LAW AND LIBERTY IN THE WAR ON TERROR

EDITORS

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FOREWORD

The Hon Sir Gerard Brennan AC KBE

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Foreword

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Any society that would give up a little liberty to gain a little security
will deserve neither and lose both.

Benjamin Franklin

Franklin’s aphorism, like many other aphorisms, seems too simplistic in its
generality. We continually yield some liberties in order to live in society, res-
pecting the rights and the integrity of our fellows. But the spirit of the
comment is surely right. When we yield more than is necessary to achieve
social order and harmony, we have denied the worth of liberty – the priceless
precondition to human dignity and self-respect. In times when we are threa-
tened by terror which may be achieved, if need be, by suicidal attacks, must we
yield up some of those liberties which the law hitherto has been jealous to
preserve? Is it right to sacrifice the liberties of those who may be suspect
participants in, or supporters of, terror in order to gain some security for
those who are not so suspected? The chapters in this book canvass these
questions, proponents of the new anti-terrorism laws seeking to justify their
provisions and opponents arguing that the laws go too far. These chapters
also show the extent of the changes that have been made to our legal and
administrative structures.

The debate opens with the Attorney-General, Philip Ruddock, defending
the laws which he administers, as designed to prevent terrorism and to define
its special criminality. Alex Conte compares the New Zealand laws, largely
based on international sources. Ben Saul and Kent Roach debate the justi-
fication for inserting a motive in the definition of terrorism and the scope of
the statutory proscriptions are discussed by Andrew Goldsmith and Patrick
Emerton. At this point it is obvious that the anti-terrorism laws are framed to
achieve a purpose that has not previously informed the general criminal law:
the laws are designed primarily to forestall the commission of a terrorist crime,
not to inhibit its commission by prescribing a penalty for crime committed.
One reason for the change is that some would-be terrorists are willing to die
for their cause and deterrence by punishment would have no effect, as Robert
Cornall, Secretary of the Attorney General’s Department, points out. He
enters the policy debate, espousing the new laws as ‘essential to provide
an adequate legal basis to deal with this unprecedented terrorist threat’. Sub-
jection to detention and interrogation is authorised subject to specified
conditions. The laws do not permit the infliction of torture, which Sarah Joseph and Neil James reject as both contrary to international law and ineffective.

The preventative purpose of the new laws carries with it serious implications for what has been traditionally regarded as the rule of law. Wide powers to detain or to restrict a person’s freedom of movement or to compel submission to questioning are conferred on law enforcement agencies or are ordered on application by them and a wide range of conduct which might assist terrorism or which is peripheral or preliminary to the commission of a terrorist act is swept into the ambit of terrorism offences, exposing to penalty persons who would not otherwise be treated as being a party to an offence or as having attempted to commit an offence.

Commenting on the powers of law enforcement agencies, James Renvick points out that provisions which authorise executive detention run counter to the traditional legal principle, protective of a fundamental freedom, that there can be no imprisonment without formal charges. The new provisions do not fall within the established exceptions to that principle but Geoff McDonald opines that a process of authorisation which requires a judicial order that can be challenged on appeal – or, it can be added, approval by a judicial officer acting as a persona designata – is more acceptable than the process adopted in some other countries. Even so, the process of securing judicial consent is itself problematic. Justice Margaret White, concerned by the absence of a contradictor when an ex parte application is made, and noting the broad and open textured tests to be satisfied in the security legislation, commends the Queensland expedient of appointing a Public Interest Monitor. The material to be placed before a judicial officer to secure the issuing of a warrant need not do more than show ‘reasonable grounds to believe’ that the warrant will have a specified anti-terrorism effect. Questions of this kind, affecting the freedom of individuals, are not the ordinary stuff of judicial decision-making. Principles of natural justice and the open administration of the law are, or may be, compromised. David Dyzenhaus and Rayner Thwaites question the significance of such a regime for the rule of law. They analyse the judgments delivered in *Al-Kateb v Godwin* and *Thomas v Mowbray* to illustrate the different ways in which the rule of law might be understood by the judiciary. Is the rule of law upheld by deferring to executive power provided that power is conferred by legislation or must there be an adherence to basic procedures and concepts by which the judiciary protects traditional rights and immunities?

