

UNIVERSITY OF MELBOURNE LECTURE

“Finding Security in Terrorism’s Shadow: The Importance of the Rule of Law”

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I am honoured to have been offered a Professorial Fellowship attached to the Asia Pacific Centre for Military Law at the Melbourne Law School. This Law School has a distinguished reputation, stretching back to its very origins. The Asia Pacific Centre for Military Law was established in 2001 and plays an increasingly important part in the modern world.

It is only since the end of the Second World War that the question of legality has come to be significant in waging war. When the British Chief of Defence Staff asks for a legal opinion before he will order his troops to invade Iraq, we know the world has changed. It is a change which gives us much cause for optimism.

The role of the Law School and of this Centre therefore becomes more important to remind us constantly that there can be no peaceful civil society without the Rule of Law at its heart. It is a privilege indeed to be able to work with people committed to such a purpose.

In 1941, Roosevelt and Churchill committed themselves to the Atlantic Charter. A statement of principles about the kind of world they intended to build after the War, a very different world from that which had preceded it. Their commitment was reinforced by the unprecedented

horror of Hiroshima and Nagasaki . This gave an impetus to leaders of nations throughout the world to move towards the establishment of a law-based international system. The terrible events of 9/11 has seen a different, tragically reactionary response, the progressive destruction of that law-based international system, which had taken more than fifty years to build. It has seen the erosion of individual human rights and the purposeful avoidance of due process, all in the name of national security.

I want to talk tonight about the Rule of Law and Due Process, especially as they impact the rights of ordinary people. I also want to talk about the development of law in relations between states and Due Process as being critical to stable, effective and rational government. Due Process normally has a legal connotation but it is also relevant to the conduct of political affairs.

I will start with the background of the post-war years and major efforts that were undertaken to build a law-based international system, then devote some attention to the Bush years which have done so much to reverse the progress of the previous six decades.

In the First World War, issues involving sovereignty, sea power and empire dominated; there was no question of the rights of individual men and women as we understand them today. It was proclaimed as “the war to end all wars”. It led to the establishment of the League of Nations. That dream was cut short because the United States Congress retired to isolationism and refused to support President Wilson. As a consequence, the League never fulfilled its promise for a global system based on rules, not warfare.

After the Second World War, the Atlantic Charter led to the creation of the United Nations, it led to the Universal Declaration of Human Rights and to the conventions seeking to give legal effect to its high principles in the protection of fundamental freedoms. It led to the establishment of the International Monetary Fund and the World Bank and many years later to the International Criminal Court, perhaps the most fundamental change to international structures since the founding of the United Nations itself.

The role of the United States was critical in these developments, it was a driving force. It took the world a considerable way towards the establishment of a law-based international system, which was a notable departure from the situation that had existed up to the Second World War. The United Nations sought to outlaw war as an extension of foreign policy. For the first time, membership of the United Nations, and therefore the international community, required acceptance of a prohibition on the resort to military force, except in cases of self-defence or authorisation by decisions of the Security Council.

Over time there were aberrations in American behaviour, especially affecting other countries in the American hemisphere, but the good that America did far outweighed the harm. It was a generous America. It recognised that the narrow attitudes so exemplified at Versailles, would only lead to further turmoil and, at some point, renewed conflict.

There was another element present when the Founding Fathers of the United Nations met, whose consequences were not fully recognised even then and, in the shadow of 9/11, it has been rejected by the Bush Administration. This element was the recognition that if there is to be a law-based world, then great powers must set an example by working

within the law and abiding by it. Without that support, a rules-based system would not long survive.

As the Cold War emerged, George F Kennan, the United States Ambassador to Moscow, reported in 1946 that the Soviet Union believed that its future would only be secure if democracy was destroyed. It was indeed very much a mirror image of the attitudes expressed by the neo-conservatives and President Bush, who believe that America will only be secure if the world is democratic in the American image. This is typical of the view of fundamentalists, whether they be political or religious. They fear their value system cannot survive competition.

Kennan ended that particular report with a plea to his political masters: “Finally we must have courage and self-confidence to cling to our own methods and conceptions of human society. After all, the greatest danger that can befall us in coping with this problem of Soviet communism, is that we shall allow ourselves to become like those with whom we are coping.”

The United States throughout the Cold War recognised that it was important to talk to their enemy and to work within the newly established rules of the United Nations. While these methods were not always employed, by and large the United States Government sought to replace unilateralism with greater use of multilateral diplomacy. The United States had confidence and did not fear discussions and negotiation.

