JUDICIAL QUIESCENCE AND ITS EXCUSES IN THE WAKE OF AUSTRALIAN COUNTERTERRORISM HYPERLEGISLATION

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Abstract

In this paper, we seek to establish the case that the counterterrorism space in Australia is ripe for greater judicial proactivity than has thus far not been forthcoming. Judges in Australia, unlike national courts in comparable jurisdictions, have in the main remained quiescent or deferential where what is required is no more than institutional realism or pragmatism. After providing a synopsis of the Australian review culture and citing authorities that have already indicated that the review style will move in ebbs and tides, we provide the basis for the argument that there is ample room in this area of public law, for a pragmatic judicial approach.

Key-terms: judicial quiescence, judicial activism, counterterrorism, Australia

Introduction

Precautionary justice poses a challenge to rule of law legality and to the judiciary, its primary guardian. In this paper we seek to establish the case that the counterterrorism space is ripe for greater judicial proactivity and in many jurisdictions this has not been forthcoming. We explore the concept of institutional pragmatism, by which we refer to a tradition of judicial review that gives sufficient weight to the maintenance of the judiciary in its role as

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defender of rule of law legality. Focussing on Australian judicial experience, we begin with a discussion of the meaning of judicial activism and its changing connotation. This then ties to the second concern, which is how to evaluate judicial activism or quiescence in this space. Relying mainly on secondary authorities, we evaluate how courts have ruled during Australia's counterterrorism hyper legislation period regarding the balance between rule of law legality and the national security interests of government. In accounting for the Australian record, we explore what we perceive as two weak explanations for the review regime. Our finding is that Australia has in the main remained quiescent or deferential when what is required is no more than institutional realism or pragmatism.

We employed comparative approach, referencing the USA, Great Britain, Canada and Australia. These countries enjoy many points of similar socio-cultural experience informing approaches and practices of justice. For the comparison of proactivity between the high courts of Canada, the United States and the United Kingdom we draw primarily on the works of Kent Roach and Eyal Benvenisti. We have not found a study that compares and contrasts the performance of courts on precisely equivalent legal issues, and any comparison between Australia and other Anglo-Saxon jurisdictions is subject to this limitation. Nonetheless, we trust that the importance of an assessment of this pivotal period of judicial review will stimulate the call for more evidence and provoke further analysis of the dynamic institutional context of this echelon of Australian legal culture.

Over the past twenty years anti-terror laws have been proliferating around the world in similar form. The active encouragement of the United States and the United Nations has shaped national interests, and third world countries have more or less unquestioningly adopted anti-terror laws of the west.[1] Both Australian and Ethiopian anti-terror laws trace their source to the United Nations Security Council Resolution 1373 (2001). Australian anti-terror law was among the legislation considered during the drafting of Ethiopia's current Prevention and Suppression of Terrorism Crimes Proclamation No.1176-

[1] Beth Elise Whitaker, *Exporting the Patriot Act? Democracy and the 'War on Terror' in the Third World, 28 (5)* THIRD WORLD QUARTERLY 1017-1032 (2007).

2020.[2] Such has been the zeal to establish these laws and the zest to do so borrowing from Anglo-American and European experience.[3] One key comparative element is the relative institutional weighting of the judiciary. This paper pursues this latter element; if there is a borrowing of experience across national boundaries, what may also be invited is the relative imperviousness of the security apparatus to 'checks and balance' legality.

1. Judicial Review

In a Westminster System under a separation of powers doctrine set out in the Australian Constitution, the strength of government is found in the balancing heft that is provided, independently, by each of the branches. As a plenary institution, the judiciary is vested with a remit of sovereign capacity. Judicial review is a core feature of liberal democratic government. It is a means of providing that public officials are accountable for the legality of their actions, state jurisdictional overreach is stymied and constitutional principles and founding intentions continue to breathe life into sovereign government. Considerable institutional autonomy is a necessary condition of liberal democratic governance in this system. Where important matters of evolving rights and freedoms come before a court, the review that it provides cannot be uniformly, predictably or regularly deferential, as this will shift power 'unconstitutionally' to the executive or legislative branches. Yet, in matters of national security, it has been widely argued, following an interpretation of Locke and others,[4] the judiciary must avoid appearing to stand in for executive or legislative decision-makers, both of which are in a better position to gauge the mood of the polity and carry out the quotidian matters of governance.

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[2] Wondwossen D. Kassa, co-author of this article, was one of the members of the Working Group that drafted Ethiopia's current Prevention and Suppression of Terrorism Crimes Proclamation No.1176-2020.

[3] KENT ROACH, THE 9/11 EFFECT 427 (Cambridge University Press, 2012); Galli, F. *et al.*, *Terrorism investigations and prosecutions in comparative law*, 20(5) THE INTERNATIONAL JOURNAL OF HUMAN RIGHTS, 593-600 (2016).

[4] JOHN LOCKE, SECOND TREATISE OF GOVERNMENT, 20-24, 28-30 (C.B. Macpherson (ed), Hackett Publishing, Classic Series, 1980); RICHARD TUCK, NATURAL RIGHTS THEORIES (Cambridge University Press, 1981).

While in principle, judicial review is a sovereign capacity, in its everyday function based on its constitutional jurisdiction the court may be more or less proactive. In this regard, relative deference is a function of the court's reference to dynamic political and socio-cultural contexts or historical antecedents.

In Australia (since 1986), the highest power of judicial review is vested in the High Court.[5] While *that* the Court possesses judicial review power is mostly uncontroversial, the degree to which the court exercises this power of review over legislative and executive acts has varied from time to time. Following Foley, it is possible to divide the High Court's history of judicial review into four periods/phases: the formative years, separated into the early years (1903-1919) before the end of WWI under Chief Justices Griffith, Barton and O'Connor, the Dixon years (1952-1964), the Mason Court (1987-1995), and the contemporary period (1996 to the present), established by Chief Justice Gleeson and continued by Chief Justice Robert French.

In her detailed account of the court's history, Foley has demonstrated that with the exception of its earliest couple of years and the short-lived Mason period (1987-1995) the Australian High Court - a 'unique creature with its distinctive history' - has acted within the framework of a legalistic or positivist approach to judicial review.[6] The die was cast, as it were, under Dixon. Serving for a lengthy period as Justice and Chief Justice of the High Court, Dixon taught generations of Australian judges that 'there is no other safe guide to

[5] This is covered in Chapter III, under section 76(i), by which the High Court has jurisdiction in matters 'arising under this Constitution or involving its interpretation', or in other words from what is necessary given the nature of federalism. The nullifying authority is also in Covering Clause 5, according to which courts 'must be able to determine whether a law is made "under the Constitution" to decide if that law is binding.' In addition, the power is found in Section 75(v), which has been interpreted to 'support judicial review powers generally,' and Section 109, which contemplates that courts will review the relative overreach of state and federal laws. Katheleen E. Foley, Australian Judicial Review, 6(2) WASHINGTON UNIVERSITY GLOBAL STUDIES LAW REVIEW 281, 286-7 (2007).

[6] *Id., at* 281.

judicial decisions in great conflicts than a strict and complete legalism.'[7] Legalism for Chief Justice Latham, means that 'contextual and consequential factors of a political, economic and social nature *are not taken into account*.'[8] For Dixon, review should be 'rule-driven, precedent-focused, and *greatly prizes certainty in the law*.'[9]

In contrast, the Mason Court, according to Foley, used 'more "open-ended" concepts in constitutional interpretation' and did this in part by drawing on foreign case law and international law.[10] Using 'wider' precedents, it was willing to interpret the Constitution more creatively or 'actively.'[11] Despite awareness that Australia needed to become more active in complying with international law in the area of human rights and political rights, it is noteworthy that the legitimacy of the Mason Court, according to contemporaneous opinion, was 'increasingly subject to challenge.'[12] Reflecting on the Mason Court in 1997, Craven observed that the position of Australian judges vis-a-vis judicial activism had changed from the traditional legalist view. Craven thought that repugnance against judicial activism was being usurped by what he describes as 'judicial triumphalism,' or the view that 'judges should feel free to take control of the law and to develop it in

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[7] *Swearing in of Sir Owen Dixon as Chief Justice*, 85 C.L.R. xi at p. xiv (1952) quoted in Michael Kirby, *"Judicial Activism"? A Riposte to the counter-reformation*, 13 (1) OTAGO LAW REVIEW 1, 3 (2005).

[8] BRIAN GALLIGAN, POLITICS OF THE HIGH COURT: A STUDY OF THE JUDICIAL BRANCH OF GOVERNMENT IN AUSTRALIA 258 (University of Queensland Press, 1987) emphasis added.

[9] Foley, *supra* note 5, at 292. Emphasis added. For instance, under *D'Emden*, the Court under Griffith CJ ruled, using 'ordinary statutory interpretation that formed part of the English legal canon' that the state legislature cannot 'fetter, control or interfere with, the free exercise of legislative or executive power of the Commonwealth…unless expressly authorised by the Constitution.' *Id., at* 295.

[10] *Id., at* 306.

[11] *Id., at* 310. For example, in *Street,* the Mason Court distinguished itself 'in the area of constitutional guarantees of rights and immunities' and by adopting 'a more radical approach to constitutional decision-making.' In *Lange v. Australian Broadcasting Corp* it recognized an *implied* constitutional freedom, freedom of communication, and in *Leeth v. Commonwealth*, it recognized an implied constitutional right of equality. *Id., at* 309.

[12] GEORGE WILLIAMS, HUMAN RIGHTS UNDER THE AUSTRALIAN CONSTITUTION 74 (Oxford University Press, 1999) quoted in *Id., at* 314.

accordance with their perceptions of the needs and desires of contemporary society.' He explained the shift in approach as follows:

> Many Australian judges now are besotted with the learning and legal style of the United States, where a free-wheeling Supreme Court wields a Bill of Rights to the destruction of any pervasive claim of legislative supremacy. Moreover, this obsession with curially enforced rights as a means of asserting judicial supremacy over legislature and executive is powerfully reinforced by the current international fashion for broadly framed guarantees of human rights. Finally, the need for the legal profession generally to re-invent itself from what has been seen as a privileged and unresponsive professional élite, into a modern, vibrant force for the protection of civil rights against governments, cannot be over-estimated.[13]

This captures the contemporaneous sentiment. But as Foley concludes, the Mason Court was but a brief departure. The Gleeson Court, and subsequently the French Court, reaffirmed that textualist constitutional legalism is at the heart of Australian High Court review.[14] Kirby notes that Dixon's position continues to be influential in the political culture of the Australian judiciary and that judges who do not agree with Dixon's exposition of legalism are "denounced as 'judicial activists.'" Commenting on the institutional power of the executive and front bench and referring to those who are swayed by the lingering effect of Dixon's strict legalism, Kirby says that there are still those who are 'contemptuous of fundamental human rights and jealous of any source of power apart from their own.'[15]

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[13] Greg Craven, *Reflections on Judicial Activism: More in Sorrow than in Anger*, (The Samuel Griffith Society proceeding, 1997) Vol. 9, Chapter 9, 4 http://www.samuelgriffith.org.au/papers/html/volume9/v9chap9.htm

[14] In *Al-Kateb*, on whether the Migration Act, if it authorised indefinite detention of unlawful noncitizens was constitutionally invalid, Justice McHugh of the Gleeson Court drew on precedent to 'assert new principles' to find that it was not. In McHugh's words, Justice Kirby's dissent was wrongheaded in seeking to find implied rights by relying upon international law or international instruments, where these 'are not even part of the law of this country,' and thereby 'constru[ing] the Constitution.' Foley, *supra* note 5, at 320.

