

The law relating to Proscription of terrorist organisations as set out in the Terrorism Act 2000

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“One man’s terrorist is another man’s freedom fighter”- How well does the current law relating to proscription of terrorist organisations protect the public and does this law encroach on an individual’s Human Rights?

The ability to proscribe an organisation resides with the Home Secretary under s.3 of the Terrorism Act 2000. This power allows the Home Secretary to proscribe and deproscribe any group who he believes is “concerned with terrorism”.¹ Fenwick claims that this is the Government’s contribution “towards making the UK a hostile environment for terrorists.”² This over-arching power gives greater responsibility to the police in cases of suspected terrorist activity, allowing for the already wide definition of a terrorist from section one of the Act to be applied to those who may, in some way be associated with the group. Proscription was originally added during the 1960s during the unrest in Northern Ireland³, but aspects of what would now be classed as proscription offences originate from the 1930s and the Public Order Act 1936⁴. In the recent year’s, attacks are still being carried out by terrorist groups, killing hundreds and inciting fear throughout the world. Proscription is as vital today as it was in the 1960s, shown in the attacks carried out in America, New Zealand and the UK itself. Terrorist acts, such as the Charlestown shootings in South Carolina, USA, in 2015, the Manchester arena bombing in 2017 and the attacks in Churchtown, New Zealand in 2019, indicate that groups of all different forms carry out acts of terrorism which must be recognised in our own legal system to maximise protection for British citizens.

¹ Terrorism Act s.3(5)

² Helen Fenwick, *Civil Liberties and Human rights* (4th edn, Routledge-Cavendish 2007) 1381

³ Howard Davis, *Human Rights and Civil Liberties* (1st edn, Willan Publishing 2003) 336 - 337

⁴ *ibid*

A question which remains is whether proscription is wholly effective in the war against terrorism. Whilst proscription may be somewhat beneficial in combatting the unrest caused by recent terrorist activity, the extent to which it governs and protects citizens is yet to be determined. This article will critically analyse and evaluate the Terrorism Act 2000, in particular s.3 and the powers of proscription, in terms of restrictions to human rights and civil liberties, as well as assess the classification of a terrorist and the issues regarding its wide-reaching definition.

Defining terrorism

In order to be able to fully comprehend the powers of proscription, one must first be able to understand what a terrorist is and how it is defined in the legislation. Prior to the Terrorism Act 2000, the Prevention of Terrorism (Temporary Provisions) Act 1989⁵ defined terrorism as “the use of violence for political ends and includes any use of violence for the purpose of putting the public or any section of the public in fear.”⁶ This early definition focuses on the use of violence and whilst modern society acknowledge that terrorism can now take many forms, the most prolific and anticipated type of terrorism is violence. S.1 of the Terrorism Act 2000⁷ redefined terrorism, giving it a broader definition of:

“Terrorism means the use or threat of action where – (B) The use or threat is designed to influence the government or to intimidate the public or a section of people and (C) the use or threat is made for the purpose of advancing a political, religious or ideological cause”⁸.

⁵ Prevention of Terrorism (Temporary Provisions) Act 1989

⁶ The prevention of terrorism (Temporary provisions) Act 1989

⁷ Terrorism Act 2000

⁸ Terrorism Act 2000 s.1(1)

The term “action” is defined in sub-section two as “(A) involving serious violence against a person;(B) serious damage to property; (C) endangering a person’s life;(D) creates a serious risk to the health and safety of the public or; (E) is designed seriously to interfere with or seriously disrupt an electronic system.”⁹ Further amendments have since been made as a result of the Terrorism Act 2006 s.34, which now includes “international governmental organisation”¹⁰ and provides a definition that is no longer confined to the United Kingdom.

Several issues could potentially arise with the definition of a terrorist; one of which is principally concerned with the nature of the definition itself and its lack of restrictions in terms of who cannot be a terrorist. The possibility of being characterised as a terrorist is not exempt from acts of armed conflict concerning foreign government. David Anderson states that “no express exemption for acts carried out overseas that constitute lawful hostilities under international humanitarian law¹¹”. It could therefore be argued that the definition of “terrorism” is somewhat similar to that of a strict liability offence as it is indiscriminate of all forms of conflict that have the potential to be seen as a terrorist act. For example, posting videos of groups exercising “self-defence by people resisting invasion of their country”¹² in *R v Gul*¹³, or in *R v Z*¹⁴, which concerned a group in Ireland named the Real IRA arguing that as they are not a proscribed group there is no ground for them to be labelled terrorists.

