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Checks and balances of risk management: precautionary logic and the judiciary

FILIP GELEV

Abstract. After the terrorist attacks of 11 September 2001 Ulrich Beck placed terrorism alongside other potentially catastrophic events such as global warming, nuclear disaster, and influenza as one of the 'dimensions' of risk society. In risk society, executive governments take 'precautionary measures' and parliaments pass 'preventative laws' allowing them to accumulate information, detain terrorism suspects, freeze funds and prohibit various groups, in order to stop catastrophic risks from eventuating. International Relations and legal scholars have used risk society theory or the ideas of Michel Foucault to criticise such excesses of the executive and parliamentary branches of government. Most studies either ignore the judiciary or argue that it stands in opposition to the other branches of governments, that it imposes checks and balances in order to uphold the rule of law and protect individual rights. The article argues that this view is naïve and does not acknowledge a long history of judicial deference to the will of the executive and parliament. Through an analysis of case law from Australia and Canada the article explores parallels between early 21st century judicial reasoning and previous periods of crisis, including the Cold War, while identifying some new 'precautionary approach' aspects. The judiciary defers to the executive, asserts that the executive is more accountable than it, and seeks to avoid responsibility for engaging in this 'precautionary justice'. Furthermore, seized by the same fear of terrorism as executive governments, the judiciary shows an ability to adapt existing legal concepts to the exigencies of risk society. The article concludes that as the memory of the 9/11 attacks fades some of the most draconian preventative measures may be scaled back but the judiciary cannot be relied on to keep the executive or parliament in check.

Filip Gelev completed a Masters of Law degree (Law and Politics of International Security) at the Free University, Amsterdam, in 2008. He is employed at the Department of Justice of the Australian State of Victoria. He is currently on a one year secondment as senior lawyer at Victoria Legal Aid, Melbourne, where he mainly works in the area of migration law. Filip Gelev can be contacted at: {FilipG@vla.vic.gov.au}.

Introduction

In the early 21st century governments across the world have gone further than ever before in taking measures to prevent catastrophic events because to react after an event is seen as inadequate: governments proscribe organisations and blacklist individuals, increase border controls and surveillance within national borders, impose control orders and detain people without trial.[1] Most International

[1] Clive Walker, 'Keeping Control of Terrorists Without Losing Control of Constitutionalism', *Stanford Law Review*, 59 (2007), pp. 1395–463, 1400; Wouter Werner and Fleur Johns, 'The Risks of International Law', *Leiden Journal of International Law*, 21:4 (2008), pp. 783–6, 784–5.

Relations (IR), and some legal, scholars have strongly criticised such government practices. They have either ignored the judiciary or put their faith in a judiciary acting as a check on the other two branches of government. On the basis of the history of judicial deference during earlier periods of crisis, as chronicled by other legal scholars, the author's hypothesis is that it is naïve to expect that in the period since 11 September 2001 the judiciary will take on a role to curb executive power in all or even in most cases. The courts may have the power but not necessarily the willingness to restrict executive or parliamentary excesses.

This article consists of two sections. It begins with an overview of the recent IR and legal literature defending the judiciary acting as a check on executive and parliamentary overreach and as a defender of the 'rule of law'.[2] In this section, I also introduce various concepts – Ulrich Beck's 'risk society' and 'precautionary principle' and others inspired by the ideas of Michel Foucault – 'rationality of government' and 'precautionary risk'. The first section concludes with a brief review of an unrelated stream of legal studies which show that, historically, in times of emergency, courts have joined the other branches of government in order to deal with the war or other crisis and failed to protect the rights and freedoms of individuals.[3]

In the second section, I test my hypothesis through an empirical analysis of four recent law cases. The cases are from Australia and Canada at the highest judicial level available. They are all common law cases, the product of legal systems close enough to each other to provide meaningful parallels.[4] They support the hypothesis that courts do not act as a counterbalance to the executive and parliamentary branches. However, the case law also provides an interesting contrast to earlier periods of perceived crisis and judicial deference as the judiciary engages in what I call 'precautionary justice' and successfully adapts existing legal concepts to fit the requirements of risk society.

The Australian cases are *Thomas*[5] – an unsuccessful challenge to the validity of control order legislation, and *Haneef*[6] – a visa cancellation case in which the judiciary seemingly did rein in the executive. The Canadian cases are *Charkaoui*[7]

[2] Devika Hovell, 'Black Holes or Loopholes? Human Rights in the Risk Society', HREOC Seminar, Gilbert and Tobin Centre of Public Law, UNSW (6 April 2005), available at: {www.gtcentre.unsw.edu.au/Publications/docs/pubs/2005_BlackHolesorLoopholes.doc}. See also David Dyzenhaus, 'Humpty Dumpty Rules or the Rule of Law: Legal Theory and the Adjudication of National Security', *Australian Journal of Legal Philosophy*, 28 (2003), pp. 1–30.

[3] Oren Gross, 'Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional', *Yale Law Journal*, 112 (2003), pp. 1011–134; see also Mark Tushnet, 'Defending *Korematsu*?: Reflections on Civil Liberties in Wartime', *Wisconsin Law Review* (2003), pp. 273–307.

[4] The cases were selected based of their high profile and because they deal with precautionary type measures.

[5] *Thomas vs. Mowbray* (*Thomas*) (2007) 237 Australian Law Reports 194; published online (2007) High Court of Australia 33, available at: {http://www.austlii.edu.au/au/cases/cth/HCA/2007/33.html}.

[6] *Haneef vs. MIAC* (2007) 161 Federal Court Reports 40; published online (2007) Federal Court of Australia, available at: {http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/federal_ct/2007/1273.html}; on appeal *MIAC vs. Haneef* (2007) 163 Federal Court Reports 414; published online (2007) Federal Court of Australia Full Court 203, available at: {http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCAFC/2007/203.html}.

