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Democracy and extremist organisations: Legal answers to political challenges in the UK

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Abstract

This thesis aims to establish that current English law only provides for proscription of organisations which seriously, deliberately, and tactically affect individual rights and interests of major importance, primarily the life and health of the citizens. It argues that this is not for the executive alone to decide anymore, but is subject to strict scrutiny by the Proscribed Organisations Appeal Commission and the courts.

In support of this it will be shown that the focus of proscription has always been on violent organisations. Also, the current case law on proscription will be examined, showing that proscription requires active steps of the organisation against important individuals' rights or interests. The inquiry of the statutory requirements will come to the conclusion that, due to notions of proportionality, the scope of proscription is on the protection of the lives and health of the citizens. The interference of an organisation with less important rights or interests will not be sufficient for proscription. This is also supported by an analysis of proportionality regarding the exercise of discretion by the Home Secretary. It will be argued that the current interpretation of the House of Lords of the Terrorism Act 2000, s.3(1)(b), providing for proscription of organisations for the reason of their name, does not comply with the case law of the European Court of Human Rights.

The thesis will also observe that not any remote conduct of the supporters of an organisation is attributed to it for proscription, but, in accordance with the identification doctrine, only such conduct which the organisation's leadership is responsible for.

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Table of abbreviations

ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
PKK	Kurdistan Workers Party
PMOI	People's Mojahadeen Organisation of Iran
POAC	Proscribed Organisations Appeal Commission
SIAC	Special Immigration Appeals Commission

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A. Introduction

UK legislators have decided to make the proscription of extremist organisations part of their strategy to cope with terrorism. Though the current proscription regime was established in 2000, there has been a long tradition of proscription legislation in the past. However, since the incorporation of the European Convention on Human Rights (ECHR) by the Human Rights Act 1998 into British law the situation is somewhat more complex. Common law rights are supplemented by Convention rights, enforced by the European Court of Human Rights (ECtHR). This incorporation is accompanied by the increasing application of the civil law principle of proportionality in British law.

In this dissertation, I will argue that the proscription regime currently in place has struck a different balance to former legislation. It has maintained the Home Secretary's political power to pursue national security interests. However, in contrast to former regimes, legislation has decided to subject the decision of the Home Secretary to full proportionality review by the courts. Only this will ensure that the rights of the affected will be taken into account appropriately. In this substantive review the courts are bound by the objectives of the statute, but also by the case law of the European Court of Human Rights. While many parts of the current regime can be interpreted in the light of the European Convention on Human Rights, there are several conflicts which will be identified.

To put the current laws into a broader context, the thesis will start with a brief overview on the history of proscription regimes in the UK (B.). This will, in the main part, be followed by an inquiry of the law on proscription (C.). It will examine how the courts as well as the statutory rules themselves attempt to establish a proportionate system of proscription.

The overall argument will be that current domestic legislation only provides for proscription of organisations which seriously, deliberately, and tactically affect individual rights and interests of major importance, primarily the life and health of individuals. It will be for the courts to fully ensure the implementation of human rights and proportionality by a strict review of the facts and the law.

B. A history of proscription in the United Kingdom

During the last century proscription was used in the UK in two major conflicts: the Ireland conflict and the rise of fascism in Europe. The Criminal Law and Procedure (Ireland) Act 1887, s.6 permitted proscription of an organisation if it was involved in the commission of crimes, acts of violence or intimidation, or if it disturbed the maintenance of public order.

More than fifty years later, the major threat was related to the rise of fascist organisations all over Europe. The ban on the British Union of Fascists marks the only proscription of a political party in the United Kingdom thus far. The Government had tried to cope with the BUF in the 1930s by using various informal techniques, such as an unofficial ban on the broadcasting of extremist views on the BBC.[1] However, on 10 July 1940 the BUF was proscribed.[2]

The Emergency Powers (Defence) Act 1939, s.1(1), gave wide powers to the executive, allowing almost any necessary delegated regulation in emergency cases. On this ground, the Defence (General) Regulations 1939 were enacted. The test for proscription in regulation 18AA(1) can briefly be summarised as a two stage test, consisting of the connection with a war enemy and the possibility that the organisation could disturb national security. The Home Secretary in his proscription order referred to the sympathies of the BUF with the Nazi-system and the fear that it could sabotage acts of war.[3]

Though the proscription of the BUF has never directly been challenged before the courts there have been cases of members detained for their membership challenging the

[1] Richard Thurlow, 'State Management of the British Union of Fascists in the 1930s', in Mike Cronin (ed.), *The Failure of British Fascism: the far right and the fight for political recognition* (Macmillan 1996) 34.

[2] Order 1940/1273.

[3] ibid.

order of their detention, one of which was *R. v Secretary of State for Home Affairs* before the Court of Appeal.[4] However, the Court of Appeal was highly deferential and granted wide discretion to the Home Secretary.[5]

After the Second World War the focus shifted back to the Northern Ireland conflict. The Birmingham bombings on 21 November 1974 lead to demands for legal action against Irish separatist extremists.[6] On 28 November of the same year Parliament passed the Prevention of Terrorism (Temporary Provisions) Act 1974, among other provisions proscribing the IRA.[7] The Act was frequently renewed until 1984.[8]

Parliament provided a schedule to the Act listing proscribed organisations.[9] Pursuant to s.1(3) and (4) of the Act, the Home Secretary could by order add or remove organisations which 'appeared' to him to be concerned with domestic terrorism or the promotion or encouragement thereof.

Terrorism was defined in s.9(1) as 'the use of violence for political ends', including 'any use of violence for the purpose of putting the public or any section of the public in fear'. Hence, proscription now focused only on violence. However, the consequences of proscription were very broad, leading to a fear that people and organisations sharing the aims of Northern Irish independence could be prosecuted for their thoughts.[10]

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[4] [1941] 1 KB 72.

[5] *Liversidge v Anderson* [1942] AC 206.

[6] Catherine Scorer, Sarah Spencer, Patricia Hewitt, *The new Prevention of Terrorism Act: the Case for Repeal* (3rd ed., National Council for Civil Liberties 1985) 1; Clive Walker, *The Prevention of Terrorism in British Law* (2nd ed. Manchester University Press 1992) 31.

[7] s.1(2); Schedule 1; expiration in s.12(1).

[8] Scorer, Spencer, Hewitt (n 6) 2, 4; Walker, *Prevention of Terrorism* (n 6) 33-36.

[9] Terrorism (Temporary Provisions) Act 1974, Schedule 1.

[10] Scorer, Spencer, Hewitt (n 6) 15; Walker, *Prevention of Terrorism* (n 6) 63.

In conclusion, proscription has always been connected to political violence or at least politically motivated threats to important rights and interests. However, depending on the assumed degree of threat a war or crisis posed to national security, the consequences varied in their breadth. Furthermore, in recent developments Parliament has increasingly taken action, not simply leaving the subject-matter to the executive alone.

C. Law and proscription

As part B demonstrated, proscribing an organisation is not new to UK law. Rather the scope has significantly been widened after the terrorist attacks on the West in September 2001 and July 2005.[11] Whilst proscription was used for a long time only in the Northern Ireland conflict, it became part of the 'war on terror' in the new millennium. The following part will give an overview on the statutes (I.) and case law (II.) constituting the present proscription regime. It will then proceed to establish the procedural part of the argument of this thesis: though the right to take the initiative is given to the Home Secretary, the courts will be ready to uphold freedom of association even in a national security context (III.). To establish the substantive part, the thesis will then examine what facts can be considered for the decision (IV.). The final part will inquire to what extent proscription may be a legitimate answer to extremism (V.). This will establish that, in the light of the European Convention on Human Rights (ECHR), the proscription regime of the UK primarily covers violent organisations.

I. Relevant legislation

The primary proscription provision is the Terrorism Act 2000, s.3, combined with the Terrorism Act 2000, Schedule 2. Section 3(1) states: 'For the purposes of this Act an organisation is proscribed if (a) it is listed in Schedule 2, or (b) it operates under the same name as an organisation listed in that Schedule.' The Home Secretary may add an organisation to this Schedule 'if he believes that it is concerned in terrorism'.[12]

Whether an organisation is concerned in terrorism is specified in subsection 5. This concernment includes the commission or preparation of terrorist acts, or the

[11] Alun Jones, Rupert Bowers, Hugo D Lodge, *Blackstone's Guide to The Terrorism Act 2006* (OUP 2006) Preface.

