

**Banishing the enemies of all mankind: the effectiveness of proscribing terrorist organisations
in Australia, Canada, the UK and US.**

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Introduction

Designating and outlawing enemies of the state - the act of proscription - has a long and ignoble political history that stretches back to the industrious empire-building of pre-Christendom Rome. In 82BC Lucius Cornelius Sulla published lists of those he considered enemies of the state, stripping them of their Roman citizenship, confiscating their wealth, and sanctioning their extra-judicial killing. Cicero, the classical philosopher and statesman was killed under such an order at Sulla's command. Similar proscriptions, under the rubric of 'outlawry', were apparent in Britain a millennium later. Before the Magna Carta was signed by King John in 1215, the British sovereign could outlaw foes with the declaration of *caput lupinum*: literally, 'May his be a wolf's head'. As with Sulla's proscriptions, a declaration of *caput lupinum* withdrew state protections from the unfortunate subject, placing him or her on an equal footing with wild animals and such that s/he could likewise be killed as such. These are more than interesting historical footnotes. Today, variations of Sulla's proscription have been used energetically in pursuit of today's class of (those designated) terrorist.

The powers to outlaw organisations and target extremists employed in Australia, Canada, the UK, US and elsewhere bear a striking resemblance to Sulla's proscriptions. Powers to strip citizenship are already partly in place; the confiscation of wealth is lawful in all Anglosphere states; and extra-judicial killing via drones in the Middle East, North Africa and South Asia is a routine feature of the worldwide campaign by US, UK and allied countries' campaign against Islamic extremism. Since the beginning of the millennium, the upsurge in international terrorism has propelled a radical global revision of anti-terrorism laws, in which proscription plays a central role, funneling decision-making powers upwards into the hands of the executive and away from the legislature and the judiciary. This is a feature common to the four countries considered in this chapter: Australia, Canada, the UK and US. Referred to here as Anglosphere states (Bennett, 2004, 2007), they share a political, legal and institutional framework built on common law principles, a shared language and a commitment to liberal democratic ideas stemming from the Westminster style of government.

Across a range of public policy issues, the Anglosphere countries are known frequently to share programmes, ideas and evidence with one another in a process of policy transfer (see Dolowitz & Marsh, 1996; Dolowitz & Marsh, 2000; Legrand, 2012). In the counter-terrorism sphere, these countries have developed a mutual understanding of the ‘problem’ of terrorism and a shared determination of how it should be tackled. As such, my comparison of these four countries proceeds not only from their common institutional and legal frameworks, but also because the raft of laws enacted therein were drafted with international harmonisation in mind.

Gauging the effectiveness of proscription powers is a puzzle. While the powers have been employed to ban a growing number of terrorist organisations, supported by legislation that defines terrorism generously, the reality is that in Australia, Canada, the UK and the US there are relatively few known instances where individuals have been charged, much less prosecuted and convicted, for membership thereof. As a result, we might wonder whether proscription powers are effective in facilitating law enforcement agencies’ disruption of terrorism, or if in fact, ‘the rarity of terrorist attacks, and accompanying state secrecy, impede assessment of effectiveness’ (Lum, Kennedy, & Sherley, 2006, p. 491). It is, however, timely to consider this question of effectiveness since there are few signs of governments slowing their efforts to proscribe organisations deemed a threat. In fact, after the murder of a British soldier in Woolwich in 2013, the British Home Secretary Theresa May spoke in support of further extending proscription laws:

We do need to look at the powers. We do need to look at the laws. We do need to look, for example, at the question of whether perhaps we need to have banning orders to ban organisations that don’t meet the threshold for proscription (May, 26th May 2013).

The central claim of the following pages is that democratic oversight mechanisms of proscription frameworks have been deliberately weakened by governments to widen government discretion, or scope of action, driven by a concern for expedience rather than effectiveness. To do this, I begin by setting out the conceptual and normative underpinnings of proscription and considering the question of effectiveness. Specifically, I draw attention to the deployment of proscription by government as a means to signal a group’s illegitimacy and to create a hostile operating environment for it. Further, these objectives are set against wider concerns pertaining to democratic freedoms.

The chapter then considers the origins and current status of the powers available to the governments of Australia, Canada, the UK and the US to outlaw terrorist organisations. Here we review the specific national and historical contexts of laws designating organisations, terrorist or otherwise, as threats to national security. It explores the common features of these legal frameworks, and draws attention to the wide discretion granted to the executive by the drafting of the laws.

A third section reviews the known usage of these laws in the respective jurisdictions. After the introduction of the new anti-terrorism legislation post-9/11, proscription was deployed widely and frequently. Since then, additions to the lists of designated organisations have been piecemeal. Nevertheless, the laws have been influential on other forms of non-terrorist legislation pertaining to organised crime in Australia and national security in the UK.

The objects of proscription

It is crucial to consider whether proscription is effective in order to satisfy concerns that laws should not sit on the statute books without justification, and further that they should not be used for purposes counter to their stated purpose. While violent extremism may well pose a threat to society, proscription laws represent a serious challenge to the core principles of a free society.

