Introduction

Civil liberties, national security and prospects for consensus: legal, philosophical and religious perspectives

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1. Introduction

The terrorist atrocities carried out across the world – from Nairobi (1998) to New York and Washington (2001), Madrid (2004), Bali (2005), London (2005) and Mumbai (2008) – signalled a dramatic change in world politics and in the relations between its communities. Opposition to Western values and Western financial and military power entered a new phase in which a strategy of globalisation was embraced. It is a phase where traditional borders between states and nations no longer applied and new arenas of conflict appeared in the heart of major cities and resorts. This has had a profound impact upon the responses of politicians, thinkers and citizens alike. As the former UK Prime Minister, Tony Blair, succinctly summed up the changing circumstances: 'Let no-one be in any doubt, the rules of the game are changing.'[1]

A dominant response to these new realities has fed the construction of a discourse which has emphasised religious, political, ethnic dichotomies – those of 'us' and 'them' – and which has marginalised a more pluralistic and interdependent world view. This dominant discourse has, on one hand, sought to consolidate a sense of national identity in order to better promote collective and national security, and on the other, has brought into much sharper focus the arguments that can promote the effective and proportionate response to a globalised terrorist threat. Nevertheless, the discourse has been accompanied by a number of interventions, ranging from the coercive removal of regimes in Afghanistan and Iraq, to the disruption of the free movement of labour (as border controls increased),

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[1] Tony Blair, PM's Press Conference, 5 August 2005, http://webarchive.nationalarchives.gov.uk/20061004051823/number10.gov.uk/page8041 (last accessed 28 February 2011).

to a reconsideration of the rights of asylum seekers and refugees, to the proliferation of privatised security companies, to the increase in intrusive data collection (e.g., air flight details, CCTV surveillance and access to the databases of internet service providers), right down to the emergence of gated city suburbs as the preferred form of urban settlement of the wealthy and privileged.

In the fields of politics, law, philosophy and sociology, this discourse has been characterised by a re-examination of what it means to be a liberal and democratic state in the face of what the former Labour Justice Secretary, Jack Straw, has called 'the new terrorism'.[2] Democracies are strong, it is argued, if they defend their freedoms vigorously and, furthermore, this can be done without jettisoning the transparency and openness in which they flourish. The way forward is to redress what is seen as an imbalance between the human rights of individuals and the collective security of the citizens of a state. Indeed, fundamental human rights can be construed as impediments to the managing of threats to the physical safety of citizens.

The terms 'security' and 'terrorism' have, therefore, become among the key terms of our time. Critics of the dominant discourse contend that rather than dealing effectively with the new strategies of terror, such new usages are being enlisted for other purposes. On one hand they are deployed to justify the encroachment by the state (and its security agencies) on international legal standards and on civil liberty in the guise of protecting its citizens. On the other, they are utilised to mobilise one segment of the population against the other. Herein, the critics argue, lies the route to increased surveillance, to the extension of pre-charge detention periods, to the prison camp at Guantánamo Bay and, ultimately, to the torture chambers of Abu Ghraib. In this context, the defence of liberty and the security of people are posited as a 'zero-sum' game where any increase in one is viewed as a reduction in the other.

From these fractious beginnings the debate has evolved. Opponents of the dominant discourse have further countered that it posits a false dichotomy whereby 'security and basic freedoms are seen in opposition'.[3] The requirement to redress the perceived security deficit resulting

[2] McGhee, below, p. 117.
[3] Lord Falconer of Thoroton spoke in his final months as Lord Chancellor and Secretary of State for Constitutional Affairs of the need to get away from 'the false dichotomy in which security and basic freedoms are seen as being in opposition'. Speech to the Royal United Services Institute, London, 14 February 2007, www.rusi.org/events/ref:E45740BC85792E/info:public/infoID:E45D3093433F92/ (last accessed 28 February 2011).

from the changing nature of the threats to democratic societies, they argue, suggests an erroneous impression of the simplicity of those threats and hence the tools needed to confront them. The metaphor of striking a new 'balance' between security and liberty has become so pervasive that it obscures other critical issues. The balance metaphor, it is argued, neither conveys the osmotic links between security and liberty nor the uneven impact that security measures have on different population groups within the state. Measures such as 'stop-and-search' police oper-ations and demographic profiling, designed ostensibly to protect the population collectively, in practice, infringe the rights of the minority and the marginalised. Furthermore, as some of the contributors of this volume highlight (Gearty, McGhee), in the course of striking the right balance, the language of human rights is being transformed and dis-torted to serve as an instrument for the protection of the rights of the majority.