[15] Kirby, *supra* note 7, at 4.

A. Judicial Activism (Re)considered

The term 'judicial activism' dates back to 1947, where, in a magazine article, Arthur Schlesinger profiled the U.S. Supreme Court justices using a tripartite categorization, 'champions of self-restraint', 'middle ground' and 'activist.' [16] In the 1950s in the U.S.,[17] the term came to be used by establishmentarian commentators primarily against the 'misuse' of judicial authority in support of civil rights applications or campaigns[18] or, in the words of Anthony Lewis, 'to boldly fix up the wrongs of our system.'[19] However, there was also much support for judicial proactivity. For example, Albon P. Man observed that, 'Murphy's votes in civil rights cases reflect not only his *objectivity* and *independence* as a judge but also his position as perhaps the outstanding judicial activist on the Court.'[20] Similarly, Justice Rutledge was lauded as a judicial activist when it came to civil rights matters for exercising judicial self-restraint in economic matters.[21] In 1949, Supreme Court Justice Brandeis was described as 'a *pragmatic* judicial activist who saw in the courts a powerful instrument to be grasped by the people in ameliorating social and economic conditions.'[22]

At least between the late 1970s and currently, that the judiciary should present a robust counter to reactionary or overweening government has become a minority position. Most commentators, both popular and learned, celebrate

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16 Arthur M. Schlesinger, Jr., *The supreme court: 1947*, FORTUNE, 202, 208 (January 1947) cited in Keenan D. Kmiec, *The Origin and Current Meanings of Judicial Activism,* 92 (5) CALIFORNIA LAW REVIEW 1441 (2004).

17 Erwin Chemerinsky, The Rhetoric of Constitutional Law, 100 MICHIGAN LAW REVIEW *2008*, 2019-20 (2002).

18 Kmiec, *supra* note 16, at 1451.

19 Anthony Lewis, *Supreme Court Moves Again to Exert Its Powerful Influence*, NEW YORK TIMES (online), 20 June 1964 <http://www.nytimes.com/1964/06/21/supreme-court-moves-again-to-exert-its-powerful-influence.html>.

20 Albon P. Man, Jr., *Mr. Justice Murphy and the Supreme Court*, 36 (7) VIRGINIA LAW REVIEW 889, 916 (1950). Emphasis added.

21 Lester E. Mosher, *Mr. Justice Rutledge's Philosophy of Civil Rights*, 24 NEW YORK UNIVERSITY LAW QUARTERLY REVIEW 661, 667-68 (1949).

22 Note, *Administrative Law: Judicial Review Denied Attorney General's Order for Removal of Enemy Alien*, 34 CORNELL LAW QUARTERLY 425, 429 (1949). Emphasis added.

judicial restraint and castigate activism.[23] Even the minority of scholars that advocate judicial proactivity in some contexts admit that the term generally carries a strongly negative connotation.[24] However, it may be argued that lack of support for activism may be related to misunderstandings of various factors that go into what is meant by the term, which are often conflated and confused. For example, Kmiec[25] has identified five distinct meanings (disregarding precedence, legislating from the bench, departing from accepted interpretive methodology, results oriented judging, nullifying unconstitutional actions). Such conceptualizations, in failing to distinguish a common continuum of values and methods, do not necessarily relieve the confusion. We therefore prefer to limit our exposition of the term to two dimensions - means and ends – and restore the basic logic of Schlesinger's categorisation.

We come to this view in light of the following. First, we reject that nullifying unconstitutional actions of other branches of government constitutes activism, per se.[26] As has been argued, striking down legislation on the basis that it is incompatible with a constitution should not be understood, by itself, to constitute judicial activism. As Kmiec[27] notes, where the court invalidates plainly unconstitutional law, such as 'a statute that establishes a national religion', this may assert the institutional authority of the court, but it is the context and direction of judgment that must also be considered before it may be contended that such a court is activist. Thus, judicial activism is not synonymous with 'doing the job' (to use Kirby's expression) of judicial review.[28] As Lindquist has observed 'judicial activism has to be distinguished

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23 Erwin Chemerinsky, *Perspective on Justice*, *LOS ANGELES TIMES* (New York), 18 May 2000, at BI 1 cited *in Kmiec, supra* note *16.*

24 Chemerinsky, *supra* note 17, at 2020.

25 Kmiec, *supra* note 16, at 1464-1474.

26 Cass R. Sunstein, *Editorial, Taking Over the Courts*, *New York Times* (New York), Nov. 9, 2002, at A19 cited in *Id.*

27 Kmiec, *supra* note 16, at 1464.

28 Erwin Chemerinsky, *The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review*, 62 TEXAS LAW REVIEW 1207, 1207-10 (1984). On the difficulty of drawing a line between judicial review and judicial activism see: Kmiec, *supra* note 16, at 1465-66.

from legitimate enforcement of the constitution.'[29] To paraphrase Kirby's citing of the *Communist Party Case,*[30] the court is merely *pragmatically institutionally defensive* when it acts to maintain rule of law legality, because this is the basis of its plenary institutional authority. But whilst the court should 'declare what the law is, even in difficult or politically sensitive cases'[31], scholars sometimes mistakenly equate annulments with judicial activism.

More difficult to categorize are cases, as per Sunstein,[32] where the court strikes down laws 'that are arguably *constitutional*.'[33] Consistent with Graglia's point, activism concerns "the practice by judges of disallowing policy choices by other governmental officials or institutions that the Constitution does not clearly prohibit'[34]. Taylor[35] succinctly refines Sunstein and Graglia as follows:

> Judicial activism involves invoking novel or debatable interpretations of the Constitution to strike down democratically adopted state or federal laws and practices that offend one's moral or political beliefs, while showing relatively little deference to the other branches of government and the voters.

In these cases, the Court may take a position that reflects conservative judicial activism[36] or progressive judicial activism.

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[29] Stefanie A. Lindquist, *The Political and Academic Debate over Judicial Activism*, in MEASURING JUDICIAL ACTIVISM 1, 39 (Stefanie A. Lindquist and Frank B. Cross (eds), Oxford University Press, 2009).

[30] *Communist Party Case* 83 C.L.R. 34 (1951).

[31] Kmiec, *supra* note 16, 1465-1466.

[32] Sunstein, *supra* note 26; Cass R. Sunstein, *Tilting the Scales Rightward*,, N.Y. TIMES (New York), Apr 26, 2001, A23 cited in Kmiec, *supra* note 16.

[33] Emphasis added. For more see: Larry D**.** Kramer, *Foreword: We the Court,* 115 HARVARD LAW REVIEW 4 at notes 5-9 and accompanying text (2001).

[34] Lino A. Graglia, *It's Not Constitutionalism, It's Judicial Activism*, 19 HARVARD JOURNAL OF LAW & PUBLIC POLICY 293, 296 (1996).

[35] Stuart Taylor Jr., *The Tipping Point*, NATIONAL JOURNAL 1810, 1818 (2000).

[36] Geoffrey Stone, *Selective Judicial Activism* 89 TEXAS LAW REVIEW 1423 (2011); Earnest A Young, *Judicial activism and Conservative Politics*, 73(4) UNIVERSITY OF COLORADO LAW REVIEW, 1139 (2002).

Kmiec has made a case that other dimensions of activism include disregarding precedence, legislating from the bench and departing from accepted interpretive methodology. However, we wish to maintain parsimony and elegance by distinguishing between, but also relating, means and ends.[37] Thus, it is correct to say that judges choose to disregard precedence as one of the devices they are in a position to exploit, but as per Sunstien and Graglia, it is that they do so in the service of a specific end that is vital to the meaning of activism. It is the political objective that is also close to the heart of other definitions including that of O'Scannlain, 'Judicial activism means not the mere failure to defer to political branches or to vindicate norms of predictability and uniformity; it means only the failure to do so in order to advance another, unofficial objective'[38] and, according to Basman, 'the actions of judges who do whatever is necessary to rule as they personally prefer, regardless of what existing law provides.'[39] Given that judges may depart from an accepted interpretive methodology in order to advance a view, we believe it is vital that that view or end is incorporated. When Kmiec says that the fourth meaning of activism is 'results oriented judging', we would say that reference to objectives ought not to be a distinct category, but integrated.

Applied to the Australian context, it has been argued that in their interpretation of common law, statute or the constitution judges may take a line that is either favourable or unfavourable of an implied or explicit constituency understood as the object of a 'legal, social or other policy.'[40] For Craven, this also implies three different meaning contexts of the term (common law, statute, constitution). Consistent with a preference for parsimony, these provide interchangeable devices, so that we may, for example, posit that we have both left or progressive common law judicial activism and right or conservative common law judicial activism. Likewise, the court construes a relation with the constitution whereby it 'continually up-

[37] For a related approach to understanding judicial activism in terms of 'methods' and 'outcome' see Young, *supra* note 36, at 1147-49.

[38] Diarmuid F. O'Scannlain, *on Judicial activism*, OPEN SPACES QUARTERLY (online), 29 February 2004 <http://open-spaces.com/articles/on-judicial-activism/ >.

[39] Howard Basman, *Judicial Activism easy to criticize, but hard to define and identify*, *THE SUNDAY* (online) 10 November 2002.

[40] Craven, *supra* note 13.

date[s] it in line with perceived community and social expectations, rather than according to its tenor or in conformity with the intentions of those who wrote it.' Craven refers to this as 'progressivism,' and notes that in this action, the High Court of Australia 'has invented an implied freedom of political communication (along with other associated freedoms), a freedom which in reality emerges neither from the words of the Constitution themselves, nor from the wildest imaginings of the Founding Fathers.' He notes that 'constitutional progressivism has been and is the most prominent form of activism practised by the Australian judiciary.'

Let us step back from these words a moment. Kirby analyses four cases in which the Australian High Court has attracted the 'judicial activism' label.[41] Following one of the decisions rendered in 1996, the then Acting Prime Minster of Australia declared that the federal government would appoint 'Capital C conservatives to replace retiring justices of the High Court.' In two of these cases the court inferred rights from the Constitution. In *Dietrich v The Queen* (1992) the court held that a defendant for a serious offence, if unable to afford a lawyer, was entitled to an order halting the trial until the state provides a lawyer to represent him in the trial. That decision was made in the absence of a constitutional provision recognizing one's right to a lawyer. In *Lange v Australian Broadcasting Corporation* (1997), the court upheld an implication of free speech in the Australian constitution.

It is Justice Kirby's contention that the Court is *not activist* in these rulings, despite that politicians, media, and some law organisations may have been making that charge. Kirby notes that an '*implication* was inferred by the High Court from the necessity to make the constitutional system of representative democracy effective and truly workable.' He contends, 'in terms of legal doctrine, none of the decisions is particularly novel. All use well-worn methods of legal reasoning. None, I suggest, deserves the torrent of abuse directed at them.'[42] For Kirby 'deriving implications from written documents is rudimentary lawyering.'[43] Altogether, Kirby says, the Court merely 'did its

41 Kirby, *supra* note 7.

42 *Id.*, at 10.

