and Others v Secretary of State for the Home Dept* (2004) UKHL 56.

<sup>22</sup> It also derogated under Article 4 from Article 9 ICCPR. On the matter of such exceptions, see G Agamben *State of Exception* (2005) University of Chicago Press, Chap 2.

<sup>23</sup> Note 21. See on the decision M Arden ‘Human rights in the age of terrorism’ (2005) 121 LQR 604-627.

that s6 HRA tends to diminish the role of judicial deference,<sup>24</sup> in its direct injunction to courts to abide by the ECHR. The government responded to the resultant s4 HRA declaration of incompatibility issued by the House of Lords by introducing control orders applicable alike to suspect nationals and non-nationals as the replacement measure, with Parliament's consent, given in passing the PTA. Orders on this model rely on targeting terrorist suspects to curtail their liberty without the need for observing the due process protections of a trial, by imposing specific restrictions on them, with the aim of preventing future terrorist activity before it occurs. The scheme on its face handed the executive apparently unlimited power to impose restrictions on suspects,<sup>25</sup> with minimal judicial supervision.<sup>26</sup> At the same time the lack of a derogation to protect the orders meant that they were not to be viewed as falling within an exception and had to be judged via the HRA directly against ECHR standards. Thus the ECHR under the HRA and the extraordinary measures were brought directly into confrontation with each other, with results that were found by 2011, by the Coalition government, to prompt the abolition of the orders.

Derogating control orders were introduced, but under pressure from Parliament they were never deployed in practice so, since the non-derogating version alone was relied on, if executive power was to be curbed by reference to human rights norms, deployment of ss3,6 and 4 HRA provided that possibility. In their early iteration as 'heavy-touch' orders,<sup>27</sup> control orders were designed to approach or over-step ECHR parameters, so in effect they relied on judicial reinterpretations requiring a minimising recalibration of relevant ECHR rights, involving exploiting their gaps and ambiguities, and leading in effect to emptying Articles 5 and 6 of part of their content by re-determining their ambit or by implying new exceptions into them.<sup>28</sup> The repressive nature of the early control orders – which included eighteen hours house detention a day, sometimes combined with forced relocation – could readily be viewed as a manifestation of 'defensive democracy' since it indicated implicit reliance on a minimised notion of the concept of 'deprivation of liberty' under Article 5.<sup>29</sup> The courts were also impliedly required to reinterpret the fair trial right under Article 6 in a minimising fashion in respect of the process of reviewing the orders.<sup>30</sup>

## **Phase 2 - judicial reassertion of rights under the HRA framework**

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<sup>24</sup> See the discussion of *A* by M Arden (ibid) and Lord Steyn 'Deference: a tangled story' [2005] PL 346. As he notes, in *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728 at 746, para 27 Simon Brown LJ said 'The court's role under the HRA is as the guardian of human rights. It cannot abdicate this responsibility'. A Kavanagh charts this change in 'Constitutionalism, counterterrorism, and the courts: Changes in the British constitutional landscape' ICON (2011), Vol. 9 No. 1, 172–199. See also A Tomkins 'National Security and the role of the court: a changed landscape' (2010) 126 LQR 543.

<sup>25</sup> S 1(3) PTA placed no limits on the obligations that could be imposed.

<sup>26</sup> An obligation could only be quashed at the initial hearing if the Secretary of State's decision to impose it was 'obviously flawed' - s3(2)(b), and at the next hearing under judicial review principles: s3(10).

<sup>27</sup> See, for example, the order at issue in *Secretary of State for the Home Department v JJ* [2007] 3 WLR 642.

<sup>28</sup> In 2009 a Report on global terrorism: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, *Assessing Damage, Urging Action* (Geneva, ICJ, 2009) identified this trend in the UK and other countries in the face of terrorism (see 91).

<sup>29</sup> The Secretary of State argued in *Secretary of State for the Home Department v JJ* [2007] 3 WLR 642 that in the security climate, the concept of deprivation of liberty in Article 5 should be interpreted with particular narrowness. See further Helen Fenwick, 'Recalibrating ECHR rights, and the role of the Human Rights Act post-9/11: reasserting international human rights norms in the "war on terror"?' (2011) 63 Current Legal Problems 153-234.

<sup>30</sup> See *Secretary of State v MB* [2006] EWHC 1000.

Ewing's thesis that the HRA is a 'futile' instrument, was, he found, largely confirmed by the *A* decision, given that it ushered in legislation almost as offensive as ACTSA Part 4, the PTA.<sup>31</sup> While there were grounds for coming to that conclusion in 2005, taking the control orders scheme at face value, the interaction between the HRA and the scheme that then followed leads, it is argued, to a different, albeit quite nuanced, conclusion as to the role of the HRA in relation to such measures. The courts' response to the scheme was to resist minimisation of the rights, especially in certain key House of Lords' decisions; thus, some recalibration of the *scheme* occurred: judicial modifications relying on ss 6 and 3 HRA, imposing, as Gearty puts it, a 'civil libertarian dilution' on the scheme,<sup>32</sup> brought it into closer compliance with both Articles 5 and 6 ECHR, clearly meaning that it became in various respects, less repressive.<sup>33</sup> But although the courts' response to the control orders' scheme meant that specific orders,<sup>34</sup> and the scheme itself, had to be modified to achieve greater ECHR-compatibility, albeit this time without rejecting it wholesale, the courts also partially acquiesced in the notion of finding that the ECHR could accommodate the scheme by accepting somewhat attenuated versions of Article 5 and 6. A scheme in 2005 compatible with the ECHR only on the basis of presupposing a narrow interpretation of those Articles, was transmuted into a modified version of itself by 2011 that came closer to achieving such compatibility.<sup>35</sup> However, since significant interferences with liberty<sup>36</sup> without trial – although *not* of the extensive nature demanded by the initial iteration of the scheme – had been accepted by the courts as compatible with Article 5, such interferences could then be viewed as having received a judicial imprimatur. The same can be said of the acceptance – but only once gisting was in place – that relying on closed material proceedings to impose the orders was compatible with Article 6.<sup>37</sup> Nevertheless, Ackerman's view that judicial control over executive power in times of crisis cannot be relied on because the judges will always tend to defer to the executive<sup>38</sup> was not fully supported by the judicial response to the scheme.

### **Phase 3 - influence of the human rights and control orders interplay on subsequent governmental decisions**

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<sup>31</sup> 'The Futility of the Human Rights Act' [2004] Public Law 829.

<sup>32</sup> 'The Human Rights Act - an academic sceptic changes his mind but not his heart' (2010) 6 EHRLR 582-588, at 586.