[7] *Charkaoui vs. Canada (Citizenship and Immigration)* (*Charkaoui*) (2007) 1 Supreme Court Reports 350; published online (2007) Supreme Court Reports 5, available at: {http://www.canlii.org/en/ca/scc/doc/2007/2007scc9/2007scc9.html}.

– a detention and deportation case, and *Suresh*[8] – a deportation case, in both of which the individuals' legal challenges were partly successful. The cases offer examples of contemporary courts not showing unquestioning acquiescence but, in three out of the four cases, giving the appearance of scrutinising acts of parliament or executive actions and then upholding their validity using the logic of precaution. I refer to this phenomenon as 'precautionary justice' or 'precautionary reasoning' because it relates to measures aimed at preventing future disasters rather than adjudicating past violations of legal norms. It will be argued that the deployment of precautionary reasoning decreases the judiciary's accountability because the taking of preventative measures can rarely, if ever, be proven to be unnecessary or wrong. In addition, some of the cases point to another phenomenon: the judiciary seems to show a degree of flexibility in 'updating' and adapting legal concepts such as danger, defence, state survival, sovereignty, and international cooperation in a way that works to the benefit of executive governments.

Below, I first consider the various scholarly views on the respective roles of the executive and the judiciary and their interrelationship – both in the contemporary world and over time – before I turn to the empirical analysis of the recent case law.

The executive and the judiciary in risk society

Since the publication of Ulrich Beck's book *Risk Society* discussions of risk have become ubiquitous in many different disciplines.[9] According to Beck, today we live in a 'risk society' characterised by uncontrollable risks, which are human-made and beyond boundaries,[10] global and universal.[11] Nobody is safe against risk society's 'bads' carrying potentially catastrophic or irremediable effects:[12] pollution, global pandemics, or nuclear disasters.[13]

One of risk society's key ideas is that decision-makers should take precautionary measures to prevent or minimise harm where there is uncertainty about the nature and extent of the relevant risk.[14] After 9/11 Beck added terrorism to the list of 'dimensions' of risk society.[15] The principles of precaution should now apply to decisions relating to terrorism. When taken to its extreme, this logic dictates that decision-makers should act based on nothing more than 'actionable suspicion', or a 1 per cent chance, that a disaster may occur.[16]

[8] *Suresh vs. Canada (Minister of Citizenship and Immigration)* (*Suresh*) (2002) 1 Supreme Court Reports 3; published online (2002) Supreme Court Cases 1, available at: {http://www.canlii.org/en/ca/scc/doc/2002/2002scc1/2002scc1.html}.

[9] Gabe Mythen, 'Reappraising the Risk Society Thesis: Telescopic Sight or Myopic Vision?', *Current Sociology*, 55:3 (2007), pp. 793–813, 793–4.

[10] Ulrich Beck, 'The Terrorist Threat: World Risk Society Revisited', *Theory, Culture & Society*, 19:4 (2002), pp. 39–55, 41.

[11] Gabe Mythen and Sandra Walklate, 'Criminology and Terrorism, Which Thesis? Risk Society or Governmentality?', *British Journal of Criminology*, 46 (2006), pp. 379–98, 384.

[12] Gabe Mythen and Sandra Walklate, 'Terrorism, Risk and International Security', *Security Dialogue*, 39:2–3 (2008), pp. 221–42, 224.

[13] Ulrich Beck, *Risk Society: Towards a New Modernity* (London: Sage, 1992), p. 49.

[14] Pat O'Malley, *Risk, Uncertainty and Government* (New York: Glasshouse Press, 2004), p. 3.

[15] Beck, 'Terrorist Threat', pp. 39–40.

[16] Ron Suskind, *The One Per Cent Doctrine: Deep Inside America's Pursuit of Its Enemies Since 9/11* (New York: Simon and Schuster, 2006), p. 166 as cited in Marieke de Goede, 'The Politics of

A Foucaultian approach offers some insights into government practices in risk society. Scholars influenced by the ideas of Michel Foucault explore the employing tactics to achieve certain ends – such as controlling risk society's perceived 'bads', including terrorism – rather than the objective reality.[17] A 'rationality of government' explores '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 [is] practised'.[18]

A Foucaultian analysis exposes the unresolvable paradox at the heart of a new rationality of government which Aradau and van Munster term 'precautionary risk': 'new configurations of risk that require that the catastrophic prospects of the future be avoided at all costs.'[19] Precautionary risk is deployed to 'govern terrorism, where other technologies have proven fallible or insufficient.'[20] It creates a vicious cycle because governments see 'any degree of likelihood' of a catastrophic event as being 'too great to tolerate'.[21] Furthermore, risks 'multiply over time since one can always do more to prevent them from becoming real.'[22]

I argue that government rationality of precautionary risk is a useful analytical tool in considering judicial decisions as well as executive and parliamentary ones. When applied by courts this rationality becomes precautionary justice, turning on its head the principle that judicial power is about deciding 'existing rights and duties ... according to law ... by the application of a pre-existing standard rather than by the formulation of policy or the exercise of an administrative discretion.'[23] Oliver Kessler discusses a similar shift in international law. He considers that international law is increasingly losing its ability to deal with the unknown future,[24] whereas I argue that courts have successfully adapted their reasoning and reinterpreted legal concepts as necessary by the perceived new threats of risk society. While it may be premature to say that as a result we are 'witnessing the end of criminal law',[25] this article argues that, contrary to the views of most IR scholars, courts are central to the precautionary risk rationality of government.

According to IR publications, executive governments, and to some extent parliament, but not courts, are forced to 'feign control over the uncontrollable'[26] and deliberately create 'law free zones' in which 'political will reigns and the rule

Preemption and the War on Terror in Europe', *European Journal of International Relations*, 14:1 (2008), pp. 161–85, 164.

[17] Michel Foucault, 'Governmentality', in Graham Burchell, Colin Gordon and Peter Miller (eds), *The Foucault Effect: Studies in Governmentality* (Chicago: University of Chicago Press, 1991), pp. 87–104, 95.

