

TERRORISM AND THE DEMOCRATIC RESPONSE 2004

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I INTRODUCTION

Repeated terrorist attacks on the London transport system in July 2005 have once again placed the legal response to this affront to democracy at the top of media, political and civic concern. In Australia, we have shared the pain of the United Kingdom because of our historical and cultural links with that society. Because many of us have family there or have ourselves travelled on London trains and buses, we can see terrorism there as a more personal and immediate problem. We feel involved when a fellow citizen dies and another talks from a hospital bed in London. We feel conflicted over the news of an innocent Brazilian worker repeatedly shot and killed by police in the Underground. If we are lawyers, we are anxious at the news of politicians, police and security officials suddenly demanding much larger powers to deal with terrorism. We know that, once made, laws of such a kind are rarely repealed. They affect the content of liberty.

Political terror is not new. In one of those strange ironies of history, 5 November 2005 makes the 400th anniversary of the Gunpowder Plot of 1605 in London. That was the occasion when Guy Fawkes and his co-conspirators planned to blow up the Houses of Parliament and kill King James I and the leaders of the Kingdom.¹ At that time, as recently, there was a potent mixture of religion, politics and planned violence. Fawkes and his colleagues aimed to restore Roman Catholic supremacy in Britain. Their plot, when unmasked, led to state trials in the Court of Star Chamber, multiple executions and renewed civil disadvantages for Catholics in Britain.² The King authorised 'the gentler tortours ... to be first used.' In more recent times, specifically at the United States army

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1 Niall Neligan, 'The Gunpowder Plot: The First Act of Modern Terrorism' (2002) 7(4) *Bar Review* 27.

2 Donald Carswell (ed), *Trial of Guy Fawkes and Others (The Gunpowder Plot)* (1995) 40.

camp at Guantánamo Bay, torture of terrorist suspects has been alleged (and also denied).³

Objectively, terrorism is not the largest problem facing the world. Nuclear safety, HIV/AIDS, climate change, access to water, poverty and homelessness are more important and pressing. But terrorism is the subject of more media coverage because it is highly visual and is of more pressing concern to the rich countries that dominate the global media. To this extent, media and terrorist share a symbiotic relationship. The Irish Republican Army ('IRA') may have publicly renounced its 'armed campaign' in Northern Ireland and promised in future to pursue only peaceful and political means.⁴ However, other groups and causes have filled its place. Their access to modern weapons causing mass destruction, panic and fear, clearly demands a response. Response there has been.

This article is about the way in which democratic societies over the past 50 years have adopted laws to answer the threats of terrorists. It begins with the responses to the communists in Australia and elsewhere. It describes the laws adopted in Europe to respond to nationalist and political terrorism and the decisions of the European Court of Human Rights about the limits of such laws. It then recounts the more recent responses of national courts in South Africa, the United States, Israel, Indonesia and the United Kingdom in cases having a security aspect. It concludes that society must respond effectively to the challenge that terrorists make to the rule of law, human rights and democratic values. But that the response must be consistent with those features of society, lest the terrorists succeed even where they fail.

II AUSTRALIAN SECURITY – AN HISTORICAL PERSPECTIVE

Fifty years before 11 September 2001, the Australian Constitution received what was probably its most severe test in peacetime. The enemy then was viewed as a kind of global terrorist and widely hated. This enemy's ideas were considered subversive. Its methods were threatening and its goals alarming. I refer to the communists. The communists did not fly commercial aircraft into buildings in crowded cities, nor did they use suicide bombers to threaten civilian populations. But they did indoctrinate their young. They had many fanatical adherents. They divided the world. They were sometimes ruthless and murderous. They developed huge stockpiles of nuclear and biological weapons. They had a global network. They opposed our form of society.

Out of fear, law-makers around the world rushed to introduce legislation to increase powers of surveillance and deprivations of civil rights. In South Africa, the *Suppression of Communism Act 1950* (SA) became, before long, the mainstay of the legal regime that underpinned apartheid and imprisoned Nelson Mandela

3 See, eg, Amnesty International, *Guantánamo: An Icon of Lawlessness* (2005) <[http://web.amnesty.org/library/pdf/AMR510022005ENGLISH/\\$File/AMR5100205.pdf](http://web.amnesty.org/library/pdf/AMR510022005ENGLISH/$File/AMR5100205.pdf)> at 29 July 2005; Human Rights Watch, *Guantánamo: Three Years of Lawlessness* (2005) <http://hrw.org/english/docs/2005/01/11/usdom9990_txt.htm> at 29 July 2005.

4 James Button, 'IRA Lays Down its Guns for Peace' *Sydney Morning Herald* (Sydney), 29 July 2005, 1.

and the African National Congress ‘terrorists’. In Malaya, Singapore and elsewhere, the colonial authorities introduced the *Internal Security Acts*, which is what the South African Act was also later called. Sadly, many of those laws remain in place today, long after independence, to restrict the rights of those with dissident opinions.

In the United States, the *Smith Act*⁵ was passed by Congress to permit the criminal prosecution of members of the Communist Party for teaching and advocating the overthrow of the government. The law was challenged in the courts of the United States. The petitioners invoked the First Amendment’s guarantees of freedom of expression and assembly. However, in 1950, in *Dennis v United States*,⁶ the Supreme Court of the United States, by majority, upheld the *Smith Act*. It held that there was a ‘sufficient danger to warrant the application of the statute ... on the merits’.⁷

Dissenting, Black J drew a distinction between governmental action against overt acts designed to overthrow the government and punishing what people thought, wrote and said.⁸ The latter activities, he held, were beyond the power of Congress. Also dissenting, Douglas J acknowledged the ‘popular appeal’ of the legislation.⁹ However, he pointed out that the Communist Party was of little consequence and no real threat in America:

Communists in this country have never made a respectable or serious showing in any election. I would doubt that there is a village, let alone a city or county or State which the Communists could carry. Communism in the world scene is no bogeyman; but communism as a political faction or party in this country plainly is. Communism has been so thoroughly exposed in this country that it has been crippled as a political force. Free speech has destroyed it as an effective political party.¹⁰

A few months after *Dennis* was decided, a similar challenge came before the High Court of Australia. In Australia, there was no First Amendment. There was no established jurisprudence on constitutionally guaranteed freedom of expression and assembly. Most of the judges participating in the case had had no political experience whatsoever. Most of them were commercial lawyers whose professional lives had been spent wearing black robes and a head adornment made of horsehair. An Australian contingent was fighting communist forces in Korea.¹¹ The Australian Government had a popular mandate for its law. Most Australians saw communists as a real danger – indeed, their doctrine of world revolution and the dictatorship of proletariat was widely viewed as a kind of political terrorism.

Chief Justice Latham, like his counterpart in the United States, upheld the validity of the Australian anti-communist law. He quoted Cromwell’s warning:

5 *Smith Act*, 18 USC § 11 (1946).

6 341 US 494 (1950).

7 Ibid 511 (Vinson CJ).

8 Ibid 579.

9 Ibid 581.

10 Ibid 588.

11 Michael D Kirby, ‘H V Evatt, the Anti-Communist Referendum and Liberty in Australia’ (1992) 12 *Australian Bar Review* 93, 95.

