

# Rethinking rights

## in the age of terror

George Brandis

Much public debate on counter-terrorism laws has taken on a certain ‘Groundhog Day’ predictability. Each time a new event occurs which heightens concern about the threat of terrorism, the Government announces a more aggressive or comprehensive legislative response. And as surely as night follows day, civil liberties groups and legal professional associations condemn the further measures as intrusions on ancient liberties.

Too often, the protagonists in the debate are talking past each other. Federal and state Governments (of both political complexions), assuming responsibility for the safety and wellbeing of the community, understand that counter-terrorism laws are not primarily about law enforcement, but about interdiction and prevention. But their critics, typically reflecting lawyers’ concerns about process, treat the debate as if it were an argument about criminal procedure – thus missing the point that, if society gets to the stage of trying an offender, it may be too late – the terrorist offence will already have been committed.

Governments do bear a heavy burden of persuasion whenever they propose laws which curtail traditional rights and liberties. They also bear a moral obligation not to take opportunistic advantage of legitimate concerns about public safety, born of the new age of terrorism, to enlarge the policing functions of the State unnecessarily.

But correspondingly, those who criticise new and intrusive counter-terrorism laws also have an obligation to reappraise the legal status quo in light of materially different circumstances. The traditional law enforcement paradigm is no longer equal to the national security challenge which global terrorism presents.

The civil libertarians’ approach reflects the attitude of the celebrated American legal scholar Ronald Dworkin, who popularised the expression ‘rights are trumps’. His argument is that no amount of social utility or public benefit can justify an incursion on a citizen’s rights. The problem with an absolutist position like that is that it forecloses further discussion – the attitude of so many civil libertarians is that they merely have to play the ‘rights’ card and that is the end of the argument. The challenges presented by terrorism demand a more sophisticated response.

In many cases, the asserted ‘rights’ which are sought to be protected are either bogus, or their content is overstated. A good example of the overstatement of the scope of a right can be seen in the reaction to the proposal to criminalise the use of language (whether spoken or written) which might encourage terrorism. It is argued that this represents a violation of the right to freedom of speech. Yet freedom of speech has never been an absolute right – if it were the laws of defamation would not exist.

In the criminal law, it has long been an offence to incite violence – notwithstanding that this means criminalising certain forms of speech or expression. It is not immediately

obvious to me why criminalising the encouragement of terrorism is anything more than an application of the same principle.

Some rights are of a procedural character: they are not fundamental human rights, but rights which are derivative from the nature of the legal process to which an accused person is subjected. The rules of evidence are the classic example of procedural rights. An accused person has a right to have inadmissible evidence excluded from the consideration of the jury. But the determination of whether evidence is admissible or inadmissible is essentially a functional question – will the admission (or exclusion) from the court of a piece of otherwise relevant information be more or less likely to result in an accurate outcome?

Unfortunately, many of the rules of evidence, the origins of which are lost in legal antiquity, have taken on an unwarrantedly sacrosanct air: they have been transformed – at least in political rhetoric – from procedural rights, which demand an essentially functional justification – to fundamental human rights, which it is supposedly a heresy to question.

Take, for instance, the right to silence. In practical terms, what this means is that in an ordinary criminal trial, no inference adverse to the accused may be drawn from the fact that he ‘remained silent’ – ie. did not provide information to the police. Yet the ‘right to silence’, along with many other contemporary rules of evidence and criminal procedure, had their origin at a time when an accused person was not even permitted to give evidence on their own behalf. The right, functionally justified at a time when criminal procedure was very different, is not so sacrosanct as constant rhetorical incantations make it appear. Indeed, in a different legal environment, when the prevention of terrorist crimes depends upon securing information, one might question even the functional justification of the right to silence.

The need to protect our citizens from terrorist violence does demand new responses from Governments. It demands, unfortunately, that in some circumstances the policing power of the State be enlarged. There are legitimate concerns about the consequences of such laws for the liberties of the citizen – and I am one who has, in the Liberal Party Room, raised such concerns on occasions. But those who share that sentiment do neither themselves, nor their arguments, any favours by making grand, rhetorical, absolutist claims about civil liberties, rather than engaging in a careful reassessment of the sources, utility and rationale of the legal principles they seek to defend. ♦

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