



## **Case Study: UK**

WP 6, Deliverable 12b

1 August 2008

'Citizens and governance in a knowledge-based society'



## **INTRODUCTION**

The history of the British fight against the IRA is largely one of trial and error. On several occasions the British government introduced measures that backfired and were withdrawn because it was clear that they only increased the popularity of the terrorists they were aimed against. Excessive use of force, harsh interrogation methods and detention without trial are just some of the elements of the initial British response to the Troubles that undermined the legitimacy of the British rule in Northern Ireland. In later years, the UK generally showed a strong awareness of the importance of restraint in fighting terrorism. It remains to be seen whether the current counterterrorism policy has taken this valuable lesson to heart. In any case, today the UK often stands accused of taking its counterterrorism policy beyond what is ethically justifiable. Both academics and respected NGOs, such as Statewatch, Amnesty International and Human Rights Watch, have expressed their concerns against British counterterrorism laws, arguing that these were violating human rights and infringing on civil liberties. This report answers the question as to which aspect of legitimacy constitutes the biggest problem in British counterterrorism legislation. Where does it go wrong? Perhaps it should be noted here that, as we are analysing legal measures that are considered problematic, our conclusions only apply to the 'subset' of the UK's counterterrorism policy that we selected for further examination. We will make no claims about whether the UK's counterterrorism policy as a whole is more problematic with regard to legitimacy than that of others.

A broader analysis of the difficulties regarding legitimacy in British counterterrorism legislation will help us find out whether there is a structural feature in British legal practice or law-making that can explain the nature of the difficulties raised by the counterterrorism laws that we identified as controversial (see next section). Simply put, we will select British counterterrorism legislation that is made out to be problematic by NGOs and official reviewers and assess the legitimacy of these laws. The five indicators we will use for the assessment are legality (does the legislation have a legal basis?) and four indicators derived from the work of Thomas Franck (Franck, 1990). They are the following:

- **Determinacy:** is the legal measure formulated clearly or does it leave room for discretionary use?

- Pedigree: does the legal measure reflect the 'spirit' of previous British counterterrorism legislation?
- Coherence: does the legal measure cohere with any principle stated by the British government in relation to their counterterrorism policy?
- Adherence: Does the legal measure adhere with the hierarchy of rules? This includes international human rights principles and its fundamental features as well as other generally accepted principles.

We will explain these indicators in more detail in the next paragraphs.

First, this report will briefly go into the selection of the ten legal measures that will be assessed and used for our conclusions. Each of the selected legal measures will be 'checked' on their legality and the indicators of Franck. Then, we will show our research results and discern which legal measures and which indicators constitute a problem. Finally, we will provide an explanation for the patterns from the previous section and will formulate some policy recommendations.

### **SELECTION OF LEGAL MEASURES TO BE ASSESSED**

Selecting the legal measures that might give difficulties regarding their legitimacy is a delicate task. In order to come up with a fair list, we used three points of reference to see whether a legal measure poses difficulties. To find controversial legislation, we used official parliamentary reviews, academic journals and NGO reports and selected all legal measures that were criticized at least once in all three of these categories (see Sources per legal measure). Articles in peer-reviewed academic journals have to meet certain quality standards, which makes the risk of unbalanced accounts quite small. Self-evidently, the NGO's we have examined have a stake in the debate on human rights and their reports might as a result be overly critical, as detecting human rights violations and infringements on civil liberties is their *raison d'être*. However, the NGOs we took into account, such as Amnesty International, Human Rights Watch, Article 19, Liberty and Statewatch, all have solid reputations and their reports will most likely be fair and balanced. The same goes for the first category of sources, the official reviews by the Joint Committee on Human Rights and the independent reviewer, Lord Carlile of Berriew Q.C., a member of the House of Lords.

Since we want this analysis to be up to date, we also included some legal provisions from the new Counter-Terrorism Bill 2008, which has not yet received Royal Assent and is thus not yet an Act. Consequently, not all elements of this Bill have been reviewed yet. The new Counter-Terrorism Bill 2008 is currently in the Committee Stage of the House of Lords. Thus, we ended up with the following ten legal measures for further examination:

