

BALANCING CIVIL LIBERTIES AGAINST NATIONAL SECURITY? A CRITIQUE OF COUNTERTERRORISM RHETORIC

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I INTRODUCTION

A prominent feature in the political and academic discourse on counter-terrorism law and policy in the aftermath of the September 11th attacks ('9/11') has been the question of whether, and to what extent, it was (and is) necessary to curtail civil liberties and human rights in order to combat international terrorism effectively.¹ On one side, the claim is made by those defending incursive counter-measures that liberal democracy itself is targeted as the enemy. According to Australia's Attorney-General, Philip Ruddock, for instance,

[t]he terrorists are driven by ideological obsession and a desire to destroy Western liberal democratic societies. They want to wage war against all those who do not conform to their perverted and corrupted view of Islam. All countries and people who value peace and freedom are terrorist targets.²

The unprecedented threat to 'our way of life,' therefore, warrants restrictions of civil liberties and human rights. It is imperative to make sure that the very mechanisms protecting the individual from excessive state power do not hamper the government's ability to respond effectively to the threat. Civil liberties and human rights, so the argument runs, are political conveniences for enjoyment in

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¹ Although often used as synonyms, civil liberties need to be distinguished from human rights. See, eg, Conor Gearty, 'Reflections on Civil Liberties in an Age of Counterterrorism' (2003) 41 *Osgoode Hall Law Journal* 185.

² Philip Ruddock, 'International and Public Law Challenges for the Attorney-General' (Speech delivered at the Centre for International and Public Law, Australian National University, Canberra, 8 June 2004) [6]–[7], <<http://law.anu.edu.au/cipl/Lectures&Seminars/04%20Ruddockspeech%208June.pdf>> at 4 June 2006.

times of peace.³ They should not, however, constitute restraining yardsticks for government in times of emergency and national danger.

On the other side, commentators maintain that it is particularly in times of crisis that the liberal democratic state must adhere strictly to its defining principles.⁴ Rights would lose all effect if they were easily revocable in situations of crisis.⁵ Besides, to believe that depriving citizens of their individual rights and freedoms was necessary to maintain security is to put oneself on the same moral plane as the terrorists, for whom the end justifies the means. Indeed, sacrificing fundamental liberal values such as the respect for the rule of law, civil liberties and human rights would amount to losing the ‘war on terrorism without firing a single shot’.⁶

What both sides have in common is that they then turn to history to seek vindication for their claims. In the US, commentators who support draconian domestic measures against terrorism often refer to President Lincoln’s suspension of habeas corpus during the Civil War and argue that democracies have survived precisely because they have occasionally suspended traditional rights and guarantees.⁷ The constitutional Bill of Rights, after all, does not constitute a ‘suicide pact’.⁸ The opponents of repressive measures, on the other hand, point to the arbitrary and unjust internment of Japanese Americans during World War II and instead prefer to quote Benjamin Franklin who reminded his fellow colonists in 1759 that ‘they that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety’.⁹

In Europe, the debate follows a similar pattern. For instance, both sides of the debate turn to the responses to left-wing and separatist terrorism in the 1970s and

³ See, eg, Richard A Posner, ‘Notes & Dispatches – The Law: Security Versus Civil Liberties’ (2001) 288(5) *The Atlantic Monthly* 46–7; Viet D Dinh, ‘Freedom and Security after September 11’ (2002) 25(2) *Harvard Journal of Law and Public Policy* 399.

⁴ David Cole and James X Dempsey, *Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security* (2nd ed, 2002); Cynthia Brown (ed), *Lost Liberties: Ashcroft and the Assault on Personal Freedom* (2003).

⁵ See, eg, Ronald Dworkin, ‘Terror and the Attack on Civil Liberties’ (2003) 50(17) *New York Review of Books* (6 November 2003).

⁶ See, eg, the statement by Wisconsin democrat Russell Feingold, the only senator to vote against the USA Patriot Act, who has pointed out that ‘[p]reserving our freedom is one of the main reasons we are now engaged in this new war on terrorism. We will lose that war without firing a shot if we sacrifice the liberties of the American people.’: 147 Cong. Rec. S11019 (daily ed. Oct. 25, 2001) (statement of Sen Feingold); see also UN Secretary-General Kofi Annan, ‘Keynote Address: Fighting Terrorism for Humanity: A Conference on the Roots of Evil’ (Speech delivered at the International Peace Academy, New York, 22 September 2003).

⁷ See, eg, William H Rehnquist, *All the Laws but One: Civil Liberties in Wartime* (1st ed, 1998).

⁸ See, eg, Jonathan Alter, ‘Time to Think about Torture’ (2001) 138(19) *Newsweek* 45 (5 November), quoting U.S. Supreme Court Justice Robert Jackson in *Terminiello v City of Chicago* 337 US 1, 37 (1949): ‘There is the danger that, if the court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.’

⁹ See, eg, Jerel A Rosati, ‘At Odds with One Another: The Tension between Civil Liberties and National Security in Twentieth-Century America’ in David B. Cohen and John W. Wells (eds), *American National Security and Civil Liberties in an Era of Terrorism* (2004) 9. The quote from Benjamin Franklin can be found in Emily Morrison Beck (ed), *Bartlett’s Familiar Quotations: A Collection of Passages, Phrases, and Proverbs Traced to their Sources in Ancient and Modern Literature* (15th and 125th anniversary ed, 1980) 348.

80s to seek guidance for the evaluation of current counterterrorism measures. Some argue that the temporary suspension of civil liberties and human rights in previous terrorism emergencies actually strengthened liberal democracy and contributed significantly to a reduction of terrorism.¹⁰ Others maintain that the repressive counter-measures taken often led to an escalation of the conflict and, what is more, that they continue to have adverse effects on civil liberties and human rights up to this day.¹¹ In Australia, too, commentators have referred to historical examples where governments sought to curb civil liberties and fundamental freedoms in the name of national security.¹²

What is most striking, however, is the fact that the great majority of analysts on both sides of the equation argue that in order to 'save' liberal democracy from the scourge of international terrorism a 'balance' must be struck between security and liberty.¹³ Where this balance falls, of course, depends on the political colours of the respective commentator. The image of balance is not only employed by academics and political analysts. It also features prominently in the transcripts of parliamentary debates on the issue in the US, Canada, the European Union and Australia.

The purpose of this article is to examine the rationale behind the balance metaphor in more detail. It is argued that the assertion that civil liberties need to be balanced against the interests of national security is, at best, misleading and, at worst, structurally wrong. Accordingly, this paper challenges the validity of the image of balance on seven interrelated grounds. These can be broadly classified in four categories: philosophical, rights-based, strategic and practical. The article concludes by proposing an alternative framework to be used when examining and reconciling civil liberties and national security.

II PHILOSOPHICAL OBJECTIONS

A The Interrelationship between Liberty and Security

The image of balancing liberty and security in the context of countering terrorism is based on the false assumption that the two goods are mutually

¹⁰ See, eg, Hans Josef Horchem, 'The Lost Revolution of West Germany's Terrorists' (1989) 1(3) *Terrorism and Political Violence* 353–360.

¹¹ See, eg, Heribert Prantl, *Verdächtig: Der starke Staat und die Politik der inneren Unsicherheit* [*Suspicious: the Strong State and the Policy of Internal Insecurity*] (2002) 24–51; Oliver Tolmein, *Vom Deutschen Herbst zum 11 September* [*From the German Autumn to 11th September*] (2002) 10–105.