Some of Patrick Emerton’s concern about the broad scope of terrorism offences derives from the discretionary power exercised by executive regulation to declare a group to be a ‘terrorist organisation’ and thus expose persons associated with the group to criminal prosecution. He submits that the dis-
cretion has not been exercised even-handedly and Waleed Aly notes that in Australia, unlike other countries, only Islamic organisations have been proscribed. Another concern, discussed by Stephen Donaghue, relates to the inability to adduce evidence for reasons of national security as certified by the Attorney-General.

Even if a sanitised version of such evidence is admitted, its precise terms may not be disclosed to an accused. Non-disclosure may extend to counsel in some instances, unless counsel has a national security clearance. Phillip Boulten claims that the new laws have changed the dynamic of the criminal trial as a battle between prosecution and defence. Security interests are now represented at the bar table and sometimes threaten criminal proceedings against counsel in the trial.

Clive Walker, speaking with the experience of anti-terrorism legislation in the United Kingdom, sees executive-based action that emphasises preventative intelligence gathering leads to ‘rather more shaky foundations in legitimacy because of the jettisoning of aspects of due process such as open hearings and evidential standards’. To provide some check, he favours the creation of a kind of Ombudsman reporting directly to a Parliamentary Committee on the operation of anti-terrorism legislation.

Public opinion on the operation of these laws may well be misinformed. Tanja Dreher points out that journalists, restricted in what can be reported, are increasingly dependent on leaks and spin from official sources. Moreover, communal fear of terrorism has been heightened by a discursive linking of national security, immigration and Islam. This is not conducive to that informed public discourse which Katharine Gelber identifies as critical to the democratic legitimacy of a law and as a defining characteristic of Australian democracy.

Waleed Aly regrets the ineffectiveness of a Muslim voice in the debates on anti-terrorism – in part due to the disparate ethnicity, culture and sectarian allegiances of Australian Muslims and in part due to public suspicion of Muslims defending civil liberties after terrorist attacks by Islamic extremists. Muslims are united, however, in their concerns about the vagueness and generality of some of the anti-terrorism laws, especially if they be held to impact on Muslim charity – one of the five pillars of Islamic practice. They have grounds for fearing that the broad discretionary powers conferred by the anti-terrorism laws will be implemented by distrusted law enforcement and intelligence agencies.

Both Andrew Lynch and Clive Walker reject as spurious the notion of striking a balance between human rights and protection from terrorism. Andrew Lynch notes the alarming width of the anti-terrorism laws which ‘can easily result in executive overreach’. The scope of the new laws and the investing of courts with powers not only to punish wrongdoers but to protect
the community from wrongdoing are working a rapid readjustment in the legal system. Many will agree with his call to preserve individual rights and constitutional constraints on government – perhaps, it could be added, important traditional constraints on government and government agencies. He declares:

Safeguarding our defining civil liberties and the presumption of innocence … is neither a hindrance nor a luxury, but instead the only certain way to ensure that in responding to the threat of terrorism we do not allow those who would do us harm to dictate what kind of people we are and our relationship with the state.

The chapters in this book cannot be dismissed as mere academic analyses. They have to do with the lives and aspirations of all Australians. They ask whether Australia is, and whether it will be, a united, secure, free and confident nation.

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Preface

This book is the outcome of a three-day symposium held in July 2007 to discuss and debate the role of law in responding to the threat of terrorism. Australia has adapted quickly to the new global security climate ushered in by the attacks of 11 September 2001. This has presented numerous challenges and the measures adopted have attracted much controversy. The purpose of the symposium – and now this book – was to bring together as many different perspectives on the relationship between law and security as possible so as to enable ideas and positions to be better understood and challenged. We are enormously grateful to all who participated in that event and to those who have continued this process of engagement by contributing a chapter to this book.

