THE FORGOTTEN FREEDOM: FREEDOM FROM FEAR

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The second recital of the Preamble to the *Universal Declaration of Human Rights* of 1948 identifies "as the highest aspiration of the common people" four specified freedoms of which one is freedom from fear. When the Declaration came to be implemented in 1966, in the form of treaties to which states could accede, by the *International Covenant on Civil and Political Rights* ("ICCPR") and the *International Covenant on Economic, Social and Cultural Rights* ("ICESCR"), a recital to each Covenant confirmed that freedom from fear could only be achieved if conditions were created in which every person could enjoy the rights in both Covenants.

The source of the four freedoms identified in the *Universal Declaration* – freedom of speech, freedom of religion, freedom

from fear and freedom from want – is the rhetoric of President Franklin Roosevelt in his annual State of the Union Address to Congress on 6 January 1941. Roosevelt's "Four Freedoms" were in part addressed to the United States experience during the Great Depression and in part addressed to American support, albeit not then military, for the people of Europe against Nazi aggression. Eventually, the objective of ensuring freedom from fear and from want would be incorporated in the official statement of war aims issued by Roosevelt and Churchill, which became known as the Altantic Charter.[1]

The centrality of fear to Roosevelt's discourse commenced with his first inaugural, addressed to the economic emergency that he faced immediately upon assuming office. The most memorable line was: "We have nothing to fear but fear itself", a line stolen from Montaigne via Thoreau, but still memorable. This response to the collapse in public confidence, gave economic and social content to the idea of freedom from fear. Originally it was expressed in terms of securing the employment and social welfare of citizens.[2] Later, in his 1941 Address to Congress and in the Atlantic Charter, an international dimension was added in terms of protection from physical aggression.[3]

Eleanor Roosevelt served as chair of the Human Rights Commission of the United Nations, which drew up the *Universal Declaration*. Because of her influence, President Roosevelt's Four Freedoms became enshrined in the second recital of that Declaration.[4] They were repeated in the preambles to the ICCPR and the ICESCR of 1966.

In the immediate post war years, President Truman pursued the theme of freedom from fear in the context of violence and threats of violence directed at African Americans, including mob violence and police brutality. He established a Committee on Civil Rights which focused on both actual violence and fear of violence proposing, ahead of its time, measures which would be adopted in subsequent Civil Rights Acts.[5]

The first international reflection of the *Universal Declaration* was the *European Convention for the Protection of Human Rights and Fundamental Freedoms* of 1950. It made no reference to the Four Freedoms.

Perhaps the English lawyers who influenced the latter significantly[6] regarded references to “freedom from fear” and freedom from want” as some sort of frolic by Mr and Mrs Roosevelt. Their intellectual heritage – by Austin and Dicey out of Bentham – reflected the intellectual amnesia of British jurisprudence about the natural law language of human rights freely deployed, for example, by Blackstone, which 19th century British texts had systematically distorted.[7]

The Significance of Fear

Over recent decades legal discourse, at an international level and within nations, has given the language of human rights salience and, in some contexts, dominance. Although still resisted by some, rights talk now provides, and is likely to continue to provide, the vocabulary of much legal discourse. The concept of freedom from fear has not featured prominently in this development. Indeed, to a very substantial degree, it has disappeared from legal discourse. Freedom from fear has become the forgotten freedom.

This is regrettable because the most significant impact on personal freedom occurs through the mechanism of fear, rather

than through actual direct interference with such freedom. No social system, including any governmental system, can possibly operate by reliance on physical restraint or direct interference alone. This must be so by reason of the limitation on resources available to those who wish to interfere with the freedom of others.

The most effective, indeed the most common, form of interference with freedom arises from the self-imposed restraint on behaviour because of the threat of adverse consequences if the behaviour is engaged in. Furthermore, the restraint on behaviour is greater, indeed almost always much greater, than would occur on the basis of calculation of the probability of those consequences actually occurring.

Fear is a socially pervasive human emotion. Indeed, it is the first emotion mentioned in the Bible, when Adam reacts in fear of God upon becoming aware of his nakedness.[8] Freedom from fear should be restored to a central position in human rights discourse.

Once it is accepted that protection of human rights requires not only the prevention of direct interference, but also a response to the threat of interference, then freedom from fear can be seen

to inhere in most of the human rights protected by international instruments and domestic provisions. Such freedom is not, itself, a freestanding right. It should, however, be recognised as a critical dimension of other rights. There is force in the observation that Roosevelt conceived freedom from fear in terms of the fear that other rights would be violated.[9]

One academic commentator is technically correct to say that human rights instruments contain "no explicit human right to freedom from fear".[10] However, this understates the significance of such freedom.

To take the example of the *Universal Declaration of Human Rights*, it is perfectly appropriate to think about most of the rights identified in terms of the significance of threats, as distinct from direct infringement:

- Article 3 the right to life, liberty and security of person.
- Article 4 the prohibition on slavery.
- Article 5 the prohibition on torture or cruel, inhuman or degrading treatment or punishment.

- Article 7 the right to equal protection of the law and protection against discrimination or incitement to discrimination.
- Article 9 protection against arbitrary arrest, detention or exile.
- Article 10 the right to a fair hearing by an independent and impartial tribunal.
- Article 12 the prohibition on arbitrary interference with privacy, family, home or correspondence and attacks upon reputation.
- Article 13 the right to freedom of movement.
- Article 14 the right to asylum from persecution.
- Article 16(1) the right to marry and to equal rights in marriage.
- Article 16(3) the entitlement of family to protection.
- Article 17 the prohibition on arbitrary depravation of property.
- Article 18 the right to freedom of thought and conscience.
- Article 19 the right to freedom of opinion and expression.
- Article 20 the right to peaceful assembly and association.
- Article 22 the right to social security and to economic, social and cultural rights required for personal dignities.

- Article 23 the right to work and freedom of choice for employment and protection against unemployment.
- Article 26 the right to education.

The practical ability to enjoy all of these rights can clearly be affected by threats. This is because persons are inhibited by fear of the infringement of each such right. Actual interference is not the only way in which each such right can be abrogated in practice. The well known "chilling effect" of constraints on the exercise of freedom of expression[11] is an effect that can be replicated in virtually every other context protected by human rights instruments. The significance of freedom from fear deserves more recognition than it has hitherto received.

There is one area in which freedom from fear is clearly acknowledged in human rights discourse. This is in the context of refugees. The *Convention Relating to the Status of Refugees* of 1951 ("Refugee Convention") defines a refugee in terms of the now well-established phrase 'well-founded fear of persecution'. It clearly distinguishes between a person who is "unable" to return to his or her country of citizenship, from a person who is "unwilling" to do so "owing to such fear".

In the refugee context, the relevant fear of persecution must be on the basis of race, religion, nationality, membership of a particular social group or political opinion. However, the fear of persecution, or the fear of the imposition of adverse consequences of a character to which persecution may not be entirely an appropriate word, is something that can arise in contexts involving other human rights.

It is not possible in a lecture of this character to attempt to distil examples of the significance of fear from the vast body of writing and case law on the Refugee Convention. Nevertheless, this body of precedent may prove instructive for debate in the context of other human rights violations. It is, however, pertinent to note that this well-known body of precedent extends to freedom from fear of conduct by both state and non-state actors. The extension of the rights recognised by other human rights instruments to protection from conduct by non-state actors is an important issue in many contexts.