43 *Id.*

job.' He observes that judicial function must embrace action beyond strict legalism and notes:

> After decades, perhaps centuries, of acceptance of the "noble lie" of the declaratory theory of the judicial function and of so-called "strict and complete legalism" most of us, by the end of the twentieth century, came to recognise the reality of the judicial role in a common law system. Judges face choices. Judges make law. They do so in construing the Constitution, interpreting legislation and reformulating the common law.[44]

To demonstrate that inference from the constitution is an inevitable task of the High Court, Kirby cites *Australian Communist Party v The Commonwealth*[45] *(1951)*. In the *Communist Party Case,*[46] the High Court invalidated the *Communist Party Dissolution Act* on the argument that the legislature was out of bounds when it relied on a Federal Parliament opinion that 'the persons to whom it applies are indiscriminately per se a danger.'[47] In explaining his conclusion, Justice Sir Owen Dixon relied on a broad political and philosophical notion of the rule of law. He treated this as an 'assumption' implied in the Constitution.[48] That assumption helped to determine that the outer boundary of the legislative power of the Federal Parliament had been exceeded. Thus, for him legalism ought not to be so strict that it cannot be consistent with both a willingness to invalidate legislation and protect the rule of law.

For Kirby, 'realism has led courts everywhere to a principle of 'purposive' construction of legislation.' This acknowledges that the judge must perform the necessary and sufficient role of ascertaining the purpose of the legislation so that s/he may give effect to it. To reiterate, under the Constitution, the judiciary in Australia must determine that legislation passed by legislatures

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44 *Id.*, at 1.

45 *Australian Communist Party v The Commonwealth* [1951] HCA 5; (1951) 83 C.L.R. 1

46 *Communist Party Case* (1951) 83 C.L.R. at 34.

47 *Communist Party Case* (1951) 83 C.L.R. at 7 (McTiernan, J.).

48 Similar reasoning has been applied in other cases. The Queen v Kirby; Ex parte Boilermakers' Society of Australia [1956] HCA 10; (1956) 94 C.L.R. 254; Melbourne Corporation v The Commonwealth [1947] HCA 26; (1947) 74 C.L.R. 31 at 83; Parton v Milk Board [1949] HCA 67; (1949) 80 C.L.R. 229 at 260.

are indeed law, and this involves plenary power that is only subservient to the Constitution, a document that must be interpreted by the Court. Kirby adds, 'the function of constitutional interpretation too is creative, indeed it is inescapably political in a broad sense of that word.'[49] Following Kirby and the observations of Kmiec, O'Scannlain, and Basman, we would conceptualise activism as the exploitation of the power of the institution of the court (in its devices including interpretation of the constitution, common law precedence) to advance ends in an impasse involving contested symbolic and instrumental political stakes or interests. Thus, the major feature of judicial activism, to use the words of Lindquist is that 'the justices have somehow overstepped their *institutional* boundaries.'[50] Activism may be progressive or left leaning (left activism) as well as reactionary, conservative or right-leaning (right activism). As Bolick has noted 'deference itself may constitute activism to the extent that it leaves in place legislation that unduly restricts those individual rights.'[51] Similarly, Stone has argued that activism may be conservative.[52] Accordingly, judgments may reflect a judge's broad political preferences, and may do so using more or less interpretive licence. That is to say, judges may choose to be less interpretivist when their broad politics is in accord with the overlapping view of authorities (common law, legislative purpose, constitutional division) or may alternatively be more interpretivist when their broad politics is less in accord.[53]

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[49] Kirby, *supra* note 7. The HCA is widely understood to be constrained by constitutional language and an unusually strict interpretation of the separation of powers See *R v Momcilovic* [2010] VSCA 50. Also, see *supra* note 6.

[50] Lindquist, *supra* note 29, at 9.

[51] Bolick (2007) quoted in *Id.*, at 25.

[52] Stone, *supra* note 36, at 1423.

[53] For example, in his confirmation hearing to the US Supreme Court, Judge Neil Gorsuch was asked by Senator Al Franken about his minority opinion that went against a trucker who disobeyed a supervisor and abandoned a trailer that he was driving because he was on the verge of freezing to death. Gorsuch refused to use the exception to the plain meaning rule, by which courts may go beyond the 'plain meaning' to the statute's purpose when the outcome of doing so would create an absurd result. The ruling that Gorsuch made was political in the broad sense that, as per Robert Fetter, it used 'extreme textualism in order to rule in favor of a company and corporate interest.' Watch: Sen. Al Franken Grills Neil Gorsuch on Frozen Trucker Case in Extended Questioning *DemocracyNow* 24 March 2017. Available at:

Three varieties of court behaviour may be bifurcated by institutional preference:

- Quiescent or deferential
    - Seeks 'recovery' of intentions in common law, legislation, constitution
    - Under-represents court interest in the constitutional/institutional balance
- Institutionally realist or pragmatic
    - Seeks 'reconciliation' of emergent and established authorities
    - Supports balanced constitutional/institutional position, and
- Activist
    - Seeks to offer support to a broad but not universal political constituency
    - Overplays court role in or resets the constitutional/institutional balance

Judges pay attention to the legal culture of the day; legal culture resides in a socio-political context in which there are more and less powerful ideological positions. The direction and dynamism of judicial opinion is dependent on this foundation. However, we would depart from Craven in the conflation of activism and progressivism.

The current legal and socio-political climate has put great pressure on judges, particularly in the area of counter-terrorism precaution. In this terrain, as we shall see, the executive and legislature and sometimes the specific wording of the law, seek to diminish the relative institutional role of the court.[54] This

<https://www.democracynow.org/2017/3/24/watch_sen_al_franken_grills_neil>. It was activist in that in departing from or finessing this 'textualism' it favored some actors (corporate, employer interests) over others (laborers seeking redress). Arguably, it was not institutional pragmatism that informed Gorsuch's opinion, as the opinion is most readily interpreted as impinging upon individual rights and freedoms.

[54] It may be and has been argued that this is what occurs with the intelligencization of the criminal process (where national security converts the rules of evidence into classified, sensitive or protected information, and that view of evidence migrates to various criminal categories). Kent

underlines the stakes as the judiciary faces strong challenges that have the capacity to reconfigure liberal democracy itself.[55] It is this context that compels the distorted perception that interprets an institutionally realist or pragmatic position as (left) activist. We agree with Kirby that engaging in construction of the constitution, interpretation of legislation and reformulation of the common law are judicial functions the doing of which should not be condemned as 'activist.' However, in the current environment in Australia, the court appears to be expected and increasingly to expect of itself a quiescence and passivity – the absence of which invites the erroneous charge that it is being activist – on matters of great institutional moment.

Indeed as we shall see, in the important test case of counter-terrorism, judges in Australia have in the main remained quiescent or deferential when what is required is no more than institutional realism or pragmatism.

B. Precaution and Judicial Review

Today the precautionary standard in law enforcement in terrorism cases imposes a hard test for judicial behaviour. Informed by a rejuvenated national security executive that draws upon public and legislative branch anxieties, a precautionary (or authoritarian liberal)[56] order is almost by definition a reset of the relative authority or institutional weight of the judicial branch as a defender of classic liberal legality.[57] It has been argued that this unique menace of terrorism requires a shift from a more reactive standard of crime definition, following law enforcement move into a strongly proactive, intelligence-led

Roach, *The Eroding Distinction between Intelligence and Evidence in Terrorism Investigation*, in COUNTERTERRORISM AND BEYOND 48 (Nicola McGarrity, Andrew Lynch and George Williams (eds), Routeledge, 2010).

55 ROBERT DIAB, THE HARBINGER THEORY HOW THE POST-9/11 EMERGENCY BECAME PERMANENT AND THE CASE FOR REFORM (Oxford University Press, 2015).

56 *Id.*

57 On authoritarian liberalism, see Ian Bruff, *The Rise of Authoritarian Neoliberalism*, 26(1) RETHINKING MARXISM 113 (2014); Jacques Donzelot, *Michel Foucault and liberal intelligence*, 37(1) ECONOMY AND SOCIETY 115 (2008); LOÏC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY (Duke University Press, 2009).

posture in line with the official objective[58] of preventing inchoate acts of terrorism from maturing to the point of where death and destruction may be immanent. In more or less deliberate break from standards of legality, precautionary counterterrorism laws follow on from an exceptional executive authority that is now readily and frequently deployed against the perceived threat[59] and whose metrics may even creep into more common crime categories.[60] At the same time, it is clear that legislation covering terrorism is rolled-out amidst amplified popular fears and that these laws are often passed with less than robust debate by legislators[61] who fear political attack for being 'soft on security.'[62] This over-broad, panic-driven legislation then comes to the court by way of defendants who are ushered about under extraordinary security, suggesting an immanent de facto danger that challenges judicial contradiction.[63]

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58 Australian Federal Police, *Annual Report 2015-2016*, <https://www.afp.gov.au/afp-annual-report-2015-16>; Lonnie M. Schaible and James Sheffield, 'Intelligence-led policing and change in state law enforcement agencies' (2012) 35(4) *Policing: An International Journal of Police Strategies & Management* 761.

59 RBJ Walker, *Lines of Insecurity, International, imperial, exceptional*, 37(1) SECURITY DIALOGUE 62 (2006); Rebecca Sanders, *(Im)plausible legality: the rationalization of human rights abuses in the American "Global War on Terror"*, 15(4) THE INTERNATIONAL JOURNAL OF HUMAN RIGHTS 605 (2011).

60 For instance, control orders in anti-bikie legislation based on criminal intelligence. Willem de Lint, *Risking Precaution in Two South Australian Serious Offender Initiatives*, 24(2) CURRENT ISSUES IN CRIMINOLOGY 145 (2012).

61 Laws were passed as quickly as within hours as in the case of Germany. For the legislative process in the several democratic countries see the country reports in TERRORISM AS A CHALLENGE FOR NATIONAL AND INTERNATIONAL LAW: SECURITY VERSUS LIBERTY? (Christian Walter et al (eds), Springer, 2004).

62 Commenting on the counter-terrorism law making in the UK and US following 9/11, Thomas has stated that there was 'an unseemly scramble amongst the legislature so that it is seen to be doing 'something.' The law is hastily tightened, with scant recourse to reasoned chamber debate or recognition of standard procedures, in order to respond to media and public outcry. Thus, the politicians' anxiety to be viewed as resolving the crisis overrides both established process and rational action.' Philip Thomas, *Legislative responses to terrorism*, *THE GUARDIAN* (online) 12 September 2002 <https://www.theguardian.com/world/2002/sep/11/september11.usa11>.

63 Gavin Philipson, *Deference and dialogue in the real-world counter-terrorism context* in CRITICAL DEBATES ON COUNTER-TERRORISM JUDICIAL REVIEW 251 (Fergal F. Davis & Fiona de Londras (Eds.), Cambridge University Press, 2014).

