

Second edition

THE PREVENTION OF TERRORISM IN BRITISH LAW

Clive Walker

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Preface to the second edition

It is customary for authors to seek to justify the costs to readers of new editions. My case principally rests upon the welter of new materials which have arisen since the first imprint in 1986 (hereafter 'P.T.B.L. (1st ed.)'). Of foremost importance is the Prevention of Terrorism (Temporary Provisions) Act 1989, which represents the fourth generation of legislation to bear that title and which incorporates the most radical changes since the original version in 1974.¹ Other important legislation includes the Aviation and Maritime Security and the Criminal Justice (International Cooperation) Acts of 1990. The courts have also provided food for thought. The Birmingham, Maguire and Guildford cases have filled many headlines.² The workings of the exclusion system were examined in *R. v. Home Secretary, ex parte Stitt*,³ and broadcasting restrictions were challenged in *R. v. Secretary of State for the Home Department, ex parte Brind*.⁴ Lethal shootings have also fuelled some important litigation, especially arising out of coroners' inquests.⁵ As well as these domestic claims, there is the adverse decision of the European Court of Human Rights in *Brogan and others v. United Kingdom*.⁶

In addition to the legal output from Parliament and the judges, a stream of official and unofficial commentaries has steadily flowed by. Official sources primarily comprise studies by the doughty Viscount Colville. Unofficial publications have included *Political Violence and the Law in Ireland* (hereafter P.V.L.I.)⁷ by Gerard Hogan and myself, to which much cross-reference will be made. Account must also be taken of present and future trends relating to terrorism. For example, incidents of foreign terrorism, such as the bombing of Pan-Am Flight 103 over Lockerbie, have become more prominent, as have the activities of animal liberationists. As expected, the campaign of Republican terrorism has persisted. Finally, consideration must be given to the likely impact on security of the implementation of the Single European Act by the end of 1992.

In summary, there is an abundance of new materials from which to

manufacture a new edition. Of course, some avenues of research remain closed, as many official reactions to terrorism are highly secret and sensitive. However, the views of the security forces and other State agencies are again reflected in two ways: through my contacts with forthcoming individuals and through the evidence they have presented to official inquiries. In any event, it would be wrong to allow official secrecy to stifle discussion.

I wish to record my thanks to all those who have aided my efforts. My sources have ranged from contacts in government departments, police forces and foreign embassies to legal practitioners and fellow academics. A substantial degree of secretarial and library assistance was as usual provided here at Leeds.

The law is stated in accordance with sources available to me on 12 April 1991, by which time the Prevention of Terrorism (Temporary Provisions) Act 1989 was fully in force.⁸ I have since incorporated important later developments, especially the Northern Ireland (Emergency Provisions) Act 1991, which replaces sections 21 to 24 of the 1989 Act.

Notes

1 Regrettably, the Act is now so substantial (72 pp.) that it cannot be fully reproduced here.

2 See ch. 11.

3 (1987) *Times* 3 February.

4 [1991] 2 W.L.R. 588.

5 See ch. 8.

6 Appl. Nos. 11209/84, 11266/84, 11386/85, Judgment of Court Ser. A Vol. 145-B.

7 Manchester University Press, 1989.

8 S.I. 1989 No. 1361; S.I. 1990 No. 215 (except the repeal by Sched. 9 of Sched. 7 para. 9). Sched. 9 repeals Sched. 7 para. 9 pursuant to the Land Registration Act 1988.

Clive Walker
University of Leeds
31 October 1991

Glossary of short titles of governmental documents

Baker Report	<i>Review of the Operation of the Northern Ireland (Emergency Provisions) Act 1978</i> (Cmnd. 9222, 1984)
Bennett Report	<i>Report of the Committee of Inquiry into Police Interrogation Procedures in Northern Ireland</i> (Cmnd. 9497, 1979)
Bowen Report	<i>Report on Procedures for the Arrest, Interrogation and Detention of Suspected Terrorists in Aden</i> (Cmnd. 3165, 1966)
Cameron Report	<i>Disturbances in Northern Ireland. Report of the Commission appointed by the Governor of Northern Ireland</i> (Cmd. 532, Belfast, 1969)
Colville Annual Reports	<i>Reports on the Operation in 1986–90 of the Prevention of Terrorism (Temporary Provisions) Acts</i> (Home Office)
Colville Annual Reports on the E.P. Acts	<i>Reports on the Operation in 1987–89 of the Northern Ireland (Emergency Provisions) Acts</i> (Northern Ireland Office)
Colville Report	<i>Review of the Operation of the Prevention of Terrorism (Temporary Provisions) Act 1984</i> (Cm. 264, 1987)
Colville Report on the E.P. Acts	<i>Review of the Northern Ireland (Emergency Provisions) Acts 1978 and 1987</i> (Cm. 1115, 1990)
Compton Report	<i>Report of an Inquiry into allegations against the security forces of physical brutality in Northern Ireland arising out of arrests on the 9 August 1971</i> (Cmnd. 4828, 1972)

