Limiting Democracy for the Sake of Itself: Fighting Extremism with Extreme Measures

by

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Abstract

In response to terrorism as one of the major challenges of our time, developments in anti-terrorism law have led to laws that infringe on democratic rights. The author addresses two key questions in relation to such legislation, namely how the development of such laws is influenced by rights instruments, and whether such laws can be justified as a proportionate response to the terrorist threat. The examination focuses on the key rights of expression and association. It takes place within a comparative jurisprudence structure, considering the treatment of these rights in the UK, Canada, Australia and the USA. The assessment is undertaken in the context of the definition of terrorism and in particular reflects on the thought/act distinction, and whether the motive element of the definition leads to a normative response that is justified or is particularly severe to these democratic rights.
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Introduction

Limiting Democracy

The challenge of terrorism has become rooted at the forefront of international legal consciousness. It is unprecedented in its complexity and scope. It has involved democratic governments and judiciaries around the world considering limitations on democracy in very real, concerned attempts to balance the needs and desires of the social and civic order with hard won human rights. This thesis examines the implications this challenge has had for the human rights of freedom of expression and association. It has both a positive and normative dimension: it charts the approaches of the UK, Canada, America and Australia to anti-terrorism legislation, focusing on the difficulties in approaching terrorism that arise from the attitude to the thought element of the crime. It will also consider the appropriate normative approach to Anti-Terrorism Law and address whether tackling thought and speech is justified in a free and democratic society. Will the laws ultimately be effective or will they have the opposite effect to that intended, resulting in democratic values being abandoned in favour of harsh suppressive techniques?

The thesis will take a multi-jurisdictional approach to the problems it addresses, not only because terrorism is essentially an international problem, but also because a comparative law structure will provide greater scope for testing theories – it “should, by exhibiting the empirical, observed variability in human law, be both a spur to philosophical reflection and testing-ground for philosophical theories”¹. Comparative law seeks out common links, which can in turn reveal the most effective legal structure. In reaching an internal understanding of the legal reasoning of different systems, it is possible both to attain a better comprehension of those systems and to achieve new perspectives². Sujit Chaudhry notes how comparative engagement can be useful in exposing the most beneficial normative structure. If the jurisdictions make different

assumptions, “the question becomes why they are different. Comparative engagement highlights the contingency of legal and constitutional order… Conversely, if the assumptions are similar, one can still ask whether those assumptions ought to be shared.”\(^3\) This is particularly relevant for the four countries examined in this thesis – the UK, Canada, America and Australia – since they build upon each other’s constitutional ideas and are influenced by each other’s laws. Indeed, since “[t]he migration of constitutional ideas across legal systems is rapidly emerging as one of the central features of contemporary constitutional practice”\(^4\), it is necessary to examine each in the context of the others, as well as the overarching international legal system, in order to gain a comprehensive understanding of the way these countries operate in terms of anti-terrorism law.

**Freedom of Expression and Association**

The inquiry will centre around two of the fundamental rights and freedoms of liberal democracy – freedom of expression and association. These two rights are inextricably linked to each other since free expression loses its value if one is unable to associate with others to develop and disseminate it. They have importance to the individual, as do all human rights. Freedom of expression has value because of its role “as an instrument of truth” and as “an instrument of personal fulfilment”\(^5\). Freedom of expression and association are crucial bedrocks of liberty since “freedom is rooted in reason, which is the capacity that makes self-determination possible. Accordingly, individuals must be free to think as they like and to speak as they think.”\(^6\)

Moreover, these rights are also distinctive in that they critically affect not only the dignity and freedom of people as individuals but also the way that people relate to each other – and therefore are critical to the way that society functions and the manner in which change is effected to the status quo. Thus both freedoms protect society as well as the individual. The United States


\(^4\) *Ibid.* at 13


\(^6\) Steven J. Heyman, *Free Speech and Human Dignity* (New Haven [Conn.]: Yale University Press, 2008) at 111 [Heyman]
Supreme Court has held that the right to free expression not only protects the right of the individual but also upholds the general public’s interest in having access to information within a free flowing marketplace of ideas. Even more than this, democratic self-government depends upon “the power of reason as applied through public discussion.” The same reasons underlie the importance to democracy of both freedom of expression and freedom of association.

Expression and association are essential for a representative government selected through valid “electoral processes and all that is necessary for elections to be fair and meaningful: free association, free speech, and an independent and professional news media.” It is their importance to the political process that has led these rights to be called a “crucial aspect of the democratic commitment, not merely because it permits the best policies to be chosen from among a wide array of proffered options, but additionally because it helps to ensure that participation in the political process is open to all persons.” Indeed, their importance to society goes beyond the practical to the psychological – they “affect the general political atmosphere, the democratic health of the community, in a way which matters whether or not a vote is imminent or a voter likely to be influenced one way or another.”

While all human rights are essential to a society that places emphasis on liberty, equality and the value of the human being, the particular and special importance of expression and association is that not only the self-determining individual that cannot function without them, but also the mutually beneficial and freely evolving society. They are “not just an incident of democratic society, to be regulated ‘sensibly’ like those other incidents. Speech is itself the very link between citizens and their political society, which renders possible all the rest of the law. Norm production in a democracy is nothing but a product of free and open communication, emerging out of the open deliberation of views, both popular and unpopular, both sympathetic and

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8 Whitney v California., 274 U.S. 357 at 375 (1927)
11 Connor Gearty, Essays on Human Rights and Terrorism: Comparative Approaches to Civil Liberties in Asia, the EU and North America (London: Cameron May Ltd, 2008) at 340 [Gearty, Essays on Human Rights]
antipathetic, both democratic and anti-democratic.”¹² It is possible to conceive of a society that could validly call itself democratic, but simultaneously permit, for example, torture or indefinite detention without charge, if prescribed by law and subject to legal constraint, but it is impossible to imagine a democracy without free expression and association. When governments start to criminalise these rights they are attacking democracy itself – the way that society progresses and changes its opinions, “the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth”¹³.

Further, these rights relate to the essence of what makes terrorism distinct. Most commentators agree “that one of the distinctive features of terrorism lies in its communicative function. Terrorism is ‘expressive’ violence”.¹⁴ The rights also relate to the particular dangers of how democracies respond to terrorism. If terrorism is communication, there is a risk anti-terrorism will in turn respond to the ideas and expressions as opposed to the acts of violence. The two rights of expression and association are also potentially bear no relation to the terrorist act. Treatment of the rights in relation to terrorism laws therefore requires acute intellectual and legal sensitivity. There is a particular danger of democracies losing their democratic character if they overreact to terrorism. Criminalising them is highly questionable not just from a philosophical perspective, but also from a legal one, since the emphasis of the criminal law on intent and responsibility arguably excludes guilt based on expression or association – “[t]he state must treat citizens as capable of making up their own minds. As a result, it cannot hold one person responsible for something that others do because of the reasons they have offered them.”¹⁵

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13 Thornhill v. Alabama, 310 U.S. 88 at 95 (1940)
14 Stefan Scottiaux, Terrorism and the Limitation of Rights: The ECHR and the US Constitution (Oxford; Protland, Or.: Hart, 2008) at 74
Militant Democracy

The trend towards limiting these two rights would seem to stem from Karl Lowenstein’s theory of militant democracy, which suggests that democracies need to be more aggressive towards those who do not believe in democracy based on “the idea that democracies are justified in denying freedoms associated with democracy to those who reject democracy.”16 This theory holds that democracy in and of itself is so important that it trumps the rights of individuals and must defend itself “even at the risk and cost of violating fundamental principles.”17 Lowenstein’s ideas are most pertinent in the states this thesis examines since, as Shlomo Avineri notes, “[i]n the Western cases – the US, UK, Canada, Australia – the defensive mechanisms (whether one sees them as excessive or not) are aimed at preserving and maintaining democratic societies and forms of government from violence that is clearly anchored in an anti-democratic ethos: they truly represent ‘militant democracy.’”18

The theory of militant democracy is particularly relevant when evaluating the treatment of these rights since it “refers foremost to restrictions of political rights. These include the right to party formation, free speech, and the right of assembly.”19 Politically, the militant mindset has proliferated since September 11, with politicians advocating tougher laws at the expense of civil liberties. Former Prime Minister, Tony Blair, argued that:

“Over the past five or six years, we have decided as a country that except in the most limited of ways, the threat to our public safety does not justify changing radically the legal basis on which we confront this extremism… [T]he right to traditional civil liberties comes first. I believe this is a dangerous misjudgement. This extremism, operating the world over, is not like anything we have faced before. It needs to be confronted with every means at our disposal. Tougher laws in themselves help, but just as crucial is the signal they send out: that Britain is an inhospitable place to practice this extremism.”20

Similarly, a wide range of academic thought has held that the “war on terror” requires a new “ethics of emergency” which may require the suspension of human rights, that emergency powers are lesser evils “forced on unwilling liberal democracies by the exigencies of their own survival”\textsuperscript{21} and “[i]n the present global context, holding fast to liberal and democratic principles means seeing Muslim totalitarianism for what it is, and using all the available means to defeat it”\textsuperscript{22}. This line of thought is particularly insidious in that it uses human rights themselves to justify breaches of human rights. It is notable that while, without exception, the countries this thesis examines have passed laws that impact on rights of expression and association, none of them has seen the need specifically to derogate from rights.

**The Countries Chosen for Comparison**

It is these issues of militant democracy, “the question of how to balance democratic and liberal values against the need to defend democracy from totalitarian movements both from the left and the right…”\textsuperscript{23}, that form the foundation of this thesis. The examination will focuses on the UK, Canada, Australia and the U.S.A. because of their shared attributes as common law systems and because of the strong influences that their jurisprudence has on each other. The anti-terrorism context has been recognized as a fertile source for an examination of the migration of constitutional ideas.\textsuperscript{24} Moreover, in testing theories about human rights, they provide a broad base for comparison, having rights instruments that range from the constitutional and entrenched, to the statutory, to virtually no specific documents at all. Australia, Canada, the UK and America are therefore a particularly apposite basis for an examination of the different ways in which countries react to militant democracy, both as a matter of their bills of rights and also constitutional cultures. The U.S. has a strong form of judicial review and a libertarian free speech culture, while Australia is limited to non-judicial review and places little legal emphasis on free speech. The UK and Canada lie somewhere in between these two. This is reflected in the patterns of “migration of constitutional ideas”, and why definitional ideas originating in the UK


\textsuperscript{23} Avineri, “Introduction”, supra note 18 at 2

\textsuperscript{24} See Sujit Choudry, ed., *The Migration of Constitutional Ideas*, (Cambridge: Cambridge University Press, 2006)
are quickly adopted by Australia and Canada but not by the U.S.\textsuperscript{25}. Similarly, the UK introduced speech related laws into its anti-terrorism legislation in 2005, and Australia quickly followed, but so far Canada and the U.S. have not.

**Structure of the Thesis**

In examining these propositions, this thesis will first review in Chapter 1 the thought/act distinction in the abstract and the difficulties posed by seeking to define terrorism. It will examine whether the motive aspect of definition leads to the criminalization of the expression and association that are implied by this thought/act distinction and whether this can be justified in a democracy. Chapter 2 will examine the international context and Chapters 3 to 6 will then examine each of the jurisdictions in turn, charting how anti-terrorism laws impact on freedom of expression and association in the context of the mechanisms available for human rights protection.

Chapters 8 and 9 will examine the effect of a charter and consider the normative approach. Anti-terrorism law makes certain assumptions – that terrorism has created an exceptional situation, that there are utilitarianist reasons for dismantling rights. In assessing the treatment of expression and association, this thesis will question the bases of these assumptions. Decisions made about the law now have the potential to effect the extent to which the state can interfere with our liberties in the future and the type of situations in which they may do so. The weakening of liberties now could change the structure of human rights law, the relationship of people to their governments and to each other, the way we think about democracy in the long term, and the very fabric of society.

\textsuperscript{25} See Chapter 2, Definition, below
Chapter 1
Definition

The Need For a Definition

A definition of terrorism is crucial for the rule of law. On the pretext of terrorism, countries have gone to war, people have been prosecuted, and others have been incarcerated without due legal process. The term has incredible power. Guelke noted in 1995 the paradox that there was so much public focus on the term yet relatively few people were killed by ‘terrorism’ – proportionately fewer people had died in Western societies as a result of political violence than at any other period in Western society history\textsuperscript{26}. The discourse of terrorism has so much power because societies today are unaccustomed to sporadic acts of violence.

Terrorism has now come to be understood as a type of subversive violence used as a weapon against governments, but originally it referred to the actions of governments themselves, “in particular the policy of intimidation used by the Jacobins in France during the 1790s.”\textsuperscript{27} It was not until the latter part of the 1800s that this changed. However, even in the early days of the use of terrorism against the state, it did not achieve its modern meaning but was “designed to bring about political change, and Russian socialist revolutionaries and anarchists of the time were proud to call themselves terrorists.”\textsuperscript{28} British imperialism, Israeli and Palestinian conflicts, and Irish subversive activities led to the term developing its current connotations, however it was not until the violence of al Qaeda began to take on an international dimension that it received its current notoriety. The novelty of terrorism now lies “in the absence of specific demands and the fact that its command structure was not hierarchical, or exclusively cell-based, but predicated

\textsuperscript{26} Adrian Guelke, \textit{The age of terrorism and the international political system} (London; New York: Tauris Academic Studies, I.B. Tauris Publishers, 1995) at 6-7
\textsuperscript{28} \textit{Ibid.} at 24
rather on voluntary emulation by disciples who were often not even specifically recruited.”

The most significant attribute of the term is its psychological implications. The word “terrorist conveys:

…a sense of illegitimacy automatically discrediting those to which it is affixed. It no longer describes a technique of violence but rather a type of person. Calling adversaries ‘terrorists’ is a way of depicting them as fanatic and irrational so as to deflect attention away from the origins of their grievances and the possible legitimacy of their demands, foreclose the possibility of compromise, draw attention to the threat to security, promote solidarity among the threatened, and pave the way for the use of force. Thus, the word ‘terrorism’ is, above all, an indicator of the speaker’s point of view, telling us that we belong to the same group as the speaker and calling on us to blame the others just as the speaker does. In this sense, already the rhetoric of ‘terrorism’ and ‘terrorist’ serves a divisive and denunciatory purpose.

It is terrorism’s moral abhorrence that leads us to seek to give it a special place in criminal law. Although any conceivable terrorist act would probably be covered under non-terrorist provisions of the criminal law, the urge is to create special legislation for terrorism in the same way as we create special legislation for crimes against humanity.

Given the psychological impact of the term and the versatility of terrorist violence as an instrument for or against governments, it is unsurprising that a large proportion of academic literature has focused on the problems of defining terrorism. David Jenkins posits that “[a]s American Supreme Court Justice Potter Stewart once remarked about obscenity, it is difficult to define, but one knows it when he or she sees it. Another cliché, ‘one man’s terrorist is another man’s freedom fighter’ also suggests a subjective perspective to understanding the term.”

It is this subjective aspect that has led Victor V. Ramraj, Michael Hor and Kent Roach to stress that the:

…first step in defining terrorism consists in distinguishing terrorism from what it is not. Whatever terrorism is in its contemporary legal use, it is conceptually distinct from: (a) legitimate state responses or counter-terrorism, (b) national liberation struggles, and (c) ordinary criminal offences… One important problem is that terrorism and counter-terrorism are indistinguishable in as much as they involve violence and fear, seek a broader audience, are purposive and instrumental, and affect non-combatants.

30 Moeckli, supra note 27 at 24
It is this blurring of the lines, the fact that a definition broad enough to encompass every kind of terrorist act may also be so broad that it encompasses legitimate or non-terrorist behaviour, which gives rise to the most difficulties. Beyond being a concrete act, terrorism is a concept, an idea that engages “fundamental questions about … the way in which justifiable challenges to state authority can be distinguished from unjustifiable ones. In short, the definition of terrorism is centrally about justification and legitimation of particular forms of political action.”

Legitimate kinds of political violence are those that seek to establish a democracy or the protection of fundamental rights whereas illegitimate kinds seek to subvert and destroy them. A definition of terrorism must therefore be capable of applying to the latter but exclude the former.

The elusiveness of a definition has led some critics to discard the effort altogether – Connor Gearty “even abandoned a law text-book [he] planned on the subject on account of the inadequacy of my introductory chapter… it had eventually dawned on me that the whole point of the subject of terrorism was that there was no definition”.

However, if terrorism is indeed to be criminalised then it must have a legislative definition. Those resulting definitions of terrorism have been wide ranging, with serious implications for the way in which jurisdictions legislate against and seek to combat terrorism.

The Definitions at Issue

The UK defines terrorism as the use or threat of action that “is designed to influence the government or to intimidate the public or a section of the public” and “is made for the purpose of advancing a political, religious or ideological cause”. It must also involve one of a range of actions including serious violence against a person, serious damage to property, endangering a person’s life, creating a serious risk to the health or safety of the public, and interfering with or disrupting an electronic system.

35 Terrorism Act 2000 (U.K.), 2000, c. 11, s1
In Canada, terrorism is defined as various acts committed inside or outside Canada, which are already offences under assorted provisions of the *Criminal Code* implementing various conventions; or “an act or omission, in or outside Canada, (i) that is committed

(A) in whole or in part for a political, religious or ideological purpose, objective or cause; and

(B) in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act, whether the public or the person, government or organization is inside or outside Canada”36.

As in the UK legislation, the terrorist act must also intentionally cause one of a range of results including death or serious bodily harm, endangering a person’s life, causing a serious risk to the health or safety of the public, substantial property damage if likely to result in any of the previous harms, and serious interference or disruption of an essential service, facility or system.

Terrorism in Australia is defined under section 100.1 of the Australian *Criminal Code*37, amended by the *Security Legislation Amendment (Terrorism) Act 2002*38, as an action or threat of action done or made with the intention of advancing a political, religious or ideological cause; and with the intention of coercing, or influencing by intimidation, the government of the Commonwealth, a State, Territory or foreign country, or of part of a State, Territory or foreign country; or intimidating the public or a section of the public. This definition is derived from both the UK and Canada. Like the UK and Canadian legislation, the action must cause one of a range of results including serious harm that is physical harm to a person, or serious damage to property, or a person’s death or endangerment of a person’s life, serious risk to the health or safety of the public and serious interference, disruption or destruction of an electronic system. There is an exemption for advocacy, protest, dissent or industrial action that is not intended to cause serious physical harm to a person, a person’s death, or endangerment of a person’s life or serious risk to the health or safety of the public.

36 Bill C-36 *The Anti-Terrorism Act, Criminal Code*, R.S. C. 1985, c. C-46, s83.01(1)(b) [ATA]
37 *Criminal Code Act 1995* (Cth.)
38 *Security Legislation Amendment (Terrorism) Act 2002* (Cth.)
The differences between these three systems are, for the most part, cosmetic. This again relates to Sujit Choudhry’s understandings of the “migration of constitutional ideas”, as the definitions of Canada and Australia (but not that of the U.S., as will be seen) are modelled on that of the UK, and the differences relate to the countries refining and limiting the existing models. Canada and Australia make exemption for protest and labour activities so long as not intended to endanger life, health or safety; the UK does not. While the British laws might capture a political protester this does not mean that the laws will be abused. Prosecutorial discretion has so far been sufficient to prevent such use and is likely to continue to be so, despite the fact that “examples can and have been cited of individuals who might fall inappropriately within the current definition, if considered solely in strict legal terms.”39 However, there are other reasons for wanting well crafted criminal laws, apart from the potential for abuse, not least of which is that legality demands that an individual should be able to clearly discern when their actions fall outside the law.

The Canadian approach to property damage is more restrained (it is included only when likely to cause death or serious bodily injury, endanger a person’s life or cause a serious risk to public health or safety whereas the UK includes all serious damage to property), but the approach to disruptions of services and systems is more expansive (in the UK only electronic systems are included). Australia defines electronic systems to include information, telecommunication, financial systems and systems used for or by the delivery of essential governmental services or an essential public utility or a transport system. This definition, being broader than that found in the UK, falls somewhere in between the two. Unlike the UK and Australia, Canada makes provision for the compulsion of international organisations and persons as well as governments, and includes not just intimidating the public with respect to ‘security’ but also ‘economic security’. It is possible to construe scenarios in which these minor differences could be used by a semantically exact authority to encompass crimes outside the ambit of what we would normally construe to be terrorism, but difficult to conceive of these scenarios being given practical effect. What stands out about the definitions are their similarities (unsurprisingly considering the

influence of the UK in this respect) – and in particular the three-part requirement for ideological motive, purpose of intimidation or influence, and finally the physical act.

In terms of definition, the American model appears much more moderate than the British and even the Canadian version, in that the element of ideological motive requirement is left out thus avoiding the danger of injecting politics and religion into investigations and trials. This may be due to the influence of the First Amendment, and the fact that unlike Canada and Australia, the U.S. definition predates the Terrorism Act 2000 and does not appear to have been influenced by it. However, the definition is similar to Canada and Britain in identifying terrorism by its intended purpose. S802 of the Patriot Act\textsuperscript{40} amends the Criminal Code, 18 U.S.C. §2331\textsuperscript{41}, to include a definition of “international terrorism” as activities that involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any state; and appear to be intended to intimidate or coerce a civilian population; to influence the policy of a government by intimidation or coercion; or to affect the conduct of a government by mass destruction, assassination, or kidnapping; and occur primarily outside the territorial jurisdiction of the United States. “Domestic terrorism” is defined as activities that involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; and appear to be intended to intimidate or coerce a civilian population; to influence the policy of a government by mass destruction, assassination, or kidnapping; and occur primarily within the territorial jurisdiction of the United States. Unlike both Britain and Canada, property damage alone is not prohibited. The definition is therefore narrower in this aspect.

All the definitions “are broad in that they cover action against any foreign government, however oppressive… they potentially cover almost all liberation movements… they do not distinguish between those aiming only at military targets and those aiming at civilian targets.”\textsuperscript{42} The broadness of the U.S. definition is further exacerbated by its lack of political or ideological

\textsuperscript{40} Unitining and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (Patriot Act)
\textsuperscript{41} United States Code (U.S.C.) Title 18
\textsuperscript{42} Helen Fenwick, Civil Liberties and Human Rights, 4th Ed. (Oxon, Oxford; New York, NY: Routledge-Cavendish, 2007) at 1380 [Fenwick]
motive, which does, at least, present another prosecutorial hurdle. Alongside the problem of possible inclusion of protest or labour activities, this raises the question of whether prosecutorial discretion is sufficient protection to ensure that the definition is appropriately applied. While Lord Carlile in evaluating the UK definition considered this discretion a sufficient safeguard, the tradition of eschewing overbreadth is one of the foundations of the common law.

**Motive**

The requirement of proof of motive has proved particularly controversial. In Australia it has been called “perhaps the most controversial aspect of our domestic response,” while the definition in the UK has been described as giving rise to a “fatally flawed” Bill in which “it is utterly perplexing that we should apparently be wedded to a definition that threatens to undermine so sweepingly civil liberties and the credibility of governance itself.” In Canada, Kent Roach in particular considers that proof of motive is “something that is generally not necessary in criminal law… But the accused’s motive sometimes does matter to society. The irrelevance of motive as a matter of legal principle does not exclude it from being a politically salient factor. A democratic criminal code can criminalize motive… This, however, does not mean that a democratic criminal code should criminalize motive (and in particular motive based on political or religious beliefs).” In response to concerns that the motive element would promote political and religious profiling, the Canadian Parliament added a clause providing that “for greater certainty, the expression of a political, religious or ideological thought, belief or opinion does not come within [the definition] unless it constitutes an act or omission that satisfies the criteria of that paragraph.”

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43 Carlile, *Definition, supra* note 39 at para 61 and 64
44 Mark Nolan “Lay Perceptions of Terrorist Acts and Counter-Terrorism Responses: Role of Motive, Offence Construal, Siege Mentality and Human Rights” in Miriam Gani & Penelope Mathew, eds., *Fresh Perspectives on the ‘War on Terror’* (Canberra: Australian National University E Press, 2008) at 89 [Nolan]
47 ATA, *supra* note 36, s83.01 (1.1)
The common law position on motive as opposed to intention is given in *Hyam v. DPP*[^48], which drew a distinction between proof of intention and evidence of motive, describing motive as “an emotion prompting an act that is quite separate from an intention”[^49]. Where proof of motive does exist, the prosecution is likely to introduce it into a case whether or not required by the definition as “some form of circumstantial evidence for proof beyond reasonable doubt of intention as the requisite *mens rea* element.”[^50] But this does not necessarily mean that motive should become a focus of the trial and an essential part of the definition. In Australia, prosecutions of terrorist offences have in fact failed because of a failure to prove political or religious motive beyond a reasonable doubt[^51]. Ben Saul dismisses jurisprudential reasons for eschewing motive, stating that “[s]ometimes it clearly does matter to society why a crime is committed”. However, the judgment of society is based on less just and more emotive grounds than the judgment of the court. Motive is the thought that comes before the crime; it is not the crime itself. The criminal law does not exist to make value judgments about ideas, but rather to punish the commission of a crime. The fact that it matters to society is more appropriately expressed at sentencing, or indeed in the media as a public forum for the expression of societal concerns.

Nonetheless, many academics accept that a “motivational aspect recognizes the unique nature of terrorism as having implications and effects beyond the circumstances of isolated or singular crimes”[^52]. This largely accords with the popular understanding of terrorism, what Ben Saul would describe as its moral difference[^53]. Coercive crimes based on ideology are emotionally and psychologically different to crimes that are self-serving. Saul states that definitions without a motive requirement are overly broad thus undermining “the offences’ moral and political force, and dilutes the special character of terrorism as a crime against non-violent politics and social

[^48]: *Hyam v. DPP* [1975] AC 55
[^49]: Ibid. at 73 (Lord Hailsham)
[^50]: Nolan, *supra* note 44 at 90
[^51]: *R. v. Mallah* [2005] NSWSC 317, 26
[^52]: Jenkins, *supra* note 31 at 435
life”\textsuperscript{54}. His comprehensive defence of political and religious motive concludes “[t]he expressive function of the criminal law cannot be overstated; a conviction for political or religious violence sends a symbolic message that certain kinds of violence cannot be tolerated”\textsuperscript{55}. This argument fails, not on its logic but on its basic premise. The law should not have an expressive function. It has a normative function, in informing what kind of behaviour will and will not be accepted. But an expressive function, by its very nature, goes beyond this – fact and reality are stated, but ideas, emotions, and opinions are expressed, and these by their very nature may be misguided or incorrect.

Other commentators have argued that a “legal definition of terrorism that recognises its underlying motivations allows the state to counter its potentially destabilizing effects upon society and government, and combat it with the similarly fixed, ideological purpose of defending democratic norms through the rule of law”\textsuperscript{56}, and that such a definition does not create any “form of discrimination against any religious group, expressly or by implication.”\textsuperscript{57} Other critics think that the motive requirement recognizes what makes terrorism distinctively different and immoral. David Jenkins has posited that the:

\begin{quotation}
...motivational aspect recognizes the unique nature of terrorism as having implications and effects beyond the circumstances of isolated or singular crimes... While inclusion of motivational elements is out of the ordinary, it is necessary to address terrorism as a peculiar criminal phenomenon undermining the normative foundations of liberal democracy.\textsuperscript{58}
\end{quotation}

Lord Carlile also saw “no demanding reason for change.”\textsuperscript{59} It is arguable that some crimes, such as terrorism and crimes against humanity, are taken beyond ordinary criminal level by motive or scale, because they appear to be an attack not just on an individual but on democratic principles. However, while this may be a compelling reason for legislating separately for terrorism, it would be possible to do so without the political or ideological motive clause.

\begin{footnotes}
\item[54] \textit{Ibid.} at 37
\item[55] \textit{Ibid.} at 37
\item[56] Jenkins, \textit{supra}. Note 31 at 432
\item[57] Carlile, \textit{Definition}, \textit{supra} note 39 at para 53
\item[58] Jenkins, \textit{supra} note 31 at 435-6.
\item[59] Carlile, \textit{Definition}, \textit{supra} note 39 at para 65
\end{footnotes}
The academic debate is reflected at the legislative level. In Canada, the Special Senate Committee on the *Anti-terrorism Act* has recommended that the political or religious motive requirement be repealed because it may “encourage racial and religious profiling during investigations”\(^{60}\). However, the House of Commons Standing Committee on Public Safety and National Security has determined that the motive requirement should remain in order to distinguish terrorism from ordinary crime\(^{61}\). Similarly, in Australia, reviews conducted by the Security Legislation Committee and Parliamentary Joint Committee on Intelligence and Security have recommended the retention of the motive requirement\(^{62}\). The UK review also recommended that the motive requirement remain\(^{63}\).

The major justifications of the inclusion of motive all relate to its symbolic and emotive message. However, it is wrong to create laws based on assuaging the doubts and fears of society. Motive should not be criminalised. The laws against terrorism exist to prevent terrorism, not to punish the ideas themselves. Laws which punish terrorist ideas in and of themselves would present huge practical difficulties due to the subjective nature of the issue. Such laws would also, as this examination will later demonstrate, fail on proportionality grounds. The criminalization of the political and religious motives behind terrorism is not justifiable, not only on jurisprudential grounds, but due to the limiting principles that inform the laws.

**Other Definitions**

Definitions of terrorism that avoid the political and ideological motive clause do exist, generally in the international context and in the U.S.. These could serve as models for a more incisive definition. Alternatively, Canada has an alternate definition of terrorism in the immigration context. The Supreme Court declined to follow definition of terrorism in the anti-terrorism...
legislation, and instead used the definition from the 1999 *International Convention on the Suppression of the Financing of Terrorism*\(^{64}\), defining terrorism as “Any . . . act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.”\(^{65}\)

There is no UN agreed definition but some guidance is provided by Security Council Resolution 1566\(^{66}\) adopted by the Security Council on 8 October 2004. The resolution states that the Security Council “[r]ecalls that criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and calls upon all States to prevent such acts, and if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature.”

The General Assembly is also working towards adopting a comprehensive convention against terrorism. It contains a draft “definition of terrorism which includes ‘unlawfully and intentionally’ causing, attempting or threatening to cause:

(a) death or serious bodily injury to any person; or

(b) serious damage to public or private property including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or the environment; or

(c) damage to property, places, facilities, or systems..., resulting or likely to result in major economic loss, when the purpose of the conduct, by its nature or context, is to intimidate a


\(^{65}\) *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1 at para 96 [*Suresh*]

population, or to compel a government or an international organization to do or abstain from doing any act.’

The draft article further defines as an offence participating as an accomplice, organizing or directing others, or contributing to the commission of such offences by a group of persons acting with a common purpose.” However, unsurprisingly the difficulties of defining terrorism have proved problematic and “diverging views on whether or not national liberation movements should be excluded from its scope of application have impeded consensus on the adoption of the full text.”

The European Union Council Framework Decision of 13 June 2002 on combating terrorism also provides a possible model, defining terrorism in Article 1 as a series of specific acts (including attacks on a person’s life or physical integrity, kidnapping or hostage taking, causing extensive destruction to a Government or public facility, a transport system an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss, seizure of an aircraft or other transport, weapons offences, the release of dangerous substances, or causing fires, floods or explosions and interfering with natural resources if to do so will endanger human life). The acts must be committed with the aim of seriously intimidating a population, or unduly compelling a Government or international organization to perform or abstain from performing any act, or seriously destabilizing or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization.

In his review of the anti-terrorism legislation, Lord Carlile concluded “[h]ard as I have striven, and as many definitions as I have read, I have failed to conclude that there is one that I could regard as the paradigm.” The special impact that makes terrorism a different crime to those already legally delineated lies in the minds of its perpetrators and victims. A definition that

68 Ibid.
70 Carlile, Definition, supra note 39 at para 10
concentrates on physical acts alone, such as those of violence, fails to encapsulate terrorism because it does not touch on its ideological power, however it is important that the temptation to include a motivational element does not result in an unintended impact on freedom of expression.

**The Progression from a Motive Based Definition to Criminalizing Expression and Association**

The problems of definition are both practical and conceptual. These crimes are considered worse not because of actions, but motive. The fact that terrorism *per se* is a crime, with the ensuing implications for treatment of beliefs and ideology, may then itself undermine fundamental human rights and freedom of democracy. The criminalization of motive makes “the politics and religion of accused terrorists a fundamental issue in their trials”\(^{71}\). This in turn risks demonizing race and religion. Nevertheless, motive and intent are the very aspects of terrorism that differentiate it from other crimes. While it would be possible, even desirable, to strike down the necessity for a political, religious or ideological motive, the intention of intimidating the public or compelling governments must remain. While the essence of terrorism is terror, the extreme fear it is intended to cause, “if someone did something likely to cause terror in others with no further aim, just for the fun of it, I think we would not see that as a case of terrorism. Terrorism is intimidation with a purpose: the terror is meant to cause others to do things they would otherwise not do. Terrorism is coercive intimidation.”\(^{72}\) However, intimidation and coercion are far more neutral requirements than religion and ideology. Religious and ideological beliefs “lie at the core of the freedom of expression and freedom of religion… The religious and political motive requirement authorized state inquiries into the deepest convictions and beliefs of the accused including those that are not associated with violence or hatred.”\(^{73}\) The difference between the two is the difference between motive and intent; coercion relates to the purpose of terrorism, while ideology is a psychological aspect of it.

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\(^{71}\) Roach, “Canadian Values”, *supra* note 46


\(^{73}\) Kent Roach & Michael Code, *The recent decision in R. v. Khawaja on the constitutionality of the definition of terrorism and a variety of terrorism offences* (Toronto: Faculty of Law, University of Toronto, 2007) at 18 [Roach, Case Comment]
Kent Roach suggests that “[n]ew offences of incitement or encouragement of terrorism will aggravate the danger of overbroad definitions of terrorism”74. Criminalising expression and association is a natural progression from an overbroad definition of terrorism. If part of the definition of terrorism is to be thought – motive, purpose, rationale – then criminalising expression and association is the closest it is possible to get to controlling this thought. The legislation is attempting to criminalise behaviour at the earliest possible stages, even before it becomes an inchoate crime. Speech offences reflect this. Incitement can already be prosecuted using principles of the common law, but this is insufficient for terrorism legislation. It seeks to attack the thought before it is even attached to an action. If motive is to be part of the definition, then it becomes a logical step for the motives themselves, or at least the expression of the motives, to be criminalised, as has been done in UK and Australia but not Canada and especially not in the U.S..

Insofar as terrorism forms a psychological attack on our societies’ values and self-determination, the threat is legitimate. And in considering the nature of this threat – that the intended victims are not just those who are directly affected, but culture and society itself, it is possible to conceive that terrorism is a crime that occurs on more than just the physical level. The reality may be that terrorism does indeed begin before an actual physical offence occurs. The existing criminal law in cases such as that of the Toronto 18 would not have been sufficient to charge the accused because their actions had not yet progressed to the stage where a clear case of attempt or conspiracy to commit a specific crime could be made out. However, the fact that terrorism legislation may permit prosecution of offences that would not otherwise exist does not mean that the prosecution of such offences conforms to principles of legality and human rights. At the centre of the discussion lies the balance between liberty and control – whether the protection of civil liberties should vary when threatened.

