

The right to a fair trial and the problem of pre-inchoate offences

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Abstract

Pre-inchoate offences, often found in counterterrorism laws, present a problem. The heightened criminal fair trial safeguards in art.6(2)-(3) of the European Convention on Human Rights are meant to be a protection against unfair state punishment. Yet some pre-inchoate offences can conceivably be made out in similar circumstances to those in which preventive orders can be imposed. Preventive orders have tested the limits of art.6 through their use of hybrid civil-criminal procedure. By comparison, pre-inchoate offences affect what has to be evidenced not by changing the relevant procedure, but by changing the form of the offence. As such, art.6 does not limit these offences; somewhat ironically, this means we must defend against pre-inchoate offences “further up-field”.

Introduction

This short article follows a seminar with Australia’s Independent National Security Legislation Monitor —James Renwick—held by the Centre for Socio-Legal Studies in the University of Oxford.² It examines pre-inchoate offences in the context of the right to a fair trial as per art.6 of the European Convention on Human Rights (“ECHR”).

Pre-inchoate offences extend criminal liability beyond the inchoate offences of attempt, conspiracy, and encouraging or assisting.³ By way of example, s.16(2) of the Terrorism Act 2000 criminalises the possession of money or other property, with either the intent that it should, or with reasonable cause to suspect it may, be used for the purposes of terrorism.⁴ Not

¹ Worcester College, University of Oxford; Editor for the Oxford Human Rights Hub. Thank you to Professor Andrew Ashworth, Dr Marc Engelhart, Karl Laird and Professor Lucia Zedner for their comments on an earlier draft.

² I am grateful to Jessie Blackburn for both organizing the event and inviting me to attend.

³ On inchoate offences generally, see David Ormerod and Karl Laird, *Smith, Hogan and Ormerod's Text, Cases, and Materials on Criminal Law* (Oxford: OUP, 2017), ch.20-22.

⁴ For further examples of pre-inchoate terrorism offences see Andrew Ashworth and Lucia Zedner, *Preventive Justice* (Oxford: OUP, 2014), pp.98-100.

a completed terrorism offence, nor planning/funding thereof, but the criminalization of mere possession of property without subjective suspicion that it could be used to fund terrorism. The article does not question whether such offences comply with the heightened criminal fair trial safeguards in art.6(2)-(3), but instead argues, over four sections, that pre-inchoate offences are troublesome because they *do* comply with the right to a fair trial. The first section provides more detail on the heightened criminal fair trial safeguards in the Convention and the rationale that underlies them, before the second examines preventive orders to show how art.6 has and can affect measures that make use of hybrid procedure. For present purposes, hybrid procedures are those in which a coercive order is imposed after a civil trial or an executive dominated procedure, but the breach of which is a criminal offence. Pre-inchoate offences are then examined in the third section, which argues it is conceivable and problematic that they can be granted based on very similar evidence to preventive orders, but are not susceptible to an art.6 challenge. The fourth and final section calls for critical engagement by academics and practitioners when pre-inchoate offences are proposed or reviewed. The article pays particular attention to terrorism offences and measures throughout, both because this is the context from which the article developed, and because terrorism legislation has proven such a key area for the enactment of pre-inchoate offences.

Article 6(2)-(3) and its purpose

Article 6 of the ECHR sets out the fair trial safeguards for those who face either a determination of their civil rights and obligations, or a criminal charge. Article 6(1) provides the safeguards that apply for both types of proceedings, such as “a fair and public hearing” and “an independent and impartial tribunal established by law”. Particular safeguards for those charged with a criminal offence are then set out in art.6(2)-(3): 6(2) provides for the presumption of innocence and 6(3) lists further heightened criminal fair trial safeguards such as the right to examine witnesses.