Diplock Report	<i>Report of the Commission to consider legal procedures to deal with terrorist activities in Northern Ireland</i> (Cmnd. 5185, 1972)
Gardiner Report	<i>Report of a Committee to consider, in the context of civil liberties and human rights, measures to deal with terrorism in Northern Ireland</i> (Cmnd. 5847, 1975)
H.O. Circular	Home Office Circular No. 27/1989: <i>Prevention of Terrorism (Temporary Provisions) Act 1989</i> (as amended by Home Office Circular No. 60/1989)
Hope Report	Royal Commission on Intelligence and Security (<i>4th Report</i> PP. 249 (Cth) (1977))
Jellicoe Report	<i>Review of the Operation of the Prevention of Terrorism (Temporary Provisions) Act 1976</i> (Cmnd. 8803, 1983)
Laudau Report	<i>Report of the Commission of Inquiry into the methods of investigation of the General Security Service regarding hostile terrorist activity</i> (1987, Jerusalem)
McDonald Commission	<i>Report of the Commission of Inquiry concerning certain activities of the Royal Canadian Mounted Police: Freedom and Security under the Law</i> (2nd Report, 1981).
May Inquiry	<i>Interim Report on the Maguire Case</i> (1989–90 H.C. 556)
N.I.O. Guide	<i>Northern Ireland Office Guide to the Emergency Powers</i> (1990)
O'Briain Report	<i>Report of the Committee to recommend certain safeguards for persons in custody and for members of An Garda Síochána</i> (Prl. 7158, Dublin, 1978)
Philips Annual Reports	<i>Reports on the Operation in 1984–85 of the Prevention of Terrorism (Temporary Provisions) Acts</i> (Home Office)
Rabie Report	<i>Report of the Commission of Inquiry into Security Legislation</i> (RP90/1981, Pretoria, 1981)
S.A.C.H.R.	Standing Advisory Commission on Human Rights for Northern Ireland, <i>Annual Reports</i> , 1973–90 (House of Commons Papers)

Scarman Report	<i>Government of Northern Ireland. Violence and Civil Disturbance in Northern Ireland in 1969. Report of a Tribunal of Inquiry (Cmd. 566, Belfast, 1972)</i>
Shackleton Report	<i>Review of the Operation of the Prevention of Terrorism (Temporary Provisions) Acts 1974 and 1976 (Cmnd. 7324, 1978)</i>
S.H.H.D. Circular	Scottish Home and Health Department Circular No. 3/1989: <i>Prevention of Terrorism (Temporary Provisions) Act 1989</i> (identical to H.O. Circular unless stated otherwise)
Widgery Report	<i>Report of the Tribunal appointed to inquire into the events on Sunday 30 January 1972 which led to loss of life in connection with the procession in Londonderry on that day (1971-72 H.C. 220)</i>

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Chapter 1

Introduction

United Kingdom laws on the subject of terrorism can be divided into three. By far the most numerous and important are those concerned with the recurring crises over the relationship between Ireland and Great Britain, the source of acute disaccord in constitutional law since the Acts of Union in 1800 and long before. What the United Kingdom Parliament has deemed to be terrorism may be viewed as but a small part of that controversy. Nevertheless, Irish terrorism has spawned a great variety and quantity of legislation, not only from Westminster, but also from Dail Eireann and the now defunct Northern Ireland Parliament. The second source of relevant laws is concerned not only with Irish terrorism but also with other sources of domestic political violence. Some examples are of great longevity (such as treason), but more recent additions deal with bomb hoaxes and food contamination. The third set of legal materials addresses the exploitation by terrorists of international frontiers.

Unfortunately constraints of space demand that only a proportion of these three sources of laws can be discussed. Detailed coverage (chapters 4 to 11) will be confined to the Prevention of Terrorism (Temporary Provisions) Act 1989, which represents the central response in British law to terrorism. An array of other relevant measures which operate domestically, including those based on international treaty, will be examined (chapter 12), and attention will be given throughout to 'normal' laws applicable to terrorism. Suggestions for improvements will also be offered and drawn together at the end (chapter 13). To complete the picture, it may be as well to detail forthwith those equally interesting fields of study which must be eschewed for present purposes.

