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The Proportionality Principle,
Counter-terrorism Laws and Human Rights: A
German–Australian Comparison

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Abstract

As a general principle of law, some form of proportionality is found in most legal systems. It is, for example, readily applied in the context of criminal law where the severity of punishment is expected to be proportionate to the seriousness of the crime. The proportionality principle, moreover, is regarded as a fundamental element of regulatory policy and public administration. In this context, the principle is considered to find its origins in German constitutional and administrative jurisprudence. Over the past fifty years, however, it has become a preferred procedure for managing disputes involving an alleged conflict between two rights claims, or between a rights provision and a legitimate state or public interest. From its German origins, the proportionality analysis spread across Europe and into Commonwealth systems such as England, Canada, New Zealand, and South Africa. In Australia it still awaits formal recognition in constitutional law and administrative law. This article examines the application of the proportionality principle in the context of anti-terrorism law with particular reference to counter-terrorism measures in Germany and Australia. It analyses how — in the German context — the principle has played an important role in preventing undue invasions of basic rights for the purposes of countering terrorism. At the same time, the article seeks to demonstrate that the lack of formal recognition of the principle in Australia has led to the adoption of a range of anti-terrorism laws that curtail civil liberties to an unprecedented extent.

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*Christopher Michaelsen**

As a general principle of law, some form of proportionality is found in most legal systems. It is, for example, readily applied in the context of criminal law where the severity of punishment is expected to be proportionate to the seriousness of the crime. The proportionality principle, moreover, is regarded as a fundamental element of regulatory policy and public administration. In this context, the principle is considered to find its origins in German constitutional and administrative jurisprudence. Over the past fifty years, however, it has become a preferred procedure for managing disputes involving an alleged conflict between two rights claims, or between a rights provision and a legitimate state or public interest. From its German origins, the proportionality analysis spread across Europe and into Commonwealth systems such as England, Canada, New Zealand, and South Africa. In Australia it still awaits formal recognition in constitutional law and administrative law. This article examines the application of the proportionality principle in the context of anti-terrorism law with particular reference to counter-terrorism measures in Germany and Australia. It analyses how — in the German context — the principle has played an important role in preventing undue invasions of basic rights for the purposes of countering terrorism. At the same time, the article seeks to demonstrate that the lack of formal recognition of the principle in Australia has led to the adoption of a range of anti-terrorism laws that curtail civil liberties to an unprecedented extent.

I. INTRODUCTION

The question of whether, and to what extent, it is necessary to curtail civil liberties and human rights in order to combat and prevent terrorism has been one of the key questions of human rights and constitutional law in the last few years. A central feature of the academic and political discourse on this matter has been the claim that a ‘balance’ needs to be struck between ‘security’ and ‘liberty.’¹ This article is based on the argument that it is inappropriate to employ the rhetoric of ‘balance’ when it comes to reconciling the

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¹ For detailed references, see notes 16–22 below.

interests of combating and preventing terrorism and protecting human rights and civil liberties. Instead, it suggests that any restrictions of human rights and civil liberties need to be strictly justifiable through the application of a proportionality test.

This test, for instance, is regularly applied by the German Federal Constitutional Court in the context of assessing constitutional complaints about infringements of basic rights as protected by the German constitution (the Basic Law).² This article examines a recent decision of the Federal Constitutional Court in relation to data mining by the police for counter-terrorism purposes and suggests that the proportionality principle has served as functional limiting factor for excessive executive action. The German example is then contrasted with the Australian experience. The article explores whether, and to what extent, the principle of proportionality can be applied to an analysis of Australian counter-terrorism law and policy. It is suggested that while a full proportionality test is yet to be formally recognised by Australian law, it is nonetheless appropriate to review Australian counter-terrorism law and policy on the basis of proportionality. Two key Australian anti-terrorism laws are subsequently subjected to a proportionality analysis. It is argued that both pieces of legislation are likely to fail the test.

II. BALANCING ‘SECURITY’ AGAINST ‘LIBERTY’?

Although there appears to be a general consensus that the protection of democratic principles and the rule of law constitutes a key component of counter-terrorism both before and after 9/11, commentators are nonetheless divided over whether it was (and is) necessary to curtail civil liberties and human rights in order to combat and prevent terrorism effectively.³ On one side the claim is made by those defending incursive counter-measures that terrorists regard liberal democracy itself as the enemy. 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, were political conveniences for enjoyment in times of peace,⁴ and they should not constitute restraints for government in times of emergency and national danger.⁵

On the other side, commentators maintain that it is particularly in times of crisis that

² See, e.g., BVerfG, 2 February 1999, 2 BvM 1/98; BVerfG, 10 May 2007, 2 BvR 304/07; BVerfG, 11 March 2008, 1 BvR 2074/05.

³ Although often used as synonyms, civil liberties need to be distinguished from human rights. See, e.g., CA Gearty, ‘Reflections on Civil Liberties in an Age of Counterterrorism’ (2003) 41 *Osgoode Hall LJ* 185. Gearty argues that too broad a deployment of the language of civil liberties can lead to the importance of civil liberties being underappreciated by the wider public.

⁴ See, e.g., RA Posner, ‘Security versus Civil Liberties’ (2001) 288 *The Atlantic Monthly* 46; VD Dinh, ‘Freedom and Security after September 11’ (2002) 25 *Harv JL & Pub Pol’y* 399.

⁵ Eric A Posner and A Vermeule, *Terror in the Balance: Security, Liberty, and the Courts* (OUP, Oxford 2007).

the liberal democratic state must adhere strictly to its defining principles.⁶ Rights would lose all effect if they were easily revocable in situations of necessity.⁷ Besides, to believe that restricting human rights and civil liberties was a prerequisite for maintaining security was to put oneself on the same moral plane as the terrorists for whom the end justified the means. When the end justifies the means, however, the ‘difference between terror and those fighting it, becomes increasingly indistinct.’⁸ 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.’⁹

What both sides have in common is that they then turn to history to seek vindication for their claims. In the United States, commentators who supported intrusive domestic measures against terrorism often referred to President Lincoln’s suspension of *habeas corpus* during the Civil War and argue that democracies have survived precisely for the reason that they have occasionally suspended traditional rights and guarantees.¹⁰ The constitutional Bill of Rights, after all, did not constitute a ‘suicide pact.’¹¹ The opponents of repressive measures, on the other hand, point to the arbitrary and unjust internment of Japanese Americans during the Second World War and may instead 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.’¹²

In Europe, both sides turn to the responses to left-wing and separatist terrorism in the 1970s and 80s to seek guidance for the evaluation of current counter-terrorism measures.

⁶ See, e.g., D Cole and JX Dempsey, *Terrorism and the Constitution: Sacrificing Liberties in the Name of National Security* (New Press, New York 2002); C Brown (ed), *Lost Liberties: Ashcroft and the Assault on Personal Freedom* (New Press, New York 2003).

⁷ See, e.g., R Dworkin, ‘Terror and the Attack on Civil Liberties’ (2003) 50:17 *New York Review of Books* 37.

⁸ E 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 J Intl L Foreign Affairs* 167.

⁹ See, e.g., the statement by Wisconsin democrat Russell Feingold, the only US 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.’ Senator R Feingold (D–WI), ‘Statement on the Anti-Terrorism Bill’ (Speech at US Senate on 25 October 2001) <<http://feingold.senate.gov/~feingold/statements/01/10/102501at.html>> accessed 6 June 2010.

¹⁰ See, e.g., WH Rehnquist, *All the Laws but One: Civil Liberties in Wartime* (Alfred A Knopf, New York 1998).

¹¹ See, e.g., J Alter, ‘Time to Think about Torture’ (2001) 138:9 *Newsweek* 45, citing *Terminiello v City of Chicago* 337 US 1, 13 (1949) (Jackson, J, dissenting): ‘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.’

¹² See, e.g., JA Rosati, ‘At Odds with One Another: The Tension between Civil Liberties and National Security in Twentieth-Century America’ in D B Cohen and JW Wells (eds), *American National Security and Civil Liberties in an Era of Terrorism* (Palgrave MacMillan, New York 2004) 14–15. The quote from Benjamin Franklin can be found in EM 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 edn Little, Brown & Company, Boston, MA 1980) 348.

