Research Report No. 5/2009

"Risk Society" and the Precautionary Approach in Recent Australian, Canadian and UK Judicial Decision Making

Filip Gelev

Follow this and additional works at: <http://digitalcommons.osgoode.yorku.ca/clpe>

Recommended Citation

Gelev, Filip, ""Risk Society" and the Precautionary Approach in Recent Australian, Canadian and UK Judicial Decision Making" (2009). *Comparative Research in Law & Political Economy. Research Paper No. 5/2009*.
<http://digitalcommons.osgoode.yorku.ca/clpe/120>

This Article is brought to you for free and open access by the Research Papers, Working Papers, Conference Papers at Osgoode Digital Commons. It has been accepted for inclusion in Comparative Research in Law & Political Economy by an authorized administrator of Osgoode Digital Commons.

Comparative Research in Law & Political Economy

CLPE RESEARCH PAPER 05/2009

Filip Gelev

“Risk Society” and the Precautionary Approach in Recent Australian, Canadian and UK Judicial Decision Making

EDITORS: Peer Zumbansen (Osgoode Hall Law School, Toronto, Director, Comparative Research in Law and Political Economy, York University), John W. Cioffi (University of California at Riverside), Lindsay Krauss (Osgoode Hall Law School, Toronto, Production Editor)

Filip Gelev

**“RISK SOCIETY” AND THE PRECAUTIONARY APPROACH IN
RECENT AUSTRALIAN, CANADIAN AND UK JUDICIAL
DECISION MAKING**

Abstract: After the terrorist attacks of 11 September 2001 terrorism was added to the list of potentially catastrophic global events, such as global warming or nuclear explosions, which characterise Ulrich Beck’s risk society. Operating in an atmosphere of fear, executive governments and parliaments around the world take precautionary measures to prevent future terrorist acts – governments accumulate information, detain terrorism suspects, freeze funds and so on. International Relations scholars see the judiciary as a guardian of human rights that can stop or at least curb the excesses of the other two branches of government. The article argues that this view is naïve. The first section includes a brief historical overview of the judiciary’s tendency to “go to war” together with the executive in times of crisis, a tendency which goes back to the 19th century and well precedes risk society. To put the same idea in Foucauldian terms the judiciary governs itself through the prevailing regime of truth, whether the emergency is the war on terrorism or a different war. In the second section, the focus is on six “sets” of recent cases, two from Australia, Canada and the UK each. In almost all the cases the judiciary shows a willingness to defer to the executive on questions of national security. Based on the limited number of cases analysed, it is argued that in some respects the regime of truth of the war on terror is nothing new, while in other ways the reasoning of the judiciary post 9/11 has certain distinctive characteristics.

Keywords: executive, judiciary, governmentality, precaution, risk society, war on terrorism, human rights, national security, emergency, Michel Foucault, Ulrich Beck, Australia, Canada, UK

JEL classification: K19, K33, K42, K49

Author Contact:

Filip Gelev
Vrije Universiteit Amsterdam
De Boelelaan 1081, NL- 1081 HV Amsterdam, The Netherlands
Email: filipcho@gmail.com

“RISK SOCIETY” AND THE PRECAUTIONARY APPROACH IN RECENT AUSTRALIAN, CANADIAN AND UK JUDICIAL DECISION MAKING

Filip Gelev*

I. INTRODUCTION

In 2006, without being suspected of committing or planning to commit any crime in Australia, a federal court issued a “control order” against Mr Jack Thomas “to protect the public and substantially assist in preventing a terrorist act”. The court was of the view that unless the order was made “Mr Thomas's knowledge and skills could provide a potential resource for the planning or preparation of a terrorist act.”¹ Mr Thomas admitted that before 9/11 he trained with in an Al-Qaeda camp in Afghanistan and continued his connection with Taliban sympathisers up until January 2003 when he was arrested in Pakistan.² In October 2008 Mr Thomas was acquitted by a jury in another court of the charge of accepting funds from a terrorist organisation.³ He is still subject to a control order.⁴

* This paper is an abridged and updated version of the author’s master’s thesis completed at the Vrije Universiteit (Free University), Amsterdam in June 2008. The author wishes to thank his thesis supervisor Prof. dr. Wouter Werner for his boundless patience, enthusiasm, wisdom and guidance.

¹ *Thomas v Mowbray* (2007) 237 ALR 194, 201; [2007] HCA 33, [1]. Most court cases below are referenced using the case neutral citation with paragraph numbers in square brackets and, where the case is reported, we also use the relevant law reports page numbers (eg *Re Charkaoui*, 2003 FC 882 (CanLII), [39]; [2004] 1 F.C.R. 528, 545). For some older cases (referred to only a few times) we utilise the official law report reference without the case neutral citation (eg *Australian Communist Party v Commonwealth* (1951) 83 CLR 1).

² *R v Thomas (No 3)* 14 VR 512.

³ He was convicted of falsifying a passport. See Milanda Rout, “Jack Thomas Acquitted on Al-Qa’ida Charge but Guilty of Falsifying Passport”, *The Australian*, 23 October

From 2003 until 2005, without being suspected of committing or planning to commit any crimes in Canada in the immediate future, Mr Adil Charkaoui was detained as a danger to the security of Canada because, among other things, he was a karate enthusiast. The court agreed with the executive government: “In the past, it has been observed that some individuals involved with Al-Qaeda are devoted to the practice of karate and/or the martial arts” most notably one of 9/11 hijackers.⁵

In 2006, the judiciary in the UK confirmed a control order against MB, the basis of which was not the suspicion that he may have committed a crime, but to prevent him from travelling from the UK to Iraq where he allegedly wanted to fight against Coalition Forces.⁶

These three cases epitomise “preventative” or “preventive” justice. The law is employed as an instrument for prevention, not as punishment for past acts (eg an attempted bombing) or adjudication of a legal dispute about an individual’s rights (eg the right to remain in a country). More interestingly, they are examples of the *judiciary* engaging in legal reasoning through which it fills the gaps in the executive’s deployment of preventative justice.

There is now a body of scholarly work in International Relations based on Ulrich Becks’ risk society and the associated ideas of precaution and prevention, and Michel Foucault’s ideas on governmentality, critiquing the expansion of executive power in general and in national security matters related to the ‘war on terrorism’ in particular.

2008. Accessed on 1 November 2008 at
<http://www.theaustralian.news.com.au/story/0,25197,24540864-601,00.html>.

⁴ Personal conversation between the author and the legal firm representing Mr Thomas on 18 November 2008.

⁵ *Re Charkaoui*, 2003 FC 882 (CanLII), [50]; [2004] 1 F.C.R. 528, 548-9.

⁶ *MB v Home Secretary* [2006] EWHC 1000, [20].

Governments across the world pass new laws or seek to utilise existing powers in new ways to proscribe organisations, detain people without trial, increase border controls, accumulate vast amount of data, freeze assets and so on.⁷ Werner and Johns see the logic of precaution in different measures and policies, e.g., the anticipatory use of force, the blacklisting of individuals, targeted killings, profiling and surveillance, and preventative detention.⁸

In this context, some International Relations scholars have argued that the judiciary's proper role is to act as a counter-balance to executive, and to a lesser extent parliamentary overreach,⁹ or as a guardian of human rights.¹⁰ Little attention has been paid to judicial reasoning allowing or even reinforcing these governmentality practices. The main question we pose in this article is whether, and if so how, the discourse of risk and the precautionary approach affect the argumentative structure and substance of judicial decision making. Our hypothesis is that it is simplistic to see the judiciary as a watchdog keeping the other branches of government in check and that the courts' role is much more limited both in practice and as perceived by members of the judiciary.

⁷ C. Walker, “Keeping Control of Terrorists Without Losing Control of Constitutionalism”, (2007) 59 *Stanford Law Review* 1395, 1400.

⁸ W. Werner and F. Johns, (2008) 21(4) “The Risks of International Law”, *Leiden Journal of International Law* 783, 784-5

⁹ Sometimes no specific distinction is drawn between actions of the executive and the legislature. See eg J. McCulloch, “Contemporary Comments. Australia's Anti-Terrorism Legislation and the Jack Thomas Case”, (2006) 18(2) *Current Issues in Criminal Justice* 357.

¹⁰ D. Hovell, “Black Holes or Loopholes? Human Rights in the Risk Society”, HREOC Seminar, Gilbert and Tobin Centre of Public Law, UNSW (6 April 2005). Last accessed on 7 April 2008 at www.gtcentre.unsw.edu.au/Publications/docs/pubs/2005_BlackHolesorLoopholes.doc. See also D. Dyzenhaus, “Humpty Dumpty Rules or the Rule of Law: Legal Theory and the Adjudication of National Security”, (2003) 28 *Australian Journal of Legal Philosophy* 1.

The paper consists of two sections. In the first section we discuss the ideas of Ulrich Beck and Michel Foucault as they relate to preventative justice and then we turn to the role of the judiciary in times of emergency, including the post 9/11 war on terror. In the second section we turn to the case-law to focus on how the discourse of risk, precaution and prevention permeate legal reasoning.

The case-law comprises six sets of cases,¹¹ i.e., two sets from three countries each – Australia, Canada and the UK, at the highest level available.¹² We selected the cases, first, because they are all from the common law legal family. The legal systems of the three countries are close enough to provide meaningful parallels and different enough to argue that any common trends are due to broad philosophical and doctrinal trends. Secondly, we looked for common themes such as preventative laws. The cases are organised thematically under the following headings: Preventative justice (2.1), Human rights and precaution (2.2) and Sovereignty v global threats and solutions (2.3).¹³

This publication is not meant as a standard legal analysis of the cases, that is, for example, an analysis of who was successful in the legal proceedings (or who in our view should have been successful) or whether parts of the relevant laws were declared invalid (or whether in our view they should have been declared invalid).¹⁴ One cannot draw definite conclusions from

¹¹ Some of the ‘sets’ include decisions at several different levels of the judicial system and civil as well as criminal proceedings. Some of the UK and Canadian cases involved more than one individual in each case.

¹² Out of the 6 sets of proceedings, *Haneef* is the only one not decided by the highest court of appeal of the relevant country.

¹³ This article is an abridged version of my masters thesis. In the thesis there were no themes. Instead, I went through an analysis of the six cases, one after the other.

¹⁴ For an analysis of *Thomas* see E. MacDonald, E. and G. Williams, “Combatting Terrorism: Australia’s Criminal Code Since September 11”, (2007) 16 *Griffith Law Review* 27. Last accessed on 28 May 2008 at http://www.gtcentre.unsw.edu.au/publications/docs/pubs/Terrorism_Criminal_Law2.pdf. For an analysis of *Charkaoui* see T. Poole, “Recent Developments in the War on Terrorism in Canada” (2008) 7(3) *Human Rights Law Review* 633. For an analysis of *JJ*, *MB*, and *E*, see C. Forsyth “Control Orders, Conditions Precedent and Compliance with

a small sample of six cases. Nevertheless, in the conclusion we argue that one can discern a pattern in the way courts approach the fight against terrorism.

A. ULRICH BECK AND RISK SOCIETY

Since Ulrich Beck's book *Risk Society* appeared in English in 1992 discussions of risk have become ubiquitous in many different disciplines.¹⁵ According to Beck today we live in "risk society" characterised by uncontrollable risks, which are not merely unnatural and human-made but beyond boundaries.¹⁶ Unlike governments in industrial society which sought to ensure the distribution of goods, in risk society the aim is to achieve the prevention of "bads" – pollution, global pandemics or nuclear disasters¹⁷ – but these common bads can no longer be contained spatially or temporally.¹⁸ The attacks of 11 September 2001 led Beck to add

Art 6(1)", (2008) 67 *Cambridge Law Journal* 1 and D. Feldman, "Deprivation of Liberty in Anti-Terrorism Law", (2008) 67 *Cambridge Law Journal* 4. For a brief overview of the "character test" (the *Haneef* case) see S. Harris Rimmer, "Character as Destiny: The dangers of character tests in Commonwealth law", A talk given at the Weekend of Ideas, Manning Clark House, The Australia Institute (29 March 2008). Last accessed on 29 May 2008 at http://works.bepress.com/cgi/viewcontent.cgi?article=1029&context=susan_harris_rimmer. For *Suresh* see D.W. Elliot "Suresh and the Common Borders of Administrative Law: Time for the Tailor?" (2002) 65 *Saskatchewan Law Review* 469 and M. Coutu and M-H. Giroux, "The Aftermath of September 11: Liberty v Security before the Supreme Court of Canada", (2006) 18(2) *International Journal of Refugee Law* 313. Finally, for *Rehman* see D. Bonner and R. Cholewinski, "The Response of the United Kingdom's Legal and Constitutional Orders to the 1991 Gulf War and the Post-9/11 'War' on Terrorism" in E. Guild and A. Baldaccini (eds.) *Terrorism and the Foreigner. A decade of tension around the rule of law in Europe*, (2007) Leiden: Nijhoff, 2007, 123-175.

¹⁵ G. Mythen, "Reappraising the Risk Society Thesis: Telescopic Sight or Myopic Vision?", (2007) 55(3) *Current Sociology* 793-813, 793-4.

