The Proportionality Principle, Counter-terrorism Laws and Human Rights: A German-Australian Comparison

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As a general principle of law, some form of proportionality is found in most legal systems. It is, for example, readily applied in the context of criminal law where the severity of punishment is expected to be proportionate to the seriousness of the crime. The proportionality principle, moreover, is regarded as a fundamental element of regulative policy and public administration. In this context, the principle is considered to find its origins in German constitutional and administrative jurisprudence. Over the past fifty years, however, it has become a preferred procedure for managing disputes involving an alleged conflict between two rights claims, or between a rights provision and a legitimate state or public interest. From its German origins, the proportionality analysis spread across Europe and into Commonwealth systems such as England, Canada, New Zealand, and South Africa. In Australia it still awaits formal recognition in constitutional law and administrative law. This article examines the application of the proportionality principle in the context of anti-terrorism law with particular reference to counter-terrorism measures in Germany and Australia. It analyses how – in the German context – the principle has played an important role in preventing undue invasions of basic rights for the purposes of countering terrorism. At the same time the article seeks to demonstrate that the lack of formal recognition of the principle in Australia has lead to the adoption of a range of anti-terrorism laws that curtail civil liberties to an unprecedented extent.

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