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Anti-Terrorism Laws and Human Rights

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A perennial question for lawmakers is how to protect the community from terrorism, while also respecting fundamental human rights. This issue is important because laws combating terrorism can pose a risk that rights such as freedom of speech and association will be compromised, thereby undermining the very democratic freedoms that need to be safeguarded. This lecture examines these issues, with a particular focus on the anti-terrorism laws enacted in Australia. That nation is a good case study for these questions because it lacks a national Bill of Rights. It provides a stark example of how the absence of human rights safeguards can affect the making of such laws.

Une question éternelle pour les législateurs est comment protéger la communauté contre le terrorisme, tout en respectant les droits fondamentaux de la personne. La question est importante car les lois visant à combattre le terrorisme peuvent poser un risque que des droits comme la liberté d'expression et la liberté d'association soient compromis, minant de ce fait les libertés démocratiques mêmes qui doivent être sauvegardées. L'auteur de cette conférence examine ces questions, en accordant la priorité aux lois antiterroristes promulguées en Australie. Cette nation est une bonne étude de cas pour ces questions car elle ne possède pas de Déclaration des droits nationale. Il s'agit d'un exemple brut de la façon dont l'absence de garanties en matière de droits de la personne peut influer sur l'élaboration de telles lois.

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Introduction

My subject is a long-standing one, the problem of how to protect the community from terrorism while at the same time respecting fundamental human rights. In legal terms, the challenge can be expressed simply: how can anti-terrorism laws be enacted that confer extraordinary powers upon government and its agencies while at the same time not undermining the democratic freedoms we are seeking to protect from terrorism?

This question has assumed even greater importance since the events of September 11. If nothing else, it is clear that the response of democratic nations to terrorism is more than a temporary, emergency reaction to those and other catastrophic attacks and to the possibility that such indiscriminate violence might be repeated at home. As the years have passed, it has become clear that anti-terrorism laws amount to much more than a transient, short-term response.

In many ways, this makes these laws of a greater significance than the exceptional measures typically found on the statute book during World Wars I and II. Those conflicts were of more definite duration and wartime legal measures ceased to operate soon after the conflict ended. By contrast, modern anti-terrorism laws have taken on a character of permanence, as the so-called "war on terror" has run for a longer period than those worldwide conflicts combined and continues unabated with no likely end in sight. In addition, while a few anti-terrorism laws are the subject of "sunset clauses" that could see them lapse after a specified period of time, most have effect for an indefinite duration. All this points to the conclusion that anti-terrorism laws may be altered in the coming years but will not likely be repealed.

The realisation that extraordinary anti-terrorism laws are here to stay has important implications. We can expect that the inroads these laws made into human rights legislation will endure. In doing so, the laws create new precedents, understandings, expectations, and political conventions when it comes to the proper limits of government power and the role of the state. Indeed, many anti-terrorism measures are becoming seen as normal rather than exceptional. This is due both to the passage of time and the fact that anti-terrorism strategies are being copied in other areas of the law. All this suggests that anti-terrorism laws are not themselves only shaped by human rights concepts, but in turn are shaping those concepts so as to bring about a historical shift in our understandings of liberty and security.

One important question in the global debate over anti-terrorism laws is what difference a charter or bill of rights makes to how a nation responds in the aftermath of an attack. For example, it is easy to play down the significance and effectiveness of such instruments at a time when the community is gripped with fear and grief. Certainly, there are many examples from the United States and elsewhere that demonstrate this. The same question arises in Canada, but it is difficult to gauge what difference the Canadian Charter of Rights and Freedoms has made to the enactment of anti-terrorism laws without some sort of comparator. The difference the Charter makes needs to be understood in light of how things might have played out if there had been no such human rights protection.

This is where Australia comes in. Australia is similar to Canada in many respects, including in regard to its legal and political systems. However, it is unique when it comes to national human rights protection.[1] Australia is now the only democratic nation in the world that lacks a national charter, bill of rights, or human rights act. Unlike Canada, Australia responded to the dramatic events of September 11, and subsequent terrorist attacks, without any baseline of human rights protection. Australia therefore provides a useful counterfactual to the question of how a nation such as Canada might have responded to September 11 and later events without the Canadian Charter of Rights and Freedoms.

Australian context

Australia came relatively late to enacting national anti-terrorism laws. It had no such laws prior to the September 11 attacks, but afterwards quickly made up for this omission. The enactment of these laws not only reflected events overseas, but also real concerns that terrorism might occur at home. This reflects the ongoing assessment of the Australian government and its agencies that terrorism remains a persistent threat to the community. As the government has stated, "[t]he threat of terrorism to Australia is real and enduring. It has become a persistent and permanent feature of Australia's security environment."[2]

1 See George Williams & David Hume, *Human Rights Under the Australian Constitution*, 2nd ed (South Melbourne: Oxford University Press, 2013).