- A. The renewal of the definition of terrorism and/or the concept of terrorist organizations. The obvious risk of a broad definition is that it will be applied to non-violent activism.
- B. An extension of pre-charge detention from 28 days (current) to 42 days (nb. formally still a Bill). The length of this period self-evidently collides with the fundamental right to liberty. This measure makes it (theoretically) possible that a person can be held in custody for six weeks without even being charged.
- C. Penalizing the "glorification/encouragement" of acts of terrorism, which includes *inter alia* the notions "indirect encouragement" and "other inducement", e.g. by way of publications. This measure collides with the freedom of expression; taking a deviant stance in a discussion about a specific event could fall within the scope of this measure, bearing in mind that one man's freedom fighter is another man's terrorist and vice versa.
- D. The rendering of Control Orders, i.e. imposing restrictive measures on a person suspected of being involved in terrorism-related activities. The power to issue a Control Order is assigned to the Secretary of State. These measures can be taken on the basis of a lower *onus probandi*, namely on "reasonable grounds" in lieu of "beyond a reasonable doubt" and are preventive measures. Even being portrayed as 'preventive measure', these measures can have a punitive character. A Control Order can range from a prohibition of communication with specific persons to a prohibition to be present at specified places at specified times and can thus severely infringe on the liberty of individuals who are not proven guilty of anything.
- E. Allowing undisclosed inquests (nb. formally still a Bill). These can be held if the inquest involves the consideration of material that should not be made public. When a person deceases in an unnatural manner, an independent and disclosed inquest to the cause of death should be rendered. This measure would, in the aftermath of a terrorist attack, allow the authorities to keep to themselves information about the perpetrators that would otherwise be out in the open..
- F. The requirement of notification on whereabouts for persons who have been *inter alia* convicted for terrorism-related offences. In these cases the requirements will span an indefinite period (nb. formally still a Bill). This could

lead to people being stigmatized as terrorists long after they have sat through their prison sentences.

G. Penalizing the withholding of relevant information regarding cases involving suspects of terrorism. This implies an obligation on journalists to disclose any relevant information to the authorities.

H. Deprivation of state citizenship (nb. not based on anti-terrorism legislation and only in case of dual nationality and not allowed when it will make the subject stateless).

I. The power to “stop and search” individuals for the purpose of searching for articles of a kind, which could be used in connection with terrorism. This power could be used in an arbitrary manner. For example, the British police have been accused of using this power mainly against the Asian community, which subsequently will lead to a feeling of discrimination.

J. Restricting the right of a detained person to consult a solicitor by making it possible to give a ‘direction’ that such a consultation may only take place “in the sight and hearing of a qualified officer”. This clearly is not in line with the deep-rooted tradition (and right) in common law of the legal professional privilege. It should be noted that this legal measure does not meet our selection criteria, but we felt that the infringement by this measure on the rights of suspects is so severe that we could not ignore it for the current analysis.

## **LEGALITY**

For this indicator, the question is whether there is a legal basis for the legal measures under consideration. This indicator is somewhat tautological, as the status of an Act of Parliament *ipso facto* implies that the concerning piece of legislation has a legal basis emanating from the national legislative framework. Also, any international agreements or conventions signed by the UK are not automatically binding for British legislation. They can only become binding by a Parliamentary decision to turn that particular agreement or convention into an Act. It is true that the international standards are thus made part of the internal legal framework and could thus be analysed under the legality strand. However, as the internal interpretation of these standards diverges from international expectations, we will deal with this in the paragraph on adherence.

Taking the question this way, there is obviously no problem regarding the legality of these measures, especially since none of these laws is currently being contested on their legality before an official court. The table below should therefore be read as a reference guide as to where the ten legal provisions can

be found. The asterisks serve to remind the reader that these specific provisions have not yet come into force. The capitals on the left correspond with the letters from the list on the previous page.

	<b>LEGALITY</b>
Definition	<p>The definition of terrorism/terrorist organizations is promulgated in the Terrorism Act 2000 (art. 1) and slightly amended with the Terrorism Act 2006 (art. 34). The new Counter-Terrorism Bill* entails a widening of the scope of the definition (art. 68). The full current definition, i.e. as amended by the Terrorism Act 2006, goes as follows:</p> <p><b>“1.—(1)</b> In this Act “terrorism” means the use or threat of action Terrorism: where—            (a) the action falls within subsection (2),            (b) the use or threat is designed to influence the government or an international governmental organisation or to intimidate the public or a section of the public, and            (c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.</p> <p>(2) Action falls within this subsection if it—            (a) involves serious violence against a person,            (b) involves serious damage to property,            (c) endangers a person’s life, other than that of the person committing the action,            (d) creates a serious risk to the health or safety of the public or a section of the public, or            (e) is designed seriously to interfere with or seriously to disrupt an electronic system.</p> <p>(3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.”</p> <p>The Counter-Terrorism Bill 2008 suggests to add ‘racial’ after ‘religious’ in section 1c.</p>
Pre-charge detention	The new Counter-Terrorism Bill* entails an extension of the pre-charge detention from the current 28 days to 42 days (art. 23 jo. Schedule 2).
Glorification	The “glorification/encouragement” of terrorist acts and the dissemination of terrorist publications are promulgated in the Terrorism Act 2006 (art. 1-4).
Control orders	The Control Order is stipulated in the Prevention of Terrorism Act 2005 (art. 1).
Inquests	The Counter-Terrorism Bill* entails the possibility of an undisclosed inquest (Part 6).
Notification of whereabouts	The requirement of notification on whereabouts is stipulated in Part 4 of the Counter-Terrorism Bill*.
Withholding information	Article 33 of the Terrorism Act 2006 renders the possibility of giving a disclosure notice to any person having information of substantial value.
State citizenship	The deprivation of citizenship not directly being based upon anti-Terrorism Acts, but on the Immigration, Asylum and Nationality Act 2006, section 56.

