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**JUDICIAL REVIEW IN A TIME OF TERRORISM - BUSINESS AS  
USUAL**

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HONOURING ARTHUR CHASKALSON

I honour Arthur Chaskalson for his service as Chief Justice of South Africa and inaugural President of the Constitutional Court of South Africa. I salute him, an *alumnus* of this famous University.

I first met him when he was practising at the Johannesburg Bar. I was taking part in a series of judicial conferences, organised by the Commonwealth Secretariat, on the domestic application of international human rights law. One of those conferences was convened, in happier times, in Harare, Zimbabwe under the leadership of Chief Justice Enoch Dumbutshena. He too was a hero of human rights and a noble African

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<sup>\*</sup> Justice of the High Court of Australia. This essay draws on earlier writings of the author on similar themes.

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defender of the rule of law. Mr Chaskalson SC gave the principal after dinner speech for the assembled Commonwealth judges, most of them gathered from all parts of Africa.

The address was electrifying, not for any verbal tricks or false passion. It was the calm, measured voice of the advocate, able to describe the sorry pass to which the law and the judiciary had come in South Africa by that time. We knew that we were listening to an authentic voice of liberty, for we were aware that he had appeared in several important trials of members of the freedom movement in his country, including of Nelson Mandela. We also knew that he was one of the joint founders in 1978 of the Legal Resources Centre that provided legal assistance, including to those who contested aspects of apartheid rule. We listened with growing concern. How would this end? When would it end?

I was there on that sunny day in Pretoria when Nelson Mandela was inaugurated as the first President of the new democratic South Africa. The President had remembered how the International Commission of Jurists (ICJ) had sent observers to his trial and the trials of others in the freedom struggle. At that time I was the President of the ICJ. The invitation came to me because Nelson Mandela had not forgotten who were his friends in those grim days.

I remember Arthur Chaskalson's excitement about the opportunities that constitutional change presented. Responsibilities

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quickly, and naturally, were cast upon him as the first President of the Constitutional Court in 1994. He shepherded that Court, in an amazingly short space of time, to become one of the great courts of the English-speaking world. I have had the privilege of seeing him preside, directing argument in the same quiet, measured, lawyerly voice I heard at that dinner in Harare. When he was elevated to be, as well, Chief Justice of this country in 2001 the appointment was universally applauded. When this year he elected to resign after his Herculean labours, he had earned a grateful nation's thanks. He now is the President of the ICJ. We come together to honour his work for the rule of law and fundamental rights.

As an Australian, a fellow lawyer and a friend, I am grateful for the opportunity to join in the words of praise. But such words are not enough for our hero has always been a person of substance. So I turn to issues of substance. In that regard, there could be few more topical issues than the one assigned to me: the role of judicial review in a time of terrorist offences and allegations. The theme for my paper could not be simpler. It is brief. It is the message that the courts must give even - perhaps especially - at such a time. Here it is. Business as usual. Exceptionalism is truly exceptional. The usual rules. That is the message that the courts must give. They must give it without equivocation.

## JUDICIAL REVIEW IN AUSTRALIA

The Australian Constitution, remarkably enough, is the fifth oldest written text still in service as a nation's basic law<sup>1</sup>. Australia seems a young country. Its modern culture, brought by settlers from virtually every part of the world, is young. Yet, in the world's terms, it is an old, long-standing parliamentary democracy, with independent courts and elected parliaments that preceded even the establishment in 1901 of the federal Commonwealth under the written Constitution<sup>2</sup>.

That Constitution was profoundly affected by the template of the United States Constitution, particularly in the provisions for a separate Judicature. In the American document this was provided for in Art III. In the Australian, the equivalent part is Ch III.

There was no explicit conferral in the Australian Constitution of the power of the courts to perform the functions of judicial review, to examine the validity and to declare authoritatively the meaning of legislation enacted by the Federal Parliament or by State and Territory legislatures or made by the Executive Governments of those component parts of the Federation. Yet, because of the federal structure of the

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<sup>1</sup> After the Constitutions of the United States of America, Sweden, Canada and Switzerland.

<sup>2</sup> The Australian Constitution, substantially created within Australia, was a schedule to the *Commonwealth of Australia Constitution Act* 1900 (UK), 63 & 64 Victoria, Ch 12.

Constitution, it was recognised from the beginning that a decision-maker was essential to resolve conflicts over the contested repositories of power<sup>3</sup>.

The courts and the people are bound by those federal laws that are "made ... under the Constitution"<sup>4</sup>. But whether a law is made under, or pursuant to, the Constitution can only ultimately be decided with binding authority by a body that is obliged to administer the law, namely a court.

Thus, from the start, the Australian system of government accepted the rule that had been established in the early days of the United States Constitution. It was a rule involving the primacy of judicial review that had gradually petered out in England and, so far as parliamentary law was concerned, was basically dead in Britain by the end of the seventeenth century<sup>5</sup>. Yet beyond the seas, Sir Edward

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<sup>3</sup> *Baxter v Commissioners of Taxation (New South Wales)* (1907) 4 CLR 1087 at 1125; *James v The Commonwealth* (1936) 55 CLR 1 at 43; *R v Coldham; Ex parte Australian Social Welfare Union* (1983) 153 CLR 297 at 313.

<sup>4</sup> Covering cl V. So the Court could not be required to enforce an industrial award going beyond federal constitutional power: *O'Toole v Charles David Pty Ltd* (1990) 171 CLR 232 at 272, 308.

<sup>5</sup> A D Boyer, "Understanding Authority and Will: Sir Edward Coke and the Elizabethan Origins of Judicial Review" 39 *Boston College Law Review* 43 at 59 (1997).

Coke's theory of judicial review<sup>6</sup> had taken root on the American mainland. It was reinforced by the power asserted by the Privy Council to disallow laws, made by the early legislatures of the American colonies and settlements. As early as 1647, the General Court of Massachusetts had ordered copies of Coke's *Reports* and his *Commentary upon Littleton*. By the end of that century, American judicial authorities had begun to invalidate legislation that violated "fundamental law in nature". Even before the Revolution of 1776, the idea that judges could strike down laws was, a tradition "deep-rooted in the country"<sup>7</sup>.

It was out of these deep roots that the early decision of the United States Supreme Court in *Marbury v Madison*<sup>8</sup> arose. It was there that Marshall CJ asserted that judicial review was a necessity in a case arising in a federal polity where validity of a law was questioned:

"Those who apply the rule [ie the law] to particular cases, must of necessity expound and interpret that rule ... [They must] say what the law is".

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<sup>6</sup> *Dr Bonham's Case* (1610) 8 Co Rep 1136 at 118a; 77 ER 646 at 652; cf *Durham Holdings Pty Ltd v State of New South Wales* (2000) 205 CLR 399 at 420 [44].

<sup>7</sup> Boyer, n 5, 90. See also now Bruce Ackerman, *The Failure of the Founding Fathers - Jefferson, Marshall, and the Rise of Presidential Democracy* (Harvard, 2005), 12, 113, 192, 263.

<sup>8</sup> (1803) 5 US 137.

Distinguished scholars could find no explicit basis in the Australian Constitution for judicial review<sup>9</sup>. Yet from the start, there had to be an umpire. Following the American precedent, the High Court of Australia asserted that role for itself. Ultimately, there has been no serious challenge to the assertion, resting as it does on the usual foundation for constitutional implications, namely a necessity inherent in the text.

Every now and again, in Australia, judicial voices have been raised to explain and justify the asserted power of judicial review. Thus, in 1951, in the *Communist Party Case*<sup>10</sup>, in a very fractious disagreement between the Federal Government and Parliament and the High Court of Australia, Fullagar J observed<sup>11</sup>:

"[T]here are those, even today, who disapprove of the doctrine of *Marbury v Madison* and who do not see why the courts, rather than the legislature itself, should have the function of finally deciding whether an Act of the legislature in a Federal system is or is not within power. But in our system the principle of *Marbury v Madison* is accepted as axiomatic".

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<sup>9</sup> eg Professors P H Lane and A C Castles. See P H Lane, *Lane's Commentary on the Australian Constitution* (2nd ed, 1997), 14; A C Castles, "Some Uncertain Foundations of Judicial Review in Australia" (1988) 62 *Australian Law Journal* 380.