From the foregoing remarks, it may be deduced that the main anti-terrorism codes in Ireland, the Northern Ireland (Emergency Provisions) Acts 1973-91 and the Offences against the State Acts 1939-85, will not be examined comprehensively.¹ However, given their importance in the battle against terrorism and their intimate relationship with the Prevention

of Terrorism Act, it would be misleading to ignore them altogether. Consequently, they will be mentioned extensively for comparative and critical purposes. Incidentally, the same treatment will be bestowed, though on a reduced scale, upon anti-terrorism legislation used in the past in the British Isles and to current measures in foreign jurisdictions.

Next, a secondary source of some British anti-terrorism measures, namely international law, will not be closely scrutinised. This omission is dictated by lack of space, by the fact that there already exists a vast literature on the subject,² and by the observation that international cooperation has so far produced a rather patchy and stultified response.³ Consequently, coverage will extend only to those international norms which have been translated into British legislation (such as extradition or multilateral conventions) or have some indirect impact (as in the case of the European Convention on Human Rights).⁴ Cross-border arrangements between Britain and the Republic of Ireland fall within this scope but will be omitted since they have been described in P.V.L.I.⁵

The third important issue which is omitted is whether terrorism is justifiable historically, politically or morally.⁶ So vital are these questions that the vindication of one side or the other determines the very labelling of the conflict: in the oft-repeated phrase, 'one man's "terrorist" is another man's "freedom-fighter"'. However the concern of this book is with the positive law and its role in combating terrorism, whereas the issue of justification questions not that laws are able to combat terrorism but whether they should do so at all. This is evidently an issue which the laws themselves cannot settle since it is their very authority which is in doubt.⁷ It is to be hoped that this prior question will be carefully considered whenever political violence is encountered, but, for the purposes of this book, it will naively be assumed that the current hostile reaction in British law to terrorism is acceptable. Similarly, whilst recognising the moral overtones implied by its use, the label 'terrorism' will be used to describe any action correlating to the description in chapter 2. The term is not meant to convey any pejorative implication.

Finally, not all forms of terrorism are accorded equal treatment. Special prominence will be given to 'revolutionary' terrorism, which is exemplified by attacks by the I.R.A. on the security forces and involves:⁸

... systematic tactics or terroristic violence with the objective of bringing about political revolution.

Other forms of political terrorism encompass counter-revolutionary terrorism (perhaps by Loyalist paramilitaries in Northern Ireland), sub-revolutionary terrorism which seeks objectives within the political order (such as animal rights) and 'state' or 'repressive' terrorism, which is officially sanctioned against targets at home⁹ or abroad.¹⁰ Terrorism may equally be

utilised for private ends, such as by racketeers and robbers. The Prevention of Terrorism Act was prompted mainly by revolutionary terrorism but has also been applied to counter-revolutionary, and some sub-revolutionary, terrorism. Other relevant laws focus mainly on sub-revolutionary terrorism.

Notes

1 But see P.V.L.I.

2 See ch. 12.

3 See: Judge A.D. Sofaer, 'Terrorism and the Law' (1986) 64 *Foreign Affairs* 901; A. Cassese, *Terrorism, Politics and Law* (1989); J.F. Murphy, *State Support of International Terrorism* (1989).

4 Cmd. 8969, 1950. For its relationship with U.K. law, see: K.D. Ewing and W. Finnie, *Civil Liberties in Scotland* (2nd ed., 1988) ch. 2; *R. v. Sec. of State for the Home Dept. ex p. Brind* [1991] 2 W.L.R. 588.

5 Ch. 14 and 15.

6 See: Fifth Working Party of the Irish Council of Churches/Roman Catholic Church Joint Group on Social Questions, *Violence in Ireland* (1976); M. Waltzer, *Just and Unjust Wars* (1978); B. Paskins and M. Dockrill, *The Ethics of War* (1979); M. Hughes, 'Terrorism and national security' (1982) 57 *Philosophy* 5; C.A.J. Coady, 'The morality of terrorism' (1985) 60 *Philosophy* 47; S.D. Bailey (ed.), *Human Rights and Responsibilities in Britain and Ireland* (1988) ch. 7; T. Honoré, 'The right to rebel' (1988) 8 *Ox. J.S.* 34; H. Katchadourian, 'Terrorism and morality' (1988) 5 *Jo. of Applied Philosophy* 131; P. Hillyard and J. Percy-Smith, *The Coercive State* (1988); P. Gilbert, 'Terrorism: war or crime?' (1989) 3 *Cogito* 51; G. Wallace, 'Area bombing, terrorism and the death of innocents' (1989) 6 *Jo. of Applied Philosophy* 3; T. Honderich, *Violence for Equality* (1989).