2 Australia, Australian Government, *Counter-Terrorism White Paper: Securing Australia — Protecting Our Community* (Barton Australian Capital Territory: Department of the Prime Minister and Cabinet, 2010) at ii.

Before looking at the laws actually enacted, it is important to ask the question of whether any laws were needed in the first place. The absence of national anti-terrorism laws in Australia prior to September 11 was unsurprising. Apart from isolated incidents such as the 1978 bombing attack on the Commonwealth Heads of Government Regional Meeting at the Sydney Hilton Hotel, Australia had little direct experience of terrorism. It took the attacks of September 11 to provide a catalyst for the passing of Australia's first national anti-terrorism laws.

It had been argued that Australia did not need such laws, primarily on the basis that terrorism can be dealt with by the existing criminal law.[3] However, that position was not sustainable. Laws were needed to deal with specific aspects of terrorist threats. For example, the nation needed a statutory framework directed to preventing the financing of terrorist acts overseas so as to ensure that Australians do not enable such attacks. New laws were also required on subjects such as the targeting of terrorist organisations.

More broadly, the criminal law in place in 2001 was not sufficient for the task of preventing terrorist attacks. It is not appropriate in the context of terrorism, as is often the case for other types of crime, to primarily apply the force of law once an act has been committed so as to bring the perpetrator to justice. Instead, given the potential for catastrophic damage and loss of life, intervention to prevent terrorism is justified at an earlier point in the chain of events that might lead to an attack. Such prevention can be seen as an act of political pragmatism given the pressing need for Australian governments to take action to protect the community from terrorism. It can also be seen as a measure designed to respect fundamental human rights, including the right to life.

Anti-terrorism laws raise important questions as to how early the law should intervene to pin criminal responsibility on actions that may give rise to a terrorist attack. It is arguable that the laws, as actually enacted, give rise to lengthy jail sentences for preparatory acts too far removed from the actual commission of an act of terrorism. However, this is not a persuasive argument against the existence of anti-terrorism laws per se, but rather for their recalibration so as to ensure that they criminalise actions that can be more

3 See e.g., Australia, Senate, *Parliamentary Debates (Hansard)*, 40th Parl, 1st Sess, No. 6 (24 June 2002) at 2403 (Senator Brown), where Greens Senator Bob Brown said during debate on the *Security Legislation Amendment (Terrorism)* Bill 2002 (Cth) package: "The existing criminal law, with offences such as murder, criminal damage, conspiracy, and aiding and abetting, can and should be used to prosecute and penalise anything that can sensibly be described as terrorism."

realistically described as preparation for committing a terrorist act. On the other hand, the argument for appropriate anti-terrorism laws is not a case for departing from well-accepted principles of criminal law aimed at ensuring outcomes such as the right to a fair trial. Anti-terrorism laws must be framed in light of such human rights values.

An effective prevention strategy also required laws to confer powers on agencies such as the Australian Federal Police and Australian Security Intelligence Organisation (ASIO). These organisations required legal authorisation to collect information to head off an attack and the power to target not only individuals that might engage in terrorism but also groups or cells of potential terrorists. Again, the issue here is not so much one of justification but of proportionality. Australia's law enforcement and intelligence agencies should have sufficient powers to dismantle and prevent threats to the community, but those powers should be carefully tailored to the level of the threat. They should also be subject to strict and transparent safeguards enforced by independent agencies.

Apart from the inadequacy of its existing national laws, Australia was justified in enacting new anti-terrorism laws after September 11 in fulfilment of its obligations as a member of the international community. For example, Resolution 1373 of the United Nations Security Council, adopted on 28 September 2001, determined that States shall "[t]ake the necessary steps to prevent the commission of terrorist acts" by ensuring that "terrorist acts are established as serious criminal offences in domestic laws and regulations."[4] This gave rise to an obligation on the part of Australia to enact laws directed at this problem. While Australia had criminal laws in place that could have been used to *prosecute* individuals for acts of terrorism, Australia could not claim that it already had sufficient laws in place directed at the *prevention* of terrorism.

Finally, Australia's anti-terrorism laws can be seen as having an important moral dimension. In an era punctuated by terrorist attacks from New York and Washington to Bali, Madrid, London, Mumbai, Jakarta and elsewhere, it was appropriate that Australia outlawed such forms of political violence. Enacting a specific crime of terrorism signalled that, as a society, Australia rejects the use of violence in the pursuit of a political, religious, or ideological goals.

4 SC Res 1373, UNSCOR, 56th sess, 4385th Mtg, UN Doc S/RES/1373 (2001), at art 2(b), art 2(e).

Australian governments and parliaments deserve credit for recognising that Australia required new laws directed towards protecting the community from the threat of terrorism. These institutions were correct in their assessment that such laws ought to be directed particularly to the prevention of such acts. In hindsight, Australia's legal system prior to 9/11 reflected complacency about the potential for political violence in Australia and the region. The task then for legislators was not to determine whether anti-terrorism law should be enacted, but to bring them into being in an appropriate form, in a way that gives due respect to fundamental human rights.