<sup>33</sup> In particular, it was found that 18 hours house detention a day, combined with other restrictions, would breach Article 5 ECHR, so shorter periods had to be imposed deemed not to create a deprivation of liberty; see: *Secretary of State for the Home Department v JJ* [2007] 3 WLR 642; *Secretary of State for the Home Department v B and C* [2010] 1 WLR 1542. The Court of Appeal found in *Secretary of State v MB* [2006] EWHC 1000 that s3 HRA should be deployed so as to read the provisions relating to court review of the orders to render them compatible with Article 6. At Strasbourg it was found that the gist of the case against the detainee had to be disclosed to him in review proceedings: *A v United Kingdom* (2009) 49 EHRR 29 (Grand Chamber), applied to domestic law via ss2 and 3 HRA under Article 6(1) in *Secretary of State for the Home Department v AF (No 3)* [2009] 3 WLR 74.

<sup>34</sup> See *Secretary of State for the Home Department v AP* [2010] 3 WLR 51.

<sup>35</sup> See Helen Fenwick and Gavin Phillipson, 'Covert derogations and Judicial Deference: Redefining Liberty and Due Process rights in Counterterrorism law and beyond', (2011) 56(4) McGill L.J. 1-54; Clive Walker 'Keeping control of terrorists without losing control of constitutionalism' (2007) 59(5) Stan.L.Rev.1395.

<sup>36</sup> They included some acceptance of up to 16 hours a day house detention: *Secretary of State for the Home Department v JJ* [2007] 3 WLR 642 [105]. That could be combined with forced relocation where no special features particularly 'destructive of family life' arose: *Secretary of State for the Home Department v AP* [2011] 3 WLR 53, at paras 19-24.

<sup>37</sup> See note 33.

<sup>38</sup> See *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism* (2006).

## *Abandoning control orders for less repressive TPIMs*

The attempt to reconcile control orders with human rights law via quashing of certain orders and modifications of the scheme, which may have contributed to under-use<sup>39</sup> of the orders, was deemed in effect to have failed by the Coalition government in 2011, which, influenced by the Liberal-Democrats, decided to abandon them while retaining a version of the control orders *model* in more Article 5-compliant TPIMs under the Terrorism Prevention and Investigation Measures Act 2011 (TPIMA).<sup>40</sup> The need for continued reliance on that model had received the support of the Counter-terror Review 2011,<sup>41</sup> of the independent reviewer of terrorist legislation<sup>42</sup> and, in effect, as discussed, of the courts.<sup>43</sup> Further, the rise post-2005 in ‘home-grown’ terrorism, relying more on strikes on soft targets such as restaurants by ‘self-starters’ rather than on larger operations,<sup>44</sup> meant that the search for effective executive measures to use against nationals remained a continuing concern, as the threat from foreign nationals decreased due to the sustained and determined use of deportation.<sup>45</sup> But, while influenced by these considerations, the contribution of the Coalition government to producing a more restrained version of measures on the control orders model went beyond the tempering impact achieved by the courts,<sup>46</sup> while also being influenced by the court-based interaction that had occurred between the ECHR and the control orders scheme, under the HRA framework. The design of TPIMA thus represented a retreat from the ‘defensive democracy’ model, since it clearly demonstrated that lessons had been learnt from that ECHR-based control orders litigation.

Under the non-derogating control orders regime any obligations that the Secretary of State considered necessary for the purpose of preventing or restricting involvement in terrorism-

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<sup>39</sup> See David Anderson (note 13) ‘Control Orders in 2011’ Seventh Report March 2012, at 5. By the end of 2011 9 control orders were in force. 52 persons had been subjected to them between 2005-11 (at 4).

<sup>40</sup> Following the model of Part 4 ACTSA preventive detention, control orders could be imposed by the Home Secretary, but with court review, on the basis of reasonable suspicion; that model was also used for TPIMs, except that the standard of proof was initially that of ‘reasonable belief’ (see note 52).

<sup>41</sup> *The Review of Counter-Terrorism and Security Powers* Home Office, Report Cm 8004 (2011).

<sup>42</sup> See David Anderson ‘Control Orders in 2011’ Seventh Report March 2012, para 6.2: ‘the control order came to occupy a small but important niche in the counter-terrorism armoury, useful and indeed necessary’.

<sup>43</sup> The courts did not declare the control orders scheme *in general* incompatible with certain ECHR rights, in particular Articles 5 and 6: see note 33 above. Strasbourg did not find that the review mechanism for ACTSA Part 4 was *in general* incompatible with Article 6 in *A v UK* (2009) 49 EHRR 29.

<sup>44</sup> Note 9 above. See: the Home Affairs Committee “Counter-terrorism” Seventeenth Report, HC 231, 30th April 2014; “CONTEST The United Kingdom’s Strategy for Countering Terrorism Annual Report” Cm 8583, March 2013, p. 8; April 2014, Cm 8848, at 15. See generally M. Sageman, *Leaderless Jihad* (Philadelphia: University of Pennsylvania Press, 2008).

<sup>45</sup> Detention or stringent bail conditions can be imposed if deportation can be seen as imminent since the exception under Art 5(1)(f) ECHR is viewed as applicable: *R (on the application of Hardial Singh) v Governor of Durham Prison* [1984] WLR 704. David Anderson has pointed out: ‘At the start of the control order regime in 2005, all controlled persons were foreign nationals. By the end in 2011, all were British citizens’: ‘Control Orders in 2011’ Seventh Report, March 2012, p4.

<sup>46</sup> This episode therefore provides some support for the view that subjecting counter-terrorism measures to judicial review is crucial to maintaining constitutionalism, while also demonstrating that governmental and Parliamentary input, on occasion, is influenced by such review but may make a stronger contribution to protecting human rights; see further Fiona de Londras and Fergal Davis *Critical Debates on Counter-terrorist Judicial Review* (CUP, 2016).

related activity (TRA) could be imposed,<sup>47</sup> with the implied requirement that they did not breach the ECHR, in particular Article 5.<sup>48</sup> The meaning of ‘a deprivation of liberty’ under Article 5 came under scrutiny domestically as a result of the use of control orders, and a determination as to that concept emerged, which did not accept the extent to which Article 5 had been impliedly – albeit potentially – minimised by Parliament when it accepted the non-derogating control orders scheme in 2005. The Coalition government, and then Parliament, rejected even that reined-in scheme, in replacing it in 2011 with TPIMs which allowed for much briefer periods of house arrest than the periods courts had accepted under control orders as not necessarily entailing a deprivation of liberty. Under TPIMA the obligations are specified and are also more limited; they are clearly designed to ensure that Article 5 is very unlikely to be breached, taking account of the control orders case-law. The lengthier house detention requirements under control orders were relaxed, becoming only an ‘overnight residence requirement’,<sup>49</sup> and the relocation provisions were dropped under the original iteration of TPIMs. TPIM orders provide for a range of more limited restrictions relating to movement (including electronic tagging),<sup>50</sup> communication and property.<sup>51</sup> A TPIM also has far less impact on liberty long-term since it can only be imposed for a two-year maximum period.<sup>52</sup> In contrast to the previous control orders regime, no TPIM has been quashed, as opposed to varied, on ECHR grounds, by the courts.<sup>53</sup>

But a perception that a more fully ECHR-compliant scheme would not meet security needs manifested itself in a lack of confidence from the outset in the efficacy of TPIMs in a crisis, resulting in s26 TPIMA, which makes provision to introduce enhanced TPIMs, similar to the early control orders, if it is urgent to do so when Parliament is in recess.<sup>54</sup> That provision, however, appeared to raise the question as to what would occur if an emergency arose while Parliament was sitting, and the only available measures, aside from the criminal justice system, (or possibly the Civil Contingencies Act 2004, as amended) were TPIMs.

