Law, Liberty, and the Pursuit of Terrorism

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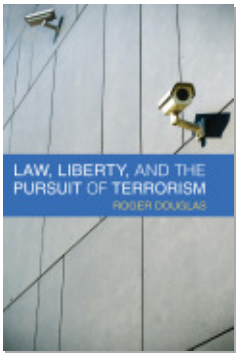

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Guilt by Association

Terrorism is unlikely to constitute a serious threat unless it is organised. So it is not surprising that governments seek to obstruct terrorist organisations. They do so by imposing penalties on supporters, limiting members' immigration rights, and freezing organisations' assets. Such measures have aroused criticism. First, many of them are predicated on an organisation's having been officially listed as a terrorist organisation, rather than on its having been found by a court to have been engaged in terrorism. Listing decisions are usually judicially reviewable, but the powers of courts are narrower than those of the listing authority. Second, the criteria for listing condition proscription on the organisation's involvement in terrorism, unqualified by consideration of whether its terrorism might have justification. Objections on this ground sometimes involve apologias for relatively vicious groups and are misplaced in that the political element in executive proscription can sometimes provide a safeguard for "good terrorists." But this very possibility raises questions about why laws make no facial allowance for justified terrorism. Third, laws tend to punish involvement regardless of whether the person believes the proscribed organisation engages in terror and even if the person makes the contribution believing that it will be used by the terrorists for nonterrorist purposes, such as those pursued by the organisation's charitable arm. This is deliberate and is intended to make life more difficult for terrorists. But it raises awkward questions about the degree to which the state's political judgments should be allowed to prevail over the conscience of those who disagree with its conclusions.

Given these considerations, one might expect that proscription would encounter resistance from within legislatures and from the courts and that responses to proscription would reflect underlying orientations to authority and to liberty. To some extent, these expectations are borne out. However, controversy tends to surround details rather than proscription itself, which seems to be among the less controversial responses to terrorism.[1] There appears to be considerable cross-institutional support for proscription, and while there is some evidence of a relationship between party allegiance and attitudes to-

wards proscription laws, the relationship is weak and blurred by the impact of whether or not a party is involved in government.

Proscription Laws

Proscription law is complicated by the existence of parallel proscription regimes, best understood as a response to different problems. One of these can loosely be called the "criminal law" regime and is embodied in primary legislation, which builds in some formal political and procedural safeguards. The latter, the sanctions regimes, are more closely tied to duties arising under the United Nations Charter and tend to derive their domestic force from legislation giving domestic effect to the requirements of the charter. Sanctions regimes are subject to relatively weak political and judicial supervision. The two major sanctions regimes are those that proscribe organisations (and people) listed by a UN committee and those that involve listing on the basis of the national government's conclusion that they fall within United Nations Security Council Resolution 1373.

"Criminal Law" Regimes

In all five countries under discussion in this book, legislation makes involvement of a terrorist organisation an element of various offences. In the United Kingdom and the United States, these offences are conditioned on the organisation having been proscribed. In Canada, Australia, and New Zealand, they apply in relation both to proscribed organisations and to organisations that are "objectively" terrorist organisations. However, in the latter case, the prosecution's evidentiary burden is considerably higher.

In the United States, only foreign organisations may be proscribed, but this power extends to permitting proscription of their local alter egos. Proscription requires a finding that the organisation engages in terrorism and is a threat to US security.[2] In the other four countries, the power may be exercised against both domestic and foreign organisations.[3] In the United Kingdom, a number of Irish organisations were proscribed in a schedule to the Terrorism Act 2000, with the home secretary being given the power to add or remove organisations from the banned list. New Zealand legislation now includes all entities listed by the United Nations. Elsewhere the legislation did not list any organisations, but as in the United Kingdom, subsequent proscription decisions required that the relevant official be satisfied that the organisation meets (or no longer meets) the conditions for its proscription. In particular, the organisation must have been (Canada, NZ) or must currently be (UK, Australia) engaged in terrorism. In Canada and New Zealand, the

criminal proscription regime also permits the listing of individuals. Unease about "criminal law" proscription was reflected in clauses that limited the life of proscription decisions to two years (United States, Canada), two and later three years (Australia),[4] and three years (New Zealand).[5] In the United States and Canada, the sunset clauses have been replaced by requirements for periodic review.[6]

"Economic Sanctions" Regimes

The five "criminal law" regimes coexist with regimes that impose economic sanctions on designated organisations (and individuals) and that provide for the enforcement of those sanctions. In Australia and Canada, this is done under legislation and regulations giving effect to UN decisions, and this was purportedly the position in the United Kingdom until 2010. There are two different UN sanctions regimes. One (the al-Qaeda regime) implements UN Security Council resolutions relating to the Taliban, Osama bin Laden, and associated entities. These have their origins in Security Council Resolution 1267 (1999), which required the freezing of assets controlled by Taliban-related entities and established a committee (the 1267 Committee) to supervise the process. Resolution 1333 (2000) extended the regime to Osama bin Laden and al-Qaeda and to associated individuals and entities, as designated by the 1267 Committee (par 8(c)). In New Zealand, those listed by the committee are designated both for the purposes of the general criminal law and for sanctioning purposes.[7] In Canada, the relevant regulations apply to all entities on the 1267 list except those listed under the criminal law regime (who are subject to criminal law sanctions for proscribed dealings).[8] Australia incorporates the 1267 list by reference, and it overlaps with Australia's criminal law list.[9] The United Kingdom made regulations to similar effect, but in 2010, the Supreme Court ruled that the relevant regulations were not a valid exercise of the rule-making powers conferred by the United Nations Act 1946 (UK). In response, the government used powers under the European Communities Act 1972 (UK) to make regulations in relation to entities designated in annex 1 to Council Regulation No 881/2002, as amended from time to time.[10] The resolution broadly corresponds to the list of the 1267 Committee and is amended to ensure its continued correspondence.