The heightened criminal fair trial safeguards are a protection for the citizen against unfair punishment by the State; punishment being the “most powerful exercise of state authority over citizens”.⁵ As such, the European Court of Human Rights has developed an anti-subversion doctrine, which aims to prevent contracting states from circumventing the heightened criminal safeguards by relabelling proceedings as disciplinary, administrative, *et cetera*.⁶ The term “criminal charge” thus has an autonomous meaning; *Engels and Others v the Netherlands* provides the test to establish what constitutes a criminal charge.⁷ The test is three-part: the first-part, which is of less importance, is whether there has been a criminal charge under the domestic law of the relevant contracting state, the nature of the measure is assessed under the second part of the test and the type of penalty imposed is considered under the third. Where neither the second nor the third part of the test alone lead to the conclusion that the measure constitutes a criminal charge, a cumulative approach to them can be taken.⁸ We now turn to consider preventive orders, to highlight the impact that art.6 and the anti-subversion doctrine can have in practice.

Preventive orders and Article 6 (2)-(3)

Despite having been repealed and replaced, the Anti-Social Behaviour Order (“ASBO”) remains the paradigmatic example of a preventive order.⁹ The legal history of the ASBO is instructive on the heightened criminal fair trial safeguards and measures that make use of hybrid procedures. What is more, the repeal of the ASBO does not mean this section is of only historic interest, there are at present around 30 preventive orders that have the same or a

⁵ Lucia Zedner, “Penal Subversions: When is a Punishment Not Punishment, who Decides and on What Grounds?” (2016) 20(1) *Theoretical Criminology* 3, 14.

⁶ The doctrine applies to other terms in the Convention too, see generally Andrew Ashworth, “Social Control and ‘Anti-social Behaviour’: The Subversion of Human Rights?” (2004) 120(Apr) *Law Quarterly Review* 263.

⁷ *Engel and Others v The Netherlands* (No. 1) (1979-80) 1 E.H.R.R. 647 at [81].

⁸ *Jussila v Finland* (2007) 45 E.H.R.R. 39 at [31].

⁹ Crime and Disorder Act 1998 s.1; replaced by Anti-Social Behaviour Crime and Policing Act 2014 s.1 and s.22.

similar form to the ASBO. These newer orders target a myriad of wrongs including terrorism,¹⁰ psychoactive substance use,¹¹ and modern slavery.¹²

The imposition of an ASBO required:

“(a) that the person has acted, since the commencement date, in an anti-social manner, that is to say, in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself; and
(b) that such an order is necessary to protect relevant persons from further anti-social acts by him.”¹³

The Order could be granted in civil proceedings; this design allowed hearsay evidence to be used to meet the above requirements.¹⁴ In effect, a police officer or local authority official could therefore present claims made against the respondent by community members who may have been too afraid to give evidence. The imposed ASBO would contain coercive conditions—such as association restrictions and curfews—the breach of which was an offence with a maximum sentence of five years’ imprisonment on indictment.¹⁵

The most important domestic decision on preventive orders and art.6(2)-(3) remains *McCann*, in which the House of Lords held that the imposition of an ASBO is not the equivalent of a criminal charge and, therefore, that hearsay evidence is admissible in proceedings for its grant.¹⁶ However, due to the “seriousness of the matters to be proved and the implications of proving them”, the evidential standard for the first requirement to impose an ASBO, set out above, was in effect made beyond reasonable doubt.¹⁷ Thus, as a consequence of an art.6 challenge, the proceedings for the grant of an ASBO were made more rigorous. Likewise, in *MB* it was held that though Control Orders do not constitute a criminal charge, there was a

¹⁰ On Terrorism Prevention and Investigation Measures see the Terrorism Prevention and Investigation Measures Act 2011. For comment on the recent Terrorism Exclusion Orders see, Helen Fenwick, “Terrorism Threats and Temporary Exclusion Orders: Counter-Terror Rhetoric or Reality?” [2017] 3 E.H.R.L.R 247.

¹¹ Psychoactive Substances Act 2016 ss.18-19.

¹² Modern Slavery Act 2015 ss.14-15.

¹³ Crime and Disorder Act 1998 s.1.