### *Introducing but not triggering the Enhanced TPIMs Bill*

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<sup>47</sup> The obligations listed in the PTA were, formally speaking, illustrative only (s1(3) PTA), although in practice they were relied on.

<sup>48</sup> Certain orders were quashed on the basis that they were in fact derogating orders which the Home Secretary had had no power to make – see in particular *Secretary of State for the Home Dept v JJ* [2007] 3 WLR 642.

<sup>49</sup> TPIMA Sched 1 para 1.

<sup>50</sup> TPIMA, Sched 1 para 12.

<sup>51</sup> Travel abroad is prevented without permission of the Secretary of State (TPIMA, Sched 1 para 2). The restrictions cover reporting to the police: sched 1, para 10; the placing of restrictions on transfers of property and requirements to disclose details of property: sched 1 para 6; seeking prior permission from the Secretary of State before meeting or communicating with ‘specified persons or specified descriptions of persons: sched 1 para 8(2)(a); a requirement not to carry out specified work or studies: sched 1 para 9.

<sup>52</sup> TPIMA s5(1),(2),s13(7). A fresh TPIM can then be imposed if a reasonable belief can be shown that ‘new’ terrorism-related activity has occurred after the imposition of the first notice: ss3(2), (6)(b); see also (6)(c).

<sup>53</sup> Mr B Wallace (Minister for Security) 26.10.16, Col 4, (see note 19 above).

<sup>54</sup> Under s26(1) the Secretary of State ‘may make a temporary ETPIM [while Parliament is in recess]’ if he/she ‘considers that it is necessary to do so by reason of urgency’. No temporary ETPIMs have yet been introduced. See further TPIM Bill 2nd Reading per Lord Hunt, HC Deb vol 730, col 1139, 5.10.11. S26(12) requires the Secretary of State to obtain the consent of the Scottish Ministers before making any provision relating to devolved matters in Scotland.

That perception of the inadequacy in security terms of TPIMs as softened control orders led to the introduction of enhanced TPIMs, in the ETPIMs Bill 2012<sup>55</sup> which would allow the enhanced measures to be relied on generally in future. In effect, the government reserved to itself the option of reinstating a measure fairly similar to control orders, in the form of ETPIMs. The ETPIMs Bill has received parliamentary scrutiny<sup>56</sup> and is available to be brought forward at any time as emergency legislation to meet the demands of an unspecified crisis situation; the trigger that would allow it to be enacted is not indicated in the Bill,<sup>57</sup> but it needs to be apparent, to an unspecified standard of proof, that the TPIM restrictions were not sufficient to deal with the risk particular suspects had created.<sup>58</sup> If the level of risk posed by suspects whose TPIMs were about to expire was deemed unacceptable, that could provide a rationale for introducing the ETPIMs Bill.<sup>59</sup> Or if in future a returnee from Syria succeeds in mounting a terrorist attack in the UK, or if some other ISIS or Al Qaeda-inspired crisis arises, ETPIMs might then be introduced, to meet the emergency.

The design of the ETPIMs Bill, however, also indicated that some lessons, in human rights terms, had been learnt from the control orders saga: in providing for enhanced restrictions similar to those available via control orders, including forced relocation and longer periods of house arrest,<sup>60</sup> combined with the potential extension of the full controlled period,<sup>61</sup> it also accompanied them by the somewhat greater safeguard of raising the standard of proof,<sup>62</sup> and limited the period during which an ETPIM could subsist to two years. But arguably the key lesson learnt from the interaction between the HRA and control orders manifested itself in the determination, apparent over the last four years, not to introduce ETPIMs,<sup>63</sup> even in the face of numerous terrorist attacks in Europe in 2016<sup>64</sup> and increased security in the UK in that year at certain locations and events.<sup>65</sup>

### *Restrained strengthening of TPIMs*

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<sup>55</sup> See Draft Enhanced Terrorism Prevention and Investigation Measures Bill, Home Office, Report Cm 8166 (2011).

<sup>56</sup> The ETPIM Bill Joint Committee was set up for this purpose; see 'Draft Enhanced Terrorism Prevention and Investigation Measures Bill,' First Report, HL 70, HC 495, 27 November 2012.

<sup>57</sup> *Ibid*, para 3. It can be introduced in response to 'exceptional circumstances' which 'cannot be managed by any other means'.

<sup>58</sup> Clause 2(4)(b). The clause only requires that the Home Secretary 'reasonably considers it necessary' to employ the more onerous restrictions.

<sup>59</sup> See ETPIM Bill Joint Committee 'Oral Evidence taken before the Committee' 11 July 2012, HC 495-i per David Anderson, 6.

<sup>60</sup> ETPIM Bill Schedule 1. A limit on the length of house detention is not specified.

<sup>61</sup> Clause 2(6)(c). A suspect subject to a TPIM could be transferred to an ETPIM without necessarily showing 'new' TRA, for another two years.

<sup>62</sup> Imposition of an ETPIM was based on a higher standard of proof (the civil standard) than for a TPIM prior to 2015 (note 76 below): ETPIM Bill clause 2(1).

<sup>63</sup> Some concerns as to their compatibility with the ECHR were expressed at the scrutiny stage: see Draft Enhanced TPIM Bill, Human Rights Memorandum by the Home Office to the JCHR, para 22. See also the Report of the Joint Committee on the Draft ETPIMs Bill 27.11.12, Session 2012-13, HL Paper 70, HC 495, in particular paras 93, 95, 97.

<sup>64</sup> See note 9.

<sup>65</sup> See eg (after the Berlin truck attack, 16.12.16) 'UK police forces on high alert after Berlin attack' *the Guardian* 21.12.16, A Ross, F Perraudin, V Dodd.

