

## **The Democratic Dilemma**

**Talk delivered on 26 Nov 2019 at Israel Democracy Institute, Jerusalem.**

1. I have quite an odd job. I am an independent lawyer. I have no powers and no staff. Yet every year I have to send a report to the UK Parliament on whether Terrorism legislation is up to scratch. I don't know how well that will translate into Hebrew so I'll add, fair and effective. The role that I have in fact seems to work relatively well in the UK.
2. The key point is that I am independent. I have access to government information including highly sensitive information, but what I say are my views not the government's.
2. I've just delivered my draft first Report to the government to security check, and once the small matter of a general election has happened, it will be published. A significant part of my Report addresses precisely the area of law covered by your Counter-Terrorism Law 5776-2016, Chapter 2. The process of designating terror groups we call proscription in the UK<sup>1</sup>. I have made recommendations as to how UK legislation could be improved.
3. What I want to talk about was is what I call the **democratic dilemma** in designating terrorist organisations which I think makes the law difficult to operate in this area, although not in principle impermissible. First let me say a few words about terrorist groups in the UK.
4. The power to ban terrorist groups has been around since the 1970s and the Troubles in Northern Ireland. The power permits the Home Secretary or the Secretary of State for Northern Ireland (not the Defence Minister as here) to ban groups that are directly involved in violence and since 2006<sup>2</sup> those who "glorify" terrorist violence.

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<sup>1</sup> Section 3 Terrorism Act 2000.

<sup>2</sup> Section 3(5A) Terrorism Act 2000 inserted by the Terrorism Act 2006.

5. An example of a glorifying group is Al Muhajaroun (widely known as ALM) many of whose UK members were involved in a suite of terrorist attacks. They were to include Asif Hanif who carried out a suicide attack in Mike's Place bar in Tel Aviv in 2003 and murdered three people and injured 50 more. It was not possible to show that the group itself was terrorist in the conventional sense: but it glorified and inspired terrorism, and was proscribed in 2006, as were various alias names used by the group in 2010, 2011 and 2014.
6. I note that in Israel your equivalent law allows designation of those who assist terrorist organisations: on the face of it, that seems rather vague because assistance can come in many forms. I do not of course know how restrictively assistance will be interpreted by the courts in Israel.
7. It is not precisely the same point, but in the UK we are still having a debate about non-violent extremism: at what point should you criminalise something that is lawful but which can make people feel less inhibited about becoming involved in terrorism. A good example is the suggestion following the inquest investigation into the London Bridge attacks of 2017. One of the killers had large amounts of violent extremist material. It's not an offence to possess it, but the UK's senior coroner has suggested that the law may need to be adapted<sup>3</sup>.
7. No distinction is made between local groups and overseas groups or types of groups. In the UK the first extreme violent right-wing group, UK-based National Action, was proscribed in 2016<sup>4</sup>. This followed its glorification of acts of terrorism after the murder of a Member of Parliament, Jo Cox, and the Pulse nightclub attack in Orlando. With all types of group, the government considers the impact of that group on the UK among other things. This seems right to me, especially when geographical location is rendered less important by the use of technologies.
8. Not all groups are eligible. There is an important but far from straightforward distinction in the UK is between terrorism and what we now call "hostile state activity".

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<sup>3</sup> Prevention of Future Deaths Report, November 2019, paragraphs 67 to 68.

<sup>4</sup> Terrorism Act 2000 (Proscribed Organisations) (Amendment) (No. 3) Order 2016, SI 2016/1238.

So when Russian operatives carried out the chemical weapons attack in Salisbury in 2018 this was not considered terrorism as it was done on behalf of the state. A group of hostile state actors could not be proscribed as a terrorist group. The UK has just started to bring in laws to deal with hostile state activity, and I suspect there are more laws to come<sup>5</sup>.

9. Given that your Counter-Terrorism Law 5776-2016 is based significantly on UK legislation, you will not be surprised to hear that in the UK when a group is banned membership is immediately an offence, as is other conduct relating to meetings, flags, uniforms, inviting support and funding<sup>6</sup>. Even though this type of criminalisation is familiar, it's still worth bearing in mind what this means at a fundamental level. Ordinary criminal offences address conduct, irrespective of the *identity* of those involved. Murder is murder. Designation or proscription causes a very unusual form of criminal liability by penalising ordinary conduct by reference to the identities of the group involved.
10. So when a politician decides to designate or proscribe, they are amending the criminal law, and in a way - unlike regulatory or administrative matters - that can lead to very long sentence of imprisonment.
11. This brings me to the **democratic dilemma**. On the one hand it seems right that there should be a democratic component to designation, in the form of a politician who is accountable to Parliament and the people. In the UK it is the Home Secretary or the Secretary of State for Northern Ireland, and any decision must be ratified by a vote in both houses of Parliament (although they, unlike the Minister, will be handicapped by not knowing the sensitive assessments on which the decision is based)<sup>7</sup>.
11. The alternatives - councils of wise women and men, intelligence agencies, judges – do not provide the level of democratic oversight. In addition, there is often a political judgment to be made based on foreign policy issues. Most groups that are banned in the UK have more of an international presence, and states put pressure on one another to

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<sup>5</sup> In Schedule 3 to the Counter-Terrorism and Border Security Act 2019.

<sup>6</sup> Terrorism Act 2000, sections 11 to 18.

<sup>7</sup> Section 123(4) Terrorism Act 2000.

ban groups that are causing them harm. Banning a foreign group is a way of supporting allies. One of the five discretionary factors considered by the Home Secretary, if the statutory threshold is met, is "the need to support other members of the international community in the global fight against terrorism".

12. For example, in December 2017 two Egyptian and two Bahraini based groups were proscribed: their impact on the UK is minimal<sup>8</sup> but UK law allows the Home Secretary to consider the importance of wider political engagement.