[18] Burchell, Gordon and Miller, *Foucault Effect*, p. 3.

[19] Claudia Aradau and Rens van Munster, 'Governing Terrorism Through Risk: Taking Precautions, (un)Knowing the Future', *European Journal of International Relations*, 13:1 (2007), pp. 89–115, 91.

[20] Aradau and van Munster, 'Governing Terrorism', p. 102.

[21] Pat O'Malley, *Risk, Uncertainty*, p. 178.

[22] Mikkel Vedby Rasmussen, *The Risk Society at War. Terror, Technology and Strategy in the Twenty-First Century* (New York: Cambridge University Press, 2004), p. 4.

[23] *Brandy vs. Human Rights Commission* (1995) 183 Commonwealth Law Reports 245, p. 268.

[24] Oliver Kessler, 'The Same As It Never Was? Uncertainty and the Changing Contours of International Law', this Special Section.

[25] Richard Ericson, *Crime in an Insecure World* (2006) as cited in Andrew Goldsmith, 'Preparation for Terrorism: Catastrophic Risk and Precautionary Criminal Law', in Andrew Lynch, Edwina MacDonald and George Williams (eds), *Law and Liberty in the War on Terror* (Sydney: The Federation Press, 2007), pp. 59–74, 60.

[26] Beck, 'Terrorist Threat', p. 43.

of law has no purchase'.[27] Clive Walker criticises decision-making which is 'in the hands of less experienced and more politically motivated government ministers as opposed to detached judges'.[28] Since 9/11 'petty sovereigns' within the government bureaucracy, instead of apolitical independent judges, make 'pre-legal decisions' for which they are not held to account.[29]

IR scholars further claim that the judiciary can, or must attempt to, act as a counterbalance to the executive. For example, Aradau and van Munster's otherwise excellent analysis creates a simple dichotomy between administrative, executive decision-making seeking to eliminate all risk and 'careful' juridical decision. According to these authors precautionary risk characterises the actions of executive governments. Their policies are 'impossible to accommodate by the juridical system'[30] and '[j]udgements of responsibility are transferred to the sphere of administrative decisions against juridical procedures'.[31] The implication is that a properly functioning 'judicial system' would not operate in this manner.

Such categorical statements reveal a lack of awareness about the history of deference by the judiciary in times of emergency and a simplistic view that the executive and the judiciary stand in opposition to each other with the judiciary displaying its true role as a guardian of individual human rights. Even judges themselves sometimes refer to the important role the judiciary allegedly plays in keeping the executive in check. In an extra-judicial speech about Guantanamo Bay Lord Steyn of the UK House of Lords, referred to a case in which the House of Lords had upheld the validity of a law allowing the internment of foreign nationals in the UK during the Second World War:

> 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.[32]

This article investigates whether the faith placed in the judiciary is justified or whether precautionary risk has become a rationality of government for contemporary courts. It argues that the judiciary adopts the logic of precaution in exactly the same way as the other two branches of government. The cases analysed in the second section of the article indicate that precaution has become part of legal reasoning and, more often than not, judges do not consider that judicial powers have been curtailed or individual liberties wrongly sacrificed. To the extent that judicial enthusiasm for precautionary justice may have diminished in the most recent past, it may be due to the passage of time since 9/11 and the diminished power on judges' imagination of the threat of terrorist Armageddon, rather than a principled stand against the executive or parliamentary branches. The politics of fear permeating risk society influences the way in which the common law is developing.

[27] de Goede, 'Politics of Preemption', p. 164.
[28] Walker, 'Keeping Control', p. 1402.
[29] de Goede, 'Politics of Preemption', p. 176.
[30] Aradau and van Munster, 'Governing Terrorism', pp. 103–4, 106.
[31] Ibid., p. 106.
[32] Lord Steyn, Lord of Appeal of the House of Lords, 'Guantanamo Bay: The Legal Blackhole', Twenty-Seventh F.A. Mann Lecture (25 November 2003), p. 2. The case was *Liversidge vs. Anderson*, (1942) Appeal Cases 206.

The judiciary – from deference to precautionary justice

Courts are independent and apolitical and have the power, within the confines of their role in a democracy with separation of powers between the branches of government, to declare certain legislation unconstitutional or invalid. However, the judiciary is at the same time part of the machinery of government. Courts often emphasise that in exercising their power they have to balance competing interests such as public order – for the majority, and freedom – for a few individuals. In times of war courts err on the side of order and protection of the majority.[33] Legal scholars have chronicled the behaviour of the judiciary in the last two centuries and have demonstrated that 'when faced with national crises, the judiciary tends to "go to war"'.[34] The 'history of the judiciary in times of emergency and alleged emergency is a dismal one of judges deferring to executive claims',[35] for instance, its failure in the US and UK to disallow the mass internment of enemy citizens during both World Wars.[36]

The four cases reviewed below, *Thomas* and *Haneef* (Australia), and *Charkaoui* and *Suresh* (Canada), involve courts taking measures, or approving executive measures, such as control orders or detention without trial. The discussion of these four cases is not a comprehensive legal analysis; it is limited to the basic facts and outcomes of the cases, seen through the prism of precautionary logic. In *Thomas*, a majority of the court showed a willingness to yield to the will of the executive and parliament. In *Charkaoui* and *Suresh* the courts seemed to lean towards acting as a check on executive power but, ultimately, the fear of terrorism prevailed, and the courts fell into the logic of precautionary reasoning. Only in *Haneef* the court seemingly stood up to the executive but, as I argue below, the facts of the case make it unique.

Louise Amoore observes that in risk society 'it is not the case that "law recedes" as risk advances but rather that law itself authorizes a specific and particular mode of risk management'.[37] I argue that the judiciary is an integral part of this risk management. Precautionary reasoning adds a particular flavour to the familiar phenomenon of judicial deference and courts stretch established legal concepts and principles. The politics of fear influence courts seeking ways to uphold radical laws and prevent unknown future actions rather than consider past acts and assess them against existing legal norms.