Australian anti-terrorism laws

The problem arising from Australia's anti-terrorism laws is the extraordinary and far reaching form in which they were enacted. Australia's response to September 11 was similar to that of many other countries, underlining the need to deviate from the ordinary criminal law — with its emphasis on punishment of individuals after the fact — by preventing terrorist acts from occurring in the first place. The result was a bout of lawmaking that continues to challenge long-held assumptions as to the proper limits of the law, and criminal law in particular, as well as accepted understandings of the respective roles of the executive, parliament, and the judiciary.

One remarkable feature of Australia's response to terrorism is the sheer volume of lawmaking. In the years since September 11, Australia's Federal Parliament, thus excluding the laws of the States and Territories, has enacted 61 anti-terrorism laws.[5] This can be divided into three periods. From 11 September 2001 to the fall of Prime Minister Howard's Coalition government in November 2007, the Federal Parliament enacted 48 anti-terrorism laws, an average of a new anti-terrorism statute every 6.7 weeks. Across the following 6 years of the Rudd, Gillard, and Rudd governments, the Federal Parliament enacted 13 of these laws, an average of one new law every six months or so.

5 This figure is based upon the 54 anti-terrorism statutes I identified had been enacted in the decade after September 11 in George Williams, "A Decade of Australian Anti-Terror Laws" (2011) 35 Melbourne University Law Review 1136 at 1144-1145. Since that tally, the following further seven anti-terrorism laws have been enacted, with such statutes identified according to the methodology set out in that article: *Combating the Financing of People Smuggling and Other Measures Act 2011* (Cth); *Aviation Transport Security Amendment (Air Cargo) Act 2011* (Cth); *Nuclear Terrorism Legislation Amendment Act 2012* (Cth); *Social Security Amendment (Supporting Australian Victims of Terrorism Overseas) Act 2012* (Cth); *Aviation Transport Security Amendment (Screening) Act 2012* (Cth); *Customs Amendment (Military End-Use) Act 2012* (Cth); *Aviation Transport Security Amendment (Inbound Cargo Security Enhancement) Act 2013* (Cth).

Finally, no new anti-terrorism laws were passed under the Abbott government from its election victory in September 2013 to 11 September 2014.

These statistics are eye-catching and, indeed, Australia's output of anti-terrorism laws exceeds that of nations facing a higher threat level. In a comparative analysis of the anti-terrorism laws passed in a range of democratic nations, Kent Roach has described Australia's response as being one of "hyper-legislation" as a result of Australia getting "caught up in the 9/11 effect."[6] He found that in its "legislative war against terrorism":[7]

> Australia has exceeded the United Kingdom, the United States, and Canada in the sheer number of new antiterrorism laws that it has enacted since 9/11 ... this degree of legislative activism is striking compared even to the United Kingdom's active agenda and much greater than the pace of legislation in the United States or Canada. Australia's hyper-legislation strained the ability of the parliamentary opposition and civil society to keep up, let alone provide effective opposition to, the relentless legislative output.[8]

Australia's national anti-terrorism laws are striking not just in their volume but, more significantly, in their reach. In particular, the laws:

- define a "terrorist act" as conduct engaged in or threats made for the purpose of advancing a "political, religious or ideological cause."[9] The conduct or threat must be designed to coerce a government, influence a government by intimidation, or intimidate a section of the public. The conduct or threat must also cause any of a number of harms, ranging from death and serious bodily harm to endangering a person's life, seriously interfering with electronic systems, or creating a "serious risk to the health or safety of ... a section of the public."[10] The definition excludes advocacy, protest, dissent, or industrial action so long as there is no intention to cause outcomes such as serious physical harm, death, or a serious risk to the health or safety of the public. The definition is more carefully tailored than others in some nations,[11] but still encompasses liberation movements, such as the struggle of Nelson Mandela against apartheid,

6 Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (New York: Cambridge University Press, 2011) at 309.

7 *Ibid* at 430.

8 *Ibid* at 310.

9 *Criminal Code Act 1995* (Cth), s 100.1(1) "terrorist act" para (b) [*Criminal Code*].

10 *Ibid* at s 100.1(2)(e).

11 Ben Golder & George Williams, "What is 'Terrorism'? Problems of Legal Definition" (2004) 27:2 UNSWLJ 270; Keiran Hardy & George Williams, "What is 'Terrorism'? Assessing Domestic Legal Definitions" (2011) 16 UCLA J Int L & Foreign Aff 77.

the armed resistance in East Timor or those seeking to bring down the Syrian government.