Many legal observers prioritize the government view of national security necessity over the judicial institutional interest in the preservation of the scope or ambit of rule of law legality. Jenkins has noted that 'difficulties with judicial review only increase as national security threats grow… so that judges often refrain from the effective review of controversial counter-terrorism measures that restrict procedural fairness.'[64] It has also been mooted that 'those who are responsible for the national security must be the sole judges of what the national security requires.'[65] A restriction on judicial review is supported by precedent: '[t]here is no rule of common law that whenever questions of national security are being considered by any court for any purposes, it is what the Crown thinks to be necessary or expedient that counts, and not what is necessary or expedient in fact.'[66] In the *Council of Civil Service Unions and others v Minster for the Civil Service* it was stated that national security is 'par excellence a non-justiciable question' for which the court is 'totally inept to deal with the sort of problems which it involves.'[67] At one time in Australia this proposition was considered as 'unquestionable law.'[68]

Reminiscent of judicial deference to the executive during World War I & II,[69] Lord Hoffman reiterated the rhetoric in a judgment which was released a

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[64] David Jenkins, *Procedural fairness and judicial review of counter terrorism measures*, in JUDGES AS GUARDIANS OF CONSTITUTIONALISM AND HUMAN RIGHTS 163, 163 (Martin Scheinin, Helle Krunke and Marina Aksenova (eds), 2016, Edward Elgar).

[65] The Zamora [1916] 2 A.C. 77, 107 per Lord Parker of Wadington, delivering the opinion of the Judicial Committee in Williams, *supra* note 12, at 194.

[66] *A v. Hayden* (1984) 156 CLR 532 per Gibbs CJ at 548.

[67] [1985] A.C. 374 HL 412 per Lord Diplock in Lison Harris, Lily Ma & C.B. Fung, *A Connecting Door: The Proscription of Local Organizations*, in NATIONAL SECURITY AND FUNDAMENTAL FREEDOMS: HONG KONG'S ARTICLE 23 UNDER SCRUTINY 303, 324 (Hualing Fu, Carole J. Petersen and Simon N.M. Young (eds), HKU Press, 2005).

[68] *The Zamora* (1916) 2 AC 77 at 107 cited in Nathan Hancock, Parliament of Australia Research Paper No. 12 2001-2002, Terrorism and the Law in Australia: Legislation, Commentary and Constraints, <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp0102/02rp12>.

[69] For example, in 1944 the U.S Supreme Court stated that 'in the nature of things, military decisions are not susceptible of intelligent judicial appraisal. They do not pretend to rest on evidence, but are made on information that often would not be admissible and on assumption that could not be proved…Hence court can never have real alternative to accepting the mere declaration of the authorities that issued the order that it was reasonably necessary from a

month after the events of 9/11. Remarking that the events of 9/11 are reminders that 'in matters of national security the cost of failure can be very high,' Lord Hoffmann notes that this underlines:

> The need for the judicial arm of government to respect the decisions of minsters of Crown on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security. It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, they must be made by persons whom the people have elected and whom they can remove.[70]

In *Rehman*, the House of Lords unanimously upheld the decision of the Secretary of State to deport a Pakistani-born Imam based on the Security Service's allegation of his involvement in terrorist activities in India.[71] Lord Slynn has noted:

> the Commission [which reviewed the secret evidence of the Security Service] must give due weight to the assessment and conclusions of the Secretary of State in the light at any particular time of his responsibilities, or of Government policy and the means at his disposal of being informed of and understanding the problems involved. He is undoubtedly in the best position to judge what national security requires even if his decision is open to review. The assessment of what is needed in the light of changing circumstances is primarily for him.[72]

Confirming the above approach, Lord Steyn has remarked that 'the tragic events of 11 September 2001 in New York reinforce compellingly that no other approach is possible.'[73] These and other similar statements were

military viewpoint.' *Korematsu v. U.S.*, 65 S. Ct. 193, 245 (1944). On the courts' war time jurisprudence see: Eyal Benvenisti, *National Courts and the "War on Terrorism"*, in ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM 307 (Andrea Bianchi (ed*),* (Hart Publishing, 2004).

70 *Secretary of State v Rehman* [2001] UKHL.

71 *Secretary of State v Rehman* [2001] UKHL

72 *Secretary of State v Rehman* [2001] 3 W.L.R. 877, 10 para 29.

73 *Id.*

regarded as a warning that courts would rubber-stamp legislative and executive actions taken in the name of countering terrorism.[74]

As is clear from this sampling above, courts may use precedent, the interpretation of the legislation, statutory language, common law and a positivist legalistic view of the institutional divisions in liberal democracies to support a position of deference. It has been fair to predict that the events of 9/11 will have seen the courts beat a retreat from the strident enforcement of human rights law and support government policies that institute a precautionary order.[75] In addition, we have seen that the High Court has a long history in which there has been a reluctance to intervene positively.

However, the story does not end here. As we noted earlier, citing Justice Kirby in this regard, the legal culture of Australia has at times escaped the exclusive recluse of Dickson's legalism. Several commentators, including Jenkins, have argued that rote judicial deference to national security 'would nowadays be regarded as too absolute'.[76] Turning next to Anglo-American experience, we find in contrast to the views of Lord Steyn that judicial pragmatism may *flourish* under the challenge of precautionary counterterrorism.

1. Precaution and judicial review in USA, Canada, United Kingdom

Counterterrorism legislation is a leading edge of the precautionary legal regime that has emerged in Anglo-American countries. A tranche of

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[74] Eyal Benvenisti, *United We Stand: National Courts Reviewing Counter Terrorism Measures*, Tel Aviv University Law School Tel Aviv University Law Faculty Papers, No 39 <http://law.bepress.com/cgi/viewcontent.cgi?article=1041&context=taulwps> ; Kent Roach, *Judicial Review of the State's Anti-terrorism Activities: The Post 9/11 Experience and Normative Justifications for Judicial Review*, 3 INDIANA JOURNAL OF CONSTITUTIONAL LAW 138, 138-39 (2009). Lord Hoffmann's infamous statement has led Ewing to note that even human rights instruments and provisions of constitutions are futile in view of the sense of emergency that the terrorist attacks of 9/11 has caused. K.D. Ewing, *The Futility of the Human Rights Act*, PUBLIC LAW: THE CONSTITUTIONAL AND ADMINISTRATIVE LAW OF THE COMMONWEALTH, 829 (2004).

[75] Benvenisti, *supra* note 74; Roach, *supra* note 74.

[76] In *Commonwealth v Colonial Combing, Spinning and Weaving Co. Ltd.* (1922) 31 CLR 421 per Isaacs J at 442.

counterterrorism laws came into force almost immediately in the USA, Canada and Australia following 9/11 and UNSC Resolution 1373. In this, legislatures supported the so-called emergency-executive prerogative stemming from John Locke.[77] Lawmakers responded swiftly, and often, as in the case of the PATRIOT Act, without reading the text of the legislation.[78]

The legislative and executive organs of governments across Anglo-American countries have developed counterterrorism law that consolidates a precautionary rule.[79] Some security analysts and most governments pitch the new precautionary order of the 'global war on terrorism' as vital to the necessary asymmetrical posture of national security.[80]

As we shall see, however, the court response is not as might be predicted given the socio-political context.[81] Though deference to security measures taken by the other branches of government may characterize national courts in time of

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77 JOHN LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION (J. W. Gough (ed), Blackwell Publishing, 1946); Ross J. Corbett, 'Locke and the challenges of crisis government' (2009) 18(2) *The Good Society* 20–25.

78 Paul Blumenthal, *Congress Had No Time to Read the USA PATRIOT Act*, *SUNLIGHT FOUNDATION* (online) 2 March 2009, <https://sunlightfoundation.com/2009/03/02/congress-had-no-time-to-read-the-usa-patriot-act/>.

79 See, for example, Lucia Zedner, *Terrorizing Criminal Law*, 8(1) CRIMINAL LAW AND PHILOSOPHY 99 (2014); William E. Scheuerman, *Survey article: Emergency powers and the rule of law after 9/11*, 14(1) JOURNAL OF POLITICAL PHILOSOPHY 61 (2006); Andrew Lynch, *Legislating with Urgency-The Enactment of the Anti-Terrorism Act (No 1) 2005*, 30 MELBOURNE UNIVERSITY LAW REVIEW 747 (2006); Filip Gelev, *"Risk Society" and the Precautionary Approach in Recent Australian, Canadian and UK Judicial Decision Making*, Comparative Research in Law & Political Economy Research Paper No. 5 (2009), <http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1120&context=clpe>.

80 EKATERINA STEPANOVA, TERRORISM IN ASYMMETRICAL CONFLICT: IDEOLOGICAL AND STRUCTURAL ASPECTS (Oxford University Press, 2008) Vol 23.

81 VICTOR V. RAMRAJ ET AL (EDS), *GLOBAL ANTI-TERRORISM LAW AND POLICY* (Cambridge University Press, 2nd ed, 2012); Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 AMERICAN JOURNAL OF INTERNATIONAL LAW 241 (2008).

war and crisis[82] and this is anticipated[83] in the 'war against terrorism' and, in one case, reflected immediately after 9/11,[84] the court in democracies has not been universally quiescent.[85] The relative deference/activism of a judiciary is difficult to gauge. Given the changing context of decisions and thus absent a constant objective marker against which deference may be measured, analysts face great difficulty in developing a metric. That said, comparison is regularly made across contexts that enjoy many points of similar socio-cultural experience and approaches and practices of justice. In this regard, the legal context across the USA, Great Britain, Canada and Australia is often considered sufficiently similar to permit reference to precedence that assumes the generic, and sometimes more specialised, common socio-politico-cultural ground between them. Since these countries have tended to express broadly similar national security objectives in the United Nations and other international bodies, significant national security expectations, if not practice, also provides a basis for a finding that differences in the interpretation of the judicial scope in interpreting national objectives may signal something beyond the institutional constraints that may be cited (bill of rights, positive law, constitution). That 'something' will include the (institutional proactivity of) judicial culture.

Benvenisti and Roach have examined the record of counter-terrorism judicial review in the three jurisdictions.[86] In what they have described as a 'quite

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82 *Korematsu v United States* 323 U.S. 214 (1944); Ex parte Quirin 317 U.S. 11 (1942); *Johnson v Eisentrager* 339 U.S. 763 (1950); Harold Hongju Koh, *Transnational Public Law Litigation,* 100 YALE LAW JOURNAL 2347 (1991); *WILLIAM REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WAR TIME* (Vintage Books, 1998); *A.W. BRIAN SIMPSON, IN THE HIGHEST DEGREE ODIOUS DETENTION WITHOUT TRIAL IN WARTIME BRITAIN* (Clarendon Press, 1994).

83 Ewing, *supra* note 74.

84 See for example *Secretary of State for the Home Department v Rehman*, [2001] 3 W.L.R. 877. Lord Hoffmann stated the following in approving the UK Secretary of State's decision to deport a Pakistani national. The question of whether something is 'in the interests' of national security is not a question of law. It is a matter of judgment and policy. Under the constitution of United Kingdom and most other countries, decisions as to whether something is or is not in the interests of national security are not a matter for judicial decision. They are entrusted to the executive.

