

Responding to terrorism

David Anderson QC reflects on his role as the UK's Independent Reviewer of Terrorism Legislation and outlines how the law is being used to tackle terrorist threats

When I strayed from the rich and sheltered pastures of European law into the post of Independent Reviewer of Terrorism Legislation, the notion that I might ever have anything useful to say about responding to terrorism would have seemed ridiculous.

For a start, I was not used to expressing a public view about anything at all. Like other members of the Bar I was in the habit of acting on instructions, making submissions, relying on precedents – at all costs, avoiding the newbie error of publicly saying “I think”. Being asked for my opinion on everything from how people are radicalised to whether Edward Snowden was a hero or a villain was going to take me well out of my comfort zone.

And anyway, my ignorance was profound. My only exposure to terrorism laws was through representing Sheikh Kadi, considered by the British Government to be a former associate of Osama bin Laden, in his attempts to have the freeze on his assets annulled

by the European Court of Justice. To be fair, the connection did not seem to worry either the Home Secretary or the three men she sent to my Chambers, under the pretence of seeking legal advice, to offer me the job of Independent Reviewer.

Impressions

Five years on, I seem to have acquired not so much a cool framework for analysis as a kaleidoscopic series of impressions. Here are just a few:

- Drinking instant coffee and discussing the Middle East with Abu Qatada in the house provided by the Home Office for his family – strangely enough in Stanmore, London's most Jewish district.
- Donning body armour to patrol South Armagh with police officers for whom terrorism remains an imminent and personal threat, but who are proud that progress allows them to do their jobs in armoured vehicles rather than helicopters.



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- Explaining the difference between public interest immunity and closed material procedures to MPs who, though not lawyers and beset with other preoccupations, displayed a conscientiousness they are rarely given credit for.
- Sharing doughnuts with the ponytailed privacy advocates of San Francisco, as they explained to me the evils of governmental intrusion.
- Having those same intrusions elucidated to me the following week by similarly ponytailed denizens of GCHQ, this time inside the Doughnut.
- Seeing my recommendations to government variously adopted, ignored, bent into politically acceptable shape and taken up by courts and parliamentary committees.
- Visiting a madrassa and a Shari'a Council in Savile Town, Dewsbury, resting my glass of water on a "stop forced marriage" coaster, and wondering how that settlement of 4000 people could have incubated both a Cabinet Minister and the UK's youngest suicide bomber.
- Venturing into the PM studio with Eddie Mair, as beguiling and as searching in his questions as the most skilled interrogators of the Court of Appeal.
- Attending Southwark Police Station to check on the welfare of a young man recently returned from a Syrian war zone, and talking him through the second half of the previous evening's friendly international which I happened to have seen but he,



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through force of circumstances, had not. That a suspected jihadi fighter should also be a mad keen England fan will not perhaps be a shock to anyone who inhabits the criminal courts. There we learn, if nothing else, that human nature is infinitely various and perpetually surprising.

If all this sounds as interesting to you as it has been for me, you may wish to know that the post of Independent Reviewer falls vacant in early 2017, and will be advertised under the public appointments procedure in a few weeks' time. The sturdy independence associated with the Bar is an excellent qualification for the job.

My statutory task has been to reduce impressions such as those above into sober accounts of the operation of the counter-terrorism laws. Has the ever-elusive balance been struck in the right place?

The general idea must surely be to bear down hard on the few thousand people who are suspected of engaging in terrorism-related activity on this island and in Northern Ireland, without alienating the millions of their peaceful and law-abiding co-religionists who wish their fellow-citizens no harm.

Bearing down hard

Bearing down hard requires strong laws, strongly enforced. These we now have. Ten or 12 years ago, successive Home Secretaries questioned whether we had the offences we needed, whether the jury system could cope with terrorism trials, and whether we might be better going over to the French investigating magistrate system.

But answers were provided in the shape of precursor offences such as preparing acts of terrorism, some of them with extra-territorial effect, and the specialised Counter-Terrorism Division of the CPS which now prosecutes terrorism offences with a high degree of success, measurable partly in the number of guilty pleas.

Held in reserve for the most intractable cases are executive orders – asset freezes and TPIMs, the control order replacement. Though rarely used, they have been a safety valve which may have helped divert the pressure to debase the strong protections which continue to characterise our criminal justice system.

It is tempting to regret our diminished mental resilience, and to ask whether, by demanding that every act of terrorism be averted, we are simply setting ourselves up to fail.