- create a range of new offences, including that of committing a "terrorist act."[12] Other provisions create a wide range of offences for conduct preparatory to a terrorist act. These include: providing or receiving training connected with terrorist acts;[13] possessing "things" connected with terrorist acts;[14] and collecting or making documents likely to facilitate terrorist acts.[15] The penalties are severe. For example, a maximum penalty of life imprisonment is imposed where a person provides or collects funds and is reckless as to whether those funds will be used to facilitate or engage in a terrorist act[16] or, more generally, where the person does "any act in preparation for, or planning, a terrorist act."[17] These offences can be combined with the "inchoate" offences that apply to other Commonwealth crimes, such as those of attempt or conspiracy.[18] These offences are also committed even if a terrorist act does not occur or the training/thing/document/act is not connected to a specific terrorist act.[19] The offences thus render individuals liable to serious penalties even before what would ordinarily be regarded as the formation of criminal intent actually exists. It is this predictive approach, exemplified in the doubly pre-emptive offence of conspiracy to do an act in preparation for a terrorist act, which gives the offences such an extraordinary reach.

- contain remodelled sedition offences whereby it is an offence punishable by seven years' imprisonment to urge the overthrow of the Constitution or government by force or violence, or to urge interference in parliamentary elections. It is also an offence to urge violence against a group or an individual on the basis of their race, religion, or political opinion.[20]

- enable warrantless searches whereby police officers may enter premises without a warrant in order to prevent a thing from being used in connec-

12 *Supra* note 9, s 100.1(1) "terrorist act".
13 *Ibid*, s 101.2.
14 *Ibid*, s 101.4.
15 *Ibid*, s 101.5.
16 *Ibid*, ss 103.1(1) (general offence), 103.2(1) (where the funds are collected for or on behalf of a specific person).
17 *Ibid*, s 101.6.
18 *Ibid*, ss 11.1, 11.4 and 11.5.
19 See *ibid*, ss 101.2(3), 101.4(3), 101.5(3), 101.6(2).
20 *Ibid*, ss 80.2A–80.2B. These offences were first introduced as 'sedition' offences by the *Anti-Terrorism Act (No 2) 2005* (Cth), Schedule 7, item 12. They were amended to their current form by the *National Security Legislation Amendment Act 2010* (Cth), Schedule 1, Part 2.

tion with a terrorism offence, or where there is a serious and imminent threat to a person's life, health, or safety.[21] While on the premises, police officers have the power to seize any other "thing" if they suspect on reasonable grounds that doing so is necessary to protect someone's health or safety or because the circumstances are "serious or urgent."[22]

- provide a longer investigation period for terrorism offences (24 hours) compared to non-terrorism offences (12 hours).[23] In the case of a terrorism offence, the investigating authorities may also apply to a magistrate for up to seven days of "dead time" if they need to suspend or delay questioning the suspect (for example, while making overseas inquiries in a different time zone).[24]

- enable the proscription or banning of organisations by government decree. The Attorney-General can make a written declaration that an organisation is a "terrorist organisation."[25] Once a declaration is made, a range of offences apply to individuals who are linked to that organisation, including: directing the activities of a terrorist organisation;[26] intentionally being a member of a terrorist organisation;[27] recruiting for a terrorist organisation;[28] receiving funds from or giving funds to a terrorist organisation;[29] providing "support" to a terrorist organisation;[30] and associating with a terrorist organisation.[31]

- include a "preventative detention order" regime in which individuals may be taken into custody, without charge or trial, and detained for a maximum period of 48 hours where this is reasonably necessary to prevent an "imminent" terrorist act from occurring or to preserve evidence relating to a recent terrorist act.[32] An extended period of detention is then possible under State law up to a maximum of 14 days.[33]

21 *Crimes Act 1914* (Cth), s 3UEA.
22 *Ibid*, s 3UEA(5).
23 *Ibid*, compare ss 23DB–23DF (terrorism offences) with ss 23C–23DA (non-terrorism offences).
24 *Ibid*, s 23DB(11).
25 In order to make such a declaration, the Attorney-General must be satisfied that the organisation "is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act" or "advocates the doing of a terrorist act", *Criminal Code*, s 102.1(2)(a)–(b).
26 *Ibid*, s 102.2.
27 *Ibid*, s 102.3.
28 *Ibid*, s 102.4.
29 *Ibid*, s 102.6.
30 *Ibid*, s 102.7.
31 *Ibid*, s 102.8.
32 *Ibid*, ss 105.4, 105.9.
33 See e.g., *Terrorism (Police Powers) Act 2002* (NSW), s 26K(2).

- include a "control order" regime, in which individuals not suspected of any criminal offence may be subject to a wide range of restrictions that can regulate almost every aspect of their life, ranging from where they work or live, to whom they can talk, where those restrictions are "reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act."[34] A person can even be subject to house arrest. All this can occur without a trial, and indeed control orders ignore the concept of guilt and innocence altogether.

