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Law, Lawyers and Lattes: The (Ir)relevance of the Chattering Classes in a Time of Insecurity

Andrew Byrnes*

*University of New South Wales

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Abstract

Legislative and policy responses to terrorism pose particular challenges for academic legal commentators who wish to analyse the adequacy of Australian governmental responses to actual and perceived threats of terrorism. Criticism of the flood of new legislation, its necessity and consistency with human rights standards and the rule of law, is often dismissed as the views only of the privileged and out-of touch liberal "chattering classes", part of a political strategy positioning which seeks to defuse criticism by charactering it as the outpourings of an "elite".

The role of critical scholarly analysis of anti-terrorism measures is of fundamental importance, as part of a critique of the way in which law and policy is made in response to particular social issues. This paper is not focused on cataloguing the failures of the federal government (or indeed those of the State governments which have followed, or been stampeded into following, the leader). Rather it sketches the contours of some of the recent debates around anti-terrorism legislation, identifies the roles that academic lawyers in particular have played, and draws attention to some of the difficulties and challenges that academics face in seeking to bring the benefits of reason, deliberation and evidence-based assessment of legislative and other measures taken by governments to create and to address our insecurity.

Law, Lawyers and Lattes: The (Ir)relevance of the Chattering Classes in a Time of Insecurity

Andrew Byrnes*

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"All bad precedents began as justifiable measures."

-- Julius Caesar in Sallust, *The Cataline Conspiracy*, Ch LI

INTRODUCTION

The first time that I recall being a member of a group whose views were criticised as being those of the 'chattering classes' was in 1999, at a time when I was living and working in Hong Kong. Less than two years previously, the former British Crown Colony had reverted to Chinese rule under constitutional arrangements which gave effect to the concept of 'one country, two systems', and which were intended to ensure the 'autonomy and prosperity' of Hong Kong, within a framework of 'Hong Kong people ruling Hong Kong'.[1] Concerns about the gradual erosion or more sudden deprivation of Hong Kong people's freedoms had been central to political debate in Hong Kong since the signing of the Sino-British Joint Declaration in 1984, and had been given a devastating urgency in June 1989, when the violent suppression of the pro-democracy movement on the Mainland profoundly affected Hong Kong people.

Yet the transfer of sovereignty came and went in July 1997, and the new constitutional system came into effect. Central to the preservation of the rule of law in Hong Kong was an independent judiciary, including a Court of Final Appeal to replace the Privy Council, which would be the final judicial arbiter of the law in Hong Kong – though the Standing Committee of the National People's Congress of the People's Republic was

* Professor of Law, Faculty of Law, The University of New South Wales. This is a revised version of the lecture presented at the University of New South Wales on 29 March 2006. It draws on research conducted as part of an ARC-funded Discovery Project (DP0451473), "Terrorism and the non-state actor: the role of law in the search for security"

[1] See generally Yash Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (Hong Kong: Hong Kong University Press, 2nd ed 1998).

given power to interpret the Basic Law if the Court referred an issue to it, and also had the power to interpret laws under the Chinese Constitution.

In late January 1999 the Court of Final Appeal handed down its judgment in a controversial case involving immigration from the Mainland to the Hong Kong Special Administrative Region,[2] its decision running counter to the policy of the Hong Kong government, which sought an interpretation from the Standing Committee of the NPC. In late June 1999 the Standing Committee, after consulting its Committee on the Basic Law (which meets in private and does not follow an adversarial or participatory procedure), issued an interpretation which effectively overturned the Court's decision in important respects.[3] This action – though available under the Chinese constitutional system – was seen by many (including me) as undermining the autonomy of Hong Kong and the integrity of Hong Kong's legal system, though it also had many defenders. One authority, Professor Jerome Cohen, a leading Chinese law academic who had taught at Harvard and New York University Law Schools, who was one of the world's leading legal practitioners in the field, and who had committed considerable time and energy over 40 years to help build and support the rule of law in China and Hong Kong, gave evidence to a US Congressional Subcommittee in which he was very critical of the Court of Final Appeal's approach. He also remarked:[4]

> 'My own hope is that "the chattering classes," Hong Kong's democratic leaders and those members of the legal community who have been upset at the fate suffered by the Court of Final Appeal's January 29 decision, will calm down, develop more realistic expectations and strategies for integrating Hong Kong's legal system with that of the mainland and prepare for the long haul required for constitutional progress.'

That criticism couched in these terms should come from such a respected scholar took me back at the time, not so much because of the substance of Professor Cohen's analysis – he may well have been right – but because of the dismissive nature of the epithet 'chattering classes' and its suggestion that the articulation of principles (albeit controversial) was out of touch with reality and a strategy of limited political value. But this at least was reasoned criticism and was certainly mild by the standards of political debate in Hong Kong and China at the time.[5]

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[2] The main case was *Ng Ka Ling and another v Director of Immigration*[1999] HKCFA 12, [1999]2 HKCFAR 4, [1999] 1 HKC 291.

[3] See generally Johannes Chan, Fu Hua-ling and Yash Ghai (eds), *Hong Kong's Constitutional Debate: Conflict over Interpretation* (Hong Kong, Hong Kong University Press, 2000).