¹⁶ U. Beck, "The Terrorist Threat: World Risk Society Revisited" (2002) 19(4) *Theory, Culture & Society* 39-55, 41.

¹⁷ U. Beck, 1992, *Risk Society: Towards a New Modernity*. London: Sage, 49.

terrorism to the list of different “dimensions” or “dynamics” of world risk society.¹⁹

A key idea associated with risk theory is that decision makers should take precautionary measures to prevent or minimise harm in circumstances where there is uncertainty about the exact nature and extent of the risk.²⁰

Risk society is global and universal²¹ and nobody is safe against phenomena such as pandemics, terrorist acts or global warming. When a risk, such as a nuclear explosion, eventuates it has catastrophic or irremediable effects.²² New technologies and the advances in science do not minimise but rather multiply risks; “genetic engineering, nanotechnology and robotics” open new Pandora’s boxes.²³ Because of the potentially disastrous scale of, for example, a terrorist attack, governments consider any chance that such an event may occur, no matter how small the probability, to be unacceptable, that is, “any degree of likelihood [is] too great to tolerate”. Ron Suskind has called this the One Per Cent

¹⁸ G. Mythen and S. Walklate, “Terrorism, Risk and International Security”, (2008) 39(2-3) *Security Dialogue* 221, 223. It is hard to pinpoint the exact time when ‘risk society’ supposedly came into existence, but I am more concerned with the post 9/11 period when terrorism ‘joined’ the myriad of other risks.

¹⁹ U. Beck, “The Terrorist Threat: World Risk Society Revisited”, (2002) 19(4) *Theory, Culture & Society* 39, 39-40

²⁰ P. O’Malley, *Risk, Uncertainty and Government*, Glasshouse Press: New York, 2004, 3.

²¹ G. Mythen and S. Walklate, “Criminology and Terrorism. Which Thesis? Risk Society or Governmentality?” (2006) 46 *British Journal of Criminology* 379, 384.

²² G. Mythen and S. Walklate, “Terrorism, Risk and International Security”, (2008) 39(2-3) *Security Dialogue* 221, 224.

²³ U. Beck “The Silence of Words and Political Dynamics in the World Risk Society” (2002) 1 *Logos* 1, 9.

Doctrine. Governments are guided by no more than "actionable suspicion" in the quest to prevent unknown disasters.²⁴

Thus, at the heart of risk society there is an unresolvable paradox because "while risk has been enormously productive of institutions, technologies of the self and new commodities, precaution is said to offer nothing."²⁵ Furthermore, some precautionary measures may be effective some of the time but, as Rasmussen puts it, "risks are infinite because they multiply over time since one can always do more to prevent them from becoming real."²⁶ As a result executive governments are forced to "feign control over the uncontrollable – in politics, law, science, technology, economy and everyday life."²⁷

The application of the principles of precaution in relation to terrorism assumes that terrorists act in a random and irrational manner,²⁸ similar to a virus, or a genetic mutation, which makes it impossible for governments to know what anticipatory measures to take. In the wake of the 9/11 terrorist acts, some have argued that "anything, anywhere is at risk."²⁹

²⁴ R. Suskind, *The One Per Cent Doctrine: Deep Inside America's Pursuit of Its Enemies Since 9/11*, New York: Simon and Schuster, 2006, 166 as cited in M. de Goede, "The Politics of Preemption and the War on Terror in Europe", (2008) 14(1) *European Journal of International Relations* 161, 164.

²⁵ P. O'Malley, *Risk, Uncertainty and Government*, Glasshouse Press: New York, 2004, 178.

²⁶ M.V. Rasmussen, *The Risk Society at War. Terror, Technology and Strategy in the Twenty-First Century*, Cambridge University Press, New York, 2004, 4.

²⁷ U. Beck "The Terrorist Threat: World Risk Society Revisted" (2002) 19(4) *Theory, Culture & Society* 39–55, 43.

²⁸ G. Mythen and S. Walklate, "Terrorism, Risk and International Security", (2008) 39(2-3) *Security Dialogue* 221, 225-6.

²⁹ M.V. Rasmussen, *The Risk Society at War. Terror, Technology and Strategy in the Twenty-First Century*, Cambridge University Press, New York, 2004, 4.

Governments are caught in a vicious cycle of their own creation: they must invent newer and ever more frantic measures whose effectiveness is both impossible to measure and perceived as inherently transient.³⁰ To borrow the former US Defence Secretary's phraseology, the risk of terrorism is managed as "an unknown unknown", a thing we do not know we do not know.³¹

Philip Bobbitt describes the way the West, and the US in particular, will be fighting 'terror' in the 21st century and introduces the term "preclusion".³²

Taking decisions to preclude a state of terror – whether by arresting a would-be terrorist who has yet to commit a crime, [or] by pre-empting a state that has yet to complete its acquisition of WMD ... depends upon estimates of the future. Rarely before have governments had to rely so heavily on speculation about the future because a failure to act in time could have such irrevocable consequences.

In the second section of this article we seek to demonstrate that courts sometimes adopt this view as well. This exercise in precaution turns on its head the principle that judicial power is about deciding "existing rights and duties... according to law. That is to say, it does so by the application

³⁰ M. Welch, "Sovereign impunity in America's war on terror: examining reconfigured power and the absence of accountability", (2007) 47 *Crime, Law and Social Change* 135-150, 137

³¹ *BBC News*, "Rum remark wins Rumsfeld an award", 2 December 2003.

Last accessed on 30 May 2008 at <http://news.bbc.co.uk/2/hi/americas/3254852.stm>. The full comment was "Reports that say that something hasn't happened are always interesting to me, because as we know, there are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns - the ones we don't know we don't know". Last accessed on 30 May 2008 at <http://news.bbc.co.uk/2/hi/americas/3254852.stm>.

³² Philip Bobbitt, *Terror and Consent*, New York, Alfred A. Knopf, 2008, 291.

of a pre-existing standard rather than by the formulation of policy or the exercise of an administrative discretion."³³ Critics of laws based on precaution have claimed that "[w]e are witnessing the end of criminal law"³⁴ and courts are part and parcel of this phenomenon.

Risk society theory, and the precautionary principle, provides a useful analytical tool in relation to judicial decision making post 9/11. In some cases courts adopt the language of risk society even though it is more likely than not that the judges are not aware of the ideas of Ulrich Beck. A good example is *Thomas*, a case analysed further in Section 2. In oral argument counsel for the executive government, compared terrorism to the threat of "invaders from outer space", "a rogue asteroid" hitting Australia or "migratory birds infected with avian flu."³⁵

The High Court of Australia adopted this discourse of risk society, on occasions verbatim from the executive government's (as the respondent in the litigation) oral submissions, eg eight reasons³⁶ which present an apocalyptic picture of what made Australia "particularly vulnerable" to a

³³ *Brandy v Human Rights Commission* [1995] HCA 10; (1995) 183 CLR 245, 268 as cited in *Thomas v Mowbray* [2007] HCA 33, Kirby J [306].

³⁴ Richard Ericson, *Crime in an Insecure World*, 2006 as cited in Andrew Goldsmith, "Preparation for Terrorism: Catastrophic Risk and Precautionary Criminal Law" A. Lynch, E. MacDonald and G. Williams (eds.), *Law and Liberty in the War on Terror*, Sydney: The Federation Press, 2007, 59-74, at 60.

³⁵ Transcript of hearing in the case of *Thomas v Mowbray* [2007] HCATrans 76 (20 February 2007). Last accessed on 28 April 2008 at <http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/HCATrans/2007/76.html>.

³⁶ *Thomas v Mowbray* per Heydon J, (2007) 237 ALR 194, 370-371; [2007] HCA 33, [647].

terrorist attack.³⁷ Australia faced an unprecedented and “frightening combination of circumstances”.³⁸

The scale and almost inestimable capacity of accessible, modern, destructive technology to cause harm, render attempts to draw analogies with historical atrocities ... unconvincing.

Counsel for Mr Thomas unsuccessfully argued that the government was merely making assertions about Australia’s increased vulnerability today compared to earlier periods in history. One of the High Court justices responded thus:³⁹

But it is going to escalate. As science discovers more ways of killing people you are going to get more and more – the threat is going to increase and it is no good saying, “Well, it was not a problem in the past”. I mean, each problem is an escalating problem.

To put the same idea in Foucauldian terms (see below at 1.2), some courts “govern themselves within the regimes of truth that surround the ‘national security’ in times of exceptional politics”.⁴⁰ On a practical level judges do not want to place national security at risk or be seen to be soft on (potential) terrorists.

³⁷ In additions, the Solicitor-General of Australia gave “the easy example perhaps of the terrorist who has access to an atomic weapon and there is a risk that if allowed free he will place it somewhere and explode it”. *Thomas v Mowbray* [2007] HCATrans 76 (20 February 2007). Last accessed on 28 April 2008 at <http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/HCATrans/2007/76.html>.

³⁸ *Thomas v Mowbray* per Callinan J [2007] HCA 33, [544]; (2007) 237 ALR 194, 342. Also Heydon J, [2007] HCA 33, [648]-[649]; (2007) 237 ALR 194, 371, rejected the argument that the government was making assertions as to possible future occurrences.

³⁹ *Thomas v Mowbray* [2007] HCATrans 78 (21 February 2006). Last accessed on 28 April 2008 at <http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/HCATrans/2007/78.html>.

⁴⁰ V. Jabri, “The Limits of Agency in Times of Emergency” in J. Huysmans, A. Dobson and R. Prokhovnik (eds.) *The Politics of Protection. Sites of Insecurity and Political Agency*, New York: Routledge, 2006, 145.

B. FOUCAULT AND GOVERNMENTALITY

Foucauldian theory yields a somewhat different theoretical analysis of various preventive justice measures than risk society theory. A Foucauldian approach focuses on the employing tactics to achieve certain ends rather than the objective reality, the laws or formal structures of government.⁴¹

Foucauldian theory views power as fragmented, dispersed or decentred⁴² and within this analytical framework courts do not stand in opposition to executive governments. The object and activity of government, including the judiciary, are not given or static; they have to be invented and learned.⁴³ A "rationality of government" (or "governmentality") then is about a "system of thinking about the nature of the practice of government, capable of making some form of that activity thinkable and practicable both to its practitioners and to those upon whom it was practised."⁴⁴ The other aspect of government, the "technology of government", encompasses the practical means through which a rationality is realised.⁴⁵

⁴¹ M. Foucault, "Governmentality" in G. Burchell, C. Gordon and P. Miller (eds), *The Foucault Effect: Studies in Governmentality*, Chicago, University of Chicago Press, 1991, 87-104, 95.

⁴² Y.-K. Heng and K. McDonagh, "The other War on Terror revealed: global governmentality and the Financial Action Task Force's campaign against terrorist Financing" (2008) 34 *Review of International Studies* 553-573, 561.

⁴³ G. Burchell, C. Gordon and P. Miller (eds), *The Foucault Effect: Studies in Governmentality* (Chicago, University of Chicago Press, 1991, x.

⁴⁴ *Ibid.*, 3.

⁴⁵ C. Aradau and R. van Munster "Governing Terrorism Through Risk: Taking Precautions, (un)Knowing the Future", (2007) 13(1) *European Journal of International Relations* 89, 97.

In this context, a “dispositif” of government consists of the combination of rationalities and technologies which influence behaviour and simultaneously “construct forms of ordered agency and subjectivity in the population to be governed as part of the social problem identified”,⁴⁶ whether it is global warming, taking action ostensibly to stop a state from developing weapons of mass destruction, fighting crime (drugs in particular) or the war on terror. Governmentality is based on perceptions, not necessarily on realities. Ulrich Beck himself, even though he is preoccupied with what he sees as a real (not imaginary) risk of terrorism, wrote soon after 9/11 that:⁴⁷

What is politically crucial is ultimately not the risk itself but the perception of the risk. What men fear to be real is real in its consequences – fear creates its own reality. [...] The perceived risk of terrorism, politically instrumentalised, unleashes security needs, which wipe out freedom and democracy, the very things which constitute the superiority of modernity.

Aradau and van Munster identify risk and precaution as being in the centre of the rationality of government vis-à-vis terrorism. They argue that “precautionary risk has emerged in the dispositif of risk to govern terrorism,”⁴⁸ where other technologies have proven fallible or

⁴⁶ *Ibid.*, 97.

⁴⁷ U. Beck, “The Cosmopolitan State”, *Eurozine*, 5 December 2001.

Last accessed on 20 December 2008 at <http://www.eurozine.com/articles/2001-12-05-beck-en.html>.