<sup>10</sup> (1951) 83 CLR 1. See M Crommelin, "Constitutional Challenges Posed by National Security: An Australian Story" in P O'Brien and B Vaughn, *Amongst Friends*, 2005, 121.

<sup>11</sup> (1951) 83 CLR 1 at 262; cf Crommelin, *ibid*, 127.

In that case, the Australian Federal Parliament had attempted conclusively to declare, by the preambular recitals of the Act, that the Australian Communist Party was prejudicial to the defence of the Commonwealth and that, therefore, the statute dealing with that Party was within the federal power to make laws with respect to defence. A majority of the High Court of Australia, in an act of great wisdom that contrasted with the contemporary decisions on similar legislation in the United States<sup>12</sup> and in South Africa<sup>13</sup>, invalidated the law. It was a decision later confirmed by the electors of Australia when, on 22 September 1951, they rejected the attempt to alter the Constitution at referendum to overcome the Court's decision<sup>14</sup>.

In Australia, in approaching the issues of the current age, much attention is focussed on the approach adopted in 1951 when the Government and Parliament sought to ban the communists. Let there be no doubt that the communists were then the equivalent of contemporary terrorists. There was much fear and not a little hysteria

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<sup>12</sup> *Dennis v United States* 341 US 494 (1951). By six Justices to two, the *Smith Act* restricting the American Communist Party and its members was upheld.

<sup>13</sup> *Suppression of Communism Act 1950* (SAf). See M D Kirby, "Terrorism and the Democratic Response 2004" (2005) 28 *University of New South Wales Law Journal* 221 at 222-223; cf "Nobel author [J M Coetzee] sees parallel in terror law", *Australian*, 24 October 2005, 1.

<sup>14</sup> The referendum failed to pass in accordance with the Australian Constitution, s 128. It failed to gain a majority of the electors voting nationally and in a majority of the States.

about them. Certainly, communists in the Soviet Union and China had access to novel weapons of mass destruction. Their ideology threatened the democracies. Their local actors were hated. Yet Dixon J, in explaining why the legislation was invalid, said<sup>15</sup>:

"History and not only ancient history, shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding the Executive power. Forms of government may need protection from dangers likely to arise from within the institutions to be protected. In point of constitutional theory the power to legislate for the protection of an existing form of government ought not to be based on a conception, if otherwise adequate, adequate only to assist those holding power to resist or suppress obstruction or opposition or attempts to displace them or the form of government they defend".

In one particular respect, the Australian Constitution contains an express provision that reinforces the centrality of judicial review and the accountability, at least of all federal officials, to the law as declared by the courts. This is the inclusion, in s 75(v) of the Constitution, of the express power, enjoyed by the High Court of Australia in the exercise of its original jurisdiction, to issue "a writ of Mandamus or prohibition or an injunction ... against an officer of the Commonwealth". This is a constitutional source of jurisdiction and power. Because of its source, it is not susceptible to legislative abolition nor to parliamentary regulation that would impede its effectiveness.

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<sup>15</sup> *Australian Communist Party v The Commonwealth* (1951) 81 CLR 1 at 187.

This point was made in 2003 in an Australian case concerned with an application for refugee protection of a person said to have been put outside effective judicial review by a federal legislative provision<sup>16</sup>, expressed as a "privative clause". The provision was aimed at restricting the questioning of official decisions in such cases in some circumstances. The High Court of Australia unanimously found that the constitutional review jurisdiction was not ousted by the legislative attempt<sup>17</sup>:

"The reservation to this Court by the Constitution of the jurisdiction in all matters in which the named constitutional writs or an injunction are sought against an officer of the Commonwealth is a means of assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them. The centrality, and protective purpose, of the jurisdiction of this Court in that regard places significant barriers in the way of legislative attempts (by privative clauses or otherwise) to impair judicial review of administrative action. Such jurisdiction exists to maintain the federal compact by ensuring that propounded laws are constitutionally valid and ministerial or other official action lawful and within jurisdiction. In any written constitution where there are disputes over such matters, there must be an authoritative decision-maker. Under the Constitution of the Commonwealth the ultimate decision-maker in all matters where there is a contest, is this Court. The Court must be obedient to its constitutional function. In the end, pursuant to s 75 of the Constitution, this limits the power of the Parliament or of the Executive to avoid, or confine, judicial review".

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<sup>16</sup> *Migration Act 1958 (Cth)*, s 474(1).

<sup>17</sup> *Plaintiff S 157/2002 v The Commonwealth* (2002) 211 CLR 476 at 513-514 [104].

From what might, therefore, have seemed at first a flimsy textual foundation for judicial review under the Australian Constitution, from more than a century of decisional law it is clear that judicial review is actually a strong remedy in the Australian constitutional setting. It could be stronger. It is sometimes ensnared in uncertain doctrines of so-called "jurisdictional error", a category that has been abandoned in other countries<sup>18</sup>. Nevertheless, the provision of constitutional writs and the direct access to the highest court to challenge federal official conduct are distinctive and beneficial features of judicial review in Australia. Thus, in Australia, there could be no suggestion that judicial review was unavailable in respect of Australian officials operating an off-shore prison camp, such as the one maintained by the United States of America at Guantánamo Bay. In Australia, so long as officers of the Commonwealth were deployed, they would be answerable to the courts, ultimately the High Court of Australia, by virtue of provisions of the Constitution that cannot be over-ridden by statute law.

What began in judicial review on somewhat shaky ground in Australia can thus be seen today to rest on settled legal foundations. What is sometimes needed to give it effect is a foundation in substantive

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<sup>18</sup> *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611; *Enfield Corporation v Development Aid Commission* (2000) 199 CLR 135.

law and the judicial will to afford relief where excess or neglect of power are demonstrated on the part of officers of the Commonwealth.

### COUNTER-TERRORISM LEGISLATION

Since September 2001 most countries of the developed world have enacted new laws designed to afford police, security agencies and the military larger powers to deal with alleged terrorists and terrorist organisations. In this respect, Australia has been no exception.

In the middle of 2002 new federal laws were enacted by the Federal Parliament. The necessity for such laws and the utility of the laws enacted were questioned in submissions made to a Senate Committee<sup>19</sup>. However, as passed, the legislation involved amendments to the Act governing the Australian Security Intelligence Organisation (ASIO); the federal Criminal Code; broader security legislation; telecommunications interception legislation; and new provisions for the suppression of the financing of terrorism.

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<sup>19</sup> M Gani and G Urbas, "Alert or Alarmed? Recent Legislative Reforms Directed at Terrorist Organisations and Persons Supporting or Assisting Terrorist Acts" (2004) 8 *Newcastle Law Review* 23 at 25 n 5. Note that State counterpart laws were enacted throughout Australia such as the *Terrorism (Police Powers) Act* 2002 (NSW) and the *Terrorism Legislation Amendment (Warrants) Act* 2005 (NSW).

From the start, the greatest controversy in Australia surrounded legislative provisions permitting federal agents to take suspects into custody for questioning for the purposes of intelligence gathering in relation to alleged terrorism<sup>20</sup>. As finally passed by the Senate (which at the time the Government did not control), the legislation restricted such detention to cases authorised by judicial warrant, with provision for questioning before a judicial officer and on videotape over a period of twenty-four hours and with detention during a one week period. Subsequently, the legislation was further amended to extend the maximum time for questioning under a warrant from twenty-four to forty-eight hours. Most controversially, it was provided that an offence was committed where a person disclosed information relating to the issuing of a warrant or the questioning of the subject of a warrant, potentially during a period of two years<sup>21</sup>.

The federal Criminal Code was amended to incorporate prohibitions on engaging in a terrorist act (maximum penalty life imprisonment); providing or receiving training in connection with terrorist acts (maximum penalty 25 years); possessing things connected with a terrorist act where the person knows of the connection (maximum penalty 15 years imprisonment); collecting or making documents

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<sup>20</sup> Gani and Urbas, above n 19, 25.