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Chapter 2 The International Legal Framework

Terrorism was born long before the terrorist attacks on the United States in 2001 – indeed the definition of terrorism that has provided guidance to Canada and Australia is the one embedded in the UK Terrorism Act 2000. Prior to this, there existed a large body of international law, including in particular twelve multilateral international conventions as well as economic sanctions, which address terrorism related offences such as kidnapping diplomats and other public figures, hostage taking, hijacking, the manufacture of explosives and dealing with monetary funds. This international law is intended “to enhance international cooperation in criminal justice with regard to the specified offences, with most of them obliging state parties to either extradite or prosecute (aut dedere aut judicare) those suspected of having committed such

75 Convention on Offences and Certain Other Acts Committed on Board Aircraft, Tokyo, 14 September 1963 704 UNTS 219
Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Montreal, 23 September 1971, 974 UNTS 177
Convention on the prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 14 December 1973, 1035 UNTS 167
International Convention against the Taking of Hostages, 17 December 1979, 1316 UNTS 205
Convention on the Physical Protection of Nuclear Material, Vienna, 3 March 1980, 1456 UNTS 101
Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, Rome, 10 March 1988, 1678 UNTS 304
Convention on the Making of Plastic Explosives for the Purpose of Detection, Montreal, 1 March 1991, 30 ILM 726
International Convention for the Suppression of the Financing of Terrorism, 9 December 1999, GA resolution 54/109
This list has been expanded through the adoption of the International Convention for the Suppression of Acts of Nuclear Terrorism, 13 April 2005, GA Resolution 59/290.

an offence.”

It is perhaps because of the difficulty in defining terrorism that for “international law-makers what terrorism is has counted for less than what terrorists do.” It is possible to conceive of how someone other than a person we would perceive as a terrorist could commit many of these acts internationally provided for, highlighting the fact that what is unique about terrorism lies not in action but in some elusive mental aspect.

However, as a global phenomenon, it is 9/11 that caused terrorism to impact on worldwide consciousness. Since that time numerous new anti-terrorism laws have been enacted. The pattern of the enactment of new legislation suggests a reactionary attitude – conclusions were quickly reached about the effects of financing and immigration law, which were not empirically born out and yet gave rise to theories that were quickly entrenched in legislation. The overall effect is of different jurisdictions taking legislation piecemeal from one another in a global scramble to create a new network of anti-terrorism law. The range of new international instruments is both a continuation of this tendency and also a stimulating force behind it.

International law holds a very particular place in setting legal trends:

“On the one hand, it may provide guidance on what normative policies are likely to be perceived as more legitimate than others in the light of past decisions and the existing normative framework. On the other, it may channel the political discourse within the legal boundaries of established and widely accepted international decision-making processes. Finally, international law can provide the technical means by which extant rules can be effectively implemented.”

International law creates new norms, gives guidance, and provides instrumental tools. However, it also creates obligations and can become a driving force in legislating. It is due to this that many of “the similarities in the anti-terrorism context can be traced to common directives emanating from international organizations.”

77 Moeckli, supra note 27 at 26
79 See Roach, “Sources and Trends”, supra note 74 at 230-241
81 Scheppele, “Anti-Constitutional Ideas” supra note 33 at 350
Since, 2001, there have been more than forty United Nations Security Council Resolutions (SCRs) on terrorism, a system for monitoring and administering state compliance with obligations placed on them by these resolutions has been put in place, and a listing scheme for designating persons and organisations as ‘terrorist’ has been created (which may in part be an inspiration for proscription and membership offences in all four countries)\(^82\). Immediately after the events of September 11 the General Assembly responded with Resolution 56/1 in which it condemned the “heinous acts”\(^83\). Simultaneously, the Security Council called on “the international community to redouble their efforts to prevent and suppress terrorism”\(^84\). However, the international drive originates with United Nations Security Council Resolution 1373 of 28 September 2001\(^85\). For the first time, the Security Council addressed terrorism generally rather than dealing with its manifestations.

The resolution was adopted under the Security Council’s powers under Chapter VII of the UN Charter, which allows the Security Council to direct member states to comply with a program it has adopted, rather than only advising or endorsing courses of action, and is therefore legally binding\(^86\). It was the first time in the Security Council’s history that this binding authority has

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82 SCR 1267 (1999) of 15 October 1999 established a Security Council Committee which designates a person or organisation as linked to Al Qaeda, Usama bin Laden and/or the Taliban wherever located. The sanctions regime has been modified and strengthened by subsequent resolutions, including resolutions 1333 (2000), 1390 (2002), 1455 (2003), 1526 (2004), 1617 (2005), 1735 (2006) and 1822 (2008). The mechanism involves one or more states have submitting the name of the person or organisation. The name is circulated to other states. If no objection is received within 48 hours the name may be listed. The person or organisation is then subject to a range of sanctions including freezing of financial assets. Individuals have no influence over decisions and states are obliged to give effect to the sanctions despite the fact that there is “simply no process at all through which an individual or group can contest this designation and the states asked to freeze assets are not given any evidence to assess whether the request is justified.” (Schepppele, “Anti-Constitutional Ideas”, supra note 33 368). The delisting procedure is onerous and requires governmental intervention and negotiation (See CH Powell “The Legal Authority of the United Nations Security Council”, in Benjamin J Goold and Liara Lazarus, eds., Security and Human Rights (Oxford; Portland, OR: Hart Publishing, 2007) 157 at 16 [Powell, “Legal Authority”]). The listing procedures have been criticised as:“vague and relatively standardless... Furthermore, the de-listing procedures are inadequate. There is no opportunity for sanctioned individuals to directly contest their inclusion on the lit. They must first get the support of the state of their nationality or residence. If cooperation is not forthcoming from those countries, then the Committee has provided no avenue for an individual to come before the Committee directly. In addition, consensus decisions mean that any one state can prevent de-listing, and the state is not required to provide any reasoning or justification.” (Gutherie, P. (2004), “Security Council sanction and the protection of individual rights”, New York University Annual Survey of American Law 491, Vol. 60 at 513-4).

83 GA Resolution 56/1, 12 September 2001, UN Doc A/RES/56/1 (2002), para 1
84 SC Resolution 1368, 12 September 2001, UN Doc S/RES/1368 (2001), para 4
85 SC Resolution 1373, 28 September 2001,
been used. This resolution calls on states “to work together urgently to prevent and suppress terrorist acts, including through increased cooperation and full implementation of the relevant international conventions relating to terrorism”, a requirement that it reaffirms in Article 3. The resolution contains eighteen sub-paragraphs, which list specific measures that states are required to take against terrorism.

SCR 1373 also created a Counter-terrorism Committee (CTC) to monitor implementation of the resolution. The CTC is made up of representatives of the countries on the Security Council, including the five permanent members (China, France, the UK, Russia and the U.S.) and the ten non-permanent members. It “sits at the apex of the UN’s institutional hierarchy. It could be said to function as a mini-Security Council, with a powerful direct line to the Security Council itself. This recalibration of the internal institutional order… tells us something about the nature of the crisis experienced (whether actual or perceived).”

87 States were given ninety days to submit reports on the steps taken to comply with the requirements of the resolution, which the CTC then assesses for compliance. It is likely that this was the cause of so many states rushing through new anti-terrorism legislation.

Two aspects give SCR 1373 particular significance. Firstly, the Security Council clearly feels that terrorist activity is so significant and pressing a threat that it requires a heavy international hand, with the result that “the Security Council clearly ventures into the field of general law-making activity.”

88 Secondly, by giving such levels of significance to terrorism, and “by qualifying international terrorism generally and, more recently, even individual acts of terrorism, as a threat to international peace and security, the Security Council has given further political momentum to the consideration of terrorism as a global risk affecting the security of the international community.”

89 Bianchi, “Achievements and Prospects”, supra note 80 at 498
The manner in which the Security Council resolutions were introduced also had a high level of significance in influencing national attitudes to the treatment of security and human rights. Human rights were notably absent from SCR 1373, thus failing to establish rights as a norm in the implementation of terrorism legislation at an early stage. Rights were mentioned for the first time in SCR 1456<sup>90</sup>, which stated that “States must ensure that any measures taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, and in particular international human rights, refugee, and humanitarian law.” This clearly makes it the job of states rather than the Security Council to ensure human rights compliance, a fact which was confirmed when the CTC stated that it was “mandated to monitor the implementation of resolution 1373 (2001). Monitoring performance against other international conventions, including human rights law, is outside the scope of the Counter-Terrorism Committee’s mandate.”<sup>91</sup> This attitude has since changed. SCR 1535<sup>92</sup> established a CTC Executive Directorate, to which a human rights expert was appointed.<sup>93</sup> The lag in bringing in human rights law to the situation may account for the way in which many laws have been implemented, but changing perspectives on human rights reveal that this state of affairs is now being re-evaluated.

Of foremost relevance to freedom of expression is UNSCR 1624<sup>94</sup>, adopted on 14 September 2005, which condemns “in the strongest terms the incitement of terrorist acts” and repudiates “attempts at the justification or glorification (apologie) or terrorist acts that may incite further terrorist acts”, while simultaneously “recalling the right to freedom of expression reflected in Article 19 of the Universal Declaration of Human Rights adopted by the General Assembly in 1948 (“the Universal Declaration”), and recalling also the right to freedom of expression in Article 19 of the International Covenant on Civil and Political Rights adopted by the General Assembly in 1966 (“ICCPR”) and that any restrictions thereon shall only be such as are provided by law and are necessary on the grounds set out in paragraph 3 of Article 19 of the ICCPR”. The

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<sup>93</sup> SCCTC, Human Rights, supra note 91
<sup>94</sup> SC Resolution 1624, 14 September 2005, UN Doc S/RES/1624 (2005)
resolution further declares that states have “obligations under international law to counter incitement of terrorist acts motivated by extremism and intolerance and to prevent the subversion of educational, cultural and religious institutions by terrorists and their supports”[^95].

UNSCR 1624 was adopted two months after the 7/11 London bombings – further evidence of the reactionary attitude to passing legislation – and “was sponsored by the United Kingdom and defended by Prime Minister Tony Blair on the basis that ‘the root cause of terrorism was not a decision on foreign policy, however contentious, but was a doctrine of fanaticism’. Blair declared that terrorism had to be combated ‘by fighting not just their methods, but their motivation, their twisted reasoning, wretched excuses for terror’”[^96]. It is notable that the UN, which does not include motive in such definitions as it has (see above), does regulate speech. However, this may be in a large part due to the input of other countries, and in particular the UK which sponsored the resolution and not only includes motive as an aspect of its definition, but also has a tradition of speech regulation (see UK, below).

The UK also has obligations to the European Union (EU) and the EU has significant international influence. All 27 EU member states are members of the UN. Article 2 of Council Framework Decision of 13 June 2002[^97] on combating terrorism creates offences related to directing or participating in a terrorist group. Participation in a terrorist group is given a wide definition and includes supplying information or material resources and the funding of terrorist activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the terrorist group (Article 2(2)(b)). In response to concerns expressed by European Parliament and NGOs, the Council inserted into the preamble that nothing in the Framework Decision should be “interpreted as being intended to reduce or restrict fundamental rights or freedoms such as the right to strike, freedom of assembly, of association or of expression, including the right of everyone to form and to join trade unions with others for the protection of his or her interests and the related right to demonstrate.”

[^95]: S.C. Res 1624, supra note 94
[^96]: Roach, “Sources and Trends”, supra note 74 at 245
[^97]: Framework Decision 2002, supra note 69
Council Framework Decision 2008/919/JHA\(^98\) of 28 November 2008 amends this framework decision, noting in paragraph 8 that the “United Nations Security Council Resolution 1624 (2005) calls upon States to take measures that are necessary and appropriate, and in accordance with their obligations under international law, to prohibit by law incitement to commit terrorist act or acts and to prevent such conduct. The report of the Secretary-General of the United Nations ‘Uniting against terrorism: recommendations for a global counter-terrorism strategy’ of 27 April 2006, interprets the above-mentioned Resolution as providing for a basis for the criminalisation of incitement to terrorist acts and recruitment, including through the Internet.” The Decision creates new offences including “public provocation to commit a terrorist offence” (Article 3) which is defined as “the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of one of the offences listed in Article 1(1)(a) to (h), where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed) and “recruitment for terrorism”, defined as “soliciting another person to commit one of the offences listed in Article 1(1)(a) to (h), or in Article 2(2))”.

Prior to this, the Council of Europe Convention on the Prevention of Terrorism (2005)\(^99\) had also created an offence of "public provocation to commit a terrorist offence" (Article 5), defined as “the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed.” The United Nations Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism expressed “his view that article 5 of the Council of Europe Convention on the Prevention of Terrorism represents a best practice in defining the proscription of the incitement to terrorism.” In doing so, he highlighted the distinction between expressions that have some empirical link to an offence, and those which are confined only to thought. He stated that “the three elements of the offence under article 5 are properly confined to: an act of communication; a subjective intention on the part of the person to


incite terrorism; and an additional objective danger that the person’s conduct will incite terrorism. The latter objective requirement separates the incitement to terrorism from more vague notions such as “glorification” of terrorism.”\textsuperscript{100} The EU inclination towards militant democracy insofar as it proscribes incitement to terrorism may also be an influence on the UK Australia. However, while the EU is engaging with the concept of militant democracy, insofar as it is proscribing terrorist speech, by limiting the crime to one of incitement, it is in fact not advancing beyond the pre-existing provisions of the criminal law.

The international regulatory framework is extremely broad in scope, and has directly influenced national legislation. The international community has adopted a “consistent normative approach” that “focuses on laying down rules geared towards the effective punishment by national jurisdictions of the individuals responsible for the proscribed activities.”\textsuperscript{101} It creates foundations for national legislation, but, as in the case of the conspicuously absent UN definition of terrorism, it leaves the implementation entirely at the discretion of the individual state.

\textsuperscript{100} Martin Scheinin, \textit{Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism}, UN Doc. A/HRC/4/26, 14 December 2006
\textsuperscript{101} Bianchi, “Achievements and Prospects”, \textit{supra} note 80 at 498
Chapter 3
The United Kingdom

Human Rights Protection through the Human Rights Act 1998

The United Kingdom does not have an entrenched charter of rights. Instead, rights delineated by the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR) are enforced under the Human Rights Act 1998 (HRA). This statutory bill of rights does not enjoy superior constitutional status, having, in theory, the same status as all other legislation. With barely more than a decade of use, the HRA is not ingrained in the consciousness of the UK in the same way that rights instruments have become a part of the national identity in other countries. The Act seeks to provide a guarantee of rights protection while undermining to the least extent possible the Parliamentary Sovereignty so fundamental to the UK. It therefore achieves a “crafty balancing trick… [which guarantees] (so far as any paper assurances can be said to guarantee anything at all) the protection of these potentially exposed persons and groups within a community that remains nevertheless for constitutional purposes both homogenous and organized on the republican principle of self-government”.

Under the HRA, courts must read and give effect to all legislation, both primary and subordinate, in a way that is compatible with human rights, insofar as this is possible (s.3 HRA). In seeking to interpret statutory provisions in accordance with the ECHR, courts “must take into account” Strasbourg jurisprudence under s.2. In effect, this means that Strasbourg jurisprudence is not binding, but it has been consistently followed in UK courts.

103 Human Rights Act (U.K.) 1998, c. 42
104 Conor Gearty, Civil Liberties (Oxford; New York: Oxford University Press, 2007) at 24
The scope of interpretation is broad. In *R. v. A.*\textsuperscript{106} the House of Lords read words into the legislation in order to render it compatible with the ECHR, stating that “it will sometimes be necessary to adopt an interpretation which linguistically will appear strained. The techniques to be used will not only involve the reading down of express language in a statute but also the implication of provisions.”\textsuperscript{107} However, in *re W. and B.*, the House of Lords reversed a radical re-interpretation of the *Children Act 1989*\textsuperscript{108} by the Court of Appeal, stating that “a meaning which departs substantially from a fundamental feature of an Act of Parliament is likely to have crossed the boundary between interpretation and amendment.”\textsuperscript{109}

The leading case on s.3, *Ghaidan v. Godin-Mendoza*, reconciled the two approaches holding that:

Section 3 enables language to be interpreted restrictively or expansively. But section 3 goes further than this. It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant...Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve.\textsuperscript{110}

The broad reach of the interpretative power has led Helen Fenwick to conclude that it has wider scope than s.33 of the *Canadian Charter of Rights and Freedoms*\textsuperscript{111} (the *Charter*), since “the UK is adhering domestically to an international human rights instrument which also binds it at the international level. The conclusion must be, then, that s.3 provides the judges with more power – in terms of adopting what is in essence a legislative role – than the notwithstanding clause used in Canada does.”\textsuperscript{112} Unlike the Canadian courts, whose powers generally have a negative application in striking down the flawed provisions, the UK courts will sometimes read words into them, in effect changing the essence of the statutes to fit the judges’ interpretation.

\textsuperscript{106} *R v. A* (Complainant’s Sexual History); [2002] 1 AC 45 (HL); [2001] 2 WLR 1546; [2001] 2 Cr App R 21
\textsuperscript{107} *Ibid.* at para 44
\textsuperscript{108} *Children Act 1989* (U.K.), 1989, c. 41
\textsuperscript{109} *Re W and B (Children) (Care Plan)* [2002] 2 WLR 720 at para 40
\textsuperscript{109} *Ghaidan v. Godin-Mendoza* [2003] 2 WLR 478; [2002] 4 All ER 1162; [2004] 2 AC 557 (HL) at paras 32-33
\textsuperscript{110} *Ghaidan*
\textsuperscript{112} Fenwick, *supra* note 42 at 190
However, there are limits to the extent to which judges can utilise this power, and if the meaning of the statute is so clear as to make interpretation impossible, then the court may make a declaration of incompatibility under s.4. However, the House of Lords has made it clear that a declaration of incompatibility is a last resort only\(^\text{113}\), and only certain courts may make such a declaration\(^\text{114}\). Further, the courts do not have the power to strike down legislation entirely, or to sever and strike out parts of it. A declaration “does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given” and is not binding on the parties to the proceedings in which it is made (s.4(6)). This is the essential difference between statutory bills of rights and entrenched ones, such as those in the USA and Canada.

While this appears to suggest that rights protection in the UK is not absolute, the system has the advantage of preserving parliamentary sovereignty and thus combining the legitimacy of representative government with the benefits of judicial review, in theory achieving the best of both the Australian and Canadian systems of protection (see chapters 4 and 5 on these states, below). Parliament has so far invariably acted on declarations, since, although amendment is not compulsory, formal declarations of compatibility inevitably “place pressure on Parliament to amend the legislation. It has been said that this mechanism establishes a dialogue between the judiciary, Parliament and the executive about the scope and nature of human rights and that the tripartite structure creates a space for the public also to participate in the debate about rights\(^\text{115}\). Further, if Parliament did not act on a declaration of incompatibility, the person could then take the case to the European Court of Human Rights (ECtHR) in Strasbourg, and if they were successful, the UK would be treaty-bound to compensate the victims and to put the matter to right. This creates a dual layer of protections.

\(^{113}\) See \emph{Ghaidan}, \textit{supra} note 110 at 50
\(^{114}\) See s4(5) – these courts include the House of Lords, the Judicial Committee of the Privy Council, the Courts-Martial Appeal Court; in Scotland, the High Court of Justiciary sitting otherwise than a trial court, or the Court of Session; in England and Wales or Northern Ireland, the High Court or the Court of Appeal
\(^{115}\) Hilary Charlesworth, \emph{Writing in Rights} (Sydney, NSW: University of New South Wales Press Ltd 2002) at 69-70
Articles 9 – 11 of the HRA set out the right to freedom of thought, conscience and religion (Art. 9), freedom of expression including the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers (Art. 10), and freedom of peaceful assembly and to freedom of association with others (Art. 11).

The scope of Art. 10 is wide. It protects “not only ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society’”.

Similarly, “the range of conduct protected by Article 11 is wide and includes the right to choose whether or not to form and join associations and the right to freely establish an association’s organisational structure.”

There is a close nexus between the two rights and “the court has consistently invoked the basic principles governing freedom of expression in dealing with complaints under Article 11.”

All these rights are subject to limitations within the Articles that delineate the rights and also express limitations. The rights contain “common limitation clauses”. These are set out in section 2 of each article and phrased in similar terms, stating that the rights may only be subject to such limitations as are “prescribed by law” and “necessary in a democratic society”, and in

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116 “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, worship, teaching, practice and observance.”

117 “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.”

118 “Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.”

119 Handyside v. UK (5493/72) [1976] ECHR 5 (7 December 1976) at 49 [Handyside]

120 Scottiaux, Terrorism, supra note 14 at 154

121 Ibid. at 155


pursuance of one of a series of legitimate aims. The phrase “necessary in a democratic society” has been interpreted as meaning “that an interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued”. The ECtHR has also occasionally used a least restrictive means analysis to assess the proportionality of measures. The ECtHR generally applies a wide “margin of appreciation” when interpreting these rights. In particular, the Court has held that political speech is the foundation of a democratic society, and should be stringently protected since “[t]he free exchange of information and ideas on matters relevant to the organisation of the economic, social and political life of the country is crucial to any democracy. Without this, it can scarcely be called a democracy at all”. Article 10 also has an implicit limitation in the qualification of the word “assembly” by the word “peaceful”. The express limitations are enumerated in the general limitation clauses in Articles 15 to 17, which permit restrictions on rights during “public emergencies threatening the life of the nation” (Article 15), on the political activity of aliens (Article 16) and on activities subversive of Convention rights (Article 17). No express reservations have been made by the UK in relation to the legislation considered.

The first notable piece of anti-terrorism legislation was passed in Britain in 1939 in response to the resurgence in Irish Republican Army activity. Coping with terrorist activity is long ingrained in the British consciousness. Since then, numerous pieces of legislation have been enacted. Before 9/11, the UK already had a comprehensive scheme with Terrorism Act 2000 (TA 2000). The TA 2000 was a result of Irish, not Islamist, extremism and it was passed because the problem of Irish Republican Army linked subversive violence was coming to an end. It began as an attempt to consolidate existing legislation. Taking advantage of the fact that “Britain was

124 The “interest of national security” is included amongst the legitimate aims for all three articles.
126 See e.g. Campbell v. UK judgment of 25 March 1992, A 233, paras 52 ff
127 “By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion… on the ‘necessity’ of a ‘restriction’ or ‘penalty’… Consequently, Article 10 §2 leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator… and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force.” Handyside, supra note 119 at 48-49
128 Campbell v. MGN Limited [2004] UKHL 22 at 148-149 per Baroness Hale
129 “Nothing in this Convention may be interpreted as implying for any state, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.”
experiencing less domestic terrorism than it had in decades, the Labour government (which had also engineered the passage of the Human Rights Act) attempted to codify Britain’s myriad of crisscrossing and conflicting anti-terrorism statutes into one code that would meet human rights standards.”130 The TA 2000 has been amended and supplemented by the Anti-terrorism Crime and Security Act 2001131, the main legislative response to September 11, the Prevention of Terrorism Act 2005 and the Terrorism Act 2006 (TA 2006).

The Anti-terrorism Crime and Security Act 2001 was passed with overwhelming backing in Parliament and with just sixteen hours of debate – only 86 of the 135 clauses of the bill were debated in the House of Commons132. The House of Lords did impose some changes, including deletion of the proposed amendment of the Public Order Act 1986133 to create an offence of incitement to religious or racial hatred. The speed of enactment as a response to a major terrorist event further exemplifies the pattern of rushed legislative response to 9/11. The offences barred by the House of Lords were later enacted in the Racial and Religious Hatred Act 2006134 (RHA), the Labour Government’s third, successful, attempt to move the offences through Parliament.

Freedom of Association

The TA 2000 created offences that curtailed a person’s right to freedom of association. The most significant of these relate to the proscription of terrorist organisations. The power to list groups is exercised under s.3(3) by the Secretary of State, who may by order add or remove organisations or amend the schedule of proscribed organisations. The Secretary of State may exercise this power “only if he believes that it is concerned in terrorism” (s.3(4)). This low standard also relates back to the broad definition of terrorism itself, discussed above, to create a power to list organisations which could conceivably include “organisations which are fighting against undemocratic and oppressive regimes and, in particular, those which have engaged in lawful armed conflict in the exercise of the internationally recognised right to self-determination

133 Public Order Act 1986, (U.K.) 1986, c. 64
of peoples.”135 Under s.123(4), proscription must be approved by a resolution of each House of Parliament.

An application for deproscription may be made under s.4 by the organisation or any person affected by the organisation’s proscription, and appealed to the Proscribed Organisations Appeal Commission (POAC) under s.5. The Commission will consider the appeal “in the light of the principles applicable on an application for judicial review”. The constitution and procedure of POAC are laid down in the *Proscribed Organisations Appeal Commission (Procedure) Rules 2001*136, under Para. 5 of Schedule 3 of the TA 2000. This paragraph gives the Lord Chancellor the power to make rules regulating the exercise of the right of appeal to the commission, prescribing practice and procedure to be followed, providing for proceedings to be determined without an oral hearing, making provision about evidence, including provision about the burden of proof and admissibility of evidence, and making provision about proof of the Commission’s decisions. In particular, the rules may provide for full particulars of the reasons for the decision to be withheld, and enable the Commission to exclude persons, including legal representatives, from all or part of the proceedings. Judicial review can be sought of POAC decisions and a further appeal may be brought to the Court of Appeal, but only on a question of law, and such an appeal may only be brought with the permission of the Commission or the Court of Appeal.

Under s.11(1) TA, a person commits an offence if s/he belongs or professes to belong to a proscribed organisation. There is no requirement of any intention to commit a terrorist act or otherwise contribute to terrorist activities. A person violates s.11 through mere association with a listed group, even without lending support to its terrorist activities. The offence is broad enough to cover persons who join organisations abroad in a country where they are not proscribed and then enter the UK137. This would be the case even if they were ignorant of the fact that the organisation was proscribed in this country. It is a defence to show that the organisation was not proscribed when the person joined it and the person “has not taken part in the activities of the organisation at any time while it was proscribed”. This effectively imposes a

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135 *R (on the application of the Kurdistan Workers’ Party and Others) v. Secretary of State for the Home Dept* [2002] EWHC Admin 644 at 47 [*Kurdistan Workers’ Party and Others*]
reverse burden of proof on the defendant, although the courts have engaged in the “reading down” under s.3 HRA of legal burdens to evidential ones. The defendant would now have to adduce sufficient evidence to justify a finding that he has not taken part in the activities of the organisation, and the burden then passes to the prosecution to disprove this beyond reasonable doubt. Under s.12 it is an offence to invite support for a proscribed organisation that is not restricted to the provision of money or other property (fund-raising is a separate offence under s.15); to manage or assist in arranging a meeting to support a proscribed organisation or to further the activities of a proscribed organisation or to be addressed by a person who belongs or professes to belong to a proscribed organisation; to address a meeting to encourage support for a proscribed organisation or to further its activities. The offences are very broad and even if “the point of addressing a meeting… may have been to advance the goals of the organisation without, necessarily, endorsing the violent means that the organisation is associated with… such an address could be an offence under section 12.”

Under s.13, a person commits an offence if he wears clothing, or wears carries or displays an article, in a public place in such a way as to arouse suspicion that he is a member or supporter of a listed organisation, even if the person is not a member of the organisation.

From the European perspective, an EU Framework Decision obliges member states to legislate against the “intentional” act of “participating in the activities of a terrorist group… with knowledge of the fact that such participation will contribute to the criminal activities of that group.” The likely approach of the European Court of Human Rights (ECtHR) to such membership offences is laid out in Refah Partisi. In this case, a political party was dissolved “on the grounds that it was a ‘centre’ (mihrak) of activities contrary to the principles of secularism.” The Court upheld the dissolution of the party, holding that its plans “were incompatible with the concept of a ‘democratic society’ and that the real opportunities Refah had

139 Howard Davis, Human Rights and Civil Liberties (Cullompton, Devon, UK; Portland, OR.: Willan Publishing, 2003)
140 Framework Decision 2002, supra note 69, Art. 2(2)(b)
141 Refah Partisi (The Welfare Party) and others v. Turkey (application nos. 41340/98, 41342/98, 41343/98, and 41344/98) [Refah Partisi]. For a contrasting case, see Sidiropoulos v Greece (57/1997/841/1047) 10 July 1998
142 Refah Partisi, ibid., at 11.
to put them into practice made the danger to democracy more tangible and more immediate."143.

The Court formulated the following test to determine whether interference with an association meets a pressing social need: “(i) whether there was plausible evidence that the risk to democracy, supposing it had been proved to exist, was sufficiently imminent; (ii) whether the acts and speeches of the leaders and members of the political party concerned were imputable to the party as a whole; and (iii) whether the acts and speeches imputable to the political party formed a whole which gave a clear picture of a model of society conceived and advocated by the party which was incompatible with the concept of a ‘democratic society’”144. A democratic society is a pluralist society based on the principles of the convention in which “the people should be given a role. Only institutions created by and for the people may be vested with the powers and authority of the State; statute law must be interpreted and applied by an independent judicial power. There can be no democracy where the people of a state, even by a majority decision, waive their legislative and judicial powers in favour of an entity which is not responsible to the people it governs.”145

This jurisprudence suggests that the ECtHR might find the UK measures acceptable, so long as they are appropriately used. Although the case related to the dissolution of a political party, rather than a criminal offence relating to membership in a terrorist organisation, “a court that was willing to accept the banning of a political party because it was committed to the implementation of sharia or is aimed at the destruction of democracy would most likely uphold offences related to membership in a terrorist group”146. While imprisonment is a more severe penalty than dissolution of an organisation, terrorist offences are serious offences, and if control of associations relating to political parties can be considered “necessary in a democratic society”, control of associations relating to terrorist organisations is equally necessary.

The approach of the Strasbourg Court is flexible. Rather than engaging broadly with the laws themselves, it examines the facts of each case on an individual basis, and gains a further margin

143 Press release issued by the Registrar 085 of 13.2.2003 on Grand Chamber Judgment In The Case Of Refah Partisi (The Welfare Party) and Others V. Turkey
144 Refah Partisi, supra note 141 at 104
145 Ibid. at 43
of adaptability to new situations from the fact that precedent does not bind it in the same way as a common law court. The ECtHR therefore has wide discretion as to what factors it considers and:

[It] engages in a multifaceted inquiry, pertaining to any or all of the following issues: whether the organisation’s objectives and (proposed) methods of political action are compatible with the concept of a democratic society; whether written or oral statements emanating form the organisation can be read as incitement to violence; and whether there is plausible evidence that the organisation poses a ‘sufficiently imminent’ risk to the democratic system[^147].

Should the laws be put to inappropriate use, for example proscribing an organisation engaged in a just cause against an undemocratic regime, it is likely that the proscription would not survive a challenge in the European Court. However, a challenge to the laws themselves, which are capable of proportionate use, would be likely to fail.

Domestically, in the case of *Sheldrake v. DPP[^148]*, the House of Lords held the membership offence to be human rights compliant. Although the court acknowledged certain problems, including the breadth of the offence, it nonetheless found the legislation acceptable. Lord Bingham of Cornhill identified the overbreadth problem, stating that taking s.11(1) in isolation “some of those liable to be convicted and punished for belonging to a proscribed organization may be guilty of no conduct which could reasonably be regarded as blameworthy or such as should properly attract criminal sanctions.”[^149] The word profess was also condemned as being “so uncertain that some of those liable to be convicted and punished for professing to belong to a proscribed organization may be guilty of no conduct which could reasonably be regarded as blameworthy or such as should properly attract criminal sanctions.”[^150] There is also a possibility that a defendant may be convicted for joining the organization after its proscription, but committing no criminal conduct. However, the defence under s.11(2), of joining the organization while it was not proscribed and not having taken part in any of its activities since proscription, was found to be sufficient to negate these problems of overbreadth, despite the reverse burden it imposes.

[^147]: Scottiaux, *Terrorism*, supra note 14 at 182
[^148]: *Sheldrake*, supra note 138
[^149]: Ibid. at 47
[^150]: Ibid. 138 at 48
The Court held that there is “no doubt that subss. (1) and (2) are directed to a legitimate end: deterring people from becoming members and taking part in the activities of proscribed terrorist organisations.” It then undertook a proportionality analysis of the section, finding that:

s.11(1) does, I think, interfere with exercise of the right of free expression guaranteed by Art.10 of the Convention. But such interference may be justified if it satisfies various conditions. First, it must be directed to a legitimate end. Such ends include the interests of national security, public safety and the prevention of disorder or crime. Section 11(1) is directed to those ends. Secondly, the interference must be prescribed by law. That requirement is met, despite my present doubt as to the meaning of "profess". Thirdly, it must be necessary in a democratic society and proportionate. The necessity of attacking terrorist organisations is in my view clear.

The Court states, correctly, that terrorist organisations must be dealt with. However, there is little engagement with whether the measures themselves are proportionate – indeed, the court simply restates the legitimate aim of the laws. There is no analysis of whether the measures are “rationally connected with preventing terrorism”. The judgment is brief, and in addressing the necessity of the measures, the question of whether they may exceed the requirements is not considered.

The Proscribed Organisations Appeal Commission has made one decision overturning the proscription of an organisation, namely the People’s Mojahadeen Organisation of Iran (PMOI). Although the Commission is theoretically limited to the mostly procedural grounds of judicial review, it did, in effect, engage with the merits of the decision, stating:

[T]here is no evidence that the PMOI has at any time since 2003 sought to re-create any form of structure that was capable of carrying out or supporting terrorist acts. There is no evidence of any attempt to “prepare” for terrorism. There is no evidence of any encouragement to others to commit acts of terrorism. Nor is there any material that affords any grounds for a belief that the PMOI was “otherwise concerned in terrorism” at the time of the decision.

The proscription was therefore overturned on the grounds of unreasonableness. Despite this, when considering the proportionality of the laws themselves, the Commission held that

151 Sheldrake, supra note 138 at 50
152 Ibid. at 54
“[r]estrictions which prevent a person supporting an organisation that is concerned in terrorism while, as in the present case, leaving the individuals free to campaign for political change in another state (here, Iran) by peaceful and democratic means, are in our view clearly proportionate and lawful. The fault was in the application of the legislation rather than the legislation itself.

**Freedom of Expression**

As with freedom of association, offences under the UK anti-terrorism legislation have clear implications for freedom of expression. Under the TA 2000 there are a wide range of such offences, including offences that impact on freedom of information. Freedom of information is an essential aspect of freedom of expression, since the underlying purpose of protecting expression will not be fulfilled unless information is protected too. Worthwhile expression must be fully informed: “Implicit in freedom of expression is the public’s right to open access to information and to know what governments are doing on their behalf, without which truth would languish and people’s participation in government would remain fragmented”.

Information related offences include s.19, which makes it an offence to fail to inform the police of a suspicion that a person has committed one of the offences relating to terrorist property in part III of that act (there is an exception for legal privilege); s.39 creates an offence of disclosing to another that a terrorist investigation is taking place if to do so would be likely to prejudice the investigation or create an interference with material likely to be relevant to the investigation; s.58 makes the collecting or recording of information useful to terrorists, or possessing a document or record with such information on it, an offence. These offences do not require any knowledge of the terrorist element of the incident and could clearly have an inhibiting effect upon journalists,

155 *People’s Mohahadeen Organisation of Iran*, supra note 154 at 355.4.

See also *Kurdistan Workers’ Party*, supra note 135; *People’s Mohahadeen Organisation of Iran*, supra note 154; R (on the application of Ahmed) v Secretary of State for the Home Dept [2002] EWHC Admin 644. This case raised issues highlighting the flawed nature of the proscription scheme. The applicants attempted to circumvent POAC procedure by seeking judicial review instead. Inter alia they sought a declaration that the relevant provisions of TA 2000 were incompatible with their convention rights due to substantial interference with right to freedom of association, freedom of expression and the enjoyment of property. The application failed on procedural grounds.

and may also have implications for academic research, despite the defence of “reasonable excuse”.

