

When are Restrictions on Speech Justified in the War on Terror?

Katharine Gelber

In the ‘war on terror’, it is democracy that we are said to be defending. It is in the name of preserving democracy that we have gone to war and passed new legislation combating terror. Our Prime Minister regularly talks of the shared democratic values that are important to Australia’s social and political fabric. He has talked of Australians’ strength in ‘our democratic beliefs’, and applauded the fact that Australia is one of the very few countries that has remained ‘continuously democratic for the last 100 years’.¹

In terms of characterising that democracy he has averred that frequent and vigorous disagreement is ‘in the nature of participatory democracy, ... in the nature of a civilised democratic society which values dialogue and differences of view’.² More specifically, he has argued that Australian democracy is composed of three central ‘pillars’: a robust parliamentary system, an incorruptible judiciary and a free press.³ These have been described as the ‘three situations that prevail against all assaults on political freedom’, the ‘three title deeds of our democracy’, and the ‘three great bulwarks of democracy’.⁴ My specific interest here is in the third of these characteristics. The Prime Minister has elaborated on his conception of a free press as involving ‘very importantly, and sometimes for we [sic] in the practice of politics frustratingly, the existence of an open, robust, free and usually highly critical media’; a ‘free and sceptical media, free and sceptical often to the discomfort of us but nonetheless an important and integral part of our society’.⁵ He has also elaborated on the idea that democracy involves the expression of different points of view, including criticism of government and robust debate.⁶

In this chapter I investigate the meaning of those views, to move beyond rhetoric or platitudes. If Australian society can claim to be democratic, what do we mean by that claim? If Australians value democracy, what does that mean? In what precisely lies the value and importance of that third bulwark of our freedom, a free and open press? What is it about expressing differing

This is a preview. Not all pages are shown.

which to make such judgments by thinking more carefully, exploring in greater depth the great contributions to democratic theory made over the centuries which can help us evaluate the tools we choose to use to fight terrorism.

The point I am trying to make is that we need to move beyond rhetorical platitudes and examine what it is we are defending, and what we are doing in that name, when we claim to be defending democracy. In doing so, we should make use of the wealth of intellectual material that is at our disposal. Democracy literature is diverse and rich. But it shares some common characteristics: the need for legitimacy to derive from the people, the need to create and maintain conditions within which legitimation can occur, the need to enhance opportunities for participation, and the need for criticism to be robust, vigorous and real. It is important that in the name of the war on terror we do not fracture the very practices which enable us to claim the mantle of a democracy. Otherwise what we have left will not deserve the name.

The threat from terrorism is real. But this is not the first time in modern history that democratic nations have felt at risk. This is not the first time they have felt cause to fear for their way of life. May I remind you that at a ‘moment unprecedented in ... history’, when ‘security [had never] been as seriously threatened from without’ as it was then conceived, the response of Franklin Roosevelt was to think about the ‘social and economic problems which [were] the root cause’ of the threat he faced.²³ In that context he emphasised that the people expected ‘the preservation of civil liberties for all’. He looked forward to a world founded upon the ‘essential human freedom’; of ‘freedom of speech and expression – everywhere in the world’. So do I.

Notes

- 1 John Howard ‘Address to community morning tea’ (Speech delivered at Wantirna, Melbourne, 9 October 2001); John Howard ‘Address at the launch of Danna Vale’s campaign’ (Speech delivered 7 October 2001).
- 2 John Howard ‘Address to ACOSS Congress’ (Speech delivered at Melbourne, 25 October 2001).
- 3 John Howard ‘Address at the Opening of the 13th Commonwealth Law Conference and 33rd Australian Legal Convention’ (Speech delivered at the Melbourne Convention Centre, Melbourne, 14 April 2003); John Howard ‘Address at Ceremonial Sitting to Mark the Centenary of the High Court of Australia’ (Speech delivered at the Supreme Court of Victoria, Melbourne, 6 October 2003); John Howard ‘Address to the National Press Club’ (Speech delivered at the Great Hall, Parliament House, Canberra, 25 January 2006); John Howard ‘Address at the Opening of the Commonwealth Law Courts’ (Speech delivered at Adelaide, 2 February 2006).
- 4 Howard ‘Address at the Opening of the 13th Commonwealth Law Conference and 33rd Australian Legal Convention’, above n 3; Howard ‘Address to the National Press Club’, above n 3; Howard ‘Address at the Opening of the Commonwealth Law Courts’, above n 3.
- 5 Howard ‘Address at the Opening of the 13th Commonwealth Law Conference and 33rd Australian Legal Convention’, above n 3; Howard ‘Address at Ceremonial Sitting to Mark the Centenary of the High Court of Australia’, above n 3.