Some argue that the temporary suspension of civil liberties and human rights in previous terrorism emergencies actually strengthened liberal democracy and that it also contributed significantly to reducing terrorism.¹³ 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.¹⁴ 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. Particular reference is made to the attempt by the government of Prime Minister Robert Menzies to outlaw the Australian Communist Party in the 1950s.¹⁵

What is most striking, however, is the fact that the great majority of commentators on both sides of the equation argue that in order to protect liberal democracy from the scourge of international terrorism, a ‘balance’ must be struck between security and liberty.¹⁶ Where this balance falls, of course, depends on the political colours of the respective commentator. In Australia, the balance metaphor is routinely employed by scholars¹⁷

¹³ See, e.g., HJ Horchem, ‘The Lost Revolution of West Germany’s Terrorists’ (1989) 1:3 *Terrorism and Political Violence* 353.

¹⁴ See, e.g., H Prantl, *Verdächtig: Der starke Staat und die Politik der inneren Unsicherheit* (Europa, Hamburg 2002) 24–51; O Tolmein, *Vom Deutschen Herbst zum 11 September* (Konkret, Hamburg 2002) 100–105.

¹⁵ See, e.g., G Williams, ‘Australian Values and the War against Terrorism’ (2003) 26:3 UNSWLJ 192–194; J Hocking, ‘Counter-Terrorism and the Criminalisation of Politics: Australia’s New Security Powers of Detention, Proscription and Control’ (2003) 49:3 AJPH 355.

¹⁶ For media commentary using the ‘balance’ metaphor, see J Rosen, ‘The Difficult Balance Between Liberty and Security’ *New York Times* (New York 6 October 2002); P Rosenzweig, ‘Balancing Liberty and Security’ (14 May 2003) <www.heritage.org/press/commentary/ed051403a.cfm> accessed 20 May 2010. For academic commentary, see EA Posner and A Vermeule, *Terror in the Balance: Security, Liberty, and the Courts* (OUP, Oxford 2007); PJA De Hert, ‘Balancing Security and Liberty within the European Human Rights Framework: A Critical Reading of the Court’s Case Law in the Light of Surveillance and Criminal Law Enforcement Strategies after 9/11’ (2005) 1 *Utrecht LR* 68; David Cole, ‘The Poverty of Posner’s Pragmatism: Balancing Away Liberty After 9/11’ (2007) 59 *Stanford LR* 1735; L Lustgarten, ‘National Security, Terrorism, and Constitutional Balance’ in G Meggle (ed), *Ethics of Terrorism & Counter-terrorism* (Ontos Verlag, Frankfurt 2005) 261; H Ball, *The USA Patriot Act of 2001: Balancing Civil Liberties and National Security: A Reference Handbook* (ABC-CLIO, Santa Barbara, CA 2004); D Thornburgh, ‘Balancing Civil Liberties and Homeland Security: Does the USA Patriot Act Avoid Justice Robert H. Jackson’s Suicide Pact?’ (2005) 68 *Albany LR* 801; ATH Smith, ‘Balancing Liberty and Security? A Legal Analysis of United Kingdom Anti-Terrorist Legislation’ (2007) 13 *Eur J Crim Pol’y Res* 73.

¹⁷ B Golder and G Williams, ‘Balancing National Security and Human Rights: Assessing the Legal Response of Common Law Nations to the Threat of Terrorism’ (2006) 8 *J Comp Pol’y Analysis* 43; A Lynch, ‘Exceptionalism, Politics and Liberty: A Response to Professor Tushnet from the Antipodes’ (2008) 3 *Intl L in Context* 305. For criticism of the balancing approach, see S Bronitt, ‘Balancing Security and Liberty: Critical Perspectives on Terrorism Law Reform’ in P Mathew and M Gani (eds), *Fresh Perspectives on the ‘War on Terror’* (Australian National University e-Press, Canberra 2008) 65; S Bronitt, ‘Constitutional Rhetoric v Criminal Justice Realities: Unbalanced Responses to Terrorism?’ (2003) 14 *Public Law Review* 76.

and policymakers alike.¹⁸ In various parliamentary debates both the government and the opposition invoked the balancing paradigm to justify or criticise proposed anti-terrorism legislation. Defending the first package of anti-terrorism laws in the Senate in June 2002, the then Minister for Justice and Customs, Chris Ellison, for instance, argued that the proposed legislation ‘strikes a balance between those security needs and the rights and liberties of all Australians.’¹⁹ Similarly, in March 2006, the then Attorney General, Philip Ruddock, declared that ‘the measures contained in the [ASIO Amendment] bill maintain an appropriate balance with civil liberties.’²⁰ The opposition employed the balance metaphor as well. Responding to Senator Ellison in June 2002, Labor Senator John Faulkner pointed out that ‘the challenge remains for this parliament to get the balance right.’²¹ Likewise, in a historical December 2002 debate on new detention and questioning powers for Australia’s domestic intelligence agency, the then Leader of the Opposition, Simon Crean, claimed that ‘the [ASIO] bill that is before us, the bill that we say the government should accept, gets the balance right between protecting our security and protecting our citizens.’²² Most recently, the Rudd government’s Discussion Paper on National Security Legislation which was released by the federal Attorney General, Robert McClelland, in August 2009, repeatedly made use of the ‘balance’ terminology.²³

While the rhetoric of balance has featured prominently in the post-9/11 public and academic debate on security and human rights and civil liberties, its usage is by no means new. Scholars have previously employed the metaphor in the discourse on countering terrorism in the democratic context.²⁴ Nevertheless, it is submitted here that the rhetoric of

¹⁸ Prime Minister John Howard quoted in ‘PM announces tough anti-terror measures’ *Sydney Morning Herald* (Sydney 8 September 2005). See also Human Rights and Equal Opportunity Commission, *Submission to the Parliamentary Joint Committee on ASIO, ASIS and DSD* (23 May 2003) [22]. <www.hreoc.gov.au/human_rights/terrorism_sub/asio_asis_dsd.html> accessed 20 May 2010.

¹⁹ Commonwealth of Australia, *Parliamentary Debates, Senate* (24 June 2002) 2446.

²⁰ Commonwealth of Australia, *Parliamentary Debates, House of Representatives* (29 March 2006) 7.

²¹ Commonwealth of Australia, *Parliamentary Debates, Senate* (26 June 2002) 2624.

²² Commonwealth of Australia, *Parliamentary Debates, House of Representatives* (12 December 2002) 10431. Crean also noted that ‘We have supported tough new powers to fight terrorism, but we also want protection for our citizens. It means getting the balance right. I use the words “getting the balance right” because when the previous antiterrorism bills came before this House the government and the Prime Minister argued that our amendments were unworkable and unacceptable. We hear that language again tonight. Three months later, when the Prime Minister went before the National Press Club, he said that the antiterrorism bill had got the balance right.’ Commonwealth of Australia, *Parliamentary Debates, House of Representatives* (12 December 2002) 10430.

²³ Australian Government, *National Security Legislation — A Discussion Paper on Proposed Amendments* (Canberra, July 2009) iii, iv, 87, 88, 105, 107, 109, 111.

²⁴ See, e.g., DA Charters, ‘Conclusions: Security and Liberty in Balance — Countering Terrorism in the Democratic Context’ in DA Charters (ed), *The Deadly Sin of Terrorism: Its Effect on Democracy and Civil Liberty in Six Countries* (Greenwood Press, Westport, CT 1994) 211; P Chalk, ‘The Response to Terrorism as a Threat to Liberal Democracy’ (1998) 44 *Australian Journal of Politics & History* 388. In the 1980s G Wardlaw, for instance, argued that ‘the duty of the government is to balance the extent of the response with the seriousness of the problem and the rights of its citizens’ see G Wardlaw, *Political Terrorism: Theory, Tactics and Counter-measures*, (2nd edn Cambridge University Press, Cambridge 1989) 126.

balance is unsuitable for reconciling respect for civil liberties and human rights with the (alleged) imperatives of national security. In fact, the language of balance is problematic for a number of reasons. These can broadly be categorised into philosophical, rights-based, strategic, and practical reasons.²⁵

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 interrelated with, security. As a consequence, the two goods cannot be balanced against each other logically.²⁶ Secondly, there are major rights-based objections against a simple balancing exercise. These include the jurisprudential problem of whether and to what extent civil liberties can be actually balanced against community interests.²⁷ Other rights-based objections range from the difficulties of conceiving security as an individual right to the distributive character of the measures curtailing liberty themselves.²⁸ It is not the entire population which is trading off liberty for greater security but only certain parts of it.²⁹ 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.³⁰ Despite some possible short-term gains in security, some counter-measures may actually increase the potential for terrorism and diminish security in the long run. Finally, detailed questions have to be asked as to whether a diminution of liberty actually enhances security or whether one is trading off civil liberties for symbolic gains and psychological comfort.³¹

III. THE NEED FOR PROPORTIONALITY

It has been suggested 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? Does it really matter? More importantly, is there an alternative?