S.59(1) of the 2000 Act creates an offence inciting terrorism abroad. A person commits an offence if he incites another person to commit an act of terrorism wholly or partly outside the United Kingdom, and the act would, if committed in England and Wales, constitute a terrorist offence under s.59(2). The RHA 2006 amends the Public Order Act 1986 to create offences relating to religious hatred. Under s.29B a “person who uses threatening words or behaviour, or displays any written material which is threatening, is guilty of an offence if he intends thereby to stir up religious hatred”\(^{157}\). The requirement of intention removes the possibility of negligently abusive or insulting language being captured under the definition. British Muslims have been supporters of the Act, while leaders of major religions and race groups, as well as non-religious groups such as the National Secular Society and English PEN have spoken out against it. Connor Gearty sees the law as a proportionate response:

> In recent discussions about the enactment of an incitement to religious hatred law in the United Kingdom, great anxiety has been expressed about the stifling effect on free speech of such a provision. But the law proposed to and ultimately accepted in a modified form by Parliament contained its own safeguard in that prosecutions could not be launched other than by the relevant public authority. Even if the law had been passed in its original form there would have been no outburst of legal vigilantism. Nor would there have been any open season on comedians, writers and the like: the words ‘incitement’ and ‘hatred’ do far more controlling work than critics have allowed, transforming the provision not only in its enacted but also in its original form into one that is protective of the human rights ideal.\(^{158}\)

Gearty’s expression of trust in the fact that the law would have been used appropriately even in its original form places a tremendous amount of faith in the executive. While there is no evidence of abuse of such laws to show that such faith is misplaced, balanced laws as well as executive discretion are necessary. Nonetheless, the strict \textit{mens rea} requirement does place a limitation on the law’s application.

The offences which have the most extreme impact on freedom of expression are to be found under the \textit{Terrorism Act 2006} (TA 2006) chapter 11 s.1-3. They include encouragement of terrorism (s.1), which a person commits by publishing a statement by which is likely to be

\(^{157}\) S.29B \textit{Public Order Act 1986}, (U.K.) 1986, c. 64

\(^{158}\) Gearty, \textit{Human Rights}, supra note 34 at144-5
understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism and by which he intends members of the public to be directly or indirectly encouraged or otherwise induced by the statement to commit, prepare or instigate acts of terrorism or is reckless as to whether it will have such effect. Statements which are likely to be so understood include ones that glorify the commission or preparation of terrorist offences, and from which the public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by them in existing circumstances and it is irrelevant whether any person is in fact encouraged or induced by the statement. Under s.2 it is an offence to distribute or circulate a terrorist publication, to give sell or lend such a publication or to offer it for sale or loan, to provide a service to others to enable them to have access to such a publication, to transmit a publication electronically or to possess a publication intending it to become subject to such conduct. In order to commit an offence, it is necessary to have the requisite intention or recklessness of intending to directly or indirectly encourage or induce the commission, preparation or instigation of terrorism or to provide assistance in such acts. Section 3 deals with the application of offences under s.1 and s.2 to internet activity.

The legislation was intended to attack terrorist behaviour at a stage before it could be prosecuted as an inchoate offence – to attack terrorism as an idea before it could become action:

[T]he July events indicate that there are people in this country who are susceptible to the preaching… of an argument or a message that terrorism is a worthy thing, a thing to be admired, a thing to be celebrated and then act on the basis of that… What this bill is about is trying to make that more difficult, that transition from people encouraging, glorifying to then an act being undertaken. ¹⁵⁹

The significant problems of trying to legislate against expression were highlighted by parliamentary debates. It is notable that many of the problems arose not from the concept of prohibiting speech, but from the definition of terrorism itself, a particular issue with speech associated with terrorism. During the debates surrounding the passing of the legislation, Dominic Grieve suggested the example of Bosnians at the time of the first Yugoslav war and exclaimed that “[a]s the clause stands, it is likely to cover the glorification of Robin Hood”¹⁶⁰,

while Alan Simpson offered the example of Burma – “Do we wish to make it a terrorist offence actively to speak about events in that country, and to encourage the resistance movement in such countries to pursue regime change?” – and also pointed out the dangers of the legislation:

The far-reaching consequences of the Bill in its current form are so draconian as to provide legislation that could virtually have been drafted for us by al-Qaeda. If we want to see acts that destroy the framework of liberties, confidence in democracy, accountability to the judiciary and rights of representation, they are to be found enshrined in much of the panic legislation that has been pushed through this House as an extension of the war in Iraq in the form of a war on our own liberties. We are doing what al-Qaeda sought to do by other means, and society will not thank us for it.

The alternatives were also considered, including incitement and condemnation by society at large: “What we as a country need to do is expose those people who glorify terrorism.”

Despite the fact that the rights implications were discussed and highlighted, the dangers exposed, and the alternatives proposed, by the time the bill reached its third reading in the House of Commons it was “the will of the House” that there should be an offence of encouragement of terrorism and:

[I]t needs to be framed in the way in which the House has now agreed. In line with our manifesto commitment, it needs to encompass the glorification of terrorism, and I am glad that the House explicitly endorsed that again yesterday. There is no reason why people should be allowed to glorify the terrorist acts of others in such a way as to encourage others to prepare and commit acts of terrorism.

There was very little further debate surrounding the glorification clause, although problems with the definition of terrorism and whether it was appropriate to have a glorification offence that could be committed recklessly were highlighted. Members of the House of Lords agreed that the legislation was a well-directed measure. Pre-existing legislation did not make it an offence “to incite people to engage in terrorist activities generally, or to incite them obliquely by creating the climate in which they may come to believe that terrorist acts are acceptable. That is the gap

161 Ibid., col. 853
162 Ibid., col. 854
163 Ibid., col. 855
164 UK, H.C., Parliamentary Debates, vol.439, No. 63, col. 492 (10 Nov 2005) (The Secretary of State for the Home Department, Mr. Charles Clarke)
165 Ibid. (Mr. Charles Clarke)
166 Ibid., col. 501
that we want to close, both to enable us to fulfil our international obligations and because we
believe that it is desirable in its own right”. However, the Parliamentary debate did not
generate a full and proper proportionality analysis, such as would be conducted by a court.

The legislation does not attack particular terrorist crimes or even preparation, but the idea of
terrorism itself, and, since terrorism is itself a poorly defined idea the legislation is broad and
uncertain, especially when taken in combination with s.1 TA 2000. S1 does not in and of itself
create an offence. It is a definition of terrorism. In contrast to an offence of incitement, which is
always linked to a criminal act, the TA 2006 “creates an offence of encouraging behaviour that is
not, strictly speaking, an offence known to law. Furthermore, it describes that behaviour in
broad unspecific ways that scarcely accord with the methodology employed in defining criminal
offences.” Since the methodology is so uncertain, the application of the legislation will
depend to a certain extent on the construction of language. The line between glorification on the
one hand, or rationalization and sympathy on the other, is a fine one which will depend entirely
on context and subjective construction “and there will be enormous scope for disagreement
between reasonable people as to whether a particular comment is merely an explanation or an
expression of understanding or goes further…”

The motivation for enacting such legislation is clear. Terrorism finds its first battlefield not in
physical actions but in the minds of those who are willing, eventually, to die for it. Mr. Clarke,
Home Secretary, summarised the reasons for committing to s.1-3 of the TA 2006:

The reason we made a manifesto commitment and why we think glorification should be dealt
with as I propose is that people who glorify terrorism help to create a climate in which
terrorism is regarded as somehow acceptable… all too many people may be influenced by
those who glorify terrorism and conclude that they have a duty to kill and injure innocent
bystanders in the misguided belief that they are bound to do so by their faith.

There is a proviso on the right to freedom of expression and the associated rights to hold
opinions and to receive and impart ideas, as framed by the ECHR. The articles state that the

167 U.K., H.L. Parliamentary Debates, vol. 676, col. 455 (December 5, 2005), (Baroness Scotland)
441 at 447 [Hunt]
561-I), at 27 – 28
exercise of these freedoms “carries with it duties and responsibilities.”\footnote{171} This reflects the fact that unlike many other freedoms these constitute negative liberties. Rather than avoidance of something being done to an individual (torture, imprisonment etc.), the individual exercising the freedom is being permitted to do an act and must do so conscientiously. However, while it is arguable that laws that interfere with the right to freedom of expression are necessary in order to ensure the freedoms are used wisely, such laws must also be proportionate. In the terms of the ECHR, freedom of thought, conscience and religion, freedom of expression, and freedom of peaceful assembly and association must be subject “only to such limitations as are prescribed by law and are necessary in a democratic society …”\footnote{172}.

The law has been certified as compatible with the HRA by Home Secretary Charles Clarke, and Lord Carlile, the independent reviewer appointed by the government to review anti-terrorism law, has concluded that the restrictions on freedom of expression in the 2006 Act are proportionate and Human Rights compatible\footnote{173} – they are “a proportionate response to the real and present danger of young radically minded people being persuaded towards terrorism by apparently authoritative tracts wrapped in a religious or quasi-religious context.”\footnote{174} Lord Carlile agreed that “mere preaching and glorification should not be capable of being regarded as terrorist offences… However, amendments made to the 2006 Act during its passage through Parliament need to be read carefully: they do not criminalise mere preaching and glorification, as subsections 2 and 3 illustrate.”\footnote{175} Kent Roach has argued Lord Carlile’s finding of proportionality “is flawed in its assumption that the criminalization of speech that glorifies terrorism is rationally connected with the legitimate and important objective of preventing terrorism… [Lord Carlile] ignores the possibility that prosecuting those who praise acts of terrorism could result in greater attention and sympathy for their cause… the encouragement offense will catch impassioned political and religious speech that may praise terrorism, but gets

\footnote{171 Supra note 32 Art. 10} \footnote{172 ECHR, supra note 91 Articles 9-11} \footnote{173 Lord Carlile of Berriew, Q.C., Report On The Operation in 2007 Of The Terrorism Act 2000 and of Part I of The Terrorism Act 2006 (23 June 2008)} \footnote{174 Lord Carlile of Berriew, Q.C., Report on the Proposals for Changing the Laws Against Terrorism ¶ 23 (Oct. 12, 2005)} \footnote{175 Carlile, Definition, supra note 39 at para 72}
nowhere near the details about how to commit it.” Lord Carlile’s conclusion that “mere preaching and glorification” will not be criminalised is also flawed. If someone glorifies terrorism then the audience are likely to understand such glorification as encouragement to commit a terrorist act. Further, when glorifying terrorism there is likely to be some element of recklessness as to encouragement. Someone who merely preaches or glorifies terrorism will therefore fall foul of the offence.

It is empirically difficult to assess whether laws that target speech can have any real impact in preventing terrorism. They may have some impact in reducing the amount of terrorist propaganda, and it is possible that the use of these laws to target the speech or expressions of terrorist figureheads may reduce the dissemination of terrorist dogma. However, there are alternatives such as the provisions of the Public Order Act 1986, which attack hate speech with more minimal encroachment on freedom of expression. In the case of R. v. El-Faisal, the Court of Appeal upheld the convictions of a Minister of Islam for soliciting murder under s.4 Offences Against the Person Act 1861 and incitement to racial hatred under The Public Order Act for the making of audiotapes urging Muslims to fight and kill Jews, Christians, Americans, Hindus and other unbelievers. The most notable case involving a conviction for speech advocating terrorism is that of Abu Hamza al-Masri. Hamza was sentenced to seven years imprisonment on charges of soliciting murder and inciting racial hatred following various speeches at the Finsbury Park Mosque. At the time, the provisions of the TA 06 would not have been available. Even if they had been, they would not have formed a preferable approach. They do not carry heightened sentencing powers and the Public Order Act, as the case demonstrates, is a viable and less restrictive alternative.

A number of terrorists, including Richard Reid, the attempted shoe bomber, Zacarias Moussaoui, and two of the 7 July London bombers listened to Hamza’s speeches. However, a causal effect, as the judge acknowledged, is difficult, if not impossible, to prove. It is equally possible that they were there because they had already formed a terrorist mindset, rather than the speech having

176 Roach, “Must we Trade Rights”, supra note 153 at 2182
177 Public Order Act 1986, (U.K.) 1986, c. 64
179 Offences Against the Person Act 1861 (U.K.) 1861, c. 100
any contributory effect on their later offences. Kent Roach highlights another example – that of Ajaib Singh, charged with and acquitted of conspiracy to bomb Air India, who made a speech that “could possibly qualify as direct or indirect encouragement of terrorism under the British Terrorism Act, 2006. At the same time, the trial judge found that such strong feelings were not uncommon in the Sikh community at the time and that the speech did not assist in proving whether Bagri conspired to blow up the Air India flight.”\(^{180}\) There was no evidence of an objective link between the expression and the terrorist act.

The government claimed that new laws were necessary over and above the pre-existing ones due to the fact that greater levels of generality were needed. Crimes under the Public Order Act require either intent to stir up racial hatred or the likelihood of this result, and lack of intent is a defence. There is therefore a very clear nexus between the offence and the possibility of damage. This is to be contrasted with the offence of encouragement under the TA 2006, where there is no need of likelihood that the audience be encouraged, only that they should understand there to be encouragement, and the offence can be committed recklessly as well as intentionally. It is also to be contrasted with offences involving incitement, which need the incitement to be attached to a specific criminal act, therefore requiring “a degree of explicitness, in terms of the speech constituting encouragement, and a degree of specificity in terms of the behaviour which was encouraged.”\(^{181}\) However, the effect of more generalized offences is that the laws in fact become less targeted to the problem they seek to address. The broader and more comprehensive the laws against speech become, the less likely they are to provide a proportionate response.

No United Kingdom cases involving challenges to the terrorism legislation under Article 10 have been considered in the European Court. However a series of Turkish cases offer some guidance as to possible reactions. Turkey has adopted various laws prohibiting expressions deemed harmful to national security in relation to their efforts to combat the Partiya Karkeren Kurdistan (PKK). In the European forum, the legislation has generally not itself been challenged as incompliant with Article 10. The challenges have related to prosecutorial decisions to use the legislation in unsuitable instances. The court, in finding a breach of Article 10, is looking at how

\(^{180}\) Roach, “Must we Trade Rights”, supra note 153 at 2209
\(^{181}\) Hunt, supra note 149 at 442
the legislation was applied in specific cases. Any breach is then found in the effect of the implementation of the legislation, rather than in the legislation itself.

In *Zana v. Turkey* an interference with the right to freedom of expression was found to be proportionate. Mr Zana was convicted of having “defended an act punishable by law as a serious crime” and sentenced to twelve months’ imprisonment after making the following remarks in an interview with journalists: “I support the PKK national liberation movement; on the other hand, I am not in favour of massacres. Anyone can make mistakes, and the PKK kill women and children by mistake.”182 The Court considered that the interference was prescribed by law and pursued the legitimate aims of national security interests and public safety, taking into account the sensitivity of the security situation. Despite the fact that the Court considered the statement ambiguous, it found the interference to have been within the bounds of democratic necessity considering the circumstances of the case and the publication of the statement in a major national newspaper at a time coincident with the murder of civilians by the PKK. The words were “likely to exacerbate an already explosive situation in that region”183. The Court explicitly referred to the margin of appreciation accorded to national authorities in such cases.

The contrasting case of *Incal v. Turkey* involved a conviction for “attempting to incite hatred and hostility through racist words” by the distribution of a leaflet referring to “state terror against Turkish and Kurdish proletarians” and calling on all “democratic patriots to assume their responsibilities and oppose the “special war being waged against the proletarian people” by setting up “neighbourhood committees based on the people’s own strength”184. However, in this case the court found a breach of Article 10 since the remarks could not “if read in context, be taken as incitement to the use of violence, hostility or hatred between citizens”185, distinguishing the case from the *Zana* judgment on the basis that Mr Incal was not responsible for the problems of terrorism in Turkey. The distinction between the two cases is subtle, however while Mr Zana was excusing killing “by mistake”, Mr Incal was advocating “committees” – an apparently

183 Ibid. at 60
185 Ibid. at 50
democratic means of response. The contrast illustrates the flexibility of the ECtHR when evaluating different approaches under similar legislative mechanisms.

The Court has made it clear that security problems can justify measures that interfere with Article 10 rights, where the measures are necessary and proportionate. A major factor in determining this is the context of the remarks in question. Thus a sociological interview with a scientist\(^{186}\), a historical book\(^{187}\), a literary work\(^{188}\) and poetry\(^{189}\) have been found to be mediums of expression where interference is not proportionate. The important aspects of the evaluation are context, the implication of the expression and its likely result, so that the examination “not only serves the purpose of discovering the true meaning of the words used, but is also aimed at assessing the probable impact of the expression.”\(^{190}\) Conversely, convictions for dissemination of propaganda against the indivisibility of the State and provoking enmity and hatred among the people, based on the publishing of letters identifying persons by name and amounting “to an appeal to bloody revenge by stirring up base emotions and hardening already embedded prejudices”\(^{191}\) were found to be proportionate.\(^{192}\)

The approach of the ECtHR is a sophisticated one, whereby the legislative measures themselves are accepted as a proportionate interference, however scrutiny is given to the manner in which they are applied. If the challenged expression amounts to a direct incitement to violence\(^{193}\) then the application of the measure in that instance is likely to be found reasonable. The decisions of the ECtHR “always depends on an appreciation of the nature of the words and context in which they were used… it leaves ample discretion to the courts to consider the circumstances of a case and balance the various interests involved.”\(^{194}\) It would therefore seem that in incitement and glorification cases, the Strasbourg Court is a forum in which the application of the measures may

\(^{187}\) Arslan v Turkey, no. 23462/94 (8 July 1999)
\(^{188}\) Polat v Turkey [GC] no. 23500/94 (8 July 1999) [Polat]
\(^{189}\) Karatas v Turkey, no. 23168/94 (8 July 1999)
\(^{190}\) Scottiaux, Terrorism, supra note 14 at 98
\(^{191}\) Surek v Turkey (No. 1) [GC], no. 26682/95 Reports 1999-IV, E.C.H.R. at 62
\(^{192}\) For a full discussion of the Turkish cases, see Scottiaux, Terrorism, supra note 14 at 90-96
\(^{193}\) See e.g. Ozturk v Turkey [GC], No. 22479/93 [1999] Reports 1999-IV, E.C.H.R. at para 66; Polat, supra note 188 at para 47
\(^{194}\) Scottiaux, Terrorism, supra note 14 at 100
be challenged more easily than the measures themselves. The degree to which any interference is found to be justified is likely to depend on the probable consequences of the expressions in question.

**UK Conclusion**

The approach manifested in the ECHR is very different to the rights protection in the other jurisdictions examined in this thesis. It has a flexible, balancing approach, rather than trying to protect rights absolutely:

> [F]our things stand out. First, we do not find it acceptable to draw a firm distinction between what can be done with British citizens on British soil and what can be done with everyone else. Second, the search throughout the European Convention is for a fair balance between the rights of the individual and the interests of the community … Third, the European Convention is a ‘living instrument’ which develops as common European standards develop… Fourth, in the search for that fair balance, all three organs of government – Government, Parliament and the Judiciary – are engaged in a constitutional dialogue.\(^{195}\)

One effect of having an extra-national rights instrument is, perhaps, that rather than considering rights something absolute, specific to the country and guaranteed by law, the UK considers rights as something applicable to everyone, whether domestic or foreign. In contrast to jurisdictions such as the U.S.A., there is no evidence of rights encroachments being unfairly weighted towards non-nationals. One example of this is the case of *A and Others (Belmarsh) v. Secretary of State for the Home Department*\(^{196}\), in which a harsh measure, namely the applicability of the indefinite detention power, that only applied to non-citizens suspected of terrorism was held by a majority of eight to one Law Lords not to be proportionate. There was no apparent justification for the singling out of non-nationals for harsh treatment and it was clear that British citizens were just as likely to be terrorism suspects. The ECHR and HRA require the government to apply rights to citizens and non-citizens equally, and seek to determine these rights based on a reasoning approach.

The effect is that rights are subject to greater erosion, because they are less absolutely guaranteed, but at the same time the HRA, with recourse to the European Court as a further layer

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of protection, seems sufficient to prevent miscarriages of justice in the application of the laws, if not in their creation, although the margin or appreciation doctrine may render protection at the European level weaker than in other jurisdictions where it is domestic law only. While still relatively new, when compared to rights protection in the USA and Canada, the HRA continues to inspire a great deal of hope and praise as demonstrating “that among the fundamental values that underpin the culture at the present moment are not only a determination to preserve civil liberties and political rights but also a commitment to human dignity and equality of respect for all.”

The UK experience indicates that laws directed at speech can be warranted when tackling a wrong of which the definitional and conceptual aspects extend beyond the physical and into the political and ideological. However, the inherent risk in this is that the laws will extend too far and will undermine the very democracy they seek to protect. The UK laws are excessively broad in their compass and therefore have great potential for misuse. The width of membership offences, and offences based on encouragement or glorification, is exacerbated by the broad definition of terrorism, since the definition determines the application of the powers. The result of such broad legislation is that it places excessive emphasis on prosecutorial discretion to ensure that it is only applied to “the most extremist groups. But given the lack of effective, independent control over the day-to-day decision making of such bodies, this is not, it is argued, a satisfactory position in civil liberties’ terms.”

On a reading of the legislation itself, independent of application or case law, these factors taken together create an impression that the UK is among the most illiberal of jurisdictions in its approach:

If the broad definitions and over-broad sanctions in UK Counter-terrorist law are taken at face value it can be argued that democratic ideals are being abandoned and that the legitimacy of the UK in terms of the values that it stands for is being undermined. So it is made less easy to place a vision of British values against that of the extremists in terms of winning over hearts and minds.

197 Gearty, Civil Liberties, supra note 91 at 28
198 Fenwick, supra note 42 at 1378
199 Fenwick, supra note 42 at 1334
The continuing danger is that legislation that is a disproportionate response will actually be counterproductive in effect and exacerbate the very danger that it seeks to address. While the law has a normative function in shaping behaviour and ideals, when it appears to be specifically aimed at limiting the democratic rights of one particular group, it can actually have the opposite effect to that intended and increase feelings of resentment.

Despite the flawed legislation, there has been a dearth of prosecutions under s.1 TA 2006, and no obvious instances of abuse:

One of the most striking aspects of these provisions is their under-use... [they] appear to be intended to have an effect that, to an extent, is more symbolic than actual. They are viewed by government as playing an important role in signalling this society’s rejection of the message of certain groups – to isolate and marginalise them, to deny them some legitimacy on the basis that they have refused to use democratic methods, resorting instead to the anti-democratic course of creating terror by using violence targeted at civilians.”

It is symptomatic of responses to terrorism that they seek to use a symbolic approach to an ideological problem. However, this does not equate to the excessive faith in the executive being justified. Adopting laws because they seem to make a definitive statement about the UK position on terrorist ideals, “but relying on an unspoken traditional British consensus that they will never be fully used, may be a mistaken policy”. Lack of evidence of misuse is insufficient to counterbalance the problems in the legislation. It is not the place of legislation to be symbolic rather than practical, and laws should be fashioned to the offences they seek to address. Laws that place such a high degree of trust in the discretion of the executive, especially in the context of a deferential judiciary, are intrinsically dangerous.

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200 Fenwick, supra note 42 at 1333
201 Ibid. at 1334
Chapter 4
Canada

Human Rights Protection under the Charter of Human Rights and Freedoms

Unlike the UK, Canada has an entrenched human rights instrument, the Canadian Charter of Rights and Freedoms (“the Charter”) and it has had this human rights instrument for a longer period of time – since 1982. A general remedial provision is provided in s.24(1), which allows anyone whose rights and freedoms have been infringed to apply to a court of competent jurisdiction “to obtain such remedy as the court considers appropriate and just in the circumstances.” Several parallels can be drawn between human rights protection in the UK and Canada. In both jurisdictions, ultimate power remains with the legislature. In Canada, this is a result of the legislative override or ‘notwithstanding’ clause in s.33, which allows any Canadian legislature to exclude legislation from most of the Charter’s operation by express declaration for renewable five-year periods. However, unlike the UK where the government must take specific action to remedy legislation that interferes with human rights, the position in Canada is reversed and the government must take action to pass legislation which interferes with rights. S.33 has never been invoked by the federal government.

Canada, like the UK, employs interpretation, or ‘reading down’, in construing legislative provisions – “if a legislative provision can be read both in a way that is constitutional and in a way that is not, the former reading should be adopted.”202 Interpretive strategies that prevent the necessity of striking down legislation are important in preserving parliamentary supremacy, and thus increasing acceptance of an instrument that might otherwise throw institutional interactions into turmoil.

S.2 of the Charter sets out the “fundamental freedoms” of conscience and religion; thought, belief, opinion and expression, including freedom of the press and other media; peaceful assembly and association. In a similar manner to the UK, and in words reminiscent of the

ECHR, these freedoms are subject to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society” (s.1).

There is no hierarchy among the Charter’s rights and freedoms. They are all subject to the same limitations. However, emphasis has been placed on free expression as “the matrix, the indispensable condition, of nearly every other form of freedom.”

Unlike the American doctrine of freedom of speech, whose compass is uncertain, freedom of expression under the Canadian Charter quite clearly extends to all expressive activity: “all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream”. The only exception to this is if “the physical form by which the communication is made (for example, by a violent act) excludes protection.”

This means that in theory all actions, whether physical or verbal, even if illegal or morally reprehensible, fall within the scope of section 2(b) - “[e]ven the physical act of illegally parking a car, so long as it was meant to convey meaning (such as protesting the manner in which parking spots are allocated), would qualify for section 2(b) protection.”

Like freedom of expression, freedom of association is considered a right of crucial importance. In considering its meaning, the Supreme Court described it as:

[O]ne of the fundamental freedoms guaranteed by the Charter, a sine qua non of any free and democratic society, protecting individuals from the vulnerability of isolation and ensuring the potential of participation in society… Association has always been the means through which political, cultural and racial minorities, religious groups and workers have sought to attain their purposes and fulfil their aspirations.

However, despite the emphasis placed upon it, limitations on freedom of association have generally been considered more acceptable than those placed on freedom of expression. Unlike freedom of expression, illegally parking a car would not acquire protection simply because one associated with others to do so. The activities consequent to the association must be lawful as it

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204 Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927 at 969
207 Reference re Public Service Employee Relations Act (1987) 38 DLR (4th) 161 at 173, 197 (Dickson CJC)
“does not acquire a constitutionally guaranteed freedom to do what is unlawful for the individual.”  It has therefore been held in several cases that “section 2(d) does not protect association for unlawful purposes or for pursuing lawful objectives by unlawful means.”

The SCC in *Irwin Toy*, and later in *Keegstra*, laid out a formal three-stage framework for interpretive analysis of the right to freedom of expression. The first stage is definitional in determining whether the activity of the litigant who alleges an infringement of the freedom of expression is actually protected by the *Charter*, while the second stage involves determining whether there has been a legislative interference. The Court described this second stage in the following terms:

The second step in the analysis outlined in *Irwin Toy* is to determine whether the purpose of the impugned government action is to restrict freedom of expression. The guarantee of freedom of expression will necessarily be infringed by government action having such a purpose. If, however, it is the effect of the action, rather than the purpose, that restricts an activity, s. 2(b) is not brought into play unless it can be demonstrated by the party alleging an infringement that the activity supports rather than undermines the principles and values upon which freedom of expression is based.

Given the width of the definition of expression under the *Charter*, the answer in most instances is likely to be that there has been an interference with a form of expression. If there is a violation of a *Charter* right, the final stage is analysis under s. 1 of the *Charter*.

In most cases, “the constitutionality of the law will turn on the outcome of the… s. 1 inquiry.” The requirement that any limit be prescribed by law, is “chiefly concerned with the distinction between a limit imposed by law and one that is arbitrary.” Laws must be sufficiently delineated that citizens are aware of what they can and cannot do. This is a relatively simple

208 Ibid. at 229 (McIntyre J)
211 *Irwin Toy*, supra note 184
212 *Keegstra*, supra note 10
213 *Keegstra*, supra note 10 at para 31
214 Hogg, *Constitutional Law*, supra note 5 at 43.2
question; the more complex analysis takes place around the words “demonstrably justified in a free and democratic society.” The leading case on this is *R. v. Oakes*[^216], which sets out a test consisting of two enquiries. Under the approach in *Oakes*, the state must first establish that the “impugned state action has an objective of pressing and substantial concern in a free and democratic society. Only such an objective is of sufficient stature to warrant overriding a constitutionally protected right or freedom”[^217]. The second stage of the *Oakes* test is itself a three-part test designed to assess the proportionality between the objective and the impugned measure. The proportionality test “attempts to guide the balancing of individual and group interests protected in s. 1”[^218]. The three components were set out in *Oakes* as follows:

First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to objective. Secondly, the means, even if rationally connected to the objective in this first sense, should impair “as little as possible” the right or freedom in question… Thirdly, there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of “sufficient importance”[^219].

Courts are generally deferential to the legislatures judgment of whether the objective is sufficiently important, and it is likely that national security would, almost invariably, be considered to satisfy the first part of the test in an anti-terrorism law context. However, it is notable that despite this fact, the first step can impact on later analysis, since “[i]f the court defines the legislative objective broadly, it may be more difficult for the government to demonstrate that there has been minimal impairment of the right and that there is no less restrictive means to advance the legislative objective. On the other hand, if the objective is defined more narrowly, it may be easier to justify the limitation as a proportionate means of advancing the particular objective.”[^220] Due to this, if the objective is defined as national security, it will be very difficult for the government to prove that a different, less restrictive law would not have sufficed. However, if the objective is narrowly defined as the prevention of terrorism, the law is likely to be more easily justified. Conversely, at the rational connection of

[^217]: Keegstra, supra note 10
[^218]: Keegstra, supra note 10
[^219]: Oakes, supra note 216 at 139
the analysis, a narrow objective might be more challenging for the government. It may be
difficult to demonstrate that targeting associations or extremist speech will prevent terrorism.
Following the 2004 investigative hearing cases, courts are likely to be reluctant to define the
objective of the Anti-Terrorism laws as national security. In Re: Application under s. 83.28 of
the Criminal Code\textsuperscript{221}, the Court concluded purpose of legislation was prosecution and prevention
of terrorism offences:

> It was suggested in submissions that the purpose of the Act should be regarded broadly as the
> protection of “national security”. However, we believe that this characterization has the
> potential to go too far and would have implications that far outstrip legislative intent… courts
> must not fall prey to the rhetorical urgency of a perceived emergency or an altered security
> paradigm.\textsuperscript{222}

Judicial deference is also observable at the second stage of rational connection – “it is rare to
find that there is no rational connection between the legislative objective and the law that is
subject to scrutiny.”\textsuperscript{223} The courts are likely to conclude that the executive is in the most
advantageous position to assess the problem and the measures that are appropriate to it. A law is
therefore most likely to fail on the final stage, that of minimal impairment. \textit{Oakes} described this
stage as the principle of “least intrusive means,” however “later cases… seemed to relax the test,
asking whether there was some other reasonable way for the legislature to satisfy the objective
that would not impair the right to freedom at issue, or that would have less impact on the right or
freedom than does the law under review.”\textsuperscript{224} Yet again there is “a rather unpredictable resort to
judicial deference by the Supreme Court even in the relaxed interpretation of the proportionality
tests as enunciated by \textit{Oakes}.”\textsuperscript{225} In many instances the courts will defer to the executive
assessment of what measures are viable.

Finally, the general requirement of proportionality requires “the courts to balance the
effectiveness of the violation in achieving the government’s objective against the harms of

\textsuperscript{221} [2004] S.C.R. 242

\textsuperscript{222} Re: Application under s. 83.28 of the Criminal Code, [2004] S.C.R. 242 at para 39

\textsuperscript{223} Roach, \textit{Charter, supra} note 220 at 68

\textsuperscript{224} Roach, \textit{Charter, supra} note 220 at 71.

\textsuperscript{225} Gerald-A. Beaudoin & Errol Mendes, ed., \textit{Canadian Charter of Rights and Freedoms}, 4th Ed. (Markham,
Ontario: LexisNexis Butterworths, 2005) at 211
denying the Charter right.”

When applying the Oakes test, the court must be guided by the values inherent in the concept of a “free and democratic society”, such as “respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.”

Critical reaction to the Charter has generally been extremely positive, and certainly it encourages both pre- and post-enactment scrutiny of laws. Drafting laws requires “consideration of their impact on individual rights, and government legal officers play an important role in encouraging their political masters to justify any limitations on Charter rights.”

It is therefore unsurprising that Canada has placed great emphasis on the fact that its terrorism legislation is Charter compliant – “Minister of Justice Anne McLellan repeatedly stressed that Bill C-36 has received the most rigorous Charter scrutiny of any bill” at one point stating in Parliament that “Charter rights have been considered and preserved against the objectives of fighting terrorism and protecting national security. I assure everyone in the House and all Canadians that we have kept the individual rights and freedoms of Canadians directly in mind in developing these proposals”, and later stating that “numerous safeguards have been included to ensure that nothing in this proposed act unreasonably infringes on civil liberties and Charter rights”.

Bill C-36, Canada’s Anti-Terrorism Act, faced strenuous pre-enactment opposition, in particular due to the broad definition of terrorist activity. The range of groups challenging the act “included Aboriginal groups... They also included various unions who raised concerns that illegal strikes that disrupted essential services might be considered as terrorism. Concerns were

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227 Oakes, supra note 216 at 136
228 Roach, Charter, supra note 200 at 42-3
230 House of Commons Debates, No. 094 (16 October 2001) at 1105 (Hon. Anne McLellan (Minister of Justice and Attorney General of Canada, Lib.)
232 Bill C-36 The Anti-Terrorism Act, Criminal Code, R.S., C. 1985, c. C-46 [ATA]
also raised that anti-globalization protests and the financial support sent by immigrants to their homelands might also be considered as terrorism. As a result of such strongly voiced concerns, the government stepped back from criminalizing speech in Bill C-36 – it was amended to provide that “for greater certainty, the expression of a political, religious or ideological thought, belief or opinion” will not constitute a terrorist act unless it satisfies further criteria in the definition. The sentence does little to change the definition and will not provide a defence. It appears to exist solely as a normative influence on the application of the laws and a pacifier for the dissenters.

**Freedom of Association**

Like the UK, the Canadian legislation contains provisions for the listing of terrorist groups. Under s.83.01(1) of the ATA, a terrorist group is defined as (a) an entity that has as one of its purposes or activities facilitating or carrying out any terrorist activity, or (b) a listed entity, and includes an association of such entities. An “entity” is defined as a person, group, trust, partnership or fund or an unincorporated association or organization” while a “listed entity” means an entity on a list established under s.83.05. The breadth of this definition, when taken in conjunction with the definition of terrorism itself, means that any group of which even a subsidiary activity may facilitate a terrorist act is included under it. A “terrorist group need not have engaged in acts of terrorism; it may only be associated with others that have committed terrorism or that may facilitate the commission of terrorism in the future.”

Section 83.05 of Bill C-36 authorises the Governor in Council to

> …by regulation, establish a list on which the Governor in Council may place any entity if, on the recommendation of the Minister of Public Safety and Emergency Preparedness, the Governor in Council is satisfied that there are reasonable grounds to believe that the entity has knowingly carried out, attempted to carry out, or participated in or facilitated a terrorist activity; or … is acting on behalf of, at the direction of or in association [with such a group].