The other regime (the general regime) has been established to implement Security Council Resolution 1373 (2001), which requires members of the United Nations to take steps to freeze the assets of entities "of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled . . . by such persons; and of persons and entities acting on behalf of, or at the direc-

tion of such persons or entities" (par 1(c)). Member states must decide for themselves whether a person or entity satisfies these conditions. The United Nations does not maintain a list of those who might fall within the resolution. New Zealand makes no provision for doing so, other than pursuant to the criminal law power, and until 2010, it had made no use of even that power. Canada and Australia permit designation for 1373 purposes, but the Canadian power may be exercised only in relation to those not listed under the criminal law or 1267 regimes.[11]

Following a decision that regulations made to give effect to the resolution were not within the powers conferred by the United Nations Act 1946 (UK), the UK Parliament passed legislation that conferred the power but made it subject to greater safeguards than those afforded by the earlier regulations.[12] It also provides that a designated person for the purpose of the act includes an entity listed for the purposes of General Regulation (EC) No 2580/2001.

The United States imposes economic sanctions on two major classes of terrorists and terrorist organisations.[13] One class consists of "specially designated terrorists" and includes groups declared by President Clinton to be using violence to impede the Middle East peace process, along with foreign persons subsequently designated on similar grounds. The other consists of "specially designated global terrorists," which includes those listed in an order made by President Bush and those subsequently added.[14]

The Consequences of Proscription

Proscription has implications for criminal liability, whether it is under a "criminal law" or a "sanctions" regime. The relevant criminal offences are discussed in more detail in the next chapter. Broadly, if the body is proscribed under a criminal law regime, offences include a wider variety of forms of assistance to the organisation and carry higher maximum penalties. Offences under the "sanctions" regimes are more closely linked to the particular concerns of these regimes, namely, the prevention of economic assistance or the transfer of funds to proscribed entities.

In the United States, there is also an express nexus between immigration and involvement in proscribed organisations. People are inadmissible if they have engaged in terrorist activity or if they are reasonably believed to have done so or to be likely to do so.[15] Terrorist activity includes soliciting funds, recruiting, or providing material support for terrorist organisations.[16] Terrorist organisations include not only designated "foreign terrorist organizations" (FTOs) but also organisations designated by the secretary of state on the request of or after consulting with the attorney general or the secretary of homeland affairs.[17] Also included are groups of two or more people, whether

organised or not, which engage in specified forms of terrorist activity.[18] In administering the legislation, limited allowance is made for those who support "good terrorists."[19]

In Canada, permanent residents and foreign nationals are inadmissible on security grounds if they are "members of an organization that there are reasonable grounds to believe engages, has engaged or will engage in [terrorist acts]."[20] That an organisation is listed as a terrorist organisation is relevant to whether reasonable grounds exist for acting on that assumption, as are prior decisions in relation to particular organisations. Thus, while the Mujahedin-e-Khalq (MEK) was still listed in Canada, membership could reasonably constitute grounds for exclusion, even if the organisation had been delisted by the UN Security Council.[21] Under current New Zealand law, a person is ineligible for an entry visa if the person is a member of a proscribed or designated entity, and a member of a group that has engaged in or taken responsibility for a terrorist act may be deported if, for that reason, the person constitutes a threat to public safety.[22] Elsewhere, immigration law makes no explicit reference to involvement in terrorist organisations, whether designated or not, but involvement would nonetheless be relevant to admissibility.

Designation as a terrorist organisation exposes the organisation to the freezing and possibly the confiscation of its assets. Under the sanctions regimes and—sometimes—the criminal law regimes, proscription means that dealings in the entity's assets are prohibited.[23]

Heightened Fears, Opportunism, Symbolism, or Deterrence? Legislative Response to Terrorist Attacks

Proscription laws are self-evidently a response to terrorism and to recent terrorist attacks, but in their current form, they can scarcely be dismissed as a hasty response to either the 9/11 attacks or earlier ones. In the United States, criminal proscription laws had their origins in the Antiterrorism and Effective Death Penalty Act of 1996.[24] The impetus for the act had come from a series of acts of international terrorism, the most recent of which had been the Lockerbie bombing. However, despite the emotions stirred by the attacks (which were evident in the congressional debates), the act was not passed until mid-1996, almost a year after it had been proposed. Moreover, despite the Oklahoma bombing, then recent, the legislation was not extended to domestic terrorist groups. The Patriot Act expanded the range of terrorist activities that could warrant designation but otherwise left the legislation largely unchanged, and these amendments were among the less controversial features of the act.

While the United Kingdom's initial proscription legislation was passed shortly after postwar violence had peaked in Northern Ireland, the 2000 Ter-

rorism Act provisions had been the subject of four years of deliberations.[25] Moreover, prior to the 9/11 attacks, all five countries had passed measures to implement their Resolution 1267 responsibilities.

The criminal proscription laws of Canada, Australia, and New Zealand were passed in response to the 9/11 bombings but, to varying degrees, reflect the UK model. Canada's criminal proscription legislation was enacted with relative haste and included narrower protections than the UK regime. But proposed amendments designed to constrain the exercise of the power and to enhance judicial review rights won the support of all the nongovernment parties, along with a few dissenting government MPs, which suggests that any panic that did exist was confined to the government and that if the government's response was opportunistic, its political wisdom was not apparent to the opposition.