[33] The US Supreme Court's Chief Justice Rehnquist said:

> [I]n 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* (New York: Random House, 1998), pp. 222–3 as cited in Gross, 'Chaos and Rules', pp. 1020–1.

[34] Gross, 'Chaos and Rules', p. 1034.

[35] David Dyzenhaus and Rainer Thwaites, 'Legality and Emergency – The Judiciary in a Time of Terror', in Lynch, MacDonald and Williams *Law and Liberty*, pp. 9–27, 9.

[36] David Bonner, 'Checking the Executive? Detention Without Trial, Control Orders, Due Process and Human Rights', *European Public Law*, 12:1 (2006), pp. 45–72.

[37] Louise Amoore, 'Risk Before Justice: When the Law Contests its own Suspension', *Leiden Journal of International Law*, 21:4 (2008), pp. 847–61, 850.

Australia

Thomas vs. Mowbray

In 2006, an Australian court issued a control order against Jack Thomas. Mr Thomas had admitted that before 9/11 he had trained in an *Al-Qaeda* camp and then maintained 'terrorist' connections until 2003.[38] He was, however, never suspected of committing or planning any crime in Australia.

Control orders have conditions such as staying inside one's house for 12 hours a day, not using communication devices, wearing a tracking device, and reporting regularly to police.[39] The issuing Court concluded[40] that because of Mr Thomas's association with *Al-Qaeda*, he was 'an available resource that can be tapped into' to commit terrorism offences.[41] The Court was satisfied on the balance of probabilities that the control order measures were necessary, appropriate and adapted to protect the public from a terrorist act.[42] The initial control order included a condition that he not contact Osama bin Laden.[43]

The first set of Mr Thomas's arguments, presented before the highest Australian court, the High Court, was that the imposition of control orders by the judiciary breached the separation of powers doctrine[44] because the issuing Court, instead of adjudicating on his guilt or responsibility for past acts, has to make various predictions about the future which is not the exercise of judicial power.

A majority of the Court upheld the validity of the law and deferred to the executive and parliament which, as history shows, is not unusual *per se*. Two of the seven justices, in separate dissenting reasons, agreed with Mr Thomas that that there was no ascertainable test or standard on the basis of which a court can decide whether to grant or refuse to make an order.[45] The task was so indeterminate that it was not the exercise of judicial power.[46] It was not appropriate for the judiciary to 'consider [unknown] future consequences'[47] and 'quintessentially' for the legislative and executive branches to decide how to protect the public from terrorism.[48] Justice Kirby said in his dissent that a person may be made subject to a control order:

> [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

[38] *R vs. Thomas* (*No 3*) 14 Victorian Reports 512.
[39] For the Australian legislation see *Jabbour vs. Thomas*, unreported, published online (2006) Federal Magistrates Court of Australia 1286 (27 August 2006), available at: {http://www.austlii.edu.au/au/cases/cth/FMCA/2006/1286.html}.
[40] On the basis of the same evidence which in the criminal proceedings was held to have been improperly obtained.
[41] *Jabbour vs. Thomas*.
[42] *Criminal Code 1995*.
[43] Tom Allard, 'Jihad Jack Wife Terror Link', *Sydney Morning Herald* (29 August 2006).
[44] *Thomas*, Chief Justice Gleeson, p. 205; [15]. In this section numbers without brackets after the name of the law reports (for example, Australian Law Reports, Supreme Court Reports) refer to the page numbers in those law reports, the numbers in square brackets refer to the paragraph numbers in the online version.
[45] *Thomas*, Justice Hayne, p. 321; [468]; Justice Kirby, pp. 281–2; [321]–[322].
[46] *Thomas*, Justice Hayne, p. 327; [495].
[47] Ibid., pp. 323–4; [476].
[48] *Thomas*, Justice Hayne, p. 329; [504]; Justice Kirby, pp. 280–1; [317].

public from a terrorist act', a vague, obscure and indeterminate criterion if ever there was one.[49]

The majority relied on 'established' principles of 'preventive justice', for example, a person accused of a serious crime must apply for bail to be released[50] and on that basis upheld the validity of this law enabling courts themselves to take precautionary measures (imposing a control order). The minority did not object to the measures as such but considered that the executive would be better placed to adopt them. Dyzenhaus and Thwaites argue that courts should be able to issue control orders and criticise the minority justices for taking 'an anachronistic attitude to the administrative state' and relinquishing 'the hope of having the rule of law control the War on Terror'.[51]

With respect, whether one prefers the majority or minority approach, the practical result is the same. The implementation of precautionary measures based on risk is forward looking, and it transforms accountability and responsibility.[52] Where a court (wrongly) determines liability, or responsibility, or guilt in relation to past events, it may be held responsible. By contrast, where the judiciary makes a control order, or confirms the validity of an executive order, it would be almost impossible to prove that the measures were wrong and to hold the court to account. The absence of a terrorist attack does not prove that the measures taken to prevent it were unnecessary. Further, the harmful consequences for the individual subject to these measures is virtually irrelevant to the exercise of the court's power because the court's focus is on what measures are necessary to prevent a future event, not how to punish the person.

The law examined by the High Court in *Thomas* can serve as an example of a similar legal shift in domestic criminal law. Traditionally criminal law concerns itself with the violation of 'norms' in the past and present whereas this law is 'future oriented and assesses the present from the perspective of some possible future'.[53] Mr Thomas's additional constitutional argument of invalidity was that the control order measures were not authorised by any of the specific heads of powers contained in the Australian Constitution, and in particular that the law could not be enacted under the 'defence' or 'external affairs' powers. A majority disagreed on both counts. The law was supported by both the 'defence' power – which traditionally applies where a state's sovereignty is under threat from another state, and the 'external affairs' power – which is ordinarily invoked in matters concerning cooperation between states.

