Counter-Terrorism and Beyond

The Culture of Law and Justice after 9/11

Edited by
Nicola McGarrity,
Andrew Lynch and
George Williams

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Contents

Part I

Introduction

1 The emergence of a 'culture of control'

Andrew Lynch, Nicola McGarrity and George Williams

As the tenth anniversary of the terrorist attacks in New York and Washington DC on 11 September 2001 approaches, our ability to assess the full extent of their impact only grows stronger. For many, the immediate shock and horror of that day has lessened over time, but we nevertheless continue to live with its consequences. The most obvious, in geopolitical terms, are the military conflicts in Afghanistan and Iraq to which 9/11 gave rise, and from which the Western powers involved have become increasingly intent on extricating themselves.

This book is concerned, however, with a different dimension of our response to the threat of terrorism over the first decade of the twenty-first century. It focuses on what might, in the now thoroughly discredited rhetoric of the 'war on terror',[1] be called the home front. In the international arena, we have seen military deployments and shifts in diplomatic relations, as well as significant changes to the international legal framework. The interconnected nature of all aspects of a state's commitment to the goal of effective counter-terrorism means that it is unsurprising that these international developments have frequently provided the impetus and the justification for the creation of counter-terrorism regimes at the domestic level. In particular, the effect of United Nations Security Council Resolution 1373[2] was to convert a likely expectation that counter-terrorism regimes would be created (or at least strengthened) in the aftermath of 9/11 into a binding commitment upon member states of the United Nations.

Countries with a less than demonstrable commitment to the rule of law and democratic governance are among the many that have implemented this commitment, and some of these have used the rubric of counter-terrorism for the further suppression of internal dissent. Opportunism of that sort was, perhaps, only to be expected. Even more significant though has been the approach taken by liberal democracies that have been regarded as the benchmark for good governance, transparency, due process and individual freedom. The sacrifices that these countries have been prepared to make to the liberty of their citizens in order to achieve, or, more accurately, pursue, security raises alarm bells about the health of the democratic project itself.

Much has been written on these issues since 11 September 2001, including by many of the contributors to this book. The primary focus has been upon the content

of the particular counter-terrorism laws and policies of the relevant nation as they have been unveiled. There is no doubt that such writings have been of great value to contemporary debates about the desirability and dangers of specific measures implemented in response to the threat of political violence. However, the immediacy, as well as the highly charged nature, of the political debates surrounding these measures has meant that attention to their further implications and effects has necessarily been limited. This is particularly so in respect of the ramifications which the emergence of a culture of security has had, and will have, beyond the counter-terrorism context.

Scholars and non-governmental human rights organisations have highlighted the potential for exceptional measures, such as those contained in domestic counter-terrorism regimes, to become a 'normal' part of the legal and political framework of a nation. As we see it, there are two aspects to this normalisation.

First, in the sense that measures devised as temporary responses to a presently perceived threat acquire a permanent position in the legal and political consciousness. This is borne out by the unwillingness of many governments to embark on even a modest rollback or amendment of some of the more extreme measures introduced after 9/11. Even legislative attempts to prescribe the duration of counter-terrorism laws through the use of 'sunset' clauses have often proved ineffective. Such clauses have frequently been renewed as a matter of course without meaningful examination of whether the underlying law has been effective in preventing or responding to the terrorist threat or whether it remains necessary. Research and commentary has been successful in drawing attention to the seemingly entrenched nature of these laws.

