

Spring 2010

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Recommended Citation

Jim Kennan S.C., *The Role of International Human Rights Law in Australian Law*, 44 Val. U. L. Rev. 895 (2010).

Available at: <https://scholar.valpo.edu/vulr/vol44/iss3/7>

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THE ROLE OF INTERNATIONAL HUMAN RIGHTS LAW IN AUSTRALIAN LAW

Jim Kennan S.C.*

I. THE ABSENCE OF HUMAN RIGHTS LEGISLATION

Australia does not have national legislation embracing a Bill of Rights or a Charter of Rights, although the Australian Government has currently sponsored a public consultation on whether a Charter should be adopted. There have been attempts in the 1970s and 1980s to introduce national human rights legislation but these did not succeed. However, a Charter of Rights has been passed in the Australian Capital Territory, and in the State of Victoria. These acts apply only to those jurisdictions. They are similar in operation to the Human Rights Act of 1998 of the United Kingdom. The rights in this Act are based on the International Covenant on Civil and Political Rights.

Australia signed the International Covenant on Civil and Political Rights ("ICCPR") in 1981. It has also signed the Convention on Torture. However, the Australian courts have shown little interest in developing Australian law by reference to the international charter, but have rather preferred to operate within the existing confines of the common law.

In the case of statutory interpretation, it has been a recognised principle in Australia that as a rule of construction, the legislature is not to be taken to have intended to legislate in violation of the rules of international law existing when the legislation was enacted. Therefore, it is the principle of statutory construction that statutes are to be read consistently with the rules of international law, but not where the clear words of the statute are inconsistent with that implication.¹ However, the courts have not generally adopted the principles contained in international treaties in the development of the common law.²

In one of the few positive references by the High Court of Australia to the ICCPR, Justice Brennan³ said that the Court could take into account the fact of the adherence by Australia to the ICCPR as an expression of community values. That case concerned the right of an accused person to be provided with legal counsel at public expense. The High Court held that the law of Australia did not recognise such a right, but that if a person was denied legal aid, then the court had the power to stay the trial until legal aid was provided if the trial was not going to be

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¹ See *Al-Kateb v. Godwin* (2004) 219 C.L.R. 562, 589-90.

² *Ragg v. Magis*. Ct. 179 A. Crim. R. 568, 18 V.R. 300 (Vict. 2008) (the approach of Bell, J. in this case has not been adopted elsewhere).

³ *Dietrich v. The Queen* (1992) 177 C.L.R. 292, 9 (opinion of Brennan, J.).

fair in the absence of legal representation. Justice Brennan referred to article 14(3)(d) as a concrete indication of contemporary values and referred to the fact that that article provided a right to have legal assistance.⁴ The Judge also referred to the covenant as being a legitimate influence on the development of the common law of Australia, although it was not part of Australian domestic law.⁵

It may be said, however, that these references to the international law are the exception rather than the rule in Australia. The Australian courts have preferred to be guided by the general common law principle that a trial must be fair rather than by reference to the specific provisions of the International Covenant, or relevant international jurisprudence which interprets the ICCPR or its European equivalent, the European Convention.

A. The High Court Upholds Lifetime Detention of an Illegal Immigrant

In *Al Kateb*, the High Court held that the Migration Act of Australia authorised the detention of a non-citizen who had entered Australia illegally, even if his removal from Australia was not reasonably practicable in the foreseeable future, and that he might spend the rest of his natural life in prison.⁶ Only one justice (Kirby, J.) referred in positive terms to the operation of international law, to hold that such a construction was wrong.⁷ Justice McHugh, who was in the majority and who argued against the application of international law, did suggest the outcome might have been different if Australia had a Bill of Rights.⁸

B. The Experience of the Australian and English Courts in the Terrorist Cases

An examination of the way in which courts in Australia have dealt with counter terrorist legislation, and the way in which courts in England have dealt with similar issues, is instructive in understanding the differences in legal cultures where one jurisdiction acknowledges international treaties in the development of the domestic law, and another jurisdiction pays only peripheral attention to them. It is also the case that since 1998 the United Kingdom has had the Human Rights Act,⁹ while Australia has none.

⁴ *Id.*

⁵ *Id.* (citing *Mabo v. Queensland [No.2]*, (1992) 175 C.L.R. 1, 41).