¹⁴ A.P. Simester and Andrew von Hirsch, “Regulating Offensive Conduct through Two-Step Prohibitions”, in Andrew von Hirsch and AP Simester (eds.), *Incivilities* (Oxford: Hart Publishing 2006), pp.175-177.

¹⁵ Crime and Disorder Act 1998, s.1(10).

¹⁶ *R (on the application of McCann) v Manchester Crown Court, Clingham v Kensington and Chelsea RLBC* [2002] UKHL 39; [2003] 1 A.C. 787.

¹⁷ *McCann* [2002] UKHL 39 at [37] per Lord Steyn, at [81]-[83] per Lord Hope, at [114] per Lord Hutton.

need for more stringent application of the civil limb of the right to a fair trial.¹⁸ Lord

Hoffmann commented:

“[I]n any case in which a person is at risk of an order containing obligations of the stringency found in this case... the application of the civil limb of article 6(1) does in my opinion entitle such person to such measure of procedural protection as is commensurate with the gravity of the potential consequences. This has been the approach of the domestic courts...and it seems to me to reflect the spirit of the Convention.”¹⁹

Further, after *McCann*, more recent preventive orders have been drafted with an awareness of the relation of the severity of the measure and the safeguards preceding its imposition by either requiring proof beyond reasonable doubt for the order to be imposed²⁰ or, arguably, having less severe consequences on breach.²¹

Though art.6 concerns have affected the procedure that precedes the imposition of preventive orders, it has been argued that the judgment in *McCann* may not have gone far enough.²²

Ashworth notably indicated that, based on the aforementioned Engel Test, the European Court of Human Rights could reasonably have reached a different decision as to whether ASBOs constitute a criminal charge.²³ Ashworth placed particular emphasis on the serious effects of the ASBO on its recipient—coercive conditions backed by a criminal offence—when criticising *McCann*.²⁴

¹⁸ *Secretary of State for the Home Department v MB; Same v MF* [2007] UKHL 46; [2008] 1 A.C. 440.

¹⁹ *MB* [2007] UKHL 46 at [24] per Lord Hoffmann. For detailed consideration of Article 6 and Control Orders see 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.

²⁰ On Slavery and Trafficking Protection Orders, see Home Office, *Guidance on Slavery and Trafficking Prevention Orders and Slavery and Trafficking Risk Orders under Part 2 of the Modern Slavery Act 2015* (Home Office, 2017) paras.3.2.1-3.2.3.

²¹ For instance, consider the lower evidential standard, balance of probabilities, for the imposition of the ASBO’s replacement, the breach of which is contempt of court and not an offence: Anti-social Behaviour Crime and Policing Act 2014 s.1. Though for a counterexample, See the TPIM the imposition of which is executive-centric, but breach remain an offence with a five-year maximum on breach: Terrorism Prevention and Investigation Measures Act 2011.

²² For example, Chara Bakalis, “Asbos, ‘Preventative Orders’ and the European Court of Human Rights” [2007] 6 E.H.R.L.R. 427.

²³ Andrew Ashworth, “Social Control and ‘Anti-social Behaviour’: The Subversion of Human Rights?” (2004) 120(Apr) *Law Quarterly Review* 263.

²⁴ Andrew Ashworth, “Social Control and “Anti-social Behaviour”: The Subversion of Human Rights?” (2004) 120(Apr) *Law Quarterly Review* 263, 275-278, 280-283.

A dissent from a recent judgment of the European Court of Human Rights adds weight to Ashworth's well-known argument. In *de Tommaso v Italy*, the applicant claimed violations of art.5 (the right to liberty), art.2 of Protocol 4 (freedom of movement), art.6, and art.13 (right to an effective remedy).²⁵ The claim related to a preventive measure that was imposed in April 2008 after a closed hearing. The measure contained coercive conditions to last for two years; these included weekly police reporting, residence restrictions, association restrictions, a curfew, a ban on mobile phones and to "not give cause for suspicion".²⁶ As with preventive orders, breach of a condition could result in imprisonment. The measure was imposed due to "active' criminal tendencies" and evidence that showed de Tommaso earned most of his income through criminal activities. The measure was quashed by the Italian Court of Appeal in January 2009 and the Government offered a settlement for the lack of a public hearing in April 2015. Nonetheless, the European Court of Human Rights found a violation of art.2 of Protocol 4, and of art.6(1) with respect to the lack of a public hearing, but not based on the right to a fair hearing.