<sup>21</sup> *Ibid*, 26. See also *National Security Information (Criminal and Civil Proceedings Act 2004 (Cth)*.

knowing of the prohibited connection (penalty 15 years); and doing any act or preparation for or planning a terrorist act (life imprisonment)<sup>22</sup>.

The mental element for the foregoing offences extended from relevant knowledge to recklessness. As well, offences were provided in the Criminal Code in relation to membership of "terrorist organisations". Such provisions were justified on the basis of accessorial or corporate liability, which are important features of any modern criminal law. However, they were criticised as amounting to a form of "guilt by association". Parallels were sometimes drawn to the offences and restrictions imposed by the *Communist Party Dissolution Act 1950* (Cth) which involved criminal and civil consequences for members of the Australian Communist Party, without more.

Following the terrorist attacks on the London transport system in July 2005, the Australian Government moved to amend the foregoing legislation still further. By July 2005, as a result of a federal election, the Government had secured a majority in the Senate. It was therefore no longer obliged to compromise with the Opposition or with minor Parties to secure passage of its legislation through the Parliament. The 2005 proposed legislation introduces enlarged powers for warrants for a range of security-related questioning. In its first manifestation, it provided for "shoot to kill" powers and other enlargements of official authority,

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<sup>22</sup> *Ibid*, 28.

criticised in some quarters because of what were said to be ineffective facilities of judicial review<sup>23</sup>.

The great power of the idea of independent judicial examination of "control orders" and other decisions, made under the foregoing legislation shows, once again, the potent metaphor that judicial review represents in modern democratic constitutional arrangements. It is as if many people recognise the need to counter-balance the swift, decisive, resolute and opinionated actions of officers of the Executive Government with the slower, more reflective, principled and independent scrutiny by the judicial branch, preformed against timeless criteria of justice and due process.

This is an old dialogue, at least in common law countries. In an earlier manifestation, it may be seen most vividly in the requirements normally imposed on officials who interfere in the liberty of the individual to bring the suspect without delay before the independent judicial branch of government so as to demonstrate to an uncommitted and unexcited outsider the lawfulness of such a serious disturbance of the norms of civilised society<sup>24</sup>.

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<sup>23</sup> Anti-Terrorism Bill (No 2) 2005 (Cth), see esp cll 105.51(2), (3), (4), 105.52(4).

<sup>24</sup> *Williams v The Queen* (1986) 161 CLR 278 at 283.

Rarely, at least in recent times, has there been such a debate in Australia about civil liberties and legislation. Of course, the legislation has had supporters<sup>25</sup>. Some critics have concentrated not on the content of the laws but on the extreme secrecy surrounding their preparation and presentation to the legislatures of Australia<sup>26</sup>. In the end, with modifications, the Australian State Premiers agreed to the substance of the Federal Government's legislative amendments. They committed themselves to enact counterpart laws<sup>27</sup>. However, many commentators have expressed concern over the preventive detention regime being created in Australia. The critics have included former Prime Ministers on both sides of politics<sup>28</sup>. Senior judges and former

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<sup>25</sup> N James, "Security Laws Will Not End the World: Memo to Civil Libertarians - Islamist Terrorists Want to Attack Our Democracy", *Australian*, 18 October 2005, 12; Editorial "A Map of Madness", *Australian*, 29 October 2005, 11; J Albrechtsen, "This level of hysteria suggests anti-terror laws are sound", *Australian*, 2 November 2005, 12; Editorial, "The Terror Beat", *Australian*, 10 November 2005, 13.

<sup>26</sup> L Oakes, "Skittling the Lickspittles", *Bulletin*, 25 October 2005, 15; "The Public Has a Right to Know", *Canberra Times*, 26 October 2005, 14; N Roxon (Shadow Attorney-General), "Terror Laws Need Public Scrutiny", Media Release, 26 October 2005, 17; "Government 'bypassing public'", *Canberra Times*, 15 November 2005, 20.

<sup>27</sup> "States Give Terror Laws the Green Light", *Australian*, 28 October 2005, 6.

<sup>28</sup> "Whitlam and Jurists Condemn Legislation", *The Age*, 25 October 2005, 4; "Whitlam Laments Labor Silence on New Laws", *Sydney Morning Herald*, 25 October 2005, 6; "Time to be Alarmed - Malcolm Fraser's Warning", *Sydney Morning Herald*, 21 October 2005, 14; T Sweetman, "Where has all the good sense gone?", *Sunday Mail*, 23 October 2005, 63.

judges have raised their concerns<sup>29</sup>. So have representatives of the Law Council of Australia and civil liberties bodies<sup>30</sup>. So too have members of the Bar<sup>31</sup> and legal academics<sup>32</sup>. Even within the Government Parties, voices of concern about aspects of the law have been expressed<sup>33</sup>.

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<sup>29</sup> Such as Sir Anthony Mason, noted *Sydney Morning Herald*, 8 October 2005, 8; and another former Chief Justice of Australia, Sir Gerard Brennan, noted *Sydney Morning Herald* 25 October 2005, 1; former Chief Justice of the Family Court, A B Nicholson, noted *The Age*, 12 October 2005, 4; and "Laws the greatest attack on freedom says former judge" [A B Nicholson], *The Age*, 5 November 2005, 4; Chief Justice of the Australian Capital Territory, Terence Higgins, noted *Canberra Times*, 14 October 2005;

<sup>30</sup> "Law Council Sees Dangers", noted *Northern Territory News*, 3 November 2005, 4. See also "Lawyers Ask for Terror Bill Boycott", *Australian*, 27 October 2005, 6 and "Anti-Terror Orders a 'Legal Minefield'", *The Age*, 25 October 2005, 4.

<sup>31</sup> I Barker and R Toner, "Ruddock Lowers the bar on Legal Terror Tactics", *Sydney Morning Herald*, 1 November 2005, 11; G Carne, "A Betrayal of the Values of Democracy", *Canberra Times*, 27 October 2005, 17; D Neal, "Anti-Terrorism Bill Ignores Basics of Due Process", *Australian*, 28 October 2005, 25. See also I Barker, "Human rights in the Age of Counter-Terrorism" (2005) 26 *Australian Bar Review* 267.

<sup>32</sup> G Williams, "Essential Liberties are Lost in Imitation", *Sydney Morning Herald*, 27 October 2005, 13; D Rothwell, "Expert Says States could be Sidelined on Terror Laws", *ABC PM Programme*, 25 October 2005; P Keyzer, "States Shut the Door on Civil Liberties", *Sydney Morning Herald*, 2 November 2005, 15.

<sup>33</sup> "Costello Fuels Doubts on Law Changes", *The Age*, 27 October 2005, 6; "ACT First to Reject Anti-Terror Legislation", *Canberra Times*, 27 October 2005, 1. See also J Morrow, "the Conservative Case Against the Anti-Terrorism Laws", *Australian*, 7 November 2005, 8.

My purpose is not to evaluate the Australian criticisms. There have been similar controversies in the British House of Commons and doubtless elsewhere. My purpose is to record the variety, intensity and persistence of the concerns. Often they have come back to the need to counterpoise any new official powers to deal with terrorist threats with judicial supervision of any Executive conduct under effective provisions for judicial review.

The support for judicial review of Executive action affecting persons accused of terrorism offences in Australia probably has its parallels in most democracies. On the other hand, the high importance of intelligence gathering and sharing and the urgency of action in some circumstances involving suspected terrorists, have led Executive authorities - especially security agencies but also the military and police - to resist moves to subject their conduct to swift and continuous external examination by independent judges as urged by the critics.

It is of the nature of such agencies (some might say of Executive Government generally) that it "knows" that it is acting in the best interests of society. Officials commonly believe that external scrutiny by "non-experts" is slow, technical and needlessly suspicious, involving an unwarranted intrusion into the resolute action necessary to respond to urgent modern perils.

In Australia, there has not so far been a major legal challenge to the raft of national and sub-national counter-terrorism laws enacted in

great number since 2001. However, Australia did face a challenge to the legislation against the earlier form of international terrorism, namely global communism. When that challenge came, the High Court had no entrenched Bill of Rights upholding freedom of association and freedom of expression. Nor did it have a developed jurisprudence on fundamental human rights. The Government had an express electoral mandate for its law. Opinion polls showed initially that 80% of the population supported it. The Opposition in Parliament had even allowed the law to pass without a parliamentary division.