The Enlightenment Inheritance

The significance of freedom from fear was recognised by Montesquieu in his classic work of political philosophy *The Spirit of the Laws*. In Book XI, in the very chapter where he made his most influential contribution – the significance of the separation of legislative, executive and judicial power – Montesquieu stated, by way of an introductory paragraph to that proposition:

> "The political liberty of the subject, is a tranquillity of mind arising from the opinion each person has of his safety. In order to have this liberty, it is requisite the government be so constituted, as one man need not be afraid of another."[12]

Book XI is concerned with political liberty with respect to the constitution of States. Book XII is concerned with political liberty from the perspective of each subject. In this latter respect Montesquieu reiterated the central significance of tranquillity of mind, when he said:

> "[Political liberty] consists in security, or in the opinion people have of their security."[13]

The word Montesquieu used, which is accurately translated as “security” in English, was the word “sûreté”, not the French word “sécurité”. The former carries the connotation of protection against dangers and threats which are external, as distinct from protection against defects or failings or errors. As I will presently show the word “sûreté”, and its English version “security”, has a significant role to play in international and national human rights instruments. Its origins can be traced back to the influence that Montesquieu’s book had in America and France.

The concept of security as an element of personal freedom was widely held in Enlightenment thought. That was a revival of the Roman concept of “securitas”, explained by Cicero as an individual condition involving tranquillity of spirit and freedom from care. Montesquieu’s link between liberty and tranquillity is reminiscent of Cicero’s aphorism: “Peace is liberty in tranquillity”.

Adam Smith, in his books *The Theory of Moral Sentiments* and *The Wealth of Nations*, also identified personal security as the fundamental purpose of the system of justice and of civil government. He identified economic prosperity as a product of “order and good government” which had the effect of ensuring “the

liberty and security of individuals".[14] Similarly, his French equivalent, Condorcet, placed the attenuation of fears, whether based on superstition – what Smith called "the terrors of religion"[15] – or on political despotism, as the essential basis for prosperity.[16]

It was only after the Napoleonic wars that the word "security" came to be used primarily in terms of relationships between states.[17] At the time of the formulation of the French Declaration and of the United States Bill of Rights – both of which were influential upon the drafters of 20th century human rights instruments – freedom from fear, expressed in terms of personal security, was an individual right which the state was required, indeed established, to protect.

Montesquieu was an important influence on the American founders – both directly and through the works of Blackstone. In his *Commentaries*, Blackstone identified three principal rights which he described as "rights of all mankind".[18] They were personal security, personal liberty and private property. This reflected the influence of Montesquieu on Blackstone.[19]

For Blackstone, the words “personal security”, as the first absolute right he identified, are deployed in the same sense as Montesquieu’s definition of liberty in terms of the “tranquillity of spirit”. He defined the right in the following way:

> “The right of personal security consists in a person’s legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.”[20]

Blackstone also incorporated in his concept of personal security a right to social welfare of the basic necessities of life, echoing the economic and social rights subsequently developed. Indeed, Blackstone identifies the English legal tradition as more “humane” than the Roman civil law tradition in this respect.[21]

For present purposes it is pertinent to note that Blackstone included both actual and threatened violence as falling within the right to personal security. He said:

> “Besides those limbs and members that may be necessary to man … the rest of his person or body is also entitled, by the same natural right, to security from the corporal insults of *menaces*, assaults, beating, and wounding … .”[22] [Emphasis added.]

The influence of these Enlightenment thinkers was reflected in the early human rights instruments. The first such reference was in the *Declaration of the Rights of Man and of the Citizen* adopted by the National Assembly of France on 26 August 1789 as follows:

> "The aim of all political association is the preservation of the natural and imprescriptable rights of man. These rights are liberty, property, security, and resistance to oppression."

This idea was repeated in the *Declaration of the Rights of Man and Citizen* in the French Constitution of 1793 which identified the natural rights of man as: "equality, liberty, security, and property".

Notably, Article 8 of the Declaration of 1793 went on to give this right to security content, as follows:

> "Security consists in the protection afforded by society to each of its members for the preservation of his person, his rights, and his property."

I note that each of these French references, translated by the word "security", are to the word "sûreté". The French Declarations were amongst the matters taken into account in the drafting of Article 3 of the *Universal Declaration*.

Security of the Person

That there is a tension between liberty and security has long been at the heart of social contract theories of the state – Rousseau, Hobbes and Locke. In critical respects, the power of the state as the protector of public security, but also as a potential source of persecution, underpins liberal democratic political philosophy and determines much of the content of the rule of law. Traditionally, the contrast is between liberty as an individual right and security as a public or collective interest. However, as Montesquieu and Blackstone emphasised, security is also an individual right.

In important jurisdictions, the interpretation of contemporary human rights instruments has subsumed "security" within the right to "liberty". The idea of security as an individual right has, in large measure, been lost.

Security is a condition that exists in an inverse relationship to the risk of an adverse consequence. Each individual's sense of freedom is determined by the fear that such a risk may eventuate. The freedom of individual citizens from fear or, to use the terminology of Cicero and Montesquieu, each individual's sense of tranquillity, has not received, in my opinion, sufficient attention in human rights discourse. Specifically, security of the person, from actual violence and threats of violence is not a focus of that discourse. Yet such security appears to me to be fundamental, both in itself and to enable persons to enjoy other rights.

In the ICCPR, and in other human rights instruments, an individual right to protection from violence is recognised in the right to life and in the prohibition on torture and on cruel, inhumane or degrading treatment. However, there is a real issue as to whether further protection from violence is provided by the right to security of person found, for example, in Article 3 of the *Universal Declaration of Human Rights*, reflected in Article 9 of the ICCPR.

Article 3 of the *Universal Declaration*, protects the right to life, liberty and security of person. When the principles of the *Universal Declaration* came to be set out in the ICCPR, Article 3

was divided so that the right to life was set out as Article 6 and the right to liberty and security of person was set out in Article 9(1).[23]

In this respect, Article 9 of the ICCPR followed Article 5 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* of 1950[24] ("European Convention"), which had separated the right to life in Article 2 and made provision in Article 5 for the "right to liberty and security of person". Furthermore, Articles 5 (European Convention) and 9 (ICCPR) each elaborated in detail on the right to liberty, by setting out a range of provisions concerned with arrest and detention. There was, however, no elaboration of any character of the right of security of persons. This has proven to be a significant omission.

The right to security of person is, perhaps, the least developed of any of the human rights protected by international human rights instruments. On this matter, the human rights case law and literature, outside Canada and South Africa, to which I will refer, is tiny when compared with that on most other human rights.[25]

Security of the person is also acknowledged in other international human rights instruments. Article 5 of the *International Convention on the Elimination of All Forms of Racial Discrimination* of 1965 ("CERD") set out the basic undertaking of the State parties to prohibit and eliminate racial discrimination and to guarantee certain rights without distinction as to race, etc. Amongst the rights so guaranteed is Article 5(b):

> "[t]he right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution".

Although the focus of case law and commentary on Article 5(b) of CERD has been on actual violence, threats and intimidation are clearly encompassed within its scope.

This Article is notable in three respects. First, it recognises "security of the person" as separate and distinct from "liberty". Secondly, it gives specific content to the concept of "security of person" in terms of "protection against violence or bodily harm". Thirdly, it imposes an obligation upon ratifying states to protect the

right to security from the activities of persons other than government officials.

Each of these three matters has been problematic in other human rights instruments which refer to security of the person. I will briefly outline how these matters have been considered in a number of jurisdictions.