[4] *A Reexamination of U.S.-China relations, Hearings before the Subcommittee on East Asian and Pacific Affairs of the Committee on Foreign Relations United States Senate*, 106th Congress, 1st session, March 23, July 1 and 21, 1999, S Hrg 106-232, 63.

[5] The last British Governor of Hong Kong, Chris Patten – who had served as Chairman of the British Conservative Party before coming to Hong Kong and after his stint in Hong Kong then went on to serve as the European Commissioner for External Relations -- was affectionately known as 'Fat Pang' among the Cantonese speaking community of Hong Kong. When his last-gasp-of-Empire proposals to introduce a greater level of democracy into Hong Kong' s political system were unveiled, they drew the ire of the

The rhetoric of the 'chattering classes' has been alive and well for some time in Australia, used as a means of attacking and seeking to discredit the knowledge and perspectives of a variety of groups broadly left in orientation (if that is still a meaningful term), whose common attribute seems to be opposition to Commonwealth government policies which are excessively parochial, economic rationalist, and disrespectful of fundamental rights.

The political origins and the use of terms such as the 'chattering classes' -- and its close friends 'chardonnay socialist' and 'latte liberal' – have been carefully analysed by Australian and overseas scholars of political science.[6] They locate the origins of the term 'chattering classes' in England of the early 1980s and its use as a common derogatory term against political opponents to the time of Margaret Thatcher, and trace its emergence in Australia in the form of an anti-elitist discourse ('new class' discourse) which takes on those members of elites identified as members of the 'chattering classes'.

The *Oxford English Dictionary* has this to say of the term 'chattering classes':[7]

> **chattering classes** (occas. also in *sing.* **chattering class**) freq. *derogatory*, members of the educated metropolitan middle class, esp. those in academic, artistic, or media circles, considered as a social group freely given to the articulate, self-assured expression of (esp. liberal) opinions about society, culture, and current events.

Johnston and Alloyet write: [8]

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central authorities, who denounced him as a 'prostitute for a thousand years' and as a 'snake with a thousand tongues' (among other descriptions).

[6] See generally Marian Sawer and Barry Hindess (eds), *Us and Them: Anti-Elitism in Australia* (Perth: API Network, 2004).

[7] http://www.oed.com/bbcwordhunt/chattering-classes.html (visited 29 March 2006)

[8] Vanessa Johnston and Pascale Alloyet, 'Mobilizing the 'Chattering Classes' for Advocacy in Australia' (2003) 46 *Development* 75, at 76. Damian Cahill writes:

> 'New class discourse constructs social movements, trade unionists, anti-globalisation protestors, Indigenous activists, feminists, gay-rights activists and social-justice advocates as powerful, well-paid zealots. So the argument goes, while claiming to represent the public interest, the new–class members use their privileged positions to pursue narrow ideological or self-interested agendas and are out of touch with the values and aspirations of ordinary Australians. The object, or target, of new-class discourse is therefore the left, broadly conceived. New-class discourse identifies the left both as the home of elites (in terms of their income, status and occupation relative to ordinary Australians) and as elitist (in terms of their disdain for the attitudes of ordinary Australians), positioning the left in opposition to ordinary Australians."
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> Damien Cahill, "New-Class Discourse and the Construction of Left-Wing Elites", in Sawer and Hindess, *supra* note 6, 77, at 80.

Tim Dymond comments:

> 'The "new class" concept combines insult and analysis into an accusation about the motives of middle-class intellectuals . . . the "new class" insults are familiar: "chardonnay socialist",

> '"Chattering classes" is a derogatory term used predominantly by the media to describe intellectuals in society perceived as having little in common or to have lost touch with ordinary people but who nonetheless indulge in extensive discussions about political social and cultural issues that affect the populace. The derision is based on the tendency to remain as discourse without any effective action that might jeopardise the comfort of the daily lives of the "chatterers". The labelling of the criticisms from the educated and professional groups has proved an effective strategy by government, not only for dismissing concerns that have been raised about a number of government policies, but also creating a chasm between the two disparate groups ("academic left" and the "working class") that had traditionally formed an effective opposition against conservative politics in Australia.'

There are a number of features of the deployment of the 'chattering classes' approach in attacks on political opponents.[9] It is an anti-elitist attack which suggests that the 'latte drinkers' are elitists who consider themselves morally superior to ordinary Australians, who articulate concerns which are of no real concern to ordinary people and who are pursuing their own self-interest,[10] whether that be the enjoyment of the smug complacency of the do-gooder or the more tangible benefits of employment and career in the various 'industries' which have evolved in response to their demands. In relation to international issues, the suggestion is that the 'chattering classes', with their commitment to universalist and international ideals, have a questionable commitment to Australian values and the national interest and that they are too ready to undermine democratic Australian values and processes by using international standards and bodies to advance their causes.[11]

It can be seen that the effect of this form of political attack on critics as a class is intended to marginalise those critics and to delegitimate their knowledge and perspectives.[12] As Marian Sawer and others have pointed out, it is an anti-elitist

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> "chattering class", "latte liberal" – all are outrider ideas for the "new class". … The accusation is that members of the 'new class' adopt radical political stances in the name of the "people" or the "public interest". However, their only real interest is in promoting themselves.'
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> Tim Dymond, "A History of the 'New Class' Concept in Australian Public Discourse" in *ibid,* 57, at 57-58.