We feel that some mention should be made of the inclusion of the phrase ‘war on terror’ in the book’s title. This expression is widely contested and our use of it is not an endorsement of the adoption of a war paradigm in responding to terrorism. Nor does it indicate unqualified approval of the many political uses to which others have put that phrase. It should be apparent, in any case, that a book featuring over 20 authors cannot be categorised as adopting any one particular view or position. Nevertheless, the expression – for good or ill – is arguably the defining one of our times and we decided that its use appropriately conveyed the context in which Australia’s national security law has been rapidly developed. We were content for individual contributors to distance themselves from it as they felt necessary – something which several do.

Last, we wish to thank the Australian Research Council for its support of the symposium through the *Discovery Projects* funding scheme, and Chris Holt and the editorial team at Federation Press for their support and enthusiasm in publishing this work – and particularly the speed with which they did so as to ensure it speaks to current events.

Andrew Lynch
Edwina MacDonald
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Mr Phillip Boulten SC
Phillip Boulten is a Sydney barrister. He specialises in criminal cases – both at trial and on appeal. He has represented a number of people suspected of and charged with terrorist-related crimes. He has acted for people who have been subjected to interrogation by the Australian Security Intelligence Organisation (ASIO) as well as for several people whose cases have been heard in the courts.

The Hon Sir Gerard Brennan AC KBE
Sir Gerard Brennan was born and educated in Queensland. He was a barrister and appointed QC in Queensland, New South Wales, Northern Territory, Papua New Guinea and Fiji. He has been a Judge of the Industrial Court of Australia, the President of the Administrative Appeals Tribunal, a foundation Judge of the Federal Court, a Justice of the High Court of Australia and Chief Justice of Australia. He is a former Chancellor of the University of Technology, Sydney. Sir Gerard has been appointed a Knight Commander of the Order of the British Empire and a Companion of the Order of Australia. He holds Honorary Degrees from Trinity College Dublin, University of Queensland, Central Queensland University, Australian National University, Griffith University, Melbourne University, University of New South Wales and University of Technology, Sydney. He is currently a Non-Permanent Judge of the Court of Final Appeal of Hong Kong.

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Robert Cornall has extensive experience at a high level in public administration. He is currently the Secretary of the Attorney-General’s Department. Before this he was the Managing Director of Victoria Legal Aid and the Executive Director and Secretary of the Law Institute of Victoria. He was also a partner and solicitor at Middletons Oswald Burt Solicitors. Robert completed his Bachelor of Laws at the University of Melbourne. He was appointed an Officer of the Order of Australia in 2006 for his contributions to the public sector.

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Professor Kent Roach
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The Hon Philip Ruddock MP
Philip Ruddock was elected to federal parliament in 1973 and has been the Australian Attorney-General since October 2003. The portfolio includes responsibility for the administration of the legal system, but also covers national security, family law, human rights, privacy and copyright. As Attorney-General he has responsibility for counter-terrorism policy, security coordination, critical infrastructure protection and emergency management. Before becoming Attorney-General, he was Australia’s longest serving Minister for Immigration
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**Professor George Williams**
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People have been debating the definition of terrorism for a long time. Continued disagreement about a proper definition explains why terrorism is not yet a crime subject to the jurisdiction of the International Criminal Court and why the United Nations has not agreed on a comprehensive convention on terrorism. Some think that it is impossible to define terrorism. I do not. Nevertheless I argue that terrorism should be defined with restraint with a focus on intentional violence to civilians. The political, religious or other motives of the perpetrators should not excuse terrorism; conversely they should also not constitute part of the crime of terrorism.

Is the ordinary criminal law adequate?

