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Legality and Emergency – The Judiciary in a Time of Terror

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The title of this chapter, and indeed this entire book, is deeply, even dangerously, misleading. Western legal orders are not living in a time of emergency or terror, despite the best efforts of our leaders to convince us otherwise. Additionally, the idea that the way to deal with the challenges to the West sharpened by the events of 9/11 is by waging a 'war on terror' was from the beginning, and is ever more, preposterous. There are, of course, many people in the world who face a daily situation of wartime emergency in which their lives are wrecked by fear of real terror. But it is important to keep in mind that among them are the peoples of Iraq and Afghanistan, whose present situation is directly attributable to the fact that foreign policy in much of the West since 9/11 has been based on this preposterous idea.

However, our topic is still useful. The judiciary does have an important role to play in countering the hyperbolic terms of the debates about the rule of law since 9/11, indeed, in imposing the rule of law on executive and legislative responses to 9/11. This argument is not an easy one to make. The history of the judiciary in times of emergency and alleged emergency is a dismal one of judges deferring to executive claims. It is true that in many of the infamous wartime cases such as *Halliday*, *Liversidge* and *Korematsu*,[1] there were ringing dissents. It is also true that in the aftermath of the wars the majority judgments were regarded as badges of shame. Hence, the dissents were taken to represent the future path for judges faced with similar problems. But it also seemed that judges reverted to deference when national security concerns were alleged by the executive, even outside of the context of wartime emergency. One honourable exception is the Australian High Court's decision in the *Communist Party Case*.[2] But generally the record of the judiciary in 'a time of terror' is a dismal one.

Notes

* This chapter develops the central themes of the paper presented by David Dyzenhaus at the Symposium on Law and Liberty in the War on Terror, Gilbert + Tobin Centre of Public Law, University of New South Wales, Sydney, 6 July 2007. That paper, published as 'Cycles of legality in emergency times' (2007) 18 *Public Law Review* 165, does not consider the central focus of this chapter, the High Court's recent decision on control orders.

1 *R v Halliday* [1917] AC 260; *Liversidge v Anderson* [1942] AC 206; *Korematsu v United States* 323 US 214 (1944).

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

3 See, for example, Cass Sunstein, 'Minimalism at War' (2004) *Supreme Court Review* 47.

4 *Hamdan v Rumsfeld* 126 SCt 2749 (2006); *A v Secretary of State for the Home Department* [2005] 2 AC 68; *Re Charkaoui* 2007 SCC 9.

5 *Re MB* [2006] EWHC 1000 (Admin), [103] (Sullivan J).

6 *Thomas v Mowbray* [2007] HCA 33.

7 *Al-Kateb v Godwin* (2004) 219 CLR 562, 586 (McHugh J); 599, 613 (Gummow J); 616, 618 (Kirby J).

8 Above, 588-89 (McHugh J); 620-22 (Kirby J).

9 See, for example, above, 648 (Hayne J).

10 Dennis Rose, 'The High Court decisions in *Al Kateb* and *Al Khafaji* – A Different Perspective' (2005) 8(3) *Constitutional Law and Policy Review* 58, 62-63.

11 See *Re Woolley; ex p Applicants M276/2003* (2004) 225 CLR 1, 52 (Gummow J).

12 In *The Constitution of Law* (2006) 92, note 56, Dyzenhaus misrepresented Gummow J's position by claiming that he put his dissent on a 'purely textual basis'. His position, properly represented, is problematic for a different reason, one which equally affects Kirby J's position.

13 *Al-Kateb v Godwin* (2004) 219 CLR 562, 577.

14 Above, 613.

15 Above, 618.

16 Above, 615.

17 Above, 584.

18 Above, 585-86.

19 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193.

20 *Little v Commonwealth* (1947) 75 CLR 94, 102-3, relying on *Liversidge v Anderson* [1942] AC 206, 104. This case involved an action for false imprisonment during the war.

21 See *Lloyd v Wallach* (1915) 20 CLR 299; *Ex p Walsh* [1942] ALR 359.

22 *Al-Kateb v Godwin* (2004) 219 CLR 562, 588-89.

23 Above, 620-22.

24 George Winterton, 'The Communist Party Case' in HP Lee and George Winterton (eds), *Australian Constitutional Landmarks* (2003) 108, 127.

25 Above, 133, quoting from Brian Galligan, *Politics of the High Court* (1987) 203.

26 *Al-Kateb v Godwin* (2004) 219 CLR 562, 584.

