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**Between the Crime and the War Falls the
Terror: Comment on *Thomas v Mowbray***

(2007) 237 ALR 194; 81 ALJR 1414; [2007] HCA 33

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INTRODUCTION

It is safe to say that terrorism was not at the forefront of the minds of the drafters of the Australian *Constitution* in the late 1890s. In retrospect, various episodes of public violence deep in Australia's pre-constitutional history could be anachronistically reclassified as terrorism, at least under some contemporary definitions of the term. Examples might include frontier violence during the colonial encounter (both by the settlers/invasers and by indigenous resistance/liberation movements); race riots at Lambing Flat and on other goldfields (where Chinese immigrants were terrorised by white mobs and had their pigtailed hacked off as trophies of terror); the Eureka stockade, a rebellion immortalised as legitimate resistance to oppressive government rule (or less gloriously understood as organised criminal violence by thugs who objected to paying license fees); various industrial battles where trade unionists and police clashed (the former using violence to coerce government industrial policy, the latter deploying "State terror" to beat the former into submission); and, on the cusp of Federation, the story of Breaker Morant, a war criminal who ruthlessly executed prisoners in the Boer War in a classic campaign of anti-insurgent terror (alongside the British scorched-earth strategy which spared no one), yet who found himself posthumously celebrated as military hero and victim in the revisionist popular culture of the late 20th century.

Such events were not typically characterised by the language and rhetoric of terrorism, though there were exceptions: in 1892, for instance, Sir Henry Parkes condemned the "reign of terror" inflicted by the Braidwood bushrangers, and recounted the story of the would-be assassin, Henry O'Farrell, who shot the Duke of Edinburgh during a sailors' picnic in Clontarf, Sydney, in 1868.¹ The Duke lived; the assassin escaped a lynching; and the NSW Parliament hurriedly passed a motion to legislate "for the better security of the Crown" and to suppress sedition – proof of the law of eternal return that some things in politics never change. The public mood was divided between those who thought

O'Farrell was insane and those (including the Inspector-General of Police) who thought he was a member of a treasonous Fenian conspiracy (that is, Irish freedom fighters). In any event, he was convicted of wounding with intent to murder (not, it should be said, of any special terrorism offence) and promptly executed; and that was the end of the matter.

Controversy about defining terrorism today is controversy about who is entitled to use violence, against whom, in what circumstances, by which means, and for what purposes.² The adoption of a definition of terrorism in s 100.1 of the Commonwealth *Criminal Code* in 2002 has hardly settled those ancient philosophical questions about when political violence – whether called terrorism, rebellion, revolution, insurgency, treason, treachery, sedition, public order offences and so on – is justifiable or excusable. Some cases are, of course, easy ones; few (though there are some) would defend the right of Al-Qaeda to exterminate Americans because they are Americans, or Jews because they are Jews, or to bomb market places full of civilians or schools full of children.

Other cases are harder. Already, the Australian courts are dealing with controversies about whether the LTTE (Tamil Tigers) in Sri Lanka should be treated as a terrorist organisation under Australian law. On the one hand, the Tigers are a party to a non-international armed conflict governed by international humanitarian law, engaging in lawful hostilities against the Sri Lankan armed forces, and any attacks on civilians (such as by suicide bombers) can already be prosecuted as war crimes attracting universal jurisdiction (including under Australian war crimes legislation). On the other hand, war crimes legislation does not supply the authorities with the broad powers which flow from classifying conduct as terrorism, including powers to ban organisations, seize their assets, and prosecute their members for a very wide range of preparatory or inchoate offences (including recklessly financing terrorism, or even recklessly supplying a mobile phone SIM card, as in the notorious case of Dr Mohammed Haneef in 2007); as well as to impose control orders, utilise preventive detention, engage ASIO questioning

¹ Parkes H, *Fifty Years in the Making of Australian History* (Longmans, Green & Co, London, 1892), chapter IX; available at <http://purl.library.usyd.edu.au/setis/id/fed0024>. My thanks to Ian Jordan for alerting me to these incidents.

² See Saul B, *Defining Terrorism in International Law* (Oxford University Press, Oxford, 2006).

and detention powers; trigger wide powers of intelligence gathering and interception, prosecute seditious speech, and censor terrorist publications. The consequence is a temptation for governments to funnel as much violence as possible into the category of terrorism, since so much special investigative and emergency power flows from it, not to mention incidental political capital (which occasionally spectacularly backfires).

In many liberal democratic countries, constitutions have a great deal to say about the exercise (and abuse) of emergency powers.³ In particular, constitutionally entrenched protections of human rights and freedoms can constrain the passage and exercise of excessive anti-terrorism powers, as in Canada where a court recently found that one element of the Canadian definition of terrorism – the requirement of a political, religious, or ideological motive behind terrorist violence – unconstitutionally infringed values such as freedoms of thought, expression, religion and non-discrimination.⁴ That decision of a lower court may well be wrong,⁵ but it illustrates the capacity of many constitutions to bring to bear rights-based analyses of emergency powers.