I approach the issue of defining terrorism from a perspective that is rooted in the criminal law. Although many officials in Australia and Canada have repeatedly justified new anti-terrorism laws on the basis that the existing criminal law is inadequate to prevent acts of terrorism, we should not lightly assume that the existing criminal law is not up to the task. It is simply wrong to argue that the ordinary criminal law only applies after an act of terrorist violence has occurred. For example, Zacarias Moussaoui, the so-called 20th hijacker, pleaded guilty to conspiracy to commit murder. Jack Roche was convicted of conspiring to bomb the Israeli embassy in Canberra. Richard Reid, the shoe bomber who was foiled on a transatlantic flight, was convicted of attempted murder. The ordinary criminal law can even apply to speech acts. Abu Hamza received a stiff penalty for inciting or counselling murder in relation to his calls for violence at the Finsbury Park Mosque.
The ordinary criminal law, including offences of conspiracy, incitement and attempt that apply long before actual acts of terrorist violence, can be applied to apprehended acts of terrorist violence. It can result in serious criminal convictions that carry with them significant stigma and punishment. The attractiveness of being able to condemn acts of terrorism on the basis that murder is murder and nothing excuses the commission of murder should not be underestimated.

I am not, however, dogmatic about whether the criminal law is an adequate response to terrorism. In some countries such as Indonesia the existing criminal law was inadequate to respond to apprehended acts of terrorism. There were no general laws prohibiting conspiracies or agreements to commit criminal acts in Indonesia. Attempted crimes were defined restrictively to require the accused effectively to have commenced the ultimate criminal act such as a bombing before that person would be guilty of an attempt. In Indonesia, the criminal law either had to be expanded or else a new terrorism law enacted. But that was not necessarily the case in Australia or Canada.

Post 9/11 terrorism laws: The flaws of British-inspired definitions of terrorism

In any event, many countries have enacted new anti-terrorism laws since 9/11. Australia and Canada based their definition of terrorist activities on that found in the British Terrorism Act 2000. In my view, definitions of terrorism inspired by the British definition are flawed for two reasons. The first is that they go well beyond what the Supreme Court of Canada recognised in 2002 was the essence of terrorism, namely the intentional murder and maiming of innocent civilians. Instead the British-inspired definitions include various forms of property damage and interference with electronic and other essential services. To be sure, these are real harms that should be subject to the criminal law, but a more restrained and precise definition of terrorism that focuses on intentional acts of violence could respond to many concerns that anti-terrorism efforts will infringe human rights. A precise definition of terrorism that focuses on the murder and maiming of civilians could provide the firmest foundation for any expansion of police powers or investigative practices that could be justified as necessary to respond to the harms of terrorist violence. It would certainly capture the type of terrorism seen on 9/11 and afterwards in Bali, Madrid, London and elsewhere.

The second flaw with British-inspired definitions of terrorism is that they require proof that a terrorist acted for a political or religious motive. To be sure, terrorism laws must have a means to distinguish terrorism from ordinary crime, but relying on political and religious motive is not necessary. The proper focus should be on whether the terrorist is pursuing a purpose of intimi-
dating a population or compelling governments or international organisations to act. This requirement avoids an official inquiry into the terrorist’s political and religious beliefs that may promote the false impression that a democratic state is responding to the accused’s politics or religion as opposed to his or her plans to commit acts of violence. It is also more consistent with the traditional criminal law principle that motive is not generally an essential element of crime. If no motive can excuse crime, as was recently affirmed when some accused attempted to challenge the application of British anti-terrorism laws to actions against a repressive regime in Libya, then it is only consistent that motive should not be a constituent part of crime.