The Government supported the law at a time on the basis that an Australian battalion was fighting in Korea against communist invaders. It relied on the defence power under the federal Constitution and also on the nationhood power. Chief Justice Latham upheld the constitutional validity of the law, citing Cromwell's famous words: "Being comes before well-being"<sup>34</sup>. He said<sup>35</sup>:

"The Parliament of the Commonwealth and the other constitutional organs of the Commonwealth cannot perform their functions unless the people of the Commonwealth are preserved in safety and security".

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<sup>34</sup> *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 141.

<sup>35</sup> (1951) 83 CLR 1 at 141-142.

However, Latham CJ was alone. The other five participating Justices of the High Court of Australia upheld the challenge. They declared the legislation constitutionally invalid, in totality. Justice Dixon grounded his opinion in the affront that he saw in the legislation, with its severe restrictions on the rights and privileges of individuals, to the implications of the Constitution that the Australian Commonwealth was a rule of law society in which the great power of Executive Government was always, and necessarily, limited by law<sup>36</sup>:

"[Ours] is government under the Constitution and that is an instrument framed in accordance with many traditional conceptions, to some of which it give effect, as, for example, in separating the judicial power from other functions of government, others of which are simply assumed. Among these I think that it may fairly be said that the rule of law forms an assumption. In such a system I think that it would be impossible to say of a law of the character described, which depends for its supposed connection with the power upon the conclusion of the legislature concerning the doings and designs of the bodies or persons to be affected and affords no objective test of the applicability of the power, that it is a law upon a matter incidental to the execution and maintenance of the Constitution and the laws of the Commonwealth".

More recent decisions have not always been so respectful of the fundamental assumptions to which Justice Dixon referred. Some may perhaps be read to uphold unlimited powers of legislative or Executive detention, at least in some circumstances<sup>37</sup>. Others have upheld State

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<sup>36</sup> (1951) 83 CLR 1 at 193.

<sup>37</sup> See eg *Al-Kateb v Godwin* (2004) 78 ALJR 1099; 208 ALR 124.

laws providing for unlimited detention orders following completion of a judicial sentence for criminal wrong-doing<sup>38</sup>. Others have reversed earlier judicial authority and expanded the powers over Australian citizens of military tribunals, outside the independent courts<sup>39</sup>. Still others have failed to uphold equality rights before the law of vulnerable or unpopular litigants, such as prisoners<sup>40</sup>. Yet none of these cases has involved an Australian court facing an explicit challenge to counter-terrorism legislation.

In answering the question of how the courts will respond to counter-terrorism legislation, it is therefore necessary to look to other countries, including to South Africa. In considering whether the courts have shown themselves worthy of the apparent confidence of those who demand the inclusion of effective opportunities of judicial review in such legislation - or whether it is misconceived to expect the courts to guard basic rights in the context of such laws<sup>41</sup> - it is timely to look to a series of decisions of national courts. My thesis is that, when such decisions are examined, they indicate, as a general statement, the utility of the provision of judicial review and the general wisdom with which final

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<sup>38</sup> *Baker v The Queen* (2004) 78 ALJR 1483, 210 ALR 1; *Fardon v Attorney-General (Q)* (2004) 78 ALJR 1519, 210 ALR 50.

<sup>39</sup> *Re Colonel Aird; Ex parte Alpert* (2004) 78 ALJR 1451, 209 ALR 311.

<sup>40</sup> *Muir v The Queen* (2004) 78 ALJR 780, 206 ALR 189.

<sup>41</sup> N Roxon, "Don't Look to the Courts to Guard Terror Laws", *Canberra Times*, 26 October 2005, 15.

courts in a number of countries have exercised their powers in this connection.

### INSTANCES OF JUDICIAL REVIEW

*South Africa and the Tanzanian bombing:* An early instance of the unwillingness of national courts to bend basic legal principles in the face of accusations of terrorism was the decision of the Constitutional Court of South Africa in *Mohamed v President of the Republic of South Africa*<sup>42</sup> ('*Mohamed*'). The case concerned Khalfan Mohamed, who was wanted by the United States of America on a number of capital charges relating to the bombing of the United States Embassy in Dar es Salaam, Tanzania, in August 1998.

The appellant had been indicted in the United States. A warrant for his arrest had been issued by a judge of the United States District Court. The accused had entered South Africa unlawfully as an alien. He was detained by the authorities, acting in cooperation with United States officials. In his interrogation, the accused was not given the rights provided to a suspect by South African law for such a case. The South African authorities offered him a choice of deportation to Tanzania or the United States. He preferred the latter but applied to the courts for an order that the Government of the United States be required to

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<sup>42</sup> (2001) 3 SA 893.

undertake that the death penalty would not be sought, imposed or carried out on him. That order was refused at first instance and the appellant was promptly deported.

This notwithstanding, an application to the Constitutional Court was pursued on behalf of the deportee on the grounds that he had been denied the protection of South African constitutional law, under which it has been held that capital punishment is contrary to fundamental guarantees<sup>43</sup>.

The Constitutional Court of South Africa held that Mr Mohamed's *deportation* was unlawful and that the law relating to *extradition*, not deportation, was the national law applicable to his case. Under South African law, extradition was required to be negotiated with the requesting state under conditions obliging receipt of an assurance that the death penalty would not be imposed following a conviction. In this respect, the Court below, and the Government of South Africa, had failed to uphold a commitment implicit in the Constitution of South Africa. It was held that there had been no waiver by the accused, consenting to deportation or extradition.

By the time the Constitutional Court made its orders, Mr Mohamed was on trial in the United States before a federal court and so it was

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<sup>43</sup> *S v Makwanyane* (1995) 3 SA 391.

outside the effective power of the Constitutional Court, by its orders, to afford him physical protection. Nevertheless, the decision of the primary judge in South Africa was formally set aside. A declaration was made that the constitutional rights of the appellant in South Africa had been infringed. The Constitutional Court directed its Chief Officer, as a matter of urgency, to forward the text of its decision to the relevant United States federal court.<sup>44</sup> Following his trial in the United States, the appellant was convicted. However, he was not sentenced to death. The South African court did what it could to uphold the accused's fundamental legal rights, notwithstanding the charge of terrorist offences. The government officials in South Africa were held to have been insufficiently attentive to those rights.

In July 2004, a somewhat similar application was before the same South African court. An aeroplane had departed South Africa for Zimbabwe, en route to Equatorial Guinea. South African officials alerted their counterparts in Harare about certain suspicions that they held concerning the aircraft and its contents. The result was that the plane was searched in Harare. A quantity of weapons was found. The alleged mercenaries were arrested and brought before the courts of Zimbabwe, where they resisted deportation to Equatorial Guinea on the basis that, if convicted, they would be subject to the death penalty. They also complained about the standards of the Guinean courts.

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<sup>44</sup> *Mohamed v President of the Republic of South Africa* (2001) 3 SA 893, 923.

Whilst this application was pending in Zimbabwe, the applicants also sought relief in the Constitutional Court of South Africa. They alleged that the South African officials had acted without regard to the applicants' rights under the South African Constitution. They also asserted that, in the exercise of its international relations and in any representations to be made to Zimbabwe and Equatorial Guinea, the South African Government was bound, by the terms of the Constitution, to take into account the requirements of the Constitution obliging the State to defend, uphold and protect the constitutional rights of those within its protection.

The decision of the Constitutional Court in this case was delivered in September 2004. It included a limited finding of the South African Government's duty in the case. In the course of argument, the Court was reminded of the famous words of Brandeis J in *Olmstead v United States*,<sup>45</sup> cited earlier in *Mohamed*<sup>46</sup>:

"In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously ... Government is the potent, omnipresent teacher. For good or ill, it teaches the whole people by its example ... If the government becomes a law-breaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy."

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<sup>45</sup> 277 US 438, 485 (1928).

<sup>46</sup> (2000) 3 SA 893, 921.

