A sad day for Australia

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In these times, bad news is an everyday occurrence. It may be the 21st century, but every week still brings a new disaster. And the latest disaster, from last Thursday, comes from Australia. Its name is Thomas v Mowbray.

I must admit I haven't been on top of my Australian High Court jurisprudence for a while now. But reading this recent decision, I feel like the Reichstag's been burnt down while I've been away. Well, of course the same thing is happening over here. But I've never seen a High Court decision so manifestly wrong on the facts, so abysmal from the scholarly viewpoint, and so beholden to official propaganda. Perhaps the result was not so unexpected, given the court's slide in recent years; but I did not expect the reasoning to be so atrocious.

In case you've been asleep, it has been declared perfectly constitutional for the government to put a dog collar (i.e. tracking device) on you, keep you under house arrest, restrict what you can do, who you can see, how you can communicate, and more a prison without bars known as a control order - without you being convicted of a crime, or even suspected of a crime. Essentially, there just has to be some suspicion of terrorism, and some reason why a control order will help prevent it. And terrorism is defined extraordinarily broadly: despite some exceptions, the definition probably covers much protest and direct action.

Violation of separation of powers? Invasion of basic civil liberties? Overturning presumption of innocence? Unconstitutional invasion of basic freedoms of speech and movement? Abuse of the powers of federal parliament? One might think so. But not if the High Court has anything to say about it! By a 5-2 majority (Gleeson CJ, Callinan, Gummow, Crennan, and Heydon JJ) the High Court upheld the legislation; Kirby and Hayne JJ dissented, Kirby spectacularly so. Indeed, the Kirby judgment is a lone voice of reason amid general despair.

So, recall the facts of the case.

Thomas is Jack Thomas, a foolish man for whom it is difficult to have much sympathy except that all the authorities seem to be doing their best to turn him into a hero. His dubious claim to fame was spending a couple of months in 2001 doing some training in one of bin Laden's ramshackle jungle gyms in Afghanistan. He apparently received some funds from Al-Qaeda, stayed on and

off in some of their safe houses, attempting unsuccessfully at some point to join the Taliban forces fighting the US, before being arrested by the Pakistani government in January 2003. Pakistani officials interrogating him engaged in intimidation, coercion and made threats including: torture by twisting of his testicles; rape of his wife; strangulation; electrocution; execution; and deportation to Afghanistan. The Australian Federal Police, investigating the case, did not extricate themselves from this thuggery but cooperated with it, performing an interview in Pakistan under the auspices of the ISI (the Pakistani CIA) without permitting Thomas access to legal advice. Such was their competence that at trial in the Supreme Court of Victoria the prosecution relied entirely upon this Pakistani interview, and the evidence was duly thrown out on appeal.

(An aside about the setting for Thomas' alleged nefarious behaviour. These jungle gyms were so pitiful that, after they were attacked by Bill Clinton with cruise missiles from afar a clear war crime under international law US military officials questioned the effectiveness of the attacks: not because they were illegal under international law (which they were); not because the attacks were effectively state-sanctioned extraterritorial killing performed on summary evidence, with conviction on far less than the balance of probabilities; not because it was based on shoddy intelligence (like most US intelligence in these matters); but because it was a waste of money to send a million dollar cruise missile at such a shambolic target.)

Thomas was deported to Australia in June 2003, and re-arrested in Melbourne in November 2004: such a threat, he was, that he was left to his own devices for 17 months. At trial in the Supreme Court of Victoria, charged with possessing a false passport and receiving funds from a terrorist organisation and on the basis of evidence consisting of an interrogation without legal counsel the reputedly liberal-minded Justice Cummins directed the jury as follows: Normally, failure to avail an interviewee of [the right to legal access] would be fatal to the admission of a subsequent interview... However, the requirement is not absolute... the suspect had the right to choose whether to proceed without that legal access. He had the right to choose not to answer... or to answer, in the legitimate aim of ultimate return to Australia. Without irony, Cummins considered the AFP interview was conducted fairly and properly: the AFP had informed Thomas of his right to remain silent, and had not held out any offers of repatriation; the context of ISI threats of torture was apparently not important. Thomas was convicted; on appeal, in August 2006 the conviction was unanimously quashed on the obvious grounds.