⁶ (2004) 219 C.L.R. 562, 1 (opinion of Gleeson, C.J.).

⁷ *Id.* at 150, 175, 179 (opinion of Kirby, J.).

⁸ *Id.* at 73 (opinion of McHugh, J.).

⁹ Human Rights Act 1998, c. 42 (U.K.).

C. *The Right to a Fair Trial*

In *Benbrika*, the court was faced with a trial of twelve persons accused with offences under the Australian terrorist legislation.¹⁰ The trial was scheduled to take between six and nine months.¹¹ The accused had been in custody for almost two years when the trial started in February 2008.¹² During this time they had been held in the most austere conditions in the prison system, including being held up to twenty-three hours per day in their cells, with very severe restrictions on receiving visitors.¹³

The accused had been held at a maximum security prison some distance from the court in Melbourne.¹⁴ The travelling time, depending on the traffic, to and from court was between sixty-five to eighty minutes each way.¹⁵ The accused were strip searched when they left the prison in the morning and again each evening.¹⁶ The process of loading them in the morning, including the strip searching, took about an hour in addition to the travel time.¹⁷ The accused were handcuffed and shackled during their travel to and from the court.¹⁸ At the end of the day, they were subject to the same routine.¹⁹

Evidence was called from medical practitioners to the effect that the impact on the physical and psychological functioning of someone subjected to this regime was that it would have a significant impact on memory and concentration, and that it would compromise significantly the capacity of the ordinary person to attend to the complex material being presented at the trial, as well as hinder the person in assisting in his defence.²⁰

The Judge in the case said that he was satisfied on the evidence that the accused were currently being subjected to an unfair trial because of these circumstances.²¹ He ordered that the accused be moved to a prison in close proximity to the court, and that the strip searching and shackling stop.²² In doing so the judge relied on the common law principles that a

¹⁰ R. v. Benbrika (2008) 182 A. Crim. R. 205.

¹¹ *Id.* at 4.

¹² *Id.* at 26.

¹³ *Id.* at 28–31.

¹⁴ *Id.*

¹⁵ *Id.* at 34.

¹⁶ *Id.* at 33.

¹⁷ *Id.*

¹⁸ *Id.* at 33–34.

¹⁹ *Id.* at 36.

²⁰ *Id.* at 47–67.

²¹ *Id.* at 84–85.

²² *Id.* at 99–102.

trial must be fair and the power of a court to order a stay of proceedings unless the unfairness was remedied.²³

The Judge said that the case could be resolved by the application of common law principles, without referring to international instruments, although the ICCPR and a number of European cases were referred to in argument.²⁴ The interesting point to note is that none of the common law cases expressly dealt with the sort of factual situation that confronted the court in this case.²⁵ The principles of the common law that referred to the right to a fair trial and the power of the court to order a stay if unfairness persisted were sufficient to determine the case.²⁶ It should be said that this is a landmark decision in the Australian common law, but that if international legal principles, such as equality of arms, were more generally recognised in Australia, and Australian courts had regard to international jurisprudence, then it might not have taken until 2008 for such a decision to be given, or for such an argument to be agitated.

In contrast to the silence of the common law in Australia (prior to *Benbrika*) on the impact of prison conditions on the capacity of the accused to participate in his trial, there were European cases which dealt with the issue as to whether or not the conditions in which accused persons were held were such that the accused could not properly participate in the trial. In particular, the case of *E v. Secretary of State for the Home Department* set out the following principles:²⁷

- The right to a fair trial is a fundamental principle of the rule of law.
- The principle of equality of arms requires that each party be afforded a reasonable opportunity to present his case under conditions that could not place him at a substantial disadvantage.
- The right of an accused person to effectively participate in a criminal trial includes the right to hear and follow the proceedings.
- It is a breach of the principle of fairness if the conditions of detention and transportation are such that the accused suffers from low physical and mental resistance.
- It is important that the accused be able to participate in the trial without being in a state of excessive tiredness.

²³ *Id.* at 90–91.

²⁴ *Id.* at 15–20.

²⁵ *Id.* at 15.

²⁶ *Id.*

²⁷ *E. v. Sec'y of State for the Home Dep't* (2007) E.W.H.C. 1731 (Q.B.D. Admin).

- The question of whether or not the conditions of the trial meet the required standards of fairness is a matter for the trial judge.