[12] Terrorism Act 2000, s.3(3) and (4).

promotion, or other concernment in terrorism. Subsections 5A, 5B, and 5C were inserted by the Terrorism Act 2006, s.21, rendering the 'unlawful glorification' of terrorism as part of the promotion of terrorism under subsection 5(c) of the Terrorism Act 2000.

The law gives a definition of 'terrorism' in the Terrorism Act 2000, s.1. Briefly summarised, terrorism under the Act is a certain qualified action carried out in order to influence government for ideological ends.

Whilst the Terrorism Act 2000 only provides for proscription of terrorist groups, the Civil Contingencies Act 2004 has, in principle, a much broader scope. S.20 of the act gives the power to the executive to make emergency regulations in emergency cases under s.21 and s.19. This also includes proscription of particular organisations.[13] Section 19 describes an emergency as 'an event or situation' or 'war, or terrorism' which threatens serious damage to the rights and interests within the scope of s.19(1)(2) or (3). However broad the conditions for such emergency regulation are, they must ensure compatibility with the Human Rights Act 1998.[14]

The Civil Contingencies Act 2004 is not purposely designed to provide an alternative proscription regime. However, it covers purposes that were covered by the Emergency Powers (Defence) Act 1939 at the time the BUF was proscribed. Therefore it must also be considered.

II. Proscription case law

Though proscription has been part of British law for decades, the amount of case law is small. It was not until 2002 that proscribed organisations challenged proscription for the

[13] Gordon Smith, 'Die Institution der politischen Partei in Großbritannien', in Dimitris Tsatsos, Dian Schefold, and Hans-Peter Schneider (eds.), *Parteienrecht im europäischen Vergleich – Die Parteien in den demokratischen Ordnungen der Staaten der Europäischen Gemeinschaft* (Nomos 1990) 329.

[14] s.20(5)(b)(iv).

first time. In *R. (Kurdistan Workers Party) v Secretary of State for the Home Department* the Kurdistan Workers Party (PKK) and two other proscribed organisations, the 'Lashkar e Tayyabar' (LeT) and the 'People's Mojahadeen Organisation of Iran' (PMOI) challenged the decision of the Home Secretary to proscribe them under the Terrorism Act 2000.[15] An application for de-proscription under the Terrorism Act 2000, s.4 had been made without success. Instead of appealing against this decision to the Proscribed Organisations Appeal Commission (POAC), the claimants sought judicial review of the decision to proscribe them before the Administrative Court. The main issue before the court was whether the POAC was an appropriate forum for reviewing matters of proscription.[16] The court held that the POAC's jurisdiction covered all substantive and procedural issues of proscription, including issues concerning the Human Rights Act 1998.[17] The POAC, and not the Administrative Court, was therefore the right forum for the claim of the parties.[18]

In 2006, members of both Houses of Parliament took the cause of the PMOI and applied for deproscription.[19] On the refusal of the Home Secretary, they appealed to the POAC in the case of *Lord Alton of Liverpool v Secretary of State for the Home Department (POAC)*.[20] The PMOI was an Iranian organisation initially opposing the regime of the Shah in the 1960s. After the monarchy was replaced with a theocracy in 1979, the PMOI campaigned for a secular democracy. While it had pursued this aim also with military means in the past, there had been no acts of violence on behalf of the

[15] [2002] EWHC 644, [2002] ACD 99.

[16] ibid para 6.

[17] ibid paras 8, 10.

[18] ibid.

[19] *Lord Alton of Liverpool & others v Secretary of State for the Home Department* App no PC/02/2006 (POAC) [19]-[21].

[20] ibid.

PMOI in the years before the decision. Nevertheless, the Home Secretary asked the POAC to uphold his decision not to deproscribe the PMOI because it had not expressively renounced terrorism and it might resort to terrorism in the future. However, the POAC found that the PMOI was no longer concerned in terrorism in terms of the Terrorism Act 2000 and was therefore to be deproscribed. This decision was upheld by the Court of Appeal.[21]

III. Proscription and the separation of powers

Before the inquiry turns to the substantive matters of proscription, the appropriate influence of different state branches must be discussed. This question has been of major importance in the *Lord Alton* decision. The Counsel for the Home Secretary demanded:

> POAC should show very considerable deference to the assessment of the Secretary of State because the issues that had to be considered (broadly described as national security, assessment of terrorist activity and foreign policy), were all matters which […] were ones which the Courts recognised were for the Executive to determine and assess.[22]

Indeed, for decades matters of national security were regarded being exclusively reserved for executive decision, and therefore outside the jurisdiction of the courts.[23] Today, however, there is much debate whether the courts should engage more in reviewing such cases.

[21] *Secretary of State for the Home Department v Lord Alton of Liverpool (CA)* [2008] EWCA Civ 443, [2008] 1 WLR 2341.

[22] *Lord Alton* (POAC) (n 19) [82].

[23] Adam Tomkins, 'National security and the role of the court: a changed landscape?' [2010] LQR 543; compare e.g. *Liversidge* (n 5).

1. Deference to the Home Secretary

In 1916, the Privy Council decided the case on *The Zamora*, a Swedish ship transporting contraband copper from New York to Stockholm.[24] The ship was stopped and brought to a British port, where the cargo was confiscated and released to the Crown on grounds of an Order in Council. In the decision, Lord Parker noted:

> Those who are responsible for national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a court of law or otherwise discussed in public.[25]

The long lasting tradition of non-justiciability was in the 1990s finally taken to the ECtHR in *Chahal v United Kingdom*.[26] In the case, a Sikh separatist leader was detained for deportation to India for national security reasons. The ECtHR found, inter alia, a violation of the applicant's right to an effective remedy under Article 13 of the ECHR.

The applicant argued that the English style of judicial review was insufficient for Article 13 of the ECHR in national security cases, for it prevented the courts from scrutinising the facts of the case.[27] The UK government contended that the advisory panel of the Home Secretary, which had an advisory function without the power to make binding decisions, provided for a sufficient remedy in respect of the nature of national security cases.[28]

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[24] [1916] 2 AC 77.

[25] ibid 107 (Privy Council); similarly: *R. v Halliday* [1917] AC 260, 269, 288 (HL); *R. v Secretary of State for Home Affairs, ex p. Hosenball* [1977] WLR 766, 784 (CA).

[26] *Chahal v United Kingdom* (1997) 23 EHRR 413.

[27] ibid [141].

[28] ibid [142], [154].

The ECtHR held that the fact that the applicant was seen as a threat to national security could not be of relevance with regard to the prohibition of torture.[29] Since both the advisory panel and the regular courts would balance the risk for the applicant to be exposed to torture with the threat to national security, they did not provide for sufficiently effective remedies.[30]

Nevertheless, in 2001, when the House of Lords decided *Secretary of State for the Home Department v Rehman*[31], the court again deferred to the executive. Rehman was a Pakistani national whom the Home Secretary had given a notice of intention to deport him for being associated with a terrorist organisation on the Indian subcontinent. The Special Immigration Appeals Commission, which as an independent tribunal had wider powers than the advisory panel in *Chahal*, decided that the Home Secretary had not provided sufficient evidence that Rehman posed a threat to national security.[32] This was upheld by the House of Lords. However, Lord Slynn in his opinion said:

> [E]ven though the Commission has powers of review both of fact and of the exercise of the discretion, the Commission must give due weight to the assessment and conclusions of the Secretary of State […]. He is undoubtedly in the best position to judge what national security requires […]. The assessment of what is needed in the light of changing circumstances is primarily for him […].[33]

Lord Hoffmann added:

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[29] ibid [149].

[30] ibid [153].

[31] [2001] UKHL 47, [2003] 1 AC 153.

[32] *Rehman v Secretary of State for the Home Department* [1999] INLR 517 (SIAC).

[33] *Rehman* (HL) (n 31) [26].

> [T]he question of whether something is 'in the interests' of national security is not a question of law. It is a matter of judgment and policy. Under the constitution of the United Kingdom and most other countries, decisions as to whether something is or is not in the interests of national security are not a matter for judicial decision. They are entrusted to the executive.[34]

He limited the power of the courts to the examination of the mere existence of evidence for the decision, the application of *Wednesbury* unreasonableness[35] and the inquiry of matters that are not to be decided upon by the executive, such as the exposure of the Appellant to torture.[36] He was of the opinion that no court could have the same expertise and legitimacy as the Secretary of State.[37]

Lord Steyn however demanded that the courts should at least scrutinise whether executive action has a legitimate objective and is necessary in a democratic society in terms of the ECHR.[38]

Though a deferential tendency towards the judgments of the Home Secretary in matters of national security can be observed in the past, Lord Steyn's statement in *Rehman* attempts to depart from this traditional view.