Given that ETPIMs have not been introduced, reliance on TPIMs as the only measure on the control orders model available, continues. But TPIMs, like control orders, were under-used,<sup>66</sup> leading to the criticism that they were too ineffective to deploy.<sup>67</sup> Their lack of use, and the perception of their inefficacy, led to the recommendation that they needed strengthening,<sup>68</sup> which occurred under the Counter-Terrorism and Security Act 2015 Part 2 (CTSA), meaning that in terms of repressiveness the new iteration of TPIMs resembles control orders somewhat more closely. In particular, the forced relocation obligation previously available under control orders was reinstated by CTSA in somewhat modified form.<sup>69</sup> The reintroduction of forced relocation is clearly the most dramatic change to TPIMs, but CTSA also amended TPIMA to impose a new travel measure, allowing travel to be restricted outside the area where the TPIM subject lives;<sup>70</sup> new prohibitions relating to access to firearms and explosives were also included.<sup>71</sup> In furtherance of de-radicalisation suspects can also be required to attend appointments with specified persons.<sup>72</sup> CTSA also significantly increased the penalties available for breaching the TPIMs obligation preventing travel abroad.<sup>73</sup> In the impact assessment that accompanied that Act, the Government anticipated that these changes to the TPIM regime would lead to a significant increase in the use of TPIMs,<sup>74</sup> and an increase in their use<sup>75</sup> from mid-2016 onwards then occurred, but the number of TPIMs in place – even in their somewhat strengthened form - remains low at the present time.<sup>76</sup>

But, significantly, lessons had again clearly been learnt from the interaction between the control orders regime and human rights law: the safeguards under TPIMA were also improved by CTSA. Thus, TPIMA, as amended in 2015, allows a wider range of TPIMs restrictions to be deployed, but only so long as proof of involvement in terrorism-related

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<sup>66</sup> Their use was “Withering on the vine as a counter-terrorism tool of practical utility”: Joint Committee on Human Rights, “Post-legislative scrutiny: Terrorism Prevention and Investigation Act 2011” Tenth Report of Session 2013-2014, HL 113 HC 1014, January 2014, 5.

<sup>67</sup> Two TPIM subjects absconded in 2012 and 2013. Yvette Cooper, then Shadow Home Secretary, said on this (1.9.14): ‘There are currently no TPIMs in use because the...police and the security services do not believe they are effective enough to be worth using...’ (at <http://www.theguardian.com/uk-news/2014/sep/01/cameron-clegg-anti-terror-talks-british-born-jihadis-syria-iraq>). The Home Affairs Committee “Counter-terrorism” Seventeenth Report, HC 231, 30th April 2014 (‘Counter-terrorism Seventeenth Report’), para 109 found that TPIMs needed to be strengthened to prevent absconding. See also HC Deb Vol. 585, Cols 24-6, 1.9.14 and Cooper’s comments: ‘TPIMs have not worked....TPIMs simply do not contain enough powers to be useful for the agencies or the police’ (2.12.14: Column 221, second reading Counter-terrorism and Security Bill, 2015 HC). Only three TPIMs were still in force by 31.8.15: Home Office, HM Government Transparency Report 2015: Disruptive and Investigatory Powers Cm 9151 (2015), 22.

<sup>68</sup> Reinstatement of relocation had been recommended in 2014 by David Anderson: ‘TPIMs in 2013’ Second Report March 2014, at 57, recommendation 4.

<sup>69</sup> Sched 1 para 1(3)(b), (3A) TPIMA. See note 96 below.

<sup>70</sup> Sched 1 para 2(2) TPIMA.

<sup>71</sup> Sched 1 para 6A TPIMA.

<sup>72</sup> Sched 1 para 10A(1).

<sup>73</sup> The penalty for breaching the obligation (TPIMA, Sched 1 para 2) was increased from 5 to 10 years: TPIMA s23(3A). If the measure is breached by leaving the UK, amendment under s17 CTSA disallows reliance on a ‘reasonable excuse’ for doing so: TPIMA s23(1A).

<sup>74</sup> It was anticipated that 5-15 new TPIMs would be imposed; ‘The best estimate is that there would be 10 additional TPIM cases a year’: p7; see: IA No: HO0146.

<sup>75</sup> Initially, the coming into force of CTSA had no impact on usage of TPIMs; eventually only one TPIM was in force in 2016. See ‘Only one Tpm terror control order is in place in Britain amid ‘severe’ threat level’: the Telegraph 28.7.16: see *EB v Secretary of State for the Home Department* [2016] EWHC 137 (Admin).

<sup>76</sup> See note 86.

activity (TRA) to the civil standard is available,<sup>77</sup> not merely reasonable belief. The definition of TRA was also somewhat narrowed.<sup>78</sup> The 2015 changes also did not include reintroducing the longer periods of house arrest available under control orders; nor did they extend the time period during which a TPIM can subsist. The reinstated forced relocation obligation clearly takes account of the Article 5-based control orders litigation.<sup>79</sup> So even when that obligation was reinstated, the scheme still came less close to creating a deprivation of liberty than the scheme accepted by the courts as avoiding such a deprivation had done in 2010. But the level of scrutiny of use of TPIMs was somewhat diminished under CTSA,<sup>80</sup> and annual Parliamentary scrutiny was not introduced.<sup>81</sup> The continuation of TPIMA only requires Parliamentary consideration of its renewal every five years<sup>82</sup> in contrast to the PTA, which required annual renewal.<sup>83</sup>

## **Reconciliation between strengthened TPIMs and human rights?**

Can it be concluded then that this current iteration of measures on the control orders model achieves a reconciliation between human rights norms and promoting security which eluded the government in 2005? In other words, has the interplay between such norms and this model as discussed led to a situation in which a state of exception need not be openly declared via a derogation, or stealthily adopted via recalibrations of rights? Clearly, the possibility of finding a breach of Article 5 would be most likely to occur in relation to specific ETPIMs, given their potential for exploration of the outer limits of the domestic deprivation of liberty concept.<sup>84</sup> But since the package of measures now available under a TPIM includes forcible relocation, specific TPIMs are now somewhat more likely to be found to breach Article 5. The prospect of further ECHR-based litigation in future has increased since late 2016, given the government's reaffirmation of its commitment to relying on TPIMs,<sup>85</sup> and the revival in their use mentioned above,<sup>86</sup> which may be linked to the current threat from supporters of ISIS and similar groups.

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<sup>77</sup> The 2015 Act raised the standard of proof for TPIM imposition to the civil standard (s20(1) CTSA, amending s3(1) TPIMA).

<sup>78</sup> The definition in TPIMA, s4(1) was narrowed by CTSA s20(2). But since it relies on the definition of terrorism in s1TA it still remains a broad definition: see criticism by David Anderson, "Report on the Operation of the Terrorism Act 2000 and Part I of the Terrorism Act 2006", 1.12.16, pp24-26.

<sup>79</sup> In *Secretary of State for the Home Department v AP* [2010] 3 WLR 51; see note 96 below and associated text as to the nature of the new obligation.

<sup>80</sup> CTSA changed the role of the Independent Reviewer in a number of respects, including relaxing the requirement that a report must be produced every year (s45(3)).

<sup>81</sup> Current Parliamentary scrutiny is minimal: the Secretary of State placed a written statement on the exercise of her powers before the House every quarter since TPIMA came into force in December 2011. (Those statements were annexed to the 2016 Review (note 18), at para 76).

<sup>82</sup> Under s21. The independent terrorism reviewer, the intelligence services commissioner and the director general of the Security Service must also be consulted by the Secretary of State, but s21 does not require their advice to be published, even in redacted form.