Even before Al-Qaida dramatically reshaped the worldview, and with it domestic freedoms, of western countries in 2001, legislators were aware of the rise of extremist organisations mobilising on an international footing. In the late 1970s and 1980s, a series of high profile terrorist attacks ratcheted up public awareness of international political conflict. The siege at Iran's London embassy in 1985 and the attacks on Israeli athletes at the Munich Olympics both represented an expanding theatre of conflict for extremist groups willing to attack overseas targets connected to domestic conflicts. Indeed, this internationalisation of violent extremism was in part responsible for the revision and consolidation of Britain's anti-terrorism legislation in 2000. The subsequent attacks of September 11th 2001 supported the growing sense that violent extremism was becoming a pervasive threat to the Western world as a whole. The British Prime Minister David Cameron has claimed of Islamic violent extremism that, 'This terrorism is completely indiscriminate and has been thrust upon us'¹. And as Jenkins argues, 'The attacks on a Bali nightclub that killed 180 people of various nationalities support the growing sense that international terrorism is a threat to all nationalities' (2003, p. 421). The targeted and discriminating nature of *politically-motivated* terrorism is, it seems, trumped by an indiscriminate *religiously-motivated* terrorism from

which no nationality is safe. The attacks of September 11th 2001, the 2002 Bali bombings, and the July 7th 2005 bombings in London all contributed to a growing sense that the western way of life, its civil society and political institutions are threatened by an uncontained extremism that does not discriminate between military and non-military, government or civilian targets. This indiscriminate international (Islamist) threat has thereby been painted as a pervasive enemy of the global community:

The work of the Catholic theologians [Aquinas and Augustine] drew upon traditions stretching back to the ancient world that would have considered terrorists to be *hostis humani generis*, the enemy of all mankind, who merited virtually no protections under the laws of war. (John Yoo, 7th June 2012, Wall Street Journal)

The sentiment that terrorists are ‘the enemy of mankind’ and undeserving of the state’s legal protections has been cemented by senior officials in the UK and Australia who have sought to deprive those suspected of violent extremism of their nationality. In the UK, the Nationality, Immigration and Asylum Act 2002 (NIAA), empowers the Home Secretary to deprive a person of their British citizenship if they pose a threat to the UK or British overseas territory, with the caveat that she can only do so if that person holds a second citizenship. In January 2014 the Home Secretary proposed legislation, currently under consideration in Parliament,² that seeks to remove that caveat entirely and, if passed into law, will enable the UK government to deprive a naturalized person of their citizenship ‘even if to do so would have the effect of making the person stateless’ (*Immigration Bill*, s.66). In support of this, the former Australian foreign minister, Senator Bob Carr, revealed in October 2013 that during his tenure he too sought legal advice on banning those who had fought in the Syrian conflict from returning to Australian shore, again rendering them stateless. Carr argued that the government should promote the message: ‘You won’t be allowed back into Australia if you defy Australian law and fight in Syria’³.

Justifications for proscription

Arguments in support of proscription tend to link together three related claims of what proscription can achieve: material, ideational and symbolic effects that diminish the terrorist threat and signal the limits of society’s tolerance. In support of the UK’s TA 2000, for instance, the then Home Secretary Charles Clarke MP argued, ‘It is important for society to state that certain activities are simply [...] beyond the pale; [...] The legislation is a powerful

symbol of that censure and is important' (Standing Committee D, 20th January 2000). This sentiment was echoed by the Australian Attorney-General, Robert McClelland, who wrote: 'a primary objective of proscription is the expression of clear public revulsion towards the activities of terrorist organisations' (McLelland, 2004, p.266). The symbolism of proscription is associated with ideas of what is, or is not, legitimate political activity. Indeed, while the revision of the UK's anti-terrorism legislation was under consideration in 1998, the Home Office issued guidance to the proposed laws setting out the objectives of proscription:

Whilst the measures may not in themselves have closed down terrorist organisations, a knock on effect has been to deny the proscribed groups legitimate publicity and with it lawful ways of soliciting support and raising funds ... perhaps more importantly the provisions have signalled forcefully the Government's, and society's, rejection of these organisations' claims to legitimacy (Home Office, 1998, 4.7)

From this perspective, the objective of proscription is simultaneously symbolic and material: the intended effect of banning terrorist organisations is *material* insofar as the government seek to undermine groups' efforts at 'soliciting support and raising funds', and this is both justified and reinforced via a *symbolic* rejection of such groups' 'claims to legitimacy'. These determinations of the utility of proscription are echoed by the US State Department, which states that proscription 'Stigmatizes and isolates designated terrorist organizations internationally' and 'Deters donations or contributions to and economic transactions with named organizations'. These two objectives are apparent, too, in the introduction of post-9/11 anti-terrorism legislation by the Australian government:

proscription contributes to the creation of a hostile operating environment for groups wanting to establish a presence in Australia for either operational or facilitation purposes. It also sends a clear message to Australian citizens that involvement with such organisations, either in Australia or overseas, will not be permitted. Proscription also communicates to the international community that Australia rejects claims to legitimacy by these organisations (Combined government submission, 2007, p.2 cited in Parliamentary Joint Committee on Intelligence and Security 2007).

Similarly, in the days following the September 11th attacks, the Minister of Justice and Attorney General of Canada, Anne McLellan argued before the Canadian Parliament's Standing Committee on Justice and Human Rights that the state required enhanced powers to combat organisations concerned in terrorism:

We must be able to disable organizations before they are able to put hijackers on planes or threaten our sense of security as we have seen in recent days with the scare of anthrax. We must have mechanisms in place to go after terrorist organizations and put them out of business (McLellan, 2001).