As a consequence of discussions between the United States and the Soviet Union, little by little agreements were put in place which, amongst other things, banned atmospheric nuclear tests, created the Treaty on the

Non-Proliferation of Nuclear Weapons, undertook discussions to limit and ultimately reduce Strategic Arms. And so the world became a safer place and nuclear war was avoided.

To this point, establishing a better world involved two different but complementary processes. First the establishment of a law-based system of international relations, step by step, falteringly, but nevertheless moving steadily forward. Secondly, it involved a process of diplomacy and communication without which neither a law-based system nor peace could have been maintained.

The great changes made in the post Second World War era sought to extend the principles of the rule of law and due process through international conventions and agreements to the behaviour of states and also moved cautiously to establish international courts to adjudicate disputes. In all of this, United States support was essential. Europe did not have the inclination or the will to provide sufficient drive and motivation. By the turn of the century we had seen the first legal humanitarian intervention in Somalia, the establishment of the Rome Statute of the International Criminal Court and a global architecture based on mutual respect, due process and the rule of law.

This by and large was the world inherited by the second President Bush. Following the calamity of the Twin Towers his Presidency halted and even in some aspects reversed, much of the progress of previous decades. There are many who think that the Twin Towers changed the world and American attitudes forever. To the Neo-Conservatives it presented an opportunity which they seized avidly.

A group of Neo-Conservatives issued a Statement of Principles in June 1997. The principles may sound harmless enough, but at their core is a simple belief, that the century or if you like, even the world, belongs to the United States. What the United States wills, it can achieve and so it is necessary first to make sure that no power can ever challenge the United States and second to challenge regimes hostile to American interests and values. The United States' role is to be unique in preserving and extending an international order, friendly to American security, prosperity and principles. It was certainly not a statement of "live and let live". It was a statement of "live and make like us".

The malign influence of the neo-conservatives was reinforced by another powerful political force, right-wing evangelical protestant churches.

Over Iraq, over Islam, the role of America, the policies of those evangelists and of the neo-conservatives combined. It was inevitable that this pressure would greatly influence President Bush and his policies; their ideas seem to meet his natural inclinations.

The twin towers enabled them to establish an aggressive unilateral foreign policy. It dismissed the idea of multilateral cooperation. America would decide its own path and other nations would not be consulted. It was based on ideas that were doomed to fail.

It also provided an opportunity for President Bush to throw off shackles which he and the neo-conservatives and evangelists believed, acted as improper restraints on the exercise of American power. The Security Council was to be diminished and many international agreements were also either rejected or abrogated, and in one case, left "unsigned". These

included agreements that would have limited trade in Small Arms, banned the use of biological weapons and maintained controls over the development and production of nuclear weapons and defence systems.

President Bush tore up the Geneva conventions. He invented a new form of “unlawful enemy combatant” or “unprivileged belligerent”, not covered by the Geneva conventions and not covered by any of the protections of civilian or military law. He established a special detention camp at the Guantanamo Bay Naval Base. He set aside basic principles of the Rule of Law. Because he was fighting, as he believed, a war on terrorism, the principles which were important to the maintenance of a civil democracy were thrown overboard. Hearsay evidence which could not be checked or verified was to be accepted. Evidence achieved by torture was to be admitted. Retrospective criminal laws were established creating new terrorist offences. Military commissions were convened with one purpose: to achieve a guilty verdict. Victors’ courts, doing justice to a tyranny, but not to a law-based country like the United States.

How do our leaders come to the view that terrorism is so different and so new that we cannot live by our own standards? How do we come to overthrow the principles so necessary for a just and stable society? How do we overturn international obligations designed to limit an arms race between the super powers? How do we set aside international conventions against torture? How do we embrace a unilateralism that is bound to lead to conflict and instability? How do we emerge from the darker age which has emerged during the War on Terror?

Already in America there are signs of revulsion at the abuse of executive power exercised by the current President. His recent Attorney-General, Alberto Gonzales, has been forced to resign.

While the dismissal of Prosecutors within the Department of Justice led to his forced resignation, Gonzales' real problem was that he believed that his role as Attorney-General was to create a legal framework and argument that would enable the President to do whatever he wished. In other words, there were to be no limits to the assertion of Executive power. If that doctrine were to prevail, it would have overthrown basic concepts for the separation of powers, so critical to American democracy and American freedom, it would have diminished Congress and the Supreme Court. It was unthinkable that such a doctrine could be allowed to prevail. The resignation of Gonzales was a significant victory for the re-establishment of the Rule of Law and Due Process in the United States.