Some commentators — including those critical of some of the counter-measures adopted in the aftermath of 9/11 — have suggested that using the balance metaphor might

²⁵ For a detailed critique of the balance rhetoric, see, e.g., C Michaelsen, 'Balancing Civil Liberties against National Security? A Critique of Counterterrorism Rhetoric' (2006) 29 UNSWLJ 1.

²⁶ See also R Dworkin, 'The Threat of Patriotism' (2002) 49:3 *New York Review of Books* 44.

²⁷ R Dworkin, 'Rights as Trumps' in Jeremy Waldron (ed), *Theories of Rights* (OUP, Oxford 1984) 153–67.

²⁸ See, e.g., C Michaelsen, 'Security against Terrorism: Individual Right or State Purpose?' (2005) 16(3) *Public Law Review* 78; O Lepsius, 'Freiheit, Sicherheit und Terror: Die Rechtslage in Deutschland' (2004) 32 *Leviathan* 64.

²⁹ See LK Donohue, 'Security and Freedom on the Fulcrum' (2005) 17 *Terrorism and Political Violence* 69.

³⁰ *Michaelsen* (n 25) 15–18.

³¹ See also Jeremy Waldron, 'Security and Liberty: The Image of Balance' (2003) 11 *Journal of Political Philosophy* 191.

be necessary to facilitate and foster broader public debate on the problem of curtailing civil liberties and human rights in the name of national security. Professor George Williams, for instance, has accepted that it may be problematic and inaccurate to refer to the process as ‘balancing.’ Nevertheless, he prefers employing the balance metaphor in public discourse in order to ‘capture in the public mind what is involved.’³² The nature of public discourse, Williams has argued, is ‘that these things are difficult to communicate except where a metaphor is used.’³³

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 metaphors becomes problematic when academics, policy makers and legislators adopt the terminology and the concept uncritically. This then leads to an unwarranted simplification of the issues at hand. Furthermore, it leads to sloppy reasoning, faulty decision-making and, ultimately, to fundamentally flawed public policy. It appears that this is exactly what has happened in the case of the balance metaphor being employed in the context of civil liberties and human rights on the one hand and national security and counter-terrorism on the other. In this case the ‘balance’ appears to routinely tip towards security. Yet, little effort is usually made to inquire whether counter-terrorism measures that impair human rights and civil liberties diminish the terrorist threat or whether other, less repressive, measures are available to reach the objective at hand.

The question, of course, is whether an alternative exists to the ‘balancing’ approach. It is submitted here that it is preferable to apply an analysis based on the principle of proportionality. What the principle of proportionality generally requires is that there is a reasonable relationship between the means employed and the aims sought. Essentially, proportionality requires one to determine whether a measure of interference which is aimed at promoting a legitimate public policy objective is neither unacceptably broad in its application nor imposes an excessive or unreasonable burden on certain individuals. Generally speaking, public policy that takes into account the principle of proportionality should, *inter alia*, be carefully designed to meet the objectives in question and not be arbitrary, unfair or based on irrational considerations. In addition, it should impair human rights, civil liberties and the rule of law as little as possible and provide adequate mechanisms of review.

A. Proportionality as a Principle of Law, Public Policy and Good Governance

An analysis based on the principle of proportionality is an analytical procedure which does not, in itself, produce substantive outcomes or answers to legal and policy problems. Rather, it is a decision-making procedure and an analytical structure that leads to the formulation of an opinion concerning policy implementation which usually deals with

³² Statement by G Williams (personal email correspondence with the author, 16 May 2005).

³³ *Ibid.*

tensions between two legal or political values and/or public policy goals.³⁴ As Alec Stone Sweet and Jud Mathews have noted, proportionality analysis is a doctrinal construction which ‘emerged and then diffused as an unwritten, general principle of law through judicial recognition and choice.’³⁵ Proportionality, however, is not only a judicial doctrine for courts to apply in reviewing the legality of government action, but also a legislative doctrine for the political institutions to observe in their decision-making functions.³⁶ As such, it forms an essential component of public policy and good governance.³⁷

As a general principle of law, some form of proportionality is found in most legal systems both at international and municipal levels. At the international level, for instance, the proportionality principle features prominently in the framework of international law and relations.³⁸ It is a key component of traditional just war theory which stipulates, *inter alia*, that force may be used only after all peaceful and viable alternatives have been seriously tried and exhausted.³⁹ Just war theory further requires that the anticipated benefits of waging a war must be proportionate to its expected evils or harms. In contemporary international law, proportionality is a key requirement of lawful self-defence. While Article 51 of the United Nations Charter does not mention the principle explicitly,⁴⁰ it is commonly agreed that the right of self-defence is limited by the principles of necessity and proportionality.⁴¹ The principle of proportionality also plays an important role in the emerging doctrine of humanitarian intervention⁴² and the so called responsibility to protect

³⁴ M Kumm, ‘Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice’ (2004) 2 *ICON* 579–81.

³⁵ AS Sweet and J Mathews, ‘Proportionality Balancing and Global Constitutionalism’ (2008) 47 *Colum J Transnat’l L* 74.

³⁶ N Emiliou, *The Principle Of Proportionality In European Law: A Comparative Study* (Kluwer, The Hague 1996) 142.

³⁷ See also A Blick, ‘Democratic Audit: Good Governance, Human Rights, War against Terror’ (2005) 58 *Parliamentary Affairs* 408.

³⁸ J Gardam, *Proportionality, Necessity and Force in International Law* (Cambridge University Press, Cambridge 2004); J Gardam, ‘Proportionality and Force in International Law’ (1993) 83 *AJIL* 391.

³⁹ See, e.g., M Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (Basic Books, New York 1977); N Rengger, ‘On the Just War Tradition in the Twenty-first Century’ (2002) 78 *International Affairs* 353.

⁴⁰ Article 51 reads: ‘Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.’

⁴¹ In the context of self-defence proportionality means that any measures taken in response to an armed attack must neither be retaliatory nor punitive in nature but rather aimed at halting and repelling an attack. See, e.g., SA Alexandrov, *Self-Defence against the Use of Force in International Law* (Kluwer, The Hague 1996). For a discussion of proportionality in the context of the ‘War on Terror,’ see, e.g., J Gardam, ‘A Role for Proportionality in the War on Terror’ (2005) 74 *Nord J Intl L* 3.

⁴² See, e.g., SD Murphy, *Humanitarian Intervention: the United Nations in an Evolving World Order* (University of Pennsylvania Press, Philadelphia, PA 1996) 311–2.

as well as in international humanitarian law (*jus in bello* or the laws of war).⁴³

At the national level, many liberal democratic systems recognise the principle of proportionality as a key component of criminal, administrative, and constitutional law. In its domestic application, however, the principle is usually framed more strictly than in the sphere of international law. It is, for instance, readily applied in criminal justice policy and criminal law where the severity of punishment is expected to be proportionate to the seriousness of the crime. The proportionality principle, moreover, is often considered to be a fundamental element of regulatory policy and public administration. It has been described as a defining principle of limited government and a key requirement of good governance.⁴⁴ In this context, proportionality is used as an analytical and evaluative tool for regulatory policy and concerns the ends of public action and the means used to attain them. Robert Thomas explains:

To achieve its objectives the administration must adopt effective means of policy implementation since the justification for the very existence of public administration is to realise collective goals through programmes of state action. In so doing the administration may adversely affect the interests of a private individual. It would be an impossible task for the administration to fulfil social needs and avoid any such interference. Clearly, private interests have to be subordinated to the greater public good. However, it may be argued that the extent of the interference was unnecessary since the public goal could have been achieved through different means... If there are alternative means, less restrictive of the individual's interests but equally effective for the realisation of the public objective, then the interference is unnecessary and disproportionate.⁴⁵

The proportionality principle in regulatory policy and public administration finds its origins in German constitutional and administrative jurisprudence.⁴⁶ Over the past 50 years, however, it has become a preferred procedure for managing disputes involving an alleged conflict between two rights claims, or between a rights provision and a legitimate state or public interest.⁴⁷ From its German origins, the proportionality analysis spread

⁴³ For example, contemporary international humanitarian law stipulates that an attack cannot be launched on a military objective in the knowledge that the incidental civilian injuries would be clearly excessive in relation to the anticipated military advantage.

⁴⁴ A Ristroph, *Proportionality as a Principle of Limited Government* (2005) Utah Legal Studies Paper No 05-19 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=851624> accessed 5 May 2010. On proportionality as a principle of good governance, see, e.g., L Senden, *Soft Law in European Community Law* (Hart Publishing, Oxford 2004) 86.

⁴⁵ R Thomas, *Legitimate Expectations and Proportionality in Administrative Law* (Hart Publishing, Oxford 2000) 77.