To further my point, the case of *R v Gul*¹⁵, regarding the appellants argument concerning the parameters of the domestic laws powers into activities concerning terrorism, acknowledged the

⁹ Terrorism Act 2000 s.1(2)

¹⁰ Terrorism Act 2006 s.34

¹¹ David Anderson qc, 'The Terrorism Act in 2012' [2013] Independent reviewer of Terrorism legislation <https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2013/07/Report-on-the-Terrorism-Acts-in-2012-FINAL_WEB1.pdf> accessed 20 April 2018

¹² *Regina v Gul (Mohammed)* [2014] AC 1260

¹³ *ibid*

¹⁴ *R v Z* [2005] 3 All ER 95

¹⁵ *Regina v Gul (Mohammed)* [2014] AC 1260

sheer breadth of s.1¹⁶. It was stated that even if a State sanctioned military activity was carried out to influence another government, it could fall under the definition of terrorism. Although they do accept that this concept is only accepted by considering the meaning of terrorism, it reinforces the view that with a definition so vast certain activities such as acting in self-defence against an oppressive regime or even publicly supporting said rebellion could be classed as acts of terrorism. This point is further supported by Fenwick, who argues that “use of violence by civilians against an invader... thus label all resistance movements terrorist groups; they potentially cover almost all liberation movements, whether or not fighting against an undemocratic regime which does not respect human rights.”¹⁷

The process of proscription and deproscription

Tim Legrand gave a direct explanation of the weight of the power given to the Home Secretary by s.3 stating that “proscription regimes require political executives to successfully narrate the existence of an identifiable and coherent organisation committed to a discernible, and illegitimate, political motive”¹⁸. Aside from s.3 of the Terrorism Act 2000 giving power to the Home Secretary to add a terrorist organisation to Schedule 2 of the Act, it also gives guidelines as to what warrants being put on the register. S.3(5)¹⁹ outlines four criteria which indicate a group is “concerned in terrorism”; they consist of “(a)Commits or participates in acts of terrorism, (b) prepares for terrorism, (c) promotes or encourages terrorism, or (d) is otherwise concerned in terrorism”²⁰. The Terrorism Act 2006 went on to further expand the definition on part (c) to include the “unlawful glorification” of terrorism. There are 88 proscribed groups²¹ which fulfil the

¹⁶ Ibid, [26] – [41]

¹⁷ Helen Fenwick, *Civil Liberties and Human rights* (4th edn, Routledge-Cavendish 2007) 1380

¹⁸ Tim Legrand and Lee Jarvis, 'Proscription Powers and Their Use in the UK' [2014] 9(4) *British Politics* <https://nsc.crawford.anu.edu.au/sites/default/files/publication/nsc_crawford_anu_edu_au/2017-05/legrand_jarvis_2014_enemies-of-the-state-article.pdf> accessed 20 April 2018

¹⁹ Terrorism Act 2000 S.3(5)

²⁰ *ibid*

²¹ Home office, 'List of Proscribed organisations'

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criteria of being a proscribed organisation, 14 relating to Irish Terrorism while the 74 others are international terrorist organisations. The power of proscription is given to the Home Secretary, however, there is no need for there to be a reasonable belief and it remains a subjective process at his discretion with little involvement from the executive. The phrase “concern in terrorism”²² opens the definition up to a level of uncertainty, as who could fall under s.1’s definition of a terrorist. This point is argued by both Davis and Fenwick, who claimed that because of the phrase “the definition of terrorism is extended because a range of people become terrorist subjects”²³. This, in turn has the potential to open the definition to scrutiny as well as have the potential to violate Article 11²⁴ (freedom of association) of the European Convention of Human Rights. In the case of *O’Driscoll vs Secretary of State for the Home Department*,²⁵ the defendant was arrested and detained on suspicion of committing an offence under s.16 of the Terrorism Act 2000. The courts found that “Section 16 was not about freedom of expression but about knowingly providing money or other property to support a proscribed organisation. So long as the organisation was properly proscribed, s.16 could not be regarded as disproportionate” therefore it was found not to infringe Article 11 in that no body of government should over extend what is necessary to achieve their intended objective.