85 Benvenisti, *supra* note 81; Roach, *supra* note 74; Benvenisti, *supra* note 74.

86 Roach, *supra* note 74; Benvenisti, *supra* note 74.

striking'[87] or 'surprising'[88] development, national courts in the United States, Canada and the United Kingdom have been active in their review by challenging counter terrorism measures taken by their national legislative and executive bodies.[89] According to Benvenisti, courts have been actively engaged in thwarting the full measure of legislative and executive counterterrorism law, and far from having fallen prey to the power grab of the other branches, may be deemed precautionary era 'victors.'[90] For him 'national courts have been challenging executive unilateralism in what could *perhaps be a globally coordinated move*.'[91]

United States

Given the history of the US Supreme Court, which often supported government 'exceptionalism' during WWI and WWII and was faced with responding to legislation in the wake of an 'unprecedented' attack by foreign state supported terrorists on U.S. soil that precipitated what GW Bush termed the 'global war on terrorism,' it would have been reasonable to predict that courts would in the main have shown deference to the state's quest to tip the scales against individual freedoms.[92] On the contrary, the US Supreme Court, has, according to Roach and Benvenisti, turned critical of the counterterrorism measures put in place by the other two arms of government.[93] In his comparison of 4 countries, Roach concludes that the United States Supreme Court has not baulked from a position that we refer to as pragmatic review. This position is echoed by Benvenisti on the basis of his comparative analysis.

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87 Benvenisti, *supra* note 74.

88 Roach, *supra* note 74, at 140.

89 Benvenisti, *supra* note 74.

90 *Id.*, at 1.

91 Benvenisti, *supra* note 81, at 3. This, as he explains, 'seeks to expand the space for domestic deliberation, to strengthen the ability of national governments to withstand the pressure brought to bear by interest groups and powerful foreign governments, and to insulate the national courts from inter-governmental pressures.' *Id.*

92 Roach, *supra* note 74.

93 Roach, *supra* note 74; Benvenisti, *supra* note 74.

In *Rasul v Bush*, where whether or not Guantanamo Bay detainees are entitled to petition for habeas corpus was at issue, the Supreme Court, reversing the holding of the lower courts, ruled in the positive. The majority distinguished the case from wartime precedents, noting that the petitioners, citizens of Australia and Kuwait, were not from countries at war with the United States. Furthermore, the court gave special importance to the fact that the detainees were subject to indefinite detention and that insofar as the petitioners were under the control of the United States, the applicable legislation does not make distinction between citizens and non-citizens. Noting that the judgment in *Rasul v Bush* did not shirk from the judicial duty and authority to perform a check on executive overreach (the executive's request for exemption from court scrutiny), Justice Kirby described the ruling as 'extremely important' in upholding the rule of law.[94]

Rasul v Bush prompted Congress to pass the Detainee Treatment Act of 2005, legislation which sought to deprive federal courts of jurisdiction to entertain habeas corpus claims from Guantanamo detainees.[95] In *Hamdan v. Rumsfeld*,[96] in a 6-3 majority the court reacted negatively to the Act in two ways. First, it held that the deprivation of jurisdiction over habeas petitions could not apply retroactively. Second, the court held that the Military Commission set up by the Bush administration to try detainees at Guantanamo Bay lacks jurisdiction by violating the Uniform Code of Military Justice and the right of a detainee to be tried before 'a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized people' as required under Common Article 3 of the 1949 Geneva Convention.

In response to *Hamdan v. Rumsfeld* congress passed the Military Commissions Act (MCA) 2006, a statute which authorizes trial by military commission and unequivocally stripped the federal courts of habeas

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94 Michael Kirby AC CMG, *National Security: Proportionality, Restraint and common-sense*, (paper presented at National Security Law Conference, 12 March 2005), <http://www.austlii.edu.au/au/journals/PrivLawPRpr/2005/8.html>

95 119 Stat. 2739.

96 548 U.S. 557; 126 S.Ct. 2749 (2006).

jurisdiction over petitions from Guantanamo Bay detainees.[97] In *Boumediene v. Bush,* the Supreme Court critically examined the new statute and found it incompatible with the constitutional provision that authorizes suspension of habeas corpus 'when in cases of Rebellion or Invasion the public Safety may require it.'[98] Furthermore, it held that the MCA did not constitute an adequate replacement for habeas corpus.

Recent rulings confirm that US courts are continuing to mitigate the impact of counterterrorism on human rights. Whether or not the courts should defer to the executive has been the central issue in Trump's executive order travel ban. Trump administration lawyers argued that the government is entitled to deference on the subject of the protection of national security and that immigration legislation that is motivated by national security concerns is 'unreviewable, even if those actions contravene constitutional rights and protections.' US federal judgements in Washington, Minnesota, Hawaii, and Maryland (State of Washington; State of Minnesota (plaintiffs-Appellees) v. Donald J Trump, *et al*, (Defendants-Appellants), United States Court of Appeals for the Ninth Circuit, No. 17-35105; State of Hawai'i & Ismail Elshikh v. Donald J. Trump, *et al* in the United States District Court for the District of Hawai'i CV. No. 17-00050 DKW- KSC; International Refugee Assistance Project *et al* v. Donald J. Trump, *et al*, United States District Court for the District of Maryland Civil Action No. TDC-17-0361) have found that the government's motive for issuing an executive order in the name of security is indeed subject to judicial scrutiny, and may be suspended on the basis that it violates the establishment clause of the Constitution.

In a 2015 immigration case, *Kerry v. Din,* Justice Kennedy wrote that in some circumstances the U.S. government's motives in denying someone entry into the United States could be subject to legal review. The opinion is said to show

97 28 U.S.C.A. s 2241 (e).

98 128 S.Ct. 2229.

that Justice Kennedy is 'not prepared to give complete and total deference to the executive branch in the enforcement of immigration laws'[99].

Canada

According to Roach's summation, although there are certainly cases where the Supreme Court of Canada has been deferential to the state's specific interest in the investigation and prevention of terrorism, it has generally not been quiescent regarding anti-terrorism measures taken by either of the two branches of government.[100] In *Suresh v. Canada* the Supreme Court of Canada has indicated that deporting a non-citizen who is suspected of financing terrorism to a jurisdiction where there is a substantial risk of torture violates the Canadian Charter of Rights and Freedoms.[101] Though the court did not specifically decide whether or not such deportation could be justified under 'exceptional circumstances' where the Charter authorizes restriction of rights,[102] it has explicitly noted that this would place Canada in breach of its international human rights obligations. In *Charkaoui v. Canada* the court held that a violation of fundamental fairness under the Charter occurred where the use of immigration law to detain suspected terrorists facilitated the government's submission of secret evidence without any adversarial challenge.[103]

There are cases where the court directly deals with terrorism legislation and prosecutions. In 2004 the Court dealt with the constitutional validity of a provision within the Canadian anti-terrorism law that authorises the police to obtain a judicial order that requires a person to answer questions and disclose documents that are useful in a terrorism investigation. Though the court did

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99 Lawrence Hurley, *In Trump travel ban fight, Justice Kennedy's 2015 opinion looms large*, REUTERS (online), 11 Feb 2017 http://www.reuters.com/article/us-usa-trump-immigration-court-kennedy-idUSKBN15P24R

100 Roach, *supra* note 71.

101 *Suresh v Canada* [2002] 1 S.C.R 3.

102 For the construction of this aspect of the judgment as being a deference to the executive see: Kent Roach, *Constitutional, Remedial and International Dialogues About Rights: The Canadian Experience*, 40 TEXAS JOURNAL OF INTERNATIONAL LAW 537 (2005).

103 *Charkaoui v Canada* [2007] 1 S.C.R. 350.

not find the investigative procedure unconstitutional per se it emphasised that material obtained through this mechanism would not be used as evidence in subsequent legal proceedings including extradition and immigration proceedings against the person forced to provide the information.[104] The court's restriction on the use of material obtained through the procedure makes retaining the procedure pointless, and led the parliament to let the provision expire in 2007.[105] In *Khadr v Canada,* the Supreme Court held that the Canadian Security Intelligence Service breached the Charter when it sent its agents to Guantanamo Bay to interview a Canadian detainee for that means participation in breaches of international law as determined by the United States Supreme Court in the *Hamdan v. Rumsfeld* case.

United Kingdom

Again, drawing upon Benevenisti and Roach, the record of the House of Lords may be characterised as pragmatic. The UK has had a long recent history with IRA terrorism, including some notorious cases that resulted in miscarriages of justice (the Guildford Four, the Maguire Seven and the Birmingham Six).[106] Nonetheless, the UK legislation was drafted and passed in a context of an unwritten or uncodified constitution that assures a good quantity of legislative and judicial deference to the executive on security matters. As is the case throughout liberal democracies, in the domain of counter-terrorism lawmaking by governments legislative deference is the consequence where both opposition parliamentarians and backbenchers lack both the pluck (political courage) and the means (access to security intelligence information and expertise) to challenge the summary information with which they are presented.[107] *The Anti-Terrorism, Crime and Security Act 2001* was passed

[104] Re Vancouver Sun [2004] 2 S.C.R. 332.

[105] Roach, *supra* note 71, at 147-48.

[106] GERRY CONLON, PROVED INNOCENT: THE STORY OF GERRY CONLON AND THE GUILDFORD FOUR (Penguin Books, 1991); CHARLES PATRICK EWING, JOSEPH T. MCCANN, MINDS ON TRIAL: GREAT CASES IN LAW AND PSYCHOLOGY 54–56 (Oxford University Press, 2006).

[107] Laurence Lustgarten, *National Security Terrorism and Constitutional Balance*, in ETHICS OF TERRORISM & COUNTER-TERRORISM 261 (Georg Meggle, Andreas Kemmerling and Mark Textor (eds), Ontos Verlag, 2005).

swiftly and other anti-terrorism laws followed (*The Civil Contingencies Act 2004*, *The Prevention of Terrorism Act 2005*, *The Terrorism Act 2006*, and *The Counter-Terrorism Act 2008*), with little deliberation, against the backdrop of spectacular security events including the July 7, 2005 bombings in London.

Though the House of Lords, in *Rehman,* deferred, and extensively justified the deference, to the conclusion of the Secretary of State, in what is referred to as 'a stunning departure from the Anglo-American tradition of judicial deference,' it opposed part of a statute passed by the British parliament. Part IV of the *Anti-Terrorism, Crime and Security Act* authorized an indefinite detention of non-citizens if suspected for involvement in terrorism provided that they cannot be deported for fear of a substantial risk of torture. This Section of the *Act* was challenged in *A v. Secretary of State (the Belmarsh Detainees* case) where the House of Lords found it to be unjustifiably discriminatory against non-citizens and disproportionate to the (terrorism related) emergency situation to which the *Act* is responsive.[108] This led the Blair government to repeal the law and introduce new legislation that authorizes control orders on both non-citizen and British citizen suspected terrorists.[109]

Lord Steyn, who was not on the panel in the *Belmarsh Detainees*, commended the judgment as follows.

> Nobody doubts in any way the very real risk of international terrorism. But the Belmarsh decision came against the public fear whipped up by the governments of the United States and the United Kingdom since 11 September 2001 and their determination to bend established international law to their will and to undermine its essential structures. It was a great day for the law —for calm and reasoned judgment, analysis without varnish, and for principled democratic decision making by our highest court.[110]

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[108] 2004 UKHL 56.

[109] The Prevention of Terrorism Act, 2005, Chapter 2.

[110] Lord Steyn, *2000-2005: Laying the Foundations of Human Rights Law in the United Kingdom*, 4 EUROPEAN HUMAN RIGHTS LAW REVIEW 349, 361 (2005).