¹² The most prominent example is Prime Minister Menzies' attempt to outlaw the Communist Party in the 1950s. See, eg, George Williams, 'Australian Values and the War against Terrorism' (2003) 26(1) *University of New South Wales Law Journal* 191; Jenny Hocking, 'Counter-Terrorism and the Criminalisation of Politics: Australia's New Security Powers of Detention, Proscription and Control' (2003) 49(3) *Australian Journal of Politics and History* 355; Jenny Hocking, *Terror Laws: ASIO, Counter-terrorism and the Threat to Democracy* (2003).

¹³ Alan M Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (2002) 165–222; The Human Rights and Equal Opportunity Commission, *Submission to the Parliamentary Joint Committee on ASIO, SIS and DSD* (23 May 2003) [22], <http://www.hreoc.gov.au/human_rights/terrorism_sub/asio_asis_dsd.html> at 9 June 2006; see also Prime Minister John Howard quoted in 'PM announces tough anti-terror measures', *The Age* (Melbourne) 8 September 2005.

exclusive. Liberty and security, however, are interrelated and mutually reinforcing; they cannot, logically, be ‘balanced’ against each other. In order to illustrate the reciprocity between liberty and security it is helpful to briefly revisit some key underpinnings of the idea of liberalism.

At the outset of his *Two Treatises of Government*, John Locke describes the state of nature as a state of liberty and equality between individuals. In this state of nature, individuals have two natural rights: the right to preserve themselves and the right to punish others for attempting to kill them or generally threatening their survival.¹⁴ They exercise those rights under the constraint of the law of nature, whereby they are forbidden to harm others. As Locke puts it, ‘though this be a state of liberty, yet it is not a state of license’. Although the state of nature is not by definition a Hobbesian state of war, it is also not stable enough for people to be altogether happy in it.¹⁵ Indeed, the state of liberty is likely to degenerate into a state of war not everybody is disposed to fulfil their duties. To prevent a state of war from ensuing, an impartial judge is needed to interpret the law and mediate between the parties, and a government is needed to enforce this law and provide stability and security.¹⁶ Locke specifically describes the reasons men have for abandoning the state of nature in favour of political society as ‘the mutual preservation of their lives, liberties, and estates, which I call by the general name “property”’.¹⁷

The notion of individual liberty as a precondition for public security was further developed by leading philosophers of the enlightenment and post-enlightenment era. When Jean-Jacques Rousseau observed that ‘man is born free, and everywhere he is in chains’, he did not advocate a lawless state of nature, but a political system built on the free will of its citizens.¹⁸ Despite the strong emphasis on individual liberty, the State’s exclusive right to resort to force to ensure security and the rule of law – illustrated in Hobbes’ *Leviathan* – has been upheld throughout European constitutional history. On Rousseau’s view, however, this monopoly of violence must be controlled by the citizenry. The State is prohibited from interfering with the individual’s right to freedom and personal development except in order to prevent a threat to the order of the state or a violation of the rights of others.¹⁹

In the 20th century, the realisation of the classic notion of liberty has been further advanced and refined by the constitutions of several leading liberal

¹⁴ John Locke, *The Second Treatise of Government*, (first published 1690, Thomas P Peardon ed 1952) chs 2–3, especially [4], [16], [18].

¹⁵ To Thomas Hobbes the state of nature in which man lived before the social contract was ‘a war of every Man against every Man’, a condition of internecine strife in which the life of man was ‘solitary, poor, nasty, brutish and short’. Thomas Hobbes, *Leviathan*, (first published 1660, Richard Tuck ed 1996) ch 13.

¹⁶ Locke, above n 14, ch 9, [124]–[126].

¹⁷ *Ibid* [123].

¹⁸ Jean-Jacques Rousseau, *The Social Contract* (M Cranston trans, 1975 ed) ch 1 [trans of *Le Contrat Social*].

¹⁹ The German philosophers Immanuel Kant and Georg Wilhelm Friedrich Hegel also placed individual liberty at the heart of the State. See, eg, Leonard Krieger, *The German Idea of Freedom: History of a Political Tradition from the Reformation to 1871* (1957) 86–138.

democracies.²⁰ For example, in the *Basic Law for the Federal Republic of Germany*, Articles 1 and 2 declare (autonomous) human beings to be the legitimating subjects of the constitution. In this way, individual liberty is taken to be a prerequisite for the constitutional order since the constitution declares (autonomous) human beings to be the legitimating subjects of the constitution.²¹ The constitutional protection of liberty not only aims at the protection of the individual, but also constitutes a command of the democratic constitutional order, which needs free individuals to form the democratic community. It supports individual development and enhances democratic participation, which leads to the existence of a plural and open society. Nevertheless, the constitution does not solely protect the autonomy of the individual out of respect for human individuality. Individual freedom constitutes a prerequisite for a democratic polity. What is more, it is a precondition for serving as a constitutional source of legitimation.²²

As this very brief historical review of the development of the idea of liberalism reveals, liberty can be conceived as a precondition of security. At the same time, it has been argued that a certain degree of security and personal safety is indispensable for the realisation of personal freedom. In the current political discourse on counter-terrorism and civil liberties, however, the interrelationship between liberty and security is often portrayed one-sidedly. Government ministers and other commentators over-emphasise the aspect of personal safety and national security as a precondition of liberty and tend to ignore the fact that individual freedom legitimises the existence of the State in the first place. In light of the threat of terrorism, so the argument runs, the citizen's full enjoyment of civil liberties depends upon a 'secure environment' in which human rights and fundamental freedoms can be realised. This state of security is to be achieved through the expansion of the investigative powers of government and through other intrusive features of special anti-terrorism legislation.

Defending the new anti-terrorism laws in Australia, the Attorney-General, Philip Ruddock, has also invoked the concept of human security in the context of counter-terrorism law and policy. According to Ruddock, the 'human security' approach constitutes a 'new framework' for understanding counter-terrorism and the rule of law, since it allows striving towards the twin goals of security and justice.²³ In light of a 'new climate of terrorism', according to the Attorney-

²⁰ See, eg, the Constitution of Germany, the *Basic Law for the Federal Republic of Germany* (1949); *Constitution of Austria* (1945); *Constitution of the 5th Republic of France* (1958); *Constitution of the Italian Republic* (1947); *Constitution of the Kingdom of Denmark* (1953); *Spanish Constitution* (1978); *Constitution of the Republic of Estonia* (1992).

²¹ See generally Donald P Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (1989).

²² The centrality of the individual human being as the source of the entire legal system, as well as its addressee, is expressed in art 1(1) of the German constitution, the Basic Law, which reads: 'Human dignity is inviolable. To respect and protect it is the duty of all State authority'.

²³ Philip Ruddock, 'A New Framework: Counter Terrorism and the Rule of Law', (Speech delivered to the Sydney Institute, Sydney, 20 April 2004) <http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Speeches_2004_Speeches_20_April_2004_-_Speech_-_A_New_Framework:_Counter_Terrorism_and_the_Rule_of_Law> at 10 June 2006.

General, 'we must recognise that national security can in fact promote civil liberties by preserving a society in which rights and freedoms can be exercised'.²⁴ Consequently, 'the extent to which we can continue to enjoy our civil liberties rests upon the effectiveness of our anti-terrorism laws'.²⁵

It is beyond question that it is one of the responsibilities of liberal democratic government to protect the citizenry from physical harm and the threat thereof. However, the duty to protect is but one of several interrelated and indivisible obligations of government. These include, most importantly, the fundamental obligation to respect human rights.²⁶ A policy that does not respect human rights in the first place cannot legitimately claim to protect these rights against transnational security threats in times of emergency.