⁴⁶ See, e.g., H Goerlich, 'Fundamental Constitutional Rights: Content, Meaning and General Doctrines' in U Karpen (ed), *The Constitution of the Federal Republic of Germany* (Nomos, Baden-Baden 1988) 45; Sweet and Mathews (n 35) 98.

⁴⁷ Sweet and Mathews (n 35) 99.

across Europe and into Commonwealth systems such as England, Canada, New Zealand, South Africa, and Israel.⁴⁸ In Australia it still awaits formal recognition in public policy and administrative law.⁴⁹ However, senior judges have started to debate the merits of proportionality intensively.⁵⁰

The principle of proportionality has also migrated to international treaty-based regimes, including the European Union, the World Trade Organisation, the Council of Europe and the international system of human rights.⁵¹ In the European Union, for instance, proportionality is enshrined in Community law through Article 5.3 of the European Community Treaty which stipulates that ‘any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.’ In this context, the proportionality principle assures to individuals that no action shall be taken against them that goes further than necessary to achieve the goals of the action — this applies to both Member State actions and to Community actions.⁵² The European Commission subsequently adopted this approach in its White Paper on European Governance, in which the term ‘European governance’ refers to the rules, processes and behaviour that affect the way in which powers are exercised at European level, particularly as regards openness, participation, accountability, effectiveness and coherence.⁵³ These five ‘principles of good governance’ reinforce those of subsidiarity and proportionality and ‘underpin democracy and the rule of law in the Member States, but they apply to all levels of government — global, European, national, regional and local.’⁵⁴

In the international human rights system, proportionality plays a key role in the application of international instruments such as the European Convention on Human

⁴⁸ See, e.g., Sweet and Mathews (n 35) 112–37; E Erling, R Kugan and J Schnaider, ‘The Principle of Proportionality: A Comparison between Canada and the European Community Law’ (paper presented at the Faculty of Law, University of Lund on 24 February 2006) 4–13.

⁴⁹ Thomas (n 45) 77.

⁵⁰ See, e.g., M Gleeson, ‘Address at the Australian Bar Association Conference: Global Influences on the Australian Judiciary’ (8 July 2002) <www.hcourt.gov.au/speeches/cj/cj_global.htm> accessed 20 May 2010.

⁵¹ For proportionality analysis in the WTO, see Sweet and Mathews (n 35) 152–9.

⁵² See, e.g., Erling, Kugan and Schnaider (n 48) 14–20. While the principle is enshrined in the text of the treaty, it first affected EC law in the *Internationale Handelsgesellschaft* case which stands for the proposition that a public authority may not impose obligations on a citizen except to the extent to which they are strictly necessary in the public interest to attain the purpose of the measure; Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.

⁵³ Commission of the European Communities, *European Governance — A White Paper* (25 July 2001) COM (2001) 428 <http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0428en01.pdf> accessed 20 May 2010.

⁵⁴ *Ibid* 10.

Rights (ECHR)⁵⁵ and the International Covenant on Civil and Political Rights (ICCPR).⁵⁶ A number of provisions in these instruments invoke proportionality. For example, rights to respect for private and family life, to freedom of thought, conscience and religion, and to freedom of expression, assembly and association, are not absolute, but any interference with them may only be such as is necessary in a democratic society for the protection of public order, health or morals, or the protection of the rights of others.⁵⁷ Also, both conventions stipulate that in times of emergency certain specified rights may be derogated from only ‘to the extent strictly required by the exigencies of the situation.’⁵⁸ This is an express reference to the principle of proportionality, which is subject to review by the Human Rights Committee and represents ‘the most important limitation on permissible derogation measures.’⁵⁹ Manfred Nowak rightly notes:

The degree of interference and the scope of the measure (both territorially and temporally) must stand in reasonable relation to what is actually necessary to combat an emergency threatening the life of the nation. The principle of proportionality requires that the necessity of derogation measures be reviewed at regular intervals by independent national organs, in particular, by the legislative and judicial branches.⁶⁰

The duty to review derogating emergency measures as contained in human rights instruments such as the ECHR and the ICCPR is highly significant as it adds another dimension to the principle of proportionality. Thus, in order to remain proportionate, extraordinary measures introduced to combat an emergency must be reviewed by government itself irrespective of any review undertaken by courts in the context of a judicial challenge. This means that a further procedural aspect is added to the proportionality principle that examines the legitimacy of a public policy measures beyond its inherent nature and content.

B. The Proportionality Test in Regulatory Policy and Public Administration

The proportionality principle in regulatory policy and public administration may be summarised by Lord Diplock’s aphorism ‘why use a steam hammer to crack a nut, if

⁵⁵ Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), entered into force 3 September 1953, 213 UNTS 222.

⁵⁶ International Covenant on Civil and Political Rights (ICCPR), adopted 16 December 1966, entered into force 23 March 1976, 999 UNTS 171.

⁵⁷ See, e.g., E Ellis, *The Principle of Proportionality in the Laws of Europe* (Hart Publishing, Oxford 1999); Marc-André Eissen, ‘The Principle of Proportionality in the Case-Law of the European Court of Human Rights’ in Ronald St J Macdonald, Franz Matscher and Herbert Petzold (eds), *The European System for the Protection of Human Rights* (Dordrecht, Martinus Nijhoff 1993) 125.

⁵⁸ ICCPR (n 56) art 4(1); ECHR (n 55) art 15(1).

⁵⁹ M Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (N P Engel, Kehl 1993) 84.

⁶⁰ *Ibid.*

a nutcracker would do?”⁶¹ In its application, the proportionality principle requires a test consisting of three main requirements. First, any measure of public policy impairing the citizen’s rights and liberties must generally be suitable. Second, the measure must be necessary. Third, it must be appropriate and strictly proportionate. This last step is also known as proportionality in the narrow sense or proportionality *stricto sensu*.⁶² The three-step test is generally preceded by a preliminary step, at the so called legitimacy stage, at which it needs to be established whether the government is constitutionally authorised to take the measure in question. As far as domestic legislation in federal states like Australia and Germany is concerned, it is to be considered, for instance, whether the federal parliament possesses the competency to legislate in the area under consideration.

The first step of the proportionality test concerns suitability and is devoted to verification that, with respect to the measure in question, the means adopted by the government are rationally related to stated policy objectives. The requirement of suitability is usually very broadly defined and means 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 may be taken.

The second step, necessity, has more bite. The core of necessity analysis is the deployment of a least-restrictive means test. This requires the government to ensure that the measure does not curtail individual rights any more than is necessary to achieve stated public policy goals. As such, the proportionality principle’s requirement of necessity 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. It means that the government must refrain from interfering with the citizen’s (possibly 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. If the government’s measure in question fails on suitability or necessity, the act is *per se* disproportionate.⁶³

The last step of the proportionality test is the most complex. It requires an analysis of whether the measure is appropriate and strictly proportionate. 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. For instance, according to the so called *Wesengehaltsgarantie* (guarantee of materiality) used in German constitutional and administrative law, a burden is particularly disproportionate if it affects the ‘essential content’ (*‘Wesengehalt’*) or the very nature of the right or freedom which

⁶¹ *R v Goldschmidt* [1983] 1 WLR 151, 155 (Lord Diplock).

⁶² See generally S Michalowski and L Woods, *German Constitutional Law: The Protection of Civil Liberties* (Ashgate, Aldershot 1999) 83–4; C Engel, ‘The Constitutional Court — Applying the Proportionality Principle — as a Subsidiary Authority for the Assessment of Political Outcomes’ (2001) Max Planck Institute Collective Goods Preprint No 2001/10 <<http://ssrn.com/abstract=296367>> accessed 20 May 2010.