2. Understanding the Shift

Regarding the review of legislative and executive counterterrorism measures Benvenisti has concluded that 'the challenge to the political branches [by the courts] has never been clearer.'[111] Referring to a clear contrast to a past of judicial deference in national security cases, he has described recent counter-terrorism decisions as 'defiant.'[112]

Lindquist has related the courts behaviour as reactive against the other branches of government as the latter expand their institutional room following the increase in 'government activity'.[113] The more active the other branches of the government, the more likely that they will be ultra vires. According to Lindquist, the courts' resistance to rubberstamping legislative and executive acts can be seen as an effort to 'retain a proportionate influence over the growing responsibilities of legislative and administrative institutions' and to maintain the 'tripartite separation of government powers.'[114] Relatedly, Lord Chief Justice Thomas said that in a changing constitutional landscape, it is necessary that judges show 'greater political engagement' with government and parliament and a 'much more proactive stance in promoting an understanding of the importance of justice and taking more proactive steps.'[115]

Furthermore, the courts' departure from their trend to defer to the legislative and executive acts in national security matters has been attributed to a newly emerging philosophy of the courts —the courts as expert balancers are better equipped than the political branches to resolve conflicts between liberty and security.[116] This argument has it that while the legislature is the proper body

111 Benvenisti, *supra* note 74, at 268.

112 Benvenisti, *supra* note 81, at 256.

113 Lindquist, *supra* note 29, at 26.

114 Powers and Rothman cited in *Id.*

115 Owen Bowcott, Judges must engage in politics to preserve rule of law – lord chief justice *theguardian* (online) 18 September 2015, <https://www.theguardian.com/law/2015/sep/17/judges-engage-politics-preserve-rule-law-lord-chief-justice>.

116 There are two other explanations, namely constitutional mandate and citing the court's special role in correcting the flaws of the democratic process. Benvenisti, *supra* note 74, at 19-20.

to assert general national policies and the executive is the appropriate organ to declare security needs, the court has the competence and qualification 'for balancing these interests against individual rights.'[117]

According to Benvenisti, under the emerging review regime the courts characterize the work of setting the balance between security measures and human rights as a matter that falls directly within their competence. While acknowledging the expertise of the security agencies in assessing threats, the courts have pushed back against the encroachment on human rights.[118] In this way, Benvenisti observes, the courts have been redefining their role.[119] This is best illustrated by comparing Lord Hoffman's position in *Rehman* and *Belmarsh.* In the former, he expressed the view that the courts are unable to go behind the executive to assess what is required in the interest of national security or therefore proactively balance liberty against security interests. In the latter, where he is said to have taken the strongest statement a judge in his position has ever made, he affirmed that 'the Court was entitled not only to assess the proportionality of certain measures deemed necessary by the executive to contend with grave risks to society, it was perfectly capable of examining, and in fact required to examine, the executive's determination of those risks.'[120]

Another justification for the court to be involved in checking legislative and executive acts is the protracted nature of the precautionary regime (in the 'war on terrorism', or counterterrorism). As Benvenisti has observed, the indeterminacy of this regime makes the intervention of the court compelling. Whilst there may be a more compelling case that during true emergencies the court may need to support temporary measures against the balance of rights as an independent institution, if emergency is to become a longstanding 'the new normal,' both the public and the government ought to retain their interest in a 'normal time' independent court. Relatedly, Sidhu, referring to the US

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117 *Id.*, at 20-21.

118 *Id.*, at 22.

119 *Id.*

120 *Id.*, at 5. Similarly French and German courts have rejected certain counter-terrorism legislative acts as unconstitutional. *Id.*, at 15-16.

Supreme Court's involvement in checking counterterrorism measures, has noted the following:

> … the judicial branch, in the performance of its constitutional duty of judicial review, furthers American national security and foreign policy objectives even when it may happen to strike down executive or legislative arguments for expanded war powers to prosecute the current war on terror and even though the executive and legislature constitute the foreign policy branches of the federal government. In other words, a "loss" for the executive or legislature, may be considered, in truth, a reaffirmation of our constitutional system and therefore a victory for the entire nation in the neglected but necessary post-9/11 war of ideas.[121]

The courts depart from their deference to other branches in national security matters, and do so by giving effect to international law against selective executive preferences that might wish against such implementation.[122]

3. The Courts, Hyperlegislation and Counter-Terrorism in Australia

As in the U.S., Canada and the U.K., in Australia there was a great deal of lawmaking activity following 9/11.[123] By 2013 over 60 counterterrorism laws were created or revised, leading to a remarkable profile featuring 'sheer volume.'[124] It has been commented that the 'Federal Parliament is addicted to the thrill of enacting these laws.'[125] Analysts have found that counter-terrorism law is often

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[121] Dawinder S. Sidhu, *Judicial Review as Soft Power: How the Courts Can Help Us Win the Post-9/11 Conflict*, 1(1) AMERICAN UNIVERSITY NATIONAL SECURITY LAW BRIEF 69, 74 (2011).

[122] Eyal Benvenisti, *Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of national Courts*, 4 EUROPEAN JOURNAL OF INTERNATIONAL LAW, 159 (1993); Benvenisti, *supra* note 74.

[123] For the lack of satisfactory parliamentary deliberation over these laws see: Nicola McGarrity and George Williams, *Counter-Terrorism Laws in a Nation without a Bill of Rights: The Australian Experience*, 2(1) CITY UNIVERSITY OF HONG KONG LAW REVIEW 45, 58-61 (2010).

[124] George Williams, *The Legal Legacy of the 'war on terror*,' 12 MACQUARIE LAW JOURNAL *3,* 6 (2013).

[125] Fergal Davis, *Opinion: Why Australia is obsessed with anti-terror laws, UNSW Newsroom* 26 June 2015. <http://newsroom.unsw.edu.au/news/business-law/why-australia-obsessed-anti-terror-laws>

rushed over the top of more than adequate existing legislation.[126] On this remarkable post 9/11 law making record, Roach has noted:

> 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.[127]

There has been concern expressed regarding both the quantity[128] and quality of this barrage of legislation. In relation to its qualitative impact on human rights, Fairall and Lacey have observed:

> the situation in Australia is currently such that basic and fundamental freedoms are being eroded by a parliament with increased legislative powers and an all-powerful executive government with the political will to use them … recent legislative measures have highlighted, to an unprecedented degree, the threat to human rights. [129]

The Eminent Jurists Panel of the ICJ has found with members of civil society and the legal community that Australian counterterrorism law provisions 'have introduced broadly defined offences, allowed retrospective application of the law,

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[126] LAURA K. DONOHUE, COUNTER-TERRORIST LAW AND EMERGENCY POWERS IN THE UNITED KINGDOM, 1922-2000 (Irish Academic Press, 2000); LAURA K. DONOHUE, THE COST OF COUNTERTERRORISM: POWER, POLITICS, AND LIBERTY (Cambridge University Press, 2008), MARK NEOCLEOUS, CRITIQUE OF SECURITY (Edinburgh University Press, 2008).

[127] KENT ROACH, THE 9/11 EFFECT: COMPARATIVE COUNTER-TERRORISM (Cambridge University Press, 2011) 310, emphasis added.

[128] See: Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights (an Initiative of the International Commission of Jurists, 'Eminent Jurists Panel concludes Australia hearing on counterterrorism laws, practices and policies: press Release' 17 March 2006, 2 < http://www.icj-aust.org.au/>; Robert McDougall, *The Baby or the Bathwater? Terrorism, Responses and the Role of the Courts*, 14 NEW SOUTH WALES JUDICIAL SCHOLARSHIP 8-13 (2007).

[129] Paul Fairall and Wendy Lacey, *Preventive detention and control order under federal law: the case for bill of rights*, 31 MELBOURNE UNIVERSITY LAW REVIEW 1072,1096 (2007).

expanded powers of the executive branch of government and *constrained avenues of judicial review* and due process of law.'[130] Former High Court Justice Michael McHugh echoes this concern, citing Subsection 31 (8) of the *National Security Information Act 2004*. According to this provision, in deciding restrictions on the disclosure of information on the Attorney General's request for confidentiality, the court has to give greater weight to the Attorney General's Certificate over other factors including the 'substantial adverse effect on the defendant's right to receive a fair hearing, including in particular on the conduct of his or her defence.' Justice McHugh has observed that:

> It is no doubt true in theory the National Security Information (Criminal and Civil Proceedings) Act does not direct the court to make the order which the Attorney-General wants. But it does as close as it thinks it can. It weights the exercise of the discretion in favour of the Attorney-General and in a practical sense directs the outcome of the closed hearing. How can a court make an order in favour of a fair trial when in exercising its discretion, it must give the issue of fair trial less weight than the Attorney-General's certificate?[131]

Similarly, the Eminent Jurists Panel has commented that by requiring the court to give greatest weight to 'the risk of prejudice to national security' in deciding whether to 'maintain, modify or remove' the Attorney General's restriction order on disclosure, the legislation requires the court to favor the government. The court is in a disadvantaged position to cite the impact of the restriction order on the right of the accused to fair trial and decide differently from the Attorney General's order.

On the other hand Robert McDougall of the Supreme Court of New South Wales vehemently dismisses the claim that counter terrorism laws have deprived the courts of their core functions as a 'bold accusation.'[132] Honourable Justice McDougall argues that not only do the courts have a role to play to protect human rights under the Australian counter terrorism legislation but they have been discharging their responsibility.[133] Honourable Justice McDougall cited and

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130 Eminent Jurists Panel, *supra* note 128, at 2, emphasis added.

131 Hon Michael McHugh AC QC, *Terrorism Legislation and the Constitution,* 28 AUSTRALIAN BAR REVIEW 117 (2006).

132 McDougall, *supra* note 128, at 37.

133 *Id.*, at 37-55.

analysed four court cases to conclude that 'not once has an Australian court baulked from making a difficult decision when it is seen to be just and right to do so. Australian courts have shown that in the age of terror, laws are not silent.' The cases are *R v Mallah*,[134] *R v Roche*,[135] *R v Thomas*,[136] and *Thomas v Mowbray*.[137]

Closer examination of the cases would make it hardly possible to see how his Honour's conclusion can be based on these cases. It is only in the third case that the court sustained an objection by the defence to the admissibility of evidence that was obtained illegally. The court decided in favour of the prosecution in the first and fourth cases and only dismissed the prosecution's appeal for higher penalty in the second case.[138]

Moreover, this claim contradicts what Justice Whealy has pointed to as the quiescent role of courts in counter terrorism prosecutions. In *R v Lodhi*, Justice Whealy has made the following observation to justify the anti-terrorism legislation that criminalizes preparatory acts,

> In those circumstances, *the obligation of the Courts is to denounce terrorism and voice its stern disapproval of activities* such as those contemplated by the offender here… In my view, the Courts must speak firmly and with conviction in matters of this kind … In offences of this kind… the principles of denunciation and deterrence are to play a substantial role.[139]

He added:

> As trial judges, *we have to respect* the legislation that comes into existence from time to time relating to terrorism offences, even if we find it personally distasteful. But the very nature of the legislation to

134 (2005) 154 A Crim R 150.

135 (2005) 154 A Crim R 150 at 169.

136 (2006) 14 VR 475.

137 [2007] HCA 33.