Stop and search	The power to “stop and search” was introduced with the Terrorism Act 2000 (Part 5).
Access to solicitor	Restricting the right to consult a solicitor was introduced with the Terrorism Act 2000, paragraph 9 of Schedule 8.

**Table 1: References to the ten selected legal provisions**

## INDICATOR 1: DETERMINACY

Table 2 will briefly outline any difficulties with the wording of the legal provisions. To avoid discretionary use of a legal provision by the state, it is crucial that the terms are not too ambiguous. An important consideration is that legislation should be formulated while keeping in mind that citizens should enjoy a certain level of protection against the state. Table 2 shows the difficulties in the level of determinacy of the ten British legal provisions. Note that each measure has a separate source list (see ‘Sources per measure’) and that the references in the blue boxes are references to the list for that particular measure.

	DETERMINACY
Definition	The definition does not truly elucidate and limit the scope of the term it defines. Consequently, it is difficult to categorize a certain act as being an act of terror or being merely an ‘ordinary’ criminal offence or even political activism. (see <i>inter alia</i> Amnesty International, 2005a; Article 19, 2006b; Human Rights Watch, 2007 and Carlile of Berriew Q.C., 2007b)
Pre-charge detention	The substantial level of determinacy of this measure is not high due to the fact that it is not made clear, as mentioned with (A), what exactly falls within the ambit of being a terrorist act. This is crucial because a possible extension depends on it. Further, an extension of the detention can be based on ‘reasonable grounds’ to believe that evidence can be obtained by extending the time of questioning (i.e. up to 42 days) by way of this measure, without an official charge. (see <i>inter alia</i> Amnesty International, 2007; Human Rights Watch, 2008d; Liberty, 2007 and Joint Committee on Human Rights, 2007)
Glorification	“Glorification”, “indirect encouragement” and “other inducement” axiomatically indicates an extremely low degree of determinacy. There is no attempt to spell out the actual acts that would constitute “glorification”, “indirect encouragement” and “other inducement”. (see <i>inter alia</i> Amnesty International, 2005a; Article 19, 2006a; report Carlile of Berriew Q.C., 2008a)
Control orders	The level of determinacy regarding the criteria for imposing a Control Order can not be considered as high, as it is based on “reasonable grounds” for suspecting that an individual is or has been involved in terrorism-related activity. (see <i>inter alia</i> Amnesty International, 2006; Human Rights Watch, 2005c; Liberty; UN Human Rights Committee, 2008)
Inquests	Giving a discretionary power to the Secretary of State to decide whether an inquest should

	be held undisclosed (not making it public i.e. without a jury), does not denote a high level of determinacy. There is no clear definition of the cases in which this right can be used. (see <i>inter alia</i> Amnesty International, 2008; Human Rights Watch, 2008; Joint Committee on Human Rights, 2008; Gearty, 2008)
Notification of whereabouts	Not a problem.
Withholding information	An extremely low degree of determinacy; if it appears to the Investigating Authority that a person has "relevant" information regarding an investigation and if there are "reasonable grounds" for believing that information is of substantial value, a disclosure notice can be imposed. This leaves the decision up to the Investigating Authority.
State citizenship	The Home Secretary can revoke citizenship if it holds the opinion that it is "conducive to the public good", which is a vague notion. This indicates a low degree of determinacy. (see <i>inter alia</i> Liberty, 2005; Bamford, 2004)
Stop and search	This provision has a potential for arbitrary use. A "stop and search" can be conducted when a constable "reasonably suspects" a person to be a terrorist, thus indicating a low degree of determinacy. (see <i>inter alia</i> Amnesty International, 2006; UN Human Rights Committee, 2008; Walker, C. 2006)
Access to solicitor	The level of determinacy of this rule is very low due to the fact that such a direction can be issued on the basis of an officer having "reasonable grounds" to give such a direction. (see <i>inter alia</i> Liberty, 2006)

**Table 2: Difficulties with determinacy**

The problem with this indicator is clear. The measures are vaguely formulated on crucial points. It seems that definitions have been vaguely stipulated in order to maintain a very high level of discretionary power. In this way, it is very easy to place a specific commission or omission in the working scope of these measures. The recurring use of the phrase "reasonable suspicion" reveals a tendency to provide the state, especially the police, with the freedom to act as they see fit.