Clearly, as the genealogy of the new terrorism attests, the role of religion is central to this debate. Recourse to one's faith in order to justify acts of extreme violence and the subsequent counter-measures are, regrettably, an encompassing feature in this new set of realities. In the light of this it is incumbent on us to ask what contribution the religious traditions can make to guide us through the conflicting prior-ities before us. One of the central aims in this project is to engage in multi-disciplinary and multi-faith debate about the meaning of security, human rights and liberty, and to explore what the term 'freedom of religion' can mean both in the emerging discourse and in what it can offer to the policy debate.

The importance of this contribution lies in the fact that religious traditions provide a platform for communal identity which, it is true, can slide into a destructive fragmentation of society and the political order (à la Lebanon). Yet religious traditions also point to an interpret-ation of collective security which respectfully recognises differences as well as supporting cross-cutting solidarities. While the resort to textual underpinnings for this role is evident in the contributions to this volume, they also emphasise the practice of faith and the praxis of communities who strive to live alongside their 'neighbours-of-a-different-god', or neighbours of the same God encountered differently, as resources for community well-being and informed political engagement. Sadly, there is no doubt that our history and contemporary politics is replete with examples of inter-communal violence based on differences of religious belief. But there is also a long and rich history of inter-faith

and inter-communal accommodations and mutual support based on shared values and on co-operation for the common good, and on the respect of many for the same religious prophets and leaders. This narrative ranges from the subordinated but semi-autonomous role of non-Muslim communities in the *dhimmi-millet* system of the Ottoman Empire to the mutual support often found in the bicommunal societies of South Asia, South East Asia and West Africa.

Relatively little literature in political theory and jurisprudence is devoted to the meaning of 'security' as compared to discussions of 'liberty' and 'religious freedom'. We aim to help correct this lacuna in ways that are sensitive to how members of the three Abrahamic and monotheistic religions – Judaism, Christianity and Islam – might understand 'security'. In bringing together this volume, we are not so concerned with providing an alternative view to the shrill voices of religious fundamentalism and extremism. Rather, our intention is to draw out of those strands in the Abrahamic faith communities resources that can both enrich the consideration of public policy options and at the same time resonate within the faith communities from which they emerge. In doing so, we draw attention to a richer conception of security than that of mere physical safety and protection against external threat.

This volume is the work of the Exeter Network for Religion in Public Life, directed by Dr Esther D. Reed. The main aim of the Network for Religion in Public Life (NRPL) is the promotion of understanding and co-operation between academics and religious communities with respect to public issues confronting policy-makers. The NRPL is committed to multi-disciplinary and multi-faith debate on: the role of religion in public life; the challenges of cultural diversity, belief pluralism and political theory; global human rights discourses; legal and theological perspectives on natural law; theologies of forgiveness in political contexts and religious freedom and the law.[4] Part of the programme from which this book grew included a British Academy-funded series of workshops and lectures that ran during the course of 2008 to 2010 entitled *Security and Human Rights: Conflict or Complementarity*. At the outset of the project, those scholars invited to participate were asked to address themselves to a series of questions: what did they understand by security and what issues and assumptions needed to be clarified with respect to concepts of 'national security', 'international security' and

[4] For further details please see the Exeter NRPL website: http://centres.exeter.ac.uk/nrpl/introduction.shtml.

'global security'? Was the subordination of human rights to these forms of security either unnecessary or morally questionable? How might the protection of human rights make nation states safer or more secure? Finally, what contribution, if any, might members of the major world religions make to this debate? This volume presents the discursive answers to these questions in which the dialogue unfolds between the participants – both in dialogue with one another and in the light of the ground established in the earlier contributions.

The volume is divided into three parts. The first section – entitled 'The security–liberty debate' – establishes the philosophical context, identifying the main challenges and issues which have to be addressed. It opens with an essay from Professor Jeremy Waldron of the New York University School of Law and Oxford University. Waldron's well-known article 'Security and Liberty: The Image of Balance' led the critique on the use of the image of balance in the debate on how democracies can confront threats to their existence and to the physical safety of their populations.[5] This was followed by further forensic investigations into the meaning of security as opposed to physical safety in his article 'Safety and Security' in 2006.[6] In this article, in which he subjects the key terms in the debate to a series of disaggregations, he concludes that while we should retain the idea of security as a political ideal, we should not 'take that as a license for simple-mindedness about what it involves'. His contribution to this volume is an update on the continuing philosophical and political challenges in the light of the reception his articles have received and, in this way, frames the debate developed in the contributions that follow. Waldron does not denigrate 'the pure safety conception' of security that emphasises absence of threat to the body but considers also the relation between security and mutual assurance as something we provide for each other in those kinds of social order that ensure the benefits are available to all, security as a common and public good.