This case is an example of how an English court readily felt able to embrace the International Law concept of equality of arms, in order to develop the common law in England.²⁸ The notion of equality of arms is not readily embraced by the Australian common law.²⁹

II. TORTURE CASES – DIFFERENCES IN APPROACH

In the case of *Thomas*, the Victorian Court of Appeal dealt with the case of an accused person who had been convicted of receiving funds from a terrorist organization.³⁰ He had been interviewed by Australian police in Pakistan while he was effectively in the custody of Pakistani officials.³¹ The Court found that he had been told repeatedly by his Pakistani interrogators that his fate would depend to a very substantial extent on the degree to which he cooperated.³² The Pakistani officials had told him that he did have the possibility on the one hand of returning to his family in Australia, and on the other hand a very different fate.³³ They told him that the Australian authorities would only be able to assist him if he could be seen to have cooperated fully.³⁴

The Australian officials did nothing to distance themselves from that position.³⁵ The Court also found that he had been emotionally manipulated by the Australian police who showed him a photograph of his wife and daughter, and a letter from his wife.³⁶ The Court found that he had been effectively threatened with indeterminate detention by the Pakistanis, in Pakistan or in some other unidentified location.³⁷ He was held in a house for about two weeks in a cell the size of a dog kennel and was deprived of food and water for about three days.³⁸ He was questioned in a room sitting on a low stool with his feet padlocked to a large metal plate on the floor, and he was handcuffed behind his back.³⁹ At one stage a Pakistani officer grabbed his hood by the collar and

²⁸ *Id.* at 21–22, 60–62.

²⁹ *But see* Ragg v. Magis. Ct., (2008) 179 A. Crim. R. 568, 18 V.R. 300 (Vict.) (addressing equality of arms in depth).

³⁰ R. v. Thomas III (2006) 181 A. Crim. R. 323, 1.

³¹ *Id.* at 2.

³² R. v. Thomas (2006) 163 A. Crim. R. 567, 71, [2006] V.S.C.A. 165.

³³ *Id.* at 74.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 76–78.

³⁷ *Id.* at 80.

³⁸ *Id.* at 12–15.

³⁹ *Id.*

900 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 44]

strangled him so that he was suffocating, and he felt unbearable heat and stress.⁴⁰ After this he was not allowed water.⁴¹ He had given evidence that he believed that he may be sent to Guantánamo Bay if he did not cooperate.⁴²

A. *The Reluctance of Australian Judges to Refer to International Norms and Treaties*

The treatment of Thomas would, on the face of it, amount to torture or cruel or degrading and inhuman treatment within the meaning of the Torture Convention⁴³, and within the meaning of Article 3 of the Geneva Conventions.⁴⁴ However, the Victorian Court of Appeal made no reference to any international treaties in its judgment, and ruled that the record of interview was inadmissible according to common law principles because it could not be said to be voluntary.⁴⁵ Nor did either of the other two judges who dealt with the case at the initial trial and on the retrial refer to international treaties when considering the circumstances of Thomas's treatment in Pakistan. The reluctance of Australian judges to refer to international law when dealing with a case of this kind stands in stark contrast to the approach taken in the United Kingdom.

B. *The Contrasting Position in England—The Cases of A and Binyam Mohamed*

The difference in legal cultures is highlighted by reference to two English cases. In *A v. Secretary of State for the Home Department (No.2)*, the House of Lords was concerned with a case where the appellants appealed against a decision on the basis that their evidence before the immigration appeals commission might have been procured by torture inflicted by foreign nationals.⁴⁶ The House of Lords held that the English common law had always set its mind firmly against the use of torture

⁴⁰ *Id.* at 15.

⁴¹ *Id.*

⁴² *Id.* at 10.

⁴³ See G.A. Res. 3452 (XXX), Art. 1, U.N. Doc. A/2433 (Dec. 9, 1975) (defining torture). Torture is defined in Article 1 of the Convention to mean: "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted . . . on a person for such purposes as obtaining [information] from him." *Id.*

⁴⁴ Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

⁴⁵ *R. v. Thomas* (2006) 163 A. Crim. R. 567, at 91-94.