[9] This discussion draws extensively on some of the essays in in Sawer and Hindess, *supra* note 6, in particular Barry Hindess and Marian Sawer, 'Introduction' in *ibid,* 1 and Marian Sawer, 'Populism and Public Choice in Australia and Canada: Turning Equality-Seekers into "Special Interests"', in *ibid*, 33.

[10] See, e.g., Christopher Pearson, 'The Culture Wars' in Nick Cater (ed), *The Howard Factor: A Decade that Changed the Nation* (Melbourne: Melbourne University Press/*The Australian*, 2006), 19, and Dennis Shanahan, 'Two Howards', in *ibid,* 31, at 44.

[11] For an example of this critique, see David Flint, *the Twilight of the Elites* (Melbourne: Freedom Publishing, 2003), critically reviewed by Rodney Tiffen in *Australian Review of Public* Affairs, *Symposium: Elitist anti*-elitism, 27 October 2003, available at http://www.australianreview.net/digest/2003/10/tiffen.html (visited 29 March 2006)

[12] See Cahill, *supra* note 8, at 83

rhetoric deployed by 'insider elitists',[13] is intensely partisan, provides an incoherent account of the 'classes' which it denigrates, and privileges non-deliberative and unmediated opinion over deliberative and expert knowledge.[14] But the 'ingenious parlour game'[15] played conservative commentators has been effective at various times in recent years in Australia.

Many academic and practising lawyers would qualify as members of the chattering classes, though not all (the former Supreme Court Justice Roderick Meagher is certainly one who would disdain such a membership[16]). But it is not my primary intention here to analyse this concept and its deployment against critics of government, although the terminology and the substantive elements of the 'chattering classes' critique *have* been directed by conservative elements in the media and politicians against those who have dissenting or critical views of certain aspects of the government's policies on national and international security.

THE HOWARD GOVERNMENT AND OUR INSECURE WORLD

During the second five years of the Howard government, traditional security concerns – external and internal -- have been central to the government's policy agenda and its public image.[17] The federal government has adopted a series of policy decisions in pursuit of its broadly defined security agenda, the most contentious of which have been the decision to go to war against Iraq in 2003, and the seemingly endless stream of anti-terrorist legislative and other measures that have been introduced since September 2001.

Lawyers – academic lawyers, professional associations, and individual practitioners – have been extensively involved in the debates over these issues.[18] My interest is not in cataloguing the failures of the government (or indeed those of the State governments

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[13] See Hindess and Sawer, *supra* note 9, at 1-2.
[14] See Sawer, *supra* note 9, at 53.
[15] The phrase is that of David Burchell, who comments: 'In recent years, cultural and social conservatives have devised an ingenious parlour game that involves tagging their leftish opponents as members of a cultural 'elite' – an elite at once unworldly and interfering, out-of-touch yet strangely sinister.' David Burchell, 'The Trouble with Empathy' in Robert Dessaix (ed), *The Best Australian Essays 2005* (Melbourne: Schwartz Publishing, 2005) 251, at 254.
[16] See Justice Roderick Meagher, "Appendix 1: Addresses Launching *Upholding the Australian Constitution*, volume 1", in *Proceedings of the Third Conference of The Samuel Griffith Society* (1993), available at http://fergco.com/~samgriffith/papers/html/volume3/v3app1-2.htm (visited 29 March 2006) (agreeing with the view that the Society was needed 'as an antidote to the chattering classes, so that sane and scholarly discussion of constitutional issues could proceed').
[17] See Paul Kelly, 'How Howard Governs', in Cater, *supra* note 10, 3 at 16-17; and Patrick Walters, 'At War with Terror', in *ibid*, 160.
[18] For reactions to the September 2005 proposals from lawyers and others, see Department of the Parliamentary Library, "Proposals to further strengthen Australia's counter-terrorism laws—2005, E-Brief: Online Only issued 6 October 2005, updated 25 November 2005", available at http://www.aph.gov.au/library/intguide/LAW/TerrorismLaws.htm, as well as in the submissions to the inquiry conducted by the Senate Committee on Constitutional and Legal Affairs into the provisions of the Anti-Terrorism Bill (No. 2) 2005 (report of 28 November 2005 available at http://www.aph.gov.au/Senate/committee/legcon_ctte/terrorism/index.htm.

which have followed, or been stampeded into following, the leader), but to sketch the contours of the debates, identify the roles that academic lawyers in particular have played, and to draw attention to some of the difficulties and challenges that we face in seeking to bring the benefits of reason, deliberation and evidence-based assessment of legislative and other measures taken by governments to create and to address our insecurity.

The roles of the academic lawyer are varied, but they include the balanced and expert assessment of public policy and legislative proposals, drawing where appropriate on historical and comparative material; and the provision of the results of these informed analyses and critiques to those involved in policy-making in our political and legal institutions. Critical, evidence-based and reasoned evaluation of proposals, their justifications and likely impact, and their broader social significance is what academic analysis at its best has to offer public debate.

But is there also a role for advocacy, for a more direct critique of government actions, which sets aside a disinterested analysis and invokes expertise to attack or support particular policy options? Where does one cross the line between an appropriate academic analysis and advocacy of policy and a politically partisan advocacy? How bright is that line?