<sup>83</sup> This lack of scrutiny of TPIMA, and its more permanent nature, was criticised in 'Amnesty, 2017' (note 5 above), 19.

<sup>84</sup> See Helen Fenwick 'Designing ETPIMS around ECHR Review or Normalisation of "Preventive" Non-Trial-Based Executive Measures?' (2013) 76(5) M.L.R. 877-909.

<sup>85</sup> By order the renewal of TPIMA was effected until 2021: see note 17. See also note 67.

<sup>86</sup> In mid-2016: see Home Office review of TPIMA, note 18 above, para 37: in the period 1.6.16- 31.8.16 6 notices came into force, 5 for British citizens.

Given the subjectivity infused into the concept of a ‘deprivation of liberty’ by *AP*,<sup>87</sup> and its holistic nature deriving from *Guzzardi*<sup>88</sup> and accepted in *JJ*,<sup>89</sup> it is not possible to be confident that certain forced relocations under TPIMs, combined with other restrictions, would not be found potentially to create a breach of Article 5. The Supreme Court has found that the imposition of fourteen hours daily house detention, combined with forced relocation, can create a deprivation of liberty<sup>90</sup> where an unusually high degree of social isolation is created.<sup>91</sup> But that has not subsequently been taken to mean that specific relocations would necessarily infringe Article 5, barring special circumstances,<sup>92</sup> while under Article 8 the relocation obligation has been found to be a necessary and proportionate measure to protect the public.<sup>93</sup> Since TPIMs do not allow for more than about ten hours over-night curfew, as opposed to fourteen hours, the imposition of relocation is less likely, looking at the *combination* of restrictions in a specific TPIM,<sup>94</sup> to be found to create a breach of Article 5.<sup>95</sup> Further, the CTSA amendment to TPIMA specifying 200 miles as the limit on relocating a person compulsorily away from the location of their residence, where they may have family or friends, appears to represent an attempt – albeit of a somewhat limited nature – to meet the Article 5-based concern as to social isolation.<sup>96</sup> But the possibility of finding a breach of Article 5 due to the impact on a particular suspect of a relocation combined with other repressive measures under a newly strengthened TPIM cannot be ruled out.

Article 6 concerns also remain. The extensive literature on closed material procedure and special advocates<sup>97</sup> has criticised the level of due process maintained in control order/TPIM proceedings.<sup>98</sup> Disclosure of the gist of the case against him to the TPIM subject is

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<sup>87</sup> Note 34 above, at paras 13 and 15, per Lord Brown.

<sup>88</sup> [1981] 3 EHRR 333.

<sup>89</sup> Note 36.

<sup>90</sup> *Secretary of State for the Home Department v AP* [2010] 3 WLR 51, relying on the ‘deprivation of liberty’ concept from *Guzzardi v Italy* (note 88).

<sup>91</sup> Lord Brown found that a control order with a 16-hour curfew and *a fortiori* one of 14 hours, would not be struck down as involving a deprivation of liberty, unless the other conditions imposed were ‘unusually destructive’ of normal life (*AP*, *ibid*, para 4). On the specific facts the forced relocation of *AP* satisfied this test.

<sup>92</sup> David Anderson notes that the Courts have refused to uphold a relocation obligation ‘in only four of the 23 cases in which it was imposed’: ‘TPIMs in 2013’ (London: Home Office, 2014), para 6.20.

<sup>93</sup> In *BM v Secretary of State for the Home Department* [2011] EWHC 1969 (Admin), the High Court upheld the Secretary of State’s decision to require *BM* to live in a city outside London. The Court considered that the relocation did amount to a serious infringement of his Article 8 rights, but found that it was necessary and proportionate under Article 8(2). That was also found to be the case in *CD v Secretary of State for the Home Department* [2011] EWHC 1273 (Admin).

<sup>94</sup> See eg Lord Plant: ‘the schemes may be compatible, the question is whether the individual combination of measures imposed on suspects [could] create a deprivation of liberty’: HL Deb vol 744, col GC349, 23.4.13.

<sup>95</sup> See note 91.

<sup>96</sup> In this respect the new relocation measure is not identical to the previous PTA one. S16(1)-(5) amend paragraph 1 of Schedule 1 to TPIMA to provide that the Secretary of State may either agree a locality with an individual or require an individual to live in a residence in a locality that the Secretary of State considers appropriate; but he/she may only require the individual to live in a residence more than 200 miles from his/her premises if the individual agrees.

<sup>97</sup> See: Eva Nanopoulos ‘European Human Rights Law and the Normalisation of the “Closed Material Procedure”’: Limit or Source?’ (2015) 78(6) MLR 913-944; Helen Fenwick and Gavin Phillipson, ‘Covert derogations and Judicial Deference: Redefining Liberty and Due Process rights in Counterterrorism law and beyond’, (2011) 56(4) McGill LJ 1-54.

<sup>98</sup> Via the Civil Procedure Rules Part 76: Rule 76.22. The Special Advocate may only communicate with the relevant party before closed material is served upon him, save with permission of the court: rules 76.2, 76.28(2).

mandatory, and in that respect differentiation between allegations against a suspected terrorist and the case for the Secretary of State in opposition to an abuse of process application, cannot be created;<sup>99</sup> the Secretary of State must ‘elect between a modicum of disclosure and withdrawing from reliance on wholly undisclosed material’,<sup>100</sup> but the question of the *degree* of disclosure required to the suspect has not been fully resolved.<sup>101</sup>

The effects therefore of use of TPIMs in their newly strengthened form suggest at a superficial glance that a return to ‘defensive democracy’ has occurred, since in their new iteration provisions that could potentially over-step the parameters set by the ECHR rights form once again part of the package of counter-terror measures, raising again the possibility of recalibrating Article 5, and the reputational disadvantage of deploying punishment without trial, or instead of trial. S3 HRA, however, provides a means of addressing the possibility that specific TPIMs have over-stepped the limits of Article 5 by placing a duty on the court to render the scheme compatible with the ECHR if possible, which could be done by finding that the scheme only allows for obligations tolerable under Article 5 to be imposed.<sup>102</sup> Alternatively, a court under its s6 HRA duty could quash or vary a relocation requirement in a particular TPIM if it might lead, or has led, to a breach of Article 5. That has occurred when other TPIM restrictions have been found to create ECHR breaches; restrictions on electronic communications affecting the children of a TPIM-subject have been found to breach Article 8,<sup>103</sup> and the wearing of an electronic tag to breach Article 3 due to its unusual impact in exacerbating the applicant’s fragile mental state.<sup>104</sup> A degree of recalibration of Article 5 remains a possibility, but there are two reasons why the situation differs from that under the control orders scheme: first, legislative restraint was shown, as discussed, under TPIMA and under CTSA in designing the current scheme to avoid the reinstatement of a number of the features of the control orders one. Second, the courts now have far more experience in focusing on the meaning of a ‘deprivation of liberty’ under Article 5, aside from paradigm deprivations.