2. Enhanced scrutiny

In *R. (PKK)* Richards J considered the POAC being the appropriate tribunal for consideration of all issues concerning proscribed organisations, especially the necessity

[34] ibid [50].

[35] *Associated Provincial Picture Houses v Wednesbury Corp.*, [1948] 1 KB 223, 230 (CA): 'If a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere.'

[36] *Rehman* (HL) (n 31) [54].

[37] ibid [62].

[38] ibid [31].

in a democratic society and the possible discrimination against the organisation.[39] This suggests an intense standard of review.

The overall case law on the standard of review in national security matters came to a turning point in 2004 when the House of Lords decided *A v Secretary of State for the Home Department*.[40] A and others were foreign nationals detained under s.23 of the Anti-terrorism, Crime and Security Act 2001, which allowed detention of foreign nationals if the Home Secretary believed them being a threat to national security, but, as terrorists, could not be deported for certain reasons. The Special Immigration Appeals Commission (SIAC) found that s.23 violated Articles 5 and 14 of the ECHR since it provided for detention only for non-nationals, which was itself discriminatory.

The House of Lords decided that the assessment of an abstract threat to national security by terrorism was a political decision which was primarily to be decided by the executive and by Parliament.[41] Lord Nicholls observed:

> All courts are very much aware of the heavy burden, resting on the elected government and not the judiciary, to protect the security of this country and all who live there. All courts are acutely conscious that the government alone is able to evaluate and decide what counterterrorism steps are needed and what steps will suffice. Courts are not equipped to make such decisions, nor are they charged with that responsibility.[42]

Nonetheless, their lordships found that if Convention rights are affected it was for the courts to ensure an effective protection by employing an intense standard of review,

[39] *R. (PKK)* (n 15) [79].

[40] [2004] UKHL 56, [2005] 2 AC 68.

[41] ibid [29] (Lord Bingham).

[42] ibid [79].

including the review of proportionality of the executive action.[43] The courts were not precluded from scrutinising the case by any constitutional doctrine to defer to the Home Secretary.[44] In particular, the specialist tribunals, such as SIAC, were given the task of scrutinising cases of national security.[45]

Hence, *A* stands for a more flexible system of judicial review, allowing the courts to examine crucial matters of national security cases, especially in a human rights context, while not generally abandoning the doctrine of deference.

In 2006 the Court of Appeal decided *Secretary of State for the Home Department v MB*.[46] In this case, the Home Secretary had sought permission to issue a control order against MB in order to prevent him travelling to Iraq to fight the coalition forces there. The Home Secretary based his decision on closed material which was not disclosed to MB. The court of first instance allowed the control order but, under s.4(2) of the Human Rights Act 1998, made a declaration of incompatibility for the procedures set out in s.3 of the Prevention of Terrorism Act 2005, finding a violation of MB's right to a fair hearing.

On appeal of the Home Secretary against the declaration, the Court of Appeal held that the provisions of the Prevention of Terrorism Act 2005 allowed the court to apply a sufficient standard of review.[47] Lord Phillips said:

> Whether there are reasonable grounds for suspicion is an objective question of fact. We cannot see how the court can review the decision of the Secretary of State without itself deciding whether the facts relied upon by

[43] ibid [42] (Lord Bingham).

[44] ibid.

[45] ibid [176] (Lord Roger).

[46] [2006] EWCA Civ 1140, [2007] QB 415.

[47] ibid [65].

> the Secretary of State amount to reasonable grounds for suspecting that the subject of the control order is or has been involved in terrorism-related activity.[48]

And further:

> Whether it is necessary to impose any particular obligation on an individual in order to protect the public from the risk of terrorism involves the customary test of proportionality. […] The Secretary of State is better placed than the court to decide the measures that are necessary to protect the public against the activities of a terrorist suspect and, for this reason, a degree of deference must be paid to the decisions taken by the Secretary of State. […] Notwithstanding such deference there will be scope for the court to give intense scrutiny to the necessity for each of the obligations imposed on an individual under a control order […].[49]

Although this decision accepts certain deference accorded to the Home Secretary, the court does not simply surrender its decision to the executive anymore. Moreover, it attempts to strike a balance both reviewing the decision and respecting the independent judgment of the executive.

The authorities in favour of such an enhanced standard of review all tend to regard the 'belief' of the Home Secretary as a question of fact, to be decided by the courts at least in terms of reasonableness. Furthermore, the discretion of the Home Secretary's decision is subject to proportionality review.

[48] ibid [60].

[49] ibid [63]-[65].

3. The POAC's decision

In *Lord Alton* the counsel for the Home Secretary demanded 'very considerable deference' to the Home Secretary's assessment at both stages of the statutory test.[50] The term 'belief' in s.3(4) of the Terrorism Act 2000 referred to 'a matter of judgment. The evaluation of the facts relevant to that belief is for the Secretary of state alone […].'[51]

The Commission however found that since the power of the executive to proscribe organisations was 'grossly antithetical to established constitutional rights', Parliament intended that there should be 'effective checks and balances' to the Secretary of State's primary decision making role.[52] With regard to the criminal offences related to proscription it had to apply 'an effective and thorough' standard of review, regarding both the reasonable belief and the exercise of the discretionary power.[53]

The POAC stated that though it was not its function to substitute its view for the initial decision of the Secretary of State, it still had to examine all the available material both at the stage of the belief and the stage of the exercise of discretionary power and therefore also to assess the balancing the Secretary of State had struck.[54] However, the Commission was aware of a certain degree of deference to the Home Secretary's decision especially at the discretionary stage.[55] These findings were upheld on appeal of the Home Secretary.[56]

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[50] *Lord Alton* (POAC) (n 19) [82].

[51] ibid [40].

[52] ibid [107], [108].

[53] ibid [111]-[114], [327].

[54] ibid [116], [117].

[55] ibid [120], [121].

[56] *Lord Alton* (CA) (n 21).

To conclude, the case law after ***Rehman*** suggests a more intense investigation of the facts by the courts even in national security matters. While the courts are ready to review all matters of fact in connection with the Home Secretary's assessment of the situation, they still pay certain deference to the executive in connection with the exercise of discretionary power, especially regarding considerations of necessity.

4. Academic reception

Judicial review and the appropriate degree of deference has been the subject of extensive academic debate. A major critique against the concept of deference was formulated by Allan:

> A doctrine of justiciability seeks to insulate certain types of governmental action from judicial review without regard to their effect on the rights or interests of the persons involved. Invoking general notions of governmental expertise or superior democratic credentials, such a doctrine effectively places administrative discretion beyond the purview of the rule of law.[57]

Allan argues that there could not be an all embracing theory of deference, providing clear cut criteria in which cases the courts will have to defer to the elected bodies.[58] He is of the opinion that the only reason for deference can be constitutional limitations of the courts' competence.[59] Allan sees that deference primarily in the choice

[57] T R S Allan, 'Human rights and judicial review: a critique of "due deference"' [2006] CLJ 671.

[58] ibid 672.

[59] ibid 673.

between different measures consistent with human rights.[60] Regarding non-consistent measures, however, the courts will have to examine all questions of illegality.[61]

Any doctrine going beyond this would force the courts to rely on the good faith or expertise of the executive.[62] This would mean that the courts were incorporated into the executive, which it is supposed to control.[63]

Allan suggests an approach in which the appropriate degree of deference is determined in accordance with the circumstances of the particular case.[64] According to him, there cannot be a general presumption that the executive has superior expertise.[65]

Kavanagh has a more multi faceted view on deference.[66] She regards an assumed dilemma between the duty of the courts to protect individual rights and the principle of respecting the executive's duty to protect the public to be the starting point for the doctrine of deference in national security cases.[67] She identifies three reasons justifying deference in those cases: First, the courts would not reach a correct decision if some of the material relevant to the decision cannot be disclosed to the courts.[68] 'Deference is a rational response to uncertainty, and uncertainty will be hightened in a case where secrecy surrounds some of the relevant facts.'[69] However, she is also of the opinion that,

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[60] ibid 694.