138 Justice McDougall's response would be that it is neither because the legislation prohibits the court from deciding otherwise nor because the court abdicates its responsibility that it decided in favour of the prosecution. Instead, it is because the court exercising its plenary power does not see it appropriate to decide otherwise.

139 R v Lodhi [2006] NSWSC 691, Para. 92 (emphasis added).

> which I have referred may tend to reinforce the potential in the public mind for prejudice, animosity and bias.[140]

Indeed, the Australian Court has not been engaged in examining the validity of what some have described as 'draconian'[141] 'troubling'[142] legislative counter terrorism measures. The restraint of the court has been expressed variously. Fairall and Lacey have noted that the High Court's approach in 'cases such as *Thomas v Mowbray …* highlighted the inability of Australian judges to prevent unjust human rights outcomes in the face of federal legislation that is unambiguous in its intent and that falls within a constitutional head of power'[143] On the court's tendency to approve legislative measures despite their derogation from human rights, they note:

> When faced with extraordinary legislative measures that significantly erode rights traditionally viewed as fundamental, the … High Court has tended to give full effect to the words of s 51 of the Constitution, which confers broad legislative powers on the parliament.

Lamenting that the majority of the High Court Justices has not paid attention to part of the constitution that could be used to safeguard human rights from such derogatory legislation, they note "the protective ambit of Chapter III and the rule of law, which is supposed to form an assumption upon which the

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[140] Marinella Marmo, *Democratic States Response to Terrorism: A Comparative Reflection on the Perceived Role of the Judiciary in the Protection of Human Rights and Civil Liberties,* in POST 9/11 AND THE STATE OF PERMANENT LEGAL EMERGENCY: SECURITY AND HUMAN RIGHTS IN COUNTERING TERRORISM 241, 250 (Aciceto Masferre (ed), Springer, 2012.) (emphasis added)

[141] Julian Burnside, *Terror laws: Extreme laws an attack on what we hold dear*, *THE SYDNEY MORNING HERALD* (online), 18 October 2015 < http://www.smh.com.au/federal-politics/political-opinion/terror-laws-extreme-laws-an-attack-on-what-we-hold-dear-20151015-gkanjm.html>.

[142] Greg Barns, *Draconian anti-terrorism bid an affront to freedom*, 6 Aug 2014, *ABC NEWS* (online) <http://www.abc.net.au/news/2014-08-06/barns-draconian-anti-terror-plan-goes-too-far/5651156>.

[143] Fairall and Lacey, *supra* note 129, at 1095.

Constitution rests, are all too often invoked only as effective limits on legislative power in dissenting opinions." [144]

Justice Kirby, frustrated by the majority in *Thomas v. Mowbray,* which upheld anti-terrorism legislation that provided for control orders that are highly restrictive of personal freedom, recalled a famous ruling:

> I did not expect that, during my service, I would see the *Communist Party Case* sidelined, minimized, doubted and even criticised and denigrated in this court. Given the reasoning expressed by the majority in these proceedings, it appears likely that, had the *Dissolution Act* of 1950 been challenged today, its constitutional validity would have been upheld. This is further evidence of the unfortunate surrender of the present court to demands for more and more governmental powers, federal and state, that exceed or offend the constitutional text and its abiding values. It is another instance of laissez faire through which the court is presently passing.
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> Whereas until now, Australians, including in this court, have generally accepted the foresight, prudence and wisdom of this court, and of Dixon J in particular, in the *Communist Party Case* (and in other constitutional decisions of the same era) they will look back with regret and embarrassment at this decision when similar qualities of constitutional wisdom were demanded but were not forthcoming. [145]

That Australian judges are relatively deferential to other authorities is a finding supported by a study of the Australian judiciary.[146] Marmo observes that domestic judges in the US and UK are more proactive defenders of human rights than their Australian counterparts. The former more readily decide against the intention of national legislation[147] and government

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[144] *Id.* For their argument on how the majority's view has been influenced by two interrelated misleading views see *Id.* 1094. Justice Bongiorno's ruling can be seen as an exception (see below note 154). However, this type of review falls within what Benveneti refers to as the 'least controversial' judicial review — 'referring an action back to the executive for reconsideration.' Benvenisti, *supra* note 74, at 11.

[145] (2007) 237 ALR 194, 301-2

[146] Marmo, *supra* note 140, at 248.

[147] *Id.*

priorities[148] and assert their institutional jurisdiction, even where this has been dominated by government agencies.[149] In contrast, senior Australian judges have said that the High Court is 'dismissive of progressive legal thinking.' Lower court judges, in the meantime, fail to proactively use human rights out of a fear of being reversed. While they have an 'abstract willingness to protect human rights,' their 'legal upbringing' in Australia provides an impediment including the relative absence of instruction in international legal developments and discouragement from adopting original, innovative or creative interpretations.[150] Although most of the interviewees in the study supported the approach taken by overseas courts, they were compelled by the Dixonian tradition of judicial review and admitted relative weakness compared against courts in the UK and US.[151] That this view may reflect the top echelon of the legal community currently is supported by a study of barristers involved in high profile counter-terrorism prosecutions, who acted on the strong belief that there was no achievable success in challenging the validity of the legislation or arguing for the applicability of international human rights law.[152]

As noted above, there is a groundswell of popular fear and a selection of expert opinion that has influenced political choices to make legislative changes, but Justice Whealy's observation presumes a risk of terrorism in Australia that may not be well substantiated by independent research.[153] Under paragraph

148 *Id.*, at 251

149 *Id.*, at 247

150 *Id.*

151 *Id.*

152 Willem de Lint and Wondwossen D Kassa, *Bent into Security: Barrister Contribution to a skewed Order in Two Terrorism Prosecutions in Australia*, 44(2) JOURNAL OF LAW AND SOCIETY 169 (2017).

153 Michaelsen has argued that as the actual risk of a terrorist attack occurring on Australian soil is rather low, Australia's drastic legislative measures are not justified by the severity of the terrorism threat. Christopher Michaelson, *Antiterrorism Legislation in Australia: A Proportionate Response to the Terrorist Threat?*, 28(4) STUDIES IN CONFLICT AND TERRORISM 321 (2005). Also See: McDougall, *supra* note 128, at 8-13. There is comparable U.S. research by Mueller and Stewart (JOHN MUELLER AND MARK G. STEWART, CHASING GHOSTS: THE POLICING OF TERRORISM (Oxford University Press, 2016); John Mueller and Mark G. Stewart, *The Terrorism Delusion: America's Overwrought Response to September 11*, 37(1) INTERNATIONAL SECURITY *81* (2012); John Mueller and Mark Stewart, *Terrorism Poses no existential threat to*

91, his Honour has noted 'terrorism is an increasing evil in our world and a country like Australia, with its very openness and trusting nature is likely to fall easy prey to the horrors of terrorist activities.' This claim is made despite that Australia has been described as 'fortunate' in its limited exposure to terrorism.[154] As per Lord Hoffman, even judges in London and Madrid, where catastrophic loss of life has been witnessed, have not taken the equivalent view of their review role and have not adopted such a deferential approach.[155] Yet, Justice Whealy *referred to* London to support his decision to impose severe punishment on Lodhi.[156] Even under precautionary counterterrorism, in common law jurisdictions, deference to the legislature and the executive is not a given.[157] In comparison with other jurisdictions, the Australian court has

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America. We must stop pretending otherwise, THE GUARDIAN (online) 25 February 2015 https://www.theguardian.com/commentisfree/2015/feb/24/terrorism-poses-no-existential-threat-to-america.

154 Stuart Koschade, *Constructing a Historical Framework of Terrorism in Australia: From the Fenian Brotherhood to 21st Century Islamic Extremism,* 2 JOURNAL OF POLICING INTELLIGENCE AND COUNTER-TERRORISM 54 (2007); Nicola McGarrity, *An Example of "Worst Practice"? The Coercive Counter-Terrorism Powers of the Australian Security Intelligence Organisation*, 4 VIENNA JOURNAL ON INTERNATIONAL CONSTITUTIONAL LAW 468 (2010).

155 In *A (FC) v Secretary of State for the Home Department,* Lord Hoffman has reasoned as follows.

> 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.

156 'The need for substantial sentences to reflect the principles of general deterrence are obvious in relation to crimes of this kind. Such crimes are hard to detect; they are likely to be committed by members of our own community and often by persons of prior good character and favourable background. One has only to consider the tragedy of the London bombings in 2005 to recognize this observation as a sad truism.' R v Lodhi [2006] NSWSC 691, para 91.

157 The judiciary is not isolated from the strong sentiment expressed in media outlets and by some security experts that the threat of terrorism demands the reset of a security-liberty balance. However, almost every generation of judges has encountered a forceful challenge to adopt a reset. Some, as below, have offered a forceful response. For example, in *Public Committee Against Torture v Israel*, Justice Barak reasoned as follows:

settled for review quiescence.[158] According to McGarrity and Williams, '[t]he role played by the Australian courts in protecting human rights [while countering terrorism] can, at best, be described as marginal.' [159]

False Justifications or Judicial Quiescence?

The court's failure to defend human rights has been widely attributed to its peculiar legal culture, encompassing its view of institutional opportunities and constraints. There are two major forces on the court that are cited to account for its unwillingness/inability to be critical of counter terrorism measures: the tradition of legal positivism and the absence of a Bill of Rights.

It is the judiciary that is expected to uphold not only the constitution, but also rule of law legality. As per the above, a quiescent or deferential position is one that under-represents court institutional interests in the Australian constitutional system. It smacks of a tautology to insist on a view that a court is indefinitely committed to the less robust view of its institutional place *as the*

> We are not isolated in an ivory tower. We live the life of this country. We are aware of the harsh reality of terrorism in which we are, at times, immersed. The possibility that this decision will hamper the ability to properly deal with terrorists and terrorism disturbs us. *We are, however, judges. We must decide according to the law.* This is the standard that we set for ourselves. When we sit to judge, we ourselves are judged. Therefore, in deciding the law, we must act according to our purest conscience. HCJ 5100/94 [1999] in Marmo, *supra* note 140, at 249 (emphasis added).

[158] However, there was an instance where the Supreme Court of Victoria has given a proactive ruling. In *R v Benbrika et al*, the defendants applied to have their trial stayed on grounds of unfairness. They claimed that the general conditions under which they were being held in detention and transported to court each day was having a detrimental effect on their psychological and physical well-being. The defendants were held in a maximum security outside of Melbourne. Prior to trial, all of the accused had spent at least two years in custody. For the first year, the defendants spent up to 23 hours a day in their cell. They were transported to court in vans divided into small box-like steel compartments with padded steel seats, lit only by artificial light. The defendants were strip-searched prior to their departure from and upon their return to the prison. Bongiorno J held that the conditions under which the defendants were being held and transported rendered the trial unfair and should be stayed unless the unfairness was remedied.

[159] McGarrity and Williams, *supra* note 123, at 45.

basis of the view that the court is not in a position to take a more robust view of its institutional place or position. In addition, the judiciary, through its capacity of review, is what gives particularity or reality to rights, independent of the absence or presence of a dedicated Bill. It is contended here that the two factors are descriptions of the excuses not to be as pragmatic as overseas counterparts, but not justifications.