By contrast, fewer inroads have been made into the much larger task of examining the *second* aspect of the normalisation of extraordinary measures, that is, the capacity of such measures to be used in response to other (and generally far less serious) threats than that of terrorism. The aim of this book is to begin to fill this gap in scholarship – among other things, to consider the 'seepage' of extraordinary legal measures developed in the counter-terrorism context into other areas of law and policy. It is too simplistic to suggest that exceptional tools emerge out of a vacuum. In many cases, they have legal antecedents. However, crises undoubtedly hasten the uptake of such measures and, what is more, in adapting existing mechanisms to respond to a severe threat such as the 9/11 terrorist attacks, governments are likely to diminish (rather than maintain) any safeguards which accompany those mechanisms. The more aggressive features of measures crafted at such a time can then have a tendency to be used for other law and policy problems facing the state – progressing these along a path they may not have journeyed had the original threat not arisen. Therefore, the central question which this book seeks to investigate is: how have the extraordinary legal measures to which liberal democracies have resorted in their 'fight' or 'war' against terrorism influenced the ordinary grain of law, justice and politics? To what extent has terrorism provided the impetus for such nations to create a 'culture of control' more broadly?[3]

A common assumption underlying national responses to 9/11 is that terrorism cannot be addressed through the offences and processes comprising the traditional criminal justice system, but instead requires the enactment of a suite of special measures. In some jurisdictions, such as Australia, which is a particular focus of this book,

this has produced a remarkable case of 'legislative inflation'.[4] In their panicked state, governments have tended to confuse meaningful steps taken towards the prevention of terrorism with the creation of legal powers and processes the need for which was often far from clear. This trend is now also readily discernible outside the counter-terrorism context, for example, in relation to organised crime, which governments evidently believe can also be 'solved' through innovative legal schemes – even if the law enforcement agencies are reluctant to actually use them.

The content of these new laws, and the extraordinary measures they contain, relies heavily on the preventive paradigm which has dominated counter-terrorism efforts in the twenty-first century. As well as sustaining the Bush doctrine that war can be justified by the principle of anticipatory self-defence, prevention has supplanted deterrence as the rationale for broad criminal offences and civil orders that aim to control individuals before they are able to wreack harm upon the community. The preventive paradigm has also fuelled expanded police powers to stop and search individuals, as well as the granting of new surveillance and questioning power to intelligence agencies. Although having an instinctive appeal, especially given the gravity of the potential harm caused by terrorist acts, the preventive justification is nevertheless highly problematic because an accurate assessment of the risk of harm and the extent to which a particular measure is likely to contribute to the elimination of that risk remains elusive. The extensive discretion necessarily vested in the executive branch of government in making this assessment poses a significant challenge to the efficacy of the political and legislative process, and requires a substantial amount of public trust.

The operational effect of the emphasis upon prevention is to shift the focus of state actors – including courts – to a point at which a much greater interference with individual liberty is permitted than has previously been the case. There are a number of reasons for this.

When the state commits to the use of law as a preventive tool, the role of evidence of wrongdoing undergoes a radical change. The successful prosecution of individuals for criminal activity requires evidence – satisfying a particular standard – to be adduced by the state. However, this is put under strain by the creation of offences cast very broadly so as to prevent, rather than punish, the commission of crimes. The criminalisation of very early preparatory activity or even, as is common in Australia, 'conspiracy to do an act in preparation of a terrorist act',[5] necessitates a heavy reliance on intercept evidence. Although still not acceptable in the United Kingdom, evidence gathered from telephone and online communication intercepts can be crucial to prosecutions in other jurisdictions. Furthermore, the blurring of the distinction between intelligence and evidence has resulted in the need to develop special procedures for the protection of national security information from disclosure in court proceedings. Such procedures may take a variety of forms, including the use of special advocates to represent the interests of a party in relation to such information. But, regardless of what specific approach is taken, the traditional protection of individuals by the rules of evidence is undoubtedly diminished.