‘Being comes before well-being’.¹² He said that his opinion would have been the same if the Australian Parliament had legislated against Nazism or Fascism. However, the remaining six Justices of the High Court of Australia rejected the law.¹³ Justice Dixon pointed out that

History and not only ancient history, shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding the executive power ... [T]he power to legislate for the protection of an existing form of government ought not to be based on a conception ... adequate only to assist those holding power to resist or suppress obstruction or opposition of attempts to displace them or the form of government they defend.¹⁴

As far as Dixon J was concerned, it was for the courts to ensure that suppression of freedom was only imposed within the letter of the law. The Australian Constitution afforded ample powers to deal with overt acts of subversion. Responding to a hated political idea and to the propagation of that idea was not enough to sustain the validity of the law.

Afforded the chance to vote on a proposal to change the Australian Constitution in order to confer powers with respect to communists and communism, the people of Australia, on 22 September 1951, refused. When the issues were explained, they rejected the suggested enlargement of federal powers. I believe that history accepts the wisdom of the response in Australia and the error of the overreaction in the United States.¹⁵ Keeping proportion, adhering to the ways of democracy, upholding constitutionalism and the rule of law, and, even under assault and even for the feared and hated, defending the legal rights of suspects – these are the ways to maintain the support and confidence of the people over the long haul. Legislators and judges should not forget these lessons.¹⁶

III ANTI-TERRORIST LAWS

A Anti-Terrorist Laws in the United Kingdom

As we have seen, laws specifically targeted at the risks of violence perpetrated by enemies, including foreign enemies, are not new. In 1939, for example, the United Kingdom Parliament enacted the *Prevention of Violence (Temporary Provisions) Act 1939* (UK) to deal with a campaign of the Irish Republican Army in the context of a new European war.¹⁷ That law was eventually allowed to

12 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 141.

13 *Ibid* 143.

14 *Ibid* 187–8.

15 Michael McHugh, ‘The Strengths of the Weakest Arm’ (2004) 25 *Australian Bar Review* 181. See *Al-Kateb v Godwin* (2004) 78 ALJR 1099, 1128.

16 Cf *Muir v The Queen* (2004) 78 ALJR 780; *Al-Kateb v Godwin* (2004) 78 ALJR 1099; *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 78 ALJR 1056; *Re Colonel Aird; Ex parte Alpert* (2004) 78 ALJR 1451 and other recent cases.

17 Clive Walker, ‘50th Anniversary Article: Terrorism and Criminal Justice – Past, Present and Future’ (2004) *Criminal Law Review* 311. See also *Civil Authorities (Special Powers) Acts (No 1) 1922* (UK).

expire when the danger was thought to have passed, an event described as ‘an act of faith without contemporary parallel.’¹⁸

There followed in Britain a number of laws responding to escalating violence in Northern Ireland. These laws included the *Northern Ireland (Emergency Provisions) Acts 1973-98* (UK), the *Criminal Justice (Terrorism and Conspiracy) Act 1998* (UK) and the *Prevention of Terrorism (Temporary Provisions) Acts* (UK), which was in continuous use between 1974 and 2001. The counter-terrorism laws of the United Kingdom were reviewed by a judicial inquiry under Lord Lloyd and Sir Michael Kerr. The inquiry reported in 1996.¹⁹ The legislative response to that report was the *Terrorism Act 2000* (UK), which came into force in February 2001.

In many countries, the events of 11 September 2001 triggered the passage of new enactments designed to put the authorities in a better legal position to deal with terrorist events and, hopefully, to prevent such events happening. In the United Kingdom, Parliament enacted the *Anti-Terrorism, Crime and Security Act 2001* (UK). Police powers were enlarged by the *Criminal Justice and Police Act 2001* (UK) and later laws.

This proliferation of legislation has led to fragmentation of the criminal law in the United Kingdom. It resulted in derogation by the United Kingdom under Article 15 of the *European Convention on Human Rights and Fundamental Freedoms*²⁰ (‘*European Convention*’)²¹ and the adoption of intrusive surveillance measures. One commentator, who fully acknowledged the need for special and extra powers in the current exigencies, concluded that:

the alternative to the war model is still an extensive security State, with increasing focus on surveillance and financial scrutiny and approaches indicative of risk management and prevention rather than prosecution. There is no final victory in the war against terrorism. Equally, in an asymmetric conflict, the terrorist cannot destroy western polities, but they may be able to provoke western polities to destroy their own spirits.²²

18 Ibid 311.

19 House of Lords, *Inquiry into the Legislation on Terrorism*, Cm 3420 (1996).

20 *European Convention*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953).

21 For the text of the derogation see The Human Rights Act 1998 (Designated Derogation) Order 2001 (UK). In March 2005, the derogation was withdrawn: see Withdrawal of derogation contained in a Note verbale from the Permanent Representation of the United Kingdom dated 16 March 2005 Council of Europe <<http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=005&CM=8&DF=09/04/05&CL=ENG&VL=1>> at 10 May 2005.

22 Walker, above n 17, 327.

B Anti-Terrorist Laws in Australia

Since 2001, several anti-terrorist laws have been enacted in Australia.²³ In fact, 17 items of legislation restricting civil freedoms have been adopted by the federal Parliament.²⁴ In addition, State legislation has been passed to complement national laws.²⁵ It is arguable that this is an area where governments employ rhetoric in order to render exceptions to civil liberties more palatable and opposition to such laws more difficult. An example of this practice can be seen in the United States where the principal counter-terrorism legislation is entitled the *USA Patriot Act* (the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act).²⁶ The Australian media have noticed the Orwellian character of some of our own statutes, such as the New South Wales *Freedom of Information (Terrorism and Criminal Intelligence) Act 2003* (NSW), whose object is to restrict access to official information on security grounds and not to enhance it.²⁷

In such an environment, the last line of defence for human rights, fundamental freedoms and individual liberty tends to be the courts.²⁸ In a contemporary democracy, in the matter of anti-terrorist legislation, the usual protections and balances may not always be available, either in the legislative process or by executive enforcement. Nations that are minor players in the global 'war on terrorism' come under occasional international pressure which they cannot resist for counterpart laws. Necessarily, the courts only have a limited role. Their duty is to give effect to any laws that are clear and constitutionally valid. They must do so according to the language of the legislation and in order to achieve its presumed purpose.²⁹ However, courts are not without lawful and proper means, in some respects, to ensure against an excess of legislative or executive action.

In many countries, such as the United States of America, when a challenge is brought, courts can evaluate legislative provisions against the standards of a

23 The *Australian Security Intelligence Organisation Act 1979* (Cth) was amended by the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth). Amongst powers afforded to the Australian Security Intelligence Organisation ('ASIO') is one of detention under conditions that forbid any public disclosure of the detention for up to 28 days (s 34VAA) and a two year prohibition on publishing 'operational information'. ASIO's powers of detention have been enlarged and the entitlements of the media and suspects' lawyers curtailed: see Michael Head, 'Another Threat to Democratic Rights' (2004) 29 *Alternative Law Journal* 127. The constitutional validity of the new laws has not been tested: cf *A v Hayden* (1984) 156 CLR 532.