This is a far more stringent test than that under the UK legislation, which merely requires the Secretary of State to believe the organisation is concerned in terrorism. There must be

233 Supra note 13 at 913
234 ATA, supra note 232, s83.01(1.1)
reasonable grounds to believe that the entity is actually linked to some kind of terrorist activity, although the definition remains broad due to the scope of the words “attempted”, “participated” and “facilitated”. Mere advocating of terrorist acts, or simply having terrorism as a purpose, is not sufficient – although such an entity might conceivable fall under paragraph (a) of the s.83.01(1) definition. As a consequence of the listing, an entity may have its property seized, restrained and/or forfeited. There are restrictions on dealing with property owned or controlled by terrorist groups, and obligations to disclose information about such property. Banks and financial institutions are required to submit a monthly report as to whether they are in possession or control of such property.

Various provisions provide for removal from the list and judicial review. A group can apply for review by the Minister, and in any case the Minister must review the list of terrorist organisations every two years. Within 60 days of notice of the decision of the Minister, a group may also apply for judicial review. The judge may hear evidence presented on behalf of the Minister in the absence of the applicant and any counsel representing the applicant on national security grounds, however the applicant is entitled to a summary of the information available to the judge and a reasonable opportunity to be heard. The judge will determine whether the listing is reasonable. If the applicant is successful, the minister must publish notice of the de-listing in the Canada Gazette. A listed entity may not make another application for delisting unless there has been a material change in its circumstances, or after the two year review of the listing. Kent Roach has argued that the lack of opportunity for prior notice and comment may be insufficient:

[A]fter-the-fact judicial review… may be too late for a group that has been erroneously placed on the official list of terrorist organizations. They will have been stigmatized as a terrorist group and people will be afraid that they may be charged with terrorism offences if they participate or give money to the organization.

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236 ATA, supra note 232, s83.13
237 Ibid., s83.14
238 Ibid., s83.08
239 Ibid., s83.1
240 Ibid., s83.11
241 Roach, September 11, supra note 235 at 37
Alexandra Dosman recounts a decision – made under regulations enacted under the *United Nations Act*\(^\text{242}\) – which illustrates the harm that can be done when the listing provisions are misused. Liban Hussein was listed after President George W. Bush designated 62 individuals and entities as linked with terrorism for the purposes of Executive Order 13244. Canada “adopted the list without checking if people deserved to be on it.”\(^\text{243}\) Hussein was accused of crimes parallel to offences under ss 3 and 4(d) of the *Terrorism Regulations* – having financial dealings with a listed person – that is to say, having financial dealings with himself. Although Hussein was eventually de-listed and released, there was much damage done in the interim\(^\text{244}\). As well as the inevitable consequences of legal proceedings and detention, “[e]xtensive media coverage in both the U.S. and Canada linked Hussein with terrorism, with immediate negative consequences for his business activity in Canada.”\(^\text{245}\) Similarly, Mr. Abousfian Abdelrazik suffered as a result of his listing by the UN 1267 Committee as an associate of Al Qaeda, despite being subsequently cleared in multiple investigations by the Sudanese government, the Canadian Security Intelligence Service, and the Royal Canadian Mounted Police. He was forced to live in the lobby of the Canadian embassy in Sudan, unwilling to return to Sudan due to the risk of arbitrary detention and torture and unable to return to Canada because the Canadian government refused to issue him travel documents\(^\text{246}\).

Although various offences are associated with the concept of a “terrorist group”, unlike the United Kingdom and Australia, Canada does not prohibit simple association or membership. However, as Irwin Cotler points out, there are serious implications for freedom of association in that the majority of safeguards are “after the fact” and there is the risk of lasting stigma to the group\(^\text{247}\). Further, bearing in mind the fact that a group may be listed simply on “reasonable grounds”, a person may also be convicted of a criminal offence on the basis of a listing “without


\(^{244}\) Alexandra Dosman, ‘For the Record’ (2004) 62(1) U. Toronto Fac. of L. Rev. 1

\(^{245}\) David Dyzenhaus, “The Rule of (Administrative) Law in International Law” (2005) 68 Law & Contemp. Probs. 127 at 143 [Dyzenhaus “Rule of Law”]

\(^{246}\) Abousfian Abdelrazik v. The Minister of Foreign Affairs and The Attorney General of Canada [2009] FC 580

\(^{247}\) *Supra* note 46 at 47
proof ever being offered of the actual activities of the group and without anyone ever having established beyond a reasonable doubt that the group really is a terrorist group”\(^\text{248}\). Although not itself criminalised, evidence of association can be persuasive evidence in criminal trials. A court, when determining whether a person has participated in or contributed to a terrorist group, may consider whether the accused “uses a name, word, symbol that identifies, or is associated with, the terrorist group; frequently associates with any of the persons who constitute the terrorist group; receives any benefit from the terrorist group; or repeatedly engages in activities” of the group\(^\text{249}\). An approach which relies on evidence of association as a means for combating terrorism may well lead to cases of mistaken identity or the targeting of the guiltless. One example of this is the case of Maher Arar, who suffered rendition to Syria after landing in the United States on his way home to Canada. Maher Arar “first came to the attention of Project A-O Canada as a result of a meeting he had with Abdullah Almalki at Mango’s Café in Ottawa on October 12, 2001… Messrs. Almalki and Arar were seen walking together in the rain and conversing for 20 minutes”\(^\text{250}\). The targeting of association is evidence of the emigration of the intelligence paradigm into the criminal law and the targeting of terrorism at its earliest stages. The danger of this is that by creating offences before any actual damage has occurred, the legislation may undermine principles of fundamental justice.

S.83.18 makes it an offence knowingly to participate in or contribute to, directly or indirectly, any activity of a terrorist group for the purpose of enhancing the ability of any terrorist group to facilitate or carry out a terrorist activity. Participation in a terrorist group is an offence whether or not “(a) a terrorist group actually facilitates or carries out a terrorist activity (b) the participation or contribution of the accused actually enhances the ability of a terrorist group to facilitate or carry out a terrorist activity; or (c) the accused knows the specific nature of any terrorist activity that may be facilitated or carried out by a terrorist group”. When taken in conjunction with the definition of “terrorist activity” which includes “a conspiracy, attempt or threat… or being an accessory after the fact or counselling”, an individual may be found guilty


\(^{249}\) ATA, supra note 232, s83.18(4)

\(^{250}\) Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, Report of the Events Relating to Maher Arar: Analysis and Recommendations (Ottawa: Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, 2006) at 18
of an offence for an ineffectual contribution that to a group that has merely threatened to carry out a terrorist activity. Despite this, it seems unlikely that a Charter challenge to the legislation would be successful. Constitutional challenges have been made to the section. In R. v. Khawaja, the defence argued that “the fault requirements in certain of the offence provisions are so watered-down as to render those provisions unsustainable in light of s. 7 of the Charter.” This challenge was rejected by Justice Rutherford. Similarly, in R. v. Ahmad and Others, a challenge to the offence of “participating in a terrorist organization” in s.83.18 under s. 7 failed on the basis that it was vague and “in so far as it criminalizes conduct which is not sufficiently proximate to any substantive offence… unconstitutionally overbroad.” Neither of the judgements dealt at any length with the contention that the provisions violated s. 2(d), although Justice Dawson did dismiss the idea that the factors under s. 83.18(4) violated s. 2(d) since these are “merely common sense suggestions. These are factors that would be considered by the court in any event.” In the immigration context, it has been repeatedly held that involvement with terrorist organizations is outside the protections of s. 2(d) as it is conduct associated with violent activity. In the context of the criminal law, it is possible that the definition may capture some activity that is not violent. For example, s. 83.01(1)(b)(ii)(E) relates to “serious interference or disruption of an essential service, facility or system”. However, considering that the offence requires any participation or contribution to be “for the purpose of enhancing the ability of any terrorist group to facilitate or carry out a terrorist activity”, any

252 Ibid. at para 28
253 R. v. Fahim Ahmad, Zakaria Amara, Asad Ansari, Shareef Abdelhaleem, Mohammed Dirie, Jahaal James, Amin Durrani, Steven Chand, Saad Khalid and Saad Gaya (31 March 2009), Ontario CRIMJ (F) 2025/07 (Ont. Sup. Ct.), Ruling No. 12: Constitutional Challenge to the Anti-Terrorism Offence Provisions of the Criminal Code, Publication restricted pursuant to s. 648 of the Criminal Code [Ahmad]
254 R. v. Fahim Ahmad, Zakaria Amara, Asad Ansari, Shareef Abdelhaleem, Mohammed Dirie, Jahaal James, Amin Durrani, Steven Chand, Saad Khalid and Saad Gaya (31 March 2009), Ontario CRIMJ (F) 2025/07 (Ont. Sup. Ct.) (Joint Factum of the Applicants Zakaria Amara, Asad Ansari and Saad Khalid at para. 3) [Ahmad, Factum]
255 Ahmad, supra note 253 at para 140, Publication restricted pursuant to s. 648 of the Criminal Code
association will be association for the purpose of an unlawful activity, and a *Charter* challenge is likely to fail.

**Freedom of Expression**

The criminalizing of speech in Canada has a similar history to that of the UK, and has generally been more accepted than it is in the U.S.A. Before the introduction of the ATA, crimes of sedition, fraud, obscenity, hate propaganda and communicating for the purpose of prostitution already existed. Like the UK, there is also a general “counselling” offence\(^\text{257}\), which relates to soliciting, procuring, or inciting an offence which is not committed. The Supreme Court has held that this includes actively inducing or advocating the commission of an offence when the accused either intends that the offence be committed, or is aware of a risk that the offence counselled will be committed.\(^\text{258}\) The ATA has created very few new offences which impact on freedom of expression.

**Definitional Issues**

It is therefore perhaps unsurprising that the greatest challenges to the legislation under s. 2(b) of the *Charter* have not been based on offences which impact on expression, but on the definition of terrorism itself. Mohamed Momin Khawaja was the first person to challenge the *Anti-Terrorism Act*. He brought an application to challenge the provisions on the grounds, *inter alia*, that they infringed his rights to freedom of association, freedom of conscience and religion, and freedom of thought, belief, opinion, and expression pursuant to section 2 of the *Charter*. Justice Rutherford held that the requirement for a political, religious or ideologically motivated crime did indeed violate s. 2, and the government had failed to justify it under s. 1 of the *Charter*. He considered two possible legislative objectives – the focusing in on political, religious or ideologically motivated crimes, or the prevention of terrorism. In the first case, the use of motive as an aggravating factor at sentencing would have sufficed, in the second a definition without the requirement of proof of political, religious or ideological motive would have been a less intrusive means. These observations are well-founded (see discussion in Chapter 2 on Definition).

\(^{257}\) ATA, *supra* note 232, s. 464

\(^{258}\) *R. v. Hamilton* (2005), 198 C.C.C. (3d) 1 (S.C.C.)
Rutherford noted that such definitions do exist and highlighted American Legislation and *Suresh*\(^{259}\) as examples. He concluded:

> There is, however, in the definition of "terrorist activity," an essential element that is not only novel in Canadian criminal law but the impact of which constitutes an infringement of certain fundamental freedoms guaranteed in section 2 of the *Charter of Rights and Freedoms*… I find further that the infringement on fundamental freedoms brought about by this provision cannot be justified in a free and democratic society…\(^{260}\)

Justice Rutherford highlighted two significant concerns, which would apply equally to any other anti-terrorism provisions that seek to target expression and association. First, that the definition could exacerbate racial tensions since it “not only serves to encourage, but also serves to legitimize, the somewhat inevitable focus on Muslims and Arabs”\(^{261}\); second, that the motive clause will inevitably “focus investigative and prosecutorial scrutiny on the political, religious and ideological beliefs, opinions and expressions of persons and groups”\(^{262}\).

Justice Rutherford concluded that it was possible to sever the political and religious motive requirement, and the remaining requirement of “intimidation or coercion of the public or its institutions” in s. 83.01 (1)(b)(B) would be sufficient to prevent overbreadth. Kent Roach notes that there is wide range of harms listed under s. 83.01(b) that will “fall under the definition of terrorist activities if they are intended to compel a person to do or refrain from doing any act. This could apply to a broad array of crimes including extortions, robberies or insurance fraud arsons that endanger human life or public safety. The new breadth of terrorist activities may well affect the government’s ability to justify the legislation under s. 1 and it may also invite new and stronger overbreadth challenges of the definition of terrorist activities.”\(^{263}\) Moreover, the striking down of the political and religious motive requirement does not mean that evidence of motive will not be introduced at trial, and indeed the prosecutor is likely to do so where there is

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259 *Suresh*, *supra* note 65 at 99: terrorism includes any “act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population or to compel a government or an international organization to do or to abstain from doing any act”.

260 *Khawaja*, *supra* note 251


263 Roach, *Case Comment, supra* note 68 at 20-21
compelling evidence to this effect. Such evidence “is admissible evidence, albeit subject to the trial judge’s discretion to balance its probative value against its prejudicial effect.”

The effect of removing motive as a requirement is a significant symbolic one, however it may result in an overbroad definition while having little empirical impact on individual trials. Further, the decision to sever and strike out the part of the definition that requires proof of a political, religious, or ideological motive is of limited application. Despite the fact that “the government chose not to appeal the ruling, it has not stated that it will amend the Criminal Code to reflect the ruling. As such, the ruling is binding only in Khawaja’s trial.” The definition has since been found to be constitutionally valid in R. v. Fahim Ahmad and others which will further limit the impact of the ruling in Khawaja.

The applicants in this case again challenged the definition on the grounds that it violated freedom of religion and freedom of expression. The trial throws into relief the dangers of a motive based definition since:

[The prosecution] is seeking to introduce into evidence at the Applicant’s trial texts, videos and articles alleged to have been in their possession to prove that they (a) subscribed to the views expressed in the materials in question and (b) the views expressed in the materials motivated them to commit terrorist acts or at least were the basis of their conspiracy to commit terrorist acts. Thus even exposure to the thoughts and beliefs of others is potentially evidence the crown can rely upon to secure a conviction.

Applying the approach set out in Keegstra and Irwin Toy, Justice Dawson quickly concluded that “terrorist activity is by definition expressive activity.” Further, not all terrorist activity falls within the Supreme Court’s exclusion for violence since clause (E) of the definitions potentially captures activity “which is not violent and which is not advocacy, protest, dissent or work stoppage.” However, Justice Dawson concluded that the application failed on the second part of this analysis, without ever reaching the section 1 proportionality test:

264 Roach, Case Comment, supra note 68 at 16
266 Ahmad, supra note 253, Publication restricted pursuant to s. 648 of the Criminal Code
267 Ahmad, Factum, supra note 254 at para. 21
268 Ahmad, supra note 253 at para 101, Publication restricted pursuant to s. 648 of the Criminal Code
269 Ahmad, supra note 253 at para 106, Publication restricted pursuant to s. 648 of the Criminal Code
In my view it cannot be said that the purpose of the legislation is to restrict freedom of expression. Notwithstanding the fact that the motive requirement has the effect of ensuring that terrorist activity is expressive and therefore within the sphere of s. 2(b) protection, the motive requirement is subsidiary to the prevention and punishment of very harmful acts, most of which involve serious violence. While the inclusion of a motive requirement is unusual in the context of criminal law, and logic suggests it was included to distinguish terrorist acts from other crimes, I do not see that as an indication that one of the purposes of the legislation was to restrict freedom of expression.270

It would seem that in reaching his decision, Justice Dawson has conflated ultimate purpose with the method of achieving this aim. When analyzing the ultimate goal of legislation it could rarely be said to have the purpose of interfering with freedom of expression – there would always be some other, greater harm such as violence, discrimination or activities inimical to freedom of expression itself that it was trying to prevent. While the legislation is designed to protect against terrorism, the purpose of the provision is to make the expressive element of the activity an essential part of the criminal act. Justice Dawson was satisfied that “the legislation is concerned with preventing the physical harm flowing from the activity, not with restricting the meaning the activity attempts to convey. This view is supported by the neutral nature of the political, religious or ideological motive requirement. It does not discriminate between possible political, religious or ideological views.”271 However, simply because the political, religious or ideological requirement is phrased neutrally doesn’t mean it is neutral in effect. In reality there will be predominantly one kind of ideology that is associated with terrorism. Justice Dawson’s arguments are flawed. Justice Rutherford’s application of the s. 1 proportionality analysis leads to a more apposite conclusion on the effect of the motive requirement on freedom of expression.

Pre-Existing Offences and Hate Speech Amendments

Canada has a pre-existing equivalent to the UK offence of incitement to racial hatred under the Public Order Act that has been upheld as Charter compliant. Section 318 of the Criminal Code creates an offence of advocating or promoting genocide, which is defined as “acts committed with intent to destroy in whole or in part any identifiable group” including “killing members of the group”. Section 320 of the Criminal Code allows the seizure of hate propaganda: “a judge who is satisfied by information on oath that there are reasonable grounds for believing that any

270 Ahmad, supra note 253 at para 120, Publication restricted pursuant to s. 648 of the Criminal Code
271 Ahmad, supra note 253 at para 124, Publication restricted pursuant to s. 648 of the Criminal Code
publication, copies of which are kept for sale or distribution in premises within the jurisdiction of the court, is hate propaganda shall issue a warrant under his hand authorizing the seizure of the copies”. Hate propaganda is defined as “any writing, sign or visible representation that advocates or promotes genocide or the communication of which by any person would constitute an offence under s. 319”. Section 319 prohibits the public incitement or promotion of hatred against any “identifiable group”.

There have been some hate speech amendments, for example permitting the removal of hate literature from the internet. The Anti-Terrorism Act amends s. 320.1 of the Criminal Code so that a judge may order removal of material and location of the author “satisfied by information on oath that there are reasonable grounds for believing that there is material that is hate propaganda… that is stored on and made available to the public through a computer system”. "Hate propaganda" means any writing, sign or visible representation that advocates or promotes genocide or the communication of which by any person would constitute an offence under section 319. The Anti-Terrorism Act also amends the Criminal Code to create an offence under s. 430 of committing “mischief in relation to property that is a building, structure or part thereof that is primarily used for religious worship, including a church, mosque, synagogue or temple, or an object associated with religious worship located in or on the grounds of such a building or structure, or a cemetery, if the commission of the mischief is motivated by bias, prejudice or hate based on religion, race, colour or national or ethnic origin”. This offence clearly limits activities whose expressive element is the damage of religious property.

Irwin Cotler regards hate speech amendments as desirable: “it is this teaching of contempt, this demonizing of the other, this standing assault on human security, this is where it all begins… this assaultive speech isolates and ostracizes minorities, who are then left vulnerable to hate-motivated attacks”272, and indeed the case law reveals that provisions which criminalize hate speech in general rather than terrorist propaganda in particular have generally been regarded as acceptable and even desirable. However, this analysis conflates the prevention of hate speech, an end which is generally viewed as desirable in and of itself, with the prevention of terrorism. Whether or not these two aspects can be linked depends on the possibility of a justification of

hate speech as the essence of terrorism. Considering the lack of an empirical link between the two, it is difficult to rationalize the limitation of speech as an anti-terrorist measure.

The hate speech amendments under the Anti-Terrorism Act have not yet been challenged, however the Supreme Court upheld the existing criminal laws against hate speech in R v Keegstra\(^{273}\). The law was found to be a reasonable limit on freedom of expression in part because it requires a high level of fault and the Attorney-General’s prior consent to any prosecution. Indeed, the anti-democratic aspects of hate speech lead Dickson C.J.C. to conclude that “the prohibition of [racial and religious hatred] is considered to be not only compatible with a guarantee of human rights, but an obligatory aspect of that guarantee.”\(^{274}\) Such a statement is reminiscent of the ECHR warning that freedom of expression “carries with it duties and responsibilities”\(^{275}\).

In applying the Oakes proportionality test, the majority noted the harmful effects of hate propaganda:

> It is thus not inconceivable that the active dissemination of hate propaganda can attract individuals to its cause… Even if the message of hate propaganda is outwardly rejected, there is evidence that its premise of racial or religious inferiority may persist in a recipient’s mind as an idea that holds some truth, an incipient effect not to be entirely discounted.\(^{276}\)

This suggests that hate propaganda may have an empirical and observable effect, and that a legal limitation upon it may well be rationally connected to the legitimate aim it seeks to achieve. The Court also held that hate propaganda is undesirable due to its underlying nature, since it argues “for a society in which the democratic process is subverted and individuals are denied respect and dignity simply because of racial or religious characteristics.”\(^{277}\) Terrorist propaganda may also argue for such a society. However, the existence of these provisions makes it likely that any law targeting terrorist propaganda specifically, and to the exclusion of other forms of hate speech, would fail on the minimal impairment test.

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274 Ibid. at 754
275 ECHR, supra note 102, Art. 10(2)
276 Keegstra, supra note 273 at 745
277 Ibid. at 764
Justice McLachlin, in her minority judgment, held that the provision “may well have a chilling effect on defensible expression by law-abiding citizens. At the same time, it is far from clear that it provides an effective way of curbing hate-mongers. Indeed, many have suggested it may promote their cause. Prosecutions under the Criminal Code for racist expression have attracted extensive media coverage.”

It is notable that her dissent highlights anxieties that have been frequently stressed in relation to various aspects of the terrorism legislation. This two-fold concern, that the law may have a chilling effect with no measurable or provable success in achieving its aim, lies at the forefront of concerns about legislation which seeks to prevent terrorist activity by curbing expression and association.

Nonetheless, although the majority in Keegstra held such provisions to be Charter compatible, Canadian sensibilities run strongly towards the protection of freedom of expression and the scope of the decision has already been eroded. In Keegstra “the court was closely divided 4:3 and two years later many of the concerns expressed by McLachlin J. on behalf of the minority in Keegstra about overbreadth and the chill of free expression resurfaced in her decision for a majority of the Court in R. v. Zundel.”

In Zundel, the Court quoted an American judgment with approval: “the fact that the particular content of a person’s speech might ‘excite popular prejudice’ is no reason to deny it protection for ‘if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought – not free thought for those who agree with us but freedom for the thought that we hate.”

Existing sedition laws are largely seen as dead letter because if used they could not be justified as a reasonable limit on Charter right to freedom of expression. Bearing in mind this current stance on objectionable expressions, it is unlikely that any laws that limit terrorist speech specifically would be passed.

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278 Keegstra, supra note 273 at 851
279 Roach, “Freedom of Expression”, supra note 206 at 290
281 S61 of the Criminal Code, R.S. C. 1985 creates an offence of publishing seditious libel, defined in s59(2) as “a libel that expresses a seditious intention.” Narrowly construed by court in Boucher v. R. [1951] S.C.R. 265 – a person can be convicted only where he or she is proved to have intended to incite violence or public disorder, or to incite hatred or contempt against the administration of justice.
Other Offences

Provisions which create offences which impact on freedom of expression include section 83.21, which states that everyone “who knowingly instructs, directly or indirectly, any person to carry out any activity for the benefit of, at the direction of or in association with a terrorist group, for the purpose of enhancing the ability of any terrorist group to facilitate or carry out a terrorist activity...” commits an offence. As with the offences relating to freedom of association, discussed above, the main difficulty is that the provision is extremely broad, taking into account both the definition of terrorist activity on which the offence is based, the fact that it covers “any activity”, including activities that might otherwise be legal, and the width of the phrase “for the benefit of”. Such offences could therefore “include acts such as setting up a bank account or supplying lodgings and food that would under the law of attempts be held to mere preparation for the commission of a crime.” The ATA also makes it clear that a person may engage in a terrorist activity on the basis that they either counsel or threaten a terrorist activity.

The Anti-Terrorism Act has also introduced laws which impact on freedom of information, and by doing so have consequences for freedom of expression. Section 38.13 of the Canada Evidence Act (as introduced by s. 43 Anti-Terrorism Act) gives the Attorney General the power to “issue a certificate that prohibits the disclosure of information in connection with a proceeding for the purpose of protecting information obtained in confidence from, or in relation to, a foreign entity as defined in subsection 2(1) of the Security of Information Act or for the purpose of protecting national defence or national security.” The certificate is valid for fifteen years, and prevents not only the disclosure of the information itself, but also the mere fact that section 38 proceedings have been engaged.

The Anti-Terrorism Act also creates new offences under the Security of Information Act. The possible impact of these offences was highlighted when reporter Juliet O’Neill was charged

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284 ATA, supra note 36, s83.01
285 Canada Evidence Act, R.S.C. 1985, c. C-5
under pre-existing provisions of that Act, including one whereby a person “allows any other person to have possession of any official document issued for his use alone, or communicates any secret official code word or password so issued, or, without lawful authority or excuse, has in his possession any official document or secret official code word or password issued for the use of a person other than himself, or on obtaining possession of any official document by finding or otherwise, neglects or fails to restore it to the person or authority by whom or for whose use it was issued, or to a police constable.”287 The Court held that the impugned measure failed under all aspects of the proportionality test – they failed the rational connection aspect for being arbitrary and unfair and the minimal impairment requirement because of overbreadth and vagueness: “because of their lack of appropriate tailoring, they are able to criminalize a wide variety of conduct that should not be caught, for example, the communication, receipt or possession and retention of information that invokes no harm element to the national interest. They also have the very real potential to “chill” the pursuit and enjoyment of the right of freedom of expression by the public and by the press.”288 The O’Neill case highlights the danger that “the media may not be free to report on abuses in the national security sphere because of reasonable fears they may be prosecuted under the broad terms of Canada’s revamped Official Secrets Act.”289 Offences that impact on freedom of information impact on freedom of expression at a far earlier stage than offences which limit the expression itself. They create the danger that opinions, while permissible, may not be fully educated or based on all the available information.

**Canada Conclusion**

Canada has a robust approach to freedom of expression and association. Unlike the UK and Australia, the Charter has allowed defendants to go so far as to challenge the motive aspect of the definition in the courts, although it ultimately appears that the requirement of motive is likely to remain part of the definition. Unlike the UK and Australia, there are no offences relating to

287 Ibid., s4(4)(b)
membership or pure association. The Parliamentary debates surrounding the legislation suggest that this may be a direct result of the Charter, since despite the intervention of several members of the Canadian Alliance\(^{290}\) stressing the requirement for a membership offence, none was created:

> [T]he charter has already had its effect on this legislation. My understanding is that the bill does not go as far as the British anti-terrorism legislation. This is because we have a Canadian Charter of Rights and Freedoms and Britain does not… For example, intellectual support for terrorist groups or causes associated with terrorism or even membership in certain organizations, is not proscribed by Bill C-36.\(^{291}\)

However, it is also notable that the Attorney General related the lack of such an offence back to basic principles of the criminal law, and the requirement that offences relate to “conduct, not status… we do not prohibit on the basis of status, that is, who someone is as opposed to what the individual does and the harm resulting from the conduct”\(^{292}\). This suggests that principles of legality and the rule of law also have an important part to play in preserving democratic freedoms.

Finally, unlike the UK and Australia there has been no incitement legislation following UN SCR 1624, although Canada does accept hate speech prohibition. The amendments to the hate speech legislation suggest that Canada anticipates the use of the hate speech prohibition in addressing the perhaps overlapping legislative objective of curbing speech that may incite terrorism. The Canadian approach of not directly targeting speech related to terrorism has practical and – in a societally diverse country – positive advantages over the UK approach. It avoids creating the perception that the war against terrorism is a war against Islam by having in place only laws that are equally applicable to any group. Ultimately, the Canadian approach appears far closer to that of the US than the other two jurisdictions.

However, although the Canadian legislation appears more rights compliant than that of the UK, there are still serious rights repercussions. Kent Roach warns against Charter-proofing, whereby instead of scrutiny based on the rule of law, legal principles and natural justice, legislation is

\(^{290}\) House of Commons Debates, No. 095 (16 October 2001) at 1035 (Mr. Vic Toews); 1245 (Mr. Kevin Sorenson); 1550 (Mr. Stockwell Day); 1630 (Mr. Jim Abbott)

\(^{291}\) Ibid., at 1140 (Mr. Bill Blaikie (Winnipeg-Transcona, NDP)

\(^{292}\) Ibid., (27 November 2001) at 1015 (Hon. Anne McLellan (Minister of Justice and Attorney General of Canada, Lib.))
subjected to the touchstone of a Charter, and the “concern is that the question of whether legislation has been *Charter*-proofed by careful drafting and strategic use of precedent is replacing more fundamental and traditional questions about the need for restraint in the criminal law”\textsuperscript{293}. Rather than asking questions about the substantive content of those rights which the *Charter* is supposed to protect, the question becomes whether the legislation is semantically, if not morally, compatible with the *Charter*. While the *Charter* has undoubtedly had a positive influence on restraining the legislation from some of the UK’s more extreme provisions, the fact that so much of the legislation has parallel provisions to those in the UK, and still has severe implications for the rights in question, suggests that in and of itself a charter is not a sufficient guarantor of human rights, but must be backed up by a robust democratic process and a vigorous and willing judiciary.

\textsuperscript{293} Roach, “Dangers”, *supra* note 229 at 135
Chapter 5
Australia

Protecting Rights Without a Charter

There has not been a terrorist attack for more than a decade on Australian soil. However, it has been affected by terrorism. Australian citizens lost their lives in the attack of 9/11. On 12 November 2002, 88 Australians were amongst the dead in the Bali Bombings in Indonesia. The Australian embassy was bombed in Jakarta in 2004. Terrorism has therefore had an enormous impact upon culture and politics in Australia. This may account for the surplus of laws that have been passed in Australia since September 2001. Although Australia has little history of enacting laws aimed at terrorism prior to September 2001, since then, it has enacted close to forty pieces of anti-terrorism legislation.

Of all the jurisdictions this thesis examines, Australia is the only one with no defined mechanism for the protection of human rights within its federal legislation (the Australian Capital Territory and Victoria have recently adopted statutory bills of rights). In fact, it is now the only democratic nation in the world with no such mechanism. Democracy itself is the most significant rights safeguard. Practically, this means that there are very few formal mechanisms for judges to assess the compatibility of new anti-terrorism laws with human rights.

Outside of democratic government, three main avenues exist which provide both a direct and indirect source of human rights protection. There is protection of the judicial function and some provisions for human rights in the Australian Constitution as interpreted by the courts; international law provides some human rights norms; and the common law, including the Communist Party case, provides some resources for judicial enforcement of the rule of law. Judicial review of laws is not solely an aspect of human rights protection, but stems from the

294 See J. Hocking, Terror Laws: ASIO, Counter-Terrorism and the Threat to Democracy (Sydney, NSW, Australia: UNSW Press, 2003)
295 Human Rights Act 2004 (A.C.T.); Victorian Charter of Rights and Responsibilities Act 2006 (Vic.)
296 Australian Constitution 1900 (Cth.)
idea that “the basis of the rule of law is not in the positive law provided by the legislature, but in what can be thought of as the unwritten or common law constitution.”

Hilary Charlesworth suggests that this lack of constitutional protection for rights is due to “the notion of parliamentary sovereignty inherited from the United Kingdom and the tradition of responsible government – the convention that the executive branch of government is kept in check by being answerable to the elected legislature – to protect individual rights.”

Responsible government is based on the idea of parliamentary accountably, whereby the executive branch is accountable to Parliament, which is directly elected and therefore representative. Ministers retain their office subject to holding parliamentary confidence. This emphasis on a democratically elected parliament as representative of the people and therefore more adequately equipped to decide the limits of individual liberty than the courts has produced resistance to the introduction of constitutionally entrenched rights. Indeed, many argue that “Australia has a relatively well developed legislative and administrative rights regime quite apart from any judicial involvement.” Tom Campbell goes so far as to warn “human rights are diminished when we seek to cure democratic deficiencies by anti-democratic devices. This is a warning that could be accompanied by a reminder of the historically weak performance of courts in the protection of rights, and the achievements of democratic systems in implementing political rights.”

Given such lines of argument, it is unsurprising that Australia has shown some reluctance to embrace a constitutionally entrenched bill of rights. However, this has not necessarily meant that Australia lacks human rights altogether and it has a positive record for protecting rights through political means, a fact which “vindicates the theoretical argument … that human rights protection can be achieved without excessive reliance upon a bill of rights or

297 Dyzenhaus “Rule of Law”. supra note 245 at 130
298 Charlesworth, supra note 100 at 36
judicial activism. Moreover, such a model of rights protection helps ensure political vigour and
democratic legitimacy.”

Jeremy Waldron in particular argues that commitment to rights does not automatically equate to
commitment to a rights instrument and “that there is no necessary inference from a right-based
position in moral or political philosophy to a commitment to a Bill of Rights as a political
institution along with an American-style practice of judicial review.” He suggests that
because rights are complex and controversial, theorists should be “more than usually hesitant
about the enactment of any canonical list of rights, particularly if the aim is to put that canon
beyond the scope of ordinary political debate and revision”. Members of society inevitably
disagree with one another about fundamental matters of principle, and theories of rights are not
exempt from these disagreements. Due to this disagreement, “and the need, despite
disagreement, to set up a common framework” in this as in other instances, legislation by
representative assembly is particularly appropriate. Indeed, he is opposed to judicial review of
laws as a method of ensuring their rights compatibility:

…the courts will inevitably become a major, if not the main forum for the revision and
adaptation of basic rights in the face of changing circumstances and social controversies… I
shall suggest that a theorist of rights ought to have grave misgivings about this prospect. For
surely, the people have a right to participate in all aspects of the democratic governance of
their community, a right which is quite deeply connected to the values of autonomy and
responsibility that are celebrated in our commitment to other basic liberties. That right to
democratic participation is a right to participate on equal terms in social decisions on issues of
high principle and not just interstitial matters of social and economic policy… I shall argue
that our respect for such democratic rights is called seriously into question when proposals are
made to shift decisions about the conception and revision of basic principles from the
legislature to the court-room…

Judicial review as non-representative and based on the opinions of a few individuals appears to
be in opposition to democratic principles.

However, the problem with Waldron’s model of rights protection that eschews judicial review is
that it always favours the majority. While parliament-centric rights protection may encourage

301 Galligan, supra note 299 at 19
303 Ibid.
304 Ibid.
libertarian laws and rights friendly government, it provides little recourse to remedy when the legislature oversteps the line and rights protection at the individual level inevitably suffers. Rights protection becomes an issue of politics and “the contours of debate may match the majoritarian pressures of Australian political life rather than the principles and values upon which the democratic system depends. This means that any check upon the power of parliament or governments to abrogate human rights derives from political debate and the good will of political leaders.”

Arguments that reject protection through the courts due to their lack of political accountability reflect concerns about judicial activism and the separation of powers. They fail to acknowledge the possibility of parliament retaining its supremacy while the courts remain the proper forum in which individual grievances and the rights of unpopular minorities, as opposed to democratic advances, can be addressed.

In terms of presumptions of statutory interpretation, the courts have developed the common law in such a way as to minimally impact on human rights, and use methods of interpretation to limit possible rights violations by the legislature. Even in the absence of a rights instrument that allows judicial review of laws, the judges still have scope for interpretation of legislation. In contrast to Waldron’s positivist stance, Dyzenhaus argues that judges’ duty is not to apply their own moral interpretation to the law:

…their duty is to determine the content of the law in accordance with the aspirations of (ideal) legal order… [T]he enacted texts of a legal order, statutes and constitutions…were never sufficient in themselves because any claim about how precisely a particular text spoke to the question the judge had to answer could not be extracted from the text alone. Rather, it relied on an interactive process of interpretation that moved between the text and the judge’s understanding of the ideal, or political point of legal order. And because that process is interactive or two-way, the judge will work up the ideal from the text as well as work down in constructing the meaning of the text in light of the ideal.

