Australian law after September 11

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On the morning of September 11, 2001 four civilian aircraft were hijacked in the United States of America. Australians watching late night television were suddenly confronted with terrifying events. Two of the hijacked planes were shown flying directly into the twin towers of the World Trade Center in New York. Another, that had left Reagan National Airport in Washington, crashed into a section of the Pentagon. The fourth plunged into a field in Pittsburgh.

The pilot of the fourth aircraft, who had contacted his family on his mobile phone, had learnt of the fate of the other three. He indicated that he and some passengers, after saying quietly the Lord's Prayer, were going to try to regain control over their doomed aircraft. Other passengers telephoned their loved ones to ask what they should do or to say goodbye. So did unfortunate victims in the buildings that were the targets of the hijacked planes, soon a crumpled mass of steel and furnace-hot debris.

'Not a year of the century was free from terrorism'

In the aftermath of these events, that are etched on the memories of everyone who lived through them, the sequels are just as frightening. The deaths of the brave New York firemen who rushed into the twin towers even as they were about to collapse. The devastating blow to the global economy. The partial shrinkage of the world civil aviation market, as passengers proved too frightened to travel. The 'global alliance against terrorism' that Australia quickly joined. Once again, our service men and women were seen farewelling relatives as they sailed off to war; but this time against a mainly invisible enemy. The scare caused by the reports of biological agents, especially anthrax, thought to be the new weapon of terror. The fear that parts of the decaying nuclear arsenal of the old Soviet Union would fall into the wrong hands.

Suddenly, the world, in its millennial year, seemed a much more dangerous place, less full of hope. A year that had begun in Australia with fireworks over Sydney Harbour in the warm afterglow of the Olympics, and in which Australians celebrated the centenary of their Constitution, now seemed a time of pessimism and danger.

The High Court of Australia sat as scheduled on the day after the attack on America. The case was called. The argument ensued as if nothing had changed. In courtrooms and lawyers' offices throughout the nation the business of the law went on. It still does. In a sense this demonstrates once again the strength and continuity of our institutions.

In the United States, Australia and elsewhere new laws were proposed to meet the threats of terrorism. It was as if we were in a new age when the innocence of our past liberties had disappeared in the wreckage of terror and fear. But need it be so? How should we react to this terror? What, if anything, do lawyers have to add to the debates on these questions?

A century of terrorism

The last century - during which our Constitution came into force and matured - was a century of terrorism. It was not always called that. Yet from the early days - from the anarchists and communists of the turn of 1901, that was the reality.

The Great War began with an act of terrorism in 1914. The reality struck home within the British Isles in the Easter Rebellion in Dublin in 1916. Not a year of the century was free from terrorism. Mahatma Gandhi deployed a very skillful combination of peaceful resistance, sporadic violence and political showmanship ultimately to lead India, the jewel in the Crown, out of British dominion. Mohammed Ali Jinnah did the same with Pakistan. Nelson Mandela carried forward, over many decades (most of them in prison on Robben Island) his leadership of the African National Congress, modelled on that of India. For decades the ANC was called a 'terrorist' organisation. What did these three leaders have in common? All were lawyers. All were gifted communicators.

Other 'terrorist' movements were led by people who refined their skills on the battlefield - Mao Tse-tung, General Giap, Ho Chi Minh, Jomo Kenyatta, Colonel Boumedienne, Colonel Nasser. All around the world, as the old European empires crumbled, terrorists struck at their quarry. They did so against the autocratic Soviet and Nazi empires and were repaid with fearsome reprisals. They did so against the relatively benign British empire in Palestine, Kenya, Malaya, Aden, Cyprus and elsewhere. They attacked the faded glories of France in Algeria and Vietnam. The new empires that took the place of the old were themselves attacked, as in East Timor, West Irian, Chechnya, Kosovo. Terrorists mounted their separatist campaigns in Northern Ireland and Quebec. Our own region has not been spared. The successive coups in Fiji involved unconstitutional and violent means. Bougainville, the Solomons and East Timor were uncomfortably close.

Back in 1975, it was within living memory of those gathering at the last Australian Legal Convention in Canberra to recall the Cyprus campaign of General Grivas. He was a commander of no more than 250 EOKA terrorists with extreme nationalist sympathies. Those few ultimately drove 28,000 British troops from the island by destroying their political capability to wage war. The same was the fate of the French in Algeria. The same has not proved true of Northern Ireland. Yet whereas the '*colons*' constituted only 2 per cent of the population in Algeria, the overwhelming majority of the Muslims in that country had a common interest in forcing their increasingly desperate and violent French rulers to leave. Eventually they succeeded. In Northern Ireland, there always were, and still are, substantial numbers in both of the divided communities who found continuing connection with the United Kingdom acceptable and terrorism unacceptable.

Why did the Red Brigades in Italy and the Baader-Meinhof faction in Germany fail to undermine liberal democracies when other terrorist groups succeed? Are there any lessons for the law in the way different societies have tackled terrorism? Are there lessons for us in Australia as we properly address our own security after September 11?