The High Court case explored some of these complex and shifting concepts – sovereignty, global threats, state and non-state actors, war and peace. One can compare *Thomas* to the *Communist Party Case*,[54] decided some 55 years earlier, in which the government of the time sought to ban the Communist Party of Australia. As the *Communist Party Case* itself demonstrates, during times of peace

[49] *Thomas*, Justice Kirby, pp. 291–2; [354].
[50] *Thomas*, Chief Justice Gleeson, p. 205; [16]. 'Preventive justice' is an expression the Chief Justice borrowed from the writings of the 18th century jurist William Blackstone. See also Justices Gummow and Crennan, pp. 219–20; [73]–[77]; Justice Callinan, pp. 291–92; [591]–[600].
[51] Dyzenhaus and Thwaites, 'Legality and Emergency', p. 24.
[52] See also Kessler, 'The Same As It Never Was?' and Aalberts and Werner, 'Mobilising Uncertainty and the Making of Responsible Sovereigns', this Special Section.
[53] Kessler, 'The Same As It Never Was'.
[54] *Australian Communist Party vs. Commonwealth* (1951) 83 Commonwealth Law Reports 1.

courts are relatively less 'pliable' and more ready to keep the executive in check.[55] Communism, according to the Australian government, posed a serious existential threat for the state and the government relied on the defence power to ban the Communist Party. This was hardly unusual during the Cold War, a time when not only Australia but many governments in the West imagined the 'unthinkable', that is, the possibility of a nuclear war and how to protect themselves from it. A RAND Corporation intellectual in the US declared that nuclear weapons during the Cold War had achieved a change 'so unprecedented that historical comparisons fail us almost completely'.[56] Yet the Australian High Court was not swayed. It held that a 'state of peace ostensibly existed', only the 'supreme emergency of war itself' could support the law in question[57] and therefore the ban on the Communist Party was unconstitutional.[58]

In *Thomas*, the High Court reached the opposite conclusion. One justice in particular indulged his imagination and criticised the *Communist Party Case* for showing 'a "preoccupation" with the Second World War'.[59] Today, his Honour said, Australia faced an 'unprecedented' and 'frightening combination of circumstances' and had to take defensive measures, because modern weapons of 'inestimable capacity' can cause harm well beyond 'historical atrocities', including the Second World War.[60] One can only speculate that it was the fear triggered by the attacks of 9/11 that led his Honour to this arbitrary and irrational conclusion.

A majority of the Court concluded that the proscription of terrorist acts 'falls within a central conception of the defence power.'[61] The defence power was not limited to aggression from a foreign state but included non-state actors and internal threats.[62] The power could be invoked 'while terrorism of the kind proved here remains a threat'[63] in order to support laws 'aimed at anticipating and avoiding the infliction of suffering.'[64]

A majority held that the external affairs power also supported the legislation because the definition of 'terrorist act' included acts where the object of coercion or intimidation may be a foreign country.[65] Some members of the Court considered that the commission of a terrorist act 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 had consequences for other countries and 'preventive or precautionary state action may be justified.'[66]

The Court's decision illustrates how legal boundaries are shifting at a time when the politics of fear have become a rationality of government. The perceived

[55] David Cole, 'Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis', *Michigan Law Review*, 101 (2003), pp. 2565–95.
[56] Bernard Brodie, 'Strategy as Science', *World Politics*, 1 (1949), pp. 467–88.
[57] *Australian Communist Party*, Justice Dixon, p. 198.
[58] Ibid., pp. 195–6.
[59] *Thomas*, Justice Callinan, p. 353; [583].
[60] Ibid., p. 342; [544]; Justice Heydon, p. 371; [648]–[649].
[61] *Thomas*, Justices Gummow and Crennan, p. 235; [146].
[62] *Thomas*, Chief Justice Gleeson, p. 202; [7]; Justices Gummow and Crennan, p. 234; [141]; Justice Hayne, pp. 314–5; [438]–[439]; Justice Callinan, p. 353; [583].
[63] *Thomas*, Justice Callinan, p. 355; [590].
[64] *Thomas*, Justices Gummow and Crennan, p. 235; [145].
[65] Ibid., p. 236; [149]–[150]. Chief Justice Gleeson agreed that the external affairs power sustained the legislation, p. 202; [6].
[66] Ibid., pp. 236–7; [152]–[153], quote from *Suresh* (2002), p. 50; [88].

realities and 'unprecedented threats' of risk society trigger precautionary justice reasoning whereby, under the threat of terrorism and contrary to established legal precedents, the High Court seemed to conclude that Australia is 'half way' between war and peace, and that the defence power can be used for protection against the danger of terrorists, that is, non-state actors. This fluid reasoning arms the judiciary with unexpected flexibility and operates to the advantage of the executive and the detriment of individual human rights.

Haneef

By contrast to *Thomas*, *Haneef* appears to be an example of the judiciary standing up to the executive and resisting precautionary reasoning. The Australian minister for immigration cancelled Dr Haneef's visa following the arrest of two of his cousins for terrorism offences in the UK. The minister formed a 'reasonable suspicion' that Dr Haneef did not pass the character test because he was 'associated' with suspected criminals. Dr Haneef successfully sought judicial review of the decision in the Federal Court and on appeal to the Full Bench of the Federal Court.