Before we turn to the relevant dissent, two points on the judgment ought to be made. First, the similarities of preventive orders and the Italian preventive measures should be clear from the above and, in fact, the Court explicitly acknowledged this when it referred to Terrorism Prevention and Investigation Measures ("TPIMs") as comparable law, "[i]n the United Kingdom similar measures were introduced in 2011 in the context of terrorism prevention."²⁷ Secondly, the question of whether the imposition of the Italian preventive measure amounted to a criminal charge was not substantially engaged with in *de Tommaso*: it was raised briefly by the applicant, and mentioned by the Court only in passing and without assessment of relevant case-law.²⁸ The Italian Government did not even offer submissions on whether the

²⁵ *De Tommaso v Italy* (App. No. 43395/09), judgment of 23 February 2017. The UK has not ratified Protocol 4.

²⁶ *De Tommaso* (App. No. 43395/09) at [17].

²⁷ *De Tommaso* (App. No. 43395/09) at [70].

²⁸ *De Tommaso* (App. No. 43395/09) at [141], [143].

measures constituted a criminal charge.²⁹ These two points increase the importance of the dissent. Taken together, they mean the dissent offers insight into how the Court could engage with a claimant who argued that the imposition of a preventive order constituted a criminal charge, as opposed to it being an approach that has been fundamentally rejected.

In his dissenting opinion, Judge Pinto (agreed with by President Sajó, Judge Vučinić, and Judge Kūris) argued the preventive measure constituted a criminal charge and that *all* three parts of the Engel Test were satisfied due to ten factors.³⁰

1. A recipient of the measure was “substantially affected” by it because they were imputed to be dangerous and thus suspected of committing future crimes.
2. As soon as proceedings commenced, temporary restrictions could be imposed on the suspect.
3. The suspect could face “highly restrictive” conditions for up to five years if this suspicion was confirmed by a judge.
4. The Italian Constitutional Court considered the measures to be criminal in nature.
5. The measures have a general and specific preventive purpose, and were based on the “socially reprehensible nature of the suspect’s conduct”.
6. Breach of the measure could result in five year’s imprisonment and the application of the measures was an aggravating factor for a number of criminal offences.
7. The Italian Constitutional Court had recognized the procedural similarities between proceedings to impose preventive measures and criminal proceedings.
8. The guarantees of a fair and public hearing apply to pecuniary preventive measures which personal preventive measures are similar to.

²⁹ *De Tommaso* (App. No. 43395/09) at [142].

³⁰ *De Tommaso* (App. No. 43395/09), pp.65-67 per Judge Pinto. Though, somewhat frustratingly, the factors are not attached to particular parts of the Test.

9. It would be “inconceivable” for the suspect not to have the benefit of the safeguards in art.6(3)(a)-(c) due to the seriousness of the measure.

10. The preventive measures are more severe than disciplinary measures that have been held to constitute criminal charges by the European Court of Human Rights.

If the European Court of Human Rights was faced with a claimant who argued a preventive order constituted a criminal charge, Judge Pinto’s dissent indicates it may well agree there had been a violation of art.6.

This section has not argued that the fair trial safeguards that precede the imposition of a preventive order are either perfect or imperfect, the central contention has instead been that art.6(2)-(3) is a live issue in the context of preventive orders: the right has shaped proceedings to date and may well continue to do so. The next section can now draw out what relevance this conclusion has to pre-inchoate offences.

