

3

The Curious Element of Motive in Definitions of Terrorism: Essential Ingredient or Criminalising Thought?

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Motive is anathema to criminal lawyers, who are schooled in the overriding importance of the intention behind conduct and the irrelevance of the motivations underlying it. As a result, some traditional criminal lawyers have been alarmed by the creeping emphasis on motive in new terrorism offences in various jurisdictions. Typical is the motive element in the Australian criminal law definition of ‘terrorist act’, which is also reflected in similar definitions in Britain, Canada, New Zealand and South Africa. Australian law defines terrorism as certain violent criminal acts done ‘with the intention of advancing a political, religious or ideological cause’, coupled with the intention of (i) ‘coercing, or influencing by intimidation’ a government, or (ii) ‘intimidating the public’ or a section of it.¹

Although described in the Australian definition as an ‘intention’, and in the comparable definitions as a ‘purpose’ requirement, the element of a political, religious or ideological cause in these definitions is commonly understood as a motive requirement; that is, as the emotion or belief prompting the prohibited physical conduct which also forms part of most terrorism definitions. The distinction between intention and motive, and different types of each, has been much discussed in criminal law. While more could be said about the jurisprudential issues, this chapter focuses on the common identification of politics, religion or ideology as elements central to the criminal law concept of terrorism. In passing, a number of courts have approached these definitional elements as motive requirements.²

For proponents of such definitions, requiring proof of a political, religious or ideological motive allows the criminal law to more finely target, stigmatise and deter what is considered by society to be especially wrongful

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arguing that the motive element should be expanded to also include racial or ethnic cause.²⁵ Racially motivated violence that also intimidates the public or coerces a government could thus be prosecuted as the serious crime of terrorism, sending a strong deterrent message to those who propagate racial hatred or ethnic cleansing. The firmer suppression of extremist violence committed by neo-Nazis, skinheads or Balkan paramilitaries is something which advances human rights – far from undermining it. Motive-based terrorism definitions need not generate prejudice or discrimination, but can be harnessed to confront and quell those who would terrorise others in the pursuit of racial supremacy or eugenic fantasies.

Conclusion: The dubious martyr effect of political crime

A final policy objection to including a motive element is a long held view that marking out offenders as political (or religious or ideological) criminals would legitimise them or transform them into *cause célèbres*, lightning rods for dissent or martyrs for the cause. On this view, requiring proof of a political motive would expose fringe political claims to the judicial process, inevitably requiring the law to take such views seriously and bringing them greater public scrutiny. It is thus thought preferable to focus on the physical harm resulting from terrorist acts and accordingly to treat offenders as ordinary criminals.

The strength of these objections is doubtful. The political demands of terrorists will usually become prominent regardless of their ventilation in a courtroom, whether through the media or the internet. While the elucidation of political motives in court may amplify them, it equally allows erroneous, misconceived or poisonous ideas to be confronted and dissipated in the ensuing public debate.

The expressive function of the criminal law cannot be overstated; a conviction for political or religious violence sends a symbolic message that certain kinds of violence cannot be tolerated in plural, secular democracies, which are duty bound to ensure the safety of their peoples and to suppress those who wish to influence politics and interfere in the autonomy of others by resorting to violence. Here the criminal law has a role in reinforcing the ethical values of democratic political communities, which are constructed on a shared commitment to peaceful deliberation and participatory dialogue, rather than using the unilateral force of arms against one's fellow citizens or their democratic institutions.

Notes

- 1 *Criminal Code* (Cth) s 100.1. Other jurisdictions' definitions are found in the *Terrorism Act 2000* (UK) s 1(1)(c); *Criminal Code 1985* (Canada) s 83.1(1); *Terrorism Suppression Act 2002* (NZ) s 5; *Protection of Constitutional Democracy Against Terrorist and Related Activities Act 2004* (South Africa) s 1(1)(xxv).

- 2 *R v Khawaja* [2006] OJ 4245, [45]-[80]; *Thomas v Mowbray* [2007] HCA 33, [161], [280] (Kirby J), [442] (Hayne J).
- 3 *Proposal for a Council Framework Decision on Combating Terrorism*, EC, COM(2001) 521 Final, CNS/2001/0217 (2001) 6, 7.
- 4 Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Review of Security and Counter Terrorism Legislation* (2006) 57.
- 5 Security Legislation Review Committee (Sheller Committee), *Review of Security and Counter-Terrorism Legislation* (2006) 57.
- 6 Human Rights and Equal Opportunity Commission, Supplementary Submission to the Security Legislation Review Committee (2006) 8.
- 7 Cited in *R v Khawaja* [2006] OJ 4245, [66].
- 8 Lord Lloyd, *Inquiry into Legislation Against Terrorism* (1996) xi.
- 9 *United States of America v Dynar* [1997] 2 SCR 462, 497.
- 10 Gerard Brennan, 'Liberty's threat from executive power', *Sydney Morning Herald*, 6 July 2007, 11.
- 11 Irwin Cotler, quoted in *R v Khawaja* [2006] OJ 4245, [62].
- 12 *R v Khawaja* [2006] OJ 4245, [79].
- 13 *Thomas v Mowbray* [2007] HCA 33, [161] (Kirby J), citing Hope, *Protective Security Review: Report*, Parliamentary Paper No 397/1979 (1979) 291, quoting Sir Victor Windeyer.
- 14 Attorney-General's Department, Submission to the Security Legislation Review Committee, February 2006, 12; Commonwealth Director of Public Prosecutions, Submission to the Security Legislation Review Committee, February 2006, 9; *R v Mallab* [2005] NSWSC 358.
- 15 *Akayesu (Judgment)* ICTR-96-4-T (2 Sept 1998), [523].
- 16 *R v Khawaja* [2006] OJ 4245, [58] and [73].
- 17 *Concluding observations of the Human Rights Committee*, UN HRC, 85th sess, 2330th mtg, UN Doc CCPR/C/CAN/Co/5 (2006); quoted in *R v Khawaja* [2006] OJ 4245, [72].
- 18 Parliamentary Joint Committee on Human Rights, UK Parliament, *Counter-Terrorism Policy and Human Rights: Terrorism Bill and Related Matters* (2005).
- 19 Brennan, above n 10.
- 20 See, for example, Amnesty International, B'nai Brith Canada, Canadian Arab Federation, Canadian Council on Islamic-American Relations, Canadian Muslim Lawyers Association in *R v Khawaja* [2006] OJ 4245; submissions to the Canadian House of Commons, Final Report of the Standing Committee on Public Safety and National Security (2007), 8; and submissions to the Security Legislation Review Committee, above n 5.
- 21 Canadian House of Commons, above n 20, 7-9.
- 22 Security Legislation Review Committee, above n 5, 55 and 57; Parliamentary Joint Committee on Intelligence and Security above n 4, 53.
- 23 Canadian House of Commons, above n 20, 9.
- 24 Human Rights and Equal Opportunity Commission, above n 6, 8.
- 25 Lord Carlile, *The Definition of Terrorism* (2007) 37.