## **INDICATOR 2: PEDIGREE**

This indicator, in Franck's work also labelled as symbolic validation, addresses the extent to which a provision is in line with what one could expect on the basis of earlier legislation. It refers to a legal tradition that provides insight into what can be considered "traditional" and what seems to be out of line with it. Although one can rightfully understand this tradition as going back to the formation of the nation state, we chose to stick with the specific British history of fighting

terrorism. As British counterterrorism legislation is as old as Northern Ireland, there is certainly a pattern of underlying principles on the basis of which one can argue the existence of a British counterterrorism 'tradition'. Thus, table 3 outlines the breaches of the selected legal provisions with the 'spirit' of earlier counterterrorism legislation.

	<b>PEDIGREE/SYMBOLIC VALIDATION</b>
Definition	When we compare the definition given by the British government in the "Prevention of Terrorism (Temporary Provisions) Act 1989" with the current definition of terrorism we can discern noticeable alterations, although they do not point to an unambiguous conclusion on this point. Some aspects of the definition, such as the seriousness of the violence committed, have been narrowed down, whereas the scope of the definition in terms of the motivation behind terrorist violence has been widened (Carlile, 2007a, p. 3). We will not take this as a clear breach with earlier practice. (see <i>inter alia</i> Article 19, 2006b; Statewatch, 2001; report Carlile of Berriew Q.C., 2007b)
Pre-charge detention	The United Kingdom has always had one of the longest periods of pre-charge detention for suspects of terrorism in Europe. Thus, although one can argue that the increase is larger than before, a new extension of this period to 42 days seems to be consistent with that tradition, as it went from 7 to 14 to 28. (see <i>inter alia</i> Human Rights Watch, 2008b; Liberty, 2007; Gearty, 2008)
Glorification	Although the wording of this legal provision is new, there is some precedent for a ban on publicly supporting terrorism. First, the Home Secretary invoked, from 1988 to 1994, the use of art. 29(3) of the Broadcasting Act 1981, which did not allow British TV stations to broadcast interviews with IRA-members. Secondly, incitement to terrorism was forbidden in The Criminal Justice (Terrorism and Conspiracy) Act 1998 (c. 40). Thirdly, public support for terrorism is prohibited since the introduction of the Prevention of Terrorism Act 1974 (art. 2). (see also Cram, 2006)
Control orders	There have been laws in the past that allowed the Home Secretary to impose restrictions on citizens in Northern Ireland to restore or maintain order, but these applied to all citizens within a specified area. As there are no other legal provisions to control the behavior of specific individuals who are not even officially charged with terrorism or related crimes, the control orders is a new concept, based on measures purportedly imposed to prevent terrorism. A second deviation from customary practice is that Control Orders can be used as punishment indicating the use of a method that is in breach with the classic conception of criminal law, i.e. imposing punitive measures after being convicted in a (fair) trial. (see e.g. Northern Ireland (Emergency Provisions) Act 1991, part IV)
Inquests	When a coroner suspects that an individual has died a violent, unnatural or unexplained death, it is possible for him to hold an inquest with a jury. Thus a removal of that competence will lead to a breach of the tradition to be able to summon a jury when holding an inquest (see <i>inter alia</i> Human Rights Watch, 2008; UN Human Rights Committee, 2008)
Notification of	This is the first legal measure that affects terrorist convicts after they are released from jail and their remission period has expired. There is no long-standing custom according to

whereabouts	which terrorist convicts are treated as suspects after their detention period. (see <i>inter alia</i> Human Rights Watch, 2008; Statewatch, 2008; Gearty, 2008)
Withholding information	The Prevention of Terrorism Act 1989 first introduced a clause that made failure to disclose information relevant for the prevention of terrorist acts or the prosecution of terrorists a criminal offence (art. 18). Although this is unusual for other crimes, this had been in force for more than ten years by the time it was incorporated into the Terrorism Act 2000. This provision is thus not completely alien to the way the UK has been countering terrorism in the past. (see Prevention of Terrorism Act 1989, art. 18(1))
State citizenship	Deprivation of citizenship of people deemed a threat to national security has not been a competence exclusively inherent to countering terrorism, but this competence has in some form or another been present, since 1914 for naturalized persons and since 1981 for all British citizens. (Nb. not possible when statelessness will occur.) (see <i>inter alia</i> Liberty, 2005)
Stop and search	Privacy-invading searches for arms and other objects that can be used for terrorism is not at all new to UK counterterrorism legislation. In fact, ever since the creation of Northern Ireland in 1922, the police has had the authority to, when necessary and without permission of the owner, search vehicles and houses for explosives, arms etc. (Civil Authorities (Special Powers) Act 1922 (Northern Ireland), regulation 18). These powers have been reconfirmed by the British parliament in several Northern Ireland (Emergency Powers Acts (e.g. 1991 and 1996). The Prevention of Terrorism Act 1996 extended the search power to searches of pedestrians (section 1). The new stop and search powers therefore do fit in with earlier, long-standing practices.
Right to solicitor	The principle of legal professional privilege has been a substantive legal and absolute right in the United Kingdom. It has been a longstanding common law principle, derogating from this principle is thus not usual. Therefore, it clearly constitutes a breach with the tradition. (see Liberty, 2006)