Subsequently, with such a dire threat able to walk free perhaps more to the Australian government's credibility, than to the Australian population in late August 2006 Thomas was placed under a control order. And so, the High Court was called upon to decide the constitutionality of the matter.

The majority judgment almost beggars belief. For one thing, the conservative fearmongering politicization of the Court itself has become absoutely apparent. The majority marginalises, arguably overturns, certainly denigrates, one of the great pillars of Australian democratic jurisprudence, the Communist Party case, which ruled the dissolution of the Australian Communist Party

unconstitutional despite the fear campaign spread by the government and its allies at the time. Indeed, the scare word terrorism, useful for frightening populations into obedience and docility, is in this sense the direct successor to the spectre of communism. But worse, the majority places extraordinary reliance on medieval precedent medieval in terms of historical period, and barbarity to justify repressive policies. And worse still, one observes a stunningly cynical use of the judicial notice doctrine to declare propaganda accepted fact before the court. And this is all apart from the effect of the case itself: a drastic attack on civil liberties, an obvious stifling of dissent and protest, and the politicization of legal procedure.

Gummow and Crennan JJ (with whom Gleeson CJ and Heydon J essentially agree) proceed as follows. The first question is whether courts are being compromised (asked to exercise non-judicial power). Certainly not, they declare! Since there is a convoluted section in the legislation telling the court what to do, a balancing process involved, and the word reasonable appears, there are judicial standards involved, and all is well. That the balancing process does not include the guilt of the defendant for any criminal act, but the control order can deprive the defendant of as much liberty as a jail sentence, does not matter. So they seem to say, regulation is complicated these days, courts do all sorts of things, and we shouldn't worry too much about it, apparently.

Then they turn to policy, which here should be pronounced fearmongering – quite an unprecedented departure from judicial restraint in political matters. They quote a description of September 11, 2001, and list a series of terrorist attacks since then (attacks on Westerners only, it seems; there is one incident mentioned from India, but nothing from the occupied territories, from Iraq, from Afghanistan, from state or paramilitary terrorism in South or Central America, nothing from the various horrors of Africa except US embassy bombings, certainly nothing from the Middle East, Eastern Europe or Central Asia). They go on to explain these terrorist attacks, betraying a level of understanding as bad or worse than various world leaders who regularly come under ridicule for their ignorance: Many such attacks have been explained, by those claiming responsibility for them, by reference to jihad, a term encompassing bellicosity, based at least in part on religious considerations. Apparently they did not even bother to consider the meaning of the word jihad to Muslim people (a nuanced term, essentially to strive as I understand, though I am no expert); for this definition, they cite the *Oxford Companion to Military History*, truly a useful resource on religious matters. Not one reference is given to the motivations of Islamic fundamentalist terrorists, nor to their grievances, nor to their statements or the policy effects of such laws. All this is too political, presumably; but it is not too political to repeat tired, misleading, lopsided snippets of recent history as relayed by fearmongering leaders. The court can consider policy, it seems, and explicit politics can creep into judicial judgments, as long as it is in the same shrill strains, and repeats the same selection of facts, as the accepted doctrine. More precisely, one notes in awe how, without any argument on these issues, the court is able to use judicial notice (basically, the doctrine that the court can consider 'general knowledge') to consider the selection of facts that is approved

by leaders and repeated by the mainstream media, regardless of the relationship of these to the whole reality. Propaganda always becomes approved doctrine but now it becomes *judicially* approved doctrine.