It is thus also misleading to suggest that it is only *after* the government has created a 'secure environment' that we can enjoy our civil liberties and human rights. This assertion would ultimately lead to security demands the government is not able to fulfil. Besides, it would effectively result in the contention that it is the State that 'creates' human rights in the pursuit of security and societal freedom. Such reasoning, however, is inconsistent with the very idea of modern liberal democracy. As Burkhard Hirsch, a former German Justice Minister, has pointed out, 'there is no societal freedom without the freedom of the individual'.²⁷ Indeed, an approach that effectively attributes the creation of human rights and civil liberties to the State would eventually bring about the end of personal and political freedom. The respect for and protection of human rights would then be reduced to a mere variable in the government's security policy. Human rights and civil liberties would represent 'luxury goods' for enjoyment in times of peace, but would not constitute restraining yardsticks for government in times of perceived national danger.

This line of reasoning strongly resembles the political authoritarianism formulated by the German political and legal theorist Carl Schmitt during the political turmoil of the Weimar Republic. Schmitt claimed that the 'existence of the State is undoubted proof of its superiority over the validity of the legal

²⁴ Philip Ruddock, above n 2, [81]–[84].

²⁵ Ibid.

²⁶ The interwoven structure of state obligations has been further refined by developments in international human rights law. The UN human rights treaty bodies, the Special Procedures of the UN Commission on Human Rights and other institutions have adopted a three-level typology outlining the obligations of states. This typology is now widely accepted and determines the state's duties as 'obligations to respect, protect and fulfil' individual rights. It is applicable to civil and political rights as well as economic, social and cultural rights. The obligation to respect requires states to refrain from interfering with the enjoyment of human rights. The obligation to protect human rights entails the expanding responsibility of States to regulate the behaviour of third parties with respect to precluding the possibility that private persons, acting within the private domain, can violate these rights (so-called 'horizontal effectiveness' of human rights). Finally, the obligation to fulfil requires states to take action to achieve the full realisation of rights. These actions can include enacting laws, implementing budgetary and economic measures, or enhancing the functioning of judicial bodies and administrative agencies: see, eg, *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, Maastricht (1997) <http://www1.umn.edu/humanrts/instree/Maastrichtguidelines_.html> at 10 June 2006.

²⁷ Burkhard Hirsch, 'Der attackierte Rechtsstaat: Bürgerrechte und "innere Sicherheit" nach dem 11. September,' (2002) 159 *Vorgänge – Zeitschrift für Bürgerrechte und Gesellschaftspolitik* 14.

norm'.²⁸ Because the norms of a legal system cannot govern a state of emergency, they cannot determine when such an exceptional state comes into existence, or what should be done to resolve it. Consequently, every legal order ultimately rests not upon norms, but rather on the decisions of the sovereign. The essence of sovereignty lies in the absolute authority to decide when the normal conditions presupposed by the legal authority exist.²⁹ For Schmitt, the respect and protection of human rights and civil liberties were thus subsidiary to the security considerations of the government (as sovereign). It is well known that several aspects of this political theory provided a defence of authoritarian dictatorship and, initially, to Schmitt's own personal support of National Socialism and the Third Reich.

In light of the disturbing parallels between Schmitt's political philosophy and some current approaches to counter-terrorism policy, it is all the more surprising that commentators like Philip Ruddock invoke the concept of human security to justify intrusive anti-terrorism legislation. Often referred to as 'people-centred security' or 'security with a human face', the idea of human security places human beings – rather than states – at the focal point of security considerations. While the definition and scope of the concept have been debated extensively in recent years, most scholars seem to agree that human security involves more than the absence of violent conflict.³⁰ As UN Secretary-General Kofi Annan has observed, 'it encompasses human rights, good governance, access to education and health care and ensuring that each individual has opportunities and choices to fulfil his or her own potential'.³¹ When Attorney-General Ruddock focuses on the more traditional notions of security in his invocation of the concept, in the sense of providing protection from physical harm, he is ignoring other, equally central aspects of human security which seek to ensure that every individual has the same legal rights and is not at risk of arbitrary or oppressive state action. As Miriam Gani has pointed out, to highlight one feature of human security at the expense of others is rather improper and misleading.³²

B The Dual Effect of Increasing the Powers of the State

A further conceptual argument against the conventional wisdom that liberty needs to be balanced against security is that enhancing the powers of the State has dual consequences. While diminishing liberty may enhance security against terrorism, it is important to note that it also reduces security against the State.³³

²⁸ Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, (George Schwab trans, 1985 ed) 12 [trans of *Politische Theorie*].

²⁹ 'Sovereign is he who decides on the exception.' Ibid 5.

³⁰ See generally Program on Humanitarian Policy and Conflict Research, *Bibliography on Human Security* (2001) Harvard University <http://www.hpcr.org/pdfs/HPCR_-_Bibliography_on_Human_Security_-_2001.pdf> at 24 July 2006.

³¹ Kofi Annan, 'Secretary-General Salutes International Workshop on Human Security in Mongolia', (Press Release SG/SM/7382, 8 May 2000).

³² Miriam Gani, 'Upping the Ante in the "War on Terror"' in Patty Fawcner (ed), *A Fair Go in an Age of Terror* (2004) 97–101.

³³ See also Ronald Dworkin, 'The Threat of Patriotism' (2002) 49(3) *New York Review of Books* (28 February 2002).

Security against the State is diminished by dismantling traditional checks and balances like due process guarantees and other essential freedoms such as the right to liberty and security of person.

The argument that enhancing the powers of the State for the purposes of combating terrorism simply leads to increased public security appears to misunderstand the very idea of security. As has been outlined above, the concept of human security, for instance, not only encompasses protection against physical harm but also seeks to ensure that individuals are not subjected to oppressive state action. Accordingly, a system of civil liberties and human rights does not just represent an array of individual benefits, but also possesses aspects of a public good. Indeed, as Emanuel Gross has noted, the rule of law and respect for civil liberties and human rights constitute major components of national security.³⁴ Undermining those principles may have adverse effects in creating a security threat that may become greater than the current threat of international terrorism itself.³⁵ It is thus erroneous to suggest that security can be weighed up against liberty through a simple balancing exercise.

A related concern stems from the risk that domestic security may also diminish because the growth in state power resulting from new counter-terrorism provisions is not evenly distributed within the State.³⁶ The executive, freed from traditional checks and balances, assumes central importance and gains a significant amount of autonomy. The citizenry, on the other hand, deprived of the special knowledge (assumedly) available to government, must trust its judgement that the terrorist threat faced by the State is indeed of sufficient magnitude to justify the curtailment of individual liberty. It must also rely on the government's judgment as to whether the counter-measures adopted will actually address the threat effectively. As a consequence, it is no longer the legislature or the population that decides where the alleged 'balance' between security and liberty is to be struck, but the executive. To claim that it is solely the liberty of individuals which is traded off for the security of the community and the State is thus simplistic and somewhat deceptive: the checks and balances placed upon the distribution of power within the State are also compromised.

C Consequentialism in the Realm of Civil Liberties?

The idea of balancing liberty and security basically rests on the assumption that individual rights can and must be balanced against the interests of the greater community; or, in the context of counterterrorism, that the civil liberties and human rights of individuals must be sacrificed in order to gain greater security

³⁴ Emanuel Gross, 'Legal Aspects of Tackling Terrorism: The Balance Between the Right of a Democracy to Defend Itself and the Protection of Human Rights' (2001) 6 *UCLA Journal of International Law & Foreign Affairs* 89, 164–7.