**Table 3: Legal provisions as breaches with the legal counterterrorism tradition**

The picture that emerges from table 3 is mixed. Some of the provisions are alien to earlier counterterrorism legislation, others amount to an extension or more explicit formulation of what was already there. Provisions A, B, C, G, H, I and J are all in a way the next step in a line that can be traced back to at least the Prevention of Terrorism Act 1974, which suggests that even controversial British counterterrorism legislation often builds on the legal instruments that were used in the past against the IRA. Overall, this indicator is not the main reason why one could question the legitimacy of the provisions we selected.

### **INDICATOR 3: COHERENCE**

To what extent do these legal provisions conflict with the stated principles of British counterterrorism policy? We chose to look primarily at the principles laid

down in the official British counterterrorism strategy, called *Countering international terrorism: the United Kingdom’s strategy*, and the *National Security Strategy of the United Kingdom* because these documents explicitly outline the boundaries that counterterrorism should respect. Both documents stress the importance of human rights and state that it is imperative that the UK has to take these into account (UK Government 2006, p. 9, UK Government 2008, p. 6). Another reason for using the official strategies is that the legal provisions on our list seem to have very little overlap with legislation or policies beyond criminal law. There would be little point in examining how they relate to the underlying principles of e.g. the UK’s agricultural or education policies. Table 4 shows for which of the selected legal measures coherence seems to be a problem.

	COHERENCE
Definition	Not applicable.
Pre-charge detention	This measure seems to be coherent with the counter-terrorism policy set out by the British government; it is a further extension of the pre-charge detention. However, the measure seems to be contradictive and in that sense not coherent with the British government’s assertion that respect for international law and human rights standards should be an integral part of their strategy.
Glorification	Coherent with the British government’s counterterrorism strategy, but not coherent with the claim in the strategy that the tradition of liberty would be ensured in this strategy (e.g. possible restriction on freedom of expression/ of the press).
Control orders	Coherent with the counter-terrorism strategy in attempting to prevent terrorist acts, but it raises questions about the level of coherence regarding the respect of basic rights and freedoms, especially it being an <i>ex ante</i> method that has punitive characteristics.
Inquests	Coherent with the British government’s counter-terrorism strategy.
Notification of whereabouts	Coherent with the British government’s counter-terrorism strategy, but it can possibly collide with the assurance of more transparency.
Withholding information	Again coherent with the policy of countering terrorism, but again a very low degree of coherence with the assertion that the British tradition of liberty will be ensured in fight against terrorism (e.g. freedom of the press).
State citizenship	Coherent with the British government’s counter-terrorism strategy.
Stop and search	Coherent with the policy, however not coherent with the assertion that citizens will never be subjected to arbitrary treatment. The chance of arbitrary use of this measure is considerable.

Access to solicitor	Coherent with the strategy set out by the British government to counter terrorism, on the other hand it is not coherent with stating that basic rights and freedoms will always be respected.
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**Table 4: Difficulties with coherence**

All difficulties listed above in some way conflict with the assertion in the strategy that civil liberties and human rights will be respected. Unsurprisingly, the provisions fit in with most of the priorities of the counterterrorism strategy that they have a bearing on. They undoubtedly play into the strategy’s stated need for “strengthening the legal framework against terrorism”, but it is well-known that an increase in security may come at the price of a decrease in freedom. In other words, there is coherence on the tactical level, but less on the strategic level. After all, it is well-known that many counter-terrorism campaigns backfired because they put the legitimacy of the state on the line by infringing on the freedom it was supposed to protect (See for example Chalk, p. 386-387 and Wilkinson, p. 62.).