If an organisation believes it has been wrongly proscribed by the Home Secretary, they can appeal to be deproscribed from the list of terrorist parties. The Terrorism Act 2000 provides a mechanism to repeal an organisation, again, at the Home Secretary’s discretion; stating “the Secretary of State may by order (b) Remove an organisation from that schedule”²⁶. If the Home Secretary refuses the application, a final resort can be taken of a further appeal to the Proscribed

70599/20171222_Proscriptionpdf, 22 december 2017)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/670599/20171222_Proscription.pdf> accessed 20 April 2018

²² Terrorism Act 2000

²³ Helen Fenwick, *Civil Liberties and Human rights* (4th edn, Routledge-Cavendish 2007) 1381

²⁴ European Convention of Human Rights Article 11

²⁵ *R (on the application of O’Driscoll) v Secretary of State for the Home Department* [2002] EWHC 2477 (Admin), [2002] All ER (D) 327 (Nov)

²⁶ Terrorism Act 2000 S.3(3)

Organisations Appeal Commission (POAC); the process of which is found in s.5 of the Act²⁷. However, when scrutinising the process of deproscription it can be held that some issues arise; namely, the level of power given to the Home Secretary. This is seen in the case of *the Peoples Mujahedin Of Iran (PMOI)*²⁸, who, after being refused twice by the Home Secretary, due to previous military activity which had since ceased²⁹, appealed to the POAC who allowed their application, claiming that the Home Secretary had misinterpreted the law when considering the first part of the two-pronged test³⁰. This case also created a guide for a greater understanding of what it means to be “concerned with terrorism” and reiterated the test which should be applied when considering the deproscription of terrorist groups. Prior to its proscription in 2001, the PMOI had carried out acts of violence in opposition the Government of the Shah of Iran. The reasons for the group’s proscription was well founded and it was agreed that at that time the group had carried out acts which were “concerned with terrorism”.³¹ At the time of their appeal application to the POAC, the group had henceforth ended all military action in an attempt to legitimise their campaign in pursuit of a peaceful democratic movement. The Home Secretary argued that the potential for the group to revert to its previous campaign of terrorist activity satisfied the definition of s.3(5) justifying her reasoning as to why she previously denied their appeal in both applications. The reasoning for her rejection was contended to be unfounded by the POAC and interfered with fundamental human rights. Through scrutiny of the Home Secretary’s decision and both open and closed hearings, the groups was found to not be “concerned with terrorism”³² and therefore there was no longer a justifiable reason as to keep the group proscribed.³³ The amount of successful deproscription appeals indicate both the strict test and the disproportionate level of power given to the Home Secretary. There have only been two successful cases from the Act being brought into force, both of which have been appealed by the POAC. From the outset of the appeal process, both cases were denied by the Home

²⁷ Terrorism Act 2000 S.5

²⁸ Secretary of State for the Home Department v Lord Alton of Liverpool and others [2008] EWCA Civ 443

²⁹ Nathan Rasiah, Reviewing Proscription under the Terrorism Act 2000, 13 Jud. Rev. 187 (2008)

³⁰ Secretary of State for the Home Department v Lord Alton of Liverpool and others [2008] EWCA Civ 443.

³¹ Terrorism Act s.3(5)

³² *ibid*

³³ Secretary of State for the Home Department v Lord Alton of Liverpool and others [2008] EWCA Civ 443

Secretary on grounds that were later quashed, demonstrating a failure in adequately apply the test to deproscribe terrorist groups. It is understandable that in terms of terrorist activity those groups must be held to account for the acts they have committed. However, if the group is no longer affiliated with and does not carry out acts that are defined in the Act, it is the task of the Home Secretary to deproscribe that group as per S.5 of the act.³⁴