³⁵ Christopher Michaelsen, 'Antiterrorism Legislation in Australia: A Proportionate Response to the Terrorist Threat?' (2005) 28(4) *Studies in Conflict & Terrorism* 321, 334–5.

³⁶ See also Laura K Donohue, 'Security and Freedom on the Fulcrum' (2005) 17(1–2) *Terrorism and Political Violence* 69, 80–1.

for the majority.³⁷ This equation finds its philosophical roots in the doctrine of consequentialism. The paradigm form of consequentialism is utilitarianism, whose classic proponents were Jeremy Bentham and John Stuart Mill.³⁸ According to Bentham, an act is morally right only if it causes ‘the greatest happiness for the greatest number’.³⁹ It is beyond the scope of this paper to examine in greater detail the philosophy of consequentialism in all its aspects and criticisms.⁴⁰ The point to be made here is that consequentialism, with its talk of changing the balance between liberty and security according to the circumstances, sits uncomfortably with human rights discourse.⁴¹ As leading political and legal philosophers of the 20th and 21st century have pointed out, rights discourse is often resolutely anti-consequentialist. Treating human rights as vulnerable to routine changes in the equation of social utility is antithetical to the notion that human rights are absolute and superior to individual and societal interests.

Two of the most powerful arguments in this regard have been made by the late Harvard philosopher John Rawls and by the legal theorist Ronald Dworkin. While the nuances of the arguments advanced respectively by these scholars cannot be adequately summarised here, it is nevertheless helpful to at least outline some of the key features.

In *A Theory of Justice* John Rawls argues that a just society would be based on two principles.⁴² His theory follows from the social contract tradition and develops a view of justice in which principles of justice are themselves the object of a kind of social contract. The first principle of justice states that all individuals have an equal right to liberty. Once this liberty is satisfied, the second principle is to be considered. The second principle states that social and economic inequalities shall be arranged to the greatest benefit of the least advantaged members of society. The hierarchy of the two principles in this order is justified by two rules of priority. The first priority rule, the priority of liberty, states that the principles of justice must be ranked in ‘lexical order’.⁴³ Consequently, liberty can only be restricted for liberty’s sake; that is, liberty can only be infringed in situations where the limitations would strengthen the total system of liberty

³⁷ Whether or not the interests of the individual are balanceable against the interest of the community at all is a highly problematic question that cannot be discussed here. Suffice it to note that this proposition has been challenged by several eminent scholars. Ronald Dworkin, for instance, has argued that ‘[t]he interests of each individual are already balanced into the interests of the community as a whole, and the idea of a further balance, between their separate interests and the results of the first balance, is itself therefore mysterious’: Ronald Dworkin, *A Matter of Principle* (1985) 73.

³⁸ See, eg, John Stuart Mill, ‘Representative Government’ in A D Lindsay (ed), *Utilitarianism, Liberty, and Representative Government* (1964).

³⁹ Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (first published 1789, 1961 ed).

⁴⁰ For in-depth analysis see, eg, Samuel Scheffler (ed), *Consequentialism and Its Critics* (1988); Samuel Scheffler, *The Rejection of Consequentialism: A Philosophical Investigation of the Considerations Underlying Rival Moral Conceptions* (1994).

⁴¹ See also Jeremy Waldron, ‘Security and Liberty: The Image of Balance’ (2003) 11(2) *Journal of Political Philosophy* 191, 194.

⁴² John Rawls, *A Theory of Justice* (1999).

⁴³ Ibid 36–40.

shared by all, or when unequal liberty is acceptable to those with the lesser liberty.⁴⁴ The second priority rule, 'justice over efficiency and welfare', is concerned with the maximizing of advantages and opportunities. The inequality of opportunities is acceptable when it enhances the opportunities of those with the lesser opportunities, and the excessive rate of saving by those with the most advantage must, on balance, mitigate the burden of those bearing the hardship. In other words, justice is achieved when unequal opportunities are weighted towards the least fortunate and the accumulation of wealth is just when it helps to alleviate the burdens carried by the less fortunate. In contrast to consequentialists and utilitarians, Rawls thus does not allow some people to suffer for the greater benefit of others.

Ronald Dworkin has taken a similar approach. In *Taking Rights Seriously* he argues that rights claims must generally take priority over alternative considerations when formulating public policy and distributing public benefits.⁴⁵ Rights are best understood as so-called 'trumps', which take priority over those justifications for political decisions that are formulated as goals for the community as a whole. As Dworkin put it:

The existence of rights against the Government would be jeopardized if the Government were able to defeat such a right by appealing to the right of a democratic majority to work its will. A right against the Government must be a right to do something even when the majority thinks it would be wrong to do it, and when the majority would be worse off for having it done. If we now say that society has a right to do whatever is in the general benefit, or the right to preserve whatever sort of environment the majority wishes to live in, and we mean that these are the sort of rights that provide justification for overruling any rights against the Government that may conflict, then we have annihilated the later rights.⁴⁶

According to Dworkin the notion of rights as 'trumps' expresses the fundamental ideal of equality upon which the contemporary doctrine of human rights rests. Treating rights as 'trumps' is a means of ensuring that all individuals are treated in an equal and like fashion in respect of the provision of fundamental human rights. Fully realising the aspirations of human rights may not require the provision of 'state of the art' resources, but this should not detract from the priority given to human rights over alternative social and political considerations.⁴⁷

The application of Rawls' reasoning to the current talk of balance may lead to the conclusion that a trade-off between liberty and security is simply ruled out. Security would fall into the domain of the (second) principle governing social and economic goods and, due to lexical inferiority, could not be 'balanced' against the superior principle of liberty. Similarly, considering Dworkin's argument on rights being 'trumps' over societal interests, civil liberties would be practically impervious to social utility arguments. The security of the whole community would constitute a public interest which generally would not be 'balanceable' with rights since the latter stand on superior moral and legal planes.

⁴⁴ Ibid 214–20.

⁴⁵ Ronald Dworkin, *Taking Rights Seriously* (1977) 189–94.

⁴⁶ Ibid 194.

⁴⁷ Ronald Dworkin, 'Rights as Trumps', in Jeremy Waldron (ed), *Theories of Rights* (1984) 153–67.

The argument presented here rests on the assumption, of course, that civil liberties are qualitatively equal to rights. One may well argue, however, that anti-consequentialist concepts of liberty and rights, as formulated by Rawls and Dworkin, cannot be applied to civil liberties straightforwardly. It is not the purpose of this paper to explore this problem any further. The brief discussion of consequentialism above merely serves to indicate that a simple balancing exercise may neglect significant aspects of the jurisprudential underpinnings of both liberty and security.

III RIGHTS-BASED OBJECTIONS

A Security as Individual Right or ‘State Purpose’?⁴⁸

It has been argued that rights appear practically impervious to social utility arguments. However, even non-utilitarians acknowledge that rights can hardly be absolute in all the circumstances. As Dworkin pointed out, ‘someone who claims that citizens have a right against the Government need not go so far as to say that the State is *never* justified in overriding that right’.⁴⁹ He suggested that the State may override a given right when it is necessary to protect the rights of others. Accordingly, for security to be ‘balanceable’ with human rights and civil liberties, it needs to be construed as a kind of individual right that may override liberty rights where they clash. Thus, the question that needs to be asked is: can security constitute an individual right?