13. Most recently in February 2019 in a move that was strongly supportive of Israel and the UK, both political and military wings of Hizbollah were banned<sup>9</sup>. It is hard to see anyone but a politician making these judgments about which international alliances to support and which not to support.

13. But the dilemma is this. What if you want to keep the list of banned groups up to date by revisiting earlier decisions? In the UK designations last until revoked. Democratically elected politicians are cautious when it comes to national security and are naturally reluctant to do anything that would or might be seen as putting the public at risk. Someone once said that for a UK politician to decide to take a terrorist group off the list would take an act of "eccentric courage"<sup>10</sup>.

14. This may be an overstatement, but it is certainly the case that political considerations get in the way.

14. A good example of this is in Northern Ireland. Following the Belfast Good Friday agreement of 1998 many proscribed groups have put down their arms. But some of those same transitioning groups have moved into organised crime<sup>11</sup>. If a group decided to become drugs dealers rather than terrorists, why would you want to reward them by taking them off the terrorism list - shouldn't you wait until they had stopped terrorism

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<sup>8</sup> Explanatory Memorandum to the Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order 2017 No.1325.

<sup>9</sup> The Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order 2019.

<sup>10</sup> Lord Anderson QC, *Terrorism Acts in 2011 Report*, at 4.51, citing Professor Conor Gearty, *Civil Liberties* (OUP 2007), at page 158.

<sup>11</sup> MI5 and PSNI, "Paramilitary Groups in Northern Ireland" (2015).

and crime? In the UK it is often said that it would upset the delicate balance in Northern Ireland if a group from only one side of the sectarian divide was deproscribed<sup>12</sup>.

15. The lack of a confident system for taking groups off the terrorism list risks politicising decisions. The government very recently proposed that the Libyan Islamic Fighting Group should be taken off the list, after an application was made on behalf of that group. But in a debate in Parliament the opposition spokesman refused to support the motion because he did not consider that he had a sufficient understanding of the evidence that the decision to deproscribe was based on<sup>13</sup>.
16. If I have understood the law here there is something of a hybrid system in Israel. A distinguished Advisory Committee including current or past judicial members is established with the possibility of hearings; that Committee then advises the Minister. Then under section 12 of your law, the Advisory Committee reconsiders foreign (but not domestic) designations every 4 years. Again, if I have understood correctly the matter the Minister still takes the final decision.
17. In the UK there is no special advisory committee although the Home Secretary is advised by a non-statutory group of officials from across government: this is intended to give the Home Secretary expert advice on the operational case, as well as matters such as community impact, for example on diaspora groups in the UK. But there is an appeal body, the Proscribed Organisations Appeals Commission<sup>14</sup>.
18. So far, in almost 20 years, it has only determined one case - the case of the People's Mojahedin Organisation of Iran which it ordered to be deproscribed in 2007 because the Commission found that it was no longer concerned in terrorism<sup>15</sup>. The UK does have a system of security cleared advocates who are allowed to see all sensitive material and participate in proceedings before the Commission<sup>16</sup>. That seems to be a strength of the

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<sup>12</sup> Hansard (House of Lords), Vol 794 Col 1647, 17 December 2018.

<sup>13</sup> House of Commons, Fourth Delegated Legislation Committee, 31 October 2019.

<sup>14</sup> Section 5 Terrorism Act 2000.

<sup>15</sup> Appeal No: PC/02/2006, subsequently upheld by the Court of Appeal in *Secretary of State for the Home Department v Lord Alton of Liverpool* [2008] EWCA Civ 443.

<sup>16</sup> Proscribed Organisations Appeal Commission (Procedure) Rules 2007, rule 9.

system, which perhaps compensates for the absence of something like an Advisory Committee when the decision is originally taken.

18. As Lila Margalit has explained of the position in Israel, the impact of proscription in the UK is far wider than creating criminal liability. Whether a group is proscribed is relevant to arrest, administrative orders, immigration measures, digital take down, EU sanctions, non-jury trials in Northern Ireland, and the impact is particularly felt on the aid sector who have to operate in bad areas alongside bad actors including proscribed groups: these are all matters that I cover in my annual Report. In Northern Ireland it has an odd effect: many groups fly flags, including of proscribed groups, but there are very rarely any prosecutions - paradoxically, this non-effect is a source of tension.
19. That is all I wanted to say by way of introduction to the UK. Despite all I have said the power to proscribe is a useful if blunt way of dismantling terror networks so I think the power should be retained. There is a question as to how useful it will prove in dealing with an evolving threat: I refer to the right-wing violent extremists and the way in which groups, or individuals associated with ideologies propagated by these groups, use modern technology. It is another issue, and I doubt it is one that is confined to the UK, but even relatively recent legislation does not address modern forms of association and communication.
20. If time allowed, I would have referred to 2 analogous powers: the power to impose financial sanctions against individuals which no one should think of as a softer measure<sup>17</sup>. It has been described by our highest court as making individuals "prisoners of the state"<sup>18</sup>.
21. Another new power in the UK is to designate areas of the world as no-go areas<sup>19</sup>. I know Israel thought about legislating for "terrorist infrastructure areas" but chose not to. It is a path that also has been taken by Australia and Denmark, and the Dutch are now thinking about it. I'm happy to take questions on either of these: all these laws are

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<sup>17</sup> Principally under Terrorist Asset-Freezing Etc Act 2010.

<sup>18</sup> *Her Majesty's Treasury v Ahmed* [2010] UKSC 2, para 60.

<sup>19</sup> Section 58B Terrorism Act 2000, inserted by the Counter-Terrorism and Border Security Act 2019.

powerful, all of them risk unintended consequences and must be constantly questioned and kept under review.

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