These last words have a special resonance in South Africa as the Constitutional Court explained in *Mohamed*<sup>47</sup>:

"we saw in the past what happens when the State bends the law to its own ends and now, in the new era of constitutionality, we may be tempted to use questionable measures in the war against crime. The lesson becomes particularly important when dealing with those who aim to destroy the system of government through law by means of organised violence. The legitimacy of the constitutional order is undermined rather than reinforced when the State acts unlawfully."

These words had been written by the South African judges in May 2001, before the events of 11 September of that year. Yet they remain true today; and not only in South Africa.

*The United States and Guantánamo Bay*: Probably the best known decision in this class of case is that of the Supreme Court of the United States in *Rasul v Bush*.<sup>48</sup> That decision was delivered in June 2004. The Supreme Court was divided 6:3. The opinion of the majority of the Court was written by Stevens J. Justice Scalia wrote the opinion of the dissenting judges, Rehnquist CJ, Thomas J and himself.

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<sup>47</sup> *Ibid.*

<sup>48</sup> 542 US 1 (2004).

In the majority opinion, Stevens J cited the law authorising President George W Bush, after 11 September 2001, to use 'all necessary and appropriate force against those nations, organisations or persons he determines planned, authorised, committed or aided the terrorist attacks ... or harbored such organisations or persons.'<sup>49</sup> In reliance upon this law, President Bush had established a detention facility at the Naval Base in Guantánamo Bay on land leased by the United States from the Republic of Cuba. Two Australians (Mamdouh Habib and David Hicks), who were detained in the facility, together with others, filed petitions in the United States' federal courts for writs of habeas corpus. They sought release from custody, access to counsel, freedom from interrogation and other relief.

The United States District Court dismissed these petitions for want of jurisdiction. It relied on a decision of the United States Supreme Court of 1950.<sup>50</sup> That decision had held that '[a]liens detained outside the sovereign territory of the United States [may not] invoke a petition for a writ of *habeas corpus*'. However, the Supreme Court reversed the federal court decision, granted *certiorari* and remitted the case to the federal courts. They have now been accepted again by the Supreme

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<sup>49</sup> See Authorisation for the Use of Military Force, Pub L No 107-243, 116 Stat 1498, 1500 (2001).

<sup>50</sup> *Johnson v Eisentrager*, 339 US 763 (1950).

Court. In effect, in *Rasul*, Stevens J followed what he had earlier written in *Padilla v Rumsfeld*<sup>51</sup> where he had said:

"At stake in this case is nothing less than the essence of a free society. Even more important than the method of selecting the people's rulers and their successors is the character of the constraints imposed on the Executive by the rule of law. Unrestrained Executive detention for the purpose of investigating and preventing subversive activity is the hallmark of the Star Chamber ... for if this nation is to remain true to its ideals symbolised by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny".

The decision of the majority of the Supreme Court in *Rasul* is reflective of similar notions. It traces the restraint on executive power in the United States to legal and constitutional 'fundamentals'. It does so through the history of the basic legal tradition which the United States shares with other common law countries.<sup>52</sup>

As Lord Mansfield wrote in 1759, even if a territory is 'no part of the realm', there is 'no doubt' as to a court's power to issue writs of *habeas corpus*, if the territory was 'under the subjection of the Crown'.<sup>53</sup> Later cases confirmed that the reach of the writ depended not on formal notions of territorial sovereignty, but rather on the practical question of

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<sup>51</sup> 124 SCt 2711, 2735 (2004). In this case, Stevens J dissented on the availability of habeas corpus in the circumstances.

<sup>52</sup> *Rasul v Bush*, 542 US 1, 14 (2004) (Stevens J).

<sup>53</sup> *King v Cowle* (1759) 97 ER 587, 598–9.

‘the exact extent and *nature* of the jurisdiction or dominion exercised in fact by the Crown’.<sup>54</sup>

In *Rasul v Bush*, the rule of law was upheld by the majority of the United States Supreme Court. In the face of Executive demands for exemption from court scrutiny because of the suggested exigencies of terrorism and the powers of the Commander-in-Chief, the Supreme Court asserted the availability of judicial supervision and the duty of judges to perform their functions, including on the application of non-citizens. To say the least, the case is an extremely important one.

By rejecting the contention that the Executive was not answerable in the courts for the offshore detention by United States personnel of alleged terrorists, the Supreme Court of the United States gave an answer to the fear that the United States military facility at Guantánamo Bay had become a ‘legal black hole’. That fear had been expressed not only by civil libertarians, do-gooders and the usual worthy suspects. It had been expressed by some of the most distinguished lawyers of the common law tradition including Lord Steyn, Lord of Appeal in Ordinary,<sup>55</sup> Lord Goldsmith, Attorney-General for the United Kingdom,<sup>56</sup> Sir Gerard

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<sup>54</sup> *Ex parte Mwenya* [1960] 1 QB 241, 303 (Lord Evershed MR).

<sup>55</sup> Lord Steyn, ‘Guantanamo Bay: The Legal Black Hole’ (2004) 53 *International & Comparative Law Quarterly* 1.

<sup>56</sup> Lord Goldsmith, ‘Terrorism and Individual Liberty: The Response of the State’ (2003) 57(4) *International Bar News* 8 (edited version of an address at the ABA conference 2003 at San Francisco).

Brennan, past Chief Justice of the High Court of Australia<sup>57</sup> and the English Court of Appeal.<sup>58</sup> Lord Goldsmith remarked on the duty of lawyers to influence and guide the response to terrorism of states and the international community<sup>59</sup>:

"The stakes could not be higher – loss of life and loss of liberty. The UK government is committed to taking all necessary steps to protect its citizens. I am convinced that this can be done compatibly with upholding the fundamental rights of all, including those accused of committing terrorist acts".

*Israel and the Security Fence*: At about the same time as the decision in *Rasul v Bush* was handed down by the United States Supreme Court, the Supreme Court of Israel, on 2 May 2004, delivered its decision upon a challenge brought on behalf of Palestinian complainants concerning the 'separation fence', or 'security fence', being constructed through Palestinian land.<sup>60</sup>

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<sup>57</sup> F G, 'Australia and the Rule of Law' (2003) *Australian International Law Journal* 1, 2–8.

<sup>58</sup> *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ. 1598, [66].

<sup>59</sup> Goldsmith, above n 55, 11.

<sup>60</sup> Subsequently, the International Court of Justice, in response to a request for an advisory opinion from the General Assembly of the United Nations, held that the construction of the wall or 'fence' on Palestinian land was contrary to international law. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)*, [2004] ICJ Rep 1. In the result, the General Assembly of the United Nations voted to condemn the building of the wall. Only five states voted against the resolution, including the United States, Israel and Australia: GA Res, 27th Sess, UN Doc A/ES-10L18/Rev.1 (2004).

This 'fence' was justified by the Government of Israel and the Israeli Defence Force as being essential to repel terrorist (specifically suicide) attacks against Israeli civilians and military personnel carried out from adjoining Palestinian lands. In defence of the security wall, the Israeli authorities pointed to the substantial decline in the number of such attacks that had followed the creation of the barrier. It would not have been surprising if the Supreme Court of Israel had refused to become involved in such a case. Few lawyers would have blinked an eye if the Court had ruled the matter non-justiciable or had said that it had no legal authority to deal with such an issue, lying at the heart of the urgent responsibilities of the Executive for the defence of the nation.

However, from bitter experience, the Jewish people have learned about the great dangers of legal black holes. In the Germany of the Nazis, the problem was not a lack of law. Most of the actions of the Nazi state were carried out under detailed laws made by established lawmakers.<sup>61</sup> The problems for the Jewish people and other victims of the Third Reich arose from the pockets of official activity that fell outside legal superintendence. Legally speaking, these, truly, were 'black holes'.

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<sup>61</sup> Including, eg, *Law for the Restoration of the Professional Civil Service* 1933 (Germ) and the *Law for the Protection of German Blood and Honour* 1935 (Germ). See discussion in *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 415–17. Note the hortatory titles of these German laws: a practice that has spread. The *Patriot Act* in the United States is an example.

It is evident that the Supreme Court of Israel was determined to avoid such an absence of effective judicial supervision. The Court did not call into question the basic decision of the Executive to build the fence or wall. However, applying what common law judges would describe as principles of administrative law or of constitutional proportionality, it upheld the complaints concerning the excessive way in which the wall had been created in several areas.