If we consider the rationales provided by Anglosphere governments for proscription, two guiding ideological and material aims emerge: First, an operational aim which is to create a 'hostile operating environment', 'isolate' and 'disable organisations'; and, second, an overarching ideological aim to 'stigmatize' organisations and signal a general rejection of their 'claims to legitimacy'. The authors of the legislation seek not only to diminish the ability of organisations bent on violence from carrying out their aims, but to preclude the opportunity for such groups to form at all. These objectives are not readily amenable to empirical scrutiny, although that is not always a necessary condition for good public policy.

It is further clear that the authors of the relevant legislation have drawn heavily on 'like-minded' countries. The Australian government, for example, has stated that 'Australia's proscription regime is consistent with widespread international practice, with the United States, the United Kingdom, Canada and New Zealand all having some form of proscription' (2007, p.25). Likewise, the Canadian Minister of Justice, Anne McLellan, observed: 'We have taken into account international law and the laws of other countries such as the United States and the United Kingdom and we have adopted safeguards within individual measures'. Yet, since their inception in 2001, this suite of anti-terrorism measures in place across the Anglosphere, and elsewhere have attracted considerable disquiet amongst academics and others for their impact on fundamental rights. Muller, for example, describes the shift in anti-terrorism legislation as a 'dangerous political and human rights lacuna in the international legal system' (Muller, 2008, p. 130). In a review of the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003, Michaelson (2005, p. 178) concludes that 'In effect, these provisions abandon several fundamental principles of the rule of law: they dilute the prohibition of arbitrary detention, they obliterate the right to habeas corpus, they remove the right to silence, and they reverse the onus of proof'. Blackburn (2008, p.65) meanwhile argues that the UK's TA 2000 represents 'the extension of law enforcement powers to the detriment of civil liberties'. And, Canada's proscription framework attracts similar critique from Dosman, who writes:

While offering the benefits of alacrity, comity with intelligence-sharing partners, and domestic control, the process of listing by Schedule raises significant procedural and substantive concerns (Dosman, 2004, p. 14).

Not all share this dim outlook. Waddington (2005, p.371) finds that ‘Civil libertarian political analyses are excessively pessimistic’, arguing that ‘the 20th century witnessed a general advance in civil liberties’ (ibid, p.372). Other proponents of restrictive anti-terrorism laws recruit the ‘lesser evils theory’ to situate the erosion of liberal democratic values alongside the deleterious effects of terrorist attacks on society. In his critique of the impact of anti-terrorism practices on human rights, Gearty explains that those holding to the ‘lesser evils’ discourse assert that to fight back against the threats of terrorism, we must sometimes commits acts of evil or harm. This ‘lesser evils’ discourse thus holds that ‘these actions are nevertheless justified, both as necessary (to save ourselves) and as less evil than what our opponents do...’ (Gearty 2007, p. 351).

Anti-terrorism legislation in the Anglosphere

The framing of modern proscription powers owes much to the frantic drafting of new anti-terrorism laws in the aftermath of the Al Qa’ida attacks of September 11th 2001. In the turmoil of uncertainty following 9/11, the United Nations (UN) acted as the chief stimulus for the reform of anti-terrorism statutes across the world (Scheppelle, 2006). Just two weeks after the attacks, the UN passed Security Council Resolution 1373. Although the UN made no attempt to define terrorism in the Resolution, and would not do so until 2004⁴, it nonetheless provided that member states enact legislation to tackle the threat posed by a seam of seemingly ubiquitous violent islamic extremist organisations. The Resolution stipulated that Member States should freeze financial assets connected to persons directly or indirectly connected to terrorists, designated by the UN’s 1267 Committee, and enact or modify domestic criminal legislation to prevent persons within the state from providing financial or other support to terrorists (see Dosman, 2004, pp. 9-10).

While UN Resolutions have no binding legal force, they nevertheless impose a ‘normative obligation’ on Member States (Saul, 2005, pp. 142-143) and the response to Resolution 1373 was immediate. States moved quickly to draft new legislation to comply with the UN’s stricture: Australia passed The Charter of the United Nations (Anti-Terrorism Measures) Regulations 2001 and The Security Legislation Amendment (Terrorism) Act 2002; Canada passed Anti-Terrorism Act 2001; the UK amended the TA 2000 with the Anti-terrorism, Crime and Security Act 2001; and the US enacted the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act 2001 (USA PATRIOT Act).

Proscription in the United Kingdom

Of the legislation considered in this chapter, the TA 2000 is the only statute to result from a deliberative process of legal revision rather than the rapidly engineered laws sparked by 9/11. The TA 2000 was the culmination of a long-standing review of the domestic and international terrorism threats to the UK and marked a significant new phase in laws tackling political violence (Walker, 2006). The TA 2000 consolidated and updated into a permanent statute the array of sundry anti-terrorism powers that had developed incrementally over the course of the 20th century in the UK's engagement with terrorism connected to Northern Ireland. Previously, the anti-terrorism powers available to policing and security agencies were defined in two parallel instruments, separated by their geographical application: the Northern Ireland (Emergency Provisions) Act 1973 (EPA: reenacted 1976, 1984, 1989), which applied only to Northern Ireland; and the Prevention of Terrorism (Temporary Provisions) Act 1974 (PTA: reenacted 1978, 1991, 1996), which applied to mainland Great Britain. These Acts were calibrated to facilitate the state's pursuit and punishment of the sophisticated threat from dissident Irish republican groups. The legislation relaxed evidential requirements and commissioned so-called 'Diplock courts', jury-less trials presided by a single judge, for cases connected to terrorism (Bamford, 2004, p. 747).