The idea of a human right to security has been debated for some time,⁵⁰ but has received particular attention in the context of anti-terrorism legislation introduced in the aftermath of the 9/11 attacks. Defending Germany’s legislative changes in an interview with German daily newspaper, Munich’s *Süddeutsche Zeitung*, the former Interior Minister, Otto Schily, claimed that curtailments of liberty were justified and indeed warranted by the government’s obligation to protect the ‘basic right to security’ of German citizens.⁵¹ Despite the fact that the basic rights catalogue of the German constitution does not contain any specific right to security, Schily assumed that this right was an ‘implicit component’ of the Basic Law. Schily’s Australian counterpart, Philip Ruddock, has also invoked the right to security as a basis for introducing wide-ranging anti-terrorism laws.⁵² For the Attorney-General, the existence of this right was hardly questionable: it was also protected by Article 3 of the *United Nations Universal Declaration of Human Rights* (‘UDHR’) and Article 9 of the *United Nations International*

⁴⁸ This section is based on a Comment by Christopher Michaelsen, ‘Security Against Terrorism: Individual Right or State Purpose?’ (2005) 16 (3) *Public Law Review* 178–82.

⁴⁹ Dworkin, above n 45, 191.

⁵⁰ See, eg, Josef Isensee, *Das Grundrecht auf Sicherheit* (1983); Christoph Gusy, ‘Rechtsgüterschutz als Staatsaufgabe – Verfassungsfragen der Staatsaufgabe Sicherheit’ (1996) 49 *Die Öffentliche Verwaltung* 573–83; Jutta Limbach, ‘Ist die kollektive Sicherheit der Feind der individuellen Freiheit?’ *Die Zeit* (Hamburg) 10 May 2002.

⁵¹ Heribert Prantl and Hans Werner Kilz, ‘Otto Schily ist Otto Schily – das ist gar nicht so schlecht’, *Süddeutsche Zeitung* (Munich) 29 October 2001.

⁵² Ruddock, above n 23.

Covenant on Civil and Political Rights ('ICCPR').⁵³ Both Ruddock and Schily have taken the State's duty to protect to create a positive individual right to security.⁵⁴

Both explanations are unsatisfactory and unconvincing for factual, as well as systematic and dogmatic reasons. The UDHR, as well as the ICCPR and its corresponding regional instruments, do indeed protect the right to liberty and security of the person.⁵⁵ It is widely accepted, however, that this right does not relate to some broader right to safety or to any obligation for the State to protect, with positive measures, the physical integrity of its citizens.⁵⁶ On the contrary, the right to liberty and security of the person concerns confining the power of the State to coerce individuals through arbitrary arrest and detention. As Monica Macovei has pointed out, in the context of the European Convention on Human Rights, the expression 'liberty and security of the person' has to be read as a whole. 'Security of a person' must be understood in the context of physical liberty;⁵⁷ it cannot be interpreted as referring to different matters, such as a duty on the State to give someone personal protection from an attack by others, or a right to social security. This interpretation has been confirmed by the jurisprudence of the European Court of Human Rights.⁵⁸

It is also unconvincing to claim that the State's duty to protect the citizenry automatically creates a positive individual right to security. Firstly, a review of several constitutions and bills of rights of leading liberal democracies reveals the absence of any specific right to security. Neither the US constitution nor the German Basic Law, for example, contain any right addressing personal security and safety explicitly. Other constitutions such as the *Constitution of Austria 1945* (Article 1), *Constitution of the Republic of Cyprus 1960* (Appendix D, Part II, Article 11.1), *Constitution of the Republic of Estonia 1992* (Article 20), *Constitution of the Republic of Hungary 1949* (Article 55), *Constitution of the Republic of Latvia 1992* (Article 94), *Constitution of Malta 1964* (section 32), *Constitution of the Portuguese Republic* (1976, (Article 27) and *Spanish Constitution* (1978, Article 17) recognise a right to security. However, as with the international human rights instruments, these constitutions refer to the right to security in the context of personal liberty and the freedom from arbitrary and oppressive State action. Consequently, the right to security in these constitutions

53 Ibid.

54 See also Günther Jakobs, 'Bürgerstrafrecht und Feindstrafrecht' (2004) *Höchststrichterliche Rechtsprechung im Strafrecht* 88.

55 Article 9(1) ICCPR states that '[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.' *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 9(1) (entered into force on 23 March 1976).

56 Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (1993) 161–3; see also Jochen A Frowein and Wolfgang Peukert, *Europäische Menschenrechtskonvention: EMRK-Kommentar* (1985) 53–8 with further references.

57 Monica Macovei, *A Guide to the Implementation of Article 5 of the European Convention on Human Rights*, Human Rights Handbooks, No 5, Council of Europe (2002) 6.

58 See, eg, *Bozano v France* (1986) III Eur Court HR (ser A); *Kurt v Turkey* (1998) III Eur Court HR 1152.

does not relate a right to personal protection or to a positive duty for the State to protect the citizenry from physical harm.

The idea of an individual right to security is problematic for systematic and dogmatic reasons as well. In a liberal democracy, one of the primary purposes of the State is to protect fundamental human rights, such as the right to life, freedom of speech and the right to property. It is the respect for, and the protection of, the rule of law and human rights in their entirety which lead to, and help to maintain, national security. If, however, national security is principally a result of the State respecting, protecting and facilitating *all* human rights, it would not make sense, from a systematic and dogmatic point of view, to create a separate and exclusive legal title (or good) allowing for an individual claim to security.⁵⁹ Were such a right to be created a situation would arise in which security policy would become an end in itself, rather than a means of facilitating the realisation of liberty. Security policy would then be independent of, and possible competing with, the State's duty to respect and protect human rights. This would ultimately lead to an unlimited relativism, wherein security may always trump the competing interest of human rights protection. This, however, is incompatible with the very idea of liberal democracy. It is a defining characteristic of liberal democracy that security policy is normatively bound to the rule of law and to human rights; it is not an end in itself.

The idea that security constitutes an individual right is all the more problematic in the context of the threat of international terrorism. While civil liberties are quite precisely defined, the public good of security is generally rather unspecific. Indeed, normatively speaking, security cannot be positively defined; only negatively defined as the defence against dangers.⁶⁰ As a consequence, the definition of these dangers requires great specificity. The definition of these dangers, and their individual assignment, might have been possible in previous terrorism crises. In the cases of left-wing terrorism in Europe in the 1970s and 80s, as well in the case of separatist terrorism in Spain and elsewhere, the threats arose from a limited number of individuals operating in a confined and restricted local environment. As far as the threat of international terrorism is concerned, however, this is no longer possible. Dangers can no longer be individualised. They arise from diffuse transnational organisations and networks without any single sponsor or home base. If the dangers arising from terrorism cannot be sufficiently defined and/or individually assigned, then it is imperative to consider security as a 'state purpose' rather than as an individual right of legal subjects.

However, if security is to be understood primarily as a 'state purpose' rather than as an individual right, then it no longer constitutes a weighable good. Talk

59 See also Gerhard Robbers, *Sicherheit als Menschenrecht: Aspekte der Geschichte, Begründung und Wirkung einer Grundrechtsfunktion* (1987) 15.