**INDICATOR 4: ADHERENCE**

How do the provisions relate to rules that should be governing them? Adherence is about whether or not a rule or law is in accordance with the rules or laws that lay down the standards that all laws below it in the hierarchy of laws should meet. This indicator is fairly broad, and is not only about the content of a particular legal measure, but also includes principles regarding transparent and democratic law-making and good governance. Generally, as the UK is a liberal democracy, we can assume that the political process that lead towards the measures we are discussing here respected the principles just listed. This assumption can be backed up by the UK’s positive scores on two prominent indicators of the functioning of states, the Failed States Index and the Freedom in the World ranking. One of the criteria of the Failed States Index is ‘Suspension or Arbitrary Application of the Rule of Law and Widespread Violation of Human Rights’. An important sub-element of this criterion is the freedom of democratically elected bodies. (See [http://www.fundforpeace.org/web/content/fsi/fsi\\_9.htm](http://www.fundforpeace.org/web/content/fsi/fsi_9.htm), accessed 14 August 2008). The UK has a very low score, indicating that this criterion is not a problem (See [http://www.fundforpeace.org/web/index.php?option=com\\_content&task=view&i](http://www.fundforpeace.org/web/index.php?option=com_content&task=view&i)

[d=229&Itemid=366](#)). The Freedom in the World survey is to a large extent about the fairness and openness of the political process. (See <http://www.freedomhouse.org/template.cfm?page=276>, accessed 14 August 2008). Again, the UK has scores indicating that the political process is not inhibited by the state. As we consider it, building on these data, safe to say that there is little wrong with the way the legal measures we selected, came about, we will now turn to the content of the measures. Here, a different picture emerges.

In this particular case, the most appropriate standards are the UK’s human rights obligations. Crucially, in adopting the Human Rights Act 1998, the British parliament decided that all British legislation has to be in accordance with the European Convention on Human Rights and Fundamental Freedoms. Table 4 shows which of the provisions can be disputed on the ground that they are violations of the UK’s international obligations in respecting fundamental rights and freedoms.

ADHERENCE	
Definition	Although being subject to numerous objections regarding its broad definition, this rule does not infringe upon international law, mainly due to the simple fact that there is no real commonly accepted definition of terrorism. (see <i>inter alia</i> Carlile of Berriew Q.C., 2007b) The implications of the broadness of the strategy might lead to violations of international law obligations, for example when political activism is repressed by labeling it terrorism, but the definition in itself is not a human rights violation.
Pre-charge detention	It is clear that the level of adherence with human right principles concerning this measure is very low. This provision infringes on one of the most fundamental and basic rights, the right to liberty, and will most probably collide with article 5 ECHR (via the Human Rights Act 1998) and with article 9 of the International Covenant on Civil and Political Rights (ICCPR). Derogating from this right will most surely lead to a diminishment of credibility of any democratic state adhering the rule of law and perceiving itself to be a part of the international legal order. (see <i>inter alia</i> Amnesty International, 2008b; Human Rights Watch, 2008d; UN Human Rights Committee, 2008)
Glorification	This measure encroaches on a very important fundamental right, the freedom of expression (as promulgated in art. 10 ECHR and also art. 19 ICCPR). The extremely broad definition of this measure seems to encompass a myriad of views that do not concur with the ruling one. For example it is quite arduous to delimit the scope of what falls under an “indirect encouragement” or what exactly “other inducement” comprises of. (see <i>inter alia</i> Amnesty International, 2005a; Article 19, 2006a; Human Rights Watch, 2008; UN Human Rights Committee, 2008)
Control	A Control Order can infringe upon several fundamental rights <i>inter alia</i> the right to a (fair)

orders	trial, the right to privacy, freedom of expression and of association (cf. art. 6, 8, 10, 11 ECHR). Formally a liberty depriving order is also possible (infringing art. 5 ECHR which will first require derogation thereof via art. 15 ECHR, implying a state of emergency). By decreasing the level of the <i>onus probandi</i> from "beyond a reasonable doubt" to "on reasonable grounds" it also constitutes a infringement of a general principle of law. Furthermore the concept of the Control Order uses an <i>ex ante</i> approach, while the classic criminal law doctrine uses an <i>ex post</i> approach. (see <i>inter alia</i> Amnesty International, 2006; Human Rights Watch, 2005b; UN Human Rights Committee, 2008)
Inquests	Holding an undisclosed inquest can impede relatives from attaining information on the cause of death. This can consequently lead to an infringement of article 2 ECHR (an undisclosed inquest can lead to violation of the procedural aspect i.e. including a profound and independent investigation, where an individual has been killed as a result of the use of force). (see <i>inter alia</i> Amnesty International, 2008; Human Rights Watch, 2008; Gearty, 2008)
Notification of whereabouts	One could argue that this inhibits on the freedom of movement, but when it is presented as a punishment, it adheres to the notion that states can restrict the freedom of movement to punish criminal behaviour.
Withholding information	Not applicable.
State citizenship	Adherent to the principle that every state can make its own decisions as to whom they provide citizenship.
Stop and search	A "stop and search" power can infringe upon the principle of <i>presumptio innocentia</i> by the possibility of a random use of this power being merely based on "reasonable grounds". Furthermore in practice the use of this power can violate the principle of non-discrimination (cf. art. 26 ICCPR) due to a possible arbitrary usage of this power. (see <i>inter alia</i> Amnesty International, 2006; UN Human Rights Committee, 2008)
Access to solicitor	Constitutes a violation of the general principle of legal professional privilege, when a confidential consultation of a detained person with his/her solicitor is not granted. (see Liberty, 2006)