THE ANTI-TERRORISM DEBATES AND LEGISLATION

Let me first turn to the anti-terrorism debates and the challenges they have posed.

The flood of anti-terrorism legislation that has been introduced by the federal and State governments over the last few years has received an enormous amount of detailed analysis from technical legal and policy perspectives, not least from my colleagues at UNSW and my former colleagues at the ANU.[19] My focus is not the detail of that legislation but a number of aspects of the legislative process and broader debate, some of which pose significant challenges for the role of academic lawyers and practising lawyers who wish to take a critical stance in evaluating that legislation.

The role of critical scholarly analysis of anti-terrorism measures – and also its independent legal review – is of fundamental importance. This is because of the political imperative that governments face, namely to be seen to be responding decisively and effectively to the perceived threats of terrorism, even if they cannot be sure that the measures taken will have any real effect in diminishing the possibility of terrorist actions. Political leaders feel that they must be seen to act, and it is difficult for oppositions not to fall into line. As the United Kingdom Parliamentary Joint Committee on Human Rights stated in its review of the Prevention of Terrorism Bill 2005 in relation

[19] See, in particular, the Terrorism and War archive of the Gilbert+Tobin Centre for Public Law, UNSW, available at http://www.gtcentre.unsw.edu.au/publications/terrorism.asp and the website of the ARC-funded project *Terrorism and the Non-State Actor after September 11 The Role of Law in the Search for Security*, available at http://law.anu.edu.au/terrorismlaw/projectoutput.asp#Submissions.

to the need for independent judicial scrutiny of executive actions in the context of terrorism:[20]

> 'Finally, in relation to the need for more judicial control in the Bill, we make a brief observation about whether members of the executive or courts are best placed to make the decision as to whether control orders should be made in individual cases. Both the Home Secretary and the Prime Minister have been very candid in saying that they are proposing legislation of this exceptional kind because they do not want it to be possible for them to be accused of not doing more to protect the public in the event of a terrorist attack succeeding. Although we find this sentiment to be entirely understandable in elected representatives who are directly accountable to the public, we also consider that it demonstrates precisely the reason why independent safeguards for individual liberty are essential. A person who is determined to avoid being accused of failing to do more to protect the public is extremely unlikely to be the best person to conduct a rigorous scrutiny of the strict necessity of a particular order. That role is best performed by independent courts.'

Scrutiny by the media and the academy can also be important elements of bolstering this accountability.

The first task of the academic commentator must be to scrutinise the necessity of the measures proposed. This has had at least two dimensions in the Australian terrorism debate. The first has been the question whether the array of new criminal provisions that has been enacted in fact largely duplicates existing criminal laws, and is to that extent primarily a political response naming and condemning terrorism rather than a necessary legal measure.[21] This raises less exciting but still important policy issues about the way in which criminal law should develop in response to what are perceived as new problems but which may in fact be variations of old ones.

The second and more difficult aspect relates to those areas in which there are significant extensions of existing criminal law and procedure, by the enactment of new or significantly expanded offences (such as sedition) or the conferral of unprecedented investigative or law enforcement powers (such as the regimes of preventive detention and control orders).

The unacceptability of some of these proposals – for example, provisions that might have criminalised the expression of strongly held political views which neither incited nor were calculated to incite violence -- seems clear on their face: in Australia there is no evident need for nor plausible justification of such restrictions on fundamentally

[20] Joint Committee on Human Rights, Session 2005-2005, *Tenth Report,* HL 68/HC 334, para 16, available at http://www.publications.parliament.uk/pa/jt200405/jtselect/jtrights/jtrights.htm.

[21] For an exploration of some of these issues, see S Bronitt, 'Constitutional Rhetoric v Criminal Justice Realities. Unbalanced Responses to Terrorism?', (2003) 14 *Public Law Review* 76, and Simon Bronitt, Miriam Gani, Mark Nolan and John Williams, Submission No. 210 to the Senate Legal and Constitutional Committee Inquiry into the Anti-Terrorism Bill (No. 2) 2005 available at http://www.aph.gov.au/Senate/committee/legcon_ctte/terrorism/submissions/sub210.pdf.

guaranteed human rights. What is less clear is why an Attorney-General would push so hard for the passage of such provisions, while simultaneously intending to refer them to the Law Reform Commission for an inquiry into their appropriateness (which he did 3 months later[22]).

The situation is more complex in relation to other provisions. While the preventive detention and control orders regimes offend fundamental principles of the common law and seriously encroach on the enjoyment of internationally guaranteed human rights, the debate becomes one of assessing the permissibility of *limitations* on those rights: what restrictions on the rights of *some* individuals are acceptable in seeking to protect *others* against possible violations of their rights?

The ability of an external commentator to scrutinise adequately a restriction on rights justified by reference to national security grounds may be limited in important respects.. A principal limitation is likely to be a lack of relevant information and knowledge. While the public knows some facts about terrorist acts and activities, we are very much at the mercy of governments in what they choose to tell us about the intelligence, and the assumptions and methods of evaluation on which they base their threat assessments and their policy and legislative responses. It becomes difficult, though not impossible, to contest judgments of proportionality when one has limited access to the possibly massaged information underlying them.[23]

Against this background, we are exhorted by politicians – and to some extent forced – to rely on our democratic institutions and processes. While we may not be in a position to second-guess or verify the government's decisions, the government's judgment is legitimated through (we are told) its grounding in expert advice and intelligence assessments, through its status as the decision of a democratically elected government assumed to be trustworthy and committed to acting in good faith in the interests of its citizenry, and through its being tested in the deliberative, adversarial processes of democratic decision-making (above all, that of Parliamentary scrutiny of legislation).

