

Deacons and Young Lawyers' Social Justice Essay Writing Competition winner

Civil Rights

NICK J. BAUM, XAVIER COLLEGE, KEW

In his famous text, *The Social Contract Or Principles of Political Right* (1762), Jean-Jacques Rousseau outlined a basis for legitimate political order. Rousseau theorised that, in order to live in society, human beings agree to an implicit social contract, which gives them certain rights in return for giving up certain freedoms. Discuss this proposition with respect to the recent federal legislative response to terrorism.

Civil Liberties and the War on Terror

"What man loses by the social contract is his natural liberty and an unlimited right to everything he tries to get and succeeds in getting; what he gains is civil liberty and the ownership of all he possesses." So said Jean-Jacques Rousseau, philosopher, writer and prominent member of the Enlightenment that swept Europe and America in the eighteenth century, when describing how he thought a society would operate best.

This principle, that people are given certain rights in return for giving up certain freedoms, has been a major part of every major democratic movement since. Sometimes, however, this principle is stretched to the absolute limit, in giving seemingly legitimate governments powers that seem autocratic, supposedly in the name of defending democracy. Australia, in passing counter-terrorism legislation, has encountered this same dilemma, trying to balance the safety of the country with the rights and freedoms of individuals.

The Social Contract Or Principles of Political Right (1762) was a revolutionary document in its time, written more than a decade before the American Declaration of Independence's "inalienable rights" and thirty years before King Louis XVI was beheaded in Paris by the French Revolutionaries.

In it, Rousseau theorised how society, and in particular government, should operate in a liberal, modern democracy. He made it clear that while men were indeed free to do whatever they wished, to participate in society they must be subject to a system of controls, so as to protect the rights of others. The principle behind it was that with democracy comes, not only rights – civil rights to life and freedom and property, but also responsibilities, to respect the rights and freedoms of others. He called this the Social Contract.

Recently, the Howard government has used this principle as a defence of contentious legislation. As a Western nation closely allied to the United States of America, Australia came under pressure from the public following the crashing of hijacked airliners into significant American buildings on 11 September 2001. In response, the government instituted a number of measures which it feels

are necessary to aid state and federal (AFP) police forces in the interests of protecting Australians from the dangers of terrorism.

Terrorism (basically defined as a criminal act intended to advance a particular political, ideological or religious cause through intimidation) is not a new idea. Terrorist acts have been performed throughout history, and due to their unconventional nature, have often been difficult for authorities to comprehend, let alone effectively combat.



SJEC winner Nick J. Baum

Legislation includes new offences in the *Criminal Code* (1995), as well as expanded questioning and detention powers for the Australian Security Intelligence Organisation (ASIO), stronger safeguards in the Customs and Migrations Acts with regard to border protection, and two new Acts – the *Maritime Transport Security Act* and the *Aviation Transport Security Act*. Since the first amendment was passed in March 2002, a total of 29 new terrorism-related laws have been passed – the equivalent of one every seven weeks. While, in most cases, these changes have been applauded as both efficient and essential, certain areas have been highlighted as unnecessarily breaching the rights of ordinary Australians.

While normally this response, done fairly and constitutionally by a freely-elected government, would have been looked upon as well within its limits, the changes to both the *Criminal Code Act* and the *Australian Security Intelligence Organisation Act* have the potential to infringe severely upon the rights of Australian citizens.

Australia does not have a Bill of Rights, or a Human Rights Act, so there are no guarantees to protect the

rights of individuals. Senior members of ASIO now have the power to detain any individual for a period of up to 168 hours (seven days), subject to the conditions of a warrant which they also have the power to issue. There are also no restrictions on the warrant being re-issued at the end of the seven day period, meaning that an individual could be held indefinitely. This is known as "arrest without charge", freedom from which was first

imprisonment is not related to his protested innocence – it is widely accepted that he did train with al-Qaeda terrorists in Afghanistan – but that he is being held without charge.

The rights given up by members of Rousseau's functional society are the rights to act totally as one pleases; stealing, attacking, murdering, and committing other acts that are generally considered inappropriate in any society. Rousseau also asks citizens to give up the right to rule directly, instead proposing a system whereby elected deputies represent large groups of the population. What Rousseau did not propose was a system where the civil rights of a nation were totally subject to the control of these elected deputies and those who act on their behalf – the police force and civil service.

So, while it is true that in order for society to function, we must give up certain rights (natural liberties) in return for certain freedoms (civil liberties), the recent federal legislative response to terrorism infringes upon rights that no democratic government has the right to



The finalists

guaranteed in the writing of the American Bill of Rights.

Anyone suspected of withholding information related to a terrorist offence can be detained without charge, and five-year jail terms can be given for a failure to cooperate. Anyone held is also forbidden to mention their detention to anyone, facing the same penalties. This can be done without any consultation by the judicial system, and even without the consent of the appropriate Minister. The Federal Police also have similar powers, although they require a court order.

Justified in response to terrorism, these new powers take on a more sinister meaning when it is considered how they could be abused by the executive arm of the government – the ministry and the two security agencies, the AFP and ASIO. The imprisonment of political opponents and other dissenters would be fully possible under this new legislation.

Rousseau's revolutionary document outlined clearly the fact that individual freedoms would indeed be breached in order for society to operate in an efficient and justifiable manner, but he never said nor wrote anything about indefinite detention with few checks and no balances.

The argument, that no government would dare use these powers incorrectly or unfairly, does not hold up either. The Bush Administration in America has utilised the climate of fear surrounding the war on terror to condone the holding of suspects at Guantanamo Bay, like Australian citizen David Hicks. The furore over his



Winners and first runners-up

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take away, such as the freedom to speak, and the freedom from arbitrary arrest. The review and addition of new sedition laws is also an unspeakable (literally) crime against humanity, giving incumbent governments the power to control free speech directed against themselves or government institutions.

Respect for the rights of individuals, whether they be criminals, terrorists, or ordinary, well-meaning Australian citizens, demands that the Howard government find another way with which to combat terrorism in a post 9/11 world. Respect for the civil liberties of the entire nation demands that laws allowing the arrest and detention of terror suspects without charge be repealed, simply because they do not belong in a liberal, modern democracy.