While there are those, like President Bush, who act as though we cannot fight terrorism and at the same time live by our own standards, there are many examples that suggest otherwise.

Britain never went to such extremes in seeking to overcome the IRA. Germany and Italy were able to maintain the Rule of Law and overcome serious terrorist attacks from the Red Army and Red Brigades. These problems and others have been overcome by an exercise of restraint, by diplomacy and within the law, even as human rights expanded and gained greater traction through the world.

The war against Iraq, which is President Bush's major response to the War on Terror, is an unmitigated disaster. It represents the worst fears of smaller nations in the developing world about the unrestrained use of American power. The Iraqi government is seen as the puppet of the United States, despite the election held last year. This does not mean there should be an immediate and short term withdrawal but it does mean that the maintenance of troops in Iraq is almost certainly a futile gesture unless major diplomacy, involving Syria and Iran and all the players of the region, is undertaken and discussions are held as the French Foreign Minister, Bernard Kouchner, indicated recently from Baghdad, as Secretary of State Baker indicated earlier this year.

The failure in Iraq demonstrates that the idea of American unilateralism, has been extraordinarily destructive. If the processes set in place by the United States under earlier administrations had been maintained, the United Nations would have been strengthened, the Security Council reinforced and the development of law to govern relations between states significantly advanced.

A second example concerns Hamas. Western policies have again made it so easy for the terrorists. For some time the West had been urging and encouraging democratic elections, not only in Palestine but throughout the Middle East. When Hamas won the free and fair democratic election, that should have been predictable to anyone with knowledge of Palestine. It would have been possible to say to Hamas from our point of view your attitudes and policies must change, but you have won a democratic election therefore we will talk, we will negotiate. Little by little it may have been possible to find areas of agreement. Instead the United States and others refused to talk to Hamas and cut off aid. They forced Hamas

back to the weapons that it had known from the beginning: to violence, to warfare.

In the process of reneging on their own principles, the West gave the terrorists a major weapon: democracy would only be acceptable if it gave the result the West wanted.

These aspects are reinforced by a recent British House of Commons bipartisan report which emphasizes that discussions with Hamas ought to be undertaken if a settlement is to be reached.

What has happened in Iraq and Palestine suggests on empirical grounds that we would have been far better off to stick to our principles, to promote democracy, to embrace diversity, to encourage involvement in a multilateral infrastructure that upholds human rights and individual freedoms. Departure from principle in the handling of these issues has only made the problems of the Middle East much worse and harder to resolve.

In the United Kingdom, Prime Minister Blair's support for President Bush was almost missionary. He sought to remain close to the President and spoke with passion about preservation of the British way of life. His motivation in and conduct of the War on Terror will provide historians with fodder for years into the future. But one thing is clear, Prime Minister Blair did not act like a person concerned for the Rule of Law when he refused to place Lord Goldsmith's legal advice as Attorney-General before his own Cabinet, concerning the legality of the war. The failure of the British Cabinet to scrutinize that legal opinion will have

consequences in future years. Future leaders will take more care before making such decisions.

We now know that Goldsmith's legal opinion over 13 pages was equivocal. Both sides of the case could be reasonably argued. Hardly a strong case for war and not the statement the Chief of British Defence Staff needed before ordering his troops to fire.

On a demand from the Prime Minister, Goldsmith did provide a short categorical statement supporting the legality of the war. As he has since publicly said, this was not a condensation of his legal advice. It is that second statement which the Australian Government tabled in the Parliament, announcing Australia's participation in the war. Since Blair did not allow the full opinion to go to his own Cabinet, it is most unlikely that he would have allowed it to go to the Australian Prime Minister or Ministers.

These aspects, however, underline an enormous difference between Iraq and the First and Second World Wars. The question of legality was of great importance. The Security Council and decades of multilateralism had influenced opinion massively. For the British Chief of Defence Staff, Admiral Sir Michael Boyce, to ask for a legal opinion would have been unthinkable in an earlier age. But this was done by Boyce before he was prepared to invade Iraq.

This unprecedented focus on legality gives us cause for optimism.

For us, Australia's role is the more important. To understand fully our own position in the post September 11th world, we need to keep in mind

differences between our own Constitutional processes and those of the United States or, for that matter, of Britain. Those differences make it much easier for governments here to set aside the Rule of Law and Due Process than it would be in either Britain or the United States. In the United States there is a clear separation of power between Congress, the Executive and the judiciary. Basic rights are enshrined in a Bill of Rights, which has always been at the centre of American attitudes.