27 See David Dyzenhaus, *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* (1991) 57-58.

28 *Shaughnessy v Mezei* 345 US 206 (1953), quoted in *Al-Kateb v Godwin* (2004) 219 CLR 562, 651.

29 *Al-Kateb v Godwin* (2004) 219 CLR 562, 585.

30 *A v Secretary of State for the Home Department* [2005] 2 AC 68, 110.

31 Above, Lord Rodger, at 155, elaborated the implications of this point.

32 See Clive Walker, 'Keeping Control of Terrorists without Losing Control of Constitutionalism' (2007) 59 *Stanford Law Review* 1395.

33 David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (2001) 12, quoted in above, 1396.

34 A similar approach was adopted in by a majority of the Supreme Court of Canada in regard to investigative hearing provisions introduced under counter-terrorism legislation: *Re Application under s 83.28 of the Criminal Code* [2004] 2 SCR 248.

35 *Thomas v Mowbray* [2007] HCA 33, [27]. See more generally [20]-[27].

36 Above, [71]-[77]. See also [88] and [100]-[103].

37 Above, [110] (Gummow and Crennan JJ).

38 Above, [28]. See also [19].

39 Above, [28]. See also [78]-[79] and [109] (Gummow and Crennan JJ).

40 Above, [349] (Kirby J); [506] (Hayne J).

41 Above, [506].

42 Above, [516].

43 Above, [17]. He holds that there is no reason to regard judicial involvement otherwise here. Heydon J also endorses this view by reference, [651], and Callinan J expresses agreement with it, [595]-[600]. However, Callinan J's agreement on this point falls within the context of a strongly and explicitly deferential approach in matters of national security, discussed below.

44 Above, [370].

45 Above, [498].

46 Above, [516] (Hayne J). This phrase is expressly adopted by Kirby J, [322].

47 *Al-Kateb v Godwin* (2004) 219 CLR 562, 643-44.

48 Above, 578-80 (Gleeson CJ) and 643-44 (Gummow J). Gleeson CJ also emphasises the broad and flexible nature of the remedy of habeas corpus. Section 22 of the *Federal Court of Australia Act 1976* (Cth) enjoins the Court to grant the appropriate remedies 'either absolutely or on such terms and conditions as the Court thinks just'.

49 *Thomas v Mowbray* [2007] HCA 33, [476] (Hayne J).

50 *Al-Kateb v Godwin* (2004) 219 CLR 562, 639-40.

51 *Thomas v Mowbray* [2007] HCA 33, [510].

52 Walker, above n 32, provides a recent and careful review of such measures.

53 The use of security-cleared counsel in the Commission of Inquiry into the Actions of Canadian Officials in relation to Maher Arar is one such example.

54 *Thomas v Mowbray* [2007] HCA 33, [351]-[359].

55 This proposition was expressed by Gummow J in *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 612, quoted in the joint judgment in above, [114].

56 *Thomas v Mowbray* [2007] HCA 33, [116].

57 For a discussion of different approaches to defining judicial power in the Australian context see Simon Evans, 'The Meaning of Constitutional Terms: Essential Features, Family Resemblance and Theory-Based Approaches' (2006) 29 *University of New South Wales Law Journal* 207, 227-230.

58 *Thomas v Mowbray* [2007] HCA 33, [331]-[338]. See also [354]-[357].

59 See above, [28] (Gleeson CJ); [121] (Gummow and Crennan JJ); [17] (Gleeson CJ).

60 Above, [17].

61 Above, [386].

62 Above, [584].

63 Above, [533].

64 Above, [589].

65 Above, [532]-[533], [583]-[589].

66 Above, [544].

67 From the *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 155-56, quoted in Callinan J's judgment in *Thomas v Mowbray* [2007] HCA 33, [589].

68 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 187-88.

69 *Thomas v Mowbray* [2007] HCA 33, [590].

70 *Zadvydas v Davis* 533 US 678 (2001), 703-705, 705-12 quoted in *Al-Kateb v Godwin* (2004) 219 CLR 562, 654-57.

71 *Thomas v Mowbray* [2007] HCA 33, [584].

72 The relevant passage from the joint judgment is found, above, [139]-[140].

73 The phrase is that of the President of the International Commission of Jurists, Arthur Chaskalson.

74 *Re MB* [2006] EWHC Admin 1000, [103] (Sullivan J).

75 The cancellation of Dr Mohamed Haneef's visa following a decision to grant bail, discussed in Chapter 20 of this book, is a good example of this.

76 See Neal Katyal, 'Equality in the War on Terror' (2007) 59 *Stanford Law Review* 1365.