**Table 5: Difficulties with adherence**

It can be asserted that all of the above-mentioned legal measures have a very low degree of adherence with international human rights principles and the international legal order, if perceived as respect for the norms laid down in the European Convention for Human Rights. Again, the UK is not a rogue state by any standard. It tends, so to speak, to respect rules about the way to make rules. The problem is rather in the content of those rules. The standards set by the international legal order in the field of fundamental rights and freedoms do not concur with the above-mentioned measures. In addition, it seems that the European Convention for the protection of Human Rights, the most important

standard concerning human rights protection in Europe, is subordinated to counterterrorism. As the bottlenecks identified in the coherence category are potential breaches with the counter terrorism strategy's intention to respect human rights and the bottlenecks for this indicator are possible infringements of human rights, it makes sense that the results for the two categories are largely the same.

## **THE BIGGER PICTURE**

Now that we have made some fairly detailed arguments over which legal measures are for what reason problematic in terms of legitimacy, we will sum up our findings in a more general impression of the bottlenecks in British counterterrorism legislation. We discerned that:

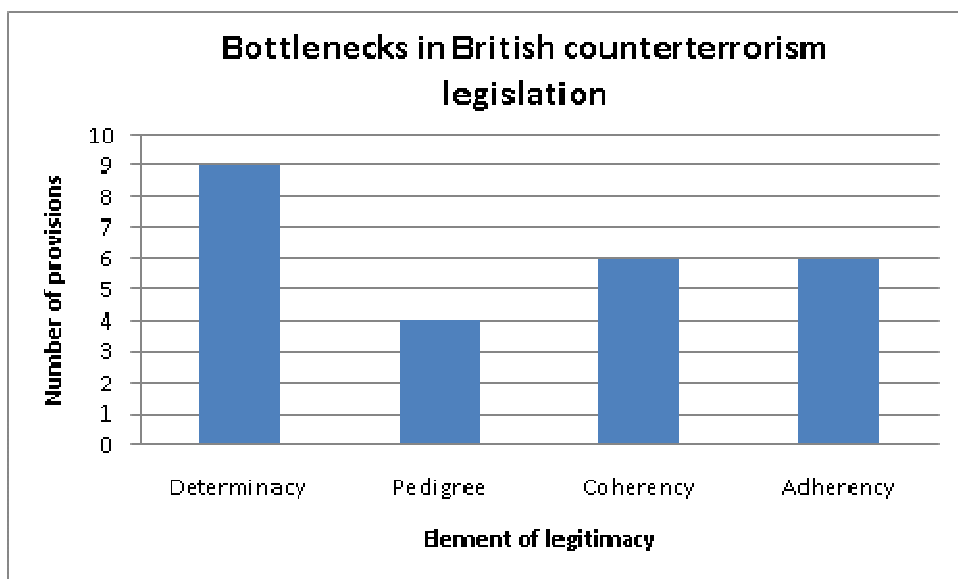
- Almost all controversial legal measures are formulated too vaguely
- A substantial number of the measures are deduced from what one could call a British counterterrorism tradition
- A substantial number of the legal measures contradicts the ambition of harmonizing counterterrorism policy with respect for human rights and civil liberties
- All legal measures that are covered by an international agreement on human rights are out of line with those agreements or with general principles of law

These findings are visualized in figure 1. A red cell shows that a legal measure is not in line with a particular indicator. The indicator of legality has been left out (see explanation indicator 1).

	Determinacy	Pedigree	Coherence	Adherence
Definition	Red	White	White	White
Pre-charge detention	Red	White	Red	Red
Glorification	Red	White	Red	Red
Control orders	Red	Red	Red	Red
Inquests	Red	Red	White	Red
Notification of whereabouts	White	Red	White	White
Withholding information	Red	White	Red	White
State citizenship	Red	White	White	White
Stop and search	Red	White	Red	Red
Access to solicitor	Red	Red	Red	Red

**Figure 1: Overview of legal provisions and difficulties**

To show more clearly the extent to which each of the indicators poses difficulties, we made a graph indicating for how many of the provisions each indicator is a problem (figure 2). Although it should not be read too mathematically, for instance a formulation such as 'determinacy is more than twice as big a problem as pedigree', it does allow for the conclusion that British counterterrorism legislation is controversial for its vague wording rather than for its lack of connection with earlier legislation.