The application of the interpretative duty to human rights is evidenced in clear judicial statements in lines of established caselaw. The High Court of Australia stated in *Coco v. the Queen* that “[t]he courts should not impute to the legislation an intention to interfere with


307 *Coco v. the Queen* (1994) 179 CLR 427
fundamental rights. Such an intention must be clearly manifested by unmistakeable and unambiguous language… a statute or statutory instrument which purports to impair a right to personal liberty is interpreted, if possible, so as to respect that right”\textsuperscript{308}. Further, it was held in \textit{Nationwide News Party Ltd v. Wills}\textsuperscript{309} that “[c]ourts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by unmistakable and unambiguous language”\textsuperscript{310}. However, the courts are still constrained by the laws and if Parliament passes a law clearly contrary to human rights, then the courts must apply that law if it cannot be interpreted otherwise.

Some assistance is provided by international law, for example the \textit{Universal Declaration of Human Rights}\textsuperscript{311}, which, although it does not impose legal obligations on states, can be regarded as part of the customary law of nations\textsuperscript{312}. Further there is “strong support for the claim that the human rights and fundamental freedoms referred to in the pledge contained in Arts 55 and 56 of the \textit{United Nations Charter} (which Australia has ratified) are those rights and freedoms set out in the \textit{Universal Declaration}\textsuperscript{313}. Australia (along with all three other states this thesis examines) has also ratified the \textit{International Covenant for on Civil and Political Rights 1966}\textsuperscript{314} (ICCPR), which contains speech and association rights. The implementation machinery of the ICCPR has three different aspects. Firstly, the issuing of reports by the State Parties to the Human Rights Committee (initially within the first year of the ICCPR entering into force and subsequently at the request of the Committee. In 1981 the Committee decided that reports should be requested every five years). Secondly, there is a procedure for complaints by one state party to another state party. Finally, and most relevantly to the impact on rights of domestic legislation, Art. 2 of the first Optional Protocol to the ICCPR, ratified by Australia with effect from 1991, allows

\begin{thebibliography}{9}
\bibitem{308} \textit{Ibid.} at 437
\bibitem{309} \textit{Nationwide News Party Ltd v. Wills} (1992) 177 CLR 1
\bibitem{310} \textit{Ibid.} at 95
\bibitem{311} \textit{Universal Declaration of Human Rights}, GA Res. 217 (III) UN GAOR, 3\textsuperscript{rd} Sess., Supp. No. 13, UN Doc. A/810 (1948)
\bibitem{312} Office of the United Nations, High Commissioner for Human Rights, \textit{Human Rights, Terrorism and Counter-terrorism} (Geneva: UNHCHR, 2008) at 4
\end{thebibliography}
individuals who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies to submit a written communication to the Committee for consideration. Australia’s reaction to the few successful complaints lodged against it has been varied, and it has not taken steps to remedy the conduct in every instance. Australia has also failed to meet its obligation to adopt measures to give domestic effect to the rights recognized in the ICCPR. The ICCPR was appended to the Human Rights and Equal Opportunity Commission Act 1986, which creates a commission (HREOC) to examine legislation for consistency with human rights standards and to report its findings to the Attorney-General, but more often than not “HREOC’s recommendations to Parliament to remedy breaches of human rights have been ignored.” The UN Human Rights Committee, in its Concluding Observations on Australia’s third and fourth reports was “concerned that in the absence of a Constitutional Bill of Rights, or a constitutional provision giving effect to the Covenant, there remain lacunae in the protection of Covenant rights in the Australian legal system. There are still areas in which the domestic legal system does not provide an effective remedy to persons whose rights under the Covenant have been violated.” In its most recent report it again noted that “the Covenant has not been incorporated into domestic law and that the State party has not yet adopted a comprehensive legal framework for the protection of the Covenant rights at the Federal level, despite the recommendations adopted by the Committee in 2000. Furthermore, the Committee regrets that judicial decisions make little reference to international human rights law, including the Covenant.”

The effect of international law is therefore a mixed one. While there can be no doubt that it has informed the language of rights protection, and helped to entrench human rights standards and goals in national consciousness, it provides no failsafe mechanism for the protection of rights.

315 See e.g. A. v. Australia, H.R.C. Communication No. 560/1993, 3 April 1997, CCPR/C/59/D/560/1993; and O’Neill, Retreat, supra note 313 at 188-193
316 For a more detailed discussion see O’Neill, Retreat, supra note 313 at 14 - 26
317 Human Rights and Equal Opportunity Commission Act 1986 (Cth.)
318 Charlesworth, supra note 100 at 34
320 Concluding observations of the Human Rights Committee: Australia, UN HRC, 2 April 2009, UN Doc. CCPR/C/AUS/CO/5 at para 8 [Concluding Observations HRC 2009]
Hilary Charlesworth considers the international arena an inadequate safety net for human rights breaches in Australia: “the UN complaint system is very slow and cumbersome… the committees never have the opportunity to hear from the parties or their advocates in person… there is little formal pressure on governments to accept interpretations adverse to their perceived interests.”\textsuperscript{321} The overall result of international instruments and covenants is to provide guidance on the parameters of human rights law, which can inform the legislature as well as the common law and judicial interpretation. However, considering that such international jurisprudence lacks force in Australia, it provides a very flimsy guarantee of rights protection: although “these instruments could provide useful assistance on human rights issues and national security, they do not form part of Australian law and lack political and legal legitimacy in Australia.”\textsuperscript{322}

There are some human rights provisions in the \textit{Constitution}. However Australia has defined these “very narrowly, severely restricting their ambit.”\textsuperscript{323} These include freedom of religion under s. 116, which bans the prohibiting of the free exercise of any religion, which could conceivably be used to protect forms of religious association or speech. In a similar manner to the UK and Canada, the courts have held that this freedom is not absolute. While limitation clauses have positive aspects, in this instance when combined with the restrictive interpretation given to the freedom it gives the right an extremely restricted application and although “the words of the clause indicate that it should operate to strike down Commonwealth laws which discriminate against persons on the grounds of their religious beliefs or make it difficult for persons to give effect to their beliefs or practices, the decided cases do not bear out that expectation because other considerations intrude.”\textsuperscript{324} It is unlikely that a court would review the proportionality of any law that restricts the free exercise of religion on the basis of national security, as s. 116 has been held not to protect religious organisations insofar as their activities are inconsistent with the war-time defence of the Commonwealth:

“Any regulations, therefore, which empower the Government to prevent persons or bodies from disseminating subversive principles or doctrines or those prejudicial to the defence of the Commonwealth or the efficient prosecution of the war do not infringe s. 116. The peace, good

\begin{itemize}
\item \textsuperscript{321} Charlesworth, \textit{supra} note 100 at 62
\item \textsuperscript{322} Williams, \textit{supra} note 305 at 537
\item \textsuperscript{323} O’Neill, \textit{Retreat, supra} note 313 at 28
\item \textsuperscript{324} O’Neill, \textit{Retreat, supra} note 313 at 78
\end{itemize}
government and order of the Commonwealth may be protected at the same time as the freedom of religion is safeguarded. Freedom of religion is not absolute. It is subject to powers and restrictions of government essential to the preservation of the community. Freedom of religion may not be invoked to cloak and dissemble subversive opinions or practices and operations dangerous to the commonwealth”\textsuperscript{325}.

Some rights have been implied into the constitution. These are based on principles that must inevitably be inherent, if unwritten, in the constitution if the society is to be a democratic one: “from the nature of our society, reinforced by parts of the written text, an implication arises that there is to be freedom of movement and freedom of communication. Freedom of movement and freedom of communication are indispensable to any free society”\textsuperscript{326}. The principle of freedom of political communication was further developed in 1992 when the High Court struck down legislation imposing stringent limits on political broadcasts and advertising during the election, holding that if “it is recognized that a representative democracy is constitutionally prescribed, the freedom of discussion which is essential to sustain it is as firmly entrenched in the Constitution as the system of government which the Constitution expressly ordains”\textsuperscript{327}. The High Court in \textit{Lange v. Australian Broadcasting Corporation}\textsuperscript{328} unanimously held that the freedom was part of Australian constitutional law and set out a test for determining whether the implied freedom has been infringed. First, does the law “effectively burden freedom of communication about government or political matters” in its terms, operation or effect? Secondly, if the law effectively burdens that freedom, is the law “reasonably appropriate and adapted” to serve a legitimate end the fulfilment of which is compatible with the maintenance of the system of government prescribed by the federal Constitution?\textsuperscript{329} The High Court did not set out the limits of the freedom, however it did hold that a nexus must exist between the communication and federal voting choices. However, this freedom, like those relevant in the UK and Canada, may be limited by legislation subject to a proportionality test – if the legislation’s “purpose is not to impair freedom, but to secure some end within power in a manner which, having regard to the general law as it has been developed in relation to the written and spoken

\textsuperscript{325} \textit{Adelaide Company of Jehovah’s Witnesses Inc v. Commonwealth} (1943) 67 CLR 116 at 149-150.
\textsuperscript{326} \textit{McGraw Hinds (Aust) Pty Ltd v. Smith} (1979) 144 CLR 633 at 670
\textsuperscript{327} \textit{Nationwide News Party, supra} note 309 at 48
\textsuperscript{328} \textit{Lange v. Australian Broadcasting Corporation} (1997) 145 ALR 96
\textsuperscript{329} \textit{Ibid.} at 112
word, is reasonably and appropriately adapted to that end”\(^{330}\). The principle is therefore very narrowly applied, and only in the extremely limited context of the political arena: “the judges have made it clear that they are not implying a personal right to freedom of communication into the Constitution. Rather they are prepared to strike down as unconstitutional legislation that places a disproportionate burden on the free communication of political matters of government. They have been reluctant to imply other freedoms into the Constitution”\(^{331}\). Implied rights are therefore also an unreliable guarantee of rights protection. They “do not have a firm status in our constitutional fabric. The changing membership of the High Court makes them vulnerable to reinterpretation and indeed to evaporation”\(^{332}\).

The picture of rights protection in Australia is complex and mixed. While it is a democratic nation with a relatively good record for rights protection, the lack of any entrenched mechanisms for rights protection, whether statutory or constitutional, means that its anti-terrorism laws may well come under less rigorous pre-enactment scrutiny than is applied in the other three jurisdictions this thesis examines. While commentators such as Tom Campbell would argue that pre-enactment review and Parliamentary debate are sufficient, others such as George Williams would contest that at least the threat of post-enactment invalidation is a prerequisite for meaningful pre-enactment review, since “[w]ithout the possibility of post-enactment scrutiny by the judiciary on human rights grounds, there may not be an incentive for pre-enactment scrutiny to occur within the legislative process. Hence, a significant advantage of a charter of rights is not so much the dialogue that may follow a judicial decision, but the deliberation that begins within the legislative body before any such decision.”\(^{333}\) Further, post-enactment, the mechanisms outside of the political arena for challenging the legislation or bringing about legislative change are extremely limited.

\(^{330}\) Nationwide News Party, supra note 309 at 95
\(^{331}\) O’Neill, Retreat, supra note 313 at 29
\(^{332}\) Charlesworth, supra note 100 at 31

Freedom of Association

In keeping with Canada, the United Kingdom and the United States, Australia has passed legislation establishing a listing process for terrorist organisations and enacted laws which create offences linked to conduct associated with listed organisations. The listing provisions were first introduced in the *Security Legislation Amendment (Terrorism) Act 2002*[^334], which allowed the Attorney-General to proscribe organisations which the UNSC had identified as terrorist organisations and the *Criminal Code Amendment (Terrorist Organisations) Act 2004*, which took this one step further and allows Australia to determine for itself which organisations pose a terrorist threat. Under s. 101.2(1) of the *Australian Criminal Code*[^335], a terrorist organisation now means (a) an organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act occurs); or (b) an organisation that is specified by the regulations for the purpose of this paragraph. It is notable that, unlike in the UK and Canada, there are no provisions for meaningful judicial review (although judicial review upon limited administrative law grounds is possible under the *Administrative Decisions (Judicial Review) Act 1977*[^336]), meaning that the decision and review of the decision take place entirely within the legislative and executive branches, a fact which has given rise to concerns “about the possibility of a future government proscribing legitimate protest movements and political opponents”[^337]. The Hon Philip Ruddock MP describes the process for making a regulation as:

> …a transparent listing process which should redress these concerns. Before an organisation can be listed, as Attorney-General, I must be satisfied that the relevant organisation is directly or indirectly engaged in preparing, planning, assisting in or fostering the doing of a terrorist act. The Act also provides that the leader of the opposition must be briefed about a proposed listing. Any regulation listing a terrorist organisation is subject to disallowance of the Parliamentary Joint Committee on ASIO, DSD, and ASIS. The ordinary parliamentary processes still apply, and therefore a regulation may also be subject to review by other committees including the Senate Regulations and Ordinances Committee[^338].

[^334]: Security Legislation Amendment (Terrorism) Act 2002 (Cth)
[^335]: Criminal Code Act 1995 (Cth.)
[^336]: Administrative Decisions (Judicial Review) Act 1977 (Cth.)
[^338]: Ibid. at 257
This process is more robust in involving Parliamentary committees than proscription in the other three states at issue, which derives from Cabinet only. Further, ex-post review by the Parliamentary Joint Committee on ASIO, DSD, and ASIS (PJC) provides a layer of protection prior to listing.

Australian law enables the proscription of organisations that advocate or praise terrorism, impacting on both freedom of expression and association (see below). Despite the assurances of the Attorney-General, it is clear that the process places tremendous faith in the government and ASIO which “have been given an extraordinary discretion to determine whose political activity and political organization will be classed as legitimate – and therefore immune from investigation and prosecution – and who will suffer the crackdown”\(^3^3^9\). The lack of provisions for judicial oversight, and the fact that such determinations will invariably be based on national security information and the Attorney-General’s own satisfaction of reasonableness, means that there will be no meaningful way to review the decisions outside of the executive branches and this “has major implications for political debate and the acceptable limitations on organized political behaviour.”\(^3^4^0\)

An organisation may only be de-listed in two ways – an organisation may make a de-listing application under subsection (17), which the Minister is obliged to consider, or the Minister may cease to be satisfied that the organisation is engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act or that the organisation advocates the doing of a terrorist act. While it would be impossible to challenge regulations in court, the first review “undertaken by the Parliamentary Joint Committee on ASIO Australian Security and Intelligence Organization, ASIS Australian Secret Intelligence Service and DSD Defence Signals Directorate into the proscription of Palestinian Islamic Jihad was encouraging…”\(^3^4^1\) Despite the fact that it “was the view of the officers from ASIO and the Attorney-General’s Department that the role of the Committee was to ensure that the Attorney-General had gone through the appropriate processes and to limit their consideration to whether the public supporting statement on the listing offered

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341 Williams, *supra* note 305 at 541.
sufficient reasons for the listing,” the Committee decided its role was not merely to examine the decision according to procedural criteria but to undertake a more thorough review on the basis that “[n]one of the other available review mechanisms offers a review of the merits of the decision. Given the severity of the penalties and the principles of natural justice, it seems prudent for the Committee to adopt a course of action that is as rigorous as possible.” However, the efficacy of the committee is limited by the extremely short amount of time which it is given to report – a non-extendable period of fifteen days. Further, “the former government on occasions failed to even provide appropriate warning of impending listings to the PJC so that it could effectively meet its responsibilities. The PJC has repeatedly complained of a failure to provide comprehensive, accurate and balanced information to support listings and validated the process.”

 Nonetheless, the approach taken by the Committee, and the breadth of the concerns which it considers, do highlight the potential of such a review process to be meaningful and comprehensive. Kent Roach compares this approach to the Canadian procedure;

The lack of any similar legislative review in Canada reflects the fact that Canada does not have a Parliamentary intelligence committee with access to classified information. Legislative review is vulnerable to politicalisation, but it also has the potential to develop expertise within Parliament on listing and intelligence matters… Although the Canadian system of judicial review would have greater independence from the government, those opposing the listing decision will often not have access to the critical intelligence reports and thus be unable to challenge them effectively. There are limits to both judicial and legislative review of proscription decisions.

343 Ibid. at para 2.8
344 Austl., Commonwealth, Parliamentary Joint Committee on ASIO, ASIS and DSD, Review of the Listing of Six Terrorist Organisations (Canberra: Australian Government Publishing Service, 2005) at para. 2.2 – 2.3
However, it is also notable that despite its expressed misgivings, the PJC has on no occasion recommended disallowance of a listing regulation. This is to be compared with the Proscribed Organisations Appeal Commission in the UK, which has disallowed a listing decision.

A comprehensive review of the legislation was undertaken by the Security Legislation Review Committee (SLRC), which commented unfavourably on the proscription process. The report stated “that no sufficient process is in place that would enable persons affected by such proscription to be informed in advance that the Attorney-General is considering whether to proscribe the organisation, and to answer the allegation that the organisation is a terrorist organisation. All members of the SLRC believe that a fairer and more transparent process should be devised for proscribing an organisation as a terrorist organization”.

The SLRC recommended either that listing decisions by the Attorney-General be advised by security experts or that a judicial process be set in place. Inherent in this recommendation is the idea that legislative and executive review are insufficient for a fair and transparent process, and that, as a minimum, subsequent judicial review such as in the UK and Canada is necessary. This tremendous emphasis upon executive discretion emphasises the fact that Australia, lacking a Bill of Rights or entrenched mechanisms for judicial oversight, must “rely upon the parliamentary process (a frail shield at present) or the good sense of our political leaders. These are ineffective checks at a time of community fear and, in any event, are not safeguards that are now regarded as sufficient in any like nation.”

Provisions banning association with these proscribed organisations are found in s. 102.3(1) of the Australian Criminal Code, which creates an offence of being a member of an organisation that a court finds to be a terrorist organisation, even if not listed by regulation. The offence does not apply if the accused “took all reasonable steps to cease to be a member of the organisation as soon as practicable after the person knew that the organisation was a terrorist organisation”. The legal burden is on the accused to prove this on the balance of probabilities, which undermines the presumption of innocence, especially since it will be difficult to prove lack of knowledge. S.

347 Hogg, supra note 345 at 472-473.
102.5 modifies the offences of providing training to or receiving training from a terrorist organisation. It makes these offences strict liability thus placing an onus on the accused person to prove that they are not involved in training activities with a terrorist organisation. There is no requirement for the training itself to be connected to a terrorist activity. Finally, the *Anti-terrorism Act (No 2) 2004* creates an association offence found under s. 102.8 of the *Australian Criminal Code* that applies to people who have links with a terrorist organisation or its members but who themselves are not members of the organisation and who do not have an active involvement with the activities of the organisation. Under this section, it is an offence to intentionally associate with another person who is a member of, or a person who promotes or directs the activities of, an organisation if the person knows that the organisation is a terrorist organisation, the association provides support to the organisation, and the person intends that the support assist the organisation to expand or to continue to exist and knows that the other person is member of, or a person who promotes or directs the activities of, the organisation. Some specific exemptions are included for close family members regarding domestic concerns, for public religious worship, humanitarian aid and legal advice. The section also does not apply if it would infringe any constitutional doctrine of implied freedom of political communication, demonstrating a legislative awareness of one of the constitutionally protected freedoms and indicating that rights provisions have an effect in limiting laws. The defendant bears an evidential burden in relation to this.

The SLRC has recommended repeal of this section due to its imprecision and the fact that it “transgresses a fundamental human right—freedom of association—and interferes with ordinary family, religious and legal communication. The SLRC considers that section 102.8 should be repealed. The interference with human rights is disproportionate to anything that could be achieved by way of protection of the community if the section were enforced”. The Law Reform Commission’s review of sedition laws has also recommended repeal of association offences.

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350 *Anti-terrorism Act (No 2) 2004* (Cth)
351 Security Legislation Review Committee, *supra* note 348 at 4-5, see also 123-126
The imprecision in the offence’s characterization adds a further layer of complexity to the issue. Despite the implications of the offence for human rights, its actual impact is liable to be limited since, as Miriam Gani suggests, in effect the offence is likely to be difficult to prove beyond a reasonable doubt “it requires multiple physical and fault elements to be in place (including the provision of support, knowledge that the organisation is a terrorist one, and the intention to assist the organisation through the support provided by the association).”

Gani proposes that the “‘terrorist organisation’ offences where executive proscription is the method by which an organisation has been designated as ‘terrorist’, are particularly worrying in their breadth and scope”, since they in fact lack the confining effect brought about the intricacy of the definition of a terrorist act. Indeed, no act need actually be committed, and at the individual level simple membership itself becomes a crime without any of the traditional criminal elements of offences coming into effect.

In a recently decided case, twelve people from Melbourne were charged with a number of offences, totalling twenty-seven charges, including being members of a terrorist organisation (s. 102.3) – their own informal jihadi group – in November 2005. They had not committed any acts that could legally be described as “attempts”, and according to the judge’s sentencing remarks: “the prisoners will be sentenced on the basis that they were members of a terrorist organization which, although it had encouraged them to perform a terrorist act or acts in the future and had taken steps towards that end, no target or targets had been selected and no explosives or other material had been obtained to carry out such an attack”. While it is clear from the evidence that the organization posed some kind of a threat, the line between preventative security measures and the criminal law becomes blurred. Facts which would clearly warrant close monitoring of the organization instead are becoming the basis of criminal prosecutions. The law is stepping to criminalize behaviour that has not yet developed into action, and it is doing this by targeting association and expression. It is made expressly clear in the judgment that there was no

354 Ibid., at 298
conspiracy or attempt. The salient details are that the accused were “members of a terrorist organization”, which “encouraged them to perform a terrorist act”.

**Freedom of Expression**

In 2005, Australia enacted anti-terrorism laws targeting speech associated with terrorism. The passage into force of the *Anti-Terrorism Act 2005*\(^ {356}\) reflects the contrast between executive scrutiny and judicial scrutiny through the mechanism of a charter. It also highlights some of the issues inherent in restricting free speech and public debate. The content of the act was:

…first agreed to in principle at a meeting of the Council of Australian Governments (COAG) in September 2005. The meeting was provided with a secret briefing on terrorism by security agencies and the federal draft legislation was provided ‘in confidence’ to the state premiers and territory chief ministers. Following indications that the federal Liberal (conservative) government of John Howard would attempt to rush the bill into and out of the federal Parliament in a single week, allowing barely one day for a senate inquiry into its provisions, the chief minister of the Australian Capital Territory, Jon Stanhope, released the draft legislation on his Web site… This leaked draft and the subsequent bill were then the subject of both extensive scrutiny and trenchant criticism…\(^ {357}\)

While part of the haste may have been a response to the obligations created by SCR 1624, the process is particularly worrying considering that, without a bill of rights, Australia relies on Parliamentary processes and democratic input to ensure the compatibility of the laws with human rights, and the secrecy and haste seem to indicate an attempt to circumvent these protections.

In November 2005, prior to the enactment of the Bill, the Senate Legal and Constitutional Legislation Committee recommended the dropping altogether of the provisions relating to sedition:

The committee acknowledges concerns about the potential impact of the sedition provisions on freedom of speech in Australia. Despite the Department's various reassurances on this issue during the committee's inquiry, the committee is troubled by evidence of the potential for 'self-censorship' by a community cautious of the potential breadth of the provisions. The committee also notes the extensive expert legal evidence to this inquiry raising serious concerns about the provisions, including the clarity of various aspects, such as the fault elements and defences\(^ {358}\).

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\(^{356}\) *Anti-Terrorism Act 2005* (Cth.)

\(^{357}\) Hocking, *supra* note 340 at 227

Nonetheless, the bill proceeded, and signalled the progression in Australia from legislating against crimes before they reach even the inchoate stage to legislating against them while they are still ideas.

Under s. 80.2 of the Australian Criminal Code, speech that urges persons to assist organisations or countries that are engaged in hostilities against the Australian Defence Forces or engaged in a declared or undeclared war on Australia is an offence. A further offence under the section applies to the urging of a group or groups (whether distinguished by race, religion, nationality or political opinion) to use force or violence against another group or groups, if the use of force or violence would threaten peace, order and good government. A person does not commit an offence if he or she acts in “good faith” in a set of specific circumstances, including political commentary and publishing material on a matter of public interest; however the accused carries an evidential burden as to this and there are circumstances in which the defence would appear not to apply – for example in the case of academic discussion unrelated to political commentary.

On 1 March 2006 the Attorney-General referred the Crimes Act 1914\(^{359}\) and the Anti-Terrorism Act [No 2] 2005\(^{360}\) to the Australian Law Reform Commission (LRC) for review. The final report of the LRC was tabled in Parliament on 31 July 2006. The LRC recommended repeal of some of the sedition provisions: “s. 80.2(7)–(8) of the Criminal Code have the greatest potential to cause incursions into the right to freedom of expression. The ALRC shares the concern that these provisions do not draw a clear enough distinction between legitimate dissent—speech that ought not to be interfered with in a liberal democracy—and expression whose purpose or effect is to cause the use of force or violence within the state”\(^{361}\). The fact that the laws are being reviewed after they are enacted highlights the limits of pre-enactment scrutiny and that there is little ex-post review. Review by the LRC seeks to fill this gap, however their recommendations for repeal have been ignored. In the other states at issue in this thesis, the governments would be forced to defend findings of human rights incompatibility in the courts, and, even in the UK where legislative amendment is not compulsory, reform would almost certainly occur.

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359 Crimes Act 1914 (Cth.)
360 Anti-Terrorism Act [No 2], supra note 50
361 Fighting Words, supra note 352 at 158
The concern is not simply that the provisions restrict freedom of expression, but their potential to impact on legitimate as well as illegitimate expression: the “offences are considered sufficiently broad to capture reflective, journalistic and creative sentiments of writers and other artists and to impose drastic sanctions on the reporting of security issues.” Such concerns may be partially addressed by the defence under s. 80.3 for acts done in good faith, including publishing “a report or commentary about a matter of public interest”. However, the fact that an evidential burden is placed on the defendant in relation to this reduces the scope of the defence, and further, although “it might be expected that this defence would cover academics, teachers, research and public commentary… [t]he scope of protection afforded is uncertain, and there is a legitimate concern that the effect will be to impose self-censorship and damp down wide and fruitfully critical discussion of Australian institutions. The effect is an impingement upon the freedom of academic thought and inquiry”.

Under s. 102.1, organizations may be proscribed on the basis that they advocate the doing of a terrorist act (whether or not a terrorist act has occurred or will occur). Advocating includes counselling, urging and praising, where such praise might have the effect of leading a person to engage in a terrorist act. Andrew Lynch and George Williams consider this provision particularly problematic because it “does not require an organization to encourage someone to undertake a terrorist act, but is far more indirect. It extends to where an organization “praises” someone else’s terrorist act and there is a mere “risk” that this might lead another person again to commit such an act (including where that person is very young or of unsound mind)”.

They continue that “[p]roscribing speech is troubling enough without also punishing people who have not made a statement but who are members or supporters of the same organization.” Before the introduction of the 2005 Act, the federal government considered listing the Hizb-ut-Tahir as a terrorist organization “after a similar-named organization was banned in the United Kingdom. It did not do so, because it could not find any evidence that HUT was planning, fostering or

362 Hocking, supra note 340 at 228.
363 Ibid. at 229.
365 Ibid. at 63
preparing a terrorist act."³⁶⁶ The banning of such an organization would likely be possible
under s. 102.1 of the 2005 Act. Although the government has yet to use or abuse the provision it
“inevitably constrains public debate in general and academic freedom in particular to discuss and
debate a range of, including unpopular, political positions.”³⁶⁷ The symbolic impact of making
such a law, and the manner in which it will inevitably inform politics and debate, will have a
detrimental impact even should it become effectively dead letter.

Other provisions also impact on freedom of expression. The *ASIO Legislation Amendment Act
2003*³⁶⁸ makes it an offence to disclose operational information, or even the simple fact of an
issue of a warrant under the Act, for two years after someone has been detained. George
Williams suggests that the “impact of this provision upon freedom of the press is of great
concern. It means that two years must pass before abuses involving the operational activities of
ASIO under the regime can be exposed through media reporting.”³⁶⁹ However, it is not simply
in instances of abuses that the two year requirement may be of concern. Discussion and debate
are also necessary for more subtle concerns, such as giving insight into the efficacy of the law.
Joo-Cheong Tham comments that an academic “study of the operations of the ASIO detention
and questioning regime could not be undertaken in Australia, given that detainees would not be
able to relate their experiences of being detained for up to two years after their detention”³⁷⁰.

It is an offence under s. 101.5 of the Australian *Criminal Code* to collect or make documents
likely to facilitate a terrorist act, even if a terrorist act does not occur. Although an offence is not
committed if the collection or making of the document was not intended to facilitate preparation
for, the engagement of a person in, or assistance in a terrorist act (ss. (5)), a defendant bears an
evidential burden in relation to this. These provisions too may have profound repercussions for
academic research:

> In July 2005, an Anglo-Saxon, Australian-born Muslim convert by the name of Abraham was
> quizzed by AF officers after borrowing and purchasing books on martyrdom and terrorism. It

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³⁶⁷ Hocking, *supra* note 340 at 220
³⁶⁸ *ASIO Legislation Amendment Act 2003* (Cth.)
³⁶⁹ Williams, *supra* note 305 at 543.
³⁷⁰ Tham, *supra* note 366 at 239.
turned out that Abraham was enrolled in a terrorism studies course at Monash University, together with two hundred other students who apparently were not questioned by the AFP. After media coverage, the AFP publicly confirmed that Abraham did not pose a security threat.\(^{371}\)

On the one hand this may be a rare worst-case scenario, given publicity because of the obvious detrimental effect of security measures on an unsuspecting bystander. The episode did not result in prosecution. However, the incident brings into relief the possible effects of such legislation on academic research, and the manner in which, even if not used, it may restrict freedom of expression.

Two notable cases have been prosecuted under these provisions. Farheem Lodhi\(^{372}\) was charged, inter alia, with two counts of making and collecting documents in preparation for a terrorist act (ss. 101.4 and 101.5 of the *Criminal Code Act*) and one count of possession of a document connected with a terrorist act (s. 101.4). The trial was redolent of the same concerns about secrecy as are heard in the other jurisdictions:

Mr Lodhi’s committal hearing was punctuated by regular sessions *in camera*, orders prohibiting the publication of evidence and even orders refusing to allow the defence to cross-examine the Singaporean witness on certain specified topics – even though those topics were relevant and probative. At one stage the magistrate closed the court and then ordered the accused taken to be taken to the cells so that legal argument could be had in his absence.\(^{373}\)

Lodhi’s case could be seen either as an accolade to the efficacy of the legislation, or as a profound condemnation of the manner in which it distorts the criminal law. While Lodhi’s acquiring of maps and materials on how to make explosives suggests that he was considering terrorist activities, it is clear from the judges sentencing remarks that his activities were at far too early a stage to be charged as an inchoate offence. The judge held that he was “perfectly satisfied that the proposal had not reached the stage where the identity of a bomber, the precise area to be bombed or the manner in which the bombing would take place had been worked out”.\(^{374}\) This is characteristic of the manner in which the legislation seeks to have a preventative effect by catching terrorist behaviour at a stage where it has yet to pass beyond the intellectual to

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371 Tham, *supra* note 366 at 243-4
374 *Lodhi*, *supra* note 372 at 26
the physical. In Lodhi’s case it was not his activities that were being targeted but the thoughts inspiring them. The materials people accumulate and the documents they create and read are an aspect of expression. The law is impacting on expression by limiting access to the material that informs it.

Bilal Khazal was charged with collecting and making documents likely to facilitate an act of terrorism (s. 101.5), a charge which related “to the use of his home computer to collect information from the internet relating to Islamist, “jihad” issues and the subsequent reformatting of this material and republishing it on the internet”\textsuperscript{375}. This case is even more troubling in that it was not linked to any specific terrorist activity, or even planning for a specific terrorist activity. The material articulated “the views that it does in generalities, urges no particular action to be taken by any particular persons at any particular time, or at any particular place. It does identify persons against whom actions might be launched, in the main as office holders, rather than as individuals. It is also clear that not much, if anything, represents the creative individual work of Mr Khazal."\textsuperscript{376} Due to the nature of the material, it was difficult to even reach an authoritative definition of its contents, and “there appears to be a good deal of room for differing interpretations and translations of various of the portions of the material, even including the title of the collection.”\textsuperscript{377} While the inflammatory sentiment may be present in the material, there is a danger in imposing weighty criminal sanctions for crimes which are crimes of thought rather than crimes of action.

\textbf{Australia Conclusion}

The Australian legislature has presented the anti-terrorism laws as human rights compatible – “the counter-terrorism laws enacted since September 11 achieve the twin objectives of targeting terrorism from all angles while possessing sufficient safeguards to limit the impact on fundamental freedoms and rights”\textsuperscript{378}. Nevertheless, it is clear that the Australian laws have profound implications for human rights. The terms of the association offences, go beyond even

\begin{flushleft}
\textsuperscript{375} Boulten, \textit{supra} note 373 at 11.
\textsuperscript{376} \textit{R. v. Khazal} [2004] NSWSC 548 at 26
\textsuperscript{377} \textit{Ibid.} at 25
\textsuperscript{378} Ruddock, \textit{supra} note 337 at 255
\end{flushleft}
the approach of the UK legislation in allowing organisations to be proscribed on the basis of advocating terrorism and criminalising association with members even if not a member oneself; and while Australia has not created a ‘glorification’ offence, it has made amendments to the sedition laws and an organisation may be proscribed, effectively causing all its members to commit criminal offences, on the basis of speech. The UN Human Rights Committee has noted concerns about Australia’s Anti-Terrorism legislation: “While acknowledging the State party’s intention to review the Terrorist Act in the near future, the Committee is concerned that some provisions of the Anti-Terrorism Act (No. 62) 2005 and other counter-terrorism measures adopted by the State party appear to be incompatible with the Covenant rights, including with non-derogable provisions.”

One reason for this may be the absence of a charter that would “allow courts to assess the changes against human rights principles. This can provide a final check on laws that, with the benefit of hindsight, ought not to have been passed. The absence of such a check is one reason why Australian law after September 11 is stringent in its impact upon individual rights.” A rights instrument may also have a pre-enactment effect, and the political communication exemption for the association offence under s. 108.2 Criminal Code demonstrates that where rights provisions do exist in the Australian constitution they can have a restraining effect on the legislation. This in turn speaks to the powers of constitutions when drafting “charter proof” legislation, even in the context of an overbroad offence. Andrew Lynch and George Williams comment that a charter or bill of rights enables a better proportionality analysis of the law, whereas “[i]n Australia, bad laws can continue to operate without this type of scrutiny. The best we have is not a national charter of rights but an implied freedom of political communication derived from the Constitution by the High Court.”

A legal check forces the legislature to examine the proposed legislation in terms of the human rights it may possibly undermine, and highlights issues at an early stage. When the legislation comes into effect, if it is challenged under a charter or bill of rights, there is a further opportunity for the courts to conduct a proportionality analysis of the law. In Australia the “lack of a legal

379 Concluding Observations HRC 2009, supra note 319 para 11
380 Williams, supra note 305 at 536.
381 Lynch & Williams, supra note 364 at 60
check means that political and legal debate in the “war on terror” is largely unconstrained by fundamental human rights principles. Instead the debate may reflect the majoritarian pressures of Australian political life rather than the principles and values on which the democratic system depends. The only check on the power of parliament or government to abrogate human rights depends on the quality of political debate and the goodwill of our political leaders.”

