

Comparative Counter-Terrorism

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CT in and outside Canada and the ATA

- Debate over ATA in 2001
- Now informed by comparative perspectives and a certain loss of innocence
- Comparative restraint and respect for human rights in ATA
- But human rights issues outside of ATA and Canada

1) Definition of Terrorism

- S.83.01(1)(b) v. s.1 Terrorism Act (UK)
- More restrained on property damages and exemption for protests and strikes (also in Australia)
- 83.01 (1.1) and continued debate and sensitivity to religious and political motive requirement in *Khawaja*

Definition of Terrorism

- ATA still broader than international best efforts in 99 Financing Convention and read in in Suresh [2002] 1 S.C.R. 3.
- Failure at UN level to make progress on definitional issue and CTC's performance see Roach *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge, 2011)

2) Proscription

- Definition of terrorist group as listed entity in 83.01
- Not challenged, but less relevant given evolution of Al Qaeda
- Simplified world of listing *R. v. Thambaiturai* 2011 BCCA 137 and other LTTE cases

3) Offences

- 83.18 participation v. Australia association offence, UK possession of materials or US material support
- General expansion of direct inchoate “pre-crime” liability
- Importance of high mens rea to offset broad crimes

4) Investigative hearings

- Upheld in Re Section 83.28 [2004] 2 SCR 248
- Expired but soon to be re-enacted
- Compare with UK offence of failing to inform authorities, US grand jury or Australian ASIO questioning warrant
- Still question about utility, sunsets and review

5) Preventive Arrest

- S. 83.3 expired but soon revived
- 72 hour compared to UK 7-14-28-14 (no 42, 90)
- Compared to Australian 14 days fed and state
- Compared to US abuse of material witness warrant
- Can morph into control orders but 810.01 not used to that end

6) NSC

- S.38 upheld in *Ahmad* [2011] SCC 38 with stress placed on statutory stay of proceedings
- No legislative thumb on the scales as in *Aust* National Security Information Act
- Still questions of efficiency with Air India and Toronto prosecutions both avoiding its use and overclaiming

7) Expanded signals intelligence

- ATA model of expanded powers and role of commissioner
- US extra-legalism of NSA
- Then revealed by NYT and partially ratified by Congress

CT outside ATA and Canada

- Relations with countries with poor human rights records
- Relation with UN processes
- Extraordinary review in public inquiries but resistance to permanent structures
- Limits on Extra-Territorial Reach of the Charter

1) Security Certificates

- Part of global movement away and lack of confidence in criminal law
- Military and administrative detention
- Belmarsh
- Problem of *Suresh* exception rejected by European Ct of HR in *Saadi*
- *Charkaoui* and special advocates

2) Terrorist Listing

- Canada like others implements 1267 listing
- Domestic push back- Abdelrazik [2009] FC 580
- 1267 evolution including Res 1989
- Still secret intelligence concern and US extra-legalism on state secrets doctrine

3) Review

- Extraordinary review with ad hoc inquiries
- Arar, Iacobucci but also Detainee (UK) and Haneef (Australia)
- Failure to make permanent adjustments to review in Canada as recommended by Arar commission
- expanded role of Aust Inspector General

4) Extra-territorial application

- Hape- Afghan detainee case 2008 FCA 401
- Munaf v. Geren 128 S Ct 2208
- Recent al Skeini and al Jedda cases (ECHR)
- Omar Khadr I and II and limits of declarations
- Abdullah Khadr and domestic stay