Here I wish to emphasize two other factors in the United States which are very different from the position in Australia.

First, if the United States is to go to war, there must be a vote in the Congress supporting that move. I would now support a similar provision placed in the Australian Constitution. If the Government has such a weak case for war that it could not persuade a majority of both Houses of Parliament, to vote in favour of a proposed conflict, then that conflict should not be undertaken. In America, the President cannot move without such a vote from the American Congress. In Australia the Parliament now does not need to be consulted. The Australian Parliament should be given a power equivalent to that of the United States Congress.

Secondly, the US Senate Select Committee on Intelligence, which examines the affairs of the intelligence community in the United States, owes its duty to the Senate and to no-one else. If the CIA or any part of the Security establishment objects to some part of a proposed report from the Senate Committee, they cannot prevent the report being published. The CIA can place its objections before the President. If the President believes the CIA has a case, he can write to the Committee and ask that a certain section be deleted. The Committee may debate it, they may refer

it to the Senate for a closed debate, but the Senate or the Committee will make the final decision whether that part to which the CIA objects will be published or not. The President has no power in the matter. The Executive can only request. It cannot command.

In Australia the situation is markedly different. If ASIO objected on national security grounds to some parts of a report to be tabled by the Australian Parliamentary Joint Committee on Intelligence and Security, ASIO may approach the Attorney-General and ask that the section be struck out. It is not left to the Committee, it is not left to the Parliament, it is a decision of the Ministers, it is a decision of the Executive. Because of the excessive reaction to what has been called the War on Terror, that virtually makes it a decision of ASIO. So ASIO has the power to censor a Parliamentary Committee's report.

Such a process would be totally unthinkable in the United States context and should not be tolerated in Australia. It demonstrates an unhealthy subservience of our Parliament to the Executive.

In Britain, the situation is also significantly different from that in Australia. In Britain, the institutional framework, the legacy of the common law, and the accession to the European Union Charter of Fundamental Rights, create a different situation from that which exists in Australia. The Law Lords have also been more independent, less bound by the legislation of government.

The House of Commons, and even the reformed House of Lords, have acted with greater independence than our Senate and House of Representatives.

In Australia the Executive is in, and of, the Parliament and controls the Parliament more effectively than a British government controls the two elements of the British Parliament. The Executive and the legislature in Australia, act as one. The legislature here has failed to exercise restraint on the Executive.

Our Constitution is about a division of power between States and Commonwealth, there is no reference in the Constitution to the protection of basic rights. What protections may exist, derive from the common Law, but the Common Law can be over-ridden by an Act of Parliament as has occurred on more than one occasion.

To the extent that there is a separation of powers in Australia, it has historically been dependent upon the States. As time has passed, the Commonwealth has come to have greater and greater influence over the activities of States and thus that original separation placed in our Constitution has much less relevance than in earlier times.

Finally, there is another protection that ought to be mentioned. There must be substantial restraints against the use of military forces in civil situations. In Australia the situation is complex but the protections are not as strong as one might wish.

I know of more than one occasion when Ministers or Prime Ministers have improperly sought to use Defence assets in civil situations. As one example, the F111, with their highly sophisticated equipment, were used to take photographs to provide evidence for a High Court case. It in fact

involves a very significant military intrusion into the judicial processes of Australia.

In 1969, in response to a crisis in Bougainville, without consultation with the Defence Minister, the Defence Committee or Cabinet, the Prime Minister sought to call out the Pacific Island Regiment. Because of the legal restraints then existing, it was possible to force a proper consideration of the issue.

The suggestion that the military might need to be used urgently to counter a terrorist incident does not provide sufficient reason for the removal of the constraints in the use of military power.

The Defence Act of 1903 could be modified so that if a Premier of a State notified the Prime Minister that a terrorist incident had or might occur, counter terrorism forces could be made immediately available.

We should never forget however, that there are very strong practical and philosophical grounds for preventing a government from using the armed forces to intervene in civilian affairs.

In the name of national security in the last seven years, there has been increasing disregard for the Rule of Law. The forfeiture of rights of individual citizens can be seen by the growing number of individuals whose circumstances have meant nothing to the government, which has shown no decency, no concern. People sent to Nauru, to prisons overseas, children kept in detention centres, Australian citizens illegally deported or in Immigration Department jails.

In these cases, regard for the Rule of Law and Due Process has been set aside. To them we must add Mamdouh Habib, David Hicks and Mohamed Haneef.