24 The most important are the *Anti-Terrorism Act 2004* (Cth) and the amendments to the amended *Australian Security Intelligence Organisation Act 1979* (Cth). See also Philip Ruddock, 'Australia's Legislative Responses to the Ongoing Threat of Terrorism' 27 *University of New South Wales Law Journal* 254 and Robert McClelland, 'The Legal Response to Terrorism: A Labor Perspective' 27 *University of New South Wales Law Journal* 262.

25 Daryl Williams, 'Reference of Terrorism Powers' (Press Release, 27 March 2003). See Head, above n 23, 130. See also Duncan Kerr, 'Australia's Legislative Response to Terrorism' (2004) 29 *Alternative Law Journal* 131.

26 Sadiq Reza, 'Unpatriotic Acts: An Introduction' (2004) 48 *New York Law School Law Review* 3.

27 'Standing Up For Liberties', *Sydney Morning Herald* (Sydney), 13 April 2004, 12.

28 Simon Bronitt, 'Constitutional Rhetoric v Criminal Justice Realities: Unbalanced Responses to Terrorism?' (2003) 14 *Public Law Review* 69.

29 *Bropho v Western Australia* (1990) 171 CLR 1, 20; *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 78 ALJR 737, 768.

national Constitution and a Bill of Rights. Even in countries like Australia that do not have an entrenched charter of rights, courts are not without legal means to uphold fundamental civil rights. In appropriate cases, they may apply settled principles of statutory interpretation that require that laws depriving individuals of longstanding and basic rights must be clear and without ambiguity.³⁰ As well, there is an increasing realisation within the courts of Commonwealth countries that national laws should, where relevant, be construed so as to conform to the developing international law of human rights.³¹ It is in this respect, including in Australia, that it has become usual for the courts to look to the decisions of the world's most important human rights court – the European Court of Human Rights at Strasbourg. So what has that court said on the subject of terrorism and anti-terrorist laws?

IV JUDICIAL RESPONSES TO TERRORISM

A The European Court of Human Rights

In the month of September, I usually attend a meeting of judges of final national and international courts held at the Yale Law School in the United States. A regular participant is Judge Luzius Wildhaber, President of the European Court of Human Rights. The jurisdiction of that Court now extends from the Atlantic Coast of Ireland to the Pacific Coast of Russia. It is a huge responsibility. The European Court of Human Rights is created by the *European Convention*. It has tackled cases of the greatest complexity and sensitivity.³² It continues to do so. A great deal could be said in praise of the principled decisions of the European Court of Human Rights since its establishment and the leadership which that Court has given to our understanding of human rights, not only in Europe but throughout the wider world. However, given the times we live in and the challenge of those times, I propose to consider some of the decisions of the European Court of Human Rights in cases brought to it by persons accused of terrorist offences.

I do this because, after the events of 11 September 2001 in the United States, October 2002 in Bali, 2004 in Madrid, Breslan and Jakarta and 2005 in London, terrorism and the legal response to it is inevitably, and properly, on our minds. As I shall show, the European Court of Human Rights has responded with great wisdom to complaints about anti-terrorist legislation and individual human

30 *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309, 363; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287; *Plaintiff S 157/2002 v Commonwealth* (2003) 211 CLR 476, 492; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 553, 575–6.

31 See, eg, *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 42; *Baker v Canada* [1999] 2 SCR 860–1; *Tavita v Minister of Immigration* [1994] NZLR 257, 266; *Vishaka v Rajasthan* [1997] 3 LRC 361 (SC India); cf *Al-Kateb v Godwin* (2004) 78 ALJR 1099, 1110–15; 1127–35.

32 See, eg, *Dudgeon v United Kingdom* (1981) 4 Eur Court HR (ser A); *Norris v Ireland* (1988) 13 Eur Court HR (ser A); *Modinos v Cyprus* (1993) 16 Eur Court HR (ser A).

rights. Its decisions carry lessons for the entire world. They are lessons important for the times we live in.

1 *The Irish Cases*

Before the onset of the most recent coordinated terrorist attacks in Western countries, specific groups in a number of European countries (notably the United Kingdom, Ireland, West Germany, Italy and Spain) presented exceptional challenges to the legal order that had to be considered by domestic courts in Europe and, subsequently, by the former European Commission of Human Rights and the European Court of Human Rights. The decisions of these bodies have attempted to steer a principled course between affording to terrorist suspects, as to other human beings, the protections stated in the *European Convention* whilst acknowledging the necessity, on occasion, for national laws to adopt exceptions that take into account the special challenge that terrorists pose to democratic societies and their institutions.³³

Several early cases in the European human rights system related to the anti-terrorism legislation of the United Kingdom and the Republic of Ireland. Some of these decisions concerned the extent to which contracting States could lawfully derogate from the rights expressed in the *European Convention* so as to permit them to adopt measures considered necessary to combat what they described as the challenge of terrorism.³⁴ Article 15 of the *European Convention* permits such derogations in specified cases. But derogations may not be at large. A country cannot derogate by adopting measures that are inconsistent with other obligations under international law.³⁵ No derogations may be made from identified rights contained in the *European Convention* articles.³⁶

In *Lawless v Republic of Ireland (No 3)*,³⁷ the European Court of Human Rights was concerned with the case in which an Irish citizen had been detained without trial by Irish authorities for five months in 1957, on the basis of his alleged activities as a member of the Irish Republican Army. The derogation and subsequent measures for detention of the prisoner were upheld by the European Court. The Court concluded that the Irish government was justified in declaring a public emergency and acting as it did.³⁸

Between 1957 and 1975, the United Kingdom government likewise gave notice of derogation on six occasions pertaining to the use of extrajudicial powers to deprive terrorist suspects of liberty for interrogation, detention and as a preventive measure. Without derogation, such measures would have contravened

33 Colin Warbrick, 'The European Convention on Human Rights and the Prevention of Terrorism' (1983) 32 *International Comparative Law Quarterly* 82, 118.

34 See Jeremie J Wattellier, 'Comparative Legal Responses to Terrorism: Lessons from Europe' (2004) 27 *Hastings International and Comparative Law Review* 397, 405–8.

35 *European Convention*, opened for signature 4 November 1950, 213 UNTS 222, art 15(1) (entered into force 3 September 1953).

36 *European Convention*, opened for signature 4 November 1950, 213 UNTS 222, arts 2 (Right to Life), 3 (Prohibition on Inhuman Treatment and Torture), 4(1) (Prohibition on Slavery and Servitude), 7 (Retroactive laws) (entered into force 3 September 1953).

37 (1961) 1 Eur Court HR (ser A).

38 *Lawless v Republic of Ireland (No 3)* (1961) 1 Eur Court HR (ser A) 32.