60 A similar definitional approach has been used by several scholars of political science. Arnold Wolfers, for instance, characterised security as 'the absence of threats to acquired values'; Arnold Wolfers, "'National Security" as an Ambiguous Symbol' (1952) 67(1) *Political Science Quarterly* 481, 485. Likewise, David Baldwin defined it as 'a low probability of damage to acquired values'; David A. Baldwin, 'The Concept of Security' (1997) 23 *Review of International Studies* 5, 13.

of ‘balancing’ security against liberty is thus misleading. Security has become vague in its meaning: as an empowering objective it constitutes a ‘state purpose’, as a legal term it describes a legal good. But, as Oliver Lepsius has pointed out, these two meanings must be strictly separated.⁶¹ The positive ‘state purpose’ of guaranteeing security must not be confounded with the negative, legally protected, right of defence against danger. To confuse the two may either lead to security demands the State is not able to fulfil or indicate the failure of the legal system. Lepsius rightly argues that security constitutes an objective that stands above positive law. It must not be used as argumentative tool on the level of positive law. In that case, a situation is created in which positive law can always be trumped by the hyper-positive idea.

B Conflicting Rights and the Right to Life

It has been argued that security does not constitute an individual right held by legal subjects, and that it therefore cannot be ‘balanced’ against individual civil liberties. A popular move by supporters of repressive anti-terrorism laws is to additionally invoke the ‘right to life’, which is robbed from the victims of terrorist violence. This right to life, so the argument runs, is so fundamental that it reigns supreme over any other rights claim, including claims to liberty. At first, such reasoning may appear plausible, since it is compatible with the non-consequentialist idea that rights may be balanced against each other, but not against social utility. Nevertheless, upon closer examination this line of argument is problematic for several reasons, two of which will be dealt with briefly here.

Firstly, it is important to realise that different rights are violated in different ways. The right to life of the victims of a terrorist attack is infringed upon by terrorist action, whereas violations of other civil liberties and human rights through anti-terrorism legislation find their origin in the actions of government. A government may only be *indirectly* responsible for the violation of the right to life of victims of a terrorist attack (through inaction, for example). As a consequence, the question that needs to be asked is: is a government’s inaction – refraining from introducing legislation or measures that *might* prevent terrorists from infringing upon the right to life of their victims – qualitatively equal to its *direct* action of introducing repressive laws? It is only when government inaction is qualitatively equal to direct government action that one can justifiably invoke the right to life as a ‘balancing right’.

Secondly, while the right to life is undoubtedly one of the most fundamental human rights, it is highly questionable whether it automatically trumps all other human rights. A concept that seems to enjoy broad acceptance, however, is that of the indivisibility, interdependence and universality of *all* human rights. This concept, officially recognised by the UDHR, further refined by the UN Human Rights Conference in Vienna in 1993, and cited by many UN documents since, provides that human rights are based on respect for the dignity and worth of all human beings. While the right to life encompasses the right to live itself, it also

61 Oliver Lepsius, ‘Freiheit, Sicherheit und Terror: Die Rechtslage in Deutschland’ (2004) 32(1) *Leviathan* 64.

includes the notion that such a life ought to be enjoyed with dignity. It is in this respect that the right to life is not easily 'detachable' from other important rights such as the right to liberty and security of person. The protection of the right to life thus cannot go so far as to constitute a supreme justification for the curtailment of all other rights. Such a justification renders all other human rights ineffective, since they would be infinitely vulnerable in the name of the right to life.

IV STRATEGIC OBJECTIONS – PROBLEMATIC LONG-TERM CONSEQUENCES

The image of balancing civil liberties and human rights against security is also misleading for strategic reasons. It is in this context that it is crucial to examine the potential effects of counter-terrorism measures more closely. While it is conceivable that certain repressive anti-terrorism measures may actually achieve some short-term security gains, they may simultaneously increase the threat of terrorism and diminish security in the long-term. The assumption that increasing security inevitably requires a curtailment of liberty is, in this way, unfounded. This argument has both a domestic and an international dimension; at its heart lie the question of what motivates terrorists to engage in violence.

Much of the terrorism literature focuses on the psychological and sociological aspects leading to individual engagement of terrorists.⁶² While terrorist behaviour is perhaps always determined by a combination of innate factors, two themes appear to dominate the debate among scholars: the role of personal grievances and the lack of alternative routes of expression and for bringing about change. Harvard scholar Jessica Stern concluded, for instance, that both alienation and humiliation play major roles in an individual's decision to engage in terrorism or political violence.⁶³ Similarly, other scholars have observed that social pressures, as well as personal and cultural humiliation, constitute major factors in the emergence of terrorism.⁶⁴

These observations have also been confirmed by Abdul Aziz Rantisi, the late political leader of Hamas. Addressing the motivation of Palestinian suicide bombers, Rantisi stated that 'to die in this way is better than to die daily in frustration and humiliation'.⁶⁵ Likewise, hopelessly entrenched political impasses and blocked societies have been blamed for the rise of Islamic extremism in Egypt, Saudi Arabia and Algeria.⁶⁶ During the 1990s, Islamic radicals in these

62 For an excellent overview see Jeff Victoroff, 'The Mind of the Terrorist' (2005) 49(1) *Journal of Conflict Resolution* 3–42; see also Walter Reich (ed), *Origins of Terrorism: Psychologies, Ideologies, Theologies, States of Mind* (1998).

63 Jessica Stern, *Terror in the Name of God: Why Religious Militants Kill* (2003) 9–62.

64 See, eg, Vamik D Volkan, *Bloodlines: From Ethnic Pride to Ethnic Terrorism* (1997); Cass R Sunstein, 'Why They Hate Us: The Role of Social Dynamics' (2002) 25(2) *Harvard Journal of Law and Public Policy* 429. On the idea of cultural humiliation see Bernard Lewis, *What Went Wrong? Western Impact and Middle Eastern Response* (2001).

65 Cited in Mark Juergensmeyer, *Terror in the Mind of God: The Global Rise of Religious Violence* (2000, 2001 ed) 187.

66 See, eg, Jason Burke, 'Al Qaeda' (2004) 142 *Foreign Policy* 18.

countries grew increasingly frustrated by their failure to change the status quo at home. As a consequence they began to turn their attention abroad. It was (and is) felt among Islamist extremists that striking at the Western sponsors of Arab regimes – the United States in particular – would be the best means to improve local conditions.

This phenomenon is not limited to Islamic extremism. The lack of political and societal reforms also played a significant role in the emergence of left-wing extremism and terrorism in Europe in the 1970s and 80s.⁶⁷ In response to these movements, several governments introduced a wide array of repressive counter-measures, including special security laws that curtailed civil liberties and human rights to a significant extent. Rather than leading to a decline of violence and civil unrest, however, the measures taken often undermined safety as the sense of personal injustice increased and channels for expressing discontent and altering political, legal and social structures were closed.⁶⁸ A comparable development may also occur as a consequence of the domestic counter-measures introduced in the aftermath of the 9/11 attacks. Perceived as repressive and discriminatory, anti-terrorism laws may lead to an inflamed sense of grievance and injustice, especially among the Muslim community. This, in turn, could further alienate and isolate Muslims – even the so-called moderates – and foster sympathy and support for religious fanatics. It is for this reason that the cooperation of Muslims is required in order to effectively manage the threat of Islamist extremism.

While research in this area is still in its infancy, the possibility of such developments has been confirmed by studies undertaken in both the United Kingdom and Australia. The first of these studies was commissioned by the Islamic Human Rights Commission (UK).⁶⁹ The study, published in late 2004, found that the Muslim experience of discrimination ranged from hostile behaviour to abuse, harassment, assault and alienation. About 80 percent of respondents reported that they had experienced discrimination because they were Muslim, a figure that had dramatically increased since 2001.