[61] ibid.

[62] ibid 675.

[63] ibid 676.

[64] ibid.

[65] ibid 692.

[66] Aileen Kavanagh, 'Constitutionalism, counterterrorism, and the courts: changes in the British constitutional landscape' [2011] IJCL 172.

[67] ibid 177.

[68] ibid.

[69] ibid.

if disclosure is possible and reasonable, e.g. at the tribunal stage, there was accordingly little reason to defer for this purpose.[70] Second, she argues, judges fear responsibility for the large scale consequences of error in national security cases.[71] Third, national security cases mostly require an anticipatory risk assessment, which judges cannot fully exercise if information relevant to the case is closed.[72] The balance the courts had to strike was between respecting the executive's expertise in policy implementation on the one hand, and safeguarding human rights by scrutinising this implementation on the other.[73]

Kavanagh rejects the idea of predetermined fields of strong and mechanical deference and argues in favour of a case-to-case decision on expertise, legitimacy, and competence.[74] She is of the opinion that, though a certain degree of deference was to be accorded to the elected bodies, 'substantial deference is owed only exceptionally'.[75] Kavanagh continues explaining her understanding of 'minimal deference':

> The duty of minimal deference accounts for the fact that judges ought not to invalidate an executive decision, or declare an Act of Parliament incompatible with the HRA, merely on the basis that they disagree with it or because they might have come up with a different solution if they had had the power to make the primary decision. […T]he error of the decision must be sufficiently grave to override the presumptive weight in its favour.[76]

[70] ibid 192 to 194.

[71] ibid 178.

[72] ibid.

[73] ibid 180.

[74] Aileen Kavanagh, 'Defending deference in public law and constitutional theory' [2010] LQR 222, 226.

[75] ibid 227.

[76] ibid 228.

The concept of minimal deference was a matter of democracy, ensuring the significance of democratic decision making.[77] Substantial deference, by contrast, could only be accorded

> in cases where the courts judge themselves to suffer from particular institutional shortcomings, i.e. where they have less institutional competence or legitimacy (or both) to decide the particular issue, than Parliament or the executive.[78]

The decision will need to strike a balance between those institutional concerns and the substantive concerns of the case.[79] Kavanagh draws an analogy to the role of precedent and the possibility of the courts to depart from them.[80]

Overall, Kavanagh is of the opinion that establishing expert tribunals at first instance can justify a more intense standard of review.[81] She also suggests to experiment with giving closed material to the higher courts.[82] She furthermore points to the Human Rights Act 1998, arguing that the act made the role of the judiciary more explicit in human rights cases.[83] However, the doctrine of deference was not to be confused with a doctrine of non-justiciability, the latter rendering certain areas of public administration a field of sole decision of the executive, whereas the former may occur in different degrees.[84]

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[77] ibid.

[78] ibid.

[79] ibid 231.

[80] ibid 232.

[81] Kavanagh, 'Constitutionalism' (n 66) 193, 194.

[82] ibid 192.

[83] ibid 194.

[84] Aileen Kavanagh, 'Defending deference' (n 74) 241.

Apart from the general debate on deference in national security cases, several commentators have discussed the *Lord Alton* proscription case in particular. Tomkins, for instance, regards it as proof that government action in connection with national security is subjected to an ever increasing judicial scrutiny.[85] He takes *Lord Alton* as an example to show how tribunals and the lower courts departed from the principles of the *Rehman* case.[86] He considers this justified in the light of the *Chahal* decision of the ECtHR.[87]

Similar to Allan and Kavanagh, Tomkins concludes from *Rehman* and *A* that not any decision based upon considerations of national security will be ruled lawful anymore.[88] He argues the judgments concerning national security were all made by a small number of judges, developing expertise in this field themselves.[89] This poses a challenge towards the claim of the executive to possess superior expertise in national security matters.

Rasiah contends that if the condition of a reasonable belief in the concernment in terrorism must be based upon reasonable grounds one may conclude that POAC will substitute judgment.[90] This ensured both the fairness of the initial procedure before the Home Secretary and compliance with the limitations set by Parliament.[91]

Walker is more sceptical, suggesting that even in *Lord Alton* proportionality was not seriously scrutinised by the POAC.[92] He however argues that the Human Rights Act

[85] Tomkins (n 23) 545.

[86] ibid 545, 549.

[87] ibid 547, 548.

[88] ibid 566.

[89] ibid.

[90] Nathan Rasiah, 'Reviewing Proscription under the Terrorism Act 2000', [2008] JR 187, 189.

[91] ibid.

[92] Clive Walker, *Blackstone's Guide to the Anti-Terrorism Legislation* (2nd ed., OUP 2009) [2.31].

1998 as well as the Terrorism Act 2000 itself provided the conditions for a 'less executive-dominated proscription process', allowing a higher level of scrutiny.[93]

5. Conclusion

In favour of significant deference for the executive in national security cases it is argued that (1) it has better expertise in the field of national security than the courts, especially if it bases its decisions upon closed material, (2) that it falls within the competence of the executive to assess the facts and the necessities in national security cases, and (3) that the executive has, as a democratically elected body, superior legitimacy.

By contrast, in favour of intense scrutiny by the courts it is primarily argued that otherwise the courts would surrender their role of safeguarding the implementation of the Convention rights to the executive.

The first argument, the presumption of superior executive expertise, faces the fact that Parliament has, in the aftermath of the *Chahal* case, established a number of expert tribunals, such as the POAC, which are entitled to hear all evidence, under certain conditions even secret evidence. It can not be argued anymore that the courts are unable to decide on the facts because the facts are not disclosed to them. Moreover, the tribunals are perfectly able to evaluate all the facts of the cases brought before them.

To address the question of competence, it must be borne in mind that the British constitutional system does not provide an expressive distribution of competences among the branches of the State. Mere reference to the separation of powers is therefore not a free-standing argument, because this principle only implies that the state powers should somehow be separated. It moreover has to be supported by substantive evidence that Parliament was in fact willing to give the power to decide upon questions of fact and law to the Home Secretary alone. The fact that Parliament has set up a number of

[93] ibid.

specialist tribunals with the task of judging national security matters casts doubt on the view that Parliament wants the courts to defer to the executive in those cases. [94]

The third argument in favour of strong deference is the reference to the particular democratic legitimacy of the executive in contrast to the non-elected judiciary. However, this argument is not limited to matters of national security but can be used against judicial scrutiny in any human rights case. It is well known that human rights can, and are designed to, limit positivist majoritarian decision making in cases in which the decision leads to a disproportionate interference with the freedom of the individual.[95] To the contrary, the argument seems to be even weaker in a national security context: if the material in national security cases can, in a large number of cases, not be disclosed, how can the public then hold the Home Secretary accountable?[96] Accountability of government then becomes a mere trust relationship between the executive and the people, depriving them of their possibility to assess the performance of government. It follows that, at second glance, the special character of national security cases in fact requires the judiciary to step in where the public is excluded from democratically scrutinising the government's performance.

Regarding human rights it can be said that Parliament has given the POAC the power to examine potential violations of the ECHR in the Terrorism Act 2000, s.5(3).[97] All this points to an intense level of judicial scrutiny, subjecting the decision of the Home Secretary to an independent fact finding at the first stage of the statutory test, as well as to a full proportionality review at the second, discretionary stage.

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[94] Tomkins (n 23) 566; similarly, Walker, *Anti-Terrorism Legislation* (n 92) [2.24].

[95] Regarding only the starting point of this debate regarding unjust legislation compare Carl Schmitt, *Legalität und Legitimität* (7th ed., Duncker & Humblot 2005, reprint of the 1st ed. 1932).

[96] With similar concerns regarding Parliamentary control of proscription: Rasiah (n 90) 190.

[97] The POAC however does not have the power to grant a declaration of incompatibility, *R. (PKK)* (n 15) [86].

It can thus be concluded that, although the idea of deference still exists in administrative law, it will be particularly hard for the executive to claim significant deference in proscription cases, since the courts are both able and, with regard to the protection of human rights, entitled to address all relevant issues of a proscription case.