⁶³ See, e.g., Sweet and Mathews (n 35) 76.

is impaired.⁶⁴ This is to ensure that the restriction does not jeopardise the right itself. The requirement of appropriateness also entails that the more the administrative action affects fundamental expressions of human freedom of action, the more careful the reasons serving as its justification be examined against the principal claim to liberty of the citizen.⁶⁵

IV. THE PROPORTIONALITY PRINCIPLE AS A CONSTITUTIONAL BARRIER TO EXCESSIVE COUNTER-TERRORISM LAWS IN GERMANY

A. The Proportionality Principle in German Constitutional Law and Judicial Review of Counter-terrorism Measures

The principle of proportionality is a fundamental principle of German constitutional law. Although it is not specifically mentioned in any provision of the Basic Law itself, the Federal Constitutional Court regularly applies a proportionality test in the context of alleged infringements of basic rights which are protected by the first twenty articles of the Basic Law.⁶⁶ The proportionality assessment as applied by the Court involves a variety of tests which largely mirror the three proportionality steps outlined above. In its German form, the proportionality assessment first of all requires that the public interest being protected is important enough to justify an encroachment on the basic right involved. Second, the measure must be appropriate (*geeignet*) for attaining the objective. Third, the measure must be necessary (*erforderlich*) for the purpose, which would not be achievable by less severe means. Fourth, the measure must not be excessive (*unzumutbar*), and it must be strictly reasonable (*angemessen*).⁶⁷

The Federal Constitutional Court has employed the proportionality test as a benchmark in its judicial (constitutional) review of counter-terrorism measures since the late 1970s, when the German government first introduced special legislative arrangements to combat and prevent left-wing terrorism by the Red Army Faction and other groups. In an early decision the Court reviewed the constitutionality of the so called ‘*Kontaktsperregesetz*’ (federal act concerning the blocking of contacts between detainees and defence counsel).⁶⁸ In the post-9/11 era, the Court has reviewed the implementation of the so called European

⁶⁴ Michalowski and Woods (n 62) 84–5.

⁶⁵ See also German Federal Constitutional Court, BVerfGE 17, 306 (1963) and Basic Law for the Federal Republic of Germany, art 19 (1)/(2).

⁶⁶ See, e.g., BVerfG, 2 February 1999, 2 BvM 1/98; BVerfG, 10 May 2007, 2 BvR 304/07; BVerfG, 11 March 2008, 1 BvR 2074/05.

⁶⁷ See, e.g., DP Currie, *The Constitution of the Federal Republic of Germany* (Chicago University Press, Chicago 1994) 19–20, 309–10.

⁶⁸ BVerfGE 46, 1 (1978). See also A Oehmichen, ‘Incommunicado Detention in Germany: An Example of Reactive Anti-terror Legislation and Long-term Consequences’ (2008) 9 German LJ 855.

Arrest Warrant⁶⁹ as well as the legality of powers to order the shooting down of hijacked airplanes likely to be used as suicide weapons.⁷⁰ Most recently, the Court has set limits to the police practice of data mining for counter-terrorism purposes.⁷¹ This latest decision will now be discussed in more detail.

B. The Federal Constitutional Court's Decision Regarding 'Data mining' for Counter-terrorism Purposes

Data mining is a special method of profiling using electronic data processing. The practice dates back to counter-terrorism operations by German law-enforcement authorities to combat Red Army Faction violence in the late 1970s. Police authorities acquire data sets related to individuals from private or public places, which are collected for completely different purposes but which are then screened automatically for certain criteria and compared. The aim of the exercise is to detect a group of people to which a certain profile can be applied.

In the case before the Federal Constitutional Court, the applicant, a Moroccan Muslim studying at the University of Duisburg, alleged that an order based on Section 31 of the Police Act of the federal State of North Rhine Westphalia (NRW Police Act) which authorised police to employ data mining in order to identify terrorist ' sleeper-cells ' violated his basic rights as protected by the Basic Law. Section 31 of the NRW Police Act allowed the police to demand the personal data relating to certain groups from the files of various authorities with a view to automated comparison with other databases. This use of data was to be permitted to the extent that it was necessary to forestall a ' present danger ' to the survival or security of the federation or a state or to the person, life, or freedom of an individual.⁷² It was limited to data required for a specific case and not subject to professional confidentiality or official secrecy.⁷³ The data was to be destroyed if the purpose of collection was attained or proved unattainable.⁷⁴ The measure needed to be ordered by the judge of the local lower court (the so called *Amtsgericht*).⁷⁵

⁶⁹ BVerfG, 18 July 2005, 2 BvR 2236/04 <www.bverfg.de/entscheidungen/rs20050718_2bvr223604en.html> accessed 20 May 2010. For analysis and comment on this decision, see C Tomuschat, 'Inconsistencies — The German Federal Constitutional Court on the European Arrest Warrant' (2006) 2 European Constitutional Law Review 209.

⁷⁰ BVerfG, 15 February 2006, 1 BvR 357/05 <www.bverfg.de/entscheidungen/rs20060215_1bvr035705.html> accessed 20 May 2010 (in German). For analysis and comment on this decision, see S Hufnagel, 'German Perspectives on the Right to Life and Human Dignity in the "War on Terror"' (2008) 32 Crim LJ 100. See also R Youngs, 'Germany: Shooting Down Aircraft and Analyzing Computer Data' (2008) 6 ICON 331.

⁷¹ BVerfG, 4 April 2006, 1 BvR 518/02. <www.bverfg.de/entscheidungen/rs20060404_1bvr051802.html> accessed 20 May 2010 (in German). For analysis and comment on this decision, see G Kett-Straub, 'Data Screening of Muslim Sleepers Unconstitutional' (2006) 7 German LJ 967.

⁷² NRW Police Act s 31 (1).

⁷³ Ibid s 31 (2).

⁷⁴ Ibid s 31 (3).

⁷⁵ Ibid s 31 (4).

In October 2001, the Düsseldorf Amtsgericht, upon application by the police, authorised a data mining operation that required the authorities responsible for the registration of residents and foreigners and educational institutions to provide information about men between certain ages. A collection of over five million records, narrowed down by data comparison, eventually yielded only eight persons who were subject to further measures. However, no criminal proceedings were initiated against any of these eight persons.⁷⁶ The Federal Constitutional Court held that the Düsseldorf Amtsgericht had infringed the student's basic right to control information about himself under Article 2(1), read in combination with Article 1(1) of the Basic Law.⁷⁷ While Section 31(1) of the NRW Police Act complied with the Basic Law in form and substance, it had been interpreted in a way that infringed upon the applicant's basic right.⁷⁸

The Court held that Section 31(1) of the NRW Police Act facilitated invasion of the basic right of individuals to control when and to what extent personal facts about their lives were revealed. It further held that the order of the Düsseldorf Amtsgericht was such an invasion. Applying its standard proportionality analysis, the Court found that Section 31(1) was proportionate. First, prevention of danger to the public or individual interests was a legitimate goal. Second, the method of data mining was generally appropriate. Third, the intrusion was necessary for the legislative purpose and could not have been achieved by less drastic means.⁷⁹ Fourth, the statutory power was also proportionate in the narrow sense, since the seriousness of the intrusion was not out of proportion to the seriousness of the grounds justifying it. It was necessary that the NRW Police Act specified a threshold for intervention, which it did, namely, a 'present danger' for the legal interest threatened.

However, the Court found that the term 'present danger' needed to be interpreted to mean 'concrete danger,' that is, there was a sufficient probability that the interests in question would be violated within the foreseeable future. The Court stated that this could well be a prolonged period, provided the probability was adduced from facts, that is, there needed to be grounds for believing that there were preparations for terrorist attacks, or persons ready to commit such acts, in the foreseeable future in Germany or elsewhere. The general state of threat of terrorism that had existed virtually ever since the 9/11 attacks did not satisfy that standard.⁸⁰ In addition, the Court held that the 'concrete danger' interpretation was necessary to fulfil the requirements of constitutional certainty and clarity for an invasion of basic rights. If understood as described, Section 31 of the NRW Police Act satisfied these requirements. The legislature had identified the purpose for which the data was to be collected in a manner that was precise and specific to the area

⁷⁶ BVerfG, 4 April 2006, 1 BvR 518/02 [11]–[33].

⁷⁷ Article 1(1) of the Basic Law reads: 'Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.' Article 2(1) reads: 'Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.'

⁷⁸ BVerfG, 4 April 2006, 1 BvR 518/02 [66], [67] and [154].

⁷⁹ *Ibid* [82]–[89].

⁸⁰ *Ibid* [141]–[147].

of activity. The authorities receiving the information and their sphere of concern were also clearly ascertainable. Furthermore, the required certainty was provided with regard to data of a kind not specifically listed in Section 31 by the purpose of the norm and the purpose behind the data collection. The Court warned, however, that if the reference point for data mining were simply the general threat of terrorism, the powers this conferred on the police would be too open-ended.⁸¹

The Court's decision in the *Data Mining* case demonstrates that the German Basic Law allows for quite severe invasions of basic rights in the event of concrete danger to the survival or security of the federation or a state or to the person, life, or freedom of an individual. At the same time, the case illustrates that the proportionality principle requires a narrow interpretation of the NRW Police Act in order to remain constitutionally valid. The case is significant as it shows that the Court recognises the legislature's wide margin of appreciation in determining the necessity and appropriateness of specific 'security' laws. However, when extraordinary measures are granted to the police, these need to be interpreted to comply with the principles of the superior Basic Law. In the *Data Mining* case, the Court thus set functional limits for the exercise of police powers which arguably still enable the authorities to use data mining but which, on the other hand, protect the individual's basic right to control information about oneself.