Europe

There is a clear preponderance of case law and commentary under Article 5 of the European Convention, accepted in English case law and commentary, to the effect that the right to security of person has no operation independent of the right to liberty in Article 5.[26] This approach is based in part on the context in which Article 5 appears. Although the first sentence would appear to give the word "security" an independent operation from the word "liberty", the remainder of the Article is only concerned with deprivation of liberty. Some other Articles in the European Convention also begin with a broad statement and proceed to define its content.[27]

Accordingly, the case law on Article 5 of the European Convention focuses on arbitrary detention.[28] Attempts to establish a right to security of the person not involving deprivation of liberty, have been unsuccessful. For example, the former European Commission on Human Rights (now superseded) did not accept an argument on the part of a complainant that the authorities failed to protect him from attack by the IRA.[29] Similarly, when a terminally ill applicant sought a guarantee from prosecution of her husband if he should assist in her suicide, the House of Lords rejected the contention that Article 5 had any application.[30] This decision was upheld by the European Court of Human Rights.[31]

The European position is summarised in The Council of Europe's *Implementation Guide to Article 5* which states:

> "The 'right to liberty and security' is a unique right, as the expression has to be read as a whole. 'Security of person' must be understood in the context of physical liberty and cannot be interpreted as referring to different matters (such as a duty on the state to give someone personal protection from an attack by others, or right to social security)."[32]

In cases involving arbitrary detention the European case law has led to the imposition of positive obligations on the state to act. For example, in a number of cases involving the disappearance of individuals arrested in Turkey, the European case law has emphasised the obligation on the state to take preventive measures and to investigate violations of Article 5.[33]

In European commentary there is a recognition that, if a right to security of the person was to be accepted as a positive right, ie a right which imposes obligations on the state, then issues would arise as to whether state action which has any such effect conflicts with other rights. The European Court's reluctance to accept an independent substantive content for the right to security has been supported on this basis.[34] It has also been subject to criticism.[35]

The reluctance to give the right to personal security any substantive content confines the scope of the protection, particularly protection against violence. The interpretive explanation has a degree of legal orthodoxy about it, albeit a literalist orthodoxy not often manifest in this sphere of discourse. I can understand a reluctance to impose on the state an unqualified obligation not to derogate from security and a duty to protect

citizens from infringement of such a right. However, qualifications have often been implied in human rights instruments. It may well be that the recognition that state action to protect the security of its citizens has so often been the justification for official infringement of other human rights is the real source of this reluctance.

The ICCPR

The reference to "security of the person" in the ICCPR must be read in the context of the *Universal Declaration* which it was expressly carrying into effect. In that *Declaration*, liberty and security of the person were combined with the right to life in Article 3. Article 9 of the Declaration made separate reference to arbitrary arrest and detention.

The formulation "life, liberty and security of the person" – which also exists in the Canadian Constitution – clearly refers to three distinct concepts. There is, so far as I am aware, no proper basis for inferring that when the reference to "liberty and security of the person" was combined with "arbitrary arrest and detention" in Article 9 of the ICCPR, it was intended to strip the words "security of the person" of the substantive content they had in Article 3 of the *Universal Declaration*.

Furthermore, Article 9 of the ICCPR must be read in the light of the reference in the preamble to "freedom from fear". There is no such reference in the *European Convention*.

Case law under the *European Convention* should not, accordingly, determine the interpretation of similarly expressed rights for nations, like Australia, whose international obligations are determined by the ICCPR. Specifically, English cases will have to be treated with care. In England, Strasbourg case law, although not strictly binding, is generally followed.[36]

As would be expected from the existence of such different contexts, cases under the ICCPR with respect to Article 9 are not in accord with the European approach. There have been cases in which the right to security of the person has been given an independent operation from the right to liberty.

For example, the Human Rights Committee found a violation of Article 9(1) by reason of a state's failure to take appropriate measures to ensure the safety of a Columbian applicant who had

received death threats and who was subsequently attacked. The Committee said:

> "Although in the Covenant the only reference to the right to security of person is to be found in Article 9, there is no evidence that it was intended to narrow the concept of the right to security only to situations of formal deprivation of liberty. … It cannot be the case that, as a matter of law, states can ignore known threats to the life of persons under their jurisdiction, just because he or she is not arrested or otherwise detained. State parties are under an obligation to take reasonable and appropriate steps to protect them. An interpretation of Article 9 which would allow a state party to ignore threats to the personal security of non-detained persons within its jurisdiction would render totally ineffective the guarantees of the covenant."[37]

Similarly, the failure of Zambia to press criminal charges, provide compensation, carry out investigations or make findings public three years after an applicant had been shot by the Zambian police force, was held to violate the applicant's right to personal security.[38] In another case, Sri Lanka did not provide

security protection or investigate complaints after a person received death threats following comments by the President of Sri Lanka suggesting he had been involved with the Tamil Tigers. That was found to be a violation.[39]

Other cases and commentary by the Human Rights Committee clearly give independent content to the right to security of person under Article 9, in a range of situations involving harassment, intimidation and threats of violence.[40] The European case law cannot be reconciled with practice under the ICCPR.

USA

A reference to the rights of a person also appears in the Fourth Amendment in the United States Bill of Rights of 1791, which provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated …"

Textual context is even more significant in United States case law than under the European Convention. The Fourth Amendment reference to the right "to be secure in their persons"

appears in a provision expressly directed to "unreasonable searches and seizures". Accordingly, the focus of American Fourth Amendment jurisprudence has come to be placed on privacy, not security.[41]

Recent commentary has suggested that it would be now appropriate for Fourth Amendment jurisprudence to be reconceptualised through the right to be secure, which is what it guarantees, rather than being analysed through the right to privacy, which is how it has developed. This has been put forward as a return to the Amendment's core meaning and core principles.[42] Nevertheless, even this reconceptualisation focuses only upon fears that the government will violate such security. It is not suggested that there is any positive obligation upon the government to protect a person's right to security.

Canada

The right to security of the person has acquired considerable significance in jurisprudence on the *Canadian Charter of Rights and Freedoms*. The Canadian provision is in the following terms:

> "7 Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof

except in accordance with the principles of fundamental justice."

Canadian case law has not interpreted section 7 as conferring separate rights. An unqualified right to life, liberty and security would be too broad. The clause, it has been held, confers a composite right not to be deprived of life, liberty or security of the person, except in accordance with the principles of fundamental justice.[43] The emphasis given to the "deprivation" limb of s 7, together with the reference to "principles of fundamental justice", has led the Supreme Court of Canada to restrict s 7 so that it does not extend to economic rights. Nor does it impose positive obligations on the state.[44]

The Canadian right not to be deprived of security of the person has been given a significant function in some of the most controversial areas of politico-legal discourse. It has been held that a person is deprived of the right to security of the person by:

- The risk to health, because of legislative restrictions on the availability of abortion.[45]
- Delays in access to public health care, when combined with a prohibition on access to private health care.[46]

- The Criminal Code offence of assisting a person to commit suicide, which would have been struck down but for the fact that the particular law did not offend the principles of fundamental justice.[47]

Of particular significance for my focus on freedom from fear is the fact that the Canadian case law emphasises the psychological dimension of security of the person.[48] Accordingly, an application to remove children for protective purposes could have such an effect on a parent's psychological integrity that the principles of fundamental justice required that the parent receive legal aid.[49] Similarly, the psychological stress caused by unreasonable delay on the part of a Human Rights Commission when disposing of complaints of sexual harassment could give rise to a constitutional remedy by reason of s 7.[50]

South Africa

The position in South Africa, as in many other respects, reflects the fact that the bill of rights in that nation draws upon a wide range of prior experience and, as a result, contains a more detailed regime. Important aspects of the South African Constitution distinguish its position from the case law of other

nations. First, it extends to socio-economic rights as well as to civil and political rights. Secondly, all rights are expressly subject to three duties: to respect, to promote and to protect, which imposes positive obligations on the state (s 7(2)). Thirdly, the Bill of Rights operates horizontally, ie, it applies to disputes between private parties (s 8(2)).

Section 12(1) of the Constitution relevantly provides:

> "Everyone has the right to freedom and security of the person, which includes the right
>
> (a) not to be deprived of freedom arbitrarily or without just cause;
>
> (b) not to be detained without trial;
>
> (c) to be free from all forms of violence from either public or private sources;
>
> (d) not to be tortured in any way;
>
> (e) not to be treated or punished in a cruel, inhuman or degrading way."

Section 12(2) proceeds to make detailed provision with respect to bodily and psychological integrity.

In contrast with other human rights instruments, the South African Constitution makes explicit provision in s 12(1)(c) for freedom from violence. This is set out as a specific example in the non-exhaustive list of the right to security of the person. Other examples, such as the prohibition on torture or on cruel, inhuman or degrading punishment, which in other contexts are separately stated rights, are also set out as specific examples of the right to security of the person.