In other democracies, freedom from arbitrary detention is, for example, an important check on the formulation and implementation of laws for preventive detention and the more aggressive forms of control orders against terrorists. That is not to suggest that preventive detention or control orders are necessarily incompatible with freedom from arbitrary detention – some orders have been quite properly upheld in Britain⁶ – and much depends on how a particular regime is crafted, upon whom an order is imposed, for how long, and involving what kind of restrictions. But such analysis remains lacking in the Australian constitutional context, widening the gulf between Australia's constitutional jurisprudence and that of comparable liberal democracies, and much diminishing – indeed marginalising – the influence of the Australian

High Court on judicial decisions in other countries.

In the absence of sophisticated rights-based arguments for evaluating anti-terrorism laws, those faced with arguably excessive laws are left with little upon which to hang their challenges. Australian administrative law, for instance, has become so well developed precisely because most human rights arguments have to be squeezed through the narrow apertures of that branch of law.⁷ In *Thomas v Mowbray* (2007) 237 ALR 194; 81 ALJR 1414; [2007] HCA 33, a classic double attack on constitutional grounds was mounted against the imposition of a control order on Joseph (Jack) Thomas under Div 104 of the *Criminal Code*: first, Ch III arguments about judicial and non-judicial power, and secondly, arguments about lack of legislative power. This comment briefly sets out the Ch III arguments before focusing on the legislative power issues (specifically, whether the defence and external affairs powers support control orders).

By way of background, Thomas was alleged to have undertaken paramilitary training with Al Qaeda in Afghanistan in 2001. After his arrest in Pakistan in 2003, he was convicted in the Victorian Supreme Court in 2004 of intentionally receiving funds from a terrorist organisation and possessing a false passport, but acquitted of providing support to a terrorist organisation. His convictions were set aside by the Victorian Court of Appeal in 2006, on the basis that his confessions were not voluntary (and therefore were inadmissible) due to threats and inducements made during his interrogation by the Australian Federal Police (AFP) while he was in custody in Pakistan. Within 10 days of the quashing of his convictions, the AFP obtained an interim control order against Thomas under Div 104 of the Commonwealth *Criminal Code*, imposing an evening curfew and requiring him to periodically report to police, to use only approved telephone and internet services, and not to communicate with terrorist organisations or specified terrorists. The control order was issued after Mowbray FM accepted, on the balance of probabilities, that issuing the order would substantially assist in preventing a terrorist

³ See, eg Gross O and Aolain FN, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge University Press, Cambridge, 2006).

⁴ *R v Khanuja*, Case No 04-G30282, Ontario Superior Court of Justice, 24 October 2006.

⁵ Saul B, "The Curious Element of Motive in Definitions of Terrorism: Essential Ingredient – Or Criminalizing Thought?" in Lynch A, MacDonald E and Williams G (eds), *Law and Liberty in the War on Terror* (Federation Press, Sydney, 2007), p 28.

⁶ See, eg, Gleeson J, SC, "*Thomas v Mowbray* (2007) 237 ALR 194", Paper delivered at the ANU Public Law Weekend, 9-10 November 2007, p 8.

⁷ Saul B, "Australian Administrative Law: The Human Rights Dimension", in Groves M and Lee HP (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, Cambridge, 2007), p 50.

act, following evidence that Thomas had received training from a listed terrorist organisation.

CHAPTER III SEPARATION OF POWERS ARGUMENTS

A majority of the High Court did not accept an argument that the control order scheme impermissibly conferred non-judicial power on a federal court by enabling a court to create new rights and obligations (rather than to resolve disputes about existing ones). Other valid exercises of judicial power (including inexact analogies⁸ with apprehended violence orders, bail proceedings, or post-sentence detention of sex offenders) could equally be seen to create new rights and obligations which may restrict a person's liberty, and Gleeson CJ noted the "ancient" provenance of such preventive judicial power, noted by Blackstone, "to bind persons over to keep the peace".⁹ The Court thus rejected rigid markers between judicial and other powers – such as an inflexible distinction between (legislatively) creating and (judicially) adjudicating rights and obligations – and in this sense acknowledged the fluidity and flexibility of the judicial function.

In a related fashion, Gleeson CJ rejected a further argument that restricting liberty by imposing a control order has a penal or punitive character which can only follow from a judicial determination of criminal guilt.¹⁰ Control orders were viewed neither as detention, nor as executive detention – rather as a preventive restriction of liberty by judicial order – although the extreme case of a control order requiring home detention for 12 months could arguably be characterised at least as detention, if not solely by the executive. As found previously by the Court, various forms of administrative detention are constitutionally permissible – such as those for quarantine, immigration or mental health purposes – and by extension, there is no rigid rule which requires all lesser restrictions of liberty to follow from a criminal conviction (or even to be imposed by a court).

The difficulty here is that as the Court rejects rules for distinguishing between judicial and other powers, or between permissible and

impermissible forms of detention, it becomes increasingly difficult to maintain essential constitutional distinctions – and thus to make sense of the doctrine of the separation of powers – especially when few other principles are proposed as substitutes. Chief Justice Gleeson suggests that what matters is that the circumstances of restraints on liberty "are carefully confined, both by the Parliament and by the courts",¹¹ but as became evident after the High Court's decision in *Al-Kateb v Godwin* (2004) 219 CLR 562; 208 ALR 124; [2004] HCA 37, controls on administrative detention (or other restraints on liberty, including by judicial order) are not always adequate to protect liberty against arbitrary abuses. Certainly the English roots of preventive judicial power are not promising in this respect. While Gleeson CJ admits that the "analogies are not exact", he omits to mention that the same passage in Blackstone's *Commentaries* describes the powers in question as (for example) preventing