V. THE PROPORTIONALITY PRINCIPLE AND IMPLICATIONS FOR THE ANALYSIS OF THE AUSTRALIAN ANTI-TERRORISM LAWS

A. The Proportionality Principle in the Australian Context

In Australian administrative and constitutional law, the concept of proportionality has so far been applied in rather limited fashion. For example, proportionality has not been accepted as a separate ground for judicial review of administrative action, although the possibility was raised by Justice Deane in the case of *Australian Broadcasting Tribunal v Bond*.⁸² In addition, in contrast to Germany and other liberal democracies, Australia does not have a constitutional bill of rights or a federal act of parliament protecting human rights. Nevertheless, over the previous two decades, the High Court of Australia has adopted the use of a proportionality-type test in the area of constitutional guarantees, freedoms and immunities.⁸³ The precise content of this proportionality test, however, is yet to be fully developed. The High Court, for instance, has not adopted the logic of the three-step test

⁸¹ Ibid [148]–[153].

⁸² (1990) 170 CLR 321, 367 (Deane J). In *Workchoices*, a majority of the High Court affirmed a line of jurisprudence rejecting the general use of proportionality in characterisation of Commonwealth laws. *Workchoices* (2006) 229 CLR 1 [142] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

⁸³ GJ Appleby, 'Proportionality and Federalism: Can Australia Learn from the European Community, the US and Canada?' 8 <<http://ssrn.com/abstract=1300082>> accessed 20 May 2010.

used, inter alia, in Germany and Canada.⁸⁴ The Court’s use of proportionality in relation to implied rights and the underdeveloped nature of the proportionality test have attracted particular criticism from scholars.⁸⁵ At the same time, as Gabrielle Appleby has noted, proportionality in its more ubiquitous form — reasonably ‘appropriate and adapted’ for the achievement of a legitimate governmental objective — is not heretical to Australian judicial methodology.⁸⁶

In spite of the uncertain application and ambiguous scope of the proportionality principle in the context of judicial review in Australian constitutional and administrative law, the Australian authorities have an obligation under international law to consider the proportionality principle when introducing measures that affect the rights of individuals. This obligation stems primarily from the ICCPR, to which Australia became a party in 1980. But it is also part of other international instruments such as the Convention on the Rights of the Child.⁸⁷ In the context of counter-terrorism, the obligation is further underlined by a range of Security Council resolutions that call on states to ensure ‘that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law.’⁸⁸ As noted by the UN Commissioner for Human Rights as well as by the UN Special Rapporteur on the Protection and Promotion of Human Rights and Fundamental Freedoms while Countering Terrorism (in his country report on Australia), when introducing new laws to combat terrorism, the Australian government is obliged to undertake an assessment of whether the proposed measures are necessary and proportionate to the threat it seeks to counter.⁸⁹ This obligation includes an assessment of whether the particular measure adopted is the least restrictive means of achieving a legitimate protective purpose as well as a requirement to explain the importance of any individual right affected and the seriousness of the interference with the right.

The proportionality principle is also applicable in Australian public policy as a general principle of limited government and good governance. This means that apart from its

⁸⁴ In part, this may be explained by the absence of a constitutional bill of rights or any other instrument explicitly protecting human rights in Australia. In the United Kingdom, for instance, it was precisely the Human Rights Act 1998 — legislation that incorporated the United Kingdom’s obligations under the European Convention of Human Rights into British law — that saw the introduction of the continental proportionality test into British law.

⁸⁵ See, e.g., BF Fitzgerald, ‘Proportionality and Australian Constitutionalism’ (1993) 12 U Tas LR 261; J Kirk, ‘Constitutional Guarantees, Characterisation and the Concept of Proportionality’ (1997) 21:1 Melbourne University Law Review 1.

⁸⁶ Appleby (n 83) 2.

⁸⁷ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC).

⁸⁸ See, e.g., UNSC Res 1456 on combating terrorism (adopted 20 January 2003) UN Doc S/RES/1456 [6].

⁸⁹ Joint statement by the Director of the OSCE-ODIHR, the UN High Commissioner for Human Rights and the Secretary-General of the Council of Europe, 29 November 2001; Special Rapporteur on the Protection and Promotion of Human Rights and Fundamental Freedoms while Countering Terrorism, *Australia: Study on Human Rights Compliance while Countering Terrorism* (14 December 2006) A/HRC/4/26/Add.3.

obligations under international law, the Australian government is required to observe the proportionality principle in its decision-making functions. Rather than an instrument exclusive to judicial review, the proportionality principle also forms a tool for policy development and analysis. In the context of Australian counter-terrorism law and policy, the applicability of the concept of proportionality has been recognised by independent and parliamentary committees as well as the Inspector-General of Intelligence and Security.⁹⁰ The Security Legislation Review Committee (the Sheller Committee), for instance, has stressed the need for proportionality in achieving the intended object of security and has noted that ‘legislation must be well framed and have sufficient safeguards to stand the test of proportionality and fairness.’⁹¹ Likewise, the Inspector-General of Intelligence and Security, in his 2004–2005 annual report, noted that there is ‘a vital public interest in ensuring that any new measures to protect national security which have been implemented, or are presently being contemplated, should not be unduly corrosive of the values, individual liberties and mores on which our society is based.’⁹² Nevertheless, despite stressing the importance of proportionality, none of the committees (or any other institution for that matter) has tested the Australian government’s domestic response to the threat of terrorism on the touchstone of a comprehensive proportionality test. In fact, to this day, such an analysis remains to be undertaken. As part of this exercise, two key pieces of Australian anti-terrorism legislation will thus be subjected to a proportionality analysis below.

B. The ‘Disproportionality’ of Australia’s Anti-Terrorism Legislation: Two Examples

1. The Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003

Since 9/11, the Australian government has enacted no less than 42 pieces of security legislation. A cornerstone of the legislative framework is the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003 (Commonwealth) (ASIO Act). The Act authorises ASIO to seek a warrant to detain and question people for a maximum time of seven days.⁹³ In contrast to comparable legislation in the United

⁹⁰ See, e.g., Report of the Security Legislation Review Committee (AGPS, Canberra, 2006) 3 (Sheller Report’); Inspector General for Intelligence and Security, Annual Report 2004–2005.

⁹¹ Sheller Report (n 91) 3.

⁹² Inspector General for Intelligence and Security, Annual Report 2004–2005, 2.

⁹³ ASIO Act ss 34C(3)(a) and 34D(1)(b). The exception is that in the case of children aged between 14 and 18 years of age, there is a requirement that the Minister is convinced that it is likely that the child will commit, is committing or has committed a terrorism offence: s 34NA(4)(a).

Kingdom,⁹⁴ Canada⁹⁵ and the United States,⁹⁶ the person detained does not need to be suspected of any offence. Persons can be taken into custody without charges being laid or even the possibility that they might be laid at a later stage. According to Section 34D(1) of the Act, it is sufficient that the ‘issuing authority’ has ‘reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence.’ An ‘issuing authority’ is defined as a person, appointed by the Minister, who is a federal magistrate or judge, or a member of another class of people nominated in regulations.⁹⁷ These arrangements differ significantly from those in other Western liberal democracies. In Canada, for example, orders for the so called investigative hearings must be made out by a regular judge who is independent from the executive.⁹⁸

The warrant issued by the ‘issuing authority’ either requires a person to appear before a ‘prescribed authority’ to provide information or produce records or things or authorises a police officer to take the person into custody and bring him or her before a ‘prescribed authority’ for such purposes. According to Section 34B of the Act, the ‘prescribed authority’ may be a retired superior court judge or a President or Deputy President of the Administrative Appeals Tribunal (AAT). While a single warrant must not exceed 48 hours, it is possible to extend detention by requesting successive warrants. In total, the successive extensions may not result in a continuous period of detention of more than 168 hours (seven days) from the time the person first appeared before any ‘prescribed authority’ for questioning under an earlier warrant.⁹⁹ However, the ASIO Act does not contain adequate safeguard provisions in relation to the issuance of the so called ‘serial warrants’ (persons are released and detained again shortly afterwards in order to refresh the detention period). As a consequence, there is the possibility that although a detainee must be released after 48 hours or seven days, he/she may be taken into custody again as soon as an hour later. The only criterion to be satisfied is that the new warrant is based on ‘materially different’ information to any previous warrants.¹⁰⁰

Under the Act, the detention decision is not subject to regular judicial review. In fact, the detention is only overseen by a ‘prescribed authority.’ As indicated earlier, a ‘prescribed authority’ is either a retired superior court judge or a President or Deputy President of the Administrative Appeals Tribunal (AAT). The AAT, however, is not a regular judicial body which is independent from the executive. Its members are so called *personae designatae*

⁹⁴ Terrorism Act 2000 (UK); Anti-terrorism, Crime and Security Act 2001 (UK). For an analysis of the British anti-terrorism legislation, see C Walker, *Blackstone’s Guide to the Anti-Terrorism Legislation* (2nd edn OUP, Oxford 2009); H Fenwick, ‘The Anti-Terrorism, Crime and Security Act 2001: A Proportionate Response to 11 September?’ (2002) 65 MLR 72.