Article 5 of the *European Convention* which guarantees the rights of liberty and security of the person. On a complaint by Ireland,³⁹ the European Court found various impermissible breaches among the United Kingdom measures, most especially in respect of the failure to preserve access to judicial review for persons in detention.⁴⁰ Some of the contraventions were held to be within a permissible derogation. However, in respect of instances being found of inhuman treatment and torture, derogation was not permitted by the *European Convention*. To this extent, the complaint by Ireland was upheld.⁴¹

In later cases concerning detention of IRA suspects, the European Court noted that 'the growth of terrorism in modern society' necessitated 'a proper balance between the defence of institutions of democracy in the common interest and the protection of individual rights'.⁴² The Court took notice of 'the existence of particularly difficult circumstances facing the United Kingdom authorities in Northern Ireland, notably the threat posed by organised terrorism'.⁴³ Nevertheless, it upheld complaints of detainees who asserted that their detention by British authorities for four days and six hours fell 'outside the strict constraints as to time permitted by [Article 5 of the *European Convention*]'.⁴⁴ Later, the United Kingdom increased the legal period of detention to seven days which was said to be necessary to maintain the 'fight against terrorism'. The United Kingdom lodged a formal derogation from the *European Convention* in this respect. Again the detainees complained to the Court in Strasbourg. However, a majority of the European Court held that, given the security circumstances then prevailing in Northern Ireland, it was not appropriate to substitute a judicial opinion for the measures deemed appropriate or expedient by the national government.⁴⁵ Therefore, although the legislation was not consistent with Articles 5(3) and (5) of the *European Convention*, it fell within the 1989 derogation lodged by the United Kingdom, and there was no violation.

Further challenges under the *European Convention* concerned the question of who bore the onus of establishing justification of the reasonableness of the measures adopted by a national government to combat terrorism. In an earlier decision, *Brogan v United Kingdom*,⁴⁶ the European Court had effectively held that the onus was on the complainant to demonstrate the unreasonableness of the impugned law. However, subsequently, in *Fox, Campbell & Hartley v United Kingdom*,⁴⁷ the European Court concluded that 'the respondent government has to furnish at least some facts or information capable of satisfying the Court that the arrested person was reasonably suspected of having committed the alleged offence'. By a majority of four judges to three, the Court held in the latter case

39 *Ireland v United Kingdom* (1978) 2 Eur Court HR (ser A).

40 Ibid 87–90.

41 Ibid 107.

42 *Brogan v United Kingdom* (1988) 11 Eur Court HR (ser A) [48].

43 Ibid.

44 Ibid [62]. The reference was to *European Convention*, opened for signature 4 November 1950, 213 UNTS 222, art 5(3) (entered into force 3 September 1953).

45 *Brannigan v United Kingdom* (1993) 17 Eur Court HR (ser A) 574–5.

46 (1988) 11 Eur Court HR (ser A).

47 (1990) 13 Eur Court HR (ser A).

that the United Kingdom had not discharged that onus.⁴⁸ It was therefore in breach of Article 5(1) of the *European Convention*. Compensation was ordered.

2 The German Cases

In late 1977, a series of terrorist incidents came to a head in the then Federal Republic of Germany ('FRG'). Although Andreas Baader and Ulrike Meinhof had been arrested in 1972 by FRG police (and Ms Meinhof had committed suicide in her cell in 1976), a series of kidnappings and bombings took place between 1975 and 1976, allegedly carried out by members of the Baader Meinhof Group (otherwise known as the Red Army faction).

In October 1977, a Lufthansa flight was commandeered by members of the Group demanding the release from prison of Mr Baader and an associate. The hijacking was quickly brought to a violent end. The prisoners, including Andreas Baader, were found dead in their cells, allegedly following suicide. The Baader Meinhof Group thereupon proceeded to execute a captive, the President of the German Employers' Association, a man with minor past association with the Nazi Party. A number of suspected members of the Group were rounded up and detained.

The legislation used by the German authorities to respond to the foregoing incidents included powers, enacted in 1968, permitting the interception of telephone calls and the mail of suspects. Proceedings were commenced in Germany to challenge such laws as violating the standards of the *European Convention*. The matter went to the European Commission and was then referred to the European Court.⁴⁹ Again, the European Court took judicial notice of 'the development of terrorism in Europe in recent years'. It held that it was reasonable for democratic states 'to undertake the secret surveillance of subversive elements operating within its jurisdiction'.⁵⁰ In such circumstances, telephonic and mail interception was held compatible with the fundamental rights contained in the *European Convention*. Despite this, the Court also stressed the need for caution and safeguards:

Nevertheless, the Court stresses that this does not mean that the Contracting States enjoy an unlimited discretion to subject persons within their jurisdiction to secret surveillance. The Court, being aware of the danger such a law poses of undermining or even destroying democracy on the ground of defending it, affirms that the Contracting States may not, in the name of the struggle against espionage and terrorism, adopt whatever measures they deem appropriate.⁵¹

Earlier, a challenge against the fairness of their trial had been brought by Andreas Baader and his colleagues in *Baader v Germany*.⁵² After the death of the applicants, the proceedings were maintained by their families.⁵³ The family

48 *Fox, Campbell & Hartley v United Kingdom* (1990) 13 Eur Court HR (ser A) 157, 210–11.

49 *Klass v Federal Republic of Germany* (1978) 2 Eur Court HR (ser A).

50 *Ibid* [48].

51 *Ibid* [49].

52 (1978) 14 DR 64.

53 See Mark Baker, 'The Western European Legal Response to Terrorism' (1987) 13 *Brooklyn Journal of International Law* 1, 22.

asserted that the prisoners had been subjected to torture and inhuman or degrading treatment or punishment and blamed the death of the prisoners on their conditions. A specific complaint was made about solitary confinement being imposed upon the prisoners over an extended period.

The European Commission, which considered the complaint, concluded that 'complete sensory isolation coupled with complete social isolation can no doubt ultimately destroy the personality'. It was held that this would be inhuman treatment 'which cannot be justified by the requirements of security'.⁵⁴ Nevertheless, the Commission rejected the complaint that the German suspects had been treated in this way. It also rejected the complaints directed at the conduct of their trials.⁵⁵

3 *The Italian Cases*

Terrorist actions in Italy also gave rise to proceedings in the European Court. They were concerned with the length of detention of terrorist suspects before conviction or discharge and the conditions in which convicted terrorists could be held.

The kidnapping and murder of the former Italian Prime Minister, Mr Aldo Moro, in 1978 constituted the high watermark of terrorist activities in modern Italy. Responsibility for the death was claimed by the Red Brigade, a political group engaged in numerous terrorist activities after 1972. The Italian legislature increased the powers of police and permitted executive detention orders and other measures. A challenge to such measures was brought in the European Court by Mr Michele Guzzardi. He was held in remand detention between 1973 and 1979. That detention was continued despite Mr Guzzardi's acquittal in 1976 of the terrorist charges. His prolonged incarceration after his acquittal was purportedly sustained by an executive order of the Italian Government.