⁴⁸ *Dispositif* consists of “discourses, institutions, architectural forms, regulatory decisions, laws, administrative measures, scientific statements, philosophical, moral and philanthropic propositions.” M. Foucault, “The Confessions of the Flesh” in C. Gordon (ed.) *Power/Knowledge. Selected Interviews and Other Writings 1972–1977*, 194–228, New York: Pantheon Books, 1980, 194 as cited in C. Aradau and R. van Munster, “Governing Terrorism Through Risk: Taking Precautions, (un)Knowing the Future”, (2007) 13(1) *European Journal of International Relations* 89, 97.

insufficient.”⁴⁹ They claim that there is a move to “drastic prevention” in policies ranging from the hunt for Osama bin Laden ‘dead or alive’, the UK police shoot-to-kill policy, pre-emptive strikes against terrorist targets, indefinite detention and extraordinary ‘rendition’ to third states or indefinite detention.⁵⁰

What is interesting is that most scholars have not only focused their criticism almost exclusively on the executive but have further declared their faith in the judiciary’s ability (or at least in the judiciary’s role to endeavour) to act as a counterbalance to the executive.⁵¹

Critics of anti-terrorism measures taken after 9/11 claim that terrorism is a pretext for cynical executive governments to create “law free zones” in which “political will reigns and the rule of law has no purchase”.⁵²

Jef Huysmans says that an essential characteristic of liberal democracies is that political power is subjugated by the rule of law, i.e., subject to judicial control.⁵³ Political power exercised by the executive, when left unchecked, can lead to “the institutionalization of decisionist government”, that is:

⁴⁹ C. Aradau and R. van Munster “Governing Terrorism Through Risk: Taking Precautions, (un)Knowing the Future“, (2007) 13(1) *European Journal of International Relations* 89, 102.

⁵⁰ *Ibid.*, 103-104.

⁵¹ There are exceptions. Richard V. Ericson in his book *Crime in an Insecure World* 2006, Polity Press, speaks to the role of courts, among others, in the criminalization across domains as diverse as national security, social security, corporate security and domestic security.

⁵² This view is not universally held. Many scholars, particularly in the US argue that the precautionary approach is appropriate. For example, Tom Campbell criticises those who argue that courts should control executive power: “How can this be done without in effect replacing one lot of guardians with another and making the judges into those officials whose discretion is determinative”. T. Campbell, “Blaming Legal Positivims: A Reply to David Dyzenhaus”, (2003) 28 *Australian Journal of Legal Philosophy* 31, 32.

⁵³ J. Huysmans, “Minding Exceptions: The Politics of Insecurity and Liberal Democracy”, (2004) 3(3) *Contemporary Political Theory* 321, 329.

[A] reduction of the state to the moment of the decision, to a pure decision not based on reason and discussion and not justifying itself, that is, to an absolute decision created out of nothingness'. This nothingness refers to a normative vacuum, that is, absence of rule of law.⁵⁴ (footnotes omitted).

Michel Coutu and Marie-Hélène Giroux contrast “normative” and “decisionist” legitimacy. The former is based on the rule of law and the compulsory character of legal norms. The latter is essentially political and alien to the rule of law.⁵⁵ Thus, “petty sovereigns” within the government bureaucracy, rather than judges, make “pre-legal security decisions” for which they are not held to account.⁵⁶ Clive Walker criticises decision-making which is “in the hands of less experienced and more politically motivated government ministers as opposed to detached judges”.⁵⁷ In the context of refugee law, Guy Goodwin-Gill argues against governments seeking to assume “potentially unaccountable power”, especially since 9/11.⁵⁸

Even members of the judiciary criticise the executive. The House of Lords’ Lord Steyn spoke extra-judicially about the executive branch “often resort[ing] to excessive measures” and then added that the “litany

⁵⁴ *Ibid.*, 329

⁵⁵ M. Coutu and M-H. Giroux, “The Aftermath of September 11: Liberty v Security before the Supreme Court of Canada”, (2006) 18(2) *International Journal of Refugee Law* 313, 318.

⁵⁶ M. de Goede, “The Politics of Preemption and the War on Terror in Europe”, (2008) 14(1) *European Journal of International Relations* 161, 176.

⁵⁷ C. Walker, “Keeping Control of Terrorists Without Losing Control of Constitutionalism”, (2007) 59 *Stanford Law Review* 1395, 1402.

⁵⁸ G. Goodwin-Gill, “Refugees And Responsibility In The Twenty-First Century: More Lessons Learned From The South Pacific” (2003) 12 *Pacific Rim Law and Policy Journal* 23, 30.

of grave abuses of power by liberal democratic governments is too long to recount."⁵⁹

We argue that such categorical statements reveal a lack of awareness about the history of deference by the judiciary in times of emergency; and a certain naïve expectation that the executive and the judiciary stand in opposition to each other with the judiciary displaying its true role as the guardian of individual human rights.

Even Aradau and van Munster's otherwise excellent insights exclude the judicial branch of government. They contrast administrative (executive) decision making seeking to eliminate all risk with "careful" juridical decision.⁶⁰ They refer to the turn of precaution deployed by "managers of unease", i.e., the executive government. One of their examples is Tony Blair's explanation for reaching the decision to intervene in Iraq based on "intelligence".⁶¹

Aradau and van Munster go even further and claim that in some instances the logic of precaution is "impossible to accommodate by the juridical system." They give the example of administrative detention where the burden of proof is on suspects, rather than on the authorities, to show that they are innocent of criminal acts.⁶²

⁵⁹ Lord Steyn, "Guantanamo Bay: The Legal Blackhole", Twenty-Seventh F.A. Mann Lecture, 25 November 2003, 2. Last accessed on 26 May at <http://www.statewatch.org/news/2003/nov/guantanamo.pdf>.

⁶⁰ C. Aradau and R. van Munster "Governing Terrorism Through Risk: Taking Precautions, (un)Knowing the Future", (2007) 13(1) *European Journal of International Relations* 89, 106.

⁶¹ T. Blair, (2004) *Prime Minister Warns of Continuing Global Terror Threat*. Prime Minister's Speech, 5 March; <http://www.number10.gov.uk/output/Page5461.asp> as cited in C. Aradau and R. van Munster "Governing Terrorism Through Risk: Taking Precautions, (un)Knowing the Future", (2007) 13(1) *European Journal of International Relations* 89, 105.

⁶² C. Aradau and R. van Munster "Governing Terrorism Through Risk: Taking Precautions, (un)Knowing the Future", (2007) 13(1) *European Journal of International Relations* 89, 106.

We wish to take the investigation of the dispositive of risk a step further to encompass courts as a rationality of government – through legal reasoning – and technology of government – through the powers the courts possess.⁶³ We argue that the judicial system seeks to cope with the logic of precaution in exactly the same way as the other two branches of government. The cases we analyse indicate that precaution has become part of legal reasoning and, more often than not, judges do not express the view that their powers have been curtailed or that individual liberties have been sacrificed.

C. THE JUDICIARY IN TIMES OF EMERGENCY AND THE TURN TO PRECAUTION

For some observers the behaviour of courts since the war on terror commenced is neither new nor surprising. A number of legal scholars, analysing the role of courts from the American Civil War through to the post 9/11 era argue that “when faced with national crises, the judiciary tends to “go [] to war”⁶⁴ and the “history of the judiciary in times of emergency and alleged emergency is a dismal one of judges deferring to executive claims.”⁶⁵

⁶³ We are not concerned with the distinction between “bio-powers” and the “juridical system of the law” as explained by F. Ewald, “Norms, Discipline and the Law,” (1990) 30 *Representations* 138-161, 139. Juridical here refers to the power of courts.

⁶⁴ O. Gross, “Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional”, (2003) 112, *Yale Law Journal* 1011, 1034. See also M. Tushnet, “Defending *Korematsu*?: Reflections on Civil Liberties in Wartime, (2003) *Wisconsin Law Review* 273. Cf. D. Cole, “Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis”, (2003) 101 *Michigan Law Review* 2565.

⁶⁵ D. Dyzenhaus and R. Thwaites, “Legality and Emergency – The Judiciary in a Time of Terror” in A. Lynch, E. MacDonald and G. Williams (eds.), *Law and Liberty in the War on Terror*, Sydney: The Federation Press, 2007, 9-27, at 9. See also D. Bonner, “Checking the Executive? Detention Without Trial, Control Orders, Due Process and Human Rights”, (2006) 12(1) *European Public Law* 45.

Oren Gross states that "when grave national crises are upon us, democratic nations tend to race to the bottom as far as the protection of human rights and civil liberties, indeed of basis and fundamental legal principles is concerned."⁶⁶ But he then goes on to propose an Extra-Legal Measures model in times of emergency allowing the executive to "deviate from existing legal principles, rules, and norms."⁶⁷

In such times courts side with the executive and choose survival. The US and UK engaged in mass internment during the two World Wars and courts sanctioned it.⁶⁸

In the extra-judicial speech about Guantanamo Bay mentioned earlier Lord Steyn referred to a case where the House of Lords upheld the validity of a law under which a foreign national was interned in the UK during the Second World War:⁶⁹

Too often courts of law have denied the writ of the rule of law with only the most perfunctory examination. In the context of a war on terrorism without any end in prospect this is a sombre scene for human rights. But there is the caution that unchecked abuse of power begets ever greater abuse of power. And judges do have the

⁶⁶ O. Gross, "Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional", (2003) 112, *Yale Law Journal* 1011, 1132.

⁶⁷ *Ibid.*, 1111.

⁶⁸ M. Stibbe, "The Internment of Civilians by Belligerent States during the First World War and the Response of the International Committee of the Red Cross", (2006) 41 *Journal of Contemporary History* 5. See also D. Bonner, "Checking the Executive? Detention Without Trial, Control Orders, Due Process and Human Rights", (2006) 12(1) *European Public Law* 45.

⁶⁹ Lord Steyn, Lord of Appeal in Ordinary of the House of Lords, "Guantanamo Bay: The Legal Blackhole", Twenty-Seventh F.A. Mann Lecture (25 November 2003), 2. Last accessed on 26 May at <http://www.statewatch.org/news/2003/nov/guantanamo.pdf>. The case was *Liversidge v Anderson*, [1942] AC 206.

duty, even in times of crisis, to guard against an unprincipled and exorbitant executive response.

Preventative justice is evident not only in relation to anti-terrorism laws but also, for example, for the detention of dangerous offenders who may commit further offences if released.⁷⁰ Seen from this perspective, Beck's risk society theory does not have much to offer. One can analyse new terrorism laws as an extension of existing criminal laws to the new circumstances of terrorism, rather than a recent invention to cope with unprecedented catastrophic "bads" in risk society. For some time now there has been a general move towards prevention, precaution, preclusion, pre-emption or predetection from criminal law and immigration through to business and dieting. Court sanctioned preventative measures in various countries precede the war on terror.

A Foucauldian analysis is somewhat more insightful than a risk society approach. Robert Castel wrote as early as 1991 that:⁷¹

These preventative policies thus promote a *new mode of surveillance*: that of systematic predetection. This is a form of surveillance in the sense that the intended objective is that of anticipating and preventing the emergence of some undesirable event: illness, abnormality, deviant behaviour, etc. (italics in the original)

One can go much further back in time. The German Criminal Code introduced preventive detention for dangerous criminals in 1933⁷² and these provisions continue to be in use. Several other European states have

⁷⁰ See Section, at 2.1.

⁷¹ R. Castel, "From dangerousness to risk" " in G. Burchell, C. Gordon and P. Miller (eds), *The Foucault Effect: Studies in Governmentality*, Chicago, University of Chicago Press, 1991, 281-298, 288.

⁷² See the European Court of Human Rights decision as to admissibility in *M v Germany*, 1 July 2008, Application no. 19359/04. At para 41.

legislation allowing for the preventive detention of offenders of sound mind.⁷³

We argue that in some respects the war on terror is no more than the latest example of judges *not* protecting individuals against an unprincipled executive. Curiously, in a UK House of Lords case decided in October 2001 – *Rehman* – the same Lord Steyn thought it self evident that in matters of national security courts must be deferential and give great weight to the views of the government.⁷⁴ Lord Hoffmann held that whether or not something was “in the interests of national security” was a matter of judgment and policy and thus a matter for the executive, not for the judiciary, to determine.⁷⁵

The House of Lords in *Rehman* had reached its decision prior to 11 September 2001, but the reasons were not published until October 2001. Some law lords added a postscript in this intervening period, underlining how deferential courts should be to the other two branches of government:⁷⁶

[S]uch decisions [relating to terrorism], with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process.

For Lord Slynn, the executive “is entitled to have regard to the precautionary and preventative principles” based on “material on which

⁷³ Austria, Italy, Liechtenstein, San Marino, Slovakia and Switzerland. See the European Court of Human Rights decision as to admissibility in *M v Germany*, 1 July 2008, Application no. 19359/04. At para. 67.

⁷⁴ *Ibid.*, Lord Steyn, [31].

⁷⁵ Section 15(3) *Immigration Act 1971*. *Rehman v Home Secretary* [2001] UKHL 47, [50].