The Australian provisions evolved much more slowly. The original post-9/11 bill provided for listing decisions to be made by the attorney-general, but in a bipartisan report, the Senate Legal and Constitutional Committee recommended that the proscription provisions not be passed in their proposed form, and in any case, it was clear that the Labor and Australian Democrat opposition meant that the government would not have been able to secure the passage of its preferred option.[26] The government had no alternative but to agree to an amendment that limited the proscription power to organisations designated by the United Nations and that provided, in a departure from usual Australian practice, that regulations proscribing organisations did not come into effect until the expiry of the period during which they were subject to disallowance by either house of the federal parliament. The power subsequently underwent further amendment. The "United Nations" limit meant that unless the UN Security Council declared particular bodies to be terrorist organisations, the only bodies that could be banned would be those on the 1267 Committee's list. In 2004, the government was anxious to list the Hizballah External Security Organisation (which was not on the 1267 list). The opposition agreed to ad hoc legislation banning the organisation and later agreed to legislation listing two other organisations.[27] The government and opposition subsequently agreed on a compromise that created a general proscription power but subjected proscription regulations to mandatory review by the joint parliamentary committee responsible for intelligence. The following year, an apparently uncontroversial amendment made proscription regulations operative from the day they were made.[28]

New Zealand's legislation was not passed until more than a year after the 9/11 attacks and after a lengthy consultation process. Unlike legislation elsewhere, it was criticised in the Parliament on the grounds both that it was too narrow and that it was too broad.

Governments and Proscription

Proscription laws can sometimes be understood in terms of governments prising powers from reluctant legislatures, and the Australian experience is particularly consistent with this. However, the New Zealand experience is not, nor are the pre-9/11 experiences of the United States and the United Kingdom. In the United States, the proscription powers contained in the Antiterrorism and Effective Death Penalty Act of 1996[29] were in some ways broader than those sought by the government. President Clinton's proposal for a ban on contributions to terrorist organisations included provision for the establishment of procedures designed to permit the making, in limited circumstances, of contributions to designated organisations for "religious, charitable, literary, or educational purposes."[30] The bill reported by the House Judiciary Committee extended the prohibition to cover the making of many forms of material contributions, and it contained no provision for licensing contributions for worthy causes.[31] The proposed legislation underwent similar changes in the Senate. In the House, the prohibition was later dropped—the resulting bill being, effectively, for an effective death penalty—but it was restored in the conference bill. In the United Kingdom, concerns about the definition of terrorism were inspired partly by concerns at the definition's relevance to proscription, and concerns about the proscription power were also prompted by the fact that it was effectively an executive power rather than one conditioned on prior judicial approval. However, the only proposed amendment—which would have required a prior judicial declaration that proscription was reasonable—was withdrawn.

All five governments have exercised their "criminal law" proscription powers, albeit to varying degrees. Australia currently proscribes only 17 organisations.[32] By contrast, Canada, the United Kingdom, the United States, and, since October 2010, New Zealand have each proscribed 40 or more.[33] Apart from the organisations proscribed in a schedule to the Terrorism Act 2000 (UK), the United Kingdom has not proscribed any domestic organisations. Australia, Canada, and New Zealand have also used their powers only against foreign organisations. Thirteen organisations are listed by all five countries. Ten have been listed by four countries. There is clearly only a rough consensus as to which countries are worthy of "criminal law" proscription. Australian reticence possibly reflects the nonsalience of threats from some Northern Hemisphere groups, along with legislative and quasi-legislative obstacles to proscription.[34]

Deproscription occasionally occurs. In the United States, for example, the Japanese Red Army, the Khmer Rouge, Manuel Rodriguez Patriotic Front

dissidents, and the Túpac Amaru guerillas have been dropped from the list of FTOs in recognition of their contemporary irrelevance. In 2008, Australia chose not to renew regulations proscribing the Armed Islamic Group, and it has dropped four other groups. The United Kingdom delisted the People's Mojahedin Organisation of Iran (PMOI), after a successful legal challenge to its continued proscription; but despite its success in securing its deproscription in the United Kingdom and Europe, the organisation was not delisted in the United States and Canada until late 2012.[35] Inertia is frequently warranted: examples of listed groups abandoning their ways are rare. But the outcome in the UK PMOI litigation evidenced government reluctance to consider whether proscription might still be warranted, and in Australia and Canada, statements of reasons for relisting often include no details of developments since the previous listing.[36]

Criminal prosecutions based on involvement in proscribed organisations have been strikingly rare, except in the United States. Indeed, there have been no prosecutions in New Zealand and only a handful in the United Kingdom, Canada, and Australia based on involvement with an organisation listed under the criminal law regime. The lack of prosecutions cannot necessarily be explained in terms of the lack of relevant crimes: there is a degree of support among Kurdish, Tamil, and Irish diasporas for relevant terrorist organisations, and it is unlikely that this never takes extralegal forms. Indeed, the CSIS public reports include periodic reference to the use of extortion by local agents of the Liberation Tigers of Tamil Eelam (LTTE), a listed entity, but this activity has generated only one prosecution.

The "economic sanctions" powers have generally been used to designate a far wider range of organisations and individuals. The US lists are lengthy, with many people and entities listed under several categories. Australia has listed a large number of organisations and individuals pursuant to Resolution 1373. (It includes virtually all the groups proscribed under the criminal law regimes in the other four countries.) It has adopted the al-Qaeda and Taliban lists by reference. In Canada, 36 organisations have been proscribed pursuant to Security Council Resolution 1373, with the al-Qaeda and Taliban lists adopted by reference, subject to exceptions. The UK Treasury's "Consolidated List of Financial Sanctions Targets in the UK" lists 30 organisations and 51 people.[37] New Zealand has adopted the al-Qaeda and Taliban lists by reference and, in October 2010, began a process of listing organisations under the criminal law power in order to satisfy its Resolution 1373 obligations. Other than in the United States, sanctions-related prosecutions have been rare or nonexistent, and the paucity of litigation surrounding assets-related powers suggests that these have rarely been exercised.