By majority, the European Court upheld the prisoner's complaints that he had been the victim of a violation of Article 5(1) of the *European Convention*.⁵⁶ It rejected the attempt of Italy to justify its detention of Mr Guzzardi in a dilapidated prison on an island off the coast of Sardinia.⁵⁷ It found that Mr Guzzardi was entitled to compensation in respect of such detention. This entitlement was held to have survived notwithstanding the fact that, on appeal, the conviction of the offences, for which he had been initially detained, was restored.

Later proceedings unanimously sustained a complaint by another Italian prisoner concerning the censorship of his correspondence and the conditions of his detention.⁵⁸ The Court held that the law under which this conduct had occurred allowed 'too much latitude' to the state authorities and was thus contrary to the *European Convention*.

54 *Baader v Germany* (1978) 14 DR 64, 109.

55 *Ibid* 112–15.

56 The Court rejected other complaints, in particular under arts 3, 6, 8 and 9 of the *European Convention*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953).

57 *Guzzardi v Italy* (1980) 3 Eur Court HR (ser A) 363.

58 *Diana v Italy* (1996) V Eur Court HR 13.

4 The Spanish Cases

A number of cases have also been brought to the European Court from Spain. A significant portion of the anti-terrorism laws enacted in Spain after the death of General Francisco Franco in 1975 were examined by the European Court in *Barberà v Spain*.⁵⁹ That case concerned alleged members of the Catalan Peoples' Army. In October 1980, a Catalan businessman had been murdered. The applicants were detained because the crimes were characterised as terrorist acts. The Spanish law permitted detention of such suspects for up to 10 days. A judicial order could require that the detainee be kept *incommunicado* during judicial investigation and subject to communication interception. Access to a lawyer was denied during the period of the *incommunicado* holding. Not until three months after they were first detained were the applicants charged with murder, a crime of which they were subsequently convicted and for which they were duly sentenced.

The applicants contended that they had been denied the right to a fair trial guaranteed by Article 6 of the European Convention. Specifically, they complained about the withdrawal of their right of access to a lawyer during the early stages of investigation. The European Court concluded that the proceedings did not satisfy the requirements of a fair and public proceeding as contemplated by the *European Convention*.⁶⁰ The Court found against the Spanish Government.

Later Spanish cases in the European Court have concerned the Basque Separatist Movement ('ETA'). This body has possibly been the most active terrorist group in Western Europe, having been linked to more than 800 deaths since 1968.⁶¹ In December 2001 and June 2003,⁶² following the events of 11 September 2001, the European Union acceded to Spain's request to proscribe ETA as a terrorist organisation. Attempts were also made by Spain to ban the political wing of ETA, Batasuna, as a political party. In 2003, Batasuna was dissolved by order of Spain's highest civil court. An appeal by the party to the Constitutional Court of Spain was rejected in January 2004. In November 2003, Batasuna filed a challenge in the European Court complaining about this exclusion from the democratic process. It asserted that the ban violated the freedom of association expressed in Article 11 of the *European Convention*. The European Court has accepted the case but is yet to rule on the issue.

Under the European Court's jurisprudence, the consideration of access of political parties to the electoral process represents a fundamental principle in a

59 (1988) 11 Eur Court HR (ser A).

60 Ibid 392.

61 Kenneth Dobson, 'The Spanish Government's Ban of a Political Party: A Violation of Human Rights?' (2003) 9(2) *New England Journal of International and Comparative Law* 637, 639.

62 See European Communities, 'Council Regulation (EC) No 2580/2001 of 27 December 2001 on Specific Restrictive Measures Directed Against Persons and Entities with a View to Combating Terrorism' (2001) L 344 Official Journal of the European Communities 70. See also EU Blacklists Basque Party (2003) BBC News <<http://news.bbc.co.uk/1/hi/world/europe/2965260.stm>> at 28 May 2005.

democracy.⁶³ Nevertheless, the Court has held that some restrictions may be validly imposed on the broadcast of live interviews with members of the political wing of terrorist organisations.⁶⁴ The challenge by Batasuna, when it is heard, will once again require the European Court to tread a difficult path of checks and balances.⁶⁵ The European Court has acknowledged that there exists a 'margin of appreciation' belonging to the European States when they deal with problems of terrorism. When the Strasbourg Court decides the Batasuna challenge, many will be watching to see whether the 'margin of appreciation' is broadened in this context following the events of 11 September 2001 and the March 2004 terrorist attack on civilians in Madrid itself. Getting the right balance in such matters is by no means easy.

It is important that national judges, including those in Australia, are aware of this large and growing body of jurisprudence in Europe. As the foregoing cases in the European Court of Human Rights demonstrate, many of the problems concerning legal responses to terrorists and terrorism that have come before national courts in and outside Europe in recent years, have already been analysed in well reasoned and detailed judicial opinions that are available to help national judges faced with similar cases. It is instructive to see the way in which national courts are responding to the challenge of terrorism and laws adopted to respond to its threats, sometimes with grateful reference to the jurisprudence of the European Court.

B South Africa and the Tanzanian Bombing

An early instance of the unwillingness of national courts to bend basic legal principles in the face of accusations of terrorism was the decision of the Constitutional Court of South Africa in *Mohamed v President of the Republic of South Africa*⁶⁶ ('*Mohamed*'). The case concerned Khalfan Mohamed, who was wanted by the United States of America on a number of capital charges relating to the bombing of the United States Embassy in Dar es Salaam, Tanzania, in August 1998. The appellant had been indicted in the United States. A warrant for his arrest was issued by a judge of the federal District Court. He had entered South Africa unlawfully as an alien and was detained there by the authorities, acting in cooperation with United States officials.

In his interrogation, the detainee was not given the rights provided by South African law for such a case. The South African authorities offered him a choice of deportation to Tanzania or the United States. He preferred the latter but applied to the courts for an order that the Government of the United States be obliged to undertake that the death penalty would not be sought, imposed or carried out on him. That order was refused at first instance and the appellant was promptly deported. This notwithstanding, an application to the Constitutional Court was pursued on his behalf on the grounds that the appellant had been

63 See, eg, *United Communist Party v Turkey* (1998) 26 Eur Court HR 121, 125–7.

64 *Purcell v Ireland* (1991) 70 DR 262.

65 Dobson, above n 61, 639–41.

66 (2001) 3 SA 893.

denied the protection of South African constitutional law, under which it has been held that capital punishment is contrary to fundamental constitutional guarantees.⁶⁷

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

By the time the Constitutional Court made its orders, Mr Mohamed was on trial in the United States before a federal court and so it was outside the effective power of the Constitutional Court, by its orders, to afford him physical protection. Nevertheless, the decision of the primary judge was formally set aside. A declaration was made that the constitutional rights of the appellant in South Africa had been infringed. The Constitutional Court of South Africa directed its Chief Officer, as a matter of urgency, to forward the text of its decision to the relevant United States federal court.⁶⁸ Following his trial in the United States, the appellant was convicted. However, he was not sentenced to death. Whether this was due in any way to the South African intervention is unknown. Nevertheless, the South African court did what it could to uphold the accused's fundamental legal rights, notwithstanding the charge of terrorist offences. The government officials in South Africa were held to have been insufficiently respectful of those rights.

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

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

67 *S v Makwanyane* (1995) 3 SA 391.