## **The increasing preference for reliance on preventive trial-based measures<sup>105</sup>**

The period of time which has seen the introduction of the control orders model and emergence of its subsequent more restrained iterations, has also seen an increase in the number of special terrorism offences that can be used to address terrorist activity, and in their

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The Justice and Security Act 2013 makes provision for closed material proceedings (CMP) in PT II, which cover TPIM hearings (s6).

<sup>99</sup> *Mohamed v Secretary of State for the Home Department; CF v Secretary of State for the Home Department* [2014] EWCA Civ 559; [2014] 1 WLR 4240, para 16.

<sup>100</sup> Following *AF* (note 33).

<sup>101</sup> In *AT v Secretary of State for the Home Department* [2012] EWCA Civ 42 the Court of Appeal found that insufficient disclosure had occurred to satisfy Article 6.

<sup>102</sup> That could be done by analogy with the finding in *AF* (note 33) that s3 could be used to render the control orders review scheme Article 6-compatible.

<sup>103</sup> *DD v Secretary of State for the Home Department* [2015] All ER (D) 53 (Jul).

<sup>104</sup> *Ibid.*

<sup>105</sup> Prosecutions remain the preferred alternative for dealing with terrorism (see Mr Wallace, Security Minister: the Third Delegated Legislation Committee, 26.10.16, col 10: note 19). See ‘Operation of police powers under the Terrorism Act 2000 and subsequent legislation: arrests, outcomes and stops and searches, financial year ending 31.3.16’, 30 June 2016, figure 4.1: the CPS Counter-Terrorism Division had a 92% conviction rate in 2015, with 47 of the 51 persons proceeded against convicted.

deployment. So far from introducing ETPIMs, or relying extensively on newly strengthened TPIMs, the risk posed by ISIS or Al-Qaeda-sympathisers in the UK, including ‘foreign terrorist fighters’, has largely been addressed by placing reliance on the array of ‘early intervention’ or precursor terrorism offences which was added to very significantly in 2006.<sup>106</sup> Their use appears to have aided in averting almost all terrorist attacks in the UK in the last decade.<sup>107</sup> There has been a recent increase in their deployment against suspect nationals,<sup>108</sup> via effective use of intelligence. Preparing terrorist acts or the display of support for ISIS or similar groups, whether by travelling to support the group, receiving weapons training abroad,<sup>109</sup> aiding another in travelling,<sup>110</sup> or by sending money to relatives who are fighting with ISIS, or via soliciting support on social media,<sup>111</sup> has been taken seriously, and resort to the criminal justice system, rather than to TPIMs, has clearly been evident. But in 2015-16 further exploration of criminalising pre-action territory has not occurred; instead the increased emphasis on the criminalization of terrorism has been realized, not by broadening the range of precursor offences, but to extending their impact by widening the territorial reach of these offences, and enhancing the severity of the penalties they attract.<sup>112</sup>

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<sup>106</sup> They include, in particular: conduct in preparation for terrorism: s5 TA 2006 (see *R v Kahar and others* [2016] EWCA Crim 568) offences of fund-raising: s15 TA 2000; using or possessing money or other property for purposes of terrorism: s16 TA; encouraging terrorism: s1 TA 2006. J Blackburne and C Walker find that TPIMs ‘continue to be enforced only to a meagre extent compared to criminalisation’: ‘Interdiction and Indoctrination: the Counter-Terrorism and Security Act 2015’ (2016) 79(5) M.L.R. 840–870, 842. See David Anderson, “Report on the Operation of the Terrorism Act 2000 and Part I of the Terrorism Act 2006”, 1 December 2016, para 9.22 on use of these offences in 2015.

<sup>107</sup> There have only been 2 terrorist-related deaths in the UK in the last decade: in 2013 of Lee Rigby and of Mohammed Saleem in the West Midlands.

<sup>108</sup> Andrew Parker, Head of MI5, said that 12 jihadi terror plots had been foiled by the security services in the past three years (note 9 above). According to CONTEST: Annual Report for 2015 Cm 9310 July 2016, para 2.6, in 2015 law enforcement and security and intelligence agencies disrupted six UK terrorist plots. Of the 280 people arrested in 2015, 83 were charged with a terrorism-related offence, and 13 with other offences; 40 charged with terrorism-related offences have already been prosecuted; 38 of these have been convicted. The Home Office (2016) Operation of police powers under the Terrorism Act 2000, quarterly update to December 2015: <https://www.gov.uk/government/statistics/operation-of-police-powers-under-the-terrorism-act-2000-quarterlyupdate-to-december-2015> found that there were 280 terrorism related arrests in Great Britain in 2015.

<sup>109</sup> See eg *R v Imran Khawaja* *The Times* 7.2.15 (Woolwich Crown Court): on return from Syria Khawaja was convicted for preparation of terrorism, attending a terrorist training camp, receiving weapons training.

<sup>110</sup> See BBC News Wales online, 10.2.16, <http://www.bbc.co.uk/news/uk-wales-35482547>.

<sup>111</sup> Most famously, Anjem Choudhury was sentenced to 5 years, six months imprisonment in 2016 under s1 TA 2006, for inciting support for ISIS via talks posted on youtube: see M Bulmer, C Mortimer, the Independent 6.9.16:<http://www.independent.co.uk/news/uk/crime/anjem-choudary-sentenced-five-years-isis-daesh-a7228211.html>.

<sup>112</sup> S81 Serious Crime Act 2015 (SCA) amends s17 TA 2006 by adding the offences under ss5 and 6 to the list of extra-territorial offences. Part I Criminal Justice and Courts Act 2015 increases the maximum penalty on indictment for terrorism-related offences to life imprisonment for weapons training for terrorism (s54(6)(a) TA 2000) and training for terrorism (s6 TA 2006). S3 SCA amends Part 1 of Schedule 15B to the Criminal Justice Act 2003 which lists a number of terrorism offences (including preparing acts of terrorism under s5 TA 2006) to be eligible for the new life sentence under s122 Legal Aid, Sentencing and Punishment of Offenders Act 2012. Schedule 1 SCA amends the Criminal Justice Act 2003 inserting Chapter 5A to list these offences in s236A ‘Special custodial sentences’. S6 and Sched 1 make provision against early release of persons convicted of serious terrorism-related offences. Other offences become precursor terrorism offences if they have a ‘terrorist connection’ and are listed in s236A, including s4 Offences against the Person Act 1861 (soliciting murder) and possession of an explosive under s4 Explosive Substances Act 1883.