Courts and Proscription

Critics of proscription legislation have argued that the relevant legislation is unconstitutional. In the United States, there was a body of promising precedent to draw on: one of the legacies of Cold War persecution of communists is a body of case law to the effect that the first amendment precluded laws forbidding mere membership of organisations that engaged in both lawful and unlawful activities.[38] The Canadian Charter of Rights and Freedoms protects freedom of association, as does the ECHR. *Australian Communist Party v The Commonwealth*[39] is sometimes taken as precluding the banning of organisations, but, read strictly, it is a more mundane decision, to the effect that the federal government lacks the power to make laws with respect to unincorporated associations, except where there is a judicially reviewable nexus between the organisation's activities and a head of commonwealth power.

Scholars have confidently asserted that proscription legislation impermissibly limits freedom of political expression.[40] It tends to involve the imposition of disabilities without the organisation being given a hearing beforehand, and problems could potentially arise from the special provisions governing the judicial review of proscription decisions. Limits (where they exist) on collateral attacks on proscription decisions raise questions about the political branches trespassing into areas belonging to the judicial arm. But for obvious logistic reasons, litigation has been rare,[41] and on the whole, governments have fared reasonably well before the courts.

United States

Under US law, a body designated as a "foreign terrorist organization" has a limited right to apply for judicial review of the listing decision to the US Court of Appeals for the District of Columbia Circuit. Review is to be based on the administrative record, supplemented by any other classified information that is submitted by the government and was used in making the relevant decision. Classified information must be considered ex parte and in camera.[42]

The designation process has raised several due process issues. Organisations have no formal means of making submissions into why they should not be banned. Moreover, the original legislation made no provision for applications for delisting and the making of submissions in relation to this. The original judicial review procedures conditioned redress on errors in the record and did not permit the court to act on such evidence as the organisation might subsequently wish to provide. Furthermore, the narrow statutory standing rules limit the right to challenge listing decisions to the organisation and its agents and preclude collateral attack on listing decisions.

Since "[a] foreign entity without property or presence in [the United States] has no constitutional rights, under the due process clause or otherwise,"[43] a constitutional challenge to the validity of the legislation had to await a situation where a designated body was found to have the requisite presence. This hurdle was overcome in *National Council of Resistance of Iran v Department of State*,[44] where the People's Mojahedin Organisation of Iran was found to have established a presence, but only because the National Council of Resistance of Iran (NCRI) was found to be its alter ego and therefore properly designated, assuming that PMOI had been properly designated. Their due process argument succeeded. While the court conceded that giving notice "might work harm to [US] foreign policy goals in ways that the court would not immediately perceive,"[45] the secretary of state had made no attempt to demonstrate this. Notice was required, as was the chance to present, "at least in written form," "such evidence as those entities may be able to produce to rebut the administrative record or otherwise negate the proposition that they are foreign terrorist organizations."[46] This constitutional minimum was more than was required under the legislation. It followed, therefore, that the designations in question (and all other designations) were flawed.

Despite this, in a June 2001 decision, the court refused relief.

> [W]e also recognize the realities of the foreign policy and national security concerns asserted by the Secretary in support of those designations We further recognize the timeline against which all are operating: the two-year designations before us expire in October of this year.[47]

The court therefore declined to vacate the orders and remanded the questions to the secretary of state, to be considered according to the standards it had laid down. On reconsideration in accordance with the court's orders, the secretary provided the organisations with the unclassified record and considered their replies, along with the unclassified and classified material. Despite the additional information, she redesignated the organisations. PMOI petitioned for review, arguing, inter alia (and notwithstanding the court's earlier decision), that in relying on secret and undisclosed information, the secretary had denied PMOI due process. The court disagreed, saying, once more, that "under the separation of powers created by the United States Constitution, the Executive Branch has control and responsibility over access to classified information and has a 'compelling interest' in withholding national security information from unauthorised persons in the course of executive business."[48] In any case, the decision was supported by the unclassified material and, indeed, by admissions made by PMOI itself.

In 2004, Congress legislated to rectify the procedural defect in the legisla-

tion. Notice of an intention to list was still not required, but organisations were permitted to petition for delisting and to provide supporting material that the secretary was required to consider.[49] Organisations have rarely availed themselves of these procedures, and none who have done so have succeeded.

Substantive arguments have also failed. The court in *People's Mojahedin Organization of Iran v Department of State* dismissed an attempt to rely on a variant of the "good terrorist" argument, namely, that "the attempt to overthrow the despotic government of Iran which itself remains on the State Department's list of state sponsors of terrorism, is not 'terrorist activity,' or if it is, that it does not threaten the security of the United States or its nationals."[50] Its rationale (as in previous cases) was that the secretary of state's finding to the contrary was nonjusticiable. A petition from the NCRI seeking review of a 2003 decision by the secretary to leave in place its designation as an alter ego of PMOI failed on constitutional and substantive grounds.[51]

In 2008, PMOI once more sought to be delisted, and its request was once more refused in 2009. An application for review of the decision was partly successful:[52] the decision was made before PMOI had had an opportunity to reply to nonclassified material on which the secretary of state's decision had been based. Changes in legislation did not mean that the secretary's procedural duties were relaxed. Nor was the failure harmless. (The secretary had argued that since the decision was based largely on classified information, further submissions would have made no difference.) The court concluded that the outcome might have been different had the secretary considered responses to nonclassified material, and it further noted the possibility that if had the decision been based solely on classified material, due process might not have been afforded.[53] Almost two years after the decision to remand, the question had not been finalised. The circuit court eventually granted mandamus requiring the secretary to make a decision within four months, failing which the designation would be set aside.[54] On 28 September 2012, the organisation was finally delisted.[55]