The first instance decision contains a vigorous defence of the Court's own jurisdiction and power.[67] The judiciary, the Court said, has an important role to play and each arm of government, including the executive, 'must pay due deference to, and not to intrude upon, the roles of the other arms of government.'[68] The Court held that the minister had misconstrued the legislation. The judge refused to adopt the minister's approach which would be to follow a simple 'mechanical exercise' because it could, for example, catch an unwitting spouse of a criminal as marriage constitutes 'association' with a criminal. The Full Court agreed and held that the legislation should be construed narrowly to exclude persons who have innocent associations.[69]

Writing in the context of Canadian legislation Craig Forcese says that 'the fundamental pre-requisite to … limiting interpretation is meaningful access to courts willing to probe carefully government claims of national security' because statutory interpretation does not 'prescribe mechanical outcomes'.[70]

Is this a rare example of the judiciary keeping the executive in check, 'probing government claims of national security' in order to avoid a 'mechanical outcome'? Arguably, yes, although both the first instance Court and the appeal Court accepted that on the existing evidence the minister, if he had applied the correct legal test, could still have reached the same negative conclusion about Mr Haneef's character.[71]

It is worth noting that Dr Haneef faced no criminal charges and it became clear soon after his arrest that he was innocent. The public and the judiciary saw him

[67] *Haneef vs. MIAC*, pp. 43–53; [5]–[68].
[68] Ibid., p. 47; [31]–[32].
[69] *MIAC vs. Haneef*, p. 447; [128].
[70] Craig Forcese, 'Through a Glass Darkly: The Role and Review of "National Security" Concepts in Canadian Law', *Alberta Law Review*, 43 (2006), pp. 963–1000, 981.
[71] *Haneef vs. MIAC*, p. 86; [261]–[264]; *MIAC vs. Haneef*, pp. 448–9; [133]–[135].

as the innocent victim of a not particularly competent investigation, rather than as a danger[72] and there was no 'actionable suspicion' against him. At best he was accused of peripheral involvement in a minor terrorist attack committed by two people acting in isolation. He did not spark the imagination of the public or the judiciary as someone who could achieve something spectacular such as the orgy of violence unleashed on 9/11. To the extent that there was a criminal case against Mr Haneef it collapsed; through an official inquiry the executive was held accountable for detaining an innocent man.[73] It became impossible at that stage for the executive to argue convincingly that he might still commit a crime in the future; the cycle of the logic of precaution, within which the executive or the judiciary might never have been held accountable for taking precautionary measures, was not triggered.

Canada

Charkaoui

From 2003 until 2005, Mr Adil Charkaoui, a Canadian permanent resident, was detained as a danger to the security of Canada.[74] A Moroccan Muslim, he was suspected of having *Al-Qaeda* links. The executive government issued an 'inadmissibility certificate' against Mr Charkaoui on security grounds. On the basis of this certificate it could detain, and then deport, a person who is already in Canada, such as Mr Charkaoui. At an initial and periodic reviews thereafter, a court could release the person, but upon release could impose conditions similar to an Australian control order.[75]

At the first review, the Federal Court agreed with the executive that Mr Charkaoui 'continued' to be a danger to Canada's national security. The Court said that the executive 'linked' Mr Charkaoui to violence, among other things, because he 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, one of the 9/11 bombers 'had trained in the martial arts in preparation for the September 11, 2001 operation.'[76] The Federal Court considered that Mr Charkaoui's interest in karate acquired certain significance when taken together with his ethnicity and religion.

It is unlikely, for instance, that a Japanese Buddhist karate enthusiast would have been seen as a danger to national security. Today, everyone may view the mass internment of Japanese citizens during the Second World War in many

[72] Sally Neighbour, 'Police chief on the back foot', *The Australian* (4 August 2007).
[73] Anne Barrowclough, 'Haneef inquiry sparks Australian terror law revamp', *Times Online* (23 December 2008), available at:{http://www.timesonline.co.uk/tol/news/world/article5387063.ece}.
[74] *Re Charkaoui* (*Charkaoui* 2003) (2004) 1 Federal Court Reports 528; published online (2003) Federal Court 882, available at: {http://www.canlii.org/en/ca/fct/doc/2003/2003fc882/2003fc882.html}.
[75] *Re Charkaoui* (*Charkaoui* 2005) (2005) 3 Federal Court Reports 389; published online (2005) Federal Court 248, available at: {http://www.canlii.org/en/ca/fct/doc/2005/2005fc248/2005fc248.html}, pp. 422–3; [86].
[76] *Charkaoui* (2003), pp. 548–9; [50].

countries, including Canada,[77] as a gross violation of human rights. By contrast, as a consequence of the post-9/11 politics of fear, governments and judges when dealing with Muslim 'suspects' imagine the possibility of apocalyptic destruction caused by Muslim fundamentalists. As a result, the detention of Muslims is seen as acceptable or even desirable.

The Court looked at the facts through what Louise Amoore, borrowing from Foucault, calls a 'calculative practice' pursuant to which Mr Charkaoui 'already resemble[d] the crime before he ... committed it', the Court 'envisage[d]' him as a terrorist before he had done anything.[78] The Court considered the fact that Mr Charkaoui had not committed any crimes in Canada as 'proof' that he was 'a sleeper agent in the bin Laden network'.[79] In other words 'absence of evidence ... is evidence of existence' of a terrorist threat.[80] In a subsequent hearing, in 2004, the Court had 'difficulty seeing any conceivable conditions that might neutralize this serious danger', without an explanation what it might be. 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 he was not released.[81] In 2005, after a fourth detention review, Mr Charkaoui was finally released as the danger he posed had inexplicably disappeared.[82] The Court, however, imposed severe restrictions on Mr Charkaoui's freedom of movement, similar to control order conditions.[83]

Mr Charkaoui could not prove that he was never going to commit a terrorist act and that therefore he should have never been detained. Traditionally, in criminal law, courts adjudicate the guilt of persons after the violation of a legal norm. In the environment of risk society, where the judiciary is helping to prevent unknown future events, responsibility, and accountability disappear or they are drastically reduced.