- 6 Howard, above n 2; John Howard 'Election Night Speech' (Speech delivered at Sydney, 10 November 2001); John Howard 'Address at the Ryde Business Forum Luncheon' (Speech delivered at Sydney, 21 February 2003); John Howard 'Address at the Queensland Press Forum' (Speech delivered 9 April 2003); John Howard 'Address at the Opening of the Police Federation of Australia Offices' (Speech delivered at Manuka, Canberra, 16 September 2003); John Howard 'Address at Australia Day Citizenship Ceremony' (Speech delivered at Commonwealth Park, Canberra, 26 January 2007); John Howard 'Address to the Menzies Research Centre' (Speech delivered at the Theatre, Parliament House, Canberra, 18 April 2006).
- 7 Jürgen Habermas, *The Structural Transformation of the Public Sphere* (first published 1962, 2003 ed) 25-6, 52, 162. This and the next section of this chapter rely on ideas developed in great depth by Habermas. See also Jürgen Habermas, *The Theory of Communicative Action, Volume 1: Reason and the Rationalization of Society* (1984): especially 38-42, 279-337; Jürgen Habermas, *The Theory of Communicative Action, Volume 2: Lifeworld and System. A Critique of Functionalist Reason* (1987); Jürgen Habermas, 'Further Reflections on the Public Sphere' in Craig Calhoun (ed), *Habermas and the Public Sphere*, (2nd ed, 1993): especially 425, 436-7, 441, 445-46; Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (first published 1992, William Rehg trans, 1996) 448, 455. Note also the changes in Habermas' views over time, in that in his 1993 work he concedes his account of a transformation of a 'culture-debating' to a 'culture-consuming' public was 'too simplistic'. He maintains the idea that critical inquiry could exist in the form of intra-associational, collective spheres (at 438, 440).
- 8 Habermas, 'Further Reflections on the Public Sphere', *ibid*, 446.
- 9 Robert Post, *Constitutional Domains: Democracy, Community, Management* (1995) 7, 273.
- 10 Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, above n 7, 448-50.
- 11 John Howard, 'Address at the NSW Liberal Party State Council' (Speech delivered at Homebush Bay, Sydney, 23 November 2002).
- 12 Gerald N Rosenberg & John M Williams, 'Do Not Go Gently Into That Good Right: The First Amendment in the High Court of Australia' (1997) *Supreme Court Review* 439, 448-50.
- 13 *Coleman v Power* (2004) 220 CLR 1, 66.
- 14 Stuart Macintyre, 'Universities', Ian Lowe, 'The Research Community' and Helen Ester, 'The Media' in Clive Hamilton and Sarah Maddison (eds) *Silencing Dissent* (2007); Linda Weiss, Elizabeth Thurbon and John Mathews *National Insecurity: The Howard Government's Betrayal of Australia* (2007), 37-38 and 40-44; Sarah Maddison, and Richard Denniss, 'Democratic constraint and embrace: implications for progressive non-government advocacy organisations in Australia' (2005) 40(3) *Australian Journal of Political Science* 373; David Marr, 'In His Master's Voice: The Corruption of Public Debate Under Howard' (2007) *Quarterly Essay* 26.
- 15 *Criminal Code* (Cth) s 80.2.
- 16 Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia*, Report 104 (2006) 176.
- 17 *Criminal Code* (Cth) s 102.1(1A)(c).
- 18 *Criminal Code* (Cth) s 101.5.
- 19 Norman Abjorensen, 'Strike up the ban: Censor joins the war on terror', *Democratic Audit of Australia Discussion Paper* 26/06 (2006); see also Phillip Coorey, 'Book Ban Anger: It Will Hinder Freedoms', *Sydney Morning Herald*, 4 October 2006, 2.
- 20 Australian Attorney-General's Department, *Material That Advocates Terrorist Acts: Discussion Paper* (2007) 3-5.
- 21 *Criminal Code* (Cth) ss 105.34-105.41.
- 22 For example, *Terrorism (Police Powers) Act 2002* (NSW) Div 5.
- 23 Franklin Roosevelt, 'Four Freedoms Speech' (Speech delivered at Congress, 6 January 1941).