...haunting bawdy houses with women of bad fame; or for keeping such women in his own house; or for words tending to scandalize the government... [and including power to] bind over all night-walkers, eavesdroppers; such as keep suspicious company, or are reported to be pilferers or robbers; such as sleep in the day, and wake in the night; common drunkards; whore masters; the putative fathers of bastards; cheats; [and] idle vagabonds....¹²

Blackstone's examples are hardly proud antecedents to, or a template for, the scope of judicial power in a modern democratic legal order; and it might be cautioned against resurrecting ancient powers which have since fallen into disuse, at least where they restrict rather than enable individual liberty. Returning to the forgotten ancients has become a habit of late; one need only think of the rebirth of the long-lapsed prerogative power to exclude aliens without statutory authority which took many by surprise (including the Chief Justice of the Federal Court) in the *Tampa* case.¹³ Blackstone

⁸ *Thomas v Mowbray* (2007) 237 ALR 194; 81 ALJR 1414; [2007] HCA 33 at [17], per Gleeson CJ.

⁹ *Thomas v Mowbray* (2007) 237 ALR 194; 81 ALJR 1414; [2007] HCA 33 at [16], per Gleeson CJ.

¹⁰ *Thomas v Mowbray* (2007) 237 ALR 194; 81 ALJR 1414; [2007] HCA 33 at [18], per Gleeson CJ.

¹¹ *Thomas v Mowbray* (2007) 237 ALR 194; 81 ALJR 1414; [2007] HCA 33 at [18], per Gleeson CJ.

¹² Blackstone, *Commentaries on the Laws of England* (1769), Book IV, chapter 18, p 253.

¹³ *Ruddock v Vadarlis* [2001] FCA 1865.

can hardly be regarded as the last word here; as Lindell observes, the idea of preventive justice would seem to contradict the views of a slightly more modern rule of law jurist, Dicey, for whom punishment (broadly understood) was not to be imposed for *future* breaches of the law.¹⁴

Thomas further argued that the criteria for issuing control orders were too vague and therefore did not provide justiciable standards for the exercise of judicial power. Under s 104.4 of the *Criminal Code*, a control order may be issued where the court is satisfied on the balance of probabilities that the order is reasonably necessary and reasonably appropriate and adapted for the purpose of protecting the public from a terrorist act, either because the order would assist in preventing a terrorist act, or because the person has provided training to, or received training from, a listed terrorist organisation. A majority of the Court found that the test was not too vague,¹⁵ not least because of judicial familiarity with concepts of reasonableness (in a variety of contexts, from criminal to administrative law) and notions of “appropriate and adapted” (which appears elsewhere in constitutional jurisprudence, and strikingly crosses over with the modern proportionality principle in human rights law in other jurisdictions).

In contrast, Hayne J argued that a court is not exercising judicial power because it is required “to apply its own idiosyncratic notion as to what is just” in deciding whether a control order is necessary to protect the public.¹⁶ Justice Kirby similarly asserted that the criteria for imposing control orders “attempt to confer on federal judges powers and discretions that, in their nebulous generality, are unchecked and unguided” and which is thus “to condone a form of judicial tyranny alien to federal judicial office”.¹⁷ For Kirby J, determining what is necessary to protect the public in considering whether to issue a control order offers no “ascertainable legal standard” which, when combined with procedures “which seriously depart from the basic rights normal to the

judicial process”, is incompatible with the exercise of judicial power.¹⁸

While the specificity of the criteria is a matter of appreciation, the dissenting judges do not satisfactorily show that the criteria are any more vague or imprecise than similar criteria (and discretions) routinely invoked by federal courts in other contexts.¹⁹ Indeed, those who support human rights law must be conscious of the latitude inevitably (and properly) exercised by judges in making decisions about the existence and restriction of human rights and freedoms, including the requirements to balance and weigh competing individual and public interests. While discretion ought to be tightly circumscribed when the consequence of its exercise may be the deprivation of liberty, nothing in the criteria for issuing control orders is so indeterminate as to take the scheme outside the familiar scope of judicial power. In other contexts, courts routinely make predictions about dangers posed to the public,²⁰ based on the weighing and assessment of various risk factors.

Moreover, as Gleeson CJ noted, the procedure for issuing control orders is consistent with the exercise of judicial power, since the initial *ex parte* hearing is followed by confirmation hearing, generally in open court, applying the rules of evidence, with the burden of proof on the applicant, the provision of documents and an opportunity to respond and cross-examine accorded to the respondent, within an impartial court focusing on the particular circumstances of the individual.²¹ This may be so, but an affected person may have only two days to prepare a response, since the federal police need only notify the court and the affected person of their intention to seek confirmation of an interim control order, and the grounds on which it is based, 48 hours before the hearing. Adequate time to prepare one’s case is a hallmark of the a fair hearing and the compressed time frame for confirming control orders curtails this basic right. Chief Justice Gleeson conceded that particular issues of procedural fairness may arise in individual cases, quite apart from the general

¹⁴ G Lindell, ‘The Scope of the Defence and Other Powers: Thomas v Mowbray’, Paper delivered at the Gilbert + Tobin Centre of Public Law, 2008 Constitutional Law Conference, Sydney, February 2008.