Preventative measures might prevent a catastrophe and therefore it is impossible to establish that they were unnecessary and to hold the court to account. Mr Charkoui attempted to challenge the validity of the entire legislative scheme and in 2007 his case reached the highest court of Canada, the Supreme Court.[84] The Court concluded that the law breached the Canadian Charter of Rights and Freedoms (the Charter) and it should be amended to include special advocates to deal with secret evidence.[85]

It has been suggested that this decision marked the beginning in Canada of post-9/11 judicial 'attitude of scepticism' towards certain policies in the War on

[77] 'The Internment of the Japanese during World War II', Peace and Conflict. *Historica*, published online at: {http://www.histori.ca/peace/page.do?pageID=279}.
[78] Louise Amoore, 'Vigilant Visualities: The Watchful Politics of the War on Terror', *Security Dialogue*, 38 (2007), pp. 215–32, 221.
[79] *Charkaoui* (2003), p. 549; [51].
[80] John Mueller, *Overblown: How Politicians and the Terrorism Industry Inflate National Security Threats and Why We Believe Them* (Washington DC: Free Press, 2006) as cited in Dan Gardner, *Risk: The Science and Politics of Fear* (Carlton North, Australia: Scribe Publications, 2008), p. 311.
[81] *Re Charkaoui* (2004), 260 Federal Trial Reports 238; published online (2004) Federal Court 1031, available at: {http://www.canlii.org/en/ca/fct/doc/2004/2004fc1031/2004fc1031.html}, [39].
[82] *Charkaoui* (2005), p. 420; [75].
[83] For example, observing a curfew, being accompanied at all other times, wearing an electronic tag, *Charkaoui* (2005), pp. 422–3; [86].
[84] *Charkaoui* (2007).
[85] Ibid., pp. 392–400; [70]–[87].

Terrorism.[86] This change of attitude should not be exaggerated. The Court gave the executive and parliament one year to amend the legislation in order to make it compatible with the Charter and dismissed all of Mr Charkaoui's other arguments. For example, it held that deprivation of liberty was not against the Charter because the periodic review of detention by a court meant that detention was not indefinite[87] and foreigners could 'apply for release and depart from Canada at any time.'[88] The Court, similarly to the Court in *Thomas*, saw nothing wrong in not only not keeping the executive in check but taking on the responsibility of applying precautionary measures itself. After referring to the unique dangers of terrorism, the Court concluded that '[w]here there is a risk of catastrophic acts of violence, it would be foolhardy to require a lengthy review process *before* [an inadmissibility] certificate could be issued',[89] that is, the judiciary must act quickly to prevent acts of terrorism.

The next case, *Suresh*, in some ways reminiscent of *Thomas*, demonstrates how the judiciary perceives the threat that terrorists pose to the existence of sovereign states to be of such magnitude that existing legal concepts must be interpreted flexibly in order to combat it.

Suresh

In *Suresh*[90] the Supreme Court of Canada considered whether to expel a refugee who may be at risk of torture in his home country because he was, according to the executive, a danger to the security of the state of Canada. Mr Suresh, an ethnic Tamil from Sri Lanka, argued that deportation to torture would breach the Charter and, further, that the words 'terrorism' and 'danger to the security of Canada', neither of which was defined in the law, were unconstitutionally vague.

Mr Suresh's 'activities' in Canada were non-violent. Nonetheless, the Supreme Court held that he might pose a danger to the state. A narrow meaning of the word 'danger' may have been intended when the Refugees Convention came into force in 1951 but:

> 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.[91]

The Court emphasised that at present there exist terrorist transport and financial networks spanning the globe; that the consequences of terrorist acts are global; that Canada can further its national security through international cooperation in the area of anti-terrorism[92] and that its security may be dependent on that of

[86] Thomas Poole, 'Recent Developments in the "War on Terrorism" in Canada', *Human Rights Law Review*, 7:3 (2007), pp. 633–42, 633.
[87] *Charkaoui* (2007), pp. 408 and 415; [107] and [127].
[88] Ibid., pp. 401–2; [90].
[89] Ibid., pp. 394–5; [75], emphasis in original.
[90] *Suresh* (2002).
[91] Ibid., pp. 49–50; [86]–[87].
[92] Ibid., pp. 50–1; [88].

another state.[93] By enumerating these factors, the Court foreshadowed that it would construe the legislation in a manner that would accommodate the executive and not keep it in check.

The Federal Court of Appeal had accepted that Mr Suresh posed no direct threat to Canada but held that deporting him back to Sri Lanka where he may be tortured was a proportionate response against a 'terrorist' who had succeeded in 'penetrating [Canada's] borders'.[94] On appeal, the Supreme Court concluded that in 'exceptional circumstances', not necessarily in this case, a person who is a 'danger' may be expelled to another country where he or she may face torture.[95]

Michel Coutu and Marie-Hélène Giroux consider that *Suresh* shows the post-9/11 paradigm shift from liberty to security in judicial decision-making.[96] They compare it with the extradition case of *Burns*,[97] decided only about a year earlier but prior to 11 September 2001, in which two crime suspects could have faced the death penalty if extradited to the US. The Supreme Court did not allow the extradition and declined to treat the executive's discretion with the 'utmost circumspection'.[98] 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 and its role to act as a check on the executive.[99]

Coutu and Giroux do not identify the precise reasons behind the opposite outcomes in the two cases beyond the fact that one case was decided before and one soon after 9/11. I argue that the difference is due to the deployment of the logic of precaution in *Suresh*. In that case the Supreme Court explained that since 2001 the world had changed and 'preventive or precautionary state action may be justified; not only an immediate threat but also possible future risks must be considered.'[100] In *Burns* the Court emphasised its own role as a guardian of the Constitution and individual human rights. By contrast, in *Suresh* it expressly sought to shift responsibility to the executive and parliament whose duty it was to combat terrorism. Executive governments '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',[101] that is, the Court should defer to the other branches of government and sanction the use of whatever 'legal tools' the executive needs. In the case involving a chance of catastrophic terrorism (as opposed to the deportation of 'ordinary' criminal suspects in *Burns*), the Court sought to avoid any accountability or responsibility. In *Burns* the Court stood up to the executive and protected the rights of two murder suspects (Mr Burns and his co-accused) but when it came to Mr Charkaoui who had not committed any