68 *Mohamed v President of the Republic of South Africa* (2001) 3 SA 893, 923.

The decision of the Constitutional Court in this case was delivered in September 2004. It included a limited finding of the South African Government's duty in the case. In the course of argument, the Court was reminded of the famous words of Brandeis J in *Olmstead v United States*,⁶⁹ cited earlier in *Mohamed*:

In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously ... Government is the potent, omnipresent teacher. For good or ill, it teaches the whole people by its example ... If the government becomes a law-breaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy.⁷⁰

These last words have a special resonance in South Africa as the Constitutional Court explained in *Mohamed*:

we saw in the past what happens when the State bends the law to its own ends and now, in the new era of constitutionality, we may be tempted to use questionable measures in the war against crime. The lesson becomes particularly important when dealing with those who aim to destroy the system of government through law by means of organised violence. The legitimacy of the constitutional order is undermined rather than reinforced when the State acts unlawfully.⁷¹

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

C The United States and Guantánamo Bay

Probably the best known decision in this class of case is that of the Supreme Court of the United States in *Rasul v Bush*.⁷² That decision was delivered in June 2004. The Supreme Court was divided 6:3. The opinion of the Court was written by Stevens J. Justice Scalia wrote the opinion of the dissenting judges, Rehnquist CJ, Thomas J and himself. In the Court's opinion, Stevens J cited the law authorising President George W Bush, after 11 September 2001, to use 'all necessary and appropriate force against those nations, organisations or persons he determines planned, authorised, committed or aided the terrorist attacks ... or harbored such organisations or persons.'⁷³ In reliance upon this law, President Bush established a detention facility at the Naval Base in Guantánamo Bay on land leased by the United States from the Republic of Cuba. Two Australians (Mamdouh Habib and David Hicks), who were detained in the facility, together with others, filed petitions in the United States' federal courts for writs of habeas corpus. They sought release from custody, access to counsel, freedom from interrogation and other relief.

The United States District Court dismissed these petitions for want of jurisdiction. It relied on a decision of the United States Supreme Court of 1950.⁷⁴

69 277 US 438, 485 (1928).

70 (2000) 3 SA 893, 921.

71 Ibid.

72 542 US 1 (2004).

73 See *Authorisation for the Use of Military Force*, Pub L No 107-243, 116 Stat 1498, 1500 (2001).

74 *Johnson v Eisentrager*, 339 US 763 (1950).

That decision had held that '[a]liens detained outside the sovereign territory of the United States [may not] invoke a petition for a writ of *habeas corpus*'. However, the Supreme Court reversed the federal court decision, granted *certiorari* and remitted the case to the federal courts where the cases are now proceeding. In effect, Stevens J followed what he had earlier written in the *Padilla v Rumsfeld* case where he said:

At stake in this case is nothing less than the essence of a free society. Even more important than the method of selecting the people's rulers and their successors is the character of the constraints imposed on the Executive by the rule of law. Unrestrained Executive detention for the purpose of investigating and preventing subversive activity is the hallmark of the Star Chamber ... for if this nation is to remain true to its ideals symbolised by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny.⁷⁵

The decision of the majority of the Supreme Court in *Rasul v Bush* is reflective of similar notions. It traces the restraint on executive power in the United States to legal and constitutional 'fundamentals'. It does so through the history of the legal system which the United States shares with other common law countries.⁷⁶

As Lord Mansfield wrote in 1759, even if a territory was 'no part of the realm', there was 'no doubt' as to the court's power to issue writs of *habeas corpus* if the territory was 'under the subjection of the Crown'.⁷⁷

Later cases confirmed that the reach of the writ depended not on formal notions of territorial sovereignty, but rather on the practical question of 'the exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown'.⁷⁸

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

By rejecting the contention that the executive was not answerable in the courts for the offshore detention by United States personnel of alleged terrorists, the Supreme Court of the United States gave an answer to the fear that the United States military facility at Guantánamo Bay had become a 'legal black hole'. That fear had been expressed not only by civil libertarians, do-gooders and the usual worthy suspects. It had been expressed by some of the most distinguished lawyers of the common law tradition including Lord Steyn, Lord of Appeal in Ordinary,⁷⁹ Lord Goldsmith, Attorney-General for the United Kingdom,⁸⁰ Sir

75 *Padilla v Rumsfeld*, 124 SCt 2711, 2735 (2004). In this case, Stevens J dissented on the availability of habeas corpus in the circumstances.

76 *Rasul v Bush*, 542 US 1, 14 (2004) (Stevens J).

77 *King v Cowle* (1759) 97 ER 587, 598–9.

78 *Ex parte Mwenya* [1960] 1 QB 241, 303 (Lord Evershed MR).

79 Lord Johan Steyn, 'Guantanamo Bay: The Legal Black Hole' (2004) 53 *International & Comparative Law Quarterly* 1.

80 Lord Goldsmith, 'Terrorism and Individual Liberty: The Response of the State' (2003) 57(4) *International Bar News* 8 (edited version of an address at the ABA conference 2003 at San Francisco).

Gerard Brennan, past Chief Justice of the High Court of Australia⁸¹ and the English Court of Appeal.⁸² Lord Goldsmith remarked on the duty of lawyers to influence and guide the response of states and the international community to terrorism:

The stakes could not be higher – loss of life and loss of liberty. The UK government is committed to taking all necessary steps to protect its citizens. I am convinced that this can be done compatibly with upholding the fundamental rights of all, including those accused of committing terrorist acts.⁸³

D Israel and the Security Fence

At about the same time as the decision in *Rasul v Bush* was handed down by the United States Supreme Court, the Supreme Court of Israel, on 2 May 2004, delivered its decision upon a challenge brought on behalf of Palestinian complainants concerning the ‘separation fence’ or ‘security fence’ being constructed through Palestinian land.⁸⁴ This ‘fence’ has been justified by the Government of Israel and the Israeli Defence Force as being essential to repel the terrorist (specifically suicide) attacks against Israeli civilians and military personnel carried out from adjoining Palestinian lands. In defence of the security wall, the Israeli authorities pointed to the substantial decline in the number of such attacks that had followed the creation of the barrier. It would not have been entirely surprising if the Supreme Court of Israel had refused to become involved in such a case, ruled the matter non-justiciable in a court of law or had said that it had no legal authority to deal with such an issue lying at the heart of the responsibilities of the executive government for the defence of the nation.

However, from bitter experience, the Jewish people had learned about the great dangers of legal black holes. In the Germany of the Nazis, the problem was not a lack of law. Most of the actions of the Nazi state were carried out under detailed laws made by established law-makers.⁸⁵ The problems for the Jewish people and other victims of the Third Reich arose from the pockets of official activity that fell outside legal superintendence. Legally speaking, these, truly, were ‘black holes’.

81 Sir Gerard Brennan, ‘Australia and the Rule of Law’ (2003) *Australian International Law Journal* 1, 2–8.

82 *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ. 1598, [66].