The decisions did not address the relevance of flawed designations in cases where people were charged with offences in relation to designated organisations.[56] This issue arose in California, where Hossein Afshari and eight[57] others had been charged with knowingly and wilfully conspiring to provide material support to the Mujahedin-e-Khalq (MEK, another name for PMOI) between 1997 and 2001. The defendants argued that the DC Circuit had effectively found that the MEK designation was a nullity and therefore incapable of serving as a predicate to a charge based on contributing to a designated foreign terrorist organisation. This argument succeeded at first instance but not on appeal.[58] The Ninth Circuit agreed that section 1189(a)(8) did not preclude constitutional collateral attack. If the DC courts had set aside the designation

decision, Afshari would have had a defence (although he could have been retried in relation to any contributions made after the nonproblematic "redesignation" in 1999). But the designation had not been set aside and therefore appeared to have legal force, notwithstanding that the designation had been constitutionally defective. An application for a rehearing, en banc, failed on a 6–5 vote, over a spirited dissent by Justice Kozinski.[59] The Supreme Court denied certiorari.[60] An attempt by the defendants to have the issues revisited two years later was unsuccessful.[61]

Listing decisions under the International Emergency Economic Powers Act[62] are judicially reviewable under the Administrative Procedures Act and also reviewable collaterally.[63] Due process arguments have generally failed. Courts have consistently held that the due process clause does not require notice prior to listing[64] and that due process in relation to listing decisions does not preclude reliance on classified information.[65] Even legally inadequate notice is not fatal to the validity of listing decisions, as long as the error can be shown to be harmless.[66] Even if the error cannot be shown to be harmless, the appropriate remedy may be not to quash the decision but to remand the matter for reconsideration.[67] Review is on the "arbitrary and capricious" standard, and designation decisions have satisfied this standard.[68]

However, in two recent decisions, courts have been receptive to the argument that freezing involves the seizure of property and therefore attracts Fourth Amendment protections. In each case, freezing had been achieved by blocking orders pending investigation, followed by designation. There was no suggestion in either case that the Fourth Amendment operated differently depending on whether freezing was achieved by preliminary order rather than by designation. In *Al Haramain Islamic Foundation v Department of the Treasury*,[69] the court held that since seizure was preventive rather than punitive, it was enough that the seizure was "reasonable." The court held that since the government's interest was substantial and outweighed the foundation's Fourth Amendment interest, the reasonableness requirement was satisfied. By contrast, the court in *KindHearts for Charitable Humanitarian Development v Geithner* held that seizure required a warrant, issued for probable cause.[70] It deferred consideration of the remedial implications of this ruling. KindHearts argued that the logic of the finding was that the blocking order was unconstitutional and therefore had to be quashed. The government argued that the court should conduct a post hoc hearing on probable cause. The court agreed that this was the appropriate course of action: the procedure had been accepted in forfeiture cases and, by analogy and on the basis of equitable principles, was applicable in freezing cases, especially given that they implicated Article II powers. The probable cause standard was less exacting in this context than in the criminal context.[71] The court remanded accordingly. In 2012, the govern-

ment eventually settled on the basis that it would lift the listing of KindHearts and pay its legal costs. With approval from the Office of Foreign Assets Control, KindHearts would transfer its remaining assets to the UN World Food Program, the UN Children's Fund, the UN Relief and Works Agency for Palestinian Refugees, Mercy Corps, and Masjid Saad (physical assets only). This done, it would dissolve itself, but its board members would be free to attempt to establish another charity.[72]

A further set of challenges have targeted the material support legislation on a variety of grounds, including First and Sixth Amendment grounds. First Amendment challenges have been unsuccessful insofar as they relate to the right to associate for terrorist purposes, but the material support offence has been more controversial. The problem is that there is a continuum ranging from providing a nuclear bomb to al-Qaeda, at one extreme, to publicly criticising the Sri Lankan government for discrimination against Tamils, towards the other. The question of where to draw the line has generated years of litigation. In general, courts agreed that financial support was on the wrong side of the line, even if the donor did not intend the gift to be used for terrorist purposes, but there was less agreement in relation to the provision of less-fungible services, as well as some disagreement as to whether Congress intended to and could condition guilt on an intent to contribute in the absence of an intent to assist terrorism. The litigation culminated in a Supreme Court decision that comes close to overruling the freedom of association cases of the post-McCarthyist years and rejects the need to prove specific intent in material support prosecutions.

With considerable success, the Humanitarian Law Project (HLP) and its allies, the Kurdistan Workers' Party (PKK) and the LTTE, had argued that the material assistance legislation impermissibly interfered with some forms of support that the HLP wished to offer to the PKK and LTTE. These included the provision of training in the making of human rights submissions to international bodies, an endeavour no doubt complicated by the two organisations' limited grasp of this concept. They also included advocacy by the HLP on behalf of the organisations. At both the district and circuit levels, courts held that successive versions of the offence were unconstitutional as applied to the plaintiffs' intended activity.[73] However, the government finally sought and was granted certiorari by the Supreme Court, which held, by majority—six Republican appointees against three Democrats—that the court of appeals had erred.

The court rejected the contention that section 2339B required a specific intention to further the organisation's illegal activities: the language and context of the legislation made it clear that it did not. The plaintiffs also could not succeed on a vagueness-as-applied argument. As applied to their activity,

the legislation was not vague: it clearly forbade some of their proposed activity while permitting other forms. The former included providing training in dispute resolution skills and in the making of submissions to the United Nations. The latter included independent advocacy on behalf of Kurds and Tamils. For advocacy to fall within the prohibition on providing personnel, it must be done under the FTO's direction or control. That was not what the petitioners had in mind. They therefore knew where they stood.