While criminal prosecution, with the necessary navigation of delicately balanced evidential issues, is an important tool that the state may select for the prevention of

criminal activity, it is nevertheless only one of many such tools. The use of immigration processes to detain or deport a non-citizen or to cancel a citizen's passport, as well as the issue of control or preventive detention orders, involve the reliance on material that may fail to meet any appropriate evidential standard at trial. The framing of such counter-terrorism measures as civil rather than criminal in nature renders them far more flexible instruments in the prevention of criminal activity. The chief purpose in designing such schemes is for the state to avail itself of liberty-depriving powers without the need to comply with the standards of proof and evidence which apply to the criminal justice model as traditionally conceived. However, there is an obvious tension here, as both the conduct which gives rise to the making of civil orders (and/or the use of immigration processes) and the penalties for breach of these orders have clear connections to criminal wrongdoing. For this reason, measures such as these appear to constitute a new hybrid civil–criminal model.[6]

It should be acknowledged that the breaking down of the traditional binary classification system of civil–criminal matters was not unheralded. Preventive measures addressing specific future behaviour were certainly in existence before 9/11.[7] In Australia, for example, preventive detention orders could be imposed in relation to convicted sex offenders upon release into the community and apprehended violence orders also prevented an individual from harassing other identified persons. The key difference between such orders, and the preventive aspects of counter-terrorism regimes, is that the former were either consequential upon a successful prosecution and conviction or, if not, were sufficiently specific in their restrictions as to represent a proportionate intrusion into individual liberty. The embrace of preventive logic as a core rationale of the modern state in the context of protecting the community from terrorism has swept away much restraint. The new hybrid national security framework displays concern neither with past criminal guilt nor with the avoidance of generic restrictions imposed upon individuals.

In addition to the undermining of the safeguards built into the criminal justice system via the employment of hybrid orders, the state's emphasis upon prevention also ensures a particularly generous scope for the exercise of executive discretion in how individuals of interest are dealt with. By its very nature, the goal of prevention requires flexibility and the ability for the executive to adopt, at short notice, whatever strategy it considers best suited to countering the specific threat that exists at any particular point in time. The result, however, is that the state is empowered to marshal a range of legal measures against an individual, and may deliberately select measures which demand less of it – in terms of due process and respect for individual liberties – than other means of achieving substantially the same end (such as through the criminal justice system).[8]

For example, in Australia, three regimes of extended detention without charge for individuals have been established under federal law – the pre-charge detention of terrorism suspects by the Australian Federal Police;[9] warrants for questioning and detention by the Australian Security Intelligence Organisation for up to one week;[10] and preventive detention orders[11] which, in conjunction with state schemes, may result in the incarceration of individuals for up to a fortnight. Different standards and processes apply, and different issuing authorities are nominated, in respect of each.

Policing and intelligence agencies are thus in a position to strategise as to which of the available measures to adopt, based on the evidence that they possess (or wish to disclose) and how early in the process of preparation for a terrorist act it is necessary for them to act. Such strategising even extends to the decision whether to charge an individual with a preparatory terrorism offence or simply to seek a control order on the basis of intelligence (parts of which may be withheld from the subject of the order). As a number of the chapters in this book indicate, this selective capacity in law enforcement agencies is now being replicated outside the counter-terrorism contexts.

What role does the judiciary play in a system geared so strongly towards prevention? Typically, the courts have been reluctant to challenge the executive's assessment of a particular threat, and have sanctioned indiscriminate and disproportionate abuses of human rights (such as the internment of persons because of their racial background) on that basis. Hopes that the judiciary might act to curb the excesses of state responses to the threat of terrorism were raised by the United Kingdom House of Lords in *A v Secretary of State for the Home Department*.[12] The House of Lords in that case did in fact declare the indefinite detention of aliens to be incompatible with the Human Rights Act 1998 (UK), which led to the repeal by the legislature of that particular scheme. However, the *Belmarsh* case is far from representative of the relationship which the judiciary has forged with the executive branch of government (in the United Kingdom or any other jurisdiction). Deference on national security issues remains overwhelmingly the tenor of the judicial approach. While that is nothing if not traditional, and may even be understandable, this mindset is of considerable concern in the context of a normalised culture of security without any conceivable end.