These two pieces of legislation were reviewed by Lord Lloyd in *The Inquiry Into Legislation Against Terrorism* 1996. Lord Lloyd recommended that the government scrap the EPA and PTA and draft a permanent unified statute to remove the territorial distinction and consolidate the powers therein. The ensuing Terrorism Act 2000 provided a new definition of terrorism and created a range of associated offences. In addition, activities that fell within the definition of terrorism triggered the availability of a host of investigation and detention powers to policing and security agencies.

Notwithstanding the deliberative process that preceded the first iteration of the TA 2000, the UK also introduced additional powers to the TA 2000 after 9/11 via the Anti-terrorism, Crime and Security Act 2001. The 2001 amendment equipped the government with the power to indefinitely detain without trial non UK-nationals deemed a terrorist threat until they could be deported or otherwise depart the UK. After the London bombings of 7 July 2005, the Terrorism Act 2006 was passed by Parliament to further augment the already-powerful powers contained in the TA 2000, including criminalising the glorification of terrorism.

The provisions for proscription in the TA 2000 place the onus of power on the Home Secretary. The Home Secretary is empowered to lay an order before Parliament to proscribe

an organisation if she believes it to be ‘concerned’ in terrorism. The statute stipulates that an organisation is regarded as concerned in terrorism if it prepares for, commits or participates in an act of terrorism; promotes or encourages terrorism; or ‘is otherwise concerned in’ terrorism. If an organisation meets these criteria, the Home Secretary has discretion to consider a range of other factors and proceed with proscription ‘if he believes that it is concerned in terrorism’ (TA 2000 Pt.II S.3(4)). These include:

the nature and scale of an organisation’s activities; the specific threat that it poses to the UK; the specific threat that it poses to British nationals overseas; the extent of the organisation’s presence in the UK; and the need to support other members of the international community in the global fight against terrorism.

If the Home Secretary, having given consideration to the criteria above, decides to proceed with proscription she may lay an order before Parliament for the organisation’s proscription. This order - which cannot be amended by Parliament - may include multiple organisations and is subject merely to a vote to pass or reject the order by the House of Commons and House of Lords. At the time of writing, 51 international terrorist organisations and 14 domestic terrorist organisations have been proscribed to date under the TA 2000.

Proscription in Australia

In 1950 the Australian government sought to outlaw the Communist Party of Australia with the *Communist Party Dissolution Act 1950* which was successfully challenged and struck down by the High Court of Australia. Prior to this, the *Unlawful Associations Act 1916* had been introduced to tackle a radical labour organisation: Industrial Workers of the World (IWW) (see Lynch, McGarrity, & Williams, 2009, p. 28). Within a few months of the Act passing, 103 workers had been imprisoned under the legislation for their membership of the IWW. Yet, subsequent prosecutions were frustrated when members of the IWW reformed the organisation under a different name, a contingency not anticipated by the drafters of the legislation. As a consequence, the *Unlawful Associations Act 1917* was passed, which provided the Governor-General with the power to declare an organisation to be unlawful without having to amend the legislation (for a comprehensive overview of proscription laws in Australia, see Lynch et al., 2009).

Australia’s response to the 2001 UN Resolution was to explicitly incorporate into domestic law the list of individuals and entities identified by Resolution 1373 as concerned in terrorism. *The Charter of the United Nations (Anti-Terrorism Measures) Regulations 2001*

was introduced in Australia on 15th October 2001. The next year, Australian legislators drew up a comprehensive revision of the Criminal Code, drawing from the newly-defined range of terrorist offences in the UK and US (Hocking, 2003, p. 356; Lynch et al., 2009). The *Security Legislation Amendment (Terrorism) Act 2002* amended the *Criminal Code Act 1995* and created a host of new criminal offences connected to terrorism. Under Subdivision 2 of Div 102, it is a criminal offence to be a member (informally or formally) of a terrorist organisation, to direct the activities of a terrorist organisation, to train to receive training from a terrorist organisation, to provide or receive funds from a terrorist organisation. Further, the Act makes it a criminal offence to knowingly associate with a member of a terrorist organisation on more one occasion.

Under these powers, the Attorney-General may make a regulation to designate a terrorist organisation at her own initiative, subject to a period in which parliament may disallow the regulation. In addition, the legislation was initially limited to organisations that had been identified by the United Nations Security Council as terrorist. This provision was removed by the *Criminal Code Amendment (Terrorist Organisations) Act 2004 (Cth)*, which gave the Attorney-General the power to designate any organisation for which she is satisfied reasonable grounds exist to believe that the organisation is concerned in terrorism.