⁴⁶ *A v. Sec'y of State for the Home Dep't (No. 2)* [2006] UKHL 71, [2006] 2 A.C. 221 (appeal taken from Eng.).

and had insisted that evidence so obtained was to be excluded.⁴⁷ The Court had regard to the European Convention⁴⁸ and the International Convention Against Torture, 1984.⁴⁹ It said that the international prohibition on the use of torture enjoyed the status of a peremptory norm of international law.⁵⁰

In the case of *Binyam Mohamed v. Secretary of State for Foreign and Commonwealth Affairs*, the Queens Bench division of the High Court in England, consisting of two judges, dealt with the case of a detainee at Guantánamo.⁵¹ The detainee said that he had been the subject of extraordinary rendition and had been tortured before his removal to Guantánamo.⁵² The proceedings in the High Court in England were directed to obtaining discovery from the intelligence agencies in England, as to what they knew of his treatment, as it had appeared that British agents had some involvement in his interrogation by Pakistani authorities and may have some knowledge of his rendition by the United States agencies.⁵³ In the course of its judgment, which ordered the disclosure of information held by the British government, the Court made a number of important observations:

- The common law had long set its face against torture.⁵⁴
- Equally significant was the fact that the prohibition on state torture had achieved the status of a peremptory norm in international law (the Court referred to the Convention against Torture 1984).⁵⁵
- The Court gave weight to Article 5 of the United Nations Universal Declaration of Human Rights, which prohibits torture or cruel inhumane and degrading treatment, Article 3 of the Geneva Convention, which prohibits cruel treatment and torture, and other Articles of the conventions which prohibited outrages upon personal dignity, in particular humiliating and degrading treatment, and Article 16 of the Convention Against

⁴⁷ *Id.* at 11 (opinion of Bingham, L.J.).

⁴⁸ *Id.* at 23–26 (citing European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, as amended by Protocol 11, E.T.S. 155 (1998)).

⁴⁹ *Id.* (citing Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. Doc. A/RES/39/46 (Dec. 10, 1984)).

⁵⁰ *Id.* at 33.

⁵¹ *Binyam Mohamed v. Sec’y of State for Foreign and Commonwealth Affairs* [2008] EWHC 2048 (Q.B.). This judgment was upheld by the Court of Appeal of England and Wales on 10th February 2010. See [2010] EWCA Civ 65.

⁵² *Id.* at 35–38.

⁵³ *Id.* at 60–145.

⁵⁴ *Id.* at 142(i).

⁵⁵ *Id.* at 142(ii).

902 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 44]

Torture which prohibits cruel inhuman or degrading treatment.⁵⁶

The Court also held that the United Kingdom Government had facilitated the interrogation of the appellant at a time when it knew of his treatment in Pakistan, including being held incommunicado and without access to a lawyer.⁵⁷ Such detention was unlawful under the law of Pakistan.⁵⁸ The Court adopted what had been said in the *Horseferry Road Magistrates Court* case.

There is . . . no principle more basic to any proper system of law than the maintenance of the rule of law itself. When it is shown that the law enforcement agency responsible for bringing a prosecution has only been enabled to do so by participating in violations of international law and of the laws of another state in order to secure the presence of the accused within the territorial jurisdiction of the court, I think that respect for the rule of law demands that the court take cognisance of that circumstance. To hold that the court may turn a blind eye to executive lawlessness beyond the frontiers of its own jurisdiction is, to my mind, an insular and unacceptable view.⁵⁹

It should be noted that this judgment was delivered some time before the enactment of the Human Rights Act 1998, in the United Kingdom. The English courts had been paying much more attention to international law in the development of the common law, than the Australian courts did, even well before the enactment of the human rights legislation in the United Kingdom.

C. *The Control Order Cases*

In another case concerning Thomas, *Thomas v. Mowbray*, a constitutional challenge was launched in the High Court of Australia, to the validity of a control order which had been made under the counterterrorism legislation in respect to Thomas.⁶⁰ The Court upheld by a majority the validity of the control order legislation on the basis that

⁵⁶ *Id.* at 143.

⁵⁷ *Id.* at 147(vi).

⁵⁸ *Id.*

⁵⁹ *Id.* (citing *R v. Horseferry Rd. Magis. Ct.* [1994] 1 A.C. 42 (on appeal from Q.B.) (opinion of Bridge, L.J.)).