- provide extraordinary new powers to ASIO whereby the Director-General of ASIO can apply to the Attorney-General for questioning and detention warrants.[35] A person may be questioned in eight-hour blocks up to a maximum of 24 hours where this would "substantially assist the collection of intelligence that is important in relation to a terrorism offence."[36] In addition, a person may be detained for up to a week for questioning where there are reasonable grounds to believe that he or she will alert another person involved in a terrorism offence, not appear before ASIO for questioning, or destroy a record or thing that may be requested under the warrant.[37] It is an offence punishable by five years' imprisonment to refuse to answer ASIO's questions or to give false or misleading information. These warrants may be issued against non-suspects, including family members, journalists, children between the ages of 16 and 18,[38] and innocent bystanders. It is an offence, while a warrant is in effect and for two years afterwards, to disclose "operational information" (including "information that [ASIO] has or had") that a person has as a direct or indirect result of the issue or execution of the warrant.[39]

- contain new powers of electronic surveillance, not only for terrorist suspects, but also for those who the authorities believe are "likely to communicate" with the person under investigation.[40]

- provide additional powers to the Attorney General to close down a courtroom from public view where sensitive national security information is likely to be disclosed.[41] That information may then be led against a

34 *Supra* note 9, s 104.4(1)(d).
35 *Australian Security Intelligence Organisation Act 1979* (Cth), Part III, Division 3.
36 *Ibid*, ss 34D–34G, 34R–34S.
37 *Ibid*, s 34F(4)(d). The seven day limit on detention is found in ss 34G(4)(c), 34S.
38 *Ibid*, s 34L; See the "special rules for young people", *ibid*, s 34ZE.
39 *Ibid*, s 34ZS.
40 *Telecommunications (Interception and Access) Act 1979* (Cth), s 46(1)(d)(ii).
41 *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth), s 31.

defendant in summary or redacted form. Decisions as to whether the evidence will be admitted are decided in a closed hearing from which the defendant and even his or her legal representative may be excluded.[42] When deciding whether and in what form to admit the evidence, the judge or magistrate is directed to give "greatest weight" to the interests of national security over other considerations.[43]

- require that publications, films, or computer games that "advocate" the doing of a terrorist act must be classified as "Refused Classification."[44] This includes instances where the publication, film, or computer game "directly praises the doing of a terrorist act in circumstances where there is a risk that such a praise might have the effect of leading a person (regardless of his or her age or any mental impairment (within the meaning of section 7.3 of the *Criminal Code*) that the person might suffer) to engage in a terrorist act."[45]

As is clear from this list, Australia's new anti-terrorism laws have an impact upon a broad range of human rights. The laws are extraordinary in their scope and operation, and so require a high level of justification to support their impingement upon fundamental freedoms.

Anti-terrorism laws without a Bill of Rights

Australia needed new anti-terrorism laws, but the laws actually enacted reflect major problems of process and political judgment. To a significant degree, this was a result of many of the laws being enacted in haste[46] as a reaction to catastrophic attacks overseas, especially those on September 11 and in London in 2005, both of which provoked considerable anger, fear, and grief in the community.

It is not surprising that at such times people look to their political leaders for a strong response, including action that may actually prove to be

42 *Ibid*, s 29(3).

43 *Ibid*, ss 31(7)(a), 31(8), 38L(7)(a), 38L(8).

44 *Classification (Publications, Films and Computer Games) Act 1995* (Cth), s 9A.

45 *Ibid*, s 9A(2)(c).

46 See Andrew Lynch, "Legislating with Urgency — The Enactment of the *Anti-Terrorism Act [No 1] 2005*" (2006) 30 Melbourne UL Rev 747; see Andrew Lynch, "Legislating Anti-Terrorism: Observations on Form and Process" in Victor V Ramraj et al, eds, *Global Anti-Terrorism Law and Policy*, 2nd ed (New York: Cambridge University Press, 2012) 151; see Greg Carne, "Hasten Slowly: Urgency, Discretion and Review — A Counter-Terrorism Legislative Agenda and Legacy" (2008) 13:2 Deakin Law Review 49.

disproportionate to the threat due to its impact on democratic liberties. This dynamic is well known, and was well stated by Alexander Hamilton in *The Federalist* (No 8) in the late-18th century:

> Safety from external danger is the most powerful director of national conduct. Even the ardent love of liberty will, after a time, give way to its dictates. The violent destruction of life and property incident to war, the continual efforts and alarm attendant on a state of continual danger, will compel nations the most attached to liberty to resort for repose and security to institutions which have a tendency to destroy their civil and political rights. To be more safe, they at length become willing to run the risk of being less free.[47]

This risk might be countered, or at least lessened, by strong human rights protection. However, such protection, at least in the form of a formal national human rights instrument, is absent in Australia.

Australia lacks anything akin to a national human rights act or bill of rights. Human rights acts have been passed in two sub-national jurisdictions, the Australian Capital Territory in 2004[48] and Victoria in 2006.[49] However, their operation is limited in that they apply only with respect to the particular territory and state laws, and not at all to national laws, including those enacted on the subject of terrorism.