The appeal to process is an attractive one, both conceptually and from a practical perspective, since we know that Parliamentary procedures can involve intense scrutiny of legislative proposals leading to greatly improved statutes (including by bringing about the moderation of excessive inroads on fundamental rights) – if the necessary time, knowledge, political interest, and commitment to principle are present. One might task whether these factors have all been present during the various Parliamentary reviews of Australia's federal and State anti-terrorism legislation – it has certainly not been the case in every instance, notwithstanding the feverish activity that has surrounded the Parliamentary examination of the various Bills.

[22] Attorney-General's Department, 'Australian Law Reform Commission to Review Sedition Laws', Media release 028/2006, 2 March 2006.

[23] See Michael Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror* (Edinburgh: Edinburgh University Press, 2004), 3.

A couple of features of the legislative process have stood out. The first is the Howard government's negotiating strategy. It is of course a common strategy in political life as well as in other fields of life that initial proposals stake out an extreme position, in the knowledge that the proposal is subject to negotiation and that compromise will bring an extreme proposal back towards a more moderate and reasonable result. This approach has been a regular feature of the federal government's approach to the anti-terrorism laws it has proposed – it has consistently staked-out an initial extreme position with proposals that can only be described as beyond the pale in their disregard of fundamental principles and human rights standards. But the reason for this is clear – at best some of these proposals will survive, at worst compromise and the adoption of less extreme proposals will still leave in place a significantly stronger set of powers and more wide-ranging criminal offences than before. And the government reaps the political benefit of being seen to be flexible and willing to compromise, while the opposition parties also obtain kudos for their role in restraining the excesses of the government.

This is, of course, no novelty in the politics of Parliaments, but at such times and on such important issues of legality and liberty it almost seems as if the substantive outcome is marginal – the political process of negotiation and compromise has produced a result that is legitimate *because* it is the result that has emerged. That may be good enough for politicians, but it is not good enough for us in our roles as evaluators of sound legal policy.

Something of this marginalisation of the substantive merits of a legislative outcome can be seen in the rhetorical devices employed by the Howard government in the promotion of its legislative and policy proposals – that of 'striking the right balance'. It is a metaphor whose use is by no means confined to the members of the Howard government, and their use of it has certainly not been confined to the field of anti-terrorism measures. Indeed, the Prime Minister entitled his 2006 Australia Day address to the National Press Club "A Sense of Balance: The Australian Achievement in 2006". In this speech he developed the metaphor in the context of his own government's policies and his personal understanding of Australian society.

In the context of anti-terrorism legislation, the metaphor has played a rhetorical role, but one which it has been largely empty of content, a verbal placebo to reassure the public that all is well. For example, in September 2005 when the Prime Minister announced the government's last round of 2005 anti-terrorism legislative proposals – which contained a number of controversial proposals, some of which were revised in the final legislation – he claimed that the proposals 'strike the right balance'. Three months later, welcoming the passage of the amended legislation, the government once again stated that the legislation also – or still – struck the right balance.

When measures to combat terrorism at home are in issue – as also with responses to threats such as the proliferation of weapons of mass destruction – a critical element of

the political acceptability of government actions is that of trust.[24] While trust may not have to be earned in government, it can be lost – and has been by the Howard, Blair and Bush governments (as by other governments before them) because of the actions they have taken in the so-called 'global war on terror'. For the scholar, the scepticism that has traditionally been adopted as a matter of prudence when it comes to assessing government actions and rhetoric must surely be maintained with intensity – because governments have given us cause to do so.

THE NEED TO ENSURE TRANSPARENCY – REGIONAL COOPERATION IN FIGHTING TERRORISM

A consequence of this scepticism and the attempts to justify policy and legislative outcomes by reference to process as much as substance, also means that scholars and other members of the 'chattering classes' must continue to devote considerable effort to ensuring maximum transparency in government. Notwithstanding all the advances that have been made in the last 30 years to open up government to the citizenry, governments still keep to themselves enormous amounts of information that is relevant to an assessment of their decisions and performance – they do this sometimes for good reasons, sometimes for bad reasons, and sometimes simply to avoid embarrassment. I have so far so focused primarily on Australian developments, but I wish to illustrate this point in a security context by reference to our government's actions on the international plane, and to underline the need to demand information about and scrutiny of its actions to combat terrorism when Australia collaborates with other nations.

The Australian government has been very active in the region in promoting bilateral and multilateral cooperation to address the issue of terrorism. An important part of that activity has been the conclusion of over a dozen bilateral agreements with countries in the region, each of which establishes a framework for cooperation with between Australia and the other country.[25] These agreements have been entered into under the rubric of Memoranda of Understanding (MOU), a designation which is intended (on the Australian side at least) to reflect their status as instruments of non-treaty status. In other words, they are not mean to impose binding international legal obligations on the parties, but do represent solemn political commitments to cooperate in the fields covered by the agreement. The status of these agreements as non-treaty instruments has the added political advantage that they are not subject to public scrutiny by the Commonwealth Parliament's Joint Standing Committee on Treaties.