At the conclusion of his reasons, Justice Aharon Barak, President of the Israeli Court, said<sup>62</sup>:

"Our task is difficult. We are members of Israeli society. Although we are sometimes in an ivory tower, that tower is in the heart of Jerusalem, which is not infrequently hit by ruthless terror. We are aware of the killing and destruction wrought by the terror against the state and its citizens. As any other Israelis, we too recognize the need to defend the country and its citizens against the wounds inflicted by terror. We are aware that in the short term, this judgment will not make the state's struggle against those rising up against it easier. But we are judges. When we sit in judgment, we are subject to judgment. We act according to our best conscience and understanding. Regarding the state's struggle against the terror that rises up against it, we are convinced that at the end of the day, a struggle according to the law will strengthen her power and her spirit. There is no security without law. Satisfying the provisions of the law is an aspect of national security. In *The Public Committee against Torture in Israel v The Government of Israel*, at 845 [I said]:

We are aware that this decision does not make it easier to deal with that reality. This is the destiny of a democracy –

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<sup>62</sup> *Beit Sourik Village Council v Government of Israel* (Unreported, Supreme Court of Israel sitting as the Israeli High Court of Justice, Barak P, Mazza VP, Cheshin J, 2 May 2004) 44–5.

she does not see all means as acceptable, and the ways of her enemies are not always open before her. A democracy must sometimes fight with one arm tied behind her back. Even so, a democracy has the upper hand. The rule of law and individual liberties constitute an important aspect of her security stance. At the end of the day, they strengthen her spirit and this strength allows her to overcome her difficulties".

That goes for this case as well. Only a separation fence built on a base of law will grant security to the state and its citizens. Only a separation route based on the path of law, will lead the state to the security so yearned for.

The Supreme Court accepted the petitions in a number of cases, holding that the injury to the petitioners was disproportionate to the asserted security needs. It ordered relief and costs in favour of those petitioners.<sup>63</sup>

*Indonesia and the Bali Bombing:* On 23 July 2004, the Constitutional Court of Indonesia set aside the punishment imposed on Masykur Abdul Kadir, convicted and sentenced to 15 years' imprisonment for helping Imam Samudra in connection with the bombing in Bali on 13 October 2002. That bombing resulted in the killing of 202 people, including 88 Australians. The decision of the Indonesian Court was reached by a majority, five Justices to four.<sup>64</sup> The problem arose out

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<sup>63</sup> For a collection of jurisprudence of Israeli cases on terrorism-related issues, see Israel Supreme Court, *Judgments of the Israel Supreme Court: Fighting Terrorism within the Law* (2005) Israel Ministry of Foreign Affairs.

<sup>64</sup> For an English summary with extensive extracts from the judgment, see Simon Butt and David Hansell, 'Casenote: The Masykur Abdul Kadir Case: Indonesian Constitutional Court Decision No 013/PUU-I/203' (2004) 6 *Australian Journal of Asian Law* 176, 185. See also Ross Clarke, 'Retrospectivity and the Constitutional Validity of the

of the decision of the prosecutor to proceed against the accused not on conventional charges of homicide or crimes equivalent to arson, conspiracy, use of explosives etc. Instead, the accused were charged only under a special anti-terrorism law, introduced as a regulation six days *after* the bombings in Bali.<sup>65</sup>

The amended Indonesian Constitution contains basic principles protecting human rights and fundamental freedoms. One of these principles, reflected in many statements of human rights,<sup>66</sup> is the prohibition on criminal legislation having retroactive effect. Under international law, an exception is sometimes allowed to permit trial or punishment 'for any act or omission which, at the time it was committed, was criminal according to the general principles of law recognised by civilised countries'.<sup>67</sup> This exception is drawn from the *Statute of the International Court of Justice*.<sup>68</sup>

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Bali Bombing and East Timor Trials' (2003) 5 *Australian Journal of Asian Law* 2.

<sup>65</sup> Bali Bombers' Convictions Ruled Illegal', *Sydney Morning Herald* (Sydney), 24 July 2004, 1.

<sup>66</sup> See, eg, *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 15 (entered into force 23 March 1976); *European Convention on Human Rights*, opened for signature 4 November 1950, 213 UNTS 222, art 7(1) (entered into force 3 September 1953). The sub-article is not derogable under the *European Convention*: see art 15(2).

<sup>67</sup> *European Convention*, opened for signature 4 November 1950, 213 UNTS 222, art 7(2) (entered into force 3 September 1953).

<sup>68</sup> Art 38. See Lord Lester and D Pannick, *Human Rights: Law and Practice* (2nd ed, 2004), 260 par [4.7.7].

The decision of the Indonesian Court was not wholly unexpected amongst lawyers who were following the Bali trials. During the Bali hearings, the problem of retroactive punishment had been repeatedly canvassed in the Australian media.

There would have been many reasons of a psychological kind for the Indonesian judges to reject the accused Bali bombers' appeal to the prohibition against retrospective punishment. The evidence against the accused, demonstrating their involvement in the bombings was substantial and often uncontested. The behaviour of some of the accused, in the presence of grieving relatives, was provocative and unrepentant. The pain for the families of victims was intense. The damage to the economy of Bali and Indonesia, caused by the bombings, was large. The affront of the bombings to the reputation of Indonesia was acute. In this sense, the case was a severe test for the judges of the Constitutional Court sworn to uphold the rule of law.

The rule of law is itself one of the fundamental principles which democrats, the world over, defend against terrorists.<sup>69</sup> As Latham CJ once said in another Australian case,<sup>70</sup> it is easy for judges of

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<sup>69</sup> See D Kerr, "Australia's Legislative Response to Terrorism" (2004) 29 *Alternative Law Journal* 131 at 134.

<sup>70</sup> *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 124.

constitutional courts to accord basic rights to popular majorities. However, the real test comes when they are asked to accord the same rights to unpopular minorities and individuals. The Indonesian case of Masykur Abdul Kadir was such a test.

Other proceedings may now be brought against Mr Kadir. The others convicted, who have exhausted their rights of appeal, may have no further remedies. Time will tell. But in the long run, the fundamental struggle against terrorism is strengthened, not weakened, by court decisions that insist upon adherence to the rule of law.

In a comment on the Indonesian court's decision, an Australian editorialist said<sup>71</sup>:

"The Constitutional Court decision should be seen for what it is – part of a proper legal process in which every person has the right to exhaust all avenues of appeal. This is a positive development for Indonesia. The ensuing legal uncertainty, and the inevitable distress it will cause ... could and should have been avoided".

*Recent British Security Decisions:* Other cases arose dealing with aspects of the response to terrorism. Indeed, such cases are beginning to appear in many jurisdictions. On 18 March 2004, the English Court of Appeal delivered its judgment in *Secretary of State for the Home*

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<sup>71</sup> Editorial, 'One Step Back Over Bali', *Sydney Morning Herald* (Sydney), 27 July 2004, 10.

*Department v M.*<sup>72</sup> The reasons of the Court of Appeal were delivered by Lord Woolf CJ. The case was an application by the Home Secretary for leave to appeal against a decision of the Special Immigration Appeals Commission. That body had been established by the United Kingdom Parliament in response to an earlier decision of the European Court of Human Rights.<sup>73</sup> The latter had criticised the procedures that then existed under the legislation then in force to respond to terrorism in Northern Ireland.

By law, the Special Commission is a superior court of record. Its members are appointed by the Lord Chancellor. A Special Commission judge must hold, or have held, high judicial office. This provision was in place when the events of 11 September 2001 occurred. Under the *Anti-Terrorism, Crime and Security Act 2001* (UK), the British Home Secretary enjoys the power to issue a certificate in respect of a person whose presence in the United Kingdom is deemed a 'risk to national security' or who is suspected to be a 'terrorist'.<sup>74</sup> The then Home Secretary, Mr David Blunkett, granted such a certificate in the case of 'M', a Libyan national present in the United Kingdom. M was thereupon taken into custody with a view to his deportation.

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<sup>72</sup> [2004] EWCA Civ 324.