The second essay in this part is by Professor Conor Gearty, from the Centre for the Study of Human Rights in the London School of Economics and Political Science. Gearty engages explicitly with Waldron's thesis and agrees that recent political theory, jurisprudence and policy-making have neglected economic, social and other dimensions of the

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[5] J. Waldron, 'Security and Liberty: The Image of Balance', *Journal of Political Philosophy*, Vol. 11/2 (June 2003), pp. 191–210.

[6] J. Waldron, 'Safety and Security', *Nebraska Law Review*, Vol. 85 (2006), pp. 301–56.

concept of security. In addition, he contends that a human rights approach to security and liberty is an advance on the Hobbesian and republican approaches. The generality of the use to which the terms 'security' and 'civil liberties' are put, argues Gearty, leaves the mere words adaptable to the latest demands made of them by leading politicians: 'Security is a richer term than those concerned only with terrorism (and crime) often acknowledge ... There are few words more dangerously confusing in the meaning', he comments further, 'than "liberty" and "security"'.[7] One of the many risks resulting from this vagueness, he argues, is failure of communication between faith communities and the wider public. Given this critique, he proceeds to explain the increased probability that human rights discourse and law will be deployed to legitimise rather than prevent the abuse of human rights.

The final contribution to this part is that of Dr Tariq Modood of the University of Bristol, who introduces the distinctive feature of this collection – the inclusion of religious voices in public debate. Modood argues that policy initiatives concerned with security and the freedom of religion, and their inter-relationship, are likely to be more successful when informed by members of the Abrahamic faith communities. He examines the relationship between religion and the state, and outlines a typology of reasons why religion might demand consideration in policy-making. He argues more clearly here in this essay than anywhere else in his writings to date, that respect for religion is compatible with, and may, indeed, be a requirement of, a democratic political culture.

The second part in this collection is entitled 'Impact on Society', with a subtitle paraphrased from Derek McGhee's essay: 'the management of unease'. It focuses on the debate from more political and legal perspectives and comprises three essays that examine how a number of UK and US counter-terrorism measures have generated significant controversy in recent years and explore further the links between national security, international security and human rights. Each contributor is intensely aware, however, that political climates rarely remain stable for long and that the current political climate is undergoing significant change. From these contributions one can identify how the public and the policy debate is shifting from the simple dichotomies that first emerged in the wake of the terrorist attacks from Nairobi to Mumbai to one which rejects as false the choice between freedom of religion and the good of security.

[7] Gearty, below, p. 35.

The first contribution to Part II is by Professor Malcolm Evans of the University of Bristol. His chapter complements the next two chapters by looking beyond the UK context to changing approaches to security and religious liberty in the jurisprudence of the European Court of Human Rights (ECHR). Like the collection as a whole, his essay is set against the backdrop of the supposedly general view of the ECHR expressed by the case of the *Refah Partisi (The Welfare Party) and Others* v. *Turkey* that 'some compromise between the requirements of defending democratic society and individual rights' is inherent in the Convention system. The cases he examines range from those concerning the Danish newspaper cartoons of the Prophet Muhammad, through to the wearing of headscarves and crosses in public institutions and the banning of minarets in Switzerland. In this way the essay brings to the forefront of the debate the conflicts between the freedom of expression and the freedom of religion. Evans concludes by suggesting that respect for the beliefs of others rather than neutrality should be a guiding principle which needs further exploration.

Covering much of the same territory but from a broad sociological perspective, the second contribution to Part II is by Professor Derek McGhee of the University of Southampton. By systematically comparing the 'securitising' policies and discourses of Tony Blair with the 'de-securitising' (in brief, meaning the adoption of unexceptional policies in response to exceptional circumstances) policies and discourses of Gordon Brown and the consensus-building attempts by the former UK Home Secretary, Jacqui Smith, McGhee is able to demonstrate the recasting of the terms security and liberty as 'core' values. Nevertheless, this recasting has led to a narrow and utilitarian conception. One major result has been 'the promotion of "personal safety" as "our" ultimate value in the context of strategies to ensure "public safety" as the ultimate duty of the government'.

The last contribution is from the Director of the UK non-governmental organisation (NGO) Justice, Dr Eric Metcalfe, and consolidates Gearty's critique. Entitled 'Terror, reason and rights', the chapter examines developments in the legal system and court proceedings to analyse directions of government policy. His essay recounts how the British government has faced particular criticism regarding the unevenness of the impact that counter-terrorism measures have on the Islamic community and perceptions of Muslims by members of other ethnic groups. Of all the essays in this part, it concerns itself especially with the counter-terrorism practices in the UK and USA and how their impact falls heaviest on certain ethnic and religious minorities. Metcalfe analyses how the political context in the UK is framed by the legislative responses to security, in particular, the Prevention

of Terrorism Act (2005), the Terrorism Act (2006) and Counter Terrorism Act (2008), leading Sir Ken Macdonald QC, the former Director of Public Prosecutions, to quip that the 'primary dividends' of the government's commitment to its war on terror 'were too many bad laws'.