How do Rule of Law countries so demean themselves that they allow these processes to occur? How is it that even more people have not been enraged? Does it rest on the age-old but narrow proposition that the people against whom these acts are directed are not like us? “They belong to them, not to us.” Haven’t we learnt time and time again that, if we stand aside and allow somebody’s rights to be pushed aside, if we allow arbitrary, injudicious acts of government to destroy the life of one person, don’t we understand that that creates a virus that spreads through the body politic? Even now, because of laws preventing publication, we do not know how many people may have been affected by the recent run of amendments to Australia’s security legislation.

While the relative silence of the Labor Party on these issues may be good politics, it leaves a void. If there isn’t a debate on important issues between major political parties, it is difficult to sustain a debate amongst the Australian public more generally. Those who support basic rights, the Rule of Law, due process, carry the banner. We need to move against all of those who have exhibited no protest on these issues and hope that the next government will have a greater concern. I have only contempt for somebody who says to me they fight these issues but privately, they are not prepared to speak out.

What does one do about all of this? How do we buttress our constitutional processes? How do we move back to strict adherence to the Rule of Law, not only in relations between citizens but in relations

between citizens and government? How do we make sure that future Australian governments will stand up for the basic rights of Australians, wherever they may be? That they will not throw aside the presumption of innocence, the right to a fair trial, the right to be heard in a properly constituted court of justice. How do we re-establish strong support for the Security Council and a law-based world? Again I ask, how do we find security in terrorism's shadow – where our rights, the rule of law and due process have been lost in the dark?

There are a number of steps that we can and, ultimately, must take.

1. We seriously need a Bill of Rights, following the practice of all European Union countries, New Zealand, Canada and the United States. The States in Australia are starting to move in this direction, led by the ACT and Victoria but this legislation only applies to State law. We need a Federal Bill of Rights to act as a restraint on governments, to provide some benchmarks for our judicial processes.
2. We need new measures to support the independence of the High Court. Perhaps we should establish a judicial council which would suggest names suitable for appointment to the High Court and for the Federal Courts.
3. We could reinforce the independence of the judicial system by ending promotions from one court to another. There is a suggestion in some quarters that judicial decisions can be influenced by the expectation of promotion. This principle as an objective was current in the United Kingdom in earlier times.

4. We must find ways in which the power of Parliament can be reasserted. While the Executive is in and of the Parliament, the power of Party machines in both major political parties is now so great that the independence that used to be exercised in the Senate in particular, hardly exists. It is rarely exercised in the House of Representatives and then only with great courage and considerable risk.

5. We should seek a constitutional change so the approval of the Senate and House of Representatives would be required before an executive government can take Australia to war.

6. We should seek a further change, probably by legislation, that makes it impossible for any part of the intelligence and security machinery to censor a Parliamentary report critical of its activities.

These changes would go a long way to strengthen the supervisory processes so essential in today's world.

We also need to give more thought to ways of keeping the Government itself within the Rule of Law?

7. How do we require the Government to provide the protections that ought to be available to Australian citizens, both here and abroad? In the Abassi case the Law Lords placed that obligation on the British Government. How do we make sure that Due Process prevails? Is there some way in which we can make the Government, or people within the Government, liable or responsible and subject to judicial processes? This was attempted in the case of David Hicks, where the Federal Court was asked to review the conduct of the Howard Government with respect to

his detention and treatment. That litigation terminated following David Hicks' guilty plea in Guantanamo Bay and his subsequent repatriation to Australia.

8. Would it be possible to establish a set of basic obligations where the fate of individuals is concerned, whether they are people in Immigration Department detention centres, or under restraint by other institutions of government, to make those involved responsible and liable for what happens? Abuse has gone so far that such steps need to be considered.

9. Beyond Australia we should re-establish strong support for the United Nations and its structures. Reform of the Security Council must be undertaken. Its capacity must be used in the resolution of disputes and its decisions respected. Only through the Security Council will we be able to establish rules for the conduct of affairs between nations. We should use our status as an ally of the United States to persuade the United States that these major issues are of critical importance to a peaceful world. Rather than going along with America, we should be seeking the support of the United States once again to adopt the far-reaching approaches so evident in much of the work they did in post-war decades.

10. There is a real role for a middle-ranking country such as Australia acting in concert with others, such as Canada, Sweden or India and many more, in strengthening the international system. Despite the regression of President Bush's time, over the past sixty years there has been progress and we should not be discouraged. The debate about the legality of the

Iraq war is a major sign of that progress. We can strengthen those moves and do much to create a more peaceful world.

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