⁷⁶ *Ibid.*, Lord Hoffmann, [62].

proportionately and reasonably [the executive] can conclude that there is a real possibility” of some harmful future acts.⁷⁷

According to Lord Steyn, in the context of the war on terrorism, and the relevant legislation, the appropriate standard of proof was that the person concerned *may* be (rather than more likely than not to be) a real threat to national security.⁷⁸ Lord Hoffmann observed that “the whole concept of a standard of proof is not particularly helpful”.⁷⁹

In the more recent case of *Suresh*, the Supreme Court of Canada expressed similar views, i.e., that courts should be deferential. Judicial review, the Court said, should only succeed where the Minister’s decision was patently unreasonable.⁸⁰ In addition, the Court did not take issue with the decision of Parliament to set a low standard of proof.⁸¹

Apart from the less than glorious history of the judiciary in times of crisis, we make a second criticism of observers who expect the courts to stand up for the rights of the individual. Constructing a simple opposition between the executive and judicial branch misses the point that the judiciary is part of government, that opposition “assumes law and force to be opposite and disregards the important implications of what Jacques Derrida calls the ‘force of law’”.⁸² As Louise Amoore argues, within the logic of risk “it is

⁷⁷ *Ibid.*, Lord Slynn, [22].

⁷⁸ *Ibid.*, Lord Steyn, [29].

⁷⁹ *Ibid.*, Lord Hoffman, [56].

⁸⁰ *Suresh* 2002 SCC 1 (CanLII), [32]; [2002] 1 S.C.R. 3, 25.

⁸¹ The threat of danger to national security must be serious, meaning that “it must be grounded on objectively reasonable suspicion based on evidence and in the sense that the threatened harm must be substantial rather than negligible” *Ibid.*, 2002 SCC 1 (CanLII), [90]; [2002] 1 S.C.R. 3, 51.

⁸² M. de Goede, “The Politics of Preemption and the War on Terror in Europe”, (2008) 14(1) *European Journal of International Relations* 161, 179.

not the case that "law recedes" as risk advances, but rather that law itself authorizes a specific and particular mode of risk management."⁸³

The flurry of legislative and executive activity since 9/11 terrorism can be seen as the latest, and not unexpected, extension of existing criminal laws. Aims such as keeping dangerous criminals in prison, keeping immigrants, alleged terrorists or sex offenders "under control" have become a *rationality* of government in the manner in which members of the judiciary decide cases. Simultaneously, judicial decision making – such as the imposition of preventive detention or control orders – is a *technology* of government. It is one more step along the way of pre-emption, prevention or preclusion. In Section 2.1 of this article we look at preventative laws in various legal contexts in Australia, Canada and the UK.

Courts often emphasise that in exercising their power they have to balance competing interests such as the interest of the state (sometimes its survival) or of the majority against an individual's human rights.⁸⁴ Some of the cases reviewed in Section 2 show that the judiciary does not reason in terms of a simple dichotomy – individual human rights versus state power. Instead, they refer to the human rights discourse but, ultimately, often arrive at an outcome where individual human rights are curtailed. There is a related problem, namely, the development of human rights law is lagging behind some of the more novel aspects of "preventative justice" eg, various means of restricting freedom of movement that do not amount to deprivation of liberty or non-punitive detention at after a person has served his sentence. We consider some of these issues under the heading human rights and precaution in Section 2.2.

⁸³ L. Amore, "Risk Before Justice: When the Law Contests its own Suspension", (2008) 21(4) *Leiden Journal of International Law*, 847-861, 850.

⁸⁴ The US Supreme Court's Chief Justice Rehnquist said that in a "civilized society the most important task is achieving a proper balance between freedom and order. In wartime, reason and history both suggest that this balance shifts to some degree in favor of order – in favor of the government's ability to deal with conditions that threaten the national well-being". W. H. Rehnquist, *All the Laws But One: Civil Liberties in Wartime*, 1998, New York: Random House, 222-3 as cited in O. Gross, "Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional", (2003) 112, *Yale Law Journal* 1011, 1020-1021.

The turn to precaution and the perception of vulnerability affect the way in which governments and courts analyse global threats. The fight against terrorism – unknown unknowns – creates one more paradox. In traditional wars sovereign states fight against each other. In the global war on terror sovereign states seek to survive by taking global measures (eg passing of similar anti-terrorist laws or participating in a UN resolution). At the same time the threat, perceived or real, comes from non-state actors thus creating the need for states to take preventive measures of unknown efficacy against unknown for an unknown length of time. But the individuals who represent the global enemy are not unknown, or at least not unknowable. The enemy is the Muslim convert who happened to be in Afghanistan in 2001, the Muslim man who is in the UK and apparently wants to go to Iraq against Coalition troops; the Moroccan man who cannot give a satisfactory explanation for his trips from Canada. We return to these issues, the sovereignty-globalisation tension in the context of precaution, in the last part of Section 2, 2.3 entitled Sovereignty v global threats and solutions.

II. PREVENTATIVE JUSTICE

As pointed out in Section 1, some varieties of preventative justice have been around for a long time. In this section, we claim that the reach of the recent legislation is unprecedented and yet the judiciary has upheld the validity of these radical new laws. The cases we analyse relate to “control order” laws in Australia and the UK and certificates of inadmissibility (coupled with detention) in Canada.

After 9/11 the UK and then the Australian Parliament passed “control order” legislation. It allows the executive (in the UK) or the judiciary (in Australia) to impose obligations such as staying inside one’s house for 12 hours a day or more, prohibitions on the use of communication devices, a requirement to wear a tracking device and to report at specified times and places and so on.⁸⁵ In Canada, a person can be declared “inadmissible” by

⁸⁵ For the Australian legislation see *Criminal Code 1995*, Div 104, Section 104.5(3). For the UK legislation see *Prevention of Terrorism Act 2005*. In *Home Secretary v JJ* [2007] UKHL 45 the obligations included remaining within one’s house/apartment for 18 hours

the executive government⁸⁶ on, inter alia, security grounds, i.e., for being engaged in terrorism, being a danger to the security of Canada, engaging in violence that might endanger the lives or safety of people in Canada, or being a member of a certain type of organisation.⁸⁷ If the person is already in Canada (as opposed to a person trying to enter Canada), they can be detained and then deported. At an initial review, and periodic reviews thereafter,⁸⁸ a court may release a person⁸⁹ but impose conditions very similar to a “control order”.⁹⁰

It is not the aim of this article to judge whether such anticipatory measures achieve the results governments claim they seek to achieve, but we argue that preventive detention of serious convicted criminals, or refusing a crime suspect bail, is significantly different to the detention pursuant to this new variety of criminal preventive detention: the preventive measures

a day. When allowed out, between 10am to 4pm, the controlled persons were confined within an area not bigger than 72 km².

⁸⁶ Two Ministers must sign the certificate. Section 77 of the *Immigration and Refugee Protection Act 2002*.

Security certificates have existed as a part of Canadian law since the 1990s. As of early 2007 a total of about twenty-seven (five after 11 September 2001) such certificates, had been issued. See J. Ip, “Comparative Perspectives on the Detention of Terrorist Suspects”, (2007) 16 *Transnational Law and Contemporary Problems* 773, 802.

⁸⁷ An organization that there are reasonable grounds for believing has engaged, engages, or will engage in terrorist acts.

⁸⁸ Before the Supreme Court decision the detention of foreign nationals, ie, non permanent residents was mandatory upon the issuing of the inadmissibility certificate and a separate order was not necessary. The detention of foreign nationals was not reviewed within 48 hours.

⁸⁹ Sections 77(1) and 80 of the *Immigration and Refugee Protection Act 2002*. There is a very large number of court cases brought by Mr Charkaoui, but it appears that the reasonableness of the security certificate has not been determined by a court. In the 2005 case on detention the Court makes mention of the fact that the certificate has not been confirmed. *Re Charkaoui* (2005) FC 248, Noël J, [3].

⁹⁰ Section 84 of the *Immigration and Refugee Protection Act 2002*.

are against someone who has not committed a crime (or there is not enough evidence to charge them) and even against people who may never attempt to commit an offence. These laws do not go together with laws aimed at punishing. They are entirely targeted towards preventing something from occurring in the future; these laws deploy *radical precaution*.

A. AUSTRALIA

In relation to criminal laws, in 2004 the High Court of Australia declared valid legislation allowing the detention of a sex offender who has served his or her sentence, but poses a risk of future offending.⁹¹ Both the detention of a convicted sex offender after the end of his or her sentence and the *Criminal Code* “control orders” are directed towards the future. A sex offender can only be kept in detention pursuant to “cogent evidence” and “to a high degree of probability” that they constitute an unacceptable risk⁹² having regard to psychiatric and other evidence.⁹³ In addition, they have already been convicted of serious offences by a court satisfied of their guilt beyond reasonable doubt.

By contrast, the post 9/11 criminal legislation is almost entirely based on the precautionary principle, on the One Per Cent doctrine. To impose a control order the “issuing court” has to be satisfied only on the balance of probabilities that making it would substantially assist in preventing a terrorist act; *or* the person has provided training to, or received training from, a listed terrorist organisation; and the measures imposed (curfew,

⁹¹ *Thomas v Mowbray* (2007) 237 ALR 194; [2007] HCA 33. Per Gleeson CJ, 206-207; [18]; per Gummow and Crennan JJ, 222, 229-230; [79], [114]-[121]; per Callinan J, 356-357; [595]-[600]. In *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 the High Court of Australia upheld the validity of legislation detaining sex offenders considered to be an “unacceptable risk”.

⁹² Section 13(3)(a) and (b), *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld).

⁹³ Section 13(4), *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld).

reporting conditions, etc) are reasonably necessary, and appropriate and adapted to protect the public from a terrorist act.⁹⁴

The relevant law was challenged in the case of *Thomas v Mowbray*.⁹⁵ The case is unusual because the legislation in question provided that the court, not the executive, imposes the control orders.⁹⁶ An "issuing court" had found⁹⁷ that because of Mr Thomas's association with Al-Qaida, he was "an available resource that can be tapped into" to commit terrorism offences. He was, according to the court, vulnerable and possibly susceptible to the views of extremists.⁹⁸ The Court was therefore satisfied on the balance of probabilities that the measures imposed would serve the purpose of protecting the public from a terrorist act. The 2006 control order imposed on Thomas included, inter alia, a condition that he not contact Osama bin Laden.⁹⁹

Mr Thomas argued in the High Court of Australia that the imposition of the order by the judiciary breached the separation of powers doctrine.¹⁰⁰ He argued further that the "issuing court" would have to exercise powers antithetical to the judicial function, i.e., it would have to make various predictions and conjectures instead of adjudicating on his guilt for past

⁹⁴ *Criminal Code 1995*, Div 104, Section 104.4(c) and (d).

⁹⁵ (2007) 237 ALR 194 ; [2007] HCA 33.

⁹⁶ The Court referred to Mr Thomas' argument that the legislation is invalid because it confers non-judicial power on courts as "curious". *Ibid.*, Callinan J, 355; [592].

⁹⁷ On the basis of the same evidence which in the criminal proceedings was held to have been improperly obtained.

⁹⁸ *Jabbour v Thomas* [2006] FMCA 1286 (27 August 2006).

⁹⁹ T. Allard, "Jihad Jack Wife Terror Link", *Sydney Morning Herald* (29 August 2006). Last accessed on 8 July 2008 at <http://www.smh.com.au/news/national/jihad-jack-wifes-terror-link/2006/08/28/1156617275236.html>

¹⁰⁰ *Thomas v Mowbray* (2007) 237 ALR 194; [2007] HCA 33. Per Gleeson CJ, 205; [15].

acts. A majority of the Court rejected both of Mr Thomas' lines of argument.¹⁰¹

Chief Justice Gleeson, for example, found a reference to the concept of "preventive justice" dating back to the 18th century. The concept was discussed by the famous 18th century jurist Blackstone:¹⁰²

This preventive justice consists in obliging those persons, whom there is probable ground to suspect of future misbehaviour, to stipulate with and to give full assurance to the public, that such offence as is apprehended shall not happen...

In dismissing the argument that only criminal convictions should impose control order type restrictions, the majority justices drew various analogies with judicial orders where deprivation of liberty or other restraints are not incidental to the adjudication and punishing of criminal guilt for past behaviour such as an order for the continued detention of a sex offender, as discussed above.

However, control orders are different in several key aspects. As Kirby J in his dissent in *Thomas* concluded, a person may be made subject to a control order:¹⁰³

[N]ot 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

¹⁰¹ Kirby and Hayne JJ dissented.

¹⁰² Blackstone, *Commentaries on the Laws of England*, (1769), Bk IV at 248 as cited in *Thomas v Mowbray* (2007) 237 ALR 194; [2007] HCA 33, per Gleeson CJ, 205; [16]. See also per Gummow and Crennan JJ, 219-220; [73]-[77]; per Callinan J, 291-292; [591]-[600].

¹⁰³ *Ibid.*, Kirby J, 291-292; [354]. His view that the law may lead to "the loss of liberty, potentially extending to virtual house arrest" was not shared by the majority. Hayne J, 328; [499], said the issuing court will have to engage in "prognostication".

criterion if ever there was one. [...] This invites the question: if the community of nations, with all of its powers and resources, cannot agree on what precisely "terrorism" is (and how it can be prevented), how can one expect a [...] court in Australia to decide with consistency and in a principled (judicial) way what is reasonably necessary to protect the public from a terrorist act?