It followed from the analysis of the legality of advocacy that the legislation applied only to a very narrow category of speech, but it nonetheless did apply to speech and therefore required strict scrutiny and a compelling justification. This was provided both by the fact that "the Government's interest in combating terrorism is an urgent objective of the highest order"[74] and by grounds for believing that any of the proscribed forms of "material contribution" to a terrorist organisation facilitated its criminal conduct. Resources given for lawful purposes would not necessarily be used for those purposes. Even if material support was meant to further peaceable conduct, it could contribute to terrorism by freeing up organisational resources, by lending legitimacy to the terrorist group, and by thereby enabling the group to mobilise additional support. Moreover, tolerating support for foreign terrorism could strain "the United States' relationships with its allies and [undermine] cooperative efforts between nations to prevent terrorist attacks."[75] The majority acknowledged that it was difficult to know whether support would assist terrorists, but it concluded that, for this reason, the court should respect the conclusions of Congress and the government.

> One reason for this respect is that national security and foreign policy concerns arise in connection with efforts to confront evolving threats in an area where information can be difficult to obtain and the impact on certain conduct difficult to assess. The dissent slights these real constraints in demanding hard proof—with "detail," "specific facts," and "specific evidence"—that plaintiffs' proposed activities will support terrorist attacks. . . . That would be a dangerous requirement. In this context, conclusions must often be based on informed judgment, rather than concrete evidence, and that reality affects what we may reasonably insist on from the Government.[76]

The minority argued that, read broadly, the legislation impermissibly interfered with freedom of speech. The government's justifications were not compelling. It had not demonstrated that HLP's activities would free up resources for use in terrorism. Its argument that HLP's proposed activities should be banned because of their potential to lend legitimacy to the PKK and

LTTE ran foul of precedent: the logic of Supreme Court decisions in relation to members and supporters of the Communist Party was that even if an organisation threatened national security, speech that merely lent legitimacy to the body could not warrant interference with membership and support per se. Arguments based on the fungible nature of financial support had merit, but they were irrelevant when the support was clearly not financial and was not clearly convertible into resources that would assist the organisations' terrorist objectives. The constitutional problem would be avoided if the statute were read down so as to require that a defendant know or intend that the resources provided bore "a significant likelihood of furthering the organization's terrorist ends."[77] The dissent left open the question of whether the same test would apply when a person provided support that, of its nature, might well assist its terrorist activities.

United Kingdom

UK courts have rejected arguments that proscription laws are contrary to the ECHR, but they have nonetheless found in favour of plaintiffs in two important cases. UK law provides special procedures for appeals against decisions to proscribe organisations. The first step involves an application to the home secretary, seeking the removal of the organisation from the list of proscribed organisations (Terrorism Act 2000, s 4(1)). Standing rules are broader than the corresponding US rules: both organisations and persons affected by the proscription may apply (s 4(2)). If the application is refused, the applicant may appeal against the refusal to the Proscribed Organisations Appeal Commission (POAC), a body created under the act (s 5(2)). The POAC must allow the appeal if it concludes that the refusal to deproscribe was flawed, "when considered in the light of the principles applicable on an application for judicial review" (s 5(3)). The procedures of the POAC are designed to protect classified information.[78]

The legislation does not, on its face, preclude resort to normal judicial review procedures. Nonetheless, in *R (Kurdistan Workers' Party and Others) v Secretary of State for the Home Department*,[79] Justice Richards dismissed an application for judicial review on the grounds that the POAC was the appropriate forum for considering proscription decisions.[80] One of the applicants in that case, the ubiquitous People's Mojahedin Organisation of Iran, had also lodged an appeal with the POAC. In a preliminary ruling, the POAC dismissed the argument that the decision to proscribe was unlawful on the grounds that PMOI had not been given a prior opportunity to make representations. Since proscription was a legislative decision, rather than a quasi-judicial or adminis-

trative one, there was no basis for such a duty in the absence of express legislative provision, and there was no such provision, express or implied, in the legislation. Fairness did not require that an opportunity be given to make representations and be consulted. This would often not be feasible, given the problems of communicating prospective decisions to some organisations and the difficulties, due to the need to protect classified information, of putting them on notice as to the basis of the case against them. Insofar as there was a duty of fairness, it was satisfied by the requirement of parliamentary approval as a condition for the operation of a ban, along with the provision for post-proscription judicial review in the POAC.[81] An appeal against the decision was abandoned, and no action was taken in relation to a further, unsuccessful application for deproscription.[82]

In 2006, three members of parliament wrote to the home secretary to ask yet again that PMOI be deproscribed. Following his refusal of their application, they exercised their right to appeal to the POAC. The ultimate question related to the legality of the refusal to deproscribe, but this raised prior questions, including whether the secretary was required to consult with the organisation prior to refusing to deproscribe, the standard of review to be applied by the POAC, and whether the POAC could rely on evidence that was "available" but not considered by the secretary.

The applicants failed on the fairness issue. Consultation was not required by the legislation and would be difficult to achieve, given the tight timetable set for consideration of applications for deproscription. There were, moreover, procedures to ensure that the overall process was fair: namely, an ongoing duty to reconsider whether proscriptions should remain in force, the right to apply for deproscription, and the procedures for review of refusal decisions.[83] On the standard of review issue, the secretary was less successful.