To be clear: terrorism is a great problem in the world today, and it requires a response. There is no reason why the court or anyone else for that matter should not consider the general circumstances. The point is to do it rationally, dispassionately, and evaluate risks and responses. A rational analysis includes not only the risks and the dangers, but also the grievances and motivations that spark the action. It includes policies of governments which lead to those grievances. And it questions its sources: it recognises the vested interests of governments and intelligence agencies; it seeks independent opinions; and it recognises the possibility that the government itself may not always have clean hands. It asks what the possible responses are, and their prospective efficacy. Merely to list incidents involving worthy victims (like us), excluding unworthy victims (like those our government and its allies are responsible for), and then cite an ignorant reference on fundamentalism, is as complete an abdication of this analytical task as is possible. In fact, it is worse than an abdication: it is a recitation of emotional shock material that is used to justify attacks on civil liberties like those attempted by this legislation.

Nevertheless, the majority proceeds. Is it an unconstitutional deprivation of liberty inconsistent with judicial power? No, of course not! Detention in the custody of the State differs significantly in degree and quality from what may be entailed by observance of an interim control order. It's completely different from jail, much more free a prison *without* bars, or sometimes with better decorated ones, is apparently fine, and such imprisonment need not require any proper criminal trial, or the commission of any crime just a potential threat to public safety, as required by the act.

The *piece de resistance* of the majority justices, though, is their parade of horrors an expedition through the trauma inflicted on democracy by the English judicial system over the centuries. There is the medieval power of justices of the peace to bind over, dispensing preventative justice, truly a frightening concept but apparently part of the legal inheritance of the Australian colonies. There is preventative detention as applied by the Court of Chancery: a case from 1747 is cited. Such historical considerations are not immediately analogous but the justices point out that the jurisdiction to bind over did not depend on a conviction – medieval laws were just sufficiently draconian that the analogy to modern legislation is possible. Thus matters of legal history support control orders or rather, the barbarisms of distant history have come to the rescue of the honourable justices.

So far, so good. But to justify the law, the justices need to ground it under a head of constitutional power! The defence power is urged: naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth. The problem is that control order legislation seems to be some sort of 'internal defence'. The extent of the defence power in such matters is controversial the case on point being, as mentioned earlier, the Communist Party case. However, this case is an

inconvenient precedent, so the court again turns to distant history. The parade of horrors begins anew.

We read at length Hamilton's writings in the 18th century *Federalist*, and the justices highlight his phrase: it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them. The smoking gun, indeed, could be a mushroom cloud. But true skeletons are unearthed in support of an internal defence power in British law, including such triumphs of the human spirit as the Riot Act of 1715 and the Treason Act of 1351. In support of the proposition that defence includes internal defence, justices Gummow and Crennan cite no less than the Ecclesiastical Appeals Act of 1532, what declares that England is governed by one supreme head and King... unto whom a body politic... be bound and owe, next to God, a natural and humble obedience.

You are not dreaming; this is correct. The High Court of Australia, in the 21st century, quotes nothing less than a 16th century declaration of tyranny to justify government policy in the present. But this is justified, as the justices argue, because the tyrannical sentiment continues through history: this is what the Australian Constitution has in mind when it establishes one indissoluble Federal Commonwealth. Relying upon such authorities, it follows rather easily that internal enemies are fair game and preventative control orders are permissible.

There is one other problem for the majority: the internal defence required by the act is not limited to Australia! Control orders can be issued for the defence of other nations, apparently! And here we rely on the external affairs power, quoting a reference to September 11 again: It may once have made sense to suggest that terrorism in one country did not necessarily implicate other countries. But after the year 2001, that approach is no longer valid. (Perhaps after the 1980s would be a better date, when the Soviet Union and United States engaged in or sponsored terrorism all over the world; probably much earlier. But the choice of historical events once more follows accepted fearmongering doctrine.) Once more, no rational analysis, no attempt to quantify risks or probabilities, approaches that courts regularly perform elsewhere: but they do warn that terrorism itself is a worldwide phenomenon (apparently only official enemies included), and that national security may be promoted by reciprocal cooperation – mutual thuggery and participation in the oppression that feeds terrorism are justified on the basis of national security.