¹⁵ *Thomas v Mowbray* (2007) 237 ALR 194; 81 ALJR 1414; [2007] HCA 33 at [27], per Gleeson CJ.

¹⁶ *Thomas v Mowbray* (2007) 237 ALR 194; 81 ALJR 1414; [2007] HCA 33 at [516], per Hayne J.

¹⁷ *Thomas v Mowbray* (2007) 237 ALR 194; 81 ALJR 1414; [2007] HCA 33 at [322], per Kirby J.

¹⁸ *Thomas v Mowbray* (2007) 237 ALR 194; 81 ALJR 1414; [2007] HCA 33 at [329] and [347] respectively, per Kirby J.

¹⁹ *Thomas v Mowbray* (2007) 237 ALR 194; 81 ALJR 1414; [2007] HCA 33; Kirby J seeks to differentiate analogous judicial powers at [331]-[338].

²⁰ *Thomas v Mowbray* (2007) 237 ALR 194; 81 ALJR 1414; [2007] HCA 33 at [28], per Gleeson CJ.

²¹ *Thomas v Mowbray* (2007) 237 ALR 194; 81 ALJR 1414; [2007] HCA 33 at [30], per Gleeson CJ.

validity of control orders in this case.²² There may, for instance, be questions about the application of legislation to protect security sensitive information where such provisions jeopardise the right to a fair hearing by preventing an affected person from being able to see and test all of the evidence.

The irony of the Ch III challenges to control orders was not lost on Gleeson CJ, who wryly observed that characterising the making of the orders as an exclusively administrative power “would not constitute an advance in the protection of human rights”.²³ Allowing the executive government to administratively impose control orders – without the protections of judicial process and supervision – would have serious consequences for individual liberty which would likely outweigh any dangers in implicating the judiciary in what, at first sight, may appear to be an executive process of law enforcement. While success on Ch III grounds would have assisted Thomas in avoiding his control order, in broader policy terms it would have come at the cost of potentially reconstituting an unsupervised, draconian scheme of executive orders (the validity of which would be subject to separate constitutional questions). While an intuitive squeamishness about involving the judiciary too closely in law enforcement is understandable, as Gleeson CJ notes, “the exercise of powers, independently, impartially and judicially ... would normally be regarded as a good thing”.²⁴

LEGISLATIVE POWER ARGUMENTS

On its face, the *Constitution* takes a simple approach to dealing with violence, including political violence. First, former colonial policing powers to deal with violent crime (of whatever description) remained with the new States, as part of their constitutional power to legislate for the peace, order and good government of their territories. Secondly, the States could always consent to refer portions of their criminal law powers to the Commonwealth where federal cooperation or uniformity was needed, as indeed was done in 2002 to support federal anti-

terrorism laws. Thirdly, express or implied incidental powers have supported a variety of federal criminal laws, beginning with offences directed against Commonwealth personnel, property and interests and gradually expanding to facilitate criminal laws across the spectrum of federal regulatory activity.

Fourthly, the external affairs power may support certain federal criminal laws, such as war crimes legislation. (It is an open question whether, in addition, an implied nationhood power may provide a further legislative basis for federal criminal laws.) Finally, an ultimate power rested with the Commonwealth to defend the new nation, although the content of that briefly described power was nowhere articulated in the *Constitution* itself – and it is precisely this lack of definition or clarity which compelled a challenge by Mr Thomas. How the defence power relates to, overlaps with, or displaces other constitutional powers is not obvious, particularly in the context of contemporary transnational terrorist violence, which defies simple classification and tends to blur traditional binary categories of crime and war.

DEFENCE POWER

Thomas argued that the defence power did not support anti-terrorism control orders because that power concerns only actual or threatened aggression by a foreign power (not acts by private terrorist groups), and which is directed against the body politic (rather than against individual citizens and their property). Both arguments were rejected by a majority of the Court, which accepted that the defence power supports an order to protect the public from a terrorist act.²⁵ Chief Justice Gleeson found that the defence power

is not limited to defence against aggression from a foreign nation; it is not limited to external threats; it is not confined to waging war in a conventional sense of combat between forces of nations; and it is not limited to protection of bodies politic as distinct from the public, or sections of the public.²⁶

²² *Thomas v Mowbray* (2007) 237 ALR 194; 81 ALJR 1414; [2007] HCA 33 at [31], per Gleeson CJ.

²³ *Thomas v Mowbray* (2007) 237 ALR 194; 81 ALJR 1414; [2007] HCA 33 at [17], per Gleeson CJ.

²⁴ *Thomas v Mowbray* (2007) 237 ALR 194; 81 ALJR 1414; [2007] HCA 33 at [17], per Gleeson CJ.

²⁵ *Thomas v Mowbray* (2007) 237 ALR 194; 81 ALJR 1414; [2007] HCA 33 at [9], per Gleeson CJ.

²⁶ *Thomas v Mowbray* (2007) 237 ALR 194; 81 ALJR 1414; [2007] HCA 33 at [7], per Gleeson CJ; Heydon J agreeing at [611].

While Gleeson CJ agrees with the reasoning of Gummow and Crennan JJ on this point, he also supports this finding by approvingly quoting a British international lawyer, Christopher Greenwood, who argues that “an armed attack need not emanate from a State” for the purposes of self-defence in international law.²⁷ That proposition may well be correct, but it does not follow that the scope of the defence power in the Australian *Constitution* necessarily aligns with the scope of the right of self-defence under public international law as it stood in 2007.