<sup>73</sup> *Chahal v United Kingdom* (1996) 23 Eur Court HR 413. See Lord Lester of Herne Hill and David Pannick, *Human Rights Law and Practice* (2nd ed, 2004) 182.

<sup>74</sup> *Anti-Terrorism, Crime and Security Act 2001* (UK) s 21(1).

Early in March 2004, the Special Commission, presided over by Collins J, allowed M's appeal against the Home Secretary's certificate. The Home Secretary challenged this action, which he declared was an unwarranted judicial interference in an essentially political and ministerial judgment. He therefore sought leave to appeal to the Court of Appeal. He complained that the Commission had reversed a decision for which he was accountable to Parliament and, through the democratic process, to the electorate.

The English Court of Appeal rejected the Home Secretary's application. It affirmed the decision of the Commission. It described the role played by the 'special advocate' under the new arrangements established by the British Parliament for participation of that advocate in the procedures of the Commission in such a case. The aim of the 'special advocate' is to make the attainment of justice possible in a legal proceeding where certain information cannot be disclosed to the accused or the accused's lawyers, because of the suggested interests of national security<sup>75</sup>:

"The involvement of a special advocate is intended to reduce (it cannot wholly eliminate) the unfairness which follows from the fact that an appellant will be unaware at least as to part of the case against him. Unlike the appellant's own lawyers, the special advocate is under no duty to inform the appellant of secret information. That is

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<sup>75</sup> [2004] EWCA Civ 324, [13].

why he can be provided with closed material and attend closed hearings. As this appeal illustrates, a special advocate can play an important role in protecting an appellant's interest before the [Commission]. He can seek information. He can ensure that evidence before [the Commission] is tested on behalf of the appellant. He can object to evidence and other information being unnecessarily kept from the appellant. He can make submissions to [the Commission] as to why the statutory requirements have not been complied with. In other words, he can look after the interests of the appellant, in so far as it is possible for this to be done, without informing the appellant of the case against him and without taking direct instructions from the appellant.

Ironically, the alleged terrorist, M, had refused to cooperate with the 'special advocate'. Presumably, he thought that this was no more than a typical British formality, designed to give a veneer of protection where none would in fact be afforded. At the beginning of the proceedings, M stated that he did not wish to take any part in the hearing. However, he affirmed that he was not involved in, nor did he support, acts of terrorism. It was then left to the Commission's own procedures to scrutinise the decision of the Home Secretary to the contrary effect.

In the result, the Commission ruled against the Home Secretary. The Court of Appeal, like the Commission, conducted part of its hearing in closed session. Only a portion of the Court's reasons was given on the public record. The Court of Appeal insisted that the suspicion of the Minister had to be a *reasonable* suspicion. It stated that the Minister had

failed to demonstrate error on the part of the Commission. In his concluding remarks, Lord Woolf CJ, for the Court of Appeal, said<sup>76</sup>:

"Having read the transcripts we are impressed by the openness and fairness with which the issues in closed session were dealt with ... We feel the case has additional importance because it does clearly demonstrate that, while the procedures which [the Commission] have to adopt are not ideal, it is possible by using special advocates to ensure that those detained can achieve justice and it is wrong therefore to under-value the SIAC appeal process. ... While the need for society to protect itself against acts of terrorism today is self-evident, it remains of the greatest importance that, in a society which upholds the rule of law, if a person is detained as 'M' was detained, that individual should have access to an independent tribunal or court which can adjudicate upon the whether of whether the detention is lawful or not. If it is not lawful, then he has to be released".

There have been more recent developments in the British House of Lords – one judicial and the other political. In December 2004, the House of Lords judicial board handed down its decision in *A (FC) v Secretary of State for the Home Department*.<sup>77</sup> The case arose out of the arrest of nine persons under the United Kingdom Terrorism legislation, including the *Anti-Terrorism (Crime and Security) Act 2001* (UK). The detainees had been taken into custody in December 2001. They were all non-citizens. None had been charged with offences or brought to trial, still less convicted. They sought release. Their case came before the Special Commission previously mentioned. That Commission upheld

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<sup>76</sup> [2004] EWCA Civ 324, [34].

<sup>77</sup> [2005] 2 AC 68 (HL).

their objection to the lawfulness of their detention. However, on this occasion the Commission's order was set aside by the English Court of Appeal. It emphasised the importance of judicial deference in such matters to the Minister's decision.

By a decision of eight to one, the Law Lords reversed the Court of Appeal. They restored the decision, obliging release of the detainees. Lord Bingham, the Senior Law Lord, in his reasons, responded to the suggestion that interference by the courts in such matters would amount to 'judicial activism'. This was an accusation commonly levelled at the courts in the United States by the former United States Attorney-General John Ashcroft. Citing the reasons of Simon Brown LJ in *International Transport Roth GmbH v Secretary of State for the Home Department*,<sup>78</sup> Lord Bingham said<sup>79</sup>:

"The Court's role under the [*Human Rights Act*] is as the guardian of human rights. It cannot abdicate this responsibility ... [J]udges nowadays have no alternative but to apply the *Human Rights Act* ... Constitutional dangers exist no less in too little judicial activism as in too much. There are limits to the legitimacy of executive or legislative decision-making, just as there are to decision-making by the courts".

Lord Nicholls opened his reasons with the following remarks<sup>80</sup>:

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<sup>78</sup> [2003] QB 728, [27].

<sup>79</sup> [2005] 2 AC 68 at 109-110 [41].

<sup>80</sup> [2005] 2 AC 68 at 127.

"Indefinite imprisonment without charge or trial is an anathema in any country which observes the rule of law. It deprives the detained person of the protection a criminal trial is intended to afford. Wholly exceptional circumstances must exist before this extreme step can be justified. The government contends that these post-9/11 days are wholly exceptional ... The principal weakness in the government's case lies in the different treatment accorded to nationals and non-nationals".

Lord Hoffmann, in his reasons, said<sup>81</sup>:

"This is a nation which has been tested in adversity, which has survived physical destruction and catastrophic loss of life. I do not under-estimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation. Whether we would survive Hitler hung in the balance, but there is no doubt that we shall survive Al Qaeda. The Spanish people have not said that what happened in Madrid, hideous crime as it was, threatened the life of their nation ... Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community".

Baroness Hale, the only woman member of the House of Lords judicial board, observed<sup>82</sup>:

"No one has the right to be an international terrorist. But substitute 'black', 'disabled', 'female', 'gay' or any other similar adjective for 'foreign' before 'suspected international terrorist' and ask whether it would be justifiable to take power to lock up that group but not the 'white', 'able-bodied',

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<sup>81</sup> [2005] 2 AC 68 at 132.

<sup>82</sup> [2005] 2 AC 174-175.

'male' or 'straight' suspected international terrorists. The answer is clear".

Lord Walker dissented from the majority. However, the Law Lords' majority voice was clear. Unlimited detention of non-nationals was inconsistent with their Lordships' view of the British Constitution, with British legal history and with the provisions of the *Human Rights Act 1998* (UK).

This decision led to a flurry of political measures aimed at increasing ministerial powers. However, the Prevention of Terrorism Bill was held up, in late night sittings in March 2005, by the repeated insistence of the House of Lords upon amendments. In the end, on 11 March 2005, the British Government backed down. It continued to insist that decisions, affording the Home Secretary the power to impose 'control orders' should be made on the civil, and not the criminal, onus. But it agreed to insert an effective sunset clause of one year, after which the legislation must be reviewed. More importantly, it agreed that the Ministerial power to impose 'control orders' on terrorist suspects, restricting their liberties, could only be made with the approval of a judge<sup>83</sup>.

After the July 2005 bombings in the London Underground, a still further enhancement of official powers was proposed to the British

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<sup>83</sup> James Kirkup, 'Blair's Olive Branch Ends Struggle Over Terrorism Bill', *The Scotsman* (Edinburgh), 12 March 2005, 1.

Parliament. In a major reverse for Mr Blair, in early November 2005, the proposed period of detention of suspects without charge was reduced from 90 days to 28 days.