[93] Ibid., p. 51; [90].
[94] *Suresh vs. Canada* (2000) 2 Federal Court 592; published online (2000) CanLII 17101, available at: {http://www.canlii.org/en/ca/fca/doc/2000/2000canlii17101/2000canlii17101.html}, [120].
[95] *Suresh* (2002), pp. 46–7; [78].
[96] Michel Coutu and Marie-Hélène Giroux, 'The Aftermath of September 11: Liberty v Security before the Supreme Court of Canada', *International Journal of Refugee Law*, 18:2 (2006), pp. 313–32, 313–14 and 323 respectively.
[97] *US vs. Burns* (2001) 1 Supreme Court Reports 283; published online (2000) Supreme Court Cases 7, available at: {http://www.canlii.org/en/ca/scc/doc/2001/2001scc7/2001scc7.html}.
[98] *Kindler vs. Canada (Minister of Justice)* (1991) 2 Supreme Court Reports, pp. 779, 837.
[99] *US vs. Burns*, [35]. In any event Mr Burns and his co-accused were extradited soon after this decision.
[100] *Suresh* (2002), p. 51; [89].
[101] Ibid., p. 12; [3], emphasis added.

acts of violence, the Court considered it could not ignore the risk to Canada's national security.

In February 2008, the security certificate against Mr Suresh was lifted; he was no longer subject to surveillance or restrictions on his freedom of movement.[102] Similarly to *Thomas* and *Charkaoui*, the lifting of precautionary measures taken by the executive or judiciary cannot lead to accountability, because of the impossibility of proving that the measures were not necessary and did not prevent anything.

The judiciary showed a real willingness to assist the executive in its fight against terrorism through precautionary justice and the interpretation of established legal concepts such as 'danger' or the absolute prohibition on *refoulement* to torture. Far from inhibiting the executive efforts to combat terrorism, the judiciary assisted it.

Conclusion

The cases considered above suggest that when it comes to national security the judiciary often eschews its role to serve as a check and balance of executive power; it defers to the executive and adopts the logic of precaution. In some of the cases, the judges' fear of terrorism is obvious, and the fact that the risk of a terrorist attack may be infinitesimally small becomes irrelevant. Courts adopt the precautionary move away from consequence management of breached legal norms to preventative justice.[103]

In 2001, Lord Steyn of the UK House of Lords who (as mentioned in the first section of this article) in 2003 was highly critical of Guantánamo Bay, held in a decision that in matters of national security (the War on Terrorism) courts must be deferential and give great weight to the views of the executive government.[104] His Lordship observed that when deciding who constitutes a danger to national security:

> [I]t is necessary not to look only at the individual allegations and ask whether they have been proved. It is also necessary to examine the case as a whole ... and then ask whether on a global approach that individual is a danger to national security ... although it cannot be proved ... that he has performed any individual act which would justify this conclusion.[105]

Using this 'global approach' where trivial facts or the absence of facts are construed as a threat, the judiciary enters precautionary justice's vicious cycle of

[102] Colin Freeze and Omar El Akkad, 'New Security Certificates Issued', *The Globe and Mail* (22 February 2008).

[103] de Goede, 'Politics of Preemption', p. 163.

[104] *Home Secretary vs. Rehman* (2003) 1 Appeal Cases 153, Lord Steyn, p. 187. For a more recent example see the reasons of Lord Hope in the House of Lords decision in *RB (Algeria) and OO (Jordan) vs. Home Secretary* (2009) United Kingdom House of Lords 10, a deportation case, spoke at [209]–[210] of the rule of law and the protection of minorities even if people may say '[o]n their own heads be it if their extremist views expose them to the risk of ill-treatment when they get home'. He then proceeded to uphold the deportation decisions.

[105] *Home Secretary vs. Rehman* (2003) 1 Appeal Cases, pp. 153, 185–6, quoting from the decision of one of the other members of the Court, Lord Woolf.

draconian precautionary measures, such as the absurd condition that Mr Thomas not contact Osama bin Laden from Australia.[106]

There is no evidence that the measures imposed on Messrs Thomas, Charkaoui or Suresh prevented any terrorist acts from occurring. Moreover, the Canadian cases concerned people – allegedly dangerous terrorists – whom the government wanted to deport to countries where they might not be arrested or detained thus 'exporting' the risk[107] instead of minimising it.

Precautionary justice frees courts from accountability and responsibility as traditionally understood. Judges cannot be held to account for seeking to stop a future catastrophe, even where there is a 99.9 per cent chance that it will not eventuate. The legal principle 'better that ten guilty persons escape than that one innocent suffer' is perhaps being replaced with 'better that a hundred innocent persons suffer than that one potential terrorist go free.'

In risk society, the judiciary's natural tendency to defer to the executive in times of crisis has become intertwined with a genuine fear of a catastrophic, dark future. 'Correlation rather than causality and speculation rather than statistical probability underpin the epistemology of security governance' and judicial decision-making.[108]

Based on the cases analysed in this article, one can only be pessimistic about the judiciary's willingness to stop governments' misguided quest for a society free of terrorism. Far from standing in a position as apolitical arbiters of rights, judges fall victim to the atmosphere of fear that pervades precautionary risk as a technology of government. The only hope is that as the tragic events of 9/11 recede in the consciousness of politicians and judges, the most egregious policies adopted early in the 21st century may be reversed as, for instance, President Obama's decision to close down Guantánamo Bay. The enduring legacy of 9/11 is likely to be that the politics of fear have entrenched precautionary reasoning as part of criminal law.

[106] Mowbray FM reduced considerably the list of individuals Mr Thomas cannot contact: *Jabbour vs. Thomas*, Schedule 1.

[107] The idea of risk 'export' was coined in relation to some UK cases. See UK House of Commons Standing Committee E, 7th Session (27 Ocotober 2005), col. 271.

[108] Claudia Aradau and Rens van Munster, 'Imagination, Security and Uncertainty', paper presented at the VIEW conference Mobilisations of Uncertainty and Responsibility in International Politics and Law, Netherlands Defence Academy, 20–22 November 2008.