The Greenwood passage is only relevant to suggest that terrorist campaigns may sometimes amount to an armed attack triggering a right of self-defence under the international law on the use of force, particularly in the aftermath of the 11 September 2001 attacks on the United States. As Hayne J argued, it is true that “[p]ower of a kind that was once the exclusive province of large military forces of nation states may now be exerted in pursuit of political aims by groups that do not constitute a nation state”.²⁸ But the magnitude of 11 September 2001 (and the defensive military response to it) sets it apart as an exceptional case, and the majority of global terrorist acts were historically – and today continue to be – treated as criminal acts under the ordinary law. Most terrorist acts exhibit nothing like the scale or intensity of military violence or armed attacks, and are more properly dealt with by the regular criminal law as acts of unlawful violence.

As such, it requires a considerable conceptual leap to uncritically accept that the wide range of acts of varying gravity encompassed by the Australian definition of terrorism uniformly attract the application of the defence power. In this respect, the factual circumstances of Jack Thomas himself did not make for an ideal challenge to control orders, since his alleged association with Al-Qaeda linked him to the key international terrorist group responsible for the 11 September 2001 attacks, and against which Australia is participating in a global campaign of suppression.

However, in other cases (perhaps most), it is not at all clear that small scale or garden variety

acts or threats of terrorism – that overwhelming majority of cases falling well short of the gravity equivalent to an armed attack under international law – should attract the defence power, over and above the ordinary application of relevant State and federal criminal law. Kirby J accurately identifies this overreach in the control order scheme, giving examples of forms of domestic crime which may fall within the ambit of control orders (for example, attacks on abortion providers, building developments, ethnic groups or foreign government interests in Australia).²⁹ As in other jurisdictions since 11 September 2001, there is a risk of judges being mesmerised by the novelty and danger ascribed to modern terrorism by governments (including Australia’s) without closely analysing precisely what the law classifies as terrorism, or seriously questioning “emotive”³⁰ executive views about the risks it poses.

In addition, given that control orders can be issued merely in response to a person’s past training with a terrorist organisation – without any evidence of any continuing or future intention to commit terrorism – there is a real question whether such cases could legitimately enliven the defence power at all. If a person trained with a terrorist group abroad years ago, then renounces any terrorist intent, there is no longer any threat against which to defend. In such circumstances, the issue of a control order would arguably be beyond constitutional power.

Even more dubious is the application of the defence power to acts of terrorism directed against foreign governments (which are covered by the Australian terrorism definition). As Dixon J stated in *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 194-195, “the central purpose of the legislative power in respect of defence is the protection of the Commonwealth” – not foreign governments. It would be a dangerous and unprincipled expansion of the defence power to regard it as capable of supporting laws to defend foreign governments, without any relevant connection to the security of Australia. Most judges tended to gloss over this problem, although as discussed below, Gummow and Crennan JJ indicated that the external affairs power may fill any gap in

²⁷ *Thomas v Mowbray* (2007) 237 ALR 194; 81 ALJR 1414; [2007] HCA 33 at [7], per Gleeson CJ.

²⁸ *Thomas v Mowbray* (2007) 237 ALR 194; 81 ALJR 1414; [2007] HCA 33 at [438], per Hayne J.

²⁹ *Thomas v Mowbray* (2007) 237 ALR 194; 81 ALJR 1414; [2007] HCA 33 at [264]-[266], per Kirby J.

³⁰ *Thomas v Mowbray* (2007) 237 ALR 194; 81 ALJR 1414; [2007] HCA 33 at [266], per Kirby J.

legislative power resulting from this possible limitation on the scope of the defence power. Further, resort to any implied power to protect the constitution, such as that extrapolated from the American experience by Dixon J in the *Communist Party* case,³¹ or any implied nationhood power (if different from Dixon J's conception) or incidental powers would not assist in this regard, since any such powers are still essentially concerned with self-preservation and not the preservation of other unrelated States.

While most judges accepted that the defence power could apply to both external and internal threats, Hayne J was more cautious, finding that the "central purpose" of the power was protection against external enemies (whether foreign governments or private actors) and indicating that in a factually different case involving a wholly internal threat, other issues may arise than in the present case.³² On one hand, that view is understandable, since internal threats will ordinarily be adequately dealt with by recourse to State and Commonwealth criminal laws, while such laws (and their enforcement) have an obviously restricted extraterritorial reach so far as external threats are concerned.

However, it cannot be discounted that internal threats or disturbances could reach a level of seriousness which would necessitate going beyond an ordinary policing response, and in such circumstances a campaign of grave and sustained domestic terrorism may well necessitate resort to exceptional measures enacted under the defence power. Of course, this is true not only of terrorism, but of any domestic violence – whether motivated by private *or* public ends (such as the political, religious or ideological purposes identified in the definition of terrorism) which seriously threatens Australia and necessitates the aid of the defence power. In this respect, the general caution sounded by Callinan J is apposite: "too ready and ill-considered an invocation of the defence power... [may] have the capacity to inflict serious damage upon a democracy. It is for this reason also that courts must scrutinise very carefully the uses to which the power is sought to be put."³³