**Figure 2: Prominence of the indicators**

The findings above reflect the need perceived by the UK government's to break away from the established legal framework on the grounds that today's terrorism cannot be countered with yesterday's tools. Not unlike governments elsewhere in the world, British policy makers based their reaction to recent terrorist incidents on the assumption that the fact itself that these incidents occurred stands as proof of the insufficiency of their counterterrorism tools and, in the same vein, that the new terrorism calls for a redefinition of the rules of the game. As late as June 2008, British Prime Minister Gordon Brown, in a speech at the Institute for Public Policy Research, spoke of "unprecedented changes in scope and scale of the security threat" (Brown, 2008). In 2005, the director of MI5, Eliza Manningham-Buller, spoke of the need for "a debate on whether some erosion of what we all value may be necessary to improve the chances of our citizens not being blown apart as they go about their daily lives." (See BBC, [http://news.bbc.co.uk/2/hi/uk\\_news/4232012.stm](http://news.bbc.co.uk/2/hi/uk_news/4232012.stm)) Further, the perception on the part of the British government is clearly that the terrorist threat is not only different, but also potentially more lethal and more difficult to detect, especially because of the willingness of Islamist inspired terrorism to inflict mass-casualties, possibly using weapons of mass destruction (BBC, 2004, BBC, 2005 and UK Government, 2006, p. 1).

This threat perception goes to the heart of the difficulties we have outlined in the tables above. It is very obvious that the UK Government wants the state to have more room to effectively counter today's terrorism. As we have seen in the discussion on determinacy, the ten provisions pay little attention to judicial oversight over the executive and widen the scope of terrorism-related offences, thus increasing the power of the state over its citizens. In this respect, it is noteworthy that some of the provisions (D, F, H and I) even point to a shift in the role of the authorities involved in counterterrorism. Law enforcement is no longer exclusively reactive in nature. It also assumes pre-emptive, anticipatory responsibilities for the police (Walker, 2006, p. 1142-1143). The focus of the authorities regarding these measures is shifting from prosecution of terrorist attacks to taking action to disrupt terrorist attacks that are still in the making. This task suggests time pressure, and cannot be hampered by lengthy procedures, this being expressed in some cases by restricting the level of judicial scrutiny.

Although this suggestion of the British threat perception does not seem to sit well with the observation that most of the controversial provisions do follow a tradition, it should be noted that even the provisions for which the legitimacy cannot be discarded on the basis of pedigree stand as evidence that the UK government perceives modern-day terrorism as a new, unprecedented phenomenon. The search for new tools went side-by-side with intensification of the old ones, because the new terrorism is seen as more threatening than the old. Most of the measures do follow a tradition, but still they were next steps, widening or specifying legislation that was considered insufficient.

## **CONCLUSION AND RECOMMENDATIONS**

Given the number of difficulties regarding legitimacy we encountered above, it is clear that the urge to transgress traditional legal principles, such as judicial scrutiny and respect for international human rights and fundamental freedoms, comes at a price. Application of Franck's principles has shown that legitimacy is definitely a problem for some pieces of British counterterrorism legislation. The pertinent question, of course, is whether this is worth it. Is the terrorist threat so overwhelming that a reconsideration of the power of the state is needed? It is doubtful that this is the case. Al Qaeda will end, and there are serious indications that the popularity of its creed is on the decline (See for example Economist, 2008, Bergen and Cruickshank, 2008 and Times Online, 2008). As for the risks of broad counterterrorism legislation with too little judicial scrutiny, India is an example of a democratic state where counterterrorism legislation was used to curb non-violent, democratic opposition (see for example Mohapatra, 2004, p. 329-333).

Of course, this is just one side of the argument. The UK Government is also responsible for the security of its citizens and, rightfully or not, further terrorist incidents will undermine the credibility of its counterterrorism policies. The following questions should be periodically asked: Is the threat that is addressed by this legislation still severe enough? Are these legal measures necessary and effective in countering this threat? To what extent is there a potential of these measures being used in a discretionary manner? How does it affect the UK's international standing regarding human rights and compliance with the international legal order? We know as yet little about the effectiveness of any counterterrorism measure, and even the nature and severity of the threat

are debated. This makes it difficult to answer these questions for the pieces of legislation we discussed above, but it seems sensible to consider certainty in these regards a precondition for the introduction of legislation that comes with difficulties regarding its legitimacy, caution and a periodical review of their effectiveness and necessity are appropriate.

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