1. Legal Positivism

It has been noted that the Australian court has developed a longstanding tradition of legal positivism, by which it is to do no more than interpret and enforce limitations on government power as embodied in the constitutional text.[160] The approach is 'rule-driven, precedent focused and greatly prizes certainty in the law.'[161] The court distances itself from questions of policy, accepting that they are best left to the parliament which dictates that judges must only apply the law.[162] Dixon, in his address upon being sworn in as Chief Justice of the High Court of Australia, stated "it may be that the Court is thought to be excessively legalistic. I should be sorry to think that it is anything else. There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism."[163]

It was to the doctrinal position adopted by Dixon that Kirby attributed a lasting view of Australian judicial restraint. For many, legalism is a doctrine by which 'judges do not make the law.'[164] And whilst some in the judiciary may have "moved beyond the 'Old Testament'" of legalism, there are many in

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160 Stephan Gageler, *Foundations of Australian Federalism and the Role of Judicial Review*, 17 FEDERAL LAW REVIEW 164, 175 (1987). The other aspect is that 'federalism necessarily requires the Court to play a unique role in determining the constitutionality of governmental action.' *Id.*

161 Sir Daryl Dawson and Mark Nicholls, *Sir Owen Dixon and Judicial Method*, 15 MELBOURNE UNIVERSITY LAW REVIEW, 543 (1986) in Foley, *supra* note 5, at 292.

162 *Id.*

163 Owen Dixon, *Upon Taking the Oath of the Office as Chief Justice*, quoted in Foley, *supra* note 5, at 293.

164 Kirby, '*supra* note 7, at 3.

the legal profession, as well as politicians, many laypersons and citizens, who still hold fast to a legal positivist view of judicial activity.[165]

Attributing the docile nature of the court to the long existing tradition than to the constitution per se, Fairall and Lacey have noted that

> Beyond the express constitutional limits on executive and legislative action, the principle of legality is applied in an ad hoc and almost discretionary fashion and a shift in the approach of the High Court would appear remote, given the tradition of cautious conservatism on the part of judges in human rights matters.[166]

After explaining the interrelationship between the court's positivist approach and its failure to serve as a guardian to human rights, Fairall and Lacey have concluded 'the limitation of the positivist approach to the protection of civil rights are now blindingly obvious.'[167] Many others,[168] including defence lawyers who were involved in terrorism prosecution[169] have echoed this view.[170]

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165 *Id.*, at 4.

166 Fairall and Lacey, *supra* note 129, at 1092.

167 *Id.*, at 1098.

168 HILARY CHARLESWORTH, WRITING IN RIGHT: AUSTRALIA AND THE PROTECTION OF HUMAN RIGHTS (University of New South Wales Press, 2002); GEORGE WILLIAMS, THE CASE FOR AUSTRALIAN BILL OF RIGHTS: FREEDOM IN THE WAR ON TERROR (University of New South Wales Press, 2004).

169 de Lint and Kassa, *supra* note 152.

170 Fairall and Lacey have attributed the High Court's failure to engage in robust review of legislative measures to 'legal positivism' which they have noted, 'is firmly entrenched as the dominant paradigm in Australian law'. They have observed:

> constitutionalism in Australia is too often understood within the confines of positivism … for the majority of the High Court, the written text of the Constitution is all too readily divorced from the non-express assumptions upon which it rests — the assumptions to which Dixon J referred in the *Communist Party case …* the principle of legality — the notion that judges have an integral role to play in demanding the legality of any executive or legislative action and in minimizing the effect of laws which are designed to remove or erode fundamental rights and freedoms —has been reduced to its minimum in Australia.

2. Absence of Bill of Rights

The Australian Constitution does not include a Bill of Rights, and in this, as Foley observes, Australia is 'an outlier in modern constitutional systems.'[171] This means that in the area of Australian constitutional jurisprudence, there is no 'large body of work in the field of individual rights,'[172] that, instead, the court is primarily concerned with the 'relationships between federal and state parliaments, executives, and courts.'[173] McGarrity and Williams have observed the role of the court in protecting human rights, in the absence of bill of rights, is 'extremely limited.'[174] Similarly, the Australian Human Rights Commission notes that though there is a potential for some counter-terrorism laws to infringe fundamental rights, in the absence of Australian Charter of Rights there is a limited opportunity for a person to challenge decisions that do not comply with human rights.[175]

According to Carne, the existence of bills of rights in other common law jurisdictions including Canada, United Kingdom, the United States and New Zealand 'has set boundaries to the legislative debate and response about

Fairall and Lacey, *supra* note 129, at 1095.

171 Foley, *supra* note 5, at 285.

172 *Id.*

173 *Id.* Also see: McGarrity and Williams, *supra* note 123.

174 McGarrity and Williams, *supra* note 123, at 58. Thus, they argue that parliamentary process 'provides the only meaningful opportunity for assessing …counter-terrorism legislation on human rights grounds.' *Id.*, at 46. However, Davis challenges this alternative arguing that 'absence of a Bill of Rights means Australian governments are uninhibited by concerns about the courts striking anti-terror legislation down. There is no legal framework to give the government pause for thought when it considers how to balance the need for anti-terror laws with human rights.' Fergal Davis, Why Australia is obsessed with anti-terror laws, *the newdaily* (online), 24 June 2015 < http://thenewdaily.com.au/news/2015/06/24/australia-obsessed-overzealous-terror-laws/>.

175 Australian Human Rights Commission, *A Human Rights Guide to Australia's Counter-Terrorism Laws* (2008) <https://www.humanrights.gov.au/human-rights-guide-australias-counter-terrorism-laws#fnB64>.

intelligence gathering from individuals for counter-terrorism purposes and has made rights evaluation more prominent in that equation.'[176]

In the aftermath of 9/11 where judges are not inclined to resist the will of the legislature, Fairall and Lacey have noted, the assumption that informal mechanisms such as 'trust in the basic decency of government, an independent and incorruptible judiciary, the transparency of judicial and administrative processes and trial by jury' provide sufficient human rights protection has been proven futile. [177]

Signifying the impact of lack of bill of rights on the role of the court, Fairall and Lacey have noted:

> when faced with legislation that erodes fundamental rights, judges have lacked a positive instrument against which the proportionality of the statute may be measured. Any engagement with human rights issues in the absence of a positive instrument designed to implement such rights carries with it the risk of being perceived as "activist"'.

Furthermore, they observed that

> in the absence of a bill of rights, the system has proven itself incapable of responding to the threat of terrorism without relinquishing many of the fundamental freedoms that Australians have for so long taken for granted. Without a statutory bill of rights, human rights issues will continue to predominantly inform only the opinions of dissenting judges.[178]

Defence lawyers who were involved in terrorism prosecution have echoed this problem. They invoke lack of bill of rights in Australia as one major reason they are in a precarious position while defending their clients. They are confident that the outcome of the cases of their clients would have been different had there been bill of rights. However, owing to this politico-legal environment and the court's degree of involvement in reviewing legislative and executive counter terrorism measures, they do not even think that resort to international human rights law

[176] Greg Carne, *Brigitte and the French Connection,* 9(2) DEAKIN LAW REVIEW 573, 604 (2004).
[177] Fairall and Lacey, *supra* note 129, at 1096.
[178] *Id.*, at 1098.

would help their client.[179] Unlike in other jurisdictions where the anti-terrorism legislation have been challenged by barristers and/or other stake holders and subject to judicial scrutiny, in Australia, despite its proliferation and the prediction that it was likely to be challenged,[180] the validity of anti-terrorism laws have never been seriously challenged before court of law. In 2006, Justice Kirby noted that there had not been a case which involves 'an Australian court considering an explicit challenge arising out of counter-terrorism legislation.'[181] Nor has there been since then. Barristers confessed that they did not think of challenging the validity of the law as feasible and practical option.[182]

Consistent with Epps' explanation on the dependency of judicial proactivity on the availability of a support structure in the jurisdiction that a court functions, lack of interest on the part of the barristers to provoke the court to consider validity of a legislative measure might have its own role in the court's failure to review these measures. Roach has linked the proactive judgments in the United Kingdom and the United States to chamber of barristers, civil society groups.[183]

Conclusion

It is argued that Australia is an outlier in many respects regarding the role of the judiciary in counterterrorism. National courts in comparable jurisdictions have not universally or even generally abdicated responsibility to safeguard fundamental rights.[184] With the notable exception of Justice Kirby, the Australian High Court has not followed this trend, and the lower courts have followed suit.

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179 de Lint and Kassa, *supra* note 152.

180 ABC radio National, 'Expert says States may be sidelined on terror laws', *PM*, 24 October 2005 (Don Rothwell) <http://www.abc.net.au/pm/content/2005/s1489607.htm>.
Michael Kirby, *Judicial Review in a time of Terrorism — Business As Usual*, 22(1) SOUTH AFRICAN JOURNAL ON HUMAN RIGHTS 21, 31 (2006).

182 de lint and Kassa, *supra* note 152.

183 Roach, *supra* note 71.

184 As Benvenisti has argued the courts' acquiescence with the executive's demand for deference in counterterrorism amounts to abdication of the courts' responsibility to safeguard basic rights of citizens. Eyal Benvenisti, *The Strategic Uses of Foreign and International Law by National Courts,* 102(2) AMERICAN JOURNAL OF INTERNATIONAL LAW 241, 246 (2008).

The phenomenon of 'hyper legislation' is but a logical outcome of politics of fear,[185] and it is expected that moral panics sometimes need to be countered by actors that have been designedly, if not manifestly, provided with a standpoint at some remove from their heat. Indeed, where the other two branches of government cannot apparently avoid the arguable overreach that is provided in the invocation of precautionary counter-terrorism, the third branch, as guardian of the constitution and rule of law legality, is weak at its own peril. The 'existential threat' is most likely to be an 'own goal': a pretext of requisite deference to the executive and legislature on national security matters causes a rot in the constitution of liberal democratic governance. Institutional pragmatism requires a long view past 'hyper-legislation,' and it is this absence in the court's deference to the two branches of government that makes Australia's counterterrorism different.[186] Contra Justice Whealy, judicial review, as Jenkins argues, 'needs strengthening just when it appears to be at its most problematic and least justifiable.'[187]

In suggesting the use of the term pragmatic review, we merely follow others (Schlesinger, Kirby) in what we believe is descriptive of the correct attitude of the court. We take into consideration that this branch of government must operate to reconcile emergent and established authorities, but must do so in support of its own position, which is always dependent on its willingness and capacity to nullify legislation and outlaw executive action. This capacity draws upon a version of the rule of law that is oftentimes depicted as quixotic or 'quaint',[188] but certainly resonates in international law instruments that we believe the court should not shirk from drawing upon.

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185 Jude McCulloch, *National (in)Security Politics in Australia: Fear and the federal election*, 29(2) ALTERNATIVE LAW JOURNAL 87 (2004).

186 Kirby, *supra* note 178, at 26.

187 Jenkins, *supra* note 64, at 163.

188 Alberto Gonzales wrote a memo to President George W. Bush in which he referred to the Geneva Conventions as possibly 'obsolete' and 'quaint' and non-applicable in the 'new paradigm' of the 'war on terror.' Steven, R Ratner, 'Think Again Geneva Conventions,' *Foreign Policy*, 8 October 2009, <http://foreignpolicy.com/2009/10/08/think-again-geneva-conventions/>.