The Foreign Minister, Mr Downer, has made much of these agreements. Visits to Australia by foreign heads of State or government or by fellow foreign ministers, or a visit by corresponding Australian leaders to another country have provided the

[24] See generally the discussion by Raimond Gaita in *Breach of Trust: Truth Morality and Politics*, *Quarterly Essay No 16* (2004)

[25] Those countries are Indonesia, Malaysia, Thailand, the Philippines, Fiji, Cambodia, East Timor, India, Papua New Guinea, Brunei, Pakistan and Afghanistan.

occasion for signing ceremonies for these instruments – the importance of which have been lavishly described in accompanying press releases from the Minister's office.[26]

Close cooperation with our regional neighbours is plainly an important aspect both of efforts to address terrorism, as well as part of our broader relationship with those nations. Yet the close cooperation between the military, intelligence and law enforcement bodies of various countries in the 'war against terror' has led to violations of fundamental human rights. The revelations of the irregular renditions of suspects – including Australian citizens -- to countries where there are reasonable grounds for believing that they may be subject to torture or other cruel, inhuman or degrading treatment during interrogation is serious cause for concern about and underlines the need to monitor carefully the formal, and perhaps more importantly the informal, cooperation between countries.

This is surely the case in relation to our own neighbours, some of whom have histories of human rights violations in the suppression both of those who might legitimately be seen as proper subjects of criminal investigation as well as of those who may be exercising their fundamental human rights to oppose the actions or policies of governments. Quite apart from disapproving of and discouraging such violations, Australia has its own legal and moral obligations not to contribute to or assist other States to engage in acts which violate the international human rights standards which we have solemnly vowed to observe and uphold – as the government has most recently done in properly and objectively assessing the claims of over 40 asylum-seekers from West Papua.

Despite the productive cooperation between Australian law enforcement authorities and those of our neighbours, these relationships have not been without controversy, and have sometimes been problematic in human rights terms – the recent discussion of the principles underlying the cooperation between Australian and Indonesian police in relation to drug smuggling and its implications for the Bali Nine illustrates the challenges.

So one might have expected that, when Australia embarked on its plan to enter into cooperative counter-terrorism arrangements with countries in the region, human rights would form part of the framework and would be explicitly referred to in those agreements. It was in an effort to discover whether this was in fact the case that I have endeavoured over some months to obtain from the Commonwealth government copies of those agreements. The Government has not been prepared to release them. There is no suggestion that the release of these framework agreements would involve the disclosure of any material that would prejudice law enforcement actions against potential terrorists. The reason proffered is that these agreements are sensitive documents for some of the governments involved and that it is not the practice to release such memoranda. Other (presumably 'sensitive') memoranda of understanding on other subjects appear on the DFAT website, and there does not appear to be an

[26] See, e.g., the press releases relating to the MOU signed with Afghanistan, http://www.foreignminister.gov.au/releases/2005/fa161_05.html.

explicit agreement with most of the governments concerned not to disclose the documents nor has the government been prepared to ask those governments whether they have any objection to their disclosure. And I am fairly confident of the relatively innocuous and anodyne content of the agreements because I have obtained copies of two of them, which were kindly provided to me by the diplomatic missions of the countries concerned when I wrote to them to request copies!

Perhaps this is just an example of academic frustration, but the clear message from the experience of recent international cooperation in relation to terrorism is that lack of transparency has too often provided a cloak for improper and illegal conduct, in some cases involving the torture of Australians and nationals of other countries. I found the words of the former Director-General of ASIO, Dennis Richardson (now our ambassador to Washington) in a speech in March 2005 to be rather chilling, though he no doubt meant them to be pragmatic and thought-provoking. He commented:[27]

> 'One of the ironies since September 11 is that liberal democracies are more dependent than is often understood on a range of other countries taking action under laws which they, the liberal democracies, would have difficulty in enacting and which, in different circumstances, they might criticise.
>
> -- the Internal Security Acts in Singapore and Malaysia are a case in point.
>
> Would regional security interests have been best served by Hambali, Jemaah Islamiyah's chief of operations, being taken into custody in Australia rather than in Thailand? An interesting question.
>
> Should a country like Australia be prepared to change its laws to accommodate the challenge of a Hambali, with all the attendant risks in the abuse of such powers, or should it place a premium on its own sense of purity and hope that the Hambalis of this world are captured elsewhere?
>
> In making these observations I am not seeking to make judgements, as I understand the dilemmas and do not have a solution for them, but make the observations to highlight the fundamental nature of the challenge of terrorism when it is up close.'

With dilemmas like these – and the temptations to abuse to which they can so easily lead – it seems that there is a need for vigilant public scrutiny of how our cooperation with other partners unfolds, and to ensure that not only does it build capacity to fight terrorism, but that it also ensures respect for human rights as well.

THE ROLE OF THE ACADEMIC IN PUBLIC DEBATE: PUBLIC INTELLECTUAL OR THE SCHOLAR AS ADVOVATE

[27] Director-General's Address, LawAsia Conference 2005, Gold Coast, Wednesday, 23 March 2005, available at http://www.asio.gov.au/Media/comp.htm (visited 29 March 2006).