The explicit reference to protection from violence has meant that South African jurisprudence could not accept the position in Europe that the reference to security of the person adds nothing to the right to liberty.

The basic text on the South African Bill of Rights identifies the purpose of s 12 in the following terms:

> "It protects the individual specifically (but not solely) against invasions of physical integrity by way of arbitrary arrest, violence, torture or cruel treatment or cruel treatment or punishment."[51]

The authors go on to state:

> "s 12(1)(c) imposes two conflicting obligations on the state. The right to freedom from state violence protects individuals from police use of an unconstitutional degree of force. At the same time, the right to freedom from private violence imposes an obligation on the state to use violent means where necessary to quell or discourage violent acts by individuals that may threaten the physical security of others."[52]

Perhaps of greater significance as a precedent for other jurisdictions is the case law under s 11 of the Interim Constitution of South Africa. That section did not include a list of specific examples of the right to security of the person. Specifically, it did not include anything in the nature of s 12(1)(c) of the Constitution as finally adopted.

Section 11 of the Interim Constitution, the predecessor of s 12, stated:

> "1 Every person shall have the right to freedom and security of the person, which shall include the right not to be detained without trial.

2 No person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment."

As a matter of textual analysis this provision is much closer to Article 9 of the ICCPR and Article 5 of the European Convention, albeit without the detailed elaboration of liberty provisions. The South African Constitutional Court took an approach to s 11 which is not consonant with the preponderant view of the European Court of Human Rights, now embraced by the English judiciary.

A range of views was expressed by judges of the Constitutional Court in the landmark case of *Ferreira v Levin NO.*[53] The majority view did not approach s 11(1) on the basis that the right to "freedom" was to be construed separately from the right to "security of the person". However, none of the reasoning accepted the European position that the right to security of the person was in some way subsumed by the right to freedom. Chaskelson P said:

> "[170] The primary, though not necessarily the only, purpose of s 11(1) of the Constitution is to ensure that the physical integrity of every person is protected. This is how a guarantee of 'freedom (liberty) and security of the person' would ordinarily be understood. It is also the primary sense in which the phrase, 'freedom and security of the person' is used in public international law."[54]

The learned President went on to refer to texts and European cases which are not representative of the European cases to which I have referred. He proceeded on the basis that that case law, and the section of the Interim Constitution, separately protect "physical liberty" and "physical security". The principal judgment in the case does, however, acknowledge the textual reasons why the European provision has been narrowly confined.[55]

Another judgment in the case referred to "freedom of the person" and "security of the person" as "two related rights" and specifically identified both as being concerned with "physical integrity".[56] Sachs J referred to s 11(1) as "treating freedom and

personal security as two elements of a single basic right which encompasses protection from interferences …”.[57]

Ferreira had nothing to do with physical violence and, accordingly, the occasion did not arise for express attention to be given to whether or not the right to “security of the person” protected against violence in the manner made explicit by s 12(1)(c) of the final Constitution.

The express provision in s 12(1)(c) has, however, resulted in the imposition of obligations upon the State to protect individuals from violence by third parties, eg, with respect to release on bail of a person who actually attacked a woman as he had earlier threatened to do;[58] to support a law protecting persons from domestic violence;[59] to support a law prohibiting corporal punishment in schools.[60]

Australia

In Australia, the two jurisdictions that have implemented a Human Rights Act have adopted the language of the ICCPR with minor modifications.

The *Human Rights Act* 2004 (ACT) provides in s 18(1):

> "Everyone has the right to liberty and security of person."

The *Charter of Human Rights and Responsibilities Act* 2006 (Vic) provides in s 21(1):

> "Every person has the right to liberty and security."

There is no explanation in the Report upon which the Victorian Act was based as to why the words "of person" were deleted after the word "security".[61] However, the Explanatory Memorandum for the Bill, when introduced, strongly suggests that it was a deliberate change to avoid the political explosiveness of the Canadian approach, which extended the right to security of person to a right to an abortion and a right to euthanasia.

The Memorandum said:

> "This clause … is a right concerned primarily with physical liberty. It is intended to operate in a different manner to article 7 of the *Canadian Charter of Rights and Freedoms* which guarantees the right to 'life, liberty and security of the person' in that the Victorian provision

> is not intended to extend to such matters as a right to bodily integrity, personal autonomy or a right to access medical procedures."[62]

The euphemism "medical procedures" was, no doubt, adopted so as not to invite a firestorm of controversy about euthanasia and abortion.

The report of the Human Rights Consultation appointed by the Commonwealth Government has recommended that the ICCPR formulation – "the right to liberty and security of the person" – be one of the rights included in any federal Human Rights Act.[63]

Australia's international obligations, which the existing and proposed human rights acts are intended to implement, are found in the ICCPR. The English *Human Rights Act* has been an important influence, indeed a model. Nevertheless, the *European Convention* is of no direct relevance. Insofar as the case law on security of the person under the ICCPR differs from that under the *European Convention* (and therefore in England), it is to the former, that Australian lawyers should look.

Positive Obligations

International human rights instruments impose obligations on states. The human rights literature often emphasises the responsibility of states under international law to take three kinds of action with respect to the human rights protected by the respective treaties to which the state is a party or pursuant to customary international law. These three are a duty to respect rights, a duty to fulfil rights by taking positive action and also a duty to protect rights, including from infringement by both state and non-state actors.

These duties are not always reflected in domestic legislation. Much turns on the interpretation of the particular provisions of the human rights instrument under consideration. Many instruments do not expressly impose positive obligations upon the state to protect citizens from infringement by non-state actors.

The responsibility upon states to take measures to respect, fulfil and protect rights is variously expressed in different international instruments. Such obligations sometimes appear in specific articles of the instruments. There are also general obligations imposed upon state parties, such as:

- "to respect and to ensure to all individuals … the rights recognized in the present Covenant" (ICCPR, Article 2.1);
- "to take the necessary steps … to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant" (ICCPR, Article 2.2);
- "to take steps … to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant" (ICESCR, Article 2.1);
- "States Parties … undertake to pursue by all appropriate means … a policy of eliminating racial discrimination in all its forms … and, to this end:

  …

  (d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization" (CERD, 2.1);

  - "States Parties … agree to pursue by all appropriate means … a policy of eliminating discrimination against women and, to this end, undertake:

…

(e) to take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise;

(f) to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women." (*Convention on the Elimination of All Forms of Discrimination against Women* of 1979 ("CEDAW"), Article 2);

- "States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child" (*Convention on the Rights of the Child* of 1989, Article 19.1).

Constitutional or statutory bills of rights often reflect the origin of those provisions in such international obligations. Two

issues arise with respect to the enforcement of the rights so recognised. First, do the domestic provisions impose positive obligations on the state to take action? Secondly, do they impose obligations upon persons other than the government? The answer to these questions depends on the particular form in which the provision has been adopted for domestic purposes.

Perhaps the clearest case of a Bill of Rights imposing generally stated positive obligations upon the state, including measures to bind non-state actors, is the South African provision that the state is obliged to take steps to respect, promote and protect the constitutional rights of its citizens. In other jurisdictions, which do not have such express provisions, there are frequent statements in the case law that the relevant constitutional or statutory bill of rights does not impose positive obligations on the state. However, there is a discernible drift in case law, and perhaps more noticeably in academic commentary, which seeks to infer positive obligations as a necessary concomitant of negatively stated obligations.

The issue is one of interpretation, because some provisions, but not others, in international and domestic instruments contain

particular references imposing a duty to take steps to enforce the right.