TPIMs were intended to provide a more effective route to prosecution than control orders – hence the use of the term ‘investigation’ in their designation. But they have failed to do so,<sup>113</sup> except indirectly and unintentionally in the sense that their perceived inefficacy as part of the counter-terror infrastructure may have encouraged the focus on using precursor terrorist offences instead. The question whether their use may ‘amount to an admission of failure to prosecute’ was raised during Parliamentary scrutiny in 2016, but answered only in the most general terms.<sup>114</sup> Nevertheless, the recent focus on enhancing the impact of the special terrorism offences, while at the same time deployment of TPIMs remains at a low level, indicates that in most instances TPIMs are *not* being relied on as a substitute for prosecutions. Amnesty’s criticism of ‘the regional trend [in Europe] of using such measures instead of charging and prosecuting people in the criminal justice system’<sup>115</sup> is not therefore fully borne out by reliance on TPIMs in the UK. Clearly, greater reliance on addressing terrorism via the criminal process cannot be attributed only to fears as to the human rights implications and moral legitimacy of the use of non-trial-based alternatives.<sup>116</sup> The broad nature of the offences, greater use of surveillance, more effective data-sharing between agencies, and greater experience of bringing terrorism prosecutions for precursor offences, have no doubt all played a part.<sup>117</sup> But the human rights-based distaste for deployment of non-trial-based measures discussed here also appears to have played a part.

### **Introducing a new derogating iteration of the control orders model?**

A superficial glance at the current security situation might suggest that there is a clear mismatch between the current under-use of TPIMs, despite their 2016 revival, and findings in 2015-16 as to the risk posed by the number of British citizens who present a threat of carrying out terrorist acts.<sup>118</sup> The threat from terrorist activity has not diminished recently and, as discussed, may escalate in 2017 as ISIS-held territory continues to shrink and trained fighters return to the UK. On that basis the option of strengthening TPIMs further (or of triggering the ETPIMs Bill), allowing them to impose restrictions more akin to those available under ‘heavy touch’ control orders, might appear attractive, and has been proposed.<sup>119</sup> If that option was taken, the government would probably seek to avoid a

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<sup>113</sup> See: D. Anderson, ‘Terrorism Prevention and Investigation Measures in 2013’ (London: Home Office, 2014) paras 6.3, 6.4; H Fenwick ‘Redefining the role of TPIMs in combatting ‘home-grown’ terrorism within the widening counter-terror framework’ (2015) (1) EHRLR 41-56.

<sup>114</sup> See note 19 above; the question was raised by Stephen Crabbe, MP and responded to by Mr Wallace, Security Minister: col 10.

<sup>115</sup> ‘Amnesty 2017’ (note 5 above), 48.

<sup>116</sup> See Mark Drumbi, ‘The expressive value of prosecuting and punishing terrorists’, (2007) 7-5 *George Washington LR* 1165.

<sup>117</sup> Recently a greater readiness to rely on prosecutions, and a rise in their success, is apparent: see David Anderson, ‘Report on the Operation of the Terrorism Act 2000 and Part I of the Terrorism Act 2006’, 1.12.16: ‘credible bomb and firearm attacks continue to be thwarted. The absence of recent fatal incidents in the UK reflects well on the security and intelligence agencies, on counter-terrorism policing, and on a criminal justice system which has shown itself equal to the task of prosecuting terrorists’ (para 2.8). 56 trials for terrorism-related offences were completed in 2015 (as against 38 in 2014 and 44 in 2013), para 9.5. See also note 105 and L Donoghue *The Cost of Counter-Terrorism* (CUP, 2008), at 65.

<sup>118</sup> See: Andrew Parker (2016, note 9 above); David Anderson ‘A Question of Trust: Report of the Investigatory Powers Review’ June 2015, para 3.15; Home Affairs Committee 8<sup>th</sup> Report ‘Radicalisation: the counter-narrative’ HC 135 25 August 2016, pp 3 and 9, which partly relies on David Anderson’s 2015 Report, and notes that terrorism-related arrests in the UK were 35% higher in 2015 than 2010.

<sup>119</sup> As proposed by Lord Carlile, and referred to in 2016 in the Third Delegated Legislation Committee (note 19), col 7.

repetition of the control orders saga by entering a derogation to Article 5 ECHR (and possibly other Articles, such as Article 8). So doing could be defensible and would show respect for the mechanisms international human rights law has provided for crisis situations: it would mean that a state of exception had been declared openly; it would avoid fuelling the perception that continued adherence to human rights creates a barrier to security, and that respect for human rights must be constantly traded off against increased security.<sup>120</sup> Use of a derogation would be more transparent than relying on other methods of reconciling executive measures with human rights law and possibly less likely to lead to normalisation of such measures. It could be less insidious in eroding rights-adherence than a possible stealthy minimising of human rights laws via recalibrations of rights; it would also be likely to be temporary,<sup>121</sup> demarcating a particular period of time during which the enjoyment of certain rights was suspended in anticipation of a return to normalcy. Unlike the position in 2001, the UK would not be the only state seeking a derogation; France has already gone down the derogation route in the wake of the terrorist attacks in Paris in 2015,<sup>122</sup> resorting to acceptance of the use of emergency, derogating non-trial-based measures, on the control orders model,<sup>123</sup> applicable to nationals and non-nationals.<sup>124</sup>

Nevertheless, it is argued that further strengthening of TPIMs, necessitating a derogation, should not be undertaken. That is also the government's position at present: while a proposal to seek a derogation to limit the UK's ECHR jurisdictional competence in conflict situations abroad<sup>125</sup> has been put forward recently by the Defence Secretary,<sup>126</sup> no other derogation is currently contemplated; nor is a further strengthening of TPIMs. A number of arguments against taking this course can be put forward, based on the process this article has traced. First, it may be argued under Article 15(2) ECHR that the risk can be managed by recourse to TPIMs in their current human-rights compliant iteration, combined with the increasing reliance on the existing 'precursor' criminal offences, discussed above, given that only two persons have been killed in terrorist attacks in the UK in the last decade.<sup>127</sup> Therefore reliance on derogating TPIMs might be viewed as not strictly required by the exigencies of the situation. Second, as discussed, ss3 and 6 HRA can be used, as they already have been, to rein in executive over-stepping of ECHR limits in the form of specific obligations under individual TPIMs. Third, the decisions of successive governments post-2005 discussed here not to seek a derogation or to maintain or introduce the most repressive measures on this model ('heavy-touch' or derogating control orders and ETPIMs) have demonstrated a serious

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<sup>120</sup> See 'Security' in D. Bigo, S. Carrera, E. Guild and R. Walker (eds), *Europe's 21st Century Challenge: Delivering Liberty and Security* (Farnham: Ashgate, 2010); J. Waldron, 'Security and Liberty: The Image of Balance' (2003) 11 *Journal of Political Philosophy* 191; M. Neocleous, 'Security, Liberty and the Myth of Balance: Towards a Critique of Security Politics' (2007) 6 *Contemporary Political Theory* 143.

<sup>121</sup> See on this point the UN Human Rights Committee General Comment 29 (2001), UN Doc. CPR/C/21/Rev.1/Add.11, paras 1, 2.

<sup>122</sup> See note 9.