## CONCLUSIONS

*Four hundred years of terrorism:* This conference in South Africa occurs four hundred years after the Gunpowder Plot of 1605. This fact represents one of those ironical historical coincidences. On 5 November 1605, Guy Fawkes and his co-conspirators planned to blow up the Houses of Parliament at Westminster and to kill King James I and the leaders of the kingdom expected to be gathering there<sup>84</sup>.

Fawkes and his colleagues aimed to restore Roman Catholic supremacy in Britain. Their plot, when discovered, led to State trials in the Court of Star Chamber, multiple executions and renewed legal disadvantages for Catholics in Britain<sup>85</sup>. King James authorised "the gentler tortours ... to be first used", so as to extract confessions from the accused. The imposition of torture upon terrorists suspects has been a feature of modern, as well as historical, events<sup>86</sup>.

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<sup>84</sup> N Neligan, "The Gunpowder Plot: The First Act of Modern Terrorism" (2002) 7(4) *Bar Review* 27.

<sup>85</sup> D Carswell (ed), *Trial of Guy Fawkes and Others (The Gunpowder Plot)* (1995), 40.

<sup>86</sup> See eg Amnesty International, *Guantánamo: An Icon of Lawlessness* (2005); Human Rights Watch, *Guantanamo: Three Years of Lawlessness* (2005).

The happening four hundred years ago has certain parallels for the events of our own time. A plot against the State. Fanatical devotees of a religious minority believing that God was on their side. The planned use of new weapons of mass destruction. Civil fear and outrage. Calls for the use of extreme retaliatory measures. Atypical and unfair trials. Extreme punishments. One hopes that, in modern democratic states, we have learned something from the intervening four hundred years, including about a sense of proportion and the need to tackle threats of terrorism in an effective but law-complying and non-extreme way.

A common thread runs through most of the decisions of the final courts that I have reviewed concerning terrorist cases and anti-terrorist measures. This is the insistence of the courts that, however novel some of the methods used by terrorists and the dangers presented, the proper course of a democratic legal order is to adhere closely to the rule of law and to uphold fundamental human rights. Of course, there are some Executive officials, together with assorted allies in sections of the media, who at the very accusation of terrorist involvement will throw away the book, forget basic liberties and demand open-ended exceptionalism. The lesson of history is that such a course plays into the hands of terrorists. It reduces civilised nations to the terrorists' level. It allows the terrorists to determine the rules of engagement. It risks diminishing the quality of democratic life which is hard thereafter to repair and reinstate.

*The experiences voice of Aharon Barak:* The need to maintain judicial review in the face of terrorist attacks has been a constant theme of the judicial and extra-judicial writings of Aharon Barak, President of the Supreme Court of Israel. In his foreword, "The Role of a Supreme Court in a Democracy"<sup>87</sup>, Justice Barak wrote:

"Terrorism does not justify the neglect of accepted legal norms. This is how we distinguish ourselves from the terrorists themselves. They act against the law, by violating and trampling it. A democratic State acts in its war against terrorism within the framework of the law and according to the law. This was well expressed by Justice Chaim Cohen more than twenty years ago when he said:

'What distinguishes the war of the State from the war of its enemies is that the State fights while upholding the law, whereas its enemies fight while violating the law. The moral strength and the objective justification of the government's war depend entirely on upholding the laws of the State: by conceding this strength and this justification, the government serves the purposes of the enemy. Moral weapons are no less important than any other weapon, and they are perhaps more important. There is no weapon more moral than the rule of law. Everyone who ought to know should be aware that the rule of law in Israel will never yield to its enemies'".

On the scope of judicial intervention (and thus of judicial review) Justice Barak proceeds<sup>88</sup>:

"Judicial review of the war against terrorism by its nature raises the question of the timing and scope of judicial

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<sup>87</sup> 116 *Harvard Law Review* 1 (2002).

<sup>88</sup> *Ibid.*

intervention. There is no theoretical difference between applying judicial review before or after combat. In fact, however, Chief Justice Rehnquist was correct in noting that the time of judicial intervention affects its content. Indeed, "courts are more prone to uphold war-time claims of civil liberties after the war is over". He asks, then, whether it isn't better to abstain from judicial application during warfare. The answer, from my point of view, is clear: I will adjudicate a question when it is presented to me. I will not defer it, because the fate of a human being may hang in the balance. Protection of human rights would be bankrupt if, during combat courts - consciously or unconsciously - decided to review the behaviour of the Executive branch only after the period of emergency. The adjudication must be effective; it cannot be delayed until after the period of emergency has passed. Furthermore, the decision need not make do with general declarations about the balance of human rights and the need for security. The judicial ruling must impart guidance and direction to the specific cases before it. Justice Brennan [of the United States Supreme Court] correctly noted that, "[Abstract] principles announcing the applicability of civil liberties during times of war and crises are ineffectual when a war or crisis comes along unless the principles are fleshed out by detailed jurisprudence explaining how those civil liberties will be sustained against particular national security concerns".

And Justice Barak faces the hard question of whether courts should back-off completely, and deny judicial review in times of an alleged terrorist crisis and the need for urgent of Executive action. His answer - coming from a man and judge who, as a boy, was rescued from the jaws of the Holocaust in a hessian bag - is strong and clear<sup>89</sup>:

"Is it proper for judges to review the legality of the war on terrorism? Many argue that the Court ought not to become involved in these matters. These arguments are heard from both extremes of the political spectrum. On one side, they argue that judicial intervention undermines security; on the other side they argue that judicial activity gives legitimacy to

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<sup>89</sup> *Ibid.*

actions of the government authorities in their war against terrorism. Both arguments are unacceptable. Judicial review of the legality of the war on terrorism may make the war against terrorism harder in the short term. It fortifies and strengthens the people in the long term. The rule of law is a central element in national security ... In the final analysis, this subservience does not weaken democracy but actually strengthens it. It makes the struggle against terrorism worthwhile. ... The role of the court is to ensure the constitutionality and legality of the fight against terrorism. It must ensure that the war against terrorism is conducted within the framework of the law and not outside it. This is its contribution to the struggle of democracy to survive. In my opinion it is an important contribution, one that realises the judicial role in a democracy".

I remind any sceptics and the critics of these words that they are written not by an ivory tower professor, safe in his comfortable study on a university campus, far from battle. These are the words of the highest judge in a country that has had to confront the daily challenges of violent acts, amidst as many legal challenges demanding immediate responses from judges who are themselves in the front line of the anger of the disparate interests who disagree with their rulings.

*Business as usual in the courts:* No one doubts that new dangers are presented to contemporary society by fanatics of all religions; by suicide bombers; and by their access to new and powerful weapons of death and destruction that endanger individuals and frighten peaceful civilian populations. Against such dangers, democratic societies are certainly entitled to protect themselves. But they must do so in accordance with the norms of constitutionalism.

This means that democratic societies must afford basic protections for suspects. The world of intelligence and surveillance, and

of Executive government action, can often make mistakes. Such mistakes may be based on excitement, false facts and wrong presumptions. The death of the Brazilian worker in the London Underground in July 2005 testifies to this danger. So does an event in Australia which recently led to a substantial damages payout after ASIO and other federal operatives entered the wrong address at gunpoint, causing great alarm and distress to the residents there<sup>90</sup>. Mistakes and human errors inevitably occur. Courts know this. It is what makes them vigilant to scrutinize Executive action against the possibility of error, excess and unlawfulness.

Centuries of experience demonstrates that judicial review has the enduring merit of subjecting governmental and other enthusiasms to the scrutiny of detached, independent-minded people well versed in history, including legal history. The experience of the cases that I have collected, old and new, suggests the wisdom of this form of scrutiny. That is why the message of the courts for the present age is, and should be, a simple one. Nothing fundamental has changed. Indeed, the fundamentals remain in place. Constitutionalism and the rule of law prevail. Judicial and constitutional review are crucial attributes of liberty. They must still apply. Business as usual.

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<sup>90</sup> Australian Broadcasting Corporation, *Online*, "Couple win payout over ASIO, AFP raid", 1 November 2005.

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**JUDICIAL REVIEW IN A TIME OF TERRORISM - BUSINESS AS  
USUAL**

**The Hon Justice Michael Kirby AC CMG**