The Court's reasoning on the defence power suffers from a failure to articulate any clear boundary (or division of competencies) between regular law enforcement responses to violent crime (including most instances of modern terrorism) – and in relation to which the States and Territories take precedence – and the exceptional powers of the Commonwealth to defend the nation against more extreme or existential threats. The Court has permitted Commonwealth laws to intrude into what was hitherto regarded as within the competence of the States, and radically lowered the threshold of application of the defence power. As Kirby J observes, Div 104 "intrudes seriously ... upon the police powers of the States. It also intrudes upon areas of civil governance normally regulated under our *Constitution* by State law".³⁴ It has created not only a problem of overlapping competencies – since the same conduct can now be regarded not only as a crime but also as an act threatening the defence of the nation – but has interfered in the constitutional settlement, tipping the balance further in favour of the Commonwealth. Callinan J seeks to reconcile this tension by proposing the following pragmatic test:

The real question in every case will be, is the Commonwealth or its people in danger, or at risk of danger by the application of force, and as to which the Commonwealth military and naval forces, either alone or in conjunction with the State and other federal agencies, may better respond, than State police and agencies alone.³⁵

Yet that test is hardly a restraint, since it could almost always be argued that federal action could assist at least in supplementing State responses. Moreover, it misses the point in the present case, where the defence power was invoked not to enable Commonwealth *military* action against terrorism, but to create a federal regime of control orders in parallel with existing criminal law responses to terrorism (which, in Thomas' case, had failed to secure the desired conviction after the original conviction was quashed).

³¹ *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 188.

³² *Thomas v Mowbray*, (2007) 237 ALR 194; 81 ALJR 1414; [2007] HCA 33 at [419], per Hayne J.

³³ *Thomas v Mowbray* (2007) 237 ALR 194; 81 ALJR 1414; [2007] HCA 33 at [590], per Callinan J.

³⁴ *Thomas v Mowbray* (2007) 237 ALR 194; 81 ALJR 1414; [2007] HCA 33 at [259], per Kirby J.

³⁵ *Thomas v Mowbray* (2007) 237 ALR 194; 81 ALJR 1414; [2007] HCA 33 at [588], per Callinan J.

A different attempt to articulate the boundary between policing and defence was made by Kirby J, who insisted that a threat (whether external or internal) “must be directed at the bodies politic” (that is, the Commonwealth and the States mentioned in the text of the defence power itself), because that characteristic “lifts the subject matter” of the defence power “to a level beyond that of particular dangers to specific individuals or groups within the bodies politic so named”.³⁶ Here, Kirby J makes an important attempt to differentiate conduct which should be properly dealt with by the ordinary criminal law and that which is elevated to the realm of national defence. He is indeed correct to observe that the defence power is indeed a power for *defence* and not a more general power for security or public safety³⁷ (or, for that, a broader power to wage “war”, as in the United States, which raises complications given Australia’s armed aggression, rather than defensive action, in Iraq in 2003).

But as Hayne J notes, force is ultimately applied to individuals and their property, not to an abstract body politic,³⁸ and it is clear that killing people and destroying property are a principal means of attacking the Commonwealth or the States. Some other criterion is arguably necessary for demarcating the boundary, and it is submitted that a preferable test might be based on the scale, gravity, severity or quantum of harm or anticipated harm – as opposed to the identity of the targets or victims (as in Kirby J’s test), or the particular methods used (as if there were to be a focus on military-style methods of attack).

None of this is to suggest that a neat binary between crime and war should (or could) be embodied in the Australian *Constitution*, to be dealt with by the States and Commonwealth respectively. Some grave acts of international or domestic terrorism directed at the Australian government or its people may properly attract the application of the defence power, and it is not unusual for certain conduct to be classified both as crimes and as defence concerns (think of war crimes, treason, treachery, sedition and so forth). Quick and Garran, for example, suggest that the defence power could potentially be used

for “the preservation of law and order within” Australia.³⁹ But the High Court has elevated many low-level terrorist crimes to the realm of national defence when – depending on the facts – they may have little to do with the genuine defence of Australia. The Court has not set out a coherent test for differentiating serious violent crime from conduct which jeopardises national defence.

An ordinary textual interpretation of the “defence” power does not get one very far; questions immediately arise concerning defence from whom, against what methods and on what scale or gravity of attack, involving what degree of actual, imminent or anticipated attack, deploying what means of response, over what period and so on. Many earlier High Court decisions on the defence power concern laws enacted for obviously defensive purposes against foreign aggression in the two world wars, or in transitional phases after those conflicts, and it is obviously difficult (and not necessarily desirable) to formulate a general test for determining the scope of the defence power outside the circumstances of those obvious cases. At the same time, it is not so difficult to properly interrogate whether a range of legally specified conduct falls within the scope of the power on a case-by-case basis. The High Court could, for instance, have more closely examined whether the many different acts identified as terrorism under Australian law all attract the ambit of the defence power – or whether, as is more likely, only certain of those acts, reaching a particular threshold of gravity, could be viewed as tipping over into the heightened sphere of national defence.

Ultimately, the securitisation or militarisation of terrorist threats may counterproductively bring far greater attention to terrorist causes than treating them as ordinary crimes, not to mention carrying attendant risks for civil liberties as ordinary legal protections are diluted (the procedures for issuing control orders, for instance, are far less protective than criminal procedure). These risks are accentuated by a political climate which constructs the fight against terrorism as a permanent emergency. In classical jurisprudence on the defence power, while the meaning of the power is regarded as

³⁶ *Thomas v Mowbray* (2007) 237 ALR 194; 81 ALJR 1414; [2007] HCA 33 at [251], per Kirby J.