<sup>123</sup> France has relied on 'assigned residence orders' which are similar to TPIMs: see Amnesty Report 4.2.16: 'Upturned lives: the disproportionate impact of France's state of emergency'; over 400 such orders have been issued.

<sup>124</sup> See Declaration contained in a Note verbale from the Permanent Representation of France, 24 November 2015. The state of emergency was renewed again on 15.12.16 for an additional seven months.

<sup>125</sup> Article 1 ECHR provides that the Convention only applies to everyone within the 'jurisdiction' of a contracting party; that jurisdiction can extend to the responsibility of British troops in conflict zones: *Al-Skeini and others v UK* 7 July 2011 App. no. 55721/07.

<sup>126</sup> On 4.10.16 by Michael Fallon at the 2016 Conservative Party Conference: see <http://blogs.spectator.co.uk/2016/10/full-text-michael-fallons-tory-party-conference-speech/>.

<sup>127</sup> See note 108.

engagement with human rights law, partly attributable to the impact of the Human Rights Act and to Parliamentary pressure, which, despite concerns raised here as to stealthy recalibrations of rights in 2005, deserves recognition. That engagement, apparent in the design of Part 2 CTSA, has represented a struggle to avoid finding on ‘defensive democracy’ lines that human rights can no longer be adhered to in the face of terrorism, and the refusal to rely on more repressive measures, combined with restrained use of control orders/TPIMs, is indicative of a continued acceptance of ECHR standards in the courts and in Parliament, which reliance on a derogation would disturb. Fourth, the mere fact of relying on a derogation would not necessarily avoid accepting a permanent state of emergency or normalising emergency powers, bearing in mind the criticism recently levelled at France for the continued renewal of its derogating emergency powers.<sup>128</sup>

It could be argued that avoiding a derogation and attempting to maintain protection of human rights in Parliament and in the courts, giving the appearance of obstructing the state in its attempts to combat terrorism, is counter-productive, in the face of the current Conservative plans to repeal the HRA,<sup>129</sup> and possibly eventually to withdraw from the ECHR.<sup>130</sup> But, taking account of the evidence of executive self-restraint discussed, and of the human-rights-based work that has resulted in the current iteration of TPIMs, it is argued that presenting the executive with a relaxation of human rights’ standards represented by a derogation would be a retrograde step. If TPIMs are to continue to occupy a very small niche as part of the counter-terror infrastructure, there is no strong case for strengthening them and relying on a derogation, resulting in encouragement to resort to them more readily, quite possibly as an alternative in some instances to prosecutions. The numbers of TPIMs currently in use or contemplated do not remotely approach the use of similar measures in France; although the measures have been deployed in the UK since 2005, the numbers in force in France far exceed the total numbers deployed over an 11 year period in the UK.<sup>131</sup>

## Conclusions

While it has been argued here that the current iteration of the control orders model represents the culmination of a human rights-based tempering process lasting for over ten years, this article still sounds a note of warning. Such a tempering previously and potentially in future, due to the operation of the measures within the HRA framework, does, ironically, have the disadvantage of fostering the normalisation of what are after all extraordinary measures.<sup>132</sup> Although these are apparently emergency measures, they have now been in place in their

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<sup>128</sup> See: ‘Amnesty, 2017’ (note 5 above), 13; Letta Tayler, Human Rights Watch, ‘France’s emergency powers: The new normal,’ *Just Security*, 2 August 2016, <https://www.justsecurity.org/32236/frances-emergency-powers-normal/>.

<sup>129</sup> The Queen’s Speech 2015 referred to proposals to introduce a British Bill of Rights in place of the HRA, a commitment which was repeated in the 2016 Queen’s Speech; recently the new Secretary of State for Justice and Lord Chancellor again reiterated that commitment: House of Commons Justice Committee, Oral Evidence, The Work of the Secretary of State HC 620, 7 September 2016, Q78-Q91, although repeal of the HRA was postponed in December until after completion of the ‘Brexit’ negotiations (confirmed by the Attorney General, Jeremy Wright QC, to the House of Commons on 8.12.16).

<sup>130</sup> See press reports that May intends withdrawal from the ECHR to form part of the 2020 election campaign: eg ‘Theresa May Plans UK Withdrawal from European Convention on Human Rights – Report’, *A Wagner The Telegraph*, 28.12.16.

<sup>131</sup> See note 123.

<sup>132</sup> The October 2016 review of TPIMA (note 19) found: ‘TPIM notices have been and remain a crucial component of the Government’s national security response’ (para 26).

various iterations for nearly twelve years, and, given their renewal in 2016, probably will be for at least seventeen.<sup>133</sup> A certain complacent acquiescence in their continued use is apparent,<sup>134</sup> which it is argued should be challenged, especially as their use is expected to rise over the next five years.<sup>135</sup>

But this article ends on a positive note, centred on the role played by the HRA in this saga. The varying iterations of control order-type measures considered here are illustrative of the post-9/11 struggle in the UK and elsewhere to reconcile international human rights norms with reliance on non-trial-based measures.<sup>136</sup> The tension and interaction between security needs and such law partly explains, as argued, the changing iterations of the control orders model discussed which exhibit a human rights tempering of that model. Credit therefore should be given to the Human Rights Act, both for the under-use of these measures, and for their modification; even the recent re-strengthening of TPIMs in 2015 did not return them to the level of repressiveness represented by control orders. It may be concluded that such measures can make a contribution to security while working *within* the framework created by the Human Rights Act: while 2016 saw a revival in the use of TPIMs, reliance on them remains very restrained, despite the many terrorist attacks outside the UK in 2015-16, and the threat from ISIS-supporting nationals. The interaction discussed between the courts, the executive and Parliament that has led since 2005 to the current iteration of these executive measures, may be said to have demonstrated eventually an avoidance of adoption of a 'defensive democracy' model, and to represent a vindication of the Human Rights Act, even at a time of a rising terrorist threat.<sup>137</sup> From this viewpoint this saga thus not only provides no support for the repeal of the HRA, but also underlines the folly of giving serious consideration to withdrawal from the ECHR.

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<sup>133</sup> See note 17.

<sup>134</sup> Richard Arkless MP, during Parliamentary scrutiny of the 2016 Order (note 19 above) said that the Committee had not been provided with information enabling it to assess the effectiveness of TPIMs: col 9.

<sup>135</sup> See note 74.

<sup>136</sup> See C Walker, 'The reshaping of control orders in the United Kingdom: Time for a fairer go, Australia!' (2013) 37 Melbourne University LR 143-188; S Bachmann, M Burt, M, 'Control Orders Post- 9/11 and Human Rights in the UK, Australia and Canada – A Kafkaesque Dilemma?' (2010) 15(2) Deakin LR 131.

<sup>137</sup> On this note David Anderson finds: 'European human rights law does not so much hamper the fight against terrorism and extremism as underline the legitimacy of that fight' (note 117, 2016), paras 11.11, 11.12.