Proscription in Canada

In response to the UN Resolution 1373 the Canadian Parliament passed the Anti-Terrorism Act (ATA 2001), which received Royal Assent on 18th December 2001. Prior to the ATA, regulations were already in place to enact UN counter-terrorism listings: the *United Nations al Qaida and Taliban Regulations* (UNAQTR) (1999) and the *Regulations Implementing the United Nations Resolutions on the Suppression of Terrorism* (RIUNRST). The ATA 2001 is structured by a three-tier approach to eradicating the threat: (i) measures to identify and prosecute terrorists; (ii) powers to state agencies to investigate and preempt terror plots; and (iii) stronger provisions countering the dissemination of hate propaganda (see Jenkins, 2003, pp. 422-423).

Under a new Bill S-7 s.83.28(10), passed in April 2013, the right to remain silent has been annulled under certain circumstances. This legislation empowers security agencies to compel individuals to provide testimony in terrorism investigations, even if the individual has not been charged with an offence. The new legislation defines terrorism as an act, actual or intended, committed with ‘a political, religious or ideological purpose, objective or cause’ that intends to intimidate or threaten the public, or seeks to influence any government or

international organisation, and intentionally causes harm to or endangers the public or seeks to disrupt ‘an essential service, facility or system’. According to Roach, this definition ‘was clearly inspired by’ the UK’s TA 2000 in requiring a religious or ideological motivation connected to an expansive range of consequential harms that stretch beyond violence to the public (2005, p. 513).

The ATA also introduced executive proscription of terrorist ‘entities’ to the Criminal Code. Under the Criminal Code (C46), the Canadian Governor-in-Council may list an entity if, having received a recommendation from the Solicitor General, he or she is satisfied that;

- (a) ‘the entity has knowingly carried out, attempted to carry out, participated in or facilitated a terrorist act; or
- (b) the entity is knowingly acting on behalf of, at the direction of or in association with an entity referred to in (a).

In contrast to the UK and Australian legislation, it is not an offence *per se* to be a member of a proscribed organisation, although greater criminal liabilities are introduced for offences connected to membership and ‘the effect of listing is to make it risky under the law for anyone to deal with the entity in question’ (Wisninski, 2006, p.17).

Proscription in the United States

In the 1950s, Senator Joseph McCarthy famously led efforts to rid the US of the spectre of communism. McCarthyism, as these came to be known, came to symbolise the excesses of an institutionalised paranoia relating to ‘reds under the bed’. During this era, various legal instruments were used to tackle and proscribe organisations associated with communism: the Smith Act of 1940, the Internal Security Act of 1950 and the Communist Control Act of 1954, though the latter were used to mixed effect. Until the attacks of September 11th 2001, the US had a raft of legal instruments in place to address terrorism. The Immigration and Nationality Act 1952; Omnibus Diplomatic Security and Antiterrorism Act of 1986; Anti-Terrorism Act of 1987 (targeting the PLO); Federal Courts Administration Act of 1992 (which defined terrorism); and the Antiterrorism and Effective Death Penalty Act of 1996, which targeted fundraising by terrorist organisations and banned US companies from conducting financial transaction with states sponsoring terrorism. After the September 11th 2001 attacks, the US hurriedly introduced the USA PATRIOT Act 2001, which amended the powers available to authorities in the Foreign Intelligence Surveillance Act of 1978 (FISA),

the Electronic Communications Privacy Act of 1986 and the Immigration and Nationality Act (INA).

On the 23rd September 2001, almost immediately after the attacks of September 11th, President George W. Bush signed into law Executive Order 13224, which authorised the US government ‘to designate and block the assets of foreign individuals and entities that commit, or pose a significant risk of committing, acts of terrorism’ (US Department of State, 2001). The process of designating a foreign terrorist organization (FTO) is administered by the Bureau of Counterterrorism in the Department of State, which monitors extremist organisations worldwide. If an organisation is deemed to fall within the provisions of the INA, the Bureau of Counterterrorism prepares an administrative record, ‘typically including both classified and open sources of information’ which is submitted to the Secretary of State. Under section 219 of the INA, the INA empowers the Secretary to designate an organisation if she finds that (i) the organisation is a foreign organisation, (ii) the organisation is either engaged in terrorist activity or has the capacity or intention to engage in terrorist activity; (iii) the terrorist activity ‘threatens the security of United States nationals or the national security of the United States’ (Sec 219 (1) a,b,c). If the Secretary of State believes an organisation satisfies these criteria, she must consult with the Secretary of the Treasury and the Attorney-General before the designation is made final. Once an organisation is determined to warrant designation, the Secretary of State must notify Congress of her intention. If, after seven days, Congress has not opted to review the decision, the designation takes effect. Designated organisations have thirty days to seek judicial review of the designation, after which designation cannot be challenged for two years.

Common features of proscription legislation in the Anglosphere

At present, there are 65 organisations proscribed in the UK under the TA 2000. Fourteen of these are connected to Northern Ireland, and were already proscribed in the UK prior to the introduction of the Terrorism Act. The remaining 51 have all been added to the list since the introduction of the TA 2000, two of which for glorifying terrorism under the Terrorism Act 2006. In Australia there are 18 organisations currently proscribed, and in the US 52 organisations designated as Foreign Terrorist Organisations. Of these, 24 were designated prior to September 11th 2001. In Canada, 48 organizations are listed as terrorist entities. Of the Anglosphere countries, the Australian government has been the most restrained in its deployment of proscription powers: since 2002, only 18 organisations have been listed there as terrorist organisations.

