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# German perspectives on the right to life and human dignity in the “war on terror”

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*The purpose of this article is to examine, from a comparative perspective, how security concerns have limited three distinct human rights in Germany and Australia: the right to a fair trial, the right to life and the right to human dignity. Since human rights are rarely absolute, the “war on terror” has required legislatures and courts to determine the reasonable limits and qualifications to these rights. The German approach diverges from Australia in relation to the paramount constitutional status of the right to human dignity. Consequently, this German hierarchy of rights produces different outcomes in relation to the range and scope of permissible counter-terrorism measures. This is apparent in the ruling of the German Constitutional Court which declared void legislative powers authorizing the use of lethal force against hijacked aircraft. Similar powers inserted into the Defence Act 1903 (Cth) would not be amenable to similar challenge on grounds that they violate the right to human dignity. Notwithstanding these legal differences, the German authorities have sought to overcome these constitutional inhibitions by resort to untested doctrines such as the suprastatutory state of emergency, suggesting the difference between the two systems is not as marked as it first appears.*

## INTRODUCTION

This article will compare and contrast a range of German and Australian legal responses to terrorism. Terrorism laws typically raise the question of the appropriate balance between security and human rights.<sup>1</sup> The problem is particularly acute in relation to the most basic of human rights – the right to life. The right to life is protected in several international conventions binding Germany and Australia: the Universal Declaration on Human Rights (UDHR), the *International Covenant on Civil and Political Rights* (ICCPR) and the *European Convention of Human Rights* (ECHR).<sup>2</sup> Like many international human rights, the right to life is not absolute.<sup>3</sup> The ICCPR contains a right not to be subject to the *arbitrary* deprivation of life, but makes an exception in relation to capital punishment.<sup>4</sup> The ECHR specifically contains a range of exceptions relating to self defence and the use of force in relation to law enforcement, prevention of crime and disorder.<sup>5</sup> The key question in relation to the use

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<sup>1</sup> Lynch A, MacDonald E and Williams G (eds), *Law and Liberty in the War on Terror* (Federation Press, 2007) pp 137-164, “Human Rights and Terrorism: Is a Trade-Off Necessary”; Williams G, “Balancing National Security and Human Rights: Assessing the Legal Response of Common Law Nations to the Threat of Terrorism” (2006) 8(1) *Journal of Comparative Policy Analysis* 43; For a critique of balancing approaches, see Bronitt S, “Constitutional Rhetoric v Criminal Justice Realities: Unbalanced Responses to Terrorism?” (2003) 14 PLR 70; Zedner L, “Securing Liberty in the Face of Terror: Reflections from Criminal Justice” (2005) 32(4) *Journal of Law and Society* 507.

<sup>2</sup> See Art 3 of the *Universal Declaration of Human Rights* (UDHR); Art 6(1) of the *International Covenant on Civil and Political Rights* (ICCPR); Art 2(1) of the *European Convention on Human Rights* (ECHR).

<sup>3</sup> Gearty C, *Principles of Human Rights Adjudication* (Oxford University Press, 2004) pp 9-10; Security Legislation Review Committee (SLRC), *Report of the Security Legislation Review Committee* (2006) p 39.

<sup>4</sup> See Art 6(2) of the *International Covenant on Civil and Political Rights*.

<sup>5</sup> See Art 2(2) of the *European Convention on Human Rights*.