A second study was conducted by the Institute of Race Relations (UK) and specifically focused on Britain's anti-terrorism laws.⁷⁰ Examining 287 out of the 609 arrests made in the aftermath of 9/11 (up until mid-2004), the study revealed that there was a considerable gap between the number of arrests made and the number of convictions achieved. Indeed, the low conviction rate among those

67 For in-depth analysis see, eg, Peter H Merkl, 'West German Left-Wing Terrorism' in Martha Crenshaw (ed), *Terrorism in Context* (1995) 160; Peter Chalk, *West European Terrorism and Counter-Terrorism: The Evolving Dynamic* (1996).

68 This is also one of the lessons to be learnt from the experience of anti-terrorism legislation in Northern Ireland. See Paddy Hillyard, 'The "War on Terror": Lessons from Ireland' (2005) <<http://www.ecln.org/essays/essay-1.pdf>> at 9 June 2006, with further references. See also Paddy Hillyard, *Suspect Community: People's Experience of the Prevention of Terrorism Acts in Britain* (1993) which is still the only ethnographic study in Britain of the impact of anti-terrorism legislation on people's lives.

69 Saied R. Ameli, Manzur Elahi, and Arzu Merali, *Social Discrimination: Across the Muslim Divide* (Islamic Human Rights Commission, 16 December 2004), <<http://www.ihrc.org.uk/show.php?id=1285>> at 9 June 2006.

70 Institute of Race Relations (UK), 'Arrests under anti-terrorism legislation since 11 September 2001' (September 2004), available at <http://www.irr.org.uk/pdf/terror_arrests_study.pdf> at 9 June 2006.

arrested – only fifteen convictions had been secured at the time – would point to an excessive use of arrest powers against Muslim communities. This finding was further supported by the difference between the religious background of those arrested and those convicted. While the overwhelming majority of those arrested were Muslims, the majority of those convicted appeared to be non-Muslims.

Studies in Australia have reached similar conclusions. In 2003, the Human Rights and Equal Opportunity Commission conducted a major study interviewing a total of 1,423 people in 69 consultations in all states and territories around Australia. In addition, 1,475 self-complete questionnaires were distributed in New South Wales and Victoria between August and November 2003.⁷¹ A common theme among the (mostly Muslim) respondents was that the Muslim community in Australia felt that it had been unfairly targeted in investigations by Australian Security Intelligence Organisation ('ASIO') officers and Australian Federal Police officers. Consultation participants in Perth were particularly concerned about the treatment of Muslims during counter-terrorism investigations in the aftermath of the Bali bombings in 2002. Many also felt they were under surveillance by neighbours and colleagues following the federal government's national security campaign launched early in 2003.⁷²

Another study was conducted by the University of Technology Sydney (UTS) and published in the Shopfront Monograph Series in 2005. Although the project did not directly analyse the impact of newly enacted anti-terrorism legislation, its key findings are similar to those of the British studies.⁷³ The UTS project focussed on data gathered through a telephone hotline that was set up by the Community Relations Commission for a Multicultural NSW (CRC) in late 2001 to receive calls relating to racially motivated attacks. After only two months of operation, the CRC hotline had already received 248 reports, predominantly from Arab, Muslim and Sikh Australians. Reported incidents included physical assaults, sexual assault, verbal assaults, racial discrimination and harassment, threats, damage to property and media vilification.

Repressive anti-terrorism legislation introduced by Western democracies may not only create security problems at the domestic level; it may also indirectly lead to the destabilisation of conflict-ridden States abroad, which may in turn generate additional security and foreign policy problems. This is particularly so in cases where anti-terrorism legislation and its corresponding political rhetoric are adopted uncritically by States lacking traditional liberal democratic checks and balances. In Uganda, for instance, President Yoweri Museveni shut down the leading independent newspaper, the *Monitor*, for a week on the grounds that it

71 Human Rights and Equal Opportunity Commission, *IsmaU – Listen: National Consultations on Eliminating Prejudice against Arab and Muslim Australians* (2004), especially 67–69 <http://hreoc.gov.au/racial_discrimination/isma/report/pdf/ISMA_complete.pdf> at 9 June 2006.

72 Some Muslim Australians felt that the booklet, *Let's Look out for Australia*, which was distributed to all homes in Australia in February 2003, unfairly targeted Muslims in particular. Several participants described how, following distribution of the booklet, their neighbours reported even routine domestic activities and family gatherings. One woman was reported to her real estate agent by a neighbour for washing her balcony with soapy water: see *ibid* 68.

73 Tanja Dreher, *'Targeted': Experiences of Racism in NSW after September 11, 2001*, UTS Shopfront Monograph Series, University of Technology, Sydney (2005).

was 'promoting terrorism'. Likewise, employing US counter-terrorism rhetoric, President Charles Taylor of Liberia declared three of his critics 'illegal combatants' who would be tried for terrorism in military court.⁷⁴

Apart from general international security considerations, the domestic anti-terrorism legislation of Western liberal democracies may also have direct impact on international security issues of major importance for the respective government, especially where nations push for the introduction of special anti-terrorism laws in Islamic countries and offer their legislation as blue print. Repressive measures taken by countries such as Indonesia may be perceived as being initiated by 'the West', which in turn may fuel hostility and lead to increased popular support for extremist groups. Besides, the introduction of repressive laws by liberal democracies also leads to a corrosion of their credibility in the field of international human rights policy. How can we demand respect for international human rights standards and treaties if we do not strictly adhere to these instruments in the first place?

V PRACTICAL OBJECTIONS

Finally, the image of balancing liberty against security is ambiguous for practical reasons. Even if one accepts that civil liberties and human rights can be balanced against national security, it is not clear whether the counter-terrorism measures introduced in the aftermath of the 9/11 attacks actually increase security, or merely diminish liberty. Indeed, it appears that those who advocate the balancing approach often have no idea whether the counter-terrorism measures introduced actually reduce the threat of terrorism. It is thus imperative to examine how far (legislative) counter-measures are based on fair estimates of actual consequences, rather than on the felt need for reprisal, or the comforts of purely symbolic action. Jeremy Waldron has convincingly illustrated the gap between symbolism and effectiveness by referring to the reduction of due process guarantees:

A reduction in due process guarantees may make it more likely that terrorist suspects will be convicted. And that, people will say, is surely a good thing. Is it? What reason is there to suppose that our security is enhanced by making the conviction and punishment of suspects more likely? We know that the conviction and punishment of an Al-Qaeda fanatic, for example, will have no general deterrent effect; if anything, it will have the opposite effect – making it more rather than less likely that the country punishing the suspect is subject to terrorist attack. Of course, this is not a reason for not punishing the perpetrators of murderous attacks, but the reasons for punishing them are reasons of justice, not security (via general deterrence); and those reasons of justice may not be as separable from the scheme of civil liberties that we are currently trading off as the 'new balance' image might suggest.⁷⁵

In Australia, the absence of any predictions in relation to the effectiveness of proposed anti-terrorism legislation has been a key feature of the parliamentary

74 Lawyers Committee for Human Rights, *Imbalance of Powers: How Changes to U.S. Law & Policy since 9/11 Erode Human Rights and Civil Liberties*, September 2002 – March 2003 (2003) 71–4, <http://www.humanrightsfirst.org/us_law/loss/imbalance/powers.pdf> at 9 June 2006.