The final issue I wish to address arises from the nature of the interventions made by academic international lawyers in the debate over the legality of the war in Iraq in 2003.[28] My comments are in part stimulated by Richard Posner's vigorous critique of the role played by public intellectuals (including legal academics) in public debate in the United States.[29] My particular focus is the relationship between the academic international lawyer as scholar and his or her role as advocate.[30] There are no doubt parallels for professions other than the academic international lawyer.

Many academic international lawyers combine in our professional and personal lives not just a scholarly interest in international law and its role in society but a commitment to many of its values. This is particularly so of human rights lawyers, but support for at least some of the precepts of an international system based on a 'rule of law' are shared by many international lawyers.[31] This is often accompanied by a preparedness, even an eagerness, to provide input from our disciplinary perspective into policymaking and legal decision-making that raises questions of international law.

There are plainly different forms of intervention. Few of us would today maintain that international legal scholarship is other than political in a broad sense of the term. Yet there is in most cases a difference between an intervention which is a broad review of an issue, with the weighing of arguments for and against a particular position, possibly accompanied by an indication of the position we think is stronger on legal grounds or preferable on legal policy grounds, and an intervention which is direct advocacy in support of the adoption of a particular legal position, or of a particular policy position because it follows from a legal argument we advocate. Of course, the two types of intervention may shade into one another, especially where a discussion which purports to be balanced is slanted or selective, but I think that the distinction is a useful one to work with.

As Posner points out in relation to the United States – and it is also true of Australia -- the media has created a demand for the contributions of public intellectuals (among whom he would number international lawyers speaking out on the legal and policy aspects of controversial political issues). The constraints of the media, with its tight deadlines, space limitations, problematic editing, and preference for clear, provocative,

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[28] This section draws on part of a paper originally presented at a workshop in Canberra on the topic 'International Challenges to National Legal Systems'. Together with other papers from the workshop, a revised version of part of that paper (not including what appears here) appears as '"The Law was Warful': The Iraq War and the Role of International Lawyers in the Domestic Reception of International Law" in Hilary Charlesworth, Madelaine Chiam, Devika Hovell, and George Williams (eds), *The Fluid State: International Law and National Legal Systems* (Sydney: Federation Press, 2005) 229.

[29] Richard A. Posner, *Public Intellectuals: A Study of Decline* (Cambridge, MA: Harvard University Press, 2003).

[30] I have not dealt here with the additional dimension of academic lawyers who may be close to government because they have served or are serving as advisers or consultants in certain areas, referred to by Martti Koskenniemi, 'Between Commitment and Cynicism: Outline for a Theory of International Law as Practice' in Law' in United Nations, *Collection of Essays by Legal Advisers of States, Legal Advisers of International Organizations and Practitioners in the Field of International Law* (New York: United Nations, 1999) 495, at 521.

[31] See the discussion and references in *id*.

adversarial contributions rather than more expansive and nuanced ones, pose real challenges for international lawyers who wish to contribute to the public debate.

The contributions of international lawyers in Australia before and during the Iraq war and occupation took many different forms, from the well-known letter by the Gang of 43 (of whom I as one)[32] to many opinion pieces, television and radio interviews, opinions in various forms provided to politicians,[33] and more extended publications in academic journals.[34] Down the track it is worth reflecting on the extent to which media demands (and the attractions of responding to media invitations) affected the extent to which Australian international lawyers were able to contribute to the debate in a manner which would satisfy our own intellectual standards.

Timothy Noah wrote in relation to the contribution of public intellectuals to public debate that 'the value of intellectual opinion – that it reflects greater knowledge and depth than you typically hear from a talk-back radio caller – is lost when intellectuals shoot from the hip' and that 'intellectuals look like asses when they attempt to make group pronouncements'.[35] Is this comprehensive condemnation of group efforts a fair one, or at least one that should make us pause and rethink future interventions of this sort?[36]

There is no doubt that group statements of any kind can give rise to difficulties once one gets beyond a relatively small group of signatories. Nuance as well as forthrightness can be lost. In the case of the *Sydney Morning Herald* letter the inclusion of references in the letter to both the illegality under international law of the use of force (the *jus ad bellum)* and the possibility of violations of the laws of armed conflict (*jus in bello*) by the manner in which it seemed likely the force would be used, led to some confusion among readers and drew criticism – not helped by the sensationalist sub-editorial contribution of a provocative headline. Had one been writing a short piece for an academic journal, it would doubtless have been different, but then a 600-word space constraint and the dynamics of the press would not have been in the picture. Yet for all that, the letter should probably be seen more as an instance of advocacy within these

[32] "A pre-emptive strike on Iraq would constitute a crime against humanity" write 43 experts on international law and human rights, *Sydney Morning Herald*, 26 February 2003.

[33] See, e.g., the two opinions prepared for then Opposition leader, Simon Crean by George Williams and Devika Hovell, and by Grant Niemann, each titled *Advice to the Hon Simon Crean M.P. on the Use of Force against Iraq*, reproduced in (2003) 4 *Melbourne Journal of International Law* 183, and 190, respectively.