Furthermore, there is a growing body of authority, notably in Europe, indicating that although negatively stated obligations are expressed in a form directed to the state, nevertheless the state has duties to protect its citizens from non-state actors.[64] For example, the European Court of Human Rights has done that with respect to the prohibition on torture or degrading treatment[65] and the prohibition on slavery.[66] I have also noted above the disappearance cases involving Turkey, where the Court held that the state had to take preventative measures and to investigate disappearances.[67]

The Canadian *Charter of Rights and Freedoms* does not contain an express obligation to secure rights. The Supreme Court has been reluctant to impose positive duties on the state.[68] There is, however, one case in which a court imposed a duty to provide legal aid for parents in child protection proceedings with respect to alleged contravention of s 7 rights, relating to the right to life, liberty and security of the person.[69] This has been

categorised not as a duty of protection, but as a duty to facilitate access to justice.[70]

The English *Human Rights Act* does not expressly impose positive obligations on the state. It does, however, provide, in s 6, that a public authority may not act in a way which is incompatible with a Convention right. This has been adopted in the two Australian jurisdictions with *Human Rights Acts* and a similar provision is proposed by the Report of the National Human Rights Consultation.[71]

Freedom from Violence

In international humanitarian law a Responsibility to Protect, or "R2P", has recently emerged as a doctrine of international humanitarian law. It is concerned to establish a responsibility on the part of all states to protect civilians from mass atrocity crimes, including crimes committed by their own government. This doctrine has been advanced by the former Australian Foreign Minister, Gareth Evans, in his capacity as the President of the International Crisis Group, following an International Commission on Intervention and State Sovereignty in 2001.[72] The focus of this

doctrine is on mass atrocity crimes such as the Holocaust, Cambodia, Rwanda and Bosnia.

The R2P concept is, in general terms, equivalent to the protection of the right to life and the prohibitions of torture and of cruel, inhumane or degrading treatment, in international treaties.

One commentator has sought to develop the doctrine of state responsibility into a duty of a state to protect its citizens from human rights violations, including those perpetrated by non-state actors.[73] However, as I have noted, an international obligation to protect citizens from any form of violence – beyond torture and cruel or unusual punishment – is not well established.

The most likely source of the development of a right not to be subject to violence, at least outside Europe, is the recognition of the right to security of the person. However, international instruments, like Article 9 of the ICCPR, do not expressly identify the qualifications which are necessarily implied in such an absolute statement. The state has many reasons to deploy violence, particularly in the exercise of legitimate police functions.

It is also necessary to determine whether, and if so how, the state has a duty to protect citizens from non-state actors.

In one academic commentary the acceptance of a positive duty on the state to protect its citizens' right to security is propounded as an important development, whilst recognising that it gives rise to the possibility of a conflict with other rights in contexts such as terrorism.[74] Another author concludes that, because of such conflicts, a positive right to security should be narrowly confined.[75]

The most comprehensive treatment of security of the person in a thesis, which is not yet published, concludes that the right to personal security includes a positive aspect of protection as well as the negative aspect of restraint from abuse of power by government agencies. The author analyses in detail the European, Canadian and South African case law. The author develops the concept of security as protection against threats and risks.[76]

It could be said that carrying into effect any such international obligation would add little if anything to the traditional

exercise of the police power of the state designed to protect citizens from violence, as reflected in the criminal law of every nation. This is plainly true of actual violence. It is, also true, albeit to a lesser degree, with respect to threats of violence.

Many jurisdictions have criminal offences relating to intimidation, harassment, blackmail, threats[77] and other such conduct which does not result in actual harm other than by inflicting fear on individuals. Protection of this character is less systematic, and much less uniform, than that dealing with actual violence. Many such provisions constitute the recognition in domestic law of the significance of the risk of harm to and, often, of the significance of fear amongst citizens.

Each nation has a patchwork quilt of such provisions. However, the failure to treat them as manifestations of an obligation to protect individual rights means that they are not taken into account, as such, in human rights discourse and decision-making. The restoration of an emphasis on freedom from fear as an integrative concept, could change this position.

The literature on human rights tends to treat the criminal law relating to actual and threatened violence as serving a public or collective interest. The analysis changes significantly if such interests are characterised as individual rights, particularly in situations where rights conflict. There is one good example of how freedom from fear can give content to the recognition of an individual right which was not hitherto recognised as such.

In comparatively recent times domestic violence has come to be seen as a human rights issue, often expressed to be based on inherent dignity, equal rights and freedom from fear.[78] This development was not feasible for as long as international human rights instruments were not seen to impose positive obligations on states to take steps to prevent rights infringements by non-state actors. There is a clear drift to the recognition of such obligations.

The *Convention on the Elimination of All Forms of Discrimination Against Women* ("CEDAW") of 1979 was originally modelled on the *Convention on the Elimination of Racial Discrimination* ("CERD"). However, the scope and range of the nations, particularly in Africa and throughout the Islamic world, with customary and social practices which were problematic in terms of

gender bias, was such that the drafting process and the final product bore the marks of major compromise of a character which did not afflict CERD.[79] The CEDAW is also one of the international human rights instruments which has attracted the largest number of reservations of breadth and scope, including by a number of Islamic nations who declare that its key provisions conflict with Islamic law.[80]

CEDAW notably makes no express reference to honour crimes, including honour killings, rape or violence against women. It does, however, contain a general prohibition of discrimination. The human rights literature, and the recommendations of the Committee on the Elimination of Discrimination Against Women, created under CEDAW propose that gender based violence, which infringes human rights, should be regarded as discrimination within the meaning of the Convention. This encompasses the right to life, the right not to be subject to torture or cruel, inhuman or degrading treatment or punishment and the right to security of the person. The effects of fear and the significance of freedom from fear have been expressly acknowledged in this context.[81]

One detects an institutional turf battle here. Complaints about infringement of the right to security of the person would go to the Human Rights Committee under the ICCPR Optional Protocol. Complaints of discrimination against women go to the parallel CEDAW Committee.

I had occasion, in a judgment concerned with the Australian system for apprehended violence orders which protect against threatened acts of personal violence, stalking, intimidation and harassment, to characterise the system as a means of protecting the right to freedom from fear.[82] Indeed, as I now know, in 1998 the West Australian Government launched a campaign of awareness on domestic violence issues which it entitled "Freedom From Fear".[83] This is, however, only one context in which this perspective can be valuable.

The Battle of the Metaphors

The sphere of discourse with which I am here concerned is particularly bedevilled by a conflict of metaphors. On the one hand, those who regard themselves as most committed to human rights like to speak of "rights as trumps". On the other hand, those who believe that their equally strong commitment to human rights

requires attention to the context in which they are asserted often speak of the need to balance rights in conflict with other rights or interests. Sometimes one encounters reference to a "thumb on the scales" of the balance. Both "trumps" and "balancing" invoke metaphors which must be deployed with care.[84]

As Benjamin Cardozo pointed out, it is desirable that we avoid becoming "enveloped in the mists of metaphor" and we should not be diverted by the "picturesqueness of the epithets". As Cardozo said:

> "Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it."[85]

A regrettable example of the distortion which can be caused by a metaphor is to be found in the recent report of the Australian National Human Rights Consultation. After referring to the Canadian concept of a "dialogue" model for a Human Rights Act,[86] the Committee recommended that only Australia's final Court of Appeal, the High Court, should have the authority to make a declaration of incompatibility. The Report acknowledged that there were significant practical problems with such a limitation.

However, this proposal was said to be based on the application of "the dialogue" model in that:

> "the Federal Parliament might not be persuaded to engage in 'dialogue' with 10 different courts."[87]

I have never been happy with the concept of "dialogue".[88] It seems to me to be just a polite cloak for the significant transfer of power to the judiciary which a human rights act inevitably involves. So far as I can see, each participant in the "dialogue" only gets to speak once. That does not appear to me to be much of a conversation. A more accurate description of the relationship between the courts and the Parliament/executive branches is one of "creative tension".[89]

However, as the recent Australian report suggests, the metaphor has assumed a life of its own. The recommendation ignores the fact that in Australia's century old Constitutional practice, any court exercising federal jurisdiction – from a Local Court to the High Court – can come to the conclusion that legislation is constitutionally invalid. To say that some special regime needs to be established, solely referable to human rights,

appears to me to reflect the dialogue metaphor getting in the way of the analysis.