The story of Uruguay is particularly instructive. Before 1974, it was one of the few longstanding, stable constitutional democracies of South America. It had adopted a new and stronger constitution in 1967. This document incorporated rule of law and human rights principles that were impeccable. But then Uruguay suffered a serious economic downturn that threatened its welfare laws. On top of this it had to grapple with the challenge of a small determined band of terrorists known as the *Tupamaros*.

The *Tupamaros* resorted to indiscriminate acts of violence and cruelty that shook Uruguayan society. The citizens, and especially the military, began to look around them. Coups had occurred in Brazil in 1964, in the Dominican Republic in 1965, in Chile in 1973. In Uruguay, in 1974, the military, police and their supporters struck.

After the coup, one by one, the constitutional guarantees were dismantled. More than 5,000 civilians in a country of fewer than three million inhabitants were incarcerated for very long prison terms for having committed political offences. Other detainees were kept incommunicado. *Habeas corpus* was gradually withdrawn. Immunity was granted to officials against an ever broader range of illegal acts. The country that had been known as the 'Switzerland of Latin America'[4] fell into a period of escalating lawlessness. At first, the strong tactics had much public support out of fear of the *Tupamaros*. But increasingly unaccountable power bred oppression. True, the *Tupamaros* were defeated. But it took fourteen years and enormous struggle to return Uruguay to constitutionalism. Even then, there had to be amnesties for the military, police and other officials. And a deep scar was left on the body politic.

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Australia has had nothing like the threats of terrorism in Cyprus, Algeria, Northern Ireland or Uruguay. Naturally, everyone wants to keep it that way. It is true that at the Commonwealth Heads of Government Conference in Sydney in February 1978 a bomb exploded and three people were killed. This led to what one analyst called '[a] synthetic panic which gripped the government (and was exploited by the media)'. Leading officials 'accepted without question the assumption that there was a real and present [terrorist] threat in Australia'.

That bombing led to inquiries and legislation. Justice Hope, the Royal Commissioner, found that there was little evidence that Australia's security organisations had the qualities of mind necessary for what he called the 'skilled and subtle task' of intelligence assessment. This was unsurprising. Earlier inquiries into the special branch files of police in New South Wales and South Australia - the latter conducted by Justice Michael White - found ludicrous biases in the identification of the supposed threats to security. According to Justice White, all State Labor leaders automatically became the subjects of index cards as suspected 'subversives'. As he put it, 'Like the *Maginot Line* all defences against anticipated subversion, real or imagined, were built on one side'. This reflected, in the antipodes, the preoccupations of the Federal Bureau of Investigation in the United States where the ratio of files on left versus right-wing organisations was a hundred to one. The Police Commissioner of South Australia defined subversion as '… a deliberate attempt to weaken public confidence in the government'. Which is exactly what, in a constitutional democracy, Opposition parties are supposed to do, do all the time and will be doing in the current Australian general election with rare abandon.

So if we ask why did terrorism succeed in Cyprus and Algeria but had only limited success in Ulster and Quebec and failed abysmally in Italy, America (and to the extent that it has occurred) Australia, the answers are complex. But they can be found. The most important is that those societies that have succeeded best against terrorism have refused to play into the terrorists' hands. They have rejected the terrorist paradigm. As the Rand Corporation's analyst, Brian Jenkins has pointed out 'terrorists want a lot of people watching and a lot of people listening and not a lot of people dead'. They want publicity, the last thing that most perpetrators of non-political violence seek. They form a symbiotic relationship with media. They create media events. Kidnapping, hijacking and suicide bombs introduce elements of high tension, as does indiscriminate brutality.

Free societies must, do and will cover such events in their media - which is itself now particularly adapted to vivid images and to sites of death and suffering. But keeping such visual horror in perspective is an important clue to defeating terrorists at their game. So is keeping one's sense of balance and priority. So is analysing the reasons, that may lie behind some the acts of terror, to see if some of them reflect grievances that need to be addressed.

According to Justice Hope's review, between 1968 and 1977 1652 deaths could be attributed to international terrorism. Such losses, appalling though they are (and worse still when they are multiplied), pale into insignificance beside other global causes of death and suffering. The 20 million dead from HIV/AIDS. Dead to the general indifference of humanity. The millions dying, mostly in developing countries, from nicotine addiction and its consequences. From malaria. From lack of water and food. Millions dead in state-run wars. Millions in refugee camps. Anonymous dead and living. Few vivid images. Boring reality. No media interest. No news. Relatively little political appeal. Victims of compassion fatigue.

The countries that have done best against terrorism are those that have kept their priorities, retained a sense of proportion, questioned and addressed the causes of terrorism, and adhered steadfastly to constitutionalism and the rule of law.

Internal security

Exactly fifty years ago, 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. His ideas were subversive, methods threatening and goals alarming. I refer to the communists. Of course, the communists did not fly commercial aircraft into targets in crowded cities. But they did indoctrinate their young. They had many fanatical adherents. They divided the world. They were sometimes ruthless and murderous. They developed nuclear and biological weapons. They had a global network. They opposed our form of society.