So much for the main judgment of the majority; they are buttressed by the rather amusing judgment of Justice Callinan. At least, this judgment would be amusing, were he not a justice of the highest court in the land.

Callinan begins with an apparently admirable skepticism: Judges should keep in mind that distortion, bias, sensationalism, emotion and self-interest are at times common currency in ordinary social intercourse, and in the media. Sounds unimpeachable, except for the next sentence: That does not mean that judges should disregard reliable reports and the genuine photographic depiction of, for example, relevantly here, the circumstances preceding, and after, the destruction of the Twin Towers in New York, the bombing of trains in Madrid,

and of people and buildings in Bali, and the like. No mention of rational analysis of risks, probabilities, and the effects on these of government policies. Just destruction in particular, pictures of destruction just dead bodies for which our enemies are responsible, and not those for which our allies and ourselves are responsible.

One wonders if Callinan thought he was writing something else and forgot it was a High Court judgment. There is a modern tendency, of which I take judicial notice, to disparage the work of most, if not all historians, on the asserted ground that no-one, not even the most rigorous of scholars, can research and write without the intrusion of an inevitable, unintentional, personal bias. Callinan delivers an apparent ideological slap in the face to progressive revisionist historiography; what this has to do with the case is unclear. Whatever the irrelevance, Callinan immediately compounds it and passes into hypocrisy by indulging himself in a history of the Soviet Union, apparently in relation to the Communist Party case. Needless to say, one sees in his gratuitous efforts as a historian an evident intrusion of an inevitable, unintentional, personal bias whoever thought they would see the phrase Soviet communist imperialism in an Australian court judgment? His potted history is deeply controversial and disputable, to say the least he argues, for instance, that the terrorist threat today is better understood (and less sensationalized, by inference) than the communist threat of the 1950s (which was more sensationalized, so he argues, despite his claims of actual vast Soviet communist imperialism). But this history is worse than bad scholarship it is speculative and ideological, and he uses such irrelevant misplaced speculation to distance himself from the Communist party case.

Returning to fearmongering of a more modern bent, Callinan quotes the scariest paragraph from an ASIO report in which the words Nuclear weapons appear; that Australia continues to be viewed as a legitimate target; and that Australian targets are part of al-Qa'ida's strategic vision. The evidence is not contested or subject to judicial scrutiny; a potentially overzealous or paranoid intelligence report is quoted as gospel; even though he admits it is hearsay, the evidence is uncontradicted. Uncontradicted, that is, because he did not consult any independent experts.

Callinan then goes further, unashamedly! He takes judicial notice of the notorious circumstances of international terrorism and the threats posed by them including making common cause of hatred, against communities posing no threat to them, in which sometimes they reside, and by which they and their families have been given residence, naturalization, comfort and education, have been granted religious and ideological tolerance, and social security and other support. They have conspired... to undertake violent, literally suicidal attacks upon even the institutions and peoples of those communities... (These are notorious facts.) Evil haters who come to good tolerant societies and blow them up simply for reasons of hatred! Except that, by every informed, academic or scholarly analysis of the motivations of Islamic fundamentalist terrorism (and it seems he is not referring to anything else), this is manifestly false. No mention of their grievances, of the perspectives they present in their own statements, no

mention of the inflammation of those grievances by current policies of Western nations, no mention of any imperialism of other kinds.

We have on the bench, not only a conservative, but an enthusiastic regurgitator of the officially sanctioned propaganda.