One issue of review of proscription has still not been addressed so far: the legislative ban on various organisations that were put in place on the Terrorism Act 2000, Schedule 2 by Parliament itself. Despite the traditional supremacy of Parliament it has in its decisions to consider human rights of those subject to proscription. Though the Human Rights Act 1998 does not force Parliament to comply with human rights, a non-complying legislative proscription will still constitute a breach of the Convention as a matter of international law. One may assume that the Terrorism Act 2000, s.3(3)(b) gives power to the Home Secretary to remove such organisations from the Schedule that were proscribed by Parliament. In a case before the POAC the Human Rights Act 1998 might then force the Home Secretary to do so. This way, even a parliamentary decision under the Terrorism Act 2000 to proscribe a terrorist organisation is subject to judicial review. This suggests that in the current UK proscription regime the rationales of human rights protection are, by Parliamentary intent, superior to legislative and executive decision making. This is the best way to efficiently protect both human rights and national security.

IV. Determining the factual basis of proscription

In order to further pursue the argument, the thesis will examine which facts the Home Secretary can rely on in a proscription case. This is of high importance for the determination of whether an organisation is eligible for proscription. The most crucial issue in this respect is the organisation's responsibility for the conduct of its members or

supporters. In *Lord Alton*, the POAC took into account official press releases[98] and statements and decisions of the PMOI leadership[99]. However, it did not address the question whether the conduct of ordinary members or supporters could either be considered.

The responsibility of an organisation for the conduct of its members is assessed in corporate liability law with the 'identification doctrine'.[100] The doctrine has its origin in Viscount Haldane's statement in *Lennards Carrying v Asiatic Petroleum*:

> For if Mr. Lennard was the directing mind of the company, then his action must […] have been an action which was the action of the company itself […T]he fault or privity is the fault or privity of somebody who is not merely a servant or agent for whom the company is liable upon the footing respondeat superior, but somebody for whom the company is liable because his action is the very action of the company itself.[101]

The doctrine was further developed in *Tesco Supermarkets Limited v Natrass* by Lord Reid, saying that it was the management and its senior officers who act as the company.[102] The conduct of ordinary employees cannot, under regular circumstances, be taken into account when charging a corporation with a criminal offence.[103] It is the degree of independence from superior advice that is crucial for the determination of corporate liability.[104]

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[98] *Lord Alton* (POAC) (n 19) [198].

[99] ibid [202] ff., [304] ff.

[100] *R. v P&O European Ferries (Dover)* [1991] 93 Cr. App. R. 72, 74, 81 (CCC).

[101] [1915] A.C. 705, 713 (HL).

[102] *Tesco Supermarkets Limited v Nattrass* [1972] AC 153, 171 (HL).

[103] ibid.

[104] ibid 187 (HL), (Viscount Dilhorne).

This is supported by the Corporate Manslaughter and Corporate Homicide Act 2007, s.1(3), providing that a corporation can only be charged with an offence of manslaughter if 'senior management' had significantly committed a breach of its duties.

Transferred to terrorist organisations, this would mean that the organisation can only be held responsible for acts that were ordered by its leaders with a significantly independent power of command. This was also the approach the POAC had chosen in *Lord Alton*.

The ECtHR has in *The Welfare Party v Turkey* established a test for the attribution of member conduct to the association, similarly taking into account the influence of particular members. Accordingly, the conduct of the organisation's leaders may be attributed to it automatically, whereas the conduct of its junior officers can only be attributed if it reveals the organisation's methods and aims.[105] As a consequence, it is suggested that the conduct of ordinary members of a group can only be attributed to it if it appears under the influence of the organisation.[106]

Domestic legislation has hence chosen a more limited approach, focusing on the conduct of an organisation's leadership. This means that, whenever a target group is diffusely organised, it will be difficult to determine which of the facts before the Home Secretary can be considered. It is also worth mentioning that the leadership conduct might, especially in such diffuse organisations, significantly depart from the overall conduct of the ordinary members. In cases, in which such weak leadership is unable to incite the group members to terrorist conduct, the facts available to the Home Secretary may depart from the real character of the organisation. However, this would have to be taken into account at the proportionality stage[107]. By contrast, in cases in which

[105] *The Welfare Party v Turkey* ECHR 2003-II [113]-[115].

[106] Sarah Theuerkauf, *Parteiverbote und Europäische Menschenrechtskonvention* (Schulthess 2006) 260.

[107] See below, p 19 ff.

leadership fails to restrain members from committing terrorist action the Home Secretary will be prevented from attributing such action to the organisation as a whole.

In conclusion, it has been shown that it is insufficient to prove that an organisation affects important rights and interests within the scope of the Terrorism Act 2000, s.1(2). Moreover, it must also be shown that the organisation's leadership is responsible for this. This follows from the identification doctrine, inherent in the POAC's *Lord Alton* decision. This excludes diffuse violent groups from the scope of proscription legislation and limits it to organisations which are deliberately and tactically concerned in terrorism.

V. Degree of threat – the extent of proscription

It will now be shown how the scope of proscription is also limited substantially in two ways. First, the law focuses on particular important rights and interests an organisation must target in order to be eligible for proscription. Second, the proscription regime provides for a threshold the degree of threat for such right or interest must reach in order to justify proscription. This is ensured by the expressive terms of the statutory test, as well as the underlying principle of proportionality. The following part shall examine the balancing the legislator has taken as well as the balancing the executive may take.

1. The scope of proscription

Terrorism is defined in the Terrorism Act 2000, s.1. The definition consists of three elements: (a) the commission or threat of a severe action within subsection 2, (b) the intention to influence the government or an international governmental organisation or to intimidate the public, and (c) the motives must be political, religious, racial or ideological.

There are two rationales behind this, one related to the public sphere and one related to the individuals' sphere. The public dimension is obviously to preserve the ability of government to act independently in all matters of policy. This is covered by s.1(2)(b) and (c). Subsection (1)(a) has a more individualised rational, taking into account the principle of proportionality. Not any action satisfies s.1(2) but only such which involves 'serious violence against a person', 'serious damage to property', endangering another person's life, putting health or safety of the public at risk, or seriously interferes with or disrupts an electronic system. These matters are all somehow related to individual interests, be it their right to life, their health, property, etc. The statutory test however breaks down the rational to only very important rights and interests. In addition to the fact that s.1(2)(a), (c), and (d) focus on the protection of the individuals' lives and health, Government has, for example, emphasised that the main purpose of the inclusion of property destruction was to prevent the accidental injury of people in politically or ideologically driven attacks on property.[108] It follows that the main rational behind the definition of terrorism is that measures as severe as those provided for in the Terrorism Act 2000 can only be triggered if the life and health of the citizens is at stake. This is supported by the history of the term, initially covering only violent organisations.[109]

However, in what respect the disruption of an electronic system may be regarded as referring to such rights or interests remains uncertain. Cyber terrorism has no connection with violence in an ordinary sense.

However, the commission of an action under s.1(2)(e) can have a wide range of effects. It is possible that the disruption of electronic systems may cause situations threatening the life or health of people, for example if flight control or emergency call

[108] Standing Committee D, Session 1999-2000, vol IV, col 20 (18 January 2000), Charles Clarke.

[109] Prevention of Terrorism (Temporary Provisions) Act 1974, s.9(1).

systems are targeted. This has a quality different from cases of minor disturbance, such as the targeting of private company websites or of public service networks which do not safeguard the life and health of the citizens. This is suggested by the focus of s.1(2)(a) to (d) on the protection of life and health, which was explained before. It would seem odd if s.1(2)(a) to (d) were so much limited if the protection of the functioning of electronic systems alone was interpreted in broadest terms. This is supported by notions of proportionality, and the case law of the ECtHR, which has decided several proscription cases, only two of which it upheld:

In *The Welfare Party v Turkey* the court held that the Welfare Party posed a concrete threat to democracy because it was part of the coalition government by then and aimed to establish a legal system in conflict with the idea of religious tolerance inherent in the idea of the democratic society.[110] In *Batasuna v Spain* the ECtHR has decided that already remote connections to violence, such as the refusal of the Batasuna party to condemn terrorist acts of Eta constitute a threat to democracy.[111]

By contrast, the court has quashed numerous proscriptions, e.g. of a political party for the choice of its name[112], it's pursuit of minority goals,[113] or even because it demands secession from the mother state.[114] It follows that only acts challenging the democratic idea may justify proscription before the ECtHR.

Therefore, it appears that a serious interference with any electronic system may not be sufficient for proscription, but only with such that is essential for a purpose of major importance, such as national defence, public safety coordination, healthcare, or

[110] *The Welfare Party* (n 105) [107] ff.