³⁷ *Thomas v Mowbray* (2007) 237 ALR 194; 81 ALJR 1414; [2007] HCA 33 at [252] and [264], per Kirby J.

³⁸ *Thomas v Mowbray* (2007) 237 ALR 194; 81 ALJR 1414; [2007] HCA 33 at [439], per Hayne J.

³⁹ J Quick and R Garran, *Annotated Constitution of the Commonwealth of Australia: Commentaries* (Angus and Robertson, Sydney, 1901), p 264.

“fixed”, what it enables “at any given time depends upon what the exigencies of the time ... warrant”.⁴⁰ If the defence power is widest in times of war – and it is accepted that we are fighting a permanent global ‘war’ against terrorism – then it is not hard to imagine future governments arrogating wider and deeper powers to counter terrorism, in ways which further disrupt the constitutional balance and its division of competencies – a constitution designed to inhibit the creeping centralisation of power and thereby to restrain any erosion of liberties by centralisation.

EXTERNAL AFFAIRS

The external affairs power received less attention in the Court’s analysis. Justices Hayne and Callinan did not consider the power, while Heydon J thought it unnecessary to address other heads of power because the defence power supported control orders.⁴¹ Chief Justice Gleeson agreed with Gummow and Crennan JJ that the external affairs power supplements, where necessary, the defence power.⁴² Justices Gummow and Crennan provide the only reasons for a finding that the external affairs power supports control orders, while conversely Kirby J argued that the power does not support them.

For Gummow and Crennan JJ, the external affairs power may be engaged to support control orders where, for instance, the defence power would not support the protection of foreign governments,⁴³ which are also protected under Australia’s definition of terrorism. At a minimum, the power was found to cover matters affecting relations with other countries, which may be undermined by international terrorism.⁴⁴ Following *XYZ v Commonwealth* (2006) 227 CLR 532; 80 ALJR 1036; [2006] HCA 25,⁴⁵ the external affairs power extends to ensure comity with foreign governments and the preservation of the integrity of foreign states.

The finding here is problematic to say the least; in many cases terrorism will have no negative repercussions for Australia’s international relations, and all the more so in cases of modern non-State terrorism where most governments are united in combating it, or in situations of low level terrorism which have not escalated to become of international concern. In addition, interpreting the external affairs power to permit measures of control in Australia, to prevent an Australian committing terrorism in Australia, may go too far. It is one thing to impose a control order to prevent a person in Australia from attacking a foreign embassy in Canberra (although there has long been relevant federal criminal law, based on international treaties, in this area), but it would stretch beyond external affairs to impose an order to prevent an Australian attacking Australians in Australia. In the latter case, neither the external affairs power nor the defence power may be available to support a control order.

There is also danger in interpreting the external affairs power to guarantee the integrity of foreign states in the context of “terrorism” laws, when much of what is now classified as terrorism was previously regarded as legitimate violent resistance to foreign oppression. For example, democratic rebel movements who use violence against oppressive military regimes in Sudan, Myanmar or Zimbabwe fall within Australia’s terrorism definition (politically motivated violence – including against military targets – to coerce a foreign government) and thus, paradoxically, the protection of authoritarian governments attracts the external affairs power of a constitutional democracy. That is certainly not in the tradition of the English common law which, for instance, has guaranteed the safety of political fugitives from oppressive regimes by granting political asylum and recognising a political offence exception to criminal extradition requests by foreign States.

Their Honours also invoked *Polyukhovich v Commonwealth* (1991) 172 CLR 501; (1991) 101 ALR 545; [1991] HCA 32, for the interpretation that “the power extends to places, persons, matters or things physically external to Australia”. Again, that interpretation would not enable a control order against an Australian planning to attack Australians within Australia, and would not materially supplement the defence power in such cases. Further, on one view, to

⁴⁰ *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 195; [1951] ALR 129; [1951] HCA 5 (per Dixon J).

⁴¹ *Thomas v Mowbray* (2007) 237 ALR 194; 81 ALJR 1414; [2007] HCA 33 at [650], per Heydon J.

⁴² *Thomas v Mowbray* (2007) 237 ALR 194; 81 ALJR 1414; [2007] HCA 33 at [9], per Gleeson CJ.

⁴³ *Thomas v Mowbray* (2007) 237 ALR 194; 81 ALJR 1414; [2007] HCA 33 at [150], per Gummow and Crennan JJ.

⁴⁴ *Thomas v Mowbray* (2007) 237 ALR 194; 81 ALJR 1414; [2007] HCA 33 at [151]-[152], per Gummow and Crennan JJ.

⁴⁵ *XYZ v Commonwealth* (2006) 227 CLR 532; 80 ALJR 1036; [2006] HCA 25 at [1044].

suggest that the external affairs power permits the regulation of anything physically external to Australia would seem to elongate the power beyond any meaningful limits, since it would extend the power to any foreign terrorism even where there is no real connection to Australia or its interests.