⁹⁵ Anti-Terrorism Act (Bill C-36) (SC 2001, c 41) <www.parl.gc.ca/37/1/parlbus/chambus/house/bills/government/C-36/C-36_4/C-36TOCE.html> accessed 20 May 2010.

⁹⁶ USA Patriot Act 2001, PubL No 107–56, § 41, 115 Stat 272 (2001).

⁹⁷ ASIO Act s 34AB.

⁹⁸ Anti-Terrorism Act (Bill C-36) (SC 2001, c 41) s 83.28 (1), s 83.3.

⁹⁹ ASIO Act s 34F(4)(a).

¹⁰⁰ ASIO Act s 34 D(1a)(b)(i).

who are dependent on the favour of the executive if they wish to be reappointed. These provisions raise serious concerns in relation to the fundamental right of *habeas corpus*. Persons detained under the provisions of the ASIO Act cannot have the detention warrant examined by a court of law. Hence, it may be argued that the detention arrangements under the ASIO Act violate the well-established principle of the prohibition of arbitrary detention because they deny a detainee the essential right to due process.¹⁰¹

The ASIO Act also severely limits the right to legal representation. While the person subjected to a warrant is permitted to contact a lawyer of one's choice,¹⁰² questioning may commence in the absence of that lawyer if permitted by the 'prescribed authority.'¹⁰³ The contact between lawyer and detainee is monitored by a 'person exercising authority.'¹⁰⁴ Also, a lawyer may not intervene in the questioning of the person nor address the prescribed authority before which the person is being questioned, except to request clarification of an ambiguous question.¹⁰⁵ In fact, if the prescribed authority considers the lawyer's conduct is unduly disrupting the questioning, the authority may direct a person exercising authority under the warrant to remove the legal adviser from the place where the questioning is occurring.¹⁰⁶ Finally, a lawyer commits an offence (punishable by five years imprisonment) if he/she communicates information to an 'unauthorised third person' about the detention or questioning.¹⁰⁷ These arrangements constitute a departure from fundamental principles of due process. In essence, these provisions prevent lawyers from fulfilling their normal professional duties. As Gavan Griffith, QC, a former Commonwealth Solicitor General, has put it:

The function of the qualified legal representation is limited to that of an excluded onlooker, confined merely to ensuring that the questions asked are understandable, and at risk of removal from the interrogation process for any interruption. Such truncated rights of legal representation are of such nominal content that it would make little difference if the Act said plainly what it does, and provide that there be no right of legal representation. Such is its real operation and effect.¹⁰⁸

Submitting the ASIO Act's arrangements to a proportionality-based review raises serious concerns. The application of the first limb of the proportionality test does not appear to be problematic. It can be accepted that the questioning and detention regime is

¹⁰¹ For a detailed analysis, see, e.g., C Michaelson, 'International Human Rights on Trial: The United Kingdom's and Australia's Legal Response to 9/11' (2003) 25 Syd LR 275.

¹⁰² ASIO Act s 34C(3B).

¹⁰³ *Ibid* s 34TB.

¹⁰⁴ *Ibid* s 34U(2).

¹⁰⁵ *Ibid* s 34U(4).

¹⁰⁶ *Ibid* s 34U(5).

¹⁰⁷ *Ibid* s 34U(7).

¹⁰⁸ G Griffith, 'Submission to the Senate Legal and Constitutional References Committee' (Submission 235) (12 November 2002) 11.

generally suitable to prevent terrorism and gather intelligence in relation to a terrorism offence. However, the same cannot be said about the second and third limbs of the test. For example, doubts arise as to whether the questioning and detention regime is necessary. In particular, it may be argued that there exist less invasive means that assist in the gathering of intelligence information. Moreover, it is questionable whether the exigencies of the situation — in particular the level of threat in Australia — warrant the introduction of arrangements that do not exist in other liberal democracies. But even if one accepts that the questioning and detention regime is suitable and necessary, it is difficult to see how it can be appropriate and strictly proportionate. In particular, it is difficult to see how the objective of intelligence gathering can justify drastic restrictions of the right to liberty and security of person, the right to legal representation, the right to judicial review.

2. *The Anti-Terrorism Act [No. 2] 2005*

The Anti-Terrorism Act [No. 2] 2005 (Commonwealth) (2005 Anti-Terrorism Act) was adopted by the Australian government in the wake of the 7 July 2005 bombings in London.¹⁰⁹ The Act added divisions 104 and 105 to Part 5.3 of the Criminal Code Act 1995 (Commonwealth) (Criminal Code) and introduced control order and a preventative detention regimes. Under the new arrangements, a person's liberty can be controlled or restricted without the person being charged or convicted of, or even suspected of, committing a criminal offence. Preventative detention orders are relatively short-term. They are aimed at either preventing an imminent terrorist attack or preserving evidence relating to a terrorist act that has recently taken place. Control orders, on the other hand, while still ultimately aimed at prevention, are not predicated on the existence of an imminent risk of terrorist attack. They may also last much longer — up to a year, with the possibility of renewal.¹¹⁰

Control orders impose a variety of obligations and restrictions on a person for the purpose of protecting the public from a terrorist act. They allow the Australian Federal Police (AFP) to monitor and restrict the activities of people as young as 16 years of age who pose a terrorist threat to the community, without having to wait to see whether this risk materialises. The potential scope of a control order ranges from a very minimal intrusion on an individual's freedom to an extreme deprivation of a person's liberty. The order can include prohibitions and restrictions on the individual being at specified areas or places, leaving Australia, communicating or associating with certain people, accessing or using certain forms of telecommunication or technology (including the internet), possessing or using certain things or substances, and carrying out specific activities (including activities

¹⁰⁹ For an analysis of the circumstances that led to the adoption of the Act, see A Lynch, 'Legislating with Urgency — The Enactment of the Anti-Terrorism Act [No. 1] 2005' (2006) 30 Melbourne University Law Review 747. See also A Lynch, 'Control Orders in Australia: A Further Case Study in the Migration of British Counter-Terrorism Law' (2008) 8 OUCJL 159.

¹¹⁰ Criminal Code s 104.5(3).

related to the person's work or occupation).¹¹¹ The order can also include the requirement that the person remain at a specified place between certain times each day, wear a tracking device, and report to specified people at specified times and places.¹¹² A person who contravenes the terms of a control order commits an offence with a maximum penalty of five years imprisonment.¹¹³

Only senior members of the AFP may seek control orders. They must first obtain written consent of the Attorney General to request an interim order from an issuing court (the Federal Court, the Family Court or the Federal Magistrates Court).¹¹⁴ Before seeking consent, the competent AFP officer must have 'reasonable grounds' for either believing that:

- (1) making the order would substantially assist in preventing a terrorist act, or
- (2) that the person subject to the order has provided training to, or received training from, a listed terrorist organisation.¹¹⁵

In determining whether or not to grant permission to employ a control order, the competent court applies the test of 'balance of probabilities.'¹¹⁶ The 'balance of possibilities' test is merely a civil, not criminal ('beyond reasonable doubt') standard of proof. Given the serious consequences that an order may have for an individual's freedom, it is highly questionable whether the civil standard of proof is appropriate.

In addition, the 2005 Anti-Terrorism Act created a new regime for preventative detention orders. The new division 105 of the Criminal Code provides for a preventative detention regime that allows the AFP to take a person into custody and detain them to prevent a terrorist attack occurring, or preserve evidence of a recent terrorist attack.¹¹⁷ Where a preventative detention order is sought to prevent a terrorist act, the AFP must establish that detaining the person is reasonably necessary for the purpose of substantially assisting in preventing a terrorist act. It must also be shown that:

- there are reasonable grounds to suspect that either the person will engage in a terrorist act, the person possesses a thing connected with the preparation for or engagement in a terrorist act, or the person has done an act in preparation for or planning a terrorist attack, and a terrorist act is imminent, or

¹¹¹ Ibid.

¹¹² Ibid.

¹¹³ Ibid s104.27.

¹¹⁴ Ibid s104.3.

¹¹⁵ Ibid s104.4 1 (c) (ii) (interim order); s104.16 (confirmed order).