Kirby J and the other dissenting justice, Hayne J, in separate reasons held that there was no ascertainable test or standard on the basis of which a court could decide whether to grant or refuse to make an order.¹⁰⁴ The task that a court would perform was so indeterminate that it was not the exercise of judicial power.¹⁰⁵ It was not appropriate for the judiciary to "consider future consequences the occurrence of which depends upon work done by police and intelligence services that is not known and cannot be known or predicted by the court."¹⁰⁶ Decision making would necessitate "evaluative judgments", or the court's "own idiosyncratic notion as to what is just",¹⁰⁷ in relation to "diffuse, fragmentary and even conflicting pieces of intelligence", which should be done by the executive.¹⁰⁸ It is "quintessentially" for the legislative and executive branches, not the judiciary, to decide how to protect the public for terrorism.¹⁰⁹

There was thus an implication even in the minority judgments, especially that of Justice Hayne, that it is reasonable for such a power to be exercised by the executive. With respect, whether a court or the executive exercises

¹⁰⁴ *Ibid.*, per Hayne J 321; [468]; per Kirby J, 281-282; [321]-[322].

¹⁰⁵ *Ibid.*, per Hayne J 327; [495].

¹⁰⁶ *Ibid.*, per Hayne J 323-324; [476].

¹⁰⁷ *Ibid.*, per Hayne J 332; [516].

¹⁰⁸ *Ibid.*, per Hayne J 330-331; [510].

¹⁰⁹ *Ibid.*, per Hayne J 329; [504]; per Kirby J, 280; [317].

this type of power, it appears to be an instance of “decisionism”, or the application of the One Per Cent doctrine, by its very nature:¹¹⁰

[W]hen evidence is uncertain, the responsibility of the ‘suspected terrorist’ is a matter of decision. This decision is no longer the juridical decision for which careful consideration of evidence is necessary, but becomes an administrative decision, where the rule of zero risk takes precedence.

Dyzenhaus and Thwaites criticise the minority justices for “exhibit[ing] an anachronistic attitude to the administrative state and to give up on the hope of having the rule of law control the war on terror”,¹¹¹ although exactly how the court was supposed to “control the war on terror” was left unclear. As the same authors say, it might be that “preventative measures can never sufficiently conform to the rule of law to make them a legitimate measure for a constitutional state to adopt.”¹¹²

The control order regime does not allow for deprivation of liberty as such. The majority in *Thomas*¹¹³ stated that detention (eg under the sex offenders legislation) “differs significantly in degree and quality from what may be entailed by observance of an interim control order”.¹¹⁴ But in his analysis of the *Thomas* decision Justin Gleeson has argued that the judiciary would probably uphold the validity of a (hypothetical) law

¹¹⁰ C. Aradau and R. van Munster “Governing Terrorism Through Risk: Taking Precautions, (un)Knowing the Future”, (2007) 13(1) *European Journal of International Relations* 89, 106.

¹¹¹ D. Dyzenhaus and R. Thwaites, “Legality and Emergency – The Judiciary in a Time of Terror” in A. Lynch, E. MacDonald and G. Williams (eds.), *Law and Liberty in the War on Terror*, Sydney: The Federation Press, 2007, 9-27, 24.

¹¹² *Ibid.*, 18.

¹¹³ As mentioned above, footnote 103, in *Thomas v Mowbray* (2007) 237 ALR 194; [2007] HCA 33, Kirby J, 291-292; [354], considered that a control order may amount to deprivation of liberty in some circumstances.

¹¹⁴ *Ibid.*, Gummow and Crennan JJ, 229; [116]. Cf J. Renwick, “Counter Terrorism and Australian Law” (2007) 3(3) *Security Challenges* 67, 73.

authorising the detention/imprisonment of a person upon proof that he or she is a member of a proscribed organisation as long as the court forms a view that imprisonment is necessary to protect the public.¹¹⁵

B. CANADA

The Supreme Court of Canada upheld preventive, criminal detention legislation relating to convicted dangerous offenders as far back as 1987, but remarked that detention for the sole purpose of preventing the commission of a future offence would violate the Charter.¹¹⁶ In 2007 in the case of *Charkaoui v Canada (Citizenship and Immigration)*¹¹⁷ the Supreme Court “adapted” the purpose of the legislation to the migration law context and concluded that the periodic review of the detention by a court meant that the law in question did not contravene the Charter as the review meant that detention was not indefinite.¹¹⁸ The Supreme Court added that “foreign nationals can apply for release and depart from Canada at any time.”¹¹⁹ The Court found that there was a rational foundation for the detention of foreign, namely, the signing of a certificate that he or she was a danger.¹²⁰

In *Charkaou* a Canadian permanent resident and another person, a “foreign national”, argued that the law breached certain provisions of the Canadian Charter of Rights and Freedoms.

¹¹⁵ J. Gleeson, “*Thomas v Mowbray*”, Paper presented at ANU 12th annual public law weekend, 11 November 2007. Last accessed on 1 May 2008 at http://www.banco.net.au/pdf/j-g_articles/ThomasEvMowbrayPaper11_11.pdf, 16-17.

¹¹⁶ *R. v Lyons*, [1987] 2 S.C.R. 309, per LaForest J, 327-28.

¹¹⁷ *Charkaoui v. Canada (Citizenship and Immigration)* (Charkaoui) 2007 SCC 9; [2007] 1 S.C.R. 350.

¹¹⁸ *Ibid.*, [107] and [127]; 408 and 415.

¹¹⁹ *Ibid.*, [90]; 401-402.

¹²⁰ *Ibid.*, [89]; 401..

The case is another excellent example of the logic of precaution in action. The matter went through several courts before reaching the Supreme Court. Some of the courts emphasised the need to employ the precautionary approach in national security matters:¹²¹

Situations and entities that pose a threat to national security are often difficult to detect and are designed to strike where society is most vulnerable. Attacks against national security can have tragic consequences. People who pose a danger to national security are [...] difficult to identify and their borderless networks are often difficult to infiltrate. They strike when least expected. Where national security is involved, we must do everything possible to avert catastrophe. The emphasis must be on prevention. After all, the security of the state and the public are at stake. Once certain acts are perpetrated, it could be too late.

In 2003 Mr Charkaoui found himself detained after the executive issued an “inadmissibility” certificate and the Federal Court agreed that Mr Charkaoui continued to be a danger to Canada’s national security. The Federal Court said that the executive “linked” Mr Charkaoui to violence.¹²² The “link” was that Mr Charkaoui was a karate enthusiast:

In the past, it has been observed that some individuals involved with Al-Qaeda are devoted to the practice of karate and/or the martial arts. In particular Ziad Jarrah, who was part of the group that hijacked American Airlines Flight 93, had trained in the martial arts in preparation for the September 11, 2001 operation.

The Federal Court seemed to accept the logic of the executive, even though an interest in karate in itself is not proof of anything; this fact acquired a certain significance when taken together with other facts eg the fact that Mr Charkaoui is a Muslim and from Morocco, rather than, for example a Zen Buddhist from Japan.

¹²¹ *Charkaoui* 2003 FC 1419 (CanLII), [126].

¹²² *Re Charkaoui*, 2003 FC 882 (CanLII), [50]; [2004] 1 F.C.R. 528, 548-9.

This is an example of the “prosaic” or “banal face of pre-emption” based on everyday activities or interests.¹²³ The Court applied the logic of radical precaution further. The lack of evidence that Mr Charkaoui plans to commit a crime turns into sinister evidence that he is a “sleeper agent”. The Court accepted that the executive “expressly and unequivocally associate[d] the [Mr Charkaoui] with a sleeper agent in the bin Laden network”,¹²⁴ despite the total lack of positive evidence of such “membership” or “association”.¹²⁵

In a subsequent hearing in 2004 the Court had “difficulty seeing any conceivable conditions that might neutralize this serious danger“, whatever the danger might be.¹²⁶ Somehow, the onus was on Mr Charkaoui to present evidence “that might allow [the Court] an understanding of this danger“ and since Mr Charkaoui failed to do so the Court could not see how the danger could be “alleviated or neutralized.”¹²⁷ In 2005, after the fourth detention review, Mr Charkaoui was released from detention,¹²⁸. The Court imposed severe restrictions on Mr Charkaoui’s freedom of movement, equivalent to control orders in Australia and the UK,¹²⁹ to ensure that the “neutrality” of the danger

¹²³ L. Amore and M. de Goede, “Transactions after 9/11: the banal face of the preemptive strike” (2008) 33(2) *Transactions of the Institute of British Geographers* 173-185, 174.

¹²⁴ *Re Charkaoui*, 2003 FC 882 (CanLII), [51]; [2004] 1 F.C.R. 528, 549.

¹²⁵ *Ibid.*, [13]; 537.

¹²⁶ *Re Charkaoui* 2004 FC 1031 (CanLII), [39]

¹²⁷ *Ibid.*, [39]

¹²⁸ *Re Charkaoui* 2005 FC 248 (CanLII), [1]; (2005), 3 F.C.R. 389, 394-5.

¹²⁹ Curfew for 11 ½ hours a day, and at other times Mr Charkaoui had to be accompanied, wear an electronic tag; could not use of communication devices, etc. *Ibid.*, [86]; 422-23.

continued.¹³⁰ The “danger” had somehow inexplicably not only decreased, it had been neutralized.¹³¹

C. UK

The UK control order legislation purports to be in accordance with the *Human Rights Act 1998* and the European Convention on Human Rights (ECHR). The European Court of Human Rights (ECtHR) jurisprudence makes it clear that Art 5 of the ECHR, which guarantees the right to liberty and security of the person, does not permit preventative deprivation of liberty, not even to prevent the commission of a terrorist act.¹³²

However, preventative restrictions on the freedom of movement may not contravene Art 5 of the ECHR, where they do not amount to deprivation of liberty. In *Labita*, restrictions were imposed on a person considered “dangerous” because suspected (“on the basis of inferences, full proof being required only to secure a conviction”)¹³³ of being a member of the Mafia. The ECtHR agreed with the Italian court:¹³⁴

[I]t is legitimate for preventive measures, including special supervision, to be taken against persons suspected of being members of the Mafia, even prior to conviction, as they are intended to prevent crimes being committed. Furthermore, an acquittal does not necessarily deprive such measures of all foundation, as concrete evidence gathered at trial, though insufficient to secure a conviction, may nonetheless justify

¹³⁰ *Ibid.*, [83]; 422.

¹³¹ *Ibid.*, [75]; 420.

¹³² See Art 5(1)(b) and *Engel v Netherlands*, judgment of 8 June 1976, Series A, No 22 (1979-80) 1 EHRR 647, [69].

¹³³ *Labita v Italy*, judgment of 6 April 2000, application No. 26772/95, [65].

¹³⁴ *Ibid.*, [195].

reasonable fears that the person concerned may in the future commit criminal offences.

As long as the restrictions are not severe enough to amount to deprivation of liberty, they are permissible.¹³⁵

Under the post 9/11 UK legislation the Home Secretary (the executive) can make a control order if he or she has reasonable grounds for suspecting that an individual is involved in terrorism-related activity, and consider that it is necessary to make a control order imposing obligations on that individual in order to protect the public from a risk of terrorism.¹³⁶ This is subject to judicial review.¹³⁷

The argument that control orders constitute “deprivation of liberty”, contrary to Art 5 of the ECHR was argued in *Home Secretary v JJ*, *Home Secretary v MB* and *Home Secretary v E*.¹³⁸

In *Home Secretary v JJ*¹³⁹ the House of Lords followed the jurisprudence of the ECHR with respect to what constitutes deprivation of liberty: there is no bright line, only a difference of degree and intensity, between deprivation of liberty and restriction or control which would not engage Art 5(1).¹⁴⁰ In deciding on which side of the line a control order falls, a court takes account of matters such as the type, duration, effects and manner of implementation of the measure in question. Each case depends

¹³⁵ Article 2 of Protocol 4 to the Convention guarantees freedom of movement. The control orders may be in breach of this provision but the UK is not a party to the Protocol.

¹³⁶ Section 2(1).

¹³⁷ Sections 3(2), (10) and (11).

¹³⁸ *Home Secretary v JJ* [2007] UKHL 45; *Home Secretary v MB* [2007] UKHL 46; *Home Secretary v E* [2007] UKHL 47.

¹³⁹ [2007] UKHL 45.

¹⁴⁰ Article 2 of Protocol 4 to the Convention guarantees freedom of movement. The UK is not a party to the Protocol.

on its own facts.¹⁴¹ A majority of the House of Lords found that the measures (including an 18-hour “curfew”) clearly amounted to deprivation of liberty.