Pre-inchoate offences and Article 6(2)-(3)

Some pre-inchoate offences can conceivably be made-out in the same circumstances as those in which a preventive order can be granted. Whereas preventive orders have made use of the civil-criminal distinction to affect evidential rules and standards, pre-inchoate offences change what has to be evidenced in a criminal trial. In other words, a conviction is made possible not by reliance on hybrid procedures, but by the form of criminal offences themselves.³¹ This claim can be evidenced briefly via examination of the Australian response to those who received training from terrorist organisations.³²

³¹ For a related inquiry see Andrew Ashworth, “Four Threats to the Presumption of Innocence” (2006) 10 *International Journal of Evidence & Proof* 241. Ashworth argues that strict liability offences are not contrary to the presumption of innocence, but do call for a principle of no criminal liability without fault.

³² The Australian response is considered because it neatly and explicitly brings out the overlap between pre-inchoate offences and preventive orders. Similar offences and orders exist in the United Kingdom, see the Terrorism Act 2006 s.6(2).

Two Orders were imposed under Australia's previous Control Order regime,³³ the recipients were Joseph (Jack) Thomas and Thomas Hicks, both of whom had received training from a terrorist organisation.³⁴ Australia also introduced a pre-inchoate offence that targets terrorism training in 2004, requiring a person to intentionally participate in or receive training from a prescribed terrorist organization³⁵. The person does not have to know that the organisation is a prescribed organisation, but instead must either be (1) reckless to this, or (2) if the organisation is listed, the person is presumed to be reckless unless they can meet an evidential standard of proof to establish they were not, and, thus, return the burden to prove recklessness to the State. A complex mens rea,³⁶ but the important point for now is the extent of inchoate liability: the offence does not target a completed terrorist attack or a conspiracy, but merely receiving related training. Nonetheless, the maximum sentence for the offence is 25 years' imprisonment.³⁷

The close relationship of the pre-inchoate training offence and the earlier use of Control Orders informed the recommendation of the then Independent National Security Legislation Monitor, Bret Walker, to repeal Control Orders in 2012:

“In this manner, the kind and cogency of evidence in support of an application for a CO [Control Order] converges very closely to the kind and cogency of evidence to justify the laying of charges so as to commence a prosecution. In particular, the availability, peculiar to terrorism, of precursor or inchoate offences earlier in the development of violent intentions and actions than ordinary conspiracy offences, renders this convergence practically complete.”³⁸

Walker continued:

³³ Independent National Security Legislation Monitor, *Declassified Annual Report* (Australia: Bret Walker 2012) pp.13-25.

³⁴ Jack Thomas was only issued with an interim Control Order. For comment on the new Australian Control Order regime see Susan Donkin, “Amendments to the Australian Terrorism Control Order Scheme: A Precautionary Tale”, in Rebecca Ananian-Welsh, Simon Bronitt, Sarah Murray and Tamara Tulich (eds.), *Regulating Preventive Justice: Principle, Policy and Paradox* (Oxford/New York: Routledge, 2017).

³⁵ Australian Criminal Code 1995 s.102.5 as amended by Anti-Terrorism Act 2004 sch.1.

³⁶ Agreeing, see GL Rose and D Nestorovska, “Australian Counter-Terrorism Offences: Necessity and Clarity in Federal Criminal Law Reforms (2007) 31(1) *Criminal Law Journal* 20, 33.

³⁷ Australian Criminal Code 1995 s.102.5 as amended by Anti-Terrorism Act 2004 sch.1.

³⁸ Independent National Security Legislation Monitor, *Declassified Annual Report* (Australia: Bret Walker 2012) p.30. The recommendation was not accepted.