⁶⁰ *Thomas v. Mowbray* (2007) 233 C.L.R. 307, 81 A.C.J.R. 1414 (Austl.).

the legislation was within the defence power of the Australian government to protect the nation against aggression from within the country, as well as from without,⁶¹ and that the conferral of the power to make a control order on the judiciary was one that was consistent with judicial activities.⁶² No reference was made to international treaties or the ICCPR by the majority in this case.

There have been a number of decisions of the House of Lords on the issue of control orders. Those decisions have different outcomes, but all involved consideration of the right to liberty under Article 5 of the European Convention.⁶³

D. Deference – The Belmarsh Case

By way of further contrast, the *Belmarsh* case decided by the House of Lords in 2004 showed a robust attitude to the interpretation of counter terrorism legislation by a court utilising the Human Rights Act 1998 and extensive reference to the European Convention and international law.⁶⁴

In that case, the appellants were foreign nationals who were detained under the Terrorism Act in the United Kingdom. The Terrorism Act empowered the Secretary of State to issue a certificate in respect of foreign nationals whom he reasonably suspected of being terrorists or having links with international terrorist groups, and whom he reasonably believed to be a threat to national security.⁶⁵ A person so certified could be detained under immigration legislation pending his removal from the United Kingdom even if such removal was impossible because of the effect of an international agreement, or for practical reasons.⁶⁶ Such a person could, however, agree to leave United Kingdom voluntarily.

The Act did not apply to British nationals.⁶⁷ The United Kingdom had formally notified the Secretary General of the Council of Europe that it found it necessary to take measures in derogation of Article 5 of the European Convention on Human Rights on the grounds that there was a public emergency threatening the life of the nation.⁶⁸

⁶¹ *Id.* at 132–40, 154.

⁶² *Id.* at 121.

⁶³ See Adam Sandell, *Liberty, Fairness, and the UK Control Order Cases: Two Steps Forward, Two Steps Back*, 2008 EUR. HUM. RTS. L. REV. 1, 120 (analyzing the right to liberty).

⁶⁴ *A. v. Sec'y of State for the Home Dep't* [2004] UKHL 56, [2005] 2 A.C. 68 (appeal taken from Eng.).

⁶⁵ *Id.* at 12 (opinion of Bingham, L.J.) (citing Anti-Terrorism, Crime and Security Act, 2001, § 21).

⁶⁶ *Id.* at 13 (citing Anti-Terrorism Act § 22(1)), 14 (citing Anti-Terrorism Act § 23).

⁶⁷ *Id.* at 33–34.

⁶⁸ *Id.* at 10.

The appeal was brought on the grounds that there was no public emergency, that the measures were not proportionate, and that they were discriminated against on the grounds of nationality or immigration status.⁶⁹

1. Judicial Deference Did Not Preclude Court Review of the Executive Decision

The House of Lords held by majority that it was appropriate for the courts to give weight to the political judgments of the government and the Parliament on the question of whether or not there was a public emergency threatening the life of the nation.⁷⁰ However, it held that judicial deference did not preclude the courts from reviewing the compatibility of the measures, with the requirements of the European Convention including proportionality.⁷¹

It held that since other measures were adequate to monitor the activities of British suspects, it was hard to see why a regime of strict restrictions and intensive monitoring would not suffice in the case of foreign nationals.⁷² The court said that the measure failed to adequately address the problem and at the same time involved the severe penalty of indefinite detention of persons who, even if suspected of having links to a terrorist organisation, might have harboured no hostile intention towards the United Kingdom. Since the risk to security emanated from both British and foreign nationals, the difference in treatment could not be justified.⁷³

There was no authority to support the proposition that in times of emergency, the State may lawfully discriminate against foreign nationals by detaining them while not detaining those of its own nationals who pose the same threat.⁷⁴ The measures involved unjustifiable discrimination on the ground of nationality or immigration status, contrary to Article 14 of the European Convention and Article 26 of the ICCPR.⁷⁵ The United Kingdom had not sought to derogate from these articles. The measures also failed to meet the third requirement of Article 15 of the European Convention since they were inconsistent with the United Kingdom's other obligations under international law.⁷⁶

⁶⁹ *Id.* at 45–46.

⁷⁰ *Id.* at 29.

⁷¹ *Id.* at 38–42.

⁷² *Id.* at 35.

⁷³ *Id.* at 68.

⁷⁴ *Id.* at 63.