[111] *Batasuna v. Spain* App no 25803/04; 25817/04 (ECHR, 30 June 2009) [88], [89].

[112] *United Communist Party v Turkey* ECHR 1998-I [54].

[113] ibid [57]; *Stankov and the United Macedonian Organisation of Ilinden v Bulgaria* ECHR 2001-IX [88]; *Yazar v Turkey* ECHR 2002-II [48].

[114] *Stankov* (n 113) [97]; *Yazar* (n 113) [49].

flight safety. If the disruption is not severe enough to pose an abstract threat the democratic society, proscription is not justified in the light of the *Welfare Party* decision. Hence, s.1(2)(e) must be construed restrictively and in the context of s.1(2)(a) to (d), focusing on electronic systems important for safeguarding life and health of the people.

To sum up at this stage, terrorism in terms of s.1(2) describes a behaviour posing a threat to human life or health in various ways in order to influence public authorities for pursuing political goals. Mere political threats, as in the *Welfare Party* case, are not included in the statutory scheme of the Terrorism Act 2000.

However, the Civil Contingencies Act 2004 provides for broader proscription in emergency cases. In this connection it is possible to proscribe organisations in order to prevent homelessness[115], the disruption of food supply[116] or of a communication system[117] for example. Again, the connection with important individual rights or interests is apparent. However, the disruption of a communication system, and especially the disruption of facilities for transport in s.19(2)(g) of the Act must be construed analogously to the above interpretation of the interference with an electronic system.

Overall, the focus of proscription law is on the protection of life and health of the citizens from the use of force by political or religious activists.

2. Proportionality of proscription

The second restraint on proscription is the principle of proportionality. It is inherent in the statutory regime in two ways: first, the statutory test only provides for the

[115] s.19(2)(c).

[116] s.19(2)(e).

[117] s.19(2)(f).

proscription of groups which are significantly concerned in terrorism. Second, the Home Secretary must exercise the discretion in a proportionate way.

a. Proportionality in the statutory test

According to the Terrorism Act 2000, s.3(5), 'an organisation is concerned in terrorism if it (a) commits or participates in acts of terrorism, (b) prepares for terrorism, (c) promotes or encourages terrorism, or (d) is otherwise concerned in terrorism.' With the Terrorism Act 2006, the provision rendering promotion and encouragement of terrorism illegal has been supplemented with the 'glorification of terrorism'.[118]

i. Preparation

Less clear than the actual commission of terrorist action is the meaning of the preparation for terrorist acts in the Terrorism Act 2000, s.3(5)(b). In *Lord Alton* the mere intention to resort to terrorism in the future did not satisfy the preparation clause.[119] Moreover, the POAC held that the maintainence of military capability was crucial.[120] Accordingly, there must be at least some practical preparation. One can guess that the Court of Appeal would have decided differently if the PMOI had attempted to buy new weapons and trained new soldiers. Therefore, proscription requires sufficiently serious preparation for terrorism. In cases such as *Lord Alton* this might be clear. However, in cases that involve less structured organisations with only a few active members it might be hard to tell what preparation is serious enough to justify proscription.

[118] Terrorism Act 2000, s.3(5A), (5B) and (5C).

[119] *Lord Alton* (CA) (n 21) [37].

[120] *Lord Alton* (POAC) (n 19) [127].

ii. Promotion and encouragement, especially: glorification

The most controversial aspect of concernment in terrorism is the promotion, encouragement and glorification of terrorism. The glorification clause in particular has been discussed at great length since 'its emphasis is on speech and not deeds'.[121]

According to s.3(5C) glorification means 'any form of praise or celebration', including communication without words. It is unlawful:

> if there are persons who may become aware of it who could reasonably be expected to infer that what is being glorified, is being glorified as (a) conduct that should be emulated in existing circumstances, or (b) conduct that is illustrative of a type of conduct that should be so emulated.[122]

This means that an assessment of the potential perception of the statement by the public is necessary.[123] Such assessment may be highly difficult to achieve, even more if members of the public worldwide have to be considered.[124] In ***R v Perrin*** for example, the publication on a webpage was held to be a publication towards anybody who could access it.[125]

In order to achieve specified standards for such assessment, Jones, Bowers, and Lodge proposed to take into consideration the case law on the Obscene Publications Act 1959[126]: In ***R v Calder and Boyars*** the Court of Appeal held that the test should be whether 'a significant proportion' of the persons likely to read the publication would

[121] Walker, *Anti-Terrorism Legislation* (n 92) [2.49].

[122] Terrorism Act 2000, s.3(5B).

[123] Jones, Bowers, Lodge (n 11) 7, 14.

[124] ibid 7 f., 13.

[125] *R. v Perrin* [2002] EWCA Crim 747 [22].

[126] Jones, Bowers, Lodge (n 11) 13.

tend to be depraved or corrupted.[127] Transferred to the glorification of terrorism, this means that a significant proportion of the people who could access a statement must interpret it as praise of terrorism.

In this respect the government was convinced that s.3(5B) drew a sufficiently clear line between 'cultural events or those that celebrate a part of our collective memory, such as Guy Fawkes and bonfire night, and people who glorify acts of terror to try to encourage similar acts here and now in existing circumstances.'[128] This sounds reasonable in theory. However, the problem is that such statements always can be understood as relating to present events. It seems that government has recognised such difficulties and advises speakers, referring to the Terrorism Act 2006, s.1(6), to 'preface their remarks with the statement that they do not condone or endorse acts of terrorism or encouraging people to kill others.'[129] This advice makes it less easy to believe in a compatibility of the glorification provisions with Art. 10 ECHR. It moreover imposes the burden of proof on the speaker[130], assuming illegality of speech about terrorist action until the 'good' reasons and motives of the speaker are proven.

Walker criticises the current legislation which does not sufficiently 'distinguish the legitimacy of extreme speech which seeks the overthrow of the constitutional order and the encouragement of violence.'[131] He criticises the 'closing down [of] channels of political discourse', arguing that even odd extremist views must be subject to discussion in society in order to 'respond with intelligence'.[132]

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[127] (1968) 52 CrAppR 706, 713 (CA).

[128] Hansard HC vol 438, col 994 (3 November 2005), Paul Goggins.

[129] Hansard HC vol 439, col 429 (9 November 2005), Hazel Blears.

[130] Walker, *Anti-Terrorism Legislation* (n 92) [2.57].

[131] ibid [2.91].

[132] ibid [2.85].

The ECtHR has unfortunately failed to draw a clear distinction as to what type of speech is still protected by Art. 10 ECHR.[133] In *Zana v Turkey*[134], a statement of sympathy for the PKK was not protected, equally a statement calling for a stabbing of moderate Islamic intellectuals with daggers and bayonets in *Gündüz v Turkey*[135] or a cartoon praising the 11 September attacks in *Leroy v France*[136]. In turn, it held that mere criticism towards the counter-terrorism strategy of a government could not be seen as encouraging or glorifying terrorism itself.[137] It can therefore be said that the closer the relation to violence of speech, the more likely it will not be protected. The Home Secretary always has to be aware of this when proscribing an organisation on grounds of glorification and interpret the term 'glorification' in the light of free speech, requiring a significant connection with violence.

iii. Other concernment

In *Lord Alton* the POAC had to determine the term 'otherwise concerned in terrorism'. Since the statute provides a rather clear description of terrorism in section 3(5)(a) to (c) the Commission concluded that the general provision in section 3(5)(d) had to be interpreted in a way that it referred to activity of a similar character.[138] It suggested that this could involve organisations that retain a military capability that is currently inactive but which the organisation intends to reactivate in the future if it considers this to be necessary.[139] However, this could not possibly be extended to an organisation that, like

[133] ibid [2.80] with these and further references.

[134] ECHR 1997-VII.

[135] ECHR 2003-XI.

[136] App no 36109/03 (ECHR, 2 October 2008).

[137] *Yazar* (n 113) [59].

[138] *Lord Alton* (POAC) (n 19) [125], [126].