“COs were said to be necessary to preventively deal with those people who had trained with a terrorist organisation before it was a criminal offence to do so. As it is now a criminal offence to provide training to, or receive training from, a terrorist organisation this is largely a historical problem and cannot be said to justify the current CO regime.”³⁹

Why does it matter that a pre-inchoate offence can be completed in the same material circumstances that can lead to the imposition of a preventive order? Unlike preventive orders, pre-inchoate offences are not susceptible to an art.6(2)-(3) challenge. The heightened criminal fair trial safeguards relate only to the procedure by which a criminal charge must be proven. They, therefore, do not provide citizens with a standard degree of protection across all criminal offences; the degree of protection varies based on what has to be proven within the obligated procedure. Furthermore, both the European Court of Human Rights and the House of Lords have been reluctant to accept that the substantive form of a criminal offence can be contrary to the protections in art.6(2)-(3).⁴⁰ As Lord Hope stated in *R v G*:

“As has been said many times, article 6 does not guarantee any particular content of the individual's civil rights. It is concerned with the procedural fairness of the system for the administration of justice in the contracting states, not with the substantive content of domestic law... The approach which the article takes to the criminal law is the same. Close attention is paid to the requirements of a fair trial. But it is a matter for the contracting states to define the essential elements of the offence with which the person has been charged.”⁴¹

The minimal engagement with substantive criminal law under art.6 is why pre-inchoate offences can be evidenced where a substantive offence could not be, and where a preventive order may otherwise have been relied upon. The result is that a pre-inchoate offence will not be found to violate art.6, and also there will not be the possibility for an art.6 challenge to shape the development of such offences in the way *McCann* has shaped more recent preventive orders.

³⁹ Independent National Security Legislation Monitor, *Declassified Annual Report* (Australia: Bret Walker 2012) p.31.

⁴⁰ Tadros and Tierney have argued for a more expansive role for art.6(2): Victor Tadros and Stephen Tierney, “The Presumption of Innocence and the Human Rights Act” (2004) 67(3) *Modern Law Review* 402.

⁴¹ *R v G (Secretary of State for the Home Department intervening)* [2008] UKHL 37; [2009] 1 A.C. 92 at [27] per Lord Hope.

It is here important to recall the aforementioned purpose of the heightened criminal fair trial safeguards: they are a protection for the citizen against unfair state punishment. The substantive form of offences affects the necessary evidence to prove commission, which can in turn limit the value of the protection offered by the heightened criminal fair trial safeguards which, as above, are not free-standing safeguards. The value of the heightened criminal fair trial safeguards is thus left open to question: they are meant as a protection against unfair state punishment, yet their value can be significantly affected by how the state chooses to draft offences.

In the context of strict liability offence and reverse burdens of proof, Tadros and Tierney have similarly commented that if the state retains the capacity to draft any criminal offence then “the presumption of innocence would provide citizens with no protection against the state whatsoever.”⁴² The thrust of this claim is undoubtedly correct, the value of the presumption of innocence cannot be considered absent an examination of substantive criminal law. Yet in one sense the statement is an over-claim; the problem is not that we have no protection from the state (see the section on preventive orders above), but that the protection is inconsistent. In another sense, Tadros and Tierney’s point, more worryingly, constitutes an under-claim, as offences can be drafted so as to undermine not only the presumption of innocence, but also the other criminal fair trial safeguards listed in art.6(3). It is also to be emphasized that though the consequences of being found guilty of a pre-inchoate offence and of the imposition of a preventive order are both serious, the former can be significantly more so. By way of example, a TPIM can contain conditions such as geographical restrictions, curfews and association restrictions,⁴³ but the maximum sentence on indictment for the possession offence, set out in the introduction above, is fourteen years’

⁴² Victor Tadros and Stephen Tierney, “The Presumption of Innocence and the Human Rights Act” (2004) 67(3) *Modern Law Review* 402, 413-414.