⁷⁵ *Id.* at 69, 73.

⁷⁶ *Id.*

2. A Landmark Decision

This decision has been said by Lady Mary Arden to be:

[A] landmark decision that will be used as a point of reference by courts all over the world for decades to come, even when the age of terrorism has passed. It is a powerful statement by the highest court in the land of what it means to live in a society where the executive is subject to the rule of law.⁷⁷

3. The Observations on Deference

On the question of the deference by the courts to political authorities Lord Bingham said this:

[I] do not accept the full breadth of the Attorney General's argument on what is generally called the deference owed by the courts to the political authorities. It is perhaps preferable to approach this question as one of demarcation of functions The more purely political . . . a question is, the more appropriate it will be for political resolution and the less likely it is to be an appropriate matter for judicial decision. The smaller, therefore, will be the potential role of the court. It is the function of political and not judicial bodies to resolve political questions. Conversely, the greater the legal content of any issue, the greater the potential role of court, because under our Constitution and subject to the sovereign power of Parliament it is the function of the courts and not of political bodies to resolve legal questions. The present question seems to me to be very much at the political end of the spectrum.⁷⁸

It may be noted that on the question of deference, Lord Hoffman had a different view. He referred to the widespread scepticism "which has attached to intelligence assessments since the fiasco over Iraqi weapons of mass destruction" ⁷⁹ But he said he was willing to accept that

⁷⁷ Mary Arden *Human Rights in the Age of Terrorism*, 121 L.Q. REV. 604, 621-22 (2005).

⁷⁸ *A. v. Sec'y of State for the Home Dep't* [2004] UKHL 56, 29 [2005] 2 AC 68 (opinion of Bingham, L.J.).

⁷⁹ *Id.* at 94.

there was credible evidence that plots for terrorist outrages existed.⁸⁰ However, he said that the question was whether there was a threat to the life of the nation.⁸¹ He went on to say that:

This is a nation which has been tested in adversity, which has survived physical destruction, and catastrophic loss of life The Spanish people have not said that what happened in Madrid, hideous crime as it was, threatened the life of their nation. Their legendary pride would not allow it. Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community.⁸²

He then stated that:

The real threat to the life of the nation, in the sense of the people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for Parliament to decide whether to give the terrorists such a victory.⁸³

Lord Scott said, on the question of deference:

It is certainly true that the judiciary must in general defer to the executive's assessment of what constitutes a threat to national security or to "the life of the nation". But judicial memories are no shorter than those of the public and the public have not forgotten the faulty intelligence assessments on the basis of which United Kingdom forces were sent to take part, and are still taking part, in the hostilities in Iraq I do have very great doubt whether the "public emergency" is one that justifies the description of "threatening the life of the nation". None the less. I would . . . be prepared to allow the Secretary of State the benefit of the doubt on this point⁸⁴

⁸⁰ *Id.*

⁸¹ *Id.* at 95.

⁸² *Id.* at 96.

⁸³ *Id.* at 97.

⁸⁴ *Id.* at 154 (opinion of Scott, L.J.).

4. A Slippery Slope

Lord Steyn, in a paper on deference, has said that “it cannot be right to say that these are issues which constitutional principle withdraws from the decision by the courts.”⁸⁵ He went on to point out that the argument in times of emergency, the notion that “we are all on the same side as the government,” is a slippery slope which tends to sap the will of the judiciary to stand up to a government guilty of an abuse of power.⁸⁶ Principles developed by the courts for extreme situations are likely to outlast those situations and be applied in normal times as well.

E. *The Approach of the Supreme Court of India*

In India (a country which has witnessed terrorist acts within its borders for fifty years) the Supreme Court has said this about terrorist cases:

Terrorist acts are meant to destabilize the nation by challenging its sovereignty and integrity The protection and promotion of human rights under the rule of law is essential in the prevention of terrorism If human rights are violated in the process of combating terrorism, it will be self defeating To maintain this delicate balance by protecting core human rights is the responsibility of the courts[.]⁸⁷

III. THE COMMON LAW DOES NOT PROVIDE ADEQUATE PROTECTION OF FUNDAMENTAL RIGHTS

Lord Steyn has also argued that in the United Kingdom prior to the introduction of the Human Rights Act 1998, fundamental rights of individuals had not been adequately protected in the legal system.⁸⁸ He argued that a constitutional democracy must protect fundamental rights. He said that “[w]ithout such a moral compass the state is bound to treat individuals arbitrarily and unjustly By the 1998 Act Parliament made the judiciary the guardians of the ethical values of our Bill of Rights.”⁸⁹ He said that the profound change in the legal system was

⁸⁵ Lord Steyn, *Deference: A Tangled Story*, PUB. L. 346, 355 (2005).