The traditional tension between liberty and security in political philosophy can be replicated in a human rights focussed jurisprudence. There is, in principle, no substantive difference between the tension between liberty, as an individual right and security, as a collective interest, on the one hand, and liberty, as an individual right and security of the person, as an individual right which the state has an obligation to protect, on the other hand. There is, however, a significant difference in how these alternative perspectives are deployed.

Human rights discourse is transparently comfortable when privileging a right over an interest. However, that literature often flounders when faced with a conflict between rights. As Jeremy Waldron has put it:

> "Rights versus rights is a different ballgame from rights versus social utility. If security is also a matter of rights, then rights are at stake on both sides of the equation, and it might seem that there is no violation of the

> trumping principle or of the idea of lexical probity when some adjustment is made to the balance.
>
> This business of conflicts of rights is a terribly difficult area – with which moral philosophers are only just beginning to grapple."[90]

The difficulty is reflected in a wide range of debates that are at the forefront of human rights discourse, such as laws directed to terrorism, organised crime and hate speech. In such contexts, measures taken by the state to protect persons from threats have led to conflicts with other human rights, perhaps most often with the right to a fair trial and the right to freedom of expression.

In the human rights literature, it appears to make a great deal of difference whether something is approached from the perspective of a conflict between rights, rather than as a conflict between a right and an interest. This tension is exacerbated if freedom from fear is included as a dimension of a right, which the state has a responsibility to protect.

Such issues have been particularly acute in the context of debates about anti-terrorism legislation. The human rights

literature tends to treat the issue of security as a form of "national security", rather than as security of the person, which the state has a duty to protect. However, as George Williams once said:

> "Terrorism is an attack on our most basic human rights. It can infringe our rights to life and personal security and our ability to live our lives free of fear."[91]

This is a rare reference in the human rights literature which regards the right to personal security, coupled with a positive obligation upon the state to protect that right, as a relevant part of the analysis. It is also a rare instance in the literature on terrorism where the concept of freedom from fear is mentioned. There is a lot of discussion about fear. However, fear is generally treated as if it is merely an emotion, rather than a result of infringement of a right.

Clearly the principal objective of anti-terrorist legislation is to protect the community, including each individual in the community, from acts of violence that can cause death or physical harm. Such legislation expressly extends to freedom from fear. In most jurisdictions terrorist acts are defined to extend to threats and to conduct undertaken with the intention of intimidating the public.

There can be no doubt that many incursions into human rights have occurred in the name of security. It is not, however, necessary to adopt the approach of a conflict between individual rights and a general collective interest. It is appropriate to approach such matters as a conflict between rights. That does not mean that the right to security of the person must prevail. Issues of probability and proportionality necessarily arise.

Accordingly, George Williams, writing with Ben Golder, has criticised suggestions that a right to security can be regarded as a "primary, almost inviolable, human right".[92] The authors advocate a balancing process. This metaphor, albeit contested, remains serviceable.

Balancing is a process which is well understood by judges who undertake it in numerous disparate areas of the law. As one useful analysis of the overall process, not focused on any particular debate, has suggested:

> "[A]lthough we may all recognize the difficulties of balancing the conflicting interests of parties or citizens, we all share a common intuitive grasp of, or at least are

in agreement about, what the metaphor of balancing interests entails."[93]

The issue often faced by courts is how to compare elements that are fundamentally incommensurable, such as the right to security and the right to a fair trial or to free speech. As Justice Scalia once put it, this is like asking "whether a particular line is longer than a particular rock is heavy".[94] Nevertheless, this is a task that judges, as well as parliaments, are often called upon to perform.

Andrew Ashworth has rejected the terminology of "balancing" on the basis that it leads to "sloppy reasoning" and allows the right to a fair trial to be "balanced away".[95] When applying this critique to terrorism legislation, however, Professor Ashworth focused was upon security as a collective interest, rather than as an individual right.[96] Nevertheless, he makes a valid point when he says:

> "[T]he term 'balance' tends to disarm opponents because it has no tenable antithesis: nobody, that is, would stand up and argue for imbalance, or indeed for disproportionality, unreasonableness or unfairness."[97]

Ashworth is right to emphasise that the use of the metaphor does not address the essential consideration about how the process of weighing conflicting rights should be undertaken. There are both empirical and value assumptions that must be made in the process.

As another commentator has observed whilst "balancing is … an opaque box that is undefined and undefinable", some such intuitive process is often essential. What is required is to "accept the opaque box and try to improve its output".[98] The danger in the "quantitative imagery" of balancing is, as Jeremy Waldron has warned, the false connotation of precision.[99]

Where incommensurable values conflict, intuitive judgment is often unavoidable.[100] Nevertheless, as in other constitutional law contexts, principles to guide the process are capable of being discerned or developed.[101] The process of balancing is not necessarily unprincipled.[102] The problem is to identify a scale of values that is not simply personal to the judge making the decision.

Insofar as there is legal guidance, it is to be found in the foundational legal texts, both international and domestic. When such issues arise particular attention must be given to the specific provision which may provide within itself a terminology that indicates how the appropriate balance should be undertaken.

It is always appropriate in legal analysis to focus on the scope of the right in issue. Precise identification of the scope of a right will often be the preferable means of avoiding conflict between rights. As one author has observed:

> "With complex rights … reasons for constricting, limiting or qualifying the exercise of the relevant right may in many cases be thought of as constitutive or definitional. The weight given to competing rights or considerations simply goes to defining the proper scope and application of the right. When properly weighted, rights to reputation or public safety merely illustrate the proposition that freedom of communication is a qualified right that does not include in its scope shouting fire in crowded theatres or destroying reputations."[103]

This process has been characterised as "definitional balancing" rather than "ad hoc balancing".[104]

Of particular significance in a "balancing process" is any indication, either express or implicit, that there exists a hierarchy of rights, whereby some rights are entitled to greater weight than others. There is, for example, a considerable body of opinion, including case law both national and international, that some rights such as the right to life or the prohibition on torture, are expressly non-derogable, and are, in any event, entitled to determinative weight in any balancing process. Similarly, case law on freedom of expression, most notably American First Amendment jurisprudence, has placed that right high in the hierarchy.

More often, however, the real focus of debate is whether or not the derogation, as a matter of empirical fact, has or is likely to have any effect, and if so to what degree, in promoting the human right on the other side of the scale. This is an issue much in dispute in criminal law generally and, particularly, in the context of anti-terrorism legislation.[105]

These are not matters capable of conclusive resolution. That is particularly so if the concept of freedom of fear has a role to play in the course of balancing. If any such balancing is to be done by judges then fear must be seen to have an objective basis. The position is not necessarily so confined if the balancing is done by the legislative or executive arms of government. In a democratic society subjective perceptions of risk are entitled to weight.

Problems of this kind often arise in the context of the criminal law. Public perceptions about the actual incidence of crime often bear no relationship to the facts. Nor do public beliefs about the efficacy of harsh punishment necessarily bear any relationship to actual outcomes.

In the context of giving weight to freedom from fear it has to be acknowledged that some human fears are non-rational: such as the fear of spiders and sharks – arachnophobia and galeophobia. In many respects such reactions are at the heart of the debates over terrorist legislation or legislation directed at organised crime.

Human rights scholars instinctively reject any suggestion that a subjective sense of threat should be accorded any weight. As Andrew Ashworth said, in the course of advancing his critique of balancing with respect to anti-terrorist legislation:

> "no curtailing of human rights simply to alleviate insecurity in the subjective sense should be contemplated, because human rights are much too serious for that. The strongest case for any curtailment of human rights must be predicated on reduction of security in the objective sense."[106]

To similar effect are the observations of Jeremy Waldron, also in the context of his critique of balancing, when he said:

> "… the balancing argument is supposed to turn on what we can achieve by diminishing liberty; it is not supposed to turn on the sheer fact or horror at what has happened nor of our fear of what might happen. Fear is only half a reason for modifying civil liberties: the other and indispensable half is a well-informed belief that the modification will actually make a difference to the prospect that we fear."