However, in *Home Secretary v MB*¹⁴² the House of Lords held that restrictions, which included a 14 hour curfew and confinement within a 23 km² area the rest of the time, did not breach Art 5.¹⁴³ In the words of Louise Amoore, borrowing from Foucault “the individual already resembles the crime before he has committed it”. The courts deploy a “calculative practice” “before a crime takes place, in order to see or to envisage the individual as criminal.”¹⁴⁴ Louise Amoore refers to the “legal screen” that is, the law’s “intrinsic role in determining ‘the way in which we see and are given to the world to be seen’ ... If the legal screen is interposed between the world of data, facts, and evidence and the making of social, political and legal judgements and decisions, then pre-emptive evidence may itself be authenticated.”¹⁴⁵

¹⁴¹ The classical “borderline” case is *Guzzardi v. Italy*, judgment of 6 November 1980, Series A, No.39 (1981) 3 EHRR 533. The Italian government kept Mr Guzzardi on a small island while criminal proceedings against him were ongoing. On the facts of the case the ECHR said that the cumulative effect of all the restrictions imposed on Mr Guzzardi amounted to deprivation of liberty. The restrictions were containment for 16 months within a very small area on an island, with a nine-hour overnight curfew in dilapidated accommodation, without social contact, subject to strict supervision with obligations to report to the authorities twice daily, to inform them of anyone whom he wished to telephone, and to seek permission before visiting the mainland. On the other hand, house arrest for 12 hours each weekday and the whole weekend was held to be restriction on movement (*Trijonis v. Lithuania*, judgment of 17 March 2005, application No. 23333/02), as was a ten-hour curfew with a requirement not to leave home without telling the police (*Raimondo v Italy*, judgment of 22 February 1994, Series A, No.281-A (1994) 18 EHRR 237).

¹⁴² [2007] UKHL 46; [2007] 3 W.L.R. 681.

¹⁴³ *Ibid.*, eg, Lord Bingham, [11].

¹⁴⁴ L. Amoore, “Vigilant Visualities: The Watchful Politics of the War on Terror”, (2007) 38 *Security Dialogue* 215, 221.

¹⁴⁵ L. Amoore, “Risk Before Justice: When the Law Contests its own Suspension”, (2008) 21(4) *Leiden Journal of International Law*, 847-861, 857.

III. HUMAN RIGHTS AND PRECAUTION

In this section our interest is twofold: Firstly, on the tendency of governments, and the courts, to curtail civil liberties in times of emergency. Secondly, on the inability of the human rights discourse to keep up with the discourse of risk society and precaution. The protection of human rights and the deployment of precautionary measures are dissociated, thus enabling courts to deploy precautionary measures while ostensibly not breaching human rights.

I. AUSTRALIA

Prima facie, compared to the Canadian and UK cases analysed further below, *Haneef* a 2007 case, appears a rare example of a case where the human rights discourse seemed to be well equipped to deal with the exigency of the ‘war on terror’. Dr Haneef’s visa was cancelled by Australia’s executive government¹⁴⁶ after cousins of his were arrested and charged in relation to terrorism offences in the UK. He himself was arrested in Australia¹⁴⁷ and charged with having intentionally provided resources – a mobile phone SIM card – to a terrorist organisation.¹⁴⁸

The cancellation was on the basis that the Minister for Immigration reasonably suspected that Dr Haneef did not pass the “character test”.¹⁴⁹

¹⁴⁶ *MIAC v Haneef* [2007] FCAFC 203, [15]-[17]; (2007) 163 FCR 414, 418.

¹⁴⁷ *Ibid.*, [7]-[8], [10]; 416-7.

Section 102.7 of the *Criminal Code* (Cth), the same Code under which a court imposed a control order on Mr. Thomas. See Chapter 2, 2.1.

¹⁴⁸ *MIAC v Haneef* [2007] FCAFC 203, [13]; (2007) 163 FCR 414, 417.

¹⁴⁹ Section 501(3) of the Migration Act 1958 (Cth) (reproduced in Annex B). The “character test” allows the Minister to refuse or cancel a visa where a person has, for example, committed a serious crime and therefore does not “pass the character test”. *Haneef v MIAC* [2007] FCA 1273, [101]; (2007) 161 FCR 40, 59.

The Federal Court found in Dr Haneef's favour as did the Full Bench of the Federal Court.¹⁵⁰

These two cases are remarkable and ordinary at the same time. They are notable for their discussion of the importance of the judicial branch of government (especially the first instance decision) and fundamental rights (especially the appeal decision) and for the fact that they reinstated Dr Haneef's visa. The expression "rule of law" appears more than 20 times. Expressions such as "the war on terror" or "fight against terrorism" do not appear at all. The courts' legal reasons are measured and formulated in a way that makes the political context fade in the background. Their apparent ordinariness makes them remarkable.

The first instance decision starts with a long and vigorous defence of the Federal Court's jurisdiction and power.¹⁵¹ His Honour speaks of the rule of law¹⁵² and the "embedded constitutional guarantee that persons will be dealt with according to law".¹⁵³ The judiciary has an important role to play and "each of the arms of government [including the executive] must pay due deference to, and not to intrude upon, the roles of the other arms of government."¹⁵⁴ The executive's heavy responsibility in national security matters,¹⁵⁵ the Minister's accountability to Parliament or the government's accountability to the electorate cannot give the Minister the right to act outside of his powers.¹⁵⁶

¹⁵⁰ *MIAC v Haneef* [2007] FCAFC 203; (2007) 163 FCR 414.

¹⁵¹ *Haneef v MIAC* [2007] FCA 1273, [5]-[68]; 161 FCR 40, 43-53. Dr Haneef's right of judicial review was not in doubt and there was no obvious legal reason to explain or defend the Court's role.

¹⁵² *Ibid.*, [9]; 44.

¹⁵³ *Ibid.*, [19]; 45.

¹⁵⁴ *Ibid.*, [31]; 47.

¹⁵⁵ *Ibid.*, [32]; 47

¹⁵⁶ *Ibid.*, [68]; 53.

On appeal, the Full Bench of Federal Court referred to the principles that Acts should be construed, where possible, so as not to infringe on common law rights and freedoms.¹⁵⁷ The Court remarked that Dr Haneef had valuable rights in Australia.¹⁵⁸

The Court at first instance denied that this was “a bout between a section of the judiciary and the executive”, but referred to an extra-judicial speech by Lord Bingham in which he spoke of “an inevitable” and “entirely proper tension” between the executive and the judiciary, especially “at times of perceived threats to national security” and the judiciary’s duty “to require that [the executive] go no further must be performed if the rule of law is to be observed.”¹⁵⁹

The Court held that the Minister had misconstrued the expression “an association with”¹⁶⁰ that it should not “construe words widely to allow them to apply to persons of good character when a narrower construction which would exclude such persons is open.”¹⁶¹ The Full Court agreed and held that the legislation should be construed narrowly to exclude persons who have innocent associations.¹⁶²

¹⁵⁷ *MIAC v Haneef* [2007] FCAFC 203, [107]; (2007) 163 FCR 414, 442-43.

¹⁵⁸ *Ibid.*, [110]; 443.

¹⁵⁹ Lord Bingham, ??????????????????, 28 as cited in *Haneef v MIAC* [2007] FCA 1273, [58]; (2007) 161 FCR 40, 52.

¹⁶⁰ Spender J said the case was about the construction of the provision that “a person does not pass the character test if: ... the person has or has had an association with someone else, or with a group or organisation, whom the Minister reasonably suspects has been or is involved in criminal conduct.”

This explanatory statement is not part of the reported decision and has no numbered paragraphs; it is only available on the online version.

¹⁶¹ *MIAC v Haneef* [2007] FCAFC 203, [128]; (2007) 163 FCR 414, 447.

¹⁶² *Ibid.*, [128]; 447.

Writing in the context of Canadian legislation Craig Forcese says:¹⁶³

At core, however, the fundamental pre-requisite to [...] limiting interpretation is meaningful access to courts willing to probe carefully government claims of national security. The rules of statutory interpretation do not prescribe mechanical outcomes.

Is this a rare example of the judiciary keeping the executive in check? Arguably, yes, within the limited scope of what a court can do in judicial review proceeding. As Vivienne Jabri puts it, the judiciary is part of the “grammar” of the legislation and “the locations in which such articulations of dissent from sovereign power take place are severely limited”.¹⁶⁴ Both Courts accepted that on the available evidence and applying the correct legal test the Minister could have reached the same conclusion and could probably make the same decision, while within his power, in the future.¹⁶⁵

Furthermore, without wishing to sound too cynical, we may also observe that Dr Haneef faced no criminal charges and it became clear very quickly that he had no more than an innocent association (being a cousin) of people involved in terrorist plots. Therefore, there was also no room for precaution or prevention: it was obvious that Dr Haneef presented no risk to anybody.

¹⁶³ C. Forcese, “Through a Glass Darkly: The Role and Review of “National Security” Concepts in Canadian Law”, (2006) 43 *Alberta Law Review* 963, 981.

¹⁶⁴ V. Jabri, “The Limits of Agency in Times of Emergency” in J. Huysmans, A. Dobson and R. Prokhovnik (eds.) *The Politics of Protection. Sites of Insecurity and Political Agency*, New York: Routledge, 2006, 136, 147.

¹⁶⁵ *Haneef v MIAC* [2007] FCA 1273, [261]-[264]; (2007) 161 FCR 40, 86. *MIAC v Haneef* [2007] FCAFC 203, [133]-[135]; (2007) 163 FCR 414 448-49.

B. CANADA

In *Charkaoui*, discussed above, the Supreme Court of Canada emphasised that "in a constitutional democracy, governments must act accountably and in conformity with the Constitution and the rights and liberties it guarantees."¹⁶⁶ The Supreme Court held that the use of evidence not disclosed to the certified person, without a counter-balancing mechanism (the Court recommended the introduction of a special advocate)¹⁶⁷ was a violation of s7 of the Canadian Charter of Rights and Freedoms', the guarantee of fundamental justice.¹⁶⁸ Mr Charkaoui's co-appellant argued successfully that the Court held that the law should apply equally to "foreign nationals" like him and "permanent residents" like Mr Charkaoui.¹⁶⁹

Was this a victory for human right and the rule of law against an overreaching executive, a sign of "an attitude of scepticism" towards certain policies in the war on terrorism?¹⁷⁰

Not necessarily. Procedural changes to the law were found to be sufficient to make it comply with the Canadian Charter. The Court rejected all the other human rights arguments raised by Mr Charkaoui and his co-appellant. For example, it held that extended periods of detention do not

¹⁶⁶ *Charkaoui* 2007 SCC 9 (CanLII), [1]; 1 S.C.R. 350, 362-63.

¹⁶⁷ *Ibid.*, [70]-[87]; 392-400.

¹⁶⁸ By contrast, the Federal Court at first instance had strongly defended the legislation and asked rhetorically: "Are more appropriate procedures truly conceivable?": *Charkaoui* 2003 FC 1419 (CanLII), [119].

¹⁶⁹ A foreign national's, as opposed to a permanent residents such as certificate was not reviewable for 120 days after a judge confirms its reasonableness. Sections 82(2) and 84(2) of the *Immigration and Refugee Protection Act 2002*.

¹⁷⁰ T. Poole, "Recent Developments in the 'War on Terrorism' in Canada", (2007) 7(3) *Human Rights Law Review* 633, 633.

breach the prohibition on cruel and unusual punishment¹⁷¹ or a common law (rule of law) prohibition on detention on the basis of an executive decision.¹⁷² It held that judges reviewing orders were non-deferential and are not perceived to be “in the camp” of the executive.¹⁷³

Further, one of the lower courts expressly criticised Mr Charkaoui for claiming that his individual human rights were absolute:¹⁷⁴

The individual right to liberty [...] no longer has much meaning or scope when, collectively, the society charged with ensuring its protection has lost its own right to liberty and security as a result of terrorist activities that it was powerless to prevent or eradicate owing to this individual right that it was to protect and intended to protect. The choice [...] “is not between order and liberty. It is between liberty with order and anarchy without either.”

Similarly, in *Suresh*, a 2002 Supreme Court of Canada decision, it was held that deportation to torture may be justified in some circumstances where a person is a danger to national security, even though the Court underlined the importance of ensuring that¹⁷⁵

legal tools do not undermine values that are fundamental to our democratic society -- liberty, the rule of law, and the principles of fundamental justice -- values that lie at the heart of the Canadian constitutional order and the international instruments that Canada has signed. In the end, it would be a Pyrrhic victory if terrorism

¹⁷¹ Section 12 of the Charter. *Re Charkaoui* 2007 SCC 9 (CanLII), [95]-[117]; 1 S.C.R. 350, 403-12.

¹⁷² *Ibid.*, [137]; 418.

¹⁷³ *Ibid.*, [42]; 379.

¹⁷⁴ *Charkaoui* 2004 FCA 421 (CanLII), [100].

¹⁷⁵ *Suresh* 2002 SCC 1 (CanLII), [4]; [2002] 1 S.C.R. 3, 13.

were defeated at the cost of sacrificing our commitment to those values.

The Federal Court of Appeal (the Court below the Supreme Court) held that deportation, even to torture, was a proportionate response to the pressing objective of preventing Canada from becoming a haven for terrorism. Expelling Mr Suresh would “not shock the conscience” of most Canadians.¹⁷⁶

Suspected terrorists cannot lay claim to an expectation that the Charter will protect them against *refoulement* simply because they have been successful in penetrating our borders. Those who are prepared to participate in political reform by way of terrorism freely accept the risks which flow from this form of expression, including death. It is not *refoulement* by the Canadian government which exposes persons to the risk of torture, rather it is the pursuit of political goals through terrorism which is the true *causa causans*. Canada is neither the first nor last link in the chain of causation giving rise to torture. The first link is the suspected terrorist. The last link is the country of *refoulement*. Canada is merely an involuntary intermediary.