In 2008, a federal inquiry was initiated to determine whether a human rights act should be adopted at the national level. It recommended in the following year that such an act be enacted.[50] However, Australia's federal government rejected this recommendation, and instead proposed a new national human rights framework centred upon enhanced parliamentary scrutiny. As now enacted, the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) requires bills and legislative instruments to be accompanied by a statement of their compatibility with a number of international human rights conventions.[51] These claims can be examined, and other human rights matters investigated, by a new Parliamentary Joint Committee on Human Rights. The model provides no avenues for judicial enforcement of human rights. There

47 James Madison, Alexander Hamilton, & John Jay, *The Federalist Papers* (New York: Penguin, 1987) at 114-115..

48 *Human Rights Act 2004* (ACT).

49 *Charter of Human Rights and Responsibilities Act 2006* (Vic).

50 Austl, Commonwealth, National Human Rights Consultation Committee, *Report* (Barton ACT: Commonwealth of Australia, 2009).

51 See generally George Williams & Lisa Burton, "Australia's Exclusive Parliamentary Model of Rights Protection" (2013) 34:1 Stat L Rev 58.

are also no legal consequences should Parliament not properly fulfil the scrutiny function.

A scheme of human rights protection is also absent from the Australian Constitution. The Constitution was drafted at two conventions held in 1891 and 1897–98, and then enacted for Australia by the British Parliament. In *Australian Capital Television Pty Ltd v Commonwealth*, Mason CJ noted the "prevailing sentiment of the framers that there was no need to incorporate a comprehensive Bill of Rights in order to protect the rights and freedoms of citizens. That sentiment was one of the unexpressed assumptions on which the Constitution was drafted."[52] Chief Justice Mason's statement reflects the widely held view that the framers intended the human rights of the Australian people to be protected by the common law and the good sense of elected representatives (as constrained by the Westminster system of responsible government). In fact, the Australian Constitution reads in many ways as did the Canadian Constitution prior to its amendment in 1982.

The Australian Constitution does contain a few, scattered express rights. However, the narrow drafting of these provisions and their constrained interpretation by the High Court of Australia has meant that they have had little (if any) effect. For example, the requirement in s 80 of the Constitution that "[t]he trial on indictment of any offence against any law of the Commonwealth shall be by jury"[53] has been interpreted by the High Court as conferring on the Commonwealth Parliament the power to determine what offences shall be "on indictment," and thus subject to a jury trial.[54] Similarly, s 41, which might seem to confer a "right to vote,"[55] has been interpreted as applying only to people who had a right to vote in State elections as of 12 June 1902. The High Court has noted that the "practical effect of s 41 is now spent."[56]

The most significant constitutional development for the protection of human rights in Australia has been the implication of rights by the High Court from the text and structure of the Constitution. The High Court has discovered in the Constitution a freedom to discuss matters relating to Australian

52 (1992), 177 CLR 106 at 136, 104 ALR 389.

53 *R v Bernasconi* (1915), 19 CLR Griffith J at 632.

54 See e.g., *ibid* Isaacs J at 637.

55 *Australia's Constitution 1900* (Cth). This section provides that "[n]o adult person who has or acquires a right to vote at elections for the more numerous House of the Parliament of a State shall, while the right continues, be prevented by any law of the Commonwealth from voting at elections for either House of the Parliament of the Commonwealth."

56 *Snowdon v Dondas* (1996), 188 CLR 48 Brennan CJ and Dawson, Toohey, Gaudron and Gummow JJ at 71-72, 139 ALR 475.

government.[57] However, this implication is narrowly focused, and does not extend to artistic, commercial, personal, or academic speech, except where they relate to how people vote in elections. Hence, communications between family members or artistic works that have attracted controversy receive no legal protection. Not surprisingly, the implied freedom has proved a frail shield. The High Court has only invoked it twice to overturn a law: once in 1992 to strike down restrictions on political advertising;[58] and then in 2013 to invalidate a law banning corporations, unions, and individuals not on the electoral roll from donating to political campaigns.[59]

In addition, Chapter III of the Constitution, which establishes and defines "federal judicial power"[60] and creates a separation of judicial from legislative and executive powers, has been recognised by the High Court as the source of a number of procedural rights. For example, in *Polyukhovich v Commonwealth*,[61] six of the seven members of the High Court held that the Commonwealth Parliament was constitutionally prohibited from enacting a Bill of Attainder. It was found that a declaration of the guilt of a particular person or class of persons by the Commonwealth Parliament would constitute an improper exercise of judicial power by the Parliament. In the same case, however, the limits of the separation of powers for the implication of rights were also demonstrated. The High Court was unable to reach a consensus as to whether the Australian Constitution prohibits the Commonwealth Parliament from making retrospective criminal laws. To date, the High Court has stopped short of implying substantive rights from the separation of powers provision. For example, in *Kruger v Commonwealth*,[62] five members of the High Court rejected the existence of an implied guarantee of general legal equality in the Australian Constitution.