The commission pointed out that proscription was conditioned on a belief that the relevant body was involved in terrorism. This required more than a suspicion that it might be, and given the nature of the power, the Parliament could be presumed to intend that the exercise of the power should be subject to strict scrutiny.[84] Moreover, since there was no requirement that the secretary consult with the organisation prior to deciding whether to deproscribe, it was reasonable to assume that the applicants should be able to adduce material not before the secretary in order to support their case.[85] The validity of the decision depended on whether there were in fact reasonable grounds for the secretary of state's belief that PMOI "*is concerned in terrorism.*"[86]

The outcome did not in fact turn on "standard of review" questions. The commission concluded that the secretary had misdirected himself on the law, by asking whether PMOI had engaged in terrorism, not whether, at the time, it

was still doing so. He had failed to consider all the relevant material that was constructively before him. There was, moreover, no evidence that PMOI had been "concerned in terrorism" after 2002.

Given this decision, it was not necessary to consider whether the legislation was inconsistent with the ECHR. The commission nonetheless considered the issue briefly, finding that while the provisions limited the appellants' rights, they did so in a manner that was legitimate and proportionate. National security was the foundation for democracy and human rights, and the law could contribute to it. It did nothing to hinder peaceful and democratic attempts to achieve political change in other states. It did not matter that the government of Iran was undemocratic and repressive. The secretary of state was entitled to conclude that this was not enough to justify terrorism. It was the clear intention of the legislature to support foreign states in the fight against terrorism.[87]

The secretary's application for special leave to appeal to the court of appeal was unsuccessful. The court broadly agreed with the approach the POAC had taken to the review. This was not a case where deference was due.

> The question of whether an organisation is concerned in terrorism is essentially a question of fact. Justification of significant interference with human rights is in issue. We agree with POAC that the appropriate course was to conduct an intense and detailed scrutiny of both open and closed material in order to decide whether this amounted to reasonable grounds for the belief that PMOI was concerned in terrorism.[88]

The only other litigation to canvass the validity of listing decisions related to the validity of listing orders made under the Terrorism (United Nations Measures) Order 2006 (TO) and the Al-Qaida and Taliban (United Nations Measures) Order 2006 (the AQO). The basis for the challenge was that the orders were not permitted by the relevant primary legislation. This argument succeeded at first instance[89] but failed (by majority) in the court of appeal.[90] In January 2010, the newly established Supreme Court ruled that both orders were invalid.

The court held that the United Nations Act 1946 (UK) did not authorise the making of the TO. The power to make orders was a power to make orders that were "necessary or expedient" for giving effect to Resolution 1373. The order allowed listing if the Treasury had "reasonable grounds for suspecting" that a person was or might be a person who fell within a category of persons or entities whose assets the resolution required to be frozen. The Supreme Court unanimously held that the purported power went well beyond what was "necessary" to give effect to the resolution. The resolution required actions

against those who fell within the categories, not those who were reasonably suspected of doing so. A fortiori, it did not apply to those whom the Treasury reasonably suspected "may" do so. Nor, given standard principles of statutory interpretation, was it "expedient."[91]

The AQO did not lend itself to that form of attack. It clearly did implement a decision of the UN Security Council, and under the UN Charter, Security Council decisions trumped all other international obligations. In 2008, the House of Lords had accepted that the Human Rights Act was subject to obligations imposed by the UN Charter.[92] A decision by the European Court of Justice striking down European regulations implementing Resolution 1267 was not relevant: since the European Community was not a member of the United Nations, it, unlike the United Kingdom, was not bound by the UN Charter.[93]

This did not mean that the order was valid. By majority, the court held that the act did not confer the power to make the order. Parliament could not have intended that order-making power could be exercised to deprive people of their common-law property rights, without giving them an effective basis for challenging the relevant decision in the courts.[94] It could do so explicitly, but if it did, it would be consciously acknowledging that giving effect to the Security Council resolution should trump basic common-law rights.[95] Lord Brown dissented: given that the United Kingdom was bound under international law to implement Resolution 1267, the act permitted the AQO. That the order was "contrary to fundamental principles of human rights" was not relevant: this was what the resolution required.[96]

The court declared that the TO and Article 3(1)(b) of the AQO were invalid. It would also have suspended the Terrorism (United Nations Measures) Order 2009 if that had been before the court. The logic of the court's reasoning was that clearly drafted legislation could give the government the powers it has assumed it had under the United Nations Act 1946. Instead, to replace the TO, the government introduced an interim bill deeming the terrorism orders to have been validly made and to be within the powers conferred by the United Nations Act 1946. It also provided protection to anyone other than the Treasury who had acted on the validity of the orders between the date of the Supreme Court's decision and the date the legislation was passed. The Treasury's liability was unaffected. The interim bill was passed by the Parliament and given royal assent before the day was out.

It was an interim measure and was superseded, two weeks before its expiry date, by the Terrorist Asset-Freezing (Temporary Provisions) Act 2010 (UK, c 38).[97] The new act was designed to meet some of the Supreme Court's substantive objections to the old sanctions regime. It included provision for notification of interim and final designations, for judicial review of designation decisions,

and for the procedures to govern such review.[98] It also broadened the criteria for designation to include a person's past involvement in terrorism.[99] The February legislation did not revive the AQO. Instead, the government made regulations under the European Community Act 1972, giving effect to a European Community directive that, in turn, substantially implements Resolution 1267 but is subject to the protections afforded by European law.[100]