The legal instruments outlined above share some distinctive procedural features. Here I draw attention to four, linked to the fiat of unilateral decision-making by the executive. First and foremost, the decision to initiate a proscription is held by a single individual. While Australia initially opted directly to incorporate the UN's list of terrorist organisations, rather than undertake an independent process of designating organisations, it subsequently joined Canada, the UK and the US in providing the Attorney-General (the Secretary of State in the UK and the US) with the power to determine which organisations pose sufficient threat to warrant proscription. This represents an executive fiat insofar as no other institution or individual, including the courts or the legislature, is able to initiate proceedings to outlaw a group.

Secondly, and contributing to the strength of the executive fiat, is the information contributing to the decision-making. For the Anglosphere, the legislation of these countries merely requires the executive to be 'satisfied' (Australia, Canada), or 'believes' (UK, US) that the organisation under consideration is concerned in terrorism. Importantly, across all these countries, no other body or individual is empowered to scrutinise the evidence supporting the determination prior to proscription's commencement; there is no oversight of this information, nor is the executive required to disclose his or her reasoning, although the Australian Attorney-General does so voluntarily.

Third, legislatures are not provided with the dossier of evidence supporting the decision to proscribe. Without the ability to review this information, the legislatures are thereby constricted in their capacity to scrutinise or, indeed, challenge the proscription order. Since 2001, none of the proscription orders made in the Anglosphere states have been resisted by their respective legislatures. While the requirement for proscription to be supported, or at least not opposed, means that proscription remains theoretically within the ambit of democratic decision-making, in practice the procedure all but precludes meaningful scrutiny and opposition to the Attorney-General/Secretary of State order. This is reinforced by a procedure that is geared towards the presumption of complicity in terrorism.

Fourth, the process by which executive proscription orders are approved by the legislature, as they must in each country except Canada, is weighted heavily against scrutiny. In the UK, Parliament is unable to amend an order or scrutinise the information contributing to the Home Secretary's decision. Further, the Home Secretary is able, and has done so in the majority of orders, to make an order for multiple organisations at once. In 2001, the presentation of 20 organisations in a single order, which Parliament was powerless to amend, prompted Lord Archer to lament the abuse of process that meant Parliament was unable to

“oppose the inclusion of any one organisation without opposing the entire order”. In the US, the proscription gains legal force merely a week after it is made unless Congress resists the order.

These common features of proscription laws point in the same direction. Proscription laws have been drafted and adapted to widen the discretionary power of the executive at the expense of legislative or judicial oversight. Proscription orders made by the executive have never been resisted by legislatures, and only rarely reversed by the judiciary, the effect of which is to make proscription an executive fiat which, according to David Anderson, ‘is in practice irreversible’ (2013, p.65).

The application and assessment of proscription

The Anglosphere countries have walked their anti-terrorism powers in step with one another and have done so with little regard to evaluating the effectiveness of these powers. Few other policy areas have so egregiously escaped empirical scrutiny, especially in a straightened financial climate in which all other arms of government have been compelled to deliver better value for money. It hardly needs to be said that this is an issue of some importance. Lum *et al.* (2006, p.490) underline the importance of empirically-informed action in this space: ‘evidence-based counter-terrorism policies are those policies which not only show promise in achieving outcomes sought, but at the same time do not cause harm’. In this section, we consider two related issues: the evaluation of the effectiveness of proscription frameworks and the impact of proscription legislation on targeted organisations and society at large.

Evaluating the impact of anti-terrorism powers

For public policy theorists, determining the effect, and by extension, the success of policy is a thorny issue. The operations and outcomes of policies and programmes cannot be easily extricated and isolated from the tide of social forces, economic fluctuations, domestic and international politics and laws (Marsh & McConnell, 2010, p. 582). Given the continued acceptance and growing support for widening proscription powers against groups and individuals, it is surprising that proscription powers, in concept and in application, have attracted little critique in mainstream politics, civil society or academia. In a meta-analysis of published research findings pertaining to terrorism, an approach known as a Campbell Collaborative systematic review, Lum *et al.* (2006) reviewed over 20,000 pieces of literature relating to terrorism, and managed to find just seven that attempted to provide a rigorous review of the effectiveness of any counter-terrorism programme. So the overriding challenge

in assessing the effectiveness of counter-terrorism measures is the paucity of data pertaining to operational or programme outcomes, criminal charges or prosecutions. There are two possibilities why this is so: evidence is difficult to acquire, or officials are reluctant to collect it.

In support of the former, Lum *et al.* (2006, p.511) suggest that the paucity of evaluations might be the result of the relatively rare instances of terrorist attacks, ‘the difficulty in detecting intervention effects of major programs’, the ambiguity of how terrorist threat is defined, the secrecy shrouding counter-terrorism efforts, and the difficulty in establishing ‘clear standards of accuracy and reliability’. In a review of the first five years of the proscription laws in Australia, the Inquiry into the proscription of ‘terrorist organisations’ under the Australian Criminal Code, found that ‘Australia has listed nineteen organisations but so far proscription has not been an element in any of the prosecutions for terrorist organisation offences’ (Jull, 2007, p.iii). More recently, this question of effectiveness was directly addressed by Australia’s Independent National Security Legislation Monitor, Brett Walker. In his Annual Report of 2012, Walker put forward an equivocal view of measuring effectiveness, claiming that in the absence of a terrorist attack on Australian shores, ‘it can be said that Australia is most fortunate to lack the means of rigorous empirical examination’ (2012, p.3). Walker’s perspective illustrates the methodological complexity involved in gauging the effectiveness of a measure designed to forestall, diminish, prevent or avoid an infrequent event from occurring:

[Australian security agencies] have been effective, in the sense that terrorist offences resulting in actual violence have not occurred. They have also been effective in the sense that prosecutions have been well conducted, with (as it happens) convictions secured. It should not be regarded as a logical extension of that observation that the CT Laws themselves are effective. A more realistic statement is that Australia’s agencies, working within the CT Laws, have been effective.