Anti-terrorism laws in the courts

These constitutional rights are limited in scope, and so there is rarely a role for Australian judges in assessing Australia's terrorism laws and even then not usually on human rights grounds. Courts might only be called upon, for example, to assess as part of the federal division of power whether a counter-terrorism law falls within any of the limited subject-matters on which the

57 *Supra* note 49.
58 *Ibid.*
59 *Unions NSW v New South Wales*, [2013] HCA 58, 304 ALR 266.
60 *Supra* note 52 at vii.
61 (1991), 172 CLR 501, [1992] LRC (Const) 54.
62 (1997), 190 CLR 1, 146 ALR 126.

Constitution permits the Commonwealth Parliament to make laws (such as with respect to "the naval and military defence of the Commonwealth" in s 51(vi)).[63]

The courts have also developed the common law rules, now known collectively as the "principle of legality," regarding the interpretation of legislation so that the infringement of human rights is minimised. According to Mason CJ and Brennan, Gaudron, and McHugh JJ in *Coco v The Queen*:

> The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakeable and unambiguous language.[64]

Hence, "a statute or statutory instrument which purports to impair a right to personal liberty is interpreted, if possible, so as to respect that right."[65] However, the limits of this method of judicial review in protecting human rights are clear. The Commonwealth Parliament may legislate to abrogate any human right if it merely states its intention to do so "by unmistakeable and unambiguous language."[66] Parliament has often shown that it is more than willing to manifest such an intention in its anti-terrorism laws, and in such a case there is no mechanism through which to analyse whether such abrogation is appropriate.

A constitutional challenge to Australia's anti-terrorism control order regime in *Thomas v Mowbray*[67] highlights the limits of Australian law when it comes to human rights. Division 104 of the *Criminal Code* empowers the Australian Federal Police to seek a control order imposing restrictions, prohibitions, and/or obligations upon an individual (for example, that he or she may not communicate with certain people or must reside at a particular address). Such an order may be made if an "issuing court" is satisfied, on the balance of probabilities, that the control order would substantially assist in preventing a terrorist act or that the subject of the control order provided training to or received training from a terrorist organisation. No finding of guilt or wrong-doing need be reached.[68]

63 *Supra* note 52, s 51(vi).
64 (1994), 179 CLR 427 at 437, 120 ALR 415.
65 *Re Bolton; Ex parte Beane* (1987), 162 CLR 514 Brennan J at 523, 70 ALR 225.
66 *Coco v The Queen* (1994) 179 CLR 427 Mason CJ, Brennan, Gaudron and McHugh JJ at 437.
67 [2007] HCA 33, 233 CLR 307.
68 *Criminal Code*, Division 104.

Thomas v Mowbray was not argued before the High Court on the basis that the control order regime violated human rights. It was argued that: (a) the legislation did not fall within the scope of the defence power, external affairs power, or implied nationhood power in the Constitution;[69] and (b) the conferral of a power upon judicial officers to issue control orders violated Chapter III of the Constitution (either because it is a non-judicial power or, if the power is judicial, the legislation authorises the exercise of that power in a manner contrary to Chapter III).[70]

It, therefore, came as no surprise that human rights were not given a prominent place in any of the five separate judgments of the majority, which rejected both of the complainant's arguments. Comments made by Gleeson CJ in relation to the Chapter III issue demonstrate a perception on the part of the majority that human rights were principally the domain of the legislative and executive branches of government:

> An argument, as a matter of policy, that legislation for anti-terrorist control orders ought to be subject to some qualification in aid of the human rights of people potentially subject to such orders is one thing. An argument that the making of such orders should be regarded as totally excluded from the judicial function is another.[71]

> No other member of the majority made any reference to human rights in their judgments. By contrast, the dissenting judgment of Kirby J is exceptional for its willingness to take human rights (and international law) into account. He said: "The *Australian Constitution* should be read, so far as the text allows, in a way that is harmonious with the universal principles of the international law of human rights and not destructive of them."[72]

In finding the control order regime invalid, Kirby J stated that it "directly encroaches upon rights and freedoms belonging to all people both by the common law of Australia and under international law."[73] As in other cases where he invoked such an approach, he found himself in dissent.

Anti-terrorism laws in hindsight

Legally protected human rights standards can provide a yardstick against which to assess the making of new anti-terrorism laws. Even then, they may

69 [2007] HCA 33, 233 CLR 307 at 313-314.
70 *Ibid* at 327.
71 *Ibid* at 329.
72 *Ibid* at 441.
73 *Ibid* at 380.

prove to be only of limited benefit in the face of what can be overwhelming political and community pressure, in the aftermath of a terrorist attack, for "tough laws" that "do whatever it takes" to stop a future terrorist attack.

A more significant benefit of human rights protection may therefore be that it can provide a trigger and mechanism for post-enactment analysis. This is a means by which overbreadth in anti-terrorism laws in other democratic nations can be reassessed and on occasion remedied. Such a winding back may occur as a result of judicial decisions or through a fresh assessment by a government recognising the value and importance of protecting democratic freedoms.