83 Goldsmith, above n 80, 11.

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

85 Including, eg, *Law for the Restoration of the Professional Civil Service 1933* (Germ) and the *Law for the Protection of German Blood and Honour 1935* (Germ). See discussion in *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 415–17. Note the hortatory titles of these German laws: a practice that has spread.

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

At the conclusion of his reasons, Aharon Barak J, President of the Israeli Court, said:

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

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

That goes for this case as well. Only a separation fence built on a base of law will grant security to the state and its citizens. Only a separation route based on the path of law, will lead the state to the security so yearned for.⁸⁶

The Israeli Supreme Court accepted the petitions in a number of cases, holding that the injury to the petitioners was disproportionate to the security needs. It ordered relief and costs in favour of those petitioners.⁸⁷

E Indonesia and the Bali Bombing

On 24 July 2004, the world awakened to the news that the Constitutional Court of Indonesia had set aside the punishment imposed on Masykur Abdul Kadir, convicted and sentenced to 15 years' imprisonment for helping Imam Samudra in connection with the bombing in Bali on 13 October 2002. That bombing involved the killing of 202 people, including 88 Australians. The

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

87 For a collection of jurisprudence of Israeli cases on terrorism-related issues, see Israel Supreme Court, *Judgments of the Israel Supreme Court: Fighting Terrorism within the Law* (2005) Israel Ministry of Foreign Affairs <http://www.mfa.gov.il/NR/rdonlyres/599F2190-F81C-4389-B978-7A6D4598AD8F/0/terrorism_law.pdf> at 10 May 2005.

decision of the Indonesian Court was reached by a majority, five Justices to four.⁸⁸ The problem arose out of the decision of the prosecutor to proceed against the accused not on conventional charges of homicide or the crimes equivalent to arson, conspiracy, use of explosives etc. Instead, the accused were charged only under a special terrorism law introduced as a regulation six days *after* the bombings in Bali.⁸⁹

The amended Indonesian Constitution contains basic principles protecting human rights and fundamental freedoms. One of these principles, reflected in many statements of human rights,⁹⁰ is the prohibition on criminal legislation having retroactive effect. Under international law, an exception is sometimes allowed to permit trial or punishment 'for any act or omission which, at the time it was committed, was criminal according to the general principles of law recognised by civilised countries'.⁹¹ This exception is drawn from the *Statute of the International Court of Justice*.⁹²

The decision of the Indonesian Court was not wholly unexpected amongst lawyers who were following the Bali trials. During the Bali hearings, the problem of retroactive punishment had been canvassed in the Australian media. Yet, if the Indonesian Constitution explicitly forbids criminal punishment based on laws of retrospective operation, the decision was not legally surprising, subject to any exceptions that might apply.

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

88 For an English summary with extensive extracts from the judgment, see Simon Butt and David Hansell, 'Casenote: The Masykur Abdul Kadir Case: Indonesian Constitutional Court Decision No 013/PUU-I/203' (2004) 6 *Australian Journal of Asian Law* 176, 185. See also Ross Clarke, 'Retrospectivity and the Constitutional Validity of the Bali Bombing and East Timor Trials' (2003) 5 *Australian Journal of Asian Law* 2.

89 'Bali Bombers' Convictions Ruled Illegal', *Sydney Morning Herald* (Sydney), 24 July 2004, 1.

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

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

92 *European Convention*, opened for signature 4 November 1950, 213 UNTS 222, art 38 (entered into force 3 September 1953).

The rule of law is itself one of the fundamental principles which democrats, the world over, defend against terrorists.⁹³ As Latham CJ once said in an Australian case,⁹⁴ it is easy for judges of constitutional courts to accord basic rights to popular majorities. The real test comes when they are asked to accord the same rights to unpopular minorities and individuals. The Indonesian case of Masykur Abdul Kadir was such a test.

Other proceedings may now be brought against Mr Kadir. The others convicted, who have exhausted their rights of appeal, may have no further remedies. Time will tell. But in the long run, the fundamental struggle against terrorism is strengthened, not weakened, by court decisions that insist upon adherence to the rule of law. This protection extends to the accused who are innocent, or who claim that they are. It also extends to the accused who are, or who appear to be, guilty. It is in Indonesia's interests, and that of the world, that even in such a case the courts should enjoy a reputation for strict adherence to constitutionalism, the rule of law and the protection of human rights and fundamental freedoms. This prolongs the pain of many. But the alternative course is more painful for even more.

In a comment on the Indonesian court's decision, an Australian editorialist said:

The Constitutional Court decision should be seen for what it is – part of a proper legal process in which every person has the right to exhaust all avenues of appeal. This is a positive development for Indonesia. The ensuing legal uncertainty, and the inevitable distress it will cause ... could and should have been avoided.⁹⁵

F Recent British Security Decisions

Other cases appeared in 2004 dealing with aspects of the response to terrorism. Indeed, such cases are beginning to appear in many jurisdictions. On 18 March 2004, the English Court of Appeal delivered its decision in *Secretary of State for the Home Department v M*.⁹⁶ The judgment of the English Court of Appeal was delivered by Woolf LCJ. The case was an application by the Home Secretary for leave to appeal against a decision of the Special Immigration Appeals Commission. That body had been established by the United Kingdom Parliament in response to an earlier decision of the European Court of Human Rights.⁹⁷ The latter had criticised the procedures that existed under the legislation then in force to respond to terrorism in Northern Ireland.

The Special Commission is, by law, a superior court of record. Its members are appointed by the Lord Chancellor. A Special Commission judge must hold,

93 In this respect, in Australia, Mr Duncan Kerr MP in Opposition supported the assertion by Mr Tony Abbott MP, in Government, that the defence of Western civilisation will fail unless leaders are prepared to uphold its values with the same passion as those who attack them. One of the identified 'values' was the rule of law. See Kerr, above n 25, 134.

94 *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 124.

95 Editorial, 'One Step Back Over Bali', *Sydney Morning Herald* (Sydney), 27 July 2004, 10.

96 [2004] EWCA Civ 324.

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

or have held, high judicial office. This provision was in place when the events of 11 September 2001 occurred. Under the *Anti-Terrorism, Crime and Security Act 2001* (UK), the British Home Secretary enjoys the power to issue a certificate in respect of a person whose presence in the United Kingdom is deemed a 'risk to national security' or who is suspected to be a 'terrorist'.⁹⁸ The Home Secretary, Mr David Blunkett, granted such a certificate in the case of 'M', a Libyan national present in the United Kingdom. M was thereupon taken into custody.

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

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

The involvement of a special advocate is intended to reduce (it cannot wholly eliminate) the unfairness which follows from the fact that an appellant will be unaware at least as to part of the case against him. Unlike the appellant's own lawyers, the special advocate is under no duty to inform the appellant of secret information. That is why he can be provided with closed material and attend closed hearings. As this appeal illustrates, a special advocate can play an important role in protecting an appellant's interest before the [Commission]. He can seek information. He can ensure that evidence before [the Commission] is tested on behalf of the appellant. He can object to evidence and other information being unnecessarily kept from the appellant. He can make submissions to [the Commission] as to why the statutory requirements have not been complied with. In other words, he can look after the interests of the appellant, in so far as it is possible for this to be done, without informing the appellant of the case against him and without taking direct instructions from the appellant.⁹⁹

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

⁹⁸ *Anti-Terrorism, Crime and Security Act 2001* (UK) s 21(1).