¹¹⁶ Ibid s104.4(1)(c), 104.14(4)(b), 104.24(1)(b).

¹¹⁷ Ibid s105.1, 105.4.

- a terrorist act has occurred in the last 28 days and detaining the person is necessary to preserve evidence of or relating to a terrorist act.¹¹⁸

The maximum period of detention under the preventative detention regime is 48 hours.¹¹⁹ The preventative detention order provisions of the Criminal Code interact with state and territory provisions which also allow preventative detention for a maximum period of up to 14 days.¹²⁰ Subject to the existence of a prohibited contact order, the person detained may only contact a number of people while in detention, including a lawyer, a family member, their employer and another person at the discretion of the police officer.¹²¹ A prohibited contact order can be made where it is reasonably necessary to preserve evidence of, or relating to, a terrorist act. Other than verifying the person's identity, members of the AFP (or ASIO) are not allowed to question him/her.¹²² However, the order may be used to take potentially dangerous people off the streets for a day or two while the AFP considers laying charges or ASIO prepares an application for questioning.

The control order and preventative detention regimes have no precedent in Australia and raise a number of serious concerns.¹²³ First, it may be argued that the arrangements give the Government a 'second chance' to deprive someone of their liberty even after they have been acquitted in a fair trial or had any convictions quashed on appeal.¹²⁴ Second, the control order and preventative detention regimes pose a challenge to the traditional purpose of legal regulation and are highly problematic in relation to the fundamental rights to liberty and to a fair trial, respectively. Persons on whom orders are served do not have to be found guilty of, or even be suspected of committing a crime. As Andrew Lynch and George Williams have pointed out, 'this is more than a breach of the old "innocent until proven guilty" maxim: it ignores the notion of guilt altogether.'¹²⁵ Third, in respect of both control and preventative detention orders, the individual has no right to appear

¹¹⁸ Ibid.

¹¹⁹ Ibid s 105.14.

¹²⁰ See Part 2A of Terrorism (Police Powers) Act 2002 (NSW); Terrorism (Preventative Detention) Act 2005 (Qld); Terrorism (Preventative Detention) Act 2005 (SA); Terrorism (Preventative Detention) Act 2005 (Tas); Terrorism (Community Protection) (Amendment) Act 2006 (Vic); Terrorism (Preventative Detention) Act 2005 (WA); Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT); Part 2B of Terrorism (Emergency Powers) Act (NT)

¹²¹ Criminal Code s105.14A-105.17

¹²² Ibid.

¹²³ The constitutional validity of the control order regime has also been challenged before the High Court of Australia which held in *Thomas v Mowbray* that the regime is constitutionally valid and does not invest the judiciary with powers contrary to Chapter 3 of the Constitution: *Thomas v Mowbray* (2007) 237 ALR 194. On this issue, see A Lynch and A Reilly, 'The Constitutional Validity of Terrorism Orders of Control and Preventative Detention' (2007) 10 Flinders Journal of Law Reform 105; J Renwick, 'The Constitutional Validity of Prevention Detention' in A Lynch, E MacDonald and G Williams (eds), *Law and Liberty in the War on Terror* (Federation Press, Sydney 2007) 127.

¹²⁴ Law Council of Australia, *A Consolidation of the Law Council of Australia's Advocacy in Relation to Australia's Anti-terrorism Measures* (Anti-Terrorism Reform Project) (August 2009) 67.

¹²⁵ A Lynch and G Williams, *What Price Security?* (UNSW Press, Sydney 2006) 42.

personally or through legal representation so as to challenge the issuing of an order.¹²⁶ As such, the control orders and preventative detention regimes also conflict with several of Australia's obligations under international law, in particular under the ICCPR.¹²⁷

Similar to the ASIO Act's questioning and detention regime, the control order and preventative detentions regimes raise serious concerns in relation to their proportionality. Both the control order regime and the preventative detention regimes may be regarded as suitable measures to prevent terrorism. However, it is highly questionable if they fulfil the requirement of necessity. As the Law Council of Australia has noted, at the time the measures were introduced no fewer than 31 Commonwealth Acts had provisions which provided for the prevention and prosecution of terrorist acts. For example, under the Criminal Code it was an offence to attempt, procure, incite or conspire to commit any offence, including terrorist related offences, and such offences incurred the same penalties as the completed offence.¹²⁸ Each of these offences allows police to take pre-emptive action to prevent terrorist acts.¹²⁹ However, unlike the control order and preventative detention regimes, they require police to establish a connection between a suspect and the planned commission of a particular offence before action can be taken to arrest and charge a person.

The proportionality of the amendments is further called into question by the measures' potential for arbitrary or inconsistent application. The broad scope of the control order and preventative detention regimes can effectively target any person suspected of involvement, even peripheral involvement, in terrorist activity. For example, there is no need to demonstrate a link between the person subjected to the order and any particular or likely terrorist offence. A person can be detained under the regime in the knowledge that no relevant offence has been committed. This means that control orders effectively render some individuals, namely those who have trained with a listed terrorist organisation, at constant risk of having their liberty curtailed.¹³⁰ Once branded a risk, a person remains vulnerable to executive intrusion, since there is no obvious expiration date on a person's 'potential terrorist' status.¹³¹

Furthermore, the control order and preventative detention regimes lack mechanisms for independent, regular and comprehensive review. Decisions made under Section 104.2 or division 105 of the Criminal Code are excluded from judicial review under the Administrative Decisions (Judicial Review) Act 1997 (Commonwealth).¹³² This makes

¹²⁶ Criminal Code s 105.8, 105.12 and 105.18.

¹²⁷ For a detailed analysis, see, e.g., Sydney Centre for International and Global Law, 'Submission to the ICJ Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights' (9 March 2006) <<http://ejp.icj.org/IMG/AustraliaSCIGL.pdf>> accessed 20 May 2010.

¹²⁸ Law Council of Australia (n 125) 67.

¹²⁹ Criminal Code Part 2.4.

¹³⁰ Law Council of Australia (n 125) 80.

¹³¹ *Ibid.*

¹³² Administrative Decisions (Judicial Review) Act 1997 (Commonwealth) Schedule 1 s 3(dab)/(dac).

it very difficult for persons subject to a control order or a preventative detention order to ascertain the true basis for the order being made, challenge the legality of the order, or challenge the conditions of their detention.¹³³ It is difficult to see how these arrangements could satisfy the least restrictive means threshold.

VI. CONCLUSION

The legal systems and traditions in Germany and Australia are very different. Germany, a country with a continental civil law tradition, has a constitutionally entrenched catalogue of basic rights. This catalogue is binding on all three branches of government. In addition, Germany's Federal Constitutional Court has the power to declare unconstitutional any measure which is inconsistent with the principles of the Basic Law. Australia, on the other hand, is a country in the common law tradition. It does not have any constitutional bill of rights and, in contrast to the United Kingdom or New Zealand, is also lacking a federal act of parliament protecting human rights. In spite of these fundamental differences, the principle of proportionality can find application in the analysis of anti-terrorism legislation in both countries. In Germany, proportionality is applied as a fundamental principle of constitutional and administrative law. In the context of counter-terrorism, the proportionality test has led to the introduction of functional limits to executive power and has arguably prevented excessive legislative and executive action. At the same time, the recent *Data Mining* case has demonstrated that the limits set by the proportionality principle still allow for severe invasions of basic rights to guarantee the survival or security of the federation or a state or to the person, life, or freedom of an individual.

In Australia, a comprehensive proportionality test has yet to be formally recognised by Australian law and/or jurisprudence. The absence of a German-type proportionality test can be partly explained by the lack of formal federal human rights protection.¹³⁴ Nonetheless, given that Australia is party to the ICCPR, there is an obligation for the Australian government under international law to observe the proportionality principle in its decision-making functions. In addition, it may be argued that the proportionality principle should be applied in Australia as a general principle of limited government and good governance. Submitting two key pieces of anti-terrorism legislation to a proportionality based review has raised serious concerns in relation to their necessity and appropriateness. The concerns, however, are not limited to questions of proportionality. Even if proportionality were to be formally recognised as a component of judicial review, significant problems and challenges remain. These stem mainly from the fact that a number of Australian anti-terrorism laws prevent regular judicial review — the ASIO Act is a case in point. It is thus suggested here that any meaningful reform of Australia's legal counter-terrorism framework should begin with thorough proportionality analysis by the Australian government.

¹³³ Law Council of Australia (n 125) 82.

¹³⁴ The Australian Capital Territory and the state of Victoria have enacted a Human Rights Act (2004) and a Charter of Human Rights and Responsibilities Act (2006), respectively.