On appeal, the Supreme Court rejected the view that Canada was no more than “an involuntary intermediary”; nonetheless it held that in “exceptional circumstances” a person may be expelled to face torture elsewhere.¹⁷⁷

Michel Coutu and Marie-Hélène Giroux have argued that post 9/11 there has been a paradigm shift from liberty to security in judicial decision making and criticise *Suresh* itself for being a Pyrrhic victory.¹⁷⁸ They

¹⁷⁶ *Suresh* 2000 (CanLII) 17101, [120].

¹⁷⁷ “The ambit of an exceptional discretion to deport to torture, if any, must await future cases.” *Suresh* 2002 SCC 1 (CanLII), [78]; [2002] 1 S.C.R. 3, 46-47.

¹⁷⁸ M. Coutu and M.-H. Giroux, “The Aftermath of September 11: Liberty v Security before the Supreme Court of Canada”, (2006) 18(2) *International Journal of Refugee Law* 313, 313-14 and 323 respectively.

compare *Suresh* with the case of *Burns*¹⁷⁹ decided only about a year earlier, an extradition case in which a crime suspect could have faced the death penalty in the US. The Court did not allow the extradition after declining to treat the executive's discretion with the "utmost circumspection" as it had been prepared to earlier (eg, in *Kindler* a 1991 case).¹⁸⁰ In *Burns* the Court said it was not trying to dictate foreign policy to the executive, but had to fulfil its duty as the guardian of the Constitution.¹⁸¹

One possible explanation for the difference between *Suresh* and *Burns* is the proliferation of precautionary reasoning since 9/11. In *Burns* the Court emphasised its own role as a guardian of the Constitution and individual human rights. By contrast, in *Suresh* it spoke of the executive and parliament's duty to do what they can to combat terrorism:¹⁸²

Governments, expressing the will of the governed, need the legal tools to face the manifest evil of terrorism and the random and arbitrary taking of innocent lives, rippling out in an ever widening spiral of loss and fear.

C. UK

In *Home Secretary v JJ* (a case already examined above), the human rights discourse was present but the House of Lords did not address the underlying question of the orders' effectiveness directly.¹⁸³

¹⁷⁹ *United States v. Burns* [2001] 1 S.C.R. 283.

¹⁸⁰ *Kindler v. Canada (Minister of Justice)* [1991] 2 SCR 779, per LaForest, 837.

¹⁸¹ *United States v. Burns* [2001] 1 S.C.R. 283, [35].

¹⁸² *Suresh* 2002 SCC 1 (CanLII), [3]; [2002] 1 S.C.R. 3, 12.

¹⁸³ *Home Secretary v JJ* [2007] UKHL 45, Lord Brown, [86].

Control orders are highly contentious. Many think them essential as a means of providing some protection at least against suspected terrorists, the very minimum which government should do in fulfilment of its undoubted obligation to safeguard public security. Others abhor the whole notion of preventive action against people not even to be charged with a criminal offence and question whether the control order regime, like internment in the past, does not create more terrorists than it disables. That, however, is a debate for the House in its legislative capacity, not for your Lordships in the Appellate Committee.

As mentioned in 2.1 in *Home Secretary v MB*,¹⁸⁴ the controlees argued a breach of Art 5 of the ECHR. They further argued a breach of Art 6, right to a fair trial.¹⁸⁵ MB succeeded at first instance before the High Court.¹⁸⁶ The Court criticised both the low standard necessary for the order to be made by the executive – “reasonable grounds for suspicion”,¹⁸⁷ based on evidence which was not disclosed to the controlee, and the low standard necessary for the order to be confirmed by a court – that the order is not “flawed”.¹⁸⁸ Further, according to Sullivan J, the role of the court pursuant to the PTA was too limited – it allowed for judicial review, whereas Art 6 of the Convention requires full merits review.¹⁸⁹ Sullivan J concluded that the legislation was incompatible with Art 6 of the Convention:¹⁹⁰

¹⁸⁴ [2007] UKHL 46.

¹⁸⁵ The House of Lords held that the proceedings were civil, not criminal, and therefore the more exhaustive provisions of Art 6(3) of the European Convention did not apply. See *Home Secretary v MB* [2007] UKHL 46, Lord Bingham, [24]; Lord Hoffmann, [48].

¹⁸⁶ High Court, Queen’s Bench Division, Sullivan J. *MB v Home Secretary* [2006] EWHC 1000.

¹⁸⁷ *Ibid.*, [51].

¹⁸⁸ Sections 3(10) and (11) of the *Prevention of Terrorism Act 2005*. *MB v Home Secretary* [2006] EWHC 1000, [86].

¹⁸⁹ *MB v Home Secretary* [2006] EWHC 1000, [79].

¹⁹⁰ *Ibid.*, [103].

The thin veneer of legality which is sought to be applied ... cannot disguise the reality. That controlees' rights under the Convention are being determined not by an independent court in compliance with Article 6.1, but by executive decision-making, untrammelled by any prospect of effective judicial supervision.

In the House of Lords Lord Brown, for example, spoke of the right to a fair hearing, Art 6, as "not merely an absolute right but one of altogether too great importance to be sacrificed on the altar of terrorism control".¹⁹¹ Yet in the end, rather than declare the law incompatible with the *Human Rights Act* and the ECHR, the House of Lords opted for a practical solution on a case by case basis which would achieve compliance with Art 6.¹⁹²

IV. SOVEREIGNTY V GLOBAL THREATS AND SOLUTIONS

By definition, states seek to assert their sovereignty when they feel threatened. Whether it is the fear of immigration, war or terrorism, it always concerns an outside threat. What is new with the war on terrorism is that there is no conventional war as such (if one puts aside the wars in Iraq and Afghanistan), it is of indefinite duration, the rules of engagement are unclear and the enemy appears impossible to identify. But perhaps, once the precautionary principles come into play, the enemy can be identified. The Muslim karate enthusiast in Canada, the white Australian Muslim who was in Afghanistan on 9/11 and the Tamil from Sri Lanka have nothing at all in common other than the fact that they are perceived (or represented for everyone to see as) the potential terrorist whose control or detention is necessary to prevent a potential disaster. Below, we explore some of the paradoxes relating to Western states' attempts to assert sovereignty and how they go about identifying those who pose a threat.

¹⁹¹ *Home Secretary v MB* [2007] UKHL 46, Lord Brown, [91].

¹⁹² *Ibid.*, Baroness Hale, [66]. See also Lord Bingham, [35].

A. AUSTRALIA

The tension between sovereignty and global threats is nicely encapsulated by the case of *Thomas v Mowbray*.¹⁹³ The Australian Constitution contains heads of power which limit the Federal Parliament's legislative power. Mr Thomas argued that neither the "defence" nor the "external affairs" power supported the legislation in question.¹⁹⁴

One of the most famous constitutional law cases in Australian legal history, the *Communist Party Case*,¹⁹⁵ concerned the Australian government's unsuccessful attempt to ban the Communist Party of Australia.¹⁹⁶ The Cold War was at its height, yet the High Court analysed the legislation as if a "state of peace ostensibly existed".¹⁹⁷ The Court stated further that the central purpose of the defence power in the Constitution ("the 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")¹⁹⁸ was the protection of the state from external enemies:¹⁹⁹ "war and the possibility of war with an extra-Australian nation or organism".²⁰⁰ Only the "supreme emergency of war

¹⁹³ (2007) 237 ALR 194; [2007] HCA 33.

¹⁹⁴ The government argued that apart from the defence and external affairs powers, three more powers supported the legislation. See *Ibid.* per Kirby J 244; [183].

¹⁹⁵ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

¹⁹⁶ The law was popular with the public and the press. One newspaper referred to the Bill as a "Drastic Remedy for Cancer". *Canberra Times* (28 April 1950), 4 as cited in G. Winterton, 'The Significance of the *Communist Party Case*' (1992) 18 *Melbourne University Law Review* 630, 643.

¹⁹⁷ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, Dixon J, 196.

¹⁹⁸ Section 51(vi) of the Australian Constitution.

¹⁹⁹ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, Dixon J, 194.

²⁰⁰ *Ibid.*, Fullagar J, 259.

itself²⁰¹ could have supported the law in question and thus it was declared unconstitutional.²⁰²

In *Thomas*, some 55 years later, the executive government argued that the risks associated with terrorism meant that the law was supported by the “defence power” (sovereignty) as well as the “external affairs” power because terrorism affects other states as well as Australia’s relations with other states (global threat and global fight against it).²⁰³

Six out of the seven High Court justices agreed. The proscription of terrorist acts, they concluded, “falls within a central conception of the defence power.”²⁰⁴ A majority held that the defence power was not limited to aggression from a foreign state, but instead included non-state actors and internal threats.²⁰⁵ The defence power could be invoked “while terrorism of the kind proved here remains a threat”²⁰⁶ in order to support laws “aimed at *anticipating and avoiding* the infliction of suffering.”²⁰⁷ (*italics added*).

²⁰¹ *Ibid.*, Dixon J, 198.

²⁰² *Ibid.*, Dixon J, 195.

²⁰³ Australian Constitution, section 51(xxix). The “external affairs” power is not defined in the Australian Constitution. It is simply the power to make laws with respect to “external affairs”.

²⁰⁴ Unlike many of the cases from the First and Second World War, which examined whether there was a sufficient connection between defence and the subject matter of the law in question (eg., controlling the price of bread). *Thomas v Mowbray* (2007) 237 ALR 194; [2007] HCA 33, per Gummow and Crennan, 235; [146].

²⁰⁵ *Ibid.*, Gleeson CJ, 202; [7]; Gummow and Crennan JJ, 234; [141]; Hayne, J, 314-315; [438]-[439]; Callinan J, 353; [583].

²⁰⁶ *Ibid.*, Callinan J, 355; [590].

²⁰⁷ *Thomas v Mowbray*, [2007] HCA 33, Gummow and Crennan, 235, [145].

Callinan J expressly criticised the *Communist Party Case* and commented that the sole dissenting judge in that case²⁰⁸ had probably been more perceptive "to the gravity of direct and indirect internal threats inspired externally, and the different manifestations of war and warfare in an unsettled and dangerous world."²⁰⁹ By contrast, the majority in that case had, according to his Honour, shown²¹⁰

both a preoccupation with the events of the recent past [the Second World War], of a declared war, uniformed, readily distinguishable external enemies, generally culturally, ethnically, ideologically and religiously homogenous states, and an incomplete appreciation, despite Hiroshima and Nagasaki, of the potential of weaponry for massive harm.

In relation to the external affairs power Gummow and Crennan JJ expressed the view that since the definition of "terrorist act" in the Criminal Code included instances in which the object of coercion or intimidation may be the government or public of a foreign country, therefore the "external affairs" power supported the legislation.²¹¹ The law

²⁰⁸ *Ibid.* Chief Justice Latham would have upheld the validity of the law. In his dissenting judgment his Honour said at 156:

"The Court may, I think, allow itself to be sufficiently informed of affairs to be aware that any peace which now exists is uneasy and is considered by many informed people to be very precarious, and that many of the nations of the world (whether rightly or wrongly) are highly apprehensive. To say that the present condition of the world is one of "peace" may not unfairly be described as an unreal application of what has become an outmoded category. The phrases now used are "incidents", "affairs", "police action", "cold war". The Government and Parliament do not regard the present position as one of perfect peace and settled security, and they know more about it than the courts can possibly know as the result of considering legally admissible evidence."

²⁰⁹ *Thomas v Mowbray* (2007) 237 ALR 194; [2007] HCA 33, per Callinan J, [589].

²¹⁰ *Ibid.*, Callinan, 353; [583].

²¹¹ This is not part of the ratio decidendi of the case because only three justices expressly stated that the external affairs power supported the legislation. *Ibid.*, Gummow and Crennan JJ, 236; [149]-[150]. Gleeson CJ agreed that the external affairs power sustained the legislation, 202; [6].

in question was with respect to matters affecting relations with other countries.

Without explaining what justified the different contemporary interpretation, their Honours concluded that the commission of a “terrorist act” as defined in the law was “now, even if it has not been in the past” a matter which could affect Australia’s relations with other nations. Since 2001 terrorism in one country has consequences for other countries, including that “preventive or precautionary state action may be justified; not only an immediate threat but also possible future risks must be considered.”²¹²

B. CANADA

In *Suresh*²¹³ the Supreme Court of Canada considered whether to expel a refugee who may be at risk of torture in his home country because he is a “danger to the security of the country” of Canada.²¹⁴

Mr Suresh, an ethnic Tamil from Sri Lanka, argued that deportation to torture would breach the Canadian Charter of Rights²¹⁵ and that the words

²¹² *Suresh v Canada (Minister of Citizenship and Immigration)* 2002 SCC 1 (CanLII), [88], [2002] 1 S.C.R. 3, 50 as cited in *Thomas v Mowbray* [2007] HCA 33, Gummow and Crennan JJ, 236-237; [152]-[153].