⁸⁶ *Id.* at 359.

⁸⁷ [2003] SOL Case No 840.

⁸⁸ Lord Steyn, *Laying the Foundations of Human Rights Law in the United Kingdom*, 2005 EUR. HUM. RTS. L. REV. 4, 349, 349.

⁸⁹ *Id.* at 349.

emphasised by the decision of the House of Lords in the *Belmarsh* case. He referred in particular to what Lord Bingham said:

I do not in particular accept the distinction . . . between democratic institutions and the courts. It is of course true that the judges in this country are not elected and are not answerable to Parliament. It is also of course true . . . that Parliament, the executive, and the courts have different functions. But the function of independent judges charged to interpret and apply the law is universally recognized as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself. The Attorney General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision-making as in some way undemocratic The 1998 Act gives the courts a very specific, wholly democratic mandate⁹⁰

If Lord Steyn is correct in saying that human rights were not adequately protected in the United Kingdom before the 1998 Human Rights Act, when only the common law applied, then the same is true of Australia today. It is a common law system, with a common law that is very close to that of the United Kingdom, prior to the introduction of the Human Rights Act.

There has been much written on the adequacy or otherwise of the response of the English courts to the counter terrorist legislation, and whether or not the Human Rights Act in England provides adequate protection of human rights in the age of terror.⁹¹

A. *The Approach of the English Courts is Much Stronger on Human Rights Than the Australian Courts*

My purpose in referring to these English decisions is not to provide an exhaustive analysis of those decisions and many other related decisions. Rather, my purpose is to draw a distinction between the way in which a legal culture informed by domestic human rights legislation, and where the courts embrace international law, deals with these issues,

⁹⁰ *Id.* at 350.

⁹¹ See generally, Thomas Poole, *Courts and Conditions of Uncertainty in Times of Crisis*, 2008 PUB. L. 234; Margit Cohn, *Judicial Activism in the House of Lords: A Composite Constitutionalist Approach*, 2007 PUB. L. 95; K.D. Ewing and Joo-Cheong Tham, *The Continuing Futility of the Human Rights Act*, 2008 PUB. L. 668; Lord Lester, *The Utility of the Human Rights Act: A Reply to Keith Ewing*, 2005 PUB. L. 249; Kim Economides et al., *Can Human Rights Survive? A Symposium on the 2005 Hamlyn Lectures*, 2007 PUB. L. 209.

in comparison with the situation in Australia where there is no domestic human rights legislation, and where the courts only treat international law as relevant at the margin, if at all.

As a practitioner in the field in Australia, having been involved to a greater or lesser extent in three different terrorist cases, I can only say that I would have much preferred to have been arguing those cases in the English context rather than the Australian context.

B. The Unprecedented Decision to Order a Retrial in Thomas, on the Basis of the Prosecution Seeking to Introduce New Evidence

In this context it should be noted that in *Thomas III*, the Victorian Court of Appeal ordered a retrial at the request of the prosecution, on the basis of new evidence in the form of a television interview recorded before the first trial, but aired after the conclusion of that trial.⁹² There was no precedent for ordering a new trial at the request of the prosecution on the basis of new evidence, in the United Kingdom, or Australia, or Hong Kong, or in the United States. I doubt whether it would have been ordered by an English court. It was a dramatic departure from established principle and a departure in favour of the prosecution. The Court itself acknowledged that its decision was without precedent.

C. Domestic Human Rights Legislation is Needed in Australia

In the *Thomas* case, the jury acquitted Thomas on his retrial. This was a sign that the jury was able to stand back from the war on terror rhetoric which has so dominated public discussion since 2001, and forms a view about the evidence, or lack of it, presented in court.

But the Australian system would be significantly enhanced by domestic human rights legislation and by the Australian courts abandoning their insular view of the world, and embracing international human rights law.

⁹² R v. Thomas III (2006) 14 V.R. 512, 13–14 (Austl.).