Proscription related offences

If s.3 of the Terrorism Act 2000 is a legal definition as to what constitutes proscription, then sections 11 to 13³⁵ of the same Act are offences based on the affiliations of organisations in Schedule 2. S.11 of the Terrorism Act makes it an offence to profess any association with an organisation. S11(1) states that “A person commits an offence if he belongs or professes to belong to a proscribed organisation”³⁶. However, s11(2) does allow for a defence against the involvement in a proscribed group. To prove one’s innocence, one must prove that at the time of joining the organisation the group was not listed in Schedule 2, and that they have not taken part in any activities relating to the group while it was proscribed³⁷. A prominent issue with this defence relates to the presumption of innocence, a right found in Article 6 of the European Convention of Human Rights. The case of *Sheldrake v DPP* focused on the type of defence that was needed to fulfil the exception of s.11(2); it being evidential as well as being a negative³⁸ meaning the defendant would have to prove that they took no part in the activity of the organisation. This, however would suggest that the defendant was guilty during the trial and needed to prove his innocence. A statement by Lord Bingham from *Sheldrake*³⁹ argued the appropriateness of the section and what it imposes on defendants, saying “any blameworthy or

³⁴ Terrorism Act 2000 S.5

³⁵ Terrorism Act 2000 s.11-13

³⁶ Terrorism Act 2000 s. 11

³⁷ Terrorism Act 2000 s.11(2)

³⁸ Ruth Costigan and Richard Stone, *Civil Liberties and Human Rights* (11th edn, Oxford University Press 2017) 57

³⁹ *Sheldrake v Director of Public Prosecutions; Attorney General's Reference (No 4 of 2002)* [2004] UKHL 43

properly criminal conduct may fall within s11(1). There would be a clear breach of the presumption of innocence and a real risk of unfair conviction”⁴⁰.

Further offences relating to proscription are contained in sections 12 and 13 of the Terrorism Act 2000⁴¹; both involve showing support for any proscribed organisation. S.12(1) finds it an offence if “a person (A) invites support for a proscribed organisation; and (B) the support is not, or is not restricted to, the provision of money or other property”⁴². It is also an offence if a person:

“arranges, manages, or assists in arranging or managing a meeting which he knows is – (A) to support a proscribed organisation; (B) to further the activities of a proscribed organisation; or (C) to be addressed by a person who belongs or professes to belong to a proscribed organisation”⁴³.

Similar to that of the s.11, the defence to this crime bares an evidential burden not a legal one⁴⁴. The final offence that is connected to proscription concerning uniform, which holds a similarity to section one of the public order act 1936 concerning political uniforms in public spaces⁴⁵. S.13(1) of the Terrorism Act characterises the offence as:

“a person ... if he: (A) wears and item of clothing; or (B) wears, carries or displays an article; in such a way or in such circumstances as to arouse reasonable suspicion that he is a member or supporter of a proscribed organisation”⁴⁶.

⁴⁰Sheldrake v Director of Public Prosecutions; Attorney General's Reference (No 4 of 2002) [2004] UKHL 43 s.51

⁴¹ Terrorism Act 2000

⁴² Terrorism act 2000 s.12

⁴³ ibid

⁴⁴ Alun Jones, Rupert Bowers and Hugo Lodge, *Blackstones Guide to the Terrorism Act 2006* (Oxford University Press New York)

⁴⁵ Public Order Act 1936 section 1

⁴⁶ Ruth Costigan and Richard Stone, *Civil Liberties and Human Rights* (11th edn, Oxford University Press 2017) 57

When looking at these offences from a human rights standpoint, it could be argued that they infringe both Articles 10 and 11, freedom of speech and freedom of association respectively. Whilst these sections could amount to proscription related offences, one could argue that they are just normal activities in day to day society which as a result of legislation, may now be perceived as hostile and raise suspicion of support of terrorist action. As previously stated, legislation surrounding terrorist activity is indiscriminate in its power. Groups who fight for peace in foreign countries and far less extreme groups who use shock to convey their point could be considered as committing terrorist activity under the definitions of sections one and three⁴⁷. It is therefore contended that by extension anyone who could be seen as supporting these groups in some way may be seen as committing acts linked to terrorism and proscription. A substantial quote from Lord Hoffman however, explains as to why some restrictions can be sanctioned for the good of society stating, "Individual freedom should only be restricted when there is a real and pressing need to do so"⁴⁸ and when that restriction is disproportionate with the outcome, the democratic system becomes unbalanced and the foundations of democracy crumble without freedom to express one's political beliefs⁴⁹.