Two differing approaches to the definition of terrorism

My approach to the definition of terrorism differs from that of Dr Ben Saul who is the author of the preceding chapter and has written an important and learned book on the definition of terrorism in international law. In his book, Dr Saul starts through the lens of international law and on that subject I agree completely with him that we need a definition of terrorism. Failure to agree on a definition of terrorism is a luxury that can no longer be afforded in the present context of increased anti-terrorism laws and activities. As Dr Saul argues, a legal definition of terrorism could help provide a restrained alternative to the use of war and extra legal measures. The absence of a precise and restrained definition of terrorism has allowed many states to define terrorism in an overly broad manner that raises concerns that protest and civil disobedience will be caught within the definition of terrorism. Although dissent may be able to survive an overbroad definition of terrorism in Australia, Britain or Canada, it may have more drastic consequences in China, Egypt or Saudi Arabia.

Dr Saul and I disagree on the breadth of a definition of terrorism and on the question of political and religious motive. He argues that a definition of terrorism should include all acts that endanger life, including acts against property, and that acts of terrorism should be defined to ensure that they are committed for a political, ideological, religious or ethnic purpose. Saul’s views are supported by Lord Carlile, the Independent Reviewer of the UK’s terrorism legislation, who has recently completed an extensive report that after a comparative study concludes that the British definition of terrorism is in almost all respects sound. They are also supported by the Sheller and parliamentary committee reviews in Australia. My position, however, I hope is not entirely hopeless. As will be seen in what follows, it has support in international and criminal law practice and the Canadian constitutional jurisprudence which has recently struck the political and religious motive requirement from Canadian anti-terrorism law.
The United Nations and the definition of terrorism

In the wake of 9/11, the United Nations in Resolution 1373 called on all states to ensure that terrorism was treated as a serious crime, without bothering to define what constitutes terrorism. Many states acted and relied on the broad definition of terrorism found in the British law. It is unfortunate that the Security Council did not provide guidance on the definition sooner. When it finally addressed the question in Resolution 1566 issued in 2004 it defined terrorism in a more restrained manner than found in Australian and Canadian law or proposed by Dr Saul.

Resolution 1566 singles out:

[C]riminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organisation to do or to abstain from doing any act.

This definition focuses on intentional causing of death or serious bodily injury or taking of hostages. It does not include property damage or the disruption of electronic systems or essential services as do Australian and Canadian law. It does not require proof of religious or political motive. Instead, it distinguishes terrorism from other crimes by the notion that the latter is committed to intimidate a population or compel governments to act. Resolution 1566 also provides that intentional acts of violence and hostage taking ‘are under no circumstances justifiable by considerations of a political, philosophical, racial, ethnic, religious or other similar nature’. This follows the traditional criminal law principle that no motive can excuse an intentional crime.

Retaining the basics of a criminal law approach

In cases in which the existing criminal law is not sufficient to deal with apprehended acts of terrorism and in cases where countries have introduced new terrorism offences, it is important to retain as many of the virtues of the criminal law as possible. These virtues include the general requirement in criminal law for proof of fault, including requirements that the accused intend or have knowledge in relation to the prohibited act, at least for the most serious offences. Another virtue of the criminal law is its requirement that a specific culpable act be established. The requirement of some intentional act is essential to ensure that the innocent are not punished on the basis of their associations or status or thoughts. The requirements of evidence of a specific culpable act and a specific intent are bedrock principles of individual respons-
IBILITY in the criminal law. They help distinguish criminal law from collective punishment or the common practices of intelligence agencies in identifying security risks on the basis of a person’s associations or beliefs.

It is important to preserve as much of the traditional criminal law as possible in order to maximise its denunciatory effects in condemning and punishing terrorism. One of the great dangers of terrorism is that it will goad and scare liberal democracies into changing their fundamental defining rules. As much as possible we should retain our traditional principles and rules in the face of terrorism. It is particularly important to maintain the traditional approach that motive does not constitute an essential element of a criminal offence, if we are to rely on our equally as traditional rule that no motive excuses crime. If motive cannot be a shield for the accused, it should also not be a sword for the state.