But Callinan is not done yet! He must drive home the fear by pointing out our vulnerabilities: Populations today are both more numerous and more concentrated. They, and property both personal and public, are more vulnerable. Modern weapons, and not just such horrific ones as nuclear bombs, germs and chemicals, are more efficient and destructive than ever before.... These matters too are blindingly obvious. There is not a hint of a rational evaluation of risks or motivations; just a recitation of danger and evil, danger and evil. He quotes some statements of bin Laden but of course, not the ones dealing with his grievances in the foreign policy of the United States and allies such as Australia; just the rabid calls to arms and to kill. He recites more Islamic fundamentalist terrorist attacks and attempts, including Kenya, Tanzania, and Singapore. He concludes: it is clear, if it were not already obvious, that terrorism of the kind which gave birth to the attacks [i.e. the ones on us, not the ones with our sanction or participation] has engaged the attention of many nations and has moved them, including Australia, to co-operate with one another to combat it: in short that the relevant terrorism is a matter of international concern, that is to say, worry and fear. (These are both notorious and conventionally proved facts.) Of course they are nothing of the sort: Callinan is missing, for instance, virtually every independent assessment of Western foreign policy (particularly the US, UK and Australia) post-2001 on Islamic fundamentalist terrorism such foreign policy has been generally unsuccessful in combating terrorism, and has succeeded mainly in inflaming and empowering it. And of course, he is missing the role of the West in the initial fomentation and creation of Islamic terrorist groups decades ago. But then again, so is everyone else.

Needless to say, the honourable justice finds the legislation supported by the defence power. The facts established here, are, in my view facts in respect of which the Commonwealth may legislate under s 51(vi) of the Constitution. That conclusion is so right and obvious that reference to authority is really unnecessary. Precedent and case law have become irrelevant, since propaganda versions of recent history and current affairs, full of danger and evil, make the conclusion so right and obvious. And, needless to say, no other problems arise.

Such is the state of the Australian judiciary, at the highest level.

While it may appear that there is barely a sane justice left on the bench, only poor lonely (rather conservative) Justice Kirby remains. He holds the legislation invalid on several independent grounds: no constitutional head of power; non-judicial power vested in judicial organs; judicial power is to be exercised in an impermissible way. Justice Hayne comes to the same conclusion of invalidity, but on narrower grounds. (He holds that the legislation is grounded under the defence or referral power but gives federal courts a jurisdiction that is not jurisdiction in a matter – the criterion applied does not depend on any norm or standard of conduct, but protection of the public.) It is, however, Kirby who takes the stand for civil liberties and the rule of law; it is therefore natural to

focus on him.

Kirby's judgment is an eminently reasonable, rational, and *judicial* approach to the issues. If you're interested in the legal issues surrounding terrorism, it is quite a good reference, including comparative material. He even goes to the trouble of comparing various overseas laws, and dissecting the ancient power precedents. Nevertheless I present some of the highlights.

Audaciously, Kirby dares to mention that terrorism existed before 2001! (Mind you, Kirby also only mentions terrorism by approved enemies.) His reference point is not medieval barbarism, but the obvious reference point, the Communist Party case of 1951. Audaciously again, he dares to note that no state of war exists! Turning the State's fearmongering on its own head, he notes that since 2003 the State's own alert system has only been at medium. And, audaciously, he dares to note the inconvenient fact that at least 86 other nations prosecute terrorism as an ordinary crime, without any special offences. He dares, in fact, to point out that the government that if such an immediate terrorist threat exists to justify this legislation, then they ought to prove it as a fact in court! Such skepticism serves to remind what a court judgment usually looks like.

Whatever threat there is, says Kirby, this law travels far beyond responding to such a threat. It 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. It extends into areas of ordinary civil government... [I]f the Constitution were intended to empower the Commonwealth to make laws for the general safety and protection of the Australian public, irrespective of the source of danger and its targets, it could readily have said so.