Furthermore, in Australia, the courts are not strictly delineated from the state apparatus. Federal and state judges, for example, have had the power to make control and preventive detention orders conferred upon them for the purpose of protecting the community. The complaint has been made that the courts are ill-suited to fulfilling this sort of task independently of the information presented to them by the executive. However, this has not prevented the employment of the judiciary in this manner by the executive, and the Australian judiciary now receives 'criminal intelligence' (rather than evidence) in contexts other than counter-terrorism.[13] The Australian situation has been attributed, at least to some extent, to Australia's unique position among democratic nations in failing to have a Bill of Rights.[14] However, even where human rights instruments provide the courts with a definite voice in review of extraordinary measures in the counter-terrorism and other contexts, there has hardly been a clear vindication of the restraining influence of the judiciary. After the circuit-breaking decision in *Belmarsh*, the House of Lords has effectively been engaged in legitimating the relatively draconian breaches of individual liberties committed by the United Kingdom Home Secretary's employment of control orders in that jurisdiction. For although a number of the applications made by individuals subject to the orders have succeeded to some degree, Keith Ewing and Joo-Cheong Tham are right to say that the real significance in these cases 'lies not in what they prohibited but in what they appeared to permit'.[15]

The nature of the courts' entanglement in the modern security project of the state might also be viewed as being in step with the 'whole of government' approach which has been brought to bear in the prevention of terrorism. This explains the ramping up of powers across the board – from surveillance, stop and search, and questioning and detention of persons of interest, through to the 'hybrid' orders or immigration controls that might be used to deal with such persons, and the eventual possibility of prosecution under broadly framed terrorism crimes. The manner in which these tools work is through the activities of numerous agencies and actors – police, intelligence services, prosecutors and, not insignificantly, officers in the government departments of foreign affairs and immigration. The farcical allegations made against Dr Mohamed Haneef by the Australian Federal Police and the Australian government[16] are an apt demonstration of the complex interaction of such varied players in the management of an investigation, which is itself subject to external, but arguably even more powerful, influences from the judiciary, politicians and the media. The ability of individuals to maintain their innocence when pitted against the machinery of the state, with seemingly unlimited resources and increasingly flexible powers at its disposal, is severely constrained. The Haneef case stands as a powerful warning against both any further absorption of the judiciary into the anti-terrorism apparatus of the state and also the preservation of strong press freedoms.

The seepage of legal innovations devised in response to the terrorist threat into other areas of the law is both facilitated by, and reflective of, the trends identified in this discussion. The employment of the threat of terrorism as a pathway to greater state power more generally is illustrated by many of the chapters in this book. As a final comment in advance of those specific studies, it is worth pointing out that law 'migrates' across jurisdictional borders as much as measures develop and spread within a single system.[17] The range of international perspectives gathered in this volume is in direct recognition of this fact, as is the emerging evidence that the ascendant culture of security is global and that the containment of exceptional measures is, like the thwarting of the terrorist threat itself, a shared challenge for the quality of our democratic governance.

Notes

1 D Dyzenhaus and R Thwaites, 'Legality and emergency – the judiciary in a time of terror', in A Lynch, E MacDonald and G Williams (eds), *Law and Liberty in the War on Terror* (Annandale, NSW: Federation Press, 2007), 9. See also, A Lynch, '*Thomas v Mowbray*: Australia's "war on terror" reaches the High Court' (2008) 32 *Melbourne University Law Review* 1182, 1194–6.

2 UNSCOR, 4385th mtg, UN Doc S/Res/1373 (2001).

3 This phrase is taken from D Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford: Oxford University Press, 2001).

4 I B Flores, 'The quest for legisprudence: constitutionalism v legalism' in L J Wintgens (ed), *The Theory and Practice of Legislation: Essays in Legisprudence* (Aldershot: Ashgate, 2005), 26, 30.

5 Criminal Code Act 1995 (Cth) s 11.5 (offence of conspiracy) and s 101.6 (offence of doing an act in preparation for or planning a terrorist act).