[139] ibid [127]; also compare [304].

the PMOI, did neither have such capability nor took any steps to acquire it.[140] Instead, the POAC held that the criteria set out in section 3(5)(a) to (c) were 'focussed on current, active steps being taken by the organisation.'[141]

Basically, the Court of Appeal agreed with the Commission's findings regarding the interpretation of section 3(5)(d) Terrorism Act 2000 and only suggested that the provision did not need to be interpreted in a way that required acts similar to section 3(5)(a) to (c).[142] However, there had to be a close connection between the organisation and the commission of terrorist action.[143] This nexus was, according to Lord Phillips, too remote if the organisation only intended to resort to terrorism in the future without taking further concrete steps.[144]

It remains uncertain which activities other than retaining military capabilities would fall under this clause. If 'other concernment' does not require action similar to section 3(5)(a) to (c), but still a close 'nexus' with the commission of terrorist action, this could mean that the clause included assistance not included in the 'preparation' clause, for example organising communication between terrorist organisations. In conclusion, the clause is obviously vague and the close 'nexus' to the commission of terrorist acts, which any interpretation must observe, cannot depart too far from section 3(5)(a) to (c) in any event.

[140] ibid [127] f., [328.2].

[141] ibid [124].

[142] *Lord Alton* (CA) (n 21) [35].

[143] ibid [36].

[144] ibid [37].

iv. Civil Contingencies Act 2004

Apart from the Terrorism Act 2000, also the Civil Contingencies Act 2004 must observe the principle of proportionality if used for proscription. It will be hard to argue that an organisation threatens 'human welfare' in other ways than by violence or force. Especially, questions of politics are excluded from its scope. Therefore, it cannot be used for proscription of political ideology, though some might argue that a socialist government might affect supply in terms of the Civil Contingencies Act 2004, s.19(2)(e) for example[145]. Possibilities for proscription under the Act are therefore primarily limited to the proscription of non-terrorist violent organisations.

v. Conclusion

It can be concluded that the statutory provisions generally require a close connection between an organisation and the commission of violent action or the threat of human life or health. Mere intention does not satisfy this condition. Moreover, the courts will ensure that groups with only remote relations to terrorism cannot be proscribed. It follows that the organisation must seriously be affiliated with terrorism, and hence seriously interfere with the rights and interests within the scope of the legislation.

b. Discretion

In her application in *Lord Alton (CA)* the Home Secretary contended that the Commission had unlawfully substituted judgment.[146] She insisted that the POAC should have applied only a *Wednesbury* unreasonableness test.[147] The Court of Appeal did not

[145] Despite the fact that this would not satisfy the conditions of an 'emergency' in any event.

[146] *Lord Alton* (CA) (n 21) 2350, 2350 f.

[147] ibid 2351.

agree and, instead, upheld the reasoning of the Commission.[148] Accordingly, the appropriate standard of review of discretion is a full proportionality test.

i. The principle of proportionality

The concept of proportionality was introduced into British law by the Privy Council in *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* in the form of a three stage test, examining whether:

> (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.[149]

Following the conception of the German Constitutional Court the proportionality test has at times been complemented with a fourth stage, as to 'whether the measure strikes a proper balance between the gains for the policy purpose and the incursion into individual rights'.[150] Regarding the tradition of proportionality in civil law jurisdictions, the fourth stage of the test has to take into account all relevant purposes, principles and protected rights on either side in order to balance all interests involved in the decision.[151]

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[148] ibid [45].

[149] *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, 80 (Privy Council).

[150] Walker, *Anti-Terrorism Legislation* (n 92) [1.53], the landmark decision of the German Constitutional Court was: BVerfGE 16, 194 (201).

[151] Konrad Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* (20th ed., C.F. Müller 1995) [318].

ii. Equality and legal certainty

The definition of terrorism has been criticised as all-embracing and too general.[152] In his report on the application of the Act, Lord Carlile however writes that this generality of the definition was offset by the 'additional requirements of […] professional codes of ethics and disciplines' at the stage of the exercise of discretionary power.[153] Accordingly, the Home Office has published guidelines for the exercise of discretion. A decision on proscription must consider:

> *(a) The nature and scale of an organisation's activities.*
>
> *(b) The specific threat that it poses to the United Kingdom.*
>
> *(c) The specific threat that it poses to British nationals overseas.*
>
> *(d) The extent of the organisation's presence in the United Kingdom.*
>
> *(e) The need to support other members of the international community in the global fight against terrorism.*[154]

These guidelines show an attempt to objectify the proscription policy. Nonetheless, critics argue that 'the UK government [has attempted] to turn itself into the arbiter between "terrorist" and "freedom fighter"', proscribing particular groups while not affecting others.[155]

Equality is an essential principle to both common law and the ECHR.[156] It demands that like groups must be treated alike.[157] However, there are different standards

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[152] ibid 12, 13.

[153] Lord Carlile of Berriew, *Report on the Operation in 2001 of the Terrorism Act 2000,* 9; similarly in: *Report on the Operation in 2005 of the Terrorism Act 2000,* [30].

[154] Home Office press release (28 February 2001), as cited by Walker, *Anti-Terrorism Legislation* (n 92) [2.12].

[155] Walker, *Anti-Terrorism Legislation* (n 92) [2.12] f.

[156] Paul Craig, *Administrative Law* (6th ed., Sweet & Maxwell 2008) [21-003], [21-005].

of equality review. In *R. (Carson) v Secretary of State for Work and Pensions* the House of Lords held that the applicable standard of review was dependent on the particular ground of discrimination. Lord Hoffmann said that discrimination on grounds of 'race, caste, noble birth, membership of a political party and […] gender' could hardly ever be justified.[158] On the other hand, concerning discrimination on other grounds, such as 'ability, education, wealth, [or] education' the courts would be satisfied with any rational justification.[159]

The Home Secretary therefore has to carefully consider the particular facts of the case. She cannot proscribe, for instance, only Muslim or Irish terrorist organisations but has to decide similarly when domestic militant animal rights activist groups or the like are concerned.[160] However, the ground for discriminatory decisions will often not be the national origin, religion or political aims of the group but the particular threat that the organisation poses to rights and interests of others.[161] This threat is under the organisation's control and therefore falls under the second *Carson* category requiring only reasonable grounds, e.g. the degree of the threat posed by the organisation.

In many cases however, it might be hard to decide whether the threat posed by two organisations was alike.[162] The determination of threat is therefore the underlying problem in such equality cases. The Home Secretary will base the decision on many pieces of information, but she will, as member of the political branch of government,

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[157] ibid [21-002] with further references to case law.

[158] [2005] UKHL 37, [2006] 1 AC 173 [15].

[159] ibid [16].

[160] A distinction on grounds of nationality was regarded discriminatory regarding the detention of suspected international terrorists in the House of Lords' decision in *A* (n 40) 68.

[161] Compare the Home Office guidelines above.

[162] Lord Hoffmann in *R. (Carson)* (n 158) [15] acknowledges that whether two groups are sufficiently different is partly a value judgment.

also be influenced by the lay public perception of threats to national security. The large scale bombings by Muslim and also Irish terrorists in the past may have an important influence on the assessment in the present, even if the organisation subject to proscription has in fact no connection to Al Qaida or the IRA.

It follows that the line between reasonable grounds for discrimination and prejudice is blurred. I would suggest that the Home Secretary must, to justify any different treatment, show that the information before her gives reason for such difference in treatment. She must be able to show that the threat the proscribed organisation poses is objectively higher than that of non-proscribed radical organisations.

iii. Foreign policy and the opposition to cruel regimes

In an obiter dictum the POAC dealt with further potential considerations for the exercise of discretion. These were the nature of the government the organisation was opposing as well as the question whether matters of foreign relations could be considered by the Secretary of State.[163] Here, the POAC argued that in the fields of national security as well as foreign policy, considerable deference had to be afforded to the Home Secretary.[164] The Commission contended that people were free to campaign for a regime change in Iran with 'methods that are consistent with the democratic ideal'.[165] The attempt to change a regime's behaviour by permitting terrorism against it would be

[163] *Lord Alton* (POAC) (n 19) [351].

[164] ibid [354].

[165] ibid [355.4].

a violation of both international law and the very idea of democracy.[166] Therefore, the nature of the regime challenged by the proscribed organisation cannot matter.[167]

It can be said that foreign policy matters are hardly considered before the courts. However, the POAC's statements can be interpreted in a way that it will at least scrutinise the reasonableness of action in this field connected to proscription.

c. Operation under a listed name

A final question of proportionality is posed by the Terrorism Act 2000, s.3(1), which provides that an organisation is proscribed if it is listed in the respective schedule (a) as well as if it operates under a name listed therein (b).