Of course, that is not the prevailing view after *Polyukhovic*, where the mere geographical externality of war crimes in Europe in the Second World War was sufficient to ground the power.⁴⁶ That view proceeds from a concern about ensuring that there is no lacuna in Australian legislative authority to regulate extraterritorially, given that Australia is a fully sovereign and independent nation.⁴⁷ However, sovereignty and independence are relational not absolute concepts, and arise by virtue of the system of public international law by which the sovereignty and independence of each State are created, recognised and sustained in relation to all other States. That system of international law imposes limits on the extraterritorial prescriptive (legislative) jurisdiction of States; it does not recognise an unlimited authority of States to legislate on any matter external to that State, but requires some specific linking point – such as the nationality of the perpetrator or the victim, the universality of international crimes, or the protection of vital State interests. Perhaps it is not surprising that a national high court would seek to possess the sovereignty cake and eat it too; but there is an inherent conceptual contradiction in invoking Australia’s international legal personality to determine the scope of domestic constitutional power while simultaneously disavowing the legal limitations which flow from and accompany such personality.

Brennan J argued in *Polyukhovic* for an Australian connection to external events,⁴⁸ which would seem to align more closely with an international law analysis. If terrorism were to be recognised as an international crime attracting universal jurisdiction (which is presently doubtful), that would supply a sufficient Australian link on Brennan’s view,⁴⁹ since all States share a common interest in the repression of international crimes (but not, by contrast, in

the prosecution of *retrospective* war crimes as applied to the war in Europe). In the absence of a universal crime of terrorism, it might alternatively be argued that Australia’s involvement in the global ‘war on terror’ – and widespread ‘international concern’ about terrorism (even absent agreement on its universal criminality) – supplies a sufficient Australian connection to attract the power. By analogy, in *Polyukhovic* Toohey J thought that Australia’s involvement in the Second World War provided the relevant Australian connection sought by Brennan J.⁵⁰

In the *Thomas* case Kirby J properly rejected the Commonwealth’s argument that the control order scheme implemented a treaty obligation – that is, pursuant to the 1945 *United Nations Charter* in conjunction with Security Council resolution 1373 of 2001, which required all countries to implement certain anti-terrorism measures.⁵¹ Nothing in that resolution, or in any other international anti-terrorism instrument, specifically requires or authorises States to enact a scheme of control orders, in contrast to the very specific injunctions in that resolution to criminalise terrorism, prevent terrorist financing and so on. Simply because international treaty law has condemned terrorism and required States to adopt certain measures against it, it does not follow that Australia can invoke the external affairs power to pass any anti-terrorism measures it so chooses. To interpret the external affairs power over-expansively is to diminish the constitutional settlement to the point of nothingness, since in a globalised world, every conceivable field of human activity has some international dimension which might be invoked as a basis for federal regulation.

CONCLUSION

It remains to be seen whether history will vindicate Kirby J’s claim that Australians “will look back with regret and embarrassment” at the *Thomas* decision.⁵² At the very least, the decision exposes uncertainties in the jurisprudence on the parameters of judicial and non-judicial power, although it is difficult to accept the dissenting

⁴⁶ *Polyukhovic v Commonwealth* (1991) 172 CLR 501 at 602-603 (Deane J).

⁴⁷ *Polyukhovic v Commonwealth* (1991) 172 CLR 501 at 602-603 (Deane J).

⁴⁸ *Polyukhovic v Commonwealth* (1991) 172 CLR 501 at 550-552 (Brennan J).

⁴⁹ *Polyukhovic v Commonwealth* (1991) 172 CLR 501 at 562-563 (Brennan J).

⁵⁰ *Polyukhovic v Commonwealth* (1991) 101 ALR 545 at 647 (Toohey J).

⁵¹ *Thomas v Mowbray*, (2007) 237 ALR 194; 81 ALJR 1414; [2007] HCA 33 at [290], per Kirby J.

⁵² *Thomas v Mowbray* (2007) 237 ALR 194; 81 ALJR 1414; [2007] HCA 33 at [387], per Kirby J. .

view that protecting the public from serious political violence is not an appropriate judicial function – and it would be hardly preferable to exclude the judiciary in favour of executive control orders.

Of greater concern is the readiness of the majority to uncritically accept that conduct defined as terrorism in Australian law uniformly attracts the defence power, when in reality only in rare cases will terrorism be sufficiently grave to elevate it to the realm of national defence. Not all terrorism is the same, and the majority's failure to unpick the distinctions between different kinds of terrorism covered by Australia's wide legal definition – some of it international, some domestic; some very grave, some trifling – resulted in an inadequate consideration of what terrorism is properly covered by the defence power – and what falls outside of it. Lowering the threshold of application of the defence power carries real risks for the constitutional settlement; it dramatically expands federal power at the expense of the States and Territories; it displaces ordinary civil policing functions and the presumption of normalcy in peacetime; and it escalates and militarises threats beyond their objective dangerousness.

Invoking the external affairs power as a generic, catch-all power to supplement the defence power is also problematic: much terrorism has no effect on Australia's international relations; treaty obligations presently do not authorise control orders; and just because terrorism happens overseas is a very slim basis on which to attract the power. Too readily triggering the power also carries risks for the constitutional settlement: more uncertainty about the division of responsibilities between the States and the Commonwealth, and worsening State-federal relations; declining public confidence in the Commonwealth due to its absorption of drastic new powers from seemingly unbounded external sources; and the internationalisation of what are frequently local problems, with local solutions.

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