

# Volume 16.2 (2012)

## Special Issue

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Introduction

Redrawing Security, Politics, Law And Rights: Reflections On The Post 9/11 Decade  
*Alexandra Dobrowolsky and Marc Doucet, Guest Editors*

## Articles

The Post-9/11 Nation Security Regime in Canada: Strengthening Security, Diminishing Accountability  
*Reg Whitaker*

*Abstract*

The post-9/11 national security regime in Canada has been characterised by the addition of resources, new powers, administrative rationalization and general strengthening of security against possible terrorist attacks. This improvement of capacity has had the unanticipated consequence of diminishing the scope of accountability for national security, as accountability mechanisms designed for the Cold War and pre-9/11 era have not been modernized to keep pace. Issues have arisen that have demonstrated the shortcomings of existing accountability structures to cope with post-9/11 realities. The Arar, "Syrian Three," Omar Khadr, Abdelrazik, security certificate, and Afghan detainee cases are all examined from the point of view of failing accountability. The Arar and Air India inquiries have made serious recommendations for reform that have so far been ignored by the government. The Canadian experience is found to be broadly similar to that of its closest allies, the USA and UK. Some explanation is sought in an examination of the institutional and political constraints imposed upon governments, and the tension between the long term need for greater accountability and the short term pressures to avoid greater transparency in the operations of the "secret state."

Failing to Walk the Rights Talk? Post-9/11 Security Policy and the Supreme Court of Canada  
*Emmett Macfarlane*

*Abstract*

This article explores the Supreme Court of Canada's record in dealing with a range of security policies implicating the Charter of Rights in the post-9/11 era, including deportation to torture, the use of security certificates and investigative hearings, and the Canadian government's obligations to Omar Khadr, the sole Canadian citizen held at Guantanamo Bay, Cuba. The article demonstrates that the decisions are marked by a mix of

judicial deference and judicial minimalism, each of which has important policy implications. The article concludes that the Court's record in balancing Charter rights with security objectives is mixed. The Court has, for the most part, adopted a posture of restraint that safeguards rights in a prudent manner. In certain instances, however, the Court's reasoning fails to live up to its rhetoric in support of rights. When the justices adopt a minimalist posture, rights failures may result from making compromises that weaken the Charter's scope. When the justices adopt a deferential posture, rights failures may result from justifications for deference that make little institutional sense. These considerations have important implications for the protection of Charter rights.

Insecure Refugees: The Narrowing of Asylum-Seeker Rights to Freedom of Movement and Claims Determination Post 9/11 in Canada

*Constance MacIntosh*

*Abstract*

This chapter has a modest goal: to track some legislative changes since 9/11 that impact on two rights of asylum seekers where those changes are linked to or justified by security concerns. These are the rights of asylum seekers to have their claim determined, and to not be detained. This article identifies how legislation restricting these key rights of asylum-seekers has largely been promoted as necessary for Canada to be able to protect its public from criminality and security threats. The article thus queries whether measures, especially those introduced under Bill C-11, The Balanced Refugee Reform Act<sup>1</sup> and those proposed under Bill C-4, Preventing Human Smugglers from Abusing Canada's Immigration System Act,<sup>2</sup> actually enable greater security. It concludes that some of the legislative changes have no clear connection with enhancing security, and may result in incentives for asylum-seekers to avoid making their presence known to officials, thus creating new security concerns. The paper concludes by finding that some of the proposed legislative measures regarding detention will likely not withstand a Charter challenge.

Governing Mobility and Rights to Movement Post 9/11: Managing Irregular and Refugee Migration Through Detention

*Kim Rygiel*

*Abstract*

The arrival of Sri Lankan migrants in British Columbia on the MV Sun Sea in the summer of 2010 renewed policy discussion in Canada around "managing migration" and the role that detention of irregular migrants and refugee claimants should play in this process. Within this context calls emerged for Canada to adopt models for handling irregular migration similar to those being practiced in Europe and previously used in Australia. In response, the Canadian government introduced Bill C-49 (reintroduced as Bill C-4) Preventing Human Smugglers from Abusing Canada's Immigration System Act. This article examines Bill C-4 within the context of the greater securitization of mobility in the post-9/11 period as well as comparative border control policy in Australia and Europe. The article argues that governments increasingly use detention as a technology of citizenship to govern mobile

populations and their rights to movement, with the effect of undermining established refugee rights to movement.

Counter-Terrorism In and Outside Canada and In and Outside the *Anti-Terrorism Act*  
*Kent Roach*

*Abstract*

Canadian counter-terrorism as practiced in the Anti-Terrorism Act (ATA) has been more respectful of human rights than Canadian counter-terrorism as practiced outside the ATA and outside of Canada. Although the ATA was influenced by British law, its definition of terrorism, preventive arrest, investigative hearings and secrecy provisions are more restrained than those of some other democracies. The ATA demonstrates a commitment to legality and democratic debate. In contrast, counter-terrorism outside the ATA has involved indeterminate detention of non-citizens on the basis of secret evidence and with the threat of deportation to torture; listing of terrorists on the basis of secret evidence; and refusal by Canadian courts to require Canada to request Omar Khadr's repatriation or to restrain Canadian officials from transferring Afghan detainees to possible torture by Afghan officials. Despite the recommendations of the Arar and Air India public inquiries, Canada does not have adequate accountability structures to monitor and restrain informal and transnational counter-terrorism.

The Role of International Law in Shaping Canada's Response to Terrorism  
*Frédéric Mégret*

*Abstract*

The impact of international law on Canada's response to terrorism post 9/11 has been significant, but in ways that are less benign than typically anticipated by international lawyers. There is a tension between the strong obligations imposed by the Security Council to combat terrorism and the soft pull of international human rights treaties and mechanisms. The Executive Branch has tended to implement international law selectively, rushing to adopt the former and drawing far less on the latter to ensure that counter-terrorism efforts respect core liberties. Surprisingly, it is domestic courts that have occasionally had a role to play in successfully resisting some of international law's illiberal tendencies. Canada's post 9/11 response is not only shaped by international law, it is shaping international law's relation to Canada.

## **Book Review**

Book Review of Kent Roach

From Counter Terrorism to National Security: *The 9/11 Effect: Comparative Counter-Terrorism*

*John McLaren*