There is a well established body of jurisprudence in the context of refugee law as to what it means for a “fear of persecution” to be “well founded”. Although subjective considerations may arise in particular contexts, the objective test in this sphere of discourse may prove a useful source of precedent.[107] In this, as in many other respects, refugee law will be a guide to the restoration of freedom from fear to its proper place in human rights discourse.

[1] The Four Freedoms Speech and the Atlantic Charter are available in full or in extract in numerous sources. See, eg, James MacGregor Burns, *Roosevelt: The Soldier of Freedom* (1970) Harcourt Brace Jovanovich Inc at 34–5, 130.

[2] See, eg, David Kennedy, *Freedom from Fear: The American People in Depression and War 1929-1945* (1999) Oxford University Press esp at 469–70.

[3] See Mark R Shulman, "The Four Freedoms: Good Neighbours Make Good Law and Good Policy in a Time of Insecurity" (2008) 77 *Fordham Law Review* 555.

[4] See generally M Glen Johnson, "The Contributions of Eleanor and Franklin Roosevelt to the Development of International Protection for Human Rights" (1987) 9 *Human Rights Quarterly* 19; Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (2001) Random House.

[5] See *To Secure These Freedoms: The Report of the President's Committee on Civil Rights* (1947).

[6] See A W Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (2001) Oxford University Press.

[7] See J J Spigelman, "Blackstone, Burke, Bentham and the *Human Rights Act 2004*" (2005) 26 *Australian Bar Review* 1, reprinted in Tim Castle (ed), *Speeches of a Chief Justice: James Spigelman 1998–2008* (2008) CS2N Publishing.

[8] *Genesis* 3.10. I owe this example to Corey Robin, *Fear: The History of a Political Idea* (2004) Oxford University Press at 1.

[9] See generally Simpson supra at 172–3.

[10] Ben Saul, *Defining Terrorism in International Law* (2006) Oxford University Press at 29.

[11] See Frederick Schauer, "Fear, Risk and the First Amendment: Unravelling the 'Chilling Effect'" (1978) 58 *Boston University Law Review* 685.

[12] Baron de Montesquieu, *The Spirit of Laws* (2005) vol 1, Law Book Exchange, Book XI Ch VI at 185.

[13] Ibid at Book XII Ch 1 at 224.

[14] See Adam Smith, *The Theory of Moral Sentiments* (1976 ed) at 156, 290; Adam Smith, *The Wealth of Nations* (1976 ed) at 412.

[15] Smith, *Theory* supra at 164; Smith, *Wealth* supra at 797.

[16] See Emma Rothschild, *Economic Sentiments: Adam Smith, Condorcet, and the Enlightenment* (2001) Harvard University Press at 12–15.

[17] See generally Emma Rothschild, "What is Security" (Summer 1995) 124 *Daedaleus* 53.

[18] Sir William Blackstone, *Commentaries on the Laws of England* (18th ed, 1829) vol 1 at [129].

[19] See Paul O Carrese, *The Cloaking of Power: Montesquieu, Blackstone, and the Rise of Judicial Activism* (2003) University of Chicago esp at 117, 122, 126–8, 153–4.

[20] Blackstone supra at [129].

[21] Ibid at [131].

[22] Ibid at [134] (emphasis added).

[23] The text of art 9(1) reads: 'Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law'.

[24] See, eg, Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd ed, 2005) NP Engel Publishers at 214.

[25] The most comprehensive treatment, not yet published, is Rhonda Louise Powell, *Security and the Right to Security of Person*, DPhil Thesis, St Hilda's College, Oxford University (2008). (I am grateful to the author for providing me with this unpublished thesis which, I understand will be published next year.) See also Sandra Fredman, "The Positive Right to Security" in Benjamin Goold and Liora Lazarus (eds), *Security and Human Rights* (2007) Hart Publishing; Liora Lazarus, "Mapping the Right to Security" in Benjamin Goold and Liora Lazarus (eds), *Security and Human Rights* (2007) Hart Publishing.

[26] See Rhonda Powell, "The Right to Security of Person in European Court of Human Rights Jurisprudence" (2007) 6 *European Human Rights Law Review* 649; Nowak supra at 214; Clare Ovey and Robin White, *Jacobs & White European Convention on Human Rights* (3rd ed, 2002) Oxford University Press at 103; Richard Clayton and Hugh Tomlinson (eds), *The Law of Human Rights* (2nd ed, 2009) Oxford University Press at 628; *East African Asians v United Kingdom* (1981) 3 EHRR 76 ('*East African Asians*'); *Bozano v France* (1986) 9 EHRR 297. Clayton and Tomlinson supra at 628 note there is only one early authority which suggested that 'security of person' had independent content: *Kamma v Netherlands* (1974) 18 YB 300.

[27] See, eg, *East African Asians* supra at [220]–[221]; Ovey and White supra at 103.

[28] See, eg, *East African Asians* supra at [222]; *Kurt v Turkey* (1999) 27 EHRR 373 at [122] ('*Kurt v Turkey*'); *X v United Kingdom* (1981) 4 EHRR 188 at [43]; *Mentes v Turkey* (1997) 26 EHRR 595.

[29] *X v Ireland* (1973) 16 YB 388.

[30] See, eg, *Pretty v Director of Public Prosecutions and Secretary of State for the Home Department* [2001] UKHL 61; [2002] 1 AC 800 at [23].

[31] See *Pretty v United Kingdom* (2002) 35 EHRR 1.

[32] Monica Macovei, *Human Rights Handbook No 5: The Right to Liberty and Security of the Person: A Guide to the Implementation of Article 5 of the European Convention on Human Rights* (2004) Council of Europe at 6. Others also emphasise that there is no duty to protect. See, eg, Clayton and Tomlinson supra at 628–9.

[33] See, eg, *Kurt v Turkey* supra; *Cyprus v Turkey* (2001) 35 EHRR 30; *Bilgin v Turkey* (2002) 35 EHRR 39; *Tanis v Turkey* (App No 65899/01) 2 August 2005; *Ipek v Turkey* (App No 2560/94) 17 May 2004.

[34] See Powell, "The Right to Security of Person in European Court of Human Rights Jurisprudence" supra at 8–9.

[35] See, eg, Pieter van Dijk, Fried van Hoof, Arjen van Rijn and Leo Zwaak (eds), *Theory and Practice of the European Convention on Human Rights* (4th ed, 2006) Intersentia at 457.

[36] See *R (on the application of Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323. See generally Jonathan Mance, "Opting into Community Law and Interpreting

Convention Rights: Is the United Kingdom More or Less Committed?" [2009] *Public Law* 544.

37 *Delgado Paez v Columbia*, 12 July 1990, No 195/85 at [5.5].

38 See *Chongwe v Zambia* (Communication 821/1998) at [5.3]; Alex Conte, Scott Davidson and Richard Burchill, *Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee* (2nd ed, 2009) at 116–17.

39 *Jayawardene v Sri Lanka* (Communication 916/2000) at [7.3]. See Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2nd ed, 2004) Oxford University Press at 306.

40 See, eg, Nowak supra at 215; Joseph, Schultz and Castan supra at 304–7.

41 See, eg, Jed Rubenfeld, "The Right of Privacy" (1989) 102 *Harvard Law Review* 737; William J Cuddihy, *The Fourth Amendment: Origins and Original Meaning 602–1791* (2009) Oxford University Press.

42 See Jed Rubenfeld, "The End of Privacy" (2008) 61 *Stanford Law Review* 101 esp at 103–4.

43 See Peter W Hogg, *Constitutional Law of Canada* (5th ed, 2007) vol 2, Thomson Carswell at 367.

44 See, eg, *Gosselin v Quebec (Attorney General)* [2002] 4 SCR 429.

45 *R v Morgentaler* [1988] 1 SCR 30.

46 *Chaoulli v Quebec (Attorney General)* [2005] 1 SCR 791 ('*Chaoulli*').