The focus in terrorism prosecutions should be on violence and preparations to commit violence. Such conclusions are supported by both normative and practical concerns. There are normative arguments that the political and religious motive requirement should be removed in order to protect the accused and others from discrimination on the basis that they are members of an unpopular religious group or that they express unpopular religious or political views. The idea that terrorism trials will inevitably be political or religious trials may have some force from a historical, political science or sociological perspective, but it is contrary to the logic of the criminal law which suggests that motive neither excuses nor constitutes intentional crime.

There are also powerful practical objections to the political and religious motive requirement. A focus on the accused’s religion and politics can prolong and distract trials. There should not be any need to call competing experts on the meaning of Islam or any other religion in a criminal trial, as sometimes has occurred when evidence about motive is admitted. It could also create harmful and counterproductive impressions that the accused are being prosecuted for their political or religious beliefs. The motive requirement could also provide an accused with a possible platform to politicise the trial process by offering extensive evidence about the true meaning of often ambiguous religious and political beliefs.

The bombing and killing of civilian targets should not be exempted from the label of terrorism in cases where we do not know what motivated the accused or in cases where the motive cannot easily be described as political, religious or ideological. From the perspective of public safety, it should not matter why someone explodes a bomb. It is an open question whether nihilistic or ethnic motivations are covered by the reference to political, religious or ideological motivations. It should not be an open question. It should not matter why a person plans acts of intentional violence of such a magnitude that they are designed to intimidate populations or compel governments to act.
In order to avoid any impression that anti-terrorism efforts are directed against Islam or any other religion, it is best to focus not on the offender’s motive, but whether they intentionally committed a culpable act. Focusing on motive may contribute to the dangerous process in which the distinction between intelligence that identifies risks of political or religious violence is blurred with evidence relating to culpable acts by identified individuals to plan or prepare to commit such acts.

The differences between crime and intelligence based approaches

Justice Dennis O’Connor’s conclusions in his 2006 report on the activities of Canadian officials in relation to Canadian citizen Maher Arar underline the importance even at the investigative stage of focusing on criminality as opposed to the security risks that capture the attention of intelligence agencies. Justice O’Connor found that Canadian officials passed on unfair and inaccurate information branding Arar ‘an Islamic extremist with connections to al Qaeda’ to American officials and that this information likely played a role in the decisions of American officials to detain Arar and remove him to Syria where he was tortured, as well as detained for almost a year before being released. The information was based not on the actions of Mr Arar, but rather on the basis of his associations with others who were the target of a national security investigation and his religion.

One of the dangers of overbroad anti-terrorism laws is that they may blur important distinctions between law enforcement and security intelligence and between admissible evidence about planned wrongdoing and intelligence about a person’s associations and expressive activities. Both the act and fault requirements of the criminal law help ensure that anti-terrorism law focuses on criminal wrongdoing. The act and fault requirement justify punishment of the offender and send a denunciatory message to society about the particular crime. The requirement for a culpable act and fault can protect the innocent.

The origins of a political and religious motive requirement

Anti-terrorism laws in Australia and Canada followed the British Terrorism Act 2000 by defining terrorist activities in part on the basis of the intent to advance a political, religious or ideological cause. The origins of Britain’s political or religious motive requirement are interesting. Lord Lloyd in his 1996 review of British anti-terrorism legislation expressed concerns that the existing definition might not catch some forms of terrorism and expressed approval for the following working definition of terrorism used by the Federal Bureau of Investigation (FBI) in the United States:
The use of serious violence against persons or property, or the threat to use such violence, to intimidate or coerce a government, the public or any section of the public, in order to promote political, social or ideological objectives.7

As Professor Clive Walker notes, however, the FBI’s definition of terrorism was used ‘for jurisdictional, budgetary and other administrative purposes’ and not ‘as a legal term of art on which liberty depends’.8 Because the United States has no domestic security intelligence agency, the FBI collects security intelligence as well as evidence. The codification of the FBI’s definition of terrorism into the British law creates a danger of blurring the distinction between law enforcement and security intelligence. In any event, the definition of terrorism in American law both before and after 9/11 was less vague than the FBI’s working definition and it makes no reference to political or religious motives, factors likely to attract critical scrutiny under the First Amendment of the American Bill of Rights.