⁴³ Terrorism Prevention and Investigation Measures Act 2001 sch.1.

imprisonment and/or a fine.⁴⁴ What is more, the Prime Minister has indicated that the maxima for pre-inchoate terrorism offences may be increased.⁴⁵

In an earlier issue of this Review the then UK Independent Reviewer of Terrorism Legislation, David Anderson, argues that the atrocity of terrorism leads to a “perceived need...to defend further up-field.”⁴⁶ Anderson gives both pre-inchoate offences and preventive orders as examples of such a defensive strategy,⁴⁷ and suggests there are three conceivable safeguards against the excesses of defending further up-field: the definition of terrorism, discretion, and constitutionalism.⁴⁸ The last potential safeguard is of particular interest here; within constitutionalism, Anderson includes domestic courts due to their enforcement of the Human Rights Act 1998 and the European Court of Human Rights.⁴⁹ It is not argued that the ECHR has failed to constrain excesses of terrorism law,⁵⁰ yet there is a clear limit on the capacity of human rights law to safeguard citizens if the state relies on pre-inchoate offences instead of expedited procedures.⁵¹ This is particularly concerning given Anderson’s scepticism of the capacity of either the definition of terrorism or the discretion of the state to limit terrorism law.⁵²

⁴⁴ Terrorism Act 2000 s.22.

⁴⁵ Helen Fenwick, “Probing Theresa May’s Response to the Recent Terror Attacks” (2017) 4 E.H.R.L.R 341, 346-347.

⁴⁶ David Anderson, “Shielding the Compass: How to Fight Terrorism Without Defeating the Law” (2013) 3 E.H.R.L.R 233, 237.

⁴⁷ David Anderson, “Shielding the Compass: How to Fight Terrorism Without Defeating the Law” (2013) 3 E.H.R.L.R 233, 237-239.

⁴⁸ David Anderson, “Shielding the Compass: How to Fight Terrorism Without Defeating the Law” (2013) 3 E.H.R.L.R 233, 239-240.

⁴⁹ David Anderson, “Shielding the Compass: How to Fight Terrorism Without Defeating the Law” (2013) 3 E.H.R.L.R 233, 245-246.

⁵⁰ Anderson gives a number of examples of when domestic courts and the European Court of Human Rights have used human rights to limit terrorism law: David Anderson, “Shielding the Compass: How to Fight Terrorism Without Defeating the Law” (2013) 3 E.H.R.L.R 233, 245-246.

⁵¹ This is not to say that no threat is posed by expedited and executive-orientated procedure, see, for instance, Helen Fenwick, “Terrorism Threats and Temporary Exclusion Orders: Counter-Terror Rhetoric or Reality?” [2017] 3 E.H.R.L.R 247.

⁵² David Anderson, “Shielding the Compass: How to Fight Terrorism Without Defeating the Law” (2013) 3 E.H.R.L.R 233, 240-245. Anderson must be right to be sceptical of discretion. To say discretion is a safeguard against terrorism law is somewhat similar to the claim that another’s freedom not to shoot a gun is a protection against being shot. For critical commentary on the definition of terrorism see Lucia Zedner, ‘Terrorizing Criminal Law’ (2014) 8(1) Criminal Law and Philosophy 99, 113-114.

Conclusion

What should we do when faced with pre-inchoate offences? As the courts and art.6 cannot be relied on to limit their excesses, we must query the legitimacy of pre-inchoate offences when they are proposed or reviewed, be it by Parliament, Government, or the Independent Reviewer of Terrorism Legislation.⁵³ Such engagement is of particular importance in the context of terrorism where pre-inchoate offences are becoming ever more common and there is a political appetite for higher maximum sentences. This suggestion constitutes a more proactive version of Anderson's comment that Parliament can act as a bastion against the excesses of terrorism law.⁵⁴ It can, of course, but a burden falls on us in the legal community to help Parliament to understand what these excesses are and why they should be avoided. In essence, and somewhat ironically, pre-inchoate offences require us to defend further up-field.

⁵³ Frameworks for such engagement exist, see, for instance, Andrew Ashworth and Lucia Zedner, *Preventive Justice* (Oxford: OUP, 2014), pp.109-115.

⁵⁴ David Anderson, "Shielding the Compass: How to Fight Terrorism Without Defeating the Law" (2013) 3 E.H.R.L.R 233, 245.