75 Waldron, above n 41, 209–10 (emphasis omitted).

debate on the issue.⁷⁶ Indeed, legislation such as the *ASIO Legislation Amendment Act 2003* (Cth) itself prevents any body from assessing whether information obtained through questioning and/or detention was of any quality at all and whether, and to what extent, the Act is an effective tool in the fight against terrorism. As George Williams and Ben Saul have pointed out, 'it is impossible for Parliament and the community to evaluate the need for, and effectiveness of, the legislation if the general nature of the information obtained through questioning remains off limits'.⁷⁷

It is beyond question that it can be notoriously difficult to make fair estimates on the effectiveness of counter-terrorism measures.⁷⁸ However, the difficulty of the task cannot be an excuse for a lack of thorough analysis and sound decision-making. An in-depth analysis must include an examination of the experiences from previous terrorism crises and comparable campaigns, such as the so-called 'war on drugs'. As far as left-wing terrorism in Europe in the 1970s and 80s is concerned, for example, it is highly questionable whether repressive counter-measures and intrusive anti-terrorism laws did play a significant part in the decline of terrorist organisations.⁷⁹ Similarly, in the context of the 'war on drugs', a campaign which in many aspects may be compared to counter-terrorism, there is little compelling evidence to suggest that requiring higher standards of due process and protection of human rights impeded effective law enforcement.⁸⁰

VI RECONCILING RESPECT FOR CIVIL LIBERTIES AND HUMAN RIGHTS WITH THE INTERESTS OF NATIONAL SECURITY

It has been argued that the balance metaphor is inappropriate to describe the process of reconciling respect for civil liberties and human rights with the (alleged) imperatives of national security. But, what is the significance of this argument? Some commentators have suggested that using the image of balance might be necessary to facilitate and foster broader public debate on the problem of curtailing civil liberties and human rights in the interests of national security. George Williams, for instance, accepts that it may be problematic and inaccurate

76 Any such predictions are nowhere to be found in the Senate Legal and Constitutional Legislation Committee, Commonwealth, *The Senate Legal and Constitutional Legislation Committee: Provisions of the Anti-Terrorism Bill (No 2)* (2005); see also Christopher Michaelson, 'Australia's Antiterrorism Laws Lack Adequate Oversight Mechanisms', (Paper presented at the Democratic Audit of Australia, Australian National University, Canberra, September 2005)

<http://democratic.audit.anu.edu.au/papers/200511_michaelson_anti_terror.pdf> at 9 June 2006.

77 Evidence to the Parliamentary Joint Committee on ASIO, ASIS and DSD, Review of Division 3 Part III of the ASIO Act 1979 – Questioning and Detention Powers, Parliament of Australia, Canberra, 24 March 2005, 9 (George Williams and Ben Saul).

<http://www.aph.gov.au/house/committee/pjcaad/asio_ques_detention/subs/sub55.pdf> 9 June 2006.

78 See, eg, Christopher Hewitt, *The Effectiveness of Anti-Terrorist Policies*, (1984) 19–23.

79 See, eg, Christoph Rojahn, 'Left-Wing Terrorism in Germany: The Aftermath of Ideological Violence' (1998) 313 *Conflict Studies* 1.

80 See, eg, Simon Bronitt, 'Constitutional Rhetoric versus Criminal Justice Realities: Unbalanced Responses to Terrorism?' (2003) 14 *Public Law Review* 76.

to refer to the process as ‘balancing’. Nevertheless, he prefers to employ the balance metaphor in public discourse ‘because “proportionality” does not capture in the public mind what is involved’.⁸¹ ‘The nature of public discourse’, according to Williams, is ‘that these things are difficult to communicate except where a metaphor is used’.⁸²

At first, the argument advanced by Williams seems to make sense. Using simple metaphors to explain difficult and complex problems is indeed helpful to communicate with the broader public. However, the use of crude metaphors becomes problematic when both academia and the legislature and/or policy makers adopt the terminology and the concept uncritically. This then leads to an unwarranted reduction of the complexity and scope of the issues at hand. Furthermore, it leads to sloppy reasoning, faulty decision-making and, ultimately, to fundamentally flawed public policy. Unfortunately, this is exactly what seems to have happened in the case of the balance metaphor being employed in the context of civil liberties, human rights and national security.

The question, of course, is whether an alternative exists to the ‘balancing’ approach. One such alternative might be the so-called ‘proportionality test’ which is used in German constitutional jurisprudence and has been further refined by the German Federal Constitutional Court.⁸³ In essence, the proportionality test consists of three main requirements: any curtailment of constitutionally protected civil liberties and human rights must generally be (1) suitable, (2) necessary and (3) appropriate.⁸⁴

The requirement of suitability (1) is usually very broadly defined to mean that the government must only introduce legislative measures that are generally suitable to achieve the intended purpose. In fact, ‘suitability’ might be more precisely defined in negative terms: that no completely unsuitable measure be taken. The second requirement (‘necessary’) relates to the scope of the government’s intervention and to the question of whether the legislative measure under consideration is warranted by the exigencies of the situation. Its effect is that the government must refrain from interfering with the citizens’ (constitutionally protected) civil liberties and human rights if it can accomplish the same aim without interference with those rights and freedoms at all, or by resorting to a less drastic measure. Finally, any government action curtailing rights and freedoms must be appropriate and strictly proportional (3). The requirement of appropriateness means that legislative action by the government is unacceptable if the burden created thereby is disproportionate to the purpose of the measure. According to the so-called *Wesengehaltsgarantie* (principle of materiality) a burden is particularly disproportionate if it affects the ‘essential content’ (‘*Wesengehalt*’) or the very nature of the right or freedom which is curtailed. It is almost self-evident that the more the statutory infringement affects

81 Email from George Williams to Christopher Michaelsen, 16 May 2005.

82 Ibid.

83 See, eg. Helmut Goerlich, ‘Fundamental Constitutional Rights: Content, Meaning and General Doctrines’ in Ulrich Karpen (ed), *The Constitution of the Federal Republic of Germany* (1988) 45–65.

84 See generally Kommers, above n21; see also Sabine Michalowski and Lorna Woods, *German Constitutional Law: The Protection of Civil Liberties* (1999) 69–93.

fundamental expressions of human freedom of action, the more carefully the reasons serving as its justification must be examined against the principal claim to liberty of the citizen.⁸⁵

VII CONCLUSION

The academic, political and public discourse on counter-terrorism law and policy has frequently revolved around the idea that a balance must be struck between civil liberties and the interests of national security. However, as has been demonstrated, this idea is problematic for four interrelated reasons. First, a simple balancing approach does not give adequate consideration to the philosophical and conceptual underpinnings of the notions of liberty and security. Liberty is a precondition of, and closely related to, security. As a consequence, the two goods cannot logically be balanced against each other. Secondly, there are major rights-based objections to a simple balancing exercise. These include the jurisprudential problem of whether, and to what extent, civil liberties can be balanced against community interests. Other rights-based objections range from the difficulty of conceiving security as an individual right, to the distributive inequality of the measures curtailing liberty themselves. It is not the entire population which is trading off liberty for greater security, but only certain parts of it. Thirdly, commentators invoking the balance metaphor to justify new security laws to counter the immediate dangers posed by terrorism do not give appropriate weight to the long-term consequences of curtailing fundamental rights and liberties. Despite delivering some possible short-term gains in security, some counter-measures may actually increase the potential for terrorism and diminish security in the long run. A detailed enquiry into whether a diminution of liberty actually enhances security or whether one is trading off civil liberties for symbolic gains and psychological comfort is necessary. In conclusion, it is imperative to avoid simple balance rhetoric when developing, formulating and implementing legal measures to counter the threat of international terrorism. The use of crude metaphors should never become a substitute for sound reasoning, sensible decision-making and effective policy work.

85 See also German Federal Constitutional Court, (1963) BVerfGE 17, [306], [314].