**Political and religious motive and the expansion of the criminal law**

The development of Australian and British anti-terrorism law suggests that a focus on the political and religious motives of terrorism may lead to expansion of anti-terrorism law. In 2005, Australia expanded its anti-terrorism laws to include various forms of sedition and to allow groups to be proscribed as terrorist groups because they advocate terrorism. Britain played a leading role that same year in the formation of UN Security Council Resolution 1624 which calls for the enactment of laws against incitement of terrorism. The British *Terrorism Act 2006* included laws against the indirect advocacy of terrorism through the glorification of terrorism. Once policy-makers focus on the extremist politics and religion that motivate terrorism they may want to use the criminal law to respond directly to such politics and religion. One problem with such an approach is that it may blur the anti-hate and anti-terrorism rationales for criminalising speech. Although democracies can use the criminal sanction to prohibit the expression of racial and religious hatred, these crimes are usually treated as much less serious than terrorism offences.

New laws against speech associated with terrorism also blur distinctions between crime and intelligence based approaches. Security intelligence agencies may have a legitimate interest in keeping track of fiery religious and political radicals and their followers; it is another question entirely whether such people should be prosecuted for their speech. Democracies may want to fight those who do not believe in democracy but they should be reluctant to use the heavy hand of the criminal law lest they betray their own ideals and open themselves
to criticisms that there are discriminatory double standards when it comes to
democratic freedoms.

**Canada’s Khawaja case**

In *R v Khawaja*, a trial judge in Canada held that the requirement for proof of
political or religious motive with respect to crimes of terrorism constituted an
unjustified violation of freedom of expression, religion and association. Rutherford J concluded that:

> [T]he focus on the essential ingredient of political, religious or ideological
> motive will chill freedom protected speech, religion, thought, belief, expres-
> sion and association, and therefore, democratic life; and will promote fear
> and suspicion of targeted political or religious groups, and will result in
> racial or ethnic profiling by governmental authorities at many levels.9

Once he concluded that the political and religious motive requirement
violated fundamental freedoms, Rutherford J then found that the government
had failed to justify the limitation as a reasonable limit on those rights. He
noted that the United Nations, the United States and a number of European
countries have defined terrorism without a political or religious motive
requirement. He also noted that the Supreme Court of Canada in *Suresh*10 read
a definition of terrorism taken from international law in to an otherwise
undefined reference to terrorism in immigration law. Like Resolution 1566,
that international law definition makes no reference to religious or political
motive. He concluded that that the limit that the political or religious motive
requirement placed on fundamental freedoms was not proportionate and had
not been justified.

Although Rutherford J made no reference to the findings of the Arar
commission in his judgment, the Arar report constituted part of the social
backdrop of the decision. Justice O’Connor in the first Arar report com-
mented:

> Although this may change in the future, anti-terrorism investigations at
> present focus largely on members of the Muslim and Arab communities.
> There is therefore an increased risk of racial, religious or ethnic profiling,
> in the sense that the race, religion or ethnicity of individuals may expose
> them to investigation. Profiling in this sense would be at odds with the
> need for equal application of the law without discrimination and with
> Canada’s embrace of multiculturalism.11

In his second report, Justice O’Connor discussed the political and reli-
gious motive requirement as one of the factors that merited increased review
of the national security activities of the RCMP, Canada’s national police force.
Although designed to place an extra burden of proof on the state, the political or religious motive requirement could also contribute to a process in which investigators may ‘lean towards increased inquiry and investigation based on religious and political beliefs. This could raise concerns about profiling in addition to the concerns about privacy and freedom of religion and expression’. The political and religious motive provision required police to collect evidence about a terrorist suspect’s religion and politics. The Arar report illustrates how the police could use this information to make inaccurate and unfair assumptions. The removal of the political and religious motive requirement is, of course, no guarantee that profiling or unfairness will not occur, but it is a step in the right direction.