The final part, entitled 'Religious dimensions', comprises four religiously informed responses to the claim that the relative dearth of religious voices in public debate about the meaning of security can and should be rectified for the sake of the common good. One of the drivers for this project has been the desire to access the richer conceptions of the Abrahamic faith communities with a view to informing the policy debate. The first essay, by Charlotte Alfred, is a discussion on the way 'religion is informing engagement in the relationship between security and human rights' through a comparative study of three organisations – one Jewish, one Christian and one Muslim – that are concerned with these issues. The organisations she has selected are the Jubilee Centre, René Cassin and the Dialogue Society. The key finding of her research is not only that the kind of engagement they exhibit is relevant to the debate under way but also that they reveal a valuable richness and complexity.

The second contribution for this section is from Professor David Novak of the University of Toronto, who bases his argument on close textual analysis. The focus of his essay is on the evolution of Old Testament and Rabbinical prescriptions on torture and body mutilation which leave Jews and Christians with the choice either 'to reject the Bible as a source of their morality, or argue for the moral responsibility of everything the Bible teaches, including mutilation and torture as legally mandated punishment'. This discussion is not, as it may first seem, tangential to the debate promoted in this volume but, rather, reveals the core issues that have to be confronted in articulating a religious contribution. Novak is able to show how developments in Jewish thought which appear to be at odds with the original formulation in the texts, in that they no longer sanction such practices, can be traced to those texts themselves. He concludes that the traditions of Jews and Christians 'have developed to the point where they can judge these cruel practices to be contrary to the protection of human dignity that their traditions take to be universal moral requirements'.[8]

Dr Abdelwahab El-Affendi's essay has at its heart Qur'anic teaching about security as safety from arbitrary violence, hunger and want, and as a divine blessing to be coveted as a public good. From this core,

[8] Novak, below, p. 223.

El-Affendi examines reasons for insecurity amongst diverse Western and Islamic communities. He warns against speaking in generalities of an Islam–West conflict, whilst addressing head-on the supposed threats of Islam to Western European culture and vice versa. A key point is that these threats, or perceived threats, are underpinned by 'a complex web of modern constructs'. The essay draws attention to the complexity of these constructs and underscores the need to comprehend their various dimensions and how they arose: hence the concentration on Middle Eastern history and attention to diverse culturally influenced readings of the United Nations Declaration of Human Rights. The essay is sensitive to the many constituent factors in the construction of personal and group identity today, and points to how neither individual nor collective experiences of security are fixed but vary in relation to how identity is circumscribed and the threats encountered: 'As a rule, the more exclusive and oppressive a system is, the more threats it is likely to face, and the less secure it is.'[9] Intensely theological in its call for Muslims to live up to Qur'anic teaching with respect to mutual non-aggression on the basis of justice and respect for religious freedoms, this essay is uncompromising in requiring Western nations to confront their own shortcomings with respect to the advocacy and implementation of democratic norms.

Professor Robin Lovin's Christian realist perspective allows him to discuss how governments maintain power through the use or threat of violence in exchange for the promise of security. Drawing on an Augustinian version of the biblical understanding of human nature in which anxiety is more basic than pride, and on which Reinhold Niebuhr relied, Lovin considers political anxiety as a contributory factor in policy-making around issues of security. Mindful that anxiety is not evil but morally ambiguous, Lovin describes states of affairs in which inadequate power (or the wrong kind of power), uncertain circumstances and the lack of clear goals lead citizens to vote for governments that promise to be firmly in control of events. Lovin asks what characterises a government that is *strong enough*, and opens for question what happens when security is treated as something to be supplied according to consumer specifications, and when the electorate is always ready to change the supplier if the product does not live up to expectations. His reminder is that some human anxieties cannot be met by the state: 'A government that is strong enough neither offers itself as a faith nor allows a faith to take the place of law.'[10]

[9] El-Affendi, below p. 226.   [10] Lovin, below, p. 256.

Together, these essays ask many difficult questions about what kind of security governments and their citizens are striving for. They examine in their different ways the costs of reducing the meaning of security to the absence of physical threat or to the low probability of a successful attack, and of trading-off security against civil liberties. Often this is achieved by a trade-off between security and civil liberties. Alert to the political challenge of the combating of terrorism, these essays recognise the existential force of a plea for protection from threat. They also, however, describe a sense of security that grows from the use of proportionate legal measures to protect civil liberties, good community relations and the respect for human rights. The religious voices especially see questions about the meaning of security as the challenge to locate personal or individual well-being in relation to wider questions of common good, and to living together vulnerably as finite beings.

References

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