7 The public and Government have experienced 'legitimation crises': F. Burton and P. Carter, *Official Discourse* (1979). Some soldiers have also refused to serve in Northern Ireland: P. Rowe, *Defence: The Legal Implications* (1987) p. 6.

8 P. Wilkinson, *Political Terrorism* (1974) p. 36.

9 See: E.V. Walter, *Terror and Resistance* (1969); P. Wilkinson, 'Can a state be "terrorist"?' (1981) 57 *Int. Affairs* 467; M. Stohl and G.A. Lopez (eds.), *The State as Terrorist* (1984). The Prevention of Terrorism Acts have themselves been condemned as 'terrorising efforts': A.McC. Lee, *Terrorism in Northern Ireland* (1983) p. 173.

10 Murphy, *op. cit.*

Chapter 2

Theory of terrorism and anti-terrorism

1 Nature of terrorism

Between 1969 and 1971, there was a spate of terrorist incidents around Britain ranging from the destruction of an outside-broadcast van covering the 'Miss World' contest to the planting of bombs directed against two of Her Majesty's Secretaries of State.¹ 'No revolution was ever won without violence,' proclaimed the Angry Brigade, the instigators of these attacks. However, the campaign was relatively short-lived, for, by the end of 1972, five of its members had been imprisoned and its arsenal seized.² Yet, given that the Irish Republican Army, one of the most effective and durable organisations ever to resort to political violence, had renewed its operations in 1970, it must have seemed that an era of terrorism had dawned in the United Kingdom. From the almost archetypal campaign of the Angry Brigade, a number of general remarks concerning the nature of terrorism may now be extrapolated.

(a) *Revolutionary terrorism as a strategy*

Revolutionary terrorism may be adopted as an end in itself, for example, by anarchists (such as the Angry Brigade) who wish to overthrow the existing government without advocating any alternative. However, terrorism is more frequently undertaken as a military strategy in support of political change, usually when two preconditions prevail.³ First, the group's objectives cannot be attained by direct military force, and secondly, the group sees no point in pursuing constitutional means. In short, terrorism is said to be the weapon of the weak (and few were militarily or politically weaker than the Angry Brigade). Assuming these conditions apply, revolutionary terrorism will be employed as one strategy within a wider enterprise. For instance, in Maoist theory, terrorism is an early stage in guerrilla warfare and becomes increasingly irrelevant as rebel forces grow.⁴ Alternatively, terrorism may be a constant military tactic with a variety of purposes

(propaganda, discipline, funding, attrition) but is combined with guerrilla operations and political agitation. This probably describes the current operations of the Provisional Irish Republican Army.⁵ Either way, the weakness of the rebels dictates their *modus operandi*. Above all, they must avoid open conflict with the government's military forces, which are overwhelmingly stronger. Hence, 'the central task of the guerrilla fighter is to keep himself from being destroyed.'⁶ Next, terrorists must have good intelligence in order to undertake effective operations without detection. Finally, since constitutional methods are rejected, there must be some compensating public emphasis on the motives for their attacks in order to distance themselves from criminal banditry. This is often secured through links with overt political factions.

There are two contexts in which the weak commonly resort to revolutionary terrorism. First, it may be utilised within independent States. The rebels envisage that terrorism will trigger a spiral of governmental repression and consequent loss of popularity and authority.⁷

[The terrorists'] object is to shake the faith of the man in the street in the Government and its local representatives, especially the police, so that in the end a desperate population will seek security, not from authorities, but from the terrorist and his political allies.

There are two substantial impediments to this theoretical blueprint. First, terrorism is unlikely to succeed in the many countries where governments pay little heed to public fears or desires. Second, even if terrorism does provoke a reaction, that repression may secure the military defeat of the perpetrators. As a result, outright success has rarely been achieved by this path, the only exceptions perhaps being Cuba and Rhodesia, where terrorism was only one facet of the conflict. However, it may be counted as a partial terrorist success if governmental victory is achieved at the expense of political fragmentation or deep unpopularity, since they pave the way for future conflict. Thus:⁸

the issue is not merely survival, but the way in which society chooses to survive.