The striking down of the political or religious motive requirement could also benefit those accused of terrorism offences and perhaps reduce the risk of miscarriages of justice in terrorism trials. If there is no requirement for proof of political or religious motive, the trial judge will no longer be required as a matter of law to admit evidence about the accused’s religious and political views into the trial. Evidence of political and religious motive can distract and prolong a trial: turning it quite literally into a religious or political trial. The forced admissibility of political or religious motive evidence could also cause a jury to be exposed to prejudicial and inflammatory evidence about the accused’s religious or political beliefs that may have little to do with whether the accused is guilty. Even if the correct result is reached, the process may be tainted by the admission of what should be irrelevant evidence.

**Conclusion**

Ben Saul argues that the inclusion of political and religious motive is necessary to distinguish private from public violence and to respond to the phenomena of terrorism which is in fact often driven by political and religious motives and extremism. In my view, it is possible to distinguish terrorism from other crimes without reliance on a political or religious motive requirement. Many definitions of terrorism require that the accused act with the intent to intimidate the public or compel governments or international organisations to act. This allows most crimes committed for financial gain to be distinguished from those designed to change governmental policy or scare the public at large.

Some might argue that requirements of intimidation of the public or compulsion of governments themselves constitute motive requirements. The differences between intent and motive can be slim. Nevertheless, intimidation and compulsion requirements differ in important respects from political and religious motive requirements. An accused’s political or religious beliefs, the prayers that he or she says and the holy texts that he or she reads, lie at the core of the freedom of expression and freedom of religion. In contrast, beliefs
that relate to the attempt to intimidate the public or compel governments to act exist more on the periphery of protected freedoms. A religious and political motive requirement authorises state inquiries into the deepest convictions and beliefs of the accused.

The closer that the definition of terrorism is to the basics of laws against murder and intentional injury that are accepted throughout the world, the less controversial anti-terrorism laws should be and the more consensus there should be on international definitions of terrorism. Overbroad definitions of terrorism are deficient not only from the perspective of protecting human rights, but also from the perspective of condemning terrorism. Overbroad terrorism laws that target the destruction of property or the disruption of essential services create an impression in civil society that those targeted as terrorists could include those involved in protest or civil disobedience. Overbroad terrorism laws that include religious and motive requirements play into dangerous ideas that the war against terrorism is a war against Islam as opposed to an effort to stop horrific violence against innocent civilians. The events of 9/11 and events in Bali, Madrid and London suggest that today’s acts of terrorism do not involve activities that are on the margins of possible definitions of terrorism. Rather acts of terrorism involve the intentional murder and maiming of civilians that is intended to intimidate populations or compel governments to act. This should be the essence of any definition of terrorism.

Notes

1 Suresh v Canada [2002] 1 SCR 3, [98].
2 In R v F, the Court of Appeal rejected an argument that the European Convention on Human Rights was violated when British anti-terrorism laws were applied to acts of preparation for terrorism against the government of Libya and Colonel Gaddafi. It relied on the traditional idea that ‘[t]errorism is terrorism, whatever the motives of the perpetrators’: [2007] 3 WLR 164, 172.
4 Lord Carlile, The Definition of Terrorism (2007).
6 South African anti-terrorism law has added philosophical motive because of concerns that an anarchist or nihilistic terrorism might not be captured by British reference to political, religious and ideological causes: Protection of Constitutional Democracy Against Terrorist and Related Activities Act 2004 s 1.
9 R v Khawaja [2006] OJ 4245, [73].
12 Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, A New Review Mechanism for the RCMP’s National Security Activities (2006) 438. The author served on the research advisory committee with respect to this report.