However, while there is little scope for the courts to evaluate and strike down the laws themselves, there is scope for them to interpret them, especially given the existing constitutional protections including political communication. Although relatively few terrorism prosecutions have been conducted in Australia, this does suggest that the courts are failing to use their powers to their full potential in interpreting the laws.

382 Lynch & Williams, supra note 364 at 92
Chapter 6
America

Human Rights Protection under the Bill of Rights

Of all the countries this thesis examines, the United States, as ground zero for the September 11 terrorist attacks, was inevitably the most profoundly effected. Alongside “the destruction of so many lives and the damage done to two of our most symbolically important buildings, the visual images of the attacks inflicted a level of trauma unknown to many Americans.”

It is within this context that American legislative reactions have to be examined.

Human rights protection in the U.S. takes place within the context of the United States Constitution. The Constitution is the “Supreme Law of the Land” (Article VI), and the court has the power to strike down Federal legislation. Freedom of speech is guaranteed by the First Amendment to the Constitution, which states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Although the wording of the provision specifies speech as opposed to expression, expressive activity has also been held to be protected. For example, in Texas v. Johnson, the Court held that conduct, flag burning, as political expression, is protected activity.

The First Amendment has been interpreted as protecting nearly every form of expression, including hate speech and commercial speech, to a far greater extent than in any of the other

384 United States Constitution 1787
385 Marbury v. Madison, 5 U.S. 1 (1803)
386 U.S. Const. amend. I.
388 Although obscenity and commercial speech do not receive full constitutional protection. See e.g., Miller v. California, 413 U.S. 15 at 23-24 (1973) (holding that the First Amendment does not protect obscenity); Central
jurisdictions examined. For example, there are no U.S. laws suppressing speech that incites racial hatred, and the United States has never ratified the *International Convention on the Elimination of All Forms of Racial Discrimination* because of concerns that it would violate the First Amendment.

While the First Amendment does identify the right to assemble, it does not make specific mention of a right to association. Nevertheless, the United States Supreme Court recognized freedom of association as a constitutional right in *NAACP v. Alabama ex rel. Patterson*. In *Patterson*, the Court recognized freedom of association as an inherent aspect of free speech rights and held that the freedom to associate for the advancement of beliefs and ideas is inseparable from the freedom of speech: "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly."

There are no express provisions in the *Constitution* for the limitation of rights equivalent to the Charter’s s1 limitation clause, or the integral limitations in Articles 9, 10 and 11 of the ECHR. The language of the *Constitution* itself is strict and absolute. However, in practice, “[v]ery few individual liberties are absolute; virtually all require some sort of balancing and permit infringement where sufficiently important government interests are advanced.” This balancing of rights and freedoms is done through the courts’ interpretation of the right.

The American courts draw a distinction between speech, to which the “strict scrutiny” standard is applied, and expressive conduct, to which a more relaxed test of “intermediate scrutiny” is applied. Terrorist speech would be subject to the “strict scrutiny” standard formulated by the

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391 Ibid. at 460

Supreme Court in *Brandenburg v. Ohio*[^393]. This test superseded the original “clear and present danger”[^394] test formulated in *Schenck v. United States*[^395]. In *Brandenburg*, the court extracted from prior decisions the principle that a state may never punish the mere advancement of ideas as opposed to express calls for violation of the law, and that it may not “forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action”[^396]. This suggests that statements “advocating terrorist violence are beyond the pale of constitutional protection only where the words used objectively urge terrorist action, the speaker subjectively intends to incite such action, and the terrorist action is imminent and likely to occur”[^397]. In effect, there is very little scope within the American constitution to outlaw incitement to terrorism as it must be proven that illegal action would be both imminent and likely. This is self-evidently a much higher standard than that conceived in the ECHR or Charter, and is characteristic of the inherent differences between rights protection in the U.S., and rights protection in the other jurisdictions examined:

> Whatever its motivating concerns, *Brandenburg* vividly symbolizes the extent to which the First Amendment currently protects freedom to express what Holmes termed ‘the thought that we hate.’ For over thirty years now, it has stuck as the law because it reflects a broadly shared cultural commitment to protect the expression even of the most remotely political ideas, even when doing so entails palpable costs… and larger risks to the society as a whole[^398].

This American aversion to criminalising unpalatable speech, such as hate speech, demonstrates how it will not regulate the content of speech in the way that the other three states will.

Cases involving expressive conduct as opposed to speech are governed by the test adopted in *United States v. O’Brien*[^399]. Government regulation of expressive conduct will be upheld “if it furthers an important governmental interest… unrelated to the suppression of free expression;

[^393]: *Brandenburg v. Ohio* 395 U.S. 444 (1969) [*Brandenburg*]
[^394]: “The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.” *Schenck v. United States* 249 U.S. 47 at 52 (1919) [*Schenck*]
[^395]: Ibid.
[^396]: *Brandenburg*, supra note 393 at 447
[^397]: Scottiaux, *Terrorism*, supra note 14 at 104
and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.\textsuperscript{400} This bears a greater resemblance to the “proportionality” test representative of the other jurisdictions.

The limits to the constitutional right to freedom of association are harder to quantify because the right arises by implication and is not expressly delineated in the Constitution. It is clear that membership in a group may not be prohibited simply because the group is associated with illegal acts. In \textit{NCAACP v. Claiborne Hardware}\textsuperscript{401} the Court held that “the right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that is not itself protected”\textsuperscript{402}, while in \textit{Elfbrandt v. Russell}\textsuperscript{403} the Supreme Court held that membership in groups that pursue both legal and illegal ends may not be proscribed.

However, it is equally clear that, in certain situations, criminal charges linked to associational activity are permissible. The test is whether “the government can prove that the individual charged was intentionally furthering the illegal goals of a group in which he was an active member. In that scenario, however, the government carries the burden of proving that a group's objective rose to the level of instigating an illegal action, not just advocating a position”\textsuperscript{404}. Thus the court held in \textit{Scales v. United States}\textsuperscript{405} that although guilt by association violates the First and Fifth Amendments, a conviction should be upheld if there is proof of specific intent to further the unlawful ends of a group.

In addition, taking the limits of associative activity much further than any other jurisdiction, the Supreme Court has expressly held fundraising activities to be protected by the First Amendment. The Supreme Court in \textit{Buckley v. Valeo}\textsuperscript{406} explained that, since “virtually every means of

\begin{footnotesize}
\begin{enumerate}
\item\textit{Ibid.} at 377
\item\textit{NCAACP v. Claiborne Hardware} 458 U.S. 886 (1982)
\item\textit{Ibid.} at 908
\item\textit{Elfbrandt v. Russell} 384 U.S. 11, 19 (1996)
\item\textit{Scales v. United States} 367 U.S. 203 (1961)
\item\textit{Buckley v. Valeo} 424 U.S. 1 (1976) [\textit{Buckley v Valeo}]
\end{enumerate}
\end{footnotesize}
communicating ideas in today’s mass society requires the expenditure of money\(^\text{407}\). "[a] restriction on the amount of money a person can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."\(^\text{408}\) Following this, in *Cincinnati v. Discovery Network, Inc.* \(^\text{409}\), the Supreme Court held that the contribution of money is protected speech since the "money is spent to project ideas".

Historically, the protection of the *American Constitution* has been extended to all those within the U.S. borders. This tenet arises “from principles of equal protection of the law to which all those obeying such laws are entitled”\(^\text{410}\). The Supreme Court has held that “[e]ven one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.”\(^\text{411}\) Resident aliens and undocumented aliens with substantial ties to the United States belong to the national community and, as such, enjoy the rights afforded by the First Amendment. They “receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country.”\(^\text{412}\).

The U.S.A. has produced far less anti-terrorism legislation than Australia, or even the UK. The five major legislative packages\(^\text{413}\) are: *The Omnibus Diplomatic Security and Antiterrorism Act of 1986* \(^\text{414}\); *The Antiterrorism and Effective Death Penalty Act of 1996* \(^\text{415}\) (AEDPA) – which passed through congress on April 19 1996, the first anniversary of the Oklahoma City bombing; the PATRIOT Act (“Uniting and Strengthening America by Providing Appropriate Tools...”)

\(^{407}\) *Ibid.* at 11

\(^{408}\) *Ibid.* at 19


\(^{411}\) *Mathews v. Diaz*, 426 U.S. 67 (1976) at 77

\(^{412}\) *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) at 271

\(^{413}\) I exclude in my examination the Guantanamo legislation such as the *Military Commissions Act of 2006*, Publ. L. No. 109-336, 120 Stat. 2600 (codified in scattered sections of 10 and 18 U.S. C.)


Required to Intercept and Obstruct Terrorism”) of 2001416, signed into law just six weeks after the September 11 attacks; the Homeland Security Act of 2002417 (HSA) (which creates a privacy and civil liberties board appointed by the President with responsibility for ensuring that the government’s terrorism enforcement activities do not infringe civil liberties or privacy of the citizenry); and The Intelligence Reform and Terrorism Prevention Act of 2004418. The PATRIOT Act, despite its length and complexity “did not add very much to the body of anti-terrorism crimes”419. In the congressional debate on the PATRIOT Act, the threat from terrorism was described as “a new kind of war”420 and “an unprecedented state of affairs”, demanding “unprecedented action”421. However, despite this, the Act itself “is an amalgam of often unrelated pieces of authority, most of which simply amend existing laws, and the larger share of which are unremarkable complements to existing authority”422. The earlier AEDPA had “comprehensively addressed most of the needs for legislating terrorism crimes, some five years before September 11 2001. Indeed, most of the prosecutions initiated since September 11, 2001 have involved provisions enacted in the 1996 Act”423.

Previous attempts at controlling speech in U.S. have been largely unsuccessful or short lived. Past attempts include The Sedition Act of 1798424, which made it an offence under s. 2 to “write, print, utter, or publish… false, scandalous and malicious writing or writings against the government of the United States”. The act was not appealed to the Supreme Court for judicial review, although the Court has since declared that “[a]lthough The Sedition Act was never tested

419 Norman Abrams, “C. The Major Legislative Packages” in Anti-Terrorism and Criminal Enforcement, 2nd ed. (St Paul, MN: Thomson/West, 2005) 8 at 10 [Abrams]
421 Ibid. at S10533, S10591 (2001) (Senator Feinstein)
422 Banks, supra note 383 at 492
423 Abrams, supra note 419 at 10.
424 The Sedition Act of 1798, ch. 73, 1 Stat. 596 (1798)
in this Court, the attack upon its validity has carried the day in the court of history."\(^\text{425}\) The act expired in 1801.

\textit{The Espionage Act of 1917}\(^\text{426}\), amended by \textit{The Sedition Act of 1918}\(^\text{427}\) to prohibit under s. 3 “disloyal, profane, scurrilous or abusive language intended to cause contempt, scorn, contumely or disrepute as regards the form of government of the United States, or the Constitution, or the flag, or the uniform of the Army and Navy, or an language intended to incite resistance to the United States or to promote the cause of its enemies” was given a broad interpretation and used for the prosecution of an anti-war speech in \textit{Debs v. United States}\(^\text{428}\) and a pamphlet urging resistance to the draft in \textit{Schenck v. United States}\(^\text{429}\). The court upheld the constitutionality of the laws. These acts were largely repealed in 1920 and 1921. Although later decisions have cast doubt on the constitutionality of the laws, the decisions have not been overruled.

\textit{The Smith Act of 1940}\(^\text{430}\) made it an offence to “knowingly or willfully advocate, abet, advise or teach the duty, necessity, desirability or propriety of overthrowing the Government of the United States or of any State by force or violence, or for anyone to organize any association which teaches, advises or encourages such an overthrow, or for anyone to become a member of or to affiliate with any such association.”\(^\text{431}\) It was used for communist prosecutions until 1957 and still remains on the books, although it is now dead letter. The \textit{Communist Control Act of 1954}\(^\text{432}\) was designed to “outlaw the Communist Party”. In \textit{Dennis v. U.S.}\(^\text{433}\) the Court upheld the conviction of a leader of the communist party while holding out the “hope, however, that in calmer times, when present pressures, passions and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free

\begin{itemize}
\item[428] \textit{Debs v. United States}, 249 U.S. 211 (1919)
\item[429] \textit{Schenck, supra note 394}
\item[430] \textit{The Smith Act of 1940}, 8 U.S.C. § 2385
\item[431] \textit{Ibid.}
\item[433] \textit{Dennis v. U.S.}, 341 U.S. 494 (1951)
\end{itemize}
significantly, these laws demonstrate that the U.S. can limit free speech, despite the Constitution. It is also notable that while the laws have limited speech, they have not been aimed at protecting the individual, in the manner that provisions against hate speech do in other jurisdictions, but at protecting United States Government and the ephemeral idea of Americanism. However, it also appears that the United States has learned from these laws, and they have since been repealed or become dead letter.

**American Exceptionalism**

One manner in which the U.S. differs from the other states is revealed by the theory of American Exceptionalism. From its earliest history, critics have argued “that the United States is an exceptional society. While different commentators have focused on various aspects of American Society … they have collectively portrayed the United States as pervasively distinctive.”

Michael Ignatieff perceives the essence of American exceptionalism as manifested in its attitude to human rights and civil liberties. Since the end of the First World War, when it was a guiding force in the creation of the United Nations, America has worked to promote acknowledgement of human rights:

> Since 1945 America has displayed exceptional leadership in promoting international human rights. At the same time, however, it has also resisted complying with human rights standards at home or aligning its foreign policy with these standards abroad… This combination of leadership and resistance is what defines American human rights behaviour as exceptional…

It therefore appears that the U.S. is at ease signing instruments but unwilling to be bound by them. As far as America is concerned, the constitution remains the first and last word in human rights protection.

The threefold effect of American exceptionalism is manifested in this distancing of itself from international human rights, emphasis upon its own values combined with estrangement of the other, and the unassailable supremacy of the American Constitution. Ignatieff notes this pattern, whereby:

434 *Ibid.* at 581

435 Charles Lockhart *The Roots of American Exceptionalism* (New York: Palgrave Macmillan, 2003) at 1

First, the United States signs on to international human rights and humanitarian law conventions and treaties and then exempts itself from their provisions by explicit reservation, nonratification, or noncompliance. Second, the United States maintains double standards: judging itself and its friends by more permissive criteria than it does its enemies. Third, the United States denies jurisdiction to human rights law within its own domestic law, insisting on the self-contained authority of its own domestic rights tradition. This creates a picture of U.S. law as entirely self-contained – the ability of outside influences and international human rights treaties to influence U.S. law is limited, but conversely tremendous importance is placed on the provisions of the Constitution. For example, the International Covenant on Civil and Political Rights allows for specific limitations on free speech if it involves a threat to public order, the defamation of a religious or ethnic group, or the promotion of war propaganda. The U.S. ratified the ICCPR, but it specifically exempted itself from these provisions. The only limitations on free speech in America are those that have arisen through judicial interpretation.

Particular emphasis has been placed on the significance of the First Amendment in U.S. culture. Unlike the limited associational and expressive rights of the other jurisdictions considered, “the American First Amendment, as authoritatively interpreted, remains a recalcitrant outlier to a growing international understanding of what the freedom of expression entails. In numerous dimensions, the American approach is exceptional.” This may account for the fact that freedom of speech, expressly protected by the constitution, is zealously protected, while the courts have permitted some encroachment on the rights that arise by implication – freedom of expression and association.

There are therefore two sides to American exceptionalism. On the one hand, enduring belief in the supremacy of domestic values as formulated in the Constitution leads to a level of rights protection in the criminal law that exceeds that seen in any of the other jurisdictions – the “rule of law in general and the United States Constitution in particular have served as societal anchors during national security crises.” On the other hand, this inability to compromise has led to

437 Ibid. at 3
439 Banks, supra note 383 at 505

\section*{Freedom of Association}

The AEDPA was designed to “provide the Federal Government the fullest possible basis, consistent with the Constitution, to prevent persons within the United States, or subject to the jurisdiction of the United States, from providing material support or resources to foreign organizations that engage in terrorist activities.”\footnote{AEDPA, \textit{supra} note 415 at 18 U.S.C. 2339B (2000) (quoting Findings and Purpose, Pub. L. No. 104-132, 301(a) & (b), 110 Stat. 1214, 1247).} It contained provisions that allow for the designation of organizations as “foreign terrorist organizations”\footnote{AEDPA, \textit{supra} note 415 at 8 U.S.C. 1189(a) (2000)} The PATRIOT Act, in Section 805, expanded the scope of the provisions, which now clearly apply to acts outside the U.S. and to those who provide expert assistance to terrorist organisations. Material support now includes all types of monetary instruments. It expanded the list of terrorism crimes for which it is illegal to provide material support. Further, in Section 810, it enhanced the criminal penalties applicable to material support.

As with Canada, and unlike Australia and the UK, simple association is not prohibited. However, as discussed in connection with Canada, above, the act of designating organisations has in itself implications for freedom of association: “the standards for group designation, coupled with the fear of social censure or criminal prosecution, [will] deter… constitutionally protected activity.”\footnote{“Blown Away? The Bill of Rights After Oklahoma City”, 109 Harv. L. Rev. 2075 (1996) at 2083} The designation will inevitably affect an organisation’s ability to recruit or retain members. The designation also has stringent consequences. Section 411 of the PATRIOT Act amends the \textit{Immigration and Nationality Act}\footnote{\textit{Immigration and Nationality Act of 1965} (Hart-Celler Act, \textit{INS Act of 1965}, Pub.L. 89-236)} to prohibit the entry into the United States of any person who is a representative of a terrorist organisation. It is a crime to provide material support to the designated terrorist organization and upon notification of the

\begin{footnotesize}
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\item \footnote{AEDPA, \textit{supra} note 415 at 8 U.S.C. 1189(a) (2000)}
\item \footnote{“Blown Away? The Bill of Rights After Oklahoma City”, 109 Harv. L. Rev. 2075 (1996) at 2083}
\item \footnote{\textit{Immigration and Nationality Act of 1965} (Hart-Celler Act, \textit{INS Act of 1965}, Pub.L. 89-236)}
\end{enumerate*}
\end{footnotesize}
designation to members of congress\textsuperscript{445} the Secretary of the Treasury “may require United States financial institutions possessing or controlling any assets of any foreign organization included in the notification to block all financial transactions involving those assets until further directive from either the Secretary of the Treasury, Act of Congress, or order of court”\textsuperscript{446}.

The Secretary\textsuperscript{447} is authorised to designate an organization as a "foreign terrorist organization" if he or she finds that it is (a) a foreign organization (b) that engages in terrorist activity\textsuperscript{448} and (c) such activity threatens the security of either United States nationals or the national security\textsuperscript{449} of the United States. Classified information may be considered when making the designation and is only disclosed for judicial review ex parte and in camera\textsuperscript{450}. Prior to designation, the Secretary must notify specified members of congress. The designation must be published seven days after the notification in the Federal Register. The designation takes effect upon publication\textsuperscript{451}.

\textsuperscript{445} 8 U.S.C. 1189(2)(A)(i)
\textsuperscript{446} 8 U.S.C. 1189(2)(C)
\textsuperscript{447} 8 U.S.C. 1189(d) – this refers to the Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General.
\textsuperscript{448} Terrorist activity is defined in 8 U.S.C.S. § 1182(a)(3)(B) as any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following:
(\textsuperscript{I}) The highjacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).
(\textsuperscript{II}) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.
(\textsuperscript{III}) A violent attack upon an internationally protected person (as defined in section 1116(b)(4) of title 18, United States Code) or upon the liberty of such a person.
(\textsuperscript{IV}) An assassination.
(\textsuperscript{V}) The use of any--
(a) biological agent, chemical agent, or nuclear weapon or device, or
(b) explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.
(\textsuperscript{VI}) A threat, attempt, or conspiracy to do any of the foregoing.
\textsuperscript{449} National Security is defined in 8 U.S.C.S. § 1189(d)(2) as the national defense, foreign relations, or economic interests of the United States.
\textsuperscript{450} 8 U.S.C. 1189(a)(4)(B)(iv)(II)
\textsuperscript{451} 8 U.S.C. 1189(a)(2)
Individual criminal defendants or aliens in removal proceedings are not permitted to question the validity of a designation at a trial or hearing. However, the organisation may petition the Secretary of State for revocation and there are provisions for judicial review. Within thirty days of the list's publication, organizations may seek to have their designation reviewed by the District of Columbia Circuit Court of Appeals. The review is based solely upon the administrative record, except insofar as the government may submit classified information, as above. The five grounds of review are: “(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitation, or short of statutory right; (D) lacking substantial support in the administrative record taken as a whole or in classified information submitted to the court, or (E) not in accord with the procedures required by law.”

The review is thus limited to procedural grounds rather than merit and the court may not consider the Secretary's national security concerns. James Dempsey and David Cole criticise “the tremendous deference given to the Secretary of State and the vagueness of AEDPA's criteria, which could describe hundreds if not thousands of groups worldwide, selective enforcement based upon the "politics of the moment" is inevitable.” The designation remains in force until revoked by an Act of Congress or the Secretary of State and if no other review has taken place must be reviewed after five years.

The ‘material support’ provisions place significant restrictions on interactions with designated groups. Anyone within or subject to United States jurisdiction may be fined or imprisoned for up to fifteen years (or life if the death

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452 8 U.S.C. 1189(a)(8)
453 8 U.S.C. 1189(a)(4)(B)
454 8 U.S.C. 1189 (c)(1)
455 8 U.S.C.S. 1189 (c)(3)
456 See People's Mojahedin Org. of Iran v. United States, 182 F.3d 17 at 23-24 (D.C. Cir. 1999) [People's Mojahedin Org.] (finding the court may not consider the third criteria for designating a "foreign terrorist organization," whether the group's activity threatens security, because it relates to the Executive Branch's foreign policy decision-making which is "not subject to judicial intrusion or inquiry" (quoting Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103 at 111 (1948)) and it may not evaluate the validity of material, even hearsay, considered by the Secretary.
458 8 U.S.C. 1189(a)(4)(A)
of any person has resulted) if he or she “knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so.”460 The term “material support or resources” is defined as “any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials”461. Critically, in relation to the term “personnel”, an individual may be prosecuted if he or she has “knowingly provided, attempted to provide, or conspired to provide a foreign terrorist organization with 1 or more individuals (who may be or include himself) to work under that terrorist organization's direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization.”462

David Cole has criticized the fundraising prohibition as unconstitutional because the right to associate is not effective without the right to financially support one's chosen group463. He also criticizes the vagueness of the law, which makes it “a crime to send crayons to a day-care center or blankets to a health care facility run by a designated group, even if the donor can prove that he intended the crayons or blankets to be used for lawful purposes and that they were in fact so used”464. Despite the fact that these provisions are far less stringent than those of the UK or Australia, they inevitably place a significant burden on civil liberties, and have come under legal challenge by organisations and individuals who claim that they violate both the right to freedom of expression and freedom of association under the First Amendment. These challenges have so far been unsuccessful.

460 18 U.S.C. 2339B(a)(1)
461 18 U.S.C. 2339A(b)(1)
462 18 U.S.C. 2339B(h)
464 Ibid. at 247
In *Humanitarian Law Project v. Reno*\(^{465}\) the court rejected the argument that the provisions imposed guilt by association:

Plaintiffs try hard to characterize the statute as imposing guilt by association... AEDPA authorizes no such thing. The statute does not prohibit being a member of one of the designated groups or vigorously promoting and supporting the political goals of the group. Plaintiffs are even free to praise the groups for using terrorism as a means of achieving their ends. What AEDPA prohibits is the act of giving material support, and there is no constitutional right to facilitate terrorism by giving terrorists the weapons and explosives with which to carry out their grisly missions. Nor, of course, is there a right to provide resources with which terrorists can buy weapons and explosives.\(^{466}\)

The line of reasoning that the material support provisions do not impermissibly restrict the right of association because they do not prohibit “mere association” and the measures are proportional has been followed in a line of cases culminating in *United States v. Marzook*\(^{467}\). The argument was concisely stated in *United States v. Hammoud*\(^{468}\), which held that the incidental effect on freedom of association was no greater than was necessary for achieving the government’s legitimate goals\(^{469}\). This reflects the more relaxed attitude in the U.S. to restricting conduct and association as opposed to ‘pure’ speech.

However, possibly the most significant burden on freedom of association is the manner in which the provision of personnel, as an aspect of material support, has been interpreted. Although merely being a member of an organisation is not prohibited, working for it, even for legitimate

\(^{465}\) *Humanitarian Law Project v. Reno*, 205 F.3d 1130 [Reno]

\(^{466}\) *Ibid.* at 1133

\(^{467}\) *United States v. Marzook*, (2005, ND Ill) 383 F Supp 2d 1056


\(^{469}\) “Hammoud's argument fails because § 2339B does not prohibit mere association; it prohibits the conduct of providing material support to a designated FTO. Therefore, cases regarding mere association with an organization do not control. Rather, the governing standard is found in *United States v. O'Brien*… Such a statute is valid if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. Section 2339B satisfies all four prongs of the *O'Brien* test. First, § 2339B is clearly within the constitutional power of the government, in view of the government's authority to regulate interactions between citizens and foreign entities. Second, there can be no question that the government has a substantial interest in curbing the spread of international terrorism....Third, the Government's interest in curbing terrorism is unrelated to the suppression of free expression... Fourth and finally, the incidental effect on expression caused by § 2339B is no greater than necessary. In enacting § 2339B and its sister statute, 18 U.S.C.S. § 2339A, Congress explicitly found that "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct." AEDPA § 301(a)(7).” *Ibid.*
purposes unrelated to criminal activity, could entail an offence. It was held in *United States v. Taleb-Jedi*\(^{470}\) that:

Mere association is different than working or assisting in the operation of a terrorist organization. There is no First Amendment right to facilitate terrorism by working under the organization's direction or control or by managing, supervising or directing the operation of a terrorist organization. See 18 U.S.C. § 2339B(h). Although the connection may not be as direct, the provision of personnel, like the provision of money, acts to free up others in a terrorist organization to engage in violence and other acts of terrorism. There is a fungibility to service for a terrorist organization just like there is fungibility to the funding of a terrorist organization.

**Immigration Law**

While the rights of citizens remain relatively unimpinged, with no penalties arising from the use of association or speech per se, there has been an expansion of severity in the laws not subject to strict constitutional scrutiny. Gerald Neuman described noncitizens as "strangers to the Constitution"\(^{471}\) because immigration laws and their application are generally not subjected to constitutional enquiry. Before September 11, aliens were deportable for engaging in or supporting a terrorist activity but not for mere association\(^{472}\). The purpose of this thesis is to examine the criminal rather than the immigration side of anti-terrorism law and policy, and all the jurisdictions use exclusion based on association as part of their immigration law to a lesser or greater extent\(^{473}\). However, America takes this approach further than any of the other jurisdictions, and it is necessary to take into account the immigration side of the law in order to understand fully the U.S. approach.

While the laws relating to citizens carefully fall short of the border of impinging on freedom of association and expression, the PATRIOT Act does allow the exclusion of non-citizens to be

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473 For example, in the UK, under the *Anti-terrorism, Crime and Security Act 2001* (c.24), the Secretary of State may issue a certificate in respect of someone whose presence in the UK he believes is a risk to national security and whom he suspects to be a terrorist (s21(1)). A terrorist is defined, inter alia, as someone who is a member of, belongs to, or has links with an international terrorist group (s21(2)). The person may then be subject, inter alia, to deportation, detention or removal. Similarly, in Canada, a permanent resident or foreign national is inadmissible if they engage in activities, or are a member of an organization which there are reasonable grounds to believe engages in activities, listed in s34 (a) – (f) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, including engaging in terrorism.
based on speech and association, thus curtailing those fundamental rights. Section 411 of the PATRIOT Act amends the *Immigration and Nationality Act* to prohibit the entry into the United States of any non-citizen who represents a “foreign terrorist organization” or “a political, social, or other similar group whose public endorsement of acts undermines United States efforts to reduce or eliminate terrorist activities” or supports or encourages others to support such organizations. In addition, spouses and children of such non-citizens are also prohibited from entry. There is an exception if they did not know or should not reasonably have known of the activity causing the alien to be found inadmissible under this section; or if the consular officer or Attorney General has reasonable grounds to believe that the alien has renounced the activity causing him or her to be found inadmissible. David Cole finds these provisions troubling:

> Citizens have a constitutional right to endorse terrorist organizations or terrorist activity, so long as their speech is not intended and likely to produce imminent lawless action. While the Supreme Court has long ruled that aliens outside our borders – in contrast to those living among us – have limited constitutional rights, such ideological exclusions nonetheless raise concerns. The First Amendment is designed to protect a robust public debate, and if our government can keep out persons who espouse disfavored ideas, our opportunity to hear and consider those ideas will be diminished.\(^474\)

Aliens are deportable for associational activity, whether or not that activity has any empirical link to the possibility of a terrorist act. They may be deported for representing terrorist groups, or groups that merely have a history of endorsing such actions, even if it is an “organization that has ever been involved in a civil war or a crime of violence, from a pro-life group that once threatened workers at an abortion clinic, to the African National Congress”\(^475\). This propensity for looking outside America to find the real threat was reflected in the process by which the AEDPA was passed into law:

> While a number of speakers at Congressional hearings warned of the international terrorist threat, the hearings inadequately addressed the domestic group threat revealed by Oklahoma City, Ambassador Philip Wilcox, Jr., who participated in drafting the proposed Act, warned that ‘Islamic extremist groups are fighting a vicious rear guard action against [Middle East] peace [efforts].’ … [This] would likely slant legislation away from domestic groups and toward international groups.\(^476\)


\(^475\) Ibid. at 966

\(^476\) Michael J. Whidden “Unequal Justice: Arabs in America and United States Antiterrorism Legislation” 69 Fordham L. Rev. 2825 (2001) at 2842
The danger of restricting the rights of non-citizens is that they are a minority with no voting rights. The debate becomes slanted away from how much liberty a nation should be willing to give up in order to reinforce its security, since it is not its own liberty that it is sacrificing. The “post-September 11 response constitutes a reprise of some of the worst mistakes of our past. Once again, we are treating people as suspicious not for their conduct, but based on their racial, ethnic, or political identity. Once again, we are using the immigration power as a pretext for criminal law enforcement”\textsuperscript{477}.

**Freedom of Expression**

Association arises by implication from freedom of speech, and it is therefore unsurprising that the material support provisions have also come under attack for impacting on freedom of expression. In *Humanitarian Law Project v. Reno*\textsuperscript{478}, the plaintiffs also argued that “providing money to organizations engaged in political expression is itself both political expression and association”, relying on cases such as *Buckley v. Valeo*\textsuperscript{479} and *In re Asbestos Sch. Litig.*\textsuperscript{480} The court responded by observing that “the cases equating monetary support with expression involved organizations whose overwhelming function was political advocacy… While the First Amendment protects the expressive component of seeking and donating funds, expressive conduct receives significantly less protection than pure speech…”\textsuperscript{481} The distinction between conduct and speech is again coming into play in order to allow the courts to apply a more relaxed test. The test which was applicable in this instance was the intermediate scrutiny standard under *United States v. O’Brien*\textsuperscript{482} which entails four questions: Is the regulation with the power of the government? Does it promote an important or substantial government interest? Is that interest unrelated to suppressing free expression? And, finally, is the incidental restriction on First Amendment freedoms no greater than necessary? In *Humanitarian Law Project v. Reno*, the

\begin{footnotesize}
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\item \textsuperscript{477} Cole “Enemy Aliens”, *supra* note 474 at 1003
\item \textsuperscript{478} *Reno*, *supra* note 465
\item \textsuperscript{479} *Buckley v. Valeo*, *supra* note 406
\item \textsuperscript{480} *In re Asbestos Sch. Litig* 46 F.3d 1284 (3d Cir. 1994)
\item \textsuperscript{481} *Reno*, *supra* note 465 at 1134
\item \textsuperscript{482} *O’Brien*, *supra* note 399
\end{enumerate}
\end{footnotesize}
court answered all four questions in the affirmative, giving a wide margin of deference to the executive in deciding the proportionality question.

*People's Mojahedin Org. of Iran v. Dep't of State* affirmed that the material support provisions do not violate the first amendment right of freedom of expression because they are not aimed at interfering with expressive component of organization's conduct and there is “no constitutional right to facilitate terrorism by giving terrorists weapons and explosives with which to carry out their grisly missions”. Similarly, *United States v. Asfari* reiterated that what was at issue was not “anything close to pure speech”, and the purchasing, or providing of financial contributions to purchase, guns or bombs was not protected.

The plaintiffs in *Humanitarian Law Project v. Ashcroft* challenged, in particular, the term “expert advice or assistance”, which they contended “is substantially overbroad because it prohibits a substantial amount of speech activity which is clearly protected by the First Amendment, such as training in human rights advocacy, giving advice on how to improve medical care and education, and distributing human rights literature.” The contention failed on the basis that “Plaintiffs have failed to demonstrate that the PATRIOT Act's application to protected speech is "substantial" both in an absolute sense and relative to the scope of the law's plainly legitimate applications.”

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483 “First, the federal government clearly has the power to enact laws restricting the dealings of United States citizens with foreign entities; such regulations have been upheld in the past over a variety of constitutional challenges… Second, the government has a legitimate interest in preventing the spread of international terrorism, and there is no doubt that that interest is substantial. Third, this interest is unrelated to suppressing free expression because it restricts the actions of those who wish to give material support to the groups, not the expression of those who advocate or believe the ideas that the groups supports. So the heart of the matter is whether AEDPA is well enough tailored to its end of preventing the United States from being used as a base for terrorist fundraising. Because the judgment of how best to achieve that end is strongly bound up with foreign policy considerations, we must allow the political branches wide latitude in selecting the means to bring about the desired goal… We will not indulge in speculation about whether Congress was right to come to the conclusion that it did. We simply note that Congress has the fact-finding resources to properly come to such a conclusion. Thus, we cannot say that AEDPA is not sufficiently tailored.” *Reno, supra* note 465 at 1135-6

484 *People's Mojahedin Org., supra* note 456 at 1244

485 *United States v. Asfari* (2005, CA9 Cal) 426 F3d 1150 at 1160

486 See also *United States v. Assi* (2006, ED Mich) 414 F Supp 2d 707


488 *Ibid.* at 1202
While the material support provisions have the most obvious repercussions for freedom of expression, other legislative measures are also relevant. In *Kahane Chai v Dep't of State*⁴⁸⁹, a website was designated as a Foreign Terrorism Organization. The listing provisions have thus indirectly been used to control material on the internet. Incitement also exists in the U.S. as an inchoate offence, as it does in the other jurisdictions. Although there have been relatively few reported instances of the use of this to restrict speech, it has been applied to instances of advocacy to commit terrorism-associated offences. For example, a Muslim cleric, Dr Ali al-Timimi⁴⁹⁰, was convicted of counseling and inducing Masoud Khan, Randall Royer, Yong Kwon, Muhammad Aatique, Khwaja Hasan and others to “conspire to levy war against the United States; to supply services to the Taliban; to take part in military expeditions and enterprises to be carried on from the United States against foreign states with whom the United States was at peace; and to use, carry, possess, and discharge firearms and explosives in furtherance of crimes of violence”⁴⁹¹ by telling them “that it was their Muslim duty to fight for Islam overseas and to defend the Taliban in Afghanistan against American forces.” The judge responded to First Amendment arguments by holding that “[t]his was not a case about speech; this was a case about intent”.⁴⁹² While much of the evidence centred around the kind of inflammatory rhetoric that could be expected to form the basis of a prosecution under hate legislation or legislation related to terrorist speech in the other jurisdictions, it is also notable that the Al-Timimi’s case was linked to the convictions of his followers for offences not related to speech⁴⁹³. Imminent lawless action did occur, and the judge held that Al-Timimi intended to

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⁴⁸⁹ *Kahane Chai v Dep't of State* (2006, App DC) 373 U.S. App DC 279 F3d 125
⁴⁹⁰ See *U.S.A. v. Al Timimi*, 04-CR-385
⁴⁹¹ U.S. Department of Justice, *News Release*, available at:
  <http://www.investigativeproject.org/documents/case_docs/73.pdf>,
⁴⁹² Eric Lichtblau, “Scholar is Given Life Sentence in ‘Virginia Jihad’ Case” *N.Y. Times*, July 14 2005, at A21. The conviction was later overturned on the basis of improperly obtained evidence.
⁴⁹³ Masoud Khan was convicted of conspiring to wage war against the United States, providing material support to Lashkar-e-Taiba, and using automatic weapons in furtherance of crimes of violence; Randall Royer was convicted of aiding and abetting the use and discharge of a firearm during and in relation to a crime of violence, and of aiding and abetting the carrying of an explosive during the commission of a felony; Yong Kwon was convicted of conspiracy to commit an offense against the United States, use of a firearm in connection with a crime of violence, and transferring a firearm for use in a crime of violence; Muhammad Aatique was convicted of aiding others in commencing a military expedition against a friendly nation, and using and discharging a firearm in relation to a
incite that action. However, the difficulty in this case is that all speech carries an element of intent, and it appears that while Al-Timimi might have used fiery rhetoric, no specific offence was discussed. The speech in this case was linked to action, but there is little empirical evidence as to what exactly that link was. While the U.S. does not go as far as the other jurisdictions in punishing ‘free-standing’ speech, it does accomplish some of the objectives of legislation on advocacy under other guises.