Canada

The first challenge to the validity of the Canadian sanctions legislation was made by a Canadian citizen who had been listed by the 1267 Committee and who had also been listed under the 1373 regime.[101] He faced extradition, but extradition was dependent on the validity of the sanctions regulations. He argued that both sets of regulations were contrary to the Charter of Rights and Freedoms, on the grounds that by designating him, they removed the onus on the Crown to demonstrate that he actually was involved in terrorism. The issue became moot. After inquiries, the government concluded that there was no basis for the plaintiff's listing and removed him from both lists. His removal from the 1267 list was accomplished by an amendment to the Regulations, stating that they did not apply to those listed in a schedule and listing the plaintiff in the schedule. By doing so, Canada was arguably breaching its international obligations,[102] but it subsequently persuaded the Security Council to delist him.[103]

A second case, *Abdelrazik v Canada (Minister of Foreign Affairs)*,[104] involved the question of whether Mr. Abdelrazik was entitled to an order that the Canadian government cooperate with his repatriation to Canada from Sudan. Canada had argued that since Abdelrazik had been listed by the 1267 Committee, assistance with his travel would violate the 1267 sanctions regime. Justice Zinn denounced the 1267 Committee regime as a denial of fundamental human rights but was able to find for the plaintiff without having to determine whether he had been properly listed.[105] In 2010, Abdelrazik commenced a challenge to his listing.[106] On 30 November 2011, he was removed from the list.[107]

Australia and New Zealand

Australian proscription decisions are reviewable according to judicial review procedures, which vary depending on whether a regulation or a refusal to delist is being challenged. There have been no judicial review applications. New Zealand proscription decisions are also reviewable, and originally they were subject to far more intense scrutiny. Section 35 of the Terrorism Suppression Act 2002 (NZ) originally required the approval of the High Court as a condition for extending proscription beyond the initial three-year term and condi-

tioned renewal on the court's satisfaction on the balance of probabilities that the entity satisfied specified conditions. Given that the New Zealand list corresponded to the 1267 Committee list, this would have meant that the government would have had to either breach its UN obligations or prove relevant facts in relation to people in distant lands, which would have been almost impossible. In 2005, it dealt with these problems by amending the legislation so that all designations were extended until two years after the report from a special committee charged with reporting on the Terrorism Suppression Act 2002 (NZ). Before the expiry of this period, the Parliament abolished the requirement for High Court approval.[108] Designation decisions continue to be judicially reviewable, but there have been no applications.

Underlying Beliefs

Proscription poses both liberty and hierarchy issues, and this was manifested in debates about proscription laws. For critics, the legislation aroused memories of earlier attacks on dissident organisations and concerns about the potential of the legislation to catch "good" terrorists as well as bad, and these concerns tended to come from the "left" rather than the "right." They were sometimes reflected in voting. In 1995, 9 Democrat members of the House Judiciary Committee voted to relax the standing requirements for challenging designation decisions and were outvoted by 18 Republicans and a Democrat. In the United Kingdom, Labour MPs seemed slightly less supportive of proscription than members of the opposition Conservatives, and Liberal Democrats were even less supportive. In Australia, Labor voted against the wide proscription powers proposed by the government. In New Zealand, the two conservative parties sought to expand the proscription powers, and the Greens sought to restrict them. In Canada, voting is less easily interpreted. A Progressive Conservative amendment provided that regulations might be made specifying the criteria to be used in listing decisions and that the criteria should be tabled and debated prior to the making of the regulations. This amendment was supported by all nongovernment parties, including the Canadian Alliance, and by a handful of Liberals. However, the amendment would have impaired the government's power only if the government chose to make the regulations.

There is less evidence of changes in partisan balances being reflected in changes to legislation or in the exercise of statutory powers. In the United States, standing requirements remain unchanged. Since coming to power, the Canadian Conservatives have done nothing to amend the criminal proscription regime to conform with the amendment for which they voted in 2001. In New Zealand, the Nationals criticised Labour's failure to proscribe any organisations other than those on the 1267 list, and once in power, they did

indeed proscribe a number of additional organisations. The only example of a change of government making a difference consistent with earlier reservations comes from Australia, where Labor's 2010 overhaul of terrorism legislation involved measures that slightly tightened the procedures governing sanctions proscription and the criteria for criminal justice proscription.

Conclusions

Whatever the impact of proscription laws might be, it seems to be small. The targets of the laws lie largely outside the national boundaries of the proscribers, although the case law is testimony to its capacity to impinge occasionally on political organisations, charities, and individuals within national boundaries. Because proscription is necessarily public in outcome, opportunities for executive abuse are limited. However, the opaque processes governing listing for sanctions purposes mean that there is an ever-present possibility of mistakes and that these may not easily be rectified. Cross-institutional conflicts have been slight. In the United States, courts have generally deferred to the executive, and the Supreme Court's decision in *Holder v Humanitarian Law Project* implies that insofar as they have not, they ought to have. In the United Kingdom, the political arms have ultimately deferred to the courts: the legislative response to *R v Ahmad* was not to provide statutory support for the ultra vires orders but to create a new and fairer regime, more in keeping with the values that had underlain the Supreme Court's decision. In the two relevant Canadian cases, the executive gave the plaintiff what he wanted in one case and frustrated him in the other.

The limited salience of proscription may account for the paradox that despite partisan divisions over proscription laws, they have largely survived changes of government and changes in the balance of legislative power. However, another reason for that paradox may be that proscription law implicates issues of internationalism and international law in a manner calculated to arouse a degree of cognitive dissonance for people of both the left and the right. More than most areas of counterterrorism law, proscription law has developed against a backdrop of attempts to internationalise counterterrorism, by both international cooperation and the development of international law. Both practices sit far more easily with the traditions of the left than with those of the right, but their consequences in the counterterror context have obvious appeal to the right. The problem only exists, however, for those who want the world to be simple. The desirability of international cooperation must be assessed against the realisation that just as there may be "good" terrorists, so there are bad states, and since international law may reflect the input of bad states as well as good ones, it, too, will sometimes be imperfect.