[34] Some of the contributions are referred to in Andrew Byrnes and Hilary Charlesworth, "The illegality of the war against Iraq", *Dialogue*, v 22/1 (2003).

[35] Quoted in Posner, *supra* note 29, at 117 and n 107.

[36] The then Attorney General, Mr Williams, referred to the statement in the following terms: 'The statement from those 43 experts is, in my view, political in nature and it uses exaggeration and selective quoting of the law to achieve conclusions that are both wrong and offensive. The statement places qualifications on the ability of the Security Council to authorise the use of force which simply do not exist… Since publication of the statement, the flaws it contains have been highlighted by a number of distinguished commentators. Professor Ivan Shearer, Challis Professor of International Law at the University of Sydney and a distinguished Australian international lawyer, referred to aspects of the statement as being not only offensive but also wrong.' *House of Representatives Hansard*, 6 March 2003, p 12421.

constraints than a more balanced and nuanced exposition of the legal position (that was done in other contexts).[37]

Despite the limitations of the format and the content of the letter, in terms of public debate it does seem to have attracted both public and government attention to the concerns of what appeared to be the overwhelming majority of international lawyers outside government, and the resulting media attention may have spurred the government into responding directly to this and perhaps contributed ultimately to the publication of the *Government Legal Advice* in mid-March.[38]

Posner writes of the impact of public intellectuals (which would include international lawyers) in relation to the Vietnam War and the effect of their publications:[39]

> 'Public intellectuals were taken more seriously during the Depression, World War II, the turbulent 1960s, the Cold War and the stagflation of the 1970s … But more seriously does not mean very seriously…. Although there was an enormous outpouring of public-intellectual work during the Vietnam War, a detailed study concludes that intellectuals were influential neither in the debate over (or conduct or outcome of) the war, nor in the civil rights crisis that was unfolding at the time) its conduct '.

The impact of the interventions in relation to the illegality of the Iraq war is also an question we might ponder in its aftermath. At one level the interventions were unsuccessful – the war went ahead, and the only impact of government appeared to be its having to respond to the legal argumentation with its own opinion, thereby defusing the legality issue as one that might cause significant problems in its public campaign.

However, this would be too negative a view. While the war did go ahead, there was an enormous level of public scrutiny of how it was conducted in light of the applicable international standards; the same applied to the period of occupation. In some cases it may have been that this possibility for public scrutiny encouraged governments to adhere scrupulously to the international legal rules; in others, such as Abu Ghraib, the scrutiny can only assist in identifying failures to do so.

CONCLUSION

What, then, should be the role of the academic lawyer and other *chatterati* (lawyer and non-lawyer alike) in a world in which challenges to our security are constantly portrayed as justification for new criminal laws, broad-ranging policy measures, and the investment of significant sums of money that is presumably coming from other areas of

[37] See the critique by Don Greig, 'It would be legal to attack Iraq', *Canberra Times*, 17 March 2003.
[38] Another issue in this context is the extent to which opposition politicians have commissioned opinions from international lawyers on a range of issues, particularly during the period of occupation of Iraq. The time constraints, and the clear intention to use these in a sometimes slanted manner to bolster a political position, raises some interesting questions about whether and how to respond to such requests.
[39] Posner, *supra* note 29, at 156.

need? I have no new prescription, but that we need to continue doing what we have been, to wit:

- To continue to critically analyse the rhetoric of the debate on anti-terrorism measures and to scrutinise carefully the process of law- and policy-making and the final products, to ensure that the political imperatives of those who govern us do not distort the laws they make for us
- To continue to seek maximum transparency from government and others – to demand the release of information and to challenge government to justify its claims of confidentially and the need for secrecy, which history shows us are so often overstated
- To monitor the impact of the measures that have been adopted both in the legal system and in the community, and to stress the temporary nature of the measures -- which means they must continue to be justified and we must do what we can to stop them from becoming accepted in the public mind and the minds of our political leaders as ordinary and unremarkable
- To undertake inquiries into the broader political economy of the development of the national security agenda by exploring issues such as the influence of the security community within and outside government, to examine the economics and major economic interests that have grown up around anti-terrorism and their influence on policy, and to ask on what it is we are *not* spending money when we devote such large resources to finance counter-terrorism efforts, for benefits that may be speculative and presumably are subject to a law of diminishing returns.

Let me conclude with the rousing words of Professor Thomas Franck, a leading US international lawyer currently at New York University School of Law. He speaks of the role of lawyers in the context of the debate over the legality of the 2003 Iraq intervention, but his exhortations apply more broadly than this:

> 'What, then, is the proper role for the lawyer? Surely, it is to stand tall for the rule of law. What this entails is self-evident. When the policy makers believe it to society's immediate benefit to skirt the law, the lawyer must speak of the longer-term costs. When the politicians seek to bend the law, the lawyers must insist that they have broken it. When a faction tries to use power to subvert the rule of law, the lawyer must defend it even at some risk to personal advancement and safety. When the powerful are tempted to discard the law, the lawyer must ask whether someday, if our omnipotence wanes, we may not need the law. Lawyers who do that may even be called traitors. But those who do not are traitors to their calling.'[40]

[40] Thomas Franck, 'What Happens Now? The United Nations after Iraq' (2003) 97 *American Journal of International Law* 607, at 620