Revolutionary terrorism is secondly undertaken during campaigns for decolonisation or for the separation of a distinct territory from within an independent country. Here, the terrorists again seek to induce repression, which, they hope, will cause the 'parent' population to weary of the battle and to calculate that the costs of retaining the territory outweigh its benefits. This has proved more effective than terrorism in the first situation probably because it does not require governments to vacate their central seats of power and therefore demands less painful concessions. In the case of the United Kingdom, terrorism of this kind was a precipitating factor in its withdrawal from Ireland, Palestine, Malaya and South Arabia. In conclusion,

terrorism in both contexts is designed to win acceptance for a political aim by a significant section of the population. Therefore, in liberal democracies at least, the increase or decrease in popular support may be taken to be the ultimate measure of success or failure for terrorists or governments.

(b) Classification

Terrorism has sometimes been classified as a form of warfare, but it is submitted that even a campaign of revolutionary terrorism does not of itself normally qualify. This is because, under the Geneva Conventions and Protocols,⁹ and probably also in common parlance, 'armed conflict' and 'warfare' consist of sustained and extensive military operations. By contrast, terrorism tends by its nature to be sporadic and of low intensity.¹⁰

Terrorism of all categories has more frequently and accurately been designated as a 'risk to the security of the State'. For example, the concerns of the Security Service (M.I.5) are now listed in section 1(2) of the Security Service Act 1989 as including:

the protection of national security and, in particular, its protection against threats from espionage, terrorism and sabotage, from the activities of agents of foreign powers and from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means.

Three points should be noted. The first concerns the wide-ranging nature of the remit, which does not even specify that the 'threats', 'activities' or 'means' be unlawful or amount to more than democratic dissent. Secondly, 'terrorism' is expressly mentioned, which is not surprising as it has long been a concern of the Security Service.¹¹ However, the term (and the same applies to 'espionage' and 'sabotage') is nowhere defined;¹² whether one should apply the definition in the Prevention of Terrorism Act (described shortly) remains to be determined. Finally, the Act governs the work of the Security Service (broadly, domestic intelligence) but probably does not affect other relevant agencies, such as M.I.6 (foreign intelligence), Army intelligence or police Special Branches. Before 1989, some security organisations were subjected to administrative restraint. For example, for the benefit of security agents attached to M.I.5, Lord Denning in his Report on the Profumo Affair advanced the restrictive guidance that their targets must threaten 'the Defence of the Realm' or be 'subversive, . . . that is . . . contemplate the overthrow of the Government by unlawful means'.¹³ Under these tests, revolutionary terrorists qualify as security risks, but groups dedicated to revolution by constitutional means do not. A more expansive definition (which could include the latter) was proffered by the Home Office in 1975, which reformulated 'subversion' as 'activities . . . which threaten the safety or well-being of the State, and which are intended to undermine or overthrow parliamentary democracy by political, industrial

or violent means'.¹⁴ This 1975 formula was applied in 1984 to the work of police Special Branches. Their concerns are the widest of all and comprise threats to public order, espionage, sabotage, extremists, terrorists and subversion.¹⁵

A number of Commonwealth jurisdictions have likewise defined security targets as invariably including terrorists. For example, risks to security are listed in section 4 of the Australian Security Intelligence Organisation Act 1979 as espionage, sabotage, subversion, active measures of foreign intervention and terrorism.¹⁶ In New Zealand, terrorism was specifically added to the concerns of the Security Intelligence Service by an amending Act of 1977¹⁷ and now ranks alongside espionage, sabotage and subversion. Thirdly, the Canadian Security Intelligence Services Act 1984¹⁸ mentions not only espionage, sabotage, clandestine or threatening foreign-influenced activities and subversive activities intended to overthrow constitutional government by violence but also the threat or use of serious violence to achieve a political objective. In summary, terrorism is widely recognised in liberal democracies as a prime threat to State security. It follows that it is seen as legitimate to pass laws against such activities and to direct the attention of the police and security services against it.

2 Definitions of terrorism

This discussion about the nature of revolutionary terrorism has proceeded as if that term had an incontrovertible meaning. In reality, this is far from true, and one might ask, for example, whether the Angry Brigade was properly characterised as terroristic. The following definition is advanced by section 20(1) of the Prevention of Terrorism (Temporary Provisions) Act 1989:¹⁹

'terrorism' means the use of violence for political ends and includes any use of violence for the purpose of putting the public or any section of the public in fear.

In the light of the foregoing delineation of terrorism as a strategy, this is a rather unilluminating and limited description of the phenomenon. However, its two main elements, 'violence' and 'political ends', are worthy of further examination.

(a) Violence

The evaluative aspect of the word 'terrorism' is most pronounced in this element. 'Violence' implies force which is unjustified and unlawful²⁰ and usually entails criminal offences which involve a threat to, or endangerment of, personal safety. In fact, relevant legislation containing lists of terrorist offences are not always so limited, though their context should be recognised in that such laws quite properly react not only to acts of political violence