Section 215 PATRIOT Act⁴⁹⁴ allows for the Director of the FBI or a designee to apply for an order “requiring the production of any tangible things (including books, records, papers, documents, and other items) for an investigation to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities”. This expands the category of what could be seized under the authority of the Foreign Intelligence Surveillance Act of 1978⁴⁹⁵. The PATRIOT Act also prohibits persons from disclosing that they have any knowledge of such seizures⁴⁹⁶, thus limiting the freedom of owners and officers of businesses to speak to the press about potential abuses of this power. While this limiting of freedom of information renders the actual effect of the provisions difficult to quantify, “[t]here are rumors that the government has used its PATRIOT Act special powers to search libraries across the country. The gag order in the Act prevents librarians from sharing with the public the extent and nature of the secret warrants’ use.”⁴⁹⁷ The ability to make such crime of violence; Khwaja Hasan was convicted of conspiracy to commit an offense against the United States, and use of a firearm in connection with a crime of violence. See News Release, U.S. Department of Justice, available at http://www.investigativeproject.org/documents/case_docs/73.pdf

494 50 U.S.C. § 1861

495 Foreign Intelligence Surveillance Act of 1978, Pub. L. 95-511, 92 Stat. 1783. Prior to the PATRIOT Act, the FBI could seek an order for production of certain transactional records from third-party custodians, such as banks and telephone companies, if the government certified that it had ‘reason to believe that the person to whom the records pertain is a foreign power or agent of a foreign power’. 50 U.S.C. §1862 As the Authority was broadened by the PATRIOT Act, commercial vendors may be compelled to produce the requested records following a statement from the FBI that the information is for an investigation ‘to protect against international terrorism or clandestine intelligence activities’.

496 PATRIOT Act §215, 115 Stat. at 287

orders increases the risk that people will be investigated and prosecuted on the basis of what they read, or on the expressive content of material to which they seek access.

There has been relatively little litigation surrounding these provisions, perhaps because the gag order means that in many cases use of the provisions will never be known. However, in cases where possible future impact on free speech or association can be demonstrated, challenges to the future use of the provisions have been upheld. In Government. Muslim Cnty. Ass'n v. Ashcroft 498 non-profit organizations believed that the FBI had used or was currently using Section 215 499 to obtain records or personal belongings of it and its members, students, and constituents. The contended that this threatened their right to free speech, free association, and free exercise of religion. They further complained that “community members are afraid to attend mosque, practice their religion, or express their opinions about religions and political issues. (Complaint, P 152)”. The pre-enforcement challenge was not dismissed as the organizations were able to show threats of injury to their members’ rights under the First Amendment sufficient to satisfy the standing requirements.

**America Conclusion**

In immigration law terms, restrictions on freedoms of expression and association are severe, and cover speech, membership and even family relationships. As opposed to the very limited definition of terrorism in domestic criminal law, “for foreign nationals, Congress has labeled as ‘terrorist’ wholly nonviolent activity” 501. There is a sharp divide between the treatment of the citizen and the alien, stemming from entrenched ideologies and exceptionalist attitudes. The “widely shared assumption that citizenship makes a difference, and that the difference warrants the distinct treatment that foreign nationals receive” 502 may also account for the shifting of significant rights encroachments from criminal law to immigration law, or even to outside the

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499 50 USCS § 1861(a)(1)

500 *Government. Muslim Cnty. Ass'n*, supra note 498 at 600


502 *Ibid.* at 211
regular legal system entirely, through the use of material witness warrants, Military Detention and Determination of Enemy Combatant Status; measures which William C. Banks perceives as “a separate track, outside the rule of law and constitutional protections, for those adjudged by the administration not to be worthy of the protections our system otherwise provides.”

With regards to domestic criminal law, the fact that America does not turn directly to speech and association offences may be a result of the fact that its definition of terrorism does not include a political or ideological motive, demonstrating that criminalisation of motive tends to result in a natural progression to speech and association based offences. It may also be an aspect of significantly different attitudes to the constitutional right to freedom of speech to those of the other jurisdictions:

American methodology is marked by a profoundly different understanding of the structure of freedom of expression adjudication, with the American approach characterized by an emphasis on rule-based categorization, in contrast to the more flexible and open-ended balancing approach that generally rides under the banner of ‘proportionality’.

The ability of organisations to challenge provisions, such as those relating to material support, that have only indirect impact on civil liberties also demonstrates the resilience of Constitutional protection. The rights guarantees under the Constitution have been used “in the service of a political tradition that has been consistently more critical of government, more insistent on individual responsibility, and more concerned to deferent individual freedom than the European socialist, social democratic, or Christian democratic traditions” American exceptionalism has advantages as well as disadvantages. It promotes insular and intolerant attitudes, whereby rights abuses take place outside the system to those who do not hold a privileged place within it, but creates much more extensive levels of rights protection that are less easy to set aside.

However, despite the lack of offences directly based on expression and association, some significant First Amendment challenges have been made to provisions perceived as impeding these rights. The fact that none of these have been successful demonstrates either the fact that the impact on the relevant rights is very limited, or the wide margin of appreciation that U.S.

503 Banks, supra note 383 at 505
504 Schauer, supra note 438 at 31
505 Ignatieff “Introduction”, supra note 436 at 11
courts, in keeping with those in the other jurisdictions, are willing to give to the executive, or both. While the U.S. does not go so far as the other jurisdictions in limiting rights, it is able to achieve some of the same objectives through the use of incitement and counseling provisions, and also by making a sharp distinction between speech and expressive conduct, with the latter subject to far less stringent protection.
Chapter 7
Does a Charter Make a Difference

On a spectrum, Australia has the weakest model of rights protection with no human rights instrument. It is dependent on judicial interpretation, the influence of international law, and some limited protection from the freedom of religion clause in its own constitution as well as the right to freedom of political communication that has been implied into it. Even then, these rights are narrowly interpreted and the limitations imposed on them broader than in the other jurisdictions.

The U.S.A. has the most powerful human rights instrument, with its Constitution entrenched and supreme. However, this supremacy is accompanied by a culture of absolutism and American exceptionalism. Gearty says of the constitutional bills of countries such as the United States that there “is something inherently distasteful about elected representatives waiting to see whether their judgments about the public interest, made on a bona fide basis with the interests of the community genuinely at heart, meet with the approval of a bench of unelected and unaccountable lawyers.”

Freedom of speech is protected by the First Amendment, and freedom of association arises by implication. The guarantee to freedom of speech is unqualified. However, “in an inevitable effort to preserve itself from absurdity, the terms of the First Amendment have been treated as less absolute than they appear. This task of tactical dilution has been entrusted to the judiciary… From the lawyer’s perspective, the results are surprisingly similar to those… in the supposedly constitutionally primitive Untied Kingdom.” The courts have similarly held freedom of association to be a limited right. In both cases, the tests are the most stringent of any of the jurisdictions with speech subject to limitation only if it is directed to inciting imminent lawless action, and expressive activity and association can be limited only if such limitation is no greater than is essential.

506 Gearty, Human Rights, supra note 34 at 93
507 Gearty, Essays on Human Rights, supra note 11 at 284
Canada’s Charter, like the U.S. model, is entrenched. It seeks to preserve Parliamentary sovereignty by means of the s. 33 ‘notwithstanding’ clause. This has the benefit of allowing Parliament to retain its supremacy, but in any case where it chooses to legislate contrary to human rights, forcing it first to directly articulate that this is what it is doing, and then to re-evaluate the law when the override expires after five years. The approach has generated considerable praise as “a creative compromise that combined the virtues of both legislative and judicial activism”\(^{508}\). The idea of such an instrument is that it does not give ultimate power to either the legislature or the judiciary, but rather promotes “a dialogue between and accountability of each of the branches” that has “the effect of enhancing the democratic process, not denying it”\(^{509}\). This is in contrast to the U.S. approach which gives ultimate power to the courts.

The s. 1 idea that rights are fundamentally limited is also at odds with the U.S. approach. This idea, rather than eroding rights, accepts that there are cases where rights may compete and even “enhances democracy by requiring legislatures to articulate, and presumably to debate, the limits they place on rights. Section 1 and section 33 remain distinctive features of the Charter that would be unthinkable to most Americans, who believe that rights are absolute and that courts should have the last say on rights.”\(^{510}\) The final result is a Charter that “neither precludes nor entrenches particular socio-economic outcomes but rather enriches the democratic process.”\(^{511}\) It has the potential to avoid some of the absurdities of the Constitution and allow for the evolution and development of rights jurisprudence.

The UK has a statutory act. The emphasis is on judicial interpretation of legislation, and Parliamentary sovereignty is preserved since legislation cannot be struck down but only declared incompatible. It can therefore retain legislation notwithstanding such a declaration. While the fact that The Human Rights Act is statutory rather than entrenched may in appearance make it a weaker model of rights protection than that of either Canada or the U.S., arguments have been

\(^{508}\) Kent Roach, The Supreme Court on Trial: judicial activism or democratic dialogue (Toronto: Irwin Law, 2001) at 54 [Roach, Supreme Court]
\(^{510}\) Roach, Supreme Court, supra note 508 at 59
\(^{511}\) Roach, Charter, supra note 220 at 43
made that it has become a constitutional act512 and is therefore as entrenched as it is possible for any law in the UK to become. Further, the dual layer of protection afforded by recourse to the ECtHR renders it more robust than it might at first seem. What the act ultimately seeks to achieve is a balancing and dialogic effect similar to that in Canada, and which has led to similar praise:

Here we have a set of clear human rights, with duties imposed on courts and public authorities to make sure that these rights are properly protected and enforced... the genius of the Human Rights Act lies in a third way in which it deliberately undermines its own authority, inviting the political back in to control the legal at just the moment when the supremacy of the legal discourse seems assured.513

While the fact that the onus is on parliament to act following a declaration of incompatibility may appear to have less force than the ability to strike down legislation, such declarations have invariable been acted upon. Judicial review “of executive action should not be underestimated. Its scope is wide, covering a large number of traditional rights concerns. When the court finds that a violation has occurred, the judgment is just as effectual as it would be under an entrenched bill.”514

All of the jurisdictions have similar listing provisions. The UK has the broadest test – the Secretary of State must simply believe that the organisation is concerned in terrorism – however the mechanisms for applications for deproscription, judicial review and appeal are also some of the broadest. Canada has the most stringent test – the Governor in Council on the recommendation of the Minister of Public Safety and Emergency Preparedness must be satisfied that there are reasonable grounds to believe that the entity has knowingly carried out, attempted to carry out, participated in or facilitated a terrorist activity. Applications may be made for removal and there is judicial review of such decisions. The U.S. test requires the organization to engage in terrorist activity that threatens national security. The organisation may petition for

513 Gearty, Human Rights, supra note 34 at 94-5
revocation, however judicial review is solely upon the administrative record and procedural
grounds. In Australia, the test is whether the organisation is preparing, planning, assisting in or
fostering the doing of a terrorist act. Applications may be made for de-listing, and there is
review by a Parliamentary Joint Committee. However, judicial review is limited.

In terms of associational offences resulting from listing, the U.S. appears the most liberal,
making it an offence to provide material support which includes training, advice, assistance and,
crucially, personnel. Mere association is not prohibited but working for an organisation could
be. The offence has been found to be proportionate by the courts. Similarly, in the Canada, it is
an offence to knowingly participate in or contribute to any activity of a terrorist group. Evidence
of association is persuasive. Both the UK and Australia directly prohibit membership, with the
UK also making it an offence to profess to belong to an organisation and taking it one step
further to the public wearing of clothes, or the public display of other articles arousing suspicion
that a person is a member or supporter of a listed organization, while in Australia it is also an
offence to associate with a member if to do so provides support to the organisation.

The U.S. has no provisions in its domestic criminal law that directly impact on freedom of
expression, although it does have provisions for the seizure of books and documents, and the
prohibition on providing money to organisations has been unsuccessfully challenged as
implicating expressive activity. In Canada, the definition of terrorism itself has been challenged
on freedom of expression grounds, and there have been some hate speech amendments,
providing for the removal of hate propaganda from the internet and mischief to religious
property. Existing offences deal with the incitement or promotion of hatred. The UK has
created an offence of encouragement of terrorism, which has yet to be used, and there have been
prosecutions based on speech under The Public Order Act. In Australia, advocating or praising
terrorism is grounds for proscription and new sedition offences have been introduced under the
terrorism legislation.

It seems clear that in appearance the liberality of the laws is in proportion to the existence and
force of a charter, with the law in the U.S. appearing most liberal, with Canada close behind and
that in Australia the least, with the U.K. only slightly more liberal than Australia. Indeed, the
report of the UN Human Rights Committee in July 2008 concluded that the UK’s
Counterterrorism policies do not fully comply with its human rights obligations. In particular, s.
1 of the TA 2006 was criticised as being “broad and vague”\textsuperscript{515}. However, in application and effect the picture changes, with Canada clearly most liberal, whereas in the U.S. liberal criminal laws are counterbalanced by illiberal activities and attitudes to alien minorities.

The type of rights instrument may be part of the reason for this, with the entrenched and absolute U.S. Constitution producing a backlash that forces illiberal activities outside the context of the criminal law for example the use of torture and Guantanamo, while the more balanced effect of the Canadian Charter allows sufficient flexibility within the law to limit rights openly. However, this is not sufficient to explain the differences between Canada and the far less liberal UK. In terms of the rights they delineate and the limits placed on them, the Charter and HRA are very similar. While it is true that the UK parliament is not obliged to act on a judicial decision, the Canadian parliament also retains its sovereignty insofar as it can declare that an Act shall operate notwithstanding the Charter. Both use the idea of dialogue to evolve laws that reflect the legitimacy of parliament while remaining rights compliant. This mechanism of dialogue emphasizes “that every system for protecting rights (even an entrenched bill) is best approached as a relationship among institutions, where neither operates unencumbered and effective protections rely on a careful structuring of the institutional interaction”\textsuperscript{516}.

The fact that two rights instruments, with the potential to create very similar results, produce such different legislation may be a result of varying degrees of judicial deference. It has been suggested of Canada that “the inclusion of a legislative override provision in the Charter generated an element of uncertainty about the institutional locus of constitutional supremacy. For a Supreme Court vested with newly expanded powers of judicial review, this uncertainty created the conditions for the strategic use of those powers to avoid a political confrontation that might undermine its long-term constitutional status.”\textsuperscript{517} In the case of the much younger HRA,

\textsuperscript{515} Sixth Periodic Report of the UN Human Rights Committee, UN CCPROR, 2008, UN Doc. CCPR/C/GBR/6 at para 26
\textsuperscript{516} Webber, supra note 514 at 264
judicial activism may be even less pronounced, and without robust decisions on the part of judges dialogue becomes impossible.

Australia, which has no rights instrument, does not fall far short of the UK position and in general has a strong record “with respect to human rights legislation and the Australian experience of using Parliamentary committees to raise and press human rights issues in the political arena.” 518 This is seemingly evidence of an approach where rights may be upheld even if not enforceable. One of the dangers of a rights instrument is that it may shift attention away from other methods of rights protection. The doctrine of the separation of powers holds that each of the three bodies – executive, legislature and judiciary – has its own unique role with each creating checks and balances for the others. It is this doctrine that “provides an institutional framework for the accountability required by a culture of justification. In Mureinik’s analysis, the culture of justification entails a substantive normative system that requires those wielding power to give account to those effected by that power.” 519

Nonetheless, while rights instruments may have faults, they are very rarely counterproductive. Christopher Manfredi lists objections to such instruments:

[C]ourts are likely to block reforms as societies change, thereby entrenching conservative opinion. Moreover, court-centred bills of rights can be used to undermine the capacity of majorities to defend their legitimate interests against powerful minorities. Bills of rights of a sort capable of being implemented by courts inevitably emphasise liberty over wellbeing, thus giving the opportunity for those with appropriate resources to counter reforms that promote the general wellbeing by reducing property rights… they create uncertainty, increase litigation, and raise expectations that are bound to be disappointed. Where such bills are activated, this leads to the politicization of the judiciary and a consequent loss of respect for courts in general. Further, the broad approach to legal “interpretation” called for in the human rights context becomes generalized throughout the legal system, thus weakening democratic control and the rule of law. 520

However, on examination such objections prove largely spurious. The principles of common law have always depended on the courts to evolve jurisprudence in line with current opinion; rights, when correctly implemented, should be non-discriminatory and thus promote equality rather than favouring majorities or minorities; concerns about the balance of well-being and

518 Campbell, supra note 300 at 337-8
519 Powell, “Legal Authority”, supra note 77 at 176
520 Campbell, supra note 300 at 329-30
liberty are reminiscent of concerns about the balance of national security and liberty – in both cases they should complement rights and neither would be worth having at the expense of liberty. Other concerns are pessimistic rather than empirically born out.

Statutory bills are beneficial in numerous ways. Jeremy Webber considers them to have three main advantages – raising the community profile of rights, giving rise to prior vetting of legislation and judicial interpretation\textsuperscript{521}. By declaring and enumerating rights, a rights instrument raises awareness and gives rights a significant place in national consciousness. Those who are aware of rights are most likely to require their protection. Governments are unlikely to wish to pass legislation that the courts will find incompatible with rights, and legislation is vetted by committees and independent reviewers. Since courts must also comply with rights, they are likely to develop the common law to protect them alongside legislation. These benefits function alongside judicial review of executive or legislative action. Thus although human rights protection is not necessarily synonymous with having a human rights instrument:

\begin{quote}
[T]he concept of rights does contain an implicit assumption that the interests identified by such rights are deserving of effective and priority implementation. To have a human right gives rise, amongst other things, to a legitimate claim for relevant protections, either through legislation, judicial intervention, improved economic policies, or simply better management.\textsuperscript{522}
\end{quote}

What a comparison of the various jurisdictions reveals is that although a rights instrument helps with the protection of rights, other policies can produce similar effects and a rights instrument cannot function in a vacuum. It is most effective when it is considered only “one tool among many social, economic and political influences contributing to social justice.”\textsuperscript{523} As Connor Gearty has stated, “Bills of rights, written constitutions, judicial decisions on rights and so on are not… the whole of the human rights story; they are merely means to an end. That end is the proper achievement of human rights. If these methods of securing this end fail then they should be condemned.”\textsuperscript{524}

\begin{thebibliography}{99}
\addcontentsline{toc}{chapter}{Notes}
\bibitem{521} Webber, \textit{supra} note 514 at 266
\bibitem{522} Campbell, \textit{supra} note 300 at 326
\bibitem{523} Charlesworth, \textit{supra} note 100 at 67
\bibitem{524} Gearty, \textit{Human Rights, supra} note 34 at 4
\end{thebibliography}
While the effect of a charter may be the most obvious reason for the differences in approach between the countries, it is therefore necessary to look beyond this to social mindsets and cultural and economic policies in order to understand the real reasons for the discrepancies. One possible explanation may lie in the attitudes of the country to liberalism and multiculturalism. In terms of statistics, the figures are relatively similar: 2.7% of the UK population is Muslim, 70.6% are Christian; around 2% of the Canadian population are Muslim and 77% are Christian; 76.5% of the American population are Christian, 0.5% Muslim; and 68% of the Australian population are Christian and 1.5% Islamic. However, 18.4% of the Canadian population and 21.9% of the Australian population are foreign born as opposed to only 8.3% of the UK population and 10.4% of the US population. Canada and Australia’s cultural identity are based on their diversity, whereas U.S. exceptionalism excludes the alien other, and in the UK diversity is not historically entrenched and attitudes are more reserved. Anxieties about the Muslim ‘other’ lead to fears about multicultural policies and beliefs that “[a] multicultural approach, if taken too far, runs the risk of undermining social cohesion and tolerating the oppression of women.” Since September 11, “European states including Britain began steering their ‘race relations’ policies away from ‘multiculturalism’ towards monoculturalism and cultural homogenization.” There has been “a shift away from the UK’s previous fumbling, tentative yet largely well meaning embrace of multicultural policies towards a new emphasis on cultural integration.”

531 Colm O’Cinneide, “Strapped to the Mast: The Siren Song of Dreadful Necessity, the United Kingdom Human Rights Act and the Terrorist Threat” in Miriam Gani & Penelope Mathew, eds., Fresh Perspectives on the ‘War on Terror’ (Canberra: Australian National University E Press, 2008) 327 at 329 see also T. Modood, “Muslims and the
perceptions of the state itself and attitudes and anxieties towards multiculturalism, human rights and acceptance of the other. Other cultural factors may also play a part. The UK has had a large amount of exposure to extremist speech, for example, the speeches of Abu Hamza at the Finsbury Park Mosque, which may have given rise to the feeling that legislation was needed to confront this. It may be for reasons originating in multiculturalism and individual national experiences that the UK and U.S.A. show a tendency towards more illiberal policies, while Australia is virtually on a par with the UK despite its lack of a rights instrument.

Rights are therefore not solely dependent on laws to protect or undermine them. The threat to the practice of civil liberties “is more from the atmosphere in the country than from any law in particular… there is a real risk that anxiety about terrorism will affect the culture’s toleration of political perspectives coming from sources identified (rightly or wrongly) with such criminal acts.” If overwhelming popular opinion supports laws that undermine civil liberties, then they are likely to be passed whether or not there is an instrument for protecting human rights, and the “Charter-proofing” of such laws may render them rights-compatible semantically if not essentially.

According to the survey of Contemporary Attitudes to Civil Liberties and Terrorism in the *British Social Attitudes* report, 52% of people thought that banning certain people from saying whatever they want in public was a price worth paying for anti-terrorism measures, while 46% thought that it was unacceptable. This may reveal the influence of prevailing popular attitudes. If the public accepts or even approves of a measure, it is less likely to be challenged on human rights grounds. This is to be contrasted with the “particularly strong civil society resistance in Canada to anti-terrorism laws.” Another factor may be the strength of the

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532 Gearty, *Civil Liberties*, supra note 91 at 154


534 Roach, “Comparison” *supra* note 346 at 54
government in power to legislate – Kent Roach contrasts “the inability of Canada’s minority Conservative Government in early 2007 to gain support for the renewal of powers of investigative hearings and preventive arrest or to enact new anti-terrorism laws” with the Howard Government which “has been in a majority position since 2004 and has been able to enact many new anti-terrorism laws.” No new Australian anti-terrorism laws have been passed since the Labor Party under Kevin Rudd took over in 2007.

A charter is only one aspect of the complex system of political and social attitudes that lead countries to decide on a particular legal course. As Kim Lane Scheppel states:

> It is often said that September 11 ‘changed everything’… [it] may have changed specific legal responses to terrorism, but it did not fundamentally change the legal character of those institutions and states that reacted to the terrorist attacks. Instead of making everything different, September 11 made the institutions and states… even more like themselves.”

The existence of a rights instrument does make a difference to the enforceability of human rights and to their profile and importance in legislation as a whole. More than this, the type of rights instrument, and the manner in which it perceives the rights it protects – as limited or absolute – impacts on the way the rights are protected, and limitation clauses lead to more balanced consideration of legislation. However, where a rights instrument exists there is a tendency to perceive it as the first and last word in the human rights story, while in reality it is only one part of a complex system of cultural attitudes. A rights instrument “is no substitute for politics. What the judges can do… is reflect in their case law a disposition to freedom that they see reflected in civil society as a whole. The stronger the political fuss made about freedom, the more likely it is that the judges will feel that they have room to assert themselves… The responsibility for the political good health of this state (indeed any democratic state) lies with those whom the civil liberties… are designed to protect and assist.”

> It is only by changing cultural perceptions, and by giving rights cultural and normative precedence, that they can be truly strengthened.

535 *Ibid.* at 54
536 Scheppel, “Other People’s Patriot Acts”, *supra* note 130 at 147-148
537 Gearty, *Civil Liberties*, *supra* note 91 at 180
Chapter 8
The Proper Normative Approach

The focus of the debate in this thesis has been the definition of terrorism and the criminalisation of speech and association. The analysis has highlighted the different encroachments on human rights that each country’s attitude to interfering with the rights of expression and association reveals, and the problems to which this gives rise in each jurisdiction. The thesis will end by considering whether the criminalisation of expression and association in order to combat terrorism is a normatively viable approach and how the rights can be balanced against the goals the legislation seeks to achieve. In this section I will focus mainly on the examples of Canada, the UK and Australia, which share a similar definition and prohibit speech and association to a greater extent than the US.

Is Terrorism a Qualitatively Different Crime Requiring a Different Normative Approach?

In order to answer the question of whether the criminalisation of expression and association linked to terrorism is the correct approach, it is first necessary to consider whether terrorism is a qualitatively different crime to other crimes, and therefore requires a different normative approach. There is an international consensus that terrorism is unique, and indeed one of the traits of terrorism is that it is frequently international, having often cross-border planning and implications, or being perpetrated by non-nationals. By the time a crime is complete, the main perpetrators may be dead and beyond the reach of the criminal law. There is “an inherent difficulty in prosecuting terrorists due to the cellular structure often adopted by terrorist groups, where persons performing important tasks in aid of terrorism may not know what the ultimate objective is or who else is involved.”

Academic attitudes to the correct normative approach, and whether the existing criminal law is sufficient, are deeply varied. Bruce Ackerman rejects existing approaches and legal rules under

538 Ahmad, supra note 253 at para. 54, Publication restricted pursuant to s. 648 of the Criminal Code
the criminal law. He believes that terrorists pose a “distinctly political challenge” and that the “only way to meet this challenge is for the government to demonstrate to its terrified citizens that it is taking steps to act decisively against the blatant assault on its sovereign authority”\(^{539}\). He also rejects the war model, on the basis that “if we choose to call this a war, it will be endless. This means that we not only subject everybody to the risk of detention by the Commander in Chief, but we subject everybody to the risk of endless detention”\(^{540}\). He proposes instead a “temporary state of emergency that enables government to discharge the reassurance function without doing long-term damage to individual rights”\(^{541}\). However, there are practical aspects inherent in the threat of terrorism that this fails to address – if “emergencies can be declared only after an actual attack”, then they fail to deal with the initial stages of terrorism or exercise any preventative function. Further, problems similar to those Ackerman identifies in relation to the war model arise: it cannot be known when the state of emergency will end. Such a state of emergency is potentially as endless as the war he rejects.

Oren Gross defines existing approaches and legal rules as the “Business as Usual” model\(^{542}\), whereby it is recognised that an act of terrorism causes harm, but is treated as a crime and dealt with under the extant law rather than making substantive changes to the law. He, like Ackerman, is pessimistic about this approach due to its “rigidity in the face of radical changes in the surrounding context”\(^{543}\). Other approaches he categorises as “models of accommodation” by which “exceptional adjustments are introduced to accommodate exigency”\(^{544}\). A declaration of emergency is one such model. Unlike Ackerman, Gross is sceptical about this. In the case of terrorism a state of emergency would have no discernible end. He further warns of the danger of terrorism law seeping into the legal system. Seepage of the British anti-terrorism law where the idea that a suspect’s silence on arrest could lead to “adverse inferences” against them is a case in point of emergency powers being embraced in general criminal law.

\(^{539}\) Bruce Ackerman, “The Emergency Constitution” (2004) 113 Yale L.J. 1029 at 1036
\(^{540}\) Ibid. at 1033
\(^{541}\) Ibid. at 1037
\(^{543}\) Ibid. at 1021
\(^{544}\) Ibid.
Gross gives “a warning about our ability to separate, effectively, between the normal and the extraordinary, between temporary and permanent measures, between measures aimed at the ‘other’ and measures targeting ‘us’. It is about the need for rational, calm and reasoned discourse even when contemplating changes to the legal system in the face of great calamities.”

He suggests instead an ‘Extra-Legal Measures’ model. This model seems highly impractical in that it calls for the separation of “action and ratification”. Public officials can depart from legal rules in the hope of ex post ratification by society – the people can hold the actor accountable or approve actions retrospectively. It presumes “candor on the part of government agents, who must disclose the nature of their counter-emergency activities” in the hope of having these activities ratified. However, “Gross provides no mechanism for ensuring that public officials would publicly acknowledge their actions… Nor is it clear that disobedient officials would have any pragmatic incentive to disclose their conduct, particularly if they made a miscalculation…”

Both practically and in respect of human nature, it is difficult to conceive how candid disclosure could be achieved, as there may be much that cannot legitimately be disclosed for security reasons, and further, if the officials in question had any genuine reason to fear post-action reprisal, it could induce a general inclination not to act at all. On the other hand, if officials are certain of ratification, there will be no constraints on their actions. This model is in fundamental contradiction to the rule of law – it even assumes rule of law is not necessary because the relevant actors will be open and transparent. David Dyzenhaus rejects the model because there “are other ways of attempting to place officials in a black hole than the legislature certifying the blank cheque to officials or indemnifying them after the fact”.

However, it is notable that Gross and Dyzenhaus do want something similar, which is currently lacking in extant models of anti-terrorism law – transparency, popular debate, individual accountability.

546 Gross, “Chaos and Rules”, supra note 542 at 1024
547 Gross, Law in Times of Crisis, supra note 81 at 11
Concerns about the separation of the extraordinary from the normal are apposite, because it is in the context of a perceived emergency that unusual legislation such as laws placing unprecedented constraints on expression or association arises. Dyzenhaus warns that in perceived emergencies, democratic states often create “grey holes” – areas in which the law theoretically applies, but is procedurally or substantively limited so that there are no meaningful limitations on executive power. Laws which legitimise erosions of the right to free speech, while maintaining that they are proportionate and the right remains intact, are an example of a ‘grey hole’. Kent Roach argues “that it is better for courts to push states towards formal black holes that require explicit derogations from rights, than to legitimate diluted versions of rights and grey holes.” Dyzenhaus describes the terrorism legislation that has been passed as seeking to “normalize the exception by declaring a permanent state of emergency… The rule of law is relaxed, though not totally, and there is no clearly defined threat. We have the permanence of the temporary, an attempt to normalize the exception.”

Dyzenhaus, like Kent Roach who points out that pre-existing criminal laws are adequate to combat terrorism and “the terrible acts of September 11 were crimes long before that fateful morning”, wants to banish the exceptional from the legal order. However, he does believe that some adaptation of legal rules is necessary and offers the “Legality Model” which preserves “the assumption of constitutionality in that it insists that the values of the rule of law are not to be compromised. It also preserves the idea of a separation between the exceptional and the normal. It holds that to the extent that political power can be successfully subjected to the discipline of the rule of law, it should…” Dyzenhaus’ model with its example of the UK Special Immigration Appeals Committee as an example of how judicial review can be made to function falls very close to the actual state of affairs, such as how in the UK the Proscribed Organisations

550 Dyzenhaus, Constitution of Law, supra note 306
553 Roach, “Dangers”, supra note 229 at 132
554 Dyzenhaus, “State of Emergency”, supra note 549 at 83-4
Appeals Commission reviews the listing of organisations. Victor Ramraj also approves of the use of specialized administrative tribunals.\footnote{555}

An alternative approach is given by Kent Roach who argues against reactive law reform and suggests that the answer is “to construct a comprehensive anti-terrorism policy that employs much more than the criminal law. Drawing on work in the fields of public health, technology and crime prevention, I will suggest that administrative and private sector strategies can play an important role.”\footnote{556} This idea forms an important counterpoint to the legislative approach. There is a danger of too much focus on the law as universal solution to the difficulties posed by the terrorist threat.

The different attitudes to anti-terrorism law are wide ranging, and there is no one consensus on how it should be dealt with. However, the overwhelming majority of critics do appear to support the idea that “rigid adherence to conventional values must give way in the face of security threats.”\footnote{557} Despite the fact that not all critics agree that this is necessary, what the various theoretical approaches do demonstrate is “a willingness to depart from ordinary norms in times of crisis. This is perhaps the definitive characteristic of the contemporary response to international terrorism; the assumption that ordinary rules no longer apply.”\footnote{558} If it is accepted that ‘ordinary’ criminal law is insufficient to deal with terrorism, then the question becomes whether a criminal law with a motive-based definition of terrorism and unprecedented restrictions on speech and association is the way to proceed.


\footnote{557} Craig Forcese, National Security Law: Canadian Practice in International Perspective (Toronto: Irwin Law, 2008) at 47

\footnote{558} Victor Ramraj “Beyond the Ottawa Principles: Social and Institutional Strategies and Counter-Terrorism” in Nicole LaViolette & Craig Forcese, eds., The Human Rights of Anti-terrorism (Toronto: Irwin Law, 2008) 371 at 374
The Link between Definition and Criminalizing of Association and Expression

The varying opinions rejecting extant approaches and positing new ones demonstrate the unspoken consensus between academics that the rules are insufficient to operate in the case of terrorism and that new models need to be conceived. It is therefore unsurprising that states have struggled with how to classify and deal with terrorism. Long before September 11, Connor Gearty charted the expansionary tendencies in the definitions of terrorism – a ‘drift from terror to terrorism’, which now encompasses almost all forms of political insurgency.559

The definition of terrorism is an integral element of the listing of organisations based on terrorist activity and the prosecution of speech that encourages terrorism. The broad definition increases the compass and exacerbates the problems with these crimes. This is problematic in that the definition is not only broad in terms of the activities it encompasses, but also overbroad in that it covers not only complete terrorist activities but also inchoate forms such as a threat (in Canada, the UK and Australia), and in Canada, which otherwise creates more liberal offences, the definition also covers conspiracies, attempts and counselling. In keeping with trying to attack the crimes at an earlier stage more appropriate for security intelligence, legislation is trying to attack actions at the earliest possible inchoate stages. Considering that:

[M]any of the terrorist activity offences in the bill are best seen as a species of inchoate crimes themselves because they prohibit activities such as financing, facilitating, and instructing that are done in preparation and sometimes rather advance preparation to the actual commission of any complete terrorist crime… [there is] the risk of piling inchoate liability on top of inchoate crimes. The ability to prosecute inchoate crimes presents a real danger of extending the criminal law to absurd lengths and diminishing the meaningfulness of the act requirement.560

It the legislation is taken at face value, this suggests the possibility of absurd prosecutions such as for counselling someone to threaten to do a terrorist act.