After all, terrorism is not necessarily the worst scourge that we face. In Britain at least, it has never accounted for as many as the 100 or so women killed every year by a current or former partner: yet no one speaks of zero tolerance for domestic violence. Everyone remembers the horrible killing of Private Lee Rigby in 2013 – one of only two terrorist murders in Great Britain in the past decade – but who recalls the other 186 homicides in that year in which the weapon was a knife or sharp instrument?

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In its classic form, it strikes not just at its immediate target but at the heart of the values we stand for. Recently we have seen people killed close to our own shores for satirising religion, for debating free speech, for celebrating music, and simply for being Jewish or for happening to find themselves near the political heart of Europe.

It is expressly aimed at dividing societies: that is why dissident republicans target hotels where the Police Service of Northern Ireland recruits Catholic officers.

And it weakens economies and so regimes, as by the attacks on holidaymakers in Tunisia and a plane leaving Sharm-el-Sheikh.

Strong laws, including strong investigatory powers, protect us and give us the confidence to avoid other, more serious impediments to our freedom.

Air travellers the world over already suffer the indignity and inconvenience of removing shoes and pouring away liquids, as a direct consequence of British terrorist plots of the last decade that almost succeeded.

With luck – and we will need some of that too – strong intelligence and strong laws will ensure that we do not need to further encroach on our own freedoms, whether by the screening of bags before we get on to the underground, as in Beijing, arches in hotel lobbies, as in much of the Middle East, or warrantless searches, curfews and house arrest, as under the current state of emergency in France.

Avoiding alienation

Strong laws will not do the job if their application alienates the population – including, in particular, the Muslim population of this island.

There are thugs, gangsters and enforcers in Muslim communities as there are in many others. Cultural sensitivities should never excuse serious criminal conduct – whether it takes the form of domestic violence, grooming for sex or calls for the physical punishment of blasphemers or apostates.

But there is much to be heartened by. Around 95% of British Muslims feel loyalty to Britain, according to a poll last year for the Today Programme. 94% say that if someone they knew from the Muslim community was planning an act of violence, they would inform the police. I doubt that if non-Muslims were asked the same questions, the percentages would be any higher. And the well-publicised barbarities of Da'esh have prompted a marked increase in the willingness of concerned parents and neighbours to come forward, including to the police.

Good community relations – the current expression of Sir Robert Peel's principle of policing by consent – are the key here. They need to be accompanied by greater minority recruitment to the police. A Brussels resident was reported to have said about captured fugitive

Salah Abdeslam, who hid out in the city for several months after the last Paris attacks: “Everyone in the neighbourhood knew”. We must hope that those words never become a reality in the UK.

International human rights standards have been a further positive. Landmark decisions in Strasbourg have resulted in the end of the pointless, but much resented, suspicionless stop and search under s 44 of the Terrorism Act, and ensured that in the most sensitive cases at least, the subject of closed material proceedings is given the gist of the allegations against him.

More cases are outstanding, for example on port controls and data collection. Some of our laws continue to be characterised by overbroad discretions which – as one serving High Commissioner put it to me – mean that a licence should really be required for their export. But six successive reasoned decisions in Strasbourg between 2010 and 2016, each of them upholding a controversial element of our counter-terrorism armoury, indicate that the balance may not be in too bad a place for now.

Linked to terrorism is extremism. Having led the world in programmes to combat violent extremism, the government has now set its sights on the non-violent kind. Here, I would suggest, considerable caution is in order. The promised Counter-Extremism Bill has not yet materialised: but it is a comfort, at least to me, to know that our domestic courts and their international counterparts stand ready to defend the rights to freedom of expression, freedom of conscience, freedom from discrimination and private life against any measures that cannot be demonstrated to be both necessary and proportionate.

Europe

Since I have grown used to expressing opinions, let me express one more. The result of the forthcoming referendum may prove to have been accurately predicted more than 30 years ago by Luigi Barzini,

the Italian journalist, who said that when one asks a Briton, ‘Are you European?’, the answer is always, “Yes’, but after a long thoughtful pause in which all other continents are mentally evoked and regretfully discarded”.

Our experience of terrorism, from the Fenian outrages of the 19th century, through decolonisation, to the Troubles and the



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Islamist plotters of the past 15 years, is the most extensive in Europe. Perhaps that is nothing to be proud of – but it has enabled us to exert significant and productive leadership in Europe on a range of terrorism-related issues. This illustrates the principle that when we really put our minds to it, we can make of the European Union not something irritating that others do to us, but a vehicle for the export of our values and our expertise to the rest of the continent and beyond.

As we all embark on Barzini’s long thoughtful pause, perhaps that is something to reflect upon. ●

This article is based on a speech to the British Institute of International and Comparative Law



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