Only Kirby bothers to note the awesome breadth of the definition of terrorism as defined in the act: Any number of actions that have hitherto been lawful and would be regarded as non-terroristic might be done with the intention of 'intimidating the public or a section of the public'. Moreover, drawing a line between acts designed to coerce or intimidate an Australian government for a political, religious or ideological cause... and pure advocacy, protest, dissent or industrial action... could be difficult. In the latter case, such acts nevertheless remain 'terrorist acts' if they are intended to 'endanger the life of a person' or 'create a serious risk to the health or safety of the public or a section of the public'.

Imposing a control order is far beyond any judicial power: the relevant federal court is asked to determine what is reasonably necessary for the protection of the public. This is not a court's normal function... Control orders undoubtedly impinge upon the basic rights to liberty of those made subject to them. This Court's duty under the Constitution is to guard against unwarranted departures from fundamental rights and freedoms which the Constitution and applicable law defend. Yet Div 104, in its present form, undermines the judicial power of the Commonwealth by attempting to deploy federal judges upon tasks that are non-normative and that are performed in accordance with procedures that seriously depart from the basic rights normal to judicial process.

Only Kirby seems to realise the seriousness of depriving people of their lib-

erty without conviction or even suspicion of criminal activity: liberty is lost, potentially extending to virtual house arrest, not by reference to past conduct or even by reference to what that person himself might or might not do in the future. It is based entirely on a prediction of what is 'reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act', a vague, obscure and indeterminate criterion if ever there was one... On its face, it is capable of arbitrary and capricious interpretation.... [I]n Australia, judges in federal courts may not normally deprive individuals of liberty on the sole basis of a prediction of what might occur in the future. Without an applicable anterior conviction, they may not do so on the basis of acts that people may fear but which have not yet occurred. Much less may such judges deprive individuals of their liberty on the chance that such restrictions will prevent others from committing certain acts in the future. Such provisions partake of features of the treatment of hostages which was such a shameful characteristic of the conduct of the oppressors in the Second World War and elsewhere. It is not a feature hitherto regarded as proper to the powers vested in the Australian judiciary. In Australia, we do not deprive individuals of their freedoms because doing so conduces to the desired control of others... To allow judges to be involved in making such orders, and particularly in [this] one-sided procedure... involves a serious and wholly exceptional departure from basic constitutional doctrine unchallenged during the entire history of the Commonwealth. It goes far beyond the burdens on the civil liberties of alleged communists enacted, but struck down by this Court, in the Communist Party Case. Unless this Court calls a halt, as it did in that case, the damage to our constitutional arrangements could be profound.

In fact, Kirby throws down the gauntlet. It is in cases such as the present that the Court is tested. When the test comes, it is not to be answered by endorsement of grave departures from long-standing constitutional history and judicial tradition. Least of all is it to be answered in terms of the emotional appeals by the Commonwealth and its supporters to notions of legal exceptionalism which this Court firmly rejected in its decision in the Communist Party Case... If the courts are seen as effectively no more than the pliant agents of the other branches of government, they will have surrendered their most precious constitutional characteristic. This Court should not allow that to happen.

The sorry state of Australian jurisprudence is succinctly summarised at the end of the judgment.

I did not expect that, during my service, I would see the Communist Party Case sidelined, minimised, doubted and even criticised and denigrated in this Court. Given the reasoning expressed by the majority in these proceedings, it appears likely that, had the Dissolution Act of 1950 been challenged today, its constitutional validity would have been upheld. This is further evidence of the unfortunate surrender of the present Court to demands for more and more governmental powers, federal and State, that exceed or offend the constitutional text and its abiding values. It is another instance of the constitutional era of laissez faire through which the Court is presently passing. Whereas, until now, Australians, including in this Court, have generally accepted the foresight, pru-

dence and wisdom of this Court, and of Dixon J in particular, in the Communist Party Case (and in other constitutional decisions of the same era), they will look back with regret and embarrassment at this decision when similar qualities of constitutional wisdom were demanded but were not forthcoming.

As for the rest, well, one simply watches as the Australian legal system slowly cheers itself into authoritarianism.