The success or otherwise of policy is problematised further by the difficulty involved in discerning the independent effects of the various anti-terrorist measures at play at any one time. Marsh and McConnell write that public policy evaluation is frequently stymied by, ‘significant methodological difficulties posed by lack of information and the problem of attempting to identify the causal effect of a policy, compared to other independent variables, such as overlapping policies, media influences, economic forces, and so on (2010, p. 582). This is illustrated by the UK’s attempt to provide a comprehensive package of counter-

terrorism measures CONTEST, which integrates four Ps of action: ‘Prevent, Pursue, Protect, and Prepare’.

To the second possibility, that officials are reluctant to enact monitoring of counter-terrorism outcomes across the world, there seems to be a manifest ambivalence towards reviewing effectiveness. In her review of the UN’s anti-terrorism measures, Bianchi describes the prospect of assessing implementation of the measures as a ‘daunting task’, and notes that lawyers, ‘lack adequate parameters to objectively judge the efficacy of states’ implementing measures as well as their consistency with other obligations incumbent on them’ (Bianchi, 2006, p. 884). This is echoed in Lum *et al.*’s meta-review of literature examining counter-terrorism measures, in which they find that ‘we currently know almost nothing about the effectiveness of any of these programs (Lum *et al.*, 2006, p. 510).

More recently, the UK Independent Reviewer of Terrorism Legislation sought to determine the extent to which counter-terrorism laws had resulted in substantive prosecutions. In his report on The Terrorism Acts in 2012, he found that the UK government does not collate complete data on all offences brought in prosecutions of individuals under the sections 11 to 13 of the TA 2000: only ‘principal offences’ are recorded and reported. Since membership of a terrorist organisation might be a lesser charge than the principal offence in a prosecution, the Reviewer thus concluded it was ‘impossible to know the full extent’ to which proscription laws criminalising membership of a terrorist organisation had been used.

In Canada, too, during debate over proposed anti-terrorism provisions contained in Bill C-36, the Solicitor General of Canada Lawrence MacAulay argued in support of the need for designating terrorist organisations, stating:

To defeat terrorists, we also need to choke off their money supply. This bill goes a long way towards achieving that. We're going to designate certain terrorist groups, make it easier to freeze their assets, prosecute those who give them financial support, and deny or remove charitable status from those who provide resources to terrorist groups⁵.

Yet these aims have not been demonstrably achieved. Senate and Commons Committees from the Canadian Parliament delivered two much-delayed reviews of the provisions and operations of the ATA 2001 in March 2007. Neither committee sought to evaluate whether Canada’s efforts in targeting the financing of terrorism or deregistering charities connected to terrorism had been effective, leading Kent Roach to comment: ‘The performance of the

committees again raises the issue of where, if anywhere, the efficacy of the state's national security activities will be reviewed' (Roach, 2007, p. 18).

Diminish or displace? Unintended consequences of proscription

As already argued, the consequences of proscription are poorly understood. Governments have been reluctant to explore, at least as far as in public domain knowledge, the impact of this power on the operational effectiveness of targeted groups. Yet there are many indications that proscription may have two significant unintended consequences: (i) proscription incentivizes targeted organisations to transform their structure; and (ii) legitimizes and potentially emboldens the targeted organisations.

The claim that proscription potentially leads to groups transforming rather than disbanding stems from Van Dongen (2011), who argues that proscription may have two 'substitution' effects. First, he claims that proscription may result in 'geographical substitution', which suggests that 'Eradication of a terrorist movement in one country may divert the people and the resources to movements in other countries'. (Van Dongen, 2011, p. 366). Second, he suggests the possibility of a 'function substitution' effect, 'which means that terrorism does not really disappear, but rather turns into different forms of aggression' (2011, p. 366). In the modern era, it is all too easy for ideas to propagate through the internet. Only minimal effort is required for a would-be extremist to access the ideas of banned organisations. A ban on organisations, which based on territorial law, is easily circumvented by virtual networks active in cyberspace. Indeed, as Van Dongen suggests, it is possible that proscription merely incentivises organisations to adopt less perceptible modes of operations; diminishing the capacity of communities and, perhaps, security agencies to identify emerging threats.