Out of fear, governments around the world rushed to introduce legislation to increase powers of surveillance, restrictions on democracy and deprivations of civil rights. In South Africa, the *Suppression of Communism Act 1950* became, before long, the mainstay of the deteriorating legal regime that underpinned apartheid and brought forth Nelson Mandela and the ANC 'terrorists'. In Malaya, Singapore and elsewhere, the colonial authorities introduced the *Internal Security Acts* which is what the South African Act was later called. Sadly, many of those statutes

remain in place, post-independence, to oppress dissident opinion.

In the United States of America, the *Smith Act* was passed by the Congress to permit the criminal prosecution of members of the Communist Party for teaching and advocating the overthrow and destruction of the government. The law was challenged in the courts of the United States. The petitioners invoked the First Amendment guarantees of freedom of expression and assembly. But in 1950 in *Dennis v United States*, the Supreme Court, by majority, upheld the Smith Act. They held there was a 'sufficient danger to warrant the application of the statute … on the merits'.

Dissenting, Justice Black drew the line between overt acts designed to overthrow the government and punishing what people thought and wrote and said. Those things, he held, were beyond the power of Congress. Also dissenting, Justice Douglas acknowledged the 'popular appeal' of the legislation. But he pointed out that the Communist Party was of little consequence 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.

History accepts the wisdom of our response in Australia and the error of the over-reaction of the United States.

A few months after *Dennis* was decided, a similar challenge came before the High Court of Australia. There was no First Amendment. There was no established jurisprudence on guaranteed free expression and assembly. Most of the judges had had no political experience. Most of them were commercial lawyers whose professional lives had been spent wearing black robes and a strange head adornment. An Australian contingent was fighting communists in Korea. The federal government had a mandate for its law. Most Australians saw communists as the bogey-man - 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 law. He quoted Cromwell's warning: 'Being comes before well-being'. He said that his opinion would be the same if the Parliament had legislated against Nazism or Fascism. But the rest of the Court rejected the law. 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 … only to assist those holding power to resist or suppress obstruction or opposition or attempts to displace them in the form of government they defend.

So far as Dixon was concerned it was for the courts to ensure that suppression of freedoms could only be done within the law. The Constitution afforded ample powers to deal with overt acts of subversion. Responding to a hated political idea and propagation of that idea was not enough for validity of the law.

Given the chance to vote on the proposal to change the Constitution, the people of Australia, fifty years ago on September 22, 1951 refused. When the issues were explained, they rejected the enlargement of federal powers. History accepts the wisdom of our response in Australia and the error of the over-reaction of the United States.

Keeping proportion. Adhering to the ways of democracy. Upholding constitutionalism and the rule of law. Defending, even under assault, and even for the feared and hated, the legal rights of suspects. These are the ways to maintain the support and confidence of the people over the long haul. We should not forget these lessons. In the United States, even in dark times, the lessons of *Dennis* and of *Korematsu* need to be remembered. Every erosion of liberty must be thoroughly justified. Sometimes it is wise to pause before acting precipitately. If emergency powers are clearly required, it may be appropriate to subject them to a sunset clause – so that they expire when the clear and present danger passes. Always it is wise to keep our sense of reality and to remember our civic traditions, as the High Court Justices did in the *Communist Party Case* of 1951.

Denouement

When the United States Supreme Court assembled on October 1st, for the first time since September 11, 2001, the Chief Justice led everyone in the courtroom in a moment of silence in remembrance of the disasters in Virginia, New York and Pennsylvania. 'Our hearts go out to the families of the killed and injured', he said. Sitting at the Bar table was the Solicitor-General of the United States (sometimes called the 'tenth Justice') whose wife, Barbara Olsen, was a passenger in the plane that crashed into the Pentagon.

Our hearts too go out to all the American victims. To every victim of terror in every land. And to those who suffer needlessly in every way. But as lawyers, we can join in the words of Justice Sandra Day O'Connor of the United States court. Diverting from a function to launch a new law school building in New York, she visited the ruins of the World Trade Centre and said:

> We wish it were not necessary. We wish we could put the clock back. But to preserve liberty, we must preserve the rule of law.

In the course of the century of the Australian Commonwealth, we, the lawyers of Australia, have made many errors. We have sometimes laughed at and belittled citizens who, appearing for themselves, fumbled and could not reach justice. We have sometimes gone along with unjust laws and procedures. We have occasionally been instruments of discrimination and it is still there in our law books. We have not done enough for law reform or legal aid. We have not cared enough for justice. We have been just too busy to repair the wrongs that we saw. Yet at critical moments in our nation's story, lawyers have upheld the best values of our pluralist democracy. In the future, we must do so more wholeheartedly. To preserve liberty, we must preserve the rule of law. The rule of law is the alternative model to the rule of terror, the rule of money and the rule of brute power. That is our justification as a profession. It is our continuing challenge after September 11, 2001.