47 *Rodriguez v British Columbia (Attorney General)* [1993] 3 SCR 519.

48 See, eg, *Mills v The Queen* [1986] 1 SCR 863 at 920; *R v O'Connor* [1995] 4 SCR 411 at [111]; *Chaoulli* supra at [41], [116]–[119], [123], [205].

49 *New Brunswick (Minister of Health and Community Service) v G (J)* [1999] 3 SCR 46 ('*New Brunswick*'); *Winnipeg Child and Family Services v KLW* [2000] 2 SCR 519.

50 See *Blencoe v British Columbia (Human Rights Commission)* [2000] 2 SCR 307.

51 See Iain Currie and Johan de Waal, *The Bill of Rights Handbook* (5th ed, 2005) JUTA and Company Ltd at 293.

52 Ibid at 304.

53 1996 (1) SA 984 (CC).

54 Ibid at [170].

55 See ibid at [89] per Ackerman J quoting with approval at fn 120 commentary that: "liberty and security are the two sides of the same coin".

56 Ibid at [209]–[210] per Mokgoro J.

57 Ibid at [254].

58 *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC).

59 *S v Baloyi* 2000 (2) SA 425 (CC) per Sachs J ('*Baloyi*').

[60] *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC).

[61] See Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) esp at 43.

[62] Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) at 16.

[63] National Human Rights Consultation Committee, *National Human Rights Consultation Report* (2009) at 369.

[64] See generally Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (2004) Hart Publishing; van Dijk, van Hoof, van Rijn and Zwaak (eds) supra. See also David Feldman, *Civil Liberties and Human Rights in England and Wales* (2nd ed, 2002) Oxford University Press at 53–5.

[65] See Feldman supra at 257–66; *MC v Bulgaria* (2005) 40 EHRR 20 esp at [148]–[153].

[66] *Siliadin v France* (2005) 43 EHRR 16.

[67] See fn 33 supra.

[68] See, eg, Ran Hirschl, "'Negative' Rights v 'Positive' Entitlements: A Comparative Study of Judicial Interpretations of Rights in an Emerging Neo-Liberal Economic Order" (2000) 22 *Human Rights Quarterly* 1060. Hirschl primarily focuses on social and economic rights as positive obligations.

[69] See *New Brunswick* supra.

[70] See Powell, *Security and the Right to Security of Person* supra at 114.

[71] See *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 38; *Human Rights Act 2004* (ACT) s 40B; National Human Rights Consultation Committee supra at 331–2.

[72] See Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* (2008) Bookings Institution.

[73] See Danwood Mzikenge Chirwa, "The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights" (2004) 5 *Melbourne Journal of International Law* 1.

[74] See Fredman supra.

[75] Lazarus, "Mapping the Right to Security" supra.

[76] See Powell, *Security and the Right to Security of Person* supra at 110-113.

[77] See, eg, the legislation considered by the High Court in *Coleman v Power* [2004] HCA 39; (2004) 220 CLR 1.

[78] See, eg, Dorothy Thomas and Michelle Beasle, "Domestic Violence as a Human Rights Issue" (1993) 15 *Human Rights Quarterly* 36.

[79] See, eg, Roberta Jacobson "The Committee on the Elimination of Discrimination Against Women" in Phillip Alston (ed) *The United Nations and Human Rights: A Critical Appraisal* (1992) Clarendon Press; Laura Donner, "Gender Bias in Drafting International Discrimination

Conventions: The 1979 Women's Convention Compared with the 1965 Racial Convention" (1994) 24 *California Western International Law Journal* 241.

[80] See Rebecca Cook, "Reservations of the Convention of the Elimination of all Forms of Discrimination Against Women" (1989–1990) 30 *Virginia Journal of International Law* 643.

[81] See, eg, Dorothea Beane, "Human Rights in Transition – Freedom from Fear" (2000) 6 *Washington and Lee Race and Ethnic Ancestry Journal* 1. See also *Baloyi* supra at [12]–[13] per Sachs J.

[82] *John Fairfax Publications Pty Ltd v Ryde Local Court* [2005] NSWCA 101; (2005) 62 NSWLR 512 at [20].

[83] See R J Donovan, D Patterson and M Francas, "Targeting Male Perpetrators of Intimate Partner Violence: West Australia's 'Freedom From Fear' Campaign" (1999) 5 *Social Marketing Quarterly* 128.

[84] As suggested by Jeremy Waldron, "Security and Liberty: The Imagery of Balance" (2003) 11 *Journal of Political Philosophy* 191 esp at 196–7.

[85] See *Berkey v Third Avenue Railway Company*, 244 NY 84, 94–5 (1926).

[86] National Human Rights Consultation Committee supra esp at 241–2.

[87] Ibid at 374–5.

[88] See the debate amongst Canadian scholars in the special issue "*Charter* Dialogue – Ten Years Later'" (2007) 35 *Osgoode Hall Law Journal*.

[89] See Murray Hunt, "The *Human Rights Act* and Legal Culture: The Judiciary and the Legal Profession" (1999) 26 *Journal of Law and Society* 86 at 89.

[90] Waldron supra at 198–9.

[91] George Williams, *The Case for an Australian Bill of Rights: Freedom in the War on Terror (*2004) UNSW Press at 27.

[92] Ben Golder and George Williams, "Balancing National Security and Human Rights: Assessing the Legal Response of Common Law Nations to the Threat of Terrorism" (2006) 8 *Journal of Comparative Policy Analysis* 43 at 51.

[93] Vincent Luizzi, "Balancing of Interests in Courts" (1980) 20 *Jurimetrics Journal* 373 at 373.

[94] *Bendix Autolite Corp v Midwesco Enterprises Inc*, 486 US 888, 897 (1987). See generally John Adler, "The Sublime and the Beautiful: Incommensurability and Human Rights" [2006] *Public Law* 697.

[95] See Andrew Ashworth, "Crime, Community and Creeping Consequentialism" [1996] *Criminal Law Review* 220 at 229; Andrew J Ashworth, "Criminal Proceedings after the *Human Rights Act*: The First Year" [2001] *Criminal Law Review* 855 at 864–7.

[96] See Andrew Ashworth, "Security, Terrorism and the Value of Human Rights" in Benjamin Goold and Liora Lazarus (eds), *Security and Human Rights* (2007) Hart Publishing.

[97] Ibid at 208.

[98] Stephen E Gottlieb, "The Paradox of Balancing Significant Interests" (1994) 45 *Hastings Law Journal* 825 at 839, 850.

[99] Waldron supra at 192–3.

[100] See generally Henry S Mather, “Law-making and Incommensurability” (2002) 47 *McGill Law Journal* 345. See also R George Wright, “The Role of Intuition in Judicial Decisionmaking” (2005–2006) 42 *Houston Law Review* 1381.

[101] See, eg, Alexander Aleinikoff, “Constitutional Law in the Age of Balancing” (1987) 96 *Yale Law Journal* 943.

[102] See also Frank M Coffin, “Judicial Balancing: The Protean Scales of Justice” (1988) 63 *New York University Law Review* 16.

[103] Geoffrey Marshall, “Things We Can Say About Rights” [2001] *Public Law* 207 at 209. See also Phillip Montague, “When Rights Conflict” (2001) 7 *Legal Theory* 257.

[104] See Aleinikoff supra at 948. See also Andrew S Butler, “Limiting Rights” (2002) 33 *Victoria University of Wellington Law Review* 113.

[105] See, eg, Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2nd ed, 2005) Law Book Co esp at 37–43, 874–6; Simon Bronitt, “Balancing Security and Liberty: Critical Perspectives on Terrorism Law Reform” in Miriam Gani and Penelope Mathew (eds), *Fresh Perspectives on the ‘War on Terror*’ (2008) ANU Press.

[106] See Ashworth, “Security” supra at 208.

[107] See Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd ed, 2007) Oxford University Press esp 63–4, 92; Roz Germov and Francesco Motta, *Refugee Law in Australia* (2003) Oxford University Press, ch 6.