In *R. v Z* this was brought to the House of Lords.[168] Z and others were members of the 'Real IRA', a splinter group of the IRA continuing violent attacks in the Northern Ireland conflict after the ceasefire declarations.[169] Schedule 2 of the Terrorism Act 2000 only lists the 'Irish Republican Army'.

However, the House of Lords decided that the term IRA covered all splinter groups using it with different prefixes.[170] Their lordships however concurred regarding the method of applying s.3(1). While Lords Bingham and Woolf regarded s.3(1)(a) and (b) as 'a composite whole', Lords Brown, Carswell and Rodger considered them mutually exclusive.[171] For the first this means that an organisation must either be covered by the term used expressively in schedule 2 or at least operate under the listed

[166] ibid [356].

[167] ibid.

[168] *R. v Z* [2005] UKHL 35, [2005] 2 AC 645.

[169] ibid.

[170] ibid [51].

[171] ibid [68] (Lord Brown); [54] (Lord Carswell); [48] (Lord Rodger); [22] (Lord Bingham); [46] (Lord Woolf).

name in a broader sense.[172] By contrast for the latter, an organisation must, to be proscribed, either be covered by the schedule, or, as an association entirely separate from that listed, operate under the identical name.[173]

In the *United Communist Party of Turkey v Turkey* case the ECtHR had to decide the case of a Turkish party which was proscribed after less than two months of existence.[174] The Turkish Constitutional Court based the proscription order on the name of the party and its programme, taking the cause of the Kurdish minority. The Turkish law on political parties prohibited certain party names, such as 'communist'.[175]

The ECtHR however held that 'a political party's choice of name cannot in principle justify a measure as drastic as dissolution, in the absence of other relevant and sufficient circumstances.'[176] Moreover, the government had failed to show that the party posed 'a real threat to Turkish society or the Turkish State'.[177]

Hence, the ECtHR would not accept the view of Lords Brown, Carswell and Rodger, who argued for the dissolution of organisations separate from the ones initially targeted by the Home Secretary on the sole ground of their names. However, it can also be concluded from this decision that the view of Lords Bingham and Woolf can only lead to proscription if the organisation that operates broadly under the listed name is actually concerned in terrorism.

[172] ibid [22], [46].

[173] ibid [68].

[174] ECHR 1998-I [54].

[175] Law no. 2820 on the regulation of political parties, s.96(3).

[176] *United Communist Party* (n 112) [54].

[177] ibid.

In conclusion, mere formalism cannot lead to immediate proscription. Hence, s.3(1) does only provide for proscription of organisations which really are 'concerned in terrorism' pursuant to s.3(5).

VI. Conclusion

The inquiry has shown that proscription is limited to organisations posing fundamental threats to equally fundamental rights and interests. It has been shown that national security is not a freestanding value but can be broken down into several rights and interests of the individual. It follows that proscription is provided for organisations endangering human life or health in direct[178] and indirect[179] ways, whereas it is not provided for organisations committing minor criminal offences.

The statutory limitation imposed on the Home Secretary is carried out in two ways. First, the statutory test provides for the limitation of proscription objectives in the Terrorism Act 2000, s.1(2) as well as in the Civil Contingencies Act 2004, s.19(2). Second, the statutory test provides for limitations concerning the subjects eligible for proscription: only such organisations can be proscribed which are sufficiently concerned in terrorism.

Within this statutory test, the 'glorification of terrorism' clause remains uncertain. Regarding Article 10 of the Convention the ECtHR will consider all circumstances of a case and decide in accordance with the relation of the organisation to violence. The more remote such glorification from incitement to violent acts is, the more likely it is to be protected by freedom of speech. After all, an organisation can only be proscribed if it uses such glorification as a systematic strategy to actually recruit terrorists for an armed fight.

[178] By actually killing and injuring people.

[179] By disrupting important services in healthcare, air traffic safety, etc.

Additionally, limitations are imposed by the underlying principle of proportionality as far as equality and foreign policy are concerned. Proportionality also precludes the Home Secretary from proscribing organisations on the sole ground of their names. This would not comply with the *United Communist Party of Turkey* judgment of the ECtHR. As far as Lords Brown, Carswell, and Roger are of the opinion that an organisation is proscribed under the Terrorism Act 2000, s.3(1)(b) if it operates under a listed name without being identical with the initially listed organisation, it follows that this does not comply with Article 11 of the ECHR. The concurring opinions of Lords Bingham and Woolf, regarding an organisation proscribed under s.3(1)(b) if it operates under the name of the proscribed organisation broadly understood, may on the other hand not provide for sufficient legal certainty. If legal certainty is considered here, the Terrorism Act 2000, s.3(1)(b) can, if any, only cover cases as obvious as *R*. And even then, the test must be complemented in the following way: an organisation is proscribed pursuant to s.3(1)(b) if it operates broadly under the same name, and if it substantially is concerned in terrorism under s.3(5). Otherwise, s.3(1)(b) would provide for proscription on mere formal grounds, which the ECtHR has, as shown, found impermissible.

D. Conclusion

This thesis has tried to establish that current domestic legislation only provides for proscription of organisations which seriously, deliberately, and tactically affect individual rights and interests of major importance, primarily the life and health of the citizens. This is safeguarded by the POAC and the courts.

In support of this, the thesis first examined the history of proscription, finding that traditionally, proscription has always been used rather as *ultima ratio* in coping with extremist organisations. This supports the part of the thesis that only the most threatening organisations may be subject to proscription.

It has also been shown that already the rules of attribution of member conduct to the organisation is subjected to proportionality balancing, taking into account only the conduct and intent of senior representatives. This follows from the identification doctrine in corporate liability law and ensures an even higher protection of the freedom of association than required by the ECtHR judicature.

It has further been shown that the statutory test attempts to find a balance between the protection of the citizens' lives and health from terrorist action and the preservation of the freedom of association of politically radical groups. The statutory definition of terrorism sets the scope of proscription. It has been shown that the idea of 'national security' in terms of the provision can in fact be broken down to the individuals' rights and interests to life and health, as even the 'destruction of property' clause is meant to prevent accidental human injury. It has also been argued that even cyber terrorism can only be a basis for proscription if it targets electronic systems which are essential for protecting those rights and interests. This excludes activist groups from the scope of the act which only commit minor criminal offences. They will be only subject to regular

criminal procedure. Moreover, an organisation must target human life or health in order to be eligible for proscription.

Further, the Terrorism Act 2000, s.3(2) also provides the scope of potential subjects for proscription. Not any group with remote relations to terrorism can be proscribed. It must be a sufficiently significant relation. This is another aspect of proportionality. Most controversial in this respect was the 'glorification' clause in the Terrorism Act 2000, s.3(5A). The courts have demanded a close nexus between acts of preparation and the commission of terrorist acts. The thesis has argued that the same standard must be applied regarding the glorification of terrorism. This is supported by the ECtHR case law, which is more willing to allow restrictions on speech in connection with violence than in other circumstances. Such glorification may for instance be a ground for proscription if the organisation glorifies in order to recruit new members for terrorist groups.

Another problem the proscription regime faces is the possibility of proscription on formal grounds in the Terrorism Act 2000, s.3(1). The ECtHR has made it clear that proscription only on grounds of the organisation's name violates Article 11 of the ECHR. The statutory provision should therefore be amended in the following way: an organisation is proscribed pursuant to s.3(1)(b) if it operates broadly under the same name, and if it substantially is concerned in terrorism under s.3(5).

In respect of substantive law it can hence be concluded that the proscription regime focuses on organisations significantly involved in threatening life and health of the citizens with the respective intention of its leadership. This leaves a significant part of illegal organisational conduct to the ordinary criminal law, electoral provisions and other provisions concerning individual conduct.

In terms of procedure, the courts have established strict review of law and fact. The thesis shows that the courts have considered both the colliding principle of the

separation of powers and human rights from the Human Rights Act 1998. They came to decide in favour of the rights, subjecting the enormous powers of the Home Secretary to independent judicial control by the POAC, a tribunal with sufficient expertise and possibilities to come to its own conclusions about a case before it. It has been shown that under the Terrorism Act 2000, even legislative proscriptions are subject to such review.

Hence, the current proscription regime must be read in the light of human rights, making proscription the *ultima ratio* of anti-terrorism policy. Only the protection of important rights can justify the dissolution of a political association. This essential feature of democracy is only properly safeguarded by the tribunals and the courts.

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