²¹³ *Suresh v Canada (Minister of Citizenship and Immigration)* 2002 SCC 1 (CanLII), [2002] 1 S.C.R. 3.

²¹⁴ The domestic Canadian provisions were ss19 and 53(1) of the *Immigration Act 1985*. Mr Suresh has not been convicted of a serious crime and that limb of Art 33(2) is not relevant.

²¹⁵ He argued breach of Art 7 of the Charter (right to life, liberty and security), Art 12 (prohibition against cruel and unusual treatment) and Canada’s international jus cogens obligations.

“terrorism” and “danger to the security of Canada”, neither of which was defined in the legislation, were unconstitutionally vague.²¹⁶

Mr Suresh’s activities in Canada were non-violent:²¹⁷ fund-raising and “support activities” of the Tamil cause.²¹⁸ Nonetheless, the Supreme Court of Canada held that a narrow meaning of the word “danger”, which might have been the intended meaning in the Refugees Convention at the time it came into force in 1951, could not be adopted after 9/11:²¹⁹

Whatever the historic validity of insisting on direct proof of specific danger to the deporting country, as matters have evolved, we believe courts may now conclude that the support of terrorism abroad raises a possibility of adverse repercussions on Canada’s security.

The Court emphasised first, the existence of terrorist transport and financial networks spanning the globe that may be used by terrorists. Secondly, terrorist acts and their consequences are global. Terrorists may target a place far from Canada “but the violent acts that support it may be close at hand”. Thirdly, the state is justified to take action that is preventive or precautionary, and consider “possible future risks”. Fourthly, Canada can further its national security through international cooperation in the area of anti-terrorism²²⁰ and its security may be dependent on that of another state.²²¹

²¹⁶ There was an additional, also unsuccessful, argument that the legislation infringed his right to freedom of speech and association, ss 2(a) and (d), of the Charter, rights triggered by the right of self-determination of Sri Lanka’s Tamils.

²¹⁷ *Suresh v Canada (Minister of Citizenship and Immigration)* 2002 SCC 1 (CanLII), [2002] 1 S.C.R. 3, [16]; 16-17.

²¹⁸ *Ibid.*, [100]; 56-57.

²¹⁹ *Suresh* 2002 SCC 1 (CanLII), [86]-[87]; [2002] 1 S.C.R. 3, 49-50.

²²⁰ *Ibid.*, [88]; 50-51.

²²¹ *Ibid.*, [90], 51.

C. UK

*Rehman v Home Secretary*²²² concerned a Pakistani national whom the UK government wanted to deport as “conducive to the public good”,²²³ namely, in the interests of national security because of his alleged association with Islamic terrorist groups in the Indian subcontinent.

The Home Secretary alleged that with his activities Mr Rehman directly supported a terrorist organization: first, Mr Rehman was recruiting British Muslims for military training and fundraising for a terrorist group and secondly, he was a “personal contact” of the world wide leader of two related terrorist groups.²²⁴

Similarly to the case of *Suresh*, the executive government did not expect Mr Rehman and his “followers” to engage in any violence in the UK, but to continue to support and further the cause of terrorism outside of the UK.

The executive’s deportation decision was overturned by the Special Immigration Appeals Commission (SIAC). The Court of Appeal concluded that SIAC’s view of what constituted “national security” was too narrow.

Whatever may have been the position in the past, increasingly the security of one country is dependent upon the security of other countries. That is why this country has entered into numerous alliances. [...] The establishment of NATO is but a reflection of this reality. An attack on an ally can undermine the security of this country.²²⁵

²²² *Home Secretary v. Rehman* [2001] UKHL 47.

²²³ Section 3(5)(b) of the *Immigration Act 1971*.

²²⁴ *Home Secretary v Rehman* [2000] EWCA Civ 168, [20].

²²⁵ *Ibid.*, [34].

The Court went further than the submission of the Attorney-General²²⁶ that in "alleged terrorist cases, a person may be said to be a danger to the United Kingdom's national security if he or she engages in, promotes or encourages violent activity which has, or is likely to have, adverse repercussions on the security of the United Kingdom, its system of government or its people."²²⁷ The Court said that the repercussions could be direct or indirect and "likely" was too high a threshold and "it is sufficient if the adverse repercussions are of a kind which create a risk of adverse repercussions."²²⁸

But for all the talk about global cooperation and "adverse repercussions" states can do little by way of prevention outside of traditional criminal law. Where a person commits an offence (eg plots to commit a terrorist act) they can be punished. When prevention is applied to people who cannot be convicted of any offence, quite often it may be because the extent of the global threat is more imaginary than real. In Australia only two people, neither of whom is suspected of committing a crime in Australia, have been subjected to a control order.²²⁹ If Canada or the UK seriously wanted to fight terrorism they could have sought to prosecute Mr Suresh or Mr Rehman in Canada or the UK respectively.

The Canadian and UK cases concerned people – allegedly dangerous terrorist – whom the government wanted to deport.²³⁰ This system has

²²⁶ Appearing as friend of the court.

²²⁷ *Home Secretary v Rehman* [2000] EWCA Civ 168, [38].

²²⁸ *Ibid.*, [39].

²²⁹ Apart from Thomas, the other person until late December 2008 was David Hicks. *Jabbour v Hicks* [2008] FMCA 178. David Hicks is no longer subject to a control order. See M. Knox, "Hicks Free, Now Keen to Clear His Name", *The Age*, 22 December 2008. Last accessed on 26 December 2008 at <http://www.theage.com.au/national/hicks-free-now-keen-to-clear-his-name-20081221-7319.html>

BBC News, "Control order for detainee Hicks", 21 December 2006. Last accessed on 1 May 2008 at <http://news.bbc.co.uk/2/hi/asia-pacific/7155138.stm>.

²³⁰ Except for one person who was prevented from going to Iraq.

been termed a “three walled prison“ because removing or deporting the allegedly terrorists may allow them to start operating from elsewhere without interference.²³¹ The UK government itself referred to this phenomenon as “exporting risk”.²³²

It is the fear of the unknown and potentially catastrophic future – something might happen unless action is taken – which leads to the making of control orders or an attempt to deport a person.

On the one hand, the threat of terrorism is vague and unknowable. Radical uncertainty requires radical precaution. Courts in construing the meaning of words – eg “terrorism”, “danger”, “national security” – err on the side of caution and use a broad interpretation to ensure that the legislation covers a wide field and is as effective as possible (eg organisations that have existed for a long time and had nothing to do with 9/11 were proscribed after September 2001).²³³

On the other hand, Ulrich Beck did not place terrorism on his list of manufactured risks until after 9/11. As Ileana Porras argues, “terrorism”, which since 9/11 it is often used synonymously with Al-Qaida and Osama bin Laden, has become:²³⁴

²³¹ J. Ip, “Comparative Perspectives on the Detention of Terrorist Suspects”, (2007) 16 *Transnational Law and Contemporary Problems* 773, 832.

Ironically, in *Charkaoui* the executive argued as an alternative ground to danger that the Federal Court should confirm the certificate on the basis that he may leave Canada and therefore not appear at proceedings or for removal and therefore must be detained. The risk of non-appearance at proceeding or for removal is an alternative ground for the confirmation of the order, s83(3). *Re Charkaoui* 2003 FC 882 (CanLII), [53]; [2004] 1 F.C.R. 528, 549-50.

²³² UK House of Commons Standing Committee E col 271, 25 October 2005, T. McNulty as cited in C. Walker, “The Treatment of Foreign Terror Suspects”, (2007) *Modern Law Review* 427.

²³³ Eg the Kurdish Worker’s Party (PKK) or the Liberation Tigers of Tamil Eelam (LTTE) in Sri Lanka.

²³⁴ I.M. Porras, “On Terrorism: Reflections on Violence and the Outlaw”, (1994) *Utah Law Review* 119, 120.

[T]he repository of everything that cannot be allowed to fit inside the self image of democracy; [...] it has become the "other" that threatens, that desires the annihilation of the democratic "self" and against which democracies therefore strenuously defend themselves.

Mr Charkaoui's interest in karate provided both a sufficient "connection" to Al-Qaida – which gives the ultimate justification for any kind of anti-terrorism measures. In *Thomas*, six out of the seven justices refer to 9/11, Al Qaida or Osama bin Laden as the embodiment of "the mischief to which the legislation is directed",²³⁵ while simultaneously it was said that the people who may want to commit acts of terrorism, are elusive and hard to identify.²³⁶

Events or facts may have been of no interest to authorities some years ago – an interest in martial arts (Mr Charkaoui), training in a camp in Afghanistan in the 1990s or meeting Osama bin Laden briefly on three occasions (Mr Thomas). But post 9/11 these facts are re-interpreted – by the executive and the judiciary – and given a new significance.

V. CONCLUSION

In a 2007 article Greg Mythen asks whether 'new terrorism' is "perceived as a significant threat, or a politically mediated red herring."²³⁷ Although we only considered a handful of cases, the answer seems to be that judges perceive terrorism as a very significant threat.

²³⁵ *Thomas v Mowbray* (2007) 237 ALR 194; [2007] HCA 33, per Gummow and Crennan JJ 223; [87].

²³⁶ See eg *Thomas v Mowbray* hearing of 6 December, Callinan J. *Thomas v Mowbray* [2006] HCATrans 661 (6 December 2006). Last accessed on 17 June 2008 at

<http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/HCATrans/2006/661.html>.

²³⁷ G. Mythen, "Reappraising the Risk Society Thesis: Telescopic Sight or Myopic Vision?", (2007) 55(3) *Current Sociology* 793-813, 805.

The limited evidence we examined suggests that courts have become caught up in the fear of terrorism which has “become part and parcel of the modern condition, the perception of society being at risk is pervasive and self-conditioning.”²³⁸

Precautionary logic is ubiquitous in the decisions. The judiciary does not appear to be a reluctant actor in the executive’s game of “decisionism”. Overall, it is not a watchdog acting against executive attempts to overreach. In the majority of the cases the judiciary adopts the precautionary “better safe than sorry” approach.

In the decisions there are many references to the need to safeguard individual human rights but national security usually prevails. Once the executive has built the edifice called national security legislation, the courts, in the decisions considered in this thesis (except for one), may get the executive to repaint it – they may tinker with procedural safeguards or the details of a control order – but the building stays in place.

The global terrorist threat serves as a justification for upholding the validity of legislation with domestic remedies. The completely illogical outcome is that often states seek to expel or move the ‘danger’. The ticking bomb is not neutralised, it is moved elsewhere.

None of the legislation considered in this thesis involved proof beyond reasonable doubt. Where the legislation does not provide for a precise burden of proof several courts emphasise the need to use a burden of proof lower than balance of probabilities. For most judges action is required because a catastrophic terrorist act may happen.

Government are moving from unknown unknowns – not knowing who or what to protect itself from – to what it believes to be known unknowns – anyone who has any connection with terrorism, no matter how insignificant, becomes a *known*. The most minor biographical detail, the most casual acquaintance acquire sinister overtones. But why he is a

²³⁸ G. Mythen and S. Walklate, “Terrorism, Risk and International Security”, (2008) 39(2-3) *Security Dialogue* 221, 233.

danger or what he might do in the future remains unknown. Therein lies a paradox: when trivial facts are construed as revealing a threat the stakes are raised even higher to take precautionary measures.

The way the legislation operates is part of what has been called "targeted governance" which operates on the basis of a set of measurable risk factors such as Muslim religion, travel to certain countries at a certain time (Afghanistan in the late 1990s) and so on. It is part of a "dream" of a "smart, specific, side-effects-free, information-driven utopia of governance."²³⁹

While the discourse of precaution affects most of the decisions reviewed in this thesis, more research is needed to confirm the presence of the logic of precaution in judicial decision making. A larger sample of lower level court decisions should reveal whether or not these are genuine trends.

Some words of cautious optimism. David Cole claims that if one considers court decision over a longer period of time "judicial review of emergency and national security measures can and has established important constraints on the exercise of emergency powers and has restricted the scope of what is acceptable in future emergencies."²⁴⁰ However, if the current war on terror is not an emergency but "the new normalcy"²⁴¹ then we should expect to see the judiciary continue to exhibit a disturbing combination of deference to the executive together with a move away from personal criminal responsibility for past acts to precautionary measures against whole classes of people for potential future acts.

²³⁹ M. Valverde and M. Mopas, "Insecurity and the Dream of Targeted Governance," in W. Larner and W. Walters (eds.), *Global Governmentality: Governing International Spaces*, London: Routledge, 2004, 239 as cited in L. Amoore and M. de Goede, "Governance, Risk and Dataveillance in the War on Terror", (2005) 43 *Crime, Law & Social Change* 149, 150.

²⁴⁰ D. Cole, "Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis", (2003) 101 *Michigan Law Review* 2565-2595, 2566.

²⁴¹ Vice-President Dick Cheney in Lynn Ludlow, "Paper Tigers", *SF Chronicle*, 4 November 2001 as cited in David Cole, "Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis", (2003) 101 *Michigan Law Review* 2565-2595, 2588.