⁹⁹ [2004] EWCA Civ 324, [13].

In the result, the Commission ruled against the Home Secretary. The Court of Appeal, like the Commission, conducted part of its hearing in closed session. Only a portion of the Court's reasons were given on the record. The Court of Appeal insisted that the suspicion of the Minister had to be a *reasonable* suspicion. It stated that the Minister had failed to demonstrate error on the part of the Commission. In his concluding remarks, Woolf LCJ, for the Court of Appeal, said:

Having read the transcripts we are impressed by the openness and fairness with which the issues in closed session were dealt with ... We feel the case has additional importance because it does clearly demonstrate that, while the procedures which [the Commission] have to adopt are not ideal, it is possible by using special advocates to ensure that those detained can achieve justice and it is wrong therefore to under-value the SIAC appeal process. ... While the need for society to protect itself against acts of terrorism today is self-evident, it remains of the greatest importance that, in a society which upholds the rule of law, if a person is detained as 'M' was detained, that individual should have access to an independent tribunal or court which can adjudicate upon the whether of whether the detention is lawful or not. If it is not lawful, then he has to be released.¹⁰⁰

Finally, I would mention two recent developments in the British House of Lords – one judicial and the other political. In December 2004, the Law Lords handed down their decision in *A (FC) v Secretary of State for the Home Department*.¹⁰¹ The case arose out of the arrest of nine persons under the United Kingdom Terrorism legislation, including the *Anti-Terrorism (Crime and Security) Act 2001* (UK). The detainees had been taken into custody in December 2001. They were all non-citizens. None had been charged with offences or brought to trial, still less convicted. They sought release. Their case came before the Special Commission previously mentioned and that Commission upheld their objection to the lawfulness of their detention. However, the Commission's order was set aside by the English Court of Appeal, which emphasised the importance of deference in such matters to the Minister.

By a decision of eight to one, the Law Lords reversed the Court of Appeal and restored the decision, obliging release of the detainees. Lord Bingham, the Senior Law Lord, in his reasons, responded to the suggestion that interference by the courts in such matters would amount to 'judicial activism'. This has been an accusation levelled at the courts in the United States by the former Attorney-General John Ashcroft. Citing the reasons of Simon Brown LJ in *International Transport Roth GmbH v Secretary of State for the Home Department*,¹⁰² Lord Bingham said:

The Court's role under the [*Human Rights Act*] is as the guardian of human rights. It cannot abdicate this responsibility ... [J]udges nowadays have no alternative but to apply the *Human Rights Act* ... Constitutional dangers exist no less in too little judicial activism as in too much. There are limits to the legitimacy of executive or legislative decision-making, just as there are to decision-making by the courts.¹⁰³

100 [2004] EWCA Civ 324, [34].

101 [2004] UKHL 56.

102 [2003] QB 728, [27].

103 [2004] UKHL 56, [41].

Lord Nicholls opened his reasons with the following remarks:

Indefinite imprisonment without charge or trial is an anathema in any country which observes the rule of law. It deprives the detained person of the protection a criminal trial is intended to afford. Wholly exceptional circumstances must exist before this extreme step can be justified. The government contends that these post-9/11 days are wholly exceptional ... The principal weakness in the government's case lies in the different treatment accorded to nationals and non-nationals.¹⁰⁴

Lord Hoffmann, in his reasons, said:

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.¹⁰⁵

Baroness Hale, the only woman member of the House of Lords judicial board, observed:

No one has the right to be an international terrorist. But substitute 'black', 'disabled', 'female', 'gay' or any other similar adjective for 'foreign' before 'suspected international terrorist' and ask whether it would be justifiable to take power to lock up that group but not the 'white', 'able-bodied', 'male' or 'straight' suspected international terrorists. The answer is clear.¹⁰⁶

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

This decision led to a flurry of political measures aimed at increasing ministerial powers. However, the Prevention of Terrorism Bill was held up, in late night sittings in March 2005, by the repeated insistence of the House of Lords upon amendments. In the end, on 11 March 2005, the British Government backed down. It continued to insist that decisions, affording the Home Secretary the power to impose 'control orders' should be made on the civil and not the criminal onus. But it agreed to insert an effective sunset clause of one year when the legislation must be reviewed. Most importantly, it agreed that the Ministerial power to impose 'control orders' on terrorist suspects, restricting their liberties, could only be made with the approval of a judge.¹⁰⁷

104 Ibid [74].

105 Ibid [96].

106 Ibid [237].

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

V CONCLUSION

The insistence of United States, British and other courts upon effective supervision of legislative and executive detention of persons, outside cases where punishment orders have been imposed by judges under pre-existing valid laws, must be compared and contrasted with recent decisions of the courts in Australia.¹⁰⁸ Of course, the Constitution must be obeyed. Valid laws must be given effect. However, in reading our Constitution we should always remember the lessons of the wise decision of the High Court in the *Communist Party Case*,¹⁰⁹ vindicated by the people and by history. And we should familiarise ourselves with the wisdom of other final courts approaching the new legal questions.

I also believe that it is important to look to the instruction of the European Court of Human Rights concerning the response that the courts should give to terrorists and to anti-terrorism laws. No court has spoken with greater clarity, consistency and wisdom on this subject. The Court has demonstrated the importance of resolution, clear rules, proportion, balance and defence of the fundamental values of suspects. Many national courts have also demonstrated that such rules are crucial to the preservation of democracy under the challenges of the present time.

Judges of national courts do not need to reinvent the wheel on responses to terrorism within the law. Of course, they must give effect to their own valid national laws if they are clear, whatever they may think of their wisdom and prudence.¹¹⁰ But in considering issues of constitutional validity and in resolving differences over the text of such a law, judges can draw, with great advantage, on the wisdom, balance and experience of the European Court. Truly in this, and in so many other challenges of our time, it is a court for the modern age. It continues to give intellectual leadership where wisdom and proportionality matter most.

For this, we in Australia, in and outside the law, should be grateful. I do not doubt that this institution of Europe will expand in its influence, including in Australia. Its contribution to the good of humanity can be boundless if we continue to dream and to aspire to a better world where peace and security, respect for human rights and the expansion of economic equity become the true foundations of life for all people on our vulnerable planet. Responses to terrorism there must be. But those responses should adhere to the rule of law and respect for fundamental human rights and freedoms. Otherwise the terrorists win in their attempts to change our societies. And that must not happen.

108 See, eg, *Al-Kateb v Godwin* (2004) 78 ALJR 1099; *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* (2004) 78 ALJR 1156; *Re Woolley; Ex parte Applicants M276/2003* (2004) 79 ALJR 43; cf *Re Colonel Aird; Ex parte Alpert* (2004) 78 ALJR 1451; *Baker v R* (2004) 78 ALJR 1483; *Fardon v A-G (Qld)* (2004) 78 ALJR 1519.

109 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

110 *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 78 ALJR 737.