The second issue concerns the emboldening effect that proscription may have on targeted organisations. Three examples underline this possibility. First, in the 1970s the UK's policy of internment was deemed partly responsible for increased sympathy for Irish republicanism: the IRA commander Jim McVeigh subsequently claimed that internment was 'among the best recruiting tools the IRA ever had' (cited in Blackburn, 2008, p. 69). Second, writing on the conflict in Sri Lanka involving the Tamils and the LTTE, Nadarajah and Sriskandarajah claim that 'proscriptions may even have consolidated the resolve of the Tamil diaspora organisations to support the Tamil nationalist project and the LTTE' (2005, p. 97; see also Walker, 2000, p. 15). Finally, and more recently, ahead of the designation of the Nigerian Islamic extremist organisation, Boko Haram, there were clear concerns of the

possibility that proscription may only act to benefit the group. At a Hearing of the US House of Representatives Subcommittee on Africa, Global Health, and Human Rights in July 2012, US Ambassador Johnnie Carson suggested that designating Boko Haram a terrorist organization, ‘would serve to enhance their status, probably give them greater international notoriety amongst radical Islamic groups, probably lead to more recruiting and probably more assistance’. The concern that designation could strengthen the arm and image of Boko Haram has been echoed widely in the media (see Taylor 2013)⁶ and, reportedly, within the US Government itself.⁷ According to Nnamdi Obasi, an analyst at the International Crisis Group, designation ‘could also further radicalise the movement and push it to strengthen international linkages with other Islamist groups’⁸.

There is a dissonance between the efforts of governments dedicated to constructing proscription frameworks and the apparent apathy toward their effectiveness. While the introduction of New Public Management three decades ago injected heightened measures of scrutiny for many government portfolios in the Anglosphere, it is apparent that anti-terrorism policies have remained relatively immune from such scrutiny. Although we should keep in mind that proscription frameworks are largely based on historical antecedents, this is an inadequate justification for the continuing reliance on such a severe and largely untested approach to combating violent extremism. As argued here, there are considerable and growing concerns around the unintended, and perhaps perverse, consequences of proscribing organisations.

Conclusion

Alongside other powers now available to Western governments, such as control orders, detention without trial, and the suspension of *habeus corpus*, proscription is among the most severe measures available to liberal democratic governments. For security officials charged with protecting the state and society from the destructive ambitions of violent extremists, proscription can be used symbolically to signal the government’s condemnation of unwelcome ideologies and to offer a means to suppress the group’s activities. Yet it is nevertheless apparent in both political and academic discourse that proscription powers sit uncomfortably in modern liberal democracies. Liberal democracy is underpinned by a marriage of individual rights and freedoms, protected by and upheld within a system of representative government. The proscription of organisations by virtue of their (actual or potential) ideas and actions is an *ex ante* interruption of, at least, freedoms of association and freedoms of expression; two of the most treasured freedoms of liberal democracy.

It is important to recognise that proscription is a long-standing instrument of government and not a modern product of the war on terrorism. As described in the introduction to this chapter, designating and banning enemies of the states reaches back into centuries of state traditions and the core tenets of proscription represent an extension of this past. It is abundantly clear that, for example, contemporary decision-making around proscription remains highly centralised. Almost every stage of the proscription process is weighted in favour of the preferences of the executive. The decision to initiate proscription and the scrutiny of information relevant to the order rest with the Attorney-General or Secretary of State in the four countries considered here. Moreover, since the executive in the Canadian, UK and US government withholds the information underpinning the decision to proscribe an organisation, these legislatures' capacity to scrutinise a proscription order is considerably diminished.

While these characteristics of proscription frameworks are concerning in and of themselves, this is further compounded by egregious reluctance to consider whether proscription manages to achieve its aims of signaling society's abhorrence of the proscribed organisations and hindering its operations. We might question whether the use of such a severe power as proscription should occur without at least some enquiry as to its effects. Indeed, a number of scholars have drawn attention to an array of unintended consequences that that proscription might bring about, including many that risk entrenching rather ameliorating violent extremism. Together, the range of concerns associated with proscription frameworks in the Anglosphere point to a severe deficit in our understanding of the relationship between proscription orders and their attendant outcomes. To adequately safeguard liberal democracy and the rule of law, it is imperative to that we not only render explicit the decision-making process around proscribing organisations and their ideas but also enhance our understanding of its the consequences.

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Notes

¹ Cameron, D. PM's Speech at Munich Security Conference, 5th February 2011. Retrieved from <http://webarchive.nationalarchives.gov.uk/20130109092234/http://number10.gov.uk/news/pms-speech-at-munich-security-conference/>, accessed 10th January 2014.

² As of the time of writing, April 2014.

³ Reported in *The Australian*, 28th October 2013. 'Carr considered banning Syria fighters from returning to Australia'. www.theaustralian.com.au/national-affairs/politics-news/carr-considered-banning-syria-fighters-from-returning-to-australia/story-fn59nqld-1226747831076#sthash.VLLxWLhZ.dpuf

⁴ The UN passed resolution 1566 in October 2004 which provided the definition of terrorism as: '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'

⁵ MacAulay, L. Evidence to the Standing Committee on Justice and Human Rights, Parliament of Canada, 18th October 2001. Retrieved from: <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=652657&Language=E&Mode=>, accessed 23rd February 2014.

⁶ <http://www.washingtontimes.com/news/2013/apr/28/for-boko-haram-us-tries-to-handle-with-care-nigeri/?page=all>

⁷ "Nigeria: US 'to name Boko Haram as a terrorist group', 13th November 2013. Retrieved from <http://www.bbc.co.uk/news/world-africa-24922833>, accessed 18th December 2013.

⁸ Quoted in 'Boko Haram: Is terror designation a badge of honour?', 15th November 2013. Retrieved from <http://www.bbc.co.uk/news/world-africa-24959207>, accessed 20th December 2013.