Such a call was taken up in the lead-up to the 2010 United Kingdom general election. Counter-terrorism reform was identified as a priority by the Liberal Democrats and the Conservative Party and then formed part of the Cameron Coalition agreement between them.[74] In 2011, the new Coalition Government announced a comprehensive review of the UK's anti-terrorism and security powers. Home Secretary Theresa May declared the government was "committed to reversing the substantial erosion of civil liberties" produced by the UK's terrorism laws:

> I want a counter-terrorism regime that is proportionate, focused and transparent. We must ensure that in protecting public safety, the powers which we need to deal with terrorism are in keeping with Britain's traditions of freedom and fairness.[75]

The results of this review were published in 2011. It was found that some of the UK's counter-terrorism measures were "neither proportionate nor necessary."[76] As a result, the government announced a suite of proposals designed to "liberalise" its counter-terrorism laws to "correct the imbalance ... between the State's security powers and civil liberties" and make those powers more targeted.[77] A key component of this reform was the abolition of control orders and their replacement with Terrorism Prevention and Investigation Measures (TPIMs).[78]

74 UK, Government, *The Coalition: Our Programme for Government* (London: Cabinet Office, 2010) at 11, 24.

75 UK Government, Press Release, "Rapid Review of Counter-Terrorism Powers" (13 July 2010), online: UK Gov <https://www.gov.uk/government/news/rapid-review-of-counter-terrorism-powers>.

76 UK, HC, "Review of Counter-Terrorism and Security Powers: Review Findings and Recommendations" Cm 8004 in *Sessional Papers*, (2011) 1 at 5.

77 *Ibid* at 3.

78 *Ibid* at 6.

Australia has gone through no like process of political recalculation and review despite the fact that its control order regime, which remains in place unamended, is based upon the now-repealed UK regime.[79] The result in Australia is a body of anti-terrorism laws that in key respects undermines democratic freedoms to a greater extent than the laws of other comparable nations, including nations facing a more severe terrorist threat. For example, it would be unthinkable, if not constitutionally impossible, in nations such as the United States and Canada to restrict freedom of speech in the manner achieved by Australia's new censorship laws that enable publications, films, or computer games to be banned according to the possible reaction of a person suffering a mental impairment. It would also not be possible to confer a power upon a secret intelligence agency, like that conferred on ASIO, to question and detain for up to a week non-suspect citizens. Similarly, Australia — but not Canada, due to its *Charter of Rights and Freedoms* — makes membership of terrorist organisations a crime and imposes lengthy jail terms due to recklessness on the part of the accused.[80]

A central challenge in enacting anti-terrorism laws is how best to ensure the security of the nation while also respecting the liberty of its people. In democratic nations, the answer is usually grounded in legal protections for human rights. In Australia, the answer is provided almost completely by the extent to which political leaders are willing to exercise good judgment and self-restraint in the enactment of new laws. This is not a check or balance that has proven effective in Australia when it comes to the enactment of anti-terrorism laws. Indeed, Australia provides a sobering example of how a democratic nation can respond to a threat such as terrorism without an effective human rights framework.

Conclusion

Australia was right to enact new anti-terrorism laws in the wake of the September 11 attacks. Such laws were needed to ensure that the legal system offered protection to the community by preventing terrorist attacks from occurring. Passing new anti-terrorism laws also enabled Australia to live up to its international obligations and signalled that as a nation Australia rejects such forms of political violence.

79 See generally Lisa Burton & George Williams, "What Future for Australia's Control Order Regime?" (2013) 24 Public Law Review 182.

80 *Supra* note 6 at 363, 381.

In the years since September 11, the Australian Parliament has enacted many new anti-terrorism laws. This has given rise to a large and remarkable new body of legislation providing for powers and sanctions that were unthinkable prior to the 2001 attacks. Indeed, the rhetoric of a "*war* on terror" reflects the nature and severity of the laws enacted in response to the threat. While these laws were often cast as a transient response to an exceptional set of events, it is now clear that the greater body of this law will remain on the Australian statute books for the foreseeable future.

This poses a long-term challenge for the Australian legal system and human rights protection. While new anti-terrorism laws were needed, the laws actually enacted diverge in too many respects from the laws that Australia should have achieved. The result is a body of enactments that is creating new understandings of the normal limits of the law in Australia. This is broadening the extent to which it is considered acceptable for Australian law to sanction extraordinary powers or outcomes, such as detention without charge or the silencing of speech.

Australia's new anti-terrorism laws expose structural problems with Australia's system of law. That system is dependent upon an effective parliamentary process and a culture of respect among political leaders when it comes to democratic values, rule-of-law, and human rights. Anti-terrorism laws reveal how many of the foundational principles of Australian democracy are actually only assumptions and conventions within the political system rather than hard legal rules that demand compliance. The laws reveal the capacity of politicians to contravene these values and, in doing so, to create new and problematic precedents for the making of other laws. Overall, the Australian experience is a salutary lesson of what can occur when a nation lacks a national bill of rights. The Australian case demonstrates how, in the absence of such a law, it can be all too easy to enact anti-terrorism measures that compromise fundamental human rights.