Possible reform

From its original aims to curtail the powers of the Irish Republican Army and other splinter groups, the law on proscription has been amended several times to widen the definition but it poses the question as to whether this power supports law enforcers in protecting the UK against terrorism. Proscription has arguably been seen as a positive method to "discourage supporters of terrorist organisations"⁵⁰. However, other sources such as Clive Walker believe "it's detrimental effects in terms of constraining the free expression of views about Northern Ireland

⁴⁷ *ibid*

⁴⁸ Ruth Costigan and Richard Stone, *Civil Liberties and Human Rights* (11th edn, Oxford University Press 2017) 454

⁴⁹ Helen Fenwick, *Civil Liberties and Human rights* (4th edn, Routledge-Cavendish 2007)

⁵⁰ *ibid*

outweigh its benefits”⁵¹. There are several potential reforms that could amend the current law on proscription. One recommendation put forward by David Anderson in his annual report focuses on setting a time limit before organisations may be considered for deproscription. He states “proscription orders should lapse after a period of time and be renewed only if there is sufficient evidence to do so”⁵². Another point put forward by Anderson relates to when the Secretary of State denies deproscription. Suggesting that reasons should be given in full to gain a greater understanding as to why groups have been denied and how this will affect their appeal⁵³. Although the appeal reasoning differs in *R v Z*⁵⁴, the case still remains relevant to the recommendation. The reason for this appeal relates to the name of their proscribed group, although not actually a listed group under Schedule 2, the defendants were charged as belonging to a proscribed organisation, the ‘Real IRA’. This is because as an umbrella term, the IRA related to all splinter groups surrounding what was one of the original reasons proscription was introduced. In doing this, the courts forsake groups that may not have used violent acts, branding all those groups who work under a name similar to that of the IRA as terrorist groups. These, however, could conflict with the current process of appeals. When looking at the current process under the Secretary of State, the two-point test that he follows makes little space for evidence as seen in the appeal process of PMOI⁵⁵. The evidence of the organisation indicated their lack of criminal activity, yet they remained listed due to the Secretary of States’ misinterpretation of the phrase “concerned in terrorism”.

To conclude, Fenwick encapsulates the original intentions of the Terrorism Act 2000 at the start of the 21st century with the claim, “the TA has four key hallmarks, it is far more extensive, covering a much wider range of groups; it is permanent; its main provisions apply equally throughout the UK and it retains almost all the draconian special powers and offences adopted

⁵¹ David Anderson Q.Q. “Independent review on Terrorism Laws; Searchlight or Veil” Cmnd 8803 [1983]

⁵² David Anderson qc, ‘The Terrorism Act in 2015’ [2016] Independent reviewer of Terrorism legislation <https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2016/12/TERRORISM-ACTS-REPORT-1-Dec-2016-1.pdf> accessed 20 april 2018

⁵³ *ibid*

⁵⁴ *R v Z* - [2005] 3 All ER 95

⁵⁵ *Secretary of State for the Home Department v Lord Alton of Liverpool and others* [2008] EWCA Civ 443.

under the previous temporary counter-terrorism scheme, whilst adding new incitement offences”⁵⁶. With terrorism becoming much more of a prominent threat in society, legislation must remain ever changing to combat the problem. The process of proscription is one that must remain up to date with current world-wide state of affairs in order to maintain its protection on the citizens of the UK. However, the legislature and law enforcement must be able to strike a balance between exercising their power to penalise those concerned with terrorism while using their “wide, even intrusive, powers”⁵⁷ to a degree that is accepted and proportional to the harm which could be incurred. The public must have access to the protection of Human Rights and the freedom to express their religious and political views without fear of being branded a terrorist.

⁵⁶ Helen Fenwick, *Civil Liberties and Human rights* (4th edn, Routledge-Cavendish 2007)

⁵⁷ *Regina v Gul (Mohammed)* [2014] AC 1260