Kent Roach has suggested that by solving problems with the definition by making it more restrained, precise, and focused on acts of violence, many of the problems with the legislation could be solved even before looking to re-tailor the crimes themselves. An improved definition “could respond to many, albeit not all, legitimate concerns that anti-terrorism efforts will infringe

559 Conor Gearty, Terror (London: Faber, 1991) at 13
560 Roach, “New Terrorism Offences”, supra note 283 at 159-160
human rights. A precise definition of terrorism that concentrates on the murder and maiming of civilians could become a unifying point that focuses on the worst forms of terrorism, while also providing maximal protection for dissent and protest.561 The definition of terrorism is not only the primary source for many of the overbreadth problems, but it is a factor in creating the attitude that leads to the criminalisation of speech and association.

Overbroad anti-terrorism laws may lead to a blurring of “important distinctions between law enforcement and security intelligence, and between admissible evidence of wrongdoing and intelligence about a person’s associations and expressive activities”562, and indeed this preventative attitude in the legislation is symptomatic of the fact that “it was designed to disrupt terrorist activities by permitting prosecution before the culmination of a terrorist act.”563 Evidence of association and opinion that would better form the basis of investigation or monitoring then becomes evidence of the actus reus of a crime, by creating laws which prohibit certain types of speech and association. One fundamental cause of this is current definition of terrorism as requiring a political or religious motive. The question of fundamental legal importance has always been whether a person intended to commit an act, not whether they had motivation for doing so. By combining the two, the definition suggests that terrorism is a crime not just because of what people do, but also because of what they think. It then makes sense to prohibit the thought as much as the action.

It is necessary to maintain “the traditional approach that motive does not constitute an essential element of a criminal offence, if we are to rely on our equally as traditional rule that no motive excuses crime. If motive cannot be a shield for the accused, it should also not be a sword for the state.”564 The concept of political or ideological motive automatically moves the focus from what a person has done to who they have associated with and what they believe. In the U.S. where motive is not an element of the crime, the integrity of freedom of speech is much better preserved, while in the other jurisdictions, where motive is an aspect of the definition, there is a

562 Ibid. at 103
563 Ahmad, supra note 253 at para. 54, Publication restricted pursuant to s. 648 of the Criminal Code
564 Roach, Case Comment, supra note 68 at 17
greater and clearer emphasis on attacking expressive activity. In the UK people may be prosecuted for encouraging terrorism, in Australia subversive speech is attacked, and in Canada there is clear evidence that hate speech provisions may be directed towards terrorism.

The Criminalisation of Speech and Association

At the beginning of this thesis, the importance of expression and association as human rights and the reasons for protecting them were discussed. Of course, not all expressions are equally worthy of protection. However, if one type is prohibited, it has an impact on the normative approach to protecting freedom of expression as a whole. There is a distinction between “restrictions on speech that have no link with the content of the speech (like making it illegal to falsely shout ‘fire’ in a theatre, causing a panic) and restrictions that are directed at the views expressed”. In the former case, there is no interference with the human right because the speech is not, in fact, expressive. Another difficulty is that protected expressions in and of themselves do not cause damage, although they may inspire or provoke it.

Where there is expressive content, the fundamental problem with its criminalisation is whether there is a sufficient nexus between the possible or actual damage and the words or expressive actions that are prohibited.

“A person who acts on reasons he has acquired from another’s act of expression acts on what he has come to believe and has judged to be a sufficient basis for action. The contribution to the genesis of his action made by the act of expression is, so to speak, superseded by the agent’s own judgment. This is not true of the contribution made by an accomplice, or by a person who knowingly provides the agent with tools… whatever these crimes involve, it has to be something more than merely the communication of persuasive reasons for action.”

If one person incites another, in the sense of giving orders or providing them with a road map of how to commit the crime, then the relationship between the ‘expression’ and the damage the law seeks to redress are clear. However, if what is expressed is merely opinion or emotion, no such link is made out.

566 Scanlon, supra note 15 at 844
The fact that such opinion may be repugnant to the majority of society is not in itself a reason for ceasing to protect it. The value of freedom of expression is in its ability to provoke debate, to lead people to make informed decisions, and it is only by protecting all expressions that we can be certain this freedom will remain – “our commitment to free expression is measured by our willingness to protect it even when it causes serious harm or offends our deepest values.”

Some critics go further than this and argue for the right to advocate even unlawful action, stating that it is “based on the role of reason in public discourse. Just as individuals must be free to question the legitimacy of the constitutional order and to advocate its overthrow, so they must be free to debate the legitimacy of particular laws and to advocate conduct that violates them.”

However, freedom of expression and association are also part of a system of other fundamental rights and freedoms. It is because of this that it is possible to argue for their limitation. If a particular instance of expression or association poses a fundamental threat to other freedoms, or to the freedom of expression and association of others, then it may be necessary to limit it in order to preserve human rights as a whole. Once rights are perceived “as the building blocks of a democratic society; on this basis we can recognise them as political freedoms rather than personal entitlements. Once understood like this, it becomes clear that they may on occasion have to yield to the greater good of the political community...” One example of this is speech that advocates revolutions which would be illegitimate “either because they would be imposed by a minority on the rest of the community or because they would deprive individuals of their basic rights. A revolution of this sort would violate the people’s rights to democratic self-government and individual liberty under the rule of law... if there is a close enough connection between the speech and the danger that revolution will take place.” The last point is one of fundamental importance. There must be a sufficient nexus between the speech and the illegitimate result. To demand that freedom of expression is used wisely does not necessarily weaken it as a right. In fact, it is at its most potent as an element of democracy when it is perceived as bringing with it not just freedoms but also responsibilities. It is therefore “not

567 Heyman, supra note 6 at 1
568 Ibid. at 113
569 Gearty, Essays on Human Rights, supra note 11 at 343
570 Heyman, supra note 6 at 114
inherently contradictory for a democratic culture to prohibit certain kinds of political expression, whether in the form of speech, membership of an organization, or public protest.” However, such prohibitions must be made with care and sensitivity.

One example of a form of speech that has been legitimately limited in the UK, Canada and Australia is hate speech, such as incitement to racial hatred. Laws against the wilful promotion of hatred against racial, religious and ethnic groups have been held to be a reasonable limit on freedom of expression by the courts. The principles of freedom of expression are overridden in this instance, although the “American understanding is that principles of freedom of speech do not permit government to distinguish protected from unprotected speech on the basis of the point of view espoused.” The U.S. has filed a reservation on First Amendment grounds to Article 4 of the Convention on the Elimination of All Forms of Racial Discrimination.

It is notable that in Australia the anti-terrorism and anti-hate rationales for restrictions on freedom of speech are blurred. This is an important point more generally in relation to both Canada and Australia, as justifications for hate speech may not be equally applicable to terrorist speech. While seditious offences in Australia apply to counselling or urging a terrorist act, under s80.2 of the Australian Criminal Code they also apply to speech that urges a group distinguished by race, religion, nationality or public opinion to use force and violence against other such groups in a manner that disrupts peace, order and good government. The advantage of such laws is that they give less of an impression that the state is targeting certain political and religious groups.

One of the laws normative goals is to guide what is and is not considered acceptable in society. Thus laws against hate propaganda send out the message that it “is harmful to target group members and threatening to a harmonious society… the hate-monger is criminally prosecuted and his or her ideas rejected.” It is beneficial to have legislation which protects minority groups from racial and religious hatred; and if laws limiting freedom for this reason are accepted,

571 Gearty, Civil Liberties, supra note 91 at 31
572 Schauer, supra note 438 at 35
574 Keegstra, supra note 273 at 769
then similar laws with an anti-terrorism rationale may also be acceptable. However, one profound difference is that instead of protecting the minority, terror legislation protects the majority from the minority. It is therefore crucial that such legislation should be necessary and have a proven effect in achieving its goal.

Various theories have been posited as to how expressions can aid in the proliferation of terrorism. Posner and Vermeule draw attention to:

[The] striking finding that press freedoms are positively correlated with greater transnational terrorism; nations with a free press are more likely to be targets of such terrorism. Correlation is not causation, but there are obvious mechanisms that might explain this, such as the ability of terrorists to exploit free media coverage to spread fear and dramatize their cause and the freedom of the press to reveal security secrets... the British government believes that fundamentalist mullahs used sermons to recruit terrorists and encourage terrorism.  

However, this theory is unsatisfactory in that democracies are more likely to be subject to terrorist attacks and one characteristic of such democracies is a free press. Further, ‘believing’ that sermons recruit and encourage terrorists is not the same as being able to prove that they have this effect.

A less concrete but more persuasive argument relates to the fact that:

Al Qa’ida can be more accurately conceived as an idea rather than an organisation. This tends to be confirmed by events like the Madrid and London bombings, which suggest that the major threat stems from local, self-starter individuals and groupings who are inspired by a combination of extremist Islam ideology and outrage at what they perceive to be the injustices inflicted on the Arab and Muslim world by the West. Such attacks require little by way of structured organisation or finance. What is needed in the way of motivation, training, technical knowledge and support is available in the constant, global flow of information delivered by new communications media.

Curbing the flow of such information is therefore one of the few available means for hindering terrorism. However, it is here that anti-terrorism law crosses a boundary – it is trying to prevent crime by controlling what people think. This goes far beyond anti-hate laws and strikes closer to the root of freedom of expression. Moreover, it targets potentially all Muslims and could

577 Hogg, supra note 345 at 304
theoretically be counterproductive in leading to an approach that opposes the Arab world against the West, leading to alienation and further resentment.

The empirical effect of such laws is almost impossible to evaluate. It is difficult to determine whether speech prosecutions will be effective in terrorism prevention since despite the fact that “terrorism might be prevented by prohibiting speech that provides concrete instructions about acts of terrorism, it is less clear that punishing speech that praises terrorism or urges intergroup violence will prevent terrorism.”\(^{578}\) However, although the preventative effect of speech prosecutions is difficult to determine, so is the extent of the chilling effect of the law, and in reality speech laws are less likely to be alienating to communities than methods such as stop and search powers which target random and generally innocent people and give a more tangible suggestion of racial profiling. The organisation Liberty has highlighted such powers as one of the major problems in the UK, having “particular concern about the use of stop and search powers without reasonable suspicion under s. 44 of the Terrorism Act 2000 (TA). The whole metropolitan area of London has been on a rolling authorisation for the use of these extended powers for over two years. In 2002 – 2003 the number of Asians subjected to S. 44 searches rose by over 300%.”\(^{579}\) Laws which target speech do at least require something empirically objectionable to have been said.

Laws that prohibit expression are clearly justifiable, at least in principle, if they are grounded in the important objective of preventing terrorism or hate. However, even if the objective and the idea of such laws are accepted, the details of the provisions must still be proportionate and tailored to the goal they seek to achieve. The next enquiry is therefore how well the law “reconciles the (often reasonably uncontroversial) objective that has produced it with the underlying principle of free speech that it must necessarily (to some extent) subvert”\(^{580}\) Such a proportionality analysis is especially important in the case of terrorism laws where the most major threat to society lies not in the ability to destroy it absolutely. Instead:

\(^{578}\) Roach, “Comparison”, supra note 346 at 83
\(^{580}\) Gearty, Civil Liberties, supra note 91 at 144
[It lies] in the tendency to push a democratic regime to react to perceived threats by employing authoritarian measures. A major goal of terrorist organizations is to bring about precisely that sort of response by the challenged government in order to (i) waken the fabric of democracy, (ii) discredit the government domestically as well as internationally, (iii) alienate more segments of the population from their government and push more people to support (passively if not outright actively) the terrorist organizations and their cause, and (iv) undermine the government’s claim to its holding the moral higher ground in the battle for survival against the terrorists while gaining legitimacy for the latter.581

Security is important, since without adequate security, the rights delineated in Charters would be unattainable. However, the cost of getting the balance wrong could be far greater than the cost of leaving society with slightly greater vulnerability to terrorist attacks.

The evaluation therefore needs to ask questions about the long-term effects of such laws for society. What will the cost be “for the legitimacy of the fight against terrorism? How does tipping the balance in favour of security during an emergency situation affect the liberty-security relationship in the longer term?”582 If we accept the fact that such laws may have a normative influence far beyond anti-terrorism itself, it becomes crucial that they are properly designed and proportionate to the end that they seek to achieve.

**The Boundaries of Proportionality**

It has become common when speaking of the limitation of rights to accommodate national security concerns in anti-terrorism law to use the metaphor of balancing. This idea is not novel. Indeed, “[t]he metaphor of balancing the public interest against personal claims is established in our political and judicial rhetoric, and this metaphor gives the model both familiarity and appeal.”583 All four jurisdictions examined in this thesis accept the idea that on occasion rights must be limited in order to accommodate other rights or pressing concerns such as national security. It is a mistake to try and reconcile rights and security, as the two are fundamentally unrelated concepts. Security is about society, human rights relate to the individual. Connor Gearty warns of a “a supposed lack of conflict between the two, flowing from a redefinition of


582 Moeckli, *supra* note 27 at 11

human rights the effect of which is to excuse repression as necessary to prevent the destruction of human rights values.” 584 This examination has shown that limitations can be both positive and necessary. However, the idea of balancing is over simplistic in that it suggests the weighing up of rights against national security with the rights being reduced in proportion to the importance of security. It is also deceptive insofar as “what is used to outweigh the – certain – diminution in liberty is in reality not a specifiable gain in security but rather the potential protection from prospective, and therefore unquantifiable, risk.” 585

The assessment of proportionality “is in fact much more multifaceted than the language of balance suggests… [it] requires a detailed inquiry into whether a concrete human rights restriction is supported by relevant and sufficient reasons and whether it is a suitable, necessary, and proportionate means for the protection of national security. It necessitates a complex assessment of the appropriateness and effectiveness of the measure in question and of its potential negative effects…” 586. Principles of proportionality are found in all the jurisdictions. However the language of the ECHR, which requires measures to be “proscribed by law” and “necessary in a democratic society”, and the Canadian Charter which requires them to be “proscribed by law and demonstrably justified in a democratic society”, fall very close to each other, and both have used concepts of rational connection, minimal impairment and proportionality, so it is these concepts which will frame the analysis.

The first aspect of necessity requires that there be some “pressing social need” 587 which the laws address. While there is clearly some kind of risk of a terrorist attack, it is not sufficient to simply proffer this risk as the basis for draconian laws – in order for there to be an evidenced need for laws it is also necessary to know the degree of risk.

Terrorism is by nature an unfamiliar risk. Victor Ramraj analyses how disproportionate fear of unfamiliar risks can lead to excessive reaction in anti-terrorism law and policy 588. Similarly, the

584 Gearty, Human Rights, supra note 34 at 107
585 Moeckli, supra note 27 at 9
586 Daniel Moeckli, supra note 27 at 10
587 Olsson, supra note 125 at 67
588 Ramraj, “Risk Perception”, supra note 555
panic theory theorises that the government either panics or acts on the public’s panic and introduces laws without proper scrutiny which may be “irrational, and thus infringe on civil liberties without also creating sufficient national security benefits. During emergencies, panic interferes with rational assessment of risks.”589. This pattern bears a striking resemblance to the reactionary manner and speed with which new laws were introduced after September 11, and suggests that further analysis of the risks is needed. Similarly, the “prospect theory” theorises that that “individuals tend to give excessive weight to low-probability results when the stakes are high enough and the outcomes are particularly bad”590, and the “availability heuristic means that individuals tend to link the probability of a particular event taking place with their ability to imagine similar events taking place.”591 These theories suggest that in the heat of the moment, and on the assumption that an ‘emergency’ exists, laws are likely to be passed which may not accurately reflect the degree of risk.

While not all the laws examined in this thesis have invoked an emergency as justification, they have all been introduced in the context of the idea that terrorism constitutes an exceptional state of affairs, which requires exceptional measures. However, terrorism has come to constitute the rule rather than the exception and “[f]or normalcy to be ‘normal,’ it has to be the general rule, the ordinary state of affairs, whereas emergency must constitute no more than an exception to that rule – it must last only a relatively short time and yield no substantial permanent effects.”592 The belief that laws are passed in the context of an exceptional situation is likely to result in less rigorous examination. Oren Gross suggests that the idea of emergency is dangerous “because it channels our vision to the immediate affects of counter-terrorism legal mechanisms, but hides from view the long-term detrimental effects of such measures.”593

589 Posner & Vermeule, supra note 575 at 61
590 Gross, Law in Times of Crisis, supra note 81 at 107; see also Daniel Kahneman and Amos Tversky, “Prospect Theory: An Analysis of Decision under Risk” in Daniel Kahneman and Amos Tversky, eds., Choices, Values and Frames (New York: Cambridge University Press, 2001) 17
592 Gross, “Cutting Down Trees”, supra note 545 at 44
593 Ibid. at 45
A balanced reassessment of the risks of terrorism and the necessity of the laws is needed, bearing in mind that terrorism is likely to remain an ongoing problem. The difficulty of such an assessment is that much of the information on which it could be based is limited, and generally only the executive are privy to it. This results in a dependence on the executive’s statements as to the risk. For example, in the Australian context, Dennis Richardson, the former Director-General of ASIO, has stated “al-Qaida had an active interest in carrying out a terrorist attack in Australia well before 11 September and… we remain a target.”\textsuperscript{594} While Paul O’Sullivan, has similarly claimed that “ASIO currently assesses a terrorist attack in Australia as feasible and [it] could well occur.”\textsuperscript{595} The alert level on the national security website has been at medium since September 2001 which means that a “terrorist attack could occur”\textsuperscript{596}. However, such statements give no level of likelihood.

This means that both courts and academics “generally approach the question of proportionality without examining the nature and quality of the terrorist threat and by accepting the executive’s assertion that the threat may warrant a range of comprehensive counter-measures.”\textsuperscript{597} However, simple acceptance of the executive’s analysis, or citing 9/11 as evidence for an emergency, such as Posner and Vermeule’s claim that “… there is no doubt that an emergency exists. Because the events that gave rise to the emergency are observable by all – consider the fall of the World Trade Centre… there is no real risk that the executive is falsely claiming an emergency in order to expand its powers”\textsuperscript{598} is no longer sufficient. Terrorism existed before the fall of the twin towers and so did terrorism laws; the risk of attack is unlikely to be greater today than it was months or even years before September 11 – the terrorist “attacks were a shock, but they should not have come as a surprise. Islamist extremists had given plenty of warning that they meant to kill Americans indiscriminately and in large numbers”\textsuperscript{599}.

\textsuperscript{594} Dennis Richardson, “ASIO Today” 41 AIAL Forum 25 (2004) at 25-26
\textsuperscript{595} Mark Todd, “Chilling Warning: Terrorist Attack Is Feasible,” Sydney Morning Herald, 14 October 2005 at 5
\textsuperscript{596} Australian National Security, Online: Australian Government \texttt{<www.nationalsecurity.gov.au>}
\textsuperscript{598} Posner & Vermeule, \textit{supra} note 575 at 43
\textsuperscript{599} National Commission on Terrorist Attacks, \textit{The 9/11 Report: Executive Summary} at 2 [9/11 Report]
Deference to the executive has become customary. The reasons for this are generally considered both practical and political:

It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process.

Judicial deference has been an obvious factor in the courts’ assessment of laws limiting freedom of speech and expression, from the wide margin of appreciation given by Courts when interpreting the ECHR\(^\text{601}\), and the deference of Canadian courts when assessing proportionality\(^\text{602}\) to the US deference in applying the proportionality principle in cases such as *Humanitarian Law Project v. Reno*\(^\text{603}\) and the deference given to the Secretary of State when listing groups\(^\text{604}\). Dyzenhaus notes “the siren song of the executive in times of emergency or alleged emergency is always seductive… Canada’s Supreme Court has retreated from its stance of rights protection in the wake of 9/11… The Supreme Court seems willing to reduce itself to the role of a rubber stamp in reviewing security decisions. In the United Kingdom the House of Lords and Court of Appeal seems set on the same path.”\(^\text{605}\)

Very little information is made available on which to assess the level of risk. It is arguable that a full assessment “of the proportionality of measures taken in order to protect national security can be made only if sufficient information is available about the precise nature of the threat, including, for example, the type of attack that is plausibly possible, the scale of the threat in terms of the numbers of people who may be plotting such attacks, the likelihood of such attacks taking place and the likely frequency of such attacks in the future.”\(^\text{606}\) Much of this information could be made available without endangering national security. It would not be necessary to indicate specific suspects or jeopardize ongoing investigations in order to supply some

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\(^{600}\) *Secretary of State for the Home Department v. Rehman*, [2001] UKHL 47 at 62, Lord Hoffman  
\(^{601}\) See p34 and p49 of this thesis  
\(^{602}\) See p58-59 of this thesis  
\(^{603}\) See p116 of this thesis  
\(^{604}\) See p110 of this thesis  
meaningful information. However, there is also a growing line of opinion that Courts “can and should be in a position to assess the nature and size of the terrorist threat without necessarily having to have access to specific intelligence.”

Christopher Michaelson uses the case of *A and Others (Belmarsh)* to demonstrate this. In this case, the Lords had to address whether the Government’s derogation from the ECHR in respect of the detention measures was lawful, and whether or not the statutory provisions were compatible with the ECHR. The majority of the Court held that a ‘public emergency threatening the life of the nation’ did exist, but that the measures could not be said to be ‘strictly required’ by the emergency. One judge held that there was both an emergency, and the measures were proportionate. The remaining judge, Lord Hoffmann, held that not only were the measures not compatible with the ECHR, but also that there was no ‘war or other public emergency threatening the life of the nation’ within the meaning of Art 15 ECHR. Lord Hoffmann held:

> “The Armada threatened to destroy the life of the nation, not by loss of life in battle, but by subjecting English institutions to the rule of Spain and the Inquisition. The same was true of the threat posed to the United Kingdom by Nazi Germany in the Second World War... I am willing to accept that credible evidence of [terrorist] plots exists... This is a nation which has been tested in adversity, which has survived physical destruction and catastrophic loss of life. I do not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation. Whether we would survive Hitler hung in the balance, but there is no doubt that we shall survive Al-Qaeda... Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community.”

Lord Hoffmann’s judgment indicates that by using theory and common sense it is possible to determine the level of the threat and whether it warrants exceptional measures even if empirical evidence is not made available. Michaelson notes that:

> [Lord Hoffmann] is able to determine, without access to specific intelligence information, that the current threat of terrorism to the UK does not threaten the life of the nation. In fact, he explicitly accepts that there is a serious terrorist threat to the UK. But this threat is put into perspective by drawing comparisons... And so the Government’s general policy decision about the nature and quality of the threat of terrorism is submitted to judicial scrutiny despite lack of access to specific intelligence information.

607 Michaelsen, supra note 597 at 110  
608 *A and Others*, supra note 196  
609 *A and Others*, supra note 196, at 91-96 (Lord Hoffman)  
610 Michaelsen, *supra* note 597 at 123
Alternatively, the courts should at the very least require that the Government give sufficient evidence of an emergency, or demonstrate that such evidence exists, so that adequate reasons are given for the court to be deferential. Dyzenhaus criticizes the majority in *A and others* on the basis that they “failed to require that a proper case for deference be made by the Government and therefore failed to conduct anything approaching appropriate judicial scrutiny of the reasons underlying the Government’s assertions about the existence of an emergency.”611 None of the judges in *A and others* looked at the secret intelligence. Even if the court does choose the deferential approach, and accept that there is information that would prove that the situation warrants the measures, but which cannot be made available for security reasons, they should call for satisfactory reasons be given to warrant their taking this course.

The executive has made demonstrable errors in the past. September 11 was arguably partially attributable to an under-estimation of the level of risk, and the invasion of Iraq failed to reveal any weapons of mass destruction. The executive may be in the best position to examine and assess evidence, however it must also do so in the light of political pressures and anxieties. It is therefore necessary “to be sceptical of claims that executive expertise per se is enough to justify our automatic deference to the executive in matters of national security. This is all the more so given the problem of transparency. In the realm of national security, executive power is itself often shielded not only from full public scrutiny, but from judicial scrutiny as well.”612

The necessity of anti-terrorist measures depends on the extent of terrorist plots and the likely level of destruction that they could cause. While insufficient information is available to make a complete analysis of the level of the threat, it seems highly unlikely that terrorists would ever be able to overthrow a nation. Bearing in mind that attacks, while unpredictable, are also sporadic, and that increased security measures are likely to limit the amount of damage that could, in the future, be caused by such attacks, the legislation fails on the necessity element of the test.

Proponents of such legislation would suggest that “[t]he risk and nature of terrorist crime are only the first pieces of evidence in the case for special laws. The second part of that evidence arises from the planning of such crime and the consequent difficulties in detecting and

611 Dyzenhaus, “Deferece”, *supra* note 606 at 130
612 Ramraj, “Risk Perception”, *supra* note 555 at 116
preventing it.”613 The argument therefore being that because the planning and preparation of a terrorist crime is unique, it therefore requires a different approach. However, for such a different approach to be justified it must also have some probable effect in preventing terrorism – it must be rationally connected to the end which it seeks to achieve.

The difficulty in assessing the extent to which laws targeting speech and association are rationally connected to their objective is (as discussed above) the fact that assessing the impact of such laws is extremely difficult. Assuming that the objective of the law is the prevention of terrorism, rather than the denunciation or punishment of terrorist speech in and of itself, the presumption underlying such laws must be that by preventing the spread of terrorist propaganda and the ability of such ideas to proliferate potential terrorists will be prevented from developing a terrorist mindset. However, while it is possible that the laws may have this effect, it is also “far from clear that targeting speech is rationally connected to preventing terrorism. Any effectiveness of targeting speech that advocates terrorism is likely to be minimal, especially when compared to the obvious harms caused to freedom of expression…”614

There is no proven link between laws limiting speech and association and the prevention of terrorism; it is also by no means clear that such laws are necessary. There is no reason to believe, for example, that such laws could have prevented the attacks of 9/11. On the other hand, established criminal laws exist which are a less drastic means of achieving a similar effect. For example, inchoate offences and accessorial offences such as incitement and conspiracy apply “to those who agree to commit crimes; those who go beyond mere preparation to commit crimes; those who counsel others to commit crimes; and those who knowingly assist in the commission of crimes or escape from crimes.”615 Such offences also require the establishment of a greater link between the contemplation of a crime and actually carrying it out. Provisions against hate speech have also been adapted to prosecutions of terrorist speech, and, in the UK, require a higher level of intent and are therefore a less draconian measure.

613 Carlile, Definition, supra note 39 at para 29
614 Roach, “Must we Trade Rights”, supra note 153 at 2183-4
615 Roach, “New Terrorism Offences”, supra note 283 at 154
Unusual criminal laws, such as those which target expression and association, are rooted in the perception that a terrorist crime is essentially different to other crimes, that “[f]anatics and others moved by a fervent ideological or similar purpose are less predictable… The fruition of other crimes does not stimulate the same dread or risk.”\textsuperscript{616} The most insidious damage caused by a terrorist crime is the fear it provokes, and since there is psychological damage it is unsurprising that the response should target the mental element of the crime. However, such a response “is unlikely to tackle the causes of terrorism and will not deter a terrorist from a premeditated course of action. Further, law-making may also redirect attention away from debate over other responses to terrorism… when the law is used as a primary tool in the war on terror, it can pose a threat to the rule of law. In succession, such laws can undermine the basic value and assumptions that have been developed over the course of centuries.”\textsuperscript{617} It is highly unlikely that the government would be able to justify with evidence a connection between speech and terrorism. Terrorist propaganda and terrorist groups are not the sources of terrorist behaviour – they are a symptom and a result. Preventing them is unlikely to be effective, and any effect certainly will not outweigh the damage to human rights and civil liberties.

\textsuperscript{616} Carlile, \textit{Definition}, supra note 39 at para 31
\textsuperscript{617} Williams, \textit{supra} note 305 at 551.
Conclusion

The definitional issues give rise to the suggestion that terrorism is too much a hybrid of law, politics and emotion to take concrete legal form. However, laws against terrorism have become a reality, and because terrorism does have some essential differences from other crimes such laws are not unwarranted. Victor Ramraj notes that “even in appropriating law as an instrument of counter-terrorism power, states commit to governing through law – and thus commit, in some fashion, to the principle of legality.”618 To have measures prescribed by law and subject to judicial oversight has to be positive, as the negative U.S. experience of taking measures outside the rule of law demonstrates.

Despite the constitutional differences between the four states, they are all responding similarly by going well beyond conspiracy and attempt laws. All four look to the listing of organizations – and the limiting of associational activities either through membership or prohibitions on working for those organizations – and to the limitation of ideas, by attacking encouragement of terrorism, seditious speech, hate speech and counselling. Such laws are rarely a proportionate or necessary response. While a bill of rights does not freeze the law, it does change the way it is developed and debated. This examination has demonstrated that bills of rights have a salutary impact in requiring justification of speech and associational limitations. In combination with increased tolerance and multicultural policies they can restrain legislation from its worst blunders.

However, in order to make such laws a more proportionate and effective response, the first step must be to improve the definition. A definition such as that given by the EU Council Framework Decision of 13 June 2002 on combating terrorism619 which places emphasis on the aim of seriously intimidating a population, or unduly compelling a Government or international organization to perform or abstain from performing any act, or seriously destabilizing or destroying the fundamental political, constitutional, economic or social structures of a country or

619 Framework Decision 2002, supra note 69
an international organization, rather than defining terrorism by a religious or ideological motive might serve as an example.

An acceptable definition of terrorism must be clearly tied to the objective of preventing terrorism. It should focus on the aspects of terrorism that make it distinctive and that have given rise to the perceived need to legislate separately for it. Aside from eschewing the political or religious motive clause, it would concentrate on violence as opposed to property damage or interference with facilities, both because it is the violent aspect of terrorism that makes it essentially abhorrent and also because a definition that includes non-violent acts runs a greater risk of encompassing demonstration and protest activities. A more concise definition would shift the focus from the inchoate stages of terrorism, and attacking thought as opposed to action. Terrorism may be targeted using hate speech laws or incitement, but in this case both a subjective intent to cause terrorist activity and an objective danger that such activity might occur is crucial for proportionality. Laws that specifically target terrorist speech are not proportionate, due to both the ephemeral nature of the terrorist threat and the impossibility of empirically proving any rational connection to the objective of preventing terrorism. Moreover, such laws risk a chilling effect on vital political expression and increased alienation of minorities.

It is more important than ever that in an increasingly diverse, multicultural world the moral fabric of society be maintained whole. It is essential that the leeway for abuse should not be taken advantage of. We are pushing the boundaries of what is acceptable, using human rights analysis as a way of justifying and legitimising harsher and harsher laws. An incremental approach to the erosion of liberties desensitizes us to their loss, while on the other hand dramatic rhetoric about the dangers of terrorism increases the fear of an attack. However, terrorism is not a new problem; it is a risk that has and always will exist, and one that we previously lived with without excessive concern. Global communications and the fast passage of news has helped change and educate our awareness of the threat. Terrorism has evolved to some extent, centring on small cells of fanatics taking independent action, a decentralized structure that by its very nature is very hard to defeat. Al Qaeda is different to, for example, the IRA, in that it “represents
an ideological movement, not a finite group of people. It initiates and inspires, even if it no longer directs. In this way it has transformed itself into a decentralized force.\textsuperscript{620}

An ideological movement can be undermined and even destroyed; however this cannot be achieved solely through law making. If the legislative “goal is to eliminate that risk, we will fail. The law, no matter how stringent, cannot guarantee our security.”\textsuperscript{621} The real causes of terrorism – poverty, social injustice, political oppression\textsuperscript{622} – are far more complex than the expressions and associations that they give rise to, and call for a political rather than a legal solution. Connor Gearty charts how the rhetoric of the War on Terror seems to have resulted in a loss of historical perspective on the causes and nature of political violence\textsuperscript{623}. This leads to the recognition that:

\begin{quote}
[T]he subject of human rights will not be truly safe until the language of terrorism, and with it all dangerous talk of good and evil, is removed entirely from political rhetoric and from national and international law, to be replaced with (as far as the first is concerned) a more nuanced approach to international relations and (in relation to the second) a code of law that emphasises the primacy of the criminal model over that of emergency or national security driven approaches.
\end{quote}

Gearty is not alone in believing that the “greatest violence the term ‘terrorism’ does to human rights is the way in which it frames the debate.”\textsuperscript{625} The rhetoric of terrorism exaggerates the danger, and gives rise to the idea that in order to avoid this unknown and unquantifiable risk, greater and greater incursions into civil liberties are permissible and necessary. Society’s interests and our civil discourse would be better served if this approach were replaced by political models for combating the causes of terrorism and by laws that are more objective and focused.

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\textsuperscript{620} 9/11 Report, supra note 599 at 8
\textsuperscript{621} Williams, Insight, supra note 349
\textsuperscript{622} The High-level Panel on Threats, Challenges and Change reported that recruitment by international terrorist groups was “aided by grievances nurtured by poverty, foreign occupation, and the absence of human rights and democracy; by religious and other intolerance; and by civil violence”. A More Secure World: Our Shared Responsibility, UN GAOR, 59th Sess., UN Doc. A/59/565 (2004) at para. 21. See also Brigitte L. Nacos, Terrorism and Counterterrorism: Understanding Threats and Responses in the Post-9/11 World (New York: Pearson Longman, 2008) at 94
\textsuperscript{623} Connor Gearty, “Rethinking Civil Liberties in a Counter-Terrorism World” (2007) 2 European Human Rights Law Review 111
\textsuperscript{624} Gearty, Human Rights, supra note 34 at 139
\textsuperscript{625} Gearty, Human Rights, supra note 34 at 123-4
\end{flushright}
Paul Roseweig suggests that it is unnecessary to be overly pessimistic about the manner in which anti-terrorism law erodes liberties. We may appear to be “on a downward spiral towards diminished civil liberties. But a better view of this history shows that the balance between liberty and security is more like a pendulum that gets pushed off-centre by significant events (such as those of September 11th) than a spiral.”626 The Courts may so far have been slow to reject anti-terrorism laws, but even when they “appear overly deferential in the midst of an emergency, they play an important function over time in limiting what can be done in the next emergency.” 627

With a new American president in power, the military detention facilities at Guantanamo Bay closing down, and a general willingness to take a more sceptical approach to executive power in the wake of the war on Iraq, now is the time to reassess and develop a more measured approach. Our primary concern should be the ongoing dialogue about rights that exists between the legislature and the judiciary, and internally in the consciousness of the country itself. The concept of the legislature seeking to set the executive free through harsh legislation is no more novel than the concept of terrorism itself. It is only by working towards a robust understanding and upholding of human rights that the perils of laws that impact on civil liberties can be avoided.

626 Paul Rosenzweig “Civil Liberty and the Response to Terrorism” 42 Duq. L